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RACS TOOLKIT (GUIDE) FOR  
LEGAL REPRESENTATIVES /  
COMMUNITY WORKERS

# REFUGEE CLAIMS BASED ON SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS (SOGIESC)



**RACS**  
REFUGEE ADVICE & CASEWORK SERVICE

# FOREWORD

The Hon. Michael Kirby AC CMG  
Past Justice of the High Court of Australia and  
Patron of RACS

Although the prosecution of Australians on the essential basis of sexual orientation, gender identity, gender expression and sexual characteristics has ceased, this only occurred throughout the nation in 1997 when the Tasmanian laws were repealed following enactment of the Human Rights (Sexual Conduct) Act 1994 (Cth). Although the latter Act was based on a decision of the UN Human Rights Committee in *Toonen v Australia* (1994) Int Human Rts Reports 97 [No 3], and although it held that continuing criminal laws, punishments and other discriminations against queer people worldwide constituted a breach of international human rights law, such discriminatory laws still exist in more than 70 jurisdictions. They criminalise private, consensual, same-sex activity. The punishments are often extremely severe. In some jurisdictions, they even involve capital punishment, dire corporal punishment and lengthy imprisonment.

In these circumstances, it is not surprising that queer people in many countries dream of being accepted as refugees in Australia. They see this as the only way they can be their true selves in matters of sexuality, identity and relationships. If they arrive in Australia, it is unsurprising that they will claim refugee status on the basis that they have a “well-founded fear of persecution” if they were to be returned to their country of origin.

Although claims to refugee status on this basis and the consequent provision of protection, have been upheld in a number of cases, including in the High Court of Australia, the journey for acceptance has been far from easy. It requires people seeking asylum to convince officials, tribunal members and courts of law of the truth of the basis of their claims. Sadly, the cases often receive a response of scepticism and hostility. The scars inflicted on the claimants are often on their minds rather than their bodies. Commonly, the LGBTQIA+ applicants find it impossible to put their experiences into words. Frequently, they have never done this, even with close family and friends. Unless they can find an environment, and helpers, whom they trust, over a corner of their lives that has always been deeply hidden, they will face great difficulties. They need specially sensitive people to help them to tell their stories and advance entitlements under the Refugees Convention and Protocol.

RACS is a wonderful organisation. It helps people who are going through the asylum process to make their claims as convincingly as truth and justice permit. In order to help avoid trauma to the vulnerable minorities concerned, RACS has assembled this toolkit to respond to the accumulated experience of lawyers, case workers and applicants for refugee status have experienced. This is a practical tool-kit for those who are themselves, or are helping, stigmatised and vulnerable minorities to find their voices, to hold their heads high, to know of their fundamental human and legal rights. And to fulfil their dreams, relevantly to become members of the Australian community.

As a country that punished and denied equality and human dignity to its own queer people until quite recently, this is a tool-kit to assist helpers and the queer refugees themselves: to advance cases and to establish their entitlements to protection, safety, fulfilment and human happiness.



Michael Kirby

Sydney,  
10 April 2022

“THE PRIMARY AIM OF THIS TOOLKIT AND RECOMMENDATIONS ON INCLUSIVE PRACTICES IS TO GIVE VOICE TO THE EXPERIENCES AND CHALLENGES PEOPLE WITH LIVED EXPERIENCE FACE WHEN SEEKING PROTECTION IN AUSTRALIA BASED ON THEIR SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND / OR SEX CHARACTERISTICS. WE ACKNOWLEDGE THAT THIS GUIDE IS BY NO MEANS A PERFECT, OR COMPREHENSIVE RESPONSE TO THE MANY AND VARYING COMPLEX ISSUES FACED BY LGBTIQ+ PEOPLE SEEKING ASYLUM IN AUSTRALIA; RATHER, IT IS AN ATTEMPT TO DOCUMENT WHAT HAS BEEN SHARED WITH US BY PEOPLE WITH LIVED EXPERIENCE, TO RAISE AWARENESS AND START CONVERSATIONS ON HOW COMMUNITY AND LEGAL ORGANISATIONS CAN BETTER DELIVER THEIR SERVICES IN WAYS THAT ARE INCLUSIVE, RESPECTFUL, SAFE AND TRAUMA INFORMED. WE HOPE THIS IS THE START OF A JOURNEY OF PRACTICE TO SEE PEOPLE BETTER SUPPORTED, RECOGNISED AND HEARD IN THEIR SEARCH FOR SAFETY IN AUSTRALIA.



– Sarah Dale, Centre Director & Principal Solicitor (RACS)

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# 1 INTRODUCTION

The background is a solid orange color. It features two large, overlapping circles in a lighter shade of orange. One circle is positioned in the upper left quadrant, and the other is in the lower right quadrant. They overlap in the center of the page, creating a lens-shaped intersection.

## 1.1 The Refugee Advice and Casework Service (RACS)

1.1.1 The Refugee Advice and Casework Service (RACS) is a not-for-profit community legal centre that provides free legal advice, assistance and representation to financially disadvantaged and vulnerable people seeking asylum in Australia. We advocate for systematic law reform and policy that treats refugees with justice dignity and respect, and we make complaints about serious human rights violations.

1.1.2 RACS works with thousands of refugees each year. In recent years RACS has seen an increase in the number of people seeking our help who fear harm based on their sexual orientation, gender identity, gender expression and/or sex characteristics (SOGIESC). Due to the nature of LGBTQIA+ experiences of persecution, many individuals experience great difficulty being forthcoming with their reasons for seeking asylum in Australia.

1.1.3 RACS is experienced in and sensitive to the circumstances of individuals fearing persecution on the basis of their SOGIESC, and committed to assisting people seek asylum in an inclusive, safe and trauma informed way.

1.1.4 RACS believes that the education and training of community workers and legal professionals to more inclusively represent the interests of LGBTQIA+ individuals will help improve their access to legal services and promote better outcomes.

## 1.2 Characterisation, Identification and Terminology

1.2.1 RACS supports the right of people seeking asylum in Australia to identify and express their sexual orientation, gender identity, expression and sex characteristics as they choose using the terminology they choose and are comfortable with.

1.2.2 For the purposes of this toolkit/manual, we use the term Sexual Orientation, Gender Identity, Gender Expression and Sexual Characteristics (SOGIESC) – noting that it is often preferred in international refugee and human rights discourse, as it does not assume particular identities that tend to come out of western experience.<sup>1</sup>

1.2.3 Whilst acknowledging the contested nature of LGBTQIA terminology (in particular, that many people from non-western backgrounds do not identify with it) the acronym LGBTQIA is still used in this manual to refer to lesbian, gay, bisexual, transgender, intersex, queer and asexual people, in order to raise awareness of the particular challenges faced by people seeking asylum based on their SOGIESC. Many RACS clients and individuals with lived experience who participated in our consultations for this manual identified with LGBTQIA+ terms, but expressed particular concern over the lack of awareness of many community workers and lawyers of the basics diverse SOGIESC concepts and terminology. The manual seeks to provide a description of these concepts and the relevant terminology, as they are currently understood in English language, in response to these concerns.

1.2.4 Our use of the plus + sign, however, serves to signify and acknowledge the in-exhaustive nature of this collection of terms, and diverse ways in which people from diverse cultures can experience gender, sexuality, relationships and human bodies.<sup>2</sup> In using this term, we also acknowledge that some cultures do not have specific terms to describe people with diverse SOGIESC, and stress the importance of not labelling or making assumptions about clients.

### 1.3 Purpose

1.3.1 Drawing on RACS' experience working with clients claiming protection on SOGIESC grounds, and our consultations with LGBTQIA+ organisations and persons with lived experience seeking asylum, this manual seeks to provide legal practitioners and community workers with:

- a best practice toolkit for the inclusive representation of LGBTQIA+ people in connection with claims for asylum, based on their SOGIESC; and
- 'step-by-step' guidance on how to respond to key substantive legal and procedural issues impacting clients at various stages during the asylum process.

1.3.2 RACS notes, however, that the substantive and procedural law issues impacting LGBTQIA+ individuals seeking asylum are non-exhaustive and constantly evolving. As such, this manual does not, and is not intended to, capture all relevant issues impacting individuals with regarding their diverse SOGIESC claims.

### 1.4 Acknowledgements

1.4.1 RACS acknowledges and extends our heartfelt thanks to the many LGBTQIA+ individuals with lived experience seeking asylum in Australia who helped inspire the creation of this training resource, and whose invaluable feedback contributed towards its development.

1.4.2 RACS would especially like to thank and acknowledge our donor, Sidney Myer Fund and Pride Foundation Australia, who generously helped fund the development this training resource.

1.4.3 We also thank all that shared their experience with us, helped write with us and train with us, and that have chosen to remain anon in their search for safety. We would also like acknowledge the partners, organisations and individuals who have supported us with their knowledge and expertise:

- The St Kilda Legal Service (SKLS)
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- Forcibly Displaced Peoples Network (FDPN), and its LGBTIQ+ Advisory Group.
- Edward Lyons & team, Landers & Rogers
- Lachlan Shelley & team, Allen & Overy
- Ellen Moore, Bonnie Nankivell & Hannah Irvine, Clothier Anderson

1.4.4 RACS acknowledges RACS staff and volunteers who were involved in consultations, research and the drafting of this manual, notably Riona Moodley, Alison Ryan, Hayden Sloggett, Genevieve Howe, Hannah Gray for their contributions.

1.4.5 RACS wishes to acknowledge the Traditional Owners, Custodians and Elders of the Gadigal People of the Eora Nation, past, present and future, on whose traditional land we work. Always was, always will be Aboriginal land.



## 1.5 Background Challenges – Global Context

1.5.1 Throughout the world, individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived SOGIESC, particularly when these do not conform to dominant social and cultural norms. While the persecution of individuals with diverse SOGIESC is not a new phenomenon,<sup>3</sup> there is greater awareness in many ‘destination’ countries, like Australia, that people fleeing persecution for reasons of their SOGIESC can satisfy the definition of ‘refugee’ under the 1951 Refugee Convention.<sup>4</sup>

1.5.2 The manner in which individuals are persecuted on SOGIESC grounds varies and may include (without limitation): laws criminalising same-sex relationships, consensual sexual conduct, transgender and gender diverse people; sexual and gender-based violence; and the denial of rights to assembly, freedom of expression and/or political opinion. Whilst state persecution is prevalent, it is important to note also that SOGIESC persecution often occurs within the private sphere by non-state actors, including family members, neighbours and the community. Persecution may also include systematic discrimination in employment, health, housing, access to services and education.



1.5.3 A number of countries that criminalise same-sex relationships and consensual sexual acts also stipulate harsh terms of imprisonment, corporal punishment and/or the death penalty as forms of punishment for such crimes.<sup>5</sup> Today, nearly 70 United Nations Member States criminalize consensual same-sex sexual acts de jure or de facto.<sup>6</sup> The most recent Trans Legal Mapping Report<sup>7</sup> has also found defacto criminalisation of trans people under laws in 37 countries. Intersex people face their own unique challenges in countries of origin, including forced medical interventions that seek to assign them as male or female.<sup>8</sup> Even when such laws are not strictly enforced, their existence often reflects a culture of intolerance which reflects systematic discrimination and abuse towards individuals in such countries. In some instances, state authorities may also not be willing or able to protect individuals from abuse and persecution by non-State actors, or otherwise tolerate acts of serious discrimination and harm. In some instances, there may also be no legislation criminalising or protecting LGBTIQ+ individuals and yet systematic discrimination and societal violence may continue with impunity.

- 1.5.4 Discrimination, stereotyping and ‘unconscious’ bias towards individuals by legal representatives, case workers and decision makers also negatively impact and hinder individuals accessing international protection on SOGIESC grounds. In many instances, individuals are also prejudiced because they do not identify with, understand and/or choose to avoid western notions or understandings of SOGIESC.
- 1.5.5 The experiences of people seeking asylum varies considerably and may be influenced by, amongst other factors, their nationality, cultural, economic, family, political and social environments. It is therefore important for legal representatives, case workers and decision makers to recognise how these intersecting factors might impact the way in which a person expresses their sexual orientation and gender identity, and fears of persecution.
- 1.5.6 For instance, it is not uncommon for LGBTQIA+ individuals seeking asylum to adopt self-protective behaviours, keeping certain aspects of their lives (such as their sexual orientation or non-conforming gender expression or intersex status) concealed since many will not have openly identified as LGBTQIA+ in their country of origin, and may have associated trauma from the disclosure of such information. Some individuals may not have had any intimate relationships and may have been forced to hide or deny their sexual orientation and/or gender identity to avoid the consequences of discovery. Others, on the other hand, may have entered into heterosexual marriages, or have had children, including because of forced and arranged marriages. Likewise, intersex people may not openly discuss or identify as intersex due to the personal nature of intersex variation being seen as a personal biological or medical experience.<sup>9</sup>
- 1.5.7 Moreover, as will be explored further below, while society may attempt to ascribe labels to individuals, SOGIESC is not a static concept, and remains fluid for many individuals. It is, therefore, vitally important that refugee and/or complementary protection claims based on SOGIESC are not based on superficial understandings of the experiences, or on erroneous, culturally inappropriate or stereotypical assumptions. Some cultures do not have specific terms to describe people with diverse SOGIESC.<sup>10</sup> **It is, therefore, vitally important for community workers and legal representatives in Australia to allow people to describe their own circumstances and identity, rather than label or make assumptions about their SOGIESC based on westernised notions or concepts of identity.**









## 1.6 International Guidelines

- 1.6.1 Although claims of persecution on the basis of SOGIESC are not expressly mentioned in the 1951 Refugee Convention, it is now widely recognised that persecution on such grounds fall within the scope of the 1951 Refugee Convention.
- 1.6.2 The affirmation of the 2007 Yogyakarta Principles<sup>11</sup> and the Yogyakarta Principles plus 10 (Yogyakarta Principles), was amongst the first international developments towards greater recognition of LGBTQIA+ rights and the susceptibility of LGBTQIA+ persons to persecution by state and non-state actors. Although non-binding, the Yogyakarta Principles were drafted by a group of international human rights experts and reflect well-established principles of international law. In 2017, the Yogyakarta Principles Plus 10 was adopted to supplement the earlier Yogyakarta Principles and provide greater recognition of the distinct and intersectional grounds of gender expression and sex characteristics.<sup>12</sup>



1.6.3 In 2012, the United Nations High Commissioner for Refugees issued ‘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’(SOGI Guidelines). Although non-binding, the UNHCR SOGI guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination. The SOGI Guidelines are considered to be ‘the most encompassing and balanced attempt undertaken to offer asylum adjudicators culturally sensitive and overall appropriate guidance on how to deal with SOGI asylum claims’.<sup>13</sup> The Guidelines note that there is now broad acknowledgement that LGBTQIA+ people are considered members of a particular social group (PSG) and as such, refugee protection claims related to sexual orientation and gender identity will commonly be assessed on this ground.

1.6.4 Other international efforts have been taken to provide practical guidance for legal practitioners assessing LGBTQIA+ protection claims. In 2016, the International Commission of Jurists (ICJ) published a

1.6.5 practitioners’ guide to claims to refugee status for reasons of sexual orientation and/or gender identity under the Refugee Convention.<sup>14</sup> That guide builds upon the principles set out in the UNHCR SOGI Guidelines and seeks to reflect recent legal developments relevant to claims to refugee status on SOGI grounds. More recently, in June 2021 UNHCR and the Mandate of the United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (SOGIE) co-convened the 2021 Global Roundtable on Protection and Solutions for Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer (LGBTQI) People in Forced Displacement to, inter alia, share good practices in the protection of and solutions for forcibly displaced and stateless LGBTQI+ persons. A roundtable report was subsequently issued setting out conclusions and recommendations from the conference.<sup>15</sup> The Roundtable recommended that states form stronger alliances with LGBTQI+ civil society to further enhance best practice guidelines when assessing claims made by LGBTQI+ people.



## 1.7 Australian Developments

- 1.7.1 In Australia, an individual's SOGIESC has been recognised as constituting membership of a particular social group for the purpose of assessing an asylum application under the Migration Act 1958 (Cth).<sup>16</sup> This position was strengthened by the High Court of Australia in *S395/2002 v Minister for Immigration and Multicultural Affairs*.<sup>17</sup> In that decision, the High Court held that the Tribunal had erred in refusing to grant protection to asylum seekers on the basis that they could hide their sexual orientation and therefore prevent any undue harm being brought upon themselves. In summary, the High Court found that refugee status could not be denied on the basis that an individual might be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity. Such developments are now also reflected in the Migration Act.<sup>18</sup>
- 1.7.2 The Department of Home Affairs (DOHA) has issued best practice guidelines (DOHA guidelines) for departmental decision makers when interviewing and assessing protection claims based on sexual orientation and gender identity.<sup>19</sup> Whilst the DOHA guidelines draw upon legal developments under Australian law, as well as international law principles set out under the UNHCR SOGI Guidelines, their implementation is far from consistent. It should also be noted that the guidelines themselves suffer from limitations, including its failure to adequately acknowledge the diverse nature of SOGIESC and fact that some cultures do not have specific terms to describe people with diverse identities or that the terminology used in other cultures and languages may be different. Such guidelines are, however, a useful resource for practitioners to rely upon when representing clients at the Departmental level. At present, the Administrative Appeals Tribunal (AAT) has issued general guidelines for Tribunal members and staff on refugee law in Australia (which includes some reference to SOGIESC based claims at various points).<sup>20</sup> Although it has not issued specific guidelines or practice notes relating SOGIESC claims, it has provided some general guidelines on gender.<sup>21</sup>
- 1.7.3 Even if an LGBTIQ+ person is found not to meet the refugee criterion under the Migration Act 1958 (Cth), they may nevertheless meet the criteria for the grant of a protection visa if there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm: s 36(2)(aa) (the complementary protection criterion).<sup>22</sup>
- 1.7.4 Whilst Australia has been accepting of refugees with SOGIESC backgrounds, many people seeking asylum in Australia nonetheless encounter a number of substantive and procedural challenges noted above in section 1.2.<sup>23</sup> This manual will endeavour to unpack some of the key issues in the sections below.
- 1.7.5 A fundamental starting point to more inclusive representation of people seeking asylum based on SOGIESC grounds is to understand basic terminology and the important role language plays in promoting inclusivity.





**RESPECT**  
**EXISTENCE**  
-OR-  
**EXPECT**  
**RESISTANCE**

# 2 UNDERSTANDING SEXUAL ORIENTATION, GENDER IDENTITY, EXPRESSION AND SEX CHARACTERISTICS (SOGIESC)



## 2.1 The Importance of correct Characterisation, Terminology and Language

2.1.1 As a fundamental starting point, it is important to note that concepts relating to sexual orientation, gender identity, expression and sex characteristics (SOGIESC) are complex, constantly evolving and not static in nature. Such concepts are also influenced by an array cultural, social, linguistic, political and religious contexts.

2.1.2 Whilst many people seeking asylum may understand and identify with western concepts and notions of SOGIESC, including the acronym LGBTIQ, it is important to note that, others may not for a multitude of reasons. Many individuals seeking asylum in Australia come from diverse cultural, linguistic and non-western backgrounds. In some cultures, there are different terms used to describe people with diverse sexual orientation, or those who identify by another gender. **It is, therefore, important to recognise that many individuals may not be familiar with, or comfortable, with the use of western conceptions and labels, including terms comprising LGBTIQ.**

2.1.3 Whilst acknowledging the contested nature and problematic use of LGBTIQ terminology by decision makers, the acronym “LGBTQIA+” is nonetheless used as an umbrella term to refer to lesbian, gay, bisexual, transgender, intersex, queer and asexual people, but also individuals who do not fall within western conceptualisations of SOGIESC. Relevantly, our use of the plus + sign, however, serves to signify and acknowledge the in-exhaustive nature of this collection of terms, and diverse ways in which people from diverse cultures can experience gender, sexuality, relationships and human bodies.<sup>24</sup> **In using this term, we stress the importance of allowing people to choose how they wish to identify, characterise and express their identity and their experience of SOGIESC.**

2.1.4 RACS’ clients and individuals who participated in our consultations for this manual expressed particular concern over

the lack of awareness of many community workers and lawyers of the basics of concepts and terminology used to describe diverse SOGIESC. Noting the above (including the contested nature of terminology), this section responds to the feedback received from individuals with lived experience, by outlining common terminology and concepts legal representatives and community workers are likely to come across when assisting individuals with refugee claims based on sexual orientation, gender identity and/or intersex variation. The language used when communicating with clients in assessing and describing their SOGIESC claims is important for a number of reasons. As explored further in the paragraphs below, given the widespread discrimination that many individuals face on account of their SOGIESC, or perceived SOGIESC, self-identity and recognition of that identity can be a very emotionally charged subject for many clients.

2.1.5 It is important to recognise, in the context of SOGIESC claims, that the impacts of mischaracterisation of SOGIESC, discrimination, persecution and associated trauma (including fear, internalised shame or stigma), may affect client interactions with the asylum process and the relationship that clients might have with their case workers and legal representatives. Recognition of appropriate SOGIESC terms, and awareness of how individuals choose personally to identify is therefore a vitally important first step to creating a safe and inclusive space and environment for clients. It is also an important part of creating greater awareness of diverse SOGIESC.

2.1.6 A glossary of terms, including terms that should be avoided, is set out at **ANNEXURE A**. We note, that the terminology used in this section is not-exhaustive and based on western terminology. Importantly, we note that the terms below may not be applicable for many individuals who come from diverse cultural and linguistic backgrounds.

## 2 Terminology

2.2.1 Sexual Orientation, Gender Identity, Gender Expression and Sexual Characteristics (SOGIESC) is often preferred in international refugee and human rights discourse, as it does not assume particular identities that tend to come out of western experience.<sup>25</sup> The related term SGN refers to “Sexually and Gender Non-Conforming.”<sup>26</sup>

2.2.2 The initials “LGBTIQA” stand for Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and Asexual. The plus + sign seeks to “acknowledge the non-exhaustive nature of this collection of terms, the fact that language can and does evolve to find new terms for describing the diverse ways in which people can experience gender, sexuality, relationships and human bodies”.<sup>27</sup> Although applications for refugee protection on SOGIESC grounds typically originate from individuals who identify as either lesbian, gay, bisexual, transgender and intersex, the SOGIESC spectrum of identities is broad.

2.2.3 It is important to recognise that not all individuals seeking asylum will identify themselves using the terms listed here. Those who do, might also identify with more than one of the identified terms or groups.

2.2.4 The language used in assessing and describing SOGIESC claims is important for a number of reasons. Given the widespread discrimination that many individuals face on account of their SOGIESC, or perceived SOGIESC, how an individual identifies and recognition of that identity can be a very emotionally charged subject. Past persecution on grounds of SOGIESC can also cause individuals to be hesitant to ‘come out’ to their representatives for fear of rejection or judgement. Using insensitive language, and incorrect terms or the wrong pro-nouns may also exacerbate past trauma and can cause offence. In turn, this can adversely impact client participation in the asylum process and their relationship with their lawyer or community worker. Further, representative’s lack of knowledge

and understanding of these concepts may impact the ability to build trust and rapport with the client.

2.2.5 For these reasons, amongst others, legal practitioners, migration agents and community workers are encouraged to ask and use the terms/pronouns that clients feel most comfortable with or which they use to describe themselves.

2.2.6 Recognition of appropriate SOGIESC terms, and allowing individuals the space to explain their own identity is a vitally important first step to creating a safe space and environment for LGBTQIA+ clients.

2.2.7 **It is important to recognise that western concepts and terminology (discussed below) may not be applicable to individuals from non-western backgrounds.** Language is constantly evolving, and as such, it is important practitioner’s and case workers understand the limitations of their own understanding, and make attempts to understand the terms and words individuals use to describe themselves based on their own conceptualisation of diverse SOGIESC. The discussion of the concepts and terminology in this manual seeks to equip the professionals with basic understanding, however, professionals should avoid a rigid approach to these concepts in dealing with their clients by attempting to put their clients in a box or label them.

## 2.3 Sexual Orientation

2.3.1 **Sexual orientation** refers to an individual’s physical, romantic and/or emotional attraction to a specific gender or genders. For instance, identification as heterosexual or “straight”, lesbian, gay, bisexual or pansexual are commonly used terms to describe a person’s sexual orientation. The term “**lesbian**” is used almost exclusively to refer to women who have an attraction to other women and the term “**gay**”, although usually used to describe men who have an attraction to other men, can be used as an umbrella term to describe both men and women who are attracted to the same

gender.<sup>28</sup> Sexual orientation differs, however, from Gender Identity, and it is important to not conflate the two. For example, a person can identify as transgender and also as heterosexual, i.e. a Transgender man who is attracted to women and vice versa.<sup>29</sup>

2.3.2 **“Bisexuality”** is commonly used to describe individuals who have a physical, romantic and/or emotional attraction to people of their own gender and other genders. It is often used as an umbrella term for diverse genders or sexualities. Some people use queer to describe their own gender and/or sexuality if other terms do not fit. While some people might identify as bisexual at one stage in their life, identification may change or evolve over time. In some instances, the label may no longer fit. This, however, can be true for any sexuality and is not confined to bisexuality.

2.3.3 **Pansexuality, or ‘pan’**, identifies someone who is attracted to a person of all gender identities, including binary or non-binary. Pansexuality is also known as an attraction to a person’s qualities, regardless of their gender identity. Pansexuality was originally used to reject the gender binary that some people felt was associated with bisexual.<sup>30</sup>

2.3.4 **Queer** is often used as an umbrella term to refer to individuals who form part of the LGBTQIA+ community. It is also a political identity as well and is a term used for diverse genders or sexualities. Some people use queer to describe their own gender and/or sexuality if other terms do not fit.

2.3.5 **Asexuality, or ‘ace’**, refers to someone who experiences little to no sexual attraction. They are not to be confused with “aromantic people,” who experience little or no romantic attraction. Asexual people do not always identify as aromantic; just as aromantic people do not necessarily identify as asexual. More generally, some people (asexual or otherwise) identify as having a romantic orientation different to their sexual orientation. The terminology is similar: homoromantic, heteroromantic, biromantic and so on.<sup>31</sup>

## 2.4 Gender Identity and/or Expression

2.4.1 **“Gender”** is not about your biological “sex” (usually assigned at birth as either male or female) but a form of social identity. Gender identity is how a person understands who they are and how they and how they interact with others people. Although most children are taught about gender in binary terms (i.e. boys and girls, men and women) gender is a diverse concept and can be understood in different ways around the world. Gender diversity has also existed, and continues to exist, in many cultures (for example, indigenous peoples in Australia, Asia Pacific, America and in Mexico) and was celebrated prior to colonisation.<sup>33</sup>

2.4.2 **Gender expression**, on the other hand, refers to an individual’s external expressions of gender, such as behaviours, mannerisms, clothes and grooming. For instance, a person can identify as a gay man and express his gender identity through feminine clothing as opposed to masculine attire.

2.4.3 **Gender diversity** refers to the extent to which a person’s gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex. This term is becoming more popular as a way to describe people without reference to a particular cultural norm, in a manner that is more affirming and potentially less stigmatizing than gender nonconformity.<sup>34</sup> Gender Non-Conforming is an adjective and umbrella term to describe individuals whose gender expression, gender identity, or gender role differs from gender norms associated with their assigned birth sex.

2.4.4 Since many individuals are discriminated against and persecuted for their gender diverse identity, special care should be taken when speaking with people seeking asylum about their gender identity and expression. It is important not to assume how a person identifies, or that they can be categorised according to western standards. It is always best to ask what term an individual prefers and the pro-nouns that



they use to describe themselves. Some of these terms are discussed below.

2.4.5 **Cis-Gender** is term used for people whose sense of gender identity matches the biological sex assigned to them at birth. This does not mean, however, that people who are cisgender cannot be a part of LGBTQIA+ communities or have diverse sexual orientation. For instance, a person can identify as cisgender but be attracted to the same-sex or both sexes. It is considered an antonym to transgender.

2.4.6 **“Transgender” (or “Trans”)** is a wide-ranging term for people whose gender identity or gender expression differs from the sex they were assigned at birth. There is no correlation between an individual undergoing gender affirmation surgery and transgender identity or experience.<sup>35</sup> Transgender should be used as an adjective.

2.4.7 **“Non binary”** is commonly used by individuals who do not identify as male or female, and/or who otherwise identify outside the gender binary ‘norm’ of men and women. This is sometimes shortened to N.B. or “enby”. Other terms used to express non-binary gender identity and masculine and/or feminine norms include “gender non-confirming”, “genderqueer” and “gender fluid”.<sup>36</sup>

## 2.5 **Sex Characteristics**

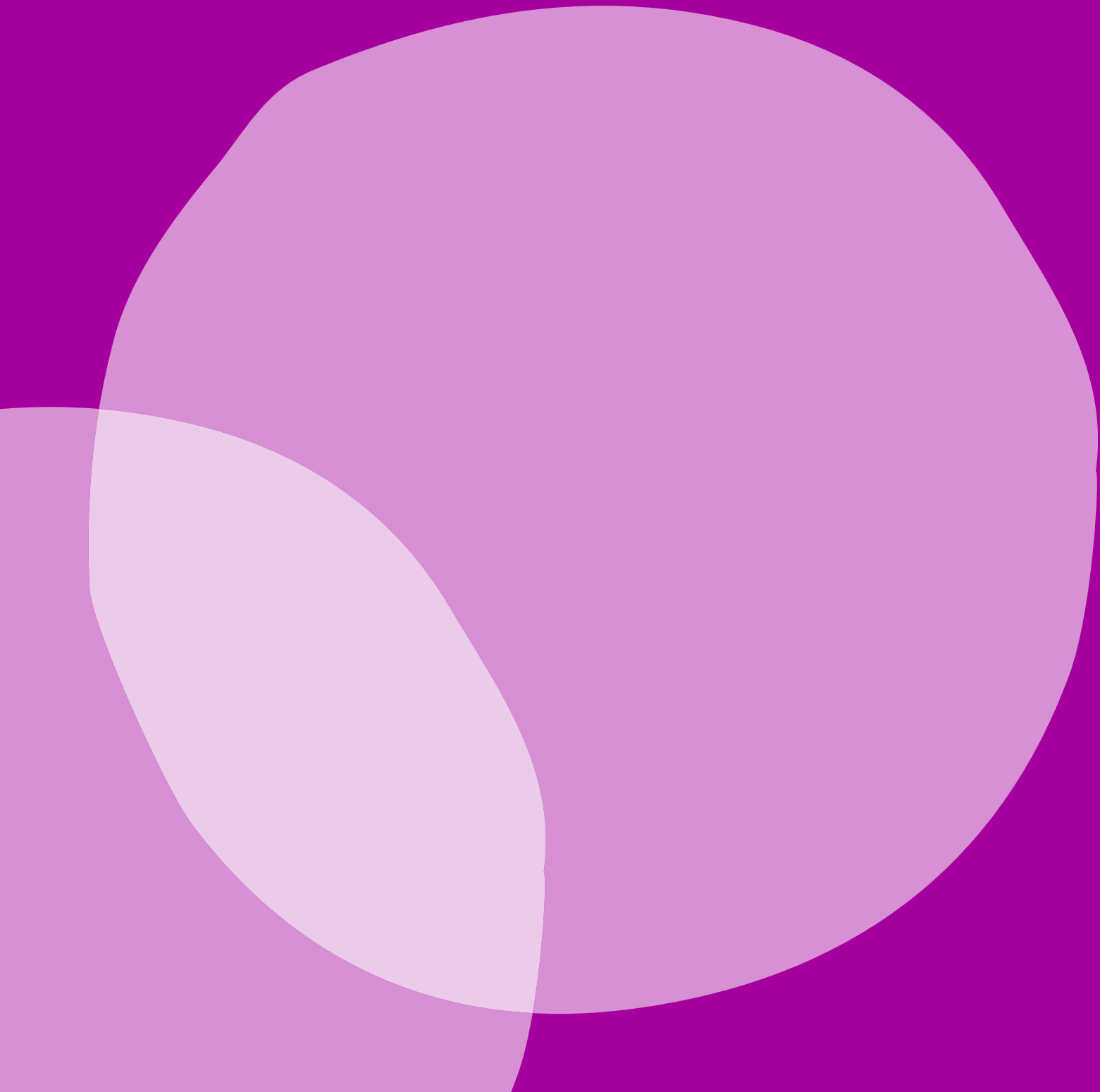
Sex characteristics are the physical features relating to sex, including chromosomes, genitals, gonads, hormones, and other reproductive anatomy, and secondary features that emerge from puberty, such as breast and hair development.<sup>37</sup>

2.5.6 Intersex is a term used describe people who have innate sex characteristics that don’t fit medical and social norms for female or male bodies, and that create risks or experiences of stigma, discrimination and harm.<sup>38</sup> There are a wide range of different underlying intersex traits that can be determined prenatally, at birth, during puberty or at other times.

2.5.7 In this regard, intersex traits can include “androgen insensitivity and other androgen synthesis variations, congenital adrenal hyperplasia, and sex chromosome variations”.<sup>39</sup> Intersex does not refer to a gender identity and as such intersex people share the same range of sexual orientation and gender identities as people who are not intersex. It is important to note also that intersex people may use different terms to describe their bodies and characteristics, including terms taught by parents and doctors.<sup>40</sup>



# **3 BEST PRACTICE GUIDELINES FOR INCLUSIVE REPRESENTATION**



### 3.1 **What is LGBTQIA+ inclusive representation?**

3.1.1 Inclusive representation is the process of maintaining an open, inviting, safe and trauma informed legal practice and/or community organisation that is welcoming to LGBTQIA+ people and treats them fairly with respect. While by no means exhaustive, the following section summarises key focus areas and recommendations on what organisations can/should do to be LGBTQIA+ inclusive in the provision of their legal services to people seeking asylum.<sup>41</sup> These recommendations have also been drawn from RACS' consultations with LGBTQIA+ individuals with lived experience seeking asylum in Australia.

### 3.2 **Creating an LGBTQIA+ Safe Environment**

#### **Online and Physical Premises of an Organisation**

3.2.1 The promotion of an organisation as LGBTQIA+ inclusive is a critical first step to providing an environment of inclusivity. LGBTQIA+ clients will feel more at ease approaching an organisation for assistance when it displays visual indicators of LGBTQIA+ inclusivity. This might include, for instance, displaying rainbow flags and other LGBTQIA+ inclusive logos on the organisations website, on email signatures and posters in the physical premises, including the reception area and interview rooms.

3.2.2 In RACS' consultations, many individuals expressed concerns over the lack of visual cues available on legal organisation websites and offices spaces to indicate whether it was LGBTQIA+ inclusive. It was also recommended that refugee legal centres and community organisations have dedicated information on their websites about expertise in assisting LGBTQIA+ persons. Where possible, information specific to LGBTQIA+ individuals would also assist.

3.2.3 Visual indicators of inclusion should, however, reflect the practices of an organisation and their staff in substance not just form. Where an organisation promotes itself as an inclusive and safe environment for LGBTQIA+ people seeking asylum, this will create a reasonable expectation that staff have been appropriately trained and are sensitive to the needs of LGBTQIA+ individuals.<sup>42</sup> In such circumstances, it would be reasonable for clients to expect that staff (including legal representatives, case workers and volunteers) have undergone training to understand the diverse nature of SOGIESC so as to not directly or indirectly discriminate, mis-gender or make stereotypical assumptions about them.

#### 3.2.4 **Key recommendations:**

- To have dedicated information on the service website about the organisations expertise in assisting LGBTQIA+ persons, and appropriate referral options to additional support services (i.e. health, that are LGBTQIA+ inclusive..
- If a service does not possess such expertise, to have this information stated.
- For organisations to undergo specific training on LGBTQIA+ issues and have this information included on their website. Such training should be provided on a regular basis and should include receptionists and volunteers.
- For organisations to mark days of significance for LGBTQIA+ people and have this mentioned on their website and social media.
- For organisations to have LGBTQIA+ issues reflected in internal policies and procedures. For example, to have statements about non-discrimination that includes sexual orientation, gender identity and intersex status as protected attributes.
- For organisations to have posters, flags or other LGBTQIA+ symbols visually displayed at their physical

- 3.2.4 premises both in the reception area and in interview rooms or other offices.
- For all staff to have pro nouns included in email signatures alongside (where possible) statements/logos symbolizing LGBTQIA+ inclusion.

### Communication

- 3.2.5 Respectful and open communication is critical to the inclusive representation of LGBTQIA+ clients and the creation of a safe environment for clients to disclose personal information to assist you to represent their interests. Such communication includes (but is not limited to) the choice of language used to describe a client’s sexual orientation, gender identity and/or intersex status, LGBTQIA+ sensitive intake and screening procedures, using chosen names and pronouns, and providing assurances over client confidentiality and recording of information.<sup>43</sup>
- 3.2.6 A critical aspect of respectful communication with clients is understanding pronouns. Pronouns are an innately important part for all individuals regardless of their gender, and as such, use of proper pro-nouns ought to be respected. Pronouns are how we speak about a person in their absence. By default the English language genders pronouns include ‘she/her’ and ‘he/his’. People also use a gender-neutral ‘them/ them’. Understanding and correctly using correct pronouns when speaking to a client is an important step to follow and remember when working with all clients, including people with gender diverse identities.
- 3.2.7 Respectful communication also includes avoiding certain forms of behaviour that may be construed as discriminatory and/or insensitive to LGBTQIA+ clients. For instance, it is important not to use outdated terms that may be considered offensive, and to avoid making assumptions about a client’s sexuality

or gender identity based on widespread stereotypes and preconceptions of what members of the LGBTQIA+ community look, or act like, or the relationships they might have.

- 3.2.8 If it is necessary to ask clients personal questions about their sexual orientation and gender identity or sex characteristics (as will be common in representing clients with SOGIESC asylum claims), it is important that legal representatives explain why this information is required/ relevant and how it relates to their claims for asylum.
- 3.2.9 As a general rule, legal representatives should attempt to provide as much clarity to clients about the asylum process, and invite clients to ask questions and/or express any concerns and/or discomfort they feel about the process, including the interview process with their lawyer, statement taking and the gathering of evidence.

### 3.2.10 Key Recommendations

- Use gender neutral greetings and recognise diverse voices when on the phone;
- During client intake / screening processes, staff and volunteers should avoid making assumptions and should instead ask all new clients how they identify, would like to be addressed and which pronoun/s they use. If you make a mistake simply apologise, correct yourself and move on. It does not need to result in a break-down of rapport so long as respect is shown to the client and you effort is made to use the correct terminology and provide a safe environment for clients.
- Due to the sensitive nature of some SOGIESC claims, if volunteers or ‘front-end’ staff are undertaking intake / screening processes, they should ask clients whether they feel comfortable explaining (in brief) the basis of their claims for intake purposes, or whether they would feel more comfortable



speaking directly with a lawyer (when available);

- Where possible, legal representatives should ask clients whether they would feel more comfortable being interviewed and/or represented by someone of a particular gender.
- If it is necessary for a representatives to ask what sex a person was assigned at birth, it should also be explained why this information is required.
- Assure the client that all information provided will be kept confidential unless they permit otherwise.
- Always address a client using the gender/s and name they identify with – regardless of whether they have changed these legally or had medical interventions including medically.

### Client Interview

3.2.11 Creating a safe, inclusive and reassuring environment for a client interview is essential especially when the purpose of the interview is to discuss an individual's claims for asylum, on SOGIESC grounds. People with diverse SOGIESC may require a more supportive environment and have greater difficulty articulating their protection claims and concerns, so it is essential for legal representatives to develop strategies to establish trust and confidence first. An applicant will be



more likely discuss their SOGIESC claims fully when they feel safe to share this information with their representative. This, in turn, will allow representatives to provide them with a more comprehensive assessment of their claim(s),<sup>44</sup> and better represent their interests in seeking protection. It is important that legal representatives carefully pre-prepare and develop strategies to help make the interview process a safe environment for clients. It may be useful also to ask a client whether they would feel more comfortable having a support person present, or a mental health counsellor present, during the first interview with their legal representative.

3.2.12 An important first step in this process is to build rapport and trust with applicants. As noted in the section above, communication should be respectful and representatives should continuously use non-judgmental and inclusive words to create a welcoming and safe environment. In RACS consultations, participants explained that where legal representatives had visible LGBTQIA+ symbols in the interview room and/or stated their previous expertise in dealing with SOGIESC claims, interviews and disclosure felt more comfortable and less stressful.

3.2.13 Providing applicants with information on their rights and what to expect during their client interview is another strategy to build trust and confidence in the process. Legal representatives should explain at the outset that they are bound by professional duties of confidentiality and reassure applicants that that all information provided will be kept confidential unless they authorise otherwise. Representatives should also explain the purpose of the interview and what form it will take (i.e. in person or online), the respective roles of all parties in the interview, including the interpreter (see section 3.3 for guidance on the use of interpreter services), as well as the rights of the interviewee. It is also helpful for representatives to explain the nature and







the types of questions that they will ask in advance of the interview. For instance, before moving on to statement taking, it may be helpful to explain to clients that there will be questions about what happened to them in their country of origin and to acknowledge that this may be upsetting and difficult to talk about. In RACS consultations, many participants disclosed this information in advance of the interview felt that it allowed them to emotionally prepare and made the interview process less traumatising. Where possible, legal representatives should give the client a choice in how they give the information. For example, some clients may prefer to spend a longer period with their lawyer and tell them everything at once, while others may prefer to have several shorter meetings over a longer period of time. Some may prefer to begin with relatively safe material, while others find the anticipation of telling of their traumatic experiences stressful and prefer to cover this material first. In short, wherever possible let the client be in control of the process. For guidance on interview techniques and questions, see Annexure B.

3.2.14 Legal representatives should empower clients to have ownership and direction over the retelling of their story and the interview process. This can be achieved by asking more open-ended questions, and then asking more closed questions where required to clarify or cover areas that were missed. As one participant in RACS' consultations observed:

*'My lawyer let me be the owner of my story and express it in the most personal and emotional way. They allowed me to control the narrative of my story and let me write my story. They then made edits, gave me advice on where things needed to be fleshed out and where supporting evidence was needed, this was very empowering'.<sup>45</sup>*

3.2.15 Other practical ways to create a safe and inclusive space for clients to communicate their SOGIESC claims and personal history include providing individuals with the option of choosing the gender of their legal practitioner or caseworker, and as well as the option to have, or refuse to have, more than one person present in a room (or online) while discussing their claims. As demonstrated in the case study below, this is particularly relevant where claims for persecution are based on sexual and gender based violence, and where the gender of the lawyer or caseworker may aid or hinder the disclosure of information relevant to an applicant's claim. Also important is the establishment of and communication to client on complaint processes available to them if they have concerns that they are not being treated fairly within your own service.

## Case Study

### The importance of creating safe and inclusive environments

Samah is a lesbian woman from a country in Central Asia, and is also a member of religious minority group. Samah was subjected to sexual and gender-based violence because of her perceived sexual orientation as a lesbian woman in her country of origin. She also experienced employment discrimination for not presenting herself in accordance with assigned gender roles for women. Samah arrived in Australia after experiencing a violent attack that made it clear that she could not live safely in her country of origin. Samah was subjected to this violence even though she had never publicly disclosed her sexual orientation. Given her past trauma, Samah found it challenging to be 'out' in Australia and to trust others with information about her sexual orientation. She was deeply distrustful of authorities, including NGOs. Samah approached a Sydney-based legal service providing free legal advice on applying for a protection visa. When she arrived for her appointment, she was escorted to a small room. There were no posters or pictures in the room, which made it feel like an interrogation. A female lawyer arrived to conduct the interview. Without seeking Samah's consent, the lawyer informed Samah that a student intern would be present as he was training to become a refugee lawyer.

The presence of a male intern distressed Samah and made it impossible for her to talk about her experiences of sexual violence. Samah did not know how to disclose that she was a lesbian either, so she only disclosed that she was bullied for being a religious minority. Even though Samah made some comments about her being constantly harassed at work for having a short haircut and not wearing dresses, the lawyer did not follow up on this information and

dismissed it as irrelevant. As a result, Samah's application for protection only included persecution on religious grounds as a main protection claim. Her claim was subsequently refused by the Department of Home Affairs. On appeal, Samah retained a new legal representative. Her lawyer had a small rainbow pin on her desk. During their first meeting, her new lawyer told Samah that she specialised in claims about gender-based violence for women and LGBTQIA+ people. She took time to ask questions about Samah's case. She asked Samah if there was something that had been omitted in her original application. Samah, still uncertain of public reactions to her sexuality, asked for a piece of paper. She wrote: "I am a lesbian". Her lawyer thanked Samah for trusting her with that information and explained that she needed now to ask Samah questions about her past to make a successful appeal. In the appeal new information was provided about Samah's experiences of violence as a lesbian woman and the reasons why this information was not disclosed in the initial application. Samah was successful in her appeal.

### 3.2.16 Key Recommendations

- Communication should always be respectful and representatives (see recommendations above) should continuously use non-judgmental and inclusive words to create a welcoming and safe environment. A respectful, calm and compassionate presence will assist the client to participate more fully in the appointment.
- There should be visible LGBTQIA+ symbols in the interview room and legal representatives should state their previous expertise in dealing with diverse SOGIESC claims.
- Representatives should explain at the outset that they are bound by professional duties of confidentiality and reassure applicants that all information provided will be kept confidential unless they authorise otherwise.
- Representatives should also explain the purpose of the interview and what form it will take (i.e. in person or online), the respective roles of all parties in the interview, including the interpreter, as well as the rights of the interviewee.
- Where possible, in advance of the interview, legal representatives should ask clients about what they can do to assist them feel more comfortable. For instance, asking whether they would feel more comfortable being interviewed and/or represented by a particular gender, and if the client would like a support person present.
- Representatives should explain the nature and relevance of the types of questions that they will ask in advance of the interview and acknowledge that some of these questions might be upsetting.
- Representatives and caseworkers should be mindful of the cognitive impacts/signs of trauma (eg on client memory, concentration and behaviour) during the interview (see section 3.4 on Trauma Informed Practice below) and where appropriate demonstrate solidarity and understanding by acknowledging the difficulties of their current situation.
- Acknowledge that legal appointments themselves can be emotionally and physically tiring. Regularly check in with the client to ensure that they are comfortable to proceed or require a break, and adjust accordingly.
- Representatives should empower clients to have ownership and direction over the retelling of their story and the interview process by asking them more open-ended questions. This can be followed by questions about specific experiences or incidents related to their claims.
- Provide clients with an opportunity to take a break, or to reschedule the interview if they are finding the process emotionally challenging.
- Representatives should take steps to ensure counselling support is available and in place for clients and seek additional support as necessary.
- Assure the client that all information provided will be kept confidential unless they permit otherwise.
- Let the client know when the appointment is nearing its end and provide an additional opportunities for them to ask questions. Where possible, provide a summary with clear instructions on any follow up action required.



### 3.3 Interpreters

- 3.3.1 The use of interpreters is a common practice in many community legal centres when communicating with clients from diverse language backgrounds. RACS' consultations with the LGBTQIA+ community has revealed, however, that engaging with interpreters is an often stressful experience for many individuals seeking asylum, in particular, when the interpreter comes from the same country of origin or cultural/ethnic background.
- 3.3.2 Many LGBTQIA+ people refuse to engage interpreters despite limited English language proficiency out of the fear that they will be 'outed' in the ethnic community and/or experience the same intolerance expressed in their country of origin. Interpreters might also be unwilling or unable to translate what the applicant says in an interview. Participants have reported numerous negative experiences with interpreters using abusive/offensive language and/ or failing to provide an accurate translation of statements. This is illustrated in the case study to the right.



### Case Study Interpreter Bias

Tulika and Majula are a couple from a country in South-East Asia. They have been together for 10 years. Only Tulika speaks English. At their interview with DOHA, the interpreter became visibly uncomfortable when needing to refer to Tulika and Manjula as a couple. When interpreting words such as 'lesbian' or 'homosexual' the interpreter used outdated and offensive language.

When Tulika spoke of violence they had experienced in their country of origin, the interpreter made offensive remarks, suggesting it could not have been possibly true that they suffered such violence and that if they were not "displaying" their relationships, they would have not encountered the issues they complained of. At this moment, Tulika corrected the interpreter. Although the tension between them and the interpreter was apparent, neither the Department immigration officer, nor the lawyer made any comments to the interpreter during this incident.

At the end of the interview, when their lawyer had opportunity to speak, no issues were raised regarding the interpreter's remarks. Tullika and Manjula were shaken due to the interview process – in particular the interpreter's offensive behaviour and the lack of repercussions for the interpreter as a result of this behaviour.

3.3.3 Drawing on RACS's consultations, there are a number of strategies that can alleviate the challenges and stress caused through the use of an interpreter. First and foremost, representatives must take care to ensure that trained, trauma informed interpreters are selected and that interpreters are made aware of professional standards and codes of conduct expected from them. Representatives should also ask clients whether using an interpreter of a particular gender or nationality might assist them feel more comfortable. Representatives should also explain to the client that they should have no hesitation interrupting the interview and asking for another interpreter if they feel uncomfortable, have concerns and/or do not believe the interpreter is accurately translating.

#### 3.3.4 **Key Recommendations**

- Ensure that interpreters used have received trauma informed training and are adequately trained on translating for LGBTQIA+ individuals.
- Where possible, for representatives to request LGBTQIA+ interpreters and to maintain a list of volunteer/professional LGBTQIA+ interpreters with lived experience (recognising that this is difficult to achieve).
- Reminding interpreters in the presence of clients of their obligations to maintain confidentiality, to translate in good faith and to use respectful language
- Providing clients with the option of choosing an interpreter of a particular gender or country of origin, if this would help them feel more comfortable communicating their story.
- Providing clients with the option of having the interpreter translate over the phone rather than in person.
- Explain to clients that they can ask to change the interpreter at any time, or stop the interview if they have any concerns, or feel the interpreter is not accurately translating their story.



## 3.4 Trauma informed Practice<sup>46</sup>

- 3.4.1 Trauma is an emotional response to a terrible event like an accident, sexual or physical assault or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea.<sup>47</sup>
- 3.4.2 Many LGBTQIA+ people seeking asylum in Australia have experienced complex traumas, compounded by discrimination and ‘minority stress.’<sup>48</sup> Trauma experienced may include physical violence, sexual assault, threats and intimidation and various other forms of torture and/or degrading treatment.
- 3.4.3 Refugee status determination processes in Australia require applicants to recount and document memories and experiences of past traumatic events. In such situations, legal representatives have dual goals: to elicit information and memories necessary to prepare the best possible application for their clients, while minimising the traumatic impact of the process.
- 3.4.4 Research shows that the cognitive, developmental, and psychosocial impacts of trauma can affect how a person perceives and interacts with their legal representative and can impact their memory.<sup>49</sup> Effects of post-traumatic stress disorder (PTSD), include (but are not limited to) sleep disorders, hyper-arousal, anxiety, depression, intrusive recollections, poor concentration, poor short term memory, flash-backs and/or disassociation or detachment or avoidance.<sup>50</sup>
- 3.4.5 It is important that legal representatives are aware that the process of seeking asylum and being interviewed by their lawyer or migration agent may also be the first occasion that they have been called upon to discuss their traumatic experiences. It is important, therefore, for representatives to acquire a sound understanding of trauma, its short and long term impacts on individuals (including behaviour and memory) and to develop strategies to support their clients and help minimise the re-traumatising impacts of the asylum applications process, through “trauma-informed” practice.
- 3.4.6 A trauma-informed practice aims to reduce re-traumatization in legal representation and recognizes the role trauma plays in the lawyer-client relationship, or community worker relationship (as the case may be). The trauma-informed approach is guided by four assumptions, known as the “Four R’s”: Realization about trauma and how it can affect people and groups, recognizing the signs of trauma, having a system which can respond to trauma, and resisting re-traumatization.<sup>51</sup>
- 3.4.7 Integrating trauma-informed practices, provides legal representatives and community workers with an opportunity to mitigate the intrusive and negative impacts of the asylum application process. It is important to note that the core principles<sup>52</sup> of an informed trauma practice means that all staff and volunteers in the organisation should have:
- A basic knowledge of the impact of trauma and stress on the body and brain;
  - Prioritise a sense of safety, trustworthiness, choice, and collaboration/empowerment in the delivery of services with clients;
  - Consistency and transparency in the way the service is provided.

3.4.8 These core principles need to be present through all aspects of the service and how it is delivered, from direct client interactions to the manner in which organisational policy and procedures are handled and created in relation to the services. These principles should also be communicated to include staff that may not have direct contact with the clients.

3.4.9 Whilst by no means exhaustive, trauma-informed practices for legal representatives preparing asylum claims must include: educating themselves (and staff) on recognizing signs and trauma in client interactions and developing trauma-informed strategies to mitigate client trauma by fostering safe environments for clients to retell their life stories, and developing trustworthy and collaborative relationships with clients.

#### 3.4.10 Key Recommendations<sup>53</sup>

- Organisations (including staff and volunteers) should undergo trauma informed training to acquire knowledge of the impact of trauma and stress on the body and brain.
- Organisations should seek to deliver their services in a way that avoids/minimises re-traumatising client by prioritising the safety, trustworthiness, choice and empowerment of clients in the delivery of services.
- Be mindful of the cognitive impacts/signs of trauma (eg on client memory, concentration and behaviour), and develop strategies to respond through, amongst others, the inclusive practices noted above, and referral of clients to appropriate support services.
- 

- Legal representatives should acknowledge to clients that some of the legal aspects of the asylum process and questions they might ask clients will be upsetting and re-traumatising, and inform clients that they can put them in touch with counselling support services, where needed. See also client interview techniques above at paragraph 3.2.11 and 5.1.2.
- Be flexible in service delivery to accommodate client needs.
- Anticipate and effectively manage trauma reactions noting that there will be times when the best intentions may not avoid reactions.
- Organisations should be aware of the impact vicarious trauma and ensure that it provides support for its staff and volunteers.





# 4 UNDERSTANDING THE LAW – REFUGEE STATUS DETERMINATION OF SOGIESC CLAIMS

The background of the slide is a solid dark red color. In the lower half, there are three overlapping circles of varying shades of red and orange, creating a layered, abstract effect. The text is positioned in the upper left quadrant, overlaid on the dark red background.

## 4.1 Refugee Criterion under the Migration Act

4.1.1 Section 36 of the Migration Act 1958 (the Act) sets out the grounds upon which a person may be eligible for a “protection visa” in Australia. Although the provision was initially linked directly to Australia’s international refugee and human rights obligations, in December 2014 references to the 1951 Refugee Convention were removed from the Migration Act and replaced with a definition of “refugee” that is similar in meaning but not identical to that provided in the 1951 Refugee Convention.

4.1.2 Section 5H of the Act defines a “refugee” as a person who is outside their country of nationality and owing to ‘well-founded fear of persecution’ in their country of nationality (or if they are stateless, their country of former habitual residence) is unable or unwilling to avail himself or herself of the protection of that country. Many of the terms used in this definition have their own defined meaning in the Migration Act.

4.1.3 **Well-founded fear of persecution** is defined under 5J(1) of the Act. To satisfy this definition, a person seeking refugee protection must establish elements:

- First, they must have a subjective fear of being persecuted for one or more of the five (5) grounds: race, religion, nationality, membership of a particular social group or political opinion (**the Convention Reason/Nexus**).
- Secondly, there must be a ‘**real chance**’ that, if the person were returned to their country of nationality (or former habitual residence) they would be persecuted for one or more of the Convention Nexus Grounds. “Real chance” does not necessarily mean there is a 100% chance they will face harm. It could even be less than a 50% chance, but cannot be a ‘remote’ chance that that they will face serious harm.
- Third, the real chance of persecution

must relate to all areas of the country of nationality. A person may not be eligible for protection if there is another party of their country or nationality that they could safely move to where they will not be harmed.

4.1.4 **Section 5J(4)** further stipulates that a well-founded fear of persecution must involve “**systematic and discriminatory conduct**” and “**serious harm**”.

4.1.5 Reference to “systematic and discriminatory conduct” reflects judicially developed case law on the meaning of persecution in Australia. In *MIMA v Haji Ibrahim, McHugh J* explained the expression “systematic conduct” was not intended to mean that there can be no persecution for the purpose of the Convention unless there is a systematic course of conduct by the oppressor; rather it was used as a synonym for non-random.<sup>54</sup> In other words, the ‘real chance’ of persecution or serious harm must be connected to a Convention reason against the person as an individual or member of a particular class.

4.1.6 Serious harm is defined<sup>55</sup> to include, amongst other things:

- a threat to the person’s life or liberty;
- significant physical harassment, ill treatment or physical harassment;
- significant economic hardship that threatens a person’s capacity to subsist;
- the denial of access to basic services or capacity to earn a livelihood where such denial threatens the person’s capacity to subsist;
- serious psychological harm.

These will be considered in further detail below in the context of SOGIESC claims.

4.1.7 If a person is found not to meet the refugee criterion under the Act, they may nevertheless meet the criteria for the grant of a protection visa if they are

a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk they will suffer significant harm: s.36(2)(aa) (the complementary protection criterion).<sup>56</sup>

## 4.2 Understanding Persecution

### Defining Persecution

4.2.1 There is no single definition of what constitutes persecution (or “serious harm” as required under Australian law), although there are common elements to what people face and UNHCR has provided guidelines as to what might amount to persecution.<sup>57</sup> Broadly speaking, persecution is generally taken to mean ‘significant abuse or other mistreatment that is inflicted either directly by the State, or by individuals (Non-State Actors) whom the State cannot or will not provide effective protection from, such as anti-LGBTI vigilante groups or the broader community.<sup>58</sup> Conduct that typically meets the threshold of persecution includes acts of murder, sexual assault/rape, physical and/or emotional abuse, threats of violence, forced marriage, genital mutilation and/or conversion therapies.

4.2.2 Under Australian law, persecution may include, but is not limited to the various types of “serious harm” listed above in 4.1.5. In *Applicant A v MIEA*, Justice McHugh observed that:

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

*nationality, political opinion or membership of a social group.*<sup>59</sup>

4.2.3 Although state interference in a person’s private life by means of discriminatory legislation (such as a ban on same-sex marriage) may not necessarily amount to persecution, DOHA guidelines note that:

*“criminalisation of same-sex sexual conduct may amount to serious harm (under refugee assessment) or (significant harm) (under complementary protection assessment) depending on the likelihood of the law being enforced, the severity of the punishment or whether the law means that the applicant would not have effective state protection from private harm.”<sup>60</sup>*

Importantly, DOHA guidelines acknowledge that the absence of laws that criminalise or discriminate against sexual or gender non-conforming behaviours in a country does not signify a lack of discrimination in that country nor does it indicate that state protection is available.<sup>61</sup>

### Discrimination and Persecution

4.2.4 Although discrimination is a common element in the experiences of LGBTQIA+ people, discrimination will usually only amount to persecution (or serious harm) where, for instance, “measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned”.<sup>62</sup> Assessing whether the cumulative effect of such discrimination rises to the level of persecution should be made by reference to reliable, relevant and up-to-date country of origin information.<sup>63</sup> Different kinds of mistreatment, including systematic discrimination and conduct, might rise to the level of persecution, especially abuse over a long period of time.<sup>64</sup> For instance, “systematic discriminatory conduct” which also threatens a person’s ability to access health care, employment and housing may also constitute persecution.<sup>65</sup>



4.2.5 Although decision makers in Australia have not applied these standards consistently<sup>66</sup>, DOHA guidelines explicitly recognise, nonetheless, that “serious discrimination” may amount to persecution for the purposes of refugee protection. In this regard, the guideline directs decision makers to “consider that applicants may have suffered a lifetime of discrimination that may cumulatively amount to serious or significant harm but not have experienced a single ‘serious or significant harm event’ that, by itself, meets the threshold for engaging Australia’s protection obligations under the PV framework.”<sup>67</sup>

4.2.6 Further, an LGBTQIA+ applicant may or may not have directly experienced persecution in the past to meet the refugee definition. What is required is a ‘real chance’ of being persecuted for one of the five grounds set out in the Convention and the Act, in the reasonably foreseeable future.<sup>68</sup>



## Case Study

### Cumulative effect of discrimination

In 1706008 (Refugee) [2021] AATA 3440, the AAT considered whether the cumulative effects of persecution across several grounds amounted to owing protection in Australia. The Applicant was a lesbian from Malaysia, who also identified as a Catholic. The Applicant also had a same-sex partner in Australia who she had been with for 5 years, and intended to marry. Her partner was formerly married, and also identified as a Muslim. While the tribunal questioned the credibility of the Applicant's sexual identity, the punishment the applicant could be subjected to, the strong social conservatism of Malaysia and her societal ostracism should she return to Malaysia provided evidence of serious harm if the applicant were to be sent back to Malaysia, including violence perpetrated by her father. The applicant's partner's account was credible and provided evidence as to their living together and aspects of their relationship. The applicant's partner's Muslim identification would elevate their risk due to the partner's divorce and her subsequent relationship with a Christian woman. Critically, the tribunal was not satisfied that the applicant had a well-founded fear of persecution for reasons of her sexual orientation alone, however due to the cumulative facts at hand this exacerbated the potential harm the applicant would experience upon returning to Malaysia. These circumstances meant the applicant faced a real chance of significant harm.

## **Agents of Persecution / Effective State Protection**

4.2.7 It is now widely accepted under Australian law (and in other jurisdictions) that serious harm involved in what is found to be persecution of LGBTQIA+ individuals can involve both state and non-state actors.<sup>69</sup> State persecution may be categorised broadly as follows:

- a) State sanctioned persecution** – where statutes, case law, penal codes, regulations or state practices criminalise and/or punish LGBTQIA+ individuals based on actual, perceived or attributed SOGIESC.
- b) Mixed-motive persecution** – where a State persecutes LGBTQIA+ individuals for their sexuality, gender identity or intersex variation but claims it is for an unrelated ground, such as ‘traditional family values’ or due to ‘religion.’<sup>70</sup>
- c) State complicity and/or failure to protect individual rights** – where LGBTQIA+ people are threatened and/or subject to persecution by individuals, including their own family members or community, and the State is complicit, unwilling and/or unable to protect them from such harm.<sup>71</sup>

4.2.8 As UNHCR notes, “[d]epending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection.”<sup>72</sup> It follows, therefore, that even when such laws are not strictly enforced, their mere existence often reflects a culture of intolerance, systematic discrimination and abuse towards LGBTQIA+ individuals in such countries.<sup>73</sup>

4.2.9 **In SOGIESC cases, the primary agents of persecution or serious harm are typically non-state actors. In this regard, claims will often relate to fears of harm from family members or the targeted acts of persecution by the broader community.**

4.2.10 Where law enforcement authorities do not respond to requests for protection, or refuse or fail to investigate and prosecute crimes against LGBTQIA+ individuals by non-state actors in a timely fashion, then state protection is unlikely to be either available or effective.<sup>74</sup>

4.2.11 Australian decision-makers have acknowledged that both formal laws and more informal state attitudes can contribute to applicants facing persecution by non-State actors and indicate that the state is unwilling to provide protection. As the DOHA guidelines note, it may also be “relevant to consider information that does not directly appear to target LGBTQIA+ people but which can be enforced in a discriminatory manner, for example, the presence of ‘anti-propaganda’ laws. If country information does not establish whether, or the extent to which, the laws are actually enforced, a pervading and generalised climate of homophobia in the country could be evidence to support the fact that LGBTQIA+ persons are being persecuted.”<sup>75</sup>

## Case Study: Propaganda Laws

In 2013, the Russian Government passed laws criminalising the distribution of “propaganda” of “non-traditional sexual relations to minors”. Whilst such laws apply uniformly across Russia, LGBTQIA+ organisations have argued that the laws have been used by authorities to unfairly target and discriminate against LGBTQIA+ people and organisations. According to Human Rights Watch, the law has been used to limit the rights of free expression and assembly for citizens who wish to advocate publicly for LGBTQIA+ rights or express the opinion that homosexuality is normal. It has also been suggested that such laws perpetuate an environment of homophobia, biphobia and transphobia, and generalised violence against LGBTQIA+ individuals.

## Case Study – Systematic Discriminatory Conduct

In 1610283 (Refugee), the Administrative Appeals Tribunal considered the protection claims of a Malaysian transgender woman, and in particular, how laws criminalising the conduct of men ‘impersonating’ as women in Malaysia, together with targeted vilification of the LGBTQIA+ community by authorities, has contributed to an environment of systematic discrimination against transgender persons amounting to persecution. Relevantly, the Tribunal found that: “...criminal law provisions such as article 377 of the Penal Code and Sharia law provisions against men ‘impersonating’ women and the government’s ongoing public vilification of LGBT people contributes to an environment where transgender people face discrimination, harassment and violence in Malaysia.”<sup>76</sup>





## Concealment of SOGIESC

4.2.12 That an applicant may be able to avoid persecution by concealing or by being “discreet” about their SOGIESC or has done so previously, is not a valid reason to deny refugee status in Australia.

4.2.13 In Appellant S395,<sup>77</sup> the High Court affirmed that “a fear of persecution for a Convention reason, if it is otherwise well-founded, remains well-founded even if the person concerned would or could be expected to hide his or her race, religion, nationality, membership of a particular social group, or political opinion by reason of that fear and thereby to avoid a real chance of persecution”.<sup>78</sup> This principle “directs attention to why the person would or could be expected to hide or change behaviour that is the manifestation of a Convention characteristic”.<sup>79</sup> In other words, where an individual has acted in the way they did only because of the threat of harm, the well-founded fear of persecution held by them is the fear that they will suffer harm unless he or she acts to avoid harmful conduct.

4.2.14 The principle in Appellant S395 is now codified in s 5J(3) of the Act. Whilst the section provides that person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid a real chance of persecution, subsection (3) outlines a list of exceptions, including where such modification would:

- conflict with a characteristic that is fundamental to their identity or conscience;
- conceal an innate or immutable characteristic of the person; and/or
- alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

It follows, therefore, that the concealment of one’s SOGIESC cannot be considered to be ‘choosing’ to be private when it is the fear of harm that is coercing or forcing an individual to hide their identity and/or self-expression.

## 4.3 Convention Nexus Grounds

4.3.1 Membership of Particular Social Group  
As noted above in paragraph 4.1.3, an applicant’s well-founded fear of persecution must be “for reasons of” one or more of the five grounds contained in the refugee definition in Article 1A(2) of the 1951 Convention, namely: race, religion, nationality, membership of a particular social group and political opinion. The Convention ground should be a contributing factor to the well-founded fear of persecution, though it need not be the sole, or even dominant, cause.

4.3.2 In Australia, an individual’s SOGIESC has been recognised as constituting membership of a particular social group (PSG) for the purpose of assessing an asylum application under the Act.<sup>80</sup> have become accepted in Australia as innate and immutable characteristics or as characteristics so fundamental to human dignity that the person should not be compelled to forsake them.

4.3.3 **Where the identity of the applicant is still evolving, an individual may describe their sexual orientation and/or gender identity/expression as fluid or they may express confusion or uncertainty about their sexuality and/or identity. In both situations, these characteristics are in any event to be considered as fundamental to their evolving identity and rightly within the social group ground. In other instances, some individuals may not feel comfortable using western LGBTIQ terminology to describe themselves and their SOGIEC.**

4.3.4 While decision-makers have more readily accepted that gay, lesbian or transgender applicants are members of a particular social group,<sup>81</sup> decision-makers appear less likely to recognise bisexual people, or “gender fluid” individuals, as members of a particular social group.<sup>82</sup> Although there have been recent successes,<sup>83</sup> the low number of reported decisions based on bi-sexual applicants succeeding in their claims suggests that applicants who identify as such face greater obstacles in proving their refugee status to decision makers.

4.3.5 For some applicants, it may also be the transgression of traditional gender roles (as they are understood in their country of origin) that puts the applicant at risk of harm, rather than their sexual orientation per se.

#### **Establishing SOGIESC and Credibility**

4.3.6 For many LGBTQIA+ claims, it is the applicant’s own witness statement on his, her, or their SOGIESC, that will often be the primary and only source of evidence. It is for this reason that the issue of credibility has become a central issue in the assessment of LGBTQIA+ claims. The UNHCR Handbook notes however, that if the applicant’s statements are coherent, plausible and do not conflict with generally known facts, if their account appears credible, the applicant “should, unless there are good reasons to the contrary, be given the benefit of the doubt”.<sup>84</sup> This position is also confirmed in the DOHA guidelines.<sup>85</sup>

4.3.7 Notwithstanding the above, decision makers have been criticised for invoking “their own Western conceptions of identities as benchmarks for measuring whether applicants are ‘gay’ or ‘trans’ enough, which leaves many applicants unprotected”.<sup>86</sup> Moreover, stereotypes based on western perspectives, have proven to be particularly problematic

where applicants are married in a heterosexual partnership, and have children. In some instances, applicants may have made significant attempts to conform with traditional gender roles in order to avoid harm, such as entering into a heterosexual marriage and having children.<sup>87</sup> They may also marry due to societal norms, as well religious/cultural expectations. Marriage should, therefore, not be construed as necessarily inconsistent with LGBTQIA+ claims.

4.3.8 In some LGBTQIA+ applicants may have made significant attempts to conform with traditional gender roles in order to avoid harm in their country of origin, such as entering into a traditional marriage. As such, marriage (and/or having children) should not be construed necessarily as inconsistent with LGBTQIA+ claims.

4.3.9 As the Department Guidelines helpfully caution in this regard, “decisions on credibility should not be based on stereotypical assumptions as there is no uniform way in which LGBTQIA+ people manifest their sexual orientation or gender identity.”<sup>88</sup>

4.3.10 Notwithstanding the above, narrow conceptions of sexual orientation, gender identity and gender non-conformism disadvantages LGBTQIA+ individuals – in particular, transgender and other gender diverse (gender-non conforming) applicants as the case study below highlights.







## Case Study

### Gender-Non Conforming Identity and Expression

In July 2018, the Administrative Appeals Tribunal found that a young Malaysian child who had displayed varied gender non-conformism over time was not “transgender” and therefore, not granted refugee protection.<sup>89</sup> The Applicant’s claimed that the child and their family faced discrimination due their son expressing ‘very girl-like behaviours’. The applicants noted that their son was ‘different’ as he refused to get a haircut and when he went shopping he wanted headbands, necklaces and gowns. When watching TV he preferred ‘girl’ cartoons and they were worried that they could not support such behaviour as they would be punished in Malaysian society for not educating their child in an ‘Islamic way’. A psychologist’s report, tendered as evidence, noted that while the parents reported a history of gender diverse behaviour, the frequency and intensity of such behaviour seemed to fluctuate. The Tribunal did not accept that activities the young child took a liking to amounted to gender non-conformity, nor did it accept how such behaviours conflicted with traditional gender roles in a traditional Malay Muslim society, or manner of dress being non-conforming to gendered stereotypes. Accordingly, the Tribunal did not consider the wide scope of Gender non-conforming claims, and thus rejected the application.

## Delay

- 4.3.11 It is not uncommon for LGBTQIA+ individuals seeking asylum in Australia to delay seeking asylum on SOGIESC grounds. This may be due to a number of reasons, but most commonly it is because many LGBTQIA+ applicants seek to avoid making sensitive claims until they have to do so. In many instances, applicants may have not previously disclosed their sexual orientation or gender identity, or fear disclosing their identity due to past trauma or discrimination associated with their ‘coming out.’

These issues are explicitly recognised in the DOHA Guidelines, which note (amongst other matters) that decision makers “should ensure that they thoroughly explore the reasons for the delay with the applicant at interview, if the officers considers that such delay may cast doubt on the credibility of the applicant’s claims.”<sup>90</sup> It is important to note in this regard, that delay in seeking asylum, or in presenting further information, should not be relied upon by a decision maker as the sole reason for a decision maker rejecting an applicant’s claims.<sup>91</sup>

## Other Convention grounds

- 4.3.12 While PSG is often a primary ground relied upon, claims relating to SOGIESC may also intersect with other Convention grounds, including those imputed to the applicant such as political opinion or religion.<sup>92</sup> The expression of diverse sexual orientation and gender identity might also be considered political in certain circumstances, particularly in countries where such non-conformity is viewed as challenging government policy, or where it is perceived as threatening prevailing social and/or religious norms and values. It is important, therefore, for legal representatives to recognise the intersectionality between grounds when advising clients.

## Case Study

### Intersectionality of Convention Grounds

Alan is a young gay man. He cannot return to his country of origin where same-sex sexual relationships are criminalised by the country's penal code. Alan committed the offence of having sex with a man and was pursued by authorities. This forced him to flee to Australia where he seeks protection owing to his well-founded fear of persecution from state authorities on the basis of his sexual orientation and conduct. However, after consulting further with Alan and country of origin information, his lawyers learn that same-sex sexual conduct is also considered blasphemous under the prevailing religious and societal values of the State. Expressing such identity challenges the State. In the circumstances, Alan's fears of persecution are due not only to his membership of a particular social group (i.e. gay men living in his home country) but intersect also with religious and political grounds.



## 4.4 Internal relocation

- 4.4.1 The harm an applicant fears must 'relate to all areas of the receiving country' for the purpose of subsection 5J(1)(c) of the Act. Furthermore, under paragraph 36(2B)(a) of the Act, in relation to complementary protection, there is taken not to be a 'real risk' that a non-citizen will suffer significant harm in a country if the Minister is satisfied that it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm. Therefore, if an individual can move to another part of their country of origin where they could safely move to and not be harmed, then they may not meet the definition of refugee under the Act.
- 4.4.2 Departmental guidelines provide that, having considered whether the applicant faces a real chance of persecution in their home region, the decision-maker must consider whether the applicant can "safely and legally" access another region in their country which is free from such harm.<sup>93</sup>
- 4.4.3 Australian decision makers have, however, acknowledged the difficulties of relocating, particularly where discriminatory attitudes are widespread. Moreover, as the DOHA guidelines state, "officers cannot find that the applicant can move to another area if their safety is contingent on other people not being aware of their sexual orientation or gender identity and/or if required to modify behaviour in any way as this would be contrary to subsection 5J(3) (which deals with behaviour modification)."<sup>94</sup>

## Case Study Internal Relocation

In 1213081 [2014] RRTA 75, the Tribunal accepted that the applicant's family would seek to find the applicant if he relocated in India and would harm him because of his "homosexuality". Moreover, given the widespread and targeted discrimination faced by gay men living in India, the Tribunal also acknowledged that the applicant and his partner would not be able to live openly together as partners in any location in India without experiencing ostracism and harm.<sup>95</sup>

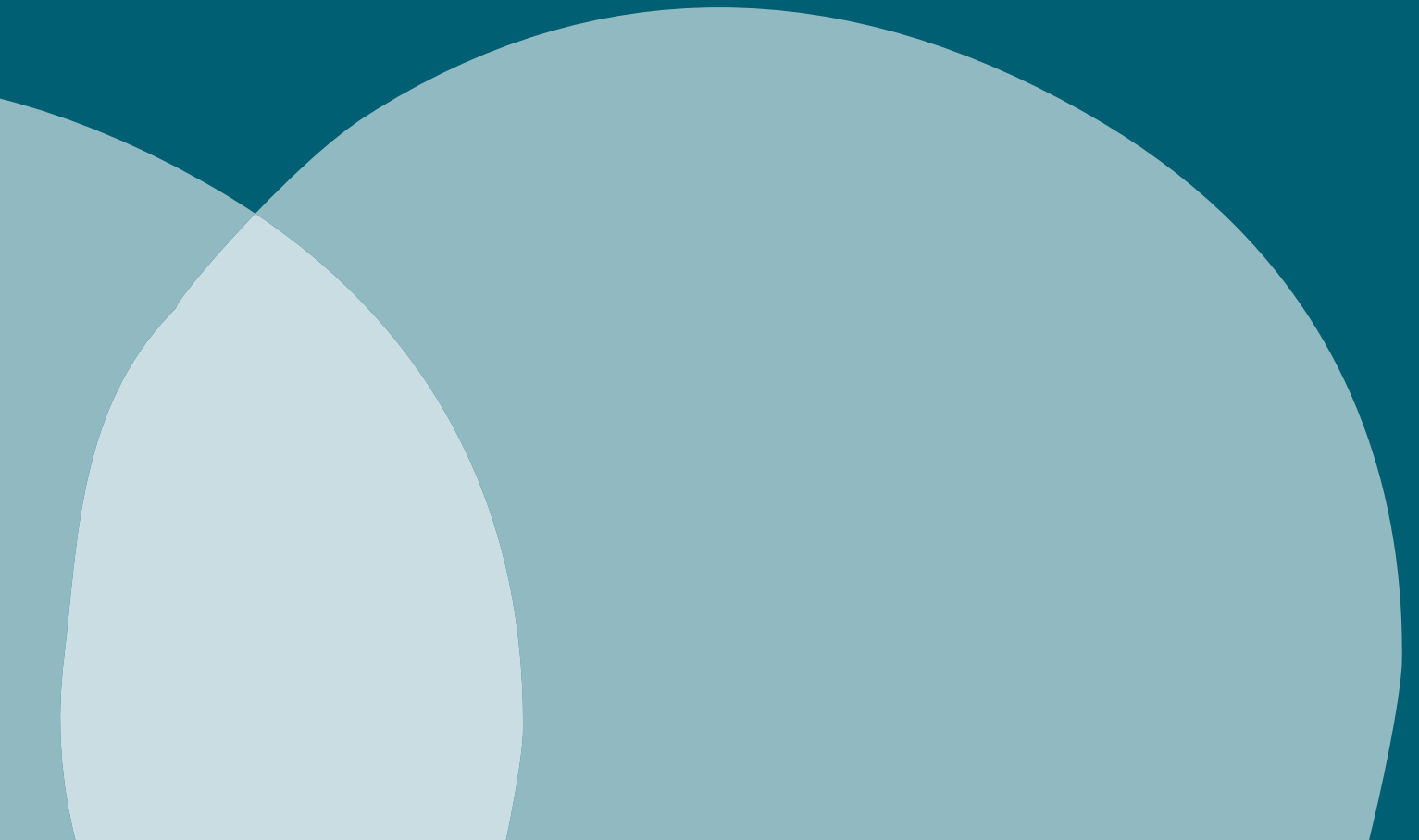


### 4.5 Sur Place claims

- 4.5.1 Sur place LGBTQIA+ claims are based on events that have occurred after the applicant has departed their country of origin, and arrived in Australia. Such claims might arise for a number of reasons, including changes to the SOGIESC of the applicant after departing from their country of origin, or as a consequence of events which have occurred, or are occurring in the applicant's country of origin since their departure.
- 4.5.2 In many instances, LGBTQIA+ applicants may not have identified themselves as LGBTQIA+ until after their arrival in Australia, or may have consciously decided not to act on their sexual orientation or express their gender identity due to their fears of persecution.
- 4.5.3 Sur place claims may also arise where an LGBTQIA+ applicant engages in political activism, uses social media, or when their sexual orientation or gender identity has otherwise been made public by themselves or someone else.
- 4.5.4 While the DOHA guidelines recognise the making of sur place claims relating to conduct in Australia, they caution Department decision makers to have regard to such claims "only if they are satisfied that it was not for the sole purpose of strengthening the applicant's protection claims as per subsection 5J(6) of the [Migration] Act".<sup>96</sup>



# **5 BEST PRACTICE FOR PREPARING APPLICATIONS BASED ON SOGIESC**



## 5.1 Introduction

5.1.1 The following sections outline key procedural and evidentiary issues that legal representatives should take into account when interviewing and preparing their SOGIESC claims. It provides guidance also on relevant (and irrelevant) considerations that decision makers may take into account when determining whether an applicant satisfies the criteria for eligibility for refugee status. These are also issues which a practitioner should address in advance of the DOHA interview.

### Refugee and Complementary Protection Criteria

5.1.2 Prior to taking a clients' statement, legal representatives should explain the refugee and complementary protection criteria under Australia law and elements that clients will need to satisfy, as outlined above in section 4.1

5.1.3 Explaining this at the outset can assist demystify the protection visa application process and prepare clients for the types of questions that will be asked of them during statement taking with their legal representative(s), but also at the DOHA interview.

5.1.4 The exploration of elements of the client's personal story must, however, be undertaken in a sensitive, trauma-informed and individualised way. Both open-ended and specific questions that are crafted in a non-judgemental manner will allow the clients to share their stories in a safe, non-confrontational way. To the extent that representatives are required to ask questions about an individual's sexual orientation, gender identity or sex characteristics, or the harm they have suffered as a result, representatives should take care to do so in sensitive and trauma informed way. Legal representatives should also explain to clients the relevance of personal questions and information sought from the applicant.

5.1.5 Developing a list of questions in preparation of the interview may be helpful, however, it is important to bear in mind that there is no one size fits all approach. Annexure B, provides structured guidance for practitioners' on statement taking and the types of questions legal representatives address with their clients to prepare a statement. Where appropriate, it might assist providing a list of types of questions to the client in advance of your interview so that they are not caught by surprise.

## 5.2 Assessing Credibility

5.2.1 Ascertaining the applicant's diverse SOGIESC background is essentially an issue of credibility. For many SOGIESC claims, it is the applicant's own witness statement that will often be the primary source of evidence. The lack of available corroborating evidence is often due to the fact that persecution and/or significant harm may have occurred in the private sphere. The applicant may have also deliberately hidden their sexuality or gender identity due to their fears of harm in their country of origin. Moreover, where there is a lack of country of origin information, decision makers will often rely solely on the applicant's testimony.

This, however, should not lead to the conclusion that the applicant's claim is unfounded or that there is no persecution of LGBTQIA+ individuals in that country. The extent to which international organizations and other human rights groups are able to monitor and document abuses against LGBTQIA+ individuals remain limited in many countries. Stigma attached to issues surrounding SOGIESC also contributes to many incidents going unreported. Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people.

5.2.2 So long as the applicant's statements are coherent, plausible and do not conflict with generally known facts the applicant

“should, unless there are good reasons to the contrary, be given the benefit of the doubt”.<sup>97</sup> This is also reflected in the DOHA guidelines. Where necessary, legal representatives should direct decision makers to applicable provisions.

### 5.3 Addressing Inconsistency

5.3.1 Decision makers are not, however, required to accept uncritically an applicant’s claim(s). In assessing the credibility of the applicant, decision makers will commonly look for consistency within the applicant’s overall narrative and past visa application history.

5.3.2 Inconsistencies in a client’s protection claims or narrative, including how they identify, is not uncommon and can arise for a number of reasons. Relevantly, these might include emotional trauma (leading to a failure to recollect events accurately), internalized homophobia/biphobia/transphobia, fear and/or mistrust of authorities, feelings of shame, age and level of education.<sup>98</sup>

5.3.3 It is important that legal representatives seek a freedom of information release of their protection file and previous applications lodged by the applicant. Once received, legal representatives should undertake a consistency check in advance of the client’s interview with the Department. To the extent inconsistencies arise, these should be raised with the client for clarification and addressed in a supplementary statement.

5.3.4 In RACS’ experience, failure to address inconsistencies can lead to adverse credibility findings by the decision maker.

### Non-disclosure / Delay

5.4.1 In many instances, LGBTQIA+ applicants may not readily disclose their SOGIESC immediately during the application process and legal representatives may find that an applicant continues to be uncomfortable disclosing their SOGIESC.

As discussed above, this can occur for a number of reasons, including lack of understanding of the protection claim process, feelings of shame, internalised homophobia/biphobia/transphobia, as well as fear of discrimination and harm arising from past trauma.

5.4.2 Delay or reluctance to disclose their SOGIESC can have implications for an applicant’s credibility in making a refugee claim based on SOGIESC, if it leads a decision maker to infer that the applicant is not in fact LGBTQIA+ because they did not disclose this fact or discuss it openly.<sup>99</sup> An applicant’s claim should not, however, be found to lack credibility merely because they did not rely on or raise their SOGIESC at the first opportunity they were given to set out the grounds on which they feared persecution.

5.4.3 As the DOHA guidelines note, “[a] delay in seeking asylum or in presenting further information should not be the sole reason for rejecting an applicant’s claims or the further information provided and there should be other reasons to support a finding that the claims are not credible.”<sup>100</sup> Applicants should be given the opportunity to explain any delays or changes to their claims.

5.4.4 As a matter of best practice, legal representatives should proactively address issues concerning delay with their clients when statement taking.





## 5.5 Addressing Health Concerns / Issues

5.5.1 In some instances a SOGIESC applicant may have health issues (physical and mental health) that could be included as part of their claims. In some instances, persecution on the basis of their SOGIESC may include the denial of medical treatment for serious health conditions. In other instance, individuals may be persecuted on the basis of their underlying health condition. By way of example, many countries continue to stigmatise and discriminate against individuals who are living with HIV. Such discrimination may be exacerbated when an individual identifies as LGBTQIA+. Legal representatives should ask open-ended questions to LGBTQIA+ clients about whether they have any physical or psychological health conditions and to not make any assumptions about their health.







## 5.6 Marriage and Children

5.6.1 The fact that an applicant is married, was married or has children is not inconsistent with LGBTQIA+ claims. Some LGBTQIA+ people are aware of their sexual orientation or gender identity from a very early age, while others are not aware until later in life. LGBTQIA+ applicants may marry due to societal norms or to meet cultural, religious or family expectations, or to avoid violence and persecution.<sup>101</sup> Individuals who know they are LGBTQIA+ may also choose to conceive children in ways known to them. Individuals who know they are LGBTQIA+ may also choose to conceive children in ways known to them.

5.6.2 Notwithstanding the above, in RACS' experience a marriage can raise issues of credibility for decision makers. Where applicants have been married and/or had children, it will be appropriate for legal representatives to ask questions surrounding the reasons for the marriage. In some instances, an applicant may have married because they are bisexual. Alternatively, it could be that they were forced into the marriage, or felt obligated to marry due to societal expectations, or in an attempt to conform, or avoid violence and persecution. These reasons should be explored in a sensitive way with the applicant and included in the witness statement.

## 5.7 Addressing Sur Place Claims

5.7.1 As discussed in section 4.5 above, some applicants may not have previously identified themselves as LGBTQIA+ before their arrival in Australia, or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin. Their fear of persecution may thus arise or find expression after they arrive in Australia, giving rise to a sur place claim.

5.7.2 According to DOHA's guidelines, sur place claims relating to conduct in Australia should only be considered where decision makers are satisfied that it was not for the sole purpose of strengthening claims.<sup>102</sup> It is important, however, that such claims be explored in the client interview for the purposes of statement taking.

## 5.8 Corroborative Evidence and Documentation.

5.8.1 Where possible, legal representatives should discuss the various types of evidence which could be produced to support aspects of their case, including evidence to establish SOGIESC and a 'well-founded fear of persecution'.

### Establishing diverse SOGIESC

5.8.2 While self-identification as an LGBTQIA+ person, should be taken as an indication of the applicant's SOGIESC, it is nonetheless beneficial for applicants to provide (where practicable) evidence of their SOGIESC and fear of harm. Appropriate types of evidence might include:

- Evidence of past relationships where appropriate (and not containing highly sensitive personal information), for example, marriage certificates, social media, couples' photos, family videos, text messages, emails.
- Evidence of involvement or participation in the LGBTQIA+ community (i.e. social media posts, photos at events, participation letters from organisations).
- Psychologist reports, if the person has experienced mental health issues due to their SOGIESC, or persecution based on SOGIESC grounds.
- Witness statements from partners, friends, family, employers, educators etc. who can corroborate claims of SOGIESC and/or fears of harm on the basis of SOGIESC.<sup>103</sup>
- Media reports and articles.

5.8.3 Applicants should never be expected or asked by their representatives to bring in documentary or photographic evidence of intimate acts or messages.<sup>104</sup> Moreover, although not a common practice in Australia, medical testing of an applicant in an attempt to determine their SOGIESC should never be used as evidence to support claims. This is especially important for people whose claims are based on sex characteristics, including intersex variations.

5.8.4 Applicants who are able to provide documentary evidence such as psychology reports (if relevant), credible recounts of their realisation of their diverse sexual orientation and/gender identity, and witness evidence from credible sources such as partners / family members are more likely to have their claim succeed.<sup>105</sup> Moreover, AAT case law trends suggest that applicants who are able to establish a lack of state protection due to their SOGIESC, through corroborating evidence, are frequently granted protection visas.<sup>106</sup>

5.8.5 Applicants who are not open about their SOGIESC will not, however, be in a position to provide corroborative evidence. A lack of corroborative evidence, or knowledge about LGBTQIA+ organisations or groups, should not lead to the conclusion that the applicant's claims are unfounded. As the DOHA guidelines note 'the ability to provide a witness is only afforded to those applicants who are 'out' about their gender identity or sexual orientation. Therefore, applicants who are not 'out' can experience bias in this regard.<sup>107</sup> Notwithstanding this, in RACS' experience a failure to provide corroborative evidence is likely to adversely affect SOGIESC claims.<sup>108</sup>

### **Evidencing 'Well-founded Fear' of Persecution**

5.8.6 Establishing a 'well-founded fear' of persecution involves satisfying both a subjective and objective element.

As noted above, the definition will be satisfied if an applicant can show genuine fear founded upon a 'real chance' of persecution for a Convention stipulated reason (see section 4 above for further discussion). Relevantly, under Australian Law there must be a 'state of mind – fear of being persecuted – and a basis – well-founded – for that fear.'<sup>109</sup> In the circumstances, LGBTQIA+ applicants generally are expected to offer both "subjectively genuine" and "objectively reasonable" components as evidence of such persecution.

5.8.7 The subject element of 'well-founded fear' will typically be demonstrated through the applicant's witness statements and oral testimony at the Department interview. However, as noted above, this can often be challenging for LGBTQIA+ applicants who are often unable to provide corroborative evidence (outside their own testimony) to substantiate their subjective fear of persecution, especially where persecution is at the hands of family members or authorities in their country of origin. A lack of corroborative subjective evidence should not, however, prejudice an applicant's testimony per se. The relevant question for decision makers is whether the applicant has a **present fear of a risk of harm in the reasonably foreseeable future**.<sup>110</sup> As noted above, this requires the applicant to demonstrate a 'real chance' of future harm.<sup>111</sup>

5.8.8 While demonstrating past harm is not a prerequisite to determining refugee status, evidence of past persecution provides support for the conclusion that the applicant's claimed fear is well-founded.<sup>112</sup> This presumption can be rebutted, however, if sufficient evidence demonstrates that there has been a fundamental change in circumstances, or that an applicant could reasonably relocate to another part of the country of origin.<sup>113</sup> An applicant does not, however, have to show past persecution in order to demonstrate a well-founded fear of being persecuted.<sup>114</sup>





5.8.9 The objective element to a ‘well-founded fear’ requires that there must also be a factual or objective basis for that fear.<sup>115</sup> This will usually involve consideration of general information about conditions in an applicant’s country of origin (see section below on ‘Country of Origin Information’) as well as an assessment of the applicant’s own claims in light of any material provided in support of such claims.<sup>116</sup> Where country conditions show a pattern or practice of persecuting LGBTQIA+ people, the objective test will usually be satisfied.

5.8.10 A lack of country information should not, however, lead to a conclusion that an applicant was not subjected to persecution.<sup>117</sup> For instance, evidence of systematic persecution may exist but country of origin information evidencing such persecution may not be readily available to decision makers for the reasons outlined below.

## Country of Origin Information

5.8.11 Country of Origin Information (COI) on the persecution and systematic discrimination of LGBTQIA+ people in many countries of origin is often limited or unavailable for a number of reasons, including the absence of visible and public LGBTQIA+ community groups or other NGOs in the region, as well as constraints on the ability of such groups to gather and distribute information in an oppressive environment.<sup>118</sup> It has been noted that the availability of COI about the treatment of bisexual women and lesbians, as well as the claims of transgender, non-binary persons and asylum seekers with diverse sex characteristics, is particularly inadequate.<sup>119</sup> Further ‘failings’ of COI relating to the treatment of LGBTQIA+ people have been observed, including factually inaccurate, out-of-date and inconsistent information.<sup>120</sup>

5.8.12 DOHA explicitly recognises in its practice guidelines that ‘the absence of information should not automatically lead to a conclusion that the applicant’s claim is unfounded, or that there is no real chance of persecution or real risk of significant harm of LGBTQIA+ individuals in that country.’<sup>121</sup> UNHCR stresses that in these circumstances where there is a lack of COI, the decision maker will have to rely on the applicant’s statements alone to determine cases.<sup>122</sup>

5.8.13 Where there is a lack of country of origin information, legal representatives should discuss whether the applicant is able to obtain statements from individuals living within the country of origin who they feel comfortable to approach and can corroborate the perception of risk of harm on the basis of their SOGIESC.

# 6 PREPARING YOUR CLIENT FOR THE DEPARTMENT INTERVIEW

## 6.1 Pre-Interview Advice Preparation

- 6.1.1 Once an applicant has received notice of their scheduled interview with the Department, it is important that their legal representatives provide them with pre-interview advice on how to prepare for, and what to expect at the interview. In RACS consultations many participants expressed concern over the lack of preparation and information provided to them prior to the interview by their representatives.
- 6.1.2 Whilst there is no one-size fits all approach to preparing LGBTQIA+ applicants for their interview with the Department, it is important that representatives provide applicants with sufficient information to allow them to navigate safely through the process. This includes not only reassuring them that you will be present to help navigate them through any challenges that might arise during the interview, but drawing to their attention some of the challenges in their case, and the types of questions that may be asked of them during the interview. In RACS consultations, participants whose legal representatives provided this information in advance of the interview felt that such preparation made the interview process less traumatising.



## 6.1.3 Key Recommendations for pre-interview preparation:

- Explain the importance of the Department interview in terms of putting forward relevant information and evidence in support of their SOGIESC claims.
- Provide a general overview of the structure of the interview and types of questions that the interviewer might ask them (see below).
- Legal representatives should reassure applicants that they will be present to assist them should the interviewer ask any inappropriate questions, and to explain that they should not feel pressured to guess the answer to a question if they don't know, or can't remember. Rehearse what to do if clients feel overwhelmed and cannot proceed during the interview.
- Help identify aspects of the process that be stressful for the client and may trigger trauma responses. Consider/discuss strategies that the client might use to help them remain in control and manage any stress they feel before or during the interview. Consider referring the client to support services, where necessary, prior to the interview.
- Provide a general overview of the structure of the interview and types of questions that the interviewer might ask them (see below).
- Undertake a consistency check with all available material, and provide the applicant with an opportunity to put forward any further relevant information/evidence in support of their claims. See section 5.3 above.
- Where applicable, legal representatives should address identity document concerns, inconsistencies and further evidence by way of a supplementary statement in advance of the Department interview.<sup>123</sup>



- The Department may ask questions about international money transfers the applicant may have made or received. The fact that an applicant may have transferred money or received money is generally not a problem, but may present problems if they have transferred money to someone or a place that is inconsistent with information they have provided to the department. It is important, however, to address these issues in advance of the interview. If inconsistencies are not addressed they can result in an adverse credibility finding.
- Discuss the likely concerns the Department will have with their case and the country information that may be put to the applicant to corroborate these concerns.
- Discuss the applicant's rights and obligations during the interview. In particular, Applicant's should be reassured of their right to confidentiality during the interview process, to raise any issues with the interpreter at any point during the interview, and to ask for break(s) if needed.

## 6.2 Appropriate lines of enquiry for LGBTQIA+ claims

- 6.2.1 To assist applicants better prepare for the Department interview, legal representatives should provide a general overview of the topics and appropriate (as well as inappropriate) lines of enquiry.
- 6.2.2 Drawing on RACS' experience as well as the UNHCR's SOGI and Departmental Guidelines<sup>124</sup>, these might include the following areas:

**Self-identification:** If a client self identifies as an LGBTQIA+ person, this should be taken as an indication of the applicant's SOGIESC. However, where an applicant does not readily identify as LGBTQIA+, a decision maker should not, on this basis alone, make a determination against the applicant. There may be a social or cultural background or other

reasons for this. It is important that applicants are aware of this and legal representatives should prepare the applicant to explain any challenges they have or had in relation to their self-identification.

**Childhood Experiences:** Some applicants come to understand their aspects of their identity early in their childhood. When relevant, decision makers may probe the applicant's experiences of feeling "different" during their childhood. In addition, applicants may have grown up in cultures where their SOGIESC is shameful or taboo resulting in experiences of disapproval, causing them to feel shame, stigmatization or isolation. Exploration of these feelings and experiences may be helpful in establishing an applicant's identification as LGBTQIA+.

**Self-realisation:** The concept of "coming out" is largely a Western concept, but may broadly be said to relate to the applicants coming to terms with their own SOGIESC, or the communication of their SOGIESC to others, or both. Each of these elements is relevant as a person may identify LGBTQIA+ for a long time before expressing it to other people.<sup>125</sup> Questions about "coming out" or self-realization processes may be a useful way for decision makers to find out more about the applicant's SOGIESC, including their experiences in their country of origin and country of asylum. Unlike sexual orientation and gender identity, intersex people will typically find out about their intersex variation from their parents or a doctor either in childhood or later in life.<sup>126</sup> The concept of "coming out" is therefore not applicable to people with intersex variation.

**Gender Transition (where appropriate):** Questions about gender transition and other related aspects of transgender and gender diverse claims may be asked by decision makers in the process of the interview. It is important to note, however, that choosing not to undertake transition only but only legal or social transition does not nullify protection claims for



transgender and gender diverse people based on their gender identity, as gender identity is not contingent on medical or indeed physical changes.

**Family Relationships including Marriage:**

Applicants may not have disclosed their SOGIESC to family members due to fears of harm or abuse. Although applicants may be married, divorced and/or may have children, this is not inconsistent with their claims. If such circumstances raise issues of credibility, decision makers may ask questions about reasons for the marriage – which could be because, for instance, the applicant is bisexual, or was forced into the marriage, or felt obligated to marry due to social, family or religious expectations.

**Romantic and Sexual Relationships:**

Romantic and sexual relationships, including relationships the applicant hopes to have in the future, may form part of their narrative. It is important to note, however, that a lack of romantic or sexual relationships should not be construed as inconsistent with

identification as LGBTQIA+. The personal nature of this area of questioning may mean that an applicant will be reluctant to discuss it in an interview setting. While the interviewer may ask general questions about a person’s relationship (such as when it began or why it ended) it is inappropriate for the interviewer to ask the applicant to provide details about their sexual behaviour. Indeed, DOHA stresses that a close questioning of romantic and sexual relationships is not necessary and is inappropriate.<sup>127</sup>

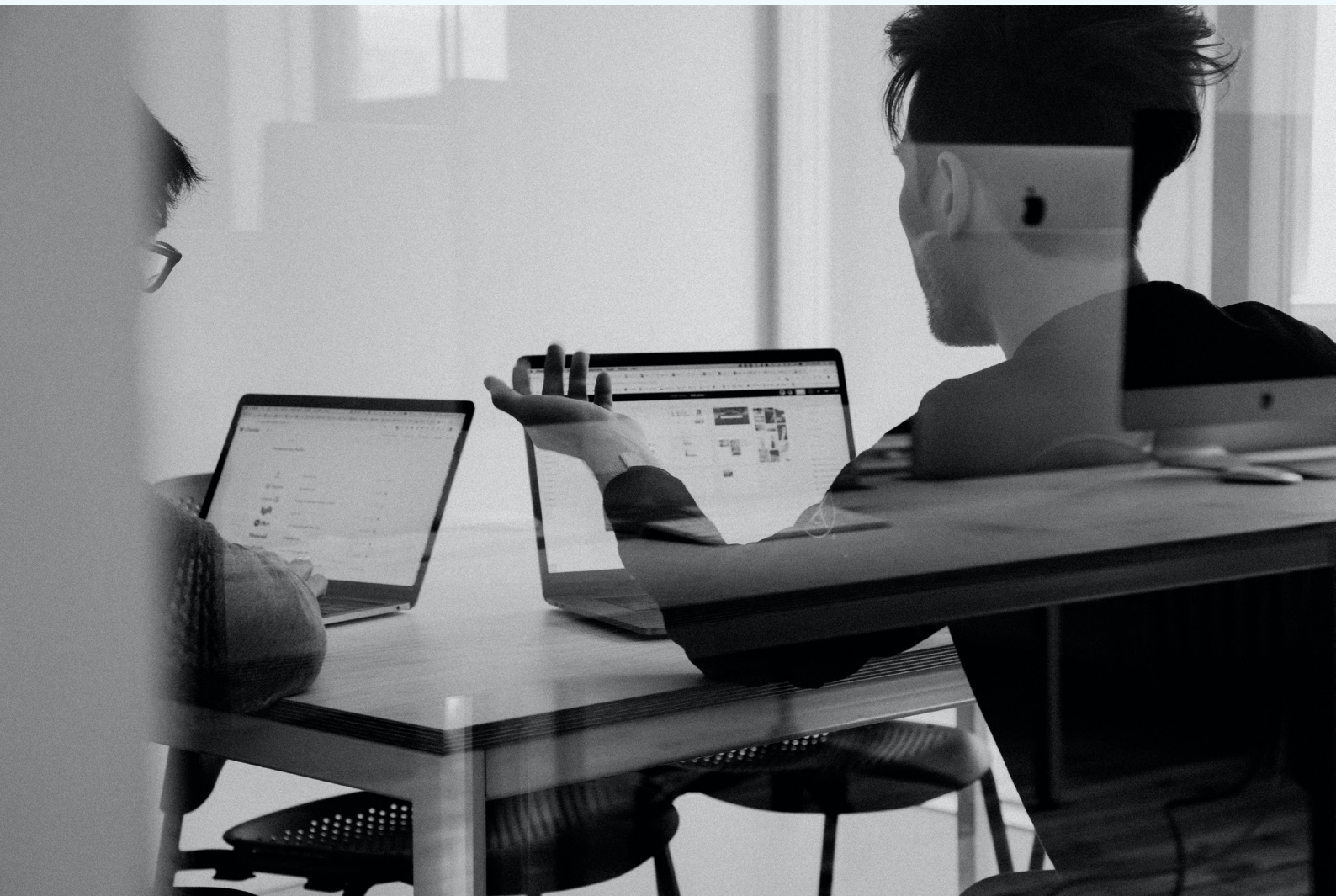
**Community Relationships:** It is common for decision makers to ask questions about the applicant’s involvement with LGBTQIA+ groups within the country of origin and/or asylum. It is important to note that lack of awareness of LGBTQIA+ organisations, events or interaction within the LGBTQIA+ community is not indicative of the applicant’s lack of credibility, as it may be the result of the applicant not having been open about their SOGIESC and/or other factors.<sup>128</sup> Questioning around an applicant’s familiarity with LGBTQIA+ organisations, issues or venues may



only be appropriate if that information is raised by the applicant in their claims and require exploration It is not appropriate to make assumptions about what an applicant should know based on stereotypical assumptions about their SOGIESC

**Third Country Considerations:** When establishing the credibility of claims relating to SOGIESC, it may also be appropriate for decision makers to enquire about the applicant's experiences in countries other than their country of origin, and why they chose not to resettle there, if relevant. This might also include discussion about any discrimination or harm they experienced on the basis of their SOGIESC.

**Religion:** Decision makers may also explore an applicant's views on the relationship between their religious beliefs and their SOGIESC. Where the applicant's personal identity is connected with their faith, religion and/or beliefs, it may be helpful for decision makers to examine this as an additional narrative about their sexual orientation or gender identity. As UNCHR notes, the influence of religion in the lives of LGBTQIA+ persons "can be complex, dynamic, and a source of ambivalence."<sup>129</sup> This is particularly so, when individuals feel that their religious beliefs or community expectations conflict with, for instance, their sexual orientation, gender identity and/or gender expression.





# ANNEXURE A – DEFINITIONS AND KEY TERMS

\* We note that this Glossary of terms is not an exhaustive list of relevant terminology and should be relied upon as such.

TERM	DEFINITION
Asexual	A person who does not experience sexual attraction to others
Bisexual	Biphobia (sometimes referred to as monosexism) is prejudice, fear or hatred directed toward bisexual people. It can include making jokes or comments based on myths and stereotypes that seek to undermine the legitimacy of bisexual identity, like “bisexuality is a phase”. Biphobia occurs both within and outside of the LGBTQIA+ community.
Brotherboy	A term used by Aboriginal and Torres Strait Islander people to describe gender diverse people that have a male spirit and take on male roles within the community. Brotherboys have a strong sense of their cultural identity. A person may or may not also identify as transgender.
Cisgender	A person whose gender identity matches their sex assigned at birth.
COI	Country of Origin Information
‘Coming out’	A term used to describe a person’s disclosure of their sexual orientation or gender identity to others. This can occur over a period of months, years or a life time, and is not restricted to the process of disclosing your SOGIESC to others when you first recognise your own identity. It is also in many instances an ongoing process. For instance, an individual may have ‘come out’ to their close friends, but members of their family, or vice versa.
DOHA	Department of Home Affairs
Endosex	People whose sex characteristics meet medical and social norms for typically ‘male’ or ‘female’ bodies.
Gay	Although usually used to describe men who have an attraction to other men, can be used as an umbrella term to describe both men and women who are attracted to the same gender.

Gender	The way in which a person identifies or expresses their masculine or feminine characteristics. A person's gender identity or gender expression is not always exclusively male or female and may change over time.
Gender diverse	The extent to which a person's gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex. This term is becoming more popular as a way to describe people without reference to a particular cultural norm, in a manner that is more affirming and potentially less stigmatizing than gender nonconformity
Gender expression	The way in which a person externally expresses their gender or how they are perceived by others.
Gender identity	A person's deeply held internal and individual feeling of gender.
Homophobia	Homophobia includes a range of negative attitudes and feelings toward same-sex sexual orientation, or people who identify or are perceived as being gay, lesbian, or bisexual. It can be expressed in a variety of ways, including antipathy, contempt, prejudice, aversion, dislike, hatred and fear. Homophobia can lead to actions and laws that result in LGBTQIA+ people suffering serious and/or significant harm.
Intersex	People who are born with genetic, hormonal or physical sex characteristics that do not conform to medical norms for 'male' or 'female' bodies. Intersex people have a diversity of bodies and identities.
Lesbian	Term used almost exclusively to refer to women who have an attraction to other women and the term "gay".
LGBTQIA+	The acronym for the broader diverse SOGIESC identifying community meaning Lesbian, Gay, Bisexual, Transgender, Questioning/Queer, Intersex, Asexual, and Plus to reflect the never ending spectrum of diverse gender identity and sexuality. Other acronyms and umbrella terms may also be used such as LGBTI, LGBTIQ+.
Misgendering	An occurrence where a person is described or addressed using language that does not match their gender identity. This can include the incorrect use of pronouns (she/he/they), familial titles (father, sister, uncle) and, at times, other words that traditionally have gendered applications (pretty, handsome, etc.). It is best to ask a person, at a relevant moment, what words they like to use.
Non-binary	Individuals who do not identify as male or female, and/or who otherwise identify outside the gender binary 'norm' of men and women. This is sometimes shortened to N.B. or "enby". Other terms used to express non-binary gender identity outside masculine and/or feminine gender norms include "gender non-conforming", "genderqueer" and "gender fluid".
NGO	Non-government organisation
Pansexual	Pansexuality is the romantic, emotional, and/or sexual attraction to people regardless of their gender. Like everyone else, pansexual people may be attracted to some people and not others, but the gender of the person does not matter. People of any gender identity can and do identify as pansexual.

Sex characteristics	A person's primary and secondary sex characteristics, for example an individual's sex chromosomes, hormones, reproductive organs, genitals, and breast and hair development.
Sexual orientation	A person's romantic or sexual attraction to another person, including, amongst others, the following: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted
SGD	Sexually and Gender Diverse
SGN	Sexual and Gender Non-Conforming.
Sistergirl	Sistergirl is a term used by Aboriginal and Torres Strait Islander people to describe gender diverse people that have a female spirit and take on female roles within the community. Including looking after children and family. Many Sistergirls live a traditional lifestyle and have strong cultural backgrounds. They may or may not also identify as 'trans'.
SOGIESC	Sexual orientation, gender identity, gender expression and sex characteristics
SOGIESC Rights	Ensuring the equal application of human rights to everyone regardless of an individual's sexual orientation, gender identity and expression and sex characteristics.
SOGIESCI	Sexual orientation, gender identity, gender expression, sex characteristics and intersex variation
TGD	Transgender and gender diverse
Transphobia	A fear, hatred or intolerance of people of who are transgender, or perceived to be transgender that often leads to discriminatory behaviour or abuse.
Transition	Transition may involve social, medical and/or legal processes to affirm a person's gender identity.
UNHCR	United Nations High Commissioner for Refugees
Androgynous	A person who does not exclusively identify as male or female, irrespective of physical sex.
Gender Queer	Individuals whose gender identity and/or expression fall outside the gender binary of male and female. These individuals may identify their gender somewhere between male or female or entirely outside those categories.



# INAPPROPRIATE TERMINOLOGY / TERMS TO AVOID

Cross-dressing	is term commonly used in the West to describe a form of gender expression for individuals who dress in clothing typically worn by or associated with another gender but who typically have no intent to live full-time as the other gender. The term “cross-dresser” was used in place of the older term “transvestite”, which is now regarded as derogatory.
Homosexual	The term “is often used as the broad definition of someone who identifies as same-sex attracted, most commonly, gay or lesbian. This term has fallen out of favour with many people in the LGBTQIA+ community, and may be considered offensive due to its use as a perceived psychiatric disorder for which people were often subject to ‘therapies’. In the circumstances, one should avoid using this term.
Transexual	This is an older term that was used to describe transgender people and is no longer considered appropriate much like “homosexuality”

# ENDNOTES

- <sup>1</sup> Pride Foundation Australia, Briefing Document on Contemporary Issues for Refugee and People seeking Asylum who have Diverse Sexual Orientation, Gender Identity, Expression and Sex Characteristics <https://pridefoundation.org.au/wp-content/uploads/2021/04/Refugee-Briefing-for-Parliamentary-Friends-of-LGBTIQ-20-12-2019.pdf>
- <sup>2</sup> St Kilda Legal Service, LGBTIQ+ Inclusive Practices Toolkit For Community Legal Centres, June 2020, 6.
- <sup>3</sup> See UNHCR, Guidelines on International Protection No. 9 (2012): Claims to Refugee Status based on Sexual orientation and/or Gender Identity (<https://www.unhcr.org/509136ca9.pdf>) (UNHCR SOGI Guidelines),
- <sup>4</sup> Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); Protocol Relating to the State of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (Refugee Convention).
- <sup>5</sup> For an overview of countries that criminalise same sex relationships and sexual acts see ILGA State-Sponsored Homophobia Report (Report, December 2020) <<https://ilga.org/ilga-world-releases-state-sponsored-homophobia-december-2020-update>>.
- <sup>6</sup> UNHCR, Summary Conclusions 2021 Global Roundtable on Protection and Solutions for LGBTIQ+ People in forced displacement (7-29 June 2021), 6.
- <sup>7</sup> ILGA World: Zhan Chiam, Sandra Duffy, Matilda González Gil, Lara Goodwin, and Nigel Timothy Mpemba Patel, Trans Legal Mapping Report 2019: Recognition before the law (Geneva: ILGA World, 2020).
- <sup>8</sup> Intersex Human Rights Australia (IHRA), 'Intersex refugees not included in any nations LGBT refugee policy': <https://ihra.org.au/12982/intersex-refugees-not-included-in-any-nations-lgbt-refugee-policy>. It is important to note also that the specific challenges faced by intersex people is often not represented or underexplored in the literature and country of origin information.
- <sup>9</sup> Kaleidoscope Australia Human Rights Foundation and K&L Gates LLP, Looking through the Kaleidoscope: A Guide to Best Practice in Determining Applications for Refugee Status Based on Sexual Orientation, Gender Identity and Intersex Grounds, [4.5].
- <sup>10</sup> Amy Chien-Yu Wang, SBS online (28/02/2020) accessed at: [https://www.sbs.com.au/language/english/audio/lgbtiq-rights-in-australia\\_6](https://www.sbs.com.au/language/english/audio/lgbtiq-rights-in-australia_6)
- <sup>11</sup> See Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007), which were drafted by a group of international human rights experts and, although not binding, reflect well-established principles of international law. See also Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles (24 November 2007) (Yogyakarta Principles).
- <sup>12</sup> Ibid.
- <sup>13</sup> Dustin, Moira and Ferreira, Nuno 'Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity', (2021) 40(3), Refugee Survey Quarterly 315-347.
- <sup>14</sup> International Commission of Jurists (ICJ), Refugee Status Claims Based on Sexual Orientation and Gender Identity – Practitioner's Guide No.11 (February 2016): <https://www.icj.org/wp-content/uploads/2016/10/Universal-PG-11-Asylum-Claims-SOGI-Publications-Practitioners-Guide-Series-2016-ENG.pdf>
- <sup>15</sup> UNHCR, Summary Conclusions 2021 above n 6.
- <sup>16</sup> See Gustavo Carlos Saavedra Morato v the Minister of Immigration, Local Government and Ethnic Affairs [1992] FCA 637.
- <sup>17</sup> [2003] HCA 71.
- <sup>18</sup> See Migration Act 1958 (Cth), s 5J(3)(vi).

- <sup>19</sup> Department of Home Affairs, Gender and Sexual Orientation – Procedural Instruction, VM–5345, reissued on 15 August 2021 (DOHA Guidelines)
- <sup>20</sup> See for instance, Administrative Appeals Tribunal (AAT), Guide to Refugee Law in Australia, accessed at: <https://www.aat.gov.au/guide-to-refugee-law-in-australia> (AAT Guide to Refugee law in Australia).
- <sup>21</sup> MRD, Gender Guidelines, AAT: <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Gender.pdf>
- <sup>22</sup> The criterion is referred to as ‘complementary protection’ since it is considered additional to Australia’s obligations under the 1951 Refugee Convention and seeks to give effect to Australia’s non-refoulement obligations under non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR), Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (‘Second Optional Protocol’), Convention on the Rights of the Child (‘CROC’) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’).
- <sup>23</sup> See also Kaleidoscope Australia Human Rights Foundation and K&L Gates LLP, Looking through the Kaleidoscope: A Guide to Best Practice in Determining Applications for Refugee Status Based on Sexual Orientation, Gender Identity and Intersex Grounds, [3.8].
- <sup>24</sup> St Kilda Legal Service, LGBTQ+ Inclusive Practices Toolkit For Community Legal Centres, June 2020, 6.
- <sup>25</sup> Pride Foundation Australia, Briefing Document on Contemporary Issues for Refugee and People seeking Asylum who have Diverse Sexual Orientation, Gender Identity, Expression and Sex Characteristics <https://pridefoundation.org.au/wp-content/uploads/2021/04/Refugee-Briefing-for-Parliamentary-Friends-of-LGBTIQ-20-12-2019.pdf> fact that language can and does evolve to find new terms for describing the diverse ways in which people can experience gender, sexuality, relationships and human bodies’:
- <sup>26</sup> Although we note this term does not include people born with variations of their sex characteristics.
- <sup>27</sup> St Kilda Legal Service, above n 2 , 6.
- <sup>28</sup> UNHCR SOGI Guidelines, above n 3, 3.
- <sup>29</sup> Ibid.
- <sup>30</sup> St Kilda Legal Service, above n , 7.
- <sup>31</sup> Ibid, 8.
- <sup>32</sup> Kaleidoscope, above n 23, 6.
- <sup>33</sup> For a history see BBC, ‘Pre-colonial communities history of gender fluidity’ (29 July 2020): <https://www.bbc.com/news/av/world-53573764>; ‘Colouring the Rainbow: Book shares perspectives of Aboriginal LGBTQI community’, ABC News 22/11/2015.
- <sup>34</sup> Gender Spectrum, 2013, Understanding Gender at: <https://www.genderspectrum.org/understanding-gender>
- <sup>35</sup> Ibid.
- <sup>36</sup> St Kilda Legal Service, above n , 6-7.
- <sup>37</sup> Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles (24 November 2007)
- <sup>38</sup> Intersex Human Rights Australia (IHRA), ‘What is intersex?’: at <https://ihra.org.au/18106/what-is-intersex/>
- <sup>39</sup> St Kilda Legal Service, above n 2, 6-7.
- <sup>40</sup> Ibid.
- <sup>41</sup> For a comprehensive guidelines on LGBTQIA+ inclusive legal representation see St Kilda Legal Service above n 2, 9-14.
- <sup>42</sup> Ibid, 14.
- <sup>43</sup> Ibid 10.
- <sup>44</sup> Ibid.
- <sup>45</sup> This information was obtained as part of RACS’ consultations with individuals of lived experience in collaboration with the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) on 29 January 2022.
- <sup>46</sup> RACS notes that this section has been specifically prepared in consultation with, amongst others, the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS).
- <sup>47</sup> See American Psychological Association, ‘Trauma’ definitions available at: <https://www.apa.org/topics/trauma>



- <sup>48</sup> Minority stress is defined as the ‘cumulative impact of being a minority within a dominant cultural group, which may result in needing to hide aspects of a person’s identity in different settings, being isolated in educational and social settings, and the experience of outright stigma and discrimination: see St Kilda Legal Service, LGBTQIA+ Inclusive Practice Toolkit for Community Legal Centres 11.
- <sup>49</sup> Saadi A, Hampton K, de Assis MV, Mishori R, Habbach H, Haar RJ (2021) Associations between memory loss and trauma in US asylum seekers: A retrospective review of medico-legal affidavits. *PLoS ONE* 16(3): e0247033. <https://doi.org/10.1371/journal.pone.0247033>
- <sup>50</sup> See for instance, Laurel Nowak, ‘Complex PTSD and Dissociation: Understanding Detachment and the Healing Process’ Bright Quest Treatment Centres (2019): <https://www.brightquest.com/blog/complex-ptsd-and-dissociation-understanding-detachment-and-the-healing-process/>.
- <sup>51</sup> Substance Abuse and Mental Health Services Administration. “SAMHSA’s Concept of Trauma and Guidance for a Trauma-Informed Approach.” HHS Publication No. (SMA) 14-4884. Rockville, MD: Substance Abuse and Mental Health Services Administration (2014).
- <sup>52</sup> These core principles are based on information provided to RACS’ in its consultations with STARTTS, and training provided by Anne Mainsbridge as a friend of STARTTS.
- <sup>53</sup> These specific recommendations have been developed in consultation with STARTTS and with reference to training provided by Anne Mainsbridge as a friend of STARTTS.
- <sup>54</sup> See for example *Mohamed v MIMA* (1998) 83 FCR 234, *Abdalla v MIMA* [1998] FCA 1017, *Chopra v MIMA* [1999] FCA 480, *Haji Ibrahim v MIMA* (1999) 94 FCR 259 at [25], *MIMA v Hamad* (1999) 87 FCR 294. In *MIMA v Hamad*, the Full Federal Court stated at [17]: ‘The phrase “systematic conduct” can be, and often is, used in two senses – either to refer to the motive, or evidence revealing the motive for the acts of the perpetrator or alternatively to refer to a number of acts or the volume of acts which are necessary before persecution is established.’ For further analysis of this phrase and case law see AAT Guide to Refugee law in Australia above n 20 Chapter 4, 11-13.
- <sup>55</sup> Migration Act 1958 (Cth), s 5J(5).
- <sup>56</sup> The criterion is referred to as ‘complementary protection’ since it is considered additional to Australia’s obligations under the 1951 Refugee Convention and seeks to give effect to Australia’s non-refoulement obligations under non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR), Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (‘Second Optional Protocol’), Convention on the Rights of the Child (CROC) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
- <sup>57</sup> UNHCR SOGI Guidelines, above n 3.
- <sup>58</sup> Kaleidoscope, above n 23, [3.3].
- <sup>59</sup> *Applicant A v MIEA* (1997) 190 CLR 225 at 258.
- <sup>60</sup> DOHA Guidelines above n 19, [3.3.7].
- <sup>61</sup> *Ibid.*
- <sup>62</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV. 3 (UNHCR Handbook), paras. 54-55.
- <sup>63</sup> *Ibid.*
- <sup>64</sup> *Ibid.*
- <sup>65</sup> For analysis on “systematic discriminatory conduct” see paragraph 4.1.5 above.
- <sup>66</sup> 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 citing 1703990 (Refugee) [2017] AATA 1014, [25]–[28].
- <sup>67</sup> DOHA Guidelines, above n 19, [3.3.5].
- <sup>68</sup> AAT Guide to Refugee law in Australia, above n 20, Chapter 3, 11. For further analysis see Chapter 3 more generally.
- <sup>69</sup> *MIMA v Respondent S152/2003* (2004) 222 CLR 1 at [18], following *MIMA v Khawar* (2002) 210 CLR 1. See also *Respondent S152* at [75] and [116]
- <sup>70</sup> See for example case study on Russian Propaganda Laws at section 4.2.11 below.
- <sup>71</sup> Kaleidoscope Australia above n 23, 8.

- <sup>72</sup> SOGI Guidelines, above n 3, 8.
- <sup>73</sup> This point is also reflected in DOHA Guidelines above n 19, 3.3.7.
- <sup>74</sup> SOGI Guidelines, above n 3, 8.
- <sup>75</sup> DOHA Guidelines, above n 19, [3.3.6].
- <sup>76</sup> 1610283 (Refugee) [2017] AATA 1116 at [45].
- <sup>77</sup> Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473.
- <sup>78</sup> Minister for Immigration and Border Protection v SZSCA (2014) 254 CLR 317 at [36].
- <sup>79</sup> Minister for Immigration and Border Protection v SZSCA (2014) 254 CLR 317 at [37].
- <sup>80</sup> See Gustavo Carlos Saavedra Morato v the Minister of Immigration, Local Government and Ethnic Affairs [1992] FCA 637. Relevant case law is now also reflected in section 5L Migration Act 1958 (Cth) which defines ‘membership of a particular social group.’
- <sup>81</sup> Andrew Loomes ‘Claims To Refugee Protection On The Basis Of Sexual Orientation: Time To Change The Definition?’ (2021) UNSW Law Journal Student Series, No 21-33.
- <sup>82</sup> 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.
- <sup>83</sup> 2018109 (Refugee) [2021] AATA 1640.
- <sup>84</sup> UNHCR Handbook 2019 above n 61, 43.
- <sup>85</sup> DOHA guidelines, above n 19, [3.3.5]
- <sup>86</sup> Berthelot, above n 81.
- <sup>87</sup> SZTIN v Minister for Immigration & Border Protection [2015] FCCA 1972, [28], [35].
- <sup>88</sup> DOHA Guidelines, above n 19, 3.3.5.
- <sup>89</sup> 1506440 (Refugee) [2018] AATA 3216.
- <sup>90</sup> DOHA Guidelines above n 19, [3.3.5].
- <sup>91</sup> Ibid.
- <sup>92</sup> DOHA Guidelines above n 19, [3.3.7].
- <sup>93</sup> Ibid [3.3.9]
- <sup>94</sup> Ibid.
- <sup>95</sup> 1213081 [2014] RRTA 75 at [25].
- <sup>96</sup> DOHA guidelines, above n 19, [3.3.8]
- <sup>97</sup> UNHCR Handbook 61, 43.
- <sup>98</sup> International Commission of Jurists (ICJ), Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners’ Guide (ICJ 2016) 21, accessed at: <https://www.icj.org/refugee-status-claims-based-on-sexual-orientation-and-gender-identity-icj-practitioners-guide-n-11-launched/>
- <sup>99</sup> For further analysis see, Kaleidoscope Australia above n 23, 18.
- <sup>100</sup> DOHA Guidelines, above n 19, 3.5.5
- <sup>101</sup> Ibid.
- <sup>102</sup> Ibid 3.3.5.
- <sup>103</sup> The DOHA guidelines, above n 19, [3.3.5] notes such ‘evidence might consist of emails, texts, videos, chat transcripts, phone records, social media, photographs or statements from relevant past/present partners.’
- <sup>104</sup> This is confirmed in the DOHA Guidelines, above n 19, at [3.2.6], and UNHCR SOGI Guidelines, above n 3, 17 which states: ‘[a]pplicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts. It would also be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation.’
- <sup>105</sup> In 1713126 (Refugee) [2021] AATA 635, for instance, the successful applicant provided “detailed evidence about how he met his partner and their relationship together. He was also able to explain how his religious beliefs, worries regarding the perceptions of the Indonesian community, and overriding concern for his parents have kept him very discreet about his sexuality in Australia. This has been further emphasised by his partner’s strong wish to also keep his sexuality secret from the community.”
- <sup>106</sup> See for example 1504524 (Refugee) [2017] AATA 2212; 1504524 (Refugee) [2017] AATA 2212; 1711688 (Refugee) [2021] AATA 2062; 1713126 (Refugee) [2021] AATA 635; 1725349 (Refugee) [2021] AATA 2241.

- <sup>107</sup> DOHA Guidelines, above n 19, 3.3.5.
- <sup>108</sup> This is reflected in AAT case law trends discussed at 5.8.4.
- <sup>109</sup> *Chan v MIEA* (1989) 169 CLR 379 at 396. See also *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 263
- <sup>110</sup> AAT Refugee Law Guide, above n 20, 3-4.
- <sup>111</sup> See section 4.1.3, above.
- <sup>112</sup> *Abebe v The Commonwealth* (1999) 197 CLR 510 at [82].
- <sup>113</sup> *Kaleidoscope Australia*, above n 23, [3.9].
- <sup>114</sup> In *Abebe v The Commonwealth* (1999) 197 CLR 510, Gummow and Hayne JJ at [192] observed that '[r]egrettably, cases can readily be imagined where an applicant's fear is entirely well founded but the particular applicant has never suffered any form of persecution in the past.'
- <sup>115</sup> *Chan v MIEA* (1989) 169 CLR 379 at 412, 396, 406, 429. As Dawson J stated at 396, 'Whilst there must be a fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'
- <sup>116</sup> For further analysis on the 'well-founded fear' see AAT Refugee Law Guide, above n 20, Chapter 3.
- <sup>117</sup> Indeed, this particular challenge is explicitly recognised in DOHA's Guidelines, above n 19, [3.1.2]
- <sup>118</sup> UNHCR, 'LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions', Discussion Paper, 4 June 2021. See also, DOHA guidelines, above n 19 [3.3.6.]
- <sup>119</sup> See for example, Moira Dustin, 'Many Rivers to Cross: The Recognition of LGBTIQ+ Asylum in the UK' (2018) 30(1) *International Journal of Refugee Law* 104–127; All Party Parliamentary Group on Global LGBT Rights, 'The UK's Stance on International Breaches of LGBT Rights' (2016); Moira Dustin and Nuno Ferreira, 'Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity' (2021) 40 *Refugee Survey Quarterly* 315.
- <sup>120</sup> Cathryn Costello, 'Safe Country? Says Who?' (2016) 28 *International Journal of Refugee Law* 601; Sean Rehaag, 'Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia' (2009) 13 *International Journal of Human Rights* 415.
- <sup>121</sup> *Ibid.*
- <sup>122</sup> UNHCR SOGI Guidelines, above n 3, 17
- <sup>123</sup> In certain circumstances, the Minister must refuse to grant a protection visa if an applicant does not provide evidence of their identity, nationality or citizenship, or provides bogus documents in this regard. It is important that the client is provided an opportunity to discuss issues in this regard with their representative.
- <sup>124</sup> UNHCR SOGI Guidelines, above n 3; and DOHA Guidelines on appropriate and inappropriate lines of enquiry, above 19, [3.2.8] and [3.2.9].
- <sup>125</sup> *Kaleidoscope Australia* above n 23, [4.5].
- <sup>126</sup> *Ibid.*
- <sup>127</sup> DOHA Guidelines, above n 19, 3.2.9.
- <sup>128</sup> This might include, for instance, fear of or actual exclusion from their communities, fear of or actual racism in LGBTIQ+ communities, cultural differences in conceptualising SOGIESC and/or lack of access to LGBTIQ+ communities due to language, cultural, geographic or economic barriers. See also *Kaleidoscope Australia*, 23 [4.5].
- <sup>129</sup> See UNHCR SOGI Guidelines above n 3, 17.
- <sup>130</sup> *Ibid.*





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