

# Annexure 5: Assessing claims related to sexual orientation and gender identity

## Introduction

### Purpose

The purpose of this Annexure is to provide policy and procedural guidance for interviewing lesbian, gay, bisexual, transgender or intersex (LGBTI) onshore protection and offshore humanitarian visa applicants and assessing claims relating to sexual orientation and gender identity. It should be used in conjunction with PAM3: Refugee and Humanitarian – Gender Guidelines which provides guidance on gender-related forms of persecution and significant harm and assessing protection claims and claims of persecution or substantial discrimination by women.

### Classes of visa

Section 35A of the Act provides for the following three classes of onshore protection visas:

- XA-866 Protection visa (PPV)
- XD-785 Temporary Protection visa (TPV) and
- XE-790 Safe Haven Enterprise visa (SHEV).

The offshore humanitarian programme comprises five subclasses of Refugee and Humanitarian visas:

- XB-200 Refugee
- XB-201 In-country Special Humanitarian
- XB-203 Emergency Rescue
- XB-204 Woman at Risk and
- XB-202 Global Special Humanitarian, which is used for the special humanitarian programme.

For more information about Class XB visas, refer to PAM3: Offshore humanitarian program - Visa application and related procedures.

These guidelines are intended to be used by officers assessing applications for any of these classes of visas, whether they are lodged in or outside Australia.

### Purpose

The department recognises that LGBTI people may experience particular acts of persecution, significant harm and discrimination specific to, and because of, their sexual orientation and/or gender identity. These guidelines have been developed in accordance with international best practice, to help officers effectively and sensitively address and assess sexual orientation and gender identity related claims, in order to enhance the efficiency, consistency and integrity of onshore protection and offshore humanitarian visa decision making.

These guidelines provide policy and procedural advice on assessing claims relating to sexual orientation or gender identity to determine if the applicant is a person who:

- engages Australia's protection obligations because they are a refugee under the Act and, if no such obligations arise, assess whether obligations are engaged under the complementary protection provision in the Act or

- under the offshore humanitarian visa programme, meets the relevant persecution/substantial discrimination provisions.

The guidelines focus on two elements of decision making that are most likely to present challenges in assessing gender and sexual orientation related claims: interviewing and assessing of claims.

## **Key terms**

The following is a list of key terms that may be used in relation to LGBTI applicants.

### **Bisexual**

Bisexual describes an individual who has the capacity to be physically/sexually, romantically and/or emotionally attracted to both men and women. Bisexual people do not necessarily have equal attraction to men and women, as they may have a preference for men or women that may also change over time.

### **Coming out**

This term refers to the process in which a person acknowledges and accepts their sexual orientation. It also refers to the process in which a person discloses their sexual orientation to others.

### **Gay**

Gay is often used to describe a man whose physical, romantic and/or emotional attraction is to other men, although the term can also be used to describe women who are attracted to other women (lesbians). The term 'gay' is used in these guidelines to refer to men attracted primarily to members of the same sex.

### **Gender**

Gender is the societal expression of being male or female. It refers to the different social and cultural expectations of men and women, rather than biological differences. Gender includes a combination of identity, expression and societal expectations related to masculinity and femininity.

### **Gender identity**

Gender identity is each person's internal experience of gender that may or may not correspond with their sex at birth. It includes a person's sense of their body, as well as other expressions of gender, including dress, speech, mannerisms and social roles. Some people may seek to change their sex to more fully match their gender identity.

### **Gender transition**

Gender transition is the process by which a person strives to more closely align their outward appearance with their internal sense of their own gender. Some people may socially transition, for example by changing their dress or using different names. Some people also transition physically, for example, by using hormone therapy or having gender re-assignment surgery.

### **Heterosexual**

A heterosexual person is one whose physical/sexual, romantic and/or emotional attraction is primarily to members of the opposite sex.

### **Homophobia**

Homophobia includes a range of negative attitudes and feelings toward homosexuality, 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 or fear. Homophobia can lead to laws and actions that result in LGBTI people suffering serious and/or significant harm.

### **Homosexual**

A homosexual person is one who is attracted primarily to members of the same sex and can apply to both men and women. The terms 'homosexual' or 'gay' are often used to describe a man whose physical/sexual, romantic and/or emotional attraction is to other men, although the terms can also be used to describe women who are attracted to other women.

### **Intersex**

The term intersex refers to a condition in which an individual is born with the reproductive or sexual anatomy that does not fit typical biological categories of male or female. For example, a person may be missing internal reproductive organs or a person may have both male and female external genitalia.

These conditions may be apparent at birth, may appear at puberty, or may be discovered only during a medical examination. Individuals with these conditions were previously referred to as 'hermaphrodites', however, this term is outdated and should not be used unless the applicant uses it.

An intersex person may identify as male or female, and this gender identity may or may not be the same as their apparent sex. Their sexual orientation may be heterosexual, gay, lesbian or bisexual.

### **Lesbian**

A lesbian is a woman whose physical/sexual, romantic and/or emotional attraction is primarily to other women.

### **LGBTI**

The acronym 'LGBTI' refers collectively to people who are lesbian, gay, bisexual, transgender and/or intersex.

### **Queer**

Queer can be used as an umbrella term to refer to the entire LGBTI community (sometimes LGBT, LGBTIQ or LGBTIQ+). However, some people may find this term offensive and it should not be used unless the applicant uses it.

### **Sex**

Sex is a person's physical anatomy which can be female, male or intersex. It includes internal and external reproductive organs, chromosomes and hormones.

### **Sexual and gender nonconformity**

Persons whose sexual practices, attractions and/or gender expression are different from the societal expectations based on their assigned sex at birth.

### **Sexual orientation**

Sexual orientation is a person's capacity for intimate relations with, and emotional and sexual attraction to, another person. This can include individuals of a different gender, the same gender or more than one gender.

Sexual orientation is not the same as gender identity. Sexual orientation relates to who a person is attracted to, whereas gender identity relates to a person's sense of their own gender.

## Transgender

Transgender describes people whose gender identity and/or gender expression differs from their biological sex. Transgender is a gender identity, not a sexual orientation. A transgender person may be heterosexual, gay, lesbian or bisexual.

As well, there is a difference between cross-dressing and being transgender. Most cross-dressers are not transgender because they do not feel that they are a different gender to their biological sex. Rather, cross-dressers enjoy wearing clothing typical of another gender.

Transgender people have previously been referred to as transsexual. However, this term should no longer be used as it confuses gender identity with sexual orientation.

More information about key terms is available in the UNHCR's Guidelines on International Protection No. 9. More information about relevant terminology in a range of refugee producing countries is available on CISNET at CIS38A8012612.

## Useful resources

The information in these guidelines has been drawn from the following sources on CISNET, which officers may refer to for further information:

- Kaleidoscope Australia, 'Looking through the Kaleidoscope: A guide to best practice in determining application for refugee status based on sexual orientation, gender identity and intersex grounds', <http://www.kaleidoscopeaustralia.com/refugee-guide/>, 2015, CISEC96CF14044.
- Nicole Laviolette, 'Sexual orientation, gender identity and the refugee determination process in Canada', University of Ottawa, March 2015, CISEC96CF14724.
- Jenni Millbank, 'The Ring of Truth: A case study of credibility assessment in Particular Social Group refugee determinations', Oxford University Press, 2009, CISE1310071783.
- Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom', The International Journal of Human Rights, 2009, 13:2-3, 391-414, CISE1310071781.
- Organization for Refuge, Asylum and Migration, 'Gender identity and gender expression: essential terminology for the humanitarian sector', 2016, CIS38A8012612.
- UNHCR, Guidelines on International Protection No. 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, HCR/GIP/12/09, 23 October 2012, CIS28955.
- UNHCR, Guidelines on International Protection: Gender related persecution within the context of 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, HCR/GIP/02/01, 7 May 2002, CIS15598.
- UNHCR, Handbook and Guidelines 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, December 2011 UNE8ABA086.

## Challenges

Onshore protection and offshore humanitarian visa applications involving claims relating to sexual orientation or gender identity are complex to assess due to the personal nature of these claims and because, other than these claims, there is often little or no supporting objective evidence provided.

Claims relating to sexual orientation or gender identity will often rely largely on the applicant's own account of their experiences because:

- there will be a lack of available corroborating evidence
- the applicant may have deliberately hidden their sexuality or gender identity
- persecution, substantial discrimination and/or significant harm may have largely occurred in the private sphere or
- official records may hide or deny the treatment of LGBTI people.

It can also often be difficult to obtain relevant country information on the treatment of LGBTI people in their home country. If there is insufficient information available, contact Country of Origin Information Services Section (COISS).

An officer will need to carefully consider the credibility of such LGBTI claims and the assessment of these will be critical.

Officers must ensure they have an accurate understanding of LGBTI characteristics and issues in the context of the applicant's country of origin information, in the same way they do for any other claim. They must not allow their personal feelings, attitudes, stereotypic views, religious views or assumptions influence their interviewing or assessment of onshore protection or offshore humanitarian visa applications for claims related to sexual orientation or gender identity. For example, officers cannot assume that a person's sexual orientation or gender identity is a lifestyle or a choice, or that bisexuals can choose to be attracted to men or women, depending on which is less likely to lead to a real chance of persecution, substantial discrimination or a real risk of significant harm.

If an officer has any personal concerns about managing a case or assessing claims relating to sexual orientation or gender identity, they should raise this with their supervisor prior to being allocated such cases.

When considering how to approach questions about fleeing persecution and seeking protection, officers should consider the compound challenges that LGBTI applicants might face when travelling in order to seek protection, due to financial disadvantage and social disempowerment. This is in addition to the risk of violence or sexual assault that may be inherent in travelling without family or community protection.

Officers should be aware that an applicant may have claims related to sexual orientation or gender identity but choose to make alternative claims rather than discuss something so sensitive and personal. While officers cannot make an applicant's claims for them, they should be alert to instances where an applicant may have claims they have not explicitly raised but that may become apparent during the interview.

## Interviewing

Policies and procedures for interviewing applicants for onshore protection and offshore humanitarian visas are in, respectively:

- Interviewing
- Refugee and Humanitarian - Offshore humanitarian program - Visa application and related procedures - Conducting interviews.

This section provides additional guidelines for interviewing LGBTI applicants, including the subsection Appropriate lines of enquiry, which provides guidance on the types of questions that can be used to obtain further information from applicants about their sexual orientation and gender identity and how to sensitively and effectively verify the credibility of their claims regarding these matters.

Officers must be mindful of any significant cultural differences in the experience and expression of sexual orientation and gender identity, and the difficulty applicants may have in discussing matters of a personal or sensitive nature. Additionally, officers should consider that applicants may not have lived openly as an LGBTI person in their country of origin and may not have had many, or any, LGBTI relationships. Further, it may be difficult for the applicant to relive painful memories, or the applicant may never have discussed their sexuality or gender identity previously, due to feelings of shame or the fear of violence or social exclusion. These circumstances may manifest themselves as an applicant being reluctant to, or having difficulty in, discussing their sexual orientation or gender identity with an officer, particularly where intolerance of LGBTI individuals is sanctioned by state officials in the applicant's country of reference.

## **Preparing for the interview**

Given the challenges of interviewing an LGBTI applicant, it is important in these cases to create an open and non-judgmental interview environment that allows the applicant to feel comfortable enough to freely discuss the details of their claims. This will help the applicant to discuss their claims more readily and fully and, therefore, facilitate the assessment of the claims by the officer more efficiently and completely.

As with any application, officers should be familiar with the relevant country of origin information before an interview. This will enable them to question the applicant effectively and identify any gaps in their story or claims that are inconsistent with available country information. Officers also need to be aware of the different ways in which sexual orientation and gender identity may be understood, discussed, and treated in different countries or cultures.

For further guidance, refer to PAM3: Refugee and Humanitarian – Asylum claims – Use of Country of Origin.

## **Terminology**

Before the interview officers should familiarise themselves with the appropriate terminology for discussing sexual orientation or gender identity in the applicant's country of origin. Officers should use language that is respectful to the individual, reflects that person's self-identification and avoids negative connotations. Using the appropriate terminology will mitigate the risk of misunderstanding during the interview, particularly if using an interpreter.

Some gay or lesbian applicants may use derogatory terms about themselves as these may be the only words available in their language, or in common use, to describe their sexuality. Therefore, this does not necessarily indicate that the applicant is not gay or a lesbian. Use of derogatory terms may also be a result of internalised homophobia caused by growing up in a homophobic culture or in a country in which being gay or lesbian is illegal. Alternatively, some applicants may refer to gay or lesbian activity in gendered terms such as 'playing the man/woman', or describe themselves as gay or lesbian even if their claims or experiences indicate that they might be bisexual.

As a general rule, officers must not use derogatory terminology. However, it may be appropriate for officers to use the same terminology that the applicant uses, to avoid causing confusion or offence.

Officers should also carefully consider and investigate what applicants mean when they use terms such as ‘friend’, which may have a wide range of meanings for them, including a person with whom they have an intimate, romantic or sexual relationship or a person with whom they communicate with only over the Internet.

## **Interpreters**

Challenges may arise in LGBTI cases if the interpreter does not possess the appropriate vocabulary, or has strong personal views on LGBTI people, as this may affect their ability to interpret impartially.

Additionally, applicants may feel increased anxiety about disclosing private information about their sexual orientation or gender identity in front of a person from their own community, ethnic or religious background as they may fear that this information will be passed on to others in their community.

When it is apparent from the application that LGBTI related claims will need to be discussed at the interview, the officer should speak to the interpreter beforehand to inform them of the nature of the claims, and check that the interpreter is comfortable being the interpreter for the interview and is familiar with LGBTI terms. If the interpreter is not comfortable, the officer should try to resolve the issues of concern. If they cannot resolve those issues, the officer should organise another interpreter.

For further guidance on using interpreters in interviews, refer to Interpreters.

## **Attendance of others as interview**

Policies and procedures for applicants for onshore protection and offshore humanitarian visas who wish to bring a support person are in, respectively:

- Attendance of others at interview
- PAM3: Refugee and Humanitarian - Offshore humanitarian program - Visa application and related procedures – Interpreters and others at interview.

Officers should carefully consider the impact that family, friends or other support persons may have on the applicant’s willingness to discuss private issues relating to their sexual orientation or gender identity. If the applicant has indicated that they wish to bring a support person, it may be appropriate to advise them separately that sensitive and detailed questions will be asked during the interview. This provides the applicant with the opportunity to decide whether they would like their support person to wait in the waiting room, rather than join them in the interview room.

## **Conducting the interview**

Officers should take steps to establish a rapport with the applicant, beginning with open questions on non-sensitive issues, and being careful of their body language and choice of wording and facial expressions. Fear of judgment, fear of the interpreter, inexperience with discussing sexual orientation or gender identity, among other things, may affect the applicant’s ability to provide information during interview. Therefore, officers need to be sensitive and patient in their questioning.

It is important that the questions asked during the interview assess the credibility of the LGBTI claims but are also sensitive and not intrusive. It is not appropriate for officers to ask applicants for details of sexual activity.

There are many lines of enquiry that officers can use to determine the veracity and credibility of an applicant's claims. As with other interviews, it is important to begin with open questions to allow the applicant to tell their story and progress to direct questions to fill in gaps or confirm details. Questions should be crafted in a sensitive manner to enable the applicant to answer without fear of judgement. In interviews about LGBTI claims, it is recommended that officers begin by discussing non-sensitive biographical details to establish rapport, before progressing to the crux of the claims.

Effectively questioning an LGBTI applicant can be difficult, due to the diversity of individual experiences and because a person may, for example, identify as gay or lesbian without having ever had a gay or lesbian relationship. However, people who are LGBTI are likely to have:

- common experiences of self-realisation of their sexuality or gender identity
- a sense of difference or shame
- experience hiding their identity
- exclusion from family or community
- attempted to conform to avoid mistreatment and
- some experiences of past mistreatment.

Asking questions about these experiences is the most useful and sensitive way of obtaining further information from applicants about their sexual orientation and gender identity and to sensitively and effectively establish the credibility of a person claiming to be LGBTI. It is important to explore what the concepts and experiences mean to the applicant.

Trauma, post-traumatic stress disorder, other mental health conditions, shame, habits of secrecy, difficulty recalling painful events and the passage of time since events occurred, may impact on an applicant's memory and their ability to provide a coherent narrative. Officers should encourage LGBTI applicants to identify key experiences and how these impacted on their life.

## **Interviewing transgender applicants**

When interviewing a transgender applicant, the officer should ask the applicant for their preferred gender, name and pronoun, so these can be used when addressing the applicant. Officers should also advise the applicant that their sex and name as listed on their identity documents will be used in departmental communication and acknowledge that this might be uncomfortable for the applicant in some instances.

It may be appropriate to ask transgender applicants whether they are currently taking any steps to transition, such as changing clothing, hair, makeup, taking hormones or other medication, undertaking surgery or changing legal documents. Officers may enquire whether the applicant plans to transition, or continue transitioning, in the future.

Officers should use the interviewing and questioning guidelines described in Appropriate lines of enquiry when interviewing these applicants and avoid asking blunt or offensive questions such as 'are you a man or a woman?'. They should instead ask more sensitive questions about how the applicant identifies and whether they were raised male or female.



Officers should also note that, if a transgender applicant has not undergone medical treatment or other steps to help their outward appearance match their gender identity, this should not be taken as evidence that the person is not transgender. Some transgender people may not be ready, or have the access, funds or inclination to undertake these changes, or for health reasons are unable to undergo treatment.

## **Appropriate lines of enquiry**

The following examples are appropriate lines of questioning for LGBTI applicants that may enable officers to obtain useful information and may also be helpful for establishing the credibility of claims relating to sexual orientation and gender identity. For details of matters about which applicants should not be questioned, refer to Inappropriate lines of enquiry.

### **Family**

It may be useful to ask the applicant about their relationships with other family members, including any exclusion or mistreatment from the family, or fear of this occurring.

To obtain this information, officers may ask about:

- past relationship with family members
- current relationship with family members
- last contact with family members
- the experience of coming out to the family, including to which family members the applicant came out, if applicable
- the consequences of family members discovering the applicant's gender identity or sexual orientation, including threats of harm to the applicant
- experiences of loss or exclusion
- how the applicant hid their sexual orientation or gender identity from their family, if applicable
- sense of responsibility to family, including negotiating expectations of marriage.

### **Self-awareness/identification**

Some applicants may not specifically identify as LGBTI, instead referring to relationships or casual encounters with 'friends' for example. However, this does not mean that the applicant does not have a valid claim based on sexual orientation or gender identity, if there are other factors that may indicate that the applicant is LGBTI.

To obtain information and clarification about these matters, officers may ask about:

- feelings of being 'different', when that occurred, and in what ways
- what that sense of difference means and how it impacts on the person's life
- desire to change themselves or conform due to external pressure
- desire to challenge socially imposed gender roles
- when the applicant developed self-awareness of sexual orientation or gender identity
- experience of self-realisation and when this occurred
- feelings about their place in the community
- reconciling personal identity with religious views
- feelings of shame/embarrassment/self-hatred
- acceptance/rejection of sexual orientation.

## Relationships

The extent of an applicant's relationship experience will vary significantly, including that some applicants may not have had any relationships at all. However, even in the absence of relationships, the applicant's response to or reasons for not having had a relationship may be useful for obtaining information regarding their sexual orientation and/or gender identity and to sensitively and effectively assess the credibility of their LGBTI claims.

To obtain more information about the applicant's relationship experiences or, if applicable, their reason for their lack of experiences, officers may ask about:

- seeking out or avoiding other LGBTI people
- forming a particularly close bond with certain people
- relationships with peers
- history of previous or current relationships, including casual encounters and any heterosexual relationships
- if no relationships or casual encounters – reasons for absence of relationships
- sense of physical/sexual attraction to others
- feeling of romantic or emotional attraction to others
- daydreams, dreams or thoughts about people that may have drawn the applicant's attention to their own sexual orientation
- any changes to relationship with religious community
- the welfare of any partners
- with whom the applicant celebrates significant events
- how the applicant meets partners.

## Perception of others

Officers may ask about:

- others perceiving that the applicant as different
- experience of disclosing of sexual orientation or gender identity to others (coming out)
- if the applicant has not come out, why not, and how they feel about that
- perception of friends, housemates and other social contacts
- experiences of others identifying the applicant's sexual orientation or gender identity
- actual or perceived non-conformity with gender roles
- how people would identify the applicant as LGBTI and what would happen if they did.

## Claims

Officers may ask about:

- treatment by family, community and authorities
- experience of bullying, shaming or exclusion
- treatment at school
- attempts/methods to avoid mistreatment or hide sexual orientation or gender identity
- forced marriage or pressure to marry
- knowledge of continuing threats or risks
- reasons for departure from country of origin
- the reason given by the persecutor for harm caused in the past
- interaction with authorities in the applicant's country of origin
- nature of future harm feared

- knowledge of others in a similar situation who may have experienced harm
- employment discrimination in the applicant's country of origin
- access to housing in the applicant's country of origin
- access to medical care in the applicant's country of origin
- physical safety and access to justice/police or other state protection or protection by a non-state actor
- experience of stigma/isolation.

## Community

If the applicant has links to an LGBTI community, it will be useful to ask about this. However, some applicants may have avoided or been unable to access an LGBTI community in either their country of origin or Australia. Officers should not assume that an applicant will be involved with the LGBTI community simply because they are now in Australia.

To obtain this information, officers may ask the applicant about:

- knowledge of or interaction with other LGBTI persons
- use of social media
- participation in advocacy or LGBTI organisations
- plans for their future
- how LGBTI people meet in their country of origin
- any connections with the LGBTI community in Australia, and if not, why not.

When establishing the credibility of claims relating to sexual orientation and gender identity, it may also be useful to enquire about the applicant's experiences in countries other than their country of origin, or while in transit from their country of origin to Australia. While travelling, or during displacement, applicants may have experienced additional hardship due to lack of privacy, lack of access to medical care and housing due to discrimination, and strained finances. Additionally, women (including transgender women), are more vulnerable to physical and sexual assault during transit and detention periods.

By exploring some or all of these aspects of a person's life, an officer can put together a full view of the applicant's experiences without resorting to inappropriate questioning about a person's sexual activity.

Officers should be aware that whether the applicant has engaged with LGBTI communities in Australia will vary from case to case. On one hand, some applicants may not feel comfortable with engaging with LGBTI communities, particularly if they are living in a community with others from their country of origin. On the other hand, if an applicant claims to have engaged with a community, the officer should investigate and assess the veracity of these claims by asking further questions of the applicant.

An applicant's individual answer to a particular question on any of these topics should not, on its own, lead to an adverse credibility finding. Rather the information from an applicant about any of these topics should be considered cumulatively in assessing their credibility, and the fact that individual experiences will vary widely should be taken into account.

For further guidance on assessing the credibility of applicants and guidelines on how to proceed following an adverse credibility finding, refer to [Assessing credibility](#).

## **Inappropriate lines of enquiry**

It is not appropriate to ask applicants for information about their sexual activities. It is also not a useful line of enquiry, as it is easy to invent and difficult to verify. Officers can more effectively gain an understanding of a person's sexual orientation by asking them about their experiences and relationships more generally.

It is also not appropriate to ask questions that assume an applicant will be familiar with Western gay cultural icons or the gay and lesbian communities in Australia. Officers should carefully consider the value of asking about familiarity or knowledge of gay and lesbian culture or communities in Australia or activities in those communities, for example, night clubbing, music or literature. It may be appropriate for officers to question the applicant on these topics only if they were raised by the applicant in their claims and require further exploration to test the veracity of such claims.

Officers should also avoid projecting their own cultural expectations or preconceived notions onto applicants as a legal error may arise if they find that an applicant is not LGBTI because they do not conform to the officer's expectations of their knowledge of LGBTI cultural references, or how an LGBTI person should appear or behave, for example dress, mannerisms, style of speech, etc.

Officers should not ask about the following matters during an onshore protection or offshore humanitarian visa interview:

- whether something happened to make the applicant LGBTI
- why the applicant chose to be LGBTI
- whether the applicant can change their behaviour to conform/avoid harm
- whether the applicant can prove they are LGBTI
- any and all questions about details of sexual activities
- detailed information about traumatic events, particularly those involving sexual violence.

When questioning applicants about their relationships, officers may find it useful to advise the applicant in advance that they do not need to provide intimate or sexual details, or to reassure them that they will not be asked for detailed information about traumatic events such as sexual assault.

## **Assessment**

This section provides guidance on the particular issues and factors that officers need to take into consideration in cases relating to sexual orientation or gender identity. This guidance is in addition to the general guidance on assessing claims in Protection obligations assessment, and the guidance on assessing protection claims in:

- the Refugee Law Guidelines
- the Complementary Protection Guidelines.

Assessing and deciding an application with claims relating to sexual orientation or gender identity must be undertaken in accordance with the legislative provisions, relevant case law and policies that apply to all onshore protection and offshore humanitarian visa applications.

### **Assessing claims relating to sexual orientation and gender identity**

Assessing claims relating to sexual orientation is challenging because individual experiences are so varied. An LGBTI applicant may be married or divorced, have had heterosexual relationships, or may never have had a gay, lesbian or bisexual relationship, and/or may have

children. Additionally, sexual orientation and gender identity are not necessarily fixed and can evolve over time. The presence of any of these factors does not mean the applicant is not gay, lesbian or bisexual, as social pressures may have forced them to conform to cultural norms.

In some LGBTI cases, the claimed harm may be in relation to actual or perceived non-conformity with socially defined and traditional gender roles, rather than sexual activity. For example, a gay man might be targeted by his community because he is effeminate, or has failed to marry and have children. In some countries, if a person conforms to gender norms and social expectations, there is a reasonably high tolerance of sexual activity with the same sex, if it is discrete. Officers should seek country specific information on these issues in order to accurately assess each applicant's claims.

Officers should be aware that not all LGBTI people will conform to cultural stereotypes associated with LGBTI communities. There is not one 'community', nor is there one established set of interests or cultural references.

Officers should not assume that because an applicant has risked serious or significant harm to have a relationship or casual encounter, the applicant does not have a subjective fear of that harm occurring. Relationships and sexuality are such fundamental parts of life that people may take significant risks, despite being fearful of the consequences.

On the other hand, if an applicant has not had any relationships in the country of origin, this does not necessarily mean that they are not LGBTI. Rather, it may be an indication that they have been avoiding harm. Furthermore, LGBTI applicants who have grown up in oppressive environments may come to a realisation about their sexual orientation or gender identity later in life than may be common in Western countries.

Assessment of LGBTI claims can be difficult as the evidence is usually limited to the applicant's personal account. Providing objective evidence of their sexual orientation, gender identity, real chance of persecution, substantial discrimination or real risk of significant harm is difficult. For information on managing evidence, refer to Evidence.

## **Assessing lesbian applicants**

In addition to their sexual orientation, lesbian women often suffer cumulative discrimination due to their gender and the likelihood that women may have a lower socioeconomic status than men. Officers may find that the treatment of women in general in a society provides useful insight into the situation for lesbian applicants in their country of origin.

Lesbians may be subjected to gender-related harm by non-state actors, such as 'corrective' rape, violence by intimate partners, forced marriage or honour crimes committed by family members. Officers should exercise particular sensitivity when assessing claims involving sexual violence or intimate partner violence.

In some cases, lesbians may have had heterosexual relationships because of social pressures to marry and have children. As in all cases, findings on lesbian related claims of these applicants must not be based on stereotypical assumptions about the way lesbians appear or behave.

For further guidance on assessing the claims of these applicants, refer to PAM3: Refugee and Humanitarian – Gender Guidelines.

## **Assessing gay men**

Gay men are often more publicly visible than other LGBTI groups and can be subjected to homophobia.

Gay men may be at particular risk of harm in detention, in prison, in the military and in other traditionally male dominated environments.

Some gay men may also have had heterosexual relationships because of social pressures, including pressure to marry and have children. Officers must not make assumptions about how gay men appear or behave, and should particularly avoid common stereotypes about the number or frequency of sexual partners, or attach significance to whether or not the applicant appears, for example, effeminate.

## **Assessing bisexual applicants**

Bisexuality is a unique identity and bisexual people are not necessarily attracted to both sexes at the same time. Nor do they necessarily have equal attraction to or the same number of relationships with both sexes.

Bisexual applicants may describe their sexual orientation as fluid or flexible. There are many manifestations of bisexuality, for example, some people might be attracted to the same sex or opposite sex at different times in their life, while other people might consistently be attracted to people of either sex, and it can vary for an individual at different times. Understanding that bisexuality is varied can assist in investigating these claims.

Officers should also note that some applicants may raise claims relating to being gay or a lesbian without actually articulating that they identify as bisexual. However, in some countries, while serious or significant harm may not explicitly be directed at bisexuals, it may be incorporated into harm targeted at gay or lesbian conduct and this may raise imputed claims based on being perceived to be gay or a lesbian.

Officers should take care to accurately assess whether an applicant is bisexual, based on their claims without necessarily requiring a specific bisexuality claim.

## **Assessing transgender applicants**

Transgender individuals tend to dress or act in ways that are different from general societal expectations based on their sex at birth. However, they may not appear or act in these ways all the time and some of them may express their gender identity only in environments in which they feel safe. In addition, gender identity is not the same as sexual orientation and, therefore, transgender applicants may be gay, lesbian, bisexual or heterosexual. For example, an applicant who was born biologically male but identifies as a woman, may be sexually or romantically attracted to men and, therefore, identify as a heterosexual woman.

Transgender individuals are often highly marginalised and may have experienced physical, psychological and/or sexual violence. Further, transgender people may have or are likely to experience significant and cumulative discrimination in relation to access to housing, health care and employment, as well as severe social ostracism which may, in some circumstances, amount to serious or significant harm. Additionally, a lack of employment opportunities and social services may force transgender individuals into sex work, thereby exposing them to further risk of violence.

Transitioning from one's birth sex is a multi-step process and can involve a range of personal, legal and medical adjustments. However, not all transgender individuals choose medical treatment, so it is important that officers avoid assumptions about sex reassignment surgery.

Officers should also consider whether a transgender applicant fears harm because of perceived or imputed homosexuality.

### **Assessing intersex applicants**

Intersex people may face discrimination and abuse for having a physical anomaly, or medical condition, or for not conforming to the expected physical appearance of males or females. Further, some intersex people, who had surgery at an early stage, may not identify with the sex they were assigned.

Some intersex children are not registered at birth by authorities. The treatment of such children, because they do not have documentation, may amount to a real chance of persecution or a real risk of significant harm in some circumstances. In some cultures, being intersex can be associated with evil or witchcraft and can result in the whole family being targeted by the community.

When the applicant is a minor and is unable to clearly express their own fear because they are intersex, claims related to being intersex may be raised by the parent/s of the intersex child due to the harm they fear for wanting to protect their child.

People who identify as intersex may be viewed by others as transgender, or there may be no social understanding or language to describe the intersex condition. This may affect how they present their claims and outline instances of persecution at interview.

### **Membership of a particular social group**

The UNHCR Guidelines on International Protection No. 9 - Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees note, in paragraph 46 in the section on Membership of a Particular Social Group, that there is broad acknowledgement that LGBTI people are members of a particular social group (PSG) and that claims related to sexual orientation and gender identity will commonly be assessed on this ground. For general guidance assessing claims relating to members of a PSG, refer to the Refugee Law Guidelines - section 6.6 Membership of a particular social group.

However, officers should be aware that claims relating to sexual orientation or gender identity may intersect with other s5J(1)(a) persecution reasons, including those imputed to the applicant, such as political opinion or religion.

If the officer is not satisfied that an onshore PV applicant with claims related to sexual orientation and gender identity has a well-founded fear of persecution owing to their membership of a PSG or on any of the other grounds in s5J(1)(a) of the Act, they must also consider whether there is a real risk of significant harm as provided for in s36(2)(aa) of the Act. For guidance about assessing claims against the criteria in s36(2)(aa), refer to the Complementary Protection Guidelines - Significant harm.

### **Transgression of traditional gender roles**

The UNHCR guidelines on gender related persecution highlight that persecution on account of a person's sexual orientation, in many cases, is due to the applicant refusing or failing to

adhere to socially or culturally defined roles or expectations of behaviours attributed to his or her gender.

It is the transgression of traditional gender roles that may put the applicant at risk of harm, rather than their sexual orientation itself. Therefore, some applicants may have made significant attempts to conform with traditional gender roles, in order to avoid harm. However, the cause of the harm can still be attributed to the applicant's membership of a PSG on the basis of their sexual orientation or gender identity.

## **Sur place claims**

Sur place LGBTI claims may arise due to changes relating to the gender identity or sexual orientation of the applicant after their departure from their country of origin or because the agent of harm has discovered that the applicant is LGBTI after their departure or because of changes to the legislation or societal attitudes since the applicant's departure from their country of origin.

LGBTI applicants may not have identified themselves as LGBTI before they departed their country of origin, or may have decided not to act on their sexual orientation or gender identity. Claims may arise where an LGBTI applicant engages in political activism, uses social media, or when their sexual orientation or gender identity is exposed by someone else.

Officers must have regard to sur place claims relating to conduct in Australia only if they are satisfied that it was not for the sole purpose of strengthening the applicant's protection claims as per s5J(6). For further information, refer to the Refugee Law Guidelines – chapter 12 Sur place claims.

## **Persecution**

### **Harm feared**

If an officer is satisfied that an applicant is a member of a PSG and their claims are credible, they must then turn their mind to consider if the applicant's claims amount to persecution. Applicants may fear a variety of types of harm and the motivation of the agent of harm will also vary. In some societies, diverse sexual orientation or sexual identity is viewed as a disease or mental illness, and the agents of harm may believe they are attempting to 'treat' or 'cure' the person of their 'illness'.

Generally, state interference in a person's private life by means of discriminatory legislation, for example, a ban on same-sex marriage, will not amount to persecution. However, criminalisation of same-sex sexual conduct may amount to serious or significant harm, 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 state protection from private harm.

There are approximately 75 countries that criminalise same-sex activity between consenting adults, seven of which have the death penalty for this crime (CIS38A8012949). It is open to officers to find that, while these laws may be considered laws of general application, they have a discriminatory impact on LGBTI people that may amount to persecution or significant harm, depending on the level of enforcement of the laws and the severity of the punishment. Officers should consult CISNET for information on the legal environment in the applicant's country of origin.

Even if it appears that criminal laws target only gay men, there may be a correlating impact on lesbians through a climate of fear and private harm. Additionally, laws that appear to have general application may have a disproportionately discriminatory effect on LGBTI people,



for example, laws against extramarital sex. Gay men and lesbians may also risk being deprived of their children if they come out or leave their partners.

Criminal penalties may include arrest, imprisonment, physical mistreatment or torture. Human rights reports have emphasised that there is a link between criminalisation of same-sex activity and homophobic hate crimes, police abuse, torture, and family and community violence faced by LGBTI persons ([CIS22180](#)). Even if not enforced, the existence of criminal laws can promote and reinforce mistreatment within society and result in people abstaining from relationships. Additionally, if the state outlaws same-sex activities, it is very unlikely an LGBTI person would be able to seek state protection from community mistreatment.

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.

The decriminalisation of same-sex relations, sexual or gender non-conforming behaviours, or the introduction of a new law, programme or other government action designed to improve the situation of LGBTI individuals in a country, need to be carefully assessed to determine whether state protection is adequate at the operational level. In these cases, officers need to examine the degree of actual implementation and, the effectiveness and durability of these legislative or other improvements in light of how state actors and general society continue to treat LGBTI individuals.

Non-state actors may harm LGBTI individuals in response to the way they dress, act, speak or if they associate with other LGBTI people. Examples of such harm can include mob violence, sexual assault, harassment, forced marriage, social ostracism and physical abuse. LGBTI people may also be subject to blackmail or extortion if someone in their community discovers that they are LGBTI and threatens to make the information public.

Diverse sexual orientation or gender identity may be perceived in various places as pro-Western, sacrilege, immorality, a psychiatric illness or an unacceptable threat to gender roles. Therefore, the source of opposition from the agent of harm can vary and may not necessarily be focused on the person's actual sexual activity.

### **Cumulative discrimination amounting to persecution**

Discrimination is a common element in the experiences of many LGBTI individuals, as a result of discriminatory laws, institutions or family and community treatment. LGBTI individuals may experience difficulties accessing food, healthcare, employment, housing, education and child custody. For example, in some countries, an applicant may be denied medical treatment for HIV because they are gay or a lesbian or may be unemployed due to employment discrimination. A situation in which a person lacks access to basic services because of their sexual orientation or gender identity may increase their vulnerability to sexual and physical assault and other exploitation.

Additionally, the harm faced by LGBTI women may be compounded by laws of the state that seek to control women's behaviour, appearance or sexuality. These laws could have a discriminatory impact on LGBTI women.

If the applicant cannot point to a particular persecution event or fear of a particular type of incident occurring in the future, officers must consider whether the applicant would face discrimination in their country of origin that would impact on several aspects of their life and amount to a level of harm equivalent to persecution.

For further information, refer to the Refugee Law Guidelines - section 11.3 Serious Harm - Other considerations concerning 'serious harm' - fear of multiple harmful acts.

### **LGBTI applicants' socioeconomic status**

An applicant's socioeconomic status may impact on their experience of being LGBTI, their access to an LGBTI community, state protection and their exposure to persecution or significant harm. For example, people from high socioeconomic backgrounds are more likely to have had access to a broader LGBTI community and funds to allow travel opportunity to meet others.

Wealthier applicants may be less at risk of being identified as LGBTI and being harmed by the public or the authorities because they may not need to take public transport, walk through the streets or frequent more dangerous parts of the city. They are also more likely to have access to private space, such as their own bedroom, in which to conduct a relationship. However, if discovered, the applicant could still be exposed to serious or significant harm.

Applicants from a lower socioeconomic background may have had exposure to different types of harm, for example, if they were identified as being LGBTI on the street or on public transport. People from a lower socioeconomic background are more likely to live outside major city centres and are less likely to have engaged with a broader LGBTI community due to financial or geographical constraints. They may also have less access to state protection.

### **Agents of harm**

In cases relating to sexual orientation or gender identity, the agent of harm will frequently be a non-state actor. In these circumstances, officers must consider whether the authorities are able and willing to provide state protection and whether moving to another area is an option for the applicant. In some circumstances, a non-state actor, who has substantial control of the country, could also provide protection and officers must also consider whether the non-state actor is able and willing to provide protection.

If the police do not respond to requests for protection, or refuse or fail to investigate and prosecute crimes against LGBTI individuals in a timely fashion, then state protection is unlikely to be either available or effective.

Many claims will relate to the applicant's fear of their family. This will be particularly common in cultural settings where it is considered that an individual LGBTI family member brings shame or disgrace on the entire family. Family disapproval will not itself amount to real chance of persecution or real risk of significant harm but could lead to other harm, such as, violence, forced marriage or ostracism to the point of threatening livelihood.

If the applicant is claiming that they fear harm from the authorities, the officer must consider the extent to which relevant laws are enforced. Additionally, officers should consider institutionalised discrimination that may affect the applicant to the point that it cumulatively amounts to serious or significant harm. The UNHCR Guidelines on International Protection No. 9 note that: "the applicant does not need to show that the authorities knew about his or her sexual orientation and/or gender identity before he or she left the country of origin".

It is usually more difficult to produce documentary evidence of harm by a non-state actor. Additionally, there is usually less country of origin information available to the officer. This means the assessment of a non-state claim will rely more heavily on assessment of the credibility of the applicant's claims.

## **Internal relocation and real chance of persecution relating to all areas**

In most cases when the agent of harm is the state, moving to another area will not be available to the applicant. There may be rare cases in which the applicant is safe in an area of the country in which the state does not exercise control.

If the agent of harm is a non-state actor, consideration should be given to their motivation and ability to pursue the applicant, as well as the availability of state or non-state protection in another part of the country. However, 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 as this would be contrary to s5J(3) and the decision in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71 ('Appellant S395/2002'). For more information about Appellant S395/2002, refer to Relevant law for onshore protection visas. An option that requires the applicant to live discreetly is not a valid internal relocation option.

Additionally, if the applicant would be safe from harm due to their sexual orientation or gender identity in another part of the country but would face harm on different grounds, then moving to another area should not be relied upon. This is particularly important in countries featuring ethnic or religious conflict and, in the assessment of complementary protection, where there is particular reliance on family for socioeconomic support and protection.

In LGBTI related cases, the most likely option in this context will be for the applicant to move to a major city, particularly if there is evidence of an established and accepted LGBTI community there. However, if the level of acceptance of the LGBTI community or legalisation of same-sex activity has changed recently, officers should consider whether legal or societal changes may swing in the opposite direction in the reasonably foreseeable future. Even when there have been legal reforms, there may still be anti-LGBTI sentiment prevalent in the community. Although country of origin information may indicate that the reforms have occurred, it may take time for the reforms to impact on the day to day treatment of LGBTI individuals.

## **Credibility**

The assessment of LGBTI claims will frequently centre on credibility because of the personal nature of LGBTI claims, and the likely absence of objective evidence to support the claim. The assessment of credibility must be undertaken in an individualised and sensitive way.

If officers have made enquiries along the lines of those outlined in this guidance, the assessment of the credibility of the applicant's LGBTI claims can be based on the applicant's overall plausibility, consistency, credibility of the applicant's responses at interview, in conjunction with available country information and the applicant's response to any adverse information. Officers should be mindful that the passage of time and the effects of trauma can impact on an applicant's recollection and, therefore, the consistency of their claims. Officers should also note that what may be implausible behaviour from a Western perspective might be reasonable in a different cultural context and, therefore, officers should be careful in drawing adverse inferences based on such findings. Decisions on credibility should not be based on stereotypical assumptions as there is no uniform way in which LGBTI people recognise and act on their sexual orientation or gender identity.

Some applicants may exaggerate their stories to reinforce their claims. This is particularly complex in LGBTI related claims, as 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. Therefore, it is important to warn applicants not to exaggerate their claims in advance, as that might cast doubt on the credibility of their claims. Officers should reinforce that the applicant's claims will be considered as a whole, when assessing the risk of future harm, rather than focusing on a particular event.

Officers should also note that even if an applicant provides a false LGBTI claim that they think the officer expects to hear, for example, that they were caught having sexual relations, the applicant may still have genuine LGBTI claims and be at risk of harm based on their other LGBTI claims.

Officers should be cautious about asserting as part of their credibility assessment that homosexuality is invariably a constant feature in a person's life and using this as a ground for refusal if the applicant does not identify with a fixed or constant sexual orientation. While most people will become aware of their sexual orientation during puberty, some people may realise, or come to terms with this, only later in life. Additionally, bisexual people may engage in heterosexual relationships for a long time before realising or accepting they are also same-sex attracted. If an applicant is claiming to have become aware of their sexual orientation later in life, this experience should be closely investigated by the officer, but not dismissed as impossible.

For further information, refer to Assessing credibility and the Refugee Law Guidelines - chapter 15 Credibility.

## **Benefit of the doubt**

For LGBTI claims, evidence will largely consist of the applicant's own account of their experiences, particularly if the applicant was not open about their sexual or gender identity before leaving their country of origin or if persecution is at the hands of family members or the community.

The UNHCR Handbook attests that if an applicant's statements are coherent, plausible, do not conflict with generally known facts and "if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt".

Officers should give the applicant the benefit of the doubt in relation to a particular claim only when they are satisfied as to the applicant's overall credibility. Officers are not required to accept uncritically an applicant's claims.

For further information, refer to the Refugee Law Guidelines - section 15.3 Considering evidence – specific situations.

## **Marriage and children**

The fact that an applicant is married, or was married, or has children, does not discount that they may be LGBTI. Some LGBTI people are aware of their sexual orientation or gender identity from a very early age, and others are not aware until later in life. LGBTI applicants may marry due to societal norms or to meet cultural, religious or family expectations.

If the applicant is married, the officer should investigate how the applicant perceives the relationship and the future of the relationship. If the applicant is able to provide a reasonable context for the marriage and a consistent explanation of how the marriage does or does not affect their ability to express their sexual orientation/gender, it is open to the officer to find that the applicant is LGBTI despite their marriage, depending on the

circumstances and their future plans. If officers require further advice on a case where other family members may be involved, they should contact the Protection visa helpdesk.

## **Demeanour**

Assessing demeanour is an unreliable source of information. The nature of LGBTI claims involve private issues of self-identity and sexual conduct and sometimes personal issues that may be stressful or unresolved. Social, cultural and religious attitudes to sexual and gender non-conformance in an applicant's society may exacerbate such problems. Caution should be applied when interpreting hesitation or lack of detail, as the applicant may have difficulty talking about these claims.

An applicant's experience of trauma or emotional stress may lead to reactions that are culturally specific and may be difficult for the officer to interpret. Recounting trauma could result in reactions as diverse as nervous laughter to withdrawal or a blank/indifferent effect. Stress, nervousness and anxiety can manifest in various ways including over-reaction and under-reaction.

For further information, refer to Assessing credibility.

## **Delay in making claims relating to sexual orientation or gender identity**

Delays in making claims related to sexual orientation or gender identity may occur if the applicant wants to avoid making sensitive claims until they have to do so. Many applicants may not have talked to anyone about their sexual orientation or gender identity previously or may have experienced serious or significant harm, particularly from government authorities, as a result of acknowledging their sexual orientation or gender identity. Applicants may also have felt more comfortable raising less personal or sensitive claims. When assessing claims after there has been a delay, applicants should be given the opportunity to explain any delays or changes to their claims.

The significance of any delay in seeking asylum or providing information will depend upon the particular circumstances of the case. Therefore, officers should ensure they thoroughly explore the reasons for the delay with the applicant at interview. 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 and there should be other reasons to support a finding that the claims are not credible.

For further information, refer to the Refugee Law Guidelines - section 15.3 Delay in applying for protection.

## **Evidence**

Officers may find it useful to seek evidence relating to past or current relationships, if appropriate. This evidence might consist of emails, texts, videos, chat transcripts, phone records, social media, photos or statements from relevant past/present partners. However, officers must not request explicit photographs or films of sexual acts. To do so would infringe the applicant's human dignity and may cause other applicants to believe it is necessary or appropriate to provide such evidence. However, if the information is provided with or in the application or at any time before a decision is made on the application, officers must consider it as required by s54 and s55 of the Act.

Officers should, where necessary, inform applicants that they do not need to provide explicit photographs or films to substantiate their claims. Applicants should also be advised that a

failure to provide such evidence will not have any bearing on the decision to either grant or refuse their application.

Officers should take care, as with any material related to onshore protection or offshore humanitarian visa application, to store the applicant's information and evidence appropriately.

## Country information

Officers should be mindful that information on the situation of LGBTI people in many countries of origin may be limited or unavailable. This may be due to an absence of LGBTI community groups or other non-government organisations or the restrictions and constraints on the ability of such groups to gather and distribute information in a pressured or oppressed environment. Therefore, 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 LGBTI individuals in that country.

When considering available country information, it is important to ensure that any recent societal and legal changes are weighed against evidence of ongoing discrimination, violence and impunity. It is also relevant to consider information that does not directly appear to target LGBTI 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 that LGBTI persons are being persecuted.

It is important to note that treatment may vary significantly between cities within a country or even in different parts of a city. Officers should consider that even when information is available that LGBTI communities or organisations exist, this does not necessarily mean that an applicant may be free from a real chance of persecution or a real risk of significant harm in the ordinary course of their life.

Officers should also note that there may be very different treatment of gay men compared to other LGBTI people by authorities in the country of origin. Country information relating to gay men, or common claims raised by gay men, should not be taken as a template for other cases relating to sexual orientation or gender identity, as the experiences of women and transgender or intersex applicants can vary widely from those of gay men.

In the absence of country information on the treatment of LGBTI people, the treatment of women in a given society may provide useful insight for officers into the rigidity of gender roles and, therefore, the treatment of people who do not conform to those gendered expectations.

If there is insufficient country information, officers should not turn to inappropriate sources of information as a substitute as this may result in a legal error. For example, officers should not use travel or tourist information promoting gay travel as evidence that a country is safe, as this information is unlikely to be an accurate or reliable representation of life for individuals that are citizens or former habitual residents in that country.

For more information, refer to PAM3: Refugee and Humanitarian - Asylum claims - Use of Country of Origin Information. Officers can also contact COISS for advice on evaluating sources and other matters related to country of origin information.

## Relevant law for onshore protection visas

### Discretion/modification of behaviour

Under s5J(3) of the Act, a 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 in a receiving country. However, s5J(3) will not apply to a person if they come under any of the exceptions in s5J(3)(a), (b) or (c). These exceptions mean that a person is not expected to modify their behaviour if it would conflict with a characteristic that is fundamental to their identity or conscience or if it would conceal an innate or immutable characteristic of the person.

Generally, most LGBTI claims are likely to fall under the exceptions that a modification would:

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

In analysing whether s5J(3) is applicable to an applicant's LGBTI claims, officers must consider the applicant's claims and explain why or why not the exceptions are relevant. If an officer finds that any of the exceptions are relevant, the applicant cannot be asked to take reasonable steps to modify their behaviour so as to avoid a real chance of persecution in a receiving country.

The High Court in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71 held that the refugee assessment does not extend to what a person could or should do if they were returned to their country of origin but what they would do. As noted in the Refugee Law Guidelines - section 6.6 Innate or immutable characteristic, an applicant cannot be required to "alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status".

It is important to note that if people are discreet about their sexual orientation or gender identity, they cannot be considered to be 'choosing' to be private when it is the fear of harm that is coercing or forcing them to be secretive.

For further information about the operation of s5J(3) of the Act and the ruling in Appellant S395/2002, refer to the Refugee Law Guidelines - chapter 10 Modifying behaviour - s5J(3).



Australian Government

Department of Immigration  
and Border Protection

# LGBTI Training

Onshore Protection  
[date] 2016



# Module overview

- Learning outcomes
- Background
- Interviewing
- Assessment
- Questions



# Learning outcomes

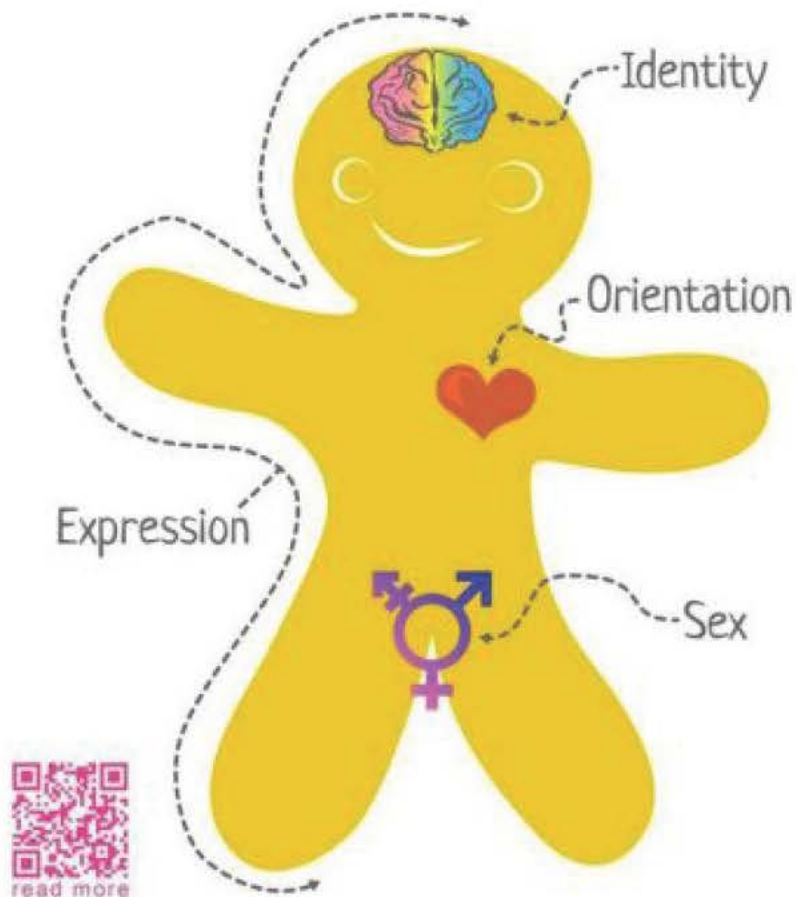
Develop a greater understanding of:

- Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) protection visa claims
- how to sensitively and effectively interview LGBTI applicants
- how to robustly assess claims relating to sexual orientation and gender identity.



# The Genderbread Person

by [www.ItsPronouncedMetrosexual.com](http://www.ItsPronouncedMetrosexual.com)



 **Gender Identity**

Woman Genderqueer Man

Gender identity is how you, in your head, think about yourself. It's the chemistry that composes you (e.g., hormonal levels) and how you interpret what that means.

 **Gender Expression**

Feminine Androgynous Masculine

Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave, and interact.

 **Biological Sex**

Female Intersex Male

Biological sex refers to the objectively measurable organs, hormones, and chromosomes. Female = vagina, ovaries, XX chromosomes; male = penis, testes, XY chromosomes; intersex = a combination of the two.

 **Sexual Orientation**

Heterosexual Bisexual Homosexual

Sexual orientation is who you are physically, spiritually, and emotionally attracted to, based on their sex/gender in relation to your own.

# Gender



Gender identity is how you, in your head, think about yourself. It's the chemistry that composes you (e.g. hormonal levels) and how you interpret what that means.



Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave, and interact.

# Sex



Sexual orientation is who you are physically, spiritually, and emotionally attracted to, based on their sex/gender in relation to your own.





ilga

# LESBIAN AND GAY RIGHTS IN THE WORLD

ILGA, THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION

May 2013  
[www.ilga.org](http://www.ilga.org)

## PERSECUTION

### DEATH PENALTY

5 countries and parts of Nigeria and Somalia

### IMPRISONMENT

73 countries and 5 entities\*

- Death penalty
- Imprisonment up to 14 years
- Imprisonment from 14 years to a life-long sentence
- Imprisonment, no precise indication of the length / banishment
- unclear: legislation not specifically homophobic but which can be used as such
- Iraq: persecution by organised non-state agents / India: law awaiting court ruling
- \* "Propaganda law" restricting freedom of expression and association

## RECOGNITION

RECOGNITION OF SAME-SEX UNIONS

30 countries and 42 entities\*

JOINT ADOPTION

14 countries and 37 entities\*

- Marriage
- Equal (almost equal) substitute to marriage
- Clearly inferior substitute to marriage
- Joint adoption

## PROTECTION

ANTI-DISCRIMINATION LAWS

46 countries and 42 entities\*

- Countries which introduced laws prohibiting discrimination on the grounds of sexual orientation

NO SPECIFIC LEGISLATION

\* These laws are aimed at lesbians, gay men and bisexuals and at same-sex activities and relationships. In some, they also apply to trans and intersex people. This edition of the world map (May 2013) was coordinated by Stephen Barile (ILGA). Design: Eduardo Eneki. Data represented in this map is based on "Stonewall Homophobia: a world survey of laws, criminalisation, protection and recognition of same-sex love - 2012", an ILGA report by Jingchu Zhu & Lucan Paik. Data is available in various languages on [www.ilga.org](http://www.ilga.org). ILGA thanks groups which contributed to the annual update.

ILGA (Courtesy Photo)

# Lesbian women

- Cumulative discrimination due to their gender, lower socio-economic status and sexual orientation.
- May be subjected to gender related harm by non-state actors eg. 'corrective' rape, forced marriage, domestic violence, honour crimes.
- May have heterosexual relationships and children.

# Gay men

- Often more publically visible and can be subjected to homophobia.
- Risk of harm in detention, prison, military or in other traditionally male dominated environments.
- May have heterosexual relationships and children.



# Bisexual

- May describe their sexual orientation as fluid or flexible.
- May raise claims relating to being gay or lesbian without articulating that they identify as bisexual.
- Imputed claims based on being perceived as gay or lesbian.

# Transgender

- May only express their gender identity in environments where they feel safe.
- Cumulative discrimination in relation to access to housing, health care, employment, severe social ostracism.
- Not all choose medical treatment for gender re-assignment.
- Perceived or imputed homosexuality.

# Intersex

- Discrimination or abuse for physical anomaly or not conforming to expected physical appearance of male or female.
- Surgery at an early age.
- Birth not registered by authorities.
- Sometimes associated with evil or witchcraft which may impact whole family.

# Interviewing challenges

- Shame about identity and experiences.
- Fear of being overheard and 'found out' by other staff, other refugees or community.
- Inability to trust others.
- Fear of homophobic interviewers, migration agents, interpreters.
- Depression, extreme anxiety and post-traumatic stress disorder (PTSD), which may lead to memory problems and inconsistencies.
- Interviewer and interviewee discomfort.
- Wide variations in experiences and identities.
- Lifetime of concealment and deception to avoid harm.

# Effective and sensitive interviewing

## Interview preparation:

- Familiarise yourself with terminology and how sexual orientation and gender identity are understood and treated in applicant's country of origin.
- Check interpreter is comfortable and familiar with LGBTI terms and issues.
- Consider attendance of family or support persons at interview.



# Effective and sensitive interviewing

At the interview:

- Use preferred gender pronoun and name and self-identifying language.
- Maintain a warm and pleasant facial expression and open body language.
- Remind applicant of the confidentiality of the interview.
- Begin with simple non-sensitive topics to establish rapport such as explaining the objective of the interview, go through interview preamble.
- Pose open questions first.
- Pose focussed questions later.
- Don't rush, be gentle and patient - delay raising sensitive subjects.
- Offer breaks if person becomes overwhelmed or temporarily move to easier topic.











# Questions and topics to avoid

- Sexual activities and practices
- Details about traumatic events such as sexual violence
- Stereotypes
- Whether the applicant can change their behaviour to conform/avoid harm
- Whether the applicant can 'prove' they are LGBTI
- What happened to make you XXX?
- Why did you choose to be XXX?
- Do you like men or women more?
- If you are gay, why are you married?
- Have you ever tried to be straight/heterosexual?
- What are you, a man or a woman?



# Assessment



## Challenges

- Lack of corroborating, objective evidence
- The agent of harm is often a non-state actor
- Lack of country information regarding treatment of LGBTI people
- Difficult to assess the credibility of such personal claims
- Sexual orientation can be fluid and may change over time.

# Assessment

- Member of a Particular Social Group (PSG)
  - Where transgression of gender roles – harm still attributed to membership of LGBTI PSG
- *Sur place* claims – conduct in Australia
- Real risk of significant harm under complementary protection
- Is the harm feared = persecution?
  - Criminalisation of same sex sexual conduct – likelihood of enforcement, severity of punishment, unable to access state protection from private harm.
  - Hate crimes, police abuse, torture, family and community violence
  - May be perceived as pro-western, sacrilege, immoral or a psychiatric illness

# Assessment

- Cumulative discrimination – does it amount to persecution?
- Agents of harm – often non-state actors
- Authorities willing and able to provide protection?
- Moving to another area
  - Cannot make finding on the basis of discretion/anonymity
- Modification of behaviour – likely to meet exceptions in s5J(3)(a), (b) or (c)



# Assessing credibility

- Overall plausibility and consistency of responses at interview
- Passage of time and effects of trauma can impact consistency
- Cultural context will determine what is plausible
- One false claim does not mean all claims are false
- Varied experiences – investigate further, do not dismiss as implausible
- Delays in making LGBTI claim – investigate reasons, should not be sole reason for rejecting claim
- Demeanour is unreliable
- Benefit of the doubt in the absence of evidence to the contrary

# Evidence

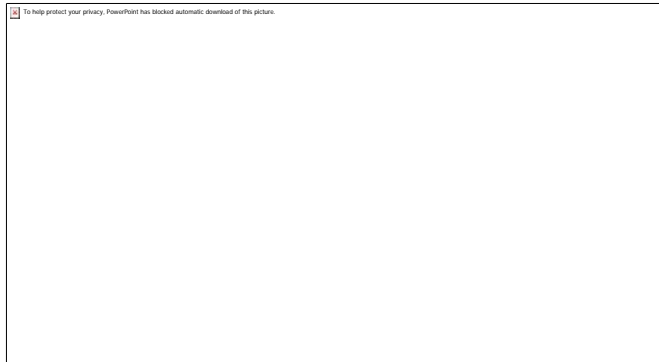
- Can consider evidence of past or current relationships if related to claim eg. emails, text, videos, photos, social media etc.
- Must not request explicit photographs or films of sexual acts.
- If provided explicit materials at any time before a decision, officers must consider it as required by s54 and s55 of the Act.
- Take care to store information and evidence securely.





# Country Information

- Country Information on treatment of LGBTI people is often limited or unavailable.
- Should not automatically lead to finding that claim is unfounded.
- General homophobia or the treatment of women indicates treatment of people who do not conform to gendered expectations.
- Existence of LGBTI communities, Mardi Gras and safe travel for homosexuals does not always equate to evidence that a country is safe.



# Further assistance

- Common Processing Guidelines
  - Refugee Law Guidelines
  - Gender Guidelines
  - Credibility Guidelines
- 
- Ask your manager for assistance in the first instance
  - For complex queries, contact the Protection visa helpdesk via s47E(d) [@border.gov.au](mailto:s47E(d)@border.gov.au)



# Questions?



## LGBTI Case Studies

## Case Study #1

The following is a situation where an applicant wishes to raise an LGBTI claim confidentially:

Before the interview an §47F applicant requests to speak with you without his agent present in the room, §47F. You agree and the agent leaves the room. The applicant is clearly very agitated and uncomfortable (sweating profusely) and states that what he is about to say he does not want anyone else knowing, even after his death. He then states that he is gay. He says he had not included this on his application as his family members had filled out his original application. He also states that he doesn't want his agent knowing as he is a member of the local §47F community and he doesn't not want the information to spread further.

**As the decision maker, what would you do next?**

- How would you handle this situation?
- What are some questions you would ask?

[illegible]

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## Case Study #2

The following is a summary of an applicant's claims and information contained in the application.

The applicant is s47F old, is from s47F and his claims are:

- He is homosexual.
- He realised he was attracted to men at the age of s47F
- He was in a relationship with another male s47F
- s47F he left home s47F before returning to his family home.
- He became unemployed s47F
- He continued the relationship s47F until s47F when s47F was tortured and killed by members of the local community due to his sexual orientation.
- He was treated as an outcast, insulted, tortured and arrested by s47F authorities and members of the local community.
- s47F authorities have issued s47F warrants for the applicant's arrest, s47F
- He fears that as a result of his sexual orientation, he will be convicted by s47F authorities and tortured and killed by members of his local community.

The applicant's passport shows that s47F

**What would be your main areas of questioning?**

### What are some possible credibility issues?

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

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## Key terms

The following is a list of key terms which can be used in relation to LGBTI applicants.

### Bisexual

Bisexual describes an individual who has the capacity to be physically/sexually, romantically and/or emotionally attracted to both men and women. Bisexual people do not necessarily have equal attraction to men and women, as they may have a preference for men or women that can also change over time.

### Coming out

This term refers to the process in which a person acknowledges and accepts their sexual orientation. It also refers to the process in which a person discloses their sexual orientation to others.

### Gay

Gay is often used to describe a man whose physical, romantic and/or emotional attraction is to other men, although the term can also be used to describe women who are attracted to other women (lesbians).

### Gender

Gender is the societal expression of being male or female. It refers to the different social and cultural expectations of men and women, rather than biological differences. Gender includes a combination of identity, expression, and societal expectations related to masculinity and femininity.

### Gender identity

Gender identity is each person's internal experience of gender that may or may not correspond with their sex at birth. It includes a person's sense of their body, as well as other expressions of gender, including dress, speech, mannerisms and social roles. Some people may seek to change their sex to more fully match their gender identity.

### Gender transition

Gender transition is the process by which a person strives to more closely align their outward appearance with their internal sense of their own gender. Some people may socially transition, for example by changing their dress, or using different names. Some people also transition medically, for example using hormone therapy or having gender re-assignment surgery.

### Heterosexual

A heterosexual person is one whose physical/sexual, romantic and/or emotional attraction is primarily to members of the opposite sex.

### Homophobia

Homophobia includes a range of negative attitudes and feelings toward homosexuality, 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 or fear. Homophobia can lead to laws and actions that result in LGBTI people suffering serious or significant harm.

### Homosexual

A homosexual person is one who is attracted primarily to members of the same sex and can apply to both men and women. The terms 'homosexual' or 'gay' are often used to describe a man whose

physical/sexual, romantic and/or emotional attraction is to other men, although the terms can also be used to describe women who are attracted to other women. In this document the term 'gay' is used to refer to men attracted primarily to members of the same sex.

### **Intersex**

The term intersex refers to a condition in which an individual is born with the reproductive or sexual anatomy that does not fit typical biological categories of male or female. For example, a person may be missing internal reproductive organs or a person may have both male and female external genitalia.

These conditions may be apparent at birth, may appear at puberty, or may be discovered only during a medical examination. Individuals with these conditions were previously referred to as 'hermaphrodites', however, this term is outdated and should not be used unless the applicant uses it.

An intersex person may identify as male or female, and this gender identity may or may not be the same as their apparent sex. Their sexual orientation may be heterosexual, gay, lesbian or bisexual.

### **Lesbian**

A lesbian is a woman whose physical/sexual, romantic and/or emotional attraction is primarily to other women.

### **LGBTI**

The acronym 'LGBTI' refers collectively to people who are lesbian, gay, bisexual, transgender, and/or intersex.

### **Queer**

Queer can be used as an umbrella term to refer to the entire LGBTI community (sometimes LGBT, LGBTIQ or LGBTIQ+). However, some people may find this term offensive and it should not be used unless the applicant uses it.

### **Sex**

Sex is a person's physical anatomy, which can be female, male or intersex. It includes internal and external reproductive organs, chromosomes and hormones.

### **Sexual and gender nonconformity**

Persons whose sexual practices, attractions and/or gender expression are different from the societal expectations based on their assigned sex at birth.

### **Sexual orientation**

Sexual orientation is a person's capacity for intimate relations with, and emotional and sexual attraction to, another person. This can include individuals of a different gender, the same gender or more than one gender.

Sexual orientation is not the same as gender identity. Sexual orientation relates to who a person is attracted to, whereas gender identity relates to a person's sense of their own gender.

## Transgender

Transgender describes people whose gender identity and/or gender expression differs from their biological sex. Transgender is a gender identity, not a sexual orientation. A transgender person may be heterosexual, gay, lesbian or bisexual.

As well, there is a difference between cross-dressing and being transgender. Most cross-dressers are not transgender because they do not feel that they are a different gender to their biological sex. Rather, cross-dressers enjoy wearing clothing typical of another gender.

Transgender people have previously been referred to as transsexual. However, this term should no longer be used as it confuses gender identity with sexual orientation.

More information on key terms is available in the UNHCR's [Guidelines on International Protection No. 9](#). While more information about relevant terminology in a range of refugee producing countries is available on CISNET at [CIS38A8012612](#).





Australian Government

Department of Immigration  
and Border Protection

# Sexual orientation and Gender Identity

Facilitator guide

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## Document details

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## Contents

Module purpose.....	5
Target audience.....	5
Module duration.....	5
Learning outcomes .....	5
Participant prerequisites .....	5
Materials / equipment required.....	5
Module agenda.....	5
Glossary of terms/abbreviations.....	6
Contacts.....	6
Slide 2 and 3 - Module overview.....	7
Slide 4 - The Genderbread Person .....	7
Slide 4 - Gender.....	7
Slide 5 - Sex .....	8
Slide 7 - Lesbian and gay rights in the world.....	9
Slide 8 - Lesbian women .....	9
Slide 9 - Gay men .....	9
Slide 10 - Bisexual .....	10
Slide 11 - Transgender.....	10
Slide 12 - Intersex .....	11
Slide 13 - Interviewing challenges .....	11
Slide 14 - Effective and sensitive interviewing.....	13
Slide 15 – Effective and sensitive interviewing.....	14
Slide 16 - Useful areas of questioning .....	14
Slide 17 - Difference, stigma and shame .....	15

Slide 18 - Family, marriage and community .....	15
Slide 19 - Relationships.....	16
Slide 20 - Questions and topics to avoid.....	17
Slide 21 - Assessment.....	17
Slide 22 – Assessment.....	18
Slide 23 – Assessment.....	19
Slide 24 - Assessing credibility .....	21
Slide 25 - Evidence .....	22
Slide 26 - Country Information .....	23

## Module purpose

The purpose of this module is to ensure protection visa decision makers have an understanding of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) issues and are able to effectively and sensitively interview LGBTI applicants and robustly assess LGBTI claims.

## Target audience

All Protection visa decision makers

## Module duration

Approximately 2 hours

## Learning outcomes

Develop a greater understanding of:

- claims related to sexual orientation and gender identity
- how to sensitively and effectively interview LGBTI applicants
- how to robustly assess claims relating to sexual orientation and gender identity.

## Participant prerequisites

- PV Induction Training, including Refugee Law, Complementary Protection and Fast Track components

## Materials / equipment required

Materials you will need to deliver this training:

- Light pro and PC/laptop for powerpoint presentation.
- Case Study Handouts.

## Module agenda

Content	Time Allocated
Introduction/Learning outcomes	5 mins
Background	15 mins
Interviewing	20 mins
Assessment	20 mins
Case Studies	15 mins
Questions	10 mins
End module	

## Glossary of terms/abbreviations

Acronym	Meaning
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex

## Contacts

This presentation has been developed by Protection Assessment Support Section, Onshore Protection Branch. All requests to amend the content should be made to Protection Programme Quality Assurance and Training Section at s47E(d) @border.gov.au

## Slide 2 and 3 - Module overview



Introduce yourself and any colleagues.

Briefly outline the structure and learning outcomes for the session as per slides.

## Slide 4 - The Genderbread Person



The way gender identity, biological sex and sexual orientation is expressed is on spectrums, rather than in boxes, as each individual sits somewhere on the scale and this can also be fluid over time.

## Slide 4 - Gender



Gender is the social expression of being male or female. It refers to the different social and cultural expectations of men and women, rather than biological differences. Gender includes a combination of identity, expression and social expectations related to masculinity and femininity.

### Gender identity

Gender identity is each person's deeply felt internal experience of gender, which may or may not correspond with their sex at birth. It includes a person's sense of their body, as well as other expressions of gender, including dress, speech, mannerisms and social roles. Some people may seek to change their sex to more fully match their gender identity.

### Transgender

'Transgender' describes people whose gender identity and/or gender expression differs from their biological sex. Transgender is a gender identity, not a sexual orientation. A transgender person may be heterosexual, gay, lesbian or bisexual. For example, an applicant who was born biologically male but identifies as a woman, may be sexually or romantically attracted to men and, therefore, identify as a heterosexual woman.

It is important to note that there is a difference between cross-dressing and being transgender. Most cross-dressers are not transgender because they do not feel that they are a different gender to their biological sex. Rather, cross dressers enjoy temporarily wearing clothing typical of another gender.

### Gender transition

Gender transition is the process by which a person strives to more closely align their internal sense of their own gender with their outward appearance. Some people may socially transition,

for example by changing their dress, or using different names. Some people also transition medically, for example using hormone therapy or having gender re-assignment surgery.

## Slide 5 - Sex



Sex is a person's physical anatomy, which can be female, male, or intersex. It includes internal and external reproductive organs, chromosomes and hormones.

### Intersex

The term 'intersex' refers to a condition in which an individual is born with the reproductive or sexual anatomy that does not fit typical biological categories of male or female. For example, a person may be missing internal reproductive organs or may have both male and female external genitalia.

These conditions may be apparent at birth, may appear at puberty or may be discovered only during a medical examination. Individuals with these conditions were previously referred to as 'hermaphrodites', however, this term is outdated and should not be used unless the applicant uses it.

An intersex person may identify as male or female, and this gender identity may or may not be the same as their apparent sex. Their sexual orientation may be heterosexual, gay, lesbian, or bisexual.

### Sexual orientation

'Sexual orientation' is each person's capacity for intimate relations with, and profound emotional and sexual attraction to, another person. This can include individuals of a different gender, the same gender or more than one gender.

Sexual orientation is not the same as gender identity. Sexual orientation relates to who a person is attracted to, whereas gender identity relates to a person's sense of their own gender.

### Lesbian

A 'lesbian' is a woman whose enduring physical/sexual, romantic and/or emotional attraction is primarily to other women.

### Gay/homosexual

A 'gay' or 'homosexual' person is attracted primarily to members of the same sex. 'Gay' is often used to describe a man whose enduring physical/sexual, romantic and/or emotional attraction is to other men, although the term is also used to describe women (lesbians).

### Bisexual

'Bisexual' describes an individual who has the capacity to be physically/sexually, romantically and/or emotionally attracted to both men and women. Bisexual people do not necessarily have



equal attraction to men and women as they may have a preference towards men or women, which can also change over time.

## Slide 7 - Lesbian and gay rights in the world



It is estimated that between 70 million – 1.7 billion people in the world are lesbian, gay, bisexual, transgender or intersex.

At least 75 countries criminalise consensual same-sex conduct and 8 of these countries can sentence a person to death for this.

People who are sexual or gender non-conforming suffer high rates of physical violence, sexual abuse, verbal abuse, discrimination and alienation. This happens at home, at school, at work and in public places. LGBTI persons often experience severe social isolation, inadequate legal protection, lack of access to responsive health care, unsafe housing, lack of employment and are targets for community violence.

## Slide 8 - Lesbian women



Lesbian women in many countries often suffer cumulative discrimination due to their gender, lower socioeconomic status than men, in addition to their sexual orientation. Officers may find that the treatment of women in general in a society provides useful insight into the situation of lesbian applicants in their country of origin.

Lesbians may be subjected to gender-related harm by non-state actors, such as 'corrective' rape, violence by intimate partners, forced marriage or honour crimes committed by family members. Case officers should exercise particular sensitivity when interviewing applicants with claims involving sexual violence or intimate partner violence.

In some cases, lesbians may have had heterosexual relationships because of social pressures to marry and have children.

## Slide 9 - Gay men



Gay men are often more publicly visible than other LGBTI groups and can be subjected to homophobia.

Gay men may be at particular risk of harm in detention, prison, the military and in other traditionally male dominated environments.

Some gay men may also have had heterosexual relationships because of social pressures, including pressure to marry and have children.

## Slide 10 - Bisexual



Bisexual applicants may describe their sexual orientation as fluid or flexible. There are many manifestations of bisexuality. For example, some people might be attracted to the same sex or opposite sex at different times in their life, while other people might consistently be attracted to people of either sex, and sexuality can vary for an individual at different times. Understanding that bisexuality is varied can assist in investigating such claims.

Officers should also note that some applicants may raise claims relating to being gay or a lesbian without actually articulating that they identify as bisexual. In some countries, while serious or significant harm may not explicitly be directed at bisexuals, harm targeted at gay or lesbian conduct may also impact bisexuals and this may raise imputed claims based on being perceived to be gay or a lesbian.

## Slide 11 - Transgender



Transgender individuals tend to dress or act in ways that are different from general societal expectations based on their sex at birth. However, they may not appear or act in these ways all the time and some of them may express their gender identity only in environments where they feel safe.

As with all LGBTI persons, transgender individuals are often highly marginalised and may have experienced physical, psychological and/or sexual violence. Further, transgender people are likely to experience discrimination in relation to access to housing, health care, and employment, as well as severe social ostracism which may, in some circumstances, amount to serious or significant harm.

Transitioning from one's birth sex is a multi-step process and can involve a range of personal, legal and medical adjustments. Not all transgender individuals choose medical treatment, therefore it is important that officers avoid assumptions about sex-reassignment surgery.

Officers should also consider whether a transgender applicant fears harm because of perceived or imputed homosexuality.

## Slide 12 - Intersex



Intersex people may face discrimination and abuse for having a physical anomaly, a medical condition, or not conforming to the expected physical appearance of males or females. Further, some intersex people who had surgery at an early age, may not identify with the sex they were assigned.

Some intersex children are not registered at birth by authorities and do not hold documentation. The treatment of such children by authorities, because they do not have documentation, may amount to a real chance of persecution or a real risk of significant harm in some circumstances. In some cultures, being intersex can be associated with evil or witchcraft and can result in the whole family being targeted by the community.

When the applicant is a minor and is unable to clearly express their own fear because they are intersex, claims related to being intersex may be raised by the parent/s of the intersex child due to the harm they fear for wanting to protect their child. People who identify as intersex may be viewed by others as transgender or there may be no social understanding or language to describe them.

Many intersex people will have never met another intersex person, let alone someone who has the same intersex variation. Secrecy and isolation is still the reality for most intersex people.

## Slide 13 - Interviewing challenges



A person's sexual orientation and gender identity is very personal and sensitive. There are many reasons why it may be difficult for the applicant to open up and discuss these issues at interview.

It may be difficult for the applicant to relive painful memories or the applicant may never have discussed their sexuality or gender identity previously due to feelings of shame, internal homophobia/transphobia or the fear of violence or social exclusion.

It may be difficult for the applicant to trust the interviewer if they have experienced past discrimination/judgement from authorities. They may assume that staff will be hostile or discriminatory.

The applicant, despite being in Australia, may not have expressed their gender identity or sexual orientation to others and may still be concealing this, even to their own family. They may fear that information will get out to their community via the interpreter or their migration agent. These fears can lead to the concealment of *bona fide* claims. They may prefer to try raising other claims first and only raise LGBTI claims when they feel they HAVE to.



### Discuss Case example #1

Ask participants to read the situation in case example 1, which is an example of an applicant raising an LGBTI claim late in the process. Ask participants for their ideas about what they would do were they the officer.

Possible Answers:

- Advise the applicant that in order to make a refugee claim about his sexual identity would require information being recorded on departmental systems.
- Explain the department's privacy policy.
- Inform the applicant that you would need to ask him a few questions about his sexuality to provide evidence that he was homosexual and give him the option of either having that conversation recorded or taking notes.

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To maintain confidentiality:

- Continue rest of the interview with the agent in the room, making no references to the applicant's sexual identity claim. For example, discuss identity and any other claims raised.
- Advise supervisor after interview.
- COI note in ICSE stating that information relating to his protection claims was not to be released to a third party, including any authorised recipients. Link to TRIM record explaining why.
- Further warnings placed at top of any case notes where applicant's sexuality is discussed.

## Wide variations in experiences and identities

Each individual might express their gender identity or sexual orientation in a different way. Some may not have lived openly as a LGBTI person in their country of origin and may not have had many, or any, intimate relationships at all. Some may not be interested in connecting with the LGBTI community, even here in Australia.

Officers should not allow their personal feelings, attitudes, stereotypes, religious views or assumptions to influence their interviewing or assessment of onshore protection or offshore humanitarian visa applications for claims related to sexual orientation or gender identity. Findings on LGBTI related claims must not be based on stereotypical assumptions about the way applicants appear or behave. For example, attaching significance to whether or not an applicant claiming to be gay appears effeminate.

Officers cannot assume that a person's sexual orientation or gender identity is a lifestyle or a choice, or that bisexuals can choose to be attracted to men or women, depending on which is less likely to lead to a real chance of persecution, substantial discrimination or real risk of significant harm.

## Slide 14 - Effective and sensitive interviewing



### Interview preparation

As well as familiarising yourself with the relevant country information, officers need to be aware of the different ways sexual orientation and gender identity may be understood, discussed and treated in different countries or cultures.

Before the interview case officers should familiarise themselves with the appropriate terminology for discussing sexual orientation or gender identity in the applicant's country of origin.

Some applicants may use derogatory terms about themselves as these may be the only words available in their language, or in common use, to describe their sexuality. This does not necessarily indicate that the applicant is not gay or a lesbian. Use of derogatory terms may also be a result of internalised homophobia caused by growing up in a homophobic culture or in a country in which being gay or lesbian is illegal. Alternatively, some applicants may refer to gay or lesbian activity in gendered terms such as 'playing the man/woman' or describe themselves as gay or lesbian even if their claims or experiences indicate that they might be bisexual.

As a general rule, officers must not use derogatory terminology. However, it may be appropriate for officers to use the same terminology that the applicant uses, to avoid causing confusion or offence. Officers should also carefully consider and investigate what applicants mean when they use terms such as 'friend', which may have a wide range of meanings for them, including a person with whom they have an intimate, romantic or sexual relationship or a person that they just communicate with over the internet.

### Interpreters

Challenges may arise in LGBTI cases if the interpreter does not possess the appropriate vocabulary, or has strong personal views on LGBTI people, as this may affect their ability to interpret impartially.

When it is apparent from the application that LGBTI related claims will need to be discussed at the interview, the officer should speak to the interpreter beforehand to inform them of the nature of the claims, and check that the interpreter is familiar with LGBTI terms. If they aren't, organise a different interpreter. It may be necessary to remind the interpreter about their responsibility and role before the interview. Mis-interpretation can cause major issues with the assessment and interpreter body language/facial expressions can influence an applicant's ability to express themselves freely.

### Support persons

Officers should carefully consider the impact that family, friends or other support persons may have on the applicant's willingness to discuss private issues relating to their sexual orientation or gender identity. Where the applicant has indicated that they wish to bring a support person, it may be appropriate to advise them separately that sensitive and detailed questions will be asked during the interview, and give the applicant the opportunity to decide if they would like their support person to wait in the waiting room, rather than join them in the interview room.

## Slide 15 – Effective and sensitive interviewing



### At the interview

Compared to some other applicants, LGBTI people may require a more supportive environment and have greater difficulty articulating claims, so establishing trust and confidentiality is key.

When interviewing a transgender applicant, the officer should ask the applicant for their preferred gender, name and pronoun, so these can be used when addressing the applicant.

Do not express judgment through body language or words. Using the wrong words may offend a person and/or negatively impact on their participation in the process.

Stress the confidentiality of the interview from:

- family and community
- unessential departmental staff
- other refugees/applicants
- authorities of the country of origin and country of transit.

As with other interviews, it is important to begin with open questions and progress to direct questions to fill in gaps or confirm details. In interviews dealing with LGBTI claims, it is recommended that officers begin by discussing non-sensitive biographical details to establish rapport, before progressing to the crux of the claims.

Questions should be crafted in a non-judgmental manner to enable the applicant to answer without fear of confrontation.

## Slide 16 - Useful areas of questioning



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It is important to explore what the concepts and experiences mean to the applicant. s47E(d)

Trauma, post-traumatic stress disorder, other mental health conditions, shame, habits of secrecy, difficulty recalling painful events and the passage of time since events occurred, may impact on an applicant's memory and their ability to provide a coherent narrative. Officers should encourage LGBTI applicants to identify key experiences and then focus on how these impacted on their life.

s47E(d) In LGBTI related claims, 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 our protection obligations. It is important to advise applicants that their claims will be considered as a whole when assessing a risk of future harm, rather than only focussing on a particular event.

## Self-realisation

There is no set standard or universal process of self-realisation or development of sexual orientation or gender identity. Intersex people will typically find out about their intersex variation from their parents or a doctor. It is common for intersex variation to be viewed as a personal medical experience, rather than the basis for shared community experience of difference or stigma.

## Slide 17 - Difference, stigma and shame



Applicants may have experienced feeling different as a child or at a later stage in their life. In some cases, people may have no recollection of same-sex attraction in childhood or adolescence. In addition, applicants may have grown up in cultures where their sexual orientation or gender identity is shameful or taboo resulting in experiences of disapproval and suppression. s47E(d)

## Slide 18 - Family, marriage and community



s47E(d)

An applicant may be married to a person of a different gender or divorced and/or may have children. Such relationships should not be taken as evidence that a person is not LGBTI. If such circumstances raise issues of credibility, it may be appropriate to ask questions surrounding the



reasons for the marriage, s47E(d)

Previous

marriages may simply be evidence of the applicant discovering their sexual orientation later in life, which is particularly common for lesbians. An applicant may be able to provide a consistent and reasonable explanation for their marital status.

If the applicant has links to an LGBTI community, it may be useful to ask about this. However, lack of knowledge of these should not be interpreted as an applicant lacking credibility, as it may be the result of the applicant not having been open about their sexual orientation or gender identity or other factors. Officers should not assume that an applicant will know of such organisations, or be interested in being involved with them now that they are in Australia.

## Slide 19 - Relationships



Romantic and sexual relationships, including relationships the applicant hopes to have in the future, may form part of their narrative. When questioning applicant's about their relationships, officers may find it useful to advise the applicant in advance that they will not need to provide intimate or sexual details, or to reassure them that they will not be asked for detailed information about a traumatic event such as sexual assault.

It is important to understand that lack of romantic or sexual relationships in the applicant's country of origin is not necessarily an indication that they are not LGBTI. It may demonstrate that they have been seeking to avoid harm. s47E(d)

Questioning about relationships should be approached with sensitivity and focus on the relationships generally, rather than details of sexual activity. The personal nature of this area of questioning may mean that an applicant will be reluctant to discuss it.

### Transgender Transition

It may be appropriate to ask transgender applicants whether they are currently taking any steps to transition, such as changing clothing, hair, makeup, taking hormones or other medication, undertaking surgery or changing legal documents. Officers may enquire whether the applicant plans to transition or continue transitioning, in the future.

If an applicant has not taken steps to help their outward appearance match their gender identity, this should not be taken as evidence that the person is not transgender. Some transgender people may not be ready, or have the access, funds or inclination, to undertake these changes. Others may be unable to undergo treatment for health reasons.

By exploring some or all of these aspects of a person's life, officers can put together a full view of the applicant's experiences without resorting to inappropriate questioning that invades a person's dignity. Information from an applicant about any of these topics should be considered cumulatively in assessing their credibility, and the fact that individual experiences vary widely should be taken into account.



## Slide 20 - Questions and topics to avoid



Questions about an applicant's sexual activities is inappropriate, infringes a person's dignity and are also not useful, as it is easy to invent stories of sexual activities and difficult to verify. Officers can more effectively gain an understanding of a person's sexual orientation by asking them about their experiences and relationships more generally.

As mentioned, officers should not rely on stereotypical assumptions about what it means to be LGBTI when considering an application. This includes stereotypes involving sexual behaviour, social behaviour, choice of dress, mannerisms and other characteristics. There are no typical interests, such as types of music, literature or social activities, including frequenting gay clubs or participating in LGBTI internet groups.

It is not appropriate to:

- discuss whether the applicant could change their behaviour in order to conform or avoid harm
- assume sexuality or gender identity is a lifestyle or a choice
- assume that bisexuals can choose to be attracted to men or women depending on which is less likely to lead to persecution.

I'll talk about this further when talking about the assessment, but sexual orientation and gender identity are generally considered to be fundamental to a person's conscience or an innate or immutable characteristic.



### Discuss Case example #2

Ask participants to read through the summary of claims for the applicant in the hand out and think about what areas of questioning they would focus on during the interview.

Discuss as a group. Questions should be based on 'useful areas of questioning'.

## Slide 21 - Assessment



### Challenges

Many LGBTI claims will rely mostly on the applicant's account of their personal experience because:

- In most cases there will be a lack of available corroborating evidence
- people may have deliberately hidden their sexuality or gender identity
- persecution may have largely occurred in the private space
- official records may hide or deny the treatment of LGBTI people.

Therefore, assessment of credibility will be crucial and officers must conduct a thorough investigation of the genuineness of claims relating to sexual orientation or gender identity.

## Slide 22 – Assessment



### Member of a particular social group (PSG)

UNHCR acknowledge that LGBTI people are members of a PSG and that claims related to sexual orientation and gender identity will commonly be assessed on this ground.

The UNHCR guidelines on gender related persecution<sup>1</sup> highlight that persecution because of a person's sexual orientation can be due to a person refusing or failing to conform to socially or culturally defined gender roles or expectations. It may be this that puts the applicant at risk of harm, rather than their sexual activity or relationships. Some applicants may have made significant attempts to conform with traditional gender roles to avoid harm. However, the cause of the harm still comes down to the applicant's membership of a PSG on the basis of their sexual orientation or gender identity.

### Sur place claims

LGBTI applicants may not have identified themselves as LGBTI before they departed, or may have decided not to act on their sexual orientation or gender identity. The applicant may have engaged in political activism, used social media or their sexual orientation or gender identity may have been exposed by someone else.

### Complementary Protection

Where an applicant is found not to have a well-founded fear of persecution owing to their membership of a PSG or any other grounds in s5J(1)(a) of the Act, officers must also consider whether there is a real risk of significant harm under complementary protection.

### Harm

Applicants may fear a variety of types of harm and the motivation of the agent of harm will also vary. Generally, state interference in a person's private life by means of discriminatory legislation, for example, a ban on same sex marriage, will not amount to persecution.

Criminalisation of same sex sexual conduct may amount to serious or significant harm, depending on the likelihood of the law being enforced, the severity of the punishment or whether the law means that state protection is unavailable to the applicant. Even where these laws only target gay men, there may be a correlating impact on lesbians through a climate of fear and private harm. Other laws, such as those against extramarital sex, may have a disproportionately discriminatory

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<sup>1</sup> UNHCR, Guidelines on International Protection: Gender related persecution within the context of 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, HCR/GIP/02/01, 7 May 2002, [CIS15598](#)

effect on LGBTI people. People may also risk being deprived of their children if they come out or leave their partners.

Human rights reports have emphasised that there is a link between criminalisation of same sex activity and homophobic hate crimes, police abuse, torture and family and community violence faced by LGBTI persons. Even where laws are not enforced, it can promote and reinforce mistreatment within society and it is very unlikely an LGBTI person would be able to seek protection from community mistreatment.

LGBTI people may be perceived as pro-western, sacrilege, immoral or having a psychiatric illness – the source of opposition may not be focussed on a person's sexual activity.

## Slide 23 – Assessment



Discrimination is a common element in the experiences of many LGBTI individuals, as a result of discriminatory laws, institutions, or family and community treatment. LGBTI individuals may experience difficulties accessing food, healthcare, employment, housing, education and child custody. For example, in some countries, an applicant may be denied medical treatment for HIV because they are gay or lesbian, or may be unemployed due to employment discrimination. A situation in which a person lacks access to basic services because of their sexual orientation or gender identity, may increase their vulnerabilities to sexual and physical assault and other exploitation.

In cases where the applicant cannot point to a particular persecution event or fear of a particular type of incident occurring in the future, officers must consider whether the applicant would face discrimination in their country of origin that would impact on several aspects of their life and amount to a level of harm equivalent to persecution. For assistance in assessing this, refer to the refugee law guidelines.

Keep in mind that an applicant's socioeconomic status may impact on their experience of being LGBTI, their access to an LGBTI community, state protection and their exposure to persecution or significant harm. For example, wealthier applicants may be less at risk of being identified as LGBTI and being harmed by the public or the authorities because they may not need to take public transport, walk through the streets or frequent more dangerous parts of the city. They are also more likely to have access to private space, in which to conduct a relationship. However, if discovered, the applicant could still be exposed to serious or significant harm.

### Agents of harm

In cases relating to sexual orientation or gender identity, the agent of harm will frequently be a non-state actor. In these circumstances, officers must consider whether the authorities are able and willing to provide state protection, and whether moving to another area is an option for the applicant.

If the police do not respond to requests for protection, or refuse or fail to investigate and prosecute crimes against LGBTI individuals in a timely fashion, then state protection is unlikely to be either available or effective.

Many claims will relate to the applicant's fear of their family. This will be particularly common in cultural settings where it is considered that an individual LGBTI family member brings shame or disgrace on the entire family. Family disapproval will not itself amount to real chance of persecution or real risk of significant harm, but could lead to other harm, such as violence, forced marriage or ostracism to the point of threatening livelihood.

It is usually difficult to produce documentary evidence of harm by a non-state actor. There may also be little country information on harm by non-state actors.

Where the harm is from state actors, the UNHCR guidelines<sup>2</sup> note that "the applicant does not need to show that the authorities knew about his or her sexual orientation and/or gender identity before he or she left the country of origin".

## Moving to another area

In LGBTI related cases, the most likely option in this context will be for the applicant to move to a major city, particularly if there is evidence of an established and accepted LGBTI community there. However, where the level of acceptance of the LGBTI community or legalisation of same-sex activity have changed recently, officers should consider whether legal or societal changes may swing in the opposite direction in the reasonably foreseeable future. Even when there have been legal reforms, there may still be anti-LGBTI sentiment prevalent in the community. Although country of origin information may indicate that the reforms have occurred, it may take time for the reforms to impact on the day to day treatment of LGBTI individuals.

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 as this assumes that the applicant must modify their behaviour to be 'discreet'. This is contrary to the exceptions listed under s5J(3) for modification of behaviour which we will talk about next.

## Modification of behaviour

Under s5J(3) of the Act, a 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 in a receiving country. However, s5J(3) will not apply to a person if they come under any of the exceptions in s5J(3)(a), (b) or (c).

Most LGBTI claims would likely fall under the exceptions that a modification would:

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

It is important to note that it is often the fear of harm that forces people to be discreet, rather than their free choice.

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<sup>2</sup> UNHCR, Guidelines on International Protection No. 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, HCR/GIP/12/09, 23 October 2012, [CIS28955](#)

## Slide 24 - Assessing credibility



The assessment of LGBTI claims will frequently centre on credibility because of the personal nature of LGBTI claims and the likely absence of objective evidence to support them. The assessment of credibility must be undertaken in an individualised and sensitive way.

### Effective questioning

If officers have made enquiries along the lines of those already mentioned, the assessment of credibility can be based on the applicant's story's overall plausibility and consistency of the applicant's responses, in conjunction with available country information and the applicant's response to any adverse information.

### Passage of time and torture

Officers should be mindful that the passage of time and the effects of trauma can impact on an applicant's recollection and, therefore, the consistency of their claims.

### Cultural context

Officers should also note that what may be implausible behaviour from a Western perspective, might be reasonable in a different cultural context and therefore officers should be careful in drawing adverse inferences based purely on such findings.

### False claim

Officers should also note that even if an applicant provides a false LGBTI claim that they think the officer expects to hear, for example, that they were caught having sexual relations, the applicant may still have genuine LGBTI claims and be at risk of harm based on their other LGBTI claims.

### Varied experiences

Officers should be cautious about asserting as part of their credibility assessment that homosexuality is invariably a constant feature in a person's life and using this as a ground for refusal if the applicant does not identify with a fixed or constant sexual orientation. While most people will become aware of their sexual orientation during puberty, some people may only realise, or come to terms with this, later in life. Additionally, bisexual people may engage in heterosexual relationships for a long time before realising or accepting they are also same-sex attracted. If an applicant is claiming to have become aware of their sexual orientation later in life, this experience should be closely investigated by the officer and not dismissed as impossible.

### Delays in making claim

Delays in making claims related to sexual orientation or gender identity may occur if the applicant wants to avoid making sensitive claims until they have to do so. Many applicants may not have talked to anyone about their sexual orientation or gender identity before or may have experienced serious or significant harm, particularly from government authorities, as a result of acknowledging their sexual orientation or gender identity. Applicants may also have felt more comfortable raising less personal or sensitive claims. When assessing claims where there has been a delay, applicants should be given the opportunity to explain any delays or changes to their claims.

The significance of any delay in seeking asylum or providing information will depend upon the particular circumstances of the case. Therefore, officers should ensure they thoroughly explore the reasons for the delay with the applicant at interview. A delay in seeking asylum or presenting further information, should not be the sole reason for rejecting an applicant's claims or the further information and there should be other reasons to support a finding that the claims are not credible.

## Demeanour

Assessing demeanour is an unreliable source of information. The nature of LGBTI claims involve private issues of self-identity and sexual conduct and sometimes personal issues that may be stressful or unresolved. Social, cultural and religious attitudes to sexual and gender non-conformance in an applicant's society may exacerbate such problems. Caution should be applied when interpreting hesitation or lack of detail, as the applicant may have difficulty talking about these claims.

An applicant's experience of trauma or emotional stress may lead to reactions that are culturally specific and may be difficult for the officer to interpret. Recounting trauma could result in reactions as diverse as nervous laughter to withdrawal or a blank/indifferent expression. Stress, nervousness and anxiety can manifest in various ways including over-reaction and under-reaction.

## Benefit of the doubt

The UNHCR handbook<sup>3</sup> attests that where an applicant's statements are coherent, plausible, do not conflict with generally known facts and "if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt."

Officers should only give the applicant the benefit of the doubt in relation to a particular claim when they are satisfied as to the applicant's overall credibility. Officers are not required to accept uncritically an applicant's claims.

## Slide 25 - Evidence



Officers may find it useful to consider evidence relating to past or current relationships, if appropriate. This evidence might consist of emails, texts, videos, chat transcripts, phone records, social media, photos or statements from relevant past/present partners. However, officers must **not** request explicit photographs or films of sexual acts. To do so would infringe the applicant's human dignity and may cause other applicants to believe it is necessary or appropriate to provide such evidence. However, if the information is provided with or in the application or at any time before a decision is made on the application, officers must consider it as required by s54 and s55 of the Act.

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<sup>3</sup> UNHCR, Handbook and Guidelines 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, December 2011 [UNE8ABA086](#)



Officers should, where necessary, inform applicants that they do not need to provide explicit photographs or films to substantiate their claims. Applicants should also be advised that a failure to provide such evidence will not have any bearing on the decision to either grant or refuse their application.

Officers should take care, as with any material related to onshore protection or offshore humanitarian visa application, to store the applicant's information and evidence securely.

## Slide 26 - Country Information



Officers should be mindful that information on the situation of LGBTI people in many countries of origin may be limited or unavailable. This may be due to an absence of LGBTI community groups or other non-government organisations, or the restrictions and constraints on the ability of such groups to gather and distribute information in a pressured or oppressed environment. Therefore, 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 LGBTI individuals in that country.

It is also relevant to consider information on laws and other measures that don't directly appear to target LGBTI people, but which can be enforced in a discriminatory manner, for example, the presence of 'anti-propaganda' laws. Where 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 that LGBTI persons are being persecuted. In the absence of country information on the treatment of LGBTI people, the treatment of women in a given society may provide useful insight for officers into the rigidity of gender roles and, therefore, the treatment of people who do not conform to those gendered expectations.

It is important to note that treatment may vary significantly between cities within a country, or even in different parts of a city. Officers should consider that even when information is available that LGBTI communities or organisations exist or events such as Mardi Gras occur, this does not necessarily mean that an applicant may be free from a real chance of persecution or a real risk of significant harm in the ordinary course of their life.

Country information relating to gay men, or common claims raised by gay men, should not be taken as a template for other cases relating to sexual orientation or gender identity, as the experiences of women and transgender or intersex applicants can vary widely from those of gay men.

In situations where there is insufficient country information, officers should not turn to unreliable sources of information as a substitute as this may amount to a legal error. For example, officers should not use travel or tourist information promoting gay travel as evidence that a country is safe, as this information is unlikely to be an accurate or reliable representation of life for individuals that are citizens or former habitual residents in that country.