



Unclassified

# Gender and Sexual Orientation

## Procedural Instruction

This Procedural Instruction provides guidelines on assessing claims related to gender and sexual orientation.

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# 1. Introduction

This procedural instruction provides policy and procedural guidance for interviewing female, lesbian, gay, bisexual, transgender or intersex (LGBTI) onshore protection visa and offshore humanitarian visa applicants and assessing claims relating to sexual orientation, gender identity and gender-related claims. Onshore protection visas and offshore refugee and humanitarian visa applications are assessed under different legal and policy frameworks. In this procedural instruction, guidance that only applies to one of these frameworks is clearly identified.

The Department of Home Affairs (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. The Department also acknowledges that women may experience particular acts of persecution, harm and discrimination differently from men because of their gender. These guidelines have been developed in accordance with international best practice, to help officers effectively and sensitively address and assess sexual orientation and gender related claims in order to enhance the efficiency, consistency and integrity of onshore and offshore humanitarian visa decision making.

Note: in these procedural instructions Class XB Refugee and Humanitarian visas are referred to as Humanitarian visas. Class XA, XE and XD visas are referred to as Protection visas (PV).

## 2. Scope

### 2.1. In Scope

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

- engages Australia's protection obligations and may be eligible for a PV under the onshore component of the Humanitarian Program, or
- meets the relevant persecution/substantial discrimination provisions and may be eligible for a Humanitarian visa under the offshore component of the Humanitarian Program.

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 assessment of claims. Some parts in these guidelines relate to assessments under the PV framework only.

### 2.2. Out of Scope

This procedural instruction should be used in conjunction with the Protection Visa Processing Guidelines and the PAM - Offshore humanitarian program – visa application and related procedures.

## 3. Glossary

Table 1 – Key Terms

Term	Definition
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

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Term	Definition
	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	<p>Gender is the societal expression of being male or female. It refers to the different social and cultural attributes and opportunities associated with being male and female, rather than biological differences. These attributes are socially constructed and are learned through socialisation processes. Gender includes a combination of identity, expression and societal expectations related to masculinity and femininity.</p> <p>In these guidelines, the terms gender based and gender related are mainly used to refer to female gender related issues.</p>
Gender-based violence	Violence that is directed against a person or a group of persons on the basis of their gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty whether occurring in public or private life.
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 and fear. Homophobia can lead to laws and actions that result in LGBTI people suffering serious and/or significant harm.
Humanitarian visa	Refugee and Humanitarian (Class XB) visas include: subclass 200 Refugee; subclass 201 in-country Special Humanitarian; subclass 202

Term	Definition
	Global Special Humanitarian; subclass 203 Emergency Rescue and subclass 204 Woman at Risk
Intersex	<p>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.</p> <p>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.</p> <p>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.</p>
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.
Protection visa	Protection visas include Class XA - subclass 866 permanent Protection visa; Class XD- subclass 785 Temporary Protection visa and Class XE- subclass 790 Safe Haven Enterprise visa (for persons in Australia)
Particular Social Group (PSG)	<p>As defined in s 5L of the <i>Migration Act</i> 1958 a person is to be treated as a member of a PSG (other than family) if;</p> <ul style="list-style-type: none"> <li>(a) a characteristic is shared by each member of the group; and</li> <li>(b) the person shares, or is perceived as sharing, the characteristic; and</li> <li>(c) any of the following apply: <ul style="list-style-type: none"> <li>(i) the characteristic is an innate or immutable characteristic;</li> <li>(ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;</li> <li>(iii) the characteristic distinguishes the group from society; and</li> </ul> </li> <li>(d) the characteristic is not a fear of persecution.</li> </ul>
Queer	Queer can be used as an umbrella term to refer to the entire LGBTI community (sometimes LGBT, LGBTIQ or LGBTIQ+). However, some people find this term offensive and it should not be used unless the applicant uses it.



Term	Definition
Sex	Sex is a person's physical anatomy which can be female, male or intersex. Sex is determined by 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	<p>Sexual orientation is a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender, the same gender or more than one gender.</p> <p>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.</p>
Transgender	<p>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. It does not imply any specific form of sexual orientation.</p> <p>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.</p> <p>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.</p>
UNHCR	United Nations High Commissioner for Refugees

## 4. Procedural Instruction

### 4.1. Challenges

#### 4.1.1 Recognising the barriers for women

Gender-based claims are claims that are specific to the applicant's gender or gender identity. Gender-based claims can encompass a range of claims and experiences in which gender is a relevant consideration. These may relate to an applicant's biological sex, gender, sexual orientation and/or gender identity. Gender-related claims may be raised by women or men, although they are more commonly raised by women.

Most forms of harm or human rights abuses are the same for men and women. However, there are some forms of harm that are used more frequently, or solely, against women. Such harm includes sexual violence, sexual exploitation, family violence, domestic slavery, human trafficking, forced abortion, forced sterilisation, forced marriage, 'honour' crimes, female genital mutilation and punishment for transgression of social mores. Due to the personal nature of some gender-based claims, it is important that officers approach such cases with sensitivity.

Officers should be aware that women may face one or more of the following obstacles when applying for a PV or Humanitarian visa:

- Social and cultural shame in lodging their applications or putting forward their own claims as it might be considered inappropriate for women to be outspoken or to come forward with information.
- They may not realise that their experiences give rise to claims of persecution or discrimination as what they experience may not be a crime in their country or may be normal practice within their community or family. Therefore, applicants may not know that a particular incident might be relevant to their claims and fail to disclose it. Officers should consider all information provided in the application or at interview and consider claims that are not expressly raised by the applicant but clearly arise on the material before the decision maker.
- Low literacy; illiteracy or language barriers may prevent some women from clearly and confidently expressing their experiences, completing forms on their own or obtaining information about the application and assessment process.
- Women may not have the same level of access to information, freedom of movement or financial resources to seek asylum and lodge a claim.
- In families where the male head of the household has responsibility for the family's official dealings, the claims of female family members may not be known, mentioned or given any weight by either the male head of the household or the female family member herself.
- Women may have difficulties providing information at interview where their experiences are too traumatic to describe or difficult to explain, or there may be shame of disclosing certain experiences and fears of how these experiences will be perceived by an interpreter or officer.
- Women victims of rape or other sexual assault may fear reprisals from other family members for failing to protect their virginity or marital dignity or for disclosing the claims to a third party. They may be unwilling to disclose information about these experiences or downplay or deny claims that have already been disclosed.
- The presence of strangers, family or friends, particularly males, combined with fear and mistrust of authority, can seriously inhibit an applicant's willingness to divulge her experiences at interview.

Due to these barriers, it is important that officers are taking appropriate steps to ensure women's claims relating to discrimination and persecution are properly heard and assessed.

#### **4.1.2 Challenges related to considering LGBTI claims**

Claims relating to sexual orientation or gender identity are complex to assess due to their personal nature and because, other than the claims, there is often little or no supporting objective evidence provided.

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 sexual orientation and gender identity claims they have not explicitly raised but that may become apparent during the interview.

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
- official records may hide or deny the mistreatment of LGBTI people.

The officer will need to carefully consider the credibility of LGBTI claims. Please see paragraph 4.3.5 of these Guidelines below.

It may also be difficult to obtain country information on the treatment of LGBTI people in their country of origin. If there is insufficient country information available, officers can contact Country of Origin Information Services Section (COISS) at <sup>s. 47E(d)</sup> [REDACTED]

Officers should ensure they have an accurate understanding of LGBTI characteristics and issues in the context of the applicant's country of origin. They must not allow their personal feelings, attitudes, stereotypic views, religious views or assumptions influence their interviewing or assessment of claims related to sexual orientation or gender identity. For example, officers must not 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 an application or assessing claims relating to sexual orientation or gender identity, they should raise this with their supervisor prior to being allocated such applications.

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.

## 4.2 Interviewing

Guidelines for interviewing applicants for Protection and Humanitarian visas are in, respectively:

- Protection Visa Processing Guideline – Interviewing
- PAM3: Refugee and Humanitarian - Offshore humanitarian program - Visa application and related procedures - Conducting interviews

This section provides additional guidelines for interviewing LGBTI applicants and women with sensitive gender-based claims. Subsection 4.2.8 - Appropriate lines of enquiry provides guidance on the types of questions that can be used to obtain further information from LGBTI applicants about their sexual orientation and gender identity and how to sensitively and effectively explore the credibility of their claims relating to these matters.

Officers must be mindful of any significant cultural differences in the experience and expression of sexual orientation, gender identity and gender based violence, and the difficulty applicants may have in discussing matters of a personal or sensitive nature, including incidents of sexual violence, sexual exploitation and family violence.

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 claims previously due to feelings of shame or the fear of violence or social exclusion. An applicant may be reluctant to discuss, or have difficulty discussing, their claims with an officer, particularly where intolerance is sanctioned by state officials in the applicant's country of origin.

### 4.2.1 Preparing for the interview

Given the challenges of interviewing an applicant about sensitive claims, 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 a more efficient and complete assessment of the claims by the officer.



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 violence against women, sexual orientation and gender identity may be understood, discussed, and treated in different countries or cultures.

If gender-related claims have been included in the application, every effort should be made to ensure the interviewing officer and the interpreter are the same sex as the applicant.

#### **4.2.2 Appropriate terminology for LGBTI claims**

Before the interview, officers and/or interpreters 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. 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.

#### **4.2.3 Interpreters**

Applicants may feel increased anxiety about disclosing private information in front of a person from their own community or ethnic or religious background as they may fear judgement or that this information will be passed on to others in their community.

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 or sensitive gender-based claims will need to be discussed at the interview, the interpreter should be advised beforehand about the nature of the claims and confirm they are comfortable being the interpreter for the interview and are familiar with LGBTI terms, if relevant. Interpreters should be advised to avoid using derogatory terms, if other non-derogatory terms are available in the applicant's language. If the interpreter is not comfortable, the officer should organise another interpreter.

For further guidance on using interpreters in Protection visa interviews, refer to Protection Visa Processing Guideline - 4.30 Interpreters. An information sheet on interpreting for PV interviews is available at ADD2017/439134.

#### **4.2.4 Interview arrangements**

Where it is indicated in the application, or becomes apparent at interview, that an applicant on a combined application with other family members may have sensitive claims, it may be necessary to schedule a separate interview for the applicant so that these claims can be appropriately considered.

In arranging such interviews, officers should be aware that in many societies, official matters are generally dealt with by the male head of household and there may be a perception that a request for a separate interview with a female applicant is an attempt by this applicant to act independently. Depending on the circumstances of the case, it may be best to simply announce the interview plan and treat this as routine procedure.

The male head of household may regard a female applicant as having failed if she attends a separate interview and the family's application is unsuccessful. This risk can be minimised by informing applicants that other members of the family may be interviewed separately to establish whether they have additional claims to submit.

Generally, infants under 12 months of age may accompany the mother during the interview, and breastfeeding mothers should be given breaks and privacy as needed to feed their children, noting that these breaks may be unscheduled.

#### 4.2.5 Support persons at interviews

Guidelines on bringing support persons to interviews for protection and humanitarian visa applicants are in, respectively:

- Protection Visa Processing Guideline – 4.27 Attendance of joint applicants or 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. For instance, a female applicant may be reluctant to talk about gender-related claims in the presences of male strangers, family members and/or friends. The use of female officers to conduct the interview can help applicants feel more comfortable about discussing sensitive matters.

If the applicant has indicated that they wish to bring a support person, it may be appropriate to advise the applicant 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.

#### 4.2.6 Building rapport

Building trust and rapport is critical for officers to elicit the detail about gender or sexual orientation related claims required to decide a case. Officers should take steps to establish a rapport with the applicant by:

- providing assurances of confidentiality. It may be necessary to repeat this throughout the interview as officers approach sensitive topics.
- beginning with open questions on non-sensitive issues, such as biographical details
- allowing sufficient time for the applicant to express themselves uninterrupted
- being careful of their body language and choice of wording and facial expressions.

To reduce stress associated with the interview, officers can explain the structure of the interview, why they need to ask certain questions and what will happen next in the process. Informing vulnerable applicants that doors to interview rooms are not locked may also assist in mitigating fears of government officials or formal interviews.

Such factors as fear of judgment, fear of the interpreter, inexperience with disclosing traumatic experience, 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 claims but are also sensitive and not intrusive. Questions should be crafted in a sensitive manner to enable the applicant to answer without fear of judgment. It is not appropriate for officers to ask applicants for details of sexual activity.

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

#### **4.2.7 Other procedural considerations**

Applicants who are included in a family member's application and submit sexual orientation or gender related claims may wish to nominate a separate address for any correspondence with the Department. These issues should be discussed and agreed upon at interview.

Officers should alert other users of a file containing information that an applicant has asked to receive separate correspondence from other family members by marking the relevant files and entering case notes in the departmental system.

The low status of girls in some cultures may lead to their omission from some Humanitarian visa applications. The interviewing officer should ensure by careful questioning that all members of the family unit have been declared and all vital information pertinent to the application has been elicited.

For guidance on sensitively interviewing applicants who have claims involving sexual assault or other sensitive or traumatic matters see Protection Visa Processing Guidelines – 4.29 Interviewing survivors of torture and trauma.

#### **4.2.8 Appropriate lines of enquiry for LGBTI 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. 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
- 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.

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 4.2.9 - 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 and 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, for PV applicants, 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 (for PV applicants only), 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. 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 assessing PV applications lodged by persons in Australia 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 Protection Visa Processing Guidelines – Part 11: Assessing credibility.

### 4.2.9 Inappropriate lines of enquiry for LGBTI claims

It is not appropriate to ask applicants for information about their sexual activities. It is also not a useful line of enquiry, because 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, for PV applicants, the gay and lesbian communities in Australia. PV 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 in their dress, mannerisms or style of speech.

Officers should not ask about the following matters during a protection or 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.

#### **4.2.10 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 section 4.2.8 - 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 may be unable to undergo treatment.

### **4.3 Assessment**

#### **4.3.1 Issues to consider when assessing female gender-based claims**

Women and girls globally continue to face challenges and obstacles to claiming and enjoying their rights. Traditional expectations and their role as child-bearers mean that women are often particularly vulnerable to persecution and other forms of harm. They may not have the same access to protection by state authorities as men or the same opportunities for flight.

Women are more likely than men to be harmed by members of their own family or community. They may be imputed with male relatives' political opinion, religion and race regardless of whether they share those beliefs or characteristics in reality. They may also be targeted as a means of attracting, contacting or pressuring their male relatives or community. Those who fail or refuse to conform to standards of behaviour imposed on them by the state or society may attract adverse attention. Those who possess a feminist ideology may be

viewed as espousing a political opinion hostile to the current administration and may be persecuted for that reason. Women are also more likely than men to be harmed because of their choice of sexual partners.

Women who are forcibly displaced from their country may face new threats of abuse and particular protection challenges related to their gender, cultural and social-economic position and legal status. This may mean that they are less able than men or boys to exercise their rights following flight. These challenges may be compounded if they lack traditional or customary protection in the form of a male relative, notwithstanding that the presence of a male relative does not necessarily guarantee a woman's protection.

Women who have been forcibly displaced from their homes are likely to have suffered some form of victimisation, harassment or abuse during their journey because of their gender. The longer a woman is displaced, the more likely it is that she will experience (additional) trauma, sexual violence and other human rights abuses, which could trigger secondary movements to another location in search of safety.

Systematic and/or mass rape has also been used as a means of persecution. Sexual assault can lead to shame and ostracism and other forms of violence as victims can be held morally responsible for the assault, lose respect and protection of their family or community, suffer further violence or reprisals, and be denied a livelihood. Sexual violence perpetrated in the private sphere or by non-state agents can also amount to persecution if there is an absence of effective state protection.

Other gender-related harm can take the form of restrictions on the way a woman behaves or involve forcing her to act a certain way. Those who flout such restrictions or challenge social conventions may attract a broad range of penalties or persecutory treatment as a result. Non-conformity with religious practices may be interpreted as an attempt to corrupt society or a threat to the religion's continued power.

#### **4.3.2 Assessing female gender-based claims under the Protection visa framework**

Gender is not, in and of itself, a ground for persecution. For example, an asylum applicant who fears being killed by a violent husband must demonstrate that she fears being persecuted for reasons of her race, religion, nationality, political opinion or membership of a PSG as per the 'refugee criterion' for a protection visa. She would also need to show that she fears harm of a type commensurate with the definition of 'persecution' and that the authorities in her country of origin cannot or are unwilling to protect her from this harm.

A woman may be persecuted in a gender specific manner for reasons unrelated to gender (e.g. raped because of her membership in a political party), she may be persecuted in a non-gender specific manner, but because of her gender (e.g. flogged for refusing to wear a veil), or she may be persecuted in a gender specific manner because of her gender (e.g. subjected to female genital mutilation). This could mean there may be other or multiple s 5J(1)(a) reasons, and not just fear of persecution for reasons of membership of a PSG. For more information about membership of a PSG based on gender, see PAM – Refugee Law Guidelines – Gender based PSG claims.

If a woman faces harm for any reason but the State refuses to protect her because of their gender then it may amount to persecution. Officers should be mindful of this when considering persecution reasons in 5J(1)(a) of the Act.

#### **Domestic and family violence**

If an applicant with claims of family violence has separated from the alleged perpetrator (for example their spouse) the family violence would generally be expressed as a form of harm rather than a component of a PSG. For example, the PSG could be characterised as 'separated woman in country [X]' fearing persecution in the form of domestic violence or other harm on the basis of being a separated person in that society. In these cases, consideration of whether a person has faced family violence is not necessary to determine whether the person is a member of such a PSG or if such a PSG exists. The central aspects to these PSG claims are:

- the applicant is separated
- a PSG exists, of which the applicant is a member, where the characteristic involves divorced or separated spouses or partners;
- the characteristic is innate or immutable; or it is so fundamental to their identity or conscience, they should not be forced to renounce it and
- there is a real chance of persecution, which may or may not be in the form of family violence, in all areas of the receiving country because the applicant is a member of that PSG.

Experience of past harm may be an indicator to whether there is a real chance of persecution in the reasonably foreseeable future. For example, if an applicant claims to fear harm in the form of family violence if returned to the receiving country because the spouse remains there and the spouse or family will seek retribution for the separation, evidence of past violence may reasonably go to establishing the veracity of that claim. Even if incidents of claimed past harm are considered not to be credible or substantiated by evidence, the officer is to address the real chance of persecution occurring in the reasonably foreseeable future.

The real chance of harm occurring must relate to all areas of the receiving country (see s5J(1)(c) of the Act, and Part 8 of the PAM – Refugee Law Guidelines). Furthermore, under s5J(2) of the Act, a person does not have a well-founded fear of persecution if effective protection measures are available to the person in the receiving country. 'Effective protection measures' are defined in s 5LA of the Act. For further information on 'effective protection measures' see paragraph 9 of the PAM – Refugee Law Guidelines.

Therefore, the adequacy of effective state protection (s 5J(2), s 5LA; and s 36(2B)(b) of the Act) and an assessment of whether the State is reluctant to be involved or turns a 'blind eye' to the harm are among the key considerations when assessing domestic/family violence related claims as well as whether there is a real chance of harm occurring in all areas of the receiving country.

For more information about effective state protection in the context of domestic violence see: Refugee Law Guidelines – section 9.4 Willing to offer protection – s 5LA(1)(b) of the Act.

#### **4.3.3 Issues to consider when assessing LGBTI claims**

Assessing claims relating to sexual orientation is challenging because individual experiences are varied. An LGBTI applicant may be married or divorced, have had heterosexual relationships, 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 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 same sex relationships, if they are 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 facing 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.

Sexual orientation and gender identity are not readily visible characteristics and have to be revealed by the applicant. Homosexual and transsexual applicants may therefore have only spoken to a handful of people, or none at all, about their sexuality and have kept it a secret before lodging a claim. Officers should therefore not be surprised if an applicant suddenly raises the issue of sexual orientation or gender identity late in an application process.

For information on appropriate lines of enquiry when interviewing LGBTI applicants refer to Appropriate Lines of enquiry at 4.3.8.

### **Assessing lesbian applicants**

In addition to their sexual orientation, lesbian women may 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, including homophobic rape (sometimes referred to as 'corrective' rape), violence by intimate partners, forced marriage or honour crime 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.

### **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 or attach significance to whether or not the applicant appears, for example, effeminate. They should particularly avoid common stereotypes about the number or frequency of sexual partners, or.

### **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 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, 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. In the context of PV assessment, 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.

### **4.3.4 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. In some societies, the lives of women are circumscribed by legal, social or religious tradition.

For LGBTI applicants, it may be the transgression of traditional gender roles that puts 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.

#### **4.3.5 Credibility**

General guidance on assessing credibility that is also relevant for gender-based claims is in the Protection Visa Processing guidelines – Part 11: Assessing credibility and the Refugee Law Guidelines - chapter 15 Credibility. This section deals specifically with assessing credibility of LGBTI claims, acknowledging particular complexities relating to such assessments.

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. When assessing LGBTI claims of PV applicants against the PV framework, officers should take into consideration that applicants may have suffered a lifetime of discrimination that may cumulatively amount to serious or significant harm but not have experienced a single 'serious or significant harm event' that, by itself, meets the threshold for engaging Australia's protection obligations under the PV framework. 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.

#### **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.

In Part Two Section B of the *Procedures for the Determination of Refugee Status*, the [UNHCR Handbook](#) gives guidance on assessing claims that cannot be proven by evidence or independent research. If the applicant's statements are coherent, plausible and do not conflict with generally known facts, and if their account appears credible, the applicant "should, unless there are good reasons to the contrary, be given the benefit of the doubt".

In other words, 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.

Further information on providing benefit of the doubt in the PV assessment context is available in the Refugee Law Guidelines - section 15.4 Considering evidence – specific situations.

### **Marriage and children**

The fact that an applicant is married, was married or has children is not necessarily inconsistent with LGBTI claims. 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.

### **Demeanour**

Demeanour is an unreliable indicator of credibility. 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.

### **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, if the officer considers that the delay may cast doubt on the credibility of the applicants' claims, 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 on considering delays in making claims by PV applicants refer to the Refugee Law Guidelines - section 15.4 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 be unethical and 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 s 54 and s 55 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.

### 4.3.6 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 <sup>s. 47E(d)</sup> for advice on evaluating sources and other matters related to country of origin information.

#### 4.3.7 Assessing claims of LGBTI protection visa applicants under the Protection visa framework

Note: while the focus of this section is on assessing 'persecution' under the PV framework and it refers to specific PV related tests, some of its content, in particular the first four subsections, is also relevant to assessing claims of persecution of humanitarian visa applicants.

##### Harm feared

If an officer is satisfied that an LGBTI applicant is a member of a PSG and their claims are credible, they must then 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 harm (under the refugees assessment) or significant harm (under the Complementary Protection assessment), depending on the likelihood of the law being enforced, the severity of the punishment or whether the law means that the applicant would not have effective state protection from private harm.

There are approximately 72 countries that criminalise same-sex activity between consenting adults, seven of which have the death penalty for such activity ([CISED50AD4462](#)). 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 persons 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 contemporary country 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, sacrilegious, immoral, 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 (i.e. persecution or significant harm depending on whether a refugee or complementary protection assessment is being conducted) equivalent to persecution.

For further information on assessing cumulative discrimination as part of PV assessment, refer to the Refugee Law Guidelines - section 11.4 Serious Harm - Other considerations concerning 'serious harm' - fear of multiple harmful acts.

### **LGBTI applicant's economic 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 home, 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 the person's capacity to subsist. Instances of 'serious harm' which would threaten a person's capacity to subsist would include significant economic hardship, denial of access to basic services, denial of capacity to earn a livelihood of any kind. However, there is a high threshold to be met for this to amount to 'serious harm' under the Migration Act. For further guidance on serious harm, please see paragraph 11.4 of the PAM - Refugee Law Guidelines.

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 Handbook, paragraph 83 notes 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.

### **LGBTI claims and membership of a Particular Social Group (PV framework)**

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 that there is broad acknowledgement that LGBTI people are members of a PSG within the meaning of the refugee definition, 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 s 5J(1)(a) persecution reasons, including those imputed to the applicant, such as political opinion or religion.

If the officer is not satisfied that a 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 s 5J(1)(a) of the Act, they must also consider whether there is a real risk of significant harm as provided for in s 36(2)(aa) of the Act (the complementary protection assessment). For guidance about assessing claims against the criteria in s 36(2)(aa), refer to the Complementary Protection Guidelines – 11. Significant harm.

### **Sur place LGBTI claims (PV framework)**

*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 s 5J(6) of the Act.

For further information, refer to the Refugee Law Guidelines – chapter 12 *Sur place* claims.

### **Internal relocation and real chance of persecution relating to all areas for LGBTI claims (PV framework)**

Broadly speaking, in order to have a well-founded fear of persecution, in addition to having a s 5J(1)(a) reason for the persecution and having a real chance of the persecution occurring if returned to the receiving country, the real chance of the persecution must relate to all areas of the receiving country. Please refer to paragraph 8 of the Protection Visas - Refugee Law Guidelines – Real chance in all areas of the receiving country.

Furthermore, under s 36(2B)(a) of the Act, in relation to complementary protection, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm. Refer to paragraph 37 of the Protection Visas – Complementary Protection Guidelines – Internal Location.

In most cases when the agent of harm is the state, moving to another area of the country 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 and/or if required to modify behaviour in any way as this would be contrary to s 5J(3) (which deals with behaviour modification). For more information refer to The Protection Visa Processing Guidelines-section 4.137.1 – Discretion/modification of behaviour for LGBTI claims and the Complementary Protection Guidelines. If further assistance is needed please contact <sup>s. 47E(d)</sup> [REDACTED]

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.

In the context of complementary protection, legal or socio-economic reasons or child-care responsibilities may prevent women from travelling freely or living on their own without family members, limiting their ability to relocate within their country of origin/country of reference. Officers must carefully consider gender- related issues when applying this test.

### **Discretion/modification of behaviour for LGBTI claims (PV framework)**

Under s 5J(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, s 5J(3) will not apply to a person if they come under any of the exceptions in s 5J(3)(a), (b) or (c). These exceptions provide 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, or without limiting s 5J(3)(a) or (b), require the person to do any of the things listed in s5J(3)(c).

LGBTI claims are likely to fall under the exceptions in s 5J(3) if a modification would:

- conflict with a characteristic that is fundamental to their identity or conscience
- conceal an innate or immutable characteristic of the person
- 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 s 5J(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.

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 more information about the operation of s 5J(3) of the Act refer to the Refugee Law Guidelines - chapter 10 Modifying behaviour – s 5J(3).

## 5. Statement of Expectation

This Procedural Instruction under the Policy and Procedures Control Framework (PPCF) sets out guidance and directions to workers on how to implement the Department's policy.

It is expected that all workers who are subject to this Procedural Instruction will have due regard to it and will only depart from it if:

- a) the departure is reasonable and justified in the circumstances;
- b) all risks have been considered; and
- c) approval has been sought and responsibility accepted for documenting the justification for the decision.

Workers are required to comply with all reasonable and lawful directions contained in this Procedural Instruction. Failure to comply with a direction may be considered a breach of the Australian Public Service Code of Conduct (for APS employees) or the *Professional Standards Secretary's Direction* under section 55 of the *Australian Border Force Act 2015* (for non-APS employees).

All records created as a result of this procedure must be managed in accordance with the Records Management Policy Statement. Records created as a result of this policy/procedure must be saved in TRIM RM8 or an approved business system.

## 6. Related Framework documents

The following instructions provide further legal and policy guidance on assessing Australia's protection obligations and deciding PV applications:

- Protection Visa Processing Guidelines

- PAM3: Refugee and Humanitarian - Refugee Law Guidelines
- PAM3: Refugee and Humanitarian - Protection visas - Complementary Protection Guidelines
- PAM3: Refugee and Humanitarian - Asylum claims - Use of Country of Origin Information
- Onshore Protection Interim Procedures Advices (OPIPs).

The following instructions provide further policy guidance on assessing Refugee and Humanitarian (class XB) visa subclasses:

- PAM - Offshore humanitarian program – visa application and related procedures

## 7. Consultation

### 7.1. Internal consultation

The following internal stakeholders were consulted in the development of this Procedural Instruction:

- Humanitarian Program Operations Branch
- Humanitarian Program Capabilities Branch
- Humanitarian, Family and Citizenship Policy Branch
- Legal Advice and Operational Support Branch.

## 8. Document details

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Version number	Date of issue	Author(s)	Brief description of change
1	25 May 2018	s. 22(1)(a)(ii)	The PI combines information from Gender Guidelines PAM and PVPG in relation to gender and sexual orientation claims.



## **8.2. Approval**

Approved by:	Miranda Lauman, Assistant Secretary, Humanitarian Programme Capabilities Branch
Approved on (date):	18/04/2018



Australian Government  
Department of Home Affairs

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# Quality Assurance Review

PV Interviews – Sexual orientation and gender identity claims

Humanitarian Program Capabilities Branch

January 2018

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QA Review Team: s. 22(1)(a)(ii)	<div>s. 22(1)(a)(ii)</div>

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## Executive Summary

This report provides a summary of findings from a Quality Assurance (QA) review conducted on a sample of protection visa (PV decisions – Permanent Protection visa (PPV), Temporary Protection visa (TPV), and Safe Haven Enterprise visa (SHEV)) with lesbian, gay, bisexual, transgender or intersex (LGBTI) claims, where an interview was conducted between November 2016 and August 2017.

The analysis includes examination of key aspects of the interview with a focus on whether delegates sensitively and effectively verified the credibility of claims during interview.

The review found most delegates followed the guidelines (PAM3: Refugee and Humanitarian - *Assessing claims related to sexual orientation and gender identity*, issued on 14 October 2016) and avoided asking the applicant to behave discreetly to avoid harm. A majority of the delegates used appropriate lines of enquiry and encouraged the applicants to identify key experiences in a sensitive and non-intrusive way.

The review found that in a small number of cases the delegates questioned the applicants around whether they could be discreet about their homosexuality to avoid harm if they were returned to their home country. While the delegates can explore possible scenarios at interview, the PAM has set out clear guidance stating 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.

## Recommendations

Assessment of LGBTI claims can be difficult, as the evidence is usually limited to the applicant's personal account. It is important that the questions asked during the interview assess the credibility of the LGBTI claims, but are also sensitive and not overly intrusive.

### Recommendation 1

Based on the key findings the review team recommends Humanitarian Program Capabilities Branch provide details of notable issues of concern to line managers and consult with the network on broader training/refresher/hot topics support, particularly around the areas of:

- |  |   |
|--|---|
| <p>1. Interview techniques</p> <ul style="list-style-type: none"><li>• Interview planning</li><li>• Building rapport</li><li>• Questioning techniques</li><li>• Dealing with vulnerable applicants</li><li>• Working with interpreters</li></ul> | <p>2. Policy</p> <ul style="list-style-type: none"><li>• Exploring internal relocation</li><li>• Modification of behaviour</li><li>• Following sensible and practical line of enquiry</li></ul> |
|--|---|

### Recommendation 2

Managers use the following support documents and training material:

- LGBTI Training Facilitator Guide (ADD2016/1954124), available on SharePoint and can be used to run local training sessions, including refresher training, for decision makers.
- PV interview training (ADF2017/45200)
- Onshore Protection Interviews: Practical Guidance (issued on 12/4/2017).

# 1. Background

The purpose of this quality assurance (QA) review is to provide analysis of a sample of primary protection visa application interviews where the applicants made claims related to their sexual orientation and gender identity. The scope of the review was to assess:

- whether the delegates follow appropriate lines of enquiry at interviews;
- whether claims are assessed sensitively and effectively to verify the credibility of claims during interview; and
- whether current controls are working effectively.

The Department recognises that lesbian, gay, bisexual, transgender or intersex (LGBTI) applicants may experience particular acts of persecution, significant harm and discrimination specific to, and because of, their sexual orientation and/or gender identity. 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.

PAM3: Refugee and Humanitarian - *Assessing claims related to sexual orientation and gender identity* was issued on 14 October 2016. This PAM provides policy and procedural guidance for interviewing LGBTI applicants for both onshore protection and offshore humanitarian visas, and assessing their claims relating to sexual orientation and gender identity. Whether these are met is determined by the information contained in the above referenced PAM with particular reference to 4.134.7 Appropriate lines of enquiry, and 4.135.1 Assessing claims relating to sexual orientation and gender identity.

The last formal training regarding interviewing and assessing LGBTI applicants was conducted in April 2016 for onshore decision makers. The training session, titled "Sexual and Gender Minority Refugees: What Refugee Professionals Need to Know and Do", was provided by the Organization for Refuge, Asylum and Migration (ORAM). Up to sixty decision makers from Sydney and Melbourne Offices attended the training. It is timely to conduct a review to ensure decision makers are effectively utilising controls in place for the interview and assessment of this cohort, following this training and release of procedural guidance in October 2016.

## 2. Scope

This report is a summary of findings from the QA review conducted on a random sample of 21 interviews. The review focused on interviewing, one of two elements of decision making that are most likely to present challenges in assessing gender and sexual orientation related claims. The other element, the write up of the assessment of the claims and the PV application are outside the scope of this review.

This review considered applicants for both permanent and temporary protection, who have made claims based on membership of a particular social group (LGBTI). The review sampled 21 cases where interviews were conducted between 1 November 2016 and 1 August 2017 and finalised at primary stage before September 2017. The sample includes applicants on both positive and negative pathways.



### 3. Methodology

The review team conducted analysis using a set of questions that were developed in consultation with internal stakeholders. The review examined recordings of PV interviews focussing on:

- appropriate lines of enquiry on LGBTI matters at interview; and
- sensitive and effective consideration of credibility of claims during interview.

While the cases are drawn from a mix of nationalities, due to the laws and levels of persecution to LGBTI people in certain countries, there is a greater representation from some nationalities (see Table 1). There is also a higher representation of grant to refusal cases. The review included representation of delegates, with the sample covering interviews conducted by 21 delegates: NSW (14), Victoria (five), and one each from Queensland and South Australia. There was an even split of illegal maritime arrivals (IMA) cases (11) to non-IMA cases (10).

As part of the drafting of this report the review team engaged with key stakeholders in the Division and Refugee and International Law Section, which led to the rationalisation of the question set from the scoping paper (ADD2017/3040447) to provide more targeted and meaningful analysis in this report.

**Table 1: LGBTI decisions by nationality**

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#### 3.1 Limitations

1. Some of the aspects of interviews require subjective, rather than objective, assessment. This is especially so for claims relating to LGBTI, due to the personal nature of these claims. This risk is mitigated through the setting of objective assessment criteria including qualifiers.
2. The data for this review was extracted at the broad level of grounds for persecution recorded as membership of a particular social group (PSG). The review team experienced difficulties in identifying suitable cases with an even distribution over state offices and nationality.

## 4. Statistical Summary

**Table 2: Summary of key findings**

Quality Measure	Met	Not Met	N/A	Met Rate (%)	Not Met Rate (%)
1. Did the delegate follow a sensible and practical line of enquiry that demonstrated the delegate had prepared for the interview?	17	4	0	81%	19%
2. Did the delegate use appropriate language and terminology throughout the interview?	21	0	0	100%	0
3. Did the delegate use appropriate lines of enquiry?	18	3	0	86%	14%
4. Did the delegate support the provision of credible evidence and testimony and encourage the applicant to identify key experiences in a sensitive non-intrusive way?	18	3	0	86%	14%
5. Did the delegate avoid exploring discretion/modification of behaviour?	17	4	0	81%	19%
6. Did the delegate explore internal relocation?	7	4	10	64%	36%

Note: 'Met' and 'not met' are defined in scoping paper (ADD2017/3040447).

## 5. Analysis

### 5.1 Question 1- Did the delegate follow a sensible and practical line of enquiry that demonstrated the delegate had prepared for the interview?

The review found that the majority of the delegates (17), prepared well for the interview and were familiar with the main claims and major relevant events pertaining to the claims. This was applicable to most IMA cases, however, in four permanent protection visa (PPV) interviews this cannot be easily ascertained. In two cases the applicants talked for long periods of time and there was no clear line of enquiry. This may indicate the need for a more focused question on a particular aspect of the claim rather than a broad open question. See Section 5.3.1 Open questions, Onshore Protection Interviews: Practical Guidance (issued on 12/4/2017).

In the other two cases the interviewer moved from one event to another even though some of the preceding events were not fully explored. This however does not indicate that the delegate had not prepared for the interview, as delegates preparatory interview notes and questions are not required to be saved to the applicants TRIM file.

### 5.2 Question 2 - Did the delegate use appropriate language and terminology throughout the interview?

The qualifiers for this question are:

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- Qualifier 3a: The delegate used the applicant's terminology in regard to their sexual orientation and/or gender identity.
- Qualifier 3b: The delegate explored ambiguous terms such as "friend", which may have a wide range of meanings, including intimate, romantic or sexual relationships.

The review found that all delegates used the correct terminology and explored ambiguous terms, as needed, throughout the interview.

### 5.3 Question 3 - Did the delegate use appropriate lines of enquiry?

The review team found that most delegates (18), avoided using inappropriate lines of enquiry, noting that while sensitivity to applicants is important this cannot be to the detriment of exploring adverse credibility issues, such as asking inappropriate questions such as:

if something happened to make the applicant LGBTI? why the applicant chose to be LGBTI?  
whether the applicant can prove they are LGBTI; questions about details of sexual activities; detailed information about traumatic events, particularly those involving sexual violence.

For the remaining three cases:

Case 1: Although the delegate did not ask the applicant to prove that he was LGBTI, questioning focused on whether there was anything observable to identify the applicant as homosexual and if there was anything in his lifestyle which would identify him as homosexual. While this question could be intended to establish the risk of harm it could also be viewed as an indirect question about proving that the applicant was homosexual. Further the delegate was quite insistent and repetitive with this line of questioning which may have bordered on an inappropriate line of enquiry.

Case 2: The delegate asked detailed questions about whether the applicant could provide any evidence to show he is gay. The delegate checked the applicant's phone for apps and messages, and asked detailed questions about the applicant's profile on dating websites. The delegate appeared to doubt the applicant's credibility and the case was subsequently refused.

Case 3: Around an hour into the interview the delegate asked. "Why do you think you are gay?" The delegate didn't seem to follow a sensible and practical line of enquiry as some events were questioned in an illogical order.

### 5.4 Question 4 - Did the delegate support the provision of credible evidence and testimony and encourage the applicant to identify key experiences in a sensitive non-intrusive way?

In most cases (18), the delegates encouraged the applicants to identify key experiences and clarify any inconsistencies in a sensitive non-intrusive way. The delegates encouraged the applicants to answer questions fully. When questioning the applicant about their relationships, the delegates reassured them that they did not need to provide intimate or sexual details, including about traumatic events such as sexual assault. Mostly the delegates were mindful of the effects of time and trauma on the applicant's recollection.

On reviewing the recording, an opinion was formed that in one case, the delegate's tone was a little aggressive. At one point the delegate sighed after one of the applicant's responses. This may indicate that the delegate did not build and maintain a good 'communication atmosphere'. See Section 5.1 Building rapport (Onshore Protection Interviews Practical guidance) for useful guidance on use of appropriate language and build rapport with the applicant.

The review team found that in two cases, the delegates did not address discrepancies and did not ask targeted follow up questions when the applicant avoided answering directly.

Case 1: The delegate asked some questions about the applicant's sexual relationships but the delegate did not really touch on any of the other lines of enquiry that may have elicited more information. This could be due to the credibility concerns raised by the delegate including that the applicant's claims were different to information collected as per the entry interview.

Case 2: The interview was long and there was no clear line of enquiry with some key events not fully investigated. The applicant talked for long periods of time and tended not to answer questions directly. The delegate did not ask clarifying questions. The applicant's representative later stated that the applicant had serious mental health issues which impacted on their ability to articulate their claims clearly.

## **5.5 Question 5 - Did the delegate avoid exploring discretion/modification of behaviour?**

This question is to test how delegates applied section 5J(3) of the Act during interview. The review found that the delegates did not use s 5J(3) to consider behaviour modification of the accepted issue, i.e. the claim of being LGBT, being central to identity or conscience/ sexual preference. In this regard the review team found all delegates had followed the legal requirements and did not explore behaviour modification of applicants' sexuality at the interview.

The review team also found that most delegates (17), followed the guidelines and avoided asking questions about modification of behaviour or behaving discreetly to avoid harm.

The review team found that in four cases the delegates asked the applicants questions around whether they could be discreet about their homosexuality to avoid harm if they were returned to their home country.

In three cases, the applicants claimed that they were discreet about their sexuality in their home countries and in Australia. The delegates then asked whether the applicant could continue to be discreet to avoid harm if they were returned to their home countries. In the other case where the applicant is openly gay, the delegate asked questions about how the applicant would have to live in Iran - i.e. would he have to be discreet or could he live openly as a gay man.

### Related case law

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 the pivotal question is whether the discreetness was, and continues to be, the person's preference or whether the discreetness was to mask their sexual orientation or gender identity to avoid harm. If the discreet behaviour was to avoid harm, a person cannot be considered to have chosen to be discreet as a way of life nor can it be expected that the person should maintain being discreet to avoid harm on the basis of LGBTI.

While there is no impediment to a delegate exploring the nature of an applicant's claims at interview, delegates should be mindful of legal and policy requirements set out in the Refugee Law Guidelines, the PAM and the High Court's ruling in S395. Noting that this review's scope was limited to reviewing the interview, so long as the reasoning in the decision record is consistent with S395 then the delegate would have applied S395 correctly, as to what the applicant would do if they were returned to their country of origin. See section 10.1 of the Refugee Law Guidelines for further information.

## **5.6 Question 6 - Did the delegate explore internal relocation?**

The review team did not identify any major issues with the delegates' exploration of internal relocation as an option. In most cases when the agent of harm is the state, such as Iran (10 cases), moving to another area to avoid harm is not considered to be a viable option for the applicant, therefore this was not explored and all these cases were scored as N/A.

Out of the remaining 11 cases, seven explored internal relocation as an option. In four cases: two Pakistani, one Lebanese and one Bangladesh, internal relocation issue was not addressed during the interview.

### Related case law

According to the PAM, 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 judgment in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71. An option that requires the applicant to live discreetly is not a valid internal relocation option.

## **5.7 Other issues**

The review team identified the following additional issues during the interview that might have impacted on the assessment process:

### **Weight placed on the applicant remaining married (heterosexual)**

In two cases, the delegates seemed to focus on the fact that the applicants were married and stayed married in Australia and that this lessened the applicants' credibility. Both applicants stated that the marriage was a façade to protect their family and minimise shame on them. Both cases were subsequently refused due to credibility of the applicants' LGBTI claims, noting the decision records are out of scope, this may not have been determinative of the applicant not being homosexual.

If the applicant is married, the delegates should investigate how the applicant perceived the relationship and the future of the relationship as the presence of any of these factors does not mean that applicant is not homosexual as social pressures may have forced them to conform to cultural norms. It is open to the delegate to make a finding that applicant is LGBTI despite their marriage depending on the circumstances and their future plans.

### **Pressure with time and use of interpreter**

In one case, it seemed that the interpreter was brought in at short notice and interpreted over the phone. The delegate advised the applicant she was trying to find ways to shorten the interview given that they had to get the interpreter at short notice. The delegate likely tried to save time as they did not follow the interview script proforma. Further to this, the migration agent raised concerns that something had been misinterpreted by the interpreter. The interpreter, in their defence, said they could not hear. The delegate continued the interview.

### **Inappropriate indication of case outcome**

In one case, the delegate indicated that she was going to grant the visa by saying to the applicant that cumulatively the applicant's claims were enough for her to meet Australia's international protection obligations.

## **6. Conclusion**

The review found all delegates used the correct terminology throughout the interview and followed the legal framework, including not exploring behaviour modification of the applicants' sexual orientation at interview. While the review did not identify any major issues of concern, it has provided an opportunity to bring to decision makers' attention, the guidance material available and requirements set out in the PAM for interviewing and assessing LGBTI claims, in order to continue to build skills in the efficiency, consistency and quality of onshore protection visa decision making.