

**Vulnerable Persons Working Party Discussion Paper  
Sexual Orientation, Gender Identity,  
and the Administration of Refugee Protection**

**International Association of Refugee Law Judges (IARLJ) Conference**  
20-25 October 2014 // Tunis, Tunisia

**Rapporteur:** Ross Pattee, Deputy Chairperson,  
Refugee Protection Division, Immigration and Refugee Board of Canada

**Associate Rapporteur:** Judge Kyrie James,  
Immigration and Asylum Tribunal, United Kingdom

**Principal Author:** Emily Cameron, Senior Project Officer,  
Immigration and Refugee Board of Canada

**with input from:** Syd Bolton, S. Chelvan, Catherine Dauvergne, Sharalyn Jordon,  
Nicole LaViolette, Jason Pobjoy, Rainbow Refugee Committee (BC, Canada)  
UNHCR Canada, UK Lesbian and Gay Immigration Group (UKLGIG).

**Vulnerable Persons International Association of Refugee Law Judges (IARLJ) Working Party**  
Discussion Paper: Sexual Orientation, Gender Identity and the Administration of Refugee Protection

## INTRODUCTION

The IARLJ working party on vulnerable persons has promoted, through several working party papers and guidelines, safeguards for vulnerable persons as they navigate refugee protection systems, and has worked to enhance consistency between adjudicators with respect to the treatment of vulnerable persons. Members of the working party forwarded concepts of procedural accommodation in order to foster common ground among adjudicators in an effort to prevent re-traumatization of claimants, share best practices, and sensitize adjudicators about various broad types of vulnerabilities.

In 2008, the vulnerable persons working party tabled a comprehensive set of guidelines that covered a range of potential vulnerabilities, such as those experienced by claimants with mental health disabilities, children, trafficked persons, elderly persons, survivors of torture, claimants who have experienced gender-based violence, detained claimants and claimants with physical disabilities. In 2011, the working party focused on the best interests of the child in refugee protection claims, raising important links between refugee protection and the United Nations (UN) *Convention on the Rights of the Child*.

This discussion paper works from the broad principles outlined in the vulnerable persons working party *Guidelines on Procedures with Respect to Vulnerable Claimants*, and, as was done with the 2011 working party paper on children, narrows the focus to examine several concepts that are relevant to claims based on sexual orientation and gender identity.

## FOUNDATIONAL ASSUMPTIONS AND WORKING DEFINITIONS

Before delving into a series of questions that will be used to guide discussion at the 2014 IARLJ conference, it is important to recognize some foundational assumptions that the remainder of this paper is built upon, which are largely derived from 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*.

As a starting point, the vulnerable persons working party agrees with UNHCR's assertion that identities are intersectional, in that claims based on sexual orientation and gender identity must be understood through a matrix of experiences:

[i]ntersecting factors that may contribute to and compound the effects of violence and discrimination [against sexual minorities] include sex, age, nationality, ethnicity/race, social or economic status and HIV status. Due to these multiple layers of discrimination, LGBTI individuals are often highly marginalized in society and isolated from their communities and families. It is also not uncommon for some individuals to harbour feelings of shame and/or internalized homophobia. Because of these and other factors, they may be inhibited from informing asylum adjudicators that their real fear of persecution relates to their sexual orientation and/or gender identity.

...

The experiences of LGBTI persons vary greatly and are strongly influenced by their cultural, economic, family, political, religious and social environment. The applicant's background may impact the way he or she expresses his or her sexual orientation and/or gender identity, or may explain the reasons why he or she does not live openly

as LGBTI. It is important that decisions on LGBTI refugee claims are not based on superficial understandings of the experiences of LGBTI persons, or on erroneous, culturally inappropriate or stereotypical assumptions. (Introduction)

The vulnerable persons working party maintains that being attuned to the intersectional nature of identity will empower decision makers to employ nuanced questioning techniques that allow them to better understand the particular circumstances of a claim, and simultaneously work against the possibility of stereotyping.

Though language usage is culturally contextual, and our understanding of gender and sexual orientation changes over time, it is useful to have working definitions from which to base our conference discussions. Drawing from the UNHCR *Guidelines* once again,

[s]exual orientation refers to: “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender”. Gender identity refers to: “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms”.

Sexual orientation and gender identity are broad concepts which create space for self-identification. Research over several decades has demonstrated that sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex. Gender identity and its expression also take many forms, with some individuals identifying neither as male nor female, or as both. Whether one’s sexual orientation is determined by, inter alia, genetic, hormonal, developmental, social, and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation. While for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person’s lifetime. Different people realize at different points in their lives that they are LGBTI and their sexual and gender expressions may vary with age, and other social and cultural determinants.

Refugee claims based on sexual orientation and/or gender identity often emanate from members of specific sub-groups, that is, lesbian, gay, bisexual, transgender, intersex and queer individuals (usually abbreviated as “LGBT”, “LGBTI” or “LGBTIQ”). The experiences of members of these various groups will often be distinct from one another [...] and, ... between members. It is, therefore, essential that decision makers understand both the context of each refugee claim, as well as individual narratives that do not easily map onto common experiences or labels.

...

Not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim. (III Terminology)

The UNHCR *Guidelines* also provide definitions for lesbian, gay men, bisexual, transgender and intersex. These definitions are a useful starting point for decision makers, and a more flexible

understanding of the experiences of sexual minorities can be derived from complex country-of-origin information, as well as by creating stakeholder relationships with academics and non-governmental organizations that specialize in advocating for the rights of sexual minorities. Their involvement in training can heighten the awareness of adjudicators, and formal consultations with external stakeholders can raise awareness of the structural limitations that sexual minorities may face when implementing new practices, procedures and guidelines.

## **THE ADMINISTRATION OF REFUGEE PROTECTION AND SEXUAL MINORITIES**

The paper developed by the human rights working party at this year's IARLJ conference reaffirms the position – through a catalogue of comparative international case law – that there is a nexus between claims based on sexual orientation, gender identity and refugee protection, whether through membership in a particular social group and/or political opinion.

Taking as a presumption that there is a nexus between sexual orientation, gender identity and refugee protection, this paper seeks to interrogate the ways in which asylum systems, and other forms of institutional population management and enforcement (at airports and detention facilities), are sites of hetero-normative values, which can translate into obstacles for, and bias against LGBTI claims, and lead to higher court reviews of decisions on such claims. In a 2012 *International Law and Politics* article entitled “Queer Cases Make Bad Law,” authors Jason Pobjoy and James Hathaway state that “[w]hile not so long ago institutionalized homophobia was common in developed countries, most of the North has now moved to embrace gay rights” (317), further noting that “[u]ntil and unless the rights of sexual minorities are comparably ensured in most Southern countries, Northern states can expect to receive asylum claims from those at risk” (318). However, affirming that so-called developed or Northern states have distanced themselves from a homophobic past through enacting anti-discrimination employment laws and assuring same-sex marriage rights (Pobjoy and Hathaway 317), forms of justice that are often cited as evidence of the “embrace” of gay rights, may lead to an understatement of the degree to which discrimination against LGBTI individuals occurs through the administration of bureaucracies and systems of justice in refugee accepting states, especially when considering racialized sexual minorities, sexual minorities with disabilities and transgender citizens.

As Sharalyn Jordan of Simon Fraser University and Christine Morrissey of the Vancouver NGO Rainbow Refugee Committee explain,

[r]aising the problem of sexuality or gender based persecution internationally risks othering cultures, faiths, or countries as monolithically or irredeemably homophobic. Moreover, we are mindful that presenting the need for QLGBT refugee settlement in Canada can entrench colonial narratives of rescue and binaries of developed vs. backwards or civilized vs. barbaric. Writing, speaking and organizing around QLGBT refugee protection invites us into echoing homonationalist discourses that equate West with progress and tolerance of QLGBT citizens with modernity. This homonationalism can ally dangerously with Islamophobia and xenophobia. Indeed, as numerous reports on discriminatory or harmful treatment of sexual minorities in the asylum systems of “developed” countries can attest, support for gay equality through the lens of employment and marriage is not in itself sufficient to protect the rights and dignity of LGBTI claimants. (*Equity Matters* 17 Nov. 2011)

An example of the persisting vulnerability of LGBTI individuals in developed countries is the Australian law requiring all asylum seekers arriving by boat to be transferred to Papua New Guinea, where homosexuality is criminalized (HRLC June 2014). Similarly, in 2010, various sources reported on the Czech Republic's “phallometric testing” of purportedly gay asylum seekers, which measured applicants' physical reaction to pornographic material (*Pink News* 6 Dec. 2010; BBC 8 Dec. 2010). In the UK, until

July 2010, LGBTI asylum seekers were refused refugee protection if decision-makers deemed that it would be “reasonable” for them to be “discreet” about their sexual orientation when returning home – a practice that was in clear opposition to the UNHCR *Guidelines* (FMR Apr. 2013, 22).

Additionally, various sources have reported on problematic credibility assessments, questioning techniques, and decisions made in the UK, Australia, Canada and the United States (US), generally due to misconceptions or lack of awareness about sexual orientation and gender identity on the part of adjudicators. For example, in 2013, the UK Home Affairs Committee on Asylum found that credibility assessments of LGBTI claimants were “particularly poor” as claimants had to “prove” their sexuality to the decision-maker to be considered credible (27-28); Australian sources have also observed the pressure on sexual minorities to prove their sexuality in the hearing room by answering invasive questions about their sexual activity and history (Amnesty International 13 July 2012; Reportage Online 17 June 2013). The UK Lesbian and Gay Immigration Group (UKLGIG) reported in 2013 that “a number of inappropriate questions are still being asked,” including the following:

- “How many sexual encounters have you had with your partner? (2013)
- Can I ask you why you did not have penetrative sex at any time in Nigeria up until December 2009? (2012)
- You have never had a relationship with a man. How do you know you are a lesbian?” (UKLGIG Sept. 2013, 20).

The UK gay rights NGO Stonewall argues that “detailed questioning of the specific sexual experiences that [the applicant has] had... is generally not effective and simply creates barriers between the applicant and the case owner [decision-maker]” (2010, 14). Stonewall adds that this type of questioning demonstrates “a misunderstanding that gay people’s persecution stems from just their conduct rather than their identity” (16). Both Stonewall and UKLGIG indicate that LGBTI asylum seekers who cannot provide evidence of a same-sex relationship are discredited, despite the fact that individuals may find it difficult to begin such relationships due to past persecution in the form of sexual violence (UKLGIG, 19; Stonewall, 16) or a lifetime of internalized shame or fear (UKLGIG, 24). It is also possible that asylum seekers cannot provide the full names or real names of their partners because concealing one’s identity is a means of protection in homophobic societies or communities (ibid. 14). UKLGIG also notes that additional stereotypes or moral judgments may be applied to lesbians, as decision-makers reportedly find it “concerning” when lesbians have spoken about one night stands or meeting other lesbians in parties in their countries of origin” (18).

Sexual minorities are also reportedly evaluated against adjudicators’ personally held beliefs about how they should look or behave; for example, expectations that they frequent gay clubs and consume gay media (Stonewall, 16; UKLGIG, 14-15; Amnesty International 13 July 2012; *New York Times* 28 Jan. 2011). In a 2009 study of media reporting on asylum claims of sexual minorities in Canada, academics Jenicek, Lee and Wong reviewed ten Canadian newspaper articles published between 2003 and 2008, and identified three main stereotypes that some adjudicators were said to rely upon: first, the stereotype that there is certain knowledge that all gay men possess (such as knowledge of their city’s Pride Parade and the location of gay bars); second, the stereotype that gay men are all sexually active and begin sexual relations with other men from a very young age; and third, that they have particular mannerisms or dress that identify them as visibly gay (650). Meanwhile, lesbian claimants were expected to look “masculine” (651). In a 2008 article in the *Yale Law and Policy Review*, Fatma E. Marouf highlights the growing prevalence of the “social visibility” test in the United States, in which refugee claimants facing persecution based on their membership in a “particular social group” are expected to “visibly” belong to that social group (49). Marouf notes that this approach diverges from the international community’s “social perception” approach and that the US and “international authorities” have in fact already “rejected the notion that gays and lesbians who remain ‘discreet’—and therefore invisible—are not protected by the

refugee definition” (50). The 2013 landmark decision of *X, Y, and Z v Minister voor Immigratie en Asiel* by the Court of Justice of the European Union also firmly established the position that

requiring members of a social group sharing the same sexual orientation to conceal it is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it. Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution. (7 Nov. 2013)

In 2012, the Federal Court of Canada overturned a decision by the Immigration and Refugee Board (IRB) to deny refugee protection to a gay claimant, citing the original decision and concluding that “[i]t is readily apparent from these passages that the Board believed that gay men are promiscuous and that anyone who is not sexually active is unlikely to be “truly gay.” This, of course, is a form of stereotyping that the Board has sometimes resorted to in dismissing claims like this one” (Canada 4 Dec. 2012). The judge also cited jurisprudence established by the Federal Court in which other decisions based on stereotypes about LGBTI claimants were overturned (*ibid.*).

Concerns have also been raised regarding cultural assumptions; for example, the assumption that a person cannot be gay because the religion that they practice condemns homosexuality (UKLGIG, 16), or the expectation a person can avoid scrutiny or social pressure for remaining unmarried in their home country in the same way that they might be able to do in a Western country (Stonewall, 26). In the Canadian context, Jenicek, Lee and Wong argue that the criteria for “proof” of sexual orientation “tend to be insensitive to the myriad economic, cultural, religious, and moral differences that may exist between sexual minority refugees and those who frequent the Canadian queer scene, which is dominated by a “White” conceptualization of queerness” (639). Once again, an understanding of the intersectional nature of identity would help avoid faulty assumptions that shared sexual orientation or gender identity is universally the key characteristic around which identity or community is formed.

Breaking down the binary of north and south, and of refuge versus persecution, will empower administrators and adjudicators of refugee protection systems to recognize the vulnerabilities that are *created* by bureaucratic systems, rather than thinking of vulnerabilities as simply inherent to certain types of bodies, conditions, experiences and nation states. Though sexual minorities will enter asylum systems with vulnerabilities stemming from prior physical violence and psychological distress—which could affect their ability to relay the details of their claim and which may necessitate procedural accommodations—it is also possible that the processes, procedures, and interviewing techniques employed throughout the refugee determination process can *cause* trauma, further stigmatize and stereotype claimants, and place claimants at risk of further violence—in particular, through the detention of transgender claimants.

In *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law*, Dean Spade “questions the usefulness of the most commonly articulated legal interventions for transgender rights: anti-discrimination and hate crime laws” (28-29), and instead argues that a “different location within the law – the administrative realm -- may be the place to look for how the law structures and reproduces vulnerability for trans populations” (29). Spade argues that addressing “... key administrative barriers to trans survival, especially access to ID, placement in sex-segregated facilities, and access to health care, ... [are] the best opportunities to combat transphobia” (37). Making specific reference to US prisons, Spade asserts that “violence against trans women in men’s prisons is consistently reported by prisoners as well as by researchers, and in court cases, testimony from advocates and formerly imprisoned people reveal trends of forced prostitution, sexual slavery, sexual assault, and other violence” (89). In its 2013 report *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention*, the Center for American Progress, a nonpartisan research and educational institute based in Washington, DC, compares how transgender

immigrants in detention facilities in the US have similar experiences of violence as the larger transgender prison population (Nov. 2013, 2). The report indicates that formal complaints lodged in 2011 by transgender detainees included “incidents of sexual assault, denial of adequate medical care, long-term solitary confinement, discrimination and abuse, and ineffective complaints and appeals processes” (4). The report also includes recommendations to ensure the “effective and humane” (2) application of the law; for example, that Immigration and Customs Enforcement (ICE) place transgender individuals “in housing that is consistent with the individual’s gender identity, not the anatomy or sex assigned at birth” (17).

Though different countries have differing degrees of jurisdictional separation between detention and the adjudication of claims – legally, procedurally, and spatially – it is important to recognize that, even with a large degree of separation, transgender claimants’ ability to feel comfortable relaying their experiences in a refugee protection claim may be informed not only by their experiences in their country of origin, but also by their experiences in the state in which they are seeking protection. Reticence to trust an adjudicator may be influenced by experiences in detention, for instance. Overall, gaining awareness about the obstacles and violence that LGBTI claimants face in refugee accepting countries as they navigate through various administrative systems can better empower adjudicators to offer meaningful accommodations to claimants that result in fair, safe and focused proceedings.

## TRAINING

In practical terms, the work of refugee protection systems—once acknowledging that claims based on sexual orientation and gender identity fit squarely within the Convention—must involve the education of adjudicators regarding claims based on sexual orientation and gender identity in an effort to ensure that sexual minorities can relay the circumstances of their claims in safety; receive accommodations that will enable a fair process; and, ultimately, ensure that claimants either receive protection or are not at risk of serious harm upon return.

In the Canadian context, the refugee protection system underwent major legislative reform from 2010 through 2012, and, once implemented, involved hiring public servant decision makers, eighty percent of whom were entirely new adjudicators. The refugee protection division decision makers received sensitization training before they began adjudicating claims, which covered a range of issues from the IRB’s own guidelines on vulnerable persons and gender, as well as training in cross cultural awareness and questioning techniques. Moreover, during the second year of the new system, every adjudicator participated in a targeted training session delivered by Nicole LaViolette, a professor in the faculty of law at the University of Ottawa who specializes in the rights of sexual minorities and refugee protection.

Professor LaViolette’s 2013 training focused on many of the issues raised in this paper, in addition to covering the *Convention* grounds through which sexual minorities obtain refugee status. She offers overarching definitions and explanations of sexual orientation, gender, gender identity, and the intersection of identity markers (15-20). The training module also covers different forms of persecution that sexual minorities may experience, and includes Canadian case law regarding the issue of discretion and concealment (10). The module also focuses on the difficulties in assessing the impacts of laws that criminalize same sex relations (8-9), as well as the challenges sexual minorities face when trying to support their claims with country of origin research (21-33). While the module addresses issues of credibility – citing cases of stereotyping that were used to make negative credibility assessments, which were subsequently overturned (22-25) – it also offers guidance on lines of questioning that steer away from intimate sex acts, and instead focuses on the personal experiences of the claimant, with the [following] caveat:

... there are no true or uniform answers to questions about a claimant’s experience

of: their sexual orientation or gender identity; the reactions of their family and community; and their interaction with the larger society and the agents of persecution. The objective of questioning a claimant about their membership in a particular social group is to elicit evidence from the claimant that will assist in determining credibility. It is not so much the accuracy of the actual answers that is important, as answers to these types of questions can differ from one individual to the next. Rather, the fact that the evidence elicited through this questioning will assist in evaluating the consistency and plausibility of the testimony as well as the overall demeanour of the claimant is important. (28)

Professor LaViolette’s training covers significant ground and encourages decision makers to question their own understanding of sexual orientation and gender identity, in addition to enhancing awareness about the challenges that LGBTI claimants face when navigating the refugee determination process. There are, of course, many ways to train adjudicators, but it is important to recognize the value of connecting with organizations and advocates who bring not only first-hand knowledge, but also exposure to a diverse range of experiences of LGBTI individuals into the hearing room.

In the UK, civil servants responsible for deciding asylum claims have received compulsory training on LGB issues since January 2011; UK Visas and Immigration has also offered refresher training (UKLGIG 21 Sept. 2014). A model for questioning LGBTI claimants, developed by UK barrister S. Chelvan and known as the “difference, stigma, shame and harm” (DSSH) model, was introduced in Sweden and New Zealand as well as the UK.<sup>1</sup>

## CONCLUSION

On the international stage, refugee protection claims based on sexual orientation and gender identity are relatively new and case law regarding these types of cases continues to develop, carving out new parameters and tests through which LGBTI claims are legitimized. In contrast, there remain an alarming number of countries where persecution of LGBTI citizens is not uncommon. And yet, there is no country where LGBTI individuals are completely free from oppression and discrimination. This discussion paper is motivated by cross-national comparisons that feed into the binary notion that there are countries that persecute versus countries that offer refuge, and seeks to critique this interpretive lens, in an effort to recognize the ways in which LGBTI claimants encounter difficulties through the very mechanisms that are meant to provide safety. This self-reflexive approach is meant to inspire dialogue about effecting meaningful change at the institutional level – changes that could be procedural, policy-based and/or pedagogical in nature. Even in countries where claims based on sexual minorities and gender identity are deemed to fall within the legislative parameters of refugee protection, there are still advances to be made in terms of ensuring equitable treatment and establishing safe spaces. And, since our knowledge of sexual orientation and gender identity is culturally and collectively produced over time, the work of building, fostering and adapting a fair system is ongoing. Toward this end, this discussion paper includes potential areas in need of further attention and poses questions for IARLJ members to consider, in hopes that the IARLJ working party on vulnerable persons can use this dialogue as a starting point from which to develop practical tools for adjudicators.

***The authors gratefully acknowledge the following individuals and organizations for their thoughtful reading and invaluable comments on draft versions of this paper: Syd Bolton, S. Chelvan, Catherine Dauvergne, Paul Dillane of the UK Lesbian and Gay Immigration Group (UKLGIG), Sharalyn***

---

<sup>1</sup> The DSSH model was also discussed in 2011 at an informal meeting of experts from UNHCR, IARLJ, and the European Legal Network on Asylum (ELENA) on refugee claims relating to sexual orientation and gender identity, a summary of which can be found at <http://www.refworld.org/pdfid/4fa910f92.pdf>.



*Jordan, Nicole LaViolette, Christine Morrissey of the Rainbow Refugee Committee, Jason Pobjoy, and UNHCR Canada. Thanks also to Kelly Sipp (Committee on Migration, Refugees and Displaced Persons) and Elise Comu (Committee on Equality and Non-Discrimination) of the Parliamentary Assembly of the Council of Europe for providing information on the European context. Finally, we are greatly indebted to Judge Kyrie James, co-Rapporteur of the IARLJ Vulnerable Persons Working Party, for her guidance and assistance in facilitating a broad consultation process for the paper.*

*For sources of additional reading on this topic, we recommend the excellent resource developed by Mary Kapron and Nicole LaViolette, **Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography (Sept. 2014)**, located at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2457503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457503).*

## DISCUSSION

- 1) What specific challenges do LGBTI claimants face when navigating refugee protection systems and how can these obstacles be identified and remedied?
- 2) What specific challenges do adjudicators face when rendering decisions on claims based on sexual orientation and gender identity?
- 3) What issues are most pressing in terms of the need for consistent practices and more focused attention?
- 4) What are the next steps for the working party on vulnerable persons?

### Potential Areas of Focus:

#### Intake forms

Intake forms require claimants to record the sex found on their passport, but do not often allow claimants to select a category other than “male” or “female,” despite the fact that their passports or other forms of identification may allow other options.<sup>2</sup> Additionally, there is not often a space for claimants to self-identify their gender, in the event that their identification does not align with their gender. Changing intake forms to provide a space for claimants to self-identify can signal to claimants that they are entering a safe space where they need not conform to gender expectations. On the Canadian Basis of Claim (BoC) form, claimants are given the opportunity to self-identify their gender. Entering claimants’ desired gender marker in tracking systems increases the likelihood that claimants are referred to in correspondence, over the phone, and during hearings in a respectful manner. Questions about marital status on intake forms may also incorrectly reflect the realities of LGBTI claimants, in that marriage is not a legal possibility for many same-sex couples.

- 5) What other procedural changes can help to safeguard the rights and dignity of LGBTI claimants?

#### Guidelines

In addition to the UNHCR guidelines referenced above, the United Kingdom issued a guideline entitled Sexual Orientation in the Asylum Claim, which touches on some of the same issues raised today, such as stereotyping and questioning techniques, as well as being responsive to domestic case law. In the Canadian context, *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing*

---

<sup>2</sup> See, for example, BBC News (1 Nov. 2013), which summarizes third gender recognition around the world, including in Germany, India, and Australia.

*Before the IRB* discusses procedural accommodations for vulnerable claimants, including those who may be vulnerable due to their sexual orientation and/or gender identity. *Chairperson Guideline 4: Women Refugee Claimants Fearing Gender Based Persecution* also makes reference to sexual orientation and gender identity; despite these references in existing Canadian guidelines, it is recognized that a guideline focused specifically on the range of issues pertinent to a claim based on sexual orientation and gender identity is required, and the IRB is planning to issue this guideline next year.

6) What types of accommodations may benefit LGBTI claimants?

### **Training**

As Professor LaViolette's module evidences, training regarding sexual minorities and gender identity can cover a broad range of issues. NGOs, stakeholders and academics specializing in LGBTI rights have considerable knowledge and experience to offer administrators and judges, whether through direct development and delivery of training, or through the review of internally developed materials. In a 2013 paper, LaViolette argues, further, that LGBT cultural competency training, first developed in the health and social work fields, is an appropriate model for refugee personnel and adjudicators—although she cautions that this type of training is not a “cure-all for the full range of problems facing LGBT refugees” (2013, 4).

7) How are relationships with NGOs, stakeholders and academics established and maintained?

8) What issues should be covered during an introductory training module on sexual orientation and gender identity?

### **Interviewing processes and questioning techniques**

The issue of credibility is closely linked to the types of questions that are asked throughout the refugee determination process. In some interviews, UK Home Office case workers have reminded claimants that they need not talk in detail about their sexual encounters and have demonstrated sensitivity in the use of language regarding terms concerning sexual identity. (UKLGIG, 19).

9) How can best practices in questioning techniques be developed, documented and shared?

10) What should best practices about questioning LGBTI claimants include and avoid?

11) How do credibility assessments of sexual minorities overlap with credibility assessments of other types of claims?

### **Country of Origin Information (COI)**

Many of the sources referenced in this paper discuss the fact that COI may be difficult to obtain for LGBTI claimants. For example, Stonewall and UKLGIG indicate that lesbians in particular are disadvantaged because COI reports rarely contain information about the situation of lesbians (Stonewall, 18; UKLGIG, 27). Referencing Canadian case law, Professor LaViolette highlights the need to understand the *impacts* of legislation proscribing same-sex relations, versus simply knowing which countries have such laws (7). Similarly, laws protecting the rights of sexual minorities may not translate into tangible security for LGBTI claimants, and so the need for detailed COI research on the impacts of legislation is highly valuable in rendering quality decisions. There is also a risk that problematic forms of COI research will be used when rendering a decision; for example, the UKLGIG reports that UK decision-makers use the Spartacus International Guide, a document “produced in Germany for wealthy European travellers” (23). Comparing the circumstances of LGBTI travellers to those of a citizen who needs to access state protection, for example, may work to overshadow forms of COI research that catalogue the treatment of similarly situated individuals in a given country.

12) What other challenges relating to COI do adjudicators and claimants face?

- 13) How can best practices in COI research be developed, documented and shared?  
 14) What should COI research on the situation of LGBTI claimants include and avoid?

### Works Cited

- Amnesty International. 13 July 2012. Senthoran Raj. "Asylum Seekers Either 'Too Gay, or Not Gay Enough.'" <<http://www.amnesty.org.au/refugees/comments/29227/>> [Accessed 27 Aug. 2014]
- British Broadcasting Corporation (BBC). 1 November 2013. "Germany Allows 'Indeterminate' Gender at Birth." <<http://www.bbc.com/news/world-europe-24767225>> [Accessed 2 Sept. 2014]
- \_\_\_\_\_. 8 December 2010. "Czech Gay Asylum 'Phallometric Test' Criticised by EU." <<http://www.bbc.co.uk/news/world-europe-11954499>> [Accessed 28 Aug. 2014]
- Canada. 4 December 2012. Federal Court. *Terentiy Kornieko (Applicant) and the Minister of Citizenship and Immigration (Respondent)*. <<http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/61635/1/document.do>> [Accessed 28 Aug. 2014]
- Center for American Progress. November 2013. Sharita Gruberg. *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention*. <<http://cdn.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf>> [Accessed 28 Aug. 2014]
- European Union (EU). 7 November 2013. "Homosexual Applicants for Asylum Can Constitute a Particular Social Group Who May Be Persecuted on Account of Their Sexual Orientation." Press Release No. 143/13. <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-11/cp130145en.pdf>> [Accessed 6 Oct. 2014]
- Forced Migration Review* (FMR). April 2013. Amanda Gray and Alexandra McDowall. "LGBT Refugee Protection in the UK: from Discretion to Belief?" FMR 43. <<http://www.fmreview.org/sogi/gray-mcdowall>> [Accessed 27 Aug. 2014]
- Human Rights Law Centre (HRLC). June 2014. "NGO Statement: Item 4, 26<sup>th</sup> Session of the Human Rights Council." <[hrlc.org.au/wp-content/uploads/2014/06/Item4\\_HRLC\\_statementUNHRC\\_June2014.pdf](http://hrlc.org.au/wp-content/uploads/2014/06/Item4_HRLC_statementUNHRC_June2014.pdf)> [Accessed 27 Aug. 2014]
- Jenicek, Ainsley, Alan D. Wong, and Edward Ou Jin Lee. 2009. "Dangerous Shortcuts: Representations of Sexual Minority Refugees in the Post-9/11 Canadian Press." *Canadian Journal of Communication*. Vol. 34. <<http://www.cjc-online.ca/index.php/journal/article/viewFile/2119/2140>> [Accessed 27 Aug. 2014]
- Jordan, Sharalyn, and Christine Morrissey. 17 November 2011. "Asylum Rights and Seeking Refuge from Homophobic and Transphobic Persecution." *Equity Matters*. <[www.ideas-ideas.ca/blog/asylum-rights-and-seeking-refuge-homophobic-and-transphobic-persecution](http://www.ideas-ideas.ca/blog/asylum-rights-and-seeking-refuge-homophobic-and-transphobic-persecution)> [Accessed 6 Oct. 2014]
- LaViolette, Nicole. May 2013. *Sexual Orientation, Gender Identity and the Refugee Determination Process* (Draft). Paper Prepared for the Refugee Protection Division of the Immigration and Refugee Board of Canada.

- \_\_\_\_\_. 2013. "Overcoming Problems with Sexual Minority Refugee Claims: is LGBT Cultural Competency Training the Solution?" *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2122573](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122573)> [Accessed 6 Oct. 2014]
- Marouf, Fatma E.. 2008. "The Emerging Importance of 'Social Visibility' in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender." *Yale Law and Policy Review*. Vol. 47. <<http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1428&context=facpub>> [Accessed 6 Oct. 2014]
- New York Times*. 28 January 2011. Dan Bilefsky. "Gays Seeking Asylum in the U.S. Encounter a New Hurdle." <[http://www.nytimes.com/2011/01/29/nyregion/29asylum.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/29/nyregion/29asylum.html?pagewanted=all&_r=0)> [Accessed 27 Aug. 2014]
- PinkNews*. 6 December 2010. "Czech Republic Uses 'Gay Tests' on Asylum Seekers." <<http://www.pinknews.co.uk/2010/12/06/czech-republic-uses-gay-tests-on-asylum-seekers/>> [Accessed 1 Sept. 2014]
- Pobjoy, Jason, and James C. Hathaway. 2012. "Queer Cases Make Bad Law." *International Law and Politics*. Vol. 44. <<http://nyujilp.org/wp-content/uploads/2010/06/44.2-Hathaway-Pobjoy.pdf>> [Accessed 25 Aug. 2014]
- Reportage Online. 17 June 2013. Roop Gill. "Sexuality of Asylum Seekers Questioned." <<http://www.reportageonline.com/2013/06/sexuality-of-asylum-seekers-questioned/>> [Accessed 27 Aug. 2014]
- Spade, Dean. 2011. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law*. South End Press.
- Stonewall. 2010. *No Going Back: Lesbian and Gay People and the Asylum System*. Nathanael Miles. <<http://dev.stonewall.org.uk/other/startdownload.asp?openType=forced&documentID=2213>> [Accessed 27 Aug. 2014]
- United Kingdom (UK). 11 October 2013. Home Affairs Committee. *Asylum: Seventh Report of Session 2013-14*. <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71.pdf>> [Accessed 27 Aug. 2014]
- United Kingdom Lesbian and Gay Immigration Group (UKLGIG). September 2013. *Missing the Mark: Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims*. <<http://www.uklgig.org.uk/wp-content/uploads/2014/02/Missing-the-Mark.pdf>> [Accessed 27 Aug. 2014]
- United Nations. 23 October 2012. United Nations High Commissioner for Refugees. *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*. <<http://www.unhcr.org/509136ca9.pdf>> [Accessed 27 Aug. 2014]