Why LGBTI People Seek Asylum, and Problems with How their Claims are Assessed
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My Background:

Do the Math:

Child of a Refugee
+
Lesbian
=
LGBTI Refugee Advocate!
• President of Kaleidoscope Human Rights Foundation.
• NGO established in Australia in 2013 to promote and protect the human rights of lesbian, gay, bisexual, transgender and intersex people in the Asia Pacific region.
• www.kaleidoscopeaustralia.com
Living a Life of Crime

• 78 countries around the world still criminalise homosexuality. See: https://antigaylaws.wordpress.com/

• In 35 of these countries, the laws apply equally to lesbians. In 20 of these countries it is unclear whether laws apply to lesbians.

• 5 of these countries impose the death penalty (will soon be 6 when Brunei implements Sharia law).
Breakdown of Countries

• **Commonwealth** accounts for 41 of the 78 countries.

• **Africa** has the highest number of countries that criminalise homosexual conduct (34)

• **Middle East:** 13

• **Asia:** 12

• **Americas:** 11

• **Pacific:** 8 (including PNG which is the only country that both produces refugees and accepts them!)
1990: Countries which criminalised homosexual conduct
2015: Countries Which Criminalise Homosexuality
Criminalisation of Homosexuality not only reason for Seeking Asylum

• Persecution comes in many shapes and sizes!

• **Russia**: decriminalised homosexuality in 1993 and age of consent has been equal since 2003. Homosexuality was declassified as a mental illness in 1999 and trans* people have been able to legally change their gender since 1997.
BUT...

• Russians seeking asylum in USA has risen from 68 in 2012, to 127 in 2013, and 161 in 2014.
• Most recent Russian asylum inquiries came from gay men in their 20s and 30s who had been targeted in anti-gay attacks.
• Why? No anti-discrimination laws and “anti-gay propoganda” laws create a culture of intolerance and are perceived as sanctioning anti-gay violence.
50 Shades of Persecution

• **Mob violence** – LGBTI people can be physically and sexually assaulted with impunity.

• **Police harassment** – nobody to turn to when persecution comes from people in authority.

• **Corrective rape** – lesbians raped to change their sexuality. Maybe even arranged by family.

• **Extortion and blackmail** is common.
Tip of the Iceberg

Figure 1 – Flow of LGBTI People through the International Protection System

- LGBTI People Living in Persecutory Environments: 175 million (2.5% of world’s population of 7 billion)
- Sexual Orientation or Gender Identity is Perceived or Known: 1.75 million (1% of LGBTI people living under persecutory conditions)
- Seriously Harmed or Threatened in Countries of Origin: 175,000 (1% of perceived or known LGBTI people)
- Able to Flee and Subsist in Countries of Transit/Asylum: 17,500
- Able to Access Legal Protection Systems: 7,500
- Apply for Refugee Status/Asylum: 5,000
- Granted Legal Protection: 2,500

Figures are projections. Actual statistics are unavailable. Relevant populations are most often in hiding, unstudied, or uncounted.
Fleeing Persecution

• The abuse and discrimination may continue during the period of flight from their country of origin, e.g. LGBTI people from one African nation have to pass through other African nations (which also persecute LGBT people) in a bid to get to safety.

• The result may be fear of disclosing the reasons for flight, fear of authorities in countries of first arrival, and perception that the authorities are unable or unwilling to help.
Critical to Assessment Process

• Decision-makers must have current, comprehensive information regarding situation in asylum seeker’s country of origin.

• Not just the state of the law, but also the situation on the ground in terms of the lived experience of sexual and gender minorities.
Hungry and Croatia have very good anti-discrimination laws, but are both very homophobic societies with significant levels of violence directed at LGBTI communities and individuals.
Singapore

• Singapore criminalises homosexual conduct, BUT Pink Dot rally last year was attended by 25,000 LGBTI people and allies without any violence or visible counter-protest.

• First Pink Dot event held in 2009.

• Sponsors of the event have included BP, Goldman Sachs and Google Singapore.
Refugee Convention

A refugee is a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."
“A Particular Social Group”

• A recognisable group comprised of individuals who share a common innate characteristic that members cannot change, or a characteristic which is so fundamental to the member's identity that they should not be required to change it; &

• a society distinguishes between persons who share the characteristic of the group and persons who do not.
“A Particular Social Group” cont.

• No requirement that the group be cohesive, know each other or associate with each other as a group.

• No requirement that a person was known to be part of the group.
“A Particular Social Group” cont.

• It’s broadly accepted that SOGI are fundamental & therefore cannot be changed & should not be required to be changed.
• Applicants seeking refugee status on the basis of SOGI are ordinarily from a sexual minority in the country of origin and subjected to actual or potential mistreatment because of their SOGI.
• Therefore persons seeking to claim refugee status based on SOGI are capable of being classified as a member of a particular social group.
Other Grounds

Where being LGBTI is prohibited by the state, or against social and religious norms, individuals may also base their application on the grounds of:

– political opinion; or
– religion.
Well Founded Fear of Persecution

• Next step is that a person must demonstrate they hold a well founded fear of persecution based on the attribute.

• ‘Persecution’ is not defined in the Refugee Convention, but encompasses serious human rights violations and cumulative experiences of lesser forms of harm which amount to violations of human rights.
Well Founded Fear of Persecution cont.

- Not required to demonstrate past persecution, only a well founded fear of persecution.
- A well founded fear of persecution is likely to be established if the applicant's country of origin has in place laws or widespread activity which discriminates against persons who identify as LGBTI.
Well Founded Fear of Persecution cont.

• Persecution doesn’t have to be by Govt. Private actions of individuals or groups may suffice to demonstrate persecution.

• Fear of persecution will be well founded even if a person could exercise discretion so as to minimise the risk of persecution.
Examples of Persecution

- consensual sex with a member of the same sex criminal (even if laws irregularly or rarely enforced);
- rape & sexual assault as punishment, 'cure' or because of a person's SOGI;
- forced psychiatric treatment, institutionalisation or other efforts to 'cure' a person's SOGI;
- forced marriage;
- Blackmail based on person's SOGI status;
- repeated physical violence due to the person's SOGI; and
- ongoing or severe discrimination and harassment.
Discrimination v. Persecution

• Generally, harassment & discrimination does not constitute persecution.

• Persecution is an extreme concept that differs from general discrimination against minority groups.

• Persecution requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.
**Objective & Subjective Standards**

**Objective:** Applicants required to objectively demonstrate a reasonable fear of future persecution through credible, direct, and specific evidence. This requirement is often met by producing documentation of country conditions that show a pattern or practice of persecuting the particular social group to which the applicant belongs. Can be difficult for applicants to raise issues regarding government action or inaction that they fearfully hid in the past.
Objective & Subjective Standards

Subjective: In addition to the provision of objective evidence, applicants are generally required to also demonstrate a genuine subjective fear of persecution. An asylum applicant’s candid, credible, and sincere testimony demonstrating a genuine fear of persecution satisfies the subjective component of the well-founded fear standard.
Not being “out”

• Don’t have to have lived openly as LGBTI in country of origin or have had any intimate relationships.
• This is because many suppress their SOGI to avoid severe repercussions if discovered.
• That an applicant can avoid persecution by being “discreet” about their LGBTI status, or has done so previously, is not a valid reason to deny refugee status.
Problems with the Assessment Process

• Questions asked can be based on stereotypes, such as the applicant’s knowledge of gay rights organisations or stereotypical behaviours.

• Applicants are questioned about their sexual practices.

• Applicants required to complete so-called ‘tests’ to confirm their sexuality, such as producing images or videos of sexual acts.
Problems cont.

• Decision-makers draw negative credibility findings from the sole fact that an applicant did not declare their sexual orientation at the outset of their asylum application.

• Overall, assessments are made using homogenous, heteronormative and stereotypical understandings of sexual orientation and gender identity.
• Bisexuals and lesbians have particular difficulties.

  – **Bisexuals**: Generally disbelieved, and adjudicators exhibit negative views on bisexuality, or claim the applicant could be discreet about their identity.

  – **Lesbians**: may have been married or had children, which is commonly taken by adjudicators to invalidate their sexual identity credibility.
DSSH – A Better Model

- Difference
- Stigma
- Shame
- Harm

Developed by UK barrister, S Chelvan
**Difference**

- **Instead of:** “When did you first realise you were gay (or lesbian or bisexual)?”
- **Ask:** “When did you realise you were different?”
- Allows for narrative of gradual realisation of difference in SOGI.
If you ask a straight man, ‘when did you first realise you were straight?’, he will look at you with questioning eyes, unable to answer.

Does that mean he is not straight?

So, why do we ask the LGB applicant, ‘When did you first realise you are gay?’. 
Recognition that close family members/friends disapprove of conduct/identity.

Recognition that the ‘majority’ does not accept/disapproves of the conduct/identity of the LGBTQI individual.

Recognition of state/cultural/religious mores/laws which are directed towards LGBTQIs.
Shame

• Impact of STIGMA

• Feelings associated with isolation

• Impact of being the ‘other’ rather than the ‘same’
Harm

• State harm – criminalisation
• Fear of arrest/detention/torture
• Non-state agent harm - mob violence
• Family – honour killing
Conclusion

Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are more likely to help the decision maker ascertain the applicant’s sexual orientation or gender identity, than a focus on sexual practices.
Mandatory detention:

“Within detention facilities... gay, lesbian, bisexual and trans-gender persons, suffer double or triple discrimination.”

UN Special Rapporteur on Torture (2010)
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