Queering constructivist international relations: Questioning identity-based human rights norms in sexual orientation-based refugee law

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Declaration

This is to certify that:

1. The thesis comprises only my original work towards the PhD except where indicated in the preface,
2. Due acknowledgement has been made in the text to all other material used,
3. This thesis is fewer than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.

Please note, part of this thesis has contributed to a publication:


Text in chapter six, pages 196 – 227 is found in this publication.

Melbourne, 13\textsuperscript{th} December 2018

Jaz Dawson
Abstract

Since the late 1980s, many norms relating to the recognition of sexual orientation-based rights have come to be accepted and institutionalised at the international level. One of these, based on developments in multiple jurisdictions since the late 1980s, has been the institutionalisation of the norm of sexual orientation-based claims to asylum. This has been accompanied by an ever-growing series of procedural norms relating to assessing sexual orientation-based claims in the refugee status determination process. At the same time, constructivist international relations scholars have been developing theory on norm institutionalisation and implementation. Scholars such as Amitav Acharya have explored how norms can be adapted when they reach the regional level, developing the notion of ‘norm localisation’. More recently, constructivist scholars Alexander Betts and Phil Orchard have argued that the institutionalisation of international norms ‘ultimately only [has] significance insofar as they translate into practice’. They have, therefore, brought their analysis on norm institutionalisation and implementation processes down to the domestic level.

Drawing on queer critical approaches to international relations and refugee-/human rights law, this thesis seeks to extend the analysis of human rights norms beyond the domestic, to the individual – to the queer individual. It questions the assumptions broadly held by many international relations theorists and refugee law and policy actors that recognising the rights of queer people is best done through developing, institutionalising, implementing, and measuring identity-based norms. An example of such norms is the recognition of sexual orientation as grounds for particular social group status in refugee claims. Beyond this however, a series of procedural norms seeking to protect the rights of applicants during the refugee status determination process has

actually served to further entrench normativities around the centrality of identity in queer asylum claims. Examining British and Australia contexts, this thesis focuses on three core elements that influence the implementation of these norms at the domestic level: the development of guidelines and training for sexual orientation-based asylum claims; the particular characteristics of the legal system; and, the role of civil society.

First, this thesis seeks to queer the way in which constructivist scholars theorise and measure identity-based human rights norms. Second, it seeks to interrogate whether these identity-based norms actually limit the ability for queer people to access human rights, including the right to asylum and to be treated with dignity in the process of claiming asylum. It is argued that without queering our understanding of human rights norms, constructivist international relations scholars perpetuate normative understandings of identity that misrepresent the lived experiences of queer people and results in their theorising failing to apply to all people. Furthermore, it is concluded that the development and reliance on identity-based human rights norms in refugee law and policy diminishes the ability for queer people to access their right to refugee protection. Third, when considering the domestic influences on norm implementation, it is argued that civil society actors have the greatest impact. This is despite differences in the legal systems between the UK and Australia, largely that the UK has access to European courts and jurisprudence that directly relates to procedural norms in queer claims. While civil society norm entrepreneurship has influenced the development and implementation of training and guidelines, it is argued that a queer critical analysis is needed to identify how these developments potentially replace heteronormativities with homonormativities.
Acknowledgements

It would be safe to say that I did this PhD my way, and because of that I have many people to thank for their patience, flexibility, understanding, and encouragement. I first have to offer my deepest thanks to the Melbourne Social Equity Institute who offered me a Strategic APA to pursue interdisciplinary research. To the team: Bernadette, Charlene, Gary, Kathleen and Claire: thank you so much for the wonderful work environment and support. Thank you endlessly to my supervisors Professor Sarah Maddison and Professor Michelle Foster. Sarah and Michelle are deeply intelligent, competent, and caring academics who supported me and my project over the four years with thoughtful guidance, constructive feedback, and the right amount of push. I never doubted that they wanted the best for me and my project. Thank you for your encouragement and patience. Thank you to Professor Thomas Spijkerboer and the Centre for Migration and Diversity at Vrije University in Amsterdam who hosted me for my Australia Awards Endeavour Research Fellowship. And thank you to Associate Professor James Milner who hosted me for a year at Carleton University in Ottawa, which ended up having a significant and positive impact on my research and life. There are endless more thankyous to be given, particularly to my friends at each university and to my friends in the outside world. I have been spoilt with encouragement and support over the last four years and this thesis is as much a project of mine as it is the project of all those who have helped me along the way. As the saying goes, it takes a village to raise a thesis.
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Chapter One

Introduction

In 2016 I was involved in a project developing Kaleidoscope Human Rights Foundation’s Looking Through the Kaleidoscope: A Guide to Best Practice in Determining Applications for Refugee Status Based on Sexual Orientation, Gender Identity and Intersex Grounds. Following the launch of these guidelines, I developed and delivered training along with colleagues at the Australian Red Cross and the Zoe Belle Gender Collective to refugee professionals in Melbourne, Australia. During this training we provided basic introductions to concepts of lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ). While the session was considered a success, and many participants found the introduction to these concepts useful, a lingering doubt plagued me. I began to wonder whether our training, based in Western and stereotypical concepts of sexuality and gender, would really be applicable in the cases in which these professionals would assist. And so began my research on queering approaches to sexual orientation-based refugee law.

Since the late 1980s, many norms relating to the recognition of sexual orientation-based rights have come to be accepted and institutionalised at the international level. One of these norms, based on developments in multiple jurisdictions since the late 1980s, has been the institutionalisation of sexual

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3 According to Kaleidoscope Human Rights Foundation, Kaleidoscope 'is a not-for-profit organization committed to promoting and protecting the human rights of lesbian, gay, bisexual, transgender and intersex people in the Asia Pacific region'. See: "What we do", KaleidoscopeAustralia.com, accessed July 13th, 2018, http://www.kaleidoscopeaustralia.com/. I have been a volunteer or director of Kaleidoscope Human Rights Foundation since 2014.


orientation-based claims to asylum. This has been accompanied by an ever-growing series of procedural norms relating to assessing sexual orientation-based claims in the refugee status determination process. At the same time, constructivist international relations scholars have been developing theory on norm institutionalisation and implementation. Scholars such as Acharya have explored how norms can be adapted when they reach the regional level, developing the notion of ‘norm localisation’. More recently, Betts and Orchard have argued that the institutionalisation of international norms ‘ultimately only [has] significance insofar as they translate into practice’. These scholars have, therefore, brought their analysis on norm institutionalisation and implementation processes down to the domestic level.

Drawing on queer critical approaches to international relations and refugee/human rights law, this thesis seeks to extend the analysis of human rights norms beyond the domestic, to the individual – to the queer individual. It questions the assumptions broadly held by many international relations theorists and refugee law and policy actors that recognising the rights of queer people is best done through developing, institutionalising, implementing, and measuring identity-based norms. An example of such norms is the recognition of sexual orientation as grounds for particular social group status in refugee claims. Beyond this, however, a series of procedural norms seeking to protect the rights of applicants during the refugee status determination process has actually served to further entrench normativities around the centrality of identity in queer asylum claims. Comparing the United Kingdom and Australia, this thesis focuses on three core elements that influence the implementation of these norms at the domestic level: the development of guidelines and training for sexual orientation-based asylum claims; the particular characteristics of the legal system; and, the role of civil society.

First, this thesis seeks to queer the way in which constructivist international relations scholars theorise and measure identity-based human rights norms. Second, it seeks to interrogate whether these identity-based norms actually limit the ability for queer people to access human rights, including the right to asylum, and to be treated with dignity in the process of claiming asylum. It is argued that without queering our understanding of human rights norms, constructivist international relations scholars perpetuate normative understandings of identity that misrepresent the lived experiences of queer people such that their theorising fails to apply to all people. Furthermore, it is concluded that the development and reliance on identity-based human rights norms in refugee law and policy diminishes the ability for queer people to access their right to refugee protection.

This queer critique is inspired, in part, by Eve Kosofsky Sedgwick’s understanding of ‘queer’, which sees queer criticism as

the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excesses of meaning when the constituent elements of anyone’s gender, of anyone’s sexuality, aren’t made (or can’t be made) to signify monolithically.  

In stark contrast to these possibilities, the asylum system is a deeply anti-queer process through which applicants are forced to attach their identity and lived experiences, including persecution and harm, to primarily Western, linear, and stereotypical caricatures of sexuality and gender. Therefore, the norms that are analysed throughout this thesis also need to continuously undergo queer critical analysis.

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From a theoretical perspective, it is argued that in order to analyse human rights norms constructivist international relations theorists need to queer their understanding of legal systems and consider the broader heteronormative nature of legal systems, including the ontological constructions of sexuality that underpin and limit present day norms. It is argued further that constructivists need to queer their understanding of identity and the way in which human rights norms, including those that seek to apply to queer refugees, are dependent upon and limited by concepts of identity. Subsequently, it is argued that to understand how procedural norms relating to sexual orientation are implemented in legal systems, the broader immigration policy environments must be taken into consideration. This is because sexuality-based rights are typically given less priority in immigration policies. Understanding the broader policy environments therefore helps to explain the success (and nature of) norm implementation, along with the struggles faced by civil society actors working to promote these.

With regard to assessing domestic contexts, when comparing Australia with the UK, it is argued that the mere existence of regional human rights and regional courts are not enough to support better implementation. While it was theorised that the influence of regional human rights courts would be a key characteristic of a domestic legal systems that affected norm implementation, it was not found to be the case. Rather, the existence of guidelines and training on LGBTI asylum, as well as civil society actors advocating on behalf of queer refugees, appear to have the greatest influence on norm implementation. However, it is also argued that while the existence of guidelines and training does appear to have a positive effect on norm implementation, as evidenced most in the UK, it is necessary to queer these ‘successes’ as they still tend to maintain or develop their own exclusionary normativities dependent on notions of identity.

Ultimately this thesis makes a novel contribution to constructivist and queer international relations theory and refugee legal scholarship. The thesis demonstrates that queer contributions to both these fields are valuable as they reveal the tendency to replace or further entrench norms based on identity,
which in turn may fail to secure fundamental human rights, including rights that ought to be protected during the process of seeking asylum. While perhaps not the intention of credibility models seeking to improve refugee status determinations of sexual orientation-based claims, it is almost inevitable that (homo)normativities will be produced where models attempt to elucidate identities. Instead, credibility models should encourage applicants to provide narratives of fear and harm that focus on their inability to adhere to cultural norms and behaviours, including those norms associated with gay and lesbian stereotypes. It is argued that a potentially queerer approach to international relations and human rights law is one that allows for queer people to refuse or refrain from a positivist account of identity in order to secure safety, freedom, and be treated with dignity.

**Sexual orientation-based asylum claims**

When the 1951 Refugee Convention and the 1967 Protocol were drafted,\(^\text{11}\) the ‘plight and protection of sexual minorities was not an issue of explicit consideration’.\(^\text{12}\) As retired Australian Justice of the High Court, the Hon. Michael Kirby pointed out in an early case, sexual orientation most likely wasn’t included in the original Refugee Convention because ‘it would have been illegal in many, if not most, countries’.\(^\text{13}\) As such, for the majority of early claims (continuing into the 1990s), decision-makers resisted applying the Refugee Convention to sexual orientation-based claims. However, much like other categories such as age and gender, over the past few decades ‘sexual orientation’ has come to be recognised as grounds of Convention protection. For decades such claims were dismissed. For example, in an early British case ‘homosexuals’ were not deemed a ‘particular social group’ under the

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\(^\text{11}\) The 1967 protocol was developed with the intention to increase accessions to the 1951 Convention, particularly in decolonized nations. One of the major elements of the Protocol was that removed that geographic and temporal limitations in the Convention that defined a refugee as someone with a ‘well-founded fear of persecution’ because of events that occurred in Europe before 1951. For a detailed discussion of the development of the Protocol, see: Sara E. Davies, “Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol,” *International Journal of Refugee Law* 19, no. 4 (2007): 703 – 728.


\(^\text{13}\) *Applicant A v MIEA* [1997] 142 ALR 331, 360.
Convention because they were considered by the decision maker to lack ‘historical and cultural characteristics’. In another early claim heard in Canada, the decision maker declared that ‘the failure of the Universal Declaration on Human Rights to mention sexual orientation was indicative of the fact that homosexuality is not afforded protection as a fundamental right’ and that the ‘1951 definition of a refugee was not meant to displace the “historical order” that prohibits homosexuality for moral and religious grounds’.15

However, according to the 1951 Convention relating to the Status of Refugees, 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.16

In the early debates over the grounds of asylum, originally the four protected categories were race, religion, nationality, and political opinion. The inclusion of ‘particular social group’ at the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons was introduced by way of amendment by the Swedish delegation.17 According to the transcript, the


17 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of refugees and Stateless Persons: Summary
Swedish delegate Judge Sture Petré argued that the definition ought to include ‘reference to persons who might be persecuted owing to their membership of a particular social group. Such cases existed, and it would be as well to mention them explicitly’. The amendment was accepted, and ‘particular social group’ was added to the Convention with little debate as to the protected grounds.

While there were a few cases that recognised sexual orientation claims based on political or religious grounds, in the early 1990s decision-makers starting to accept claims based on particular social group status. Many accounts of sexual orientation-based claims begin with the 1993 Canadian decision of Canada v. Ward. While the claim dealt specifically with a former member of the Irish National Liberation Army, Justice La Forest established in obiter that ‘sexual orientation [as] an immutable personal characteristic’ satisfied the definition of particular social group. La Forest detailed three possible categories that would be encompassed by particular social group:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members involuntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;
3. groups associated by a former voluntary status, unalterable due to historical permanence.

Speaking to these groups in the decision, Justice La Forest explained:

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation,
while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one’s past is an immutable part of the person.\textsuperscript{22}

This acceptance of sexual orientation has been incorporated, to varying degrees, in many jurisdictions where same-sex acts are not criminalised and that receive applications for asylum. For example, in the United Kingdom sexual orientation was accepted, again \textit{in obiter}, as grounds for particular social group status in the case of \textit{Islam (A.P.) v Secretary of State for the Home Department}, a case that considered whether Pakistani women constituted a particular social group.\textsuperscript{23} In their decision, the court found that ‘homosexuality’ was legitimate grounds for asylum and that sexual orientation was a ‘common immutable characteristic’ that could be the basis of a claim.\textsuperscript{24}

Meanwhile, Australian courts initially developed a ‘social perception’ approach in the 1992 case of \textit{Morato v Minister for Immigration, Local Government and Ethnic Affairs}.\textsuperscript{25} The court found that for a person to be part of a particular social group they need to be ‘identified with a recognisable or cognisable group within a society that shares some interest or experience in common’.\textsuperscript{26} In a later, more frequently cited case in the Australian High Court, Justice McHugh explained further that ‘if the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group that distinguish them from society as a whole, they will qualify for refugee status’.\textsuperscript{27} In 2002, the UNHCR published its \textit{Guidelines on Membership of a Particular Social Group} which sought to provide ‘interpretive guidance for

\textsuperscript{22} La Forest J, ibid.
\textsuperscript{23} \textit{Islam (A.P.) v Secretary of State for the Home Department; R V Immigration Appeal Tribunal and Another, Ex Part Shah (A.P.)} [1999]; McGhee, “Persecution and social group status”, 22.
\textsuperscript{24} McGhee, “Persecution and social group status,” 22; \textit{Islam (A.P.) v Secretary of State for the Home Department; R V Immigration Appeal Tribunal and Another, Ex Part Shah (A.P.)} [1999].
\textsuperscript{25} \textit{Morato v Minister for Immigration, Local Government and Ethnic Affairs} [1992] 106 ALR 367, 432.
\textsuperscript{26} Ibid.
\textsuperscript{27} \textit{Applicant A v MIEA} [1997] 142 ALR 331, 360.
governments, legal practitioners and decision-makers, including the judiciary’. 28 In recognition of the two major approaches to interpreting membership of a particular social group, the Guidelines define a particular social group as

... a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.29

Many refugee-accepting countries have seen great gains in terms of the acceptance of sexual orientation-based claims. However, there have also been persistent issues associated with determining the limitations on appropriate lines of questioning and exactly how best to decide the credibility of such claims. Sexual orientation-based asylum cases demonstrate the difficulties in developing norms related to identity, the implementation and institutionalisation of such norms at all levels, and their utility for those seeking to gain asylum on the grounds of sexual orientation.

Research problem and questions
This thesis is an interdisciplinary project that seeks to understand domestic influences on norm implementation in sexual orientation-based refugee law. The project began with the perceived human rights violations of sexual orientation-based refugee applicants in Australia, and the subsequent question: why? What was it about the Australian jurisdiction that allowed for approaches within the law and policy that had been disallowed in comparable jurisdictions? To answer these questions, this thesis draws comparison between the United Kingdom and Australia. While assessing norm implementation, this thesis analyses the content of the norms and the ways in

28 UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 2 “Membership of a Particular Social group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02, para.1.
29 Ibid, para.11.
which they construct queer experiences of persecution and work to circumscribe rights and protections. This engagement with queer literature and methodology provides a critical analysis of refugee law and policy in the case-study jurisdictions. It also seeks to inform a reflexive criticism of the role of constructivist theorising, the development and implementation of ‘best practice’ guidance, and research that seeks to queer refugee law.

There are two normative goals underpinning this research that ought to be stated outright. First, it is argued that asylum applicants, activists and refugee professionals can benefit from understanding domestic influences on norm implementation in refugee law. If clear sites of influence can be identified, they can also be understood as sites of change. This is reflected by Alexander Betts who argues that ‘if the processes that shape implementation can be understood, then they can be influenced’. Second, as a consciously queer approach to research, it is also a goal of this thesis to further develop the academic discussion on how refugee law and policy can better protect queer persons seeking asylum without unnecessarily demanding, enforcing, or reproducing exclusionary normativities. This thesis, therefore, focuses on the topic of procedural norm implementation in sexual orientation-based refugee law. The choice of topic was primarily informed by perceived inconsistencies in the treatment and status determination processes of sexual orientation-based asylum claims in Australia. While existing accounts of Australian sexual orientation refugee law are largely located in legal scholarship, it is apparent that a broader and more interdisciplinary approach is necessary to understand Australia’s variance from international guidance and practices in comparable jurisdictions.

In early constructivist scholarship, the institutionalisation of a given norm was generally understood to result in the process of ‘norm diffusion,’ where states’ acceptance or endorsement of a norm at the international level was expected.

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to ‘trickle down’ to the state level. This assumption limited constructivist analysis to the international level, and to a lesser extent regional levels. However, Australian refugee law appears to deviate from international norms relating to best practice for determining sexual orientation-based refugee status, calling into question the diffusion of norms as the literature might suggest. Through an exploration of domestic influences on sexual orientation refugee norm implementation we can begin to understand the characteristics particular to Australia that have influenced the way sexual orientation refugee norms have, or have not, been embedded in Australian refugee law.

Therefore, this thesis asks the following questions:

What characteristics of a domestic legal system might explain its success in implementing, or failure to implement, international norms relating to sexual orientation-based refugee claims?

How does a queer critical approach to constructivist international relations theory help us to better theorise norm development and implementation for queer people seeking asylum?

These questions centre on four core issues. First, several authors have identified previous variance between Australia and comparable jurisdictions in their adjudication of sexual orientation-based claims. Second, as Australian refugee law and policy appear to be at odds with international guidance and

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jurisprudence, it seems that this case is evidence of what Betts and Orchard call the ‘normative institutionalisation-implementation gap’. This ‘gap’ refers to the theoretical question as to why states with similar levels of institutionalisation, and subsequently prior implementation, demonstrate significant variation in the content and character of norms.\(^{33}\) Third, it is clear that while certain types of claims are increasingly finding success, normativities about sexuality and gender are being entrenched in the process, potentially leading to the further marginalisation of queer asylum seekers. And fourth, existing theorising about norm implementation does not contend with the impact that stereotypes about sexuality, gender, and sex influence the outcomes of the implemented norms for people affected.

**Research approach**

This thesis contributes to the emerging body of queer international relations scholarship. It considers when and how queer people are afforded human rights looking particularly at refugee status determinations. In doing so, the thesis critically analyses constructivist international relations theorising on norm implementation in different domestic contexts. Through queering constructivist international relations theories and methodologies, this thesis demonstrates that queer approaches can benefit our understanding of human rights norms, domestic structures, and their influence on the way international norms are implemented. Furthermore, this approach reveals the complications in developing and attempting to implement identity-based human rights norms that ultimately may further marginalise the very (queer) people they seek to protect.

*Focussing on procedural norms*

While sexual orientation as grounds for asylum has been almost universally accepted as a norm in non-criminalising countries, there remains much variability in the way applicants are assessed. Around the world there are adjudication practices that arguably constitute human rights violations but are often difficult to appeal or challenge including the use of stereotyped and/or

\(^{33}\) Betts and Orchard, “Introduction”, 2.
sexually explicit questioning and requesting or reviewing sexually explicit evidence. The lack of attention to procedural rights promotes the idea that a person does not have inherent rights until they have refugee status or citizenship, an attitude that allows governments to shirk the responsibility to protect the rights of people seeking asylum and undergoing the refugee status determination process. By seeking to analyse the extent to which certain procedural norms have been implemented, we can better understand how queer people are regulated through the refugee status determination process and the extent to which their rights are respected in the process.

Whereas the right to asylum is regarded a substantive right, the requirement to be treated with dignity and fairness throughout the process of seeking asylum is considered a procedural right. While substantive laws are ‘the part of the law that creates, defines, and regulates the rights, duties and powers of parties’, procedural laws encompass ‘the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves’. Where a state has signed and ratified the 1951 Refugee Convention, the obligations set forth in the treaty are considered binding. In order for these to become binding in practice, they must be ratified and incorporated in a given state through the introduction of legislation. The UNHCR has the ongoing responsibility to supervise the Convention and therefore produces a number of documents, including guidelines, which themselves are not binding but are regarded as ‘soft law’. Legal scholars Andrew Guzman and Timothy Meyer define ‘soft law’ as ‘those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct’.

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In this thesis, the norms that are considered are listed in the ‘Procedural Issues’ section of the UNCHR’s 2012 ‘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’. The table below provides an overview of a selection of the norms analysed in this thesis:

<table>
<thead>
<tr>
<th>Para.</th>
<th>Procedural Issue (norm)</th>
</tr>
</thead>
<tbody>
<tr>
<td>59.</td>
<td>‘…Adverse judgments should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of “safe country or origin” concepts.’</td>
</tr>
<tr>
<td>60 ii.</td>
<td>‘Interviewers and decision-makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity. There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.’</td>
</tr>
</tbody>
</table>


| 60 iv. | ‘Specialized training on the particular aspects of LGBTI refugee claims for decision-makers, interviewers, interpreters, advocates and legal representatives is crucial.’ |
| 60 v. | ‘The use of vocabulary that is non-offensive and shows positive disposition towards diversity of sexual orientation and gender identity, particularly in the applicant’s own language, is essential. Use of inappropriate terminology can hinder applicants from presenting the actual nature of their fear. The use of offensive terms may be part of the persecution, for example, in acts of bullying or harassment. Even seemingly neutral or scientific terms can have the same effect as pejorative terms. For instance, although widely used, “homosexual” is also considered a derogatory term in some countries.’ |
| 60 vii. | ‘…Respect for the human dignity of the asylum-seeker should be a guiding principle at all times.’ |
| 62. | ‘Ascertaining the applicant’s LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant’s sexual orientation or gender identity, rather than a focus on sexual practices.’ |
| 64. | ‘…Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts. It would also be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation.’ |

This thesis does not deal with every measure listed in the ‘Procedural Issues’ section of the 2012 Guidelines. This would be unwieldy and would not allow adequate space for theoretical discussions. The selected issues demonstrate some of the key best practices that have developed and the attempts to implement them. There is a focus on tangible measures, such as the use of
fast-tracking, or the implementation of specialised training, which can be more easily identified when compared to, for example, identifying ‘an open and reassuring environment’. Likewise, some of the procedural issues are considered and analysed together, particularly when assessing ideational domestic influences and its impact on the ‘use of vocabulary that is non-offensive’ and the use of ‘non-judgmental’ lines of questioning in credibility assessment.

**Constructivist approach to norm implementation**

In the 1990s, research on norms began to rise in prominence in international relations scholarship. Authors contested the sanctity of the ‘state’ as the central actor of the international system, and instead argued that the ‘state’ was socially constructed. Furthermore, it was argued that rather than ‘instrumental rationality’ driving an international actor’s behaviour, normative assumptions in fact compelled actors to behave in certain ways as well as simultaneously constituting their ‘social identities’ in the international ‘arena’. There has been a series of major shifts in constructivist scholarship. Early scholarship, for example, generally focused its analysis at the international level where norms were typically understood as means of mediation between states. In this era, norms referred to the ‘fundamental values, organizing principles or standardized procedures’ which were considered to be whole at the point they had ‘gained support in multiple forums including official policies, laws, treaties or arrangements’.

Martha Finnemore and Kathryn Sikkink’s widely cited 1998 work *International*  

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40 UNHCR, ‘Guidelines No. 9’.  
41 Ibid.  
Norm Dynamics and Political Change typifies early constructivist scholarship.\(^\text{45}\) Finnetmore and Sikkink theorised that there existed a ‘norm life cycle’ where the ‘patterned evolution’ of norms underwent distinct stages, including: emergence, acceptance by a ‘critical mass of states,’ and subsequent institutionalisation where the acceptance of the norm in question had achieved ‘taken-for-granted’ status amongst the majority of states.\(^\text{46}\) Criticisms of this early work included complaints that the model failed to take into consideration the role of the ‘socializee’;\(^\text{47}\) that despite being useful to ‘operationalize global norm diffusion’ it failed to take domestic influences on ‘norm creation and appropriation’ into account;\(^\text{48}\) and that the model rested on a linear approach of norm development and change that oversimplified large, complex, and messy processes.\(^\text{49}\)

Subsequent norm scholarship, typified by scholars such as Thomas Risse-Kappen and Amitav Acharya, contended that ‘ideas do not float freely’.\(^\text{50}\) It was argued that the dominant early scholarship depicted norms and their content as ‘relatively static’ where norms, whose boundaries were conceived of as largely fixed, were simply ‘taught, advocated, and internalised’.\(^\text{51}\) However, Risse-Kappen argued that the existing approaches to norm theory failed to explore and explain the conditions that contributed to the success of some norms ‘while others [fell] by the wayside’.\(^\text{52}\) Antje Wiener has also explored the role that culture and ideas have in the constitution of international norms at the


\(^{48}\) Betts and Orchard, *Implementation in World Politics*.


\(^{51}\) Krook and True, “Rethinking the Life Cycles of International Norms,” 104.

\(^{52}\) Risse-Kappen, “Ideas Do Not Float Freely,” 186.
domestic level. For Wiener, norms are not simply ‘grafted’ onto existing local norms and practices, but rather they operate through ‘meaning-in-use’, meaning that an international norm can become a vastly different thing when combined with local historical and cultural contexts. Furthermore, Amitav Acharya has explored how norms can be adapted when they reach the regional level, developing the notion of ‘norm localisation’. Despite developing the concept of ‘norm localisation,’ however, Betts and Orchard contend that the focus of Acharya’s work (as with much ‘second wave’ scholarship), was on the regional level and did not ‘drill down’ to the local level.

Betts and Orchard have argued, therefore, that the institutionalisation of international norms ‘ultimately only have significance insofar as they translate into practice’. Maintaining a focus on international institutionalisation without seeking to understand the implementation of norms, they argue, risks ‘failing to explain how norms actually affect people’s lives’. Subsequently, they provide an account of ‘implementation’s causal factors’ in order to address the ‘normative institutionalisation-implementation gap’ present in the existing constructivist literature. Expanding on the work of authors such as Acharya and Wiener, who have focused on cultural influences, Betts and Orchard describe causal factors at the domestic level that include ideational, material and institutional structures. Implementation, they argue, is a ‘distinct phase of normative contestation’ that ‘may be triggered prior to, during, or following clear markers of institutionalisation’. The premise is that through the separation of norm institutionalisation and implementation processes, we are able to better

54 Wiener, “Enacting Meaning-in-Use.”
55 Acharya, “How Ideas Spread”.
57 Ibid, 21.
58 Ibid, 38.
account for variation at the domestic level. In contrast to dominant accounts, norms here are not understood to be rules or commitments enshrined by institutional guidelines or treaties, but rather as concepts that inherently evolve over time through their interaction with external environments and other competing norms. While institutionalisation is often considered to be the ‘end point’, implementation is understood to be a continuing and never complete process that opens up space for contestation, rejection, and alteration of a given norm. The first domestic structures identified by Betts and Orchard are ideational, suggesting that norms can be both constituted and constrained by domestic cultural and political contexts. Betts and Orchard’s description resembles that of Acharya’s notion of ‘norm localisation’. According to Archarya, norm localisation at the regional level involves a ‘complex process and outcome by which norm-takers build congruence between transnational norms and local beliefs and practices’. The introduction of a norm and its contestation at the domestic level will necessarily occur within pre-existing cultural structures. The norm is consequently altered and gains new meaning through its use in the domestic context. Wiener also argues that successful norm implementation must be accommodated by ‘cultural validation’ within the required structures, or by the necessary actors.

Legal scholar Beth Simmons has argued that domestic legal frameworks are the most significant variable in determining how human rights norms are implemented within domestic jurisdictions. Legal systems, and their actors,

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62 Krook and True, “Rethinking the Life Cycles of International Norms”.
64 Ibid.
66 Ibid.
68 Ibid.
69 Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics
can serve as both a constraining or constitutive structure in the implementation and legitimation of international norms.  

For example, Andrew Cortell and James Davis have explored the way different international norms gain legitimacy in some states while not in others. They explain that this variation may be the result of norms binding and morphing with pre-existing legal and normative frameworks. Furthermore, these introduced norms interact and affect existing jurisprudence and policy, influencing the way in which they can come to affect the law in practice.

However, as Martha Finnemore and Stephen Toope have argued, while the law is often described as having a constraining effect on norm implementation, ‘law working in the world’ can also have significant ‘creative generative powers’. A clear example of this is the role of what Simmons describes as ‘causal lawyering’. Causal lawyering is the process through which legal challenges are ‘directed at altering some aspect of the social, economic, and political status quo’. This role is often a creative one, typically playing a constitutive role in the development of a new norm or the alteration of an existing norm within the law. Norm entrepreneurs may spark a new idea altogether, or they may reinterpret existing ideas, calling attention to the issue through naming and dramatising the issue. They can be found in all areas of society, for example, within the administration of a state, in civil society through non-government organisations, or as actors within the legal system.

The second domestic structure identified by Betts and Orchard is material. When assessing the implementation of a norm at the domestic level it is imperative to acknowledge that ‘norms and interests are not distinct from one

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70 Betts and Orchard, “Introduction,” 15.
72 Ibid.
74 Simmons, Mobilizing for Human Rights, 4.
75 Ibid. 13.
76 Ibid, 13.
another’. Rather, as a growing number of scholars have pointed out, the material interests and capacity of relevant domestic actors both shape and alter norms throughout the implementation phase. Stephen Krasner has argued just this in his book on ‘organized hypocrisy’, where he demonstrates that when norms are ambiguous and imprecise they are more likely to be adopted and adapted to meet the interests of a given actor, institution, or state. Again, Krasner’s analysis is at the international level. However, Betts and Orchard argue that the same power relations evident between actors at the international level also exist at the domestic level and, through a process of ‘interest-based normative contestation’, exert the power to influence the way in which ambiguous norms are construed to align with their prior interests. Material interests, however, do not only play a constitutive role in norm implementation. As VanDeveer and Dalbelko argue, ‘it’s about capacity stupid’. Capacity, they argue, is contingent on a wide variety of ‘contextual factors associated with the public sector functions under examination’. Unless a state has the material or institutional capacity to implement a norm, or align its practice and policies with a given norm, it is necessarily going to fail in its efforts to do so.

The third domestic structure Betts and Orchard identify is institutional, highlighting the fact that the history of, and politics within, given institutions at the domestic level will inevitably affect norm implementation and content. For example, the way in which a government divides its ministries and their responsibilities, and the way in which resources and competencies are divided between these, will have an effect on how a norm is implemented. For example, in his work on the European Union (EU), Jeffrey Checkel has

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79 Ibid, 15.
80 See for example, L Jones, ASEAN, Sovereignty and Intervention in Southeast Asia (Basingstoke: Palgrave Macmillan, 2012); Sarah Percy, Mercenaries: The History of a Norm in International Relations (Oxford: Oxford University Press, 2007).
82 Betts and Orchard, “Introduction,” 16.
84 Ibid, 25.
85 Betts and Orchard, “Introduction,” 17.
86 Ibid.
demonstrated the way in which norm institutionalisation and dissemination amongst EU states can be explained by individual bureaucratic, organisational, and institutional structures and identities between them. Moreover, Michael Schroeder and Alana Tiemessen have argued that legal norms need to be supported by receptive state agencies, for example the judiciary, in order to be implemented. This is particularly true when a norm must overcome opposition from other agencies, legislators, or the ruling political party. Furthermore, as Betts and Orchard argue, while it may be diplomats or elected politicians who make the initial decision to institutionalise a norm, the actual implementation will likely be left up to civil servants and bureaucratic processes that operate in quite distinct ways.

Often, contestation between different domestic institutions and actors will affect the way in which a norm is implemented. Some institutions, for example, may present themselves as ‘policy gatekeepers or veto players’ if they have ‘sufficient power to block or at least delay policy change’. Scholars such as Risse-Kappen and Cortell and Davis have demonstrated the way in which certain domestic institutional arrangements between agencies and actors can result in the formation of ‘winning coalitions’ of actors and institutions to allow for the successful implementation of a given norm. These coalitions may, for example, assist with when and how a norm enters domestic discourse and the ways in which the norm is ‘channelled’ through other institutions and policies.

89 Ibid.
90 Betts and Orchard, “Introduction,” 17.
94 Risse-Kappen, “Ideas Do Not Float Freely.”
95 Cortell and Davis Jr, “Understanding the Domestic Impact of International Norms”.
96 Ibid.
Furthermore, the institutional political culture of a given administration or institution will often influence the extent to which they are open ‘to lobbying by domestic interest groups and international actors’ on a given norm’s implementation.\(^97\)

**Queering the existing approaches**

If constructivist theorising about norm implementation, especially human rights norm implementation, is to have meaning for all people, then the approaches and norms considered need to be queered. Can a norm really be considered a success if it promotes certain constructions of sexuality and gender that exclude or further marginalise queer asylum seekers and refugees? This is especially the case when considering human rights norms that have been developed and are attached to constructions of identity that are simplistic, couched in heteronormative and largely ‘Western’ histories, and operate in highly formalised legal institutions. Domestic material, institutional, ideational structures are not neutral, but embody these histories.

**Thesis outline**

Chapter one argues that constructivist international relations theorising on norm implementation has much to gain from queering its approach -- not merely through the act of taking queer people and their human rights as valid subjects within international relations, but also by taking seriously the potential that queering our theorising has real-world impact on the people these norms seek to assist. The chapter introduces emergent queer international relations scholarship, highlighting the paradoxes that emerge in any attempt to fit anti-normative experiences and modes of being into processes that demand normative understandings of identity and rights. Refugee law is a useful example for exploring these concepts. It is argued that refugee status adjudication is often a process of seeking to attain and regulate the identities of applicants. Furthermore, especially in the case of global north receiving

countries, these norms are overly reliant on restrictive Western tropes that are imposed on applicants.

The chapter argues that there is much to be gained through the queering of constructivist international relations theory. At the core of both constructivism and queer theory are issues of norms and identity. Drawing on constructivist scholar Felix Berenskoetter and queer scholar Donna Haraway, among others, I argue that queer critical approaches to international relations can answer the question of why anxiety controlling mechanisms such as refugee status determinations are relied on to create and regulate identities. Ultimately, I argue that theorists need to consider how they contribute to norm narratives, how they might misrepresent and misinterpret queerness, and how constructivist scholarship can be seen to have been doing a disservice to queer people and the queer possibilities of international relations theory.

Chapter two outlines the methodological framework and research approach of this thesis. It describes a queer interdisciplinary approach that seeks to push the existing disciplinary boundaries prevalent in mainstream international relations scholarship. This thesis draws on many disciplines including constructivist and queer approaches to international relations and refugee law. The thesis takes an expansive approach to queering international relations, leaning on the work of scholars such as Cynthia Weber, Cai Wilkinson, Anthony Langlois and Jasbir Puar. It approaches the topic reflexively, asking how researchers can theorise ‘tenuous and fleeting subjects’ that are ultimately ‘fluid, unstable, and perpetually becoming’.

In this chapter I seek to emulate Wilkinson in using ‘queer as a verb’ where ‘queer regains its agency, moving from a noun to a powerful verb: to queer something is to denormalise it and destabilise its presumed naturalness’. The chapter then provides an introduction to measuring the implementation of

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norms, setting up the basis from which the thesis critiques the ability to measure the ‘success’ of norms that seek to apply to queer people. The methodology and justification for conducting interviews of eighteen participants, twelve in the United Kingdom and six in Australia, is provided, along with rationale for choosing these as comparative case studies. The chapter also reveals some of the procedural and ethical issues faced during the research, not least of which being the major theoretical shift from a mainstream constructivist international relations project to a queer one. This shift undoubtedly had an effect on the design, interviews, and outcomes of the project. Lastly, I provide some critical reflexive appraisal of my own position as a queer scholar working on refugee law, highlighting the need to incorporate the role of researchers and their theorising in the stabilisation and maintenance of exclusionary constructions of identity and norms.

Chapter three analyses the role that legal systems play in the implementation of procedural norms in sexual orientation-based refugee status determinations. This is spurred by one of the most obvious institutional differences between the United Kingdom and Australia, namely the existence of a regional human rights convention and courts in Europe that apply to Britain, and the lack of equivalent regional institutions pertinent to Australia. While both states are party to the International Covenant on Civil and Political Rights (ICCPR) and subsequently the UN Human Rights Committee, the focus is on the role of regional rather than international courts. The differing factor between the UK and Australia in this regard. In order to queer understandings of legal institutions, however, the chapter first analyses the heteronormative history of international human rights law. It looks at the way a particular ontological construction of primarily male-based accounts of ‘homosexuality’ was developed in European courts from the mid-1950s and argues that understanding this history is imperative for constructivist international relations scholarship. Legal institutions can never be thought of as neutral, particularly when considering human rights norms relating to sexuality and queerness. Rather, such institutions have been

primary sites for the regulation of sexualities and identities. Any subsequent norm, therefore, must be mapped onto these pre-existing legal histories.

The chapter then turns to the role that the administrative and legal system in Australia plays in the implementation of procedural norms in sexual orientation-based refugee status determinations. Many of the same issues that appear in sexuality-based rights in international law also persist in Australian law. At the same time, it is argued that the Australian resistance to engage with international human rights instruments in decision-making has had a negative influence on the implementation of procedural norms. Given this conclusion, the chapter then asks whether the European courts played a significant influential role in the UK. It is concluded, however, that such influence is limited, and instead the analysis reveals two factors that have supported the implementation of procedural norms in the UK. First, the existence of guidance and training on sexual orientation, gender identity, and intersex status, and second, a robust civil society pushing for the rights of queer refugees and transparency in the practices of the Home Office. This conclusion leads to the arguments made in the second half of the thesis.

Chapter four considers whether the existence of guidelines and training has a positive influence on the implementation of other procedural norms in the UK. It is almost taken for granted that the existence of these programs is beneficial to improving sexual orientation-based refugee status determinations. It is argued, however, that working with norms for queer people necessitates a critical evaluation of the norms that are perpetuated in such guidelines and training. In order to explore this, the chapter considers the ‘Difference-Stigma-Shame-Harm’ Model (DSSH Model), an LGBTI credibility assessment model for asylum claims, and questions whether it perpetuates exclusionary norms relating to sexual identity. The DSSH Model has been developed to address serious issues in sexuality-based refugee claims, pushing for a shift to identity-based narratives. Such issues as a reliance on stereotypes and sexually explicit questions and evidence. On the one hand, this can be considered a positive sign concerning the implementation of the procedural norms in the UK. On the other hand, however, in attempting to do so, it is clear that this shift to
a reliance on ‘identity’ in queer asylum claims perpetuates exclusionary tropes about sexuality that may actually limit queer claims. The chapter then analyses this reliance of identity in constructivist international relations through a queer lens, concluding that constructivist scholars need to queer their understanding of identity as it operates in international relations, human rights law, and in relation to queer asylum claims.

Chapter five looks at the existence of a robust civil society advocating for queer refugees as a key indicator that influenced procedural norm implementation in the UK. First, the chapter considers the role that civil society plays in norm development, implementation, and contestation. As actors who typically operate from a minority position, civil society plays an important role in promoting transparency and the rights of refugees in the face of a far more resourceful immigration department. The chapter provides an overview of the ‘hostile environment’ created for asylum applicants in the UK and Australia and argues that both countries exhibit characteristics of ‘exclusionary convergence’ in their immigration policies. The chapter analyses accelerated processing policies in the UK and Australia and demonstrates the pressures placed on civil society and applicants. Yet despite these ‘hostile environments’ for norm entrepreneurship, it is argued that in both cases civil society has been able to successfully influence norm implementation. Both the UK and Australia have developed and implemented guidelines and training based on sexual orientation, gender identity, and intersex status after civil society and experts or academics encouraged or demanded them to do so.

The last chapter provides the conclusions of this thesis. The first key conclusion of this thesis is that it was not the legal systems, but rather civil society organisation that had the greatest influence on procedural norm implementation in sexual orientation-based claims. Through the development of guidelines and training civil society organisations have been able to influence policy, practice, and the law – even in the hostile political environments of Australia and the UK. Furthermore, as bureaucratic institutions tend to rely on academic and experts, it is concluded that an undertheorised element in constructivist international relations is the role of academics and experts in
norm implementation. In fact, the success of experts and academics in influencing policy and practice in relation to queer refugee claims is evidence of the way in which theory can influence practice. It is an important part of the process of normative evolution and change. However, with regard to such norm entrepreneurship, such as the DSSH model, it is concluded inevitable that any project that seeks to contest existing human rights norms through promoting identities is inherently going to be a project of supplanting one exclusionary norm with another. Therefore, the designing of any credibility assessment guidelines need to take this reality into consideration and consider alternative, queerer approaches.

The last chapter of this thesis also details the overall practical and theoretical conclusions and suggests future research based on these outcomes. The major practical conclusion of this thesis is that civil society engagement in each domestic jurisdiction appeared to be the most affective influence rather than the existence of regional human rights mechanisms or courts. It was evident both in the UK and Australia, despite the hostile conditions in which actors had to operate, there were successful interventions that encouraged and produced the implementation of LGBTI-specific guidelines and training. This was even the case in Australia, where civil society was lacking compared to the UK, ultimately demonstrating that even in the harshest policy and political environments, civil society can make an impact in procedural norm implementation in queer refugee claims.

A subsequent finding was that there is an under theorisation of the role of experts and academics in norm implementation in constructivist international relations scholarship relating to refugee policy and practice. In reality, the work of experts and academics internationally, as well as in Australia and the UK has had a significant impact. This is clear with the work of Chelvan, Millbank and LaViolette, whose scholarship and advocacy on LGBTI asylum claims has been drawn upon directly by governments and the UN to improve decision-making processes and outcomes. However, this thesis has also argued the importance of queering norm entrepreneurship and examining normativities and stereotypes developed by such successful influences and outcomes of
norm implementation. For example, while the DSSH model was successfully taken up by many jurisdictions and the UNHCR, the model itself risks perpetuating stereotypes and normativities that replace existing ones.

The major theoretical conclusion of this thesis is that there is much to be gained from queering constructivist international relations theory. While at first thought to be antithetical, in fact both approaches to international relations grapple concepts of identity and norms. Given that human rights norms relating to queer people have emerged in many contexts, it is concluded that constructivist theorising could be furthered by engaging with the way queer theorists seek to destabilise notions of figurations, identities or norms around sexuality and gender. This ought to include the recognition that legal institutions are not neutral but instead have been mechanisms through which sexuality-based rights have developed based on unique and limited constructions of identity which impact successive norms and rights in the modern day. Legal systems regulate and restrict particular ‘images’ of persons and groups that are unique to a context and time and which are never truly capture reality. In understanding this, constructivist theorists need to incorporate the lack of certainty and fixedness of identities in human rights norm development and implementation to better understand their success or failure, and importantly, the affect they have on the intended human rights-bearer. This is demonstrated by analysing the claims of queer women as a first-step to engaging how static norms have been imbedded in LGBTI trainings, guidelines, and decisions. The fundamental problem that arises from attempts to fit unfixed genders, sexualities, and identities into the law and into our theorising requires more exploration.

Furthermore, it is concluded that existing scholarship on incorporating queer logics of identity and being into international relations theory needs to be extended. In her work on queering international relations, Cynthia Weber argues for the use of the ‘and/or’ in relation to identity.101 Dispelling notions of an individual, state, or actor being either one thing or another, Weber argues

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that this binary can be busted through recognising and theorising the possibility of multiplicities in figures in international relations. However, as with many approaches to asserting rights for LGBTI and queer persons, such an approach is reliant on a positivist approach to identity. This thesis concludes in light of analysis of the DSSH model as an example that there is a need to expand this logic to the ‘and/or/not’. Theorising about and development of human rights norms need to account for those who refuse or resist definition. A queerer approach to international relations exists in allowing for those who do not adhere to normativities, whether heteronormativities or homonormativities, to access their fundamental rights but also operate as actors within international relations.
Chapter Two
Queering international relations: The paradox of human rights norms

Introduction
If we are going to care about human rights, and if international relations theorising is to encompass the realities of all people, then we must take seriously queer critiques of the construction of gender, sexuality, bodily autonomy, relations between states, and between states and their citizens. Beyond the normativities embedded in ideals of the human rights holder, people exist in ways that disrupt binary, static, and immutable expectations. And yet, states demand and regulate people to be knowable in order to create sense and order. One concrete example of such processes is the administration of refugee claims. It is a complicated process in which states interpret and apply some of the most established international human rights norms relating to asylum, all the while laws and norms relating to who counts as a refugee are evolving and shifting. Processing asylum claims is often one of the largest administrative tasks a state will have, and the consequences for the individuals involved are dire, often a literal life or death decision.

While for a long time it was not recognised as such, scholarship on global sexuality and queer issues has been consistently touching on international relations interests. One such example is the scholarship on queer human rights. Queer scholars seek to highlight the paradoxes that emerge in any attempt to fit anti-normative experiences and modes of being into processes that demand normative understandings of identity and rights. In order to demonstrate this, the manner in which sexual orientation has been recognised in refugee law will be discussed. It is argued that the entire process of adjudicating asylum claims often demands that a person create and maintain an identity that is knowable and understandable. Furthermore, that this is a process that limits queerness and imposes largely Western stereotypes about sexuality and gender on the applicant. This chapter subsequently argues that through the queering of constructivist international relations we can theorise better the role of identity in human rights norm scholarship and the way queer theorising about the fluidity and multiplicity of identity is essential to
understanding norms, especially human rights norms. Furthermore, if figurations of sexual identity are accepted as never static or complete, then it follows that neither are the institutions that regulate and reproduce norms, rights and laws relating to them.

**Queering international relations**

In 2015, Cynthia Weber asked ‘Why is there no Queer International Relations theory?’ While there is already a well-established body of Global Queer Studies (GQS) scholarship that attempts to queer ‘contemporary global incidents’ such as terrorism, neoliberalism, and war; queer international relations as a legitimate and accepted sub-discipline had so far failed to cement itself. As far back as 1994, queer scholar Lisa Duggan argued that ‘the time has come to think about queering the state’. This broad and disparate body of GQS scholarship, argues Weber, generates unique and significant analysis on the global phenomena of ‘race, on the problems of transnationalism, on conflicts between global capital and labour, on issues of diaspora and immigration and on questions of citizenship, national belonging, and necropolitics’. In fact, according to Weber, given that queer scholarship on the three conventional core research areas of international relations already existed: war and peace, state and nation formation, and the international political economy; so too did queer international relations scholarship. It had just failed to be recognised as such.

Weber argues that this is because queer scholars typically ignored issues of sovereignty, while international relations scholars tended to under-theorise sexuality and gender. In the ground-breaking book *Queer International... or not?*
Relations Weber seeks to bring international relations and queer theory into conversation with each other. Weber describes the way in which ‘crafting... sovereign and sexualised figures’ are both types of ‘domestic and international games of power’, engaging with the ‘traditional logic of “modern statecraft as modern mancraft”’.\footnote{Ibid. See: Richard Ashley, Living on Border Lines: Man poststructuralism, and war (Massachusetts, US: Lexington Books, 1989), 303.} In large part due to Weber’s sustained provocation, a new body of scholarship emerged that seeks to examine the generative potential of queering international relations theory. Indeed, proof of queer approaches to international relations scholarship emerging into the mainstream is the 2017 inclusion of Melanie Richter-Montpetit and Weber’s co-authored \textit{Oxford Research Encyclopaedia} handbook entry on ‘Queer International Relations’\footnote{Cynthia Weber, Faking It: U.S. Hegemony in A ‘Post-Phallic’ Era (Minneapolis: University of Minnesota Press, 1999).}.

There is a wide variety of scholarship that demonstrates a pre-existing queer interest in the international or, rather, an international interest in the queer. Scholarship, for example, had already begun to look at the way ‘failing hegemonic states perform queerness through their conduct of interventions and wars to solidify their hegemonic status’.\footnote{Ibid.} Authors, such as Jasbir Puar, have described how states position themselves and their citizens as queer-friendly, or pro-LGBTI global subjects, in a project that creates a new category of ‘other state’, ‘civilizations’, or populations as national and global threats.\footnote{Jasbir Puar, “Sexuality and Space: Queering Geographies of Globalization”, \textit{Environment and Planning D: Society and Space} 21 (2003): 383-387.} A growing number of scholars have also begun to look at the way in which concepts of queer/ness are ‘mobilized to designate some state practices as progressive and others as non-progressive as a mechanism to divide the world into orderly vs disorderly (anarchic) spaces’.\footnote{Weber, “Why is there no Queer”. See also: Puar, “Sexuality and Space”; Anna M. Agathangelou, “Neoliberal Geopolitical Order and Value: Queerness as a Speculative Economy and Anti-Blackness as Terror,” \textit{International Feminist Journal of Politics} 15, no. 4 (2013): 453-476; Rahul Rao, “The State of ‘Queer IR’”, \textit{GLQ: A Journal of Lesbian and Gay Studies} 24, no. 1 (2018): 139-149.}
In 2012, Sarah Schulman wrote an influential *New York Times* opinion piece entitled ‘Israel and “Pinkwashing”’.¹¹³ In this article Schulman describes the ‘pinkwashing’ of Israel as ‘a nefarious phenomenon: the co-opting of white gay people by anti-immigration and anti-Muslim political forces in Western Europe and Israel’.¹¹⁴ In the context of the Israeli occupation of Palestine, pinkwashing refers to the ‘deliberate strategy to conceal the continuing violations of Palestinians’ human rights behind an image of modernity signified by Israeli gay life’.¹¹⁵ Schulman argued that the Israeli government and its supporters systematically promote Israel as a ‘pro-LGBTI’, modern, and democratic state in contrast to other Middle-Eastern countries to distract from Israeli persecution of Palestinians. The term pinkwashing was originally used to describe the marketing strategies of companies who promoted breast cancer charities while continuing to manufacture products that were linked to disease. For some companies it represented the ‘commodification’ of breast cancer awareness to increase sales, and for others it had the effect of distracting from the harm their products caused.¹¹⁶

In international relations however, pinkwashing is typically used in relation to LGBTI rights, and discussions often start with Palestine and Israel. Schulman points to the support of anti-immigration politicians in the Netherlands, Norway, and the US by ‘gay voters’, or those who support LGBTI rights, citing Islam and Muslim immigration as ‘enemies of gay people’.¹¹⁷ The movement is based on the mobilisation of queerness or LGBTI identity to defend a rejection of Muslim immigration, despite as Schulman points out, Islam obviously not being the only religion to reject queer people. The publication of this article coincided with Schulman’s book, published the same year, *Israel/Palestine and the Queer International*.¹¹⁸ Drawing upon her own intimate experience of being queer and part of the Jewish diaspora, *Israel/Palestine* is part of a global discussion of

¹¹⁴ Ibid.
¹¹⁵ Ibid.
¹¹⁷ Schulman, “Israel and Pinkwashing”.
solidarity amongst oppressed populations, including sexualities and nationalities, and a resistance to privileged queer populations turning a blind eye to state atrocities.

In a more conventionally international relations approach, the passing of Uganda’s *Anti-Homosexuality Act* in 2014 brought both relations between states and domestic legislation relating to queer issues to the forefront of the international media and international relations scholarship. In response to the Ugandan legislation, the United States went as far as imposing economic sanctions until the legislation was repealed. This action, argued scholars Manuela Picq and Markus Thiel, marked the ‘formal politicization of sexuality but also the salience of sexual discrimination in domestic contexts’. However, ‘Uganda is not unique’ declares Michael Bosia. Rather, for many it is clear that homophobia has been ‘the helpmate of the Western modernist project’ from the very beginning of the British empire with the spreading of anti-sodomy laws through legislative imprints in British colonies. Rahul Rao argued in relation to Uganda that scholars must resist monolithic understandings and utilisations of ‘homophobia’ in analysis of global politics. Instead, Rao argues that homophobia is deployed in ‘conjunction with both imperial collaboration and anticolonial nationalism’. Taking either account into consideration, Bosia is correct when he argues that the connection

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121 Picq and Thiel, *Sexualities in World Politics*, 1.
125 Ibid, 184.
between ‘homosexuality’ and ‘modernity’ continues to this day. 

So, while scholarship exists on the heteronormatively regulatory role of the nation state, and the role sexuality is beginning to play in international affairs, the discipline of international relations has lagged in theorising both phenomena. According to Weber, the presumed lack of queer international relations scholarship is the consequence of the ‘(un)conscious effect of how Disciplinary International Relations codes various types of theory as a failure’. This disciplinary exclusion of queer theory, Weber argues, can in part be traced to the work of foundational international relations scholar Martin Wight. Wight argued in 1966 that for any international theory to be successful its purpose and function ought to be the accumulation of knowledge about relations between states. Weber argues that by taking Wight’s dictum on the role of international theory and subsequently a ‘Disciplinary IR perspective’, queer international relations theories necessarily fail because they are often deemed to not contribute to this greater theorising goal. It is typically acceptable outside of international relations scholarship for queer politics and research to constitute a mix of epistemologies, methodologies, and theories. However, queer approaches to international relations will often fail in Wight’s terms, argues Weber, because they do not seek to tell ‘the one true story all international relations theory must tell – the story about the survival of states in the state system’. Instead queer approaches seek to question power hierarchies, normative assumptions, and in many cases, bring gender, sexuality, and sex to the forefront of discussions about the international.

128 Weber, Queer International Relations; Wight, “Why is there no International Theory?”.
130 Wight, “Why is there no International Theory?”
131 Weber, Queer International Relations.
132 Ibid.; Wight, “Why is there no International Theory?”
The notion that queer theory has nothing to offer to international relations theorising is incorrect. Queer theory has disruptive and productive potential. Jamie Hagen’s scholarship on ‘Queering women, peace and security’ exemplifies such potential.\textsuperscript{133} Hagen argues that for too long queer people have been rendered invisible in peace and security studies through the synonymous use of ‘gender’ to mean cis-gender women. To date, Hagen argues, research has largely failed to take into account that the same gendered power relations that inform the ‘systematic use of rape as a weapon of war’ are the very same relations that compel homophobic and transphobic violence.\textsuperscript{134} For queer scholars Picq and Thiel,

\begin{quote}
Sexualities, in their various meanings and experiences, constitute such a location in the conceptual non-core that permits (us) to unlearn established theoretical frames, using positionality and reflexivity to turn what is familiar into something strange.\textsuperscript{135}
\end{quote}

It is their goal as scholars to not only ‘think through an LGBTQ lens’, but also to ‘reframe’ traditional ontologies at the core of international relations and to compel international relations theorists ‘to take the non-core seriously’ and simultaneously ‘use it in theory-making’.\textsuperscript{136}

\textit{The queer paradox of human rights}

Since scholars began producing queer theory they have analysed state regulation, sanction, and control of sexuality, gender, bodies, sex, and relationships. The term ‘queer theory’ was first employed by Teresa de Lauretis in a 1991 article entitled ‘Queer Theory, Lesbian and Gay Sexualities’.\textsuperscript{137} In this

early theorising, de Lauretis aimed to differentiate ‘queer’ from the dominant gay and lesbian studies of the period through the creation of a ‘certain critical distance’. More broadly, queer theory was the product of post-structuralist feminist theorising in the late 1980s. Foundational queer texts, though not necessarily recognised as such at the time, included Judith Butler’s *Gender Trouble* and Eve Kosofky Sedgwick’s *Epistemology of the Closet* and *Between Men: English Literature and Male Homosocial Desire*. These texts sought to illuminate the largely ignored socially constructed nature of gender, and the subversive and overt manner in which illicit same-sex attraction between men dictated broader gender relations, respectively. Queer theory can refer to ‘a range of anti-identity theories that challenge assumptions about “normal” and “valid” constructions of gender and sexuality’. For Lee Edelman, thinking queerly ‘exposes the obliquity of our relation to what we experience in and as social reality’. This in turn allows us to uncover ‘the fantasies structurally necessary in order to sustain it’ as well as the ‘figural logics, the linguistic structures’ that constitute them. That is, queer opens up opportunities to think about the construction of self and identity, and the systems that sustain them.

Michel Foucault argues that, since the eighteenth century, the implementation of anti-sodomy laws and the legal enshrinement of queerness as deviant behaviour has been part of an integral regulatory exercise by nation-states.

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138 Ibid.
139 Ibid.
144 Ibid.
This has been a process imbedded in broader systems of institutional and social structures that seek to order, sustain, and create subjects and subjectivities. From reading Foucault’s genealogy of sexuality, ‘sex’ can be understood as an artificial construct, a ‘device’ through which sexuality is categorised, conceptualised as being composite of ‘certain organs and acts’, and dependent on rigid and enduring figurations of ‘sex’ in terms of gender.\textsuperscript{146}

This disciplining process, through which heteronormativity is enforced by states, is explained through what Foucault termed ‘biopower’. Donna Haraway succinctly describes Foucault’s concept of biopower as ‘the practices of administration, therapeutics, and surveillance of bodies that discursively constitute, increase, and manage the forces of living organisms’.\textsuperscript{147}

Through Foucault’s conceptualisation of the ‘homosexual pervert’, among other figures such as the ‘hysterical woman’ and ‘masturbating child’, Foucault demonstrates how these ‘biopolitical figures’ are produced within discourses of social, moral, and medical degeneration.\textsuperscript{148}

The process of ‘biopower’ is understood to operate through the control of individuals who are designated passive ‘subjects’ through the medicalisation of their nature or being and through a process of compulsory confession of their ‘sexual proclivities’ and subsequent adoption of an ‘identity’.\textsuperscript{149}

Here, according to Foucault,

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\text{homosexuality appears as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.}\textsuperscript{150}
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Indeed, not only did 19\textsuperscript{th} century Victorians conceive of homosexuality as a

\textsuperscript{146} Foucault, \textit{The History of Sexuality}; Eve Kosofsky Sedgwick, \textit{Between}.
\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid.
\textsuperscript{150} Foucault, \textit{The History of Sexuality}, 43.
sinful and sickly ‘sexual practice’, they also described the ‘sodomite’ as a ‘new alien strain’ where ‘the homosexual’ was described as a new ‘species’ altogether.\footnote{151} Thus, homosexuality and queerness was not understood as interesting behaviour common within humanity, but as an identity of otherness, immutable, and essential.

This historical construction of sexuality through bio-power/political processes has shaped dominant Western understandings of sexuality and sexual identity. Subsequently, it has also underpinned the way in which states have regulated and criminalised people. According to Sedgwick, ‘sexuality, like ideology, depends on the mutual redefinition and occlusion of synchronic and diachronic functions’.\footnote{152} In other words, the mere process of categorising or labelling sexuality or identity ‘is always retroactive to most of the sensations and emotions that constitute it’ and it is therefore ‘historically important what counts as sexual’, a consensus that is ‘variable and itself political’.\footnote{153} For example, while in the Victorian era ‘homosexuality’ was demonised, women largely escaped analysis and criminalisation because it was simply disbelieved that any activities between women could ‘count’ as sex.\footnote{154}

While historical theorising and literature primarily focused on understanding the process of criminalisation, contemporary research is dominated by attempts to understand the processes of affording rights and freedoms based on a person’s sexual orientation, gender identity, and sex characteristics. Scholars have been quick to note that the same biopolitical processes that operate through persecutory frameworks exist in the process of ‘LGBTI’ rights promotion. As many have begun to argue, the concept of queer human rights is ‘not as straightforward as some human rights enthusiasts might think’.\footnote{155} According to

\begin{itemize}
\item Weber, \textit{Queer International Relations}, 19;
\item Foucault, \textit{History of Sexuality}, 53-73;
\item Siobhan B. Sommerville, \textit{Queering the Color Line: Race and the Invention of Homosexuality in American Culture} (New York: Duke University Press, 2000);
\item Neville Hoad, “Arrested development or the queerness of savages: Resisting evolutionary narratives of difference,” \textit{Postcolonial Studies} 3, no. 2 (2000): 133-158.
\item Sedgwick, \textit{Between Men}, 15.
\item \textit{Ibid.}
\item Sedgwick, \textit{Between Men}.
\item Anthony Langlois, “Human rights, LGBT Rights & International Theory”, in \textit{World Politics}: 155
\end{itemize}
Berger, ‘far from being natural, objective and universal’ the human rights project ‘is a historical product that heavily relies on binary and normative structure’. This, argues queer scholar Anthony Langlois, is because any extension of rights to queer people necessarily involves the transplanting of pre-existing ‘conceptual, institutional, legal and political frameworks’.

In particular, the law plays a significant role in the process of identity construction and associated rights. The legal system necessarily appropriates and privileges certain constructs and narratives while rejecting and displacing competing understandings. Claims to international human rights may have provided some applicants with an access point to challenge the regulation of their sexual orientation, but in the process the recognition of rights has also produced/reproduced a characterisation of sexual orientation that is exclusionary. As Butler argues, ‘international human rights is always in the process of subjecting the human to redefinition and renegotiation’. The ‘human’ is both conceptualised as a subject ‘in the service of rights’, as well as a subject that is constantly rearticulated in dialogue and conflict with existing ‘cultural limits’ of its articulation.

The process of rights ‘extension’ creates normative standards by which all queer people are expected to ‘identify with, assimilate to, support, or engage with’. In the process, the role of the ‘institution’ in regulating queer lives often works unintentionally to ‘constrain freedoms, generate inequality and entrench injustice’. Therefore, according to Langlois, the

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156 Nico Beger, Tensions for the struggle for sexual minority rights in Europe: Que(e)rying political practices (Manchester: Manchester University Press, 2009), 87.


160 Judith Butler, Undoing Gender, 33.

161 Ibid.


163 Ibid.
theoretical paradox for a politics that seeks to queer human rights should be clear: human rights are about establishing particular normative boundaries; queer, if it is anything, is anti-normative. Establishing and politicking boundaries is not supposed to be its brief.\textsuperscript{164}

In other words, queer is not a label or an identity, but rather a ‘positionality’.\textsuperscript{165} This sits uncomfortably alongside the fact that human rights law and state recognition are championed by many as having significant value in the protection of queer people. For example, Richard Thoreson argues that ‘for all their theoretical and practical shortcomings, LGBTI human rights projects are becoming primary vehicles through which a future for queer people is being negotiated and institutionalized’.\textsuperscript{166} Through successful human rights claims, queer ‘identities’ are being calcified. Indeed, as Johnson argues,

ontological claims that sexuality is “inborn” and “natural”... are conducive to the key epistemological tenets of human rights discourses through which human beings are conceived as individuated “units” in possession of fundamental and universal features common to all humanity.\textsuperscript{167}

Similarly, Thoreson argues that, in the process of advancing LGBTI rights, activists either explicitly or implicitly advance particular understandings of ‘who counts as a human, the state’s authority to regulate morality, health, reproduction in public or private, and the types of sexual subjects who merit specific kinds of rights and recognition’.\textsuperscript{168} This inevitably excludes those who

\textsuperscript{164} Ibid, 28.
\textsuperscript{166} Thoreson, “The Queer Paradox”, 27.
\textsuperscript{167} Johnson, Homosexuality and the European Court, 46.
\textsuperscript{168} Thoreson, “The Queer Paradox”, 27.
do not fit these understandings. The argument is that through the gains achieved by some under the moniker of LGBTI human rights, normative standards are set, and models of identity and behaviour accepted into mainstream norms, further marginalising those who do not fit these accounts.

In light of this, Jasbir Puar argues that ‘the ascendance of heteronormativity… is not tethered to heterosexuals’. According to Puar, queer people have been, and continue to be, complicit in the reproduction of heteronormative understandings of identity and rights. This phenomenon has been labelled ‘homonormativity’, a term that describes the ways in which certain types of ‘assimilated’ identities have become both ‘the logic of heteronormativity’ and normative themselves. Queer scholar Lisa Duggan argues that while earlier advocacy and scholarship were focused on the diversity of sexual and gender identity and experience, as well as forms of social dissidence, rights claims increasingly are made to attain privileged forms of rights that seek to be integrated into heteronormative state practices. Duggan has described this ‘new homonormativity’ as

a politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them while promising the possibility of a demobilised gay constituency and a privatised, depoliticised gay culture anchored in domesticity and consumption.

In particular, the seemingly global push for same-sex marriage rights has been identified as such a movement. Yasmin Nair describes this movement as a quest to attain ‘full citizenship’ while confirming heteronormative ideals, thereby

170 Ibid.
further regulating and marginalising those who do not seek, or cannot abide, marriage norms as holders of some sort of ‘half citizenships’. Likewise, Christiaan Rapcewicz sees the push for same-sex marriage as a reinforcement of the pre-existing distinction between married and unmarried citizens, reproducing social hierarchies of the ‘good gay’ over the ‘other Others’.

There are also overt racial and national overtones produced in these global hierarchies of queer human rights and freedoms. Just as Schulman argues in her work on Palestine and Israel, along with Puar in her work on ‘homonationalism’, queerness is used in multifaceted ways to reinforce international power relations. Rather than being a ‘synonym for gay racism’, Puar describes homonationalism as

a facet of modernity and a historical shift marked by the entrance of (some) homosexual bodies as worthy of protection by nation-states, a constitutive and fundamental reorientation of the relationship between the state, capitalism and sexuality.

Sara Ahmed also describes this phenomenon when arguing that a concept such as sexual freedom is often, and increasingly, used by a nation to justify war and empire expansion. This image of ‘sexual freedom’ also becomes conceptualised as a ‘cultural attribute’ that can and must be obtained and given by states. There is a strong paradox in the human rights project that seeks to define and protect queer populations where it necessarily ‘erases ambiguity by creating and imposing particular epistemologies regarding sex, sexuality,

178 Ibid.
180 Ibid.
and sexual subjectivity’.\textsuperscript{181} There is also danger in reproducing racist power relations and using human rights to measure ‘bad queers’ against ‘good queers’, and ‘good queer loving states’ against ‘bad queer hating states’, for the purposes of restricting and regulating access to human rights and freedoms, and also for the military and capital goals of certain states.\textsuperscript{182} As Langlois describes, it is these qualms that are being raised by scholars attempting to ‘negotiate the global politics of sexuality rights’.

Ultimately, however, as Ruskola argues, ‘being a respectable subject of rights is preferable to being a sexual object… without [rights] one has no liberal and political existence’.\textsuperscript{184} Thus it is within this contextual framework that the rights and protections of people applying for asylum based on their sexual orientation operate. Being included in the asylum system is essential, but it comes at a cost as queer existence is fed into the institutionalisation and regulation of human rights norms and citizenship.

### Queering refugee law

One of the key ways in which states regulate their populations is through controlling immigration. It is both a process of physical power at national borders and a complex and ever-changing administrative and bureaucratic function. For many states, assessing visa applications takes up a significant part of the state’s bureaucratic function. In the application and development of refugee law, states construct policy and courts develop jurisprudence relating to gender and sexuality. This contributes to an evolving barometer of what persecution toward queer people is unacceptable and ultimately justifies the protection of the Refugee Convention. A number of scholars have examined how the heteronormative nation-state and its citizens are regulated and policed through migration policies and law. Simultaneously, there has been a vibrant

\textsuperscript{181} Thoreson, “The Queer Paradox”, 16.
\textsuperscript{182} Weber, \textit{Queer International Relations}.
\textsuperscript{183} Langlois, “Human rights, LGBT Rights & International Theory,” 29.
\textsuperscript{184} Teemu Ruskola, “Gay Rights versus Queer Theory: What is Left of Sodomy after Lawrence v Texas?” \textit{Social Text} 23, nos. 3-4 (2005): 84.
collective of legal scholars discussing the recognition of sexual orientation within refugee law.

Writing on US and Canadian immigration, Ray Sin argues that '[h]eternormativity has always been intertwined with immigration'. Indeed, historically, along with being denied basic human rights, migrants from sexual minority groups were treated harshly under the law by many states and continue to experience unjust treatment in many more. In the United States, for example, the Immigration Act of 1917 excluded the entry of individuals deemed to be ‘mentally defective’ or who possessed a ‘constitutional psychopathic inferiority’. It wasn’t until the passing of the 1990 Immigration Act that the phrase ‘sexual deviation’ was withdrawn from the Act, therefore disqualifying it as a legal basis to bar people from entering the country. Indeed, according to queer migration scholar Eithne Luibhéid, the entire system of asylum operates as a key ‘apparatus of power’ in producing, demanding, and enforcing identities ‘in ways that are deemed legible for adjudicating states, (trans)national publics, and supranational bodies’. As such, not only do adjudicators and state officials need to have comprehensive understandings of diverse sexualities and gender expression or identities, they also need to acknowledge the ways in which the immigration system functions as a ‘major site of creating identities and reinforcing their legitimacy’. The process of

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185 Sin, "Does sexual fluidity challenge sexual binaries?", 416.
186 H.R. 10384; Pub.L. 301; 39 Stat. 874. This ban was furthered by the enactment of the 1952 Immigration and Nationality Act (INA), which barred the entry of ‘aliens afflicted with a psychopathic personality, epilepsy, or a mental defect.’ H.R. 10384; Pub.L. 301; 39 Stat. 874. In an attempt to clear any confusion as to whether these laws applied to lesbians and gay men, in 1965 the US Congress passed an amendment to the 1952 Immigration and Nationality Act which added ‘sexual deviation’ as medical grounds upon which a person could be denied entry into the US. 1965 Immigration and Nationality Act, a.k.a. the Hart-Cellar Act, H.R. 2580; Pub.L. 89-236; 79 Stat. 911.
187 Immigration and Nationality Act of 1990, Pub.L. 101–649, 104 Stat. 4978, enacted November 29, 1990. Similarly, immigration law in Canada historically discriminated against sexual minorities. In fact, until 1977, under the 1952 Immigration Act, gay men were barred from entering Canada along with ‘prostitutes, ... pimps, or persons coming to Canada for these or other immoral purposes.’ 1952 Immigration Act, R.S.C. 1952, c. 325, s. 5(e) [1952 Act]; Nicole LaViolette, “Coming out to Canada: The Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act,” McGill Law Journal 49 (2004): 973.
189 Ibid.
asylum adjudication is an example of the way sexual and gender norms are developed—norms that asylum seekers are subsequently expected to fit.\textsuperscript{190} Any asylum claim must be articulated in a certain form that is dependent on the ‘relational interaction between advocate or decision-maker and asylum seeker at every stage of the process’ which results in a highly mediated narrative.\textsuperscript{191}

In order for a claim to be successful this relational power dynamic ultimately dictates that the applicant’s narrative must not challenge the core elements of a decision-maker’s understanding of the world.\textsuperscript{192} In their adjudication, decision-makers and tribunals often employ stereotypical understandings about what constitutes ‘proper’ relationships or ‘legitimate’ sex when considering the claims of queer refugees from diverse cultural contexts.\textsuperscript{193} As queer legal scholar Senthorun Raj argues, ‘the challenge becomes conceptualising queer refugees that does not occlude their complex identities and experiences’.\textsuperscript{194} Through the recognition of sexual orientation and gender identity as grounds for asylum, cultural theorist Greg Mullins warns that the continued emphasis on finding common and reducible characteristics that are immutable to all those who do not identify as heterosexual or cis-gender clouds the complex realities and identities of those who experience persecution based on their own identified or perceived sexual orientation or gender identity.\textsuperscript{195}

Indeed, legal scholars Catherine Dauvergne and Jenni Millbank have argued that in the Australian context ‘much of the jurisprudence in this area focuses upon sexuality by understanding the “social” as a universal characteristic innate to particular bodies’.\textsuperscript{196} Most decision-makers seem unable to adjudicate without relying on stereotypes of ‘Western sexuality’. These stereotypes are

\textsuperscript{190} Ibid.
\textsuperscript{192} Ibid.
\textsuperscript{193} Senthorun Raj, “Protecting the persecuted: Seeking asylum in Australia,” \textit{Legal Date} 25, no.1 (2013): 27.
\textsuperscript{194} Ibid, 26.
not even accurate descriptors of the sexualities of ‘Western citizens’, ‘but rather as the ideal model of sexuality’ understood to be the ‘construction of an acceptable, normal, healthy sexuality against which the sexualities of both citizens and non-citizens are judged’.197

In many ways, the acceptance of claims based on sexual orientation has been heralded as a great achievement and a step towards further recognition of the persecution faced by people around the world based on their real or perceived sexual orientation.198 However, it is not without criticism. One of the major pieces questioning the extent to which claims can be considered on the grounds of sexual orientation came from legal scholars and experts James Hathaway and Jason Pobjoy in their 2011 article ‘Queer cases make bad law’.199 In response to key decisions in Australian and British courts, namely the high profile cases of S395 and HJ and HT, Hathaway and Pobjoy argued that these decisions had taken an ‘all-embracing formulation’ with regard to the ‘action-based risks’ attributed to sexual orientation-based refugee claims.200 Hathaway and Pobjoy argue that the Australian and British courts, while ultimately making the right findings, failed to differentiate endogenous harms (those that have an internal cause of origin) from exogenous harms (those that are related to external factors). They argue that ‘more nuance is required to identify the circumstances in which protection is owed where risk follows from actions rather than from identity per se’.201

In particular, they reference the fact that the HJ and HT judgement included the following remark:

To illustrate the point with trivial stereotypical examples from

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197 Ibid.
198
201 Hathaway and Pobjoy, ‘Queer cases make bad law’, 333.
British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talk about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talk about boys with their straight female mates.  

Hathaway and Pobjoy argued that these decisions ‘seem to assume that risk following from any “gay” form of behaviour gives rise to refugee status’ and that in order to maintain the integrity of refugee law there ought to be a line drawn between those actions that are considered integral to sexual orientation while discounting those that are considered ‘peripheral, trivial or stereotypical’. For Hathaway and Pobjoy, such an interpretation is ‘insufficiently attentive to the endogenous harms’ that come from discretion or altering behaviour. At the same time, they argue the decision could be too liberal in that ‘it fails to interrogate the extant scope of “sexual orientation” as a protected interest to determine when there is a duty to protect on the basis of associated activities, rather than simply as a function of identity per se’. With good reason, Hathaway and Pobjoy argue that this is important because, in the wake of decisions such as S395 and HJ and HT, courts have struggled in recognising the risk of persecution in such claims. This is especially relevant where ‘where risk appears to follow neither from status nor from a closely connected activity’.

In response, Thomas Spijkerboer argues that Hathaway and Pobjoy had made ‘the doctrinal error’ of ‘mixing up persecution and persecution ground’. For

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202 HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, [2010] UKSC 31, per Lord Rodger at par. 81, 37.
203 Hathaway and Pobjoy, “Queer cases make bad law”; Millbank, “The rights of lesbians and gay men”.
204 Ibid, 335.
205 Ibid.
206 Ibid, 336.
example, while wearing a headscarf may not be grounds for protection, argues Spijkerboer, it may very well be the identifying ‘action’ that triggers the persecution of a woman on religious grounds, subsequently qualifying for refugee protection.\textsuperscript{208} Spijkerboer continues, ‘to formulate this question as the question of whether one’s hairstyle is protected by international human rights law reflects the fundamental misunderstanding of what refugee protection means in situations such as these’.\textsuperscript{209} Likewise, Jenni Millbank argues that Hathaway and Pobjoy’s claims ‘rest upon a misleading and unsustainable act/identity distinction (comprising equally unsustainable binaries of integral/peripheral and necessary/voluntary acts)’.\textsuperscript{210} Millbank correctly argues that ‘an activity may express the identity, or it may reveal the identity’.\textsuperscript{211} For example while plucking one’s eyebrows may not be essential to expressing ‘an innate sense of gayness’, it ‘may be an integral aspect to revealing gayness in a particular context in a way that cannot be predetermined’.\textsuperscript{212} Regardless of the existence of the intent to express identity, persecution may arise due to real or imputed sexual orientation. Indeed, if the focus is on the persecutory and social context, such as strict heteronormative gender norms around dress, appearance and behaviour, rather than focussing on sexual identity and its (acceptable) manifestations, it becomes clear that the point is not that a refugee ought not to be protected for something as ‘trivial’ as drinking a cocktail, but rather the fact that the triggering event is something so trivial highlights the extent of persecution.\textsuperscript{213}

Other scholars point out that applicants are often expected to have a sense of ‘recognition and association’ within the ‘LGBTI community’ – both in their country of origin and in the country of asylum.\textsuperscript{214} Many applicants, therefore,

\textsuperscript{208} Ibid.
\textsuperscript{209} Ibid.
\textsuperscript{210} Millbank, “The rights of lesbians and gay men,” 501.
\textsuperscript{211} Ibid, 512.
\textsuperscript{212} Ibid.
\textsuperscript{213} Efrat Arbel, Catherine Dauvergne and Jenni Millbank eds., “Introduction”, in Gender in Refugee Law: From the Margins to the Centre (Routledge, 2014), 1-16.
feel ‘compelled to perform a visible identity’ in order to substantiate their claim.\textsuperscript{215} Often times, argues Rachel Lewis, these performances of identity are ‘expected to conform to neoliberal narratives of sexual citizenship grounded in visibility politics’, through which an almost overwhelming ‘burden of proof’ is placed on applicants to fulfil LGBTI stereotypes marked by consumption, being ‘out’, and community participation.\textsuperscript{216} Such expectations are especially prevalent in those jurisdictions that historically have relied on the requirement of social visibility in establishing an applicant’s membership of a particular social group. For example, in the French case of \textit{Djellal},\textsuperscript{217} heard in 1999, the Commission found that protection under the Refugee Convention was only for those ‘persons who claim their homosexuality and manifest it in their external behaviour’.\textsuperscript{218} As Jean-Yves Carlier has argued, such an approach essentially requires ‘an affirmative stance of protest and social transgression on the part of the claimant, without which he/she will not be perceived as a member of a social group by society’.\textsuperscript{219}

Raj has also written about the inadequacies of refugee law’s ability to capture and accommodate queer lives. Raj argues that while the recognition of sexual orientation as grounds for asylum has been ‘promising’, the fact-finding element of sexual identity credibility assessment ‘remains a troubling element of refugee adjudication’.\textsuperscript{220} He contends that,

\begin{quote}
the ongoing pursuit to find a common, reducible characteristic that is immutable to all those who identify as non-heterosexual obscures the complex identities and experiences of sexual and
\end{quote}

\textsuperscript{216} Ibid, 966.
\textsuperscript{217} \textit{Djellal}, French CRR (SR), Decision No. 328310, 12 May 1999 [translated]. Original text: ‘\textit{personnes qui revendiquent leur homosexualité et entendent la manifester dans leur comportement extérieur}’; Foster, “The ‘Ground with the Least Clarity’”.
\textsuperscript{218} Ibid.
\textsuperscript{219} J.-Y. Carlier translation provided in Foster, “The ‘Ground with the Least Clarity,’” 11.
Raj, A/Effective 455.

Speaking to the Australian context, though it is applicable in many others, Raj finds that often ‘adjudicators disbelieve claims because they misunderstand queer lives’.\footnote{Raj, ‘A/Effective Adjudications’, 455.} At the heart of this inability to understand queer lives, and therefore recognise their identities, experiences, injuries, and legitimate claims to refugee status is the ‘critical problem’ that adjudicators have in ‘negotiating the cultural differences and the emotional experiences’ of queer asylum applicants.\footnote{Ibid, 456.} Indeed, there is a failure to ‘acknowledge the diasporic, non-Western position of the queer refugee body [which] effaces sexual heterogeneity and the mediation of homophobic violence through different cultural and social relations’.\footnote{Sara Ahmed, Queer Phenomenology: Orientations, Objects, Others (Durham and London, Duke University Press: 2006), 54.}

\textbf{Queering constructivist international relations}

While at first glance, queer and constructivist approaches international relations may not have much in common, the core theme of both is the analysis of norms and the way these affect the behaviour of states, groups, and individuals. Constructivist and queer scholars are seeking to bring the domestic and individual level of norms and their implementation and impact to the centre of the discussion. As Betts and Orchard argue, ‘norms – especially people-centred norms such as human rights, development, or humanitarian norms – ultimately only have significance insofar as they translate into practice’.\footnote{Betts and Orchard, “Introduction”, 2.} What use are human rights norms if we are not interrogating how they affect individual peoples’ lives? How people, as individuals and collectives, are constructed and identified is crucial to the way in which human rights norms
develop. Discussions of ‘identity’ have been key to constructivist international relations and were especially prominent in the late 1980s and early 1990s.\textsuperscript{226}

In fact, according to Felix Berenskoetter, ‘it is fair to say that identity is a constructivist concept if there ever was one’.\textsuperscript{227} In even clearer terms, theorist Anthony Burke argues that there is simply ‘no world politics without identity, no people, no states, no international system’.\textsuperscript{228} According to prominent constructivist scholar Ted Hopf, ‘identities are necessary, in international politics and domestic society alike, in order to ensure at least some minimal level of predictability and order’.\textsuperscript{229}

Early discussions of identity in constructivist international relations were restricted to ideas of collective and ‘national identity’.\textsuperscript{230} Alexander Wendt’s work advocating states as ‘autonomous and competing power units’ with individual ‘identity structure relations’ was key for mainstream international relations scholars. They promoted the understanding of international society as anarchic and a playground for states with individual pressures, characters, goals, and behaviours. National identity, particularly in the post-war and Cold War eras of international relations scholarship, often held, as Bruce Cronin describes, that ‘identities provide a frame of reference from which political leaders can initiate, maintain, and structure their relationships with other


\textsuperscript{227} Ibid.


\textsuperscript{230} Bloom, Personal Identity.
At the same time, other scholars explored identity within international relations in a manner that was used to ‘deconstruct the Westphalian mode’ of the ‘sovereign state’, which was historically understood and theorised as ‘a fixed entity defined by a bounded territorial space’. Instead, it was argued that the nature of a ‘state’ is not fixed, nor singular, and ought to be understood as operating within a particular social and historical context depending on certain collective identities. The drive of much of this scholarship, as traditionally is the case with international relations theorising in general, was to understand how nation states defined their interests and why they subsequently acted in the international arena in particular ways.

However, despite the prominence of identity within constructivist literature, scholars such as Berenskoetter and Nicholas Onug argue that the concept of identity is both ‘one of the most fashionable concepts’ but also ‘one of the murkiest – so difficult to fathom’, so much so that Onug suggests he has been ‘reluctant to use it’. For Rogers Brubaker and Frederick Cooper, identity ‘tends to mean too much (when used in a strong sense), too little (when understood in a weak sense), or nothing at all (because of its sheer ambiguity)’. On the one hand, the language of ‘identity’ re-emerged in international relations scholarship as a consequence of post-Cold War geopolitical and territorial shifts. Scholars looked to the concept of ‘identity’ to explain how war developed, the nature of conflicts, and the ‘conditions of peace’. Wendt, for example, sought to understand and explain how identity constituted state interests and influenced state behaviour, beyond the realist explanations of security and power that dominated realist international

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232 Bereknskoetter, *Identity in International Relations*.
233 Weber, “Why is there no Queer”; Wight, “Why is there no International Theory?”
236 Berenskoetter, “Identity in International Relations”, 3596.
However, as Berenskoetter argues, there ‘remains ample room for confusion about how to conceptualise the relationship between identities and interests, including whether it makes sense to conceive of identities as a “basis” at all’. For Berenskoetter, the view of identity as a “basis” is complicated further by holding that identities are not naturally given but constructed through ideas, norms, values, symbols, discourses, and practices, often subsumed under the label “culture”.

Berenskoetter seeks to describe the mechanisms through which a sense of ‘ontological security’ is sought or secured. Here, ‘ontological security’ can be understood as the feeling of having a ‘stable sense of self’. In order for ontological security to be gained, Berenskoetter argues that a number of ‘anxiety controlling mechanisms’ are put into place. These processes, or ‘constitutive logics’, are typically based on the idea that culture influences identity which subsequently influences interests. In particular, there has been a surge of scholarship seeking to understand the role that cultural influences play on norms in international relations, for example the ideational influences investigated as part of this thesis, and the work of Acharya and Betts and Orchard. However, Berenskoetter contends that for the large part, this scholarship fails to grapple with what ‘identity’ actually means in any sense beyond the argument that it is culturally constituted.

Berenskoetter argues that broadly speaking, human existence is embedded in three worldly dimensions: the social, the spatial and the temporal, pointing out

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238 Berenskoetter, “Identity in International Relations”, 3598.
239 Ibid.
241 Ibid.
243 Berenskoetter, “Identity in International Relations”, 3599.
that:

1. We cannot read the minds of others and don’t really know what they think or feel (the social);
2. Historical accounts are contested and we don’t really know what the future brings (the temporal); and
3. We are living on a planet containing an abundance of matter, whose moves we cannot control, and which is floating in an infinite space of which we know very, very little (the spatial).\footnote{Berenskoetter, “Time, Anxiety and Agency”, 2.}

The inescapability of living with uncertainty inspires what Berenskoetter describes as ‘anxiety controlling mechanisms’, which are attempts to obtain ‘cognitive and behavioral certainty’.\footnote{Jennifer Mitzen, “Ontological Security in World Politics: State Identity and the Security Dilemma”, \textit{European Journal of International Relations} 12, no. 3 (2006): 342; Berenskoetter, “Time, Anxiety and Agency”, 9.} They introduce a false-sense of permanency and predictability that reduce an individual’s anxiety allowing people to act on the basis of those identities, whether their own or others.\footnote{Berenskoetter, “Time, Anxiety and Agency”.}

The first anxiety controlling mechanism Berenskoetter identifies is that of ‘quantification’. Quantification explains the tendency to produce linear chronologies on which key development milestones of identity formation can be pinpointed. More than that, these milestones are understood as being developmental, where causation explains transition from one milestone to the next, and there is a clear pattern and predictability in their development. The second mechanism Berenskoetter identifies is that of ‘routine practices’. Here, basing his analysis on the work of Anthony Giddens, Berenskoetter argues that we are drawn to find ontological security in the routinised practices of an individual over time which creates predictability and ‘the illusion of permanence’.\footnote{Ibid, 11; Anthony Giddens, \textit{The Constitution of Society} (Berkeley: University of California Press, 1984), 35.} This work is similar to that explored in international relations.
on the writings of Foucault, Bourdieu and Giddens, who demonstrate the powerful ‘socializing and reproductive power’ of certain practices such as ‘performances, habitus, routines’. The third mechanism Berenskoetter identifies is the reliance on ‘narratives’. Here, narratives are understood both in individual and collective senses, through which they are considered to ‘lend human existence a sense of temporal continuity and purpose’. In particular, constructivist scholars have often sought to explain foreign policy as an extension of the needs and values established through national narratives that seek to shape a collective identity.

Queer scholars will see the similarities between Berenskoetter’s attempt to understand the construction of identity in constructivist scholarship and queer critiques both in- and outside of international relations. In fact, queer scholarship can greatly enhance how we understand identity in constructivist international relations, and more importantly for individuals, how these identities are employed to either grant or restrict human rights. As Berenskoetter argues, there is a tendency for international relations theories to ‘themselves function as temporal stabilizing mechanisms, through which theorists claim to understand the world (states) in predictable and patterned ways’. It is at this juncture that queer scholars can intervene and destabilise the construction of collective and individual identities and international relations theorising on these.

Weber, in her work on queering international relations speaks to this tendency, in a sense, when she argues that her work is not intended to constitute a discipline within international relations. Rather it is a critical appraisal of international relations as a discipline. It is a critique of the theoretical foundations of international relations that purports to know the world and be able to predict behaviour in the world. Indeed, queer critical approaches to international relations can begin to explain why people and scholars rely on

249 Berenskoetter, “Identity in International Relations”.
250 Ibid, 3956.
251 Weber, Queer International Relations.
anxiety controlling mechanisms to create identities, how these are imposed on people/states, and what theorising in international relations and human rights scholarship might look like if we were not so reliant on underdeveloped concepts of identity.

In consideration of queer approaches to security studies, Cai Wilkinson considers her research ‘not only as a contribution to the ongoing “queer turn” in international relations scholarship, but also a challenge to queer not only our theorizing but our practices by foregrounding lived experiences and queer stories’.\textsuperscript{252} This subsequently allows for queerness to be considered as more than a problem and instead be seen as ‘a powerful lens on the gendered and sexed construction of the sociopolitical world and the capacity to deconstruct norms and also reconfigure them’.\textsuperscript{253} For too long the issue of ‘queerness’ has been dismissed as a complicating and unproductive problem in international relations, rather than as a fundamentally reconfiguring and productive approach to knowing the international, national, and personal. More specifically, Cynthia Weber provides a map for queer methodologies within international relations in the 2016 text \textit{Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge}.\textsuperscript{254} While certainly necessary to read in full for understanding queer approaches to international relations, for the sake of brevity and applicability to constructivist international relations, and this thesis in particular, this section will primarily focus on Donna Haraway’s concept of ‘figurations’, which Weber argues can assist in understanding the ‘figuration of the “homosexual”’ internationally and in international relations, and her notion of plural logoi adapted from Roland Barthes’s description of the ‘\textit{and/or}’.\textsuperscript{255}

For Haraway, ‘figurations are performative images that can be inhabited.

\begin{itemize}
\item\textsuperscript{253} Ibid.
\item\textsuperscript{254} Weber, \textit{Queer International Relations}.
\item\textsuperscript{255} Ibid, 28; Donna Haraway, \textit{Modest Witness@Second_Millennium.FemaleMan@MeetsOncoMouse™: Feminism and Technoscience} (New York: Routledge, 1997).
\end{itemize}
Verbal or visual, figurations can be contestable worlds’. They … are distillations of shared meanings in forms of images. They do not (mis)represent the world, for to do so implies the world as signified preexists them. Rather, figurations emerge out of discursive and material semiotic assemblages that condense diffuse imaginaries about the world into specific forms or images that bring specific worlds into being.257

There are four specific forms that figurations take within Haraway’s work: tropes, temporalities, performativities, and worldings.258 These are important to unpack, not only because of their explanatory power in analysing sexed and gendered figures within international relations, but also because these concepts, as demonstrated further below, map onto emerging work in constructivism exploring ontological security and the problem of identity in constructivist international relations. The similarities between queer approaches and constructivist approaches to identity share more in common than might be expected.

The first element Haraway describes are ‘tropes’, those ‘material and semiotic references to actual things that express how we understand them’.259 These are not literal – when any possible kind of language or communication must involve ‘at least some kind of displacement that can trouble identifications and certainties’.260 That is, with every attempt to communicate our perception of reality or representations of reality, our references to these things are immediately removed from them in imperfect attempts to communicate about them. Second, Haraway describes figurations as temporal. She argues that figurations are deeply connected to ‘the semiotics of Western Christian realism’, which is tied to a progressive and developmental understanding of

256 Haraway, Modest Witness, 11.
257 Weber, Queering International Relations, 28.
258 Ibid; Haraway, Modest Witness, 11.
259 Ibid.
260 Ibid.
figurations.\textsuperscript{261} Here, the underpinning assumption is that figurations/figures can develop and improve, they can be altered to fit within a given society, or in some cases, their ‘universal morality’ will eventually be understood and the society or nation state will shift to afford that figure respect.\textsuperscript{262}

Third, drawing on Judith Butler’s concept of ‘performativity’, the idea that when an act is repeated the subject performing them is thus constituted,\textsuperscript{263} Haraway argues that ‘figurations are performative images that can be inhabited’.\textsuperscript{264} This Weber argues, however, does not mean that they are ‘frozen’ figurations. Rather, each iteration is a moment of possibility for reformation and change that challenges static/frozen tropes/figurations as well as the subsequent ‘institutionalized organizations of power, including those that participate in “build[ing] the fantasy of state and nation”’.\textsuperscript{265} Lastly, according to Haraway, the culmination of these elements in the production of figurations – performativity, temporality, and tropes – is the process of ‘worlding’, the mapping of ‘universes of knowledge, practice, and power’.\textsuperscript{266} This could be understood as the manner in which figurations fit into, or engage with, specific social/spatial/temporal dynamics that give rise to ever shifting understandings of these figurations and the ever shifting practices, powers, and knowledges produced in relation to them.

In deploying Haraway’s conception of figurations, identities and norms based on constructions of identity can never be said to be fixed or static. They must always be understood as mutating and singularly unique iterations that never literally represent reality or even the representation that preceded it. As Haraway describes:

\begin{quote}
For every performance of a figuration depends upon innumerable particularities, including historical circumstances,
\end{quote}

\textsuperscript{261} Haraway, \textit{Modest Witness}, 11.
\textsuperscript{262} Ibid; Weber, \textit{Queering International Relations}, 29.
\textsuperscript{264} Haraway, \textit{Modest Witness}, 11.
\textsuperscript{266} Haraway, \textit{Modest Witness}, 11; Weber, \textit{Queering International Relations}, 29.
geopolitical context, spatial location, social/psychic/affective/political dispositions, and perceived/attributed traits (racial, religious, sexual, classed, gendered, [dis]abled) of individuals in relation to the figurations they are presumed to inhabit, an individual’s success, failure or jamming of their assigned/assumed figuration as they performatively enact it, and how these performativities are received by others. Because no two performative enactments are ever identical (Butler 1999), every repetition and inhabitation introduces some, even tiny, amount of difference.267

Subsequently, if figurations of ‘the homosexual’, for example, are never static or complete, neither can the institutions that police, regulate, and reproduce norms about them.268 Therefore, our theorising about how norms are developed, institutionalised, and implemented through institutions, at any level, must take this into account.

However, what is missing particularly in international relations accounts of personhood and identity, argues Weber, is an understanding or explanation of how the ‘sovereign man’ and orders of international relations are constructed not just by ‘singular logos but a plural logoi’.269 This concept comes from the work of Roland Barthes who describes plural logoi as the rule of ‘and/or’.270 Here, the ‘and/or’ is an adaptation of the common rule of ‘either/or’, where a figuration is understood through deploying a binary logic in which a person, discipline, or text must be either one thing or another. Rather, the and/or logic attempts to bust the binary logic. For example, it dismisses the gendered categories of either boy/masculine or girl/feminine, and allows for the duplicity, or multiplicity, of identity and orders of international politics, figures and constructions.271

267 Haraway, Modest Witness, 11.
268 Weber, Queering International Relations.
269 Ibid.
270 Ibid.
271 Weber, Queering International Relations.
Figurations of identity or state can be understood not simply by the ‘normal versus perverse’ binary logic, sustained by traditional binary logics long held dear in international relations theories such as ‘anarchy versus order’, ‘peace versus conflict’, ‘north versus south’, and ‘developed versus undeveloped’. Through embracing this multiplicity of identity and orders of international politics, figures and institutions can be understood as not simply ‘normal’ or ‘perverse’, but rather simultaneously normal ‘and/or’ perverse. Furthermore, this and/or state of being is, according to Weber, ‘enacted through sexes, genders, and sexualities as well as through various registers of authority’.272 There can be ‘pluralised’ identities and modes of being that perform more than one state of being, resisting ‘static’ conceptions of identity and disrupts claims of pure or literal representations of them.273 This account provides opportunities to shift our understanding and theorising of identity, sexuality, gender and sex in the international, as well as theorising about the relations between international institutions and certain ‘subjects’ of the international.

Conclusion
This thesis analyses the implementation of human rights norms in refugee jurisprudence. It raises particular limitations on the discussion, allowing us to limit the possibilities of considering, among others, figurations, identity, queerness, and constructivism to the project at hand. However, this leaves plenty of issues to consider. First, it is apparent that norms need to be understood as operating not just within international state and non-state institutions, but also within complex domestic and regional institutions and contexts that all have deeply heteronomative histories and practices. Second, in any process, human rights norms are attached to notions of identity, an examination and consideration of the ontological construction of these identities or figurations must occur with particular emphasis on the ‘anxiety controlling mechanisms’ put into place and practice to locate these identities.

272 Ibid, 39.
273 Ibid, 40.
This can occur at the individual level, for example as the ‘gay human rights holder’, and at the national and international level, for example where states position themselves as ‘pro-LGBTI’ vis-à-vis so-called ‘anti-LGBTI’ states or groups. Third, given that identity is never stable, always changing, and can be more than one thing (or nothing), we need to engage with how actors strategically engage with identity and figurations in order to navigate human rights systems. It is necessary to deconstruct the way in which static and fixed identities are entrenched in the law, despite some people experiencing fluidity and constant change as core elements of their sexuality, gender, or identity. What negotiations and manipulation happens to connect a queer person’s account of being and fleeing to the pre-existing requirements or expectations of particular social group status, credibility assessment, and accounts of persecution? What theoretical impact does this have on the norm, its effect on future claimants, and the methods that activists and scholars advocate and evaluate in order to achieve norm implementation? The following chapter begins to examine these questions by considering the queer potentials of international relations and the productive analysis of identity-based human rights norms in constructivist international relations and refugee law.
Chapter Three
Queer as a verb: Searching beyond the court transcripts

Introduction
This chapter explains the methodological framework and research approach undertaken in this thesis. First, the chapter expands on the reasons this thesis takes a queer approach to international relations and its utility. It argues that queer approaches are valuable and necessary when considering notions of norms, identity, and human rights. What exactly counts as a queer approach is established, and how this has influenced the project over time is discussed. It is suggested that theoretical and methodological approaches in international relations that do not take into consideration all people, including non-normative people, simply do not meet the standards of the discipline. Second, the paradox of queer human rights norms is discussed, explaining why this thesis uses ‘queer’ as a verb and not necessarily an identity label, though many adopt it as such. In doing so, the thesis seeks to uncover the assumptions that underpin the process of adjudicating sexual orientation-based asylum claims, establishing associated rights, and the challenges of theorising about these.

Following, an overview of the procedural norms that are analysed in this thesis is provided. These norms are dependent on the right to asylum on sexual orientation-based grounds, but are developed, institutionalised and implemented in distinct ways. Next, the chapter introduces the case studies of Australia and the United Kingdom justifying their suitability as comparative cases and describes the method of conducting semi-structured interviews with lawyers and refugee advocates in each country. Lastly, the chapter discusses some of my own reflections on conducting the interviews and the impact the process of undertaking these interviews may have had on the research as well as further reflections on ‘being queer’ in the discipline of international relations.

Research approach: Queering international relations and refugee law
This thesis rests on the conviction that queer approaches to international relations are valuable and can help us theorise about international relations,
state discourses and practices, and the way in which these influence human rights. This thesis focuses on one of the core functions of the state, namely the regulation of citizenship, primarily through granting asylum. In the tradition of scholars such as Weber, Ahmed, Duggan, and Puar, the thesis seeks to push the boundaries of international relations. I have situated the analysis at the domestic and individual level in order to analyse both the impacts of norms on queer refugee applicants and the queer nature of states, their institutions, and how we research these in international relations and law. At times the scope of the project broadens out to international institutions and regional courts, and at other times narrows to the influence that domestic ideational structures may have on the stereotypes brought forward by an individual decision maker or judge, or even the effect that access to legal advice may have on sexual orientation-based refugee applicants. The analysis draws from interdisciplinary sources at multiple levels of analysis to explore the relationship between states, sexuality, queerness, and asylum.

While the parameters of what can be considered a queer approach to international relations is, in a sense, limitless; in her latest consideration of queer approaches to international relations, Weber sets out the characteristics of what is not queer work:

I cannot claim to be doing queer work if I have no genuine interest in those who refuse/fail to signify monolithically in terms of sexes, genders, and sexualities. I cannot claim to be doing queer work if I neglect to analyse how power circulates in and through sexes, genders, and sexualities to attempt to normalize and/or pervert them. I cannot claim to be doing queer work if my evocation of the term queer closes down possibilities for critical thinking and practice in relation to nonmonolithic sexes, genders, and sexualities. I cannot claim to be doing queer work if I do not analyse how any evocation of the term queer is itself always made

through a particular power on behalf of some kind of intimate, national, and/or international politics.275

This expansive take on queer approaches to research opens many avenues for the researcher. However, as Kath Brown and Catherine Nash argue many scholars who use queer theory use undefined notions of what they mean by ‘queer research’ and rarely undertake a sustained consideration of how queer approaches might sit with (particularly social scientific) methodological choices’.276 They define, in part, queer research as those methods often used to ‘let us interact with people, usually on the basis of sexual/gender identities and within anti-normative frameworks’.277 However, they also point to the fundamental issues that such an approach may pose for the social scientist. How, for example, can researchers gather ‘data’ from ‘tenuous and fleeting subjects’ who are understood to be ‘fluid, unstable and perpetually becoming”?278 And what implications does this have for the researcher, and their role in attempting to qualify and analyse queer subjectivities in the confines of their project? What meanings can we draw from such data, and what use can we make of, when it is only momentarily fixed and certain?279

In undertaking a queer approach to this thesis, the first issue that must be addressed is the selection of sexual orientation as grounds for particular social group as the focal point of this thesis. Initially, this thesis focused solely on sexual orientation-based claims. However, as the project progressed, I began to realise that through this methodological selection of ‘sexual orientation’ as an isolated ‘social group’ to be analysed, I was in part contributing to the assumption that sexual orientation should be dealt with separately from other claims. This thesis does not go far enough to make a strong claim for anything otherwise, but it does, make a queer critique of the procedural protection norms and their implementation in relation to sexual orientation. A question asked

275 Weber, Queer International Relations, 16.
277 Ibid.
278 Ibid.
279 Ibid.
consistently through this work, is what ontological constructions about sexuality, queerness, and identity are perpetuated, reinforced, or invented in the process of implementing these procedural norms? And do they ultimately increase human rights protections for queer asylum applicants throughout the refugee status determination process in Australia and the United Kingdom?

Originally, I did not consider it a possibility within the confines of my project to contest the definition of sexual orientation within refugee law and question whether claims could be considered differently to incorporate broader experiences and understandings of queerness. Furthermore, as evident, the project did not initially take a queer critical approach. Instead, in the early stages the project used a primarily constructivist international relations methodology that sought to expand on mainstream norm implementation literature without necessarily contesting the contents of such norms. Over time, as the research proceeded and on the advice and feedback from colleagues and my supervisors, the methodological and theoretical focus of the thesis developed to focus on a queering of constructivist international relations theory rather than merely utilising constructivist methodology. This approach has been complicated at times, drawing on many different disciplines and approaching the questions from very different angles, but I consider that it has significant potential to contribute to international relations theorising and enable a more critical approach to both the subject under consideration (sexual orientation-based refugee claims) and the methodology and theory being used to frame that subject (constructivism and norm implementation theory).

This also raises the issue of terminology. Throughout this thesis I variously use terms such as sexual and gender minority, LGBTI, queer, sexual orientation, queer and so on. I do not, and never would, seek to endorse a particular approach to labelling sexuality, gender identity, or queerness. Any attempt to do so would perpetuate Western constructions of culturally specific, constructed, and performed ‘figurations’, to use Haraway’s words, which is not my intention.\(^{280}\) However, this does not mean that I have not used specific

\(^{280}\) Haraway, ‘A Cyborg Manifesto’.
terms quite deliberately. In particular, 'LGBTI' is only ever used when it is a direct reference to the term used in policies or research of others. I typically prefer to use the term ‘queer’ when not specifically referring to a person or a group who describe themselves otherwise. There is a great tension between the way we describe queerness within the law and the subsequent manner in which rights are afforded, and this thesis has attempted to refrain from the lazy use of dominant terms such as ‘lesbian’ instead of queer women, or ‘homosexual’ as a replacement for everyone who is not straight or cisgender.

As I have discussed in the previous chapter, there are distinct contradictions in queer pursuits of human rights because any norm is, in essence, anti-queer in its reduction and universalisation of meaning and identity. This needs to be explicitly taken into consideration when seeking to ‘measure’ norm implementation, and especially when I assess a given norm as ‘successfully’ implemented. If a norm’s implementation perpetuates exclusionary or reductive accounts of queerness, then can it simply be said that it has been ‘successfully’ implemented? From a queer perspective, it could be argued that any success made today is simply the grounds for discrimination tomorrow. That is, while one norm may represent the successes of legal decisions or applicants who have come before it, it still likely constitutes norms that are exclusionary to others who seek to access those same rights or freedoms. Likewise, it must be acknowledged that these norms are being implemented or becoming embedded in pre-existing heteronormative and homonormative institutions, be they legal, political, or social, and therefore their ‘success’ is being measured against, and in reliance upon, these pre-existing structures. Therefore, queer critical approaches to measuring implementation must also analyse the implications of these ‘successful’ norms for queer refugees.

Ultimately, this thesis is queer in that it seeks to queer constructivist international relations literature on norm implementation as well as refugee legal scholarship. It is influenced by Krook and True who argue that norm diffusion happens ‘precisely because – rather than despite the fact that – they may encompass different meanings, fit in with a variety of contexts, and be
subject to framing by different actors’.

It seeks to highlight the heteronormativity of institutions, questioning what ‘success’ looks like, and whether ‘implementation’ of a given norm should be where an analysis stops. Furthermore, it provides a critique of the ‘norm’ of sexual orientation as grounds for asylum, as well as associated procedural policy norms that seek to enhance protections for applicants in the process. And lastly, this thesis does not provide answers, but instead seeks to ask questions of taken-for-granted processes of asylum, guidance to asylum seekers, purported positive developments, and the theoretical and methodological international relations approaches that we use to described and assess these. At the very least, this project takes the dominant heteronormative scholarly institutions of international relations, constructivism and refugee literature and engages these with queer thinking and the existence of queer people.

In a review of Dennis Altman and Jonathan Symons’ book *Queer Wars*, Cai Wilkinson grapples with what ‘queer victory’ would look like. Wilkinson’s account is an attempt to provide a pragmatic answer to what an approach to respecting the human rights of queer people might look like, whilst simultaneously (and necessarily) resisting the co-option of hegemonic, heteronormative, and homonormative ontologies of human rights and identity. Wilkinson writes

…Here, queer regains its agency, moving from a noun of identity to a powerful verb: to queer something is to denormalise it and destabilise its assumed naturalness. In this way, queer challenges us to imagine sex and sexuality not in terms of risk and respectability, threat and taboo, identity and id, but in terms of consensual practices and pleasures, respect for bodily autonomy and an end to shaming people for their desires.

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281 Krook and True, ‘Rethinking the Life Cycles’, 105.
It is with this spirit, using queer as a ‘powerful verb’, that this thesis approaches the investigation of norms in asylum that apply to queer people. This approach is also taken to using constructivist international relations theory in the pursuit of an analysis, attempting to maintain the critical gaze on the theoretical assumptions, methodologies, and role of the researcher.

An integral element of this queer approach is continuing to question normativities, in both LGBTI and queer scholarship and activism as well as in broader mainstream research, which prop up Western-centric norms around sexuality, gender, and intimate relationships. Sexual orientation as a concept, as well as broader concepts of LGBTI identity, are often taken for granted as universalist phenomena. There needs to be far more emphasis on the culturally variable and contextual conceptions of sexuality and gender and the way in which this influences refugee law and norms. Indeed, this lack of intersectionality inhibits the decision-makers from understanding and recognising someone’s persecution or even membership of particular social group, as it is prescribed within most refugee status determination processes. The queer approach in this thesis, then, is also to question the ‘naturalness’ or ‘universality’ of dominant understandings of sexuality, gender and sex and push approaches to human rights norms and recognising refugee status determinations toward methodologies that are more encompassing of cultural variability.

**Research Methodology**

This thesis employs an interdisciplinary qualitative research methodology. In order to capture the diverse influences that come to bear on the asylum process, data and analysis are drawn from diverse sources including international relations, legal, and policy analysis. Perspectives are drawn from migration scholars, constructivist scholars, human rights scholars, and queer scholars. In doing so, this thesis seeks to capture the socio-political influences on the development and practice of legal and administrative practices. Existing scholarship fails to deal with the often silent, but ever present, heteronormativity of legal and political institutions and the effect this has on seemingly straightforward processes of recognising somebody’s persecution.
and right to safety. Put simply, this thesis seeks to understand the processes and influences that cannot be gleaned from a tribunal or court transcript. It seeks to understand the role of individual actors, overarching political processes, and pre-existing political and legal institutions.

**Substantive and Procedural Norms**

In order to make sense of the norms discussed in this thesis, the distinction between ‘substantive’ norms and ‘procedural’ norms is important. As described in the introduction, this thesis analyses the implementation of procedural norms as outlined in the UNCHR 2012 Guidelines. Procedural norms are intended to protect rights during the process of securing asylum and are secondary to the substantive right of asylum. It is important to recognise that procedural norms developed as a consequence of norms based on the substantive rights, such as sexual orientation being grounds for asylum. Understanding the relationship between procedural and substantive norms has consequences for queering our understanding of the development, institutionalisation, and implementation of these.

As stated, while this thesis does not focus solely on sexual orientation and particular social groups status, it does take this into consideration in the analysis of procedural norm development and implementation. In reality, one cannot be discussed without the other. The procedural norms are developed based on particular constructions of sexual orientation and identity that have been embedded and perpetuated within particular social group status. Likewise, the historical and institutional context in which the acceptance of sexual orientation as grounds for particular social group status occurred is important for understanding how the procedural norms were developed, and how they are institutionalised and implemented within political and legal institutions. This thesis, therefore, analyses the acceptance of sexual orientation-based refugee claims across multiple jurisdictions, including the heteronormative history of human rights law, and relies on analysis of other major issues in sexual orientation-based refugee status determinations. This includes, for example, the phenomena of discretion reasoning, which has had
serious implications for the implementation of the procedural protection norms analysed by this thesis.

**Measuring Implementation**

If norms are understood to be processes that are ‘works in progress,’ the issue of measuring norm implementation becomes a problem. Andrew Cortell and James Davis have developed the concept of ‘domestic salience’ to help measure implementation. They identify two norm saliency ‘signposts’. First, that the norm will be embedded in domestic institutions, reflected in their adoption via ‘domestic laws and procedures’ where ‘the more numerous the mechanisms devoted to its reproduction and reinforcement, the greater its domestic salience’. Second, a norm is thought to be salient when it is promoted through national discourse where state leaders demonstrate support for the obligations inherent in the norm, and subsequently state policies must be in line with these obligations. Specifically, implementation will be understood as implemented when present, for example, in official guidelines and policy, and in the jurisprudence of domestic and regional courts. This is further complicated, however, by whether these policies are actually put into practice at the individual case level and also whether the norms, and their subsequent policies or jurisprudence, actually give effect to the protection of queer applicants seeking asylum.

Much of the recent literature on norm implementation has stressed the different cultural contexts of a given jurisdiction or state, and the impact this has on the rearticulation, contestation, and implementation of a given norm. Discussing those treaties that are considered to be the most precise and easily measurable, Victor et al. argue that ‘it is often unclear exactly what changes in

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284 Krook and True, “Rethinking the Life Cycles,” 104.
285 Cortell and Davis Jr, “Understanding the Domestic Impact.”
286 Ibid, 76.
287 Ibid, 79.
behavior will be required to meet international commitments’. For example, even within the formal context of the European Union, Van Kersebergen and Verbeek find that, once adopted, norms may continue to mean different things to different actors. In fact, they argue that the acceptance of a given norm at the domestic or regional level will often simply result in ‘a new phase of battle over the norm itself’ where putting the norm into practice actually begins to reveal how the norm operates and how particular actors wish to use the norm.

According to Robertson and Merrils, in order for any international norm to be implemented at the domestic level, any given state needs to have first ‘national remedies used for the realization of international law and the system of state bodies that are competent for the realization of obligations occurring from international law’. In contexts where this is lacking, the systematic study of implementation would likely be looking toward non-state actors, such as NGOs. This is important, as this thesis looks specifically at legal, policy, and political domestic structures to assess implementation. Any theoretical generalisations that are made about human rights norm implementation, therefore, are preconditioned by the fact that they are intimately connected with the ‘remedies’ outlined by Robertson and Merrils.

Such case studies also have particular constraints when it comes to generalisability. For example, in some jurisdictions shifts in policy or changes in decision-making are often made through litigious or contested and complicated processes that may occur through legislation or broad scale policy.

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292 Ibid.
shifts by a ruling party. This is not comparable to the policy shifts of small or medium non-government organisations operating in ‘lawless’ regions or in environments where they have autonomy from the government in implementing their policies. Ultimately, the goal is to understand the ‘causal mechanisms’ influencing these variant processes in highly bureaucratic environments such as the UK and Australia. In attempting to analyse norm implementation in these cases, this thesis considers the domestic institutional, ideational, and material influences on norm implementation in sexual orientation-based claims. At the same time, these ‘causal mechanisms’, or domestic structures in Betts and Orchards terminology, are subjected to a queer critical analysis that enables a deeper evaluation of the way in which international relations scholars theorise identity-based norms. Norms, and the institutions they are embedded within, embody certain conceptualisations about sexuality and queerness, and therefore have unintended consequences on present and future asylum claims for queer people.

Case Studies
This thesis conducts a qualitative review of jurisprudence, policy and relevant public statements by governmental officials and legal actors primarily from two jurisdictions: Australia and the United Kingdom. Data are also drawn from international jurisprudence, analysis and guidance when considering ‘best practice’ and the development of legal norms at the international level. Initially, Australia was chosen as it is my home country and appeared to be jurisdiction that had issues in relation to claims based on sexual orientation. A comparison was considered important in order to try to understand what is particular about the Australian case that has meant that procedural norms have not taken hold in Australian policy and decision-making practices. The UK was chosen as a comparative case study.

There are similarities between Australia and the UK that make them suitable for comparison. These include the fact that they each have common law legal systems meaning that each jurisdiction may, and often does, draw upon
decisions made by each as precedent or for comparison, and that they are liberal-democracies that have de-criminalised same-sex sexual activity (UK in 1967, and Australia completing in 1997). Both countries have accepted sexual orientation as basis for an asylum claim (Australia in 1992, UK in 1999) and each have produced significant jurisprudence in the area of sexual orientation-based refugee law. There are also some significant differences between the two countries. In the context of asylum adjudication, the fact that the UK is party to the European Convention of Human Rights and can have cases appealed to regional human rights courts is notable. Australia, on the other hand, is not bound toby or subject to the jurisdiction of to any regional courts. Differences such as these are useful for assessing the implementation of norms for the purposes of the thesis. The domestic variances are part of the analytical puzzle that assist in understanding different practices and levels of norm implementation in each case.

**Interviews**

In order to gain a greater understanding on the political/legal influences on norm implementation in sexual orientation-based claims in these case studies, I interviewed legal and refugee professionals in Australia and the United

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293 Though the 1986 *Australia Act* eliminated the right for UK courts to legislate on behalf of Australian courts, Australian judges can still use British precedents, but they are no longer bound to follow them. See: Jana Wessels, "Discretion in sexuality-based asylum cases: An adaptive phenomenon", in *Fleeing Homophobia: Sexual orientation, gender identity and asylum*, eds. Thomas Spijkerboer and Sabine Jansen (New York: Routledge, 2013).

294 It is important to note that Australia is signatory to and bound by the International Covenant on Civil and Political Rights (ICCPR) (1996) and its two Optional Protocols (1966, 1989) which protects civil and political rights including 'the right to freedom of conscience and religion, the right to be free from torture, and he right to a fair trial'. Australia agreed to be bound by the ICCPR in 1980 with the Australian Human Rights Commission being responsible for monitoring Australia’s adherence to the ICCPR. The ICCPR has influenced Australian law relating to sexual orientation significantly, most notably in the case of *Toonen v Australia*. Mr Toonen, a gay man from the Australian state of Tasmania, challenged the criminalization of homosexuality on the basis of privacy and equality rights of the ICCPR. Article 17 of the ICCPR states that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation' and that '[e]veryone has the right to the protection of the law against such interference or attacks'. The UN Human Rights Committee, found that Toonen’s right to privacy had been violated. Australian Human Rights Commission, “Human Rights Explained: Fact sheet 5: The International Bill of Rights,” accessed July 1st, 2018, https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights/, *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.
Kingdom. Some of the key reasons these actors were chosen as interviewees include:

i. It was expected that lawyers, case workers and advocates would have a broader understanding of the history of changes to the asylum system that may influence these particular claims;

ii. It was expected that these interviewees would have an already high level of understanding of the ethics of discussing asylum claims and be able to protect their own interests and the best interests of any refugee they have assisted when being interviewed;

iii. It was expected that these interviewees would have a greater understanding of the pressures or influences that have an effect on a case that are not readily found in the court transcript or policy documents. This might be, for example, time and resource pressures, the way in which policies do not actually work, and issues faced by applicants in the process such as non-verbal influences and behaviours that affect their experiences in the process;

iv. It was expected that these interviewees might have a greater understanding or awareness of the impact of broader political, cultural, or policy shifts have on the adjudication process.

In total, I conducted 18 interviews with lawyers, case workers, academics, and workers in non-government organisations (NGOs). Many of these participants had histories involving more than one of these roles or were presently involved both with representing clients and producing academic or advocacy work. Twelve interviews were conducted in the UK and six in Australia. The interviews ranged from 30 minutes to almost three hours in length. I conducted semi-structured interviews allowing for each conversation to adapt to the expertise or experiences of the participants. This was particularly important given that participants had different ways of approaching the topic of research. The language and approach a lawyer might take, for example, varied greatly.
from academic or advocate perspectives and language. The following questions were used as a guide for each of the interviews:

1. What is your experience working with sexual minority asylum seekers/refugees?
2. Are there any clear issues faced by sexual minority asylum seekers?
3. How do you think broader refugee policy affects refugee applications based on sexual orientation?
4. Do you think that decision-makers understand issues faced by sexual minority asylum seekers?
5. What is your opinion on the suitability of the asylum application process for sexual minority asylum seekers?
6. How do you feel immigration officials treat sexual minority asylum seekers?
7. Have there been any positive developments in refugee jurisprudence or policy for sexual minority asylum seekers?
8. Are there services or policies that could be introduced to benefit sexual minority asylum seekers?
9. Do you think there are any changes in refugee policy and law that will affect sexual minority asylum seekers?

These questions, and the interviews more generally, were conceived when the project was not intended as a queer critique of constructivist international relations. Rather, the project sought to discuss sexual orientation-based claims as they were, without providing broader critique of these claims and the use of identity-based concepts for establishing particular social group status. Therefore, the usefulness of these interviews diminished over the course of the thesis. They were not rendered irrelevant, as plenty of the discussion during these interviews touched on issues of identity, credibility, norms, and the broader socio-political influences on adjudication, law, and policy. However, if these interviews were to be as impactful as they possibly could have been for this thesis, the questions would have differed from those listed above. For example, asking advocates their opinion on how policy changes are influenced
or whether they find separating sexual orientation from other queer claims useful in making their cases.

Data from these interviews are presented only in Chapter 6, which focuses on civil society, as the interviews provided the most insight into how civil society actors (including the interviewees themselves in some cases) were involved in pushing for norm implementation in their contexts. Interviewees were, as was originally expected, also able to describe some of the broader constraints faced by civil society actors that were interesting and useful for understanding the norm implementation process. The interviews did not, however, lend much content to the other analytical chapters of this thesis.

Some other specific issues may have affected the interviewing process and ought to be stated explicitly. First, I suspect strongly that, particularly in the case of those interviewees who identified as LGBTI or queer, my credibility as a researcher was impacted by whether I was perceived to be queer or LGBTI. In fact, in one interview, the participant explicitly asked if I was a lesbian. When I confirmed I was queer and had a girlfriend, the participant went on to talk about sexually explicit issues in ways that I felt were more forward or honest than they might have been if I had answered that I was straight. Following this interview, I felt compelled to ‘out’ myself during interviews in order to gain the trust of the interviewee, signalling that I was an ‘insider’ and would understand and be able to competently discuss LGBTI or queer issues and sexual practices without judgement or embarrassment. While I cannot be certain, I have a lingering suspicion that, given that I pass as a heterosexual/cis-gendered woman, the perception that I am not queer may have affected interviews prior to this shift in my approach.

Second, it was significantly easier to organise and conduct interviews in the UK when compared to Australia. A few things might have influenced this. It appeared that Australian refugee professionals were extremely time poor compared to their British counterparts. Furthermore, while there were people in the UK who were experts on LGBTI asylum or whom had relatively long histories representing LGBTI or queer clients or conducting advocacy on
LGBTI/queer refugee policy and practice, there were not similar experts in the Australian context. This fact, which influenced the interviewing process, is also taken into account in chapter six of this thesis which looks at the role of civil society and its influence on norm implementation.

Third, particularly in the case of the UK, the network and community of people who are knowledgeable about LGBTI/queer asylum issues is fairly close knit and well known to each other. My role as a researcher, for example, was also impacted by the fact that I work with an international LGBTI/queer human rights organisation that gives me connections with people in this field. It also meant that many of the interviewees in the UK knew of each other and were hesitant to speak ill of each other. More than once, participants explicitly made it known that they knew legal or policy actors well, did not want to appear to be critical, or would not like to talk specifically about a particular person. Even though the participants had the option of anonymity, given the small and connected community, it was clear that participants were aware that they could be identified through their responses by other people they work with or hope to maintain good working relationships with. It should be noted that the interviews were recorded and that this may have enhanced the perception by participants that what they said was on the record and permanent, despite having the right and opportunity to redact or change their responses before being used by the researcher.

**Ethics/Reflexivity**

One of the key ethical concerns in this project, and a dilemma that has impacted on this project and my work on queer asylum advocacy in general, has been the tension between pursuing the best interests of queer people and the inherently anti-queer asylum system. In working on a project that has the normative goal of improving the asylum process for queer applicants, the criticism can rightly be made that this project seeks to improve a system that many consider immoral or unethical. Rather than deconstructing fundamentally problematic systems of oppression, in a sense, any attempt to *improve* an asylum system is in the same stroke a process of lending it an air of validation. This was borne out directly in my attempts to interview civil society actors.
Multiple organisations rejected outright my request to interview them arguing in different ways that any research seeking to study the treatment of queer refugees was part of the problem. Rather, they argued, my research should have been towards efforts of dismantling the asylum system. Such attitudes are reflected in ‘No Pride in Borders’ protests in the UK, Australia, and elsewhere. My own personal reconciliation of this tension, and the worry that my research lends to the maintenance of the broader asylum system that is complicit in the persecution of queer people, is my own scepticism that the end of border control in all its facets is nigh. Rather, in the process of advocating for ‘no borders’, people caught within asylum and immigration processes around the world are treated unequally, and without dignity. This is a fundamentally irreconcilable position with the ‘no borders’ movement, but one that resonates with me as a researcher and advocate.

This very thesis was born out of my own concerns over conducting LGBTI sensitisation training with refugee lawyers in Australia and wondering whether I believed in the concepts underpinning the training or whether the training contributed to entrenching normativities around sexual identities that further marginalised queer people accessing asylum. I have tried to bring this critical reflexivity through in the research, to identify and discuss where scholarship overlaps with practice and influences norm contestation, development, and implementation. Scholars often fail to acknowledge that their work has the potential for real world policy and practical impact, even where their expertise is drawn on by institutions. This has influenced my project in that it seeks to be reflexive about the role of academics and scholars in our evaluation of norms relating to queer human rights, as well as their role in the norm institutionalisation and implementation process. Just as institutions are not neutral, scholars also participate in the maintenance of exclusionary norms, and this must be considered, particularly in refugee policy research where institutions often draw on academics for guidance.

Over the time that I have written this PhD, during which I have attended academic conferences and been able to participate in the blossoming community of queer international relations scholars, I have been struck by the feeling that there is something more to queer international relations that simply applying queer theory to international relations. I've begun to wonder about the extent to which we explore our own queerness through queering international relations and subsequently, the extent to which it is as much a personal project as it is a theoretical one.

On the one hand, at a purely social level (remembering that behind every article, book, and presentation is a real human being) the growth of queer international relations as a sub-field resembles to me the physical coming together of LGBTI and queer scholars. I had largely lost interest in international relations as a discipline until I got the courage to queer my project. Subsequently, I began presenting and talking to queer scholars at conferences like the International Studies Association Annual Convention. It’s like finding your table in a high school cafeteria. The social element of academia is so often overlooked. I remember a group of us PhD students stunning our professor when we argued vehemently that getting joint publications or being invited to speak at a university was as influenced by that last beer post-conference as the content of your paper, or the ground-breaking quality of your ideas.

On the other hand, I also have begun wondering about the personal experience of queerness and our interest in researching queer international relations. I can’t deny that it is satisfying to locate a better, yet imperfect, vision of myself in discussions on human rights and international relations. I also can't deny that I draw deep pleasure at discussing ordinarily taboo topics such as queer sex practices, concepts of non-binary gender, and issues of kink, polyamory and bondage, discipline, dominance and submission, and sadomasochism (BDSM) on panels in spaces where it has long been disregarded or where it might offend and embarrass. Due to the nature of my project, for quite a time I was on panels or in discussions with constructivist scholars who were quite reluctant to engage with me on the queer elements of my research. Part of the reason that queerness has been invisible in academic and human rights
discourses for so long is that it is seen as undignified and vulgar, or simply embarrassing. And in some ways, as I discuss in the thesis, attempts to incorporate elements of queerness have also sought to sanitize experiences into concepts of identity – erasing the often inherently sexual and taboo elements of a person’s experience, practice, or self-identification. One of my favourite experiences during my PhD was presenting at the Sex and Sexualities conference at Oxford University in 2015. We had a big sign plastered up in a very old, white, masculine space that declared in capitals ‘SEX’ and pointed to our space. Such violations of decorum are a treat in an otherwise very institutionalised and professionalised space.

The idea that has captured my thoughts the most, however, is how we as scholars might be experiencing, exploring, or expanding our own queerness through our research. P.J. Macleod argues in their piece ‘Dirty talk: on using poetry in pornography research’ that just as pornography might be considered a ‘body genre,’ in which it is not only judged for its text but also its ability to produce a physical response, so might poetry ‘be able to offer sex an sexualities scholars the potential to access and express something internal or intangible that may otherwise resist description’. It raised the question in my mind: to what extent do researchers’ and readers’ evaluations of scholarship and subject matter relate to their own arousal, disgust, or enjoyment of the issues at hand? I have come to the conclusion, for example, that while I am constantly read and presumed as straight in my social, academic, and activist circles, my PhD research has been a key way for me to explore and express my own version of queerness. As the influential Ken Plummer spoke of his experience in the field of sexualities ‘… to cut a long story short, what drew me to this field of study were very personal reasons about being gay and wanting to understand it and wanting to apply this theory I’d learned about to my life and the world.’


'queer identity’, where I don’t look sufficiently like a lesbian, for example, I don’t think it’s an accident that I have been drawn to work that critiques the use of identity in human rights and international relations theorising.

Limitations
The first major limitation of this thesis is that it only considers and compares two jurisdictions, the UK and Australia. In addition to being fairly similar when compared to other jurisdictions, these countries also process a relatively small number of asylum claims when compared to global south countries that host the majority of the world’s refugees. The impact that this research has then, considering the small number of refugees affected by the practices focussed on in this thesis, is limited.

Second, due to the change in thesis design midway, the effectiveness of the interviews was lessened. This thesis could have been strengthened by allowing for greater discussion of civil society actors and the role they play, given that those were also the people being interviewed. If repeating this research in different contexts, this would strengthen the research enormously. Third, another limitation of this thesis is that it does not consider all the procedural norms listed by the UNHCR. Therefore, the project could be expanded, and perhaps links between failures or successes of those norms not considered could render more insight into the processes of domestic influence on norm implementation in these cases. Lastly, but not exclusively, this thesis was also limited by the fact that it focused on sexual orientation-based claims. To be a queerer project, the thesis would have been strengthened by considered claims made on gender, gender identity, and other grounds that involved non-normative expressions of gender and sexuality.
Chapter Four
Different legal systems, same heteronormative baggage

Introduction298
Domestic legal systems are important sites for assessing the variability of refugee norm implementation, how norms are adapted and adopted and why norm implementation may fail in some domestic contexts. This chapter begins this assessment with an analysis of the heteronormative history of international human rights legal norms. Heteronormativity can be defined as ‘the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent… but also privileged’.299 This chapter argues that many of the issues facing asylum seekers, including the institutional challenges to implementing procedural norms, can be better understood through an analysis of the restrictive and stereotypical way in which sexual orientation-based rights have been developed within the European court. In particular, I consider the impact on sexual orientation-based rights that developed with emphasis on the notion of privacy, which persisted in many jurisdictions including Australia and the United Kingdom. Understanding this heteronormative history of human rights norms is imperative for constructivist theorising.

Second, this chapter analyses the case of Britain and considers whether, as is notably missing in the case of Australia, the existence of regional human rights courts supports the implementation of norms in decision-making. Again, British decision-making has been characterised by the use of discretion reasoning, the suggestion that claimants should hide their sexuality in order to avoid persecution. The eventual dismissal of discretion reasoning saw a shift of emphasis to credibility assessment and the use of sexually explicit and stereotyped decision-making. It is argued, however, that the European courts actually have a fairly limited impact on the implementation of procedural norms

298 This chapter includes text that has been published in the following journal article: Jasmine Dawson and Paula Gerber, ‘Assessing the asylum claims of LGBTI people: Is the DSSH model applicable to lesbians?’, International Journal of Refugee Law 29, no. 2 (2017).
when compared to domestic influences from civil society and its role in pushing policy shifts including the creation of guidelines and training.

Third, this chapter looks at the role that legal systems play in norm implementation in Australia. As has been the case with international human rights legal institutions, Australian decision-making in refugee status determinations shows a heteronormative history. This has been particularly pronounced in the entrenched use of discretion reasoning in claims based on sexual orientation. In early research, it appeared that there was a significant lack of procedural norm implementation in Australian claims, with a notable lack of either reference to international human rights law or the existence of training and guidelines. However, upon reviewing publicly available AAT claims based on sexual orientation between 2016 and mid-2018 it became clear that there are recent signs of norm implementation in Australian claims. For example, while not publicly announced, there have been guidelines and training developed by the Australian Department of Immigration and Border Protection to assess claims based on sexual orientation, gender identity and intersex status. Furthermore, decisions during this recent period of research demonstrate a shift toward identity-based accounts of sexuality and away from the sexually explicit and stereotypical lines of questioning that characterised Australian decision-making until the mid-2010s. What is clear in both the UK and Australia, even though Australia has lagged, is that the role of civil society and the development of guidelines and training appear to have had a positive impact on norm implementation.

The heteronormative history of international human rights norms

In their theorising about the domestic structures that influence norm implementation, Betts and Orchard argue, as explained in greater detail in chapter one, that institutional, material and ideational factors affect both the implementation and content of a norm. Similar institutions may operate in varying ways across different domestic case studies. For example,

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governments may divide their ministries and ministerial responsibilities differently, may prioritise different resources and competencies, and the particular legal influence of an institution may differ significantly. In their work on legal norm implementation, Michael Schroeder and Alan Tiemessen argue that legal norms need to be supported by ‘receptive state agencies’. This is especially important when a given legal norm ‘must overcome opposition from other agencies, legislators, or the ruling political party or leaders’. The judiciary and legal institutions in any given state play a crucial role in testing the implementation or protecting the institutionalisation of a legal norm, particularly human rights-based legal norms.

According to Beth Simmons, domestic legal frameworks are one of the most important elements or domestic structures in explaining variable norm implementation between cases. Similarly, Australian legal scholar Susan Kneebone has argued that, in relation to the implementation of UNHCR guidance of refugee status determinations, the ‘systems put in place tend to reflect domestic legal cultures in relation to human rights and the degree of respect given to international obligations’. As Martha Finnemore and Stephen Toope argue, while the law and legal institutions are commonly considered only as constraining factors, the law is both ‘working in the world’ and has ‘creative generative powers’. Rather than focusing on ‘formal, treaty-based law’, Finnemore and Toope call for accounts of law that understand it to be ‘a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interactions among societies’. For example, Jenni Millbank described refugee law as a representation of the concrete application and manifestation of international

301 Ibid.
302 Schroeder and Tiemessen, “Transnational Advocacy”.
303 Ibid.
304 Simmons, Mobilizing Human Rights.
306 Finnemore and Toope, “Alternatives to ‘Legalization’”: 743.
307 Ibid.
human rights law, which is simultaneously inseparable from the ‘norms and institutional practices of the receiving country’.\textsuperscript{308} There will always be a process of ‘interpretation and contestation’ in a given jurisdiction when the process involves applying specific rules and actions through mediation, deliberation, and competition between different actors and bureaucracies at the domestic, regional, and international level.\textsuperscript{309}

In order for any norm to take hold at the domestic level, Cortell and Davis argue that it must gain saliency or legitimacy within the domestic cultural and legal structural context.\textsuperscript{310} Furthermore, in order to gain ‘cultural validation’, any norm must undergo normative contestation through which it is debated, engaged with pre-existing cultural and legal structures, and ultimately able to earn legitimacy through what Antje Wiener describes as gaining ‘meaning-in-use’.\textsuperscript{311} Essentially, no matter how established an international norm may be, these scholars argue that attempts at implementation will only take hold at the domestic level after a process of contestation, strategic use, and culturally specific employment of the norm that is in some way congruent with pre-existing normative and cultural structures. This process of cultural validation is essential, as without it a norm may become superfluous, ineffective or difficult to engage.\textsuperscript{312} In the case of refugee law, this process of cultural validation or the importance of ideational influences on norm implementation is particularly apparent. As Millbank describes, refugee law is both an application and a manifestation of international human rights law whilst at the same time being influenced and constituted by the ‘norms and institutional practices of the receiving country’.\textsuperscript{313} Taking note, however, that refugee law can only be implemented through domestic legislation and jurisprudence.

\begin{footnotes}
\item[310] Cortell and Davis Jr, “Understanding the Domestic Impact of International Norms,” 66.
\item[312] Wiener, “Contesting Meanings”, 5.
\end{footnotes}
Particularly when dealing with international human rights norms, the utilisation of strategic litigation to push for implementation and cultural or political change is common. This may, in constructivist terminology, be the role of ‘norm entrepreneurs’ – those who take actions to pursue particular normative change or application. In the case of the law, this is likely to be in the form of strategic litigation, the influence of a judge or judges on reinterpreting the law in a given decision, or by applicants themselves in pursuing novel claims or issues not yet decided upon. Norm entrepreneurs, who operate at all levels of norm development, institutionalisation, and implementation, may ‘introduce or reinterpret new ideas’, or ‘call attention to issues or even “create” issues by using language that names, interprets and dramatizes them’. In particular, Simmons highlights the phenomena of ‘causal lawyering’ where legal challenges or advocacy is ‘directed at altering some aspect of the social, economic, and political status quo’.

Indeed, Betts and Orchard consider the legal system both a constitutive and constraining ideational structure on attempts to legitimise an international norm and thus, in part, allow them to take effect. Though, of course, norms may take effect politically and socially without having legal recognition. It is not always the case that the law leads social change, but rather that it often tails movements and progressions that happen outside of the courts. Despite this, according to Simmons, domestic legal frameworks are one of the most important variables in understanding differences in norm implementation between jurisdictions or states.

The process of applying the law inherently involves a carefully and well documented mediation between ‘rules and specific action’. It is inevitable

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314 Finnemore and Sikkink, “International Norm Dynamics and Political Change.”
315 Simmons, Mobilizing for Human Rights, 133.
317 Simmons, Mobilizing for Human Rights, 134.
318 Betts and Orchard, Implementation in World Politics.
319 Simmons, Mobilizing for Human Rights
that these rules will ‘always be subject to interpretation and contestation’. 321
Indeed, no ‘complex rules system’, whether it be domestic, regional, or international, will ever be able to fully resolve conflicts between ‘its actors and constituents’. 322 Nevertheless, as Christian Reus-Smit argues, given the codified nature of law, what these legal structures do provide is an opportunity for observers to identify actor identities and interests with more clarity. 323 A caveat to this is that these identities and interests are snapshots presented through legal discourses at a particular point in time. However, despite its rigidity and formality at times, the law is not static. Through domestic and international legal processes and adjudication, the ‘logic of argumentation’ can be followed, by which a constructivist scholar can attempt to trace a norm as it is contested, tested, and evaluated. 324

In order to understand norm implementation in sexual orientation-based refugee claims, and more broadly the process of securing human rights for queer people, the heteronormative history and current status of legal institutions must be incorporated into constructivist theorising. Any norm purporting to improve the rights of queer people is developed and constructed within a broader history of sexual rights that has been limited to certain stereotypical ontologies about sexual orientation and gender. New human rights norms must engage with pre-existing networks of rights within the law at the domestic, regional, and international level. Any norm that attempts to shake the foundations of these entrenched understandings of sexuality and gender will struggle to take hold. This is particularly because they are being interpreted, assessed, and applied by decision-makers who are well established within the existing institutional culture. Decisions will be based primarily on pre-existing case law and human rights frameworks. It is simply not enough, as Doris Buss argues, to focus on the private realm of sexuality. 325 Rather, queer approaches

321 Ibid.
322 Ibid.
324 Ibid, 37-38.
need to unveil the ‘fantasies necessary in order to sustain [social reality]’ including the pervasive myth of heteronormativity that underpins international and domestic law, institutions and human rights. 326

This section, therefore, argues that there is a heteronormative history of international human rights law. It pays particular attention to European courts where the majority of claims based on sexual orientation were raised beyond the state level during the 20th century. European decisions were also purposefully chosen for this analysis in order to provide background to the UK’s engagement with European courts and consider whether these had a significant impact on procedural protection norm implementation. Through this analysis, it is argued that there are three core outcomes of the heteronormative history of international human rights law that have impacted sexual orientation-based refugee law. First, that historical approaches to recognising sexual orientation-based rights confined ‘homosexuality’ to the private sphere, fuelling elements of status determinations including the formerly widespread application of ‘discretion reasoning’. Second, that these accounts of sexuality within the law were primarily based on male stereotypes, therefore entrenching normativities and a gender bias in the jurisprudence. And third, that the immutability of sexuality along with a focus on sexual behaviours or practices has given rise to many of the credibility issues found in modern refugee jurisprudence.

While many accounts of sexual orientation-based rights simply ‘seek to derive a corpus of rights from extant human rights law’, 327 other queer researchers have sought to explore the way in which the ‘disciplinary powers’ inherent in law have the propensity to normalise, produce and colonise forms of identity. 328 Within legal discourse and institutions, queer theory requires us to unearth the assumptions and stereotypes about identity that are entrenched and


328 Ibid.
reproduced in legal systems. Further, as Otto argues, queering international human rights law also reveals how ‘deeply’ international law extends into the ‘domestic jurisdiction of states than it claims - into the biopolitical management of our lives’. Likewise, Paul Johnson describes the law as ‘an integral aspect of the “great surface network” through which sexuality is socially constructed’. Drawing on Foucault, he argues that it is ‘both an important site at which the “formation of special knowledges” about sexuality are interpreted and reproduced, and a vital nexus at which “controls and resistances” around sexuality are negotiated’. International human rights law ‘legitimates particular forms and subjects of history and subjugates or erases others’. Indeed, the law at any level is a significant site for exploring the establishment of normative ‘truths’ because it is one of the most powerful and authoritative institutions through which sexuality-based norms are established. Throughout the history of sexual orientation-based human rights law, the ‘homosexual’ as a subject of the law has been both introduced, and maintained, primarily through the use of traditional essentialist narratives that have continued to exclude many queer people from accessing human rights protections.

The development of international human rights law over the past sixty years progressed in many ways ‘while keeping issues of sexuality firmly in the closet’. For much of the twentieth century human rights law and norms did little more than further entrench the silence surrounding queerness and ignored

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329 Ibid, 217.
the discrimination and persecution of ‘sexual outsiders’ all over the world.\textsuperscript{337} In heteronormative environments, the silencing and privatisation of queerness served to reproduce heterosexuality as the norm, especially in legal institutions.\textsuperscript{338} Leslie Moran argues that heterosexuality is

in some respects like the air we breathe, a diffuse all-pervasive presence (a sense of rightness) but at the same time out of mind, unnoticed, unrecognisable, often unconscious, and immanent to the practice or to the institutions.\textsuperscript{339}

Heterosexuality is so pervasive that, while heterosexual rights are taken as the unquestioned basis of society, rights for queer people must be argued for, designed, and relentlessly pursued.

Many accounts of sexual orientation-based international human rights law begin with the 1981 case of \textit{Dudgeon v UK}, which involved a challenge against Northern Ireland’s sodomy laws.\textsuperscript{340} There is, however, a longer history of challenges based on sexual orientation in Europe dating back to the mid-1950s. Prior to Dudgeon, there were 19 cases – all brought forward by men – that were either deemed inadmissible or found to involve no violation of European Convention rights. Notwithstanding the lack of success, these early cases are important because they became the foundation on which later decisions were based, and the heteronormative basis upon which international human rights law developed. In the post-war era, it became clear that the European Commission had developed a ‘distinctive ontological understanding of homosexuality’.\textsuperscript{341} This ontology has impacted international human rights law, and in many ways, can be seen in the types of procedural and jurisprudential issues that have plagued refugees applying for asylum on the basis of their sexual orientation.

\begin{thebibliography}{99}
\bibitem{337} Ibid.
\bibitem{339} Ibid.
\bibitem{340} \textit{Dudgeon v. United Kingdom}, no. 7525/76 ECHR, 22 October 1981.
\bibitem{341} Johnson, \textit{Homosexuality and the European Court}, 20.
\end{thebibliography}
Two of the main themes associated with queer rights in the twentieth century – privacy and morality – were firmly established in these early cases. While none of the European Commission’s decisions included any extensive explanation why the suppression of ‘homosexual practices’ was necessary in a democratic society, the ontological construction of male homosexuality was based on the idea of it being dangerous, a threat to ‘the mental, physical and social development of young men’. In 1955, the European Commission considered for the first time whether the criminalisation of homosexual conduct was a violation of human rights. The 1955 case of *W.B. v Federal Republic of Germany* involved a challenge to paragraph 175 of the German Criminal Code which, since 1871, had criminalised ‘unnatural fornication’ between men. In 1935 this was amended to include ‘intercourse-like acts’ such as ‘anal, oral and thigh intercourse’ as well as the mere act of two men kissing or embracing. *W.B.* was an important case because while the European Commission found no violation of Article 8 of the European Convention [the right to private life], anti-sodomy laws were recognised as interfering with the applicant’s private life. The Commission, however, stated that it was the right of the State to interfere with an applicant’s private life in order to protect public morals. The result of the *W.B.* decision was that future applicants proceeded to concentrate their complaints strategically on challenging a state’s right to interfere with their right to private life.

During this early period, every sexual orientation-based claim before the Commission was rejected with the same brief conclusion that

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342 Ibid, 49.
346 Ibid.
347 Johnson, *Homosexuality and the European Court*. 

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The Convention allows a High Contracting Party to punish homosexuality since the right to respect for private life may, in a democratic society, be subject to interference as provided for by the law of that Party for the protection of health or morals.\textsuperscript{348}

In 1972, the case of \textit{X. v. Federal Republic of Germany} represented a new direction in the way the Commission responded to sexual orientation-based complaints. This complaint focused on unequal age of consent laws and was also unsuccessful. The Commission stated that the government had the right to protect the public from ‘a specific social danger in the case of masculine homosexuality’ because ‘masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytise adolescents’.\textsuperscript{349} Such demonising constructions of male homosexuality continued late into the 1990s with the European Court of Human Rights (ECtHR) still being presented with arguments that male homosexuality constitutes ‘deviant sexual practices’ and making no comment as to whether this was correct or otherwise.\textsuperscript{350} In the 1962 case of \textit{G.W. v Federal Republic of Germany} the Commission endorsed the view that homosexuality needed to be legally regulated because it was necessary to protect society from ‘this particular sort of crime’, which ‘often led to recidivism’.\textsuperscript{351} While the Commission did not elaborate on the nature of the ‘threat’ and ‘danger’ that sex between consenting men posed to the health or morality of society, it nevertheless continued to accept arguments premised on the understanding that the ‘homosexual male’ was a danger to ‘the family’ and to public health, and portrayed gay men as ‘paedophilic predators’ who would corrupt ‘innocent youths’.\textsuperscript{352}

These early cases are key to understanding some of the core elements of how international human rights law responds to sexual orientation-based rights.

\textsuperscript{349} \textit{X. v Federal Republic of Germany}, no. 5935/72, Commission decision, 30 September 1975.
\textsuperscript{350} \textit{Osman v United Kingdom} 1998-VIII; 29 ECtHR 245 at par. 12.
\textsuperscript{351} \textit{G.W. v Federal Republic of Germany}, no. 1307/61, Commission decision, 4 October 1962.
\textsuperscript{352} Johnson, \textit{Homosexuality and the European Court}, 32.
claims. First, it is apparent that the demonisation of same-sex attracted men, and the supposed threat they posed to the welfare of children and society, was fundamental to the law’s ontological construction of queerness. For example, the lives and persecution of lesbians and queer women were rarely, if ever at that stage, the consideration of legal challenges beyond the state. Second, that this misconceived assessment of ‘homosexual’ men was seen in the eyes of many governments and the Commission to justify the criminalisation of same-sex activity. And third, by recognising that laws criminalising same-sex activity were merely an interference with the right to private life that did not amount to a violation, while simultaneously ignoring complaints based on other Convention rights, the basis was established for future claims focussing heavily on the right to privacy.

The right to private manifestations
In 1981 the ECtHR became the first ever court to find that laws criminalising same-sex sexual activity were a breach of fundamental human rights. This was a significant development after nearly three decades of unsuccessful complaints brought by men on the basis of their sexual orientation. However, the decision in Dudgeon v. United Kingdom was limited to the right to privacy and maintained the historical and heteronormative distinction between permissible private rights and impermissible public rights. In this breakthrough decision, the ECtHR found that Northern Ireland’s sodomy laws violated the applicant’s right to privacy. Article 8 of the European Convention (the right to privacy) states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country,

353 Dudgeon v. United Kingdom, no. 7525/76, ECtHR, 22 October 1981.
for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\footnote{ETS 5; 213 UNTS 221 (Article 8).}

This is similar to Article 17 of the ICCPR, which also protects an individual’s right to privacy and family life.\footnote{United Nations General Assembly, \textit{International Covenant on Civil and Political Rights}, 16 December 1966, United Nations, Treaty Series, vol. 999, 171.} However, Article 17 states that ‘everyone has the right to protection of the law against such interference or attacks’ [on one’s private and family life], whereas Article 8 of the European Convention explicitly allows for the state to interfere in certain circumstances. The ECtHR found that the mere existence of the sodomy laws had a direct and continuous negative affect upon the applicant’s private life.\footnote{\textit{Dudgeon v United Kingdom}, App. 7525/82, 22 October 1981, ECtHR, par. 41.} Although the Commission had heard numerous cases relating to the criminalisation of same-sex sexual conduct, prior to \textit{Dudgeon}, only two such cases had made it to the ECtHR.\footnote{A third case during this period found no violation of the applicants’ rights concerning a complaint, among many other more weighted aspects, of same-sex content being taught in a sex education class. Sexual orientation, however, did not play a major role in the case. See: \textit{Kjeldsen, Busk Madsen and Pedersen v Denmark}, nos. 5095/71, 5920/72, 5926/72, 7 December 1976, ECtHR, par. 28.}

The decision in \textit{Dudgeon} represented a significant departure from earlier rulings. In \textit{Dudgeon}, the ECtHR rejected the United Kingdom’s claim that the criminalisation of homosexuality was necessary for the protection of public morality and health, on the basis that the same laws had already been repealed in England and Wales.\footnote{\textit{Ibid.}} In \textit{Dudgeon}, as well as its progeny cases \textit{Norris v. Ireland} and \textit{Modinos v. Cyprus}, the ECtHR accepted that the state has a right to limit privacy on the grounds of ‘public morality’.\footnote{\textit{Norris v. Ireland}, no. 10581/83, ECtHR, 26 October 1988, par. 46; \textit{Modinos v. Cyprus}, no. 7/1992/352/426, ECtHR, 23 March 1993.} However, this was not applicable when the law was seeking to regulate ‘consenting adults alone’,\footnote{\textit{Dudgeon v United Kingdom}, App. 7525/82, ECtHR, 22 October 1981: par. 60.} on the matter of ‘a most intimate aspect of private life’.\footnote{Ibid.} Ultimately, the ECtHR found that the sodomy laws were neither necessary nor proportional.\footnote{International Commission of Jurists, \textit{Sexual Orientation, Gender Identity, and Justice: A}
Following *Dudgeon*, in the 1988 case of *Norris v Ireland*, the Court confirmed that while members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanction when it is consenting adults alone who are involved.\(^{363}\)

While *Dudgeon* was undoubtedly an unprecedented success in securing the right to privacy, the Court maintained the historically heteronormative view that ‘public manifestations’ of same-sex desire ought to be regulated so as to prevent the ‘exploitation and corruption of those who are especially vulnerable by reason, for example, of their youth’.\(^{364}\) As Johnson argues, it remained a consistent theme in ECtHR jurisprudence to conceive of ‘homosexuality as “an essentially private manifestation of human personality”’.\(^{365}\) Jenni Millbank describes this era of jurisprudence as a period in which international courts developed a ‘rights within limits’ approach towards sexual orientation-based rights.\(^{366}\) The decisions were characterised by a division between the ‘private’, and therefore legitimate, homosexual legal subject and their illegitimate ‘public’ demands.\(^{367}\) Thus, from the very first cases, sexual orientation-based human rights claims were linked to privacy.

However, this was not the sole argument raised by claimants, who also asserted violations of the right to life (Article 2),\(^{368}\) the prohibition of torture
(Article 3), and the prohibition of discrimination (Article 14). These additional arguments were routinely ignored by the Commission and Court, which chose to focus instead on the link between ‘homosexuality’ and the right to privacy. This historical distinction between public and private rights continues to be significant, and problematic, because the flawed logic continues to be used by governments to justify the suppression of public expression. Further than this, the fixation on the private and sexual manifestation of sexual identity/orientation is deeply rooted in the construction of sexuality present in cases such as Dudgeon.

For decades in decisions by the ECtHR the rights of queer people were limited in order to protect public morality, health and the rights and freedoms of others. Johnson has described the way in which the ECtHR has consistently used the legal method of ‘margin of appreciation’ to refrain from acknowledging the inherently moral-based reasoning behind limiting sexual orientation-based rights to anything more than that of privacy. Margin of appreciation is ‘the space for manoeuvre’ the ECtHR allows to states in order to fulfill their Convention obligations. Particularly in the case of Convention Articles 8-11, the Council of Europe explains that ‘a state’s margin of appreciation will be determined by the Court’s assessment of the legality, legitimacy and necessity of any restriction by a public authority’.

In the 2010 case of Schalk and Kopf v Austria, the Court found that the state has a wide margin of appreciation in prohibiting civil marriage for same-sex couples. However, in their dissenting opinions, Judges Rozakiz, Spielmann

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369 A.S. v Germany, no. 530/59, Commission decision, 4 January 1960.
372 Ibid, 587.
373 Johnson, "Essentially Private," 77.
374 Johnson, Homosexuality and the European Court, 32.
376 Art. 8 (Right to Privacy), Art. 10 (Freedom of Expression), Art. 11 (Freedom of Assembly and Association).
377 Council of Europe, “The Margin of Appreciation.”
378 Schalk and Kopf v Austria, no. 30141/04, ECtHR, 24 June 2010.
and Jebens argued that, given that the Government offered no justification for the differential treatment of queer people compared to heterosexuals, there ought to have been ‘no room to apply the margin of appreciation’. In elevating such legal ‘tools’ as the margin of appreciation, the European Commission and Court have been criticised for failing their ‘duty to discover and give effect to the morally based understanding of human rights’. Kratochvil argued that through the invocation of the margin of appreciation the Court is essentially dodging the necessity to provide a rationale for its decisions, and instead puts up a ‘smoke screen’ in which the impression is given that the margin of appreciation tool has resolved the dispute. For example, in the 1995 case of *H.F. v Austria*, concerning a complaint against discriminatory minimum age of consent laws, the Commission failed to pursue an analysis of the margin, simply stating that the state had not overstepped its margin of appreciation and therefore no Convention violation had occurred.

It was not until 2010 that the European Courts recognised the right to public manifestations of sexual orientation-based rights. That year, the ECtHR held that refusing to issue a permit to hold a ‘gay pride’ event violated several articles of the European Convention, namely, Article 11 (freedom to assembly), 13 (effective remedy), and 14 (freedom from discrimination). The Russian government asserted that it had acted within its margin of appreciation because of its legitimate aim to protect public safety, morals, and the rights and freedoms of others. What made this a landmark decision is the ECtHR’s unequivocal rejection of the argument that the discussion of ‘homosexuality’ in public would negatively affect public morals, particularly given that the public

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379 Ibid. Joint dissenting opinion of Judges Rozakis, Spielmann and Jebens.
382 *H.F. v Austria*, no. 22646/93, ECtHR, 26 June 1995.
383 Ibid.
384 Alekseyev v Russia, nos. 4916/07, 25924/08 and 14599/09, ECtHR, 21 October 2010, section 82.
assembly in question was designed ‘to promote respect for human rights and freedoms and to call for tolerance toward sexual minorities’.\textsuperscript{386} The Court stated that,

\begin{quote}
[t]here is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or “vulnerable adults”.\textsuperscript{387}
\end{quote}

As such, the Court delivered its strongest declaration yet on sexuality extending beyond the private sphere, finding that restrictions of the public expression of sexuality may not be made for the purposes of protecting public morality. In addition, the Court dismissed the argument made by the Russian government that it had a wide margin of appreciation given that the Court had ‘ample case-law reflecting a long-standing European consensus’\textsuperscript{388} relating to homosexuality - that there was ‘no ambiguity’ within the member states’ acknowledgement of sexual minorities’ right to advocate for their own rights and freedoms.\textsuperscript{389}

These decisions, in a sense, upended decades of law that had required queerness to remain solely in the private sphere. They are also evidence of the fact that human rights are always socially bound and are intended to be interpreted in the ‘light of the times’. This is clear when looking at the EU and the slow process towards regional consensus on sexual orientation-based rights. When international human rights law treaties were drafted, it was never with the intention that they would be used for sexual orientation-based claims. However, the European Convention was intended to be a set of ‘living instruments,’ interpreted and applied ‘in their context and in the light of its object and purpose,’ as guided by the Vienna Convention’s rules on treaty

\textsuperscript{386} Ibid, 587; \textit{Alekseyev}, para.82-6.
\textsuperscript{387} \textit{Alekseyev}, para.86.
\textsuperscript{388} \textit{Alekseyev}, para.83.
\textsuperscript{389} Ibid, para.84.
According to the ECtHR, in order to be both effective and practical, Convention rights need to be ‘interpreted in the light of present day conditions’ taking into consideration ‘sociological, technical and scientific changes, evolving standards in the field of human rights and altering views on morals and ethics’. We can see, particularly in the cases of Alekseyev and Fedotova, that shifting understandings of public morality and ontological constructions of sexuality have been used to dismiss the restriction of expression to the private sphere.

Furthermore, this history illustrates the legal institutional framework that advocates must work with. The law is such that in order for individuals to gain, they must engage with existing laws and human rights, and this may potentially be at odds with their own understanding of sexuality and queerness. Furthermore, this history of sexual orientation-based claims in EU institutions demonstrates clearly that legal institutions are not neutral but rather are inherently anti-queer. Any attempt to extend human rights and legal norms for queer people involves a normative process that reduces, categorises, and prescribes. For constructivist international relations theorising on norm implementation, especially where it intends to account for sexual rights norms, there needs to be an interrogation of the pre-existing heteronormative nature of these institutions, and the ‘normative’ baggage they bring to contemporary decision-making.

**The Role of Regional Courts in British Decision-making**

Like other jurisdictions, the UK struggled with discretion reasoning. This application of discretion reasoning in the UK was strongly influenced by its own domestic policies and laws regulating ‘homosexuality’, which had similarly led to issues of credibility and the non-implementation of procedural norms. One of the key points of difference, when compared to Australia, however, is the fact that the UK litigants have access to the European Convention on Human

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Rights and regional human rights courts. However, the extent to which this influences the implementation of procedural norms is not clear. This section first analyses the history of British regulation of sexuality and the role this played in the employment of discretion reasoning. Second, it looks at the role that European courts play in British decision-making. It is argued that given the fact that British legal and policy decisions predated the regional decisions that established the procedural norms in question, and also given that many of the European decisions are not binding on British courts, the role regional courts play in the implementation of procedural norms in the UK is less significant than might be expected.

*Being discreet in the UK*

The use of discretion reasoning was prevalent in the UK up until its dismissal in 2010. Discretion reasoning, which has appeared to varying degrees in many jurisdictions, is broadly understood to be the ‘expectation or assumption that claimants would or should hide their sexual orientation and thus avoid a risk of persecution’. Essentially, it is the tendency to tell applicants that they did not warrant the protection of the Refugee Convention because they could easily hide the characteristics that were “attracting” persecution and harm. In this sense, discretion reasoning is, at its heart, a sophisticated form of victim blaming in the context of refugee law, where the onus of protection is placed on the refugee rather than the persecutor or state. In other instances, the requirement for applicants to be discreet about their sexual orientation in order to gain protection has itself been understood to constitute persecution. According to Christopher Kendall, the logic of discretion reasoning essentially results in governments, tribunals, and courts persecuting applicants through the enforcement of ‘state-imposed invisibility’.

Deemed a substantive rather than a procedural protection issue by the UNHCR

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Guidelines, discretion reasoning has been dismissed in multiple jurisdictions as well as by the UNHCR. The 2012 Guidelines state:

That an applicant may be able to avoid persecution by concealing or by being “discreet” about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. LGBTI people are just as much entitled to freedom of expression and association as others. \(^{396}\)

As stated, this policy came to be accepted at the international level through ‘numerous decisions in multiple jurisdictions’. \(^{397}\) The timing at which different jurisdictions have dismissed discretion reasoning varied greatly, and so too does the ways in which it continues to manifest in modern jurisprudence. For example, in 2011 Sabine Jansen and Thomas Spijkerboer detailed in their report *Fleeing Homophobia* that discretion reasoning was still occurring in 18 European jurisdictions. \(^{398}\)

Discretion reasoning, apparent in sexual orientation-based refugee status determinations from the very first claims, has had mixed reception in different jurisdictions. It proved to be particularly pervasive in Australian and British courts, for instance, while being dismissed very early on in Canadian determinations. \(^{399}\) The leading case that dismissed discretion reasoning occurred in 1995 when the Canadian Immigration Review Board (IRB) rejected discretion reasoning in sexual orientation-based claims just two years after

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\(^{396}\) UNCHR, “Guidelines on International Protection No. 9”, par. 32.

\(^{397}\) Ibid.


\(^{399}\) Millbank, “From Discretion to Disbelief.”
particular social group status was recognised in *Ward v Canada*. The IRB held that

> [a]t the heart of the Convention definition of a refugee is the concept that no person should face a reasonable chance of persecution because of her or his race, religion, nationality, membership in a particular social group or political opinion. To deny refugee status to someone who cannot or will not conceal one of these immutable or fundamental attributes, on the ground that by such a concealment he or she could remove the fear of persecution, would make a mockery of the Convention.\(^{400}\)

In a second case heard in 1995, the IRB argued that the logic of discretion reasoning may itself constitute a violation of human rights, commenting that ‘expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution.’\(^{401}\)

By contrast, it was common for decision-makers in the UK to dismiss sexual orientation-based claims because same-sex acts or relationships were perceived to be ‘an association of a private and purely voluntary nature’.\(^{402}\) For example, in one early asylum application in 1989, the UK Secretary of State argued

> [h]omosexuals… are a group but their only common characteristic is a sexual preference which, if it is revealed at all, is normally only revealed in private. A group cannot be a social group if its only common characteristic is so concealed.\(^{403}\)

Such positions were eventually dismissed in the case of *Shah v SHHD [1999]*

\(^{400}\) *RE XMU [1995] CRDD No 146 (QL)*, IRB Reference T94-6899 (Griffith Rucker 23 January 1995) at par. 100-102).

\(^{401}\) *Chan v Canada (Minister of Employment and Immigration [1995] 3 S.C.R. 593)*.

\(^{402}\) McGhee, “Persecution and Social Group Status”, 23.

\(^{403}\) Quoted on review: *Re SSHD ex parte Binbasi [1989] Imm AR 595.*
in which the court found that ‘homosexuality’ was a ‘common immutable characteristic’ that constituted ‘a legitimate basis for a refugee status based on the social group definition’. And yet, despite this, the characteristically restrictive nature of British refugee status determinations in the case of sexual orientation-based applications persisted in the post-Shah era.

Two UK-based organisations during this period collected and published important information relating to the adjudication of sexual orientation-based claims. The first is Stonewall UK, a group founded in 1989 that lobbied against discriminatory laws and policies against LGBT persons in the UK. The second is the UK Lesbian and Gay Immigration Group (UKLGIG), which was formed out of the Stonewall Immigration Group in 1993. Initially focussing on the immigration concerns of same-sex couples, the group gradually developed a focus on asylum seekers which it maintains today. In 2010 the UKLGIG reported that in 55 per cent of the cases that it reviewed, ‘case workers found that the person could return to a hidden life in their country of origin, even where people provide clear evidence of having suffered severe harm due to their sexual identity’. Furthermore, UKLGIG estimated that around 98 per cent of cases based on sexual orientation were refused at the initial interview. Angela Mason, patron of UKLGIG, stated that it appeared ‘the Home Office was routinely refusing applications on the grounds that lesbians and gay men

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404 Islam (AP) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, ex parte Shah (AP) (Conjoined Appeals) [1999] 2 AC 629; [1999] 2 All ER.


408 Ibid.
[could] go back and be “discreet” or “relocate”. Meanwhile, in a 2010 Stonewall UK report, a senior case worker from the UK Border Agency said that while discretion reasoning was routinely used in cases based on sexual orientation, it was never suggested to applicants applying on other grounds that they should ‘go back and practice your religion quietly, or go back and stop being a political activist’. Likewise, in a 2010 UKLGIG report, it was argued that discretion reasoning simply was not found in other types of claims, but exclusively in sexual orientation-based applications. As a result, the public expression of one’s religion or political belief were found to be core elements of those identities. Meanwhile, as Dauvergne and Millbank argue, in the UK the concept of a ‘secret gay life [was]… repeatedly defined by members imposing the discretion requirement as “giving up something less” than a fundamental human right. Essentially, this meant that unlike other minorities applying for asylum, queer people had the “option” of being “discreet” about their sexual orientation’, and therefore were not worthy of being granted protection.

At a distance, the emergence and application of discretion reasoning is a symptom of the broader historical construction of ‘homosexuality’ as being a ‘discreet preference’, one characterised by the ‘ever-present possibilities of

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409 Diane Townsend and Mark Taylor, “Gay asylum seekers face ‘humiliation’”, The Guardian, September 2nd, 2014. https://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office. British barrister S Chelvan was quoted in Stonewall UK’s 2010 report No Going Back as saying “I had a Pakistani client who was 17 when he came to the UK. He was found kissing his boyfriend, caught by the policy and beaten over the head. In the UK he came out to his uncle who threatened him, told him to leave the house and said he’d inform his family in Pakistan that he was gay who would kill him if he ever returned. All these facts were accepted by the Home Office… However, when the question was posed, on relocation outside his home area, what does he say when somebody asks him “Why aren’t you married?” the judge said, well all he needs to say is, “I’m not the marrying kind”. That client is now in Pakistan hiding because he was sent back”.

410 It should be noted that ‘internal relocation alternative’ within refugee law is a well-established concept. However, this is sometimes conflated with discretion. Queer applicants are particularly vulnerable, and relocation is often not an appropriate solution. For detailed insight into the logic of internal relocation, see: James Hathaway and Michelle Foster, “Internal protection/relocation/flight alternative as an aspect of refugee status determination”, in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection, ed. E. Feller et al (Cambridge: Cambridge University Press, 2003) 357-417.

411 Ibid, 21.

412 UK Lesbian and Gay Immigration Group, Failing the Grade, 4.


being visible or not visible, of being closeted or out, of speaking up or remaining silent, of being known or not known'. 415 With a closer look, however, the employment of discretion reasoning can be seen to be reflected in deeply rooted cultural and legal approaches to sexual orientation. This ‘trope of invisibility’, as Sedgwick describes it, is part of the broader ‘politics of homosexuality’ in which there has always been a distinction between ‘being in or out of the closet’, which has been ‘the “defining structure” for lesbian and gay oppression in the twentieth century’. 416

That the UK has struggled to do away with discretion reasoning is not surprising given the chronological development of domestic protections for queer citizens. In particular, the UK struggled to let go of notions of privacy and discretion. According to Millbank, UK decision-makers tended to regard ‘the private realm’ as being the ‘proper place of homosexuality and that the only response to the “problem” of persecution was the maintenance of this constructed ‘private homosexual’ through discretion reasoning. 417 The UK was relatively slow to accept claims based on sexual orientation. 418 It also applied discretion reasoning more heavily than any other comparable jurisdiction. 419 This may be due to the fact that although same-sex acts were decriminalised in the UK in 1967, domestic laws in relation to sexual orientation still created a culture ‘in which gay sexuality was stigmatized through regimes of privacy and bare “tolerance”’. 420

In 2006 the UK passed the Equality Act (2006), which followed the passage of anti-discrimination measures and the Civil Partnership Act (2004). These

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418 Miles, No Going Back.
419 Millbank, “A preoccupation with perversion”; UK Lesbian and Gay Immigration Group, Failing the Grade.
changes were especially significant given that, up until 2003, sexuality-specific provisions relating to ‘public’ spaces had not yet been expunged from the statutes and ‘sweeping and discriminatory laws on ‘public’ indecency continued to be enforced’.\textsuperscript{421} It was not until 2000 that legislations conferring equality in ‘age of consent’ was passed (\textit{Sexual Offences (Amendment) Act} 2000) and not until 2003 that the ‘anti-proselytizing’ provisions relating to homosexuality ‘promotion’ were repealed (\textit{Local Government Act} (1998). Cl. 28). As such, despite the passage of rights-based legislation, the propensity to designate the private sphere as the proper place for homosexuality was still strongly ingrained.

According to Emma Henderson, this tendency in British culture and law can be traced back to the 1956 \textit{Wolfenden Report}, which argued that the “solution” to the “problem” of homosexuality was protecting and enforcing privacy.\textsuperscript{422} The Report stated that while same-sex acts and homosexuality were understood to be ‘sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition’, the sexual acts of any citizen conducted in private was ‘outside the “proper sphere” of the law’s concern’.\textsuperscript{423} In detail, the Committee that authored the report argued that

\begin{quote}
[i]t is not the function of the law to interfere in the private lives of citizens, or to seek to enhance any particular pattern of behavior… unless a deliberate attempt is made by a society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is not the law’s business.\textsuperscript{424}
\end{quote}

Rather than supporting a positive right to privacy, however, Henderson argues that the position of the Committee essentially called for the \textit{imposition of}

\textsuperscript{421} Ibid, 14.
\textsuperscript{423} Ibid, 10, 21; Henderson, “Of signifiers and sodomy.”
\textsuperscript{424} Wolfenden Report, 9-10.
privacy. The report was clear evidence that in the UK ‘gay men were out of place in the public, and conceptualized as inherently transgressive in that sphere’. In effect, it follows that from the Wolfenden Report in the 1950s to the application of discretion reasoning in the 1980s, 1990s, and 2000s, the approach to the rights of queer people remained firmly one that restricted same-sex sexual expression and desire to the private (and therefore tolerable) realm. Another way of considering this divide is that this history of privacy embodied the fear that any same-sex public expression would negatively interfere with the public ‘moral space’. This can be seen in the asylum application of a Bulgarian man in 1998, for example, who had been arrested for ‘immoral behaviour’ because his neighbour had informed the police that his partner was sleeping in his apartment. In this case, the Tribunal found that the mere fact that the police had to intervene was ‘itself seen as proof of the non-private nature of the conduct’ which then justified the arrest and disqualified the applicant from refugee status on the grounds of persecution due to sexual orientation. In 2010, however, the UK Supreme Court finally rejected discretion reasoning when it abolished the often applied ‘reasonable tolerability’ test in the case of HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department. The case, widely heralded as a major step forward in sexual orientation-based refugee jurisprudence, involved two men from Iran and Cameroon who had had their applications dismissed because they were told they could go back to

429 Despite homosexuality being decriminalized in Bulgaria at this stage, the law still provided that ‘whoever engages in homosexual acts in public or in a scandalous manner or in any way so as to entice others to perversity will be punished with a prison sentence of up to two years’ (art. 157 (3), cited in Apostolov v SSHD (1998).
430 Millbank, “A preoccupation with perversion,” 123.
431 HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31 (HJ and HT v SSHD [2010]).
their countries and hide their sexual orientation in order to avoid persecution. By a 4:3 majority, the Court held that the reasonable tolerability test was ‘wrong in principle, unworkable and inconsistent’ with the Convention.\footnote{Ibid, per Lord Rodger at par. 81, 37).} And yet, according to legal scholar Thomas Spijkerboer, discretion reasoning turns out to be a ‘many-headed monster’.\footnote{Thomas Spijkerboer, “Sexual Identity, Normativity and Asylum,” in Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum, ed. Thomas Spijkerboer (New York: Routledge, 2013), 291–222.} The dismissal of discretion reasoning in the UK resulted in the manifestation of heteronormative approaches to disbelieving applicants as well as erroneous factual assessment of queer identities. In particular, British decisions were plagued by sexually explicit questioning and stereotypical expectation of a shared cultural identity.

Spijkerboer has described numerous ‘mutations’ of discretion reasoning since its dismissal in cases such as\footnote{Thomas Spijkerboer, “European Sexual Nationalism: Refugee Law after the Gender & Sexuality Critiques.,” vol. 8 (Nordic Asylum Seminar, University of Uppsala, 2015), http://thomasspijkerboer.eu/wp-content/uploads/2015/05/Uppsala-201505081.pdf.} HJ and HT and 2003 Australian case of S395 and S396 discussed below.\footnote{HJ and HT, ibid.} Briefly, two of the mutations that continue to influence decision-making are the concept of being ‘naturally’ discreet and the argument that only ‘activities properly understood to be inherent’ to sexual orientation ought to be afforded protection.\footnote{Spijkerboer, “Sexual Identity, Normativity and Asylum,” 252.} The assumption that some people are ‘naturally’ or ‘voluntarily discreet’, suggests that discretion would not be \textit{required} for these people if they were then sent back to their country of origin. That is, it would subsequently be a ‘reasonable \textit{factual} prediction’ that they would, by their own choice, be discreet upon return as they were before making their application.\footnote{Wessels, “HJ (Iran) and HT (Cameroon),” 822.} Jana Wessels has similarly argued that ‘discretion logic’ persists in the test that was laid out in HJ and HT.\footnote{Wessels, “HJ (Iran) and HT (Cameroon),” 822.} The new test, as laid out by Lord Rodger, in part states that

…if the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live.
or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected… 438

As a result, Wessels argues, the test represents a shift from expectations of ‘reasonably tolerable discretion’ to an understanding that applicants may engage in ‘discretion by choice’. 439 In his decision, Lord Roger referred to the 2003 Australian case of *S395 and S396 v MIMA* despite the fact that the Justices in the Australian cases did not reference ‘choice’ in any way. Nevertheless, in *HJ and HT* Rodgers suggested that,

> In the remainder of para 40 they point out that, if the position were otherwise, the Convention would not protect those who *chose to exercise their right*, say, to express their political opinion *openly*. Similarly the Convention would not protect those who chose to live openly as gay men rather than take the option of living discreetly. 440

This has the effect that where the reasoning of *HJ and HT* is applied, even when it is accepted as a fact that queer people face persecution in their country of origin, an applicant is expected to distinguish whether their discretion would be the consequence of a fear of persecution of whether it was the result of ‘natural’ secrecy to avoid mere ‘social’ and ‘familial’ disapproval. 441 The second ‘mutation’ of discretion reasoning associated with *HJ and HT* is the argument that only ‘activities properly understood to be inherent’ 442 to sexual identity ought to be protected by refugee status. 443 In *HJ and HT*, the Court held that

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438 (emphasis added) Lord Rodger in *HJ and HT*, para. 82. V.
439 Wessels, “*HJ (Iran) and HT (Cameroon)*,” 826. Lord Rodger continued that in such circumstances ‘it is at least possible that the only real reason for an applicant behaving discreetly would be his *perfectly natural* wish to avoid harming his relation- ships with his family, friends and colleagues... He would not be a refugee within the terms of article 1A(2) of the Convention because, by *choosing to behave discreetly* in order to avoid these social pressures, the applicant would simultaneously *choose to live a life* in which he would have no well-founded fear of being persecuted for reasons of his homosexuality.
440 (*HJ (Iran) and HT (Cameroon)* per Lord Rodger at par. 55, 27.
441 Wessels, “*HJ (Iran) and HT (Cameroon)*”, 833.
442 Hathaway and Pobjjoy, “Queer cases make bad law”, 335.
443 *HJ and HT*, Spijkerboer, “European Sexual Nationalism.”
to pretend sexual identity did not exist that 'or the behaviour by which it manifests itself can be suppressed,' constitutes a denial of fundamental rights.

**Regional legal influences?**

The opportunity for applicants in the UK to appeal to their rights under the European Convention of Human Rights, and also the British courts’ obligations to consider or implement European jurisprudence on refugee status determinations, represents one of the clearer institutional differences between the UK and Australia. Despite the history of heteronormativity illustrated above, in recent years the EU courts have produced a number of significant cases relating to sexual orientation-based refugee status determinations. This includes a Dutch case decided by the Court Justice of the EU (CJEU) which formed the basis of many of the procedural protection norms that are contained in the UNHCR guidelines. It was thus theorised that these decisions, and the ability for applicants to appeal to regional human rights courts, would have a significant impact on the implementation of procedural norms.

In 1966 the UK accepted an individual’s right to take a case to Strasbourg and the jurisdiction of the European Convention on Human Rights. Later, the 1988 passing of the *Human Rights Act* ‘gave effect in domestic law to the fundamental rights and freedoms in the Convention’. Despite the ECtHR system being considered by many to be the ‘most advanced and effective international regime for enforcing human rights in the world’, some British commentators have criticised the European Convention and have consistently called for the establishment of a British Human Rights Bill. This was an element of the proposed Brexit deal made by the British government under Theresa May. Despite some confusion over whether the UK ought to continue implementing the European Convention after it leaves the European Union, in April 2018 Parliament voted to maintain the European Convention in British

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While criticisms were raised by some politicians about European law being unduly imposed on British courts and the government, the UK government has been relatively successful in its representation before European courts. For example, of the 11,833 individual applications to the ECtHR that were brought against the UK between 1999 and 2010, only 390 (3 per cent) were admitted and only a 215 (1.8 per cent) of those admissible cases produced a decision that the UK had violated the applicant’s fundamental rights. Furthermore, the influence of the ECtHR is dampened by the fact that its decisions are not binding on British courts. Rather, according to Lord Irving of Lairg, under British law as described in section 2 of the Human Rights Act, British courts are only compelled to ‘take account of’ ECtHR decisions. Irvine explained,

“Take account of” is not the same as “follow”, “give effect to” or “be bound by”. Parliament, if it had wished, could have used any of these formulations. It did not. The meaning of the provision is clear. The judges are not bound to follow the Strasbourg Court: they must decide the case for themselves.

Ultimately, this means that British courts are never bound to follow ECtHR decisions, even when there are implications arising from cases that are successfully brought against the British government. Courts are allowed to apply their own interpretation, and there have been some significant decisions that have differed from ECtHR case law. For example, in the case of R v Horncastle and others (Appellants) in 2009, the Supreme Court decided a case relating to the right to a fair trial that disagreed with ECtHR jurisprudence on

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448 Table 4.1 in Equality and Human Rights Commission, The UK and the European Court of Human Rights, 31.

449 Ibid, 119.

450 Ibid.
the matter. In another case, *R (Animal Defenders) v Secretary of State for Culture, Media, and Sport* in 2008, the House of Lords ignored an ECtHR judgement that would have dismissed British rules on media neutrality before an election.

However, unlike the decisions made by the ECtHR, decisions made by the CJEU are binding on UK decision-makers. One case in particular directly addresses some of the core procedural norms addressed in this thesis. The key case in this area is the 2014 CJEU decision in *A, B and C v Staatssecretaris van Veiligheid en Justitie* where the Netherlands sought guidance on whether further inquiry beyond self-identification in the cases of same-sex attracted men could infringe or violate the right to integrity (Article 3) and to respect of private and family life (Article 7) as laid out in the EU Charter of Fundamental Rights. The CJEU found that while self-identification is the starting point of inquiry, assessment must take account of the individual situation and personal circumstances of the applicant, while ensuring that the applicant’s rights to respect for human dignity (Article 1) and respect for private and family life (Article 7) are not violated. Assessments, should therefore not:

i. employ or rely upon *stereotypes*. For example, an applicant’s inability to answer questions about gay organisations, venues, or icons, cannot constitute a sufficient reasoning for finding a lack of credibility;

ii. include questions about *sexual practices*. The Court found sexually explicit questioning is contrary to an individual’s right to

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451 *R v Horncastle and others (Appellants)* [2009] UKSC 14
452 *R (Animal Defenders) v Secretary of State for Culture, Media, and Sport* [2008] 1 AC 1312
454 C-148/13 to C-150/13, 2 December 2014.
456 *A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014], para.52.
457 Ibid, para.57.
458 Ibid, para.60-63.
respect of dignity and respect of privacy and family life;\(^{459}\) iii. entail the decision-maker seeking or reviewing “evidence” in the form of sexual acts, films of sexual acts, or “tests” purported to prove an applicant’s sexual orientation as this would violate an applicant’s right to respect of dignity;\(^{460}\) and iv. result in a finding that an applicant’s self-identification as LGBT lacks credibility because they did not assert or reveal this to officials, in their initial interview, as the basis for their claim.\(^{461}\)

Such guidance on the limitations on lines of questioning in these cases can also be found in the procedural issues section of the UNCHR’s 2012 Guidelines to International Protection No. 9; the procedural norms under examination in this thesis.\(^{462}\)

The issue of limiting sexually explicit material remains contentious, particularly among applicants and the lawyers representing them. Some have argued that this limitation is a necessary requirement to protect the privacy and dignity of applicants, as well as identifying the way in which sexually explicit documentation raises the burden of proof while simultaneously proving nothing.\(^{463}\) For example, Rachel Lewis has argued that when it comes to credibility issues relating to ‘performance of group membership’, the use of sexually explicit material may ‘have the effect of heightening the burden of proof and exacerbating the credibility issues for future gay and lesbian asylum applicants’ were it to become an expectation held by decision-makers.\(^{464}\)

However, others have expressed their frustration at not being able to use the evidence provided by their clients. In effect, the decision considers the effect such questioning on a wider group of people rather than simply on the

\(^{459}\) Ibid, para.64-65.
\(^{460}\) Ibid, para.65-66.
\(^{461}\) Ibid, para.67-71.
\(^{463}\) See for example: Wessels, “HJ (Iran) and HT (Cameroon)”.
individual applicant in question, which is not the role of a lawyer when representing a single client.\textsuperscript{465} Rather, a lawyer’s responsibility is to litigate in the best interest solely of their client, including when it might have been potentially in the best interest of the client to submit sexually explicit material. Likewise, with regard to the International Commission of Jurists’ (ICJ) 2016 practitioners’ guide \textit{Refugee Status Claims Based on Sexual Orientation and Gender Identity}, Alice Edwards writes that the Guide does not take this judgement at face value but compels the practitioner to think about how to handle some possible exceptions to the strict rule made by the Court, such as whether pre-existing video evidence filmed with the purpose of substantiating a claim to refugee status should also be disqualified.\textsuperscript{466}

Whether the CJEU decision has had a significant impact on British decision-making is disputable. Some of the key issues under consideration in the \textit{ABC} case had already been accepted by the Home Office as policy prior to the case being decided. In 2014 a leaked report in the UK revealed a series of ‘shockingly degrading’ incidents in the assessment of sexual orientation-based claims.\textsuperscript{467} For example, the leaked report detailed how one bisexual applicant was asked questions by the Home Office such as: ‘Did you put your penis into x’s backside?’ and ‘When x was penetrating you, did you have an erection? Did x ejaculate inside you. Why did you use a condom?’\textsuperscript{468} The report also revealed that at another point during the applicant’s five hour interview, the applicant was asked: ‘What is it about men’s backsides that attracts you?’ and ‘What is it about the way men walk that turns you on?’\textsuperscript{469} Following this reporting, and the significant outcry from civil society organisations, the then Home Secretary, Theresa May, ordered a review of the way that asylum claims based on sexual orientation in the UK were assessed.\textsuperscript{470} The Independent

\textsuperscript{465} Ibid.
\textsuperscript{467} Taylor and Townsend, “Gay asylum seekers face ‘humiliation’”.
\textsuperscript{468} Ibid.
\textsuperscript{469} Ibid.
\textsuperscript{470} John Vine, \textit{An Investigation into the Home Office’s Handling of Asylum Claims Made on the Grounds of Sexual Orientation} (London, UK: Independent Chief Inspector of Borders and
Chief Inspector of Borders and Immigration John Vine found that twenty per cent of interviews in their research involved stereotypical lines of question, and ten per cent involved lines of questioning that were likely to elicit sexually explicit answers.\(^{471}\)

In response to the Vine’s report, the UK Home Office published a response document that formally ‘accepted’, among other things, to: review training and ‘ensure that decision-makers know that it is not acceptable to ask questions which stereotype LGB claimants’;\(^{472}\) that guidance and formal training would reflect this,\(^{473}\) and that guidance would ‘make it absolutely clear that there are not circumstances in which it will be appropriate to initiate questions of a sexually explicit nature’.\(^{474}\)

Subsequently, the Home Office published asylum policy instructions on claims made on the basis of sexual orientation which, as of August 2018, are in their sixth revision.\(^{475}\) It appears there has been a mutually constitutive relationship between British and European courts in the development of European jurisprudence leading to protections for sexual orientation-based asylum applicants. In the case of these protections the court played a key role and settled matters within the UK that lawyers and advocates had been dealing with. The UK had to now follow the ABC decision, and the guidance was implemented into guidelines for sexual orientation and gender identity. However, this was facilitated by domestic movements pushing for proper, separate, guidelines that dealt explicitly with credibility assessment issues for


\(^{472}\) Ibid.


\(^{474}\) Ibid, s. 1.2.

\(^{475}\) Ibid, s. 2.2.

sexual orientation and gender identity. Domestic shifts within the UK actually led the CJEU on issues of stereotypical and sexually explicit questioning with approaches such as the DSSH model being adopted by the Home Office. The model was the work of London barrister S. Chelvan who developed it to better assess credibility in LGBTI asylum claims. DSSH, which stands for ‘Difference – Stigma – Shame – Harm’, attempts to guide decision-makers in assessing an applicant’s identity narrative and experiences of difference from broader society rather than focusing solely on sexually explicit acts and tropes about sexuality.

Therefore, while the CJEU decision does have a binding effect on the questioning practices of British decision-makers, this was not the causal factor for such limitations occurring in practice and policy within the UK. In fact, British civil society and policy actors came to this conclusion prior to European decision-makers, and therefore the effect of the decision is limited when considering influence on the procedural norm implementation. It is not a major explanatory factor in distinguishing norm implementation between Australia and the UK, as it appears that actions at the domestic level, rather than within the regional courts, were the instigators and implementers of such procedural norms in sexual orientation-based claims.

**Australian decision-making: Slow signs of implementation**

Just as European legal institutions developed heteronormative human rights norms, the Australian legal system has also developed heteronormative constructions of identity and rights that have subsequently informed refugee status determination. This section first analyses the historical persistence of discretion reasoning in Australian decision-making and the way this has led to present day issues relating to credibility and the non-implementation of many

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477 Ibid.
of the procedural norms. It then asks what role the legal system in Australia has on the implementation of procedural norms in sexual orientation-based claims in Australia. It is argued that despite not having access to regional human rights conventions and human rights courts, norm implementation is beginning to emerge in the Australian context, albeit a number of years after the UK. As in the UK, it appears that civil society activism and engagement at the domestic level has influenced policy makers and decision-makers more than high profile policy or legal developments. A review of AAT decisions between 2016 and mid-2018 reveals that LGBTI guidelines and training have been developed and are being used by decision-makers with positive results in procedural norm implementation.

Taking the analysis of procedural norm implementation to the level of individual cases is important because the bulk of implementation or non-implementation of any procedural norms most often occurs in tribunal and lower court processes. According to legal scholar Rebecca Hamlin, constructivist and other international relations theorists typically assume that domestic political decisions are exclusively influenced by ‘international power dynamics, norms, and pressure from global governing institutions’, when in fact refugee status determinations are influenced more by ‘domestic concepts of administrative justice than any influence coming from the global refugee regime’. 478 Indeed, according to legal scholar Susan Kneebone, ‘the systems put in place tend to reflect domestic legal cultures in relations to human rights and the degree of respect given to international obligations’. 479 Rather than solely considering courts and tribunals as institutions at odds with government policy, Hamlin argues that scholars ‘need to conceptualize courts as political actors with distinct interests, priorities, and power’. 480 In the case of Australia, this is particularly so, given its lack of access to, and influence of, regional courts.

While Australia isn’t party to any human rights courts at the regional level, and
doesn’t have a domestic human rights bill, it is party to the ICCPR and the
decisions of the UN Human Rights Committee. With regards to human rights
commendations of same-sex Australians, there are three significant UN Human
Rights Committee cases that have been heard. The first was the landmark case
*Toonen v Australia*, decided in 1994, which effectively ended the
criminalisation of same-sex acts in Australia.\(^{481}\) The Human Rights Committee
extended the definition of ‘sex’ in the ICCPR to include sexual orientation and
therefore found that same-sex couples were being discriminated because of
laws criminalising consensual sex between adult men in private.\(^{482}\) The second
was the case of *Young v Australia*, decided in 2003, in which the Human Rights
Committee found that the Australian government’s refusal to provide pension
benefits to a same-sex partner of a war veteran was a violation of Article 26,
the right to non-discrimination.\(^{483}\) A third case, *C v Australia*, was decided in
2017 in which the Human Rights Committee found that the denial of the right
to divorce for same-sex persons who had married overseas was also a violation
of Article 26.\(^{484}\)

However, the need to focus on lower-level decision-making is especially
important given that refugee status determinations are a growing area of
administrative law in which processes of bureaucratic decision-making give
adjudicators the task of deciding whether someone is awarded asylum – a
potentially life or death decision.\(^{485}\) Despite the fact that the majority of the
decisions, policies, and practices that come to bear on the refugee status
determination process occurs within domestic bureaucratic and administrative
agencies, they are often absent from international debates about migration and
refugee policy. Departmental and tribunal decision-makers ‘are the frontline
interpreters of international law as well as the frontline enforcers of migration
policy’.\(^{486}\) It is these lower level actors who, in practice, develop or violate
norms. The tribunal levels involve constant trial, error, and innovation with

\(^{482}\) Paula Gerber and Joel Gory, “The UN Human Rights Committee and LGBT Right: What is it
\(^{483}\) *Young v Australia*, CCPR/C/78/D/941/2000 (2002).
\(^{484}\) *C v Australia*, CCPR/C/119/D/2215/2012 (2017).
\(^{486}\) Ibid, 18-19.
regard to assessing new kinds of claims, with new grounds, and new issues that inform new guidelines, policy, and jurisprudence.

Just as the heteronormative history of international human rights norms developed at the international and European regional level, decision-making in Australia, especially at the lowest levels, reveals a heteronormative history of assessing refugee status determinations. In particular, for many years the employment of discretion reasoning in Australian claims restricted applicant’s rights to gain refugee status as well as influenced present day non-implementation of procedural norms. Looking back at earlier claims in Australia and Canada between 1994 and 2000, Catherine Dauvergne and Jenni Milbank found that 52 per cent of gay men and 69 per cent of lesbians were successful in their claims in Canada; a combined average success rate of 54 per cent.\(^{487}\) This was, at the time, fairly comparable to the overall success rate of asylum claims of 60 per cent.\(^{488}\) To put this into perspective, during the same period Canada accepted ten times the number of sexual orientation-based claims than Australia did, although they had comparable application rates.\(^{489}\) These Canadian success rates remained fairly consistent. Legal scholar Sean Reehag found that in 2004, sexual orientation-based claims were successful in Canada 49 per cent of the time; while LaViolette found that between 2009 and 2011, 58 per cent of claims were successful.\(^{490}\)

While Canadian and Australian courts have been described as ‘leading the way’ in adjudicating sexual orientation-based asylum claims, Dauvergne and Milbank found Australia to be ‘consistently harsher than Canada, both in reasoning employed in decisions and in trends of outcomes,’ which, particularly

\(^{488}\) Ibid.
\(^{489}\) Ibid.
prior to 2003, had far lower rates of acceptance.\textsuperscript{491} For example, during the period between 1994 and 2000, discretion reasoning only appeared in four per cent of Canadian sexual orientation-based claims,\textsuperscript{492} whereas during the same period it appeared in 40 per cent of publicly available tribunal decisions in Australia.\textsuperscript{493} In particular, Australian cases during this period revealed a strong correlation between success rate and the employment of discretion reasoning. Where discretion was simply mentioned, the failure rate of sexual orientation-based claims at the tribunal level was 70 per cent. However, where discretion was explicitly required or expected, the failure rate rose to an astonishing 98 per cent.\textsuperscript{494} In another study, Milbank described some of the ways in which applicants had been directed at the department and tribunal level to be discreet about their sexual orientation, rather than offered Convention protection.\textsuperscript{495} In order to achieve “discretion” and “safety” in their country of origin, applicants were directed to, for example: never reveal their sexual orientation; ‘avoid any behaviour that would identify them as gay’; relocate within the country to ‘attain invisibility’, only engage in ‘anonymous sex in public spaces’; pretend their lovers were ‘flatmates’; and even to ‘remain celibate’.\textsuperscript{496}

When looking at this early Australian decision-making, Millbank argued that where a given domestic legal system has greater familiarity and engagement with human rights claims and legal challenges relating to sexual orientation more generally, in addition to a well-developed analysis of equality principles within the law, decision-makers tend to more easily associate human rights with sexual orientation.\textsuperscript{497} While this did not inherently ‘guarantee a panacea for discrimination on the basis of sexuality’, engagement with international jurisprudence did constitute one of the most significant domestic influences on

\textsuperscript{491} Dauvergne and Millbank, “Burdened by Proof,” 302.
\textsuperscript{493} Millbank, “From Discretion to Disbelief”, 393.
\textsuperscript{494} Ibid; Dauvergne and Millbank, “Before the High Court,” 98.
\textsuperscript{495} Millbank, “The rights of lesbians”.
\textsuperscript{496} Ibid.
\textsuperscript{497} Millbank, “The Role of Rights”, 196.
the application of discretion reasoning.\textsuperscript{498} That is, in jurisdictions such as Canada, the relatively early engagement with human rights norms and equality analysis impacted on the likelihood that decision-makers were willing to identify persecution in relation to sexual orientation-based claims.\textsuperscript{499} Meanwhile, it was determined that in Australia the ‘lack of grounded human rights framework or any thoughtful application of international human rights standards to sexual orientation claims have led to very restrictive decisions’.\textsuperscript{500}

In 2002 the Australian High Court heard the case of \textit{S395 and S396 v MIMA} concerning the application of a Bangladeshi couple applying for asylum based on their sexual orientation.\textsuperscript{501} The case is notable for being the first sexual orientation-based refugee claim to appear before a final appellate court anywhere in the world. Significantly, the Court decided by a majority of 4:3 that the tribunal had erred in failing to consider whether the discretion requirement itself constituted harm and for failing to ‘consider the future-focused question of what would happen if the applicants were in fact discovered to be gay’.\textsuperscript{502} High Court Justices Gummow and Haynes argued that where discretion reasoning is applied, ‘the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity’.\textsuperscript{503}

In its submission to the case, the UNHCR emphasised that discretion reasoning had clearly been rejected in comparative case law on the grounds of race, religion, or political opinion, and that any such requirement of sexual orientation-based claimants would result in a discriminatory approach to the status protected under the Refugee Convention.\textsuperscript{504} In their joint judgement,

\textsuperscript{498} Ibid.
\textsuperscript{499} Ibid, 197.
\textsuperscript{500} Ibid, 213.
\textsuperscript{504} United Nations High Commissioner for Refugees UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,” November 21, 2008,
Justices McHugh and Kirby and Justices Gummow and Haynes rejected the proposition that the review tribunal may ‘expect’ or ‘reasonably require’ applicants to ‘cooperate in their own protection’ by hiding their sexual identity. Furthermore, the justices dismissed the categorisation of sexual minorities as being either ‘discreet’ or ‘open’ about their identity. The minority judgments, however, display contrary reasoning that was later echoed in British courts. In their dissenting opinions, Justices Callinan and Heydon argued that the couple were not oppressed because, in their opinion, the applicants’ secrecy in Bangladesh was ‘voluntarily chosen’ and that sexual minority applicants are responsible for proving that ‘their lives of secrecy were motivated largely, or even exclusively, by fear of harm’. Furthermore, Callinan and Heydon argued that discretion was in fact a ‘naturally’ occurring phenomena that

[op] the tribunal’s findings, no fear of such harm as could fairly be characterised as persecution imposed a need for any particular discretion on the part of the appellants: such ‘discretion’ as they exercised, was exercised as a matter of free choice. The outcome of these proceedings might have been different – it is unnecessary to decide whether that is so – if that position were different.

This issue of ‘natural’ or ‘voluntary’ discretion, while rejected by the majority in S395 and S395 has persisted in the UK decision of HJ and HT, discussed further below.

Some post-S395 and S396 cases in Australia showed nuanced application of the arguments for dismissing discretion reasoning in sexual orientation-based claims. For example, in a 2006 case an Australian decision maker made the

506 Millbank, “From Discretion to Disbelief,” 392.
508 [2003] FCA 129 p. 6, para. 110; Wessels, “Sexual orientation in Refugee Status Determination”.
following observation:

The exact numbers of LGBT [lesbian, gay, bisexual and transgender] people that are being prosecuted may not be available, but those figures do not necessarily indicate the level of tolerance or acceptance by public authorities. The ‘effectiveness’ in oppressing LGBT people of legislation criminalising homosexuality is not necessarily reflected in the number of prosecutions. Many LGBT people either abstain from same-sex relationships, or keep occasional social and sexual contacts secret, applying severe restrictions to their social life and personal identity, in order to prevent arrests, harassment or prosecutions. As long as ‘open homosexuality’ is not allowed, and LGBT people live their life in fear and secrecy, the criminalisation of homosexuality can be said to be ‘effective’ in its repression, even if this is not reflected in large numbers of prosecutions and/or arrests.509

In the Australian context, it appears that the dismissal of discretion reasoning did not initially have a demonstrable positive effect on the outcomes of sexual orientation-based claims. Jenni Millbank describes how in Australian jurisprudence, there has been a shift from ‘discretion to disbelief’ in sexual orientation-based asylum claims.510 In fact, Millbank argues that ‘the overall impact of the decision has been far more muted, and even arguably thwarted, by the practices of decision-makers at lower levels’.511 While the extent to which tribunals used discretion reasoning fell by roughly half in the three years post S395 and S396, the overall rate of success for sexual minority applicants appears to have remained unchanged.512 Millbank suggested that, in lieu of applying discretion reasoning, decision-makers increasingly disbelieved an

509 RRT Reference 060931294 [2006] RRTA 229 (unreported, Jacovides, 21st December); LaViolette, “Independent Human Rights Documentation”.
510 Millbank, “From Discretion to Disbelief”.
511 Ibid, 392.
512 Ibid, 395.
applicant’s identity or sexual orientation. Therefore, while it appeared that decision-makers in most jurisdictions were no longer relying on discretion reasoning as the basis for rejecting sexual orientation-based claims, they were finding alternative bases for rejection, namely, that they did not believe applicants’ testimony that they belong to a sexual minority.\footnote{Lewis, “Gay? Prove It”, 961.} Millbank captures this shift in her observation that decision-makers had moved from ‘discretion to disbelief’.\footnote{Millbank, “From Discretion to Disbelief”, 399.}

There is a lack of transparency of refugee status determinations in Australia. First instance decisions are made by a delegate of the immigration department and conducted in private.\footnote{Migration Act 1958 (Cth.) s 429.} In practice, Crock and Berg identify several ‘fundamental flaws’ in the tribunal review process including that applicants do not have the right to legal representation, they are not allowed to examine or cross-examine witnesses, and that the privacy of the hearings results in a lack of external scrutiny.\footnote{Mary Crock and Laurie Berg, Immigration, Refugees and Forced Migration (Sydney, Australia: The Federation Press, 2011), 353.} This is compounded by a lack of research on refugee status determinations in Australia relating to sexual orientation or queer refugee claims. During the 2000s Millbank produced a series of publications analysing the nature of adjudications and seeking to identify trends in decision-making. In a comparative study of Australian, Canadian, and British decision-making, Millbank argued that where there was greater familiarity with ‘lesbian and gay claims’ across broad within the domestic legal system, decision-makers were more likely to connect fundamental human rights with sexual orientation-based claims.\footnote{Millbank, “The Role of Rights”, 196.}

Australia has developed world-class recognition of same-sex relationships within the law and has produced extensive legislation protecting people from discrimination based on their sexual orientation, gender identity, or intersex characteristics. Unfortunately, these advances have not necessarily translated into the refugee status determination process. Comparing Australian and

\footnote{Lewis, “Gay? Prove It”, 961.} \footnote{Millbank, “From Discretion to Disbelief”, 399.} \footnote{Migration Act 1958 (Cth.) s 429.} \footnote{Mary Crock and Laurie Berg, Immigration, Refugees and Forced Migration (Sydney, Australia: The Federation Press, 2011), 353.} \footnote{Millbank, “The Role of Rights”, 196.}
Canadian jurisdictions, Millbank argues that protections based on sexual orientation have occurred through a ‘piecemeal legislative process’ across Australian states at varying times.\(^{518}\) Furthermore, Millbank argues that due to the lack of ‘formal legislative equality guarantees of high profile litigation’ Australian courts and tribunals, compared to other jurisdictions, are less familiar, and have had less engagement with, sexual orientation-based rights.\(^{519}\) Consequently, Millbank argues that decision-makers in Australian have ‘a weaker understanding… at a conceptual level’ of sexual orientation-based rights and have struggled to recognise sexual orientation-based refugee applicants as ‘subjects within a shifting framer of reference, from outsiders/objects to insiders/subjects of rights’.\(^{520}\)

As well as failing to engage with domestic sexual orientation-based protections, in this early period of Australian decision-making tribunal members scarcely referenced international human rights norms and laws in their decisions. Where they did, it was largely in a manner that restricted sexual orientation-based rights to concepts of ‘privacy’. Indeed, as Millbank argued, before the first major sexual orientation-based refugee appeal to the High Court, ‘claims to universal standards, when made, tended to be a universal abhorrence of homosexuality rather than to universal human rights’.\(^{521}\) This was especially explicit in early decisions. In a 1995 case, the tribunal member stated that ‘international jurisprudence does not show that homosexuals have inalienable human rights relating to their sexuality which extend beyond the right to private consensual adult sex’.\(^{522}\) According to Dauvergne and Millbank, much of the early refugee status determinations were made on the basis that ‘gay and lesbian rights are distinct from, and lesser than, other human rights’.\(^{523}\) Within the Australian administrative legal structure this phenomenon has proved difficult to budge.

\(^{518}\) Ibid, 196.
\(^{520}\) Ibid, 40-41.
\(^{521}\) Millbank, “The Role of Rights,” 206.

When looking at publicly available guidance for Australian decision-makers, the only thorough discussion of sexual orientation present in the Guide to Refugee Law is found in ‘Chapter 11: Applications of the Refugee Convention in Particular Situations’. The Guide dedicates roughly 800 words to the dismissal of discretion reasoning in *S395/2002 v MIMA*. The remainder of the discussion of sexual orientation-based claims is relegated to the footnotes. Sexual orientation appears once more in the Migration and Refugee Division Guidelines on the Assessment of Credibility, updated in July 2015. On the topic of ‘oral evidence’ the Guidelines state that ‘[c]laims relating to a person’s sexual orientation or to sexual assault or domestic violence, require particularly sensitive investigation’. The Guidelines continue that the ‘tribunal should be mindful that an applicant may find it particularly difficult or embarrassing to discuss claims [in] relation to his or her sexual orientation’. On this point, the AAT references the 2003 case of *WAIH v MIMA* during which Federal Magistrate Raphael discusses an infamous case in which ‘unfortunate’ questioning by the Tribunal was deemed ‘biased’ and ‘closed’. For example, the Tribunal employed stereotypical questioning involving the ‘gay underground’ and inferences of a shared, global gay culture including icons such as Bette Midler, Madonna, and Oscar Wilde.

Rather than providing guidance on appropriate limits to sexually explicit or stereotypical lines of questioning, Federal Magistrate Raphael endorsed the
necessity of ‘embarrassing’ lines of questioning in sexual orientation-based claims, and consequently so does the most recent AAT Guidelines on Credibility Assessment. Raphael explains that:

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\text{[a]ny investigation into a person’s sexual orientation is an invasive and embarrassing affair. Sexual orientation is essentially a very subjective matter. It is not easily reconciled with the notion of objective proof. But where an applicant is claiming protection on the grounds of his membership of that social group constituted by homosexuals then his sexual orientation is a matter upon which the Minister is required to be satisfied.}\]

This explanation provides no limits on the types of questions decision-makers may pursue, no consideration of an applicant’s right to privacy or dignity and is clearly at odds with guidance on protecting the rights of asylum seekers fleeing persecution based on their sexual orientation in international and comparative jurisdictions, such as the UK. Rather than taking steps toward providing guidance on protecting the rights of sexual orientation-based asylum applicants, Australia appears to endorse ‘embarrassing’ and probative questioning in a manner contrary to international best practice, and potentially, the applicant’s human rights.

\textit{Signs of implementation}

According to this earlier period of research, Australian decision-making failed to implement procedural norms due to a lack of engagement and familiarity with international human rights law as well as a lack of training and guidance regarding sexual orientation-based cases. In order to evaluate whether this remains the case in recent decision-making, a review of all AAT decisions between 1 January 2016 and 31 July 2018 was undertaken by me. Of the

\textit{533 WAIIH v MIMA [2003], para.23.  
534 Ibid.  
535 1414394 (Refugee) [2016] AATA 3013 (6 January 2016); 1413749 (Refugee) [2016] AATA 3690 (17 April 2016); 1417147 (Refugee) [2016] AATA 3538 (4 March 2016); 1416717 (Refugee) [2016] AATA 3653 (4 April 2016); 1417831 (Refugee) [2016] AATA 3456 (2 March 2016); 1601346 (Refugee) [2016] AATA 3826 (4 May 2016); 1415650 (Refugee) [2016]}

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1,976 refugee claims reviewed by the AAT and publicly available, 61 cases were made on the grounds of sexual orientation. In hearing these appeals, the AAT can either affirm, vary, or set aside the previous decision made by the department. The following definitions are provided by the AAT:

- **affirms** the decision, this means the decision made by the department is not changed;
- **varies** the decision, this means the decision has been changed or altered in some way;
- **sets asides and substitutes** a new decision, this means it agrees or partially agrees that the decision was wrong and has changed all or part of the decision; or

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AATA 3876 (20 May 2016); 1418335 (Refugee) [2016] AATA 3878 (24 May 2016); 1413205 (Refugee) [2016] AATA 3973 (7 June 2016); 1601328 (Refugee) [2016] AATA 4385 (6 September 2016); 1413343 (Refugee) [2016] AATA 3463 (21 September 2016); 1421199 (Refugee) [2016] AATA 4520 (26 September 2016); 1504130 (Refugee) [2016] AATA 4738 (14 November 2016); 1506605 (Refugee) [2017] AATA 174 (17 January 2017); 1613923 (Refugee) [2017] AATA 172 (22 January 2017); 1611522 (Refugee) [2017] AATA 131 (23 January 2017); 1508333 (Refugee) [2017] AATA 3071 (28 April 2017); 1604230 (Refugee) [2017] AATA 679 (19 April 2017); 1512111 (Refugee) [2017] AATA 513 (7 March 2017); 160932 (Refugee) [2017] AATA 678 (31 March 2017); 1615725 (Refugee) [2018] AATA 1255 (2 May 2018); 1605011 (Refugee) [2018] AATA 833 (4 May 2017); 1415836 (Refugee) [2017] AATA 978 (22 May 2017); 160932 (Refugee) [2017] AATA 982 (23 May 2017); 1510025 (Refugee) [2017] AATA 980 (30 May 2017); 1606121 (Refugee) [2017] AATA 988 (7 June 2017); 1604863 (Refugee) [2017] AATA 1045 (8 June 2017); 1621665 (Refugee) [2017] AATA 1311 (13 July 2017); 1604178 (Refugee) [2017] AATA 1173 (14 July 2017); 1604321 (Refugee) [2017] AATA 2089 (17 July 2017); 1621127 (Refugee) [2017] AATA 1262 (24 July 2017); 1514524 (Refugee) [2017] AATA 1190 (25 July 2017); 1511272 (Refugee) [2017] AATA 1404 (28 July 2017); 1603678 (Refugee) [2017] AATA 1494 (10 August 2017); 1615493 (Refugee) [2017] AATA 1670 (4 September 2017); 1613499 (Refugee) [2017] AATA 2723 (19 September 2017); 1607718 (Refugee) [2017] AATA 1825 (25 September 2017); 1509377 (Refugee) [2017] AATA 1680 (5 October 2017); 1601459 (Refugee) [2017] AATA 2005 (5 October 2017); 1700189 (Refugee) [2017] AATA 1960 (5 October 2017); 1512002 (Refugee) [2017] AATA 1823 (9 October 2017); 1612819 (Refugee) [2017] AATA 1826 (11 October 2017); 1511751 (Refugee) [2017] AATA 1911 (13 October 2017); 1620706 (Refugee) [2017] AATA 2359 (17 October 2017); 1600725 (Refugee) [2017] AATA 2355 (24 October 2017); 1713192 (Refugee) [2017] AATA 2084 (27 October 2017); 1611199 (Refugee) [2017] AATA 2676 (8 November 2017); 1606103 (Refugee) [2017] AATA 2931 (15 November 2017); 1514908 (Refugee) [2017] AATA 2962 (22 November 2017); 1515415 (Refugee) [2017] AATA 3010 (14 December 2017); 1501160 (Refugee) [2017] AATA 3025 (15 December 2017); 1605362 (Refugee) [2017] AATA 3018 (19 December 2017); 1612373 (Refugee) [2018] AATA 289 (15 January 2018); 1510418 (Refugee) [2018] AATA 569 (26 February 2018); 1605348 (Refugee) [2018] AATA 785 (14 March 2018); 1514543 (Refugee) [2018] AATA 920 (16 March 2018); 1513200 (Refugee) [2018] AATA 1303 (27 March 2018); 1605830 (Refugee) [2018] AATA 1738 (28 March 2018); 1603598 (Refugee) [2018] AATA 1739 (10 April 2018).

• **sets aside and remits** the decision, this means it is sending the matter back to the department to be decided again in accordance with the AAT’s instructions or recommendations.  

It is important to note that not all AAT refugee determinations are made public. Rather, due to the high case load in migration and refugee decisions there is a process of random selection of a certain percentage of some categories of decisions and full disclosure of others. After receiving negative media coverage over issues of accountability and transparency, the AAT introduced a *Decision Publications Policy* in November 2017 that set targets for the publication of decisions according to different functions of the AAT. There are certain instances in which written decisions will not be published, however from July 2018 the targets for publishing protection visa decisions are described in the *Table 1* below.

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540 “2.2 A written decision is not published if:
(a) any legislative provision prohibits the publication of the decision;
(b) a tribunal member makes a direction under section 35 or 35AA of the AAT Act or section 378 or 440 of the Migration Act to the effect that the decisions not be published; or
Table 1: AAT Protection Visas Targets

<table>
<thead>
<tr>
<th>Protection Visas</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any substantive review of a decision to refuse to grant a visa to:</td>
<td>100%</td>
</tr>
<tr>
<td>- a national of a country not among the 25 most common countries of origin; or</td>
<td></td>
</tr>
<tr>
<td>- a stateless person</td>
<td></td>
</tr>
<tr>
<td>Any substantive review of a decision to refuse to grant a visa to a national of</td>
<td>25%</td>
</tr>
<tr>
<td>a country among the 25 most common countries of origin (other than Malaysia)</td>
<td></td>
</tr>
<tr>
<td>Any substantive review relating to a national of Malaysia, including decisions</td>
<td>5%</td>
</tr>
<tr>
<td>to refuse to grant a visa</td>
<td></td>
</tr>
</tbody>
</table>

For the cases under consideration in this thesis, however, this policy does not yet apply. When comparing the publicly available decisions and statistics reported by the AAT it is clear that the sample size of cases that is being used for this discussion is relatively small and therefore the conclusions drawn are limited in their generalisability. For example, as Figure 1 shows, in the period of 1 July 2016 to 30 June 2018 there were 10,574 protection visa decisions made by the AAT. When looking at the published decisions during this same period, there are only 1,450 publicly available representing just 13.7 per cent of total decisions, well under the targets set in the new policy.

When compared to the combined average over these two years, sexual orientation-based claims appeared to fare better than average. See Figure 2 below for the outcome of publicly available AAT refugee claims based on sexual orientation between 1 January 2016 and 31 July 2018. While an average of 63.4 per cent of all claims were affirmed, during this same period only 54 per cent of claims based on sexual orientation were. When comparing the cases that were set aside and remitted to the department for reconsideration, only 7.8 per cent of all claims were remitted compared to 46 per cent of sexual orientation-based claims. However, it is important to note two things. First, the very fact that certain claims are published may be due to the AAT choosing to publish them as illustrations of innovative decision-making that the AAT wants to highlight. Therefore, sexual orientation-based claims that
are remitted may be overrepresented because they are published when there is part of the decision that the AAT wants to be made public.

Figure 2

Second, while protection visas for Malaysian applicants are likely to be underrepresented in the overall publishing statistics given their high volume, they are by far the largest group of applicants biased on sexual orientation in the publicly available claims as can be seen in Figure 3 below. One hypothesis for this is that while general claims by Malaysians may have a low success rate, claims based on sexual orientation may be increasing and with merit, therefore the tribunal is making more decisions to remit these claims on the basis that they satisfy criteria of the refugee definition. In 2018 alone there has been a spate of very public human rights abuses against queer Malaysians including the public caning of two lesbians, an attempt to convert queer students at a public Malaysian university, and the government ordered shut


down of a LGBT art exhibition. As shown in Figure 3 below, Malaysian claims based on sexual orientation represented 41 per cent of the publicly available decisions. Of these claims, 68 per cent were remitted – an extremely significant number of claims when compared within sexual orientation-based decisions and all decisions in general.

Figure 3

![Chart showing the country of origin of publicly available AAT refugee claims based on sexual orientation between January 1st 2016 and July 31st 2018.]

Other than the deteriorating conditions for queer Malaysians in the past year, a number of Malaysian claims involved applicants who were transgender or gender non-conforming. Of the 25 claims, 4 claims involved an applicant who described themselves as ‘Pengkid’. According to gender scholar Yuenmei Wong, ‘in 2008, Pengkid became a localized synonym for a masculine-looking Malay-Muslim lesbian who is outlawed in Malaysia through Islamic

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545 1606121 (Refugee) [2017] AATA 998 (7 June 2017); 1620706 (Refugee) [2017] AATA (17 October 2017); 1615493 (Refugee) [2018] AATA 1670 (4 September 2018); 1607718 (Refugee) [2017] AATA 1825 (25 September 2017).
discourses’. In recent years, Pengkid Malays have come under attack in Malaysia after the National Fatwa Council issued a fatwa, an interpretation of Islamic law, against Pengkid Malays in order to ‘prevent lesbianism’. These claims were all remitted for reconsideration and demonstrated a relatively high degree of nuance in decision-making when compared with earlier claims.

One issue, however, is apparent in a claim in September 2017 in which the tribunal member states

Both the applicant and her partner [Ms A], presented at the applicant’s Tribunal hearing with short hair, wearing shorts and shirts, in what could be described as ‘tomboyish’ appearance. The Tribunal accepts that the applicant could be considered ‘pengkid’ in conservative Malay society.

While gender expression is an important element of being Pengkid, it is inappropriate to judge applicants on their appearance in a tribunal hearing or to disregard an applicant because they do not exhibit stereotypical characteristics. Furthermore, just as photographic evidence may be considered fabricated for the purposes of establishing credibility, it is likely that some decision-makers would make similar judgements if they felt an applicant was dressing a certain way in order to bolster their credibility. A breakdown of the outcomes of sexual orientation-based claims by gender identity and/or expression can be seen below in Figure 4.

548 1615493 (Refugee) [2017] AATA 1670 (4 September 2017), para. 28.
When comparing the claims, men were much more likely to have their decision affirmed, while women had a 50 per cent chance of their claim being remitted. Applicants who were gender non-conforming, transgender, or Pengkid were the most likely to have their claims accepted. These claims are interesting because each had sexual orientation as a central element to the claim, even where an applicant did not have a ‘normative’ gender identity or expression such as male or female.

Overall, in contrast to the early assessment of claims conducted by Milbank and Dauvergne, this more recent review suggests there are fewer procedural issues in assessing the credibility of applicants and explicit signs of norm implementation. Some claims had issues with questioning and decision-making. For example, a number of cases exhibited the expectation that the applicant engage with the ‘LGBTI community’ in the country of application for asylum, asking questions about night clubs and referencing the ‘gay lifestyle’.

Expectations such as these represent the non-implementation of procedural norms and perpetuates stereotyped expectations of ‘gay

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549 See i.e: 1605348 (Refugee) [2018] AATA 785 (14th March 2018).
behaviour’. In one claim heard in 2017, the decision-maker commented that ‘the applicant was unable to nominate LGBTI themed movies or books or a favourite gay actor or similar artistic expression during the hearing’. In a second claim that year, the tribunal again asked the applicant if they had read ‘any literature widely known in the Malaysian LGBTI community’ and noted that ‘the applicant when asked could not tell the Tribunal of any gay-inspired literature she had read or knew of that was in current circulation’. As stated previously, it is unreasonable to expect that applicants are engaged with ‘cultural icons’ just as it has been previously ruled that applicants should not be expected to have read Oscar Wilde or be fans of Madonna.

Other issues emerged in claims during this period. For example, in violation of the norm of refraining from asking sexually explicit questions, in January 2017 a tribunal member questioned an applicant about whether they looked at pornographic websites, without the topic having been raised by the applicant. Decision-makers also appeared to have difficulty with claims where there were elements of both sexuality and gender identity or expression. For example, in a 2016 claim the tribunal transcript records that:

The applicant presented as a female at hearing. He told the Tribunal that he feels like a female in a male’s body and has felt this way since he was a young child but his family were opposed... After considering the applicant’s evidence, the Tribunal accepts that he is transgender and homosexual. The Tribunal accepts that while he has dressed as a woman to go out and to his workplace, he has been careful and lived a very quiet life to avoid detection. The Tribunal accepts his evidence that he has experienced humiliation because he is transgender and while he has maintained employment, he has experienced harassment in the workplace.

550 17100189 (Refugee) [2017] AATA 1960 (5 October 2017), para.140.
551 1603678 (Refugee) [2017] AATA 1494 (10 August 2017), para. 28.
552 1611522 (Refugee) [2017] AATA 131 (23 January 2017).
While the claim was remitted to the department with guidance that the applicant should be granted asylum, the misgendering of the applicant throughout the claim, and the confusion between concepts of sexuality and gender identity are clear violations of the applicant’s dignity. The tribunal in this instance should have first sought to clarify how the applicant referred to themselves and been more thorough in determining whether the applicant did indeed identify both as ‘transgender and homosexual’.

In a claim by a Turkish applicant heard in 2018, the tribunal member questioned an applicant who said they felt like ‘a girl’ stating that ‘it might be said that he appeared on the video screen and in past photographs to be presenting, at least outwardly, as a muscular, stubbled male. (He later submitted photographs of himself with a tattooed chest)’.554 Here again, the tribunal member seems to be judging the applicant on stereotyped expectations of gender expression, counter to procedural norms of the UNHCR. While transcript records that the applicant describes themselves as ‘male on the outside and hides his female self-image’, misgendering continues and the tribunal member posits that ‘[p]erhaps in particular cultural contexts it is difficult to be same-sex without apprehending oneself to be somehow at one with the opposite gender’.555

The core issue here is the confusion of gender identity and sexuality and the consistent misgendering of the applicant throughout the hearing. UNHCR procedural norm 60v in the Guidelines speaks directly to this issue stating that the ‘use of vocabulary that is non-offensive and shows positive disposition towards diversity of sexual orientation and gender identity, particularly in the applicant’s own language, is essential’.556 And, so too does 60vii, which states that ‘…[r]espect for the human dignity of the asylum-seeker should be a guiding principle at all times’.557 That the decision maker is not using the terminology the applicant uses to describe themselves in this case is both a denial of the applicant’s identity and dignity and appears to confuse the basis

554 1513200 (Refugee) [2018] AATA 1303 (27 March 2018), para. 32.
555 Ibid.
556 UNHCR, Guidelines on International Protection No. 9.
557 Ibid.
of the claim as to whether it is on the grounds of gender identity, sexuality, or both.

However, when looking at the sexual orientation-based claims in this recent period the number of claims that do not have obvious procedural errors is notable. Thirty-six of these claims did not have any obvious violation of the procedural norms under consideration in this thesis, representing 59 per cent of claims. The most significant indication that norm implementation is beginning in the Australian context shows up in three cases heard in July, October and November of 2017. The first and third tribunal members both noted the following:

Given that it is often difficult for lesbian, gay, bisexual, transgender and/or intersex (LGBTI) people to talk about matters concerning their sexuality, the Tribunal has also utilised the Department's guidelines for assessing claims related to sexual orientation and gender identity.

In the second claim, the tribunal member makes specific reference to ‘Departmental Guidelines PAM-17: Sexual Orientation and Gender Identity’. Thanks to a freedom of information request made for media purposes in March 2017, it is apparent that an annexure of departmental materials related to training for decision-makers on the basis of sexual orientation, gender identity and intersex status was released. Table 2 below indicates the ‘schedule of documents’ that the Department has generated in relation to these claims and the decision on their release. In total, four of the eight documents were release in part or in full, detailing the Department’s approach to assessing sexual

558 1514524 (Refugee) [2017] AATA 1190 (25 July 2017); 17100189 (Refugee) [2017] AATA 1960 (5 October 2017); 1514908 (Refugee) [2017] AATA 2962 (22 November 2017).
560 Ibid, para. 29.
orientation and gender identity and intersex claims. These included internal guidelines and an incomplete collection of training documents.

Table 2: 2017 Freedom of Information Request Schedule of Documents

<table>
<thead>
<tr>
<th>No.</th>
<th>Date of document</th>
<th>Description</th>
<th>Decision on release</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Undated</td>
<td>Annexure 5: Assessing claims related to sexual orientation and gender identity</td>
<td>Release in full</td>
</tr>
<tr>
<td>2.</td>
<td>2016</td>
<td>LGBTI Training – Onshore Protection</td>
<td>Release in part</td>
</tr>
<tr>
<td>3.</td>
<td>Undated</td>
<td>LGBTI Case Studies</td>
<td>Release in part</td>
</tr>
<tr>
<td>4.</td>
<td>16/12/2016</td>
<td>Sexual Orientation and Gender Identity Facilitator Guide</td>
<td>Release in part</td>
</tr>
<tr>
<td>5.</td>
<td>April 2016</td>
<td>Sexual and Gender Minorities: Module 1: Sensitization and Identification</td>
<td>Exempt in full</td>
</tr>
<tr>
<td>6.</td>
<td>April 2016</td>
<td>Module 2: Protection SGM Refugees</td>
<td>Exempt in full</td>
</tr>
<tr>
<td>7.</td>
<td>April 2016</td>
<td>Module 3: Working with SGM Refugees</td>
<td>Exempt in full</td>
</tr>
<tr>
<td>8.</td>
<td>April 2016</td>
<td>Module 4: Assessing the Credibility in SOGI/GE-based claims</td>
<td>Exempt in full</td>
</tr>
</tbody>
</table>

The guidelines are relatively comprehensive and nuanced in addressing sexual orientation, gender identity, and intersex status. Whereas previous guidelines provided no limitations on questioning, these guidelines cover extensively what is recommended and what is not. For example, they advise that ‘it is not appropriate for officers to ask applicants for details of sexual activity’, decision-makers ‘should not allow their personal feelings, attitudes, stereotypic views, religious views or assumptions influence their interviewing’, and that

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563 Ibid, 8.
564 Ibid, 5.
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 LGBTI cultural references, or how an LGBTI person should appear or behave, for example dress, mannerisms, style of speech, etc.\textsuperscript{565}

While it is evident that in some claims considered following the release of these guidelines and training such issues and styles of questioning do continue to occur, it is a positive sign of implementation that such limitations are included in the documents.

Furthermore, the guidelines mirror shifts in guidance in other jurisdictions such as the UK and in international guidelines such as those from the UNCHR in emphasising identity development narratives over sexually explicit evidence of sexuality. For example, while noting that applicants will have diverse and individual experiences, the Australian guidelines state that LGBTI applicants are likely to have:

i. a common experience of self-realisation of their sexuality or gender identity;
ii. a sense of difference of shame;
iii. experience hiding their identity;
iv. exclusion from family of community;
v. attempted to conform to avoid mistreatment and;
vi. some experiences of past mistreatment.\textsuperscript{566}

A number of 2016-2018 claims make reference to international guidelines or jurisprudence which as Millbank noted in her early research was rare and appeared to have a negative effect on the procedural rights of applicants. This included referencing UK Home Office reports, the UNHCR Guidelines, and

\textsuperscript{565} Ibid, 12.
\textsuperscript{566} Ibid, 8.
ECtHR jurisprudence. Alongside this, a number of decisions indicate a shift from sexually explicit lines of questioning to focussing on identity development and narrative. For example, a 2018 Turkish case also signalled some positive norm implementation with the tribunal member referring to ‘relevant UNHCR guidelines’ that ‘advise of the importance of the decision maker to have regard to an applicant’s personal, individual narrative’. In another case in October 2017, the tribunal member remarked

The applicant’s account of her feelings and life as she developed her sexual identity in Malaysia and her efforts to manage her identity in a culture of prejudice and hostility was direct and unembellished. Through questioning the Tribunal explored with the applicant her early years and growing awareness of her interest in females.

A number of cases emphasised ‘identity narrative.’ For example, in a March 2018 claim the tribunal notes that ‘relevant UNHCR guidelines advise of the importance for the decision maker to have regard to an applicant’s personal, individual narrative’. In an earlier claim in September 2016, this shift was used in the determination of an applicant’s non-credibility where the decision maker recorded that

Whilst the tribunal appreciates the very personal nature of matters of sexual orientation and how one’s confrontation with these issues may be influenced by or vary according to a range of factors, including culture, the applicant’s evidence did not contain any credible or meaningful references to any thought processes, which may have occupied his mind while coming to

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567 1608621 (Refugee) [2017] AATA 982 (23 May 2017); 1513200 (Refugee) [2018] AATA 1303 (27 March 2018); 1510025 (Refugee) [2017] AATA 980 (30 May 2017).
568 Ibid, 42.
569 1620706 (Refugee) [2017] AATA 2359 (17 October 2017).
570 1513200 (Refugee) [2018] AATA 1303 (27 March 2018), para. 85
terms with significant issues of identity and difference over a relatively significant period of time.\textsuperscript{571}

It is clear that there is a shift underway in Australian decision-making following the release of the guidelines. This shift includes the increasing implementation of procedural norms and mirrors changes that have happened in other jurisdictions, including the UK in which references are made to identity, narrative, and difference discussed further in the following chapters.

**Conclusion**

This chapter looked at the influence of legal systems in procedural norm implementation. First and foremost, the argument was made that within constructivist theorising, legal systems cannot be presumed to be neutral institutions. This is especially the case when considering sexuality-based rights. Any procedural norm must develop as an extension of the core constructions of sexual orientation that have developed in the law. The chapter thus examined the heteronormative history of the international human rights law, with a particular focus on the European courts for two reasons. First, because many of the early claims based on sexual orientation appeared before European institutions and courts and, second, because the decisions of European courts are especially relevant when looking at British policy and decision-making. Sexual orientation-based rights overwhelmingly developed in a way that limited ‘homosexual’ expression to a sphere of ‘private rights’. At the same time, even into the twenty-first century, the ‘right’ of a state to police and protect ‘public morality’ was upheld by international courts. This history has had a demonstrable effect on sexual orientation-based refugee law. Notably, this has influenced the prevalence of discretion reasoning in jurisdictions such as Australia and the UK.

It was argued that to properly theorise norm implementation, we must take our analysis to the individual level of both applicants and decision-makers. Given that the overwhelmingly proportion of decision-making happens at the lower

\textsuperscript{571} 1421199 (Refugee) [2016] AATA 4520 (26 September 2016), para. 36.
levels, the effect of procedural norms and the way in which they develop and are contested is most pronounced at this level. More importantly, it is at this level that they have the most influence on the actual people they are intended to assist. When considering the UK, it was initially theorised that given the UK is party to a regional human rights convention and to regional human rights courts, this would have had a positive effect on procedural norm implementation in the UK. In particular, the chapter considered the ABC decision made by the CJEU which was a *binding* decision encompassing four of the key procedural norms assess in this thesis and contained in the UNHCR Guidelines. However, it was argued that the effect of the CJEU and other European courts was actually somewhat limited in the UK. Even where a decision was made specifically on the procedural rights in question, it was suggested that domestic influences such as the domestic influences of the existence of training and guidelines had already begun to influence norm implementation in the UK and see results.

In the case of Australia, for a significant period it appeared that there were no signs of norm implementation. Issues in decision-making matched those initially found in the UK including the use of sexually explicit and stereotypical lines of questioning. This appeared to be compounded by the lack of guidelines and training and, as Millbank noted in her earlier research, the lack of reference to international guidelines and best practice. However, when looking at recent decisions between 2016 and 2018, it is evident that training and guidelines have been developed and implemented in Australia with positive impacts on norm implementation. Subsequently, it was argued that there appears to be a shift in Australian decision-making practices, including moving to narrative based approaches and refraining from sexually explicit questioning, are starting to appear in Australia. Despite clear institutional differences, it appears that legal systems play a limited role compared to the development of training and guidelines and the activity of civil society. These issues, therefore, form the basis of the two following chapters.
Chapter Five

Civil Society norm entrepreneurs in ‘hostile environments’

Introduction
A key factor identified in this thesis that appears to influence procedural norm implementation is the existence of an active civil society seeking to advocate for queer refugees and their rights. This chapter first argues that civil society actors play a significant role in the norm implementation process. As facilitators, adaptors, or entrepreneurs, civil society actors often operate from a minority position to achieve their normative goals. However, when considering procedural norm implementation in refugee law, increasingly harsh broader immigration policies of states such as Australia and the UK must be taken into consideration. The chapter subsequently provides an overview of the manner in which British and Australian governments have created hostile environments for immigration and asylum. In order to analyse the impact this had on procedural norm implementation in the UK, the chapter looks at the influence the now defunct Detained Fast Track system had on queer claims. It is argued that the system clearly impeded norm implementation and put great pressure on applicants and advocates. However, in the case of the UK, a robust civil society contested the system and pushed for norm implementation. Through multiple and innovative means, these actors, among others, have had success in collaborating with the Home Office for reform and implementation of norms through guidelines and training.

The chapter then analyses Australia, looking at its own version of restrictive processing, Fast Track Assessment. Along with the broader shifts in immigration policies in Australia, the introduction of accelerated processing has had similar negative affects to those experienced by applicants and civil society in the UK. At the same time, Australia appears to have a smaller and less active civil society working on queer asylum issues. There has been a general lack of attention given to refugee and asylum issues by LGBTI civil society actors in Australia. While the UK has 13 organisations devoted specifically to the needs and interests of queer asylum seekers and refugees, Australia lacks a single
one. Despite this, it is argued that there are signs of successful implementation of norms due to pressure from existing civil society actors, and indications that research and advocacy is having some impact. It seems clear, therefore, that even where civil society is under duress and is operating in a hostile environment, civil society influence on procedural norm implementation is possible and can be extremely effective. However, just as with the inherent limitation of attempts to engage with the legal system, civil society necessarily participates in many ways that produce and reproduce heteronormativities. While unavoidable, it is a necessary outcome of civil society engagement on queer and LGBTI human rights projects, where actors must work with, within, and against pre-existing heteronormative structures.

**Norm Contestation and Implementation in a Climate of ‘Exclusionary Convergence’**

In order to assess the implementation of a norm at the domestic level it is important to take into consideration the political landscape in which they are created, contested, and implemented. Betts and Orchard argue that ‘norms and interests are not distinct from one another’. Rather, they suggest that both the material interests and the capacity of domestic actors will influence the process of norm implementation. Stephen Krasner likewise argues that where a norm is relatively ambiguous or imprecise it is more likely to be implemented through a process of adaptation to meet the pre-existing needs or interests of a state, domestic actors, or institutions. Domestic actors will contest and exert power during the norm implementation process in ways that will bend or construe a given norm to align with their prior policy interests. At the most fundamental level the capacity of a given state, institution, or actor to implement a norm is contingent on a diverse range of ‘contextual factors

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572 Betts and Orchard, “Introduction”, 15.
573 Lee Jones, ASEAN, Sovereignty and Intervention in Southeast Asia (Basingstoke: Palgrave Macmillan, 2012); Sarah Percy, Mercenaries; The History of a Norm in International Relations (Oxford: Oxford University Press, 2007).
575 Betts and Orchard, “Introduction”, 16.
associated with the public sector functions under examination’. Put simply, state or domestic actors will fail in seeking to implement any norm unless it has the material capacity to do so.

As Beth Simmons argues, ‘there is little doubt that most governments do not have the capacity to implement every aspect of their international legal obligations’. This is due to the particular ‘administrative and resource constraints’ that come with prioritising and implementing norms or policies. For example, where a state might want to expand or improve their refugee policies and practices, any norm that attempts to introduce additional rights or protections must be supported financially or explicitly in policy. Likewise, where a government seeks to freeze or restrict policy changes or human rights challenges, the implementation of any additional norm is likely to struggle against a lack of resources or opposing institutions supported with greater capital. Financial restrictions to immigration policies in the UK and Australia are less of an issue than in many refugee receiving or hosting nations. In fact, both are notable for the significant amount of financial resources they dedicate to border security, detention and immigration policy.

Particularly in terms of immigration policy, the resources devoted to meeting the interests of the government in the UK and Australia are vast and can create a significant hurdle for civil society actors operating in the space. Civil society groups can be understood, according to Richard Price, as ‘a “third system” of agents, namely privately organized citizens as distinguished from government or profit-seeking actors’. Such actors have an important role in the process of norm contestation, implementation and institutionalisation and, arguably, for the functioning of a democratic state. For example, Aaron Boesenecker and

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576 Ibid, 25.
577 Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press, 2012), 357.
578 Ibid.
580 Sarah Maddison and Andrea Carson, Researching Not-For-Profit Advocacy (Melbourne, Australia: Civil Voices, 2017).
Leslie Vinjamuri describe the pivotal role civil society organisations such as Human Rights Watch and Amnesty International played in establishing the international norm for criminal accountability for perpetrators of mass atrocities.⁵⁸¹ These organisations, they argue, ‘stand at the forefront of a vanguard of international human rights advocates who have helped embed this accountability norm’.⁵⁸² However, it is not the case that civil society groups are always ‘compliant’ in the pursuit of entrenching norms. Rather, civil society organisations themselves are an integral part of the ‘ongoing contestation’ that defines international politics.⁵⁸³

Sarah Maddison and Andrea Carson argue that the ‘function’ of civil society groups such as NGOs is the

… active interventions by organisations on behalf of the collective interests they represent, that have the explicit goal of influencing public policy or the decisions of any institutional elite… These activities may be high profile and openly political, or they may be low profile, more discrete processes of influence; they may be aimed directly at the decision-makers, or they may be aimed at influence by proxy through public opinion or voter intervention.⁵⁸⁴

At their core, however, is the task of civil society organisations to express the opinions of their constituencies, both when they are in line and when they are in conflict with prevailing government policy or practice.

In constructivist international relations scholarship, civil society actors have also been described, in the terms of Finnemore and Sikkink, as ‘norm entrepreneurs’.⁵⁸⁵ These actors develop norms that begin at the domestic level

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⁵⁸² Ibid.
⁵⁸³ Ibid, 347.
⁵⁸⁴ Maddison and Carson, *Researching Not-For-Profit Advocacy*, 15.
⁵⁸⁵ Finnemore and Sikkink, “International Norm Dynamics”, 893.
before they become international norms, a process that relies on all sorts of entrepreneurs. 586 Alan Bloomfield argues that those actors resistant to normative change or implementation can be described as ‘antipreneurs’ who serve to ‘defend the status quo’. 587 Bloomfield argues that scholars undertheorise the role of antipreneurs in norm contestation, and stresses that ‘the degree to which the normative status quo is entrenched or institutionalised matters because antipreneurs enjoy special static and tactical advantages when defending entrenched norms’. 588 Boesenecker and Vinjamuri describe some actors as ‘norm facilitators’, those who ‘embrace, embody and disseminate international expectations’ in relation to a certain norm. 589 They can also be described as ‘downloaders’ of international norms, ‘taking practices from abroad and facilitating their adoption locally’. 590 Alternatively, some could be characterised as ‘norm adapters’, those who are ‘highly pragmatic actors… seeking to adapt “international” norms to fit with local political constraints and culture’. 591 While different authors seek to describe different types of ‘entrepreneurs’, ‘adapters’ or ‘facilitators’, at their core domestic civil society seeks to implement norms through the innovative and strategic use of both international and domestic political and legal tools.

However, in all these circumstances it remains the fact that at each level of normative contestation ‘actors bring to bear both normative and material powers’ and therefore the ‘distinction between law and politics vanishes’. 592 The material pursuits of each actor, be they state or civil society, have an impact on the contestation of norms. For example, one similarity between the UK and Australia is the increasing harshness and securitisation of refugee and immigration policy. It is within this context that any sexual orientation procedural norm must be implemented, and thus this context is key to understanding the broader shifts in migration policy in the UK and Australia and

586 Ibid.
588 Ibid, 3.
590 Ibid.
592 Sandholtz and Sweet, “Law, Politics, and International Governance”, 242
the climate in which civil society actors or norm entrepreneurs are operating. The shifts in Australian and British migration policy exhibit characteristics of what some scholars call ‘exclusionary convergence’. Hamlin describes this as ‘the ways in which states have joined a race to the bottom, trying to find innovative strategies for keeping asylum seekers and other migrants out of their territories’. 593 “The bottom” here refers to policies and practices that appear to be retreating from international human rights law and the advice of the UNHCR.

As Hamlin explains, the race to the bottom is often exhibited through public stances by politicians claiming that “real refugees” are either waiting patiently overseas in camps or will find some way to rise like cream to the top of domestic RSD processes. 594 Comments made in 2017 by then Australian Minister for Immigration, Citizenship and Multicultural Affairs Peter Dutton exemplify this sentiment. Speaking on Australia’s resettlement quotas, Dutton suggested that:

[Australia cannot afford to be] …taken for a ride by people who refuse to provide details about their protection claims.

We are not going to allow, given the level of debt that our country is in, for more debt to be run up paying for welfare services for people who are not genuine.

The expectation is, if people can’t make their claim for protection, then they need to depart our country as quickly as possible. 595

The emphasis from successive immigration ministers in Australia has been on this separation between ‘genuine’ refugees, those who come in through the

593 Hamlin, Let Me Be A Refugee, 186.
594 Ibid.
international resettlement program, and ‘non-genuine’ refugees who have the means to arrive on Australian shores, by any mode of transport, and seek asylum. Indeed, as Hamlin describes,

Australia’s policy-based distinction between onshore and offshore migrants is a clear-cut example of how restrictive politics can affect RSD and strip away administrative insulation. So-called offshore asylum seekers (those who have been diverted from making a claim within Australian territory) never access the same RSD process as other asylum seekers and are vulnerable to summary exclusion.

In recent years, it has been argued that the changes in Australia’s refugee and asylum seeker policies have, broadly speaking, been a ‘political response’ to those who arrive by boat. In the five years preceding December 2012, this has included 51,637 people and the 862 recorded deaths of refugees at sea during this period. Both leading political parties have mobilised the issue of deaths at sea, whether out of genuine concern or for more political reasons, through a policy of deterrence in which those who attempt to seek asylum by travelling to

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596 While much of the focus on Australian immigration policies relates to on-shore claims to asylum, international resettlement also occurs through off-shore claims to resettlement either through the UNHCR or through applications made directly by individuals. These may be made through four classes of off-shore visas: Refugee (visa subclass 200); In-Country Special Humanitarian (visa subclass 201); Emergency Rescue (visa subclass 203); and Women at Risk (visa subclass 204). See: “Refugee resettlement to Australia: What are the facts?”, Parliament of Australia, September 7th, 2016, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/RefugeeResettlement.

597 In recent years government officials have fought to describe those who have arrived by boat as ‘non-genuine’ or ‘illegal maritime arrivals’, arguably misleading the public as to whether it is legal to seek asylum or not. See: “Face the Facts: Asylum Seekers and Refugees”, Australian Human Rights Commission, accessed November 1st, 2018, https://www.humanrights.gov.au/face-facts-asylum-seekers-and-refugees

598 Hamlin, Let Me Be A Refugee, 187.

Australian by boat are refused access to the refugee status determination process.  

Legal researcher Asher Hirsch argues that, in many ways, Australia is a ‘leader in the extraterritorialisation of migration controls’, particularly in relation to its development of ‘co-operative non-entrée’ policies with neighbouring countries in South East Asia and the Pacific. While Australia has a variety of non-entrée policies that include ‘visa requirements, carrier sanctions, airline liaison officers (ALOs), surveillance technologies, interception at sea, and the excising of Australian territory’, it has also signed a series of agreements using rhetoric such as ‘regional cooperation’ and ‘burden sharing’ in order to divert refugees from reaching Australia. These agreements are, in part, the consequence of Australian legislation that denies any access for those who arrive to Australian waters or shores by boat.

In order to deal with refugees who arrived to Australian waters or shores by boat, the Australian government also negotiated five bilateral agreements with neighbouring countries to ensure that those who arrive by boat never make it to the Australian mainland. According to statements made at the Fourth Bali

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600 Ibid.
603 Hirsh, “The Borders Beyond the Borders”, 49.
604 Ibid.
605 Hathaway, The Rights of Refugees Under International Law, 298; Hirsch, “The Borders Beyond the Border”. In the early 2000s the Australian parliament passed six pieces of migration legislation with the effect, as Hirsh argues, of creating ‘a secondary tier of refugee status determination procedures’. One of the key pieces of legislation was the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth), which excised some Australian territories and islands to the north of the mainland from the ‘migration zone’ according to the Migration Act 1958 (Cth), providing a ‘narrower’ process of asylum and restricting the rights of refugees who arrived by boat. Later, in 2013, Parliament extended this excision to include the entire mainland by the passage of the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013. In 2011, eventually struck down by the High Court, the government sought to ‘swap’ refugees from offshore detention centres with those who were awaiting resettlement in Malaysia. Then in 2012, a Memorandum of Understanding (MoU) was signed with the government of Papua New Guinea to establish offshore detention centres on Manus Island to send refugees intercepted at sea. This deal stood until 2015 when the Papua New Guineans
Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime in 2011, the Australian government presented an agenda that sought to develop cooperative deterrence policies in the region, evidenced by Australia’s emphasis on the ‘collective responsibility of source, transit and destination countries in responding to complex migratory movements’. 607 This “burden-sharing”, Kneebone argues, creates the ‘perception that it is the region’s “responsibility” to protect Australia, on the basis that the nation’s interests are self-evidently more important than those of other states in the region, which have substantial protracted refugee populations’. 608 Indeed, in its agreements with Nauru and PNG, the Australian government vehemently maintains that the ultimate responsibility for the management of the detention centres, and the rights and welfare of the refugees detained within them, rests with the PNG and Nauruan governments.

Australia is fairly typical of many states reacting to the global refugee ‘crisis’. 609 Leanne Weber argues that ‘[w]hile seeking to divest itself of international responsibilities […] the late-modern state increasingly expresses its sovereign power through asserting, relocating and redefining its borders’. 610 As Hyndman and Mountz argue, such policies represent a ‘paradigm shift’ that has seen numerous states moving from a ‘refugee protection’ approach towards

Supreme Court dismissed the arrangement as unconstitutional as those being detained were done without charge and had entered Papua New Guinea legally under the agreement between the two governments. Despite the illegality of detention, as of September 2017 there were still 803 men living in the detention centre in Papua New Guinea. The same year as the Papua New Guinea MoU was established, the Australian government also struck a deal with the small Pacific nation of Nauru where as of September 2017 there were 371 people detained, including 42 children. Cambodia (2014), USA (2016).

609 While Australian authorities have painted the number of refugees attempting to enter their territory as a ‘crisis’, it is actually a tiny portion of the ‘global refugee crisis’ whereby countries in the Global South are disproportionately burdened with refugee processing and hosting when compared to Global North countries such as Australia. For current statistics, please see: “Figures at a Glance”, UNHCR, accessed November 14th, 2018, http://www.unhcr.org/figures-at-a-glance.html.
prioritising ‘border protection’.\textsuperscript{611} The penultimate name change of the Australian immigration department to the Department of Immigration and Border Protection typified this.\textsuperscript{612} It appears that the shifting narrative around ‘border security’ and immigration has evolved again in Australia, with the 2017 creation of a new ‘super ministry’ described as a ‘federation of border and security agencies’ to be called the Department of Home Affairs.\textsuperscript{613} The new ministry is modelled on the UK Home Office and is to be in effect by the end of 2018.\textsuperscript{614} As legal scholar Amy Maguire noted in response to the announcement of the proposed ministry, ‘one group of people – refugees and asylum seekers – were completely absent from the ministers’ remarks’.\textsuperscript{615} There are multiple, unanswered questions regarding the meaning of the changes for these particularly vulnerable people, who remain subject to the powers of the Home Affairs minister.\textsuperscript{616} Perhaps the most distinct evidence of Australian law and policy retreating from international norms was the removal of reference of the 1951 refugee convention from Australian legislation with the passing of the Migration and Maritime Powers Legislation Amendment (resolving the Asylum Legacy Caseload) Bill 2014 in December 2014.\textsuperscript{617}

Meanwhile, in the UK \textit{The Immigration Act (2016)} came into force in May 2016, a piece of legislation that focussed on ‘illegal migration’ and introducing punitive


\textsuperscript{612} Hirsch, “Borders Beyond the Border”, 51.


\textsuperscript{615} Ibid.

\textsuperscript{616} Ibid.

policies that target those who don’t ‘play by the rules’. The new legislation includes measures such as criminal sanctions for those who employ illegal migrants, criminal sanctions for landlords who rent to ‘illegal migrants’, and the extension of the ‘deport first, appeal later’ scheme. This scheme essentially entailed the right of the government to deport any migrant who has made either an asylum claim or another human rights appeal before the outcome of their appeal unless it would cause ‘serious, irreversible harm’ to the migrant. According to British immigration and asylum barrister Colin Yeo, this legislation is part of the ‘hostile environment’ sought by the government to be a ‘package of measures designed to make life so difficult for individuals without permission to remain that they will not seek to enter the UK to begin with or if already present will leave voluntarily’. Yeo argues that these developments in British immigration policy are ‘inextricably linked to net migration targets’ whereby these ‘hostile measures’ are intended to encourage emigration and reduce immigration.

It is not just lawyers and policy watchers who describe this legislation as purposefully creating a hostile environment. In May 2012 the then foreign secretary, now prime minister, Theresa May described the intentions of her policies stating,

[t]he aim is to create here in Britain a really hostile environment for illegal migration… What we don’t want is a situation where people think that they can come here and overstay because they’re able to access everything they need.

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618 The Immigration Act 2016 (UK)
620 Ibid.
622 Ibid.
623 James Kirkup and Robert Winnett, “Theresa May interview: ‘We’re going to give illegal migrants a really hostile reception’”, The Telegraph, May 25, 2012,
The changes made to the *Immigration Act* in 2014 and 2015 secured many measures that created this hostile environment. This included the restriction of services for migrants and refugees that do not have documents, and reducing financial support to those unprocessed asylum applicants who were ‘poor and face a genuine problem leaving the UK’. Here the government rhetoric distinguishing ‘genuine’ refugees as those who are ‘poor’ contributes to the popular opinion that there are many non-genuine refugees who are paying smugglers to reach the UK, which is seen to justify the government’s stern approach. The Migrants’ Rights Network argues that these changes in immigration policy in the UK may lead to ‘an unprecedented expansion of the powers of immigration officials to detain individuals, to seize property, and to otherwise interfere with everyday activities’. British Lawyer Tom Nunn commented

> I think that the interesting thing about the Immigration Act (2016) was just how much it was the government trying to take control away from the courts, which I find particularly scary.

A further contribution to this hostile environment in the UK is the legislative landscape, which is becoming increasingly complex and places often unattainable expectations on applicants and advocates. According to Yeo, there are many ways in which the ability of applicants to appeal erroneous decisions made by the Home Office have been weakened in recent legislative changes including, but not limited to

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626 Nunn, Interview.
1. Rights of appeal to immigration tribunal have been curtailed by reducing the number of decisions which can be appealed and the grounds on which an appeal can be brought;
2. More litigants are forced to appeal after rather than before they are removed, at the risk of rendering their appeal impossible;
3. Fees for immigration appeals were briefly increased very substantially before the Government backtracked following a threat of litigation;
4. Waiting times for immigration appeals have been permitted to grow considerably… standing at 83 weeks for some appeals at the time of writing.\textsuperscript{627}

In this increasingly hostile and resource limited environment, it is not just applicants and lawyers who are affected. Home Office staff also suffer, which affects the quality of their decisions. In an interview for this thesis, lawyers Wesley Gryk and Tom Hardwick describe the pressures that decision-makers and clients face in the UK:

\begin{quote}
W: They lack capacity to do everything. There is no targeting of LGBTI cases, I think...
\end{quote}

\begin{quote}
T: Maybe two or three years ago, we would always expect a case to be dealt with within two or three months. I don’t think we expected a case to take longer than that. Sometimes it was because they were put in the fast track and the client were dealt with fairly quickly. Even if that wasn’t the case, you’d expect a substantive interview to follow the screening interview in about a month, and then a decision a couple of weeks after that. But now, once clients go to a screening interview… you could be waiting for six months before a substantive interview, at least.\textsuperscript{628}
\end{quote}


\textsuperscript{628} Wesley Gryk and Tom Hardwick, Interview with Jaz Dawson (August 29th, 2016, London)
These harsh immigration environments, characterised by measures of ‘exclusionary convergence’, place pressure on applicants, advocates, and decision-makers. Any consideration of the implementation of procedural norms must be considered in the context of such environments. Where an applicant has a rushed application timeframe, or limited to no access to their lawyer, the likelihood of preparing a case that prevents the violation of procedural rights is limited. This does, however, highlight the role that applicants and advocates have in pushing for, or ensuring, norm implementation in the context of resource scarce immigration regimes.

**Detained Fast Track in the UK versus a robust civil society**

This section looks at the UK’s former policy known as the ‘Detained Fast Track’ system and the impact that this system had on the implementation of UNHCR procedural norms in sexual orientation-based applications. According to the Immigration Law Practitioner’s Association (ILPA), the Detained Fast Track system refers to ‘the process by which asylum seekers are detained for their application of asylum and any subsequent appeal to be quickly processed under accelerated procedures’. This policy put extraordinary pressure on advocates and applicants, and highlighted the vulnerabilities of sexual orientation-based claims when government policies are directed at the quick processing of claims rather than on quality adjudication. It is a key example of the way in which the material aims of a government can stymie the implementation of procedural protection norms. The Detained Fast Track system is reminiscent of current practices in Australia, possibly foreshadowing the rights violations or explanations for the non-implementation of procedural norms that are not yet comprehensively recorded or researched in the Australian context. In combination with the restriction of legal aid, the Detained Fast Track system put queer applicants in the UK under intense pressure, and imposed limitations on attempts at implementing the procedural norms.

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629 Ibid, ix.
The Detained Fast Track system was developed along with a slew of broader deterrent policies in the UK. In designing and implementing these measures, the government was looking to create streamlined and limited processes of asylum application that would dissuade any future applicant from presuming that it would be a simple or easy process. This trend, as we have seen, is far from unique. Refugee policy scholar Lisa Hassan argues that

States ostensibly use deterrence measures, such as detention or the withdrawal of welfare benefits, in an effort to preserve asylum for the benefit of the ‘bona fide’ refugee…. [where] states implement deterrence measures to reduce the numbers of applicants for asylum overall, regardless of their validity; to save money; to criminalize aliens and discourage permanent resettlement; and to conciliate certain sectors of the public and reassert state legitimacy.630

The Detained Fast Track system was initially implemented in 2005 with the aim of accelerating asylum applications and appeals.631

Official Home Office policy during the period of the Detained Fast Track system was that ‘any asylum claim, whatever the nationality or country of origin of the Claimant, may be fast-tracked where it appears after screening to be one that may be decided quickly’.632 The system produced serious procedural and legal issues for applicants, advocates, and the legality of the system at large. According to ILPA, the Detained Fast Track system was of particular concern because it meant that any asylum seeker in the system had severely restricted time and resources to build their case, present it to the Home Office, or prepare an appeal.633 Data shows that from April 2005 until March 2006, 99 per cent of

633 ILPA, The Detained Fast Track.
appeals lodged in the immigration detention centre at Yarl’s Wood were rejected, and 97 per cent of those in Hammondsworth immigration detention centre were rejected. This is significantly lower than the 14-28 per cent success rate of appeals outside of the Detained Fast Track system heard during that same time.634

Unlike those undergoing regular asylum proceedings in the UK at the time, asylum seekers in the Detained Fast Track system were entitled to have publicly funded representation.635 Yet as one judge in a 2014 case commented, however, ‘[l]egal representatives are not excluded from the interview, if the applicant already has a representative, but where the applicant does not have one, the presence of a lawyer is not facilitated’.636 It was not the case that asylum seekers in the Detained Fast Track system were guaranteed legal representation before the tribunal stage. Subsequently, 2011 research showed that 63 per cent of applicants in Detained Fast Track system were unrepresented at their appeal.637 Furthermore, research in 2012 showed that of the 59 per cent of unrepresented asylum seekers detained in Harmondsworth, only one per cent won their appeals compared to 20 per cent of those who did have legal representation.638

Considering all the limitations of the Detained Fast Track system, queer people applying for asylum were especially vulnerable to not having their claims heard effectively and ultimately being deported. In 2013, UKLGIG reported that the majority of LGBTI asylum seekers were being placed in detention while having their claims considered.639 Furthermore, they found that in the majority of cases where the applicant was applying based on sexual orientation, sexuality did not

634 Ibid.
637 Detention Action, Fast Track to Despair.
638 Ibid.
639 UKLGIG, Missing the Mark, 28.
appear to have been taken into consideration by immigration officials.\textsuperscript{640} UKLGIG reports that in one 2013 case the Court of Appeal upheld the fact that an applicant’s claim was not able to be determined quickly according to the Detained Fast Track rules, due to the fact that he was a gay man.\textsuperscript{641} Considering whether the Home Office would have been able to properly determine the claim during the two week period that the applicant was detained, the Court concluded

Given the nature of the appellant’s claim, I find it difficult to see how it could. Homosexuality is a characteristic that cannot be reliably established without evidence from sources external to the claimant himself. On the face of it, therefore, the appellant did need additional evidence to support his claim and since some of that evidence was likely to be available online in Jamaica or elsewhere abroad, it was likely that he would need additional time in order to obtain it. A failure to allow him that time was likely to lead (as in the event it did) to a decision that was neither fair nor sustainable.\textsuperscript{642}

According to UKLGIG, at the time of publishing their 2013 report Missing the Mark 40 per cent of their clients were in detention and 70 per cent of requests for assistance were made by asylum seekers in detention.\textsuperscript{643} However, they also reported to researcher Rachel Lewis that many of the LGBTI asylum seekers that approached UKLGIG for assistance were actually homeless and undocumented because they feared being placed in detention.\textsuperscript{644}

UKLGIG also documented bad decision-making in the Detained Fast Track system. For example, in their analysis of letters of denial given to refugees, it appeared that a trend was developing whereby decision-makers were using

\textsuperscript{640} Ibid.
\textsuperscript{641} Ibid.
\textsuperscript{642} JB (Jamaica) v. The Secretary of State for the Home Department [2013] EWCA Civ 666 [29]; UKLGIG, Missing the Mark, 28.
\textsuperscript{643} UKLGIG, Missing the Mark, 29.
\textsuperscript{644} Lewis, “Gay? Prove It”.

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the medical notes made by detention medical staff without the informed consent of applicants.\textsuperscript{645} In one case relating to a Ugandan women’s claim, both the Home Office and an immigration judge decided that the woman could not truly be a lesbian because she used contraception. According, the judge explained in the case

It is noted that when you were inducted by the healthcare team at Yarl’s Wood, you were asked “are you using any form of contraception?” to which you answered “yes – implant”. It is considered that as a lesbian, you will not have any benefit from using an implant contraceptive. You also state that you have never been attracted to men or been “interested in boys at all”.\textsuperscript{646}

This was despite the fact the applicant had explained that she used contraception to regulate her menstrual cycle in order to treat certain medical issues.\textsuperscript{647} This is typical of the fact, as Lewis describes in her research, that queer women were especially vulnerable in the Detained Fast Track system given that it typically prevented the ‘complicated legal work’ that needed to be undertaken to establish credibility in such intricate cases.\textsuperscript{648} Lewis argues that ‘the experience of detention makes it virtually impossible for lesbian asylum applicants to exercises the kind of “personal responsibility” needed to prove their sexuality’.\textsuperscript{649}

Regarding the experiences of queer women in detention, in an interview for this project UK Lawyer Tom Nunn explained that:

They are detained, they are detained often. And probably the majority of the people who are in Yarl’s Wood, maybe, are LGBT asylum claims. Because they are people who are likely to be doubted amongst women, because women are a particular social

\textsuperscript{645} UKLGIG, Missing the Mark.
\textsuperscript{646} Ibid, 28-29.
\textsuperscript{647} Ibid.
\textsuperscript{648} Lewis, “Gay? Prove it?.
\textsuperscript{649} Ibid.
group in themselves, and so are able to have an asylum claim. If you are a Somali lone woman, then you will get refugee status if you show that you’ve got no family... You can’t doubt that someone is a woman in the same way that you can doubt their sexuality. So, the women who find themselves doubted, and find themselves being detained, are far more likely to be of that type of claim, I guess.650

Advocates in the UK pointed out that the detention system actually prevented applicants coming forward with sexual orientation-based claims, often to the detriment of their case when it was eventually made.

However, it is also the case that for certain applicants who did apply based on their sexuality, the Detained Fast Track system was not necessarily a negative experience. As Nunn continued to explain,

Certain people want to go into detention. Certain people are like, I want to have my case fast-tracked because I want to have this process sped up. The asylum process can take years, and if you’ve got a strong case and a good lawyer, and you are in a relationship with a British national, and everyone is willing to put all that evidence forward, then it is arguable that you are better off going through the fast-track process.651

Likewise, Gryck and Hardwick described,

G: Ironically, some of our cases that then went into the fast track system, they were so strong compared to the run of the mill fast track system, they won their case within a week.

650 Nunn, Interview.
651 Ibid.
H: Which is a great result, good for the client, but leads to a fairly stressful week for everybody.\textsuperscript{652}

The Detained Fast Track system was eventually found to be unlawful in a case led by UK organisation Detention Action in which the High Court found that the Detained Fast track system was ‘systematically unfair’ and therefore unlawful.\textsuperscript{653} This occurred after two reports, one published in 2015 by a cross-parliamentary committee,\textsuperscript{654} and another independently published report in January 2016 by Stephen Shaw, the former prisons and probation ombudsman.\textsuperscript{655} The Shaw Report comprised of an independent review into the welfare of immigration detention and was commissioned by then home secretary Theresa May.\textsuperscript{656} The report called for the government to reduce ‘boldly and without delay’ the over 30,000 people who were held in immigration detention each year.\textsuperscript{657}

When looking at the historical policy of Fast Track Detention in the UK, it is evident that despite guidelines, training, and jurisprudence seeking to implement procedural norms, ultimately, where the government creates systems that limit access to effective representative and judicial appeal, these developments are severely hampered. If the broader asylum system is created as a punitive and deterrent measure, dissuading and restricting legal justice for asylum seekers, queer applicants suffer both within physical detention centres and in the complex legal aid system that is required to have a serious chance of having their claim approved. However, in the British context it is also clear that on the issue of sexual orientation-based asylum claims there has been a robust community dedicated to litigating, working with government, and

\textsuperscript{652} Gryk and Hardwick, Interview.  
\textsuperscript{653} The Lord Chancellor v Detention Action [2015] EWCA Civ 840.  
\textsuperscript{656} Ibid.  
\textsuperscript{657} Ibid.
pushing for media attention into the treatment of queer refugees. According to Asylum Aid, there are 13 organisations that explicitly provide support to LGBTI asylum seekers and refugees in the UK.\footnote{Asylum Aid, “Resources: Asylum related to sexual or gender identity or expression in the UK”, accessed May 24th, 2018, https://www.asylumaid.org.uk/wp-content/uploads/2017/12/LGBTI-Resources.pdf. These include: UKLGIG; African Rainbow Family (Manchester); Lesbian Immigration Support Group (Manchester); First Wednesdays (Greater Manchester); Pride Without Borders (Leicester); LASS (Sheffield); Kairos Lesbian Immigration Support Group (Nottingham); Micro Rainbow International (London); Journey Asylum Social at Birmingham LGBT (Birmingham); East London Out Project (London); Say It Loud Club (London); London Friend (London); Mind’s Outcome LGBTIQ+ Asylum Seeker Project (London).} Other organisations also support LGBTI refugees and policy shifts, including Stonewall UK.\footnote{UKLGIG, “History”, accessed May 24th, 2018, https://uklgig.org.uk/?page_id=13.}

The most notable and influential organisation is UKLGIG which has had significant impact in the UK. Founded in 1993 as part of a group of organisations advocating for equality in immigration law for same-sex couples, UKLGIG now primarily focuses on advocating for, supporting, and representing LGBTI asylum seekers and refugees in the UK. Annually, they estimate that UKLGIG assists over 1,500 people.\footnote{Ibid.} The organisation explicitly engages with domestic and international human rights law to pressure the British government to change policies and for the courts to apply a human rights based approach to its assessment of LGBTI asylum claims. The stated aims of the organisation are to ‘promote for the public benefit’ human rights, equality and diversity drawing upon the European Convention on Human Rights, the 1951 Convention Relating to the Status of Refugees and its Protocols, the European Treaties and Directives, the Charter of Fundamental Rights of the European Union, and \textit{The Equality Act 2010} and similar instruments.\footnote{Ibid.}

The organisation’s scope is diverse, with advocacy actions including provision of legal advice and assistance, non-legal assistance, conducting research into immigration policy, raising awareness, and advancing law and policy including by commenting on proposed legislation.\footnote{Ibid.} UKLGIG are also the only LGBTI organisation in the British Home Office National Asylum Stakeholder Forum
and Strategic Engagement Group. Solicitor Tim Barnden praised UKLGIG’s role, stating that ‘the kind of critical engagement approach that UKLGIG has taken… has really paid off at the Home Office’. Part of this success was because of the manner in which asylum seekers themselves participated in UKLGIG advocacy, research, and collectivising.

Evidence of UKLGIG’s successful impact in LGBTI asylum issues in the UK is its prominence in the 2014 Vine Report ‘An Investigation into the Home Office’s Handling of Asylum Claims Made on the Groups of Sexual Orientation’. The Vine Report was prompted by an Observer article published on February 9, 2014 that detailed extremely sexually explicit and stereotype laden questioning by the Home Office. In addition to this, the Report explicitly points out that the Observer article relied upon UKGLIG research that ‘identified questions of a prurient nature, and quoted the organisation’s conclusion that some Home Office caseworkers were “fixated on sexual practice rather than on sexual identity”’. Furthermore, the Vine Report relied on interviews with UKLGIG clients as part of their methodology in writing the report. The Report explicitly recognised the ‘pressure from stakeholders’ around the time of the HJ(Iran) and HT(Cameroon) case that disallowed discretion reasoning in the UK, noting that UKLGIG and Stonewall had ‘strongly criticised the Home Office’s handling of sexual orientation’. As a consequence, it is noted that the Home Office collaborated with the UNHCR, UKLGIG, Stonewall, and Pride London “to develop specific sexual orientation asylum policy, guidance and training.”

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664 Barnden, Interview.
665 Ibid.
666 Vine, An Investigation into the Home Office.
667 Ibid.
668 Italicized in original. UKLGIG, Missing the Mark, 19; Vine, An Investigation into the Home Office, 5.
670 Ibid, 10.
671 Ibid.
These guidelines and training were designed for Home Office caseworkers and were administered to all in 2010-11.672

Following this, the Report notes that UKLGIG’s September 2013 report Missing the Mark concluded that ‘old problems are creeping back’, which influenced the Parliamentary Home Affairs Committee Asylum report published in October 2013, which also expressed concern about Home Office practice.673 The pressure and communication between UKLGIG and the Home Office appeared to be maintained. As then UKLGIG Director Paul Dillane described during an interview for this thesis,

We advised them to delay doing that until after ABC. Because we thought it didn’t make sense to update your policy whilst you know a major judgement is coming, because then you are going to have to redesign it all together. And you have to communicate these things to civil service, you can’t do it in fits and starts.674

Following this period, and the CJEU decision of ABC, the Home Office released its new Asylum Policy Instruction (API) in January 2015.675 APIs are released by the Home Office to provide specific guidance on how decision-makers should assess certain types of claims. They provide advice on screening and substantive asylum interviews, issues to take into consideration while assessing claims, and how to assess the likelihood of fear of harm.676

UKLGIG, Stonewall, the UNHCR and S Chelvan collaborated with the Home Office to write the 2015 Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim.677 Within this instruction is evidence of the implementation of

672 Ibid.
673 UKLGIG, Missing the Mark.
674 Dillane, Interview.
676 Ibid.
677 Dillane, Interview; UK Home Office, Asylum Policy Instruction.
procedural norms. For example, one of the key considerations listed by the API is that ‘[c]aseworkers must not stereotype the behaviour or characteristics of lesbian, gay or bi-sexual (sic) persons’. Furthermore, the API references the CJEU decision of ABC as relevant case law, listing the four elements that are also procedural norms in the UNHCR Guidelines including the rejection of stereotyped questions, detailed questioning regarding sexual practices, sexually explicit evidence, and refraining from medical testing. Seemingly influenced by the public outrage over the 2014 leak and the Vine Report, on the issue of sexually explicit questioning the API states

Home Office policy is clear – detailed questioning about claimants’ sexual practices must not be asked and there are no circumstances in which it will be appropriate for the interviewer to instigate questions of a sexually explicit nature. Present in the 2015 edition, and expanded upon in the 2016 update, the API also incorporates S Chelvan’s DSSH Model. The DSSH Model, which was developed in the UK by London barrister S. Chelvan, has since been endorsed and adopted by the UK Home Office and the UNCHR as well as influencing Australian guidelines. The model stands for ‘difference, stigma, shame, and harm’ and seeks to provide guidance for decision-makers assessing the credibility of LGBTI applicants and has been heralded as an improvement in the credibility assessment of queer claims. The API mirrors the DSSH explanation of the narrative of difference and its utility in elucidating an applicant’s credible narrative of identity development. This includes indicators such as:

- childhood behaviours indicating strong identification with the opposite gender, while for others experiences of difference

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678 Home Office, Asylum Policy Instruction, 5.
679 Ibid, 6.
681 Ibid, 26-7.
may be manifested in unusual feelings and strong emotions toward another person of the same sex;
• recognition that the claimant is not like other girls/boys in childhood or adolescence;
• feelings of isolation;
• self-doubt and loneliness; and
• gradual recognition of sexual and emotional attraction to members of the same sex or feelings of not wanting to be exposed to others.682

According to the Vine Report ‘as a result of stakeholder discussions, the Home Office has already agreed to bring the DSSH into its training’.683 This subsequently came to fruition in the API and the Home Office’s LGBTI Action Plan 2015-2016, where the DSSH model was referenced heavily throughout as an important component of reform.684 The LGBTI Action Plan included actions such as

a) Provide greater detail and clarity on the ‘Difference, Stigma, Shame and Harm’ model… progress at time of publishing was evidence noting that ‘S. Chelvan of No 5 Chambers, delivered a workshop on the DSSH model on 11 September 2015 for senior case workers, technical specialists and trainers.
b) The LGB element of the programme is up-to-date with current guidance and policy, including explicit references to DSSH and European case law.
c) Deliver sexual identity refresher training workshops for caseworkers and screening staff to reinforce policy guidance including; fact gathering at interview, the handling of sexually explicit information provided by applicants, consideration of

682 Ibid.
credibility and material facts and provide information on the DSSH model.\textsuperscript{685}

Key actors, such as Chelvan and UKLGIG have been able to influence policy makers, making sure they have a seat on review committees and that their work is drawn upon in reviews conducted by or for the government. Notably, Chelvan was also a trustee of UKLGIG between 2005 and 2012.\textsuperscript{686} His role as a civil society actor in assisting norm implementation is multifaceted and not limited to being a single ‘type’ of actor. Chelvan has operated sometimes in a UKLGIG capacity, and sometimes as an independent expert, lawyer, trainer, or policy advisor to the Home Office, EU organisations, regional legal organisations, and the UNHCR.

The feedback loop between civil society and government in the UK is important here for norm implementation. In particular, civil society actions have resulted in transparency. Without the data from, for example, reports such as \textit{Failing the Grade} and \textit{Missing the Mark}, evidenced based complaints against the Home Office and courts could not have been made. This push for transparency has also led to the Home Office deciding to publish statistics on sexual orientation and gender identity-based claims.\textsuperscript{687} Having this information empowers civil society to track the ways in which queer applicants are having their claims assessed. The new Home Office statistics now include the number of asylum claims where sexual orientation was raised as a basis, or part of the basis, of the claim; the initial decision of claims where sexual orientation was raised as part of the claim; and the outcome of appeals for asylum cases where sexual orientation was raised as part of the claim.\textsuperscript{688}

While civil society focused on advocacy for queer refugees is certainly robust in the UK when compared to Australia, success may be evidence of the fact, also, that despite the ‘hostile environment’ being created in the UK LGBTI rights

\textsuperscript{685} Ibid, 4-6.
\textsuperscript{686} S Chelvan, Interview with Jaz Dawson, (August 5\textsuperscript{th}, 2016, London).
\textsuperscript{687} UK Home Office, \textit{Asylum claims on the basis of sexual orientation: EXPERIMENTAL STATISTICS} (London: Home Office, 2017).
\textsuperscript{688} Ibid.
seem to be a topic that both conservatives and liberals will cooperate on, even in the context of asylum. For example, as Gryk describes,

In a way, with a nasty old Tory government, somehow gay issues were considered small enough that they could show they were keeping pace. So they are all for gay marriage and in terms of LGBTI asylum seekers, they were glad to make an effort, because the number is a drop in the ocean.689

Other interviewees spoke encouragingly of the government, including Dillane and Chelvan, complimenting the government on undertaking a collaborative approach in developing guidance and training on LGBTI asylum.690 Chelvan praised Theresa May who has a significant influence in her former role as Home Secretary and present role as Prime Minister:

Theresa May has been very good when she was Home Secretary because she reacted… When the HJ/Iran judgment came down when she was already Home Secretary she gave very positive indications that the Home Office would incorporate. She started to interact with stakeholders, including UKLGIG, which I was a trustee of between 2005 and 2012.691

It is difficult to assess what impact the role of civil society has had on the softer approach taken by the conservative government in the UK toward LGBTI issues in asylum, especially given their stricter approach to asylum in general. It is also likely that given the UK parliament has the largest number of openly gay politicians in the world, that there exists a unique culture of discussing and incorporating LGBTI issues within multiple areas of policy.692 All these factors have resulted in the UK having a fairly productive and successful relationship

689 Gryk, Interview.
690 Dillane, Interview; Chelvan, Interview.
691 Chelvan, Interview.
between civil society actors and government or policy makers when it comes to sexual orientation-based refugee claims.

Fast Track Assessment in Australia versus hampered civil society

In Australia the role of civil society is particularly important in the era of the ‘legacy caseload’, referring to those asylum seekers who arrived by boat between August 2012 and December 2013.693 These dates were arbitrarily chosen, as was the ‘immovable deadline’ of October 1 2017, when the government eventually chose to process these claims through the Fast Track Assessment process explained below.694 At the announcement of the deadline, then Secretary of the Australian Department of Immigration and Border Protection Mike Pezzullo remarked ‘Whether we hit zero or 100 or 300 or 400 [applicants outstanding] at that point [1 October], the commissioner [of the Australian Border Force] and I have to turn our mind as to how we will operationalise a departure strategy... how we will aggressively pursue a departure policy.’695 These asylum seekers have been subjected to ‘continuous pressure due to a number of punitive policy changes’ including having to wait for many years for the chance to apply for asylum, the chance of permanent residency being rescinded, and a ‘drastic reduction’ in legal aid assistance.696 According to the UNHCR, ‘the Government termed these asylum-seekers the ‘legacy caseload’ largely for political reasons and to categorise them by reason of their mode and date of arrival in Australia’.697

695 Ibid.
Those who are deemed by the government to have ‘arrived illegally in Australia’, such as the legacy caseload, are not eligible to use the government funded Immigration Advice and Application Assistance Scheme (IAAAS). This policy, in effect, cuts all taxpayer funded legal aid to these applicants and places strain on the non-government legal aid community. While some support is provided through the Primary Application Information Service (PAIS) to those who, along with other criteria, are:

a) At the time of the assessment, an adult in relation to whom the Department considers it to be in the best interests of Government to provide assistance to ensure their claims are presented and able to be considered, in particular, a person regarded as being exceptionally vulnerable;

b) They are, at the time of assessment, an unaccompanied minor.

Who counts as ‘exceptionally vulnerable’ is not outlined, but there is no indication by the Department of Home Affairs or government that this would systematically encompass queer applicants.

In addition to the restriction of legal assistance and subsequent pressure placed on pro bono legal assistance, on December 5 2014 the Fast Track Assessment system was introduced to process the 30,000 claims that had yet to be processed as part of the legacy caseload. The Fast Track Assessment process was designed for legacy caseload applicants who arrived in Australia on or after August 13 2012 and before January 1 2014 and who were not

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700 UNHCR, “Fact Sheet”.

701 Ibid.
transferred to detention centres in Nauru and Papua New Guinea.\(^\text{702}\) Included in this process, according to the UNHCR, are ‘shorter timeframes at first instance for responding to request for information and a limited form of merits review of refusal decisions for eligible asylum-seekers’.\(^\text{703}\) Furthermore, the UNHCR has expressed concern about ‘the lack of procedural safeguards in the fast track review process’, especially given that the process ‘denies asylum-seekers the opportunity to attend a review hearing’.\(^\text{704}\)

As part of this system, the Independent Assessment Authority (IAA) was established, which only assess claims ‘on the papers’.\(^\text{705}\) These assessments typically involve not holding a hearing or interview with the applicant and only in ‘exceptional circumstances’ requesting additional or new information.\(^\text{706}\) The IAA was established with the view that the AAT process was too lengthy and that there needed to be an expedited process for assessing the legacy caseload.\(^\text{707}\) As such, according to Mary Anne Kenny, Nicholas Procter, and Carol Grech, ‘the combined effect of these new provisions places increased pressure to ensure that the initial application is one which is as thorough and complete as possible’.\(^\text{708}\) In the period of 2015 – 2016 the IAA was referred 264 cases and finalised 130. The median length of time that it took to resolve those cases was five weeks. By comparison, in the 2016 – 2017 period there were 2,664 referrals and 1,604 finalised with the median length of time to resolve more than doubling to 11 weeks. The percentage of cases remitted to the tribunal dropped significantly from 28% (36) in the first period to 16% (261) in the second period.\(^\text{709}\) It is evident in these statistics that under the increased caseload it is more difficult for asylum seekers to have their claim remitted and

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\(^\text{702}\) Ibid.
\(^\text{703}\) Ibid.
\(^\text{704}\) Ibid.
\(^\text{705}\) Migration Act 1958 (Cwth) s473 D; Kenny, Procter and Grech, “Mental Health and Legal Representation”, 89.
\(^\text{706}\) Ibid.
\(^\text{708}\) Kenny, Procter and Grech, “Mental Health and Legal Representation”, 89.
subsequently accepted. In 2018 the Australian High Court upheld the Fast Track Assessment process finding that the IAA does not have to comply with all requirements set out in the *Migration Act 1958*.\(^{710}\) Although it was argued that the applicant was denied procedural fairness because he was ‘not given the opportunity to respond to information gathered by the Department of Border Protection and Immigration, which led to the department rejecting his claim’,\(^{711}\) the Court unanimously dismissed the claim. \(^{712}\)

According to the UNHCR guidelines, two procedural norms intended to support queer applicants are especially vulnerable in the context of accelerated procedures. They are:

1. LGBTI individuals require a supportive environment throughout the refugee status determination procedure, including pre-screening so that they can present their claims fully and without fear. A safe environment is equally important during consultations with legal representatives; and

2. Due to their often complex nature, claims based on sexual orientation and/or gender identity are usually unsuited to accelerated processing or the application of “safe country of origin” concepts.\(^{713}\)

It was evident throughout the analysis of the impact of the Detained Fast Track system, for example, that the expedited processes and lack of access to lawyers and representatives meant that other standards of processing were lowered.

It is not known whether advocating for LGBTI rights or queer issues is considered too sensitive an issue for Australian refugee advocacy

\(^{710}\) Wahlquist, “High court upholds”.
\(^{711}\) Ibid.
\(^{712}\) Ibid.
organisations to be raising publicly. What is known, however, is that civil society organisations are under a significant amount of stress to be diplomatic in their advocacy. A 2017 report authored by Maddison and Carson indicated that in general ‘Australian not-for-profit organisations are on a path of quiet advocacy’. The report found that civil society organisations in Australia tend to ‘self-silence’ and to go about their activities carefully ‘lest they risk financial security and political retribution’. Of the 1,462 people who provided responded to the Civil Voices survey, 69 per cent indicated that they believed ‘dissenting organisations risk having their funding cut’. Such a climate has led Australian civil society organisations to ‘engage elite policy actors directly, rather than ‘relying on intermediaries, such as the mainstream media, to carry their message’. This perhaps explains in part why there has not been a similar public push by the media or civil society organisations for a UK style review of Australian decisions in relation to queer applicants. Nevertheless, it is evident that the media has, on numerous occasions, reported on poor questioning practices in sexual orientation-based claims, although this has produced no tangible policy response from the government.

Asylum organisations and lawyers appear to be strained under their workload. Australian interviewees articulated the burden that the refugee sector in Australia faced and how this has meant that queer refugees slipped through the legal, health and social service delivery cracks. Regarding the needs of queer applicants, one Australian caseworker said

I think it’s just really overwhelming. I think it’s not seen as a priority because there are so many other things going on in the sector and I think there should be a lot more done. I’m not saying that I think that it is some deliberate malice, but I think it is just an oversight that people just don’t know about. Within the sector it is an afterthought, it is not people’s priority.

714 Maddison and Carson, *Researching Not-For-Profit Advocacy*.
715 Ibid, 1.
716 Ibid, 2.
717 Ibid, 3.
718 Australian Case Worker, Interview with Jaz Dawson (November 8th, 2016, Melbourne).
Indeed, even where individuals within the refugee legal sector do have knowledge about procedural norms and rights for sexual orientation-based claims, they can be hesitant to push boundaries for fear of repercussions for the applicants resulting failed asylum claims. With limited chances for review and limited time to attempt such reviews, the stakes are high. As one Australian lawyer described in an interview for this project, rather than trying to establish new avenues for securing procedural rights or making a successful claim, they felt claims had to become more conservative and fit within the existing paradigm within this context:

Especially now we have Fast Track, which really is one shot, there is no proper merits review there. There is no hearing on the merits review. If anything, the processes are becoming more draconian and more difficult for this claimant group. And people are going to have to toe the line even more.

So, we are just perpetuating the issues, and we are consolidating them for the government in the way that we work within this space. Because it is too risky. It is just too risky.\(^\text{719}\)

In the face of this, broader civil society in Australia has largely failed to focus on the specific needs of queer refugees and asylum seekers, and both the LGBTI and refugee sectors have struggled to develop intersectional and cross culturally competent services. Individuals have been significant in countering this. Just as is evident in Chelvan’s multifaceted approach to norm entrepreneurship and engagement in the UK, Millbank (who provided the 2008 training to the RRT) has had significant influence at multiple sites domestically and internationally.\(^\text{720}\) In 2010 she was invited as an expert to participate in the development of UNHCR policy on LGBTI asylum and to present to fellow

\(^{719}\) Australian Lawyer, Interview.  
\(^{720}\) LaViolette, ”UNHCR Guidance Note“.
experts on the topic, and she has also produced the most significant research on sexual orientation-based claims. By gaining access to many years of unpublished RRT decisions, Millbank has produced quality research that has shifted the conversation in academia on sexual orientation-based claims. However, beyond this kind of lone academic activism, however, there is not evidence of the same policy lobbying and consultation in Australia as there is with civil society actors such as Chelvan and UKLGIG in the UK.

The LGBTI civil society sector in Australia has largely failed to take asylum and refugee human rights violations within their mandate. As LGBTI advocate Alastair Lawrie describes in our interview,

Disappointingly, I would suggest that the Australian LGBTI community has been largely (although not completely) disinterested in the issue of LGBTI people seeking asylum and refugees, and have therefore not helped to provide community-specific support services that may otherwise be helpful.

There are, however, growing signs of collaboration between the LGBTI and refugee sectors in Australia. For example, in November 2017 the Red Cross Migration Support Programs in association with Australian Gay and Lesbian Multicultural Council announced a new ‘Cultural Rainbow Service Delivery’. This was described as being the product of ‘the Cultural Rainbow Forum that was held at the Red Cross in November 2017 to address the ongoing gap in service knowledge for LGBTI migrants, refugees and asylum seekers’.


Alastair Lawrie, Interview with Jaz Dawson (February 13th, 2017, Online – Melbourne).

Anthony Benedyka, Email with Jaz Dawson (February 28th, 2018, Melbourne).
‘Multicultural/Refugee+Asylum Seeker Services’, only four organisations are listed, none of which are exclusively designed groups for LGBTI refugees.724

In 2014 there were 241 submissions to the Australian Senate Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.725 Thirteen organisations raised issues related to sexual orientation-based claims, representing five per cent of all submissions.726 Of those thirteen submissions, none were made by an explicitly LGBTI organisation. However, a submission was made by the HIV/AIDS Legal Centre (NSW) Inc, which described the fact that thirty per cent of their legal casework involves representing people applying for asylum ‘on the basis of their membership of the social group of ‘people living with HIV/AIDS and/or those who face persecutions on the basis of their sexuality’.727

In relation to temporary visas, the centre submitted that:

HIV stigma and persecution for homosexuals (Iran, Bangladesh, Lebanon, Tonga, India) is unlikely to be ameliorated in our lifetime.

We submit issuing temporary visas does not provide any form of long term security or sustainable options for refugees, and will

726 Those submissions were made by: Asylum Seeker Resource Centre; HIV/AIDS Legal Centre (NSW) Inc.; Refugee Advice and Casework Service; Refugee Council of Australia; Castan Centre for Human Rights; United Nations High Commissioner for Refugees; Australian Human Rights Commission; Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW; Migration Law Program, Australian National University; Department of Border Protection; Canberra Refugee Action Committee; Dominica Dorning AO RFD QC; and Marina Brizar, Clare Jackson, Melinda Jackson & Besmedah Rezaee. Ibid.
generate a vast amount of additional processing requirements for the Department.\textsuperscript{728}

On the one hand, having a submission by an organisation that specifically addresses HIV/AIDS and sexuality is beneficial in dealing with the issues facing queer refugees. However, the legal centre’s submission also suggests a very narrow representation of sexuality, with the reference to target groups as merely to ‘homosexuals’ disregarding other groups such as bisexuals, lesbians, and transgender queer people who are likely to face high risk of contracting HIV/AIDS in persecutory environments.

The majority of submissions to the 2014 inquiry that referenced sexuality were in relation to the proposition of s5J(3) which, as explained in the government’s submission made via the Department of Immigration and Border Protection, is that,

\begin{quote}
The new refugee framework under section 5J(3) requires decision-makers to take into account when assessing whether a person has a “well-founded fear of persecution” what a person \textit{could} do upon returning to a receiving country to avoid the relevant persecution, not just what they \textit{would} do upon return.\textsuperscript{729}
\end{quote}

The department provided further that

\begin{itemize}
\item [a] person would not be required to modify their behaviour to avoid persecution if such a modification:
\begin{itemize}
\item conflicts with a characteristic fundamental to their identity or conscience; or
\end{itemize}
\end{itemize}

\textsuperscript{728} Ibid.

- requires them to conceal an innate or immutable characteristic.\(^{730}\)

Presumably in expectation of potential criticisms relating to sexual orientation, the department also stated that

A person should not be required to modify or change their behaviour if this would require a person to conceal an innate or immutable characteristic, e.g. sexual orientation. The Refugees Convention would be undermined in Australia if protection visa applicants were required to avoid doing things such as publicly expressing their sexual preferences in order to avoid the persecution from which they are seeking protection. This provision does not require people to conceal their sexual orientation as that would conflict with the reason for seeking protection, e.g. membership of particular social group.\(^{731}\)

Seven of the thirteen submissions to the inquiry made recommendations against this proposed section of the legislation in relation to sexual orientation-based claims.\(^{732}\) For example, the Australian Human Rights Commission highlights that ‘the new section would require courts to make judgements about what aspects of a person’s conscience are “fundamental” and what are expendable and could be modified to avoid protection’.\(^{733}\) This would mean, they argue, that for cases based on religious persecution the following issues might arise:

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\(^{730}\) Ibid.

\(^{731}\) Ibid, 24.

\(^{732}\) Those submissions were made by: Asylum Seeker Resource Centre, Refugee Advice and Casework Service, Castan Centre for Human Rights, Australian Human Rights Commission, Canberra Refugee Action Committee Dominica Dorning AO RFD QC, and Marina Brizar, Clare Jackson, Melinda Jackson and Besmellah Rezaee.

a) should a person be required not to wear religious symbols such as a cross, or clothing required by religious tenets such as a headscarf?

b) should a person be required not to attend religious gatherings in public if such gatherings could be conducted privately?

c) should a person be required not to proselytize or actively seek attention on religious matters?  

Of these questions, the Commission also stated that the same issues might arise for other groups making claims based on particular social groups status, ‘for example one based on sexual orientation’. Likewise the Asylum Seeker Resource Centre warned that ‘where one decision maker accepts holding hands in the street is fundamental to one’s sexuality, another may find this aspect of behaviour could be modified’. According to the Refugee Advice and Casework Service,

> the complexity of the internal identity issues involved in many applicants’ fearing harm on the basis of an actual, perceived, or changing LGBTIQ identity is not properly accounted for in section 5J.

The subsequent report produced by the Senate noted the concerns made through the submissions and made explicit mention of LGBTI persons. As such, the report stated

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734 Ibid.
735 Ibid, s. 55.
1.51 Proposed section 5J(3) of the Bill will provide that an asylum seeker is not entitled to protection if they could ‘modify’ their behaviour so as to avoid persecution. The Opposition is concerned that the ‘modification’ principle could operate inhumanely.

1.52 For example:

... 
(d) Should LGBTI refugees adopt a heterosexual identity or conceal the true sexual orientation or gender identity? Note that some commentators continue to claim that homosexuality can be ‘cured’ and that it is not an innate, immutably personal characteristic?

1.53 The reasonableness of expecting a person to ‘modify’ his or her behaviour to avoid persecution in any particular circumstances in ambiguous. The Bill fails to expressly rule out expecting a person to ‘modify’ their behaviour to avoid persecution in the above circumstances. Labor Senators find this to be absolutely unacceptable.738

The submissions made by civil society and the Senate report had a clear positive impact on the final legislation. In the passed bill, section 5J(3) included the exception that modifications that included the following would not be required:

(c)(vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.739

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739 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, s. 5J(3)(c)(vi).
It is also positive that modification of behaviour and discretion was addressed by a number of civil society organisations, which subsequently had a demonstrable impact on the Senate’s report and final legislation passed.

However, there was not the same attention paid to the issue of accelerated processing and the unsuitability for sexual orientation-based applicants. According to the government’s Explanatory Memorandum for the proposed legislation

[a] fast track applicant has ample opportunities to present their claims and supporting evidence to justify their request for international protection throughout the decision-making process and before a primary decision is made on their application.740

To this statement, the UNHCR responded in their submission that

C) trauma, shame or other inhibitions may have prevented full oral testimony by the asylum-seeker in the previous examination procedure, particularly in the case of survivors or torture, sexual violence and persecution on the grounds of sexuality.741

This was one of only two submissions to address the particular vulnerability of queer applicants subjected to fast track assessment in Australia. In the submission made by the Refugee Advice and Casework Service, an example case study is provided where an application on sexual orientation-based


grounds is fast tracked because the decision-maker does not believe that their behaviour is ‘consistent with a homosexual lifestyle’. 742

Overall, these civil society interventions represent their successful influence. There remains, however, a lack of civil society advocacy for procedural rights issues for queer refugees in Australia when compared to the UK. There have been two reports published by the Australian Research Centre in Sex, Health and Society at La Trobe University that address these concerns. The first report, Nothing for Them: Understanding the support needs of Lesbian, Gay, Bisexual and Transgender (LGBT) young people from refugee and newly arrived backgrounds, was published in January 2014. 743 Among other recommendations covering social, housing, and health services, the report made recommendations to fund research, and to develop and deliver staff training and capacity building. Furthermore, the report recommended that ‘steps should be taken to foster the support of organisational leadership and encourage a ‘top-down’ approach to effective policy development and the setting of professional standards and expectations’. 744

It appears that not much changed in the following few years. In their second report published in 2016 entitled Something for Them: Meeting the support needs of same sex attracted, sex and gender diverse (SSASGD) young people who are recently arrived, refugees or asylum seekers, the same issues were reported to persist. 745 For example, the second report made the same recommendations that there needed to be legislative and policy change, including ‘reforming assessment processes for protection claims by recently

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742 Refugee Advice and Casework Service, Submission to the Migration and Maritime Powers Legislation Amendment, s 4.10.
arrived SSASGD young people in line with best practice’. Many of the same issues facing young queer asylum seekers and refugees remained. In particular, the report stated that ‘a number of our participants expressed frustration that there was not a ‘stand alone’ dedicated service providing health care and support to SSASGD young people who were recently arrived, refugee or asylum seekers’. Overall, the recommendations in the second report mirror the first report, and do not signify any major improvements especially in relation to creating services for asylum seekers and refugees and lobbying or collaborating with the government to improve the refugee status determination process.

Perhaps the clearest evidence of civil society actors having influence on norm implementation is the aforementioned development of departmental guidelines and training on LGBTI asylum. The approach taken in the guidelines drew from a number of resources. The referenced resources appear to have been listed by the weight they were drawn upon and are as follows: Kaleidoscope Human Rights Foundation Australia, academics Nicole LaViolette and Jenni Millbank, the Organization for Refuge, Asylum and Migration, and the UNHCR. In particular, many of the elements appear to be influenced by Kaleidoscope Australia’s report Looking through the Kaleidoscope: A guide to best practice in determining applications for refugee status based on sexual orientation, gender identity and intersex grounds, which was published in Australia in October 2015. In turn that report was influenced by the work of London barrister S. Chelvan who developed the DSSH model for credibility assessment in LGBTI asylum claims, as noted above and discussed in greater detail in the following chapter. It appears that in drawing on the work of both Kaleidoscope Australia and Jenni Millbank, the Department developed guidelines that have begun to influence norm implementation in sexual orientation-based claims. It is important to note, too, that according to publicly available resources and

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746 Ibid, 33.
747 Ibid, 34.
748 Kaleidoscope, ‘Looking Through the Kaleidoscope’.
academic literature, prior to 2016 the only reported training for the RRT on sexuality and gender was conducted by Millbank in 2008.749

Another development that has potential to influence policy, and is marketed as such, is the Australian Equality Project's policy guide, launched in 2018. The guide directly addresses issues relating to refugees, in particular that claims of LGBTIQ people must be assessed in a way that recognises:

(a) the progressive nature of disclosure to fear and stigma surrounding an LGBTIQ asylum seeker’s willingness to address issues of sexuality;
(b) that persons seeking asylum are often coming to terms with their SOGII status thus may not consider themselves to be LGBTIQ due to cultural framing instead referring to themselves by another term eg ‘hijra’ which means third gender in many South Asian countries and especially in India;
(c) the possible presence of a discriminatory translator;
(d) issues of safety presented by the LGBTIQ asylum seeker’s colocation with other asylum seekers who may hold discriminatory views;
(e) the possibility that a person’s understanding of sexuality, sexual orientation and gender may differ according to culture or context.750

Subsequently, the guide concludes that ‘the application of the Fast Track process to individual category of claim must be reviewed in light of these considerations.’751 Such explicit policy recommendations have the potential to be used by civil society and the Australian Equality Party to push for policy change in Australia.

749 LaViolette, “Overcoming Problems”.
751 Ibid.
Queering Civil Society Successes

As has been demonstrated, civil society actors have an important role in the process of norm contestation, implementation and institutionalization. ⁷⁵² Some of these actors can be described as norm entrepreneurs, adapters, facilitators in the instances where they actively seek to embed a new norm in law, policy, and practice. ⁷⁵³ Central to their roles in society, such actors strategically use both international and domestic political and legal tools to advance their cause. And, as previously demonstrated in chapter four, it is clear that especially in the case of Australia and the UK, these existing socio-political and legal structures are heteronormative and increasingly homonormative in their operation. Therefore, strategic use of these systems and tools by civil society, mirroring the experiences of individual appellants claiming their rights based on their sexual orientation, are limited and confined often to using normative and exclusionary understandings of sexuality in order to make gains. For example, UKLGIG has rightly been praised by many as making successful interventions in LGBTI refugee policy in the UK through participating and engaging in policy development and revision by sitting on advisory committees, and the like. Similarly, S Chelvan has had a deeply influential role in UK policy advancements, providing training and in on improving credibility assessment.

And yet, through doing so, both actors through their advocacy have contributed to a broader shift from sexuality-based concepts of queerness to identity-based concepts of queerness. While heralded improvements by many, and no doubt accompanied by improvements in reducing stigma, bigotry, and disrespect - in can be argued (and is argued in chapter six) that these improvements and normative developments retain many of the exclusionary hetero/homonormativites that resist queering refugee law. That is not to say that these developments are not positive, practical, and pragmatic – but they are not immune to queer critical analysis.

⁷⁵³ Finnemore and Sikkink, “International Norm Dynamics”, 893.
Conclusion
This chapter looked at the role of civil society actors in procedural norm implementation in refugee law. Constructivists theorise the role of actors in norm contestation and implementation, identifying norm entrepreneurs and antipreneurs, and highlighting the way in which the material capacity of these actors impacts their ability to advocate for their specific aims. One stark material differential can be found between government bureaucracies seeking to create hostile immigration policy environments and civil society actors seeking to implement procedural rights for queer refugees. This chapter focussed on the impact of civil society actors in the UK and Australia during periods in which the respective governments implemented the accelerated processing of asylum claims. Such policies place material and temporal strain on civil society actors and applicants, as well as compromising clearly constituted procedural norms as laid out by the UNHCR, which considers LGBTI applicants unsuitable for any form of accelerated processing.

In the case of the UK, this chapter considered the now abolished Detained Fast Track system. Civil society actors reported that this system posed significant difficulties for the vast majority of queer applicants. However, a group of civil society actors in the UK who have been dedicated to representing and advocating for queer refugees have had an impressive impact on Home Office policies and procedural norm implementation. Actors such as UKLGIG and British lawyer S Chelvan have successfully influenced the Home Office to implement guidelines, deliver training, and publish statistics on claims based on sexual orientation and gender identity to allow for greater accountability.

In Australia, the Fast Track Assessment system, which is a similar process of accelerated processing with limited judicial review, is still in operation. Like the UK, it appears to have a negative impact on queer refugees, although this is not as clear given the more limited civil society attention and resources that have been paid to queer refugee rights in Australia. Unlike the UK, there is not a single queer specific refugee organisation that represents their interests and there is also a broader trend of restricting the freedoms and finances of civil society that has resulted in the ‘silencing’ of civil society actors. Nevertheless,
there is evidence of norm implementation in Australia. Civil society actors have successfully responded to proposed legislation in 2014 and advocated for queer refugees to be exempt from modification of behaviour provisions. More importantly, the work of academic Jenni Millbank and the non-profit organisation Kaleidoscope Human Rights Foundation appears to have influenced the immigration department to deliver and implement its own training in 2016.

It seems clear, therefore, that in both the UK and Australia, civil society actors including organisations, experts, and academics have had significant influence on procedural norm implementation in policies relating to sexual orientation-based claims. In the UK, this occurred through the public means of media reportage, explicit dialogue and collaboration. In Australia the style of advocacy has been more private and rather opaque, including that there was not even a public announcement of the internal guidelines and minimal, if any, public consultation with civil society. Despite this, it is clear that government drew upon civil society and academic expertise in the development of these guidelines, making civil society impact quite evident. It is evident that even in legal systems that are characterised by being restrictive and limiting procedural rights, civil society actors and the implementation of guidelines and training can encourage norm implementation. However, while these guidelines and trainings are successful ‘moments’ of norm implementation, it remains to be seen as to whether the normative content of those guidelines and training serve to protect queer people or whether they perpetuate exclusionary norms. The following chapter critically analyses the DSSH model to assess whether heteronormativities may be simply replaced by homonormativities.
Chapter Six
Guidelines and training: from hetero- to homo-normativity?

Introduction
Guidelines and training on issues of sexual orientation and pertaining to LGBTI and queer people more broadly are considered to have made a positive impact on credibility assessment and procedural norm implementation. This chapter considers the strengths and weaknesses of such guidelines and training in terms of improving the asylum process for queer applications. First this chapter considers the difficulties that decision-makers face in assessing claims based on sexual orientation. To demonstrate this, the claims of lesbian women are discussed as an example of the difficulty is assessing the intersection of gender and sexuality in claims to asylum. In order to analyse whether credibility models might have a positive impact on the difficulties involved in credibility assessment, and therefore on procedural norm implementation, this chapter then considers the most influential credibility model developed for sexual orientation-based claims – the DSSH model. This chapter takes a more critical view and argues that the DSSH model might not solve all of the issues facing applicants applying on sexual orientation-based grounds. Instead, a queer analysis suggests that the model may actually perpetuate gendered and Western constructions of sexual identity development and expression that serves to limit its usefulness for queer applicants.

Drawing on the work of Berenskoetter, it is argued in many ways the DSSH model serves as an ‘anxiety controlling mechanism’ that seeks to quantify and locate routine practices, and develop individual and collective narratives to construct an identity in order to help adjudicators comfortably assess whether someone is ‘authentic’ in their claim. 754 In making this argument, I call into question the procedural norm of restricting sexually explicit questioning and documentation. I argue that in attempting to shift the discourse away from

sexual practices and towards sexuality on the basis of identity grounds, expressions of queerness that do not conform to these standards are dismissed or rejected.

Subsequently, I argue that when considering the influences of factors such as guidelines and training on norm implementation, it is not enough to consider them a success merely by virtue of their appearance in policy and practice. Rather, the analysis needs to be extended to consider the normative influence that such guidelines and trainings themselves perpetuate. Furthermore, constructivist theorising needs to take greater account of the role that identity plays in developing and implementing human rights norms. Where identity-based norms have been developed and applied to queer people, any ‘successful’ implementation of a norm needs to be deeply scrutinised. In particular, when taken the claims of women into account, one of the clear examples of conflict with identity-based narrative is that it is common for women to report shifts and changes in their self-identification over time. This speaks particularly to the risk that stereotypes based on male constructions of sexual identity are being pursued at the cost of the queer experiences of women.

It is not my suggestion that the DSSH model was deliberately developed and implemented in order to establish a new, homonormative account of queer identity. Rather, I contend that such an outcome is somewhat inevitable in the context of human rights law and refugee status determinations. Therefore, the designing of any credibility assessment guidelines need to take this reality into consideration and consider alternative, queerer approaches. Drawing upon Weber’s formation of the ‘and/or’ plural logic of identity in international relations, I argue that a queerer approach can be developed through expanding to an ‘and/or/not’ logic which attempts to encompass those who refuse or fail to take an identity. Those who might best be characterised by difference and inaction, rather than a positivist account of identity assertion.

**Focus on credibility: the need for training and guidance**
The UNCHR 2012 Guidelines addressing issues relating to sexual orientation and gender identity refugee claims state clearly that ‘specialized training on the particular aspects of LGBTI refugee claims for decision-makers, interviewers, interpreters, advocates and legal representatives is crucial’. Indeed, according to Canadian refugee legal expert Nicole LaViolette, ‘if members of staff who interact with sexual minorities do not reflect on their own prejudices and assumptions about homosexuality and transsexuality, they are unlikely going to be able to fairly assess asylum and resettlement claims’. In essence, LaViolette argues, any training on gender or sexuality requires the acquisition of ‘cross-cultural competency’ where a ‘person with cross-cultural competencies is defined as an individual who has an ability to understand, communicate with, and effectively interact with people originating from a variety of cultural backgrounds’. This approach to addressing ignorance, biases, and stereotypes is common to training that already exists on culture more broadly in refugee adjudication.

Within constructivist international relations theorising on refugee policy, the role that decision-makers play in norm implementation in refugee law is underexplored. The variance between decision-makers is often stark, and well-known to experienced advocates. For example, an empirical study of refugee status determinations in the US found that there was significant variance between decision-makers and regions. The researchers found that ‘different officers and judges may bring to their task quite different presuppositions about the degree to which inconsistencies or lapses in the telling or retelling of a personal history prove that an applicant is committing fraud’. This is due, they suggest, to a decision maker’s previous work, history, and socio-economic/cultural background. Likewise, in a study on Canadian decision-making, Sean Rehaag concluded that ‘the identity of the Board Members

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757 Ibid, 11.
760 Ibid.
assigned to particular claims appear to be an important fact in refugee claim outcomes'. 761 Meanwhile, in Australia, Mary Crock and Laurie Berg argued that acceptance rates at first instance were reduced by one third and at appeal by almost half following a ‘thinly veiled warning’ from the Minister that decision-makers risk their reappointment should they be thought to be “‘reinventing’ the definition of a refugee’ in relation to claims made by women who were victims of domestic violence. 762

Regardless of their backgrounds, attitudes, or the external pressures they face, it is also fair to say that decision-makers face serious challenges and must make decisions in conditions of ‘radical uncertainty’. 763 Indeed, as Trish Luker points out, the refugee status determination process has been described as ‘one of the most complex adjudication functions in industrialized societies’ where decision-makers are consistently presented with complex and challenging cases. 764 As Luker details, decision-makers must,

... have sufficient knowledge of the current social and political conditions in the claimant’s country of origin; a detailed understanding of the legal framework provided by both the international convention as well as the national legislation and relevant case law; skills to conduct hearings and elicit evidence in an inquisitorial manner, in an intercultural context and with the assistance of an interpreter; an ability to understand and evaluate the psychological aspects of the process; the capacity to listen empathetically and bear witness to accounts of threats, detention, attacks, abuse, rape and torture; the ability to deal with stress and possible vicarious traumatization; as well as the confidence to

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762 Crock and Berg, Immigration, Refugees and Forced.
763 Audrey Macklin, “Coming Between Law and the State: Church Sanctuary for Non-citizens”, Nexus, University of Toronto, Faculty of Law (Fall/Winter 2005): 51.
make decisions, which, if wrong, may result in a person being forced to return to their country of origin where they may face further traumatization or even death.\textsuperscript{765}

Evidently, making such decisions is no simple task and demands of an adjudicator a multifaceted role that must take account of extreme circumstances and potentially extreme consequences. As Gregor Nöll writes, asylum adjudication is a process whereby the decision maker is asked ‘to give credence to the incredibility of evil’, they are asked to imagine unimaginable horrors in an incredibly mundane and far removed bureaucratic context.\textsuperscript{766}

To avoid relying on stereotypes, decision-makers need to understand that the notion of ‘Western sexuality’ is not an accurate descriptor of the lived sexualities of Western citizens, ‘but rather as the ideal model of Western sexuality’ understood to be the ‘construction of an acceptable, normal, healthy sexuality against which the sexualities of both citizens and non-citizens are judged.’\textsuperscript{767} This understanding often proves to be a true struggle for many decision-makers who have often not had training, who perhaps have been provided with insufficient or no guidelines, and who certainly have not had a lot of experience in researching and understanding variable expressions of sexuality and gender in different cultural contexts.

Gender blindness also affects the success of queer claims. Victoria Neilson argues that the entire paradigm of seeking asylum has a gendered base, where historically, ‘definitions of persecution in asylum law have been based on a male model of political activity’.\textsuperscript{768} Neilson suggests that the ‘paradigmatic asylum case’ is one where a male, who has been signalled out for his political dissonance practised in ‘public’, suffers harm in public either via the military or the police. This paradigm is translated into the ‘prototypical gay male asylum

\textsuperscript{765} Ibid, 514.
\textsuperscript{767} Gaucher and DeGagne, "Guilty until Proven Prosecuted".
case', whereby a gay male is targeted for ‘engaging in public activities’ and subsequently persecuted by the police.\textsuperscript{769} In the UK, for example, it is common for lesbian asylum claims to be dismissed for ‘insufficiently engaging with the Refugee Convention’.\textsuperscript{770} Despite the significant body of sexual orientation-based cases, the claims that are the most likely to succeed are the ones in which the ‘ideal lesbian refugee’ can demonstrate both prior instances of harm suffered in the public sphere and that ‘she is vulnerable to sexuality persecution in the receiving state because she performs her sexuality publicly’.\textsuperscript{771} Asylum officials continue to assume that lesbians face less risk of persecution compared to gay men, because there are fewer incidences of them being attacked or harmed for public activities. \textsuperscript{772}

The failure to properly consider the intersection of gender and sexuality often stems from a lack of country of origin information relating to lesbians when compared to that available for gay men.\textsuperscript{773} Historically, reports on LGBTI persecution have tended to exclude rigorous examination of the persecution suffered by lesbians. For example, country guidance relating to Jamaican lesbians was only provided by the British immigration department in 2010, six years after similar guidance was provided for Jamaican gay men.\textsuperscript{774} As well as frequently dismissing or disregarding the intersection of gender and sexuality in lesbian narrative of persecution,\textsuperscript{775} UK courts continue to ‘equate the lack of documented evidence of human rights abuses against lesbians in country-of-origin reports with an absence of human rights abuses’.\textsuperscript{776}

\textsuperscript{769} Ibid, 427.
\textsuperscript{770} Lewis, “‘Gay? Prove It’”, 964.
\textsuperscript{771} Sarah Keenan, “Safe Spaces for Dykes in Danger? Refugee Law’s Production of the Vulnerable Lesbian Subject”, in \textit{Regulating the International Movement of Women: From Protection to Control} (Routledge, 2011), 37; Neilson, “Homosexual or Female?”.
\textsuperscript{776} Lewis, “‘Gay? Prove It’".
These domestic ideational influences brought forward by decision-makers have important consequences in the implementation and development of norms in sexual orientation-based claims, and more broadly for the protections and freedoms of queer people. At the most basic level, advocates and applicants work within these pre-existing heteronormative structures, be they cultural or legal, and push for incremental change to established laws and norms. This entails bargaining and the strategic employment of certain legal avenues or understandings of queerness. As such, gains in this area need to be considered as imperfect representations of queerness or the priorities or goals of queer people and their advocates.

While decisions such as *S395 and S396* and *HJ and HT* demonstrate a positive shift in sexual orientation-based refugee law, by no means have such decisions resolved the plethora of issues faced by sexual minority claimants. As Rachel Lewis argues, ‘decision-makers still have no idea what claimants need to do to prove their sexual orientation’ and that, through highly bureaucratic process of seeking asylum, ‘proving sexuality in order to establish credibility … becomes, quite literally, an impossible task’. In the case of sexual orientation-based claims, decisions continue to be influenced by stereotypes, biases, or ignorance relating to gender, sexual orientation, sex and so on, particularly when narrated from a different cultural context and mediated by experiences of trauma and violence. Where an applicant’s credibility relating to their belonging to a ‘particular social group’ is in question, such as “homosexual males in Mexico” or “lesbian women in Uganda”, there is a need to recognise and reconcile the way in which the ‘queer body is discursively mediated within the legal system’ where they are neither fixed, immutable, nor universal.778

Exploring the difficulties experienced by women claiming asylum on sexual orientation-based grounds reveals just how ingrained and sustained some stereotypes about sexuality are. The difficulty that decision-makers have in assessing both gendered and fluid elements of a queer person’s claim

777 Ibid.
demonstrates the attachment to core and limiting norms relating to identity upon which decisions are based. Consistently, decision-makers, policy-makers, and advocates struggle to incorporate the ‘unfixidness’ of sexuality for many into their approaches to LGBTI refugee law advocacy. In this way, heteronormative expectations continue to influence sexual orientation-based claims and those claims that defy the stereotypical claims made on sexual orientation grounds. Heteronormative expectations disproportionately affect women, who are often expected to meet stereotypes based on male-centric caricatures of ‘gayness’. For example, in the UK one Muslim woman was considered not-credibly queer because of her ‘lack of knowledge of the “gay scene” in Manchester’. This was despite the fact that going out to clubs and bars was neither desirable or appropriate for her. Such expectations are especially crucial given the shift in emphasis to assessing the credibility of applicants’ membership of a particular social group, particularly in the UK and Australia.

The expectation that applicants will seek out LGBTI groups or social affiliations, especially at nightclubs and bars, is often relied upon by decision-makers to determine whether an applicant’s account is plausible. According to Sarah Keenen, such stereotyped expectations constitute a ‘grid of understanding’ used by decision-makers who assume that asylum applicants who are queer have both ‘the capital and the desire to spend time and money on commercial recreation activities’. These ontologies of sexual identity are informed by ‘the racialized, classed, and gendered stereotypes of male homosexual identity typically invoked by asylum adjudicators’. Meanwhile, women are much less likely to engage with public LGBTI activities, especially in countries that

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780 Ibid.
781 Berg and Millbank, “Constructing the Personal Narrative”.
784 Ibid.
persecute sexual and gender minorities. In relation to the expectation that applicants participate in social and commercial gatherings for LGBTI people and communities, Keenen is right to note that ‘it is particularly inappropriate for women as, even in regard to the local pink dollar market, it is men rather than women who tend to form the majority of the clientele’. 785

Women are often faced with the ‘culturally insensitive imaginations of adjudicators’, where applicants’ experiences of love, sex, and harm are often misread and/or disregarded. 786 For example, in one Australian claim made by a Mongolian woman on sexual orientation grounds, the adjudicator refused to recognise the validity of the applicant’s relationship with her girlfriend saying:

I accept that the applicant has a girlfriend and that she has had a close relationship with this friend since [year]. I have doubts as to whether their relationship is a relationship as the evidence as to how they first met and their lack of involvement in the lesbian community is of concern. Further the applicant gave little details of the nature of the relationship and I felt she was being evasive as to the real basis of their friendship. 787

The adjudicator continued that,

[Despite claiming she was a lesbian that [sic] she had no other contacts with lesbian groups or other lesbians after her initial contact with her partner in [year]. 788

Although the applicant was eventually granted asylum, this case demonstrates the damage done to the applicant’s credibility by her lack of engagement with the ‘purported public “lesbian community”’. 789

785 Ibid.
786 Raj, “A/Effective Adjudications”, 456-7
787 Cited Ibid.
788 Cited Ibid.
Expectations of participation in public communities often provide a lose-lose situation for female applicants. In one 2011 UK decision, for example, the judge dismissed the claim that a Ugandan lesbian attended LGBTI clubs with her friends, saying:

She has not been working and any money she has received has come from friends where she stayed. In those circumstances I do not accept that she would be able to fund a lifestyle of going to gay clubs, the clubs did not have free entry and the Appellant would not be able to take her turn at buying drinks.\(^{790}\)

Thus, it seems that while in some cases lesbian applicants are discredited for their lack of participation in the LGBTI community, a claim that they are engaged with the community can similarly be used against them.

**DSSH Model: The best attempt to implement**

There are difficulties in assessing whether procedural protection norms have been successfully implemented in sexual orientation-based claims in Australia and the UK. Other than decisions that are made public by tribunals, however, guidelines and training provided by government departments and tribunals can provide another set of data for better understanding decision-making practices. Many have heralded the introduction, updating, and provision of LGBTI specific training and guidelines for decision-makers as a welcome improvement. Experts, including the UNCHR, consider training to be essential in ensuring that the procedural protections in sexual orientation-based claims are implemented properly, and that the rights and dignity of applicants are protected.

In the 2008 UNCHR Guidance Note on sexual orientation and gender identity-based claims, the UNCHR states that the growing number of claims ‘has necessitated greater awareness among decision-makers of the specific

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experiences of LGBT asylum-seekers and a deeper examination of the legal questions involved’. 791 Accordingly, where decision-makers lack cultural competency, there may be a direct ‘psychological impact’ on the claimant arising from the trauma of the credibility assessment process and, more fundamentally, if they are erroneously returned to a country where they face persecution. 792 Raj, for example, has written about the important role that understanding ‘emotion’ and its relationship to persecution plays in queer asylum claims in Australia. 793 He argues that ‘emotion poses significant challenges to legal representation’ where ‘culturally different experiences of sexuality and gender diversity must be translated across different emotional, as well as linguistic, positions (between the adjudicator and the applicant)’. 794 As seen above, there is a pervasive tendency by decision-makers to devalue and discredit romantic emotions between women where they more readily accept it in the claims of men.

Drawing on Bourdieu, Luker argues that an asylum hearing is necessarily a ‘cross-cultural communicative exchange’ that requires the decision maker to listen to the lived experience of someone whose ‘cultural habitus is vastly different to her own and whose mode of delivery and demeanour are likely to be unfamiliar’. 795 In the case of queer claims, challenges are compounded, Raj argues, because

[in] order for adjudicators to better engage with queer refugees, they must be willing to interrogate their own emotional and conceptual attachments to narrow ideas of sex, sexuality, gender identity and persecution. This largely involves eschewing stereotypes in favour of attending to the emotional dynamics of queer experiences in

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791 United Nations High Commissioner for Refugees, “UNHCR Guidance Note”.
792 LaViolette, “Sexual Orientation, Gender Identity”. 12.
adjudication.  

Indeed, according to scholars such as LaViolette and Ghassan Kassisieh, cultural competency training for decision-makers is essential in order to address stereotypical and explicit questioning and to ‘assist decision-makers in understanding the impact of actual or perceived homophobia and heterosexism in the refugee status process’.  

This section analyses the DSSH Model, the preeminent credibility assessment guide, and questions whether it achieves the goal of better protecting queer applicants. In order to demonstrate this assessment, the experience of women vis-à-vis the DSSH model will be examined in order to reveal the ways in which the model inadvertently entrenches certain stereotypes about sexuality that marginalise those who do not conform to these stereotypes. As outlined prior, the DSSH model (Difference, Stigma, Shame, Harm) was developed by Chelvan in relation to sexuality-based asylum claims in the UK. The model has been endorsed by the UNHCR, who state that:

Ascertaining the applicant’s LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualised and sensitive way. Exploring elements around the applicant’s personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant’s sexual orientation or gender identity, rather than a focus on sexual practices.

In December 2015 the UNCHR released a large volume of training resources on working with LGBTI refugees, intended for both UNHCR staff and the

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broader humanitarian community. The modules, developed in collaboration with the International Organization for Migration, address a wide variety of issues, including refugee status determinations, resettlement, communication, international law, and terminology. In particular, the intended outcomes of the training include identifying sensitive and appropriate ways to interview applicants, addressing problematic stereotypes and assumptions that may negatively impact upon the process, and ensuring that staff and decision-makers are assessing and assisting LGBTI claims in accordance with international guidelines and standards.

The model is part of a broader push by advocates and scholars to assess the credibility of applicants on identity grounds rather than sexual practices. Primarily, the model was produced in the context of UK refugee jurisprudence. It was prompted, in part, by the findings of Lord Rodger in *HJ and HT*, as discussed earlier in relation to discretion reasoning. In that case, as noted, Lord Rodger found there to be a distinction between ‘those who are “openly gay” and those who choose to remain “discreet” about their sexual orientation’.

Wessels argues that this ‘new test’ fails on three grounds: first, it distinguishes between visible and concealed sexuality; second, the test assumes there is a relevant underlying choice made between visibility and concealment; and third, that the test is predicated on a subjective assessment of fear of persecution that unfairly restricts the application of the Convention to sexual orientation-based claims.

In particular, Wessels argues that the ‘new test’ in fact revives the previously dismissed issue of concealment by reviving the ‘artificial distinction’ between

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800 Ibid.
802 S Chelvan, “Put Your Hands Up (If You Feel Love) – A Critical Analysis of *HJ (Iran) and HT (Cameroon)* [2010], *Journal of Immigration, Asylum, Nationality Law* 25 (2011): 56-66; Raj, “Protecting the Persecuted”; UK Lesbian and Gay Immigration Group, *Failing the Grade.*
803 *HJ (Iran) and HT (Cameroon)* [2010]; Chelvan, “Put Your Hands Up”.
804 Wessels, “*HJ (Iran) and HT (Cameroon)*”, 817.
identity and acts, arguing that ‘persecution is clearly not restricted to gay people “who live openly”’.\textsuperscript{805} Such reasoning is likely to result in lesbian, gay and bisexual asylum seekers needing to visibly perform their identity as a form of proof in a way that other asylum seekers do not. For lesbian asylum seekers, in particular, the often private nature of their persecution renders them far less likely than gay men to be able to satisfy this test.\textsuperscript{806} The result of decisions such as \textit{HJ} and \textit{HT} is that applicants feel compelled to prove that they are living ‘openly’ in the arrival country so as to convince the decision maker that if they were returned to their country of origin they would almost certainly face persecution.\textsuperscript{807} The DSSH model is a response to these pressures, which have led some asylum seekers to pursue desperate measures in order to prove they are gay.\textsuperscript{808} For example, in a number of documented cases in the UK, applicants seeking asylum on the basis of their sexual orientation, provided photographic or video evidence of same-sex sexual activity in an attempt to prove their sexual orientation.\textsuperscript{809} Lewis argues that such ‘performance of group membership’ through ‘pornographic documentation’ has the effect of ‘heightening the burden of proof and exacerbating the credibility issues for future’ sexual orientation-based claims.\textsuperscript{810}

The DSSH model seeks to provide a means of assessing credibility such that the ‘issue is not that the applicant is gay, but that they do not conform to a specific heterosexual stereotype held by the potential prosecutor, i.e. [that] they are not “straight” enough’.\textsuperscript{811} At its core, the DSSH model is premised on the claim that ‘Difference, Stigma, and Shame are common themes in the narrative

\begin{footnotes}
\item[805] Ibid, 827.
\item[807] Lewis, “Gay? Prove It”, 961.
\item[809] Bennett, ‘Lesbians and United Kingdom Asylum Law”; UK Lesbian &Gay Immigration Group, \textit{Missing the Mark}.
\item[810] Lewis, “Gay? Prove It”, 962.
\item[811] Chelvan, “Assessment of Credibility of Women”,
\end{footnotes}
of the majority of LGBTI individuals globally’. Similarly, Berg and Millbank argue that ‘perhaps the one universal in the experience of lesbians and gay men around the world other than the actual experience of homosexual sex… [is] the hegemonic nature of heterosexuality which forces one to develop a sense of lesbian or gay identity in opposition to this norm’.

The DSSH model proposes that the first question asked of asylum seekers with sexual orientation-based claims should be, ‘when did you know you were different?’ This should be followed by requests to ‘explain how this led to feelings of stigma, shame and the harm (persecution), central to the asylum claim’. The model is thus intended to operate as a set of conversational ‘triggers’ to ‘enable a detailed narrative to be provided by the asylum seeker on the experiences surrounding their claims within a detailed statement and/or interview’. The DSSH model answers ‘the plea for narrative’ that, particularly in recent years, has seen a wealth of scholarship calling for the ‘need to reconceptualise notions of credibility within the political asylum process’. Scholars such as Carol Bohmen and Amy Shuman argue that the ‘current methods of evaluating credibility based on the traditional “tools” of evidence do not serve the goal of correctly identifying genuine asylum seekers’. Instead of focussing on ‘discovering truth,’ decision-makers need to recognise that they have the task of assessing credibility ‘in the face of empirical uncertainty’.

Advocates of the ‘narrative of difference’ approach argue that it offers a way to explore sexual minority identity across cultures based on the premise that

812 Ibid, par. 16.
813 Berg and Millbank, “Constructing the Personal Narratives”, 206.
814 Chelvan, “Assessment of Credibility of Women”,
815 Ibid.
feelings of difference for queer people in a heterosexist world are universal’. Such methods provide the tools for the much needed shift away from relying on sexually explicit details of an applicant’s sexual conduct. The following example, provided by Chelvan, illustrates how the model can illuminate applicants’ experiences of Difference, Stigma, Shame, and Harm, thus fulfilling credibility requirements:

Following recognition of difference, which can be expressed in non-hetero-normative conduct in childhood, for example a young boy playing games with the girls rather than the boys, a detailed narrative develops. When the recognition of difference occurs, then there is stigma, attached to difference. Stigma results from the fact that the family, the neighbours, your community will not accept you because of your difference. Shame is the internalised impact of stigma.

Elizabeth Connelly notes that the DSSH model follows the rationale of ‘the narrative of difference’ in suggesting ‘that questions about difference will trigger a memory prior to sexual attraction, which can then be linked to feelings of stigma and shame’. The model is intended to allow asylum seekers to discuss, in a non-linear manner, their own recognition of difference and the way that it ‘shaped their sense of self in response to adversity’. In this context, Bohmer and Shuman argue that decision-makers should consider the ‘most reliable indicator of an applicant’s credibility in the political asylum process… [to be] their ability to sustain an extensive account of what happened’.

The ‘narrative of difference’ method has been heralded by many as a significant

820 Raj, “Protecting the Persecuted”.
822 Connelly, “Queer, Beyond a Reasonable Doubt”, 10.
823 Ibid, 23.
824 Shuman and Bohmer, “Gender and Cultural Silences”, 171.
improvement to credibility assessments. Not everyone agrees, however, and scholars such as Wessels have cautioned that there is still no single way of recognising and acting upon sexual or gender identity.\(^{825}\) Because of this, models such as the DSSH do not necessarily make the task of adjudicating claims any easier.\(^{826}\) In fact, such models could just as easily lead to ‘hegemonic understandings of what constitutes an authentic “narrative of difference”’.\(^{827}\) Luibhéid asserts that the asylum system itself operates as a major ‘apparatus of power’ in producing, demanding, and enforcing identities in ‘ways that are deemed legible to adjudicating states, (trans)national publics, and supranational bodies’.\(^{828}\) As such, not only do adjudicators need to have comprehensive understandings of sexual and gender identities, they also need to recognise and consider the ways in which the asylum system functions as a ‘major site of creating identities and enforcing their legitimacy’.\(^{829}\) The process of asylum adjudication is an example of the way sexual and gender norms are produced and shared, and how queer people are expected to fit into the process despite there being no universal understandings of sexuality and gender.\(^{830}\)

Models such as the DSSH, which is intended to be merely a guide for practitioners, risk becoming ‘calcified in an interrogation style which assumes that there is a typical evolution of self-identity’.\(^{831}\) This, argue Berg and Millbank, is because ‘what is being looked for is heavily influenced by Western conceptions of the linear formation and ultimate fixity of sexual identity’.\(^{832}\) In order to avoid relying on stereotypes, decision-makers need to see the notion of ‘Western sexuality’ not as an accurate descriptor of the lived sexualities of Western citizens, ‘but rather as the ideal model of Western sexuality’, and to understand it as the ‘construction of an acceptable, normal, healthy sexuality

\(^{825}\) Wessels, “Sexual Orientation in Refugee Status Determination”.
\(^{826}\) Connely, “Queer, Beyond a reasonable Doubt”, 10
\(^{828}\) Luibhéid, “Heteronormativity and Immigration Scholarship”, 1037.
\(^{829}\) Ibid.
\(^{830}\) Ibid.
\(^{831}\) Berg and Millbank, “Constructing the Personal Narratives”, 206.
\(^{832}\) Ibid, 197.
against which the sexualities of both citizens and non-citizens are judged’. The ‘model of Western sexuality’ is characterised by the innate and sometimes pathological conception of sexuality that ‘manifests as a coherent identity’ and is only considered genuine if such ‘desires are acted upon and/or if the individuals is (sic) “out” to their family, friends, and community’.

Thus, the DSSH model runs the risk of reinforcing the Cass ‘staged’ model of sexual identity development that was popularised in the 1980s. The Cass model described the conventional ‘coming out’ narrative as beginning with identity development, recognition of difference, experiencing stigma and shame, followed by tolerance, acceptance, pride, and synthesis. This understanding of sexual identity, argue Berg and Millbank, reinforces the deeply embedded linear concept of ‘self-knowledge moving from denial or confusion to “coming out” as a self-actualised lesbian or gay man’. Such models encourage the understanding of queer experiences as having an ‘end point’, where past experiences need to be reinterpreted as evidence of an applicant always having been queer. So, rather than advancing an understanding of the diverse and complex experiences of gender and sexuality, and allowing for the lived experiences of asylum seekers to be received as legitimate, the ‘narrative of difference’ model may actually encourage and reinforce a ‘tick-box’ approach to sexual identity formation.

Issues arising from this ‘tick-box’ phenomena with regard to the DSSH model are evident, at the most basic level, when examining how the model maps onto or assists applications from women. In an area of law dominated by the claims and experiences of sexual minority men, it is necessary to analyse how such models operate with regard to the underrepresented claims of sexual minority women as well as bisexuals and other queer people. While the development of

833 Gaucher and DeGagne, “Guilty until Proven Prosecuted”.
834 Ibid.
835 Berg and Millbank, “Constructing the Personal Narratives”.
837 Berg and Millbank, “Constructing the Personal Narratives”, 206.
839 Berg and Millbank, “Constructing the Personal Narratives”.
the DSSH model, with its emphasis on narrative and difference, is an improvement for LGBTI refugee status determination, without explicit consideration of gendered differences the model risks imposing Western gay male narratives on other sexual minorities. For the model to be effective, there needs to be a concerted effort to account for the diversity of identity and lived experiences within the category of LGBTI asylum seekers, and not just in reference to stereotypical ‘mainstream’ heterosexual identity.

Many scholars have argued that adjudicators take for granted that the stereotypical ‘Western, white, middle-class gay men’s experience of sexual identity formation is a universifiable one’. This view is compounded by the fact that refugee law on sexual orientation, while being applied to both women and men, is overwhelmingly based on cases involving men. While the DSSH model aims to be gender-neutral, and may appear on its face to be so, what is left out of the DSSH Guidelines perpetuates gendered and heteronormative assumptions that create ‘further silences and inconsistencies in the asylum process’. The intersection of gender and sexual orientation in asylum claims cannot be ignored. Arbel, Dauvergne, and Millbank argue that, ‘in scholarship, policy, and decision-making, gender and sexuality appear to be rarely understood as intimately related or mutually constituted’. Meanwhile, the UNHCR has explicitly stated that the persecution suffered by lesbians, gay men, bisexuals, and transgender persons all stem from ‘non-conformity to rigidly defined gender roles’. Despite this, while sexuality is now commonly referenced in gender guidelines, there is rarely an ‘unpacking’ of sexual identity to explain the way in which women and men’s experiences of sexuality and persecution are vastly different.


\[843\] Arbel, Dauvergne, Millbank eds., “Introduction”, 5.

\[844\] UNHCR, “Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol
Asylum claims by lesbian and bisexual women are negatively affected by the lack of conscious consideration of both gender and sexuality in their persecution, when compared to the claims of men. Millbank has discussed, for instance, the tendency for the elements of sexual orientation and gender to be elided when the claim has only been adjudicated through the ‘lens’ of gender or sexual orientation. 845 For example, according to Arbel, Dauvergne, and Millbank, while the claims of lesbians in Canada are ‘frequently addressed as if they are only about gender’, in other countries, such as Australia, lesbian claims are ‘almost never seen as “gender claims”’. 846 This has resulted in an asylum process where gender and sexual orientation are typically dealt with in isolation, instead of being considered as intersecting elements of lesbian experience, or fear, of persecution. 847 This phenomena is arguably influenced by the fact that, according to publicly available sexual orientation-based claims appealed beyond the tribunal level in Australia and the UK, the majority of applications were brought forward by men. For example, as of 2018 only three of the 12 British claims and only eight of the 66 Australian claims were made by women. 848 It is therefore not surprising that the constructions of identity and sexuality embedded in this area of law are based on male stereotypes.

When looking at one of the elements of the DSSH Model, for example, it can be observed that the chronology of the identity development that underpins the model seems to favour the experiences of men. According to the DSSH Model, ‘difference’ may be experienced first through the ‘recognition that [they are] not

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846 Ibid, 7.
847 Ibid.
like other “boys/girls” with respect to personal sex gender role development’. Further, it is explained that recognition may result from expressing non-heteronormative conduct at a young age, such as a boy playing games with girls, which then leads to stigma. The suggested questions are designed to trigger memories before sexual attraction commenced, which can be connected to later feelings of stigma and shame. In 2015, this point was rewritten as, ‘[r]ecognition that the applicant is not like other girls/boys in childhood or adolescence (or like other women/men later on) with respect to gender roles’. This recognition that sexual identity development cannot always be traced to childhood is a significant improvement.

However, it is still useful to discuss how the original approach was problematic for lesbian and bisexual women’s asylum claims as it is a pervasive approach to understanding sexual identity that many decision-makers still employ. The normative elements of gender atypicality, of feeling different from other children of the same gender, a lack of sexual interest in members of the opposite sex, and resulting same-sex sexual experimentation, are often not applicable to women. Research suggests that there are ‘substantial differences in the timing, spacing, and sequence’ of sexual identity developments between women and men. It has been shown that some same-sex attracted women have no recollections from childhood or adolescence of same-sex attraction, that for many same-sex attracted women this attraction was triggered in adulthood, and that for many women, sexual identity shifted through the formation of an intense emotional bond to a single woman.

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849 Chelvan, “Assessment of Credibility of Women”.
850 Ibid.
Focusing on differences in childhood experiences can mean that women with ‘late-appearing same-sex attractions’ are often characterised as being ‘less essentially or exclusively attracted to the same sex than those with early appearing same sex attractions’.855 A 2004 US study, which surveyed 450 women who identified as lesbians, found evidence of later ‘appearance’ of sexual identity. The results showed that the average age when women first ‘wondered about being lesbian’ was 16, while the average age at which they reported having had their first ‘same-sex relationship’ was 25.7.856 These results lend weight to the experiences of lesbian asylum seekers, and support the argument that there are distinct differences between the development of sexual identity in gay men and in lesbians. It is therefore problematic to emphasise childhood differences when assessing women’s claims for asylum based on sexual orientation. It should be noted, however, that these results do not indicate an essential difference between men and women. Rather, they provide evidence that sexual minority women break dominant stereotypes of gay sexual identity development, which in themselves are stereotypes that do not necessarily represent the experiences of gay men in the West (or elsewhere).

While studies have shown that both heterosexual and same-sex experiences of attraction typically begin around the age of ten,857 Diamond and Savin-Williams found that these feelings are rarely interpreted by women to mean that they are lesbian.858 In fact, some of the women interviewed in their study described periods of ten to 20 years between their ‘first recollected experience and their first recollected awareness of same-sex attractions’.859 And yet, in their research in Western countries, Berg and Millbank found ‘numerous instances’ of adjudicators making their findings based on over-generalisations, including ‘that it is “typical” for lesbians and gay men to become aware of their

855 Diamond and Savin-Williams, ‘Explaining Diversity’.
858 Diamond and Savin-Williams, “Explaining Diversity”, 304.
859 Ibid.
sexual orientation in adolescence’. This understanding maps onto the Western ‘coming out’ trope, where all lesbian, gay, and bisexual people are expected to be able to provide a narrative that began when their ‘nature made itself known to them despite a hostile environment’ The premise is that once an individual has recognised their same-sex attraction, they will retroactively come to identify a fixed ‘queerness’ that was always present.

The 2015 DSSH revisions now address the possibility that ‘[e]xperiencing difference can happen at any age’, and acknowledge that:

In societies where women are expected to not have sexual desires and/or where women are in a strongly inferior power position as compared to men, lesbians may often understand their difference later than gay men. Therefore, while focusing on difference in childhood and adolescence can be helpful in the majority of cases, it must not be treated as an obligatory element of credibility assessment.

It is certainly helpful that the different influences on sexual identity development in men and women in oppressive societies are now mentioned, however the model still fails to consider the differences in how sexuality is developed and expressed by men and women. For example, the tendency for some lesbians not to recall childhood memories or feelings that they can connect with their later same-sex attraction is not considered. Such an omission makes it more likely that decision-makers will continue to apply male-based stereotypes of sexual identity development to lesbians’ claims for asylum, leading to an increased likelihood that they will fail the credibility test.

Queering our understanding of identity

860 Berg and Millbank, “Constructing the Personal Narratives”, 208.
862 Ibid.
The existence of credibility assessment guidelines and training should not be taken for granted as measures of norm implementation success. Rather, they too need to be interrogated from a queer perspective; first, because the majority of queer cases that fail in the post-discretion era in Australia and the UK are on grounds of credibility, \(^{864}\) and second because they are the outcome of advocacy from scholars and lawyers seeking to improve the process for queer asylum seekers and thereby protect their fundamental rights. Problematically, this has resulted in a normative catch-22 where attempts to educate and guide lawyers and decision-makers (on what ‘being LGBTI’ looks like, and what the persecution of ‘LGBTI people’ looks like), has led to new hegemonic and universalist normativities. Furthermore, when theorising about norm implementation, constructivists need to queer their understanding and use of identity in relation to human rights norms. Questions still needs to be asked about how attempts to understand norms, especially human rights norms, perpetuate mythic constructions of identity that maintain the exclusion and marginalisation of queer people and prevent them from accessing their rights.

The development of guidelines or policies that seek to support or implement a norm may actually be counterproductive. Particularly in areas such as refugee status determination processes, which are legalistic or prone to simplification or rigidity, an excess of guidance may be misused by decision-makers to create barriers for refugees accessing the rights designed for them. In order to understand domestic influences on norms the influence that individual decision-makers have in adjudicating the law plays a significant role for individual applicants, particularly where revisions are scarce or difficult. Focusing solely on measures of implementation at the policy and legal institutional level misses a key ‘human element’ to adjudicating the law, something often overlooked in legal research and certainly overlooked in international relations research. Ultimately, policy does not always translate into practice, and analysis that cease at the policy level miss the impact that these normative developments might actually have on individual applicants.

\(^{864}\) Millbank, “From Discretion to Disbelief”.

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It is not enough to simply have guidelines. When comparing Canada (a jurisdiction that dismissed discretion reasoning very early on) with Australia and the UK, one clear difference has been the availability of training for refugee tribunal decision-makers from very early on. While Australia was also receiving applications based on sexual orientation from the early 1990s, Canada leapt ahead in terms of providing training and producing guidelines. Periodically, in 1995, 1999, 2003, 2004, and 2010, legal academic and expert Nicole LaViolette developed and provided cultural competency and professional development training on issues of sexual orientation and gender identity for the IRB.865 As previously noted, however, up until 2016, publicly available information indicates that there had only been a single training session on sexual orientation and gender identity in Australia (in 2008), provided by legal academic Jenni Millbank for the RRT.866 The UK, while slower than Australia to both recognise claims based on sexual orientation and to dismiss discretion reasoning, has since rolled out training and guidance on sexual orientation. In 2010 and 2011 the UK Border Agency (UKBA) began providing training to all its case workers through contracting the UKLGIG.867

However, even in the UK where training and guidelines have been implemented, there is some scepticism about the impact that training and guidelines have had given the pre-existing culture of the Home Office and decision-makers. While there has been evidence of less sexually explicit questioning following the Vine Review, there continues to be lacklustre understanding and implementation of the guidelines. Just as some have criticised the DSSH model for becoming calcified into a ‘tick-box’ model, one UK detention charity case worker expressed concern that ‘Home Office policy is so rigid that whatever you tell them they will put in some sort of structure that you can’t be outside of’.868

865 LaViolette, “UNHCR Guidance Note”.
866 Ibid.
867 LaViolette, “Overcoming Problems”.
868 UK Detention Charity Worker, Interview with Jaz Dawson (August 10th, 2016, London).
It is perhaps inevitable that that credibility guidelines such as the DSSH will face criticism given that they are models designed to improve and work within a system that already seeks to create and assess certain subjects and identities. This concern is reminiscent of the major criticism of queer cases that came from Hathaway and Pobjoy in 2011, who argued that queer cases expanded and diluted the core conception of what it is to be a refugee.\footnote{Hathaway and Pobjoy, “Queer Cases Make Bad Law”.} Their fear was that if actions that are not essentially tied to an applicant’s identity were to be the basis of protection, the boundaries of the refugee definition would be diluted to something meaningless and unworkable. While this has proven to be a largely unfounded fear, these anxieties around identity and the integrity of refugee law are fundamental to issues relating to credibility assessment processes. Raj describes the role of ‘anxiety’ around dismissing ‘bogus’ claims and ensuring the true identity of an applicant, and therefore, the right to asylum.\footnote{Raj, “A/Effective Adjudication”, 463.} This process is bound, as Raj describes, by the ‘normative ideas of “truth” (whether an asylum claim fits within the legal framework) and “true” (the veracity of asylum experiences)’.\footnote{Ibid.} According to Didier Fassin, where granting someone asylum used to be conceptualised largely as an act of ‘humanitarian compassion’, in the 21\textsuperscript{st} century it is now one of ‘anxious control’.\footnote{Ibid; Didier Fassin, “The Precarious Truth of Asylum,” \textit{Public Culture} 25, no. 1 (2013): 39-63.}

How these attempts to locate ‘truth’ and ‘true’ refugees operate in sexual orientation-based approaches has changed over time. Models such as the DSSH, as we have seen, have sought to encourage a shift from sexually explicit behaviour-based assessments to those based on identity. In particular, this has resulted in a narrative based approach that seeks to locate identity development over the course of a person’s life. These narratives are pinned primarily to the concept of ‘difference’.

The guidelines have been developed in response to the complexity and rigidity of refugee status determination processes and issues facing queer
applicants.\textsuperscript{873} The structure of the DSSH guidelines can be mapped onto Berenskoetter’s outline of anxiety controlling mechanisms, which are designed to produce a false sense of permanence and predictability relating to identities that allows for people (whether the subject or the analyst), to gain a sense of certainty about how that person has, will, or should act.\textsuperscript{874} The DSSH’s desire to trace differentiated identity development attempts to quantify and locate routine practices and to develop narratives, just as Berenskoetter’s ‘anxiety controlling mechanisms’ describe. In particular, through developing a ‘narrative of difference’ approach to identities, the DSSH model reflects Berenskoetter’s argument that through creating ‘both individual and collective’ narrative we can ‘lend human existence a sense of temporal continuity and purpose’.\textsuperscript{875} Further, it is imagined that this sense of individual and collective identity will be gradual and developmental, comprehensible and predictable, established through a conception, articulation and expression of difference that is universally shared.

In discussing the development of the guidelines, their author has argued explicitly that ‘there has been a growing push to understand sexual orientation as identity-based, bringing sexual minorities out of the bedroom and into the public’.\textsuperscript{876} This is why the DSSH model supports the implementation of procedural norms that emphasise refraining from sexually explicit questioning, using stereotypes, considering medical testing, or reviewing sexually explicit documentation as evidence. While this has largely been accepted as a positive step, it is also evidence of a sanitised construction of sexual orientation that perpetuates the idea that the type of queerness that can be accepted in refugee status determinations is a universalist, innate, and palatable conceptualisation of sexual orientation. Overwhelmingly, this sexual orientation is explicitly or implicitly expected to fit into an identity narrative. For example, while the aim to restrict sexually explicit documentation was to protect an applicant’s dignity and privacy, this notion of ‘dignity’ implies that sexually explicit documentation or

\textsuperscript{873} Berenskoetter, “Time, Anxiety, and Agency”.
\textsuperscript{874} Ibid.
\textsuperscript{875} Berenskoetter, “Identity in International Relations”, 3600.
\textsuperscript{876} Chelvan, “Put Your Hands Up (If You Feel Love)”.
acts are always an undignified part of someone’s queerness, not suitable for public consumption.

Often, because of the way ‘particular social group’ is defined in most jurisdictions, sexuality is reduced by decision-makers and advocates to an innate or immutable characteristic. This in turn raises two core problems: first, the assumption of such a characteristic is generally based on a binary construction of gender and sexuality; and second, it is typically considered to be a fixed and finite state of being that cannot shift or change over time or in different (cultural, social, linguistic) contexts. As Matthew Waites argues, within the concept of sexual orientation, the individual is generally understood to be ‘oriented’ towards one particular gender, ‘man or woman’. This ‘homo-hetero binary’ creates great difficulties for those who are ‘oriented’ to more than one gender at the same time. As Waites argues, this has ‘exclusionary effects for a huge range of people worldwide who do not relate sexually to only a single gender,’ such as bisexual, pansexual and polysexual persons, or people who are themselves or who are attracted to others who identify as non-binary.

These conceptions of gender and sexual attraction are normative and restrictive, as Raj describes they are

a set of culturally and historically situated expressions that give shape to individual psyches and subjectivities. These dichotomous sexed/gendered identities are also tethered to binary notions of (homo/hetero) sexual orientation and erotic desire – and assumption that excludes intersex bodies that do not conform to these binary expectations.

878 Ibid.
Raj, among others, uses ‘queer’ as ‘a critical term that refers to practices, pleasures, emotions and identities that “disorient” decision-makers by failing to conform to their normative ideas of sexuality, nationhood and family.’ 880 Often, the binary is not just which binary gender the applicant is attracted to, but also the binary of ‘gay’ or ‘straight’. The consequence of analysing the exclusionary normativities that are perpetuated through LGBTI-specific credibility models, and potentially the dominant approach to particular social group status in which sexuality, gender, and sex are typically portrayed as binary and immutable, is to critical engage the role that advocates, lawyers, and scholars play in this process. As Spijkerboer argues,

... the structure of the legal procedure implicates the lawyer in the legal structure. Like the characters in Querelle, s/he becomes entangled in a structure that s/he re-creates at the same time. It is only by defying the unspoken presumptions of the legal process, while at the same time taking part in it, that a lawyer could escape being a legitimizing part of a structure that as such leads to a negative decision for her/his client. 881

In particular, Spijkerboer argued that the presumption that ‘straights and non-straights are two clearly distinct groups of people’ has played ‘an implicit, but all the more central, role in both Dutch case-law and in writings of gay and lesbian refugee advocates’. 882 Some twenty years later, this analysis holds essentially true, except that it extends far beyond Dutch case law to become embedded in UNHCR, and is most explicit in credibility models such as the DSSH. In many ways, despite the best intentions of activists and lawyers such as Chelvan, such is the legalistic and norm dependent nature of the legal system that they cannot help but maintain or develop norms in their attempts

881 Spijkerboer, “Querelle Asks for Asylum,” 216.
882 Ibid, 191.
to better the system. This is the queer ‘activist’s dilemma’.\textsuperscript{883} As Melissa Autumn White argues,

For those of us working from perspectives of queer and trans theory, such an “advocate’s dilemma” resonates with the quotidian challenges of making the lives of gender and sexual minoritarian subjects more liveable within the present moment while still aiming to transform the grid of normative intelligibility that produce and organise the very conditions of gender and sexual vulnerability.\textsuperscript{884}

As in the case of the DSSH model, any attempt to create a universal account of sexuality is fraught with opportunities for the diversity of queer experiences to be elided into monolithic accounts that in turn become homonormative.

What would some ‘queerer’ ways look like then? Perhaps they would involve returning to approaches that have been developed in feminist or gender-based approaches to refugee law. Efrat Arbel, Catherine Dauvergne and Jenni Millbank argue that ‘in scholarship, policy, and decision-making, gender and sexuality appear to be rarely understood as intimately related or mutually constituted’.\textsuperscript{885} Meanwhile, the UNHCR has explicitly stated that the persecution suffered by lesbians, gay men, bisexuals and transgender persons all stem from ‘non-conformity to rigidly defined gender roles’.\textsuperscript{886} Despite this, while sexuality is now commonly referenced in gender guidelines, there is rarely an ‘unpacking’ of sexual identity to explain the way in which women, men, gender diverse and intersex persons’ experiences of identity, sexuality, body and persecution are vastly different.\textsuperscript{887} It is in light of this that I want to suggest the need to be a shifting of emphasis in the narrative of difference approach. Rather than focusing on elucidating through narrative an account of a linear, staged, and ultimately immutable or static identity, an applicant should

\textsuperscript{884} Melissa Autumn White, “Documenting the undocumented: Toward a queer politics of no borders”, \textit{Sexualities} 17, no. 8 (2014): 976-997.
\textsuperscript{885} Arbel, Dauvergne and Millbank, “Introduction”, 5.
\textsuperscript{886} UN Doc HCR/GIP/02/01 7 May 2002; UN Doc HCR/GIP/12/01.
\textsuperscript{887} Arbel, Dauvergne and Millbank, “Introduction”, 5.
be guided to provide a narrative that explains their experience or fear of harm based on their inability, or perceived inability, to adhere to dominant cultural norms or behaviours, including those norms and behaviours that are attributed to lesbian and gay stereotypes.

While subtle, this is a significant shift from attempting to describe or assess a credible identity, as is dominant in the current approach to queer claims. It is better, rather, to understand how an individual person might face persecution for failing to meet prevailing cultural gender-based norms. As Berg and Millbank argue, ‘gender roles and expectations include particular sexual, as well as social, but sexualised, practices – including autonomous female sexuality, homosexual sex and widespread expectations of heterosexual marriage and child rearing’.888 This approach is not without precedent, and in scholarship and jurisprudence on gender-based claims to asylum, such an approach has been accepted. As Deborah Anker has argued, ‘simply adding gender or sex to the enumerated grounds of persecution’ for women would not have solved the issue of their inclusion in asylum claims.889

In her work on queering international relations, Weber develops Barthes’ ‘either/or’ logic into one of ‘and/or’, a binary busting attempt at recognising and theorising the possibility of multiplicities in the state, actor, and individual figures within international relations. And yet, this approach could be extended to include an ‘and/or/not’ logic. There is a tendency in queer approaches to take positivist approaches to identity or experience, without taking into account the gaps in this approach for people who are ‘not’ one thing or the other, and who do not label or seek to define, whether duplicitous or not, their manner of ‘being’. As David Halperin argues, queer

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demarcates not a *positivity* but a *positionality* vis-à-vis the normative... a horizon of possibility whose precise extent and heterogeneous scope cannot in principle be delimited in advance.\textsuperscript{890}

While attempts to incorporate queer people into the human rights system have been gaining success, this has been done so largely through a process of identity assertion and strategic connection between identity and rights. Indeed, with claims based on sexual orientation, as evidenced by the necessity of the DSSH model, decision-makers often hinge their decision first based on the assessment of fact as to whether a person is truly the identity or part of the social group they purport to be. However, it is decidedly un-queer that a person should be *required* to assert an identity as a prerequisite to being afforded fundamental rights, freedoms, and protection. Likewise, in attempts to insert queer people into international relations and human rights law, we must be wary that we are not simply inserting homonormative identities into the pre-existing system, but also developing and molding existing processes to account for, theorise, and in-practice protect those who in the paraphrased words of Eve Kosofsky Sedgwick do not wish to or are unable to signify monolithically.

**Conclusion**

This chapter sought to analyse the role that guidelines and training that specialise in gender and sexuality assessments in asylum claims may have on the implementation of procedural norms. It was argued that the impact of the guidelines and training is important, especially given the radical uncertainty from which decision-makers operate, and the significant influence that individual decision-makers have within administrative tribunals. To explore this theory, the DSSH model of credibility assessment in LGBTI claims was assessed. While the model has been successfully implemented in the UK and has been used by the UNHCR and in Australia, the queer potential of the model was called into question. In the case of the DSSH, it was argued that the model

is based on the tropes of Western gay male sexual identity that do not necessarily fit the needs of other queer applicants. In particular, when considering the claims of women as a general example, it is clear that such accounts struggle to account for experiences of sexuality that are not static, are fluid, and trouble core tenants of popular constructions of ‘identity’ and ‘orientation’.

The deconstruction of a model that is generally presented as best practice and as a positive step toward implementation allows for a greater exploration of the contradictory manner in which queer people are (or are not) having their rights recognised through identities. It was argued that queerer approaches to recognising the refugee status of queer applicants might be found in focusing on the way in which the applicant violates social norms in their specific context versus how the applicant embodies a universalist identity. Despite the intentions of Chelvan and the desire for the model to improve assessment of credibility in LGBTI claims, in practice the model has arguably created new standardised expectations of identity development. This is, however, perhaps an inherent element in the ‘queer paradox’ of securing human rights. It is argued that queerer approaches can be found in moving away from positivist accounts of queer identities and trying to answer how a person can be afforded protection and dignity for sampling being ‘not’ the norm.
Chapter Seven
Conclusion

Introduction
This thesis has analysed domestic influences on the implementation of procedural norms in sexual orientation-based claims to asylum in Australia and the UK. The intention was to look at the human rights issues that applicants face in the process of claiming asylum. These procedural norms were taken from the UNHCR 2012 guidelines addressing sexual orientation and gender identity-based claims, and included refraining from the use of accelerated processing; stereotypical, inaccurate or inappropriate questions; the use of specialised training and appropriate terminology; the use of the DSSH model to identify difference rather than focusing on sexual practices; and refraining from eliciting or reviewing sexually explicit documentation.\(^{891}\) In choosing procedural norms as the focus, this thesis sought to highlight the fact that governments often shirk the responsibility of ensuring the rights of refugees and asylum applicants before they are granted status. As Mara Pieri argues, ‘the more distant subjects are from citizenship, the weaker the capability (or the will) of institutions to provide them human rights protection’.\(^{892}\) Through analysing the extent to which these procedural norms have been implemented, the factors that influence the process of implementation, and the nature of these norms in relation to their subjects, I have argued that a greater understanding of how queer people are treated and understood in the refugee status determination process is still needed in order to ensure their procedural rights are protected.

In conducting an analysis of claims made in the UK and Australia, this thesis set out to answer two questions:

What characteristics of a domestic legal system might explain its success in implementing, or failure to implement, international

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\(^{891}\) UNHCR, “Guidelines on International Protection No. 12”.

\(^{892}\) Mara Pieri, “Undoing Citizenship”, 108.
norms relating to sexual orientation-based refugee claims?

How does a queer critical approach to constructivist international relations norm theory better help us theorise about norm development and implementation for queer people?

This chapter provides an overview of the two major thematic findings of this thesis. Furthermore, it details the potentials for future research, the limitations of this project, and major contributions made by this research.

Civil society as successful (homo)norm(ative) entrepreneurs
This thesis began with an observation of the inconsistencies between Australian practice and adjudication of sexual orientation-based claims when compared to international best practice and guidance, and specifically with the UK. It was theorised that the differences in legal systems would provide some evidence as to why thesis inconsistencies were apparent. The findings from the research largely debunk this assumption. This thesis makes clear that it was not the legal systems that were the key variant in determining successful norm implementation, but rather the entrepreneurship of civil society actors. While more active in the UK, both countries exhibit evidence of successful norm entrepreneurship in the case of procedural norms in sexual orientation-based refugee law.

The key difference between legal systems in the UK and Australia was that while the UK had access to regional human rights courts and a human rights convention, Australia did not. Earlier research by Jenni Millbank suggested that greater familiarity and engagement with international law and human rights conventions would improve the decision-making practices of Australian tribunal decision-makers. When looking at the UK, especially given the ECHR decision in the case of ABC relating to many of the procedural norms under examination, it was presumed that such important regional jurisprudence would have had a significant effect on procedural norm implementation.
This was not borne out in the research. Rather than jurisprudence, it has been civil society and the subsequent guidelines and training developed and delivered by or in consultation with these organisation that have had the greatest influence on procedural norm implementation. This was evident, for example, in the way civil society groups prompted British policy shifts and the introduction of guidelines before the ABC decision was actually handed down by the ECtHR. Similarly, the notion that European jurisprudence would trump domestic legal, political, and civil society influence was not supported by the research. While both the UK and Australian governments had developed policies and practices that served to create ‘hostile environments’ for asylum applicants, and subsequently for the civil society actors assisting them, civil society actors were in fact able to overcome these policies in both jurisdictions and have had a significant impact on norm implementation. Even in Australia, which for a significant period of time lagged behind comparable jurisdictions in terms of norm implementation, has shown evidence that (since 2014) civil society actors have made successful attempts at norm implementation. This occurred clearly in the amendments to legislation passed in 2014, and more subtly in the development of guidelines and training by the Department of Immigration and Border Protection that drew heavily upon civil society and academic expertise for their content and philosophy.

One interesting element of the influence of civil society actors was the impact that experts and academics have had on norm implementation in this area. In the UK, it is well known that S Chelvan has had a serious impact through the development and advocacy of the DSSH model. Meanwhile, in Australia, Jenni Millbank both provided training for the Refugee Review Tribunal as far back as 2008 and has had her research drawn upon in the development of their guidelines (alongside Canadian academic Nicole LaViolette and the work of Kaleidoscope Human Rights Foundation). It appears that a key characteristic of domestic legal systems that explained whether or not norms were implemented in sexual orientation-based claims is the willingness or capacity to engage with training and guidelines on queer refugee claims.
The influence of academics and experts in the institutionalisation and implementation of norms in refugee law and policy is undertheorised and emphasises the manner in which theorisation about refugee and human rights norms must itself be included in any account of a ‘norm lifecycle’. As Boswell argues, bureaucratic organisations depend on expert knowledge in both an instrumental sense as well as through a symbolic function, where expert knowledge both informs decisions and is used to legitimise or substantiate them.893 Yet from a constructivist international Relations perspective, however, there is more at play that utility and legitimisation. Expert knowledge is an active element that contributes to the formation of norms and subsequent developments or changes to these norms. A feedback loop appears to exist between the bureaucracies and academic critique or analysis and therefore the expert knowledge or academic appraisal is a more explicit function in norm development than is often credited in norm scholarship. In many ways, academic research and theorising on human rights norms represent a significant contribution that theorising can bring to practice. Through identifying the failures of existing approaches, academics and experts encourage evolution and change in policy and practice. In relation to refugee law, where it is clear that institutions often draw on expert opinion, this impact is clear.

While civil society and its influence on training and guidelines were identified as the most significant influence on norm implementation, in order to better understand the way in which these procedural norms affect queer applicants the DSSH credibility model was analysed. Given the enormous task that adjudicators have in assessing queer claims, it is clear that guidelines and training play an important role in norm implementation. In the attempt to shift decision-making trends away from sexually explicit questioning and the use of stereotypes, however, it was argued that the DSSH model itself risks perpetuating stereotypes based in Western accounts of sexuality and identity development. This is evidence of the paradox inherent to norm contestation,

demonstrating the ‘theoretical and practical shortcomings’ of LGBTI rights being used to recognise queer people within the law. As Butler writes, ‘[t]here can be no radical change without performative contradiction’. At the same time, however, the critique of the DSSH model is critiqued does not imply that this is necessarily a form of 'bad' activism. Rather, as an inherently normative project that seeks to contest existing legal human rights norms through the elucidation of identities, it is inherently going to be a project of supplanting one norm with another. However, as Butler continues to argue, ‘the contradiction must be relied on, exposed, and worked on to move forward to something new. There seems to be no other way’.

**Queering constructivist international relations and theorising about norms**

In answer to the first question of this thesis, it is argued that there is much to be gained from queering constructivist international relations. In many senses, queer and constructivist approaches to international relations at first appeared to be antithetical. While many constructivist scholars seek to measure the institutionalisation and implementation of norms at the international, regional, and (increasingly) domestic levels, queer approaches are supposed to be anti-normative and anti-identity. In practice, however, international norms relating to queer people and their rights have emerged, been institutionalised, and are being implemented. Constructivists typically seek to identify norms, trace them, measure them, and try to understand state behaviour in relation to them. In contrast, queer theorists typically seek to critique them, debunk them, and point out their myths and falsehoods.

At the heart of both queer and constructivist theorising in international relations is also the issue of identity. Berenskoetter and others have argued that identity is a fundamental concept in constructivism. In demonstrating the utility of

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894 Thoreson, “The Queer Paradox”, 11.
896 Ibid.
898 Berenskoetter, “Identity in International Relations”, 3596
bringing constructivist and queer approaches to international relations together, this thesis drew especially upon Berenskoetter’s analysis of the ‘anxiety controlling mechanisms’ that actors use to achieve ontological security, to seek ‘cognitive and behavioural certainty’.\textsuperscript{899} It was argued that, in many ways, asylum processes seek to make sense of queerness, find truth, and refugee status through utilising anxiety controlling mechanisms to determine identity. In the same vein, however, theorising about the nature of human rights norms can act as ‘temporal stabilizing mechanisms through which theorists claim to understand the world (states) in predictable and patterned ways’.\textsuperscript{900} This thesis considered how attempts to understand norms, especially human rights norms, might perpetuate constructions of identity that maintain the exclusion and marginalisation of queer people.

I have argued that institutions, especially legal institutions and subsequently human rights norms, are not neutral. Rather sexuality-based rights have developed based on certain historical constructions of ‘the homosexual’ and notions of morality and privacy that continue to influence norm development and implementation in the modern day. In the asylum context, for example, this was demonstrated in the use and persistence of discretion reasoning. However, it also illustrates the nature of legal systems in regulating, restricting, and creating figures of individuals or groups that are always only a certain ‘image’ of those people, set in time and place, and inherently unable to articulate or capture ‘reality’. This understanding of legal institutions, and the effect that they have on human rights norms in particular, must be incorporated into constructivist international relations theorising in order to enable more productive scholarly conversation about norms relating to queer people and, more broadly, about the issue of attempting to capture the experience and identities of all people in international relations. If constructivists are to research human rights norms, then in order to properly understand their likely of success or failure, their likelihood of being institutionalised or implemented, and the likelihood that they will meaningfully benefit the people they are intend to

\textsuperscript{899} Ibid.
\textsuperscript{900} Ibid.
benefit, this gap between the experiences of queer people and the identity-based norms developed by and from them is essential to international relations.

**Contributions and practical application**

This thesis has made contributions to three core bodies of scholarship: constructivist international relations, queer international relations, and refugee law. As outlined above, the thesis has argued that there is much to be gained from queering constructivist international relations. Likewise, this thesis has contributed to queerer approaches in international relations by demonstrating the utility of queering mainstream international relations schools of thought. Increasingly, queer scholars are paying attention to the international, and to international theorising. This thesis is evidence of the fact that a queer approach to core theories within international relations can open up many possibilities for research, particularly in relation to the ways in which individuals are constructed and protected in relation to international human rights. Continuing to destabilise identity in international relations from a queer perspective is a productive continuation of many foundational discussions that have been ongoing in constructivist international relations.

Furthermore, this thesis has made a critical contribution to refugee law scholarship on sexual orientation-based claims. It has provided analysis of best practice guides to assessing credibility, such as the DSSH, suggesting that better suited approaches in feminist refugee law scholarship have perhaps been overlooked. As a result, evaluations of successes in protecting queer refugees may actually be contradictory. This was demonstrated in arguing against the universalist deferral to identity narratives over hearing and respecting sexually explicit experiences of queerness in claims. The queer approach in this thesis, then, also questions the ‘naturalness’ or ‘universality’ of dominant understandings of sexuality, gender and sex and pushes approaches to human rights norms and refugee status determinations toward methodologies that are more encompassing of cultural variability. Drawing upon the example of queer women, it was argued that the fixed and static constructions of sexual identity often explicitly or implicitly advocated exclude certain expressions of queerness and perpetuate hetero-homonormative uses
of identity. It isn’t argued that homonormative accounts of queer identity were
the intended outcome of models such as the DSSH, but instead that this is
inevitable in international human rights and refugee law. However, through
demonstrating that such an outcome is possible, any future development of
credibility assessment guidelines need to consider this reality and ensure that
they are not reliant on stereotypes. These stereotypes, importantly, can come
from developments that aim to promote LGBTI rights.

The major practical application of this thesis will hopefully be toward assisting
refugees, advocates, and activists in locating sites of possible change for
implementing the procedural rights of queer asylum seekers in the refugee
status determination process. This was one of the normative goals of the thesis
at the outset. Subsequently, one of the findings of the thesis is that civil society
actors and organisations can have a significant impact at the domestic level in
influencing immigration policy and practice. In the case of the UK, it can be
considered even more influential that the existence of international human
rights conventions and courts. Going forth, and especially in the case of
Australia, attempts to effect change ought to focus on supporting civil society
organisations to build capacity in advocating for queer refugees.
Fundamentally, it is hoped that this will achieve the better protection of queer
refugees throughout the process of refugee resettlement determinations. A
secondary practical application could be the re-examination of best practice
models for assessing the credibility of queer asylum claims without assuming
that the implementation of LGBTI/queer specific guidelines is a success in and
of itself. Instead, this thesis provides evidence and an example of critical
reflexivity on the creation of universalist guidelines to sexuality and gender.

There remains great possibility in queer international relations scholarship that
turns from theorising queer people and their rights in a positive sense towards
shifting conceptions of freedoms and bodily autonomy, modes of rights
discourse that allow for individuals to remain elusive, refuse identification, and
still be treated with dignity and afforded rights. While many queer people assert
their identities, people can also be ‘culturally marked by inaction or difference’.
Here, further development of Weber’s theorisation about Barthes’ ‘either/or’ logic as one of ‘and/or’ is necessary. As discussed in chapter two, Weber describes the manner in which subjects can be simultaneously more than one ‘thing’. That there are multiple identities that international relations theorising has yet to fully embrace, and which queer international relations theorising is dutifully contributing to the discipline. However, in light of those people who do not signify one or another thing, who do not embody a single identity, let alone two, this logic needs to be folded in on itself. In the context of asylum, for example, an approach to queer claims that rejects categorisation of identities per se but focuses instead on transgressions of dominant gender norms and mores, could allow for an even more expansive and queerer account of asylum. In this model, those who might express characteristics of being asexual, or in non-normative relationships such as polyamory, might also come into the fold of the successes of queering our approaches to human rights norms.

This has both implications for refugee law and activism, as well as for constructivist international relations theorising. Should human rights norms based on identity be regarded as successful if they in practice fail to protect individuals who have no desire or ability to assert an identity. If human rights norms are solely tied to identity, and our international relations theorising presumes as much, then both the law and the scholarly discipline is clearly failing queer people.

**Future possibilities for research**

With these arguments in mind, the possibility opened by this project is a further examination of queer approaches to human rights recognition and theory in international relations and refugee law. Future research projects should begin with looking at existing approaches within refugee law and guidance for alternate ways in which queer claims could be approached and assessed. For example, the 2002 UNHCR Gender Guidelines, note that claims that involve

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‘homosexuals, transsexuals or transvestites’ are situations where ‘the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex’. The UNHCR explains that harm is triggered when ‘LGBTI individuals are seen as not behaving according to societal norms which dictate what is “proper” to men and women, and they may be insulted, assaulted, or killed for their appearance, manner, or dress’. Approaches that focus on the specific gender norms of a given culture enable asylum claims to be assessed, as Lubhéid described, while ‘understanding sexuality as constructed within multiple, intersecting relations of power, including race, ethnicity, gender, class, citizenship status, and geopolitical location’.

Gender-based claims have also often been made under other grounds, such as race, political opinion, and religion. For example, Raj describes how

Religious persecution could manifest against Muslim women refusing to wear a veil or a Christian woman living in a same-sex relationship. Gender may also manifest in the category of political opinion where women challenge the putatively domestic roles that the state seeks to secure through its “family” policies or when where they publicly identify as a “feminist”.

Particular social identities can be politicised as transgressive. This could include women who refuse to get married and reproduce, or who are in same-sex relationships, or who engage in sex work. Emphasis on ‘social mores’ rather than identity in gender-based claims can be traced back to cases such as that of Shah and Islam where it was found that ‘women of Pakistan’ or ‘women who had offended against social mores or against whom there were imputations of sexual misconduct’ satisfied criteria for particular social group

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902 UNHCR HCR/GIP/02/01, 4; Berg and Millbank, “Constructing Personal the Narratives”, 186, 121.
903 UNHCR HCR/GIP/02/01, par. 15.
904 Luibhéid, “Heteronormativity and Immigration Scholarship”.
905 Raj, “Asylum and Gender”, 2.
906 Ibid.
status. Such approaches enable asylum claims to be assessed, as Luibhéid describes, while ‘understanding sexuality as constructed within multiple, intersecting relations of power, including race, ethnicity, gender, class, citizenship status, and geopolitical location.’

Similar understandings of gender norms can actually be found in various descriptions of LGBTI persecution. In the UNHCR’s 2011 report *Working with Lesbian, Gay, Bisexual, Transgender and Intersex People in Forced Displacement* it is explained that ‘intersex individuals may endure persecution because they do not conform to gender expectations…’ In another set of UNHCR guidance, it is explained that LGBTI individuals face serious harm and persecution, in part because ‘their behavior and appearance may be perceived as not conforming to social, cultural and religious norms’. Furthermore, such understandings also lend themselves to understanding persecution when applicants are persecuted because they have an imputed LGBTI status. This can be seen, for example, in the ICJ’s listing of those who ‘are viewed as “effeminate” or “masculine” but identify as heterosexual’. This, in part, lends to discussion of whether the issue is actually identity, or whether persecution might be the result of transgressions of general gender-based social mores.

Suggested research could begin with undertaking a historical review of refugee claims in which queer people gained asylum on grounds other than their sexuality. Understanding the creative and diverse ways in which claims can be made, and experiences of persecution described, could greatly benefit the path forward for guidance on queer claims in the future. Furthermore, an assessment of the suitability of gender-based claims to that of queer claims more broadly, especially an exploration to how more marginalised queer people such as intersex, asexual, and those who practice ‘deviant’ sex or relationships should be undertaken. A severely under-researched topic is that

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907 Luibhéid, “Heteronormativity and Immigration Scholarship”, 172.
of intersex asylum which has yet to see a single scholarly publication solely devoted to their claims or experiences.

**Bibliography**

**Legislation**

*Australia*

Migration Act 1958 (Cth).
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, s. 5J(3)(c)(vi).
Migration Reform Act 1992 (Cth).
Migration Amendment (Excision from Migration Zone) Act 2001 (Cth).
Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth).
Migration Legislation Amendment Act (No. 1) 2001 (Cth).
Migration Legislation Amendment Act (No. 5) 2001 (Cth).
Migration Legislation Amendment Act (No. 6) 2001 (Cth).
Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (Cth).

*United Kingdom*

The Immigration Act 2016 (UK)

*European*


**Cases**

*Australia*

AIT15 v Minister for Immigration & Anor [2016] FCCA 1259
Applicant A v MIEA [1997] 142 ALR 331, 360.

*C v Australia,*


MZXFJ v Minister for Immigration & Anor [2006] FMCA 1465.


SZUQO v Minister for Immigration & Anor [2015] FCCA 592.

SZUMY v Minister for Immigration & Anor [2015] FCCA 1482.

SZTGR v Minister for Immigration & Anor [2014] FCCA 1441.

SZHEV v Minister for Immigration and Citizenship [2008] FCA 1234.

1414394 (Refugee) [2016] AATA 3013 (6 January 2016)
1413749 (Refugee) [2016] AATA 3690 (17 April 2016)
1417147 (Refugee) [2016] AATA 3538 (4 March 2016)
1416717 (Refugee) [2016] AATA 3653 (4 April 2016)
1417831 (Refugee) [2016] AATA 3456 (2 March 2016)
1601346 (Refugee) [2016] AATA 3826 (4 May 2016)
1415650 (Refugee) [2016] AATA 3876 (20 May 2016)
1418335 (Refugee) [2016] AATA 3878 (24 May 2016)
1413205 (Refugee) [2016] AATA 3973 (7 June 2016)
1601328 (Refugee) [2016] AATA 4385 (6 September 2016)
1413343 (Refugee) [2016] AATA 3463 (21 September 2016)
1421199 (Refugee) [2016] AATA 4520 (26 September 2016)
1504130 (Refugee) [2016] AATA 4738 (14 November 2016)
1506605 (Refugee) [2017] AATA 174 (17 January 2017)
1613923 (Refugee) [2017] AATA 172 (22 January 2017)
1611522 (Refugee) [2017] AATA 131 (23 January 2017)
1508333 (Refugee) [2017] AATA 3071 (28 April 2017)
1604230 (Refugee) [2017] AATA 679 (19 April 2017)
1512111 (Refugee) [2017] AATA 513 (7 March 2017)
1600932 (Refugee) [2017] AATA 678 (31 March 2017)
1615725 (Refugee) [2018] AATA 1255 (2 May 2018)
1605011 (Refugee) [2017] AATA 833 (4 May 2017)
1415836 (Refugee) [2017] AATA 978 (22 May 2017)
1608621 (Refugee) [2017] AATA 982 (23 May 2017)
1510025 (Refugee) [2017] AATA 980 (30 May 2017)
1606121 (Refugee) [2017] AATA 988 (7 June 2017)
1604863 (Refugee) [2017] AATA 1045 (8 June 2017)
1621665 (Refugee) [2017] AATA 1311 (13 July 2017)
1604178 (Refugee) [2017] AATA 1173 (14 July 2017)
1604321 (Refugee) [2017] AATA 2089 (17 July 2017)
1621127 (Refugee) [2017] AATA 1262 (24 July 2017)
1514524 (Refugee) [2017] AATA 1190 (25 July 2017)
1511272 (Refugee) [2017] AATA 1404 (28 July 2017)
1603678 (Refugee) [2017] AATA 1494 (10 August 2017)
1615493 (Refugee) [2017] AATA 1670 (4 September 2017)
1613499 (Refugee) [2017] AATA 2723 (19 September 2017)
1607718 (Refugee) [2017] AATA 1825 (25 September 2017)
1509377 (Refugee) [2017] AATA 1680 (5 October 2017)
1601459 (Refugee) [2017] AATA 2005 (5 October 2017)
1700189 (Refugee) [2017] AATA 1960 (5 October 2017)
1512002 (Refugee) [2017] AATA 1823 (9 October 2017)
1612819 (Refugee) [2017] AATA 1826 (11 October 2017)
1511751 (Refugee) [2017] AATA 1911 (13 October 2017)
1620706 (Refugee) [2017] AATA 2359 (17 October 2017)
1600725 (Refugee) [2017] AATA 2355 (24 October 2017)
1713192 (Refugee) [2017] AATA 2084 (27 October 2017)
1611199 (Refugee) [2017] AATA 2676 (8 November 2017)
1606103 (Refugee) [2017] AATA 2931 (15 November 2017)
1514908 (Refugee) [2017] AATA 2962 (22 November 2017)
1515415 (Refugee) [2017] AATA 3010 (14 December 2017)
1501160 (Refugee) [2017] AATA 3025 (15 December 2017)
1605362 (Refugee) [2017] AATA 3018 (19 December 2017)
1612373 (Refugee) [2018] AATA 289 (15 January 2018)
1510418 (Refugee) [2018] AATA 569 (26 February 2018)
1605348 (Refugee) [2018] AATA 785 (14 March 2018)
1514543 (Refugee) [2018] AATA 920 (16 March 2018)
1513200 (Refugee) [2018] AATA 1303 (27 March 2018)
1605830 (Refugee) [2018] AATA 1738 (28 March 2018)
1603598 (Refugee) [2018] AATA 1739 (10 April 2018)

Austria
H.F. v Austria, no. 22646/93, ECtHR, 26 June 1995.
Schalk and Kopf v Austria, no. 30141/04, ECtHR, 24 June 2010.

Belize

Canada
Re. X. (J.K.) [1992] CRDD no. 348 (QL)

Cyprus
Modinos v. Cyprus,
no. 7/1992/352/426, ECtHR, 23 March 1993

Denmark
Kjeldsen, Busk Madsen and Pedersen v Denmark, nos. 5095/71, 5920/72, 5926/72, 7 December 1976, ECtHR,

Germany
A.S. v Germany, no. 530/59, Commission decision, 4 January 1960.
G.W. v Federal Republic of Germany, no. 1307/61, Commission decision, 4 October 1962.
W. B. v Federal Republic of Germany, no. 104/55, Commission decision, 17 December 1955 (original in French).
X. v Federal Republic of Germany, no. 5935/72, Commission decision, 30 September 1975.

UK
AR and NH (lesbians) India [2016] UKUT 66 (IAC).
Dudgeon v. United Kingdom, no. 7525/76, ECtHR, 22 October 1981.
HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, [2010] UKSC 31.
Islam (A.P.) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, ex parte Shah (A.P.) (Conjoined Appeals) [1999].
2AC 629; [1999] 2 All ER.
JB(Jamaica) v. The Secretary of State for the Home Department [2013] EWCA Civ 666.
Norris v. Ireland, no. 10581/83, ECtHR, 26 October 1988.
Osman v United Kingdom 1998-VIII; 29 ECHR 245.
Re SSHD ex parte Binbasi [1989] Imm AR 595.
R (Animal Defenders) v Secretary of State for Culture, Media, and Sport [2008] 1 AC 1312.

Netherlands
A, B and C v Staatssecretaris van Veiligheid en Justitie C-148/13 to C-150/13, 2 December 2014.

Russia
Alekseyev v Russia, nos. 4916/07, 25924/08 and 14599/09, ECtHR, 21 October 2010.
Razkane v. Holder, Attorney General, No. 08-9519, (10th Cir. 2009), 21 April 2009.
Shahinaj v Gonzales, 481 F.3d 1027, (8th Cir. 2007), 2 April 2007.

Other sources


“Refugee resettlement to Australia: What are the facts?” Parliament of 
Australia. September 7th, 2016. 

“Resources: Asylum related to sexual or gender identity or expression in the 

“Statement about recent media coverage.” Australian Appeals Tribunal. April 


“Sunday Interview: Fatwa on ‘Pengkid’ to Prevent Lesbianism.” Malaysia 

“The Fast Track Assessment process,” Department of Immigration and 
Border Protection March 8th, 2015. 

http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp

“The United Kingdom Immigration Detention.” Global Detention Project. 
https://www.globaldetentionproject.org/countries/europe/united-kingdom


https://www.theguardian.com/commentisfree/2017/jul/19/new-home-affairs-department-seems-to-be-more-about-politics-than-reform

https://detentioninquiry.com/2016/05/17/detention-inquiry-panel-members-statement-on-the-immigration-act-2016-becoming-law/

Blomfield, Paul. “We are locking up people indefinitely. This inhuman practice needs to end.” The Guardian. August 24, 2017.


Hoad, Neville. “Arrested development or the queerness of savages: Resisting evolutionary narratives of difference.” *Postcolonial Studies* 3, no. 2 (2000): 133-158.


Macklin, Audrey. “Coming Between Law and the State: Church Sanctuary for Non-citizens.” *Nexus.* Toronto: University of Toronto Faculty of Law, 2005.


Mejia-Canales, David, William Leonard. *Something for Them: Meeting the support needs of same sex attracted, sex and gender diverse (SSASGD) young people who are recently arrived, refugees or asylum*


Pieri, Mara. “Undoing Citizenship. Undocumented Queer Activism and


