

**SEXUAL ORIENTATION AND GENDER IDENTITY ASYLUM  
CLAIMS AND REFUGEE PROTECTION UNDER SOUTH  
AFRICAN LAW**

**LLM Mini-dissertation**

**By**

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degree LLM (Multi-disciplinary Human Rights)**

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## DECLARATION

I Kizitos Charloz Okisai, hereby declare that this mini-dissertation is original and has never been presented in the University of Pretoria or any other institution. I also declare that any secondary information used has been duly acknowledged in this mini-dissertation.

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## **ABSTRACT**

The South African Constitution and legislation provide for granting of asylum and protection for refugees who have fled into South Africa because of persecution based on their sexual orientation or gender identity. International human rights law recognises the right to seek asylum and to be protected from persecution. There is growing consensus within the field of international human rights and refugee law that persecution based on one's sexual orientation or gender identity is a basis upon which refugee status and protection should be granted. South Africa's legal regime is, therefore, consistent with emerging international human rights standards and reflects the Republic's consciousness to its international obligations towards the protection of asylum seekers and refugees.

Out of keeping with the progressive legislative and human rights guarantees under South African law, asylum seekers and refugees whose applications are based on sexual orientation or gender identity often face rejection of their asylum applications and violations of other human rights while in South Africa. These and a number of other identified challenges facing these asylum seekers and refugees, such as non-disclosure of true reasons for seeking asylum due to trauma, negative social attitudes, and lack of protection by law enforcement agencies, require concerted efforts by the various stakeholders. Multi- and inter-disciplinary dimensions to the institutional responses and overarching synergies that bring together the much needed efficacy in service and protection delivery are identified in this research as the ultimate goal.

## LIST OF ABBREVIATIONS

AIDS-	Acquired Immune Deficiency Syndrome
AU-	African Union
ACHPR-	African Commission on Human and Peoples' Rights
CC-	Constitutional Court
CJ-	Chief Justice
CERD-	Convention on the Elimination of all forms of Racial Discrimination
DHA-	Department of Home Affairs
DJ&CD-	Department of Justice and Constitutional Development
EC-	European Community
ECHR-	European Convention on Human Rights and Fundamental Freedoms
EU-	European Union
HIV-	Human Immunodeficiency Virus
ICCPR-	International Covenant on Civil and Political Rights
ICESCR-	International Covenant on Economic, Social and Cultural Rights
LGBTI-	Lesbian Gay Bisexual Transgender Intersex
NPA-	National Prosecuting Authority
NGO-	Non-Governmental Organisation
OAU-	Organisation of African Unity
PASSOP-	People Against Suffering, Oppression and Poverty
RSDO-	Refugees Status Determination Officer
SAPS-	South African Police Service
SC-	Supreme Court
SCRA-	Standing Committee on Refugee Affairs
RAB-	Refugee Appeals Board

RRO-	Refugee Reception Office
SOGI-	Sexual Orientation and Gender Identity
UDHR-	Universal Declaration of Human Rights
UN-	United Nations
UNAIDS-	United Nations Programme on AIDS
UNDP-	United Nations Development Programme
UNHCR-	United Nations High Commissioner for Refugees
UNOHCHR-	United Nations Office of the High Commissioner for Human Rights
UNESCO-	United Nations Education Science and Cultural Organisation

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# CHAPTER ONE: INTRODUCTION

## 1.1 Background to the research problem

Although sexual orientation and gender identity (SOGI) have initially, under international and national law, not qualified as grounds for granting refugee status, there has been an evolution, with more and more states now accepting at least sexual orientation as a basis upon which refugee status is granted.<sup>1</sup> Gender identity has, however, proven to be more problematic.

Whereas the South African Constitution prohibits unfair discrimination on the basis of sexual orientation, it is not clear what the actual practice regarding the granting of refugee status on the basis of SOGI is.

Against the background of a rising trend of homophobia across Africa, the recent adoption of very restrictive and specific anti-homosexuality legislation in Nigeria and Uganda,<sup>2</sup> and the persistence of government repression and inaction in the face of violence against the lesbian, gay, bisexual, transgender and intersex (LGBTI) community by non-state actors, more and more members of the LGBTI community are likely to be forced to flee and seek asylum.<sup>3</sup> South Africa, with its legal regime that is lauded as progressive and accommodating in protecting LGBTI persons,<sup>4</sup> has been and will increasingly be a destination for those seeking safety and international protection as refugees.

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<sup>1</sup> D Sanders *Human rights and sexual orientation in international law* (2001) 2.

<sup>2</sup> Disapproval of homosexuality in Uganda and Nigeria is very high. A Pew global attitudes project survey reflected 97% disapproval in Nigeria and 95% in Uganda Pew Global Attitudes Project, *World Publics Welcome Global Trade But Not Immigration* (2007) 47, available at <http://pewglobal.org/files/pdf/258.pdf> (accessed 26 April 2014).

<sup>3</sup> Within days of parliament passing into law, a bill that outlawed homosexuality, more than 20 gays had fled Uganda. Uganda laws force gays into hiding <http://ewn.co.za/2014/03/09/Uganda-laws-force-gays-into-hiding> (accessed 9 September 2014). This law was however declared unconstitutional due to a procedural technicality in August 2014 as the requisite parliamentary quorum had not been met in passing the law.

<sup>4</sup> Even though there are challenges, South African laws generally recognise non-discrimination on the basis of one's sexual orientation as will be discussed further in Chapter two below.

This mini-dissertation explores South Africa's national and international obligations in relation to the treatment of asylum claims lodged by those fleeing persecution because of their sexual orientation or gender identity, and the practical, general and specific aspects of the state's asylum regime in refugee protection. The mini-dissertation also attempts to demystify the practical and real life experiences of LGBTI asylum seekers and refugees. In so doing, the limitations of the law in the actual protection of those it seeks to protect and the possible role other disciplines can play to complement the law are highlighted.

## **1.2 Main research question**

The main research question addressed in this research is:

Does South African law, in theory and practice, allow for the granting of refugee status on the basis of sexual orientation and gender identity?

### **1.2.1 Sub-questions**

Following from the main question, the following sub-questions are addressed:

- i. What are South Africa's international human rights obligations in respect of granting refugee status on the basis of SOGI?
- ii. What does South Africa's domestic law provide for in respect of granting refugee status on the basis of SOGI?
- iii. What is the actual practice in South Africa, in respect of (a) granting refugee status on the basis of SOGI, and (b) challenges in protecting asylum seekers and refugees?
- iv. What are possible solutions to identified challenges?

## **1.3 Research methodology and modus operandi**

This research utilises consultative meetings and interviews with the different stakeholders including relevant civil society organisations, asylum seekers and

refugees, as well as analysis of media reports to come to an understanding of the interplay between law and practice around the status determination process and protection of SOGI asylum seekers and refugees.

### **1.3.1 Sub-question i**

In understanding South Africa's international law and human rights obligations in regard to granting or refusing refugee status on the basis of SOGI, research is conducted through desk review of the 1951 United Nations (UN) Convention Relating to the Status of Refugees and its 1967 Protocol, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, other relevant human right treaties, existing jurisprudence, commentaries and relevant policy guidelines.

### **1.3.2 Sub-question ii**

This question is analysed through desk review of the South African Constitution, legislation, case law, administrative directives and practices. Further analysis of international human rights norms and their effect on South Africa is done. In addition, human rights developments in the protection of LGBTI persons are analysed.

### **1.3.3 Sub-question iii**

The question is answered by conducting in-depth semi-structured interviews. Sample questionnaires are included as **Annexure A**. Ethical standards were adhered to during the research and to ensure the confidentiality of research subjects, and as required by the University of Pretoria research ethics rules and regulations, a clearance by the Ethics Committee at the Faculty of Law was sought and granted. The email from the Chairperson of the Ethics Committee in the Faculty of Law is available as **Annexure B**.

Upon obtaining ethical clearance, interviews were conducted with 14 asylum seekers and refugees; two staff members from two Non-Governmental Organisations (NGOs); and one former member of staff of the Department of Home Affairs (DHA). A list of the research subjects is attached as **Annexure C**. Research subjects have been

assigned identities and references, such as ‘IMB’ or ‘JM’, which are not their real names. These research subjects were identified through the snowballing method, using media reports, information from NGOs and United Nations High Commissioner for Refugee UNHCR as a basis.

The interviews were conducted in a semi-structured manner and answers have been transcribed in a tabular prose format.<sup>5</sup> The interviews reveal the gaps in what the law provides and the actual implementation of the law in the determining applications based on SOGI.

In addition, decisions by the DHA have also been surveyed, reviewed and analysed to understand the propriety in the reasoning behind denial of refugee status.<sup>6</sup>

#### **1.3.4 Sub-question iv**

In answering this question, recommendations were derived from an analysis of the findings from the foregoing research questions.

#### **1.3.5 Participatory action research methodology**

The interviews with refugees and asylum seekers were conducted with a view to identify particular legal and or physical protection needs and challenges. Being a staff member of the UNHCR with protection and solutions responsibilities, the needs and challenges identified through this research, will be addressed by UNHCR to the extent possible.

Information will also be shared with relevant stakeholders, including NGOs working with LGBTI refugees and asylum seekers as well as other UNHCR colleagues, for the purposes of advocacy and other interventions. Structured collaboration with People Against Suffering Oppression and Poverty (PASSOP) and the Legal Resources

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<sup>5</sup> The interview transcripts and other annexures are available on file with the author.

<sup>6</sup> These decisions are also on file with the author.

Centre is already a work-in-progress commencing with this research work. However, the extent of needed collaboration and networking goes beyond these two organisations.

Knowledge-based interventions including follow-up with the DHA and referral of refugees for protection and permanent solutions through UNHCR has already been commenced. The envisaged interventions will include referrals for resettlement to third countries,<sup>7</sup> for those refugees who have serious protection needs.

#### 1.4 Terms and definitions

**Sexual orientation:** This term refers to a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.<sup>8</sup>

**Gender identity:** This denotes a person's innate perception of self as being a man or a woman, both or neither. It also refers to a person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth,<sup>9</sup> including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms.<sup>10</sup>

**Lesbian:** The term refers to a woman with an enduring physical, romantic and or emotional attraction to other women.<sup>11</sup>

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<sup>7</sup> As of writing this mini-dissertation, one refugee has already been referred and is being considered for resettlement by the United States of America on an expedited basis based on the serious hardships experienced.

<sup>8</sup> Yogyakarta Principles of 26 March 2007 on the application of international human rights law in relation to sexual orientation and gender identity.

<sup>9</sup> Therefore allowing for freedom of one to choose modification of their bodily appearance or functioning through 'medical, surgical or other means'.

<sup>10</sup> Yogyakarta Principles (n 8 above).

<sup>11</sup> United Nations High Commissioner for Refugees (UNHCR) Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/12/09 (23 October 2012) 4, paragraph 10.

**Gay:** This refers to a man with an enduring physical, romantic and or emotional attraction to other men.<sup>12</sup>

**Bisexual:** This is a description for a person with physical, romantic and or emotional attraction to both men and women.<sup>13</sup>

**Transgender** is a person's gender identity that describes or a gender expression that is different from the sex that was biologically assigned to the individual at birth.<sup>14</sup>

**Intersex** is a description of a condition whereby an individual is born with reproductive or sexual anatomy and/or chromosome patterns that are not consistent with the typical biological notions of being male or female.<sup>15</sup>

**LGBTI** stands for lesbian, gay, bisexual, transgender and intersex.

## 1.5 Literature review

Very little literature exists on this specific topic. Although much has been written about SOGI in South Africa, the issue of asylum determination and protection on that basis has not been canvassed in the literature.

South Africa's obligations towards SOGI asylum seekers and refugees are established under the Refugees Act 108 of 1998 (the Act) and the Constitution, Act 108 of 1996. The Act makes specific reference to gender and sexual orientation as reasons to grant refugee status,<sup>16</sup> whereas the Constitution contains express non-discrimination provisions and recognises same sex relations.<sup>17</sup>

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<sup>12</sup> n 11 above.

<sup>13</sup> n 11 above.

<sup>14</sup> n 11 above.

<sup>15</sup> n 11 above.

<sup>16</sup> Section 1(xxi) of the Refugees Act.

<sup>17</sup> R Tielman & H Hammelburg *world survey on the social and legal position of the gays and lesbians* in Hendriks et al (eds) *The third pink book* (1993) 249-325 46. Also see, D Sanders (n 1 above) 2.



Regarding the experiences of asylum seekers and refugees in South Africa, Roni has conducted studies that reveal several gaps in the asylum process which result in administrative unfairness at the DHA.<sup>18</sup> However, these studies are not specific to SOGI asylum seekers and refugees in that Roni discusses the general impediments to fair asylum access.

According to a survey by PASSOP, there are discriminatory practices against sexual minorities that result in barriers to accessing employment and housing for SOGI refugees and asylum seekers.<sup>19</sup> The PASSOP survey is narrow and specifically addresses barriers in accessing social and economic rights. That survey is, however, being relied upon in discussing the challenges and possible solutions in the protection of LGBTI asylum seekers and refugees.

The work of Moodley is the closest attempt to addressing the issue of LGBTI asylum seekers and refugees in South Africa.<sup>20</sup> Moodley's work is limited to interviews with asylum seekers in which issues of non-disclosure and errors of law are uncovered. Moodley goes on to make recommendations to the South African government. This research goes beyond Moodley's work to identifying challenges facing the DHA and other stakeholders and makes a raft of recommendations to different stakeholders besides the government. This research for the first time documents not just the experiences of refugees and asylum seekers, but also reflects views from the DHA, civil society and the UNHCR.

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<sup>18</sup> A Roni 'No way in: Barriers to access, service and administrative justice at South Africa's refugee reception offices' (September 2012) *ACMS Research Report* 11 and A Roni 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 3 *International Journal of Refugee Law* 458.

<sup>19</sup> PASSOP (2014) 'Economic injustice: Employment and housing discrimination against refugees and asylum seekers in South Africa'.

<sup>20</sup> Y Moodley 'Receiving LGBTI refugees in South Africa: Towards a culture of non-discrimination and human rights' (2012) [http://www.refugeerights.uct.ac.za/usr/refugee/Working\\_papers/Working\\_Paper\\_5\\_of\\_2012.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_5_of_2012.pdf) (accessed 10 December 2014).

## 1.6 Research limitations

The research methodology assumes that all the anticipated participants would be available and cooperate fully in providing valuable information that enriches the intended outcome. However, because of conflicting appointment schedules, only one former staff of the DHA was interviewed. Further, it was not possible to obtain statistical and substantive information on the number of SOGI asylum applications at the DHA, and adjudication considerations or guidelines followed by officers. Requests for decisions where SOGI applicants were granted refugees status remained pending at the conclusion of this mini-dissertation and therefore, it was not possible to understand the reasoning behind the positive decisions.

## 1.7 Structure

**Chapter one** introduces the research questions, literature review, assumptions and limitations to the research. It also outlines the aims of the study and conclusion.

**Chapter two** discusses the national and international obligations that South Africa bears under its national legislation and under international law and human rights law towards the protection of refugees whose applications are grounded upon their SOGI. Comparable regional human rights systems are analysed from a jurisprudential and institutional perspectives to shed light to the evolution of human rights protection relevant to SOGI.

**Chapter three** discusses the challenges faced by refugees and asylum seekers and reflects the findings from consultative meetings and in-depth interviews with refugees and asylum seekers on their experiences in South Africa as well as information from a former DHA official, as well as NGO and UNHCR officials.

**Chapter four** proposes general and specific interventions that can be effective in protecting the rights of LGBTI refugees in South Africa. An examination of the role and

limitation of the law and human rights law will be highlighted thereby paving the way for multi-disciplinarity in confronting the problem of human rights violations and providing proposals as to how the various disciplines can contribute towards human rights promotion and protection for LGBTI asylum seekers and refugees.

### **1.8 Aims of the study**

This mini-dissertation aims at clarifying the obligations both under national and international human rights law that South Africa bears in respect of refugee status determination and protection for SOGI applicants. In-depth interviews conducted reveal and illuminate the legal and human rights protection and the practical challenges in realising those legal and human rights safeguards.

An appreciation of the state's obligations under national and international law will help to identify the gaps between the law and practice in this area. As a result, stakeholders in the field of international refugee protection including the government of South Africa, UNHCR, NGOs as well as refugees and asylum seekers themselves, are more specifically informed and therefore, equipped to address the identified gaps or challenges identified.

Addressing any gaps between the law and practice will require multi-functional and multi-disciplinary approaches especially since refugees and asylum seekers face not just difficulties in benefiting from the legal and human rights law protection, but also, local integration challenges abound due to negative social attitudes.

## CHAPTER TWO: NATIONAL AND INTERNATIONAL OBLIGATIONS

### 2.1 Introduction

Prior to the 21st century, sexual orientation or gender identity (SOGI) were not grounds upon which one qualified to be granted refugee status under national and international law.<sup>1</sup> However, the trend since the last number of decades shows increasingly that more states, including South Africa, have accepted in their national laws, that discrimination on the basis of SOGI has become unacceptable.<sup>2</sup>

The South African Refugees Act 130 of 1998 does provide sexual orientation as a reason for granting refugee status. The 1996 Constitution of South Africa,<sup>3</sup> which was the first in the world to explicitly prohibit discrimination on the basis of sexual orientation,<sup>4</sup> has been judicially interpreted with the result that the Constitutional Court on 9 October 1998 struck down the sodomy provisions contained in several pieces of legislation<sup>5</sup> as being inconsistent with the Constitution's non-discrimination provisions.<sup>6</sup> While recognising the rights of same sex partners,<sup>7</sup> the Court ruled that laws prohibiting consensual sexual activities between men offended the non-discrimination provisions in the Bill of Rights.<sup>8</sup>

With this positive legal regime, South Africa is a logical destination for those fleeing persecution on the basis of SOGI. Therefore, in this chapter, South Africa's national and international obligations relative to the granting of refugee status based on SOGI are analysed. It is demonstrated that, although not making express provisions for

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<sup>1</sup> R Tielman & H Hammelburg *world survey on the social and legal position of the gays and lesbians* in Hendriks et al (eds) *The third pink book* (1993) 249-325 46.

<sup>2</sup> Tielman & Hammelburg (n 1 above).

<sup>3</sup> Section 9 of the 1996 South African Constitution.

<sup>4</sup> Tielman & Hammelburg (n 1 above).

<sup>5</sup> Including an item in schedule 1 of the criminal procedure Act 51 of 1977, section 13(8) of the South African Police Services Act, 68 of 1995, section 20A of the Sexual Offences Act 1957, and sections 1(8), (9) and 2(1)(c) of the Special Pensions Act 69 of 1996 .

<sup>6</sup> Section 172(2)(1) of the Constitution

<sup>7</sup> *National Coalition for Gay and Lesbian Equality v The Minister of Justice*, 1998 (1) SA 31-32 (CC).

<sup>8</sup> n 7 above Per Ackermann J, 42-44.

granting refugee status based on SOGI, the Constitution, read together with the Refugees Act, provides for granting refugee status and protecting SOGI applicants. Relevant international human rights instruments to which South Africa is a party are discussed and some regional trends are highlighted briefly to establish the evolution of human rights protection for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons notwithstanding the absence of express clauses in the law and human rights treaties.

## **2.2 National framework for the protection of SOGI refugees**

All persons lawfully residing in South Africa are protected by the provisions of the Constitution. In the case of asylum seekers and refugees, their status is determined under the Refugees Act. The constitutional safeguards apply to them during the refugee application process and after they are determined to be refugees.

### **2.2.1 The Constitution of South Africa, Act 108 of 1996**

With a few exceptions,<sup>9</sup> the human rights guaranteed in the South African Bill of Rights apply to all persons legally resident within the Republic.<sup>10</sup> Under section 7(1), the Bill of Rights in the Constitution is a cornerstone of democracy enshrining the rights of all people and affirming the democratic values of human dignity, equality and freedom’.

The Constitutional Court adopting a purposive interpretation<sup>11</sup> in the case of *Khosa and others v Minister of Social Development and others*<sup>12</sup> found that ‘[t]he Constitution expressly provides that the Bill of Rights enshrines the rights of ‘all people in our country...the word “everyone” in this section cannot be construed as referring only to ‘citizens’.<sup>13</sup>

Refugees and asylum seekers are legally resident in South Africa. As such, they are entitled to the constitutional guarantees in the Bill of Rights except as expressly

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<sup>9</sup> The exceptions are for example with regard to voting rights.

<sup>10</sup> *Khosa and others v Minister of Social Development and others* 2004 6 BCLR 569 (CC).

<sup>11</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 6 BCLR 665 (CC).

<sup>12</sup> *Khosa and others* (n 10 above) 30.

<sup>13</sup> *Commissioner for Inland Revenue v NST Ferrochrome (Pty) Ltd* 1999 (2) SA 228 (T) 232.

limited by the Constitution.<sup>14</sup> The non-discrimination provisions in section 9(3) of the Constitution therefore apply to LGBTI asylum seekers and refugees.

## 2.2.2 Refugees Act 130 of 1998

Under the Refugees Act 130 of 1998, the Department of Home Affairs (DHA) is the government organ responsible for asylum management. Therefore, the DHA is responsible for the issuance of documentation that regulates the legal residence of all those applying for asylum or seeking to remain as refugees in the Republic and to not discriminate against them on any grounds including on the basis of SOGI.<sup>15</sup>

The definition of a refugee under the Refugees Act in section 3(a) and 3(b),<sup>16</sup> is in terms similar to articles 1A(2) of the 1951 UN Convention and article 1(1) and 1(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa.

The Act describes a person as qualifying for refugee status if a person

‘3(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

3(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere’.<sup>17</sup>

SOGI is not explicitly provided for as a ground upon which one may be recognized as a refugee under the Refugees Act. However, read contextually and holistically, there is no doubt that the Act regards persecution based on SOGI as a

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<sup>14</sup> Political rights in section 19, citizenship rights, section 20, the right to a passport and to enter, remain and reside in the Republic in sections 21(3) and 21(4) apply only to nationals.

<sup>15</sup> Section 9(3) of the Constitution.

<sup>16</sup> Refugee Amendment Act 33 of 2008 introduces gender as ground upon which persecution qualifies one to grant of refugee status but the Act is not yet in force until enactment of regulations as per section 34 thereof.

<sup>17</sup> Section 3(b) is similar to the 1969 OAU Convention definition.

reason to grant refugee status. This is because section 3(c) of the Act clearly states that membership of a particular group makes one eligible for refugee status. In its definitional section, the Act clarifies unequivocally that gender or sexual orientations constitute a 'social group'.<sup>18</sup> Besides the provisions of the Act, the United Nations High Commissioner for Refugees' (UNHCR) 2012 Guidelines have also clarified that 'membership of a particular social group' is the ground under which SOGI based claims are commonly assessed<sup>19</sup> even though other grounds such as political opinion or religion may also apply to a claim that is based on SOGI.<sup>20</sup>

### ***Understanding the meaning of 'a particular social group'***

The inclusive approach in the Act is in line with the UNHCR 2002 Guidelines. According to the UNHCR 2002 Guidelines on the Interpretation of the 1951 Convention ground 'a particular social group', can be defined 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'.<sup>21</sup>

In determining whether a group exists and therefore an asylum seeker could be considered to be protected under this Convention ground, two approaches can be used according to the UNHCR guidelines.<sup>22</sup> First, is the protected characteristics approach<sup>23</sup> and the second is the 'social perception' approach.<sup>24</sup>

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<sup>18</sup> Section 1(xxi) of the Refugees Act.

<sup>19</sup> UNHCR Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/12/09 23 October 2012. These, replaced the 2008 Guidelines, paras 40-50.

<sup>20</sup> UNHCR (2012) Guidelines paragraph 40.

<sup>21</sup> Guidelines on international protection (2002) '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 Distr. general HCR/GIP/02/027.

<sup>22</sup> See paragraph 5 of UNHCR 2002 Guidelines (n 21 above).

<sup>23</sup> Paragraph 6 of UNHCR 2002 Guidelines (n 21 above).

<sup>24</sup> Paragraph 7 of UNHCR 2002 Guidelines (n 21 above).

In the protected characteristic approach, considerations are given as to whether a group is identifiable by (a) innate, unchangeable characteristic; or (b) by a past temporary or voluntary status that is unchangeable because of its historical permanence; or (c) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.<sup>25</sup> Through the use of this approach, administrative, judicial and quasi-judicial bodies have concluded that homosexuals, amongst other groups, constitute a particular social group within the meaning of article 1A(2) of the 1951 Refugee Convention.<sup>26</sup>

The 'social perception' approach looks into whether members of a group share a common characteristic that makes them cognizable or sets them apart from society at large.<sup>27</sup> Similar to the 'protected characteristic' approach, adjudicators for asylum applications have found that homosexuals constitute a particular social group when regard is had to the existing social circumstances.<sup>28</sup>

### **2.3 Regional human rights safeguards**

There is broad consensus both at the regional and international human rights levels that discrimination on the basis of sexual orientation or gender identity is impermissible.

Within the Africa regional human rights system, the 1969 OAU Convention and the 1981 African Charter on Human and Peoples' Rights (African Charter)<sup>29</sup> are the main regional treaties providing for the protection of refugees and asylum seekers.

The 1969 OAU Convention requires states to grant admission and provide protection and secure asylum,<sup>30</sup> and not to discriminate asylum seekers and refugees in their territories.<sup>31</sup>

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<sup>25</sup> n 24 above.

<sup>26</sup> n 24 above.

<sup>27</sup> n 24 above.

<sup>28</sup> n 24 above.

<sup>29</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981, O.A.U Doc. CAB/LEG/67/3.



The African Charter prohibits discrimination of any kind on the basis of race, social origin, ethnicity and analogous grounds.<sup>32</sup> It also protects the right to respect for life and the integrity of the person. Cumulatively, these human rights safeguards have been implied to protect the right to privacy for persons belonging to sexual minorities.<sup>33</sup>

In May 2014, the African Commission on Human and Peoples' Rights, referring to the various human rights protections in the Charter adopted Resolution 275 condemning SOGI-based violence. This significant step is an explicit acknowledgement by the Commission that persons of diverse sexual orientations and gender identities have faced and continue to face serious human rights violations amounting to persecution. Some of those persecuted remain in their countries and live with such persecution while others flee to seek asylum in countries such as South Africa. Wherever they may be, states parties to the Africa Charter are enjoined by the Resolution to ensure the protection of LGBTI persons from violence.

Clearly therefore, the Africa Charter has been interpreted quite authoritatively by the Africa Commission, to require of state parties to the Charter, to grant asylum and provide protection to those who flee violence or persecution because of their SOGI.

South Africa is a state party to these regional treaties which have also been domesticated not only through the tenor and purport of its Constitution, but also in the Refugees Act. Therefore, South Africa is obliged to implement the relevant provisions of the treaties protecting refugees and asylum seekers whose claims are based on SOGI. The relationship between international human rights law and South African law will be discussed later in this chapter.

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<sup>30</sup> Organization of African unity convention governing the specific aspects of refugee problems in Africa adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, article 2.

<sup>31</sup> n 30 above.

<sup>32</sup> African Charter (n 30 above) article 2.

<sup>33</sup> R Murray & F Viljoen, 'Towards the non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 89.

## 2.4 The United Nations treaties and treaty bodies

In the post-World War II era, there are number foundational instruments from which human rights law sprung. These are the United Nations Charter 1945, the Universal Declaration of Human Rights 1948, the 1966 International Covenants on Civil and Political Rights, (ICCPR) and Economic, Social and Cultural Rights (ICESCR).<sup>34</sup> Also recognized as 'core' instruments are the UN Conventions on Racial Discrimination,<sup>35</sup> Women,<sup>36</sup> Torture<sup>37</sup> and Children.<sup>38</sup>

### 2.4.1 The Universal Declaration of Human Rights

The Universal Declaration provides for the right to seek and enjoy, asylum from persecution in other countries.<sup>39</sup> The enjoyment of this right is without any distinction whatsoever,<sup>40</sup> much less on grounds of SOGI. The Declaration also provides that all human beings are born free and equal in dignity and rights<sup>41</sup> and that that 'everyone is entitled to all the rights and freedoms'<sup>42</sup> therein on the basis of equality and non-discrimination.<sup>43</sup> While it is not binding, many provisions of the Universal Declaration have now been widely acknowledged and accepted as *jus cogens* norms of customary international law binding to all states in their treatment of nationals and state relations *inter-se* within the comity of nations.<sup>44</sup>

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<sup>34</sup> D Sanders, *Human rights and sexual orientation in international law*, University of British Columbia (2001) 2.

<sup>35</sup> UN General Assembly International convention on the elimination of all forms of racial discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

<sup>36</sup> UN General Assembly, Convention on the elimination of all forms of discrimination against women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>37</sup> UN General Assembly, Convention against torture and other cruel, inhuman or degrading treatment or punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>38</sup> UN General Assembly, Convention on the rights of the child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>39</sup> Universal Declaration of Human Rights GA Res 217 A (111) GAOR, Sess Part 1 Resolution 71 (1948) Article 14(1).

<sup>40</sup> n 39 above.

<sup>41</sup> n 39 above, Article 1.

<sup>42</sup> n 39 above, Article 2.

<sup>43</sup> UNHCR Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/12/09 23 October 2012. These, replaced the 2008 Guidelines.

<sup>44</sup> JP Humphrey 'the Universal Declaration of Human Rights, its history, impact and judicial character', in BG Ramcharan (ed) *Human Rights, thirty years after the Universal Declaration* (1979) 21.

#### 2.4.2 The 1951 UN Convention and its 1967 Protocol

Respect for fundamental rights and the principle of non-discrimination are core aspects of the 1951 Refugee Convention. International refugee law prohibits discrimination based on SOGI.<sup>45</sup> Implicitly, therefore, and supported by jurisprudence and the UNHCR interpretation tools, LGBTI asylum seekers are entitled to legal protection under the Convention ground, ‘membership of a particular social group’<sup>46</sup> and should not be discriminated on the basis of their SOGI. South Africa is a party to the UN Refugee Convention and is thereby bound by the provisions thereunder.

#### 2.4.3 International Covenant on Civil and Political Rights

An expert legal interpretation of the ICCPR by the UN Human Rights Committee (HRC) found that the Covenant provides protection to sexual minorities, and gays in particular<sup>47</sup> in its protection of the right to privacy.<sup>48</sup> In the case of *Toonen v Australia*,<sup>49</sup> the HRC in a complaint filed by a Tasmanian, Nicholas Toonen found that sexual orientation was a protected status under the ICCPR’s anti-discrimination provisions. This resulted in the repealing of Australia’s sodomy laws. The finding reflected a broad and purposive understanding of the right to privacy.<sup>50</sup>

#### 2.4.4 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>51</sup>

Ratified by South Africa,<sup>52</sup> the CERD obliges state parties to eliminate all forms of discrimination, guarantee the right to non-discrimination for “all”; without distinction of

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<sup>45</sup> UNHCR 2012 Guidelines (n 43 above) paras 2-3.

<sup>46</sup> UNHCR (2012) Guidelines (n 43 above) 11.

<sup>47</sup> International Covenant on Civil and Political Rights adopted 16 Dec. 1966, G.A Res 2200 (XXI) .N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 March 1976).

<sup>48</sup> ICCPR, (n 47 above) Article 17 states that ‘No 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.’

<sup>49</sup> Human Rights Committee, Communication 488/92, *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (March 1994).

<sup>50</sup> Murray & Viljoen (n 33 above) 89.

<sup>51</sup> UN General Assembly International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660 195.

any kind and guarantee the right to security of person and protection by the state against violence or bodily harm.<sup>53</sup>

The provision can be invoked by SOGI asylum seekers and refugees to argue for their rights in South Africa. Indeed in its General Recommendation 22, the Committee on Elimination of Racial Discrimination draws attention of states to article 5 of the CERD to the rights of refugees and displaced persons to be protected against discrimination and to ensure their enjoyment of civil, political, economic, social and cultural rights and freedoms.<sup>54</sup>

#### **2.4.5 The Yogyakarta Principles<sup>55</sup>**

Adopted in 2007 by a group of human rights experts, the Yogyakarta Principles provide an important emphasis to the right to seek and enjoy asylum in another country based on persecution related to SOGI.<sup>56</sup> States, including South Africa, are thus discouraged from *refouling* individuals on the basis of SOGI.<sup>57</sup> While without a binding force, the Yogyakarta Principles are a powerful treaty interpretation and advocacy tools.<sup>58</sup>

From the foregoing, it is clear that international human rights law under the realm of the United Nations treaties support the granting of asylum and protection of refugees for reasons of any persecution based on SOGI.

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<sup>52</sup> South Africa signed the CERD on 3 October 1994 and ratified on 10 December 1998. See [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) (accessed 15 July 2014).

<sup>53</sup> CERD (n 51 above) Article 4.

<sup>54</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 22 of 24 August 1996.

<sup>55</sup> Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007), introductory section.

<sup>56</sup> Yogyakarta Principles (n 55 above) principle 23.

<sup>57</sup> Yogyakarta Principles (n 55 above).

<sup>58</sup> PL Ettelbrick & AT Zerán 'Final Report: A study of the impact of the Yogyakarta Principles on international human rights law development' (November 2007-June 2010) 5.

## 2.5 International human rights law and its effects on South Africa

Under section 231 of the South African Constitution 1996, international agreements bind the Republic upon approval of such agreements by resolutions in both the national assembly and the national council of provinces. Agreements that are of a technical, administrative or executive nature or, those that do not require either ratification or accession are exempt from such approval. Also exempt from prior resolution or approval are those agreements entered into by the national executive but which must be tabled in the assembly and the council within a reasonable time. Under section 231(4), international agreements become law in South Africa when enacted into law by national legislation. However, a self-executing provision of an agreement that has been approved by parliament is law in the republic except if it is not consistent with the Constitution or an Act of Parliament. South Africa is bound by international agreements which were binding to it when the 1996 Constitution came into force in 1997.<sup>59</sup>

### 2.5.1 Monist and dualist approaches to international law

Generally, the interaction between the domestic laws and international laws in South Africa can be seen from a split lens. One is that in which the act of ratifying a treaty immediately incorporates or subsumes the particular international law into the domestic law. This is called the monist approach and is applicable to the self-executing treaties. The other is that in which international law has first to be legislated at the national level in a process called 'domestication'. This is called the dualist approach.<sup>60</sup>

While the South African Constitution adopts a dualist approach to international obligations emanating from treaty law, its approach to customary international law and particular treaties that are self-executing, is a monist one,<sup>61</sup> as per section 232. That provision states that 'customary international law is law in the Republic unless it is inconsistent

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<sup>59</sup> See sec 231(5) 1996 Constitution of South Africa, Act 108 of 1996.

<sup>60</sup> These are simple definitions of these two different legal systems. There are deeper doctrinal discussions of what constitutes each approach. The varying literature and schools of thought to these two approaches are beyond the scope of this mini-dissertation.

<sup>61</sup> *President of the Republic of South Africa and Others v Quaglini* 2009 (2) SA 466 (CC). See also, *State v Makwanyane* 1995 6 BCLR 665 (CC).

with the Constitution or an Act of Parliament'. South Africa's approach therefore, is neither strictly monist nor strictly dualist. It can be described as a hybrid in its approach.

The purposive approaches and obligations towards positive interpretation of international law encapsulated in sections 233 and 39(2) of the Constitution which make South Africa's legal model neither strictly monist or dualist; that marries monist and dualist principles. Ngcobo CJ succinctly captures this position;

[The South Africa Constitution]...reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law....These provisions of our Constitution demonstrate that international law has a special place which is carefully defined by the Constitution.<sup>62</sup>

South Africa is a state party to, and has domesticated, the 1951 Refugee Convention and its 1967 Protocol. It has also ratified most of the international human rights instruments discussed above, that are relevant to the protection of refugees and asylum seekers including those whose refugee claims were or are based on SOGI. Therefore, South Africa is under international obligations to grant asylum and protect refugees whose applications are based on SOGI.

## 2.6 Conclusion

Consensus exists at the global level of the UN as well regional levels that discrimination on the basis of SOGI is a violation of fundamental rights and therefore impermissible. South Africa has in its 1996 Constitution recognised this position. The judicial interpretations of the relevant provisions in the Constitution have further affirmed the rights of LGBTI persons in South Africa's Bill of Rights.

The South African Bill of Rights applies to all persons resident within the Republic and thus asylum seekers and refugees who apply for international protection

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<sup>62</sup> See the dissenting opinion by Ngcobo CJ in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) 2011 ZACC 6 at paragraph 97.

because of a fear of persecution based on their SOGI are deserving of, and have a right to be protected under the Constitution. This has been confirmed by the Refugees Act which clarifies unequivocally that gender and sexual orientation are reasons for which one can apply for asylum under the ground membership of a particular social group.

## CHAPTER THREE: ACTUAL PRACTICE AND CHALLENGES

### 3.1 Introduction and conceptual framework

This chapter interrogates and reveals the actual asylum process, experiences and challenges faced by asylum seekers and refugees, their protection environment in the country including access to certain civil, economic and social rights. The chapter also reflects challenges facing the Department of Home Affairs (DHA) and other actors in the refugee and asylum seeker protection framework.

The Department of Justice and Constitutional Development (DJ&CD) acknowledges the existence of unfair practices and treatment within public institutions that provide services and protection to LGBTI persons.<sup>1</sup> Against the backdrop of those practices, the DJ&CD established a national intervention strategy for LGBTI<sup>2</sup> which even though not specifically mentioning asylum seekers and refugees, is couched in language that refers to communities generally, without distinction, and would therefore include LGBTI asylum seekers and refugees.

In reviewing some decisions in which the DHA rejected a number of asylum applications, mainly from Uganda,<sup>3</sup> it was disconcerting to note that most of the decisions were based on the lack of a well-founded fear of persecution.<sup>4</sup> The DHA argued that the asylum seekers would have been able to internally relocate within their own countries to avoid localized harm. The agents of persecution in those cases were state authorities enforcing anti-homosexuality laws.<sup>5</sup> Internal relocation is normally not considered as a relevant or reasonable option where the state is the agent of

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<sup>1</sup> Department of Justice and Constitutional Development (DJ&CD)'s 'national intervention strategy for lesbian, gay, bisexual, transgender and intersex (LGBTI) sector', available at; <http://www.justice.gov.za/vg/lgbti/2014-LGBTI-Strategy.pdf> (accessed 12 September 2014).

<sup>2</sup> n 2 above.

<sup>3</sup> At the time of writing this mini-dissertation, the Uganda Constitutional Court had struck down the Uganda anti-homosexuality law only for reasons of technicality. However, the subjects of this study had applied for asylum when the law was still in force.

<sup>4</sup> A majority of the denial decisions reviewed were based in whole or in part, on the lack of a well-founded fear of persecution.

<sup>5</sup> Uganda's (defunct) Anti-homosexuality Act 2014 and the Uganda Penal Code Act 1950. The latter contains provisions for unnatural offences at sections 145 and 146.



persecution.<sup>6</sup> The state is presumed to have authority and control over its entire territory and relocation is therefore not a relevant consideration.<sup>7</sup>

In another case, the asylum application was denied as being manifestly unfounded although the asylum seeker originates from Nigeria, a country where homosexuality is prohibited by law and where the generally known facts regarding social attitudes towards LGBTI persons in that country remain extremely negative.<sup>8</sup>

In countries where there are laws that penalize homosexuality by, for instance, a term of imprisonment, such sanctions in and of themselves, may constitute persecution provided that the law is actually being enforced.<sup>9</sup> These two decisions show some inherent problems in properly and fairly assessing claims based on sexual orientation bearing in mind that in most of the countries of origin, the state is the agent of persecution. An analysis of the asylum process and unfair experiences by asylum seekers and refugees is discussed shortly in this chapter.

### **3.2 The application process and procedural safeguards**

Asylum seekers and refugees enjoy the rights under the Refugees Act,<sup>10</sup> the Constitution<sup>11</sup> and international human rights law.<sup>12</sup> These rights include the right to be treated with human dignity, equality<sup>13</sup> and freedom from discrimination. All state organs

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<sup>6</sup> UNHCR Guidelines on international protection, internal flight or relocation alternative within the context of Article 1A(2) of the 1951 Convention and/or 1967 protocol relating to the status of refugees (2003) paras 13-14

<sup>7</sup> UNHCR (2003) IFA Guidelines (6 above) paragraph 13. Also see Summary Conclusions – Internal protection/relocation/flight alternative, global consultations on international protection, San Remo expert roundtable 6–8 September 2001.

<sup>8</sup> The 2014 PewResearch global attitudes project puts at 93%, the disapproval of homosexuality in Uganda as a morally unacceptable conduct. <http://www.pewglobal.org/2014/04/15/global-morality/table/homosexuality/>.

<sup>9</sup> Europe EU press releases, Homosexual applicants for asylum can constitute a particular social group who may be persecuted on account of their sexual orientation [http://europa.eu/rapid/press-release\\_CJE-13-145\\_en.htm](http://europa.eu/rapid/press-release_CJE-13-145_en.htm) (accessed 10 September 2014).

<sup>10</sup> Refugees Act 130 of 1998.

<sup>11</sup> The Constitution of South Africa Act 108 of 1996, section 7.

<sup>12</sup> Including obligations under 1951 Convention Relating to the Status of Refugees and the 1967 Protocol thereto.

<sup>13</sup> Constitution section 7(2).

are enjoined to protect the rights in the Constitution.<sup>14</sup> Similarly, refugees and asylum seekers have obligations to respect the country's laws and customs.<sup>15</sup>

Although the law is positive and progressive in the protection of fundamental rights and freedoms of all in the Republic,<sup>16</sup> including LGBTI asylum seekers and refugees, the 'lived realities' and the law are worlds apart. Asylum applicants of diverse sexual orientations and gender identities face insurmountable challenges. This research has identified that the challenges straddle the various stages of asylum and beyond.

The Refugees Act, read together with the Immigration Act,<sup>17</sup> establishes a four-stage process. After arrival in the country, asylum seekers firstly notify the refugee reception office (RRO) of their intention to apply for refugee status. Thereafter, within fourteen days, completed asylum applications are submitted to the RRO.<sup>18</sup> During the fourteen days, an intending asylum seeker is issued with a non-renewable permit under section 23.<sup>19</sup> The next stage is a first hearing in the refugee reception offices and issuance of a temporary six months permit under section 22 of the Act.<sup>20</sup>

The temporary permit contains an entitlement to study, work and access other socio-economic rights pending the final stage which is a second hearing by a refugee status determination officer (RSDO). During the hearing by the RSDO, full reasons for seeking refuge are obtained, evaluated and a reasoned decision issued.<sup>21</sup> The decision would be to grant refugee status or reject an application as being manifestly unfounded,

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<sup>14</sup> Constitution section 8(1).

<sup>15</sup> Under article 2 of the 1951 Convention, refugees have duties to conform to laws and regulations as well as measures taken for the maintenance of public order in the country of asylum. See section 34 of the Refugees Act.

<sup>16</sup> DJ & CD Intervention Strategy (n 1 above).

<sup>17</sup> Immigration Act 13 of 2002.

<sup>18</sup> Sections 21-22 of the Refugees Act read together with section 23(1) of the Immigration Act.

<sup>19</sup> Department of Home Affairs, General procedure, application for asylum <http://www.home-affairs.gov.za/index.php/immigration-services/refugee-status-asylum> (accessed 30 September 2014).

<sup>20</sup> General procedure (n 19 above).

<sup>21</sup> General procedure (n 19 above).

abusive or fraudulent, or, if there are any questions of law, refer the matter to the Standing Committee for Refugee Affairs (SCRA).<sup>22</sup>

Manifestly unfounded claims are those claims that are not based on any of the grounds on the basis of which a person may apply for refugee status under the Refugees Act,<sup>23</sup> the 1951 Refugee Convention and its 1967 Protocol or the 1969 OAU Convention. A fraudulent application refers to an asylum application that does not evince a reasonable cause on facts. This includes information, documents or representations which an asylum seeker knows to be false and intended to materially affect the outcome of the application.<sup>24</sup>

When granted refugee status, the refugee is provided with a written recognition of refugee status through the issuance of a section 24 permit. This renewable permit, initially valid for two years, entitles the refugee to remain, work, study<sup>25</sup> and enjoy other rights provided for by the law.

### **3.3 The lived realities: ‘Law remains in Parliament’**

Outside of the asylum institutions, generalised homophobia exists and discrimination towards sexual minorities remains embedded in the attitudes that are yet to reflect the aspirations of the law in the daily lives of asylum seekers and refugees. The lived realities for LGBTI asylum seekers and refugees are that the law is ineffective and the human rights safeguards of those laws remain in Parliament where they are legislated. ‘*Out here, it is a different story*’,<sup>26</sup> one research participant stated.

During the in-depth interviews conducted, refugees and asylum seekers reported common challenges they encountered during reception and status determination interviews. Notable challenges are the failure to disclose the true reasons for seeking

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<sup>22</sup> General procedure (n 19 above).

<sup>23</sup> The Refugees Act, chapter one: general definitions xii.

<sup>24</sup> Refugees Act, chapter one: general definitions (n 10 above) xi.

<sup>25</sup> General Procedure (n 19 above).

<sup>26</sup> Interview with **PN**, a potential asylum seeker from Zimbabwe.

asylum, the lack of dignified treatment, lack of confidentiality, rushed decisions that do not reflect their persecution, and corruption. These factors are in turn discussed below.

### 3.3.1. Non-disclosure of reasons for seeking asylum

As was the case with many research participants, LGBTI persons often do not disclose their status to avoid risks of abuse during reception. They are unlikely to reveal their SOGI or non-standard body anatomy to those receiving them.<sup>27</sup>

Persons fleeing on the basis of sexual orientation or gender identity (SOGI) have often faced varied forms of persecution. These forms range from direct physical assaults, arbitrary police detentions and maltreatment, social discrimination and stigma, to general denial of fundamental rights.<sup>28</sup> A number of asylum seekers interviewed during the research project withheld the information from the RSDO based on their historical realities and experiences of their persecution.

**IMB** for example, is an asylum seeker from the Democratic Republic of Congo (DRC). He arrived in South Africa in 2009 and his case is still pending an appeal hearing by the Refugee Appeals Board (RAB)<sup>29</sup> after having been issued with a rejection around November 2013.

When he first arrived, **IMB** was traumatised by persecutory treatment in the DRC. During the interview with an RSDO, **IMB** could not express himself in English and was provided with an interpreter who introduced himself as being from the DRC. Because of his traumatic experiences of persecution in the DRC where he had been arrested and tortured for being gay, **IMB** feared that he would be subjected to the same experiences in South Africa if his sexual orientation became known.

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<sup>27</sup> UNHCR (2011) 'Need-to-know guidance: working with LGBTI persons in forced displacement', 9.

<sup>28</sup> Overall analysis based on interviews with 14 refugees and asylum seekers regarding their reasons for fleeing their countries of origin.

<sup>29</sup> Refugees Act section 26.

Afraid that the Congolese interpreter would pass information to the rest of the Congolese community where he lived, during the interview **IMB** decided to withhold the true reasons why he had fled the DRC. He instead informed the RSDO that he had fled the DRC because of the war in which his father and other family members had been killed. Notably, **IMB** had been affected by the conflict in the Eastern DRC where his father and some family members were indeed killed. However, **IMB** was not present at the time and place when his family members were killed.

**JSMN** did not tell the true reasons why he fled his country because he was not provided counseling as to confidentiality of information he provided. *'On the day of my interview, the interpreter was from my country', JSMN said. 'Because of what I had gone through back home, I was afraid of what would happen to me if anyone from my country knew about my sexual orientation. I was afraid that they would pass the information to the people back in my country that I was now in South Africa. So I decided to lie'.*

Persons fleeing because of their sexual orientation and gender related-persecution require a supporting environment assuring them of confidentiality.<sup>30</sup> Because of the shame arising from experiences of past persecution or trauma, some asylum seekers, like **IMB** and **JSMN**, are reluctant to reveal the persecution suffered or the extent thereof or even the true nature of the persecution.<sup>31</sup> **IMB** and **JSMN** were not counseled that the interview and information elicited therefrom would be confidential. According to the United Nations High Commissioner for Refugees (UNHCR) RSD Handbook, persons such as **IMB** and **JSMN** may continue to fear family and community reprisals,<sup>32</sup> and this could lead to concealing information.

In order to facilitate full disclosure of personal and sensitive information such as SOGI, the UNHCR 2002 Guidelines on Gender Related Persecution<sup>33</sup> are of specific

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<sup>30</sup> UNHCR Handbook and guidelines on procedures and criteria for determining refugees status under the 1951 Convention and the 1967 protocol relating to the status of refugees (2011) 87 paragraph 35.

<sup>31</sup> UNHCR RSD Handbook (n 30 above).

<sup>32</sup> UNHCR RSD Handbook (n 30 above).

<sup>33</sup> UNHCR Guidelines on International Protection, Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002) paragraphs 35 & 36 iv.

relevance. Persons such as **JSMN**, whose applications are based on SOGI, should be accorded an environment that is reassuring so as to create mutual trust between the asylum seeker and the interviewing officer.<sup>34</sup>

### 3.3.2 Undignified treatment and inadequate procedural safeguards

During his RSD interview at the DHA, **IMB** explained that his experience was very humiliating. When he first arrived and went to apply for asylum at the DHA, he queued with other asylum seekers. While in the queue, *'I was pushed from the male queue to the female queue and the women pushed me back to the male queue. All this time, they shouted 'moffie moffie moffie'. Once I get inside to the DHA office, the officers there laugh at me and ask what is wrong with me. The perception at home affairs is that of gay people being less human. When I go to renew my section 22, the other refugees insult me because they pick me out from the clothes I wear. I get out and the people on the streets treat me like I am dirt. It is a bad life'*, **IMB** lamented.

**GM** is a transgender-female who fled Uganda to South Africa in 2012. She was granted refugee status in 2014 based on the true account of what happened to her in Uganda. Like many LGBTI refugees and asylum seekers, **GM** experienced a humiliating and demeaning treatment at the DHA where she was insulted several times by the officials at the department. *'As soon as it becomes known that one is not 'straight' or is 'gay' they get humiliated and abused especially by DHA officials and outside by Congolese and Nigerians'*, **GM** noted. During **GM's** appointments at the DHA, she would normally queue with the men. She does this to avoid being insulted, humiliated and sometimes even attacked by either the men or the women.

LGBTI asylum seekers may continue to experience harm once they arrive in the countries of asylum thereby making it difficult for them to access asylum procedures.<sup>35</sup> The UNHCR 'need-to-know guidance' recommends additional assistance and measures during reception and provision of other protection services. This need is evident in the cases of **IMB** and **GM** and other LGBTI refugees and asylum seekers who require

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<sup>34</sup> UNHCR 2002 Guidelines (n 33 above).

<sup>35</sup> UNHCR Need-to-Know-Guidance (n 20 above) 4.

special reception, care arrangements and assistance to accessing asylum procedures and protection from the vulnerabilities of physical harm or even sexual violence at service delivery points.<sup>36</sup>

In the case of **PRS**, a gay refugee from Uganda, initial treatment at the DHA was as humiliating as most LGBTI asylum seekers and refugees that he knows. During his initial appearances at the DHA, the officials there used to laugh at and ridicule him. They would draw the attention of other officials to him whenever he walked in. *'Come and see this moffie'*, they would exclaim. *'It was demeaning to see everyone looking at me as though I was a ghost. These are the same people that I was expecting to help me. It felt hopeless'*, **PRS** lamented.

**PRS** was interviewed by a female officer whom he praises as quite reasonable compared to the treatment that other LGBTI asylum seekers have reported. Of this interview, **PRS** stated that, *'when I mentioned to the officer that I was gay, she stopped the interview, left, and only resumed after some hours. When the officer was ready to resume my interview, she shouted at me; 'you, moffie... come!' At first, I did not understand if it was me being called because the word 'moffie' was one that I had never heard before. I only realized it was me she referred to because her eyes were fixed at me and she shouted even louder asking if I thought she had the whole day to wait for me. A few minutes after the interview commenced, another officer came to briefly listen in to my story and at some different times as my interview progressed, the two officers would burst into laughter'*.

**PRS** feels that the particular officer who interviewed him was reasonable because she actually took time to listen to him even though appearing bemused during the interview.

**PRS** arrived in South Africa on 25 December 2009. He fled Uganda after having been arrested, detained and tortured for being gay by police while in custody. He was granted refugee status on 30 January 2014. A request for the decision from the DHA is still pending but it may be assumed that **PRS** was granted refugee status based on persecution for being gay in Uganda.

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<sup>36</sup> n 35 above.

During refugee status determination interviews, interviewers and decision makers, such as the RSDOs should ensure objectivity to avoid conclusions founded upon stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals.<sup>37</sup> Respect for the fundamental rights and human dignity of the individual should always be the guiding principle.<sup>38</sup> The use of what appears to be a derogatory term, *moffie*, applying a harsh language, and entertaining the presence of other persons during interviews, as happened during **PRS**' interview, offends these salient and important procedural safeguards. Such undignified treatment, as **PRS** was subjected to, exacerbates the feeling of non-acceptance and attendant psychological trauma in the country of refuge.

### 3.3.3 Corruption and overzealous asylum denials

Widespread corruption is a problem within the DHA that the government through the ruling African National Congress (ANC) acknowledges in its March 2012 Policy Discussion document. The unofficial policy to limit access to asylum through consistent denial of asylum applications has created fertile ground for corruption to thrive.

**Jimmy**, a gay refugee from the DRC who entered South African in May 2009 holds a valid section 24 permit. **Jimmy** had been told by other foreign nationals that he would not be granted refugee status for being gay. The same people advised **Jimmy** that if he paid money to a DHA official, he would be granted refugee status. **Jimmy** engaged in 'piece jobs'<sup>39</sup> and saved money out of which he gave R2900 to a DHA official through an intermediary. In return, he obtained the refugee permit.

**SOO** is an asylum seeker from Nigeria whose application has been rejected as manifestly unfounded. **SOO** stated as follows:

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<sup>37</sup> UNHCR *Guidelines on International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* HCR/GIP/12/09 23 October 2012.

<sup>38</sup> UNHCR 'summary report on informal meeting of experts on refugee claims relating to sexual orientation and gender identity' (2011) paragraph 34.

<sup>39</sup> 'Piece jobs' are a common reference to casual, non-indentured labour in South Africa.



*'I was a journalist in Nigeria. When I applied for asylum in Durban, it was a spectacle on the day of my interview. When I started narrating my story, the DHA official summoned others to come and see a homosexual. I sat there telling my harrowing experience in Nigeria as the officials listened in awe. One of them asked me what would happen to me if he rejected my refugee status application. I explained reasons why I left Nigeria....This interview took place in a hall with five interviewers all asking me questions in turns and sometimes without letting me to answer a question, they would ask another question. Eventually, the DHA official told me that I did not look like a gay and my asylum application was rejected as manifestly unfounded. The officials at the DHA generally do not want to hear that an applicant is gay'.*

**SOO** was not explained the reasons for the rejection of his asylum application. The law requires that an applicant be provided with reasons for the denial of an application.<sup>40</sup> The RSDO decision which was reviewed during this research did not evince a detailed reasoning to support the conclusion that the application was manifestly unfounded. As such **SOO** has been put in a difficult situation as far as lodging a competent appeal is concerned. This offends the important provisions relating to procedural fairness in all administrative actions under the Promotion of Administrative Justice Act.<sup>41</sup>

**Jimmy** and **SOO**'s situations may not be isolated ones. With what appears to be a consistent trend of rejecting asylum applications based on SOGI, most applicants may resort to corruption to regularise their stay in South Africa. Corruption and laxity have in the past been noted to be rampant in the RSD process.<sup>42</sup> Those who are unable to bribe, such as **SOO**, end up being rejected and fall victim to unfair administrative actions.

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<sup>40</sup> Section 24(4) of the Refugees Act.

<sup>41</sup> The Promotion of Administrative Justice Act 3 of 2000. Section 33 of the Constitution demands for procedural fairness and requires written reasons for adverse administrative decisions to be provided.

<sup>42</sup> V Darshan 'A foot in the door, access to asylum in South Africa' (2008) 25 2 *Refuge* 44.

Studies have suggested notable overzealousness in the asylum procedures resulting in the unlawful denial of access to the system that negatively prejudices asylum seekers.<sup>43</sup>

A 2012 study by Roni Amit from the African Centre for Migration and Society (ACMS)<sup>44</sup> concluded that ‘South Africa’s asylum system exists to refuse access to the country and makes no attempt to realize the goal of refugee protection’ and ‘[It] functions solely as an instrument of immigration control’.<sup>45</sup>

From decisions reviewed, it is evident that the RSDOs had not given due attention to prevailing country of origin conditions in adjudicating asylum applications. Applicants from Uganda and Nigeria for example have been rejected for lack of a well-founded fear of persecution notwithstanding that anti-homosexuality laws exist in those countries. There is also a misapplication of the Refugees Act. The decisions are presented in a way that does not recognize SOGI as a ground for persecution contrary to the Act.

Just as Amit’s research study found, this research also reveals an apparent focus by RSDOs on the history of persecution as evidence of future risk. Ugandan gays and lesbians were rejected notwithstanding the prevailing negative social, political and legal environment in Uganda. Some decisions recommended that applicants would not face persecution if they remained discreet about their sexual orientation.

LGBTI persons are entitled to freedom of expression in much the same way as others. A person cannot be denied refugee status on the basis that they should conceal

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<sup>43</sup> Darshan (n 42 above).

<sup>44</sup> A Roni ‘No refuge, flawed status determination and the failures of South Africa’s refugee system to provide protection’ (2011) 23 3 *international journal of refugee law* 458-488. See also, ACMS Research Report itself, A Roni ‘No way in, barriers to access, service and administrative justice at South Africa’s refugee reception offices’ (September 2012) *ACMS Research Report* 79 (n 76 below).

<sup>45</sup> South Africa’s flawed asylum system, information posted on the Lawyers for Human Rights (LHR) website <http://www.lhr.org.za/news/2013/south-africas-flawed-asylum-system> (accessed 01 December 2014).

their identity, opinions or characteristics so as to avoid persecution.<sup>46</sup> The above findings reflect overzealousness to reject asylum applicants that genuinely need international protection as refugees.

### 3.3.4 Errors of law and inadequate procedural safeguards

From interviewing rejected asylum seekers and upon reviewing some of the decisions, errors of law were apparent on the face of the records. There was also a failure to ensure that certain minimum procedural safeguards are maintained, including confidentiality measures, objectivity, and building trust so as to facilitate a full and truthful disclosure of the reasons for flight.

Asylum applications were mostly denied because they are manifestly unfounded,<sup>47</sup> or that internal flight alternative was available. Some decisions were unclear and a muddle of credibility concerns, veiled as a lack of evidence of persecution.

SOGI, as already discussed, constitutes a basis for granting refugee status under the ground, membership of a particular social group contained in both the Refugees Act<sup>48</sup> and under international refugee law.<sup>49</sup> **SOO** fled Nigeria after harassment and loss of employment and income as a result of his sexual orientation. Therefore, to consider **SOO**'s claim to be manifestly unfounded is a clear error of law that cannot stand judicial scrutiny.

That **SOO** was interviewed in a hall, by more than one RSDO officer and subjected to what appears to be prejudicial and intrusive questioning, offends the procedural safeguards in the Refugees Act as well as the relevant UNHCR guidelines requiring amongst other measures, that confidentiality be maintained and applicants to

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<sup>46</sup> UNHCR 2012 Guidelines (n 37 above) paragraphs 30-33.

<sup>47</sup> Refugees Act, section 1(xii).

<sup>48</sup> Refugees Act, section 1 (xxi).

<sup>49</sup> The 1951 Refugee Convention Relating and the 1967 Protocol thereto, and the 1969 OAU Convention.

be treated with dignity and respect.<sup>50</sup> Intrusive questioning is by its very nature disrespectful and an infringement of the right to dignified treatment.

According to the UNHCR 2012 Guidelines,<sup>51</sup> the interviewers and decision makers are encouraged to be objective<sup>52</sup> and non-judgmental.<sup>53</sup> To say that **SOO** 'did not look like gay' falls short of the desired objectivity and non-judgmental standards. In this respect, the UNHCR 2012 Guidelines warn that 'some LGB[TI] individuals, for example, may harbour deep shame and/or internalized homophobia, leading them to deny their sexual orientation and/or to **adopt verbal and physical behaviours in line with heterosexual norms and roles**'. (**Emphasis added**). Furthermore, asylum seekers who come from 'highly intolerant countries may, for instance, not readily identify as LGBTI and this alone should not rule out that the applicant could have a claim based on sexual orientation or gender identity where other indicators are present'.<sup>54</sup>

Nigeria, where **SOO** comes from, has gone beyond intolerance towards sexual minorities, pushed the unremitting boundaries of intolerance and homophobia, to legislating against same sex conduct.<sup>55</sup> The rejection of **SOO**'s asylum application exposes him to a real prospect of *refoulement*. For the DHA, therefore, to deny an asylum application from anyone, let alone **SOO** claiming persecution on the basis SOGI, as being manifestly unfounded defies all the indicators regarding the restrictive legislative and social environment for LGBTI persons in Nigeria, and constitutes a flagrant error of law.

Questions regarding the credibility should not be confused with the lack of nexus to the grounds in the Refugees Act or the international refugee law. It would appear that the RSDO had difficulties believing the veracity of **SOO**'s claimed sexual orientation namely, that he may not be gay. However, that is not the same as saying that the

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<sup>50</sup> UNHCR 2011 summary report (n 38 above).

<sup>51</sup> UNHCR 2012 Guidelines (n 37 above).

<sup>52</sup> UNHCR 2012 Guidelines (n 37 above) paragraph 60(ii).

<sup>53</sup> UNHCR 2012 Guidelines (n 37 above) paragraph 60(iii).

<sup>54</sup> UNHCR 2012 Guidelines (n 37 above) paragraph 63(i).

<sup>55</sup> Nigeria's Same Sex Marriage (Prohibition) Act 2013.

reason for alleged persecution, presented as sexual orientation, is not a basis for granting refugee status under national and international refugee law.

The stereotyping that appears to exhibit itself in the DHA's decision rejecting **SOO**'s asylum application flies in the face of fundamental principles in assessing asylum applications based on SOGI. SOGI is not visible as would race and nationality for instance.<sup>56</sup> The preoccupation with obtaining evidence to prove a claim of an applicant being LGBTI is a misnomer that often results in partiality, personal assumptions or stereotypes.<sup>57</sup> This should be avoided.

### 3.3.5 Structural and systemic inefficiencies in service delivery

The RROs are characterized by disorder and inefficiency in the way services are delivered to asylum seekers and refugees.

**RN**, a lesbian from Uganda, whose asylum application was rejected in 2009 and has an appeal pending for the last five years complained of long waiting hours at the DHA when renewing her asylum documents. During the long waiting hours, asylum seekers and refugees from different countries keep asking if she is a woman or a man. *'They (women) keep mocking me saying that I should queue with men and not women. The officials at the DHA don't treat me with respect and do not think I am normal to be a lesbian'*, **RN** said.

**JSMN** is a gay man from the Republic of Congo (RoC). He arrived in South Africa on 21 May 2012. His asylum application was rejected and the appeal is still pending with the SCRA.<sup>58</sup>

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<sup>56</sup> V Turk 'Sexual orientation and gender identity and the protection of forced migrants: Ensuring protection for LGBTI persons of concern' (2013) 42 *Forced Migration Review* 6.

<sup>57</sup> n 56 above.

<sup>58</sup> Procedural fairness dictates that all administrative and judicial bodies provide hearings and decisions within a reasonable time.

**DM** is transgender female from Burundi who arrived in South Africa on 9 December 2009 but is still an asylum seeker. **DM** has not yet been interviewed by the RSDO.

Although the Regulations to the Refugees Act require failed asylum seekers to lodge appeals within 30 days, the period within which appeals should be heard and disposed of is not stated. Impliedly however, such hearings and determination should be within a reasonable time-frame. Five year is far from reasonable and is a denial of justice.<sup>59</sup>

In the case of **DM**, it is instructive to note that the Refugees Act provides that status determination be finalized within 180 days following the lodging of an asylum application.<sup>60</sup> The reality, however, is that many asylum seekers such as **DM** wait for years before their asylum applications are finalized.<sup>61</sup>

The disorganisation and delays in properly providing services to refugees and asylum seekers adversely affect LGBTI asylum seekers and refugees who already face various levels of discrimination and threats to their physical safety and security.

### **3.3.6 Trauma, lack of social support systems, and non-disclosure**

LGBTI asylum seekers and refugees normally do not enjoy the community support that they may have had before their flight. As was the case of **JSMN** whose interpreter during the interview was also from the RoC, compatriots would normally be a reminder of the very agents of persecution.<sup>62</sup> The asylum seekers and refugees are therefore likely to withhold their SOGI status.<sup>63</sup>

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<sup>59</sup> Under section 6 of the Promotion of Administrative Justice Act 3 of 2000, unreasonable delay can be a ground for judicial review.

<sup>60</sup> Regulation 3(1), Regulations to the Refugees Act 130 of 1998.

<sup>61</sup> PASSOP 'Economic Injustice, Employment and Housing Discrimination Against LGBTI Refugees and Asylum Seekers in South Africa' (2013)4.

<sup>62</sup> A Shidlo & J Ahola (ed) 'Sexual orientation and gender identity and the protection of forced migrants, *mental health challenges of LGBT forced migrants* (2013) 42 *Forced Migration Review* 10.

<sup>63</sup> Shidlo & Ahola (n 62 above).

**JSMN** also did not understand English at the time when he was first interviewed and for the reasons he provided for seeking asylum, **JSMN** was told by the RSDO that he came to South Africa in search of a better life and not because of persecution. **JSMN** experienced severe persecution in which he was stabbed in the eye.<sup>64</sup> He underwent eye replacement surgery in South Africa and is receiving trauma counseling.

The negative experiences at the DHA have left other potential applicants such as **PN**, a gay man from Zimbabwe hiding. **PN** fled into South Africa in 2007 and is yet to apply for asylum.

At the end of 2007 **PN's** family learned that he was gay. **PN** and his boy-friend used to cross-dress and one day while driving home, **PN** and the boyfriend were stopped by police who asked if they were '*ngochana*': a local reference to homosexuals. **PN's** boyfriend answered 'yes'. They were both taken to a police station where the homophobic police tortured them for four days. His friend's condition deteriorated as a result of the torture. Seeing this, the police released them and **PN's** boyfriend died the following day. **PN** then fled the country into South Africa.

**PN** lives an isolated life because of his past experiences. He fears applying for asylum because of the negative feedback about the DHA. **PN's** situation is supported by the UNHCR 2012 Guidelines at paragraph 30:

'LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret... to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or family exclusion'.

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<sup>64</sup> **JSMN** now has the asylum appeal application pending at the SCRA where he intends to provide true reasons seeking asylum.

### 3.3.7 Lack of protection by law enforcement agents

Law enforcement and in particular, the South Africa's Police Services (SAPS) has reportedly been known to be homophobic towards LGBTI persons including refugees and asylum seekers. Without effective police protection, this community's vulnerabilities become intolerable both in public and private life.<sup>65</sup> Both physical and sexual assaults by the SAPS have been reported.<sup>66</sup>

According to **PN**: *'in South Africa, there are rights but those rights end (remain) on the floor of parliament where they are made. Life in townships is difficult both for foreigners and for the South African nationals. Police stations exist but these do not help much especially for the foreigners. I have been robbed and assaulted several times and have reported ... to the police. Police open the cases and promise to investigate but that is usually the end of it..'*

**JMN** is a gay refugee from the DRC. He arrived in South Africa in 2010 after fleeing persecutory discrimination from other students and teachers in school, family and relatives at home, and friends in social places.

**JMN** had hoped to live in South Africa and pursue LGBTI rights activism. However, he has been assaulted several times by members of the public. In one incident, **JMN** reported an assault to the police. The police could not protect **JMN** after learning that he was gay. **JMN**, amid sobs recounted that, *'...instead, the police asked me to change my ways. They dragged me to the back of the police station where they seriously beat me. They almost broke my arm'*.

The homophobic attack on **JMN** was reported in an online media website through which it came to the attention of UNHCR and the author.<sup>67</sup> **JMN** reported the assault to the police oversight body, Independent Police Investigative Directorate (IPID). Fearing retaliation by the concerned police officers, UNHCR through the author worked with the

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<sup>65</sup> PASSOP (n 61 above) 4-5.

<sup>66</sup> PASSOP (n 61 above) 5.

<sup>67</sup> South-Africa brutal homophobic police attack being investigated-<http://www.pinknews.co.uk/2014/07/29/south-africa-brutal-homophobic-police-attack-being-investigated/> (accessed 8 August 2014).



United States Refugee Admissions Program (USRAP) and **JMN** has since been resettled to the United States of America.<sup>68</sup>

At the time of his departure, **JMN's** report to the IPID (IPID 2014080558) was yet to be concluded. It is not optimistic that, with **JMN's** departure, his known assailants will ever be fully investigated and or punished.

**TC**, the first openly Malawi gay case and now a trans-woman was granted refugee status after successful legal representation at the DHA. She has been assaulted twice and her reports to the police have been unhelpful.

Allowing those who harm gay people to go unpunished is a violation of human rights.<sup>69</sup> In the words of Hillary Clinton; former United States of America Secretary of State, 'it is a violation of human rights when people are beaten or killed because of their sexual orientation, or because they do not conform to cultural norms about how men and women should look or behave'.<sup>70</sup>

The failure by the police to intervene on reports of threats to physical safety and security by the LGBTI asylum seekers and refugees exacerbates homophobia and a feeling of rejection within this community. It is an ingredient for homophobia built on a culture of impunity.

### **3.3.8 Inaccessible asylum procedures, documentation and the risks of detention and *refoulement***

Asylum seekers and refugees interviewed expressed frustration in lodging new asylum applications or renewing documents due to closures of RROs across parts of the

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<sup>68</sup> **JMN** departed to the United States on 19 November 2014 where he will be a permanent resident and eventually a citizen. Credit goes to the office of the UNHCR the US Resettlement Programme.

<sup>69</sup> A Richard 'Sexual orientation and gender identity and the protection of forced migrants' (2013) 42 *Forced Migration Review* 4.

<sup>70</sup> Remarks by former United States of America's Secretary of State, Hillary Clinton, in recognition of international human rights day at the Palais de Nations, Geneva, Switzerland on the 6 December 2011.

<http://www.state.gov/secretary/20092013clinton/rm/2011/12/178368.htm> (accessed 1 December 2014).

country. Many did not have valid documents and had been unable to pay fines for expired documents.

**BK** is a lesbian asylum seeker from Uganda who arrived in South Africa in March 2014. **BK** was smuggled into the country by a truck driver and taken to Cape Town where the RRO is closed<sup>71</sup> for new applications. Besides not having income to enable her to travel to Durban or Musina to lodge her asylum application, without a valid document **BK** is at risk of being arrested and even deported.

The closure of the Cape Town RRO has and continues to remain particularly problematic for undocumented LGBTI asylum seekers who face the risk of detention and even *refoulement*.<sup>72</sup>

**BK** dated and lived with her girl-friend in Uganda as a result of which she was persecuted.<sup>73</sup> She was finally evicted by a landlord who feared being punished under the new law.<sup>74</sup> **BK** was smuggled into South Africa through Musina<sup>75</sup> and now faces a risk of being deported to Uganda having been unable to lodge an asylum application.

**BL**, a gay asylum seeker from Kenya with an appeal pending since 2008, failed to renew his asylum document because he was hospitalized following a homophobic attack. DHA has imposed R2500 fine which he cannot afford. Without valid documents, he risks arrest and deportation to Kenya where he will be persecuted.

The practice of fining refugees and asylum seekers for expired permits has resulted in many of them being left undocumented and therefore placing them at risk of

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<sup>71</sup>In July 2012, the DHA closed its Cape Town Refugee Reception Office and would not accept any new applications. A court order gave an ultimatum for the reopening by July 2013 but DHA defied the order.

<sup>72</sup>PASSOP (n 61 above).

<sup>73</sup>Uganda's defunct Anti-homosexuality Act 2014 outlawed same sex relations.

<sup>74</sup>Under sections 7 and 13(1) of the defunct law landlords could be punished for aiding, abetting or providing premises to homosexuals.

<sup>75</sup>Border town between South Africa and Zimbabwe.

*refoulement* as many are unable to pay.<sup>76</sup> The closure of RROs in parts of the country, the dysfunctional systems in those offices and the imposition of fines to unemployed asylum seekers and refugees are problematic.

### 3.3.9. Unemployment and housing challenges

The legal regime regulating both employment and housing is favorable and provides for access to these socio-economic rights. Sections 9, 26(1) and 26(3) of the Constitution provide for equality and prohibit against unfair discrimination, access to housing, and prohibit unlawful evictions respectively. The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>77</sup> (Equality Act) provides against discrimination on the basis of several grounds that include one's sexual orientation.<sup>78</sup>

Under section 4(1) of the Rental Housing Act, a landlord may not unfairly discriminate against prospective tenants based on the basis of race, gender, marital status, sexual orientation, ethnic or social origin, or language.<sup>79</sup>

LGBTI refugees and asylum seekers often have varied professional qualifications, skills and expertise developed in their countries.<sup>80</sup> While the law provides access to socio-economic rights, the lived realities for those interviewed during this project reflect a consistent denial of opportunities to meaningful use of their valuable skills.

**GM** is a hair stylist and has been denied jobs several times on account of his sexuality. **GM** recalls once she applied for a job and during the interview, the manager asked to have sex with her first. When she refused she was told 'to take a walk'.

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<sup>76</sup> A Roni 'No way in, barriers to access, service and administrative justice at South Africa's refugee reception offices' (September 2012) *ACMS Research Report 11*.

<sup>77</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>78</sup> The prohibited grounds in section 1 of the Equality Act.

<sup>79</sup> Rental Housing Act 50 of 1999.

<sup>80</sup> PASSOP (n 61 above) 3.

**PRS** has unsuccessfully applied for several jobs and not having any source of income, he now lives in shacks. **PRS** holds a degree in business administration and presently engages in commercial sex work to survive.

**DM** faces difficulties finding accommodation and work because of her sexuality. **DM** stated that *'house owners refuse to rent their houses to me since they can clearly see that I am not straight....Finding a job opportunity is very difficult and every day I face dangers from people who hate me because they see I am not like them'*.

Unemployment has made **DM** vulnerable to sexual exploitation. **DM** stated further that *'I was repeatedly raped by people in the townships but I could not report to the police .... I became a sex worker because of the difficulties I experienced... now I have HIV which I lived for a long time without knowing that I had. There was no one to help me'*. In this respect, Hillary Clinton has noted that *'It is a violation of human rights when lesbian or transgendered women are subjected to so-called corrective rape....or public spaces are out of bounds to people because they are gay'*.<sup>81</sup>

In the case of **JMN**, he was attacked by his landlord when he found out that **JMN** was gay. The landlord who also stayed in the same premises ordered that **JMN** does not receive any male visitors.

As many other refugees who are not gender-conforming, employment opportunities are very scarce. Without income, access to housing is a nightmare. For some refugees and asylum seekers, even when they find housing, the house owners have homophobic tendencies and unlawfully evict them or dictate the gender of visitors they can receive.

The above cases are simply, a microcosm of the larger problem facing LGBTI asylum seekers and refugees. Most resort to survival sex work and other risky behavior to eke out a living and in the course of which they are exposed to HIV infection and

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<sup>81</sup> Hillary Clinton (n 70 above).

other hazards. Without proper housing, they are forced into forms of 'nomadic' life which has attendant risks and dangers to their own physical safety and dignity.

### 3.3.10 Physical and mental health challenges

LGBTI asylum seekers and refugees often report a history of traumatic events across their lifespan.<sup>82</sup> These include forced prostitution and corrective rape all of which cumulatively or even in isolation, result in significant mental health challenges. Diagnoses range from recurrent depression, dissociative disorders, to post traumatic stress disorders (PTSD) and complex PTSD.<sup>83</sup>

**DM** has faced extreme difficulties that made her vulnerable to sexual exploitation. It was observed during the interview that **DM** appeared traumatized with possible mental health needs. She has been referred to a non-governmental organisation (NGO) that provides psycho-social assessment and support.

Many of the asylum seekers and refugees interviewed during this research project exhibited signs of trauma and mental health challenges. A number of others such as **DM** revealed their HIV<sup>84</sup> status, and **DM's** case, this has stalled her transitioning process as well.

LGBTI persons have diverse needs requiring physical care. Mental health care and psycho-social support is often necessary for physical or sexual violence, social isolation, rejection, concealment, depression, anxiety or other trauma.<sup>85</sup>

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<sup>82</sup> Shidlo & Ahola (n 62 above) 9.

<sup>83</sup> n 82 above.

<sup>84</sup> Human Immunodeficiency Virus that causes Acquired Immune Deficiency Syndrome (AIDS).

<sup>85</sup> The Henry J Kaiser Foundation Health and access to care and coverage for LGBT Individuals in the U.S. (October 2014) 4 available at <http://files.kff.org/attachment/health-and-access-to-care-and-coverage-for-lgbt-individuals-in-the-u-s-2-issue-brief> (accessed 1 December 2014).

### 3.3.11 Negative social attitudes and discrimination

In South Africa, there is a tense co-existence between progressive legislation that enshrines the rights of LGBTI persons on the one hand, and the pervasive discrimination, violence and hate crimes targeted at them.<sup>86</sup>

**J**, a gay man from the DRC, has on many occasions been attacked by members of his Congolese community. In 2011, **J** was in a train station when some people accosted and pushed him from the second concourse level. He fell a near thirty meters to the ground sustaining serious injuries.

In September 2013, **J** and a boyfriend were at home when some Congolese refugees came and accosted the pair. **J**'s boyfriend was fatally wounded during the homophobic attack and succumbed to his injuries. The police came but left immediately they learned that **J** was gay. **J** was left with the body of his boyfriend until the following morning. **J** pressed murder charges against the known assailants but, two of the suspects left and went back to the DRC. In the series of many threats, a week before the research interview with **J**, he had been seriously wounded and had a black eye with multiple other bodily injuries following a homophobic attack.

Ever since arrival in South Africa, **IMB** lives with humiliation because of his homosexuality. In public transportation, he is picked upon by members of the public who taunt him by shouting *moffie* at him.

**RN** has been raped several times Khayelitcha, a township where she lives. In 2010, five men accosted **RN** and three of them raped her in turns telling her that they wanted to 'cure' her abnormality. They wanted to show her that she is 'a woman and not a man'. Police did not respond to her reports.

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<sup>86</sup> B Roberts & V Reddy 'Pride and prejudice: Public attitudes towards homosexuality' (2008) *South African social attitudes survey 9* also available at <http://www.hsrc.ac.za/uploads/pageContent/1607/Pride%20and%20Prejudice.pdf> (accessed on 1 December 2014).

**BL** experiences difficulties with locals who dislike foreigners. According to **BL** the treatment is even worse for the gay. Stones are hulled to his temporary residences and is often humiliated by people shouting derogatory names; *moffie*, when he walks past.

In addition to being labeled witches and sorcerers, LGBTI persons in South Africa face human rights violations because of their SOGI and prejudice towards gays and lesbians remains rife.<sup>87</sup> The violations occur at different levels and perpetrated by families, churches and schools that use the myth that homosexuality is ‘un-African’.<sup>88</sup>

Some in South Africa perpetuate the myth that homosexuality is a deprivation that can be remedied. They assert that lesbians have yet to be satisfied through intercourse with a man.<sup>89</sup> **Eudy Simelane** is a former member of the country’s national team. She was raped and fatally stabbed twenty five times for her sexual orientation.<sup>90</sup> **Simelane’s** tragedy has befallen thirty one others who have been subjected to ‘corrective rape’ and only one legal conviction for murder recorded.<sup>91</sup>

### 3.4 Challenges facing the DHA

An interview conducted with a former official of the DHA acknowledged the experiences asylum seekers and refugees brought forth but also highlighting some challenges the DHA grappled with in its workload management and quality assurance.

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<sup>87</sup>R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 87. Also see, D Smith ‘South African lesbians live in fear, report finds’ *The Guardian*, 5 December 2011 <http://www.guardian.co.uk> (accessed 01 December 2014).

<sup>88</sup>S Hawthorne ‘Ancient hatred and its contemporary manifestation, the torture of lesbians’ (2005) 4 *Journal of Hate Studies* 33-58.

<sup>89</sup>I Asokan, ‘the ‘L’ word, an evaluation of corrective rape in South Africa’ (2012) available at [http://www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=1123:the-l-word-an-evaluation-of-corrective-rape-in-south-africa&catid=91:rights-in-focus&Itemid=296](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1123:the-l-word-an-evaluation-of-corrective-rape-in-south-africa&catid=91:rights-in-focus&Itemid=296) (accessed 01 December 2014).

<sup>90</sup>A Kelly ‘Raped and killed for being a lesbian: South Africa ignores ‘corrective’ attacks’, *The Guardian* 12 March 2009, <http://www.guardian.co.uk> (accessed 01 December 2014).

<sup>91</sup>A Mieses ‘Gender inequality and corrective rape of women who have sex with women, Gay Men’s Health Crisis’ (GMHC) (December 2009) *Treatment Issues* available at <http://www.scribd.com> (accessed 01 December 2014).

### 3.4.1 Influx of new of asylum seekers and negative impact on quality

According to UNHCR, South Africa is a major destination for asylum-seekers as well as migrants.<sup>92</sup> In 2008 and 2009, South Africa received the highest number of new asylum seekers globally.<sup>93</sup> In 2013, there were 300,600 asylum seekers and refugees in the country and this number is projected to be 350,000 by end of 2014 according to the UNHCR country profile for South Africa.

The DHA is faced with an increased number of new applications with the same amount of resources to process them, and maintain standards both qualitatively and quantitatively.

This research found that, the net result of the numerical increase in the new asylum applications is a processing backlog and pressure to finalise applications within set times which then impacts negatively on quality and efficiency of the status determination process. Timelines for completing applications are not met, decisions are not well argued with errors of both facts and law often a common occurrence. The inefficiencies therefore, create room for maneuvers by some unscrupulous officials and asylum seekers who on their part are desperate to regularise their stay in the country.

The DHA has come up with processing benchmarks that require that RSDOs process and finalise a minimum of ten applications per day with a financial incentive for finalising more applications. **Mr. MH** a former RSDO points out that some officers finalise up-to twenty applications per day. This is encouraged by the financial bonus corresponding to the applications an RSDO processed.

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<sup>92</sup> 2014 UNHCR Country operations profile, South Africa available at <http://www.unhcr.org/pages/49e485aa6.html> (accessed on 1 December 2014).

<sup>93</sup> UNHCR *Statistical Yearbook* (2009) 36.



With the pressure to meet the processing benchmarks, a study by Amit Roni deduced that each application takes an average seventeen minutes to complete with some lasting less than fifteen minutes.<sup>94</sup> These are decisions on people's lives.

An RSD decision derives from an interview that involves a full account of one's background information, flight history, events linked to persecution, country of origin information research and an assessment of the asylum claim.<sup>95</sup> From first-hand experience in UNHCR's mandate status determination, it takes at least an hour of preparation for an interview, three hours of interview and two hours of completing an assessment. Therefore, seventeen minutes or less, may only cover introductions, confidentiality counseling and laying-out interviewer/interviewee duties and obligations.

The non-calibrated focus upon administrative efficiency has seriously jeopardised the quality of the status determination at the DHA.<sup>96</sup> Arguably, the status determination has been dehumanised with the presumption of ineligibility for refugee status presenting real possibilities of *refoulement*.

South Africa's refugee recognition rate is the lowest in the world at between five and fifteen percent, below the global average of thirty seven percent.<sup>97</sup> Persons who meet the refugee definition including those whose applications are based on SOGI are often rejected without proper reasoning.<sup>98</sup>

### 3.4.2 Abusive asylum claims

The DHA asserts that 90% of those seeking asylum in South Africa are economic immigrants.<sup>99</sup> Although this claim is wholly disputed by the civil society,<sup>100</sup> the ANC's

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<sup>94</sup> ACMS 2012 Research Report (n 76 above) 12.

<sup>95</sup> See generally, the UNHCR RSD Handbook (n 30 above).

<sup>96</sup> LB Landau & A Roni 'Wither policy? Southern African perspectives on understanding law, 'refugee' policy and protection' (2014) *Journal of Refugee Studies* 8.

<sup>97</sup> Landau & Roni (n 96 above)7.

<sup>98</sup> Landau & Roni (n 96 above).

<sup>99</sup> ACMS 2012 Research Report (n 76 above) 10.

<sup>100</sup> ACMS 2012 Research Report (n 76 above).

2012 Policy document reasserted this position estimating that 95% of economic immigrants applied for asylum.<sup>101</sup> Economic immigrants abuse the asylum process partly because the existing immigration legislation provides only very limited opportunities for those with lower level skills to apply for immigrant permits.<sup>102</sup>

The existing policy narrative and rationalisation of abuse to the asylum process has created cynicism in a way that asylum applications, including those from genuine refugees are consistently rejected. In Mr. **MH's** view, often, decisions are copy-pasted, without even changing personal bio-data. He stated that *'it is a difficult task to engage in an in-depth assessment and there is no time for that'*. Rejected cases are not reviewed but if an RSDO decided to grant refugee status, then that decision attracts close scrutiny and review.

In the context of mixed asylum and migration flows, the UNHCR developed a Ten-Point Plan of Action outlining some measures that states can adopt in order to ensure at the very least, that refugees arriving in situations of mixed flows are protected, or are not *refouled*.<sup>103</sup> Importantly, the document recommends the need for differentiated processing.

In South Africa differentiated processing would require establishment of mechanisms to expediently identify manifestly founded and unfounded claims. In parallel, more complex claims can be channeled through detailed assessment with separate arrangements for those seeing to migrate.<sup>104</sup>

### **3.4.3 Lack of knowledge and awareness**

In Mr. **MH's** view, RSDOs have not been provided training on how to interview and adjudicate SOGI-based claims. He admitted to lack of knowledge about country of origin

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<sup>101</sup> Africa National Congress 'Peace and stability policy discussion document' (March 2012) 5.

<sup>102</sup> ANC (2012) policy document (n 101 above) 7.

<sup>103</sup> UNHCR (2007) 'Refugee protection and mixed migration, a 10 point plan of action'.

<sup>104</sup> UNHCR (2007) plan of action (n 103 above) 3-4.

information. It is, therefore, not surprising to him that claims such as from Uganda and Nigeria, are rejected for lack of evidence to support persecution.

From the decisions reviewed, RSDO's do not thoroughly research country of origin conditions and fundamentals of refugee law are often misapplied. There is a restricted understanding of what amounts to persecution and persecution is limited to political opinion. Officers dwell upon the history of persecution to support a finding of future risk.<sup>105</sup> Asylum applications by 'a Ugandan man who fled persecution for being a homosexual and a man who was targeted by the police in his country for exposing mineral trafficking were both rejected'.<sup>106</sup>

#### **3.4.4 Corruption**

The ANC Policy document acknowledges the existence of widespread corruption in the asylum process<sup>107</sup> and blames criminal syndicates of people smugglers for overloading the weak asylum systems in place.<sup>108</sup>

Two officials working on LGBTI projects at the Legal Resources Centre (LRC) and PASSOP confirmed during interviews that corruption at DHA offices was rife. Corruption permeates all stages of the asylum process; granting of refugee status and timely renewal of asylum or refugee documents.

#### **3.5 UNHCR: Identified challenges and gaps**

From a UNHCR stand-point, challenges to ensuring proper service delivery stem from the dispersed urban population, limited partnerships and limited knowledge regarding SOGI issues amongst the Agency's staff. The closure of RROs has also made it difficult for all asylum seekers and refugees to access services.

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<sup>105</sup> LHR website (n 45 above).

<sup>106</sup> South Africa's flawed asylum system IRIN news available at <http://www.irinnews.org/printreport.aspx?reportid=97944> (accessed on 02 December 2014).

<sup>107</sup> ANC (2012) policy document (n 101 above) 5.

<sup>108</sup> n 107 above.

### **3.5.1 Dispersed urban population against limited outreach capacity**

South Africa has an urban and self-settled refugee population dispersed across the country's width and breadth. As with many displaced persons coming into urban environments, refugees and asylum seekers in South Africa struggle to find effective protection and assistance.<sup>109</sup>

UNHCR has limited presence in Pretoria, Cape Town, and Musina. With asylum seekers and refugees dispersed across the country, UNHCR lacks the resource capacity to effectively map and monitor the protection needs of refugees generally and the LGBTI in particular.

UNHCR's interacts with refugees through weekly consultations, periodic protection needs assessments, and an e-mail system through which refugees and asylum seekers can contact UNHCR with updates on their situation. These three mechanisms allow only for an insignificant fraction of the population to reach UNHCR relative to the existing needs.

### **3.5.2 Limited partnerships and collaboration**

UNHCR has formal partnership arrangement with a number of NGOs through sub-agreements. Whilst some of the services offered by these NGOs might benefit LGBTI asylum seekers and refugees, the sub-agreements do not specifically address the needs of the LGBTI refugees and asylum seekers which are said to be integrated generally, within the programmes for vulnerable groups. The needs of the LGBTI asylum seeker and refugee community can often be unique and need tailored interventions.<sup>110</sup> The generality of the project descriptions in the sub-agreements do not address the specificities in the needs of this community.

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<sup>109</sup> Landau & Roni (n 96 above) 4.

<sup>110</sup> See generally, UNHCR Need-to-Know Guidance (n 35 above).

### **3.5.3 Lack of training and awareness**

UNHCR has undertaken some remarkable efforts in providing policy guidance and awareness through print material. However, these are still not sufficient to create safe spaces, and build a body of skilled manpower that understands the variables in dealing with this vulnerable segment of the population on a routine basis. In November 2014, UNHCR undertook a pilot training on working with LGBTI refugees and asylum seekers. The first cohort of this training targeted protection staff in Africa. This is a commendable initiative that will need more compliance monitoring and follow-up.

### **3.5.4 Lack of contact with asylum seekers upon arrival**

With registration and status determination being conducted by the government, not all asylum seekers and refugees approach UNHCR. In fact, the number of asylum seekers and refugees who are known to UNHCR is only about eight percent of the entire population.

Not being able to identify LGBTI asylum seekers when they arrive, UNHCR's abilities to map their needs and intervene with the DHA and other service providers are hampered.

## **3.6. Conclusion**

Although South Africa's law provides for granting refugee status on the basis of SOGI, in reality, applications are rejected for a variety of reasons including that such applications are manifestly unfounded.

Beyond the deficiencies in the DHA's asylum process, LGBTI asylum seekers and refugees face a wide range of daily protection challenges in accessing documentation, police protection, employment, housing, healthcare and police protection amongst others. These challenges are institutional, structural and systemic.

The DHA and other stakeholders also face challenges in properly addressing the needs of LGBTI asylum seekers and refugees including the large numbers of new applications that raise quality concerns, mixed asylum and migration flows, a dispersed urban refugee and asylum seeker population whose needs it is difficult to map in a systematic and comprehensive manner.

## CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS TOWARDS A FAVOURABLE PROTECTION REGIME

### 4.1 Conclusion and specific recommendation

The foregoing chapter laid bare some only of the challenges that Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) asylum seekers and refugees face in South Africa. Those challenges have been gleaned through the different lenses that represent the various actors involved in the protection, promotion and fulfillment of human rights.

South Africa's law and international refugee law provide for grant of refugee status based on sexual orientation or gender identity (SOGI). Both the Refugees Act and the Bill of Rights in the Constitution provide for enjoyment of fundamental rights and freedoms. While the laws and human rights protection exist, asylum applications based on SOGI are consistently and wrongfully rejected by the Department of Home Affairs (DHA). Asylum seekers and refugees also face a wide variety of human rights violations throughout their asylum life despite the fact that the law enshrines such rights.

The disjunction between the law and practice in South Africa as regards LGBTI rights and fundamental freedoms is well-captured by studies by Roni,<sup>1</sup> Darshan<sup>2</sup> and a survey report by People Against Suffering and Oppression (PASSOP).<sup>3</sup> Viljoen in *Beyond the law* posits that even though it is an important step towards accountability and redress, legalisation or judicialisation is not necessarily a sufficient condition to realising human rights.<sup>4</sup> The existence of human rights for the LGBTI persons in South

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<sup>1</sup> A Roni 'No refuge, flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 3 *International Journal of Refugee Law* 458-488. See also, ACMS Research Report itself, A Roni 'No way in, barriers to access, service and administrative justice at South Africa's refugee reception offices' (September 2012) *ACMS Research Report* 79.

<sup>2</sup> V Darshan 'A foot in the door, access to asylum in South Africa' (2008) 25 2 *Refugee* 44.

<sup>3</sup> PASSOP report 'Economic Injustice, Employment and Housing Discrimination Against LGBTI Refugees and Asylum Seekers in South Africa' (2013).

<sup>4</sup> F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) xiv.

Africa's law, while providing an important yardstick to measure and monitor government conduct, does not explain why such rights are violated.<sup>5</sup>

The proposals that follow recognise that solutions to the challenges laid out in the preceding chapter lie not in the DHA alone, or law enforcement agencies alone, or civil society and United Nations (UN) bodies in isolation. Possible solutions rest upon a multi-functional and multi-disciplinary interaction of different stakeholders and disciplines focused on realisation of human rights entitlements.

The following are sector- and stakeholder-specific findings and recommendations:

#### **4.2 To the government (the DHA)**

The systemic gaps at the DHA are rooted in three broad paradigms. The first is the unqualified narrative that a majority of those seeking asylum in South Africa are economic immigrants. Secondly, the institutional lack of capacity to appropriately manage mixed asylum migration flows. Thirdly, there is the prevailing progressive national legal regime that is overlooked and yet to translate into human rights protection for sexual minorities. The thematic proposals for the DHA are aimed towards shifting these paradigms towards realising a properly functioning and effective asylum system.

As a starting point, the DHA needs to establish safe places<sup>6</sup> and platforms from where individuals LGBTI asylum seekers and refugees can freely express their SOGI absent of fear judgment or reprisal. Programmes tailored towards assisting persons of diverse SOGI must ensure confidentiality is guaranteed.<sup>7</sup> Refugees and asylum seekers should be informed that they may request a staff member of a particular gender, if desired<sup>8</sup> and should be informed of available services. Hand-outs and information brochures could be used to pass useful information to the individuals and communities

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<sup>5</sup> Viljoen (n 5 above) xv, also citing M Freeman *Human rights: An interdisciplinary approach* (2011) 91.

<sup>6</sup> For the definition of 'safe places' see J Rumbach 'towards inclusive resettlement for LGBTI refugees' (2013) 42 *Forced Migration Review* 40-42.

<sup>7</sup> Rumbach (n 6 above) 41.

<sup>8</sup> Rumbach (n 6 above).



At the nucleus of all the challenges lies the need for political impetus to drive the paradigm shift in a way that law and human rights provisions benefit refugees and asylum seekers and in particular, those whose applications are based on SOGI.

#### **4.2.1 Structural review for differentiated processing**

It is important to acknowledge that the DHA will continue to grapple with the existing challenges until fundamental immigration policy reforms are put in place<sup>9</sup> to provide an alternative to those who arrive in South Africa to pursue non-asylum related interests. In the meantime, and in line with United Nations High Commissioner for Refugees' (UNHCR) Ten-Point-Plan of Action,<sup>10</sup> the DHA needs to establish mechanisms for differentiated processing that ensures genuine asylum seekers are identified within the mixed migration flows into the country.

In establishing such differentiated approaches, the Department should ensure that those more vulnerable groups that include LGBTI asylum seekers and refugees, unaccompanied and separated children, women and girls at risk, and survivors of sexual and gender based violence have special reception and care arrangements corresponding to their special needs.

#### **4.2.2 Capacity building and enhancement**

There is a need for training of all personnel within the DHA who interact in one way or another with asylum seekers and refugees whose applications are based on SOGI. The needs exist from the point of reception to the finalisation of decisions. Reception arrangements should take into consideration the specific needs of LGBTI asylum seekers and refugees to avoid or mitigate the vulnerabilities encountered.

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<sup>9</sup> A Roni et al 'National survey of the refugee reception and status determination system in South Africa' *Migrant Rights Monitoring Project Research Report* (2009).

<sup>10</sup> UNHCR (2007) 'Refugee protection and mixed migration, a 10 point plan of action', 3-4.

For the Refugees Status Determination Officers (RSDO), members of the Standing Committee on Refugee Affairs (SCRA) and the Refugee Appeals Board (RAB), the training should be tailored towards addressing procedural safeguards, sensitive interviewing techniques and adjudication of SOGI claims based on subjective facts provided by applicants, as well as research skills on collecting objective information about countries of origin.

Substantive training is needed to enable RSDO, SCRA and RAB members to properly place SOGI in both national and international refugee law. Procedural fairness is essential in the status determination process and therefore should form a core component of trainings.

To address the quality and quantity concerns, the DHA should consider employing more trained RSDOs. The need for efficiency expressed in the Department's turn-around strategy<sup>11</sup> should balance the national and international obligations to provide international refugee protection for all those who deserve it, against the institutional challenges of clearing existing backlog.

Some studies have shown that sometimes staff at reception deliberately obstruct and hamper access by asylum seekers and refugees.<sup>12</sup> Special and deliberate measures such as safe spaces and designated focal points need to be taken during reception to ensure dignified access and avoid the heightened vulnerabilities at points of service delivery. Incidents of corruption and other malpractices need bold measures that are targeted at both the DHA personnel and refugees. Punitive sanctions can act as a deterrent for both personnel and refugees involved.

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<sup>11</sup> DHA Strategic Plan 2004/5-2006/7.

<sup>12</sup> Roni (n 9 above) 52.

### 4.2.3 Collaboration and partnerships with UN bodies and civil society

The DHA has maintained a good level of collaboration with the office of the UNHCR. This collaboration can be enhanced further to cover this specific area where UNHCR can offer technical advice and guidance both for general protection management and for specific SOGI-based applications. It may be important to share any applications based on SOGI with the UNHCR and to invite the Agency to comment on decisions. Collaboration with members of the civil society and especially those with LGBTI specific projects such as LRC and PASSOP in a way that ensures those who are wrongfully denied status are provided review alternatives is helpful.

### 4.3 To civil society

Some Non-Governmental Organisations (NGOs) are already well seized of matters related to the asylum seeker and refugee LGBTI community in South Africa. Extensive advocacy work is on-going. Some important areas were identified during the in-depth research interviews,<sup>13</sup> in which different organisations can play a useful role, for example by:

- Assisting with timely and proper asylum documentation;
- Providing legal representation which was successful in the case of **TC**, the first openly gay Malawian who was granted refugee status;
- Organizing awareness campaigns on document renewal procedures to avoid penalties and also sensitise asylum seekers and refugees to avoid or report corruption;
- Conducting awareness campaigns on access to socio-economic rights for both the duty bearers and rights holders;
- Establishing LGBTI shelters and work with refugees and asylum seekers towards creating support networks;
- Conducting vocation training and micro-credit facilities for self-reliance initiatives; and

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<sup>13</sup> Also mentioned in a PASSOP report (n 3 above) 22-23.

- Establishing working relationship with UNHCR in mapping evolving needs of the LGBTI persons and designing shared interventions. Through this research project, collaboration with the LRC and PASSOP has started.

#### **4.4 To the media**

There is a constant need for proactive media engagement to positively report on LGBTI rights and constructive criticism to any violations of such rights. The media needs to be fully seized of positive developments in the protection of the rights as well as develop media messages promoting tolerance and clarifying the rights of LGBTI persons generally. It may be important to give time slots for constructive debates around the issues of LGBTI rights.

#### **4.5 To law enforcement agencies**

##### **4.5.1 Police**

Training of law enforcement agents and establishing specific programmes for receiving complaints and intervening in cases of LGBTI based violence are important in ensuring that rights and lives are protected. Homophobic attacks and police prejudices towards LGBTI persons should be punished as a violation of individual rights and freedoms and a dereliction of the responsibility to protect. Civil society should develop structured avenues for working with the police and courts to enhance the protection space for LGBTI persons including refugees and asylum seekers. It is important to identify key alliances within police stations with whom to provide both emergency and long term interventions and support.

##### **4.5.2 Courts**

Judicial officers equally need sensitisation and training to provide judicial interventions and uphold the law where LGBTI rights have been violated. A judgment of the Western Cape, in the case of *Esnat v Minister for Home Affairs*,<sup>14</sup> made a bold decision remitting

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<sup>14</sup> *Esnat Maureen Makumba v Minister for Home Affairs and others* 2014 (14) SA 6183 (HC).

to the RSDO for consideration, a case of a lesbian Malawian who had concealed her sexual orientation arising from past persecution in Malawi.

In the *Esnat* case, an asylum application by Esnat who fled persecution in Malawi because she is a lesbian was finally rejected. Esnat had false reasons for seeking asylum. During her status determination interview, she withheld the fact that she fled Malawi because of persecution for her sexual orientation because of the fear that she would be persecuted in South Africa if her sexual orientation became known. She also was not informed that sexual orientation was a reason for granting of refugee status. Remitting the case to the DHA for a hearing *de novo*, the Court correctly considered that even if Esnat had lied about the reasons for seeking asylum, the important consideration was whether on the new facts that she brought forward, she would face persecution were she to be returned back to Malawi.

Such judicial awareness, through training and workshops, on the issues around international refugee protection as was evidenced in the *Esnat* case is important to ensure that the administration of justice is upheld and that those fearing persecution are not *refouled* to their countries.

#### **4.5.3 The National Prosecuting Authority**

In order to ensure that reported cases of human rights violations are prosecuted successfully, collaborative efforts that involve the civil society and the NPA would be important. The networks and alliances from incident reporting to investigation stages are likely to see that convictions are achieved in cases where asylum seekers and refugees have been victims of human rights violations through discriminatory or criminal acts of state or non-state agents.

#### **4.6 To the UNHCR and other UN agencies**

The UNHCR should engage other UN agencies in addressing the various facets of human rights violations targeting LGBTI asylum seekers and refugees. The United

Nations Office of the High Commissioner for Human Rights (UNOHCHR) can help to document these violations and seek government responses during the Universal Period Review processes. The United Nations Programme on HIV/ AIDS (UNAIDS) can be called upon to address the issues of HIV/AIDS prevalence within the LGBTI community. The United Nations Education, Scientific and Cultural Organisation (UNESCO), in its mission to mobilise for education and pursue initiatives towards enhancing cultural understanding can address the social and cultural relativities that view SOGI as a form of cultural imperialism. The United Nations Development Programme (UNDP) can support initiatives aimed at integrating refugees into the economic development agenda and foster self-reliance or skills training and development.

UNHCR's outreach activities aimed at mapping needs require specific efforts to identify LGBTI asylum seekers and refugees and develop multi-sectoral frameworks for responding to the specific needs. UNHCR's collaboration with other stakeholders is also necessary in order to address the various challenges at the different levels of service delivery. The asylum seeker and refugees participation in the different phases of programme design, planning and implementation remains key in ensuring that overall needs of LGBTI persons are integrated in the refugee Agency's biannual planning cycle.

UNHCR is mandated with international protection and seeking solutions for refugees. The solutions are in the form of voluntary repatriation back to refugees' countries when conditions permit, local integration in the new host communities and resettlement to third countries which have accepted to admit refugees.<sup>15</sup>

UNHCR in South Africa conducts assessments and considers for resettlement, refugees with serious protection challenges and whose stay in South Africa has been rendered untenable. It is in this context that **JMN** was resettled to the United States. Granted that LGBTI refugees continue to face real and direct threats to their physical

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<sup>15</sup> Statute of the UNHCR, GA Resolution 428(v) of 14 December 1950, articles 1&9.

safety and other human rights violations, UNHCR has and will continue to carefully pursue resettlement for identified LGBTI refugees.

#### **4.7 To schools and academic institutions**

An inclusive curriculum which provides for open discussion and understanding on LGBTI issues has been shown to improve safety of LGBTI students in school. It dissipates any mean rumours about LGBTI students.<sup>16</sup> Schools need to lay out clear policies against bullying and other forms of homophobia and take early exemplary corrective measures against perpetrators.<sup>17</sup> Such measures will ensure that LGBTI persons including asylum seekers and students do not face discrimination in schools.

There is need for continuous empirical research that challenges the myths and stereotypes that perpetuate homophobia. Universities should ensure compulsory modules in different disciplines that have a research component on a wide variety of LGBTI related issues.

#### **4.8 To the African Commission on Human and Peoples' Rights**

The legal restrictions to diverse sexual orientations and gender identities, the homophobia that prevails in African societies and the inability or unwillingness by governments to protect their vulnerable citizens culminates in their displacement into South Africa and elsewhere.

As mentioned elsewhere in chapter two, these refugee producing countries have obligations to protect, promote and fulfil the fundamental human rights of their people and to ensure non-discrimination on any and analogous grounds. However, these states have failed in their obligations. The African Union institutions, especially the African Commission on Human and Peoples Rights (the Commission), still has the potential to

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<sup>16</sup> California safe schools coalition 'safe schools research brief 4'. [www.casafeschools.org](http://www.casafeschools.org) (accessed 5 December 2014).

<sup>17</sup> n 16 above.

adopt a very strong position relating to state obligations to ensure protection of sexual minorities.

Notwithstanding the continuing human rights violations against gays and lesbians in Africa,<sup>18</sup> the African Commission has not seriously considered or taken up steps to stem these violations<sup>19</sup> except for cursory references on the rights of gays and lesbians in the Continent.<sup>20</sup> The recent adoption, in May 2014, of a Resolution is a good sign and is discussed briefly at the end of this segment.

Through the work of the civil society,<sup>21</sup> some commissioners in the past decade have raised concerns regarding the situation of sexual minorities in certain African countries through the state reporting mechanism.<sup>22</sup> In one instance, Commissioner Taklula of South Africa remarked that discrimination on the basis of sexual orientation in Cameroon was contrary to article 2 of the African Charter<sup>23</sup> and questioned the compatibility of the Cameroonian sodomy law with the Charter in the following the arrest of suspected gay men in Yaoundé.<sup>24</sup> In the end, several commissioners raised questions and concerns and pointed to the need for tolerance and non-discrimination of people based on their sexual orientation.<sup>25</sup>

The Commission has therefore shown its willingness to engage and should engage more widely and firmly in condemning African countries that have continued intolerance and discrimination or failed to protect those who are persecuted on the basis

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<sup>18</sup> R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation, the normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 87.

<sup>19</sup> Human Rights Watch, 'More than a Name: State sponsored homophobia and its consequences in Southern Africa' (2003), available at [hrw.org/reports/2003/safrica](http://hrw.org/reports/2003/safrica) (accessed 6 December 2014).

<sup>20</sup> R Murray & F Viljoen (n 18 above) 100.

<sup>21</sup> NGOs are normally permitted to send questions regarding compliance by states with the human rights obligations.

<sup>22</sup> Under Article 62 of the African Charter, states are required to submit a report every two years on the legislative and other measures taken to implement the Charter.

<sup>23</sup> R Murray & F Viljoen (n 18 above) 103.

<sup>24</sup> International Gay and Lesbian Human Rights Commission (IGLHRC) 2 March 2006 Press release on Cameroon: 'Public Homophobia Increases on the Eve of Sodomy Trial' available at <http://www.iglhrc.org>.

<sup>25</sup> R Murray & F Viljoen (n 18 above) 102-104.



of their SOGI. South Africa, an asylum receiving country for those fleeing persecution based on sexual orientation, affirmed its policy on non-discrimination on the basis of sexual orientation enshrined in the Constitution.<sup>26</sup> Periodic review of state practices and the Commission's strong leadership in this area, and a strong consistent expression in its concluding observations on state reports, will go a long way towards reawakening states to their treaty obligations to protect and promote human rights observance.

The Commission, under articles 55 to 59 of the Charter, has in place a procedure for receiving individual communications. This mechanism could be utilised and positive findings would likely have far reaching ramifications to the myth that is mostly propagated about LGBTI being un-African.<sup>27</sup>

Some specific measures that the Commission can adopt are: a follow-up on the implementation of its decisions from the states reports review mechanism; collaboration with civil society for the purposes of receiving shadow reports; public deliberations on individual complaints of significant public policy matters especially where there is evidence of widespread and consistent discrimination against sexual minorities.

The Commission can use its promotional mandate and working with civil society, design thematic subjects upon which, open discussions on sexual minority rights can take place. Forging alliances with more conscientious Commissioners and inviting their participation within the Commission's promotional mandate is likely to yield expressive positions.

The robust engagement by the Commission expressed in its May 2014 Resolution 275<sup>28</sup> is commendable. While outlining the relevant human rights protections

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<sup>26</sup> Remarks by the Minister of Justice, leading the South African delegation during the African Commission's thirty-eighth session. See R Murray & F Viljoen (n 18 above) 103.

<sup>27</sup> R Murray & F Viljoen (n 18 above) 105.

<sup>28</sup> Resolution on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity adopted by the African Commission's at its 55<sup>th</sup> Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

of the Africa Charter in articles 2, 3, 4 and 5, The Commission expressed its concern by condemning increased violence and human rights violations on the basis of SOGI. It also called and urged states to provide an enabling environment for human rights defenders and ending acts of violence whether by state or non-state actors. By heeding the calls from the African Commission, fewer or no people will flee to seek asylum and those seeking asylum will enjoy the protection of the human rights in while in asylum.

There is, therefore, a sense of optimism in the continent that the Commission can certainly do much more in this area.

#### **4.9 To health care service providers**

It was established during the research interviews that NGOs working with LGBTI asylum seekers and refugees have some referral mechanisms to specialised health care providers for gender reassignment needs or hormonal therapy. Establishing alliances with a wide network of healthcare service providers across different parts of the country to whom specific needs can be channeled will be useful.

Most of those interviewed were already accessing anti-retroviral therapy. There is a need to create awareness and provide information on prevention of sexually transmitted diseases (STIs). Organisations working with sexual minorities need specific programmes that illuminate risky sexual behavior and prevention mechanisms for STIs.

LGBTI asylum seekers and refugees have a right to access public healthcare in the same way all persons lawfully resident in South Africa are. Healthcare providers may need to be sensitized about the range of needs including identification and proper response to mental health care needs for those who might be suffering from mental effects of past persecution.

#### 4.10 Making South Africa a safe haven: the case for multi- and inter-disciplinarity

Against the background set out above, a broader approach needs to be adopted that ensures that the overarching elements of the recommendations are effective through multi- and inter-disciplinarity. Ensuring the asylum and protection for SOGI asylum seekers and refugees calls for cooperative and coordinated contribution of the different disciplines.

Sociological studies have posited that the prevalence of prejudices and discrimination has been there throughout human history and are difficult to alter.<sup>29</sup> The prejudices which lead to discrimination result in denying access to those who are believed to be undeserving of equal treatment.<sup>30</sup> Gordon Allport, a psychologist, describes the social construction of prejudice as part of a society targeting a group which is different (or perceived to be) and for whom the difference is the defining characteristic for the group.<sup>31</sup>

Sociological studies hypothesise solutions to prejudices as: (i) The self-esteem hypothesis requires that members of society are given an appropriate education as well as higher self-esteem so as to eliminate prejudices. (ii) The contact hypothesis sees a solution to prejudice as bringing together into interaction the different groups in order that they learn to appreciate common experiences, backgrounds or differences. (iii) The cooperation hypothesis requires cooperation between the conflicting segments of society by putting aside the differences and accepting to live together. (iv) Legal hypothesis advances the enforcement of laws against discrimination so as to eliminate prejudice.<sup>32</sup>

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<sup>29</sup> Cliff's notes, Sociology, prejudice and discrimination <http://www.cliffsnotes.com/sciences/sociology/race-and-ethnicity/prejudice-and-discrimination> (accessed 9 December 2014).

<sup>30</sup> Cliff's notes (n 29 above).

<sup>31</sup> GW Allport *The nature of prejudice* Basic books (1979).

<sup>32</sup> Cliff's notes (n 29 above).

From ethical and theological stand-points, prejudice is inexcusable,<sup>33</sup> and the Church does not condone harmful social interaction.<sup>34</sup> Sociology and psychology have given insights into sexuality being not just the result of biology but, rather, of a complex combination drawing from cultural symbols, role expectations interacting with intrapsychic scriptures and internal dialogue.<sup>35</sup> Anthropology has shown substantial cultural variation in the meanings of sexual behaviour that questions the validity of statements that generalise sexuality.<sup>36</sup> History explains that differences even within one culture have and will continue to occur and the meaning of sexuality will continue to evolve.<sup>37</sup>

Christianity underscores the values such as mercy<sup>38</sup> founded upon God's love for human beings. People's service to God is exemplified in the way they love one another.<sup>39</sup> The bible puts emphasis on God's grace and faith which are the cornerstones of a righteous life.<sup>40</sup> Therefore LGBTI persons are an integral part of the Church where they fellowship in God's name<sup>41</sup> since all people are equal before God.<sup>42</sup>

With the above contributions from other disciplines, communities where LGBTI live require concerted efforts to change negative attitudes.<sup>43</sup> An integrated use of social hypotheses by engaging communities in dialogue through workshops, community drama and skits adapted for specific audience, are reported to bear significant impacts in changing attitudes.<sup>44</sup> This translates into tolerance and respect for individual rights.

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<sup>33</sup> Y Dreyer 'Prejudice, homophobia and the Christian faith community' *Verbum et Ecclesiae* (2006) 27 155-173, 156.

<sup>34</sup> Dreyer (n 33 above) 165.

<sup>35</sup> GH Gagnon & W Simon *Sexual conduct: the social sources of human sexuality* (1973) 316.

<sup>36</sup> Dreyer (n 33 above) 165.

<sup>37</sup> J D'Emilio & EB Freedman, *A history of sexuality in America* (1998) cited in Dreyer (n 29 above) 165.

<sup>38</sup> Luke 6:36 states that 'be merciful as I am merciful'.

<sup>39</sup> Dreyer (n 33 above) 165.

<sup>40</sup> Dreyer (n 33 above).

<sup>41</sup> Dreyer (n 33 above).

<sup>42</sup> 14 bible verses about everyone is equal [http://www.openbible.info/topics/everyone\\_is\\_equal](http://www.openbible.info/topics/everyone_is_equal) (accessed 11 December 2014).

<sup>43</sup> Hivos, *South Africa Responding to the safety and security needs of LGBTI communities and organisations: A situational analysis Malawi, South Africa, Zambia and Zimbabwe* (August 2013) 26.

<sup>44</sup> Hivos 2013 report (n 43 above).

As important as positive law and human rights law are in the protection of sexual minorities, more efforts are required in order to ensure the protection, promotion and fulfillment of human rights for refugee sexual minorities. These efforts are both general for, and specific to, the different actors in the asylum and refugee protection regime. The different disciplines help to deconstruct and understand the rationalisation of human rights abuses and also help in shaping more effective ways to promoting and protecting those rights. Broad awareness and sensitisation is needed to ensure that SOGI asylum seekers and refugees live a respectful and dignified life. Disciplines including social sciences, political sciences and criminology<sup>45</sup> offer a complementary value addition that helps to seal the social and structural crevices in which negative and destructive attitudes thrive.

**(20,354 words)**

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<sup>45</sup>JB Woods 'Queering criminology: Overview of the State of the field (2014) *Handbook of LGBT communities, crime, and justice* 15-41.

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