



*ARRA*

*Australian Refugee Rights Alliance*

*“No Compromise on Human Rights”*

**Draft Discussion Paper**

**Refugee Status Determination  
Based on Sexual Orientation**

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**Comments Invited**

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*Sexual orientation* refers to a person's capacity for emotional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender, the same gender or more than one gender  
*Gender identity* refers to a person's deep sense and experience of belonging to a gender, which may or may not correspond with sex at birth, a personal sense of the body or other expressions of gender  
*GLBT or LGBT* (gay, lesbian, bisexual, transgender) is a preferred term for what is referred to as inclusive and reflective of diversity in sexual orientation and gender identity  
*Sexual minority* is inclusive of LGBT persons and incorporates sexual orientation and gender identity.

## **Introduction**

The groundbreaking Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity (March 2007) noted clear international legal standards which governments should comply with to end violence, abuse and discrimination, to ensure full equality, and increase clarity of States' human rights obligations under human rights law. They affirm sexual orientation and gender identity as integral to dignity and humanity and that these must not be the basis for discrimination or abuse. They recognise discrimination and severe human rights violations based on actual or perceived sexual orientation or gender identity. Condemnation of such abuse is grounded in human rights standards and UN precedents. GLBT people are therefore increasingly claiming the same rights as others, including asylum. Also, just as the right to asylum cannot be compromised, nor can obligations to address root causes of abuse, to advocate for refugee protection and to end abuses suffered when reaching safe haven.

## **Violations of gay and lesbian rights**

Widespread and patterns of violation include police persecution, invasions of privacy, arbitrary arrest or detention, sentences for private sexual acts between consenting adults, torture and ill-treatment, sexual assault or rape, death penalty or extrajudicial execution, prohibition of sexual relations between persons of the same sex, laws against 'public scandals' or 'indecent behaviour', community or family violence, lack of state protection and discrimination relating to other human rights. Abuses violate the right to be free from torture or cruel, inhuman or degrading treatment, discrimination, violence and harassment, and the right to privacy, free expression and association, a fair trial, work, education, and equality before the law.

In 2005 at the Commission on Human Rights, a joint statement affirming human rights violations based on sexual orientation and gender identity stated: "We cannot ignore evidence of human rights violations... To remain silent is to condone some of the worst forms of discrimination."<sup>1</sup> The Johannesburg Statement (2004) also asserted: "We exist... despite denials of our existence. We face human rights abuses which threaten our lives."<sup>2</sup> It recognised discrimination and human rights abuses in Africa and the need for action.

## **International human rights instruments and policy**

Discrimination based on sexual orientation has gained sufficient recognition that it is now part of a broad human rights agenda. Some countries have advanced protections against discrimination through legislation or jurisprudence. South Africa (1996) was the first country to bar discrimination based on sexual orientation and in its Constitution Fiji's High Court (2006) ruled its sodomy law as unconstitutional. Yet international responses to rights violations are inconsistent and approaches are not part of international human rights law - no international human rights instrument references sexual orientation or gender identity.

Significantly, in 1999 the European Union Treaty of Amsterdam empowered the European Council to act against discrimination based on sexual orientation, in 2000 the European Charter of Fundamental Human Rights included 'sexual orientation' in the anti-discrimination clause, and the Human Rights Committee (2004) determined that protections against discrimination in the International Covenant on Civil and Political Rights should be understood to include 'sexual orientation' as a protected status. In 1993 the UNHCR accepted that 'homosexuals' constituted membership to a 'particular social group' ensuring eligibility for protection after several industrialised nations

recognised LGBT as a 'social group' under the Refugee Convention. Council of Europe resolutions (2000) supported refugee status for persons facing persecution on the basis of sexual orientation asserting that cultural reactions reinforce the need to promote greater tolerance.<sup>5</sup> Sexuality based persecution on the grounds of being a member of a 'particular social group' is now an accepted basis for a refugee claim. As an outcome of 2006, and controversial July 2007 ECOSOC decisions, five GLBT organisations were granted UN consultative status. The UN now acknowledges the need for non-discriminatory access, maintenance of fair process and the recognition of LGBT NGO entitlement to UN participation. States have thus affirmed the importance of sexual orientation and gender identity issues in NGO's use of consultative status to work directly on human rights violations. Furthermore, in August 2007 the Human Rights Committee of the Southern Common Market issued a Declaration promoting an end to discrimination against sexual and gender minorities by member countries. This Declaration could bring sweeping changes to Latin American policies as well as contributing to the potential for significant global impact.

These actions have seen reactions from some Christian groups, and a counter-discourse challenging 'Western' ideas of human rights which conflict with local cultures and traditions. Also, at the UN level, States have actively opposed initiatives on sexual minority rights. In this way the 'homosexuality' card continues to contribute to developing world resistance to the Western human rights agenda.

### **Realising sexual minority refugee determination**

Over the last 50 years the global north has been regressing in commitments to refugee protection, diluting international obligations and adopting restrictive policies, including violating the principle of *nonrefoulement*. The Refugee Convention defines a refugee as anyone who, *"Owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion... is unable...or unwilling to return... to his country of nationality."*<sup>6</sup>

Today, as LGBT cases are included within the definition of 'social group', attention focuses on applicants proving sexual orientation and providing evidence that their treatment has amounted to persecution. The credibility of LGBT asylum claims is hindered by the conduct of those appealing a decision, conduct of courts/representatives/decision-makers, lack of in-country information and the nature of persecution. The dearth of information in the documentation of persecution, the absence of sexual sensitivity in refugee determination, and stakeholder failure to identify and meet specific needs of asylum seekers, set barriers to asylum claim. Concerns include: credibility assessments (fact of sexual identity), sexuality as activity versus identity (variation of sexuality played out in public/private), the persecution standard (some persecution is justified) and the discretion requirement (behaviour adjustment to become discrete and avoid persecution).

### **Some regional considerations in refugee determinations**

In Australia, 'credibility' has usurped 'discretion' as the main reason for rejection, with decisions subject to value positions of decision makers and where understanding sexual orientation and how it is expressed is considered. Despite adequate law, outdated 'facts' on country conditions may be reproduced and may replace evidence or opinion in eroding applicants' lived realities (claim versus evidence) with applicants left unbelieving. This is important in understanding sexual orientation within social, cultural and political contexts of countries of origin and natures of constructed sexual identity. Determinations based on sexual orientation may not be compatible between claimant, country of origin, decision makers or receiving country. A further paradox is that being too public can be interpreted as deserving of abuse and undeserving of protection, or being too private risks claims not qualifying as persecution and sexuality being regarded as merely private and therefore easily avoidable and not requiring protection.

A Pakistani man, Ali Humayun, has been in immigration detention in Sydney for over two years. His asylum application is based on fear of persecution (Christianity and homosexuality) if returned home. Mr Humayun identified as bisexual before entering a gay relationship whilst in detention and now identifies as homosexual. His claim was rejected based on inconsistent evidence and that his relationship was situational and not based on his sexual orientation (persecution regarding sexual orientation was considered not credible).

The UK asylum claim made by Pegah Emambakhsh, a lesbian from Iran, was rejected. She currently faces deportation. British support of the human rights of sexual minorities has not resulted in asylum. There is an

increasingly high likelihood and legitimate fear that she will face severe repercussions and persecution if forced to return. Extreme Iranian human rights violations against sexual minorities are well documented. Yet Iran claims immunity asserting that its international obligations do not prevent it from executing convicts.

In 2006, the Swedish and Dutch governments violated international law by deporting asylum seekers to Iran, thus compromising *nonrefoulement*. The Dutch Immigration Minister stated: "For homosexual men and women [in Iran] it isn't impossible to function in society, although they should be wary of coming out of the closet too openly."<sup>7</sup> This 'discretion requirement' suggests that hiding is an acceptable price for staying alive. But silencing is not a way of avoiding persecution; it is the essence of persecution. The Netherlands now recognise LGBT failed asylum seekers from Iran as a 'special group' who deserve Dutch protection.

## Summary

State-sponsored hostility and entrenched bias toward LGBT people place them at risk of violence and persecution and guarantee obstacles to State protection. International law recognises a well founded fear of persecution on the basis of sexual orientation as qualifying refugee status. Sexual orientation as recognised under UN instruments impact on host countries obligations to uphold claims and entitlements.

Sexual orientation equality rights at the international level build on domestic reforms. Notable is the degree to which sexuality based prejudices, negative stereotypes, and discrimination generate prejudice against sexual minorities in refugee determination processes, and maintain legitimacy and respectability of prejudice in a manner unacceptable for other minorities. Understandings of sexuality move with cultural change and interchange with no interpretation considered permanent, alien, or authentic. Language referring to sexual orientation is inclusive of discrimination and so of value in refugee claims. As human rights standards continue to be part of social and political discourses, sexual minority rights contribute to evolving and contemporary public issues. The language of rights includes the right to define oneself.

## Recommendations

- Affirm the fundamental international obligation not to return sexual minority asylum-seekers to countries where they face the real risk of torture or execution
- Refugee determination must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights
- States fulfil their moral and legal obligations by recognizing people facing persecution due to their sexual orientation as protected under the Refugee Convention
- International sexual orientation guidelines be developed and implemented to enable better application of the Refugee Convention in affirming the rights of sexual minorities to international protection
- States, Special Procedures, treaty bodies, civil society and the High Commissioner for Human Rights ensure that sexual orientation and gender identity based violations receive international condemnation
- Understandings of international human rights law and its application to issues of sexual orientation and gender identity are applied in recognising the rights of sexual minorities
- The rights of all persons regardless of sexual orientation and gender identity to be protected
- All Special Procedures of the Commission on Human Rights, and treaty bodies, to give due attention within their mandates to human rights violations based on sexual orientation and gender identity.

<sup>1</sup> ARC International (2006) NGO Committee's Rejection of Groups Based on Sexual Orientation & Gender Identity: Fact Sheet <http://arc-international.net/facte.pdf>

<sup>2</sup> Human Rights Watch (2004) The Johannesburg Statement on Sexual Orientation, Gender Identity, and Human Rights [http://hrw.org/lgbt/pdf/joburg\\_statement021304.htm](http://hrw.org/lgbt/pdf/joburg_statement021304.htm)

<sup>3</sup> Sanders D (2002) Human Right and Sexual Orientation in International Law. Gays Without Borders? University of British Columbia pg

<sup>4</sup> Convention Relating to the Status of Refugees (1951)

<sup>5</sup> Human Rights Watch (2006) Netherlands, Sweden: Bar Deportations to torture in Iran <http://hrw.org/english/docs/2006/10/06/sweden14361.htm>