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## **Australian Lesbian Medical Association**

An Organisation with Special Consultative Status to the  
Economic and Social Council of the United Nations

# **Human Rights Violations of Lesbian, Bisexual Women, Transgender and Intersex People in Australia: A Shadow Report for Australia**

July 2018

Submitted to the United Nations CEDAW Committee for  
consideration at the 70th Session of the Committee on the  
Elimination of Discrimination Against Women

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## BACKGROUND

This report is a submission by the Australian Lesbian Medical Association (ALMA) to the United Nations (UN) Committee on the Elimination of Discrimination Against Women (“the CEDAW Committee” or the “Committee”) on the occasion of its consideration of the State of Australia’s implementation of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) at the 70<sup>th</sup> session taking place in Geneva, Switzerland, 2-20<sup>th</sup> July 2018.

The Australian Lesbian Medical Association (ALMA) is an NGO with special consultative status to the Economic Council (ECOSOC) since July 2013.

The authors of the report call upon the CEDAW committee to recommend immediate and decisive action on the part of the Government of Australia to ensure all individuals, regardless of sexual orientation, sex or gender identity may enjoy their basic human rights.

## EXECUTIVE SUMMARY

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognizes a right to protection from discriminatory laws, stereotypes, and cultural attitudes for all women. Despite these guarantees, LGBTI people in Australia still experience harassment and discrimination.

The purpose of this report is to highlight the human rights violations of lesbian and bisexual women, transgender and intersex individuals (LBTI) in Australia. The report specifically highlights issues that should be addressed in relation to health including:

- The rights of LGBTI individuals who experience human rights violations in their country of origin and who are now seeking asylum. The Australian Government, by refusing asylum to LGBTI refugees, continues to allow the persecution and discrimination of LGBTI in the countries of their origin,
- The mental health and related impacts on LGBTI individuals that result from discrimination and violence in Australian society,
- The difficulty accessing health and social services that further exacerbates health inequalities for LGBTI individuals,
- The violation of rights of people with intersex variations who continue to be medically treated without the individual's consent and without legislation protecting their right to decide.

LBTI persons are entitled to their full rights under the CEDAW Convention. In order to protect the right to life free from discrimination or harassment and the rights to education and employment, the Government of Australia must take positive steps to combat discrimination both for Australians and those LGBTI people seeking asylum in Australia.

## RECENT POSITIVE STEPS TAKEN BY THE GOVERNMENT

The Government of Australia amended The Marriage Act 1961 to redefine marriage as “union of two people” with the Marriage Amendment (Definition and Religious Freedoms) Bill 2017, ensuring Marriage Equality.

## SUBSTANTIVE VIOLATIONS

### 1. Article 2 – Discriminatory Laws and Practices

The report makes the case that asylum seekers who are lesbian, bisexual, transgender or intersex (LBTI) have a genuine claim for refugee status, which should be overtly recognised by Australia. Further, that women with diverse sexual orientation, gender identity or intersex (SOGII) status have different issues to men, in relation to invisibility, and to safety issues in detention.

#### 1.1 LBTI as legitimate grounds for asylum

The UNHCR has declared that

“[a]ll people, including LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination.”

The Universal Declaration of Human Rights (**Declaration**) recognizes fundamental and inalienable rights for all persons. In adopting the Declaration, Member States of the United Nations pledged to promote universal respect for and observance of human rights and freedoms contained in the Declaration, including Article 14(1) of the Declaration:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

The obligations of Member States with respect to persons seeking asylum were codified at international law by the UN Convention on the Status of Refugees (the **Refugee Convention**) and the 1967 Protocol Relating to the Status of Refugees (the **1967 Protocol**). Together, the Refugee Convention and the 1967 Protocol form the foundation of the rights of refugees at international law.

Article 1A(2) of the Refugee Convention defines a refugee as a person who:

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

LBTI women and individuals are a particular social group who are vulnerable to persecution in certain countries of the world, and hence qualify for protection under the 1967 Protocol of the Refugee Convention.

## 1.2 Refugee LBTI Women/individuals – numbers and persecution issues

In 2012, the Organization for Refuge, Asylum and Migration (ORAM International) estimated that approximately 175 million lesbian, gay, bisexual, transgender and intersex individuals were in countries where they were at risk of persecution. However, ORAM estimated that only 5,000 each year are able to apply for asylum based on their sexual orientation, gender identity or intersex variation, with approximately only 2,500 being successful.<sup>1</sup>

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<sup>1</sup> (Kaleidoscope Australia Human Rights Foundation, K&L Gates LLP)

Individuals may be persecuted on the basis of Sexual Orientation, Gender Identity or Intersex status (**SOGII**) as a result of:

- laws criminalizing same-sex sexual conduct between consenting adults
- attempts to “cure” the individual
- sexual assault or rape as punishment or attempted “cure”
- forced heterosexual marriage
- blackmail via threat to disclose SOGII without permission
- physical or psychological violence
- forced sex-reassignment surgery, sterilization and/or hormone therapy.

The United Nations Report, May 2015, states:

“(There is) continuing, serious and widespread human rights violations perpetrated, too often with impunity, against individuals based on their sexual orientation and gender identity. Since 2011, hundreds of people have been killed and thousands more injured in brutal, violent attacks.... Other documented violations include torture, arbitrary detention, denial of rights to assembly and expression, and discrimination in health care, education, employment and housing. These and related abuses warrant a concerted response from Governments, legislatures, regional organizations, national human rights institutions and civil society, as well as from United Nations.”<sup>2</sup>

### 1.3 Specific considerations for women with SOGII status

LB women, transgender and intersex people remain less visible than men. An analysis of all publicly available sexual orientation-based

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<sup>2</sup> Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General 4<sup>th</sup> May 2015 on Discrimination and Violence against individuals based on their Sexual Orientation and Gender Identity.



asylum claims appealed beyond the tribunal level in Australia, Canada, and the UK, reveals that only 17 per cent of cases involved women.<sup>3</sup>

Women also experience persecution as a result of their SOGII status. As women they have even less access to independent travel, and have greater social pressures as a result of their gender, to silence them, leading to greater invisibility. The persecution of a woman with SOGII status often comes in the form of increased domestic violence or rape, which may only be visible as related to her gender rather than her SOGII status.

ALMA has received emails from LBT women from countries where homosexuality is a crime, and/or where LGBTI people experience discrimination and violence that exemplify these specific issues.

One young woman writes:

“(I)live in sadness and depression, where I had (sic) deadly persecution of the family, in spite of their lack of knowledge (that) I am lesbian, but I always feel I'm different because I refuse to marry a man. I want to.... live a normal life, but I am unable to do so because it is (a) crime (here) and also I am a Muslim and the punishment in Islam is death, and I like a girl and have a relationship with (her), and (I have) gender identity disorder and (with this) situation (I am) not able to live here. We 're going to be physical abuse(d), to harassment and physical violence. We live in fear and anxiety as well as fear of parents. we run the risk of our lives. If the family knew about our relationship, (they) will kill (us).”

Another email received:

“I live in the pressure of society and fear and I could not talk about my homosexuality. It is a crime and the police arrest them and I have a fear and (am) rejected from community.

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<sup>3</sup> International Journal of Refugee Law, 2017, Vol 29, No 2, 292–322 Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?

(And of her girlfriend) (They) would kill her by virtue of Sharia Islamic law. I became an outcast from my friends and my community I live (in) fear. My family does not respect the female. Now, (I) fear forced marriages and I do not know what to do. Please help us.”

#### 1.4 Specific issues for LGBTI women in detention

The current system of detention creates an environment where LGBTI individuals continue to experience persecution, harassment and discrimination. This not only continues the traumatization of persecution, but perpetuates the need for continued invisibility in order to maintain personal safety. Invisibility then threatens their application for asylum in the current asylum process, leading to their return to further persecution in their country of origin.

An International Detention Coalition report states:

“Within places of immigration detention, LGBTI persons face heightened levels of harassment, discrimination, psychological abuse, physical and sexual violence by detention staff as well as other detainees. They are frequently segregated in conditions falling below those of the general detainee population and well-established international standards, or are subjected to policies of solitary confinement, which have been shown to have severe mental and physical health consequences. Almost universally, LGBTI persons in detention are in situations of extreme vulnerability.”<sup>4</sup>

The current asylum seeking assessment process continues to be problematic:

“Asking stereotypical and/or sexually explicit questions of individuals pursuing refugee claims based on sexual orientation, gender identity, or intersex (SOGII) status is a violation of human dignity and the right to privacy. Yet, lesbian, gay, bisexual,

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<sup>4</sup> LGBTI Persons in Immigration Detention June 2016

transgender, and intersex (LGBTI) asylum seekers continue to be asked such questions.”<sup>5</sup>

To ensure the basic human rights of LGBTI individuals in the process of seeking special considerations are necessary.

(i) LGBTI women/individuals need to be considered as vulnerable individuals in a detention centre and alternatives to detention should be sought.

(ii) Unlike individuals seeking asylum on grounds of religious or ethnic persecution, LGBTI individuals seeking refugee status on the grounds of sexual orientation, gender identity or intersex variation are more complex as the asylum seeker may have not lived “openly” as an LGBTI person. Fear of persecution may cause them to be reluctant to disclose their sexual identity or gender identity or intersex status.<sup>6</sup>

LGBTI women/individuals require LGBTI-sensitive screening procedures such as the Difference, Stigma, Shame and Harm Model (DSSH)<sup>7</sup>.

It is important that those making the assessments and decisions are adequately trained to understand that LGBTI individuals will often present in many diverse ways, and may not present in ways that are common in Western cultures. This is particularly true when an LGBTI woman presents as having been married or having children.

(iii) The principle of *non-refoulement*, which prohibits the return of a refugee to a territory where his or her life or freedom is threatened. It is considered a rule of customary international law and should be employed when considering LGBTI individuals seeking asylum.

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<sup>5</sup> International Journal of Refugee Law, 2017, Vol 29, No 2, 292–322 Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?

<sup>6</sup> Kaleidoscope Australia Human Rights Foundation, K&L Gates LLP

<sup>7</sup> International Journal of Refugee Law, 2017, Vol 29, No 2, 292–322 Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?

## Recommendations relating to Discriminatory Laws and Practices

Recommendations to ensure the human rights of LGBTI women/individuals seeking asylum are protected are:

(i) that SOGII status is accepted as grounds for seeking asylum in Australia if the individual is living in a country that criminalises such status

(ii) that LGBTI individuals are identified as being vulnerable and not suitable for detention and alternatives to detention for them are found.

(iii) that LGBTI-sensitive training is mandatory for all workers and decision makers involved in the asylum seeking process, and includes issues specific to LB women and TI people.

(iv) that LGBTI-sensitive assessment processes are implemented rather than stereotypical and/or sexually explicit questioning. Interviewing models such as the DSSH model to be implemented.

(v) that the principle of *non-refoulement*, which prohibits the return of a refugee to a territory where his or her life or freedom is threatened be implemented when considering LGBTI individuals seeking asylum.

### **Questions for the Government**

(i) What is the current training for decision makers re assessing LGBTI people seeking asylum and what improvements are planned?

(ii) What alternatives to detention centres can be considered for LGBTI people?

(iii) What plans are there to work in with LGBTI organizations to resolve these issues?

(iv) In 2001, the Committee commended the government of Sweden for passing legislation providing resident permits to individuals who have a well-founded fear of persecution on the basis of sexual orientation or gender identity, particularly in cases that involve discrimination against women.

Does the Government have plans to pass similar legislation?

## 2. Article 5 - Modifying Social and Cultural Patterns

CEDAW Article 5 recognizes that gender stereotypes and cultural attitudes can negatively affect the lives of women.

Lesbian and bisexual women, transgender and intersex people experience ongoing discrimination in Australia and as a result are at increased risk of mental health issues and substance abuse<sup>8</sup>, violence<sup>9</sup>, homelessness and unemployment and difficulty accessing health services<sup>10</sup>.

### 2.1 Discrimination and health outcomes

Although ALMA recognizes the enormous value of having achieved marriage equality for same-sex couples in Australia recently, the public debate leading up to the final vote highlighted the level of homophobia, biphobia and transphobia there is in the Australian culture, and the negative impact this has on LGBTI health, particularly for bisexual and trans individuals<sup>11</sup>. More than 90% LGBTIQ people found the debate had a negative impact and 80% found this debate stressful. A senate inquiry into the impacts of the equal marriage vote recommended the following:

- “that questions of human rights for minority groups should not be resolved by a public vote

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<sup>8</sup> McNair, R., Szalacha, L. A., & Hughes, T. L. (2011). Health Status, Health Service Use, and Satisfaction According to Sexual Identity of Young Australian Women. *Women's Health Issues, 21*(1), 40-47

<sup>9</sup> Szalacha, L. A., Hughes, T. L., McNair, R., & Loxton, D. (2017). Mental health, sexual identity, and interpersonal violence: Findings from the Australian longitudinal Women's health study. *BMC Womens Health, 17*(1), 94

<sup>10</sup> McNair, R. P., & Bush, R. (2016). Mental health help seeking patterns and associations among Australian same sex attracted women, trans and gender diverse people: a survey-based study. *BMC Psychiatry, 16*(1), 1-16

<sup>11</sup> Ecker S, Bennett E. Preliminary results of the Coping with Marriage equality debate survey. The Australia Institute and National LGBTI Health Alliance, [www.tai.org.au](http://www.tai.org.au)

- that the Australian Government consider how further funding and support could be offered to mental health and LGBTIQ organisations to help address the consequences of the postal survey”<sup>12</sup>

The level of misinformation and cultural fear of LGBTI people that was voiced during the public debate highlights the ongoing need for education and public social programmes in schools, workplaces and communities.

## 2.2 Stereotypes in Receiving Goods and Services

LBTI women experience difficulty accessing some services based on their sexual orientation, gender identity or intersex status. A number of LBTI women/individuals report negative experiences on disclosing their sexual orientation in medical settings, or decide not to disclose their sexual orientation due to fears of non-acceptance or reduced care<sup>13</sup>. Access to homelessness services can be difficult for LBTI people<sup>14</sup>, and access to alcohol and drug services is particularly difficult for LB women and transgender individuals<sup>15</sup>.

One of the central issues in Australia today is the lack of specific training regarding SOGII status for health and social care providers at all levels

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<sup>12</sup> Commonwealth of Australia. Senate inquiry into arrangements for the marriage equality postal survey, February 2018. [www.aph.gov.au/senate\\_fpa](http://www.aph.gov.au/senate_fpa)

<sup>13</sup> McNair, R., Hegarty, K., & Taft, A. (2015). Disclosure for same-sex attracted women enhancing the quality of the patient–doctor relationship in general practice. *Aust Fam Physician*, 44(8), 573-578

<sup>14</sup> Oakley, S., & Bletsas, A. (2017). The experiences of being a young LGBTIQ and homeless in Australia: Re-thinking policy and practice. *Journal of Sociology*, 1440783317726373.

<sup>15</sup> McNair, R., Pennay, A., Hughes, T., Love, S., Valpied, J., & Lubman, D. I. (2018). Health service use by same-sex attracted Australian women for alcohol and mental health issues: a cross-sectional study. *British J of General Practice Open*, 1-11.

of professional development<sup>16 17 18</sup>. This can be rectified through initiatives at undergraduate and postgraduate training levels to overtly include LGBTI health issues.

### 2.3 Issues specific to people with intersex variations

People with intersex variations in Australia face a number of issues including high levels of discrimination in society, and human rights violations in the form of modifying medical treatment without consent or choice, usually as infants and children<sup>19</sup>. The Darlington Statement is a joint consensus statement from the Australia and New Zealand intersex community in March 2017<sup>20</sup>. This called for the recognition of the rights and autonomy of people with intersex variations to self-determination, bodily integrity, and legislative protection from discrimination on the grounds of sex characteristics. They also sought the development and implementation of human-rights based intersex standards of care for medical treatment.

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<sup>16</sup> Mullens, A. B., Fischer, J., Stewart, M., Kenny, K., Garvey, S., & Debattista, J. (2017). Comparison of Government and Non-Government Alcohol and Other Drug (AOD) Treatment Service Delivery for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community. *Subst Use Misuse*, 1-12.

<sup>17</sup> Rutherford, K., McIntyre, J., Daley, A., & Ross, L. E. (2012). Development of expertise in mental health service provision for lesbian, gay, bisexual and transgender communities. *Medical Education*, 46(9), 903-913.

<sup>18</sup> McNair, R. P. (2003). Outing lesbian health in medical education. *Women Health*, 37(4), 89-103.

<sup>19</sup> Tiffany Jones, B. H., Morgan Carpenter, Gavi Ansara, William Leonard,, & Lucke, J. (2016). *Intersex: Stories and Statistics from Australia*: Open Book Publishers.

<sup>20</sup> Darlington Statement on intersex rights, 2017. <https://ihra.org.au/darlington-statement/>

## Recommendations relating to modifying Social and Cultural Patterns

- (i) Provide access to quality counselling and psychosocial support for LGBTI people and their families who are experiencing SOGII-based discrimination in any aspect of life.
- (ii) Conduct public education campaigns and programmes against homophobia, biphobia and transphobia and promote human rights of LGBTI people through mass media and other public means.
- (iii) Provide adequate and appropriate education in school programmes so that all school age children, including in private schools receive education in human rights regarding LGBTI people.
- (iv) To uphold the rights in people with intersex variations including prevention of unnecessary medical procedures.
- (v) To develop and implement human-rights based intersex standards of care for medical treatment in Australia. To ensure that all training and education programmes, especially those relating to health and community services, receive adequate and appropriate training in the human rights and special needs of LGBTI people.