

POSITION SUMMARY

LGBTI refugees and people seeking asylum

THORNE HARBOUR HEALTH'S POSITION

LGBTI people seeking asylum and their families must not be detained in regions that cannot guarantee their safety. Best practice guidelines and training for asylum claims involving LGBTI status must be developed and based on UNHCR guidelines for refugee status determination. Increased funding for LGBTI service providers is needed to develop LGBTI-centred support services for refugees and people seeking asylum throughout the period of detention, assessment and the initial period of resettlement in Australia or the regional processing jurisdiction.

RECOMMENDATIONS

1. Establish an independent expert LGBTI review panel, or LGBTI intermediary, to make determinations about LGBTI status for asylum claim assessments to ensure that such assessments are subject to expert oversight.
2. Review and ensure the adequate implementation of LGBTI-specific departmental training and claims assessment procedures that are consistent with the UNHCR *Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*.
3. Review and implement procedures to protect LGBTI asylum seekers in immigration detention, where they may experience discrimination and harassment from other detainees, members of staff, or service providers. This could include the appointment of LGBTI Liaison Officers.
4. Funding to support community-informed research and services that work with LGBTI people seeking asylum to ensure appropriate care and support during the detention, assessment and initial resettlement period.

BENEFITS

- Reduced barriers for LGBTI people to make a claim for asylum.
- Reduced administrative costs associated with detention and claims processing.
- Improved health and wellbeing of LGBTI people seeking asylum.
- Meeting of Australia's international obligations as they relate to refugees and asylum seekers.

BACKGROUND

- Australia has obligations under international treaties to protect the human rights of refugees and asylum seekers, and to uphold the principle of non-refoulement, in which it must ensure people seeking asylum are not sent back to a country where they will likely be persecuted.
- LGBTI people seeking asylum in Australia experience disadvantage and discrimination, particularly during processing of their legal claims for protection, during which they are subject to unnecessary scrutiny and intrusive questioning to 'prove' their LGBTI status.
- LGBTI asylum seekers have likely concealed their status for safety reasons. Culturally, they are constrained in presenting evidence for their claims, and may not be forthcoming if asked deeply personal questions.
- Many LGBTI people in both offshore and onshore detention centres are afraid to identify their status in such environments, where they risk harassment and harm.
- People detained in Australia's detention centres experience physical harm and mental distress, with long-term consequences.
- The *Migration Act 1958* defines a 'refugee' differently to the Refugee Convention. This allows people seeking asylum to be sent back to unsafe countries if "effective protection measures" are available, or to regions deemed to be safe even when other regions of the same country are not.

EVIDENCE BRIEF

LGBTI refugees and people seeking asylum

KEY POINTS

- LGBTI refugees and people seeking asylum experience disadvantage and discrimination, especially during the processing of their asylum claims.
- Some LGBTI refugees and people seeking asylum under Australia's care are detained and resettled in regions that cannot guarantee their safety.
- There are limited support services for LGBTI refugees and people seeking asylum.
- Australia is currently failing to meet its international obligations as they relate to refugees and people seeking asylum.
- An expert review panel is better qualified to make determinations about LGBTI status for the purposes of asylum claims.

BACKGROUND

Problems experienced by LGBTI people seeking asylum

While there is still room for improvement, compared to other nations Australia performs well as far as its treatment of LGBTI citizens is concerned. However, the same standard of treatment is not extended to LGBTI people seeking asylum in Australia's care. Currently, LGBTI people seeking asylum are often outed in front of their fellow asylum seekers, subjected to humiliating and unnecessary scrutiny,¹ and sent to regions where same-sex sexual activity is illegal,² or where they face likely and foreseeable harm and discrimination due to their LGBTI status.³ These LGBTI-specific abuses are in addition to the physical and sexual abuse experienced by many people detained in Australia's offshore detention centres.⁴

Australia's international obligations

As the Australian Human Rights Commission has noted, "Australia has international obligations to protect the human rights of all asylum seekers and refugees who arrive in Australia, regardless of how or where they arrive and whether they arrive with or without a visa."⁵

The United Nations Convention Relating to the Status of Refugees (hereafter the Refugee Convention) defines who refugees are, and outlines the basic rights that countries should guarantee to people seeking safety.⁶

The Refugee Convention defines a 'refugee' as a person who is outside their country, and unable or unwilling to return due to a well-founded fear of being persecuted due to their race, religion, nationality, membership of a particular social group, or political opinion. LGBTI people fall under the category of 'particular social group'.⁷

Australia has ratified the Refugee Convention. It is therefore obligated to uphold the principle of non-refoulement, in which it must ensure people seeking asylum who meet or may meet the definition of a refugee are not sent back to a country where they will likely be persecuted. However, Australia's *Migration Act 1958* defines a refugee differently to the Refugee Convention, allowing people seeking asylum to be sent back to unsafe countries if "effective protection measures" are available, or to regions of a country deemed to be safe even when other regions of the same country are not.

It is often relatively straightforward to confirm when LGBTI refugees will be vulnerable to persecution upon return to a country or region that cannot guarantee their safety. These countries and regions often lack antidiscrimination legislation, or have overtly discriminatory legislation targeting LGBTI people, and cultures that still exhibit violence towards people due to their gender and sexuality. For example, homosexuality is criminalised in over 70 countries.⁸

In addition to the Refugee Convention, Australia is party to a number of international treaties that have bearing on its obligations towards people seeking asylum. For example, the International Covenant on Civil and Political Rights⁹ and Convention on the Rights of the Child¹⁰ provide the right to not be arbitrarily detained. People seeking safety are still owed protection under these treaties even if they are not deemed to be refugees.

Need for an independent expert LGBTI review panel

An expert LGBTI review panel, or LGBTI intermediary, will ensure LGBTI people are not pathologised or prejudiced against on the basis of their LGBTI status during their assessment. LGBTI people are best placed to accurately determine the LGBTI status of someone seeking asylum, and to do so in a way that is sensitive and respectful of their LGBTI status. This model would provide a safe and affirming environment in order to facilitate the open sharing of information that is important to determine asylum claims based on LGBTI status.

Need for resourcing of LGBTI support organisations

The *Nothing for Them Report* highlighted significant gaps in service provision for LGBT refugees and people seeking asylum,¹¹ and the *Something for Them Report* highlighted barriers to their feeling of belonging once settled in Australia.¹² Secure funding arrangements and the development of referral pathways to LGBTI support organisations are needed to ensure that LGBTI refugees and people seeking asylum have the support they need to establish themselves in Australia.

CURRENT PRACTICE

Review training material for asylum claims involving LGBTI status

The United Nations Human Rights Commission (UNHCR) has released a training programme detailing how to appropriately handle asylum claims involving LGBTI status.¹³ The programme “covers relevant terminology, international law, communication, operational protection, conducting interviews, durable solutions, health, and refugee status determination.”¹⁴ Existing training materials used for assessing claims involving LGBTI status should be reviewed against the UNHCR training programme.

CONCLUSION

LGBTI people experience disadvantage and discrimination, especially during the processing of their asylum claims. This process can be re-traumatising and there are limited support services for LGBTI refugees and people seeking asylum. In addition, some LGBTI refugees and people seeking asylum under Australia's care are detained and resettled in regions that cannot guarantee their safety.

RECOMMENDATIONS

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2. Review and ensure the adequate implementation of LGBTI specific departmental training and claims assessment procedures that are consistent with the UNHCR *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*.
3. Review and implement procedures to protect LGBTI asylum seekers in immigration detention, where they may experience discrimination and harassment from other detainees and members of staff. This can include the appointment of LGBTI Liaison Officers.
4. Funding to support community-informed research and service providers working with LGBTI people seeking asylum to ensure appropriate care and support during the detention, assessment and initial resettlement period.

REFERENCES

¹ Shannon Power, 'LGBTI people can do more for asylum seekers and refugees: Gillian Triggs', *Star Observer* (online at 25 February 2016) <<http://www.starobserver.com.au/%20news/national-news/lgbti-people-can-do-more-for-asylum-seekers-and-refugees-gillian-triggs/146459>>.

² For example, Manus Island in Papua New Guinea (PNG). Section 210 of the PNG *Criminal Code Act 1974* makes male homosexual acts criminal offences punishable by up to 14 years' imprisonment.

³ Nicole Hasham, 'Gay refugees on Nauru 'prisoners' in their home as Australia prepares to celebrate Mardi Gras', *The Sydney Morning Herald* (online at 5 March 2016) <<https://www.smh.com.au/politics/federal/gay-refugees-on-nauru-prisoners-in-their-home-as-australia-prepares-to-celebrate-mardi-gras-20160304-gnam2h.html>>.

⁴ Australian Human Rights Commission, 'Asylum seekers, refugees and human rights: snapshot report (2nd edition)' (Web Page, 2017) <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_Snapshot%20report_2nd%20edition_2017_WEB.pdf>.

⁵ Australian Human Rights Commission, 'Asylum seekers and refugees guide' (Web Page, last updated 14 August 2015) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/asylum-seekers-and-refugees-guide>>.

⁶ The office of the United Nations High Commissioner for Refugees, 'Convention and protocol relating to the status of refugees', UNHCR, Geneva, Switzerland. <<https://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>>.

⁷ Free & Equal United Nations for LGBT Equality, 'Fact sheet: refuge and asylum', The office of the United Nations High Commissioner for Human Rights, and Organisation for Refuge, Asylum and Migration, 2014. <https://www.unfe.org/system/unfe-54-UN_Fact_Sheets_Refuge_Asylum.pdf>.

⁸ Free & Equal United Nations for LGBT Equality, 'Fact sheet: criminalization. The office of the United Nations High Commissioner for Human Rights' <[https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf)>.

⁹ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, (entered into force 23 March 1976), Article 9(1).

¹⁰ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 37(b).

¹¹ Olivia Noto, William Leonard and Anne Mitchell, 'Nothing for them: Understanding the support needs of LGBT young people from refugee and newly arrived backgrounds' (Monograph Series No. 94. GLHV, the Australian Research Centre in Sex, Health & Society, La Trobe University, 2014). <http://www.myan.org.au/file/file/Nothing_for_them_report.pdf>.

¹² David Mejia-Canales D and William Leonard, 'Something for them: Meeting the support needs of same-sex attracted, sex and gender diverse (SSASGD) young people who are recently arrived, refugees or asylum seekers' (Monograph Series No. 107, GLHV, the Australian Research Centre in Sex, Health & Society, La Trobe University, 2016). <<https://www.glhv.org.au/report/something-them>>.

¹³ Jennifer Rumbach, 'Training manual for facilitators: Working with lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in forced displacement and the humanitarian context' (The office of the United Nations High Commissioner for Refugees and the International Organisation for Migration, January 2017) <https://lgbti.iom.int/sites/default/files/Training%20Manual_Jan2017.pdf>.

¹⁴ Makes Levin, 'UNHCR leads in LGBTI refugee, asylum seeker protection: largest and most comprehensive training package of its kind being rolled out globally' (UNHCR, 24 December 2015). <<http://www.unhcr.org/en-au/news/latest/2015/12/567bb2869/unhcr-leads-in-lgbti-refugee-asylum-seeker-protection.html>>.