



Kaleidoscope
Australia
Human Rights Foundation

**Submission to the Senate Legal
and Constitutional Affairs
Committee on the Impact of the
Migration Amendment
(Complementary Protection and
Other Measures) Bill 2015**

26 November 2015

Executive Summary

This submission on The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 addresses four key elements of the Bill and their effect on sexual orientation, gender identity and intersex based asylum claims, namely:

1. Section 5LAA(1)(a) which requires that ‘the real risk of significant harm needs to relate to all areas of a receiving country’;
2. Section 5LAA(1)(b) which requires that ‘the person needs to face the real risk personally’;
3. Section 5LAA(5) which introduces ‘a provision to exclude persons from complementary protection who could take reasonable steps to modify their behaviour, so as to avoid a real risk of significant harm in a receiving country, provided that this would not conflict with their identity or core belief system’; and
4. Section 5LAA(1)(a) relating to the availability of effective protection measures through State or non-State actors in a receiving country.

Recommendations

We make three key recommendations for amendment to the Bill, namely that:

- 1. the ‘reasonableness’ element in the internal relocation principle is not removed from the *Migration Act*;**
- 2. the reference to non-State actors as providers of safety in the analysis of ‘real risk’ per section 5LAA(1)(a) be removed; and**
- 3. The language throughout The Bill be consistently gender neutral.**

Introduction

Kaleidoscope Human Rights Foundation is a not-for-profit organisation founded in Australia, in 2013, to promote and protect the human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people, so as to enable them to live a life of dignity.

The proposed changes to *The Migration Act 1958* will have an impact on claims for asylum based on sexual orientation, gender identity and intersex (SOGII). Same-sex sexual acts are criminalised in 77 countries around the world, over half of which are in Commonwealth nations.¹ Thus, it is clear that there is rampant homophobia and transphobia in many of the countries producing refugees. Providing a safe haven for LGBTI refugees is critical.

¹ Paula Gerber, “Countries That Still Criminalise Homosexuality,” 2014, <http://antigaylaws.org/all-countries-alphabetical/>.

The Organization for Refugee, Asylum and Migration (ORAM International) estimates that as of 2012, there were roughly 175 million LGBTI individuals living in persecutory environments. Of this 175 million, ORAM estimates that 5,000 each year are able to apply for asylum. From these claims, ORAM estimates that only 2,500 are successful.²

This submission will address four key elements of The Migration Amendment (Complementary Protection and Other Measures) Bill 2015, including:

1. That 'the real risk of significant harm needs to relate to all areas of a receiving country', per the proposed new paragraph 5LAA(1)(a);
2. That 'the person needs to face the real risk personally', per the proposed subsection 5LAA(1)(b);
3. The proposed introduction of 'a provision to exclude persons from complementary protection who could take reasonable steps to modify their behaviour, so as to avoid a real risk of significant harm in a receiving country, provided that this would not conflict with their identity or core belief system' per proposed subsection 5LAA(5); and
4. The proposed amendment of 'the provision relating to state protection measures, when determining whether a person faces the relevant risk of harm relating to complementary protection, to clarify that a person will not face a real risk of significant harm if effective protection measures are available to the person through State or non-State actors in a receiving country', per proposed subsection 5LAA(1)(a).

Before addressing each of these proposed amendments, we make one overarching general comment relating to the language used in the Bill. Currently, the Bill does not use gender neutral language. While gendered language is being replaced by the term 'person' in paragraphs 5H1(a) and 5H1(b), it is being introduced in sections such as the new subsection 5LAA(3) where it is provided that 'a person will suffer significant harm if... the person will be arbitrarily deprived of his or her life...'

This language is exclusionary to those applicants who do not identify with the gender binary of 'his/her' and is unnecessary for the purposes of the legislation proposed. For some gender minorities, the pronoun of 'his/her' is not applicable or an appropriate way to describe or refer to them. They may chose gender neutral terminology, when having to do so in English, such as 'they/them'. Sexual orientation, gender identity, and intersex variation manifest themselves in a myriad of different ways across different cultures. Therefore, the way these are expressed or understood in one cultural context will often not reflect the experience in another.

² Asylum & Migration Organization for Refugee, "Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers," 2012, 7, <http://www.oraminternational.org/images/stories/PDFs/oram-opening-doors.pdf>.

As this legislation is specifically designed to process claims of asylum seekers from different cultures, it is even more important to remove unnecessary gender binaries to ensure the most inclusive language used in the Act.

1. Internal Flight Alternative (IFA) Argument

The proposed paragraph 5LAA(1)(a) states that ‘a necessary element of the risk of significant harm is that the real risk relates to all areas of the receiving country’. This is an area of asylum law that has been particularly problematic for LGBTI applicants. As noted by the UNHCR in their 2010 Guidance Note, the use of the IFA argument is:

sometimes used to reject claims without being properly analysed by adjudicators, who may assume that a LGBTI person can safely return to a larger city or different area of the country where s/her is not known, without any country of origin or other information supporting such a claim.³

While comparable records are not available for Australian decisions, the United Kingdom Lesbian and Gay Immigration Group (UKGLIG) reported in 2010, that 68% of initial asylum decision denials for sexual orientation based claims in the UK included an argument from the UK Home Office that the applicant could relocate to a different area of their country of origin.⁴ This occurred even in the instance of an applicant from Jamaica, where prejudice against LGBTI individuals is widespread.⁵

The 2012 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*, provide that where ‘the country in question criminalises same-sex relations and enforces the relevant legislation, it will normally be assumed that such laws are applicable in the entire territory’.⁶ In the case of gender identity or intersex based claims, where laws ‘do not allow a [trans*] or intersex individual to access and receive appropriate medical treatment if sought, or to change the gender markers on [their] documents, would also normally be applicable nationwide and should be taken into account when considering the proposed place of relocation’.⁷

³ United Nations High Commissioner for Refugees UNHCR, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,” November 21, 2008, para. 28, <http://www.refworld.org/docid/48abd5660.html>.

⁴ UKGLIG, “Failing The Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum” (London, UK: UK Lesbian & Gay Immigration Group, April 2010), 5.

⁵ Ibid.

⁶ 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,” no. HCR/GIP/12/01 (October 23, 2012): para. 53, <http://www.refworld.org/docid/50348afc2.html>.

⁷ Ibid.

The burden of proof rests on the decision maker to prove that there is an internal flight alternative where the applicant will not be exposed to the original or new forms of persecution. In all circumstances, this should not involve a concealment of the applicant's SOGII identity/characteristics.⁸

As outlined in the *Explanatory Memorandum*,

the aim of new paragraph 5LAA(1)(a) is to ensure that this approach is both applied to an assessment of complementary protection claims and applied consistently with the interpretation of Australia's non-refoulement obligations; that is, to ascertain if a safe and legally accessible alternative flight option exists that would mitigate a 'real risk' of 'significant harm' to the person.⁹

This is followed by the explanation that 'such an assessment is not required to further determine whether the alternative flight option would provide the person with ideal or preferred living circumstances'.¹⁰ The Government puts forth in these proposed amendments that 'in interpreting the "reasonableness" element to the internal relocation principle in the refugee context, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation'.¹¹

This contradicts the UNHCR Guidelines and best practice in refugee status determinations, and represents a further shift away from international human rights principles and treaty obligations. According to the UNCHR's 2012 Guidelines, decisions makers must take into consideration whether internal flight is reasonable or not. In particular, 'the decision maker needs to assess whether return to the proposed place of relocation would cause undue hardship, including by examining the applicant's personal circumstances'.¹² This is especially pertinent in the cases of women and gender minorities who are likely to have fewer economic opportunities compared to men, which means that it may not be viable or possible for them to live apart from male family members. It would be irresponsible and place the applicant's life in danger, if these considerations were not taken into account.¹³

⁸ 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," para. 54.

⁹ Migration Amendment (Complementary Protection and Other Measures) Bill 2015, *Explanatory Memorandum*.

¹⁰ *Ibid.*, para. 59.

¹¹ Migration Amendment (Complementary Protection and Other Measures) Bill 2015, *Explanatory Memorandum*, para. 60.

¹² Para 56 2012 Guidelines. See also: *Boer-Sedano v. Gonzales*, US, 418 F.3d 1082, (9th Cir. 2005), 12 August 2005, available at: <http://www.unhcr.org/refworld/docid/4821a2ba2.html>, found that the applicant's [HIV-positive] health status would make relocation unreasonable.

¹³ *Ibid.*

2. Facing the real risk personally.

The persecution faced by LGBTI persons can be grouped into three general categories:

- i. *legally sanctioned persecution*: statutes, case law, penal codes, regulations or practices that punish individuals based on actual, perceived or attributed same-sex sexual conduct or gender identity, and State performed or sanctioned abuse or punishment;
- ii. *mixed-motive persecution*: in which a State persecutes LGBTI individuals for their sexuality, gender identity or intersex variation but claims it is for an unrelated ground; and
- iii. *State complicity, silence or failure to protect individual rights*: in the face of persecution of LGBTI individual by “non-State” actors.¹⁴

Persecution based on sexual orientation, gender identity or intersex variation may include:

- murder;
- torture;
- sexual, physical or emotional abuse, serious threat, economic persecution;
- extortion;
- severe discrimination, harassment or ostracisation;
- crimes or violence by family members;
- genital mutilation;
- forced or underage marriage, force pregnancy and/or corrective rape;
- forced institutionalization
- forced sex-reassignment surgery, sterilization and/or hormone therapy; and
- conversion therapies, including electroshock therapy, drug injection or hormonal therapy.¹⁵

¹⁴ Kaleidoscope Australia Human Rights Foundation, “Looking Through the Kaleidoscope: A Guide to Best Practice in Determining Applications for Refugee Status Based on Sexual Orientation, Gender Identity and Intersex Grounds” (Melbourne, 2015), 8, <http://www.kaleidoscopeaustralia.com/wp-content/uploads/2015/06/Best-Practice-Guide-22nd-June-2015.pdf>.

¹⁵ *Ibid.*, 10.

The fact that an applicant may not have disclosed their sexual orientation, gender identity, or intersex variation in their country of origin does not mean that they did not, or will not, face 'real risk' personally. An applicant may have felt compelled to conceal their SOGII in order to avoid harm, there may have been a culture of shame and embarrassment surrounding LGBTI identification and it may have been a culture whether the applicant never openly discussed their SOGII. In particular, many intersex people will have never met another intersex person, let alone someone who has the same intersex variation.¹⁶ Secrecy and isolation is still the reality for most intersex people.

Examples of institutionalised persecution, including laws criminalising same-sex relations, violence, threats and abuse by authorities may include:

- legal sanctioned persecution because of sexual or gender minority status through statutes;
- case law;
- criminal laws, regulations or practices that punish an individual based on actual, perceived or attributed SOGII;
- state performed or sanctioned abuse or disparate punishment such as whipping, lengthy imprisonment and even the death penalty; and
- state-sponsored forcible hormone therapy and genital normalising surgeries under the guise of so-called 'reparative therapies'.¹⁷

3. Modification of behaviour

According to proposed subsection 5LAA(5), the Migration Act would

exclude persons from complementary protection who could take reasonable steps to modify their behaviour, so as to avoid a real risk of significant harm in a receiving country, provided that this would not conflict with their identity or core belief system.

The section goes on to provide that this does not include any modification which would:

¹⁶ People with intersex variations are those who are born with atypical sex characteristics that do not fit within the stereotypical binary definitions of male or female. Intersex is a spectrum term with at least 30 or 40 intersex variations currently identified. Intersex does not refer to a gender identity. Intersex variations can be identified prenatally, at birth, during the onset of puberty, when attempting to conceive, or by chance. They include a diverse range of hormonal, anatomic, genetic and chromosomal variations. *Ibid.*, 29.

¹⁷ *Ibid.*, 10.

- ‘conflict with a characteristic that is fundamental to a person’s identity’;
- ‘conceal an innate or immutable characteristic of the person’;
- result in an applicant having to ‘alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status’.

This explicit reference to sexual orientation and gender identity is commendable. However, the use of gendered language is inappropriate.

4. Effective protection measures

The amendment to section 5LAA(1)(a) aims to remove the ‘reasonableness’ test from the process of considering whether an applicant can relocate within their country of origin. According to the *Explanatory Memorandum*, the aim of this amendment is to ‘clarify that a person will not face a real risk of significant harm if effective protection measures are available to the person through State or non-State actors in a receiving country’.¹⁸ This infers that non-State actors are satisfactory agents of protection. This is contradictory to the guidance set forth by the UNHCR in its 2012 Guidelines, which provides that ‘United Nations agencies, non-governmental organisations, civil society and other non-State actors are not a substitute for State protection’.¹⁹

For a wide variety of reasons, LGBTI asylum seekers fleeing persecution will not be able to secure safety from either State or non-State agencies. Where a State’s laws criminalise same-sex relations or the expression of an individual’s gender identity, this is generally understood to be an indication that the protection of LGBTI persons is not available.²⁰ In particular, it is unreasonable to expect an individual to seek State protection from harm that is deemed a criminal act. In such situations, an asylum seeker should not be expected to demonstrate that they sought protection from State or non-State authorities. Instead, they should be expected to establish that this protection was not available to them, or would not be likely available to them if returned.

Even where persecution of LGBTI individuals is not officially sanctioned, those individuals who are stigmatised may be vulnerable to attacks by individuals or groups. This can often be at the hands of police forces or the armed services. Often armed, criminal or vigilante groups will specifically target individuals for being LGBTI. For example, Russia decriminalised homosexuality in 1993,

¹⁸ ¹⁸ Migration Amendment (Complementary Protection and Other Measures) Bill 2015, *Explanatory Memorandum*.

¹⁹ 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,” 51.

²⁰ Kaleidoscope Australia Human Rights Foundation, “Looking Through the Kaleidoscope: A Guide to Best Practice in Determining Applications for Refugee Status Based on Sexual Orientation, Gender Identity and Intersex Grounds.”

however, the rate of Russians seeking asylum in the United States based on their SOGII has risen in recent years:

- **68** in 2012
- **127** in 2013
- **161** in 2014

The majority of the recent Russian asylum inquiries have come from gay men in their 20s and 30s who have been targeted in anti-gay attacks by vigilante groups. This violence is the result, in part, of the lack of anti-discrimination laws and 'anti-gay propaganda' laws which create a culture of intolerance and are perceived as sanctioning anti-LGBTI violence.²¹

It is especially important to note in the case of LGBTI asylum seekers, that the persecutors can be family, neighbours, or their broader community. They may be either directly or indirectly involved in persecutory acts, such as intimidations, harassment, family violence, or other forms of physical, psychological or sexual violence.

Persecution may also arise in instances where authorities or the State is unwilling or unable to protect a victim, prosecute a violator, in the case of violence against a person because of their SOGII.

Conclusion

The Bill in its current form indirectly discriminates against LGBTI asylum seekers. For all the reasons outlined above, we recommend that the Bill be amended in the following ways:

1. the 'reasonableness' element in the internal relocation principle is not removed from the *Migration Act*;
2. the reference to non-State actors as providers of safety in the analysis of 'real risk' per section 5LAA(1)(a) be removed; and
3. The language throughout The Bill be consistently gender neutral.

If you require clarification or elaboration on any aspect of this submission, please contact Jasmine Dawson, Director, Kaleidoscope Human Rights Foundation and Chair of the LGBTI Working Group on jasmine.s.dawson@gamil.com, 0401 076 565.

²¹ Associated Press, "Gay Russians Face Uncertain Wait for Refugee Status in US," *The Guardian*, November 30, 2014, sec. World news, <http://www.theguardian.com/world/2014/nov/29/gay-russians-refugee-status-us-asylum-seekers>.