



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

**Advancing the rights of LGBTQIA+ Persons
Submission to the Australian Government's
LGBTQIA+ Human Rights Strategy**

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Acknowledgement

Australian Lawyers for Human Rights (**ALHR**) acknowledges the traditional owners and custodians of the lands, rivers and seas on which we work, live and travel across Australia as the first people of this country. We recognise that the land belonging to these peoples was never ceded. We pay our deep respect to Elders past and present. We recognise First Nations peoples' cultural authority and rights to self determination.

About Australian Lawyers for Human Rights

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees.

ALHR seeks to use its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to:

- Promote Federal and State laws across Australia that comply with the principles of international human rights law;
- Engage with the United Nations in relation to Australian human rights violations;
- Promote and support lawyers' practice of human rights law in Australia;
- Engage internationally to promote human rights and the rule of law.

Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Executive Summary

ALHR is grateful for the opportunity to provide this submission to the Department of Foreign Affairs and Trade (**DFAT**) consultation on LGBTQIA+ human rights in Australia's development program.

We welcome the Australian Government's intention to increase its support and advocacy for the human rights of LGBTQIA+ persons, including through the development of an LGBTQIA+ Human Rights Strategy (**the Strategy**) and a new Inclusion and Equality Fund (**the IE Fund**). This strengthening of supports to protect and advance the rights of individuals with diverse sexual orientation, gender identity, gender expression and innate variations of sex

characteristics(**SOGIESC**) is a step closer to the Sustainable Development Goals (**SDGs**) agenda to truly ‘leave no one behind’:

“We will only realize this vision [of ‘no one left behind’] if we reach all people regardless of their sexual orientation or gender identity. Ending marginalization and exclusion of LGBT people is a human rights priority – and a development imperative.”¹

International Human Rights Law Framework

Australia’s international human rights law obligations are codified in international conventions or covenants which Australia has ratified. By ratifying a treaty, Australia has voluntarily accepted legal obligations under international law. ALHR submits that the Australian Government’s LGBTQIA+ Human Rights Engagement Strategy should have regard to, and be framed by, Australia’s binding international human rights obligations.

Australia is a party to the seven core international human rights treaties:

- the International Covenant on Civil and Political Rights (**ICCPR**);
- the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
- the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**);
- the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**);
- the Convention on the Rights of the Child (**CRC**);
- the Convention on the Rights of Persons with Disabilities (**CRPD**).

Australia also has periodic treaty body reporting obligations under these treaties.

In March 2017 Australian and Aotearoa/New Zealand intersex organisations and independent advocates signed the Darlington Statement², a joint consensus statement setting out the priorities for intersex human rights in our region, and outlining calls by the intersex human rights movement in our countries, under six headings: a preamble, human rights and legal reform; health and wellbeing; peer support; allies; and education, awareness and employment.

¹ UN Secretary General Ban Ki-Moon, 2015

² Darlington Statement: Joint consensus statement from the intersex community retreat in Darlington, March 2017. Joint statement by Australia and Aotearoa/New Zealand intersex community organisations and independent advocates available here: <https://ihra.org.au/darlington-statement/>

On 10 November 2017 the Yogyakarta Principles plus 10³ were adopted by representative groups, to supplement the Yogyakarta Principles (**YP plus 10**). The YP plus 10 arose from the intersection of developments in international human rights law and growing knowledge of violations suffered by persons on grounds of sexual orientation and gender identity, and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics.

On 29 September 2015, 12 UN agencies, namely the International Labour Organization (**ILO**), the Office of the United Nations High Commissioner for Human Rights (**OHCHR**), the Joint United Nations Programme on HIV/AIDS (**UNAIDS**) Secretariat, the United Nations Development Programme (**UNDP**), the United Nations Educational, Scientific and Cultural Organization (**UNESCO**), the United Nations Population Fund (**UNFPA**), the United Nations High Commissioner for Refugees (**UNHCR**), the United Nations Fund for Children (**UNICEF**), the United Nations Office on Drugs and Crime (**UNODC**), UN Women, the World Food Programme (**WFP**) and the World Health Organization (**WHO**), issued an unprecedented joint statement⁴ calling for an end to violence and discrimination against lesbian, gay, bisexual, transgender and intersex adults, adolescents and children. The UN Human Rights Office's Chief of Global Issues, Charles Radcliffe, said at the time: *"This is the first time that so many members of the UN family have joined forces in defence of the basic rights of lesbian, gay, bisexual, transgender and intersex people,"*

It is in this background that we ask you to forensically consider Australia's international obligations and civil society's joint statements on the LGBTQIA+ community's rights and how they might be reflected and advanced through Australia's foreign policy, including the Strategy and IE Fund.

Background of Australia's International Engagement

Despite engagement with LGBTQIA+ rights internationally, Australia has not, to date, developed a formal LGBTQIA+ foreign policy strategy.

From 2011, under the Obama Administration the United States created the Global Equality Fund (**GEF**), which supports grassroots LGBTQI human rights programs, encourages states to

³ The Yogyakarta Principles Plus 10" - International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, <https://www.refworld.org/legal/resolution/icjurists/2017/en/122482>

⁴ Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people at: https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

repeal discriminatory laws and promotes LGBTQI rights through foreign aid.⁵ Through the GEF, 25 governments (including the Australian Government⁶), as well as companies, and foundations work collaboratively to support local initiatives spearheaded by human rights defenders and civil society organizations working to protect LGBTQI+ persons from violence and abuse, criminalisation, discrimination, and stigma, and to empower local LGBTQI+ movements and people.

In October 2016, the United States and Australia held the first *Australia-United States dialogue in support of the human rights of LGBTI persons*.⁷ Australia committed to:

1. increase cooperation to advance the human rights of LGBTI people around the world, in particular to step up our efforts in the Indo-Pacific region to combat discrimination and violence against LGBTI people, coordinate the provision of targeted funding for LGBTI communities and improve outreach to civil society organisations, recognising the vital role they play in driving change;
2. being a strong and positive voice for the human rights of LGBTI persons in the United Nations, including by working as a member of the Equal Rights Coalition with 29 other like-minded governments to advance equal rights and genuine inclusion for all around the globe; and
3. ongoing work within the GEF; including initiatives in the Pacific to increase civil society efforts to address violence and discrimination against LGBTI persons.⁸

In 2016 Australian Embassies in the Indo-Pacific have supported efforts toward LGBTQIA+ inclusion, including:

- the first Mardi Gras in Hanoi, Vietnam;
- the &Proud LGBT Film Festival in Myanmar;
- wearing Purple for Pride Day in the Cambodian Embassy;
- installing a gender-neutral bathroom sign on Transgender Remembrance Day in the Laos Embassy;
- hosting an event in Thailand to honour former High Court justice Michael Kirby for his commitment to LGBTQI rights and to celebrate the appointment of the first UN independent expert on protection against violence and discrimination based on sexual orientation and gender identity.⁹

⁵ See: <https://www.state.gov/global-equality-fund/>

⁶ GEF's Partners: Argentina, Australia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Iceland, Italy, Montenegro, the Netherlands, New Zealand, Norway, Spain, Sweden, Uruguay

⁷ See

<https://www.dfat.gov.au/news/media/Pages/australia-united-states-dialogue-in-support-of-the-human-rights-of-lgbti-persons>

⁸ Ibid

⁹ Kate Clayton, "Australia and LGBTQI rights" The Interpreter published by the Lowy Institute at <https://www.loyyinstitute.org/the-interpreter/australia-lgbtqi-rights>

Australia, together with Europe and Canada established the Equal Rights Coalition¹⁰, a diplomatic network dedicated to achieving non-violence and non-discrimination for LGBTQI people. Australia is also a member of the United Nations LGBTI Core and the Group of Friends on Sexual Orientation and Gender Identity.¹¹

ALHR submits that the development of a DFAT Strategy and IE Fund are the much needed next steps that will provide an overarching human rights framework and resources that enable Australia to continuously build upon its international engagement to advance LGBTQIA+ rights as a priority area of Australia's foreign policy.

Recommendations

ALHR provides the following recommendations for DFAT in drafting the new LGBTQIA+ Human Rights Strategy and implementing the Equality and Inclusion Fund:

Recommendation 1: All DFAT-led designs and programs should include:

- (a) an explicit statement that Australia recognises that international human rights law affirms that all persons, regardless of sexual orientation, gender identity, or variations in sex characteristics are entitled to the full enjoyment of all human rights, that the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities, and that in all actions concerning children the best interests of the child shall be a primary consideration the rights of the child to participate should be upheld¹²; and
- (b) a risk and needs assessment to consider ways to support people of diverse SOGIESC and monitoring and evaluation frameworks include a section for tracking SOGIESC activities.

Recommendation 2: Continue advocacy on LGBTQIA+ human rights in multilateral fora and expand bilateral dialogue and advocacy. This includes Mission Visits in New York in the margins of the Commission on the Status of Women (**CSW**) to canvas support for inclusive language.

¹⁰ See <https://www.dfat.gov.au/sites/default/files/2020-01/dfat-annual-report-2016-17.pdf>

¹¹ See <https://unlgbticoregroup.org/>

¹² The Yogyakarta Principles Plus 10" - International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, <https://www.refworld.org/legal/resolution/icjurists/2017/en/122482>

At CSW, UN Member States are grouped by regional blocs and caucus in regional blocs to achieve impact at meetings/negotiations. The regional blocs dominating the CSW come to the meeting prepared with a unified statement and position; they exert power and influence over the review process, which is structured to allow a regional bloc to represent a common position. At the same time, these dominant blocs were dismissing calls for the inclusion of diverse sexual orientations and gender identities in statements and language was traded away at the last minute in order to reach consensus. This must stop.

Recommendation 3: Mainstream efforts to advance LGBTQIA+ inclusion and equality across Australia's international development cooperation and humanitarian assistance program. The current DFAT GEDSI Analysis Guidance for example must consider ways to support people with diverse SOGIESC to ensure the inclusion and representation of those who are affected by the intersecting drivers of marginalisation and exclusion, including on the basis of gender, gender identity, sexuality, sexual orientation or being born with innate variations in sex characteristics

Recommendation 4: DFAT Capital and Posts must have a solid understanding of the current state of LGBTQIA+ laws and rights as well as the allies, organisations and support networks. Australia should take the opportunity to advocate for LGBTQIA+ human rights across the Indo-Pacific region, particularly in the Pacific. Cultural norms in the Pacific and homophobia and stigma have been flagged as underpinning resistance. As Tara Chetty and Rachel Faleatua (2015) noted:

persons whose sexual orientation or gender identity does not conform to majority norms are nonetheless often stigmatised, discriminated against, and subjected to bullying and in many cases horrendous sexual abuse, including by close family members. Protection of the rights and freedoms, and recognition and respect for the sexual rights of sexual minorities is way overdue in our region, where in most countries same-sex relationships are criminalised and homophobic hate crimes occur.¹³

Recommendation 5: Continue making representations to select governments against the death penalty and on women's and LGBTQIA+ rights in Africa.¹⁴

Recommendation 6: Intersex minors continue to be subjected to invasive and irreversible medical procedures to modify innate variations in sex characteristics. These procedures are done without personal consent and breach rights of bodily integrity. The Strategy and IE Fund should identify this as a critical area of international engagement.

¹³ Chetty and Faleatua 2015: Regional Advocacy Tool p26

¹⁴ see representations made in 2108 and 2019

<https://www.dfat.gov.au/sites/default/files/2020-01/dfat-annual-report-2018-19.pdf>

Recommendation 7: It is important that a *Do No Harm* approach is taken as this can be risky and dangerous in some contexts. Listen to civil society organisations and networks who are advocating for LGBTQIA+ inclusion and equality about priorities, needs, risks and culturally nuanced approaches. This could include working with faith based agencies who take a progressive approach to overcome any perceived objections by using faith based language of inclusion.

Recommendation 8: The new Inclusion and Equality Fund must be permanent and its value increased over time.

ALHR is happy to meet with staff from DFAT or the Minister to provide any further information or clarification in relation to this consultation.

If you would like to discuss any aspect of this submission, please email ALHR President Kerry Weste at: president@alhr.org.au

Yours faithfully

A handwritten signature in blue ink, appearing to be 'Kerry Weste', written over a light blue rectangular background.

Kerry Weste
President
Australian Lawyers for Human Rights

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.