



**Brief to the House of Commons' Standing Committee on Citizenship and Immigration study of the Immigration and Refugee Board's appointment, training and complaint process.**

**March 27, 2018**

## **I. Overview**

The Canadian HIV/AIDS Legal Network (“Legal Network”) is an internationally recognized leader in researching the impact of laws on groups affected by the HIV epidemic, including lesbian, gay, bisexual and transgender (LGBT) communities.<sup>1</sup> The Legal Network is also a founding member and the current secretariat of the Dignity Network (DN), which is a network of organizations and individuals from across Canada working to encourage a stronger Canadian voice on human rights issues facing LGBT communities around the world.<sup>2</sup> A major part of DN’s work involves informing Canada’s refugee policy so that it fairly treats LGBT persons who have to flee persecution in their home countries.

By some estimates, approximately 400 million LGBT persons live under the threat of criminal imprisonment or even death in their home country.<sup>3</sup> The Immigration and Refugee Board (IRB) is faced with thousands of refugee claimants each year trying to escape persecution in their home country simply because of their sexual orientation, gender identity or gender expression. While strides have been made to improve the cultural sensitivity of IRB members, more could be done to enhance the cultural competence of IRB members—charged with making decisions about the lives of LGBT persons seeking asylum in Canada.

A barrier to cultural competence at the IRB is a misunderstanding about what defines homosexuality and gender expression. Researchers have developed three main approaches to defining LGBT membership: self-identification, same-sex attraction and same-sex experiences. Based on the reported experiences of claimants, the IRB bases many of their decision on evidence of self-identification. However, in countries that still criminalize same-sex sexual activities, it is often too risky to self-identify. Moreover, the last two approaches to defining LGBT membership (i.e., same-sex attraction and same-sex experiences) require more education for IRB board members to progress from LGBT sensitivity to competence.

## **II. State-Sponsored Homophobia**

Seventy-one countries still criminalize same-sex sexual activity.<sup>4</sup> In 2017, 7 of these were among the top 10 countries of origin for refugees accepted to Canada: Turkey, Eritrea, Syria, Nigeria,

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<sup>1</sup> The Canadian HIV/AIDS Legal Network ([www.aidslaw.ca](http://www.aidslaw.ca)) is a charitable, not-for-profit organization that promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization. It is the only national organization working exclusively on HIV-related legal issues in Canada, and one of the world’s leading organizations in the field, with an extensive body of human rights–based research and analysis on a range of legal and policy issues related to HIV.

<sup>2</sup> Formed shortly after the WorldPride Human Rights Conference held in Toronto in June 2014, the Network has been led by a working group of individuals from across Canada, representing a range of organizations. The Network has the twin objectives of strengthening both solidarity work by Canadian civil society groups and Canada’s foreign policy commitment to the realization of human rights for LGBTI people internationally.

<sup>3</sup> Inter-Agency Regional Analysis Network, “A Global Outlook on LGBT Social Exclusion through 2030” (January 2018) at 5.

<sup>4</sup> Aengus Carroll & L.R. Mendos, “State-Sponsored Homophobia: A world survey of sexual orientation laws: criminalisation, protection and recognition,” Lesbian, Gay, Bisexual, Trans and Intersex Association (Geneva: ILGA, May 2017) at page 37. Available at:

[http://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf).

Burundi, Pakistan, China, Iraq, Colombia and Afghanistan.<sup>5</sup> Therefore, it should come as no surprise that many of those seeking asylum because of LGBT persecution are publicly proclaiming their sexual orientation or gender identity and expression for the first time at an IRB hearing. While LGBT communities in many countries have legal protections, those in other countries face a genuine humanitarian crisis.

For example, in Africa (the region of origin for many refugee claimants in Canada), cases of violence and stigma persist, despite the adoption of a resolution condemning violence against LGBT persons by all 54 member states of the African Commission on Human and Peoples' Rights three years ago.<sup>6</sup> In Tanzania, the government threatened to publish the names of known LGBT people in early 2017.<sup>7</sup> In Egypt, the police used online dating applications to identify, arrest and detain LGBT people.<sup>8</sup> In Tunisia, Cameroon, Egypt, Kenya, Lebanon, Turkmenistan, Uganda and Zambia, gay men are routinely forced to undergo anal examination as a means of gathering evidence for charges of same-sex conduct, despite the UN declaring it a form of torture.<sup>9</sup> The climate of homophobia—especially in the countries of Sudan, Somalia, Nigeria and Mauritania that retain the death penalty for same-sex conduct<sup>10</sup>—makes social organizing all but impossible. In Kampala, Uganda, the police raided a gay pride event in August 2016, taking 20 LGBT-identified individuals and human rights defenders into custody as a means of intimidation.<sup>11</sup> The formal and informal persecution of LGBT persons remains unchallenged in most African countries, causing LGBT persons to not only hide their sexuality and gender expression, but flee to places like Canada when the situation becomes untenable.<sup>12</sup>

In Western and Central Asia, many countries including Iran, Saudi Arabia, Yemen, Iraq, Afghanistan, Pakistan, Qatar, the UAE, Bangladesh, Bhutan, Pakistan, Sri Lanka and India<sup>13</sup> either actively enforce the death penalty for same-sex offences or still criminalize same-sex conduct.<sup>14</sup> In a stunning symbolic global statement in 2016, India voted against the UN General Assembly resolution extending marriage benefits to same-sex couples working for the UN.<sup>15</sup> Pakistan is still a hostile climate for LGBT persons who risk sanctions from their family, societal

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<sup>5</sup> Immigration and Refugee Board of Canada, “Refugee Protection Claims (New System) by Country of Alleged Persecution- 2017”. Available at: <http://www.irb-cisr.gc.ca/Eng/RefClaDem/stats/Pages/RPDStat2017.aspx> .

<sup>6</sup> *Ibid* at 151.

<sup>7</sup> “Tanzania Threatens to Publish ‘List’ of Gay People,” *Deutsche Welle*, February 18, 2017. Available at: <http://allafrica.com/stories/201702180336.html>.

<sup>8</sup> Mia Jancowicz, “Jailed for using Grindr: homosexuality in Egypt,” *The Guardian* , April 3, 2017. Available at: [www.theguardian.com/global-development-professionals-network/2017/apr/03/jailed-for-using-grindr-homosexuality-in-egypt](http://www.theguardian.com/global-development-professionals-network/2017/apr/03/jailed-for-using-grindr-homosexuality-in-egypt).

<sup>9</sup> “U.N. panel to Tunisia: Stop forced anal exams,” *Erasing 76 Crimes* (blog), May 23, 2016. Available at: <https://76crimes.com/2016/05/22/u-n-panel-to-tunisia-stop-forced-anal-exams/>.

<sup>10</sup> *Supra* note 4 at 40.

<sup>11</sup> “Uganda: Police raids Uganda Pride event, arrests several human rights defenders and assaults participants,” *FIDH*, August 9, 2016. Available at: [www.fidh.org/en/issues/human-rights-defenders/uganda-police-raids-uganda-pride-event-arrests-several-human-rights](http://www.fidh.org/en/issues/human-rights-defenders/uganda-police-raids-uganda-pride-event-arrests-several-human-rights).

<sup>12</sup> *Supra* note 4 at 153.

<sup>13</sup> *Supra* note 4 at 173-175.

<sup>14</sup> *Supra* note 4 at 40.

<sup>15</sup> Makepeace Sithloul, “India’s UN vote: A reflection of our society’s deep seated anti gay prejudice,” April 20, 2015. Available at: <https://amnesty.org.in/indias-un-vote-reflection-societys-deep-seated-anti-gay-prejudice/>.

isolation, legal problems and ever-present violence.<sup>16</sup> Some countries in this region incorporate various interpretations of Shari'a law into their legal systems, which punishes homosexuality—and even positive opinions about same-sex intimacy—by death, severe beatings or brutal prison sentences.<sup>17</sup> LGBT refugees are particularly vulnerable in Iraq, Syria and Yemen where internal wars have displaced approximately 11 million people, with a further 40 million in need of humanitarian assistance.<sup>18</sup> In ISIS/ISIL-controlled areas, LGBT persons are assaulted or murdered in the name of “moral cleansing”.<sup>19</sup> If internally displaced people are able to make it to safe camps, the security screening centres are known to be sites of serious abuse against LGBT persons.

The Legal Network works closely with LGBT communities in the Caribbean and one of our Canadian partners in the Dignity Network is Rainbow Railroad.<sup>20</sup> A significant number of refugees that the Rainbow Railroad assists come from the Caribbean. In the Caribbean, despite the landmark ruling in Belize striking down the criminalization of same-sex sexual acts in 2016, 10 other Anglo-Caribbean countries still refuse to follow suit.<sup>21</sup> Antigua's first murder for 2018 was a homophobic attack that left a father dead.<sup>22</sup> It is not rare to see graphic photos in the Antiguan press about another homophobia-related attack. In 2017, Dexter Pottinger, the “face” of Pride Jamaica 2016, was murdered in his home and although his neighbours admitted hearing his multiple cries for help and seeing his stolen car being driven away, they did not call the police. Friends discovered Dexter's body days later.<sup>23</sup> This was the breaking point for Dexter's same-sex partner, who has recently been accepted as a refugee to Canada and was interviewed for this submission. In Trinidad and Tobago, a young man was shot after an alleged homosexual relationship with the country's Chief Justice was made public; he is now seeking asylum in the UK.<sup>24</sup> In Barbados, a trans woman was savagely attacked and nearly killed by a former lodger wielding a meat cleaver and, despite knowing the perpetrator's whereabouts, the police allowed

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<sup>16</sup> “Pakistan: Homosexuals and homosexuality,” *Land Info: Country of Origin Information Centre* (Storgata, Norway: Land Info, May3, 2013) at 3. Available at: [https://landinfo.no/asset/2942/1/2942\\_1.pdf](https://landinfo.no/asset/2942/1/2942_1.pdf).

<sup>17</sup> *Supra* note 4 at 176.

<sup>18</sup> *Ibid.*

<sup>19</sup> Report of the Secretary General, “Conflict-related sexual violence,” *United Nations Security Council*, March 23, 2015 at 10. Available at: <http://undocs.org/S/2015/203>.

<sup>20</sup> Rainbow Railroad is a Canadian charitable organization that helps lesbian, gay, bisexual and transgender (LGBT) individuals escape violence and persecution in their home countries. In the past, they have helped individuals from the Caribbean, Africa and the Middle East relocate to safer countries in Europe and North America. The organization was formed in 2006, with its name and concept inspired by the Underground Railroad. It received charitable status from the Canada Revenue Agency in 2013, and also maintains a 501(c)(3) organization based in New York City to issue tax receipts to American donors.

<sup>21</sup> *Supra* note 21 at 38.

<sup>22</sup> “Murder charge for stabbing suspect,” *The Daily Observer*, February 14, 2018. Available at: <https://antiguaobserver.com/murder-charge-for-stabbing-suspect/>.

<sup>23</sup> Jay Michaelson, “Who Killed Dexter Pottinger, Jamaica's ‘Face’ of LGBT Pride?” *The Daily Beast*, May 9, 2017. Available at: [www.thedailybeast.com/who-killed-dexter-pottinger-jamaicas-face-of-lgbt-pride](http://www.thedailybeast.com/who-killed-dexter-pottinger-jamaicas-face-of-lgbt-pride).

<sup>24</sup> Robert Booth, “Questions over shooting of gay man with links to Trinidad judge,” *The Guardian*, February 28, 2018. Available at: [www.theguardian.com/world/2018/feb/28/questions-over-shooting-of-gay-man-with-links-to-trinidad-judge](http://www.theguardian.com/world/2018/feb/28/questions-over-shooting-of-gay-man-with-links-to-trinidad-judge).

him to remain free for two days before pressure from local groups forced them to apprehend him.<sup>25</sup>

The official anti-discriminatory stance of some Anglo-Caribbean governments<sup>26</sup> is countered by the personal statements of many political and religious leaders. In response to the Belize ruling, Evangelical Bishop Charlesworth Browne said that if homosexuality is legalized in Antigua, the country will suffer from God's wrath, just like Canada did during the 2016 Fort McMurray fires, which destroyed an entire town and forced 88,000 people to flee for their lives.<sup>27</sup> In 2017, Prime Minister Gaston Browne responded to a comment on his public Facebook page saying, "Sir, you are behaving like an anti-man" (a homophobic slur).<sup>28</sup> He would not apologize when called upon to do so by other politicians.

### **III. Experiences at the IRB**

To inform this submission, two former refugees now working at Canadian LGBT refugee support organizations,<sup>29</sup> two immigration lawyers specializing in LGBT refugee claims, and one recently accepted LGBT refugee claimant were interviewed about their experiences before the IRB. Based on their collective experiences, three recurrent themes emerged.

#### **A. Pre/Misconceptions About Looking and Acting LGBT**

On the worst end of the pre/misconception spectrum, many of the interviewees recounted personal experiences, or those of other refugees, being told that they did not "look" or "act" gay by IRB members. The stereotype of the effeminate gay male still persists. One of the immigration lawyers interviewed for this submission reported that during an IRB interview his muscular male client recounted a story of being physically assaulted in a bar in his home country. However, the IRB panel did not believe that such a superficially "strong" individual would have experienced such treatment. His claim was denied by the IRB and it was only after a complaint to a superior that he was given a second hearing and a new panel, free of such preconceptions, accepted his refugee claim within 30 minutes.

The two interviewees who work for LGBT refugee support organizations indicated that the IRB has terminated or re-trained most of the members who were reported to have exhibited such conduct. The recently introduced "Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression" (SOGIE guidelines)<sup>30</sup> supports this notion of improvement—in particular section 6 that specifically deals with

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<sup>25</sup> Michael Lavers, "Barbados police criticized for response to attack on trans activist," *Washington Blade*, February 26, 2018. Available at: [www.washingtonblade.com/2018/02/26/barbados-police-criticized-response-attack-trans-activist/](http://www.washingtonblade.com/2018/02/26/barbados-police-criticized-response-attack-trans-activist/).

<sup>26</sup> Kieron Murdoch, "Gov't says it protects the LGBTI community," *The Daily Observer*, September 2, 2016. Available at: <https://antiguaobserver.com/govt-says-it-protects-the-lgbti-community/>.

<sup>27</sup> Tameika Malone, "Bishop Browne: Buggery law must stay," *The Daily Observer*, May 19, 2016. Available at: <https://antiguaobserver.com/bishop-browne-buggery-law-must-stay/>.

<sup>28</sup> "Antiguan PM criticized for using the word 'anti man' in social media exchange," *The Daily Observer*, July 25, 2017. Available at: [www.stlucianewsonline.com/regional-antiguan-pm-criticised-for-using-the-word-anti-man-in-social-media-exchange/](http://www.stlucianewsonline.com/regional-antiguan-pm-criticised-for-using-the-word-anti-man-in-social-media-exchange/).

<sup>29</sup> The 519 Centre and Black CAP.

<sup>30</sup> Canada, Immigration and Refugee Board, "Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression," May 1, 2017. Available at: [www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuidDir/Pages/GuideDir09.aspx#a6](http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuidDir/Pages/GuideDir09.aspx#a6).

stereotyping. However, claimants continue to be subjected to panel members with these stereotypical views.

Another misconception by some IRB members is that even if a claimant cannot self-identify in their home country, once they arrive in Canada they will do so immediately, proudly and publicly. Despite the SOGIE guidelines that do not require a person to join an LGTB group in Canada, there is an implicit or unwritten expectation that an LGBT person should be involved in the LGBT community once they arrive. Even when there is involvement, the motivations and intentions of the claimant come under scrutiny. As discussed above, many claimants are in the process of overcoming the tension of remaining a part of their homophobic culture (even in Canada) while accepting their sexual orientation. The objective of their refugee claim is not to participate in a pride float, but to be safe in Canada from the constant threat of persecution or even murder in their home country. No adverse inferences should be drawn from a lack of self-identification, even once a refugee arrives in Canada.

### **B. Evidence of Self-Identification & Persecution**

All of the claimants and lawyers spoke of the IRB requiring evidence of self-identification to substantiate asylum claims. Photos, social media posts, letters of support and membership in LGBT advocacy groups is “proof” of being queer in the judgment of the IRB. In one instance, the IRB asked to examine a claimant’s cell phone for proof of communication on a gay relationship mobile application. This evidence was requested spontaneously without any opportunity for the lawyer to review or to prepare the claimant for such an unorthodox request. In another, a claimant was confronted about supposed evidence to the contrary—photos with women or children—that suggested a heterosexual life.

These claimants’ experiences lead to the concern that the IRB’s decisions are not fully taking into account that (i) evidence of self-identification may not be possible because of their home country’s cultural or legal attitude to homosexuality, (ii) “contrary” evidence may have been explicitly created as a heterosexual cover to avoid persecution, or (iii) an LGBT person may be admitting their sexuality later in life after attempting to live as a heterosexual, including by marrying and having children.

The other area where the IRB demands evidence is to substantiate claims of persecution. In many instances, it is not safe for a claimant to either report homophobic or transphobic incidents to the police or to health care providers because of state discrimination and retaliation. In the case of medical records, it may be safer for claimants to cite another cause of injuries that will not result in further inquiry, which in turn could lead to legal or other trouble. Even if claimants report an attack, the incident is often not taken seriously, formally recorded or a report cannot be obtained. Often, claimants must rely on family members in the home country to obtain reports of persecution or medical records, and these family members may not be willing to expose themselves as relatives of an LGBT refugee claimant.

Ultimately, the claimants interviewed felt that the IRB gave greater weight to empirical evidence gathered by the IRB than to personal experiences, which are no less credible if properly assessed.

### **C. IRB Protecting Against Fraudulent Claims**

There is an unfounded notion that a claim of same-sex persecution is the easiest way to gain asylum, summed up in the idiom, “If you say you’re gay, you get to stay.” Interviewees felt varying degrees of suspicion on these grounds by IRB members during their hearings. This may explain, at least in part, why the IRB appears to put so much emphasis on empirical evidence. However, the IRB needs a better understanding of the risks attached to a claim—especially if unsuccessful—on these grounds.

As the statistics in Section II demonstrate, publicly self-identifying as an LGBT person in some of the 71 countries where same-sex sexual activity is illegal is a veritable death sentence, either literally or culturally. While 64% of SOGIE refugee claims in Canada are successful, the 36% who are unsuccessful face a potentially worse fate by virtue of their claim.

The risk for the person who decides to perpetrate a fraudulent claim comes not only from substantiating it empirically to the aforementioned IRB standards, but also from keeping up the charade during the up to three-hour hearing. A few fabricated examples of same-sex encounters or experiences of discrimination will not hold up under the scrutiny of IRB members trained to evaluate genuine claims.

While the risk of fraudulent or ineligible asylum seekers is real, fewer than 3% of SOGIE claims have been found to have no credible basis. It is hardly an epidemic that needs to be assiduously protected against by the IRB.

#### **IV. Recommendations for Improvement of SOGIE Training at the IRB**

Overcoming LGBT stigma requires addressing social perceptions. IRB members should appreciate that the way in which they have been trained and the way in which they understand LGBT people and how they might identify is inappropriate and culturally incompetent. We therefore recommend:

- Multi-day LGBT sensitivity training for IRB members involving individuals from refugee source countries;
- IRB dialogue with agencies and lawyers serving LGBT refugees to establish clearer guidelines and expectations; and
- Opportunities for claimants and counsel to provide post-hearing feedback that will improve IRB member questioning in a manner that will not adversely affect the claimant’s application for refugee status.