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Country Information and Guidance

India: Sexual orientation and gender identity

Preface

This document provides guidance to Home Office decision makers on handling claims made by nationals/residents of India as well as country of origin information (COI) about India. This includes whether claims are likely to justify the granting of asylum, humanitarian protection or discretionary leave and whether - in the event of a claim being refused - it is likely to be certifiable as 'clearly unfounded' under s94 of the Nationality, Immigration and Asylum Act 2002.

Decision makers must consider claims on an individual basis, taking into account the case specific facts and all relevant evidence, including: the guidance contained with this document; the available COI; any applicable caselaw; and the Home Office casework guidance in relation to relevant policies.

Within this instruction, links to specific guidance are those on the Home Office's internal system. Public versions of these documents are available at <https://www.gov.uk/immigration-operational-guidance/asylum-policy>.

Country Information

The COI within this document has been compiled from a wide range of external information sources (usually) published in English. Consideration has been given to the relevance, reliability, accuracy, objectivity, currency, transparency and traceability of the information and wherever possible attempts have been made to corroborate the information used across independent sources, to ensure accuracy. All sources cited have been referenced in footnotes. It has been researched and presented with reference to the [Common EU \[European Union\] Guidelines for Processing Country of Origin Information \(COI\)](#), dated April 2008, and the [European Asylum Support Office's research guidelines, Country of Origin Information report methodology](#), dated July 2012.

Feedback

Our goal is to continuously improve the guidance and information we provide. Therefore, if you would like to comment on this document, please email: CPI@homeoffice.gsi.gov.uk.

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The Independent Advisory Group on Country Information (IAGCI) was set up in March 2009 by the Independent Chief Inspector of Borders and Immigration to make recommendations to him about the content of the Home Office's COI material. The IAGCI welcomes feedback on the Home Office's COI material. Information about the IAGCI's work and a list of the COI documents which have been reviewed by the IAGCI can be found on the Independent Chief Inspector's website at <http://icinspector.independent.gov.uk/country-information-reviews/>

It is not the function of the IAGCI to endorse any Home Office material, procedures or policy.

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Annex A: Caselaw

MD (same-sex oriented males: risk) India CG [2014] UKUT 65 (IAC) (12 February 2014)

Court of Justice of the European Communities (including Court of First Instance Decisions), Minister voor Immigratie en Asiel v Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen [2013] EUECJ C-199/12 (07 November 2013)

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1. Guidance

Updated 16 May 2014

1.1. Basis of claim

- 1.1.1 Fear of mistreatment by the Indian authorities or by non state actors due to the person's sexual orientation or perceived sexual orientation.

1.2. Specific issues

- Does a lesbian, gay, bisexual or transgender (LGBT) person from India form a particular social group (PSG)?
- Is the person at real risk from the Indian authorities or non state actors due to their sexual orientation or gender identity?
- Are those at risk able to seek effective protection?
- Is the person able to internally relocate within India to escape that risk?

See Asylum Instructions on [Considering the asylum claim and assessing credibility and Certification under section 94 of the NIA Act 2002.](#)

1.3. Consideration of issues:

Do LGBT persons from India form a particular social group (PSG)?

- 1.3.1 In the [Court of Justice of the European Communities judgement for the joined cases of C-199/12 to C-201/12, dated November 2013 \(CJEC C-199/12 to C-201/12\)](#), the Court ruled that the existence of criminal laws which specifically target 'homosexuals', supports the finding that those persons must be regarded as forming a particular social group. (Paragraphs 48, 49.)
- 1.3.2 Section 377 of the Indian Penal Code is an existing criminal law which specifically targets gay and bisexual men. Furthermore, other LGBT persons are also considered members of a particular social group because they share a common characteristic that cannot be changed and, based on an assessment of the country information, they have a distinct identity in India which is perceived as being different by the surrounding society.

See asylum instruction on [Sexual orientation issues in the asylum claim](#) and also the process guidance on [Interviewing/assessing the claim](#)

Is the person at real risk from the Indian authorities or non state actors due to their sexual orientation or gender identity?

- 1.3.3 Section 377 of the Indian Penal Code 1860 criminalises (male) same-sex sexual activity. However, prosecutions for consensual sexual acts between males are, and have always been, extremely rare. This point was confirmed in the country guidance case of [MD \(India\)](#) (February 2014). The Upper Tribunal accepted as evidence that the Indian Supreme Court, in 2013, found that there had been less than 200 persons prosecuted under Section 377 in

See asylum instruction on [Sexual orientation issues in the asylum claim](#)

the past 150 years and that 'Putting these figures in context... the Indian Supreme Court cited evidence that the total population of MSM (men who have sex with men) was estimated to be 25,000,000 as of 2006.'

See [MD](#), paragraph 129

1.3.4 There are no laws in India criminalising lesbian sexual activity. Women are not, therefore at risk of prosecution for same-sex sexual activity.

1.3.5 In a landmark judgment of April 2014, the Indian Supreme Court directed the central Government of India and all state governments to legally recognise transgender persons (including hijras) as a third gender and to implement measures to safeguard their Constitutional rights.

See [country information](#)

1.3.6 LGBT persons in India can be subject to societal and state discrimination, points confirmed in [MD](#). However, the Upper Tribunal held that, although some gay men (or those who are perceived to be) suffer ill-treatment, extortion, harassment and discrimination from the police and the general populace, '...the prevalence of such incidents is not such, even when taken cumulatively, that there can be said to be in general a real risk of an openly same-sex oriented male suffering treatment which is persecutory or which would otherwise reach the threshold required for protection under the Refugee Convention, Article 15(b) of the Qualification Directive, or Article 3 ECHR.'

See also [country information](#)

See [MD](#), paragraph 174

Are those at risk able to seek effective protection?

1.3.7 Police conduct towards LGBT people varies from one Indian state to another. In several states the police have received relevant additional education and sensitivity training in LGBT issues

See [MD](#).

1.3.8 Whilst there have been some reports of police not providing effective protection in individual cases, there are avenues of redress in such circumstances. The objective country information shows no evidence that, in most cases, the police would fail to properly investigate an incident of violence, or other serious crime, on the basis that the victim happened to be a lesbian, a gay man, bisexual or transgender. There is also no reason to believe that the courts would be unduly lenient towards the perpetrators in such circumstances.

1.3.9 Victims of police misconduct who do not wish to complain to the police have recourse to NGOs who will act on their behalf; or to an independent police complaints authority (in most states); or directly to the courts.

See [country information](#)

1.3.10 The country guidance case of [MD](#) also found that India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities, from which a person can seek support and assistance.

See [MD](#), paragraph 174

1.3.11 For a claim to succeed on grounds of sexual orientation, the onus

will be on the person to demonstrate not only that they will face on return persecutory or inhuman or degrading treatment, but also why they would be unable to access effective protection or alternatively relocate to areas of the country where they would not face such difficulties even without concealing their sexual orientation.

See asylum instruction on [Sexual orientation issues in the asylum claim](#)

Is an LGBT person able to internally relocate within India to escape that risk?

1.3.12 Internal relocation to avoid any risk of ill-treatment by non-state actors is generally likely to be both relevant and, depending on the particular circumstances of the person concerned, reasonable, for example to a large city where generally gay, lesbian, bisexual and transgender relationships are more accepted, as is the case in India. The decision maker must, however take into account that the Supreme Court in the case of HJ (Iran) held that a person cannot be expected to modify their behaviour and that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location in order to avoid persecution.

See guidance on both internal relocation and women in [India OGN \(May 2013\)](#)

1.3.13 India is a vast country with a population of 1.2 billion. It comprises 35 states and 'union territories'. There are seven cities which have populations of over 5 million and over 600,000 towns and villages. There are no legal restrictions preventing relocation to most parts of the country, including to the major cities.

1.3.14 The Upper Tribunal held in MD (India) 'We consider the possibility of the police, or any other person or body, being able to locate, at the behest of an individual's family, a person who has fled to another state or union [territory] in India, to be remote.'

See [MD](#), paragraph 154

1.3.15 The Upper Tribunal further held in MD (India) 'It would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.'

See [MD](#), paragraph 'e'

1.3.16 Relocation may be more difficult for a single woman who no longer has the support of her family, but less so for two women moving together.

1.3.17 India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities. Evidence accepted in [MD](#) was that, following relocation, gay people could often rely on NGOs or support groups to provide emotional and material support; this may include assistance in establishing contacts and obtaining employment and accommodation.

See [MD](#), paragraph 170

Policy Summary:

Lesbians, gay men, bisexual persons and/or transgender persons (LGBT persons) in India form a particular social group.

Although male same-sex sexual acts are criminalised in India, in practice the authorities rarely prosecute cases. There are no laws relating to lesbian sexual activity. A recent Indian Supreme Court ruling has transformed the legal situation of transgender persons.

While LGBT persons (or those perceived to be) may suffer ill treatment, extortion, harassment and discrimination from the police and the general populace, the prevalence of such incidents is generally not such, even when taken cumulatively, as to give rise to a real risk of an LGBT person suffering treatment which would reach the threshold required for protection under either the Refugee Convention, the EU Qualification Directive, or the European Convention on Human Rights.

Where, in individual cases, an LGBT person demonstrates that she or he will, on return encounter a level of social hostility which puts them at real risk, the individual would generally be able to seek protection from the police. For persons who become victims of police misconduct, avenues of redress exist. Additionally or alternatively, internal relocation to avoid any risk of ill-treatment by non-state actors is likely to be both relevant and, depending on the particular circumstances of the person concerned, reasonable.

As a consequence, a person who fears persecution on the basis of their sexual orientation is unlikely to qualify for the grant of asylum or humanitarian protection.

Where, in exceptional cases, decision makers conclude that the person is at real risk of persecution anywhere in India on account of their sexual orientation, or the risk is localised and it would be unduly harsh to expect them to relocate, they should be granted asylum, as LGBT persons in India are members of a particular social group(s).

Where a claim is refused, it is likely to fall to be certified as 'clearly unfounded' under section 94 of the Nationality, Immigration and Asylum Act 2002.

There are no issues around safety on return to India.

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2. Information

Updated 15 May 2014

2.1. Legal rights

- 2.1.1 There are no national laws specifically prohibiting discrimination on the basis of sexual orientation or gender identity.¹
- 2.1.2 The Indian Constitution² does not refer to sexual orientation in Articles defining the rights of citizens. The Constitution provides:

Article 15a: The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth...'

Article 14: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

Article 16.1: 'There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.'

Gay and bisexual men

Section 377 of the Indian Penal Code (IPC)

- 2.1.3 Section 377 was included in the Indian Penal Code by the colonial government in the 1860s. It provides as follows:

'377. Unnatural offences.

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1*[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'³

The phrase 'carnal intercourse against the order of nature' is interpreted to include sodomy and applies in principle in both gay and heterosexual relationships. There are currently 84 countries which have laws criminalising sexual acts between males; several of these are former British colonies which have provisions in their penal codes similar to Section 377 IPC.⁴

- 2.1.4 On 2 July 2009, in the case of Naz Foundation (India) Trust v Government of NCT Delhi, the Delhi High Court ruled as follows: 'We declare section 377 of IPC [Indian Penal Code], in so far as it criminalises consensual sexual acts of adults in private, is violative of Articles 14, 21 and 15 of the Indian Constitution.' The Court held, however that Section 377 should continue to be applied in cases of non-consensual sex and sex involving

¹ ILGA Asia: India – Law <http://ilga.org/ilga/en/countries/INDIA/Law>, accessed May 2014

² The Constitution of India as at 1 December 2007 (updated to 94th Amendment Act): Ministry of Law and Justice website <http://lawmin.nic.in/coi/coiason29july08.pdf>, accessed May 2014

³ Indian Penal Code (Act No.45 of Year 1860) <http://india.gov.in/indian-penal-code-act-1860>, accessed May 2014

⁴ www.slideshare.net, 'The Naz Foundation Case – Section 377' <http://www.slideshare.net/utkarshk02/the-naz-foundation-case-section-377-interlinking-and-hyperlinking>, accessed May 2014

minors.⁵ The Delhi High Court's ruling only had effect within the union territory of Delhi. Section 377 has always remained in force throughout the rest of India. (India is divided into 28 states plus 7 'union territories', of which Delhi is one.)

- 2.1.5 Following the Delhi judgement, the Supreme Court (SC) was petitioned by 16 individuals and organisations. These cases were grouped together in the SC under the name Suresh Kumar Koushal & Ors vs. Naz Foundation & Ors [SLP(C) 15436/2009].⁶ The Indian Government did not appeal or contest the Delhi High Court's ruling.⁷ Arguments were heard in the SC from 23 February to 27 March 2012.⁸
- 2.1.6 It was reported on 11 December 2013 that the Supreme Court had ruled to uphold the constitutionality of Section 377 of the Indian Penal Code (setting aside the Delhi High Court's 2009 judgment). The SC indicated in its judgment that it was deferring to the will of Parliament in the matter, i.e. that it should be up to Parliament to determine whether or not Section 377 is to be amended or repealed.⁹
- 2.1.7 BBC News reported on 20 December 2013 that the Government of India and certain NGOs had filed petitions in the Supreme Court (SC), requesting the Court to review its decision of 11 December 2013. The Government stated that 'the position of the central government on this issue has been that the Delhi High Court verdict... is correct.'¹⁰ The SC, on 28 January 2014, rejected the Government's and all other review petitions.¹¹ It was then announced on 3 April 2014 that a three-judge panel of the SC had agreed to consider a 'curative petition' in relation to the judgement of 11 December.¹² (As of 15 May 2014, an SC determination on this curative petition had not yet been delivered.) Activists were reported in January 2014 as saying that many gay people had 'come out' since the Delhi High Court's ruling in 2009; the activists said there would be 'no turning back' in their campaign to abolish Section 377.¹³

Enforcement of Section 377 IPC

- 2.1.8 The Immigration and Refugee Board of Canada, in an Information Response dated 13 May 2004, recorded that, 'According to the government of India, Section 377 is rarely

⁵ The Hindu, 2 July 2009 'Delhi High Court legalises gay sex.'

<http://www.hindu.com/thehindu/holnus/000200907021111.htm>, accessed May 2014

⁶ Supreme Court of India: Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation, February 23 to March 27, 2012 http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf accessed May 2014

⁷ International Gay and Lesbian Human Rights Commission (IGLHRC), 'India: Government Defers Decision on 377 to Supreme Court, 18 September 2009' <http://www.iglhrc.org/content/india-government-defers-decision-377-supreme-court>, accessed May 2014

⁸ Supreme Court of India: Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation, February 23 to March 27, 2012 http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf, accessed May 2014

⁹ The Hindu, 16 December 2013, 'The wrongness of deference' <http://www.thehindu.com/opinion/lead/the-wrongness-of-deference/article5463126.ece?homepage=true>, accessed May 2014

¹⁰ BBC News, 'India government asks court to review gay sex ban', 20 December 2013 <http://www.bbc.co.uk/news/world-asia-india-25461691>, accessed May 2014

¹¹ www.slideshare.net, 'The Naz Foundation Case – Section 377' <http://www.slideshare.net/utkarshk02/the-naz-foundation-case-section-377-interlinking-and-hyperlinking>, accessed May 2014

¹² First Post (F.India), 3 April 2014 'SC agrees to consider curative petition on section 377 in open court', <http://www.firstpost.com/india/sc-agrees-to-consider-curative-petition-on-section-377-in-open-court-1463985.html>, accessed May 2014

¹³ The Times of India, 'Gay activists say there is no looking back', 29 January 2014 <http://timesofindia.indiatimes.com/city/mumbai/Gay-activists-say-there-is-no-looking-back/articleshow/29521688.cms> accessed May 2014

applied except when child abuse or rape is alleged.’¹⁴ The Supreme Court noted in its judgment of 11 December 2014 that fewer than 200 people had been prosecuted under Section 377 since it came into force 150 years ago. Only a minority of those cases had involved consenting adults.¹⁵ The Naz Foundation (India) Trust – a leading LGBT advocacy organisation in India and the principle respondent in the Supreme Court case – informed the British High Commission (Delhi) in September 2013 that they were not aware of any instance ‘in the last couple of years’ in which an individual(s) was convicted under Section 377 in a case involving consenting adults, anywhere in India. (See BHC letter of 4 September 2013, [Annex B](#)). According to various reports, however, the **threat** of being charged under Section 377 has sometimes been used by police to harass people.¹⁶

Other legal rights

2.1.9 There is no provision in Indian law for civil partnerships or for the recognition of same-sex marriages.¹⁷

2.1.10 Same-sex couples are generally not allowed to adopt children jointly as a couple. Surrogacy is legal and the law recognises single male or female parenthood.¹⁸

Lesbian and bisexual women

2.1.11 There are no laws in India pertaining to lesbian sexual activity.¹⁹

2.1.12 As stated above, Indian law does not recognise same-sex marriages or civil partnerships.

2.1.13 In vitro fertilization (IVF) is carried out in hospitals and private clinics in several centres²⁰ and is available to single women who wish to start a family.^{21 22}

¹⁴ Immigration and Refugee Board of Canada, India: Update to IND32120.E of 25 June 1999 on the situation of homosexuals (26 June 1999-April 2004), 13 May 2004, IND42507.E: <http://www.refworld.org/docid/41501c1e2a.html>, accessed May 2014

¹⁵ Supreme Court of India: Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation, February 23 to March 27, 2012 http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf, accessed May 2014

¹⁶ The World Bank South Asia Human Development Sector: Report 55: ‘Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012. http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2012/07/18/000386194_20120718034127/Rend ered/PDF/712700NWP0Coll07017020120Box370067B.pdf, accessed May 2014

¹⁷ The World Bank South Asia Human Development Sector: Report 55: ‘Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012. <http://documents.worldbank.org/curated/en/2012/07/16514787/charting-programmatic-roadmap-sexual-minority-groups-india>, accessed May 2014

¹⁸ The World Bank South Asia Human Development Sector: Report 55: ‘Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012 <http://documents.worldbank.org/curated/en/2012/07/16514787/charting-programmatic-roadmap-sexual-minority-groups-india>, accessed May 2014

¹⁹ ILGA Asia: India – Law <http://ilga.org/ilga/en/countries/INDIA/Law>, accessed May 2014

²⁰ For example: Indraprastha Apollo Hospitals, Delhi: Gynecology & Obstetrics - Treatments & Services http://www.apollohospdelhi.com/web/index.php?option=com_content&view=article&id=314&Itemid=561, accessed May 2014

²¹ Delhi IVF Fertility Research Centre: ‘Single parent IVF’ <http://www.delhi-ivf.com/single-parent-ivf.html>, accessed May 2014

²² Victoria International IVF Center, Mumbai: ‘Guide to Gay, Lesbian, Bisexual and same sex couples’ <http://ivfinindia.in/lgbt-friendly-ivf-clinic-india>, accessed May 2014

Transgender persons

- 2.1.14 There are a number of hospitals in India which have facilities for sex reassignment surgery (SRS). The legality of SRS is not yet clear, although there have been no documented cases of doctors being prosecuted for carrying out such surgery. (Section 320 of the Penal Code criminalises the emasculation of a person and falls under the definition of grievous hurt; however, Section 88 provides an exception, where an action is undertaken in good faith and the subject gives consent to suffer that harm.)²³
- 2.1.15 Official guidance enables the issue of national identity documents ('Aadhaar' ID cards), passports and voter registration where transgender people can show their gender as 'transgender' or 'other' if they wish to; F to M reassigned persons may record their gender as male; M to F can record their gender as female.²⁴
- 2.1.16 The Supreme Court of India, in a judgment published on 15 April 2014, issued the following directions to the central Government of India (the 'Centre') and to all state governments:
- '(a) Hijras, Eunuchs, apart from binary gender, are to be treated as [a] "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
 - (b) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
 - (c) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
 - (d) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.
 - (e) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
 - (f) Centre and State Governments should take proper measures to provide medical care to [the Transgender community] in the hospitals and also provide them separate public toilets and other facilities.
 - (g) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.
 - (h) Centre and State Governments should take steps to create public awareness so that [the Transgender community] will feel that they are also part and parcel of the social life and be not treated as untouchables.

²³ NUJS Law Review 'Crystallising Queer Politics - The Naz Foundation Case and Its Implications For India's Transgender Communities' page 462 <http://www.commonlii.org/in/journals/NUJSLawRw/2009/26.html>, accessed May 2014

²⁴ ILGA Trans, 'An identity at last as 71 transgenders get Aadhaar cards', 9 March 2014 <http://ilga.org/ilga/en/article/oxY9yVG10d>, accessed May 2014

- (i) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.’²⁵

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2.2. Attitudes of, and treatment by, state authorities

- 2.2.1 Reacting to the Supreme Court judgment of December 2013, the President of the then-ruling Indian National Congress party described Section 377 IPC as ‘an archaic, unjust law’.²⁶ Various serving government ministers echoed that view.²⁷ As mentioned above, the Government challenged the Supreme Court ruling by filing a review petition.²⁸ Nevertheless, as of April 2014, no legislation had been introduced in Parliament to amend or repeal Section 377.
- 2.2.2 The government of the state of Tamil Nadu established an Aravani (Hijra) Welfare Board in 2008 and has taken several initiatives to improve the lives of transgender people, including admission quotas in colleges, ration cards and free surgery in state hospitals.²⁹
- 2.2.3 Gay Pride parades have taken place, with police protection, in New Delhi, Bangalore and Chennai since 2008, and in Pune since 2011. The first pride parade was held informally in Kolkata in 1997.³⁰

Police conduct

- 2.2.4 There is no national police force in India. Most of the 35 states and ‘union territories’ have their own independent police forces. And there are several thousand police stations throughout the country. Evidence accepted in MD (India) showed that police conduct towards LGBT people varied from one state to another.³¹
- 2.2.5 The US State Department reported that, in 2013, ‘Some police committed crimes against LGBT persons and used the threat of arrest to coerce victims not to report the incidents. Several states, with the aid of NGOs, offered education and sensitivity training to police.’³²
- 2.2.6 According to a report of July 2012, prepared on behalf of the World Bank by Amaltas Consulting (Delhi) and Humsafar Trust, a Mumbai-based LGBT advocacy NGO:

²⁵ Supreme Court of India: Writ Petition (Civil) no 400 of 2012 with No 604 of 2013: National Legal Services Authority vs Union of India and Ors <http://www.supremecourtindia.nic.in/outtoday/wc40012.pdf> (Paragraph 129), accessed May 2014

²⁶ BBC News, ‘India government asks court to review gay sex ban’, 20 December 2013 <http://www.bbc.co.uk/news/world-asia-india-25461691>, accessed May 2014

²⁷ The Indian Express, ‘Ministers’ comments on our gay sex order ‘unwanted’, says SC’, 4 January 2014 <http://www.indianexpress.com/news/ministers--comments-on-our-gay-sex-order--unwanted--says-sc/1215189/>, accessed May 2014

²⁸ BBC News, ‘India government asks court to review gay sex ban’, 20 December 2013 <http://www.bbc.co.uk/news/world-asia-india-25461691>, accessed May 2014

²⁹ Economic & Political Weekly: Editorial: Gender Rights’, 15 July 2008 <http://qmediawatch.wordpress.com/2008/07/15/epw-editorial-gender-rights>, accessed May 2014

³⁰ ILGA Asia, ‘Violence against LGBT groups still prevails in India’, 30 November 2013 <http://ilga.org/ilga/en/article/ooEKTUd1Gh>, accessed May 2014

³¹ MD (same-sex oriented males: risk) India CG [2014] UKUT 00065 (IAC), accessed May 2014

³² US Department of State: 2013 Country Report on Human Rights Practices, published 27 February 2014 <http://www.state.gov/j/drl/rls/hrrpt/2013/sca/220392.htm>, accessed May 2014

‘Countless episodes of gay men entrapped in public spaces and parks by police and threatened with arrest and prosecution under Section 377 have been reported.

‘It is common for police to misuse their privilege with impunity against alternate sexuality since intolerance is built into the social structure. Moral policing replaces the policing that is protective of human rights, laid down by the law of the land.

‘Community activities such as simple get-togethers are met with suspicion and complaints of public nuisance. There are various incidents where gay parties have been raided by the police on the pretext of drugs and sex.’³³

2.2.7 Dr Akshay Khanna stated in his role as an expert witness in the Country Guidance case of MD (India) in October 2013:

‘Apart from the Queer pride marches...there is no evidence of the police positively supporting LGBT people, especially working class LGBT people facing adversity. There is an obstinate refusal to recognise violence as being homophobic, and even where this is obvious, the police tend to obfuscate this fact and treat these as simply violent crimes. There is also a tendency to refuse investigation...and instead there is a tendency to ridicule and taunt...’³⁴

Remedies for police misconduct

2.2.8 Human rights protection cells within state police forces investigate allegations of human rights violations committed by police officers.³⁵ Victims of police misconduct who do not wish to complain to the police have recourse to NGOs who will act on their behalf (see below), or to an independent police complaints authority (in many states), or to the courts. In addition to criminal and disciplinary sanctions incurred by police officers, complainants have sued the police for harm caused to them.³⁶

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2.3. Societal treatment and attitudes

Gay men and lesbians

2.3.1 India is a vast, diverse, multicultural country. Communities vary considerably not only in size, but also in their religious, ethnic, economic and political composition – and in the extent of their adherence to traditional social and family values.

2.3.2 The World Bank report of July 2012 observed:

³³ The World Bank South Asia Human Development Sector: Report 55: ‘Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012 <http://documents.worldbank.org/curated/en/2012/07/16514787/charting-programmatic-roadmap-sexual-minority-groups-india>, accessed May 2014

³⁴ MD (same-sex oriented males: risk) India CG [2014] UKUT 00065 (IAC) paragraph 170

³⁵ UN Human Rights Council: ‘Report of the Special Rapporteur on the Situation of Human Rights Defenders, Addendum : Mission to India, 6 February 2012, [A/HRC/19/55/Add.1] <http://www.unhcr.org/refworld/docid/4f39343c2.html>, accessed May 2014

³⁶ Human Rights Law Network (HRLN), New Delhi: Shinar, Adam: ‘Accountability for the Indian Police: Creating an External Complaints Agency’, August 2009 http://www.hrln.org/hrln/pdf/intern_work/Indian%20Police%20Reform%20Report%20-%20Adam%20Shinar%20formatted%20by%20Ka.pdf, accessed May 2014

‘Often the stigmatizing attitudes and discriminatory actions towards homosexuals or persons with alternative sexuality are hostile, and justified on the pretext of them being anti-religious, anti-social or just anti-tradition.

‘Sexuality is sometimes viewed even in liberal and radical circles as a frivolous, bourgeois issue. In such a context, homosexuality is seen implicitly as something deviant and unnatural that is at best defended as an individual freedom but not a matter of priority for the human rights movement. Generally, issues of poverty, class and caste oppression are seen as more important than that of gender and sexuality – especially gender and sexual minorities – and the links and interdependencies are often not recognized.

‘Even in the southern states where the LGBT mobilization has been quite strong, there have been instances where people from the LGBT communities have not been allowed to enter hotels, restaurants or clubs.’³⁷

2.3.3 The Naz Foundation (India) Trust, a leading LGBT advocacy organisation and the principal respondent in the Indian Supreme Court case regarding Article 377 IPC, advised the British High Commission (Delhi) in September 2013: ‘...we do see a lot more openness in relationships especially in urban areas. Many couples are living together...’ (See BHC letter of 22.09.2013 [Annex B](#).)

2.3.4 Evidence in an Australian Refugee Review Tribunal case of September 2007 was as follows:

‘It is true that homosexuality is more tolerated in large cities than it is in other areas of India. In those cities (particularly Mumbai and Delhi, but also in other cities such as Bangalore and Kolkata) it is possible for gay men and lesbian women to live in a publicly acknowledged homosexual relationship ... [Some NGO representatives commented] that while it might be possible to live in a publicly acknowledged homosexual relationship, it certainly is not easy. For these reasons the majority of gay people prefer to keep their sexuality a private matter...’³⁸

2.3.5 A founder of the support group, The Sangini Trust, told Diva magazine in 2009 that a major problem facing lesbians in India was societal and family pressure to marry. The magazine quoted an editorial from the Indian women’s magazine Gladrags: ‘From the time a little girl turns into a young girl, the one goal of her family and her is that she attracts a good husband. Other problems often expressed by callers to Sangini’s helpline included fear of loneliness (or growing old alone) and, in the case of Christian women, questions of sin.’³⁹

2.3.6 From time to time, certain religious and nationalistic agents have targeted the gay community through malicious and threatening statements and declarations. For example, it was reported in January 2014 that an Islamic mufti of the Bareilly school of Sunni Islam in the northern Indian town of Bareilly had issued a fatwa against both same-sex and

³⁷ The World Bank South Asia Human Development Sector: Report 55: ‘Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012.
<http://documents.worldbank.org/curated/en/2012/07/16514787/charting-programmatic-roadmap-sexual-minority-groups-india>, accessed May 2014

³⁸ Australia: Department of Foreign Affairs and Trade: Advice on the treatment of LGBT persons in India (July 2003), as quoted in Refugee Review Tribunal (Australia) case 071494945 [2007] RRTA 276, 19 September 2007.
<http://www.unhcr.org/refworld/pdfid/47ea2e4e2.pdf>, accessed May 2014

³⁹ Diva Magazine, ‘Curry and conversation: Lesbians in India’, December 2009
<http://www.divamag.co.uk/diva/features.asp?AID=3409>, accessed May 2014

extramarital heterosexual cohabitation, calling such relationships anti-Islamic; it stipulated punishments for gay couples such as stoning and being burned alive.⁴⁰ At the time of publication, no evidence could be found that any pronouncements of this nature have actually been acted upon.

Transgender persons

- 2.3.7 There appears to be little available information on societal attitudes specifically towards people (other than hijras) who have undergone sex reassignment surgery or therapy.

Hijras (Aravanis)

- 2.3.8 In the culture of the Indian sub-continent, hijras – also known as aravanis – are regarded as a ‘third gender’; most hijras regard themselves as neither man nor woman. They cannot accurately be described as ‘eunuchs’ or ‘hermaphrodites’ or ‘transsexual women’, which are Western terms. Most hijras were born male or intersex (with ambiguous genitalia); many will have undergone a ritual emasculation operation, which includes castration. Some other individuals who identify as hijras were born female. Although most hijras wear women’s clothing and have adopted female mannerisms, they generally do not attempt to pass as women. Becoming a hijra involves a process of initiation into a hijra family’, or small group under a guru-teacher, who has a parental role. (The Lesbian and Gay Studies Reader, 1993)⁴¹
- 2.3.9 It was estimated in an article in the New Statesman that there were about 200,000 Hijras in India in 2008. The article stated:

‘With more than 4,000 years of recorded history Hijras have a supposedly sanctioned place in Indian life, but they’ve faced severe harassment ... Something, however, is beginning to alter in the traditional Indian mindset as right now there seems to be both subtle and appreciable changes taking place in terms of how this group are being treated and recognised by mainstream society ... Yet these developments come after years of crushing social stigmatisation, abuse and general derision from the wider community.’⁴²

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2.4. Other forms of discrimination

Access to healthcare

- 2.4.1 According to the World Bank report of July 2012,

‘[Focus group interviews] show very clearly that the LGBT community prefers to stay away from the mainstream health services. The reason for staying away is the stigmatization faced by the LGBT community in the hands of the health service providers. The stigmatization doubled for MSM and transgenders. Other than

⁴⁰ Middle East Media Research Institute: ‘Indian Cleric Issues Anti-Gay Fatwa: A Gay Or Lesbian ‘May Be Burned Alive, Pushed From A High Wall, Or Beaten Publicly With Stones’, 20 January 2014 <http://www.memri.org/report/en/0/0/0/0/0/7771.htm>, accessed May 2014

⁴¹ The Lesbian and Gay Studies Reader (hard copy)

Edited by Abelove, Barale and Halperin. Published by Routledge, 1993.

ISBN 978-0-415-90519-0 Chapter 35: ‘Hijras as Neither Man Nor Women’, by Dr Serena Nanda

⁴² New Statesman, ‘India’s transgendered – the Hijras’, 13 May 2008 <http://www.newstatesman.com/world-affairs/2008/05/hijras-indian-changing-rights>, accessed May 2014

stigmatization the community also feels that service providers specially the doctors are not oriented about the health issues faced by the community.⁴³

- 2.4.2 The US State Department 2013 Human Rights Report noted that, according to activists, transgender persons who were HIV-positive continued to have difficulty obtaining medical treatment.⁴⁴

Rented accommodation

- 2.4.3 There have been reports of homophobic landlords refusing to rent accommodation to LGBT tenants and there is no law in India effectively preventing such discrimination. However, the Upper Tribunal found in MD India that '...the evidence does not disclose that this problem is endemic or anywhere approaching it.'⁴⁵

Workplace harassment

- 2.4.4 The US State Department 2013 Human Rights Report stated that 'advocacy organizations, such as the Mission for Indian Gay and Lesbian Empowerment (MINGLE), have documented workplace discrimination against LGBT persons, including slurs by colleagues and supervisors as well as unjustified dismissals.'⁴⁶
- 2.4.5 It was observed in The World Bank report of 2012 that 'workplace policies are locally defined and many organizations, big or small, are not necessarily inclusive, sensitized or protective towards LGBT persons.'⁴⁷
- 2.4.6 A survey by the Labour Bureau in 2010 showed that only 17 per cent of the Indian workforce is in formal, salaried employment; more than 70 per cent of all working people are self-employed as casual workers.⁴⁸

Education

- 2.4.7 The World Bank report of July 2012 stated:

'The educational system is often the point at which many [LGBT] community members face their greatest initial challenge. Ostracized by their classmates and sometimes facing extreme forms of violence, [several interviewees have spoken] about how the educational system was blind to the needs of young persons with a different experience of sexual awakening. The consequent high dropout from the school systems leads to

⁴³ The World Bank South Asia Human Development Sector: Report 55: 'Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012. <http://documents.worldbank.org/curated/en/2012/07/16514787/charting-programmatic-roadmap-sexual-minority-groups-india>, accessed May 2014

⁴⁴ US Department of State: 2013 Country Report on Human Rights Practices, published 27 February 2014 <http://www.state.gov/j/drl/rls/hrrpt/2013/sca/220392.htm> accessed May 2014

⁴⁵ MD (India) paragraph 167

⁴⁶ US Department of State: 2013 Country Report on Human Rights Practices, published 27 February 2014 <http://www.state.gov/j/drl/rls/hrrpt/2013/sca/220392.htm>, accessed May 2014

⁴⁷ The World Bank South Asia Human Development Sector: Report 55: 'Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012. <http://documents.worldbank.org/curated/en/2012/07/16514787/charting-programmatic-roadmap-sexual-minority-groups-india>, accessed May 2014

⁴⁸ BBC News, 'Nearly 10%' of Indians are without jobs', 11 November 2010 <http://www.bbc.co.uk/news/world-south-asia-11732328>, accessed May 2014

poor educational outcomes and perpetuates poor social acceptance and achievement within mainstream society.

‘In the present scenario as soon as a student is identified as a person with different gender/sex orientation the attitude of the teachers and the students change. Discrimination by the teachers or the administrative staff is evident during admission and evaluation, while discrimination faced from the students is mainly in the form of ragging.’⁴⁹

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2.5. Internal relocation

2.5.1 India comprises 28 states, plus 7 ‘union territories’. Some of these states have populations of over 100 million.⁵⁰ The major urban areas are Delhi U.T. (population 21.6 million in 2011); Mumbai, formerly Bombay (18.8 million); Kolkata, formerly Calcutta (14.1million); Chennai, formerly Madras (8.7 million); Bangalore (8.5 million); Hyderabad (7.7 million); Ahmedabad (6.3 million) and Pune (5.0 million).⁵¹ There are some 600,000 villages in the country.⁵²

2.5.2 There are no legal restrictions to relocation to most parts of India, or to any of the major cities.

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2.6. NGOs and support networks

2.6.1 As noted in the US State Department 2013 Human Rights Report:

‘LGBT groups were active throughout the country mostly in urban areas. Advocacy groups and collectives regularly sponsored events and activities, including pride marches, cultural events, and public demonstrations of support for equal rights. LGBT groups reported that they faced widespread discrimination and violence throughout society, particularly in rural areas.’⁵³

2.6.2 Prominent NGOs providing support, counselling and advocacy to the LGBT communities include:

Naz Foundation (India) Trust <http://www.nazindia.org/>

Naz Foundation International, Lucknow (Facebook address)

⁴⁹ The World Bank South Asia Human Development Sector: Report 55: ‘Charting a Programmatic Roadmap for Sexual Minority Groups in India, July 2012.

<http://documents.worldbank.org/curated/en/2012/07/16514787/charting-programmatic-roadmap-sexual-minority-groups-india>, accessed May 2014

⁵⁰ IndiaOnlinePages: India’s population 2014, undated <http://www.indiaonlinepages.com/population/india-current-population.html>, accessed May 2014

⁵¹ NewGeography: ‘Urbanising India: the 2011 Census shows slowing growth’, 21 November 2011 (2011 Census provisional data) <http://www.newgeography.com/content/002537-urbanizing-india-the-2011-census-shows-slowing-growth>, accessed May 2014

⁵² United Nations Population Fund (UNFPA): UNFPA at Work in India, undated <http://web.lb.unfpa.org/intercenter/unfpa/india.htm>, accessed May 2014

⁵³ US Department of State: 2013 Country Report on Human Rights Practices, published 27 February 2014 <http://www.state.gov/j/drl/rls/hrrpt/2013/sca/220392.htm>, accessed May 2014

Sangini Trust (for women) <http://sanginiindia.wordpress.com/about/>

Aanchal Trust (for women) <http://www.infosem.org/anchal.htm>

Humsafar Trust, Mumbai <http://www.infosem.org/hst.htm>

Challenge, Chennai <http://www.infosem.org/siaap.htm>

Gay and Lesbian Vaishnava Association (Hindu religious) <http://www.galva108.org>

Lakshya Trust (transgender) <http://www.infosem.org/lakshya.htm>

Dai Welfare Society, Mumbai (for Hijras) <http://www.infosem.org/dai.htm>

A further listing of support organisations can be found on the India Network for Sexual Minorities (Infosem) website: <http://www.infosem.org/orgs.htm#alpabet> . There are also several smaller, locally based NGOs in this category which are not listed above.

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Annex A: Caselaw

MD (same-sex oriented males: risk) India CG [2014] UKUT 65 (IAC) (12 February 2014)

In this country guidance case the Upper Tribunal held:

“

- a. Section 377 of the Indian Penal Code 1860 criminalises same-sex sexual activity. On 2 July 2009 the Delhi High Court declared section 377 IPC to be in violation of the Indian Constitution insofar as it criminalises consensual sexual acts between adults in private. However, in a judgment of 11 December 2013, the Supreme Court held that section 377 IPC does not suffer from the vice of unconstitutionality and found the declaration of the Delhi High Court to be legally unsustainable.
- b. Prosecutions for consensual sexual acts between males under section 377 IPC are, and have always been, extremely rare.
- c. Some persons who are, or are perceived to be, same-sex oriented males suffer ill treatment, extortion, harassment and discrimination from the police and the general populace; however, the prevalence of such incidents is not such, even when taken cumulatively, that there can be said in general to be a real risk of an openly same-sex oriented male suffering treatment which is persecutory or which would otherwise reach the threshold required for protection under the Refugee Convention, Article 15(b) of the Qualification Directive, or Article 3 ECHR.
- d. Same-sex orientation is seen socially, and within the close familial context, as being unacceptable in India. Circumstances for same-sex oriented males are improving, but progress is slow.
- e. It would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.
- f. India has a large, robust and accessible LGBTI activist and support network, mainly to be found in the large cities.”

Court of Justice of the European Communities (including Court of First Instance Decisions), Minister voor Immigratie en Asiel v Hooq Commissariaat van de Verenigde Naties voor de Vluchtelingen [2013] EUECJ C-199/12 (07 November 2013) found that:

- the existence of criminal laws which specifically target homosexuals supports the finding that those persons must be regarded as forming a particular social group;
- the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution; and
- When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.

Annex B

Letter from the British High Commission (New Delhi), 4 September 2013

Foreign & Commonwealth Office (letterhead)

Migration Policy
British High Commission
New Delhi
110021
Tel: +91 11 24192[xxx]
Fax: +91 11 24192[xxx]
www.fco.gov.uk

Country of Origin Information Service
Home Office

04 September 2013

Dear [Name],

Situation of gay men and lesbians in India

I confirm that, following your request, we put the following three questions to the Executive Director at the Naz Foundation (India) in New Delhi:

1. Are you aware of any individuals actually being tried and convicted in any Indian state under Section 377 – in the last two or three years – where the case only involved consensual sex between adult men?
2. Although it might be difficult to generalise (because there are separate police forces in each state), are you aware of any general change in police attitudes towards LGBT persons?
3. [DfID] mentioned that 'there are still a number of social pressures, but an increasing number of gay men and lesbians in the larger cities are able to find ways to live openly, to different degrees'. Could you elaborate on this please?

The following response was received in an email from the Naz Foundation on 3 September:

- "1. i am not aware of any individual tried and convicted under section 377 in the last couple of years involving consensual sex involving adult men.
2. in delhi we have seen a change over the years...difficult to comment on other states.

3. yes...[DfID] is right. we do see a lot more openness in relationships especially in urban areas. many couples are living together. the means to meet each other have also expanded..thanks to the internet!"

As agreed, I have omitted the name of my colleague at the Department for International Development – DfID.

Yours sincerely,

Migration Delivery Officer
British High Commission
New Delhi

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Annex C: Map of India

Map of India extracted from the University of Texas at Austin, Perry-Castañeda Library Map Collection⁵⁴



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⁵⁴ University of Texas at Austin, Perry-Castañeda Library Map Collection <http://www.lib.utexas.edu/maps/>, India, 2001, http://www.lib.utexas.edu/maps/middle_east_and_asia/india_pol01.jpg, date accessed 21 April 2014