

Refugee Review Tribunal

AUSTRALIA

RRT RESEARCH RESPONSE

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Questions

1. Please provide the latest DFAT report in relation to the acceptance of/attitudes towards homosexuals in India generally.
2. What are the prevailing attitudes and/or treatment of Sikh homosexuals in India generally?
3. Are these attitudes any different in places like Ashmanpur, Chandigarh and Karnal, Haryana?
4. Which homosexual groups are currently most active in India in promoting homosexual rights?
5. Has the constitutional challenge on Article 377 brought by the Naz Foundation before the Delhi High Court been decided yet?

RESPONSE

1. Please provide the latest DFAT report in relation to the acceptance of/attitudes towards homosexuals in India generally.

The latest DFAT report in relation to the acceptance of/attitudes towards homosexuals in India is the 2005 *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities* (DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities*, (sourced from DFAT advice of 29 July 2005), 29 July - Attachment 1).

It notes, relying on Rahul Singh, a representative of the Naz Foundation, that:

...while both homosexual and lesbian couples continue to face significant discrimination by both State and non State actors, lesbians face the additional burden of discrimination against women. There is cultural space for transgendered individuals in the form of Hijra (eunuch) communities and there are very few transgendered people in India living outside these communities. The overwhelming prejudice faced by sexual minorities meant that it is likely that there have been no or very few cases brought against the police for harassment

...as a society that did not recognise the concept of homosexuality as a valid lifestyle choice, treatment of homosexuals in India was similar, whether the person had lived overseas or not ... Should a returnee attempt to live as an openly gay person in India, they face the prospect of harassment by the State and ostracisation from their family

... as homosexuality is illegal throughout the country, attitudes towards homosexuals were fairly uniform. No state or states treated homosexuals in a worse fashion than was standard...

...due to the high level of harassment sexual minorities suffered at the hands of the police, individuals in general did not/not feel able to lodge a complaint the police. The fact that the complaint would require discussion of their sexual preference also created the possibility that the complainant would be charged under section 377 [of the Indian Penal Code] (DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities*, (sourced from DFAT advice of 29 July 2005), 29 July - Attachment 1).

Another recent DFAT report on the issue is the 2003 *Country Information Report No. 106/03 – India: Treatment of Homosexual People* (DIMIA Country Information Services 2003, *Country Information Report No. 106/03 – India: Treatment of Homosexual People*, (sourced from DFAT advice of 31 July 2003), 31 July – Attachment 2).

It deals with the constitutional challenge on Section 377 of the Indian Penal Code and the treatment of those arrested and charged under the section. It also refers to the more tolerant attitudes towards homosexuals in large cities of India.

The constitutionality of Section 377 of the Indian Penal Code was challenged by the Naz Foundation in 2001 and the Delhi High Court dismissed it on the ground of technicality in 2004. The subsequent review petition was also dismissed. For a further treatment of the constitutional challenge on the controversial Section 377, see the response to Question 5 below.

2. What are the prevailing attitudes towards and/or treatment of Sikh homosexuals in India generally?

While no definitive information has been located on the prevailing attitudes towards and/or treatment of Sikh homosexuals in India, homosexuals are generally shunned/ostracised/harassed/suppressed regardless of their religious or ethnic origin although some sections of certain cities appear to be becoming more tolerant. It is also noted that the younger generation today is generally more tolerant towards homosexuality than the older one.

In the absence of information on the attitudes towards Sikh homosexuals, attempts have been made to identify the Sikh and Hindu attitudes towards homosexuals as believers of the two religions comprise more than 82% of the Indian population today. Sikhism itself takes rather ambivalent/divided attitudes towards homosexuals although the majority of Sikhs appear to oppose homosexuality. Similarly, Hinduism has taken divergent attitudes, ranging from full acceptance to severe punishment.

Commenting on the current situation regarding homosexuality in India, *Lonely Planet* states that:

In India, homosexual relations for men are illegal. Section 377 of the national legislation forbids 'carnal intercourse against the order of nature' (that is, anal intercourse) and the penalties for transgression can be up to life imprisonment. There is no law against lesbian relations.

A 2002 survey estimated that one-sixth of India's male and female population was homosexual. Although the more liberal sections of certain cities (such as Mumbai, Bangalore, Delhi and Kolkata) appear to be becoming more tolerant of homosexuality, generally gay life is still largely suppressed. Since marriage is highly regarded in India, it is believed that most gay people stay in the closet or risk being disowned by their families and society (*India: Lonely Planet Travel Survival Kit* 2003, Lonely Planet Publications, pp 121-2 – Attachment 3).

Another source, Ethnicity Online website states that:

Sikhism is a very tolerant religion and seeks to find the truth rather than adhere rigidly to rules. Homosexuality is not specifically banned in any of the writings of the Gurus, but they do stress that God has intended people to live as man and wife, or to be celibate, with no deviation from this design. This ambivalence allows most Sikhs to be very tolerant of homosexuality and accept a homosexual individual while still regarding the practice as against God's design" ('Sikhs: Sexual Health' 2003 - 2005, Ethnicity Online website http://www.ethnicityonline.net/sikh_sexual_health.htm – Accessed 9 July 2007 – Attachment 4).

The *Religion Facts* website comments that:

The Sikh sacred text, the Guru Granth Sahib, is the highest authority in Sikhism. It is silent on the subject of homosexuality. However, there are parts of the Guru Granth Sahib that have been interpreted to mean that homosexuality is wrong.

There are five vices outlined in the Guru Granth Sahib that are to be avoided by Sikhs. These vices are called the Five Thieves. They are Pride (a'Hankar), Anger (Kr'odh), Greed (Lob'H), Attachment (Mo'H), and Lust (K'haam). Many Sikhs believe that homosexual thoughts and behaviour are just manifestations of lust, and that it is therefore forbidden.

However, other Sikhs believe that Guru Nanak's emphasis on universal equality and brotherhood is fundamentally in support of gay rights. This view is held by a minority of Sikhs, many of whom have been born/raised in countries that are more tolerant towards homosexuality. Some Sikhs have even gone so far as to describe homosexuals as "the new Untouchables" in reference to Sikhism's rejection of the Indian caste system

.... One of Sikhism underlying values is family living. Sikhs are expected to live in a family environment in order to conceive and nurture their children in order to perpetuate God's creation. Any alternative manner of living is prohibited specifically a celibate lifestyle. Most Sikhs assume this means homosexuality, which cannot result in procreation, is unnatural and against God's will ('Homosexuality and Sikhism' (undated), *Religion Facts* <http://www.religionfacts.com/homosexuality/sikhism.htm> - Accessed 6 July 2007 – Attachment 5).

Another Sikh website notes that:

Homosexuality is not addressed in scripture [Guru Granth Sahib or Sri Guru Granth Sahib – The Holy Book of Sikhism], but one source indicated that it is considered as part of one's karma, and subjects the person to psychic imbalance between female and male energies, which could lead to self-destructive behaviors. Gender equality is a stated position and is emphasized in practice. ('Welcome to eSikhs.com' (undated), eSikhs.com website http://www.esikhs.com/index_2.asp - Accessed 10 July 2007- Attachment 6).

During his meeting with the visiting Canadian Sikh MPs on 29 March 2005, Giani Joginder Singh Vedanti, the highest Sikh authority stated that homosexuality is "against the Sikh religion and the Sikh code of conduct and totally against the laws of nature." He called on Sikhs to support laws against gay marriage ('World Sikh group against gay marriage bill' 2005, *CBC News*, 29 March <http://www.cbc.ca/canada/story/2005/03/28/sikhguy-050328.html> - Accessed 4 July 2007 – Attachment 7).

He also denounced same-sex marriage and urged the Sikh assembly not to allow such ceremonies in a Sikh place of worship. According to him, "the Sikh code of conduct does not allow such marriages" (Laghi, Brian 2005, 'Sikh leader in India denounces same-sex marriage', *Globe and Mail*, 18 January <http://pewforum.org/news/display.php?NewsID=4287> - Accessed 9 July 2007 – Attachment 8).

On the other hand, Hinduism whose believers comprise 80.5% of the Indian population today ('2001 census' 2007, CIA Factbook:India, 19 June <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> - Accessed 10 July 2007 – Attachment 9) has taken divergent attitudes towards homosexuality, ranging from full acceptance to severe punishment. Today homosexuality is most likely not viewed as correct but perhaps tolerated. However, the new generation growing up in India is adopting a lot of Western ideas for good or for bad and many of the new generation are more tolerant towards homosexuality (Gay & Lesbian Counselling Service of NSW 2006, *Religions And Their Attitudes To Homosexuality*, Information Pack Document # 11, p 4, 10 August http://www.glcsnsw.org.au/documents/Infopack/11_religions.pdf - Accessed 10 July 2007 – Attachment 10).

3. Are these attitudes any different in places like Ashmanpur, Chandigarh and Karnal, Haryana?

No definitive information has been located on the attitudes towards homosexuality in places like Ashmanpur in the Chandigarh administrative division and Karnal in the Haryana administrative division in India.

However, given the sources above (see *India: Lonely Planet Travel Survival Kit* 2003, Lonely Planet Publications, pp 121-2 – Attachment 3; DIMIA Country Information Services 2003, *Country Information Report No. 106/03 – India: Treatment of Homosexual People*, (sourced from DFAT advice of 31 July 2003), 31 July – Attachment 2; and Gay & Lesbian Counselling Service of NSW 2006, *Religions And Their Attitudes To Homosexuality*, Information Pack Document # 11, p 4, 10 August http://www.glcsnsw.org.au/documents/Infopack/11_religions.pdf - Accessed 10 July 2007 – Attachment 10), it can be inferred that homosexuality is tolerated less in smaller cities like Ashmanpur, Chandigarh and Karnal, Haryana than in the large urban centres such as Mumbai, Bangalore and Delhi.

4. Which homosexual groups are currently most active in India in promoting homosexual rights?

While it is difficult to pinpoint which homosexual groups are currently most active in India, a gay website *Global Gays* lists homosexual rights groups in each of the large cities in India as follows:

Delhi

■ <http://www.globalgayz.com/www.nazindia.org>

Humrahi Trust--Forum for Gay Men

■ The Naz Foundation Trust

■ National AIDS Control Organization

■ PRISM E-mail : prism_delhi@yahoo.co.in

■ Human Rights Law Network

E-mail : hrindel@vsnl.net

Calcutta

■ SAATHII Calcutta

E-mail : saathii@yahoo.com

■ Human Rights Law Network

■ New Alipore Praajak Development Society

■ SWIKRITI

E-mail: swikriti2003@hotmail.com

■ The Praajak Gender Trust

E-mail : pratyaygendertrust@yahoo.co.in

■ Dumdum Swikriti Society

(E-mail: swikriti2003@hotmail.com)

■ Durbar Mahila Samanwaya Committee

■ Gokale Road Bandhan

E-mail : ranjitbandhan@rediffmail.com

Bombay(Mumbai)

■ Humsafar Trust

■ Aanchal Trust for Women (mostly straight and western)

■ The Sakhi Char Chowghi Trust

(E-mail: sakhicharchowghi@yahoo.com)

■ Dai Welfare Society

(E-mail: daiwelfaresociety@gmail.com)

Bangalore

■ Sangama

■ Swabhava Trust <http://www.sacw.net/SexualityMinorities/sangama.html>

Alternative Law Forum

(E-mail: alforum@vsnl.net)

■ Gelaya Trust

E-mail: gelayaa2000@yahoo.co.in

■ Good as You

■ Jagruthi

(E-mail: snehadaan@yahoo.com)

■ Vividha

(E-mail: vividhabangalore@hotmail.com)

Pune

■ Sampathik Trust

Chennai (Madras)

■SAATHII - Chennai

■Sahodaran (website under reconstruction)

■Social Welfare Association for Men (SWAM)

(E-mail only: sekar_swam@rediffmail.com)

■Tamilnadu Aravanigal Association (THAA)

(E-mail: aashaathaa@yahoo.co.in)

■South India AIDS Action Programme

■APSACS (Andhra Pradesh AIDS Control) Society

■SWAM Chennai

Hyderabad

■Saathi

■<http://members.tripod.com/gaydelhi/Page7.htm><http://www.west-london.freemove.co.uk/gaysia/links.html>Mithrudu

(E-mail: mithrudu@yahoo.com)

Goa

■<http://members.tripod.com/gaydelhi/Page7.htm>

<http://www.west-london.freemove.co.uk/gaysia/links.html>

Humsafar Goa

(‘Links for Gay India’ (undated), *Global Gays*, <http://www.globalgayz.com/g-india.html> -

Accessed 10 July 2007 – Attachment 11).

In addition, other homosexual rights groups found in India include the following:

- Men Community Development Society (MCDS), ‘the first ever gay-club in Chennai’, India (‘Chennai gets first gay-club in India’ 2006, *New Kerala*, 19 March <http://www.newkerala.com/news2b.php?action=fullnews&id=27779> – Accessed 10 May 2006 – Attachment 12);
- Indian Network for Sexual Minorities (Home page at <http://www.infosem.org/> - Accessed 10 July 2007);
- The Gay and Lesbian Vaishnava Association, Inc (Home page at <http://www.galva108.org/index.html> - Accessed 10 July 2007).

5. Has the constitutional challenge on Article 377 brought by the Naz Foundation before the Delhi High Court been decided yet?

The constitutionality of Section 377 of the Indian Penal Code was challenged by the Naz Foundation in 2001. The Delhi High Court dismissed it on the ground of technicality in 2004. The subsequent review petition was also dismissed upon which the petitioners filed a special leave petition (SLP) before the Supreme Court. It in turn sent back the petition to the High Court in 2006 for disposal on merits saying that it is a matter related to public interest. It appears that the case is still pending as of today.

The petition was formally listed in 2001 as

“IN THE HIGH COURT OF DELHI AT NEW DELHI, WRIT PETITION (CIVIL) NO.7455 OF 2001 IN THE MATTER OF: Naz Foundation ----Petitioner Versus Govt. of N.C.T. and others -----Respondents” (‘NACO affidavit in the matter of NAZ Foundation vs Government of NCT’ 2006, *Aids India*, 23 July <http://health.groups.yahoo.com/group/AIDS-INDIA/messages/6018?threaded=1&m=e&var=1&tidx=1> - Accessed 2 July 2007 – Attachment 13).

Referring to the case, the US Department of State comments that:

In November 2005 the government declined to change provisions of Section 377 outlawing homosexuality. In a response to a Supreme Court case, the government stated, "public opinion and the current societal context in India does not favor the deletion of the said offense from the statute book."

...In September 2004 the Delhi High Court dismissed a legal challenge to Section 377. Plaintiffs filed the case in 2001 after police arrested four gay and lesbian rights workers at the NAZ Foundation International and National Aids Control Office premises in Lucknow, Uttar Pradesh. ... The court dismissed the case, ruling that the validity of the law could not be challenged by anyone "not affected by it," as the defendants had not been charged with a sex act prohibited by law. In April 2005 despite the September 2004 challenge of Section 377 by two gay and lesbian NGOs, the NAZ Foundation International, and the National Aids Control Office, the government submitted a petition to the Supreme Court reaffirming the validity of Section 377. In February the Supreme Court ruled that the Delhi High Court should not have dismissed the case because the NGO was not a directly affected party to the case. The Supreme Court referred it to the Delhi High Court, which has not reexamined the case.

In July the National AIDS Control Organization (NACO) filed an affidavit in the Delhi High Court supporting the demand to scrap Section 377 of IPC that declares homosexuality an offense. This affidavit supports the petition filed by the NAZ Foundation. The affidavit was filed after NACO conducted a survey that reported 8 percent of the estimated 2.5 million homosexual population of the country was affected with HIV/AIDS as compared to 1 percent of the general population affected by the disease. A high-profile campaign to overturn Section 377, led by writers Vikram Seth and Amartya Sen, continued at year's end (US Department of State 2007, *Country Reports on Human Rights Practices – India*, 6 March <http://www.state.gov/g/drl/rls/hrrpt/2006/78871.htm> – Attachment 14).

Siddharth Narrain of *Frontline* gives details of the Naz Foundation's challenge as follows:

In 2001, the Naz Foundation, a non-governmental organisation (NGO) involved in HIV/AIDS prevention, filed a petition in the Delhi High Court (*Naz Foundation vs Government of NCT, Delhi and others*) asking for Section 377 to be read down, in order to decriminalise private consensual sexual activity...

In September 2004, a two-Judge Bench of the Delhi High Court, consisting of Chief Justice B.C. Patel and Justice Badar Durrez Ahmed, dismissed the petition on the grounds that there was no cause of action in the petition since there was no prosecution pending against the petitioner. The court said that an academic challenge to the constitutionality of a legislative provision cannot be entertained...

The petitioners filed a review petition before the High Court pointing out that the homosexual community in India, on account of Section 377, is a socially disadvantaged group which is unable to approach the court directly for fear of being identified and subject to harassment by the police...

The High Court dismissed the review petition as well, upon which the petitioners filed a special leave petition (SLP) before the Supreme Court on the limited question of whether the High Court could dismiss the petition on the grounds that there was no cause of action. The SLP was heard by Justices Y.K. Sabharwal and P.P. Naolekar. The court, while issuing notice to the Central government to be represented before it in the next hearing, said that the petition did not deal with an academic question and that this was a public interest issue that was being debated all over the world. The Judges observed that the High Court could refuse to entertain such an issue only on the grounds that it was merely academic and that there was no personal injury to

any party (Narain, Siddharth 2005, 'A battle for sexual rights', *Frontline*, vol 22, 7-20 May 2005 issue, May <http://www.flonnet.com/fl2210/stories/20050520002410400.htm> - Accessed 2 July 2007- Attachment 15).

The International Gay and Lesbian Human Rights Commission notes that:

A recent attempt by Indian advocates to challenge the constitutionality of Section 377 was rejected by the Delhi High Court on September 2, 2004. The Court claimed that the deletion of Section 377 from the Indian Penal Code would "open flood gates of delinquent behaviour and be misconstrued as providing unbridled license to such behaviour." An affidavit submitted by the government in support of the law claimed that Section 377 was necessary "to provide a healthy environment in the society by criminalizing unnatural sexual activities." (International Gay and Lesbian Human Rights Commission 2005, 'IGLHRC Responds to Reports of Gay Man in India Beheaded After Sex', 31 January <http://www.iglhrc.org/site/iglhrc/section.php?id=5&pos=0&print=1&detail=551> - Accessed 2 July 2007 – Attachment 16).

Similarly, the International Lesbian and Gay Association refers to the Delhi High Court's decision not to reconsider its previous decision of September 2004 ('Delhi High Court's refuses to change law: Section 377 criminalizes sodomy and other acts against the order of nature. A petition by Naz India asked the Court to declare it should no longer apply to consenting adults' 2004, International Lesbian and Gay Association, 11 September <http://www.ilga.org/print.asp?LanguageID=1&FileCategory=1&FileID=372&ZoneID=3&> - Accessed 2 July 2007 – Attachment 17).

In response to the Naz Foundation's special leave petition (SLP), the Supreme Court on 3 February 2006 asked the Delhi High Court to dispose on merits the petition. A four-Judge Bench set aside the High Court order and remitted the petition for fresh disposal ('Court told to dispose of petition on homosexuality' 2006, *The Hindu*, 4 February <http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2006020416441100.htm&date=2006/02/04/&prdt=th&> - Accessed 4 July 2007 – Attachment 18).

Another article of 3 February 2006 from Rediff.com comments that the Supreme Court sent back the Special Leave Petition filed by the Naz Foundation to the Delhi High court on the same day. It states that the search for legal acceptance by the Indian gay community went one step forward when the petition was sent back to the High Court ('Gays rights is matter of public interest: SC' 2006, Rediff.com website, 3 February <http://us.rediff.com/news/2006/feb/03gay.htm?q=tp&file=.htm> - Accessed 2 July 2007 – Attachment 19).

For a full copy of the Indian government submission verified on 17 July 2006 in connection with the case, see 'NACO affidavit in the matter of NAZ Foundation vs Government of NCT' 2006, *Aids India*, 23 July, <http://health.groups.yahoo.com/group/AIDS-INDIA/messages/6018?threaded=1&m=e&var=1&tidx=1> - Accessed 2 July 2007 – Attachment 13).

No report of further development of the case has been located in a search through the sources consulted.

List of Sources Consulted

Internet Sources :

Government Information & Reports

Immigration and Refugee Board of Canada http://www.irb-cisr.gc.ca/cgi-bin/foliocgi.exe/refinfo_e

UK Home Office <http://www.homeoffice.gov.uk/>

US Department of State <http://www.state.gov/>

CIA *Factbook* <https://www.cia.gov/>

United Nations (UN)

UNHCR <http://www.unhcr.ch/cgi-bin/texis/vtx/home>

Non-Government Organisations

Amnesty International <http://www.amnesty.org/>

Human Rights Watch <http://www.hrw.org/>

International News & Politics

BBC News <http://news.bbc.co.uk>

Daily India <http://www.dailyindia.com/>

Daily Times <http://www.dailytimes.com.pk/>

Economic Times <http://economictimes.indiatimes.com/>

Frontline <http://www.frontlineonnet.com/>

Globe and Mail <http://www.theglobeandmail.com/>

Hindustan Times <http://www.hindustantimes.com/>

India Daily <http://www.indiadaily.com/>

India Today <http://www.india-today.com/itoday/>

Khaleej Times <http://www.khaleejtimes.com/Index00.asp>

rediff.com <http://in.rediff.com/index.html>

The Telegraph <http://www.telegraphindia.com/>

The Times of India <http://timesofindia.indiatimes.com/>

The Tribune <http://www.tribuneindia.com/>

Wikipedia http://en.wikipedia.org/wiki/Main_Page

Yahoo India News <http://in.news.yahoo.com/>

CBC News <http://www.cbc.ca>

The Pew Forum on Religion & Public Life <http://pewforum.org/>

Gay & Lesbian

365 Gay <http://www.365gay.com>

Gay Bombay <http://gaybombay.org>

Gay.com UK <http://uk.gay.com/>

Global Gayz <http://www.globalgayz.com/>

The Gully <http://www.thegully.com/>

Humrahi <http://www.geocities.com/WestHollywood/Heights/7258/>

Humsafar Trust <http://www.humsafar.org>

International Gay and Lesbian Human Rights Commission <http://www.iglhrc.org/site/iglhrc/>

International Lesbian and Gay <http://www.ilga.org/>

Naz Foundation <http://www.nfi.net/>

People's Union for Civil Liberties <http://www.pucl.org/>

Sodomy Laws <http://www.sodomylaws.org/>

The South Asian Lesbian and Gay Association NYC (SALGA India)

<http://www.salganyc.org/>

Topic Specific Links

Ethnicity Online <http://www.ethnicityonline.net/>

IndiaLawInfo <http://www.indialawinfo.com>

Shiromani Akali Dal <http://www.shiromaniakalidalbadal.com/>

Gay & Lesbian Counselling Service of NSW <http://www.glcsnsw.org.au>

Search Engines

Google <http://www.google.com.au/>

Copernic <http://www.copernic.com>

Searchmash <http://www.searchmash.com/>

Databases:

FACTIVA (news database)

BACIS (DIAC Country Information database)

REFINFO (IRBDC (Canada) Country Information database)

ISYS (RRT Country Research database, including Amnesty International, Human Rights Watch, US Department of State Reports)

RRT Library Catalogue

List of Attachments

1. DIMIA Country Information Services 2005, *Country Information Report No. 05/46 – India: Treatment of Sexual Minorities*, (sourced from DFAT advice of 29 July 2005), 29 July. (CISNET India CX131933)
2. DIMIA Country Information Services 2003, *Country Information Report No. 106/03 – India: Treatment of Homosexual People*, (sourced from DFAT advice of 31 July 2003), 31 July. (CISNET India CX83082)
3. *India: Lonely Planet Travel Survival Kit* 2003, Lonely Planet Publications, pp 121-2. (MRT-RRT Library)
4. ‘Sikhs: Sexual Health’ 2003 - 2005, Ethnicity Online website http://www.ethnicityonline.net/sikh_sexual_health.htm – Accessed 9 July 2007.
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<http://www.newkerala.com/news2b.php?action=fullnews&id=27779> - Accessed 10 May 2006.
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16. International Gay and Lesbian Human Rights Commission 2005, 'IGLHRC Responds to Reports of Gay Man in India Beheaded After Sex', 31 January,
<http://www.iglhrc.org/site/iglhrc/section.php?id=5&pos=0&print=1&detail=551> - Accessed 2 July 2007.
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