



# **Gay & Lesbian Rights Lobby**

**Submission to Senate Inquiry into  
Conditions and Treatment of Asylum  
Seekers and Refugees at the Regional  
Processing Centres in the Republic of  
Nauru and Papua New Guinea**

**March 2016**

## About the Gay and Lesbian Rights Lobby NSW

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the peak organisation for lesbian and gay rights in NSW. We provide referral and educative resources on gay and lesbian rights to the media, policy makers and the community.

Our mission is to achieve legal equality and social justice for lesbians, gay men and their families.

**We lobby** politicians, government departments, policy makers and the media to redress discrimination against lesbians and gay men.

**We represent** the gay and lesbian community at the local, state and national level through statewide consultations. Our major consultations have highlighted social injustice and legal inequality faced by lesbians and gay men, in areas such as relationship recognition, parenting and adoption rights, workplace discrimination, the age of consent and homophobic violence.

**We educate** the gay and lesbian community on how to activate their rights. We provide information to the community, media and individuals on gay and lesbian rights and areas of discrimination. We refer clients to legal and welfare services and direct them to ways to enforce their rights.

**We empower** the community to take action in the push for equality. The GLRL runs volunteer working groups which organise campaigns and events that highlight equality issues.

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Dear Committee Secretary,

The NSW Gay & Lesbian Rights Lobby (GLRL) welcomes the opportunity to make a submission to the Senate Legal and Constitution Affairs Committee on the Inquiry into conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea.

As an organisation that advocates on behalf of gay men, lesbians and their families, we do not have the authority or experience to represent the broader bisexual, transgender and intersex communities. As such, this submission does not seek to make universal claims about the experiences of those members of the LGBTI communities that are the subject of the submission, and we encourage further consultation with these groups in policy making and service provision. Indeed, we urge that all policy development relating to particular members of LGBTI communities be developed with specific consultation with these communities.

The intention of this submission is to highlight that LGBTI refugees are some of the most vulnerable individuals held in detention around the world. They are twice, sometimes three times as likely to be exposed to violence, torture and persecution, both at the hands of the state and of fellow detainees.<sup>1</sup> This submission outlines some of the issues faced by LGBTI refugees in Australian offshore processing facilities, and the ways in which these issues can be addressed.

Whilst we note this inquiry's primary focus is on the specific conditions in detention centers in Nauru and Papua New Guinea, GLRL feels it is important for the Committee to be aware of the particular issues faced by all LGBTI refugees, including those LGBTI refugees currently in regional processing centres.

This submission also seeks to draw attention to the increasing number of refugees seeking protection in Australia based on their LGBTI status. At least 77 countries worldwide have implemented laws that criminalise homosexual behaviour. Many of them continue to introduce new laws or harsher penalties. As such, we believe it is crucial for officials in detention centers, administrative decision makers and the

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<sup>1</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations General Assembly, Human Rights Council, 31<sup>st</sup> Session, Agenda Item 3, UN Doc A/HRC/31/57 (5 January 2016) 5.

Australian public to be made aware of the circumstances, stories and needs of LGBTI refugees.

## Sensitivity toward LGBTI Refugees

This submission focuses on people who belong to a sexual minority group as a result of their emotional and physical attraction to people of the same sex, as well as individuals who do not subscribe to the traditional gender binary categories of male and female. Such individuals may be described using labels such as 'lesbian', 'gay', 'bisexual', 'trans' or 'intersex' but it is crucial to recognise that these labels vary greatly depending on cultural context.

Multiple markers of difference should be considered when assessing LGBTI refugees. Aside from the LGBTI status of an individual, other considerations must be made with regard to gender, socio-economic status, rural/urban locality, religious or ethnic background, HIV status, education level, and age.<sup>2</sup> Of particular importance is gender, as persecuted LGBTI individuals often have gender-specific experiences. For example, in many countries, female LGBTI applicants are more likely to face harm from non-state actors, whereas male applicants are more likely to experience harm at the hands of state-actors.<sup>3</sup>

Transgender applicants often face the unique struggle of identifying as a different gender to that listed on their official documentation.

## LGBTI refugees in Regional Processing Centres

The key concern with the conditions and treatment of LGBTI refugees in regional processing centres arises from the fact that members of the LGBTI communities are subjected to severe discrimination within the region. For example, Papua New Guinea criminalises homosexual behaviour ('unnatural offences') with a potential prison sentence of up to 14 years under section 210 of the *Criminal Code Act 1974*. Papua New Guinea also harbours dominant cultural attitudes that homosexuality is both pathological and perverse.<sup>4</sup>

The GLRL believes that the processing and potential resettlement of LGBTI refugees in Papua New Guinea is highly problematic.

## Understanding Sexual Orientation

There is no stereotypical lifestyle for a LGBTI person and a person's LGBTI status cannot be determined by their appearance, lifestyle, mannerisms or sexual history. It must be recognised by officials in detention centres and administrative decision

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<sup>2</sup> Ghassan Kassisieh 2008, *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation*, Gay and Lesbian Rights Lobby (NSW).

<sup>3</sup> Ibid.

<sup>4</sup> Senthoran Raj, *Will LGBTI Asylum Seekers be at Risk in Papua New Guinea?* (5 August 2013) Amnesty Australia < <http://www.amnesty.org.au/refugees/comments/32421/>>.

makers that there is usually not an obvious manifestation of someone's sexual orientation, and that sexual orientation is generally not something that can be proved.

LGBTI issues are often misunderstood by officials in detention centres, and administrative decision-makers may come to their decisions based on erroneous facts, stereotypes and inappropriate exercising of discretion. These systemic problems lead to mistreatment of LGBTI refugees and can ultimately impact upon their safety, as their requests for asylum are not appropriately considered.

Most refugees are not asked about their sexual histories, but LGBTI refugees are often bombarded with questions pertaining to officials' stereotypical views about homosexual lifestyles. Identifying as lesbian or gay does not necessarily mean being sexually active or being in a homosexual relationship. In 2010 a gay male refugee from Lebanon commented, regarding questioning by officials:

*"Although I was happy to finally be in a country where I could be open about my homosexual orientation, it does not mean that overnight I would turn into a promiscuous person willing to engage in homosexual activities with any man that I met."*<sup>5</sup>

In 2008, the LGBTI status of a Mongolian female refugee was called into question by the Refugee Review Tribunal (RRT) for disturbing reasons. The RRT said:

*"I accept that the applicant has a girlfriend and that she has had a close relationship with this friend since [year] I have doubts as to whether their relationship is a lesbian relationship as the evidence as to how they first met and their lack of involvement in the lesbian community is of concern. Further the applicant gave little details of the nature of the relationship and I felt she was being evasive as to the real basis of their friendship."*<sup>6</sup>

Although the woman in question was eventually granted refugee status, it is problematic for the RRT to consider an individuals' involvement in the 'lesbian community', especially in a situation when that individual is fleeing their homeland for fear of persecution because of their LGBTI status.

In 2011, a lesbian refugee from Uganda was denied a protection visa because the Department of Immigration and Border Protection (DIMP; then known as the Department of Immigration and Citizenship) believed that she was assuming the persona of a lesbian in order to obtain the visa. The applicant stated:

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<sup>5</sup> Senthorun Raj, *Asylum Seekers Either Too Gay, or Not Gay Enough* (13 July 2012) Amnesty Australia <<http://www.amnesty.org.au/refugees/comments/29227/>>.

<sup>6</sup> Ibid.

*“I have kept my homosexual orientation private in Uganda because I fear for my life. It is for this reason that I did not directly associate with or join lesbian groups.”<sup>7</sup>*

Invasive questions about the sexual activity of applicants can sometimes result in embarrassment and defensiveness from the applicant, which the RRT has, in some cases, interpreted as a lack of credibility.<sup>8</sup> Furthermore, some applicants do not initially disclose their sexual orientation to officials for fear of discrimination, negative reactions, shame or persecution. On occasion, these failures to disclose have resulted in adverse credibility findings against applicants.<sup>9</sup> In at least one case, the RRT has made a negative assessment of credibility due to an otherwise open and frank applicant’s reluctance to discuss his sexual behaviour.<sup>10</sup> This exemplifies the ways in which actual or perceived homophobia and heterosexism may induce shame and have a negative impact on an applicant’s ability to disclose their LGBTI status.

It is disturbing and unacceptable that officials from DIMP and the RRT are relying upon outdated stereotypes to discern the legitimacy of LGBTI refugees’ claims. Such treatment, and its impact, are not acceptable.

Officials should be given access to educational resources and training about the different cultural contexts of LGBTI individuals and overall general sensitivity to LGBTI individuals seeking refuge in Australia.

## The Unique Situation of LGBTI Refugees

LGBTI refugees are often not only fleeing laws that criminalise homosexual behaviour, but also social stigmatisation and persecution. They usually have no evidence or witnesses to testify to their LGBTI status, have been rejected by their families and are alone in their quest for asylum. In cases of religious or racial persecution, the RRT often calls close friends or family members to give evidence to the applicant’s status as a member of a persecuted group. However, in cases of LGBTI refugees, often these witnesses form part of the source of persecution and can be of no assistance to the applicant. Sometimes, witnesses are reluctant to come forward in support of the applicant because they are afraid of revealing their own homosexual orientation, being accused of homosexual orientation, or harming their own applications for refugee status. Many LGBTI refugees face bigotry and rejection from their own ethnic communities within Australia post-settlement, highlighting the extreme stigma that many communities still attach to LGBTI individuals.

This social stigmatisation and persecution often follows LGBTI persons as they seek asylum. The United Nations Human Rights Council recently revealed that LGBTI

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<sup>7</sup> Ibid.

<sup>8</sup> Above n 2.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

detainees worldwide suffer greater rates of violence than other detainees. United Nations Special Rapporteur on Torture, Juan E. Méndez, states in the report that:

*“Women, girls, and lesbian, gay, bisexual and transgender persons are at particular risk of torture and ill-treatment when deprived of liberty, both within criminal justice systems and other, non-penal settings.”*<sup>11</sup>

The report also states that:

*“A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization.”*<sup>12</sup>

LGBTI refugees in regional processing centres are at increased risk of harm, both from the state and from other detainees, indicating a clear need for urgent changes to the ways in which officials deal with such applicants. The risk of long-term psychological damage from such conditions and treatment is high, and there are currently insufficient support services available for LGBTI refugees in detention.

There is a clear need for increased protection of LGBTI refugees in detention centres and for officials working in those centres to be familiarised with the unique vulnerabilities of such individuals in order to prevent further persecution, discrimination and violence.

## The Principle of Non-Refoulement

Australia’s non-refoulement obligations require, *inter alia*, that Australia not return any person to a place where he or she would be at risk of persecution, torture, cruel, inhumane or degrading treatment or punishment, or arbitrary deprivation of life. These obligations arise under the Refugee Convention (signed by Australia in 1954),<sup>13</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed by Australia in 1985),<sup>14</sup> and the International Covenant on Civil and Political Rights (signed by Australia in 1972).<sup>15</sup>

The repatriation of LGBTI refugees has been made easier by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, which was made law on 5 December 2014. This plainly risks breaching Australia’s international law non-refoulement obligations. This legislation is

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<sup>11</sup> Above n 1.

<sup>12</sup> *Ibid* 5.

<sup>13</sup> Convention Relating to the Status of Refugees (opened for signature 28 July 1951, 189 UNTS 150, entered into force 22 April 1954) (‘Refugee Convention’), read in conjunction with the Protocol Relating to the Status of Refugees (opened for signature 31 January 1967, 606 UNTS 267, entered into force 4 October 1967).

<sup>14</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987 (opened for signature 4 February 1985, 1465 UNTS 85, entered into force 26 June 1987), Art 3.

<sup>15</sup> International Covenant on Civil and Political Rights (opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976), Arts 6 and 7.

particularly concerning as it excises all references to the United Nations Refugee Convention and removes the right of appeal for refugees.

This legislation means that LGBTI refugees can be repatriated to the country from which they fled, fearing persecution, if there is some area of that country in which they could hide or be considered 'safe', even if they do not speak the language, have no kinship ties or social connections, no ability to find work and nowhere to live.

Furthermore, it should be noted that country-specific information provided by the Department of Foreign Affairs and Trade (DFAT), used by officials to determine the level of risk an individual would be under in that country, is often incorrect or misinformed, and administrative decision-makers are strongly advised to procure country-specific information from a combination of government and independent sources such as human rights organisations and non-government organisations that advocate on behalf of refugees and LGBTI people before repatriating LGBTI refugees back to their country of origin.<sup>16</sup>

Administrative decision-makers and officials at regional processing centres should be required to take into account other markers of difference, such as the local or rural origin of an individual, gender, socio-economic status, and education levels. These factors all play a relevant part in determining the threat to an individual's well-being and their level of risk in their home country. The situations of individual refugees must be considered holistically and realistically with all relevant factors in mind. Repatriation would in many cases be putting LGBTI individuals at direct risk of violence, death, persecution under the law, or ostracism from their communities and families.

The removal of the right to appeal is exceptionally disturbing as up to 70 per cent of decisions put before the RRT are overturned.<sup>17</sup> This means that rather than improving the system, these laws have removed access to the tribunal that corrects the mistakes of the original decision-makers.<sup>18</sup> Many applications for refugee status are outright denied on the first application, and it is only when the decision is properly considered on review that an individual's request for protection is found to be valid. Therefore, these laws are making Australia almost impenetrable for LGBTI refugees, and Australia is neglecting its duties to refugees under the United Nations Refugee Convention.

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<sup>16</sup> Above n 2.

<sup>17</sup> Benedict Brook, *Australia "Becoming Impenetrable" For LGBTI Asylum Seekers* (December 17 2014) Star Observer <<http://www.starobserver.com.au/news/local-news/australia-becoming-impenetrable-for-lgbti-asylum-seekers/131175>>.

<sup>18</sup> *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Commonwealth) paragraphs 843, 1306, 1307, 1308, 1312, 1313, 1314, 1315.



## Recommendations

It is evident that LGBTI refugees in regional processing centres are a particularly vulnerable group and are currently not being treated with appropriate sensitivity. Stereotypes, biases and heterosexism still play a large role in the treatment of LGBTI refugees, illustrating the urgent need for education and training of officials and administrative decision-makers in the area of LGBTI individuals. The recommendations of the GLRL are as follows:

1. Guidelines should be developed about the treatment of LGBTI refugees in regional processing centres, adherence to which must be mandatory for officials.
2. Training on understanding sexual orientation and gender identity, covering key issues such as an awareness of the diversity of LGBTI lives and lifestyles, particularly in a cross-cultural context, should be implemented. The training should reference how LGBTI lives may differ on the basis of multiple markers of difference, such as gender, socio-economic status, ethnicity, locality, education levels, age and other factors, as well as an awareness of how LGBTI persons negotiate interactions with gay and gay-friendly spaces (where they are available).
3. Education should also be provided to regional processing centre officials, DIBP staff and health and allied health professionals around understanding the impact of actual or perceived homophobia and heterosexism and the experience of persecution and the refugee determination process. Key issues in this area include inappropriate questioning, understanding that embarrassment, reluctance to disclose and shame are often factors in an applicant's response to questioning, awareness of common harms inflicted against LGBTI individuals, and an awareness of why there may be a lack of reporting on the persecution of LGBTI individuals. Such training would ensure refugees are provided access to appropriate services that can assist with a range of issues.
4. There should be mandated responses to violence against LGBTI individuals in detention by other detainees.
5. Refugees must be given access to LGBTI appropriate telephone counselling services through the use of a translator.
6. In accordance with Australia's *non-refoulement* obligations, LGBTI refugees should not be repatriated back to the country from which they are fleeing if it would in any way compromise their safety or wellbeing.<sup>19</sup> LGBTI refugees should also not be resettled in countries where homosexual behaviour is criminalised, such as Papua New Guinea.

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<sup>19</sup> Article 33(1) of the 1951 United Nations Convention Relating to the Status of Refugees states that 'No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

As earlier indicated, the GLRL welcomes the opportunity to contribute to this inquiry. We are happy to provide further information on this topic, or to meet to discuss its contents, should you wish. If so, please contact Rebekah Hitchenson at [policywg@glrl.org.au](mailto:policywg@glrl.org.au).

Thank you for your consideration of this submission.

Sincerely,

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Chris Pycroft

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