



# Refugee Council of Australia

AUSTRALIAN HUMAN RIGHTS COMMISSION

## **SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX RIGHTS CONSULTATION**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and more than 900 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback to the Australian Human Rights Commission's Sexual Orientation, Gender Identity and Intersex (SOGII) rights consultation. Our submission responds to the first of the content headings for this consultation, *How well SOGII rights are respected and protected in Australia*, focusing specifically on issues affecting same-sex attracted asylum seekers.

Due to the extremely limited availability of information on the experiences of gender diverse and intersex refugees and asylum seekers in Australia, RCOA unfortunately is not able to provide informed feedback on issues affecting these groups. We believe that this is a significant knowledge gap which warrants further investigation in the future.

### **1. Processing of sexual orientation-based asylum claims**

- 1.1. There is limited information available regarding the processing of asylum claims received based on sexual orientation in Australia. Neither the Department of Immigration nor the Refugee Review Tribunal (RRT) publishes comprehensive information regarding the number or success rate of sexual orientation-based asylum claims received by Australia, the profile of applicants lodging such claims or the reasoning used by decision-makers in assessing these claims.
- 1.2. Nonetheless, analyses of the limited information available – namely, decision records published by the RRT and Australian courts – suggest that there are significant shortcomings in Australia's processes for assessing sexual orientation-based claims. Key issues of concern include: significant inconsistencies in decision-making; use of inappropriate methods to assess credibility (such as relying on stereotypes, failing to take into account differences in cultural norms and asking invasive questions about the person's sexual history); use of poor quality or unreliable country of origin information; and lack of understanding of the diversity of human sexuality.<sup>1</sup>
- 1.3. The consequences of poor decision-making for same-sex attracted asylum seekers can be very serious, potentially resulting in the denial of refugee status and forced return to situations where their freedom, safety or lives could be at risk. To ensure that people fleeing persecution based on their sexual orientation are able to access the protection to which they are entitled, RCOA

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<sup>1</sup> Such concerns have been raised in research and analysis over a number of years; see, for example, Crosbie, J. (2014). "The Catch-22 of asylum seekers." *Star Observer*, 15 September, <http://www.starobserver.com.au/news/local-news/the-catch-22-of-asylum-seekers/127726>; and Kassisieh, G. (2008). *From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation*, [http://qjrl.org.au/images/stories/from\\_lives\\_of\\_fear\\_to\\_lives\\_of\\_freedom.pdf](http://qjrl.org.au/images/stories/from_lives_of_fear_to_lives_of_freedom.pdf)

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believes it is imperative that decision-makers are adequately equipped to assess sexual orientation-based claims appropriately and accurately.

### **Recommendation 1**

RCOA recommends that all officials tasked with assessing asylum claims receive training on appropriate methods for determining claims based on sexual orientation.

## **2. Implications of recent and proposed changes to migration legislation**

- 2.1. RCOA has elsewhere<sup>2</sup> expressed concern about legislation recently passed by and currently before Parliament which seeks to restrict the capacity of asylum seekers to provide new information about their claims at a later stage of processing. While the Australian Government has asserted that such changes are intended to encourage asylum seekers to articulate their claims accurately and in full at the earliest possible opportunity,<sup>3</sup> we believe that this is an unrealistic expectation for certain groups of asylum seekers and may result in some individuals with genuine claims being erroneously denied refugee status.
- 2.2. Same-sex attracted people are one of the groups at particular risk in this regard. As noted by the United Nations High Commissioner for Refugees, a person who has faced persecution due to their sexual orientation or been forced to conceal or suppress their sexual orientation in order to protect their own safety “may at first not feel confident to speak freely or to give an accurate account of his or her case”.<sup>4</sup> Denying these asylum seekers the opportunity to present new information relevant to their claims or drawing unfavourable inferences about the credibility of people who do so could place these individuals at serious risk of being returned to danger.

### **Recommendation 2**

RCOA recommends that:

- a) *The Migration Amendment (Protection and Other Measures) Bill 2014 not be passed; and*
- b) *The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 be repealed.*

## **3. Offshore processing on Manus Island**

- 3.1. RCOA is greatly concerned about the situation of same-sex attracted asylum seekers transferred by Australia to Papua New Guinea’s Manus Island for processing of their asylum claims. We believe that forcibly relocating these asylum seekers to a country in which same-sex sexual activity remains a criminal offence represents an act of *refoulement* and places them at high risk of serious human rights violations.
- 3.2. RCOA believes that the people seeking protection from persecution based on their sexual orientation are at particularly high risk of having their claims erroneously rejected by Papua New Guinea and being returned to their country of origin. For example, as noted by Amnesty International Australia, same-sex attracted asylum seekers may feel compelled to lodge a false claim on different grounds – “which [is] less convincing and harder to sustain than their original, genuine claim” – for fear of their sexual orientation being revealed to authorities.<sup>5</sup>
- 3.3. RCOA has also received alarming reports of same-sex attracted asylum seekers being subjected to serious violence and harassment while in detention on Manus Island. We fear that it will not

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<sup>2</sup> See RCOA’s submissions on the *Migration Amendment (Protection and Other Measures) Bill 2014*, <http://www.refugeecouncil.org.au/r/sub/1408-Migration-Amendment.pdf> (pp. 3-4) and the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, <http://www.refugeecouncil.org.au/r/sub/1410-Legacy-Caseload.pdf> (pp. 7-8).

<sup>3</sup> See Explanatory Memorandum on the *Migration Amendment (Protection and Other Measures) Bill 2014* <http://bit.ly/1EOvIDn> (p. 14) and Explanatory Memorandum on the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* <http://bit.ly/1Ha7Teg> (p. 135).

<sup>4</sup> United Nations High Commissioner for Refugees (2008). *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, <http://www.refworld.org/docid/48abd5660.html> (p. 17).

<sup>5</sup> Amnesty International Australia (2013). *This is breaking people: Human rights violations at Australia’s asylum seeker processing centre on Manus Island, Papua New Guinea*, [http://www.amnesty.org.au/images/uploads/about/Amnesty\\_International\\_Manus\\_Island\\_report.pdf](http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf) (pp. 74-5).

be possible to ensure the safety of these asylum seekers or secure adequate remedies for their mistreatment in an environment where revealing their sexual orientation could result in serious criminal penalties.

- 3.4. Furthermore, the only outcome currently available to people found to be refugees after having their claims assessed on Manus Island is settlement in Papua New Guinea. This is likely to present significant challenges for all refugees in these circumstances, let alone people who face a real risk of ongoing persecution in Papua New Guinea due to their sexual orientation. Indeed, Papua New Guinea's inability to offer effective protection to same-sex attracted refugees may compel some people seeking protection on this basis to return to their country of origin despite having a well-founded fear of persecution.<sup>6</sup>
- 3.5. RCOA believes that the situation of same-sex attracted asylum seekers on Manus Island highlights both serious shortcomings in Australia's policy of offshore processing and Papua New Guinea's inability to provide effective protection to refugees. As such, we strongly recommend that offshore processing be abolished.

***Recommendation***

*RCOA recommends that offshore processing of asylum claims be abolished and all asylum seekers currently subject to offshore processing be returned to Australia.*

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<sup>6</sup> Amnesty International Australia 2013, p. 75.