



1 January 2014

Committee Secretary  
Senate Standing Committees on Legal and Constitutional Affairs

**Attention Sophia Dunstone**

### **Complimentary Protection**

**It is the contention of this submission that the Government's intention to repeal complementary protection legislation is both unjust and inefficient and asks Senators to reject the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013. RCT Inc. requests an opportunity to address Senate Standing Committee on Legal and Constitutional Affairs regarding this submission as the safety, life and future of LGBTI Asylum Seekers is at stake.**

### **Introduction**

This submission is made on behalf of the Rainbow Communities Tasmania State Council in respect of protection for LGBTI people forced into migration as asylum seekers because of threat of imprisonment or death sentence against homosexuals in their home Country of birth or family arrangements.

Around the world, LGBTI people face abuse, arbitrary arrest, extortion, violence, severe discrimination and lack of official protection because of their sexual orientation and/or gender identity.

Lesbian, gay, bisexual, transgender and intersex (LGBTI) asylum seekers and refugees face a myriad of threats, risks and vulnerabilities throughout all stages of the displacement cycle. There needs to be greater awareness not only of the specific protection concerns relating to LGBTI individuals but also of related jurisprudence and guidance available for UN staff, partners, state authorities and decision-makers. At the centre of the 1951 Refugee Convention are human dignity, the richness and diversity of human life, and the full expression of individual freedoms. The very purpose of the Convention is the protection of those who manage to flee predicaments that violate their dignity, identity and freedoms. Despite the fact that there was no explicit recognition in the Convention of persecution for reasons of sexual orientation or gender identity, its drafters used broad enough language to cover such instances, notably through the introduction of the 'membership of a particular social group' ground.

### **Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013.**

On the 4 December the Government in the House of Representatives introduced the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*

It is the contention of this submission that the Government's intention to repeal complementary protection legislation is both unjust and inefficient. Of particular concern to our organisation is the serious threat to LGBTI people who flee persecution, imprisonment and the death penalty as it applies in their home or birth country of origin. LGBTI people in this situation are currently able through existing procedures to engage Australia's non-refoulement obligations under the Convention against Torture or degrading Treatment or punishment and the international Covenant on Civil and political Rights (ICCPR). See Appendix A Why Afi Came to Australia.

If this new Bill Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 passes, then there is no guarantee that LGBTI people at risk of torture, death or other serious human rights violations will be protected from removal from Australia.

People at risk of this kind of harm don't qualify as refugees unless it is for reasons of their race, religion, nationality, political opinion, or membership of a particular social group. So if the bill passes, LGBTI people fleeing torture or the death sentence in Iran caught up in the civil war, or a woman at risk of being the victim of an honour killing, may be sent home. These people under current arrangements are already disadvantaged by the new protocols of Bridging Visa's or Off shore processing in Countries that persecute and imprison homosexuals e.g. Papua New Guinea Detention Centres.

Since March 2012, Australian law has enabled people at risk of being arbitrarily deprived of their lives, subjected to the death penalty, or exposed to torture or cruel, inhuman or degrading treatment or punishment to apply for a protection visa. This implements our obligations under international human rights treaties, and is known as 'complementary protection' because it complements our protection obligations under the Refugee Convention.

Now, the Government wants to remove complementary protection from Australian law - even though it accepts that Australia must not return people to these forms of ill-treatment. LGBTI Asylum seekers now on bridging visas, under threat of Temporary Protection Visas, or expatriated to off shore processing detention centres in Countries hostile to LGBTI people are already penalised and disadvantaged with threats of being deported to their hostile country of origin.

This risks exposing individuals to very serious human rights violations, including torture or death. As members of a democratic, safe and secure society, most Australians would find it abhorrent to think that our Government's actions could expose LGBTI people to this kind of ill-treatment.

The minister has claimed that the system is open to "widespread abuse" and adds "another produce to the people smugglers' shelf". But the number of protection visas granted on complementary protection grounds is extremely low. According to the most recent figures from the Immigration Department, in September this year, only 55 out of 1,200 protection visas granted onshore were on complementary protection grounds. This is hardly a sign the system is being abused.

For those 55 individuals, the protection visa was often the difference between life and death. The majority of cases involved inter-personal disputes such as extortion attempts, blood feuds, honour killings, domestic violence and revenge. There were also cases of

people fleeing from a death sentence in Iran. (As an aside, it should be noted that applicants who had themselves committed serious crimes were excluded from complementary protection.)

In addition, we need to remember that one of the reasons why the legislation was introduced in the first place was for reasons of efficiency. The previous process - which the government wants to reinstate - was that asylum seekers at risk of torture or death who did not meet the refugee definition still had to lodge a refugee application, and go through all stages of review, before being able to appeal to the Minister to exercise his discretion to grant a visa. Former immigration minister Chris Evans saw this as an incredible waste of ministerial time, and also lamented that he was single-handedly 'playing God' with asylum seekers' futures.

The introduction of complementary protection created a transparent and functional process. Claims could be heard and disposed of more quickly, and Australia could demonstrate clearly that it was implementing its international legal obligations.

This is why the Government's desire to return to a wholly discretionary approach raises alarm bells. The Minister cannot be compelled to exercise his discretion in the first place, and there is no way to have his decisions reviewed. There is no check and balance on the exercise of ministerial power. And there is no way to know whether or not Australia is sending people back to serious harm, and violating our international law obligations in the process.

If the provisions are repealed, there is a real risk that LGBTI asylum seekers will be exposed to very serious international human rights violations, including torture or death contrary to our international legal obligations. Removing a codified basis to have claims considered against the complementary protection criteria means that Australia cannot guarantee that LGBTI asylum seekers will be protected from removal to significant harm. The proposed alt alternative – ministerial discretion – is criteria by the merits reviewer. insufficient to meet the absolute requirement in international human rights law that Australia will not expose LGBTI people to a real risk of torture, cruel, inhuman or degrading treatment or punishment, the death penalty, or arbitrary deprivation of life.

Ministerial discretion is inefficient a reason why complementary protection was introduced was to enhance efficiency. By enabling decision makers to assess from the outset whether a person was at risk of one of the specified human rights violations, the complementary protection legislation put this assessment upfront, thus saving time and money, and also alleviating the human suffering associated with long periods of uncertainty (especially if in immigration detention). The previous process – which the bill would reinstate – was that asylum seekers who did not meet the refugee definition, but risked significant harm, nevertheless had to lodge a refugee application, and proceed through all stages of review, before being eligible to appeal to the Minister to exercise his discretion (under section 417) to grant a visa. Our experience is that there are not the support services available to LGBTI asylum seekers to support the process when the Government is withdrawing support from people. Ministers in a Government that is not renowned for its recognition of LGBTI rights should not single-handedly be 'playing God' with LGBTI asylum seekers' futures. The system has been described in Parliament as 'inefficient and time-consuming', adding 'stress upon stress to the applicants', and causing 'excessive uncertainty and delays'.

#### **Case at Point**

The recent case of Ali Choudhry being denied a visa to remain in Australia is a case in point of the vulnerability of LGBTI people facing arbitrary deportation. Ali is facing deportation to Pakistan after his application for a visa was refused, despite being in a relationship with his partner Matt for nearly four years. If deported, there is a risk. Ali could be imprisoned for life in Pakistan, where being openly gay carries a long jail sentence. Having grown up in the United States, Ali is also unable to read or write the local language.

The process also suffers from the dangers of political interference, favouritism and arbitrariness, inconsistent with basic principles of the rule of law but subject to particular homophobic views of regional members from conservative electorates... The introduction of complementary protection created a transparent and functional process. Claims could be heard and disposed of more quickly allowing Australia to demonstrate that it was implementing its international legal obligations. Ministerial discretion does not guarantee that our international obligations will be met

The obligations to which complementary protection gives effect are absolute and cannot be delegated from under international law. The Ministerial intervention process is non-compellable, non-delegable and non-reviewable. It is not transparent or subject to procedural fairness considerations. By its very nature, a discretionary power like this cannot fully comply with Australia's protection obligations under international law. While international treaties do not prescribe the form in which States are to give effect to their obligations, it is apparent that any provision that contains a non-compellable and non-reviewable discretion is at odds with Australia's duty to respect the principle of non-refoulement for special groups under international human rights law. The number of visas granted on complementary protection grounds is small the protection visa was often the difference between life and death. Family unity not guaranteed. Currently, if a person is granted protection on the complementary protection grounds, a protection visa is also granted to his or her family members. However, if the complementary protection provisions are repealed, this guarantee will also disappear for LGBTI Asylum seekers families. This is a stress about their family members left behind and subject to arbitrary retaliation.

The repeal of the complementary protection provisions seems to be another sign that the Government wants to do things behind closed doors. If the Government is truly committed to ensuring that no-one who engages Australia's complementary protection obligations will be removed, then why remove a functioning, efficient and transparent process?

### **Rainbow Communities Tasmania Inc. Supporting LGBTI Asylum Seekers**

Rainbow Tas Inc. through the Coming Out Proud Program has been established in Tasmania with the purpose of negotiating local policy and practice to provide for strategies that will enable GLBTI people in the regions to 'come out with pride' and live in their community with dignity as fully respected and participating members.

The COPP is established in four regions Cradle Coast, Greater Launceston/East Coast, Greater Hobart as well as Kingborough/Huon. The Program is endorsed by nearly 20

Councils and Council Liaison Officers are appointed. RCT has established a State GLBTI Council to work in conjunction with the State Government LGBTI Reference Group in implementing the GLBTI Framework as well as developing local & community responses.

The basis and strength of the COPP is the formulation of a management plan by local CLC members in consultation with local GLBTI communities and local government according to their needs and issues of the local/regional communities. COPP collaborates with other GLBTI service organisations to find solutions to these issues and negotiating in special & mainstream programs & services including support for LGBTI Migrants, Refugees, Asylum Seekers and International Students who often experience the triple discrimination of their refugee, LGBTI and racial status...

Health and Wellbeing are important issues for the GLBTI Community to improve the quality of care and way the Health Industry treats us. As a minority group the incidence of health and well-being issues is at a higher level than in other sections of the Community. Sexual Health is a critical factor for our community from many aspects but is dominated by the hidden nature of the problem and the resulting sexual practices and meeting points for sex that have developed as a result of discrimination and being forced into 'the closet' for LGBTI people.

### **RCT Working with LGBTI Migrants Refugees/Asylum Seekers and Overseas students.**

Rainbow Communities Tasmania Inc. LGBTI /CALD Group has developed brief re initiatives in this area. This is regionally through the four COPP Community Liaison Committees working with local Government and at State Level through the Rainbow Council.

RCT Inc. is working with a number of LGBTI refugees/asylum seekers through the Tasmanian Refugee Legal Service which is critical given the move to temporary protection visas and the review arrangement of the current Government

Over the last six years the COPP Community Regional Liaison Committees and the League have been aware of loneliness/ isolation, discrimination and even hate crime experienced by GLBTI Migrants/Workers, International students/Visitors and Refugees in Tasmania. This included a considerable number of hate crime cases in rural & regional areas and the support that we are providing to refugees/asylum seekers fleeing persecution. There are also GLBTI same-sex partners of Tasmanian (men and women) from other countries that experience difficulty in gaining permanent visas to live together in Australia. It is also associated with the Log of Claims regarding LGBTI Hate Crime involving CALD as well as LGBTI aspects of discrimination and violence experienced in the State. Also supporting the coverage of LGBTI Refugees and Asylum in the State LGBTI Suicide Prevention Strategy through the State Consultation and Senate Inquiry.

The Federal Government announced new guidelines to make it easier for sex and gender diverse, Trans and intersex people to get a passport in their preferred gender. Under the guidelines, sex reassignment surgery will no longer be a prerequisite to issue a passport in a person's preferred gender "Sex and gender diverse people now have the option of presenting a statement from a medical practitioner supporting their preferred gender,"

RCT is currently supporting applications for permanent visas of same sex couples based on relationship status.

Given these concerns COPP Hobart Conducted a Search/ Workshop on the Difficulties experienced by GLBTI Migrant, International Students and Refugees in Tasmania As well the Workshop have explored existing or new collaborative and cooperative strategies to eliminate discrimination and enable respect for diversity and a broader multicultural society in Tasmania. This drew together the various employer organisations of CALD workers, universities, local government and community based multicultural centres to encourage improved capacity and sensitivity to the LGBTI issues in a difficult cultural environment. Unfortunately no collaborative, cooperative or coordinated strategy between LGBTI organisations has emerged and despite an emerging need for an increasing number of asylum LGBTI seekers and deliberate 'punish, penalise and criminalise' asylum seekers the need for advocacy and support services is unmet. We would hope that there is some collaborative continuity with this initiative.

Representation on the RCT State Council by immigrant /refugee/student representation is important as we move towards improved collaboration and cooperation with this important and large sector. The Latin American Immigrant/Refugee group have two active representatives on the State Council and Pedro Salazar represented this important area at the National LGBTI Health Indifference Conference.

**Rainbow Communities Tasmania is working in this area as follows;**

- An advocacy program supporting LGBTI asylum seekers to gain permanent visas based on their protection under the International Torture and Refugee Conventions
- Working with Lawyers and the Tasmanian Refugee Legal Service to support LGBTI protection and permanent visa applications
- Working on an Forced Migration advocacy and education program in conjunction with the Oxford University Refugee Studies Centre to achieve change to repressive legislation and practice against LGBTI Asylum Seekers
- A Mentor program to assist LGBTI Asylum seekers/Refugees with day to day support and advocacy alongside Red Cross as managing case management
- Raising and providing access to regional support funding through the COPP Trust Small Grants Program for asylum refugee advocacy through the Regional COPP Community Liaison Committees
- Providing referrals to mainstream organisations of LGBTI Asylum Seekers and Refugees as regards accommodation, income support, and emergency support.”

**Awareness of LGBTI Rights in the Humanitarian Community**

There has been growing awareness in recent years about the rights of LGBTI individuals within the human rights and humanitarian community and an emergence of a body of research on this topic. The 2007 Yogyakarta Principles, in particular, have made a significant contribution to a better appreciation of how human rights norms apply and are to be interpreted in the context of sexual orientation and gender identity. It is perhaps premature to assess the role played by the Principles in making concrete improvements in the lives of LGBTI people; however, encouragingly, the Principles have been drawn upon on numerous occasions by the UN (including UNHCR), states, activists, asylum courts and tribunals, and have a constructive role to play as a legal, practical and advocacy tool. For almost two decades the UN has documented violations

against LGBTI people and articulated human rights standards in the context of sexual orientation and gender identity. More recently, the UN has called at the highest levels, for equal rights, non-discrimination, an end to violence and the abrogation of laws that criminalise same-sex relationships. And in May 2012, the UN High Commissioner for Refugees issued a message to all UNHCR staff, encouraging them to help improve protection for LGBTI persons of concerns as well as to eliminate homophobia and transphobia in the workplace.

UNHCR has developed policy and practical guidance for staff, partners, state authorities and decision-makers to promote a consistent and rights-based approach to the protection of LGBTI people. In 2008 UNHCR issued a Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity to improve decision-makers' awareness about the specific experiences of LGBTI asylum seekers and encourage a deeper analysis of the legal questions involved.

This Guidance Note is now superseded by a new set of guidelines on international protection, published in October 2012, which for the first time deal comprehensively with refugee claims based on sexual orientation and/or gender identity. These new Guidelines provide advice on substantive, procedural, evidentiary and credibility issues relating to such claims. The Guidelines are intended to provide guidance to governments, legal practitioners, decision-makers and the judiciary, as well as to UNHCR staff adjudicating these claims under the 1951 Convention, and to ensure a proper and harmonised interpretation across jurisdictions of the definition of a Refugee under the 1951 Convention. They recognise that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A(2) of the 1951 Convention. In 2011 UNHCR released a Need to Know Guidance Note on Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement to help UNHCR and partners' staff improve their understanding of the rights and the distinct vulnerabilities of LGBTI refugees and promote concrete actions to ensure that they are protected throughout all stages of their displacement. It provides practical advice on how to make office environments more welcoming, make programmes safe for, and inclusive of, LGBTI persons, and promote participation. In addition, UNHCR's Age, Gender and Diversity Policy explicitly refer to LGBTI refugees and asylum seekers. However, policy and guidance will be of limited effect if prejudice and ignorance prevail among those responsible for implementing that guidance.

To remedy lack of understanding among UNHCR's as well as partners' staff, UNHCR is developing a staff training package with ORAM. This package covers terminology, responses to day-to-day protection issues, refugee status determination (RSD) and LGBTI-sensitive interviewing techniques. The refugee status determination and resettlement processing stages are often the stages when LGBTI persons of concern will self-identify but are also where the most vital decision-making concerning their future will occur. The 2011 UNHCR Resettlement Handbook provides guidance on the resettlement of LGBTI individuals, which is often the only viable solution in many first-country-of-asylum contexts. UNHCR expedites the resettlement of LGBTI refugees according to their vulnerability, which has in some cases involved emergency resettlement. Although the latest edition of the Heightened Risk Identification Tool addresses the detection of protection risks facing LGBTI individuals, further efforts are needed, including improvement of referral mechanisms. UNHCR is currently working on a resettlement assessment tool for LGBTI refugees who will include a checklist and step-by-step guide for assessing LGBTI refugees in need of resettlement. We are aware,

however, that the lengthy average processing time for resettlement by states has an adverse impact on the well-being of LGBTI individuals, who are often in dangerous and difficult situations

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## **Appendix A**

### **Why Afi Piri Came to Australia**

**Beware this story contains torture details**

#### **Why and How I left Iran**

My name is Afi Piri (my birth name is Mohammed but I prefer to be called Afi as my story will explain). I lived in Tehran, Iran. I lived with my family Dolat my father, Roya my Mother, Ali Reza and Mojtaba my brothers. I worked as a barber in a shopping complex that my Father owned with four other barbers. I managed the shop and was very happy about my life. I was supporting my family through my income and felt appreciated in the family. I love my profession of being a barber as well as my skills at tattooing. I love helping people improve their appearance and wellbeing.

My Brother Ali Reza was jealous of me because he thought my Father liked me better than himself. He told my Father that I was gay very bad and I had a boyfriend.

Six months later Afi's family went on holidays for 2 weeks. They returned home early & caught Afi' in bed with his male partner.

Afi's father confronted him & enquired if he was gay. Afi confirmed he was. Afi's father called his grandfather- both these men are very powerful in their community. They in turn advised Police Afi was gay. Afi was told he was no longer has a father, grandfather, mother etc. or a home.

My Father was very angry. He asked me "is this true". I said you know me yes it is true. Then he said to me  
"My son is dead, get out"!

He said

"You have no mother, no father, no brothers, and no home"

My Father who is a Mullah and my grandfather who is an Aotollah reported this to the Police; As well my Brother reported to the Police that I was tattooing women. The Police came to my home. My Mother rang me and told me it was too dangerous to go home because the police were searching for me there. When the Police caught me I was taken to Police Station 157 Masudie, I was booked for tattooing a woman. I was strung up & consistently bashed. He had his fingers bent backwards & broken as well as bashed consistently with batons.

Had the tendon in his leg cut when 3 Police "stomped" on him with boots. Suffered severe damage & was also finger printed. Kicked out of Police station & barely conscious phoned a friend to take him to hospital, Afi remained there for a month & couldn't walk.

Afi & his partner then fled & lived in a car for 4 months- after they ran away. They then shared a small flat for 9 months. 30 Tir. Home Number 40. Reza paid the rent he was still working.

Afi set up a home tattooing & piercing for friends at home.

### **Why I Left Iran and How I came to Australia**

After 9 months Afi's brother & father gave Police Afi's & Reza's address- they were set up to be arrested & executed. Afi's Father & Grandfather signed papers to arrest Afi; luckily Afi's neighbour tipped him off & advised the Police were searching for them. There was a man outside Afi/Reza's flat waiting for them. Afi's neighbour let Afi & Reza escape through his place. The neighbour also purchased all the furniture & Renzo's car to give them enough money to purchase a plane ticket to Malaysia then to Indonesia. They then proceeded to Jakarta by boat. This took 4 days. They were in Jakarta for 4 weeks then paid 'people smugglers' \$5300 each. After 4 days on a boat they arrived in Christmas Islands 11/7/2013 just after the Rudd Government introduced the 'no benefit clause' that effectively holds asylum seekers in a 'never world' for up to ten years – no work, no recognition, constant surveillance in or out of detention.

### **What has happened in Australia?**

In Christmas Islands they were held in detention for three weeks then sent to Perth. Afi was granted a Temporary Safe Haven visa (subclass 449) and Bridging E visa they were then moved to Melbourne & after 2 months to Tasmania being released into the Community on bridging visas. Afi was in a hotel in Hobart for about 6 weeks prior to meeting RCT Inc. Afi and Renzo had broken their relationship since coming to Australia. Rainbow Communities Tasmania Inc. was contracted by Red Cross and asked to provide mentor support for &Afi.

RCT Inc. Is working with Afi to help him gain a permanent protection visa based on the International Torture and Refugee Conventions? The bridging visa (the safe haven visa has been replaced by the Bridging visa and offers little protection to Afi in not allowing him to work and having to live on an allowance well below the poverty line.

### **Rainbow Communities Tasmania Inc.**

RCT has supported many LGBTI refugees, asylum seekers and overseas students through a mentor system of support and advocacy work around gaining stable permanent visas. This was established through a LGBTI CALD Forum held by the Greater Hobart COPP Community Liaison Committee and the Hobart City Council. The Forum expressed concerns about the lack of appropriate support for LGBTI Asylum seekers and refugees as well as the failure of CALD workers to be trained in LGBTI cultural awareness competencies in Tasmania. RCT has developed a relationship with the Oxford Refugee Studies Centre and their specialist research and practice in relation to the protection of forced LGBTI migration given fundamentalist discrimination against minority groups leading to imprisonment and execution. The RCT work in this area has not been endorsed or supported by other LGBTI organisations or mainstream organisations working in the CALD area! Afi's story has been featured on the ABC &.30 Reports in November 2013 and the LGBTI Press.