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

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To whom it may concern

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Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea ('the Inquiry').

From the outset, I wish to express my opposition to the policies adopted by both the current Liberal-National Government, and the previous Labor Government, which detain (sometimes indefinitely), process and in some cases resettle people seeking asylum in Nauru and Papua New Guinea (PNG).

I believe that the actions of successive Australian Governments are in breach not just of international human rights law, but also fall far short of basic standards of human decency, denying the opportunity of a better life to people fleeing persecution in other countries.

However, while I oppose the overall detention, processing and resettlement of all people seeking asylum in Nauru and PNG, in this submission I will focus on one group of people for whom these policies cause particular problems: lesbian, gay, bisexual, transgender and intersex (LGBTI) people.

It is my view that the Australian Government inflicts serious harm on LGBTI people seeking asylum by detaining, processing and resettling them in countries that continue to criminalise homosexuality.

Before I address this issue in more detail, I would like to clarify that here I am not simply referring to people who claim asylum based on persecution because of their sexual orientation, gender identity or intersex status in other countries, but also include people who seek asylum on the basis of persecution of another attribute (such as race, religion or political views) *and* who are LGBTI. Both groups are negatively affected by the Australian Government's current approach.

In this submission, examining the treatment of LGBTI people seeking asylum, I will primarily focus on two of the Inquiry's six criteria:

a) conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea;

d) the extent to which the Australian-funded regional processing centres in the Republic of Nauru and Papua New Guinea are operating in compliance with Australian and international legal obligations.

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Sending LGBTI people seeking asylum to countries that criminalise homosexuality is itself a human rights abuse, and one that exposes those people to other forms of abuse and mistreatment

The Australian Government currently detains people seeking asylum in two countries outside of Australia: Nauru and PNG.

In both countries, male homosexuality remains criminalised. In both places, the maximum penalty is set at 14 years imprisonment. And in both, the origins of their current laws can be traced back to British, and subsequently Australian, imperial rule.

Nauru has two main criminal offences under its *Criminal Code* (which, I understand, are based on Queensland's 1899 *Criminal Code*) that are relevant to this discussion:

"Section 208 Unnatural Offences
Any person who:
(1) Has carnal knowledge of any person against the order of nature; or
(2) Has carnal knowledge of an animal; or
(3) Permits a male person to have carnal knowledge of him or her against the order of nature;
is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years[i]" and

"Section 211 Indecent Practices between Males
Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years."

Despite comments in recent years by the Government of Nauru that suggested homosexuality could be decriminalise there, these offences remain in place today.

Papua New Guinea also has two main offences under its *Criminal Code* that are relevant (and the offences, and even the language used, again appear to be based on Queensland's since repealed criminal provisions):

"Section 210. Unnatural Offences.

(1) A person who-
(a) sexually penetrates any person against the order of nature; or
(b) sexually penetrates an animal; or
(c) permits a male person to sexually penetrate him or her against the order of nature,
is guilty of a crime.
Penalty: Imprisonment for a term not exceeding 14 years.
(2) A person who attempts to commit and offences against Subsection (1) is guilty of a crime.
Penalty: imprisonment for a term not exceeding seven years" and

"Section 212. Indecent Practices Between Males.

(1) A male person who, whether in public or private-
(a) commits an act of gross indecency with another male person; or
(b) procures another male person to commit an act of gross indecency with him; or
(c) attempts to procure the commission of any such act by a male person with himself or with another male person,
is guilty of a misdemeanour.
Penalty: Imprisonment for a term not exceeding three years."

Unlike Nauru, there does not even appear to be any prospect of the PNG offences being repealed in the short or medium-term future.

Thus, *prime facie*, it appears that any members of the LGBTI community who engage in what could be described as male-male sexual activity – which would include gay men, bisexual men, some trans people (including because of mis-gendering by authorities) and some intersex people – would be committing criminal offences if they are sent to Nauru or PNG.

The criminalisation of male homosexuality in both PNG and Nauru stands in stark contrast with the situation in Australia, where all states and territories have decriminalised sexual activity between men (with Tasmania the last state to do so, in 1997).

If LGBTI people seeking asylum were instead allowed to have their claims processed on Australian soil, they would not need to fear being prosecuted simply because of who they are.

The legal situation in Australia is also relevant in establishing that the criminalisation of homosexual sexual activity in both Nauru and PNG is a contravention of international human rights law. It does so in two ways:

i) The first United Nations Human Rights Committee (UNHRC) decision to find that laws criminalising male homosexuality were a violation of the 'right to privacy' in article 17 of the International Covenant on Civil and Political Rights (ICCPR)[ii] involved an Australian complainant. The case of *Toonen v Australia*[iii] – which considered a complaint against the 'sodomy' laws of Tasmania – was ground-breaking when it was handed down in early 1994, and remains relevant around the world today[iv] (as we shall see below).

ii) The Australian Government, and Parliament, then confirmed that the international human right to privacy included consensual sexual activity between adults through the passage of the *Human Rights (Sexual Conduct) Act 1994*. Specifically, subsection 4(1) provided that: "[s]exual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights."

And yet, despite a 1994 decision of the UNHRC finding that the international human right to privacy should include the right to consensual sexual activity between adults, and despite this being confirmed as a right by the Australian Parliament more than 20 years ago, successive Australian Governments have effectively determined that this right should not apply to LGBTI people seeking asylum who seek protection from Australia.

Instead, successive Australian Governments have detained, processed and, in some case, resettled LGBTI people seeking asylum in countries that continue to criminalise male homosexual activity, exposing them to what I would argue are human rights violations under both Australian and international law.

There has previously been a suggestion that the criminal laws of Nauru and PNG, and especially those laws that prohibit homosexual sexual activity, might not apply to people seeking asylum who are being detained in either or both of those places.

However, I have raised this issue directly with respective Immigration Ministers under both the previous Labor and current Liberal-National Governments, and neither has explicitly ruled out the application of these criminal laws.

In September 2012, I asked then Immigration Minister the Hon Chris Bowen MP:

"Are you aware that homosexuality is currently illegal in all three countries [at the time, they also sought to send people seeking asylum to Malaysia] to which the Australian Government currently intends to send asylum seekers?" and "Will the laws of these jurisdictions apply to asylum seekers being detained by the Australian Government?"[v]

The response from the Department of Immigration and Citizenship, received in June 2013 (see **Appendix A**), refused to answer these questions – and therefore refused the opportunity to deny that the offences would indeed apply.

I wrote to the new Minister for Immigration the Hon Scott Morrison MP in February 2014, raising the same issues, this time specifically in relation to Manus Island, following the release of the Amnesty International Report *This is Breaking People*.[vi] In this letter, I included the following statement, something that I continue to firmly believe today:

"If you, as Minister for Immigration and Border Protection and therefore Minister responsible for the welfare of asylum seekers and refugees, cannot guarantee that section 210 and 212 of the PNG Penal Code do not apply to detainees on Manus Island, then you cannot send LGBTI people there in good conscience."[vii]

The response to that letter, again from the Department rather than the Minister, and received in February 2014 (see **Appendix B**), did nothing to allay concerns that the criminal laws applied to LGBTI people seeking asylum held on Manus Island:

"The enforcement of PNG domestic law is a matter for the Government of PNG. The government is aware of laws relating to homosexual activity in PNG and understands that there have been no recent reports of prosecutions under those laws.

"If homosexual activity should occur in the OPC [Offshore Processing Centre], there is no mandatory obligation under PNG domestic law for Australian officers or contracted services providers to report such activity to the PNG Government or police."

There is a lot to absorb from those short paragraphs and indeed from the letter as a whole (and I will attempt to address these issues in turn).

However, one thing that does not appear anywhere in this correspondence is a denial that the criminal laws of PNG apply to LGBTI people seeking asylum and refugees on Manus Island, irrespective of whether they are awaiting assessment or have had their applications approved and are living in the community.

Thus, on the basis of both letters, it can safely be asserted that the laws that criminalise homosexuality in PNG, and Nauru, apply to LGBTI people seeking asylum detained in both places by the Australian Government.

Looking at the specific claims in the February 2014 letter in more detail, we must remember that it does not actually matter whether the criminal laws of either PNG or Nauru have been the subject of prosecution in recent years. As the United Nations Human Rights Committee decided in the 1994 *Toonen* case:

"The Committee considers that Sections 122(a), (c) and 123 of the *Tasmanian Criminal Code* "interfere" with the author's privacy, even if those provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future… The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy."

In this light, the continued existence of the laws of Nauru and PNG criminalising male homosexuality is sufficient to constitute a human rights abuse of any person who is included by their scope, irrespective of whether the laws are actively being enforced or not.

The February 2014 letter actually highlights this potential abuse, even as it attempts to reject a claim made in the *This is Breaking People* report, namely that staff on Manus Island had a legal requirement to report homosexual activity to PNG police.

The letter itself only states that "there is no mandatory obligation under PNG domestic law", not that such behaviour could not and would not ever be reported to the PNG Government or police – thus reinforcing the potential threat to LGBTI people seeking asylum.

The threat of criminal prosecution under PNG law has even been directly brought to the attention of people seeking asylum being detained on Manus Island. From *The Guardian* in September 2014[viii]:

"*Guardian Australia* has obtained a copy of an orientation presentation shown to asylum seekers on Manus after they arrived on the island. It was prepared by the Salvation Army and shows a picture of two men kissing with a large red cross through it.

"The delivery notes attached to the presentation warn; "Homosexuality is illegal in Papua New Guinea. People have been imprisoned or killed for performing homosexual acts."

A spokesman for the Salvation Army confirmed the slides were used in the presentation to asylum seekers and said they formed part of a "broader education program about life in PNG.""

Given this context, and applying the precedent of *Toonen* decision above, it is undeniable that the treatment of LGBTI people seeking asylum by the Australian Government is in clear breach of international human rights law.

This breach also directly causes other serious harms to these people seeking asylum. This includes increased discrimination against, and ostracising of, LGBTI people by other people seeking asylum in these detention centres.

As has been highlighted by multiple reports, including Amnesty International's *This is Breaking People*, work by Human Rights Watch[ix], and the previously quoted article in *The Guardian*, the threat of criminalisation means LGBTI people who have been the victim of mistreatment in the detention centres – whether by other people seeking asylum or even detention centre employees – are far less likely to bring such mistreatment to the attention of relevant authorities.

Distressingly, these reports include multiple allegations that gay and bisexual men seeking asylum have been subject to sexual assaults inside detention centres but, due to the threat of the criminal laws being imposed on them for their homosexuality, have chosen not to make official complaints about these assaults.

That seems like an inevitable outcome of the offshore detention centre system created by successive Australian Governments, and yet it is no less abhorrent for this inevitability.

This abhorrent situation is reflected in the quotes of gay asylum seekers in both *The Guardian* article and Human Rights Watch report. From Human Rights Watch:

"A gay asylum seeker said, "I have not come to stay in Manus, a country where it's possible [for a gay man] to be jailed for 14 years. If I wanted to live like this I would have stayed in Iran and gone to prison, been released, and then sent to prison again."

"Another said, "Everyone leaves me. No one considers me a friend. Those few men who do are only with me because they want to take advantage of me sexually. They become my friends and after they use me they leave. And make fun of me. It's very hard here.""[x]

And from *The Guardian* article[xi]:

"Author Karim writes:

"In this camp I suffer a lot. For example about four month ago I had to protect myself from a vicious man who tried to rape me, I lodged a complaint against the man, but I've got no reply yet.

"Life in the camp became harder because after that incident everyone stopped talking to me, I am completely alone, they are bullying and humiliating me at all time.

"I asked the psychologists to help me, but I've been ignored."

"[Another author] Ahmed continues:

"I have to hide my sexuality because in this country, like Iran, there are a lot of people – fanatics – whom if they find out anyone is gay they would harass them and maybe even try to kill them.

"I have to hide my personality once again. I have to lie as someone else.

"It feels like this is a disease that is consuming me for all these years and society will never leave me alone. It feels like the universe doesn't want you to live in the serenity of one moment, I don't know what I have done to the universe, or what it has against me.

"I can't live one moment without anxiety stress and sadness, it doesn't let me live happily with anyone who I love or feel love, I don't know what is my crime that I have to be punished so harshly."

And from Omid (also in *The Guardian* article):

"I couldn't return to Iran and be executed by the Iranian government. Hence living in PNG was not any better, because being gay is considered a crime in PNG as well, and the punishment for such crime is 14 years imprisonment.

"I am so sorry that I was born gay. I never meant to hurt you, mum.

"I wish our boat had sunk in the ocean and stopped me living the most painful year of my life.

"I thought Australia and its people would be my protector, but they taught me otherwise."

These are the tragic lessons that we, as a country, are teaching LGBTI people seeking asylum by detaining, processing and resettling them in countries that criminalise homosexuality.

Another direct and very real consequence of the threat of criminalisation is the associated failure to provide proper sexual health education and services to LGBTI people seeking asylum.

Leaving aside the claims that people seeking asylum on Manus Island have been denied access to condoms (which the February 2014 letter rejected, but which is difficult to verify in the absence of independent monitoring), it is highly questionable whether appropriate and inclusive sexual health education is provided to all people seeking asylum who are held, including lesbian, gay, bisexual, transgender and intersex people.

But it is beyond doubt that LGBTI people seeking asylum are forced to exercise extreme caution when attempting to access sexual health services given doing so may expose them to criminal sanction. Criminalisation in this context, as in many other areas, directly jeopardises public health outcomes, and specifically increases the risks of HIV transmission.

Indeed, as the United Nations Human Rights Committee wrote more than two decades ago in relation to *Toonen*:

"The Australian Government observes that statutes criminalising homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalisation of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Second, the Committee notes that no link has been shown between the continued criminalisation of homosexual activity and the effective control of the spread of the HIV/AIDS virus."

Thus, in addition to breaching the human rights of LGBTI people seeking asylum under international and Australian law by detaining them in countries that criminalise homosexuality, the Australian Government is also increasing the risks of those same people seeking asylum contracting a virus that, while manageable with access to appropriate care and treatment, nevertheless still killed 1.5 million people worldwide in 2013 alone[xii].

Before concluding this submission, I would like to make two final observations.

First, the Committee will note that throughout I have referred to lesbian, gay, bisexual, transgender and intersex people seeking asylum. I have done so even while I acknowledge that for some members of this community – including lesbians, bisexual women and some transgender and some intersex people – the criminal laws against male homosexual activity in both Nauru and PNG will not technically apply.

Nevertheless, I believe that the unsafe situation created by these laws *does* apply to all LGBTI people seeking asylum who are detained there. By retaining laws against male homosexuality, both Governments effectively encourage discrimination across all of these population groups.

The consequence of this is that even for lesbians, bisexual women and those transgender and intersex people, they remain at increased risk of harassment and abuse (by both other people seeking asylum and detention centre employees), and sexual assault, as well as being denied access to appropriate and inclusive sexual health education and related services.

Second, I note that in both the June 2013 and February 2014 letters the Labor and Liberal-National Governments indicated that, were an LGBTI person seeking asylum to lodge an objection to being detained on either Nauru or PNG because of their laws against homosexuality, there is some possibility that they may not be sent to either place.

From the June 2013 letter:

"Pre-Transfer Assessment is undertaken prior to a person's transfer to an RPC [Regional Processing Centre] to consider whether there are specific circumstances or special needs that mean it is not reasonably practicable to transfer an asylum seeker to an RPC at this time.

"Where a person raises concerns against a designated RPC, the Departmental officer refers to relevant country information, as well as the assurances received by Australia from the RPC governments[xiii], to assess if those charges are credible. If the person makes credible claims against all RPCs, the case is brought to the Minister's attention in accordance with his guidelines for considering the exercise of his power under section 198AE of the *Migration Act 1958* to exempt that person from transfer."

From the February 2014 letter:

"Any claims made against Nauru and PNG by an IMA [Illegal Maritime Arrival][xiv], including claims concerning the treatment of homosexuals, bisexual, transgender and intersex asylum seekers in either country, are considered prior to transfer. Where an IMA makes such a claim, consideration is given to whether the IMA can be transferred to the proposed country, or an alternative country, or whether the IMA's case should be referred to the Minister for consideration of exemption from transfer."

While this process may appear to offer a small glimmer of hope to an even smaller number of LGBTI people seeking asylum, there are significant problems with any process that requires people to raise these concerns *before* being sent to either Nauru or Manus Island.

Imposing this requirement presupposes that the LGBTI person seeking asylum involved is aware that they are likely to be sent to one of these two countries, and that they also have knowledge of the criminal laws in both potentially applying to them.

It also requires them to be aware of the process involved in making such a claim (which is highly unlikely, especially in the absence of legal representation), and that they have the ability to raise it, with an appropriate Government representative, in the increasingly short period of time between detention by the Australian Government and transfer.

And it forces an LGBTI person seeking asylum to make this claim in an environment where they may be travelling with family members and friends (to whom they may not be 'out'), or other members of their community that may not be accepting of different sexual orientations, gender identities or intersex people.

Finally, the June 2013 letter itself acknowledges that there may be some delay between a person seeking asylum protection from the Australian Government, and them making a claim on the basis of their LGBTI status. From that letter:

"Unlike other persecuted groups, sexual orientation and gender identity is not a readily visible characteristic and has to be revealed by the individual. Homosexual and transsexual applicants may, therefore, have only spoken to a handful of people, or none at all, about their sexuality and have kept it a secret. Interviewers and decision-makers should, therefore, not be surprised if an applicant suddenly raises the issue of sexual orientation or gender identity late in an application process, prefaced perhaps by an earlier weak or false claim on other grounds."

Given this, it makes absolutely no sense to limit the ability of LGBTI people seeking asylum to make claims for protection against their detention on either Nauru or Manus Island, PNG to prior to their detention there – they should be able to make such a claim, and request transfer from these facilities (preferably to be processed in Australia), at any point.

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Overall, I believe that the actions of successive Australian Governments, in sending lesbian, gay, bisexual, transgender and intersex (LGBTI) people seeking asylum to Nauru and PNG, both countries that criminalise male homosexuality, is a fundamental breach of international human rights law.

This breach has flow-on consequences, by leading to increased harassment and abuse of LGBTI people seeking asylum, including by other people seeking asylum and by detention centre employees, and exposing them to sexual assault, as well as denying them access to appropriate and inclusive sexual health education and related services, increasing their risk of contracting HIV.

I submit that, instead of detaining, processing and resettling LGBTI people seeking asylum on Nauru and Manus Island, PNG, the Australian Government must instead ensure that the claims of these people are processed in Australia, where they are not criminalised and where they can be provided with access to appropriate support services.

Thank you for taking this submission into account as part of this Inquiry. If the Committee would like additional information about any of the above, or to clarify any part of this submission, please do not hesitate to contact me at the details provided.

Sincerely,
Alastair Lawrie

[i] Attempt to commit unnatural offences is also an offence under section 209, with a maximum penalty of 7 years imprisonment.
[ii] Article 17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.
[iii] *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994). http://www1.umn.edu/humanrts/undocs/html/vws488.htm
[iv] From an article in *New Matilda*, celebrating the 20th anniversary of the Toonen decision (*20 Years Since Toonen Changed the World*, 11 April 2014 https://newmatilda.com/2014/04/11/20-years-toonen-changed-world/): "Perhaps most dramatic of all has been the impact of the Tasmanian UN decision around the world. The Tasmanian decision was the first time the UN had recognised the equal rights of LGBTI people. When the Indian High Court overruled that country's anti-gay laws in 2009 it was on the basis of the Tasmanian decision. When the UN Secretary-General Ban Ki Moon successfully urged the President of Malawi to release men gaoled for being gay, he cited the Tasmanian decision.In 2011 the UN Human Rights Commissioner, Navi Pillay, described the Tasmanian decision as a "watershed with wide-ranging implications for the human rights of millions of people."
[v] Letter to Chris Bowen on LGBTI Asylum Seekers http://alastairlawrie.net/2012/09/07/letter-to-chris-bowen-on-lgbti-asylum-seekers/
[vi] A copy of the *This is Breaking People* report can be found here: http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf
[vii] Letter to Scott Morrison about Treatment of LGBTI Asylum Seekers and Refugees sent to Manus Island, PNG http://alastairlawrie.net/2014/02/02/letter-to-scott-morrison-about-treatment-of-lgbti-asylum-seekers-and-refugees-sent-to-manus-island-png/
[viii] *Guardian Australia*, 'Gay asylum seekers on Manus island write of fear of persecution in PNG', September 24 2014. http://www.theguardian.com/world/2014/sep/24/gay-asylum-seekers-manus-island-fear-persecution-png
[ix] *Human Rights Watch*, 'Australia/Papua New Guinea: The Pacific Non-Solution', July 15 2015. https://www.hrw.org/news/2015/07/15/australia/papua-new-guinea-pacific-non-solution
[x] Ibid.
[xi] Op cit, *Guardian Australia*, September 24 2014.
[xii] World Health Organisation Global Health Observatory data. http://www.who.int/gho/hiv/en/
[xiii] Based on the principles of the *Toonen* UNHRC decision, these assurances are irrelevant – the continued existence of laws criminalising male homosexuality should be sufficient to prevent the transfer of LGBTI people seeking asylum to these countries.
[xiv] This is the term used in the letter, not one that I would personally use or approve.