

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: Australian Human Rights Commission

Question No. BE16/003

Senator Hanson-Young asked the following question at the hearing on 5 May 2016:

Senator HANSON-YOUNG: ...I appreciate that. I am also wondering what the commission's legal view is—and you may wish to take this on notice as well, or please feel free to give us your understanding, if you have it to hand—on a young woman who was recently subjected to sexual assault on Nauru while in Australia's care, fell pregnant and required an abortion. Rather than being brought to Australia for her termination, she was sent to Papua New Guinea at the Australian minister's request. It is illegal in Papua New Guinea to have an abortion. What is the commission's view of Australia sending a young woman in their care to a country where that termination is illegal?

Prof. Triggs: Thank you, Senator. I am aware of that case.

...

Prof. Triggs: As I have said, I am aware of this and I have been briefed by the lawyers acting for the woman concerned, but the matter is now before the courts. It is not an area on which we are currently acting; it is before the courts and I cannot, frankly, say any more than that.

Senator HANSON-YOUNG: International law requires Australia and other signatory countries to not participate in non-refoulement. Would you take on notice whether an incident like this would fall within the concerns in relation to non-refoulement.

Prof. Triggs: We would be very happy to take that on notice and to look at the question, but, because this matter is before the court, I would necessarily give an answer which is a principled answer on the law, rather than on the details of this particular case.

Senator HANSON-YOUNG: Thank you.

The answer to the honourable senator's question is as follows:

The *non-refoulement* provisions of the *Convention Relating to the Status of Refugees* stipulate that a person should not be sent a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.ⁱ The Commission considers that unless one of the five grounds listed in this definition was engaged in a particular case (for example, if an abortion was being denied on a discriminatory basis, or if the woman was part of a relevant social group), these provisions may not apply to a woman requiring an abortion who had been sent to a country in which abortion is illegal.

However, the UN Human Rights Committee has found that denying access to abortion may in some circumstances result in violations of article 7 of *International Covenant on Civil and Political Rights* (ICCPR),ⁱⁱ which prohibits cruel, inhuman or degrading treatment or punishment:

- In the case of *K.L. v Peru*, the Committee found that Peru had violated article 7 of the Covenant through denying an abortion to a 17-year-old girl whose unborn child was diagnosed with serious foetal abnormalities resulting in the baby's death soon after birth.ⁱⁱⁱ

- In the case of *V.D.A. v Argentina*, the Committee found that Argentina had violated article 7 of the Covenant through denying an abortion to a woman with a mental impairment who had become pregnant as a result of a rape.^{iv}
- In the case of *Mellet v Ireland*, the Committee found that Ireland had violated article 7 through denying an abortion to a woman whose unborn child had been diagnosed with congenital heart defects and was likely to die in utero or shortly after birth.^v

The Commission considers that sending a woman in similar circumstances to a country in which she may be denied access to an abortion could therefore engage Australia's *non-refoulement* obligations under article 7 of the ICCPR.

ⁱ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), art 33(1).

ⁱⁱ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 7.

ⁱⁱⁱ *K.L. v Peru*, Communication No. 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (22 November 2005) [6.3].

^{iv} *V.D.A. v Argentina*, Communication No. 1608/2007, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011) [9.2].

^v *Mellet v Ireland*, Communication No. 2324/2013, UN Doc CCPR/C/116/D/2324/2013 (9 June 2016) [7.2–7.6].