

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

**Program:** Australian Human Rights Commission

**Question No. BE16/004**

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

Senator HANSON-YOUNG: Thank you. Following on from the issue of nonrefoulement and Australia's transfer of individuals, there has been some debate and concern about, in particular, asylum seekers who are gay who have been left on Nauru and in Papua New Guinea—people who have been found to be refugees. Some of them have left their countries because of their sexuality being an issue of concern in their homelands. What is the obligation of Australia to ensure that those people are not further persecuted or threatened or harmed because of their sexuality?

Senator SMITH: Or returned to persecution.

Senator HANSON-YOUNG: Or returned to persecution.

Prof. Triggs: We at the Human Rights Commission are deeply concerned by these particular cases. If I may say so, some two years ago—I would have to check my records—we were given an assurance that the respective ministers of immigration would never send people of a different sexual orientation to Manus and Nauru. We made direct and deliberate inquiries about that because we were particularly concerned about Manus Island and Papua New Guinea law. Sadly, we have some cases in which individuals have brought their concerns to our attention. There is a particular couple who are on Manus who, we are told, are fearful of leaving their living quarters because they fear that they will be attacked. I do not know the full story, but we are now getting a consistent level of information that there are people of a different sexual orientation, particularly on Manus, and it is a very difficult, distressing and possibly even dangerous environment for them. But this is a very good example of refoulement, if you like, to a country where their interests are not protected or where there is a risk that they will be then refouled again, to another country where they would be subject to persecution, and it clearly falls within the definition of a refugee. But, as you quite correctly point out, I believe the particular couple I have in mind have been determined to be refugees. I think this is a very egregious case and I would really ask that efforts be made to protect the interests of those particular people.

REPEATED QUESTION:

Senator SMITH: Professor, did I hear you correctly in previous evidence? You suggested that you might have had a commitment from a minister or previous minister that LGBTI people would not be sent to Nauru or Manus?

Prof. Triggs: I think I did say I believed that we had. I would like to take that on notice and go back over our notes of the meetings. I know that I have raised it and that I had an assistant with me who was taking notes. I also know that Commissioner Tim Wilson has raised it. These are private meetings with ministers—I am sure you appreciate that.

Senator SMITH: Of course.

Prof. Triggs: It may or not be appropriate for us. I would like to be able to say that I can confirm that that was our respective understandings—both Mr Wilson's and mine—that commitments were given that those of a different sexual orientation would not be sent to Manus. That is the crux of it. That is my memory, but I would like to be absolutely clear that that is reflected in our notes. I will consult Mr Wilson to be sure that that reflects his own memory as well.

**The answer to the honourable senators' question is as follows:**

The *Convention Relating to the Status of Refugees* defines a refugee as a person outside their country of origin who has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.<sup>i</sup> Refugee claims relating to sexual orientation are usually recognised under the ground of 'membership of a particular social group'.<sup>ii</sup>

According to the United Nations High Commissioner for Refugees (UNHCR):

An applicant's sexual orientation and/or gender identity can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation and/or gender identity, which does not, or is seen not to, conform to prevailing political, cultural or social norms.<sup>iii</sup>

UNHCR further notes in relation to laws criminalising same-sex sexual activity that:

Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations.<sup>iv</sup>

As such, the Commission considers that sending a same-sex attracted person to a country in which same-sex sexual activity is criminalised would engage Australia's *non-refoulement* obligations under article 33(1) of the Convention.<sup>v</sup>

The previous Human Rights Commissioner, Tim Wilson, discussed the situation of same-sex attracted asylum seekers sent to Nauru and Manus Island under third country processing arrangements with the former Minister for Immigration and Border Protection, the Hon Scott Morrison MP, on a confidential basis on 1 October 2013.

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<sup>i</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), art 1A(2).

<sup>ii</sup> United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (23 October 2012) [40]. At <http://www.refworld.org/docid/50348afc2.html> (viewed 11 August 2016).

<sup>iii</sup> United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (23 October 2012) [13]. At <http://www.refworld.org/docid/50348afc2.html> (viewed 11 August 2016).

<sup>iv</sup> United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (23 October 2012) [27]. At <http://www.refworld.org/docid/50348afc2.html> (viewed 11 August 2016).

<sup>v</sup> *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).