



Submission to the Inquiry into Payment of Cash or
Other Inducements by the Commonwealth of
Australia in Exchange for the Turn Back of Asylum
Seeker Boats

Senate Legal and Constitutional Affairs References Committee

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1. Executive Summary

1. The Senate Legal and Constitutional Affairs References Committee has asked for submissions to its inquiry into the alleged payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats.
2. The inquiry arises out of reports that the Australian Government paid the crew of an asylum seeker boat headed for New Zealand to return to Indonesia, without the agreement or knowledge of the Indonesian Government.
3. While the Immigration Minister initially denied the allegations,¹ the Prime Minister subsequently refused to rule out that the payments had been made, saying only that the Australian government “will do what is necessary to keep our country safe and to keep this evil trade stopped”.²
4. It should be emphasised at the outset just how unsatisfactory it is that Australians, including the members of this Committee, have been forced to evaluate conduct which the government refuses to confirm or deny engaging in. The Australian public has received more information about these allegations from Indonesia than they have from their own government.
5. What we do know is that an Indonesian police chief, the boat crew and some of the asylum seekers who were on board allege that an Australian official gave the crew around USD\$30,000 to return to Indonesia after the boat was intercepted by Australian vessels in international waters. The asylum seekers say Australia provided them with two boats to return to Indonesia. One of the boats ran out of fuel on the return journey and all 71 people, 6 crew and 65 asylum seekers, had to continue on the one remaining boat.
6. That boat then struck a reef off Rote Island and most of the crew and some asylum seekers made their way to shore. Some passengers, including women and children, remained on board and had to be rescued by locals.³
7. If the allegations are true, this conduct by the Commonwealth:
 - a) would violate international law;
 - b) may constitute an offence under Australian domestic law;

¹ Andrew Probyn, ‘Ministers avoid boat payment claims’, *The West Australian*, 16 June 2015, <<https://au.news.yahoo.com/thewest/national/a/28464927/ministers-avoid-boat-payment-claims/>>.

² Daniel Hurst, ‘Tony Abbott refuses to rule out paying people smugglers to turn back boats’, *The Guardian*, 12 June 2015, <<http://www.theguardian.com/australia-news/2015/jun/12/tony-abbott-refuses-to-rule-out-paying-people-smugglers-to-turn-back-boats>>.

³ George Roberts, ‘Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew’, *ABC Online*, 17 June 2015, <<http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>>.

- c) risks damaging Australia's relationship with Indonesia; and
- d) would represent fundamentally bad policy.

2. International Law

8. When it ratified the *Protocol against the Smuggling of Migrants by Land, Sea and Air* ('*People-Smuggling Protocol*'), Australia undertook to "prevent and combat the smuggling of migrants".⁴
9. "Smuggling of migrants" is defined in the *People-Smuggling Protocol* as:
 - the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.⁵
10. The payment of money to return people to Indonesia would undoubtedly constitute "procurement". The real question is whether the Commonwealth procured their return in order to obtain a "material benefit". Assuming the allegations are true, the benefit gained by the Commonwealth includes preventing the entry of the vessel and its crew to Australia and the associated perceived political gain of "stopping the boats". There are reasonably strong arguments that these constitute "material benefits" and accordingly that paying people smugglers to smuggle people back to Indonesia in these circumstances would be a breach of the *People-Smuggling Protocol*.
11. Like all treaties by which it has agreed to be bound, Australia is obliged to perform its obligations under the *People-Smuggling Protocol* in good faith.⁶ It must act consistently with both the letter and spirit of the law. The two stated purposes of the *People-Smuggling Protocol* are "to prevent and combat the smuggling of migrants" and "to promote cooperation among State Parties to that end".⁷ Unilateral action by one state to facilitate the smuggling of people into another undermines both of these key objectives.
12. The *People-Smuggling Protocol* also makes clear that combating people smuggling does not justify or excuse violating the basic rights of the people being smuggled, who retain their right to seek protection under international law.⁸ Australia's central legal obligation to people

⁴ *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241. UNTS 507 (entered into force 28 January 2004) ('*People-smuggling protocol*') article 2.

⁵ *Ibid*, article 3(a).

⁶ *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969, 1155 UNTS (entered into force 27 January 1980) article 26.

⁷ *People-Smuggling Protocol*, article 2.

⁸ *People-Smuggling Protocol*, article 19(1).

seeking protection is to never return them to danger – the principle of non-refoulement.⁹ This obligation can be breached when a person is returned directly to a country where they face danger or to a country which may, in turn, send them to a place where they face the risk of persecution.¹⁰

13. Compliance with non-refoulement obligations requires the fair, thorough and individualised assessment of protection claims - precisely what Australia fails to do each and every time it intercepts and returns an asylum seeker boat without any transparency or due process. For these reasons both the UNHCR¹¹ and the UN High Commissioner for Human Rights¹² have repeatedly emphasised that Australia's practice of boat turn-backs (in whichever way they are carried out) carries inherent risks of violating international law.

3. Domestic Law

14. People smuggling is a serious crime under Australian domestic law. While offences in the *Migration Act 1958* (Cth) only apply to the smuggling of people into Australia, the *Commonwealth Criminal Code Act 1995* (Cth) makes it an offence to “organise” or “facilitate” the irregular entry of a person into a foreign country.¹³
15. There are legal and political reasons why a prosecution in respect of the present allegations is unlikely. Most significantly, the personal written consent of the Attorney-General is required before any prosecution can be commenced.¹⁴

⁹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (*Refugees Convention*) as modified by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 6060 UNTS 257 (entered into force 4 October 1967); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 29 ILM 1464 (entered into force 11 July 1991); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

¹⁰ It is the latter which is the most relevant to asylum seekers being returned to Indonesia – a country which has not signed the *Refugees Convention*.

¹¹ UNHCR Regional Representation, Canberra, ‘UNHCR Position: Interception and turn back of boats carrying asylum-seekers’, 23 July 2015, <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=581&catid=37&Itemid=6>.

¹² United Nations High Commissioner for Human Rights, ‘Opening Statement’, Human Rights Council 27th session (8 September 2014) <http://hrc.org.au/wp-content/uploads/2014/09/AdvancedCopy_HRCOpeningStatement_Sep2014.pdf>.

¹³ See the *Criminal Code Act 1995* (Cth) division 73.

¹⁴ See the *Criminal Code Act 1995* (Cth) section 73(5).

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16. In the unlikely event such consent was provided then the defence of lawful authority may apply, depending on who made the payments and in what circumstances.¹⁵ If the payments were made by an agent of the Australian Secret Intelligence Service, then that agent may seek to rely on the immunity from civil or criminal liability in section 14 of the *Intelligence Services Act 2001* (Cth).
 17. Separate from any potential criminal liability, there would be serious questions about whether such conduct could be authorised by the *Maritime Powers Act 2013* (Cth) and also whether, in the event of injury or harm being suffered by one of the people returned, the Commonwealth would be liable in tort.
 18. Ultimately, whether a crime has been committed and whether other laws have been infringed will depend on the facts. The Government refuses to disclose any and in so doing continues to subvert vital legal and democratic scrutiny of its actions.

4. Impact on bilateral relationship

19. Australia's relationship with Indonesia has already been strained by its policy of boat turn-backs. When Australia breached Indonesian territorial waters six times in the space of two months last year, the Indonesian Government made its displeasure clear, saying in a statement that it “deplores and rejects the violation of its sovereignty and territorial integrity”¹⁶ and that “any such violation of whatever basis constitutes a serious matter in bilateral relations of the two countries”.¹⁷
20. Australia has kept turning back boats regardless. Indonesia demanded answers in response to the reports that Australia paid people smugglers to smuggle people into Indonesia, but Australia refused to provide any.¹⁸ This latest incident, and the Government's continued secrecy, undoubtedly further damages our relationship with our close neighbour.

¹⁵ See the *Criminal Code Act 1995* (Cth) section 10(5).

¹⁶ BBC News ‘Indonesia condemns Australian navy waters violations’, *BBC News*, 17 January 2014 <<http://www.bbc.com/news/world-asia-25772063>>.

¹⁷ George Roberts, ‘Indonesia demands Australia stops risking violation of territory, increases navy patrols’, *ABC News*, 17 January 2014, <<http://www.abc.net.au/news/2014-01-17/indonesia-says-it-regrets-violations-of-waters/5205974>>.

¹⁸ ABC/Reuters, ‘Asylum seekers: Indonesian foreign minister wants answers over allegations Australia paid people smugglers’, *ABC News*, 15 June 2015, <<http://www.abc.net.au/news/2015-06-13/indonesian-fmwants-answers-over-smuggling-pay-allegations/6544206>>.

5. Other related matters

5.1 Secrecy

21. All governments should respect legal and democratic limits on their power. Transparency is vital to upholding those limits. The current government's refusal to discuss "operational matters" impairs the ability of both the Australian legal system and the Australian people to properly evaluate government conduct.
22. There is no justification for the continued secrecy around these issues. If the government authorised the payment of taxpayer funds for this purpose, it should disclose this and explain how it believes the payments are lawful and in the national interest. If the Government did not make the payments, it should confirm this as the continued failure to deny the payments acts as an incentive to other people smugglers to seek a similar payment.

5.2 Policy implications of paying people smugglers

23. The government has sought to justify tremendous cruelty as being necessary to fight the "evil" people smugglers and to "smash their business model". It would be extraordinary if the government was now paying those same individuals to turn boats around and smuggle people elsewhere. Doing so would also seem to incentivise other smugglers to make the trip to Australia in the hope of receiving similar payments.
24. More broadly, boat turn-backs, however achieved, are fundamentally bad policy. They:
 - a) carry clear and inherent risks of returning the persecuted to their persecutors;
 - b) constitute unilateral and uncooperative action at a time when the global refugee crisis demands a multilateral and cooperative approach;
 - c) shift, rather than share, responsibility for people fleeing persecution and in so doing undermine the international refugee protection framework; and
 - d) set a precedent which, if followed by others, would lead to thousands of men, women and children floundering in the middle of the ocean with nowhere to go, as we saw in May 2015 when thousands of Rohingya refugees were left stranded in the Andaman sea.
25. Developing safe and viable pathways to protection is the humane and lawful way to save lives at sea. Turn-backs risk endangering them elsewhere. When people seek Australia's protection their entitlement to it should be assessed fairly and transparently under Australian law. They should not be summarily returned under a shroud of secrecy.