Chapter 3

The legal and policy implications of paying people-smugglers

3.1 Of the 12 submissions received to this inquiry, nine focused largely or wholly on the legal ramifications of the incident reported to have occurred in May 2015, should those events have transpired in the manner reported by the media and claimed by the Indonesian authorities. The submissions were consistent in their analysis of the laws and legal issues raised, and the legal experts who appeared as witnesses at the committee's public hearing elaborated on these matters.

3.2 Several submissions also raised concerns about the policy implications of paying people-smugglers to turn back boats, particularly for Australia's relationship with Indonesia, and for the objective of combating people smuggling.

Australian law

3.3 Submitters raised issues relating to various Commonwealth laws that may be of relevance in relation to the alleged incident, including people smuggling provisions in the *Criminal Code Act 1995* (Criminal Code) and the *Migration Act 1958* (Migration Act), and immunity provisions in the *Intelligence Services Act 2001* (ISA).

The Migration Act

3.4 Submissions noted that while the Migration Act contained certain offences relating to people smuggling, these would not be relevant in this instance, as the Migration Act offences (only) related to the smuggling of persons into Australia.[1]

The Criminal Code

3.5 On the other hand, many submissions assessed that the actions allegedly taken by Australian officials may constitute the commission of people smuggling offences as set out in the Criminal Code.

3.6 Division 73 of the Criminal Code establishes people smuggling and related offences. Under section 73.1, an offence of people smuggling is committed if a person organises or facilitates the entry of another person into a foreign country (whether or not via Australia) in a way that does not comply with the requirements under that country's law for entry into the country, and the person smuggled is not a citizen or permanent resident of the foreign country. This offence attracts a penalty of up to ten years' imprisonment.

3.7 Section 73.2 provides for an aggravated offence of people smuggling if the perpetrator recklessly places the victim in danger of death or serious harm, or subjects the victim to cruel, inhuman or degrading treatment. A further aggravated offence is

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1 Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre), *Submission 3*, p. 7; Law Council of Australia (LCA), *Submission 5*, p. 2.

contained in section 73.3, for smuggling five or more persons. The aggravated offences attract penalties of up to 20 years' imprisonment.

3.8 An offence of 'supporting the offence of people smuggling' is established by section 73.3A. This offence is committed if a person 'provides material support or resources' which aids another person or organisation to engage in people smuggling conduct, and carries a penalty of up to ten years' imprisonment.

3.9 Section 73.5 specifies that proceedings against an individual for any of the people smuggling offences must not be commenced without the written consent of the Attorney-General.

Commission of offences

3.10 Civil Liberties Australia (CLA) pointed out that, if the reporting of the incident was accurate, it was clear that the asylum seekers' entry into Indonesian territory did not comply with Indonesia's requirements for entry, and that the passengers were not citizens or permanent residents of Indonesia, satisfying two out of the three limbs of the core people smuggling offence in section 73.1 of the Criminal Code.[2]

3.11 Most submitters concurred that whether the primary offence of people smuggling was committed would essentially depend on whether the actions satisfied the third limb of the offence, in that the officials 'organised or facilitated' the illegal (re-)entry of the asylum seekers into Indonesia.

3.12 CLA argued that this had indeed occurred:

> By supplying two boats, paying money to the Indonesian crew, loading the passengers onto those boats, providing them with fuel and other supplies and directing them towards Rote Island, Australians have organised and facilitated the entry of other persons into Indonesia.[3]

3.13 The Law Council of Australia (LCA) noted that the meaning of the terms 'organises' and 'facilitates' are not defined in the Criminal Code, and as such 'should be given their ordinary meaning'. It assessed that, accordingly, 'it is arguable that 'facilitates' may include the financing of people smugglers'.[4]

3.14 Professor Ben Saul of the University of Sydney referred to relevant case law which has considered the meaning of these terms, stating:

> [I]n this context, 'organise' means to 'arrange personally; take responsibility for providing (something)'…To 'facilitate' means 'make easy or easier; promote; help forward (an action result etc)'…Moreover, 'organise' and 'facilitate' describe conduct directed at producing a result or outcome, namely bringing about entry into another country. A person will possess the intention to organise or facilitate entry if he or she means to engage in that

2 Civil Liberties Australia (CLA), *Submission 2*, [p. 7].

3 CLA, *Submission 2*, [p. 7].

4 LCA, *Submission 5*, p. 2. See also Refugee & Immigration Legal Centre (RILC), *Submission 11*, p. 2.

> conduct (Criminal Code, s.5.2(1)) and is aware of the purpose and destination of the voyage…There is no requirement that the offence be committed to obtain profit or other benefit.[5]

3.15 Professor Saul concluded as follows in relation to whether the offence of people smuggling had been made out:

> In this case, Australian officials allegedly paid crew members to take migrants back into Indonesian waters…In these circumstances, it is arguable that such payments amount to 'organising' the illegal entry of migrants into Indonesia, since their original destination was Australia and *but for* the payments, they would not have been taken to Indonesia. Australian personnel thus arranged or took responsibility for the illegal entry to Indonesia…In the alternative, if 'organising' people smuggling is considered to demand a higher level of involvement or control over illegal entry, then the Australian conduct would still likely amount to 'facilitating' illegal entry to Indonesia—that is, enabling or promoting it by paying the crew to carry it out; again, but for the payments, the crew would not have taken the migrants illegally to Indonesia.[6]

3.16 Should the primary offence be established, several submitters argued that the 'aggravated' offences may also be relevant.

3.17 In relation to the aggravated offence of people smuggling involving conduct which gives rise to a danger of death or serious harm to the victim, Dr Anthony Cassimatis and Ms Catherine Drummond of the University of Queensland submitted that:

> Media reports state that one of the wooden boats which Australian officials allegedly gave people smugglers to return their passengers to Indonesia ran out of fuel, forcing the second vessel to take its passengers on board. That second vessel then crashed on a reef near an Indonesian island. This suggests that insufficient fuel was provided for the journey which is inherently dangerous and was likely to endanger the lives and safety of the migrants concerned, which included at least one pregnant woman and three children.[7]

3.18 The Refugee & Immigration Legal Centre (RILC) agreed:

> In these circumstances, we consider that if Australian officials are found to have committed the offence of people smuggling, the alleged conduct in question also gave rise to a danger of death or serious harm to the asylum seekers on the boat.
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> The Criminal Code provides that a person is reckless with respect to a result (such as death or serious injury being caused to someone) if: he or she is aware of a substantial risk that the result will occur; and having regard to

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5 Professor Ben Saul, *Submission 1*, pp 1-2 (internal citations omitted).

6 Professor Saul, *Submission 1*, p. 2.

7 Dr Anthony Cassimatis & Ms Catherine Drummond, *Submission 8*, p. 9. See also CLA, *Submission 2*, [p. 8].

> the circumstances known to him or her, it is unjustifiable to take the risk. In the circumstances it would be likely that the Australian officials responsible would be conscious of such a risk to the safety of passengers on board, and that a reasonable person in those circumstances would consider exposing those passengers at that serious risk unjustifiable. As a result, the Australian officials responsible for providing the relevant cash payments, inducements, and replacement sea vessels, may have committed an aggravated offence of people smuggling under section 73.2 of the Criminal Code.[8]

3.19 CLA and other submitters noted that the reports of the incident indicated that 65 asylum seekers were involved, and argued that it was therefore likely that the aggravated offence of smuggling at least five people had also been committed.[9]

3.20 Professor Saul expressed the view that officers involved in the incident, including those who did not make the actual alleged payment, may have committed the offence of supporting people smuggling under section 73.3A:

> [This offence] potentially captures those who stood behind the ASIS officer(s) who made the payments; for instance, a senior officer who ordered or approved the operation, or a finance officer who approved the payments may have aided the officer who organised or facilitated entry by actually making the payments.[10]

3.21 RILC advised that while the meaning of providing 'material support or resources' in section 73.3A was not defined in the Criminal Code, the explanatory memorandum to the bill that introduced this offence had envisaged a broad interpretation including, but not limited to the provision of: property, tangible or intangible, or service, finances including currency or monetary instruments or financial securities, financial services, false documentation or identification, communications equipment, facilities and transportation.[11]

Complicity and common purpose

3.22 Several submitters argued that officials may be criminally responsible by being 'complicit' in the offence of people smuggling committed by the boat crew members.[12] Complicity and common purpose ('aiding and abetting') the offence of people smuggling would be an offence under section 11.2 of the Criminal Code.[13]

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8 RILC, *Submission 11*, p. 3.

9 CLA, *Submission 2*, [pp 7-8].

10 Professor Saul, *Submission 1*, p. 2.

11 RILC, *Submission 11*, pp 3-4.

12 Professor Saul, *Submission 1*, p. 2; CLA, *Submission 2*, p. 9; LCA, *Submission 5*, p. 2; Dr Cassimatis & Ms Drummond, *Submission 8*, p. 14; RILC, *Submission 11*, p. 4.

13 Professor Saul, *Submission 1*, p. 2.

3.23 LCA argued that if a court were to determine that paying the people smugglers as alleged did not constitute facilitating people smuggling, it could still amount to aiding and abetting in the relevant offence of people smuggling.[14]

3.24 CLA expressed the view that officials not directly involved in the cash payment may also be criminally liable under this offence:

> [A]nyone who has been involved in the decision making that led to the incident in question is potentially guilty of [aiding] and abetting the underlying offences of people smuggling and aggravated people smuggling. It is possible that other offences have been committed by Australians who, though not directly involved in the incident in question, may have assisted them before and/or after the fact.[15]

Caveats and immunities

3.25 Submissions noted that section 73.5 of the Criminal Code, providing that proceedings against a person for people smuggling offences could only be commenced with the written consent of the Attorney-General, were likely to prevent prosecution if the alleged perpetrators were agents of the government.

3.26 Many submitters regarded this as an inherent conflict of interest within the law, and a matter of concern. RILC stated that:

> There may well be…serious violations of not only international law but domestic law in Australia, and yet the gatekeeper for whether there is a proper investigation under the ordinary protections of Australian law is the Attorney-General, and that is potentially a serious problem here for obvious reasons, given the potential conflict of interest that arises…
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> …
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> The end point of all this—and it is a dramatic consequence—is that Commonwealth officials can be directed to commit serious criminal offences which put people's lives in danger, as we have potentially seen here, and prosecution can be immunised by politicians, by the executive. What this points to is the real potential for an exercise of largely arbitrary power outside of the ordinary legal constraints and ordinary legal scrutiny under the rule of law in our country.[16]

3.27 RILC argued that 'urgent amendment' to the Criminal Code and other provisions needed to be considered, 'so that classes of offence of a serious nature cannot be immunised by the executive so easily or at all'.[17]

3.28 Further, submitters noted that Australian Secret Intelligence Service (ASIS) officers may be protected by subsection 14(1) of the *Intelligence Services Act 2001* (ISA), which provides that a staff member or agent of a designated agency (which

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14 LCA, *Submission 5*, p. 2.

15 CLA, *Submission 2*, p. 9.

16 Mr David Manne, *Committee Hansard*, 5 February 2016, pp 3-4.

17 Mr David Manne, *Committee Hansard*, 5 February 2016, p. 6.

includes ASIS) 'is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency'.[18] Under subsection 14(2), any officers in Australia connected to such acts would enjoy the same immunity.

3.29 Professor Saul advised in his submission that:

> The legal effect of s. 14(1) is to create an exemption from or exception to liability, since a person 'is not subject to any civil or criminal liability' that would ordinarily apply. It is therefore more than a mere procedural immunity which bars prosecution for an offence; rather, it eliminates altogether any underlying criminal liability.[19]

3.30 Submitters discussed whether the alleged activity (making a payment to the crew of a people smuggling boat) would constitute an act done 'in the proper performance of a function' of ASIS. The Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre) contended that :

> This is questionable, since most ASIS functions relate to intelligence-gathering, not operational activities. However, if the…Minister responsible for ASIS…directed an official to make the alleged payment, then the official would be immune from prosecution, since section 6(1)(3) of the Act includes as an ASIS 'function' 'such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia'.[20]

3.31 Dr Cassimatis and Ms Drummond argued, on the other hand, that:

> Despite this broad function, it still seems unlikely that conduct which Australia has criminalised and assumed international obligations to prevent and suppress could be regarded as being done in the proper performance of the functions of ASIS. If the alleged incident were part of some covert operation to gain the trust of people smugglers for the purpose of gathering intelligence to prevent and disrupt people smuggling, then the case may be stronger for it falling within the proper performance of ASIS functions. On the available facts, this is not the case.[21]

3.32 LCA noted that the responsible minister may only direct ASIS to undertake activities if he or she has consulted other ministers who have related responsibilities, and is satisfied that there are acceptable arrangements in place to ensure that:

- in carrying out the direction, nothing will be done beyond what is necessary having regard to the purposes for which the direction is given; and

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18 Professor Saul, *Submission 1*, p. 4; LCA, *Submission 5*, p. 3; Kaldor Centre, *Submission 3*, p. 8.

19 Professor Saul, *Submission 1*, p. 4.

20 Kaldor Centre, *Submission 3*, p. 9.

21 Dr Cassimatis & Ms Drummond, *Submission 8*, p. 14.

- the nature and consequences of acts done in carrying out the direction will be reasonable having regard to the purposes for which the direction is given.[22]

3.33 Professor Saul added that, given the immunity provisions in the ISA, the defence of 'lawful authority' under section 10.5 of the Criminal Code would also potentially be available to an ASIS officer in proceedings brought against them.[23] RILC noted on the other hand that there may be classes of officials, including those indirectly involved, who were not covered by the relevant immunities.[24]

3.34 At the committee's public hearing, Professor Cassimatis queried whether the actions as reported could be lawfully authorised at all:

> As to the scope of the immunities, plainly we are a society under law, and so statements cannot just be taken at face value if there is fundamental undermining of the standards through conduct that could not possibly be authorised. It may be possible that the immunities could be outmanoeuvred. Plainly [the government] cannot just authorise any conduct at all, and this does appear to be on the unreasonable side of conduct…an open, publicly marked vessel involved in payment of funds to people smugglers…seems to push the boundaries quite severely.[25]

Civil liability

3.35 One submission also raised the issue of potential civil liability for the alleged conduct of Australian officials, through the tort of misfeasance of public office. Dr Cassimatis and Ms Drummond proposed that:

> Paying people smugglers and releasing asylum seekers into the hands of people smugglers also potentially raises the tort of misfeasance of public office…[This] tort can apply in cases where a government official acts 'with reckless indifference to the harm that is likely to ensue' and with knowledge that the act in question is beyond power. Recalling that the asylum seekers included three children and a pregnant woman and that one of the vessels supplied by Australia appears to have had insufficient fuel, misfeasance of public office cannot be excluded. The conduct of Australian officials in paying people smugglers (a patently unlawful act) and then releasing asylum seekers back into their control raise an arguable case of reckless indifference.[26]

International law

3.36 Submitters to the inquiry commented in detail on the conformity of the alleged conduct of Australian officials with Australia's international treaty obligations,

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22 LCA, *Submission 5*, p. 3.

23 Professor Saul, *Submission 1*, p. 4.

24 Mr Greg Hanson, *Committee Hansard*, 5 February 2016, p. 6.

25 Professor Anthony Cassimatis, *Committee Hansard*, 5 February 2016, p. 5. [It is noted that Dr Cassimatis' title had changed to Professor by the time of his appearance at the committee's public hearing.]

26 Dr Cassimatis & Ms Drummond, *Submission 8*, p. 17 (internal citations omitted).

including obligations under: the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime* (Migrant Smuggling Protocol);[27] and the *Convention Relating to the Status of Refugees* (Refugee Convention).[28]

The Migrant Smuggling Protocol

3.37 The purpose of the Migrant Smuggling Protocol is 'to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants'.[29] It defines smuggling of migrants 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'.[30]

3.38 Some submitters argued that Australia may have breached its obligations under the Migrant Smuggling Protocol by acting contrary to its purpose. The Kaldor Centre stated that:

> [P]aying people smugglers to transport asylum seekers to any country they cannot lawfully enter is contrary to the stated purpose of the Protocol…The practical effect of the alleged payment—and any other payments that may have been made in the past under both the current Coalition and the previous Labor government—is the creation of incentives for people smugglers to continue their activities, in the hope that they may also be paid to return their passengers. This clearly undermines the purpose of the Migrant Smuggling Protocol.
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> …[T]he additional requirement in the Protocol's purpose – that the rights of smuggled migrants be protected – suggests that any action that could result in refoulement or otherwise put asylum seekers' lives or safety at risk would be contrary to the treaty.[31]

3.39 Dr Cassimatis and Ms Drummond argued further that, if the alleged conduct of Australian officials met the definition of migrant smuggling under the Protocol, Australia 'would undeniably have acted contrary to the purpose of the Protocol to prevent and combat migrant smuggling'.[32]

3.40 More specifically, it was also submitted that the alleged conduct of Australian officials could constitute specific offences under the Protocol. Professor Saul submitted that the alleged conduct of Australian officials could fall within the scope of one or more of the following offences:

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27 [2004] ATS 11; done at New York, 15 November 2000, entered into force for Australia 26 June 2004.

28 [1954] ATS 5, done at Geneva, 28 July 1951, entered into force for Australia 22 April 1954.

29 Migrant Smuggling Protocol, Article 2.

30 Migrant Smuggling Protocol, Article 3(a).

31 Kaldor Centre, *Submission 3*, p. 4. See also UnitingJustice Australia, *Submission 7*, p. 3.

32 Dr Cassimatis & Ms Drummond, *Submission 8*, p. 6.

> (1) The offence of people smuggling under article 6(1)(a) of the Protocol. Paying the crew to turn back the boat procured the illegal entry of the asylum seekers into Indonesia, in order to obtain the 'material benefit' of directly preventing imminent irregular entry to Australia. A 'material' benefit is not exhaustively defined, is to be interpreted 'understood broadly' to capture motives other than obtaining a financial benefit.
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> (2) The offence of participating as an accomplice in people smuggling, under article 6(2)(b)) of the Protocol. Complicity encompasses conduct that aids, abets or facilitates people smuggling. This could include paying the crew to procure the migrants' illegal entry, where the crew do so for financial benefit. The financial benefit obtained by the crew need not be their exclusive motivation to do so; for instance, threat of prosecution by Australia may also have motivated them.
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> (3) The offence of organizing or directing other[s] to commit people smuggling, under article 6(2)(c) of the Protocol. The payments, coupled with the Australian naval interdiction of the vessel, a policy of forcible turn backs of boats, and the threat of prosecution unless the crew agreed to Australia's request, could cumulatively amount to organizing or directing the crew to commit people smuggling.[33]

3.41 Several other submitters also noted Australia's potential contravention of these provisions.[34]

3.42 Submitters noted that the commission of such offences under the terms of the Protocol would depend in part on whether the Australian government had obtained a 'material benefit' from its activities. On this point the Human Rights Law Centre (HRLC) agreed with Professor Saul that:

> 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 Protocol.[35]

3.43 Some argued further that Australia had not complied with Article 7 of the Migrant Smuggling Protocol, which requires State Parties to engage in cooperative activities and 'cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea'. UnitingJustice Australia referred to 'Australia acting unilaterally and without proper consultation with neighbours' in this regard.[36]

3.44 The Kaldor Centre submitted that:

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33 Professor Saul, *Submission 1*, p. 3 (underlines in original).

34 See: Kaldor Centre, *Submission 3*, pp 5-6; Professor Hilary Charlesworth, Dr Emma Larking and Ms Jacinta Mulders, *Submission 6*, p. 2; Dr Cassimatis & Ms Drummond, *Submission 8*, pp 6-9.

35 Human Rights Law Centre (HRLC), *Submission 10*, p. 4.

36 UnitingJustice Australia, *Submission 7*, p. 5.

> The alleged payment of people smugglers to return to Indonesia, without the knowledge or consent of the Indonesian government, undermines the principle of international cooperation. It seems clear that the Australian government neither consulted nor cooperated with the Indonesian government in facilitating the return of the asylum seekers to Indonesia, since Indonesia's Foreign Ministry made repeated requests for information from Australia about the incident, all of which were refused.[37]

3.45 RILC argued that Australia had failed to meet its obligations under Article 16 of the People Smuggling Protocol to take all appropriate measures to preserve and protect the rights of persons who have been the object of smuggling under applicable international law.[38]

3.46 It was noted by submitters that the offences set out in the Migrant Smuggling Protocol are not judiciable at the international level. Rather, States Parties are relied on to incorporate them into domestic legislation, which Australia has done through the inclusion of people smuggling offences in the Commonwealth Criminal Code, as discussed above.[39] Professor Cassimatis advised the committee that although there was a clause in the Protocol providing for ultimate referral of disputes between parties to the International Court of Justice, that was unlikely to be applicable in this case.[40]

The Refugee Convention and non-refoulement

3.47 Several submitters noted Australia's obligations as a signatory to the Refugee Convention, primarily the obligation of non-refoulement; namely, that Australia is prohibited under article 33 of the Convention from refouling (returning) asylum seekers to any 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; or where they are at risk of being returned to another country where they have a well-founded fear of persecution.[41] It was also noted that the principle of non-refoulement is contained in other international treaties to which Australia is party, including the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT), and is further considered a principle of customary international law, meaning that it is binding on all nation states regardless of treaty obligations.[42]

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37 Kaldor Centre, *Submission 3*, p. 4. See also: Professor Charlesworth, Dr Larking and Ms Mulders, *Submission 6*, p. 2; UnitingJustice Australia, *Submission 7*, p. 5; RILC, *Submission 11*, p. 9.

38 RILC, *Submission 11*, p. 8.

39 Professor Saul, *Submission 1*, p. 3. See also Dr Cassimatis & Ms Drummond, *Submission 8*, p. 5.

40 Professor Anthony Cassimatis, *Committee Hansard*, 5 February 2016, p. 3.

41 Kaldor Centre, *Submission 3*, pp 6-7; UnitingJustice Australia, *Submission 7*, p. 4; RILC, *Submission 11*, p. 9.

42 LCA, *Submission 5*, p. 5; Professor Charlesworth, Dr Larking and Ms Mulders, *Submission* 6, p. 3

3.48 Submitters argued that the return of the asylum seekers to Indonesia (which is not a party to the Refugee Convention), absent an individual determination of the protection needs of each asylum seeker, created at minimum a risk that the principle of non-refoulement would be violated. The Kaldor Centre contended:

> Indonesia is not a party to the Refugee Convention, and does not have national refugee status determination procedures in place to identify protection needs, nor legislative or practical frameworks to adequately safeguard the rights of asylum seekers in their territory. While there is insufficient information to ascertain whether the 65 asylum seekers in the present case were in danger, the important point to note is that a policy of turning back boats creates an inherent risk that the principle of non-refoulement will be violated, because an individual determination of the protection needs of each asylum seeker is not undertaken.[43]

3.49 Professor Hilary Charlesworth, Dr Emma Larking and Ms Jacinta Mulders argued that diverting the asylum seekers to Indonesia was contrary to the object and purpose of the Refugee Convention, as well as its specific provisions:

> The actions of the Australian authorities in diverting the asylum-seekers to Indonesia are contrary to the object and purpose of the [Refugee Convention], including to assure to refugees the widest possible exercise of their fundamental rights and freedoms, and to deal with the problem of refugees through international cooperation (preamble). Australia has been a party to the Refugees Convention since 1954.
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> The Convention implicitly requires States Parties to consider the refugee status claims of asylum-seekers who are subject to their control. This involves assessing claims of refugee status in good faith and through a robust determination process. The circumstances of the transaction between Australian authorities and the Indonesian boat crew suggests that no substantive or comprehensive assessment of the asylum-seekers' protection claims were carried out.[44]

3.50 RILC also regarded Australia's failure to undertake refugee status determinations of the asylum seekers as a major concern:

> …payments that result in inducements to turn back asylum seekers at sea not only potentially endanger those people's lives, but also eviscerate the possibility of meeting our obligations, because at the heart of the obligations under the refugee convention is ensuring that someone who is fleeing from harm is not exposed to further harm in the future. If we do not inquire and examine the predicament of that person on that boat who is en route to Australia or possibly to New Zealand, we create a situation where it is literally impossible to meet the absolutely fundamental obligation and the

43 Kaldor Centre, *Submission 3*, pp 6-7.

44 Professor Charlesworth, Dr Larking and Ms Mulders, *Submission 6*, pp 2-3. See also RILC, *Submission 11*, pp 9-11.

starting point, and that is to work out whether or not that person may well be at risk.[45]

Other international laws

3.51 The relevance of other international laws was also raised in some submissions, including other human rights treaties and the international law of the sea.

3.52 LCA listed various Australian obligations under international law it regarded as relevant to the committee's inquiry:

- respecting the internationally recognised right to seek asylum, and the system of refugee protection envisaged by the Refugee Convention;
- recognising, protecting and promoting the individual rights of those seeking asylum as protected under the human rights Conventions to which Australia is a party;
- recognising, protecting and promoting the rights of all children seeking protection in Australia, including those set out in the *Convention on the Rights of the Child* (CRC), which requires that in all actions concerning children, the best interests of the child must be a primary consideration;
- ensuring the safety of life at sea;
- treating humanely all people in its custody or control;
- respecting freedom of navigation on the high seas;
- respecting the sovereign maritime boundaries and areas of other countries; and
- providing accessible, timely and effective remedies for alleged violations of Australia's international human rights law obligations.[46]

3.53 Legal expert Dr Emma Larking believed that '[i]f there was detention or a failure to provide humane treatment, there are a range of protections under…human rights treaties that could well have been breached here', citing ICCPR and the CRC.[47]

3.54 Amnesty International agreed, asserting in its report that the conduct of the government as described in its research was in breach of various principles and instruments of (domestic and) international law. In addition to the matters already raised in this chapter, Amnesty drew attention to its allegations of unlawful detention, ill-treatment and excessive use of force as abuses of various human rights provisions in international law.[48]

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45 Mr David Manne, *Committee Hansard*, 5 February 2016, pp 4-5.

46 LCA, *Submission 5*, pp 5-6 (internal citations omitted).

47 Dr Emma Larking, *Committee Hansard*, 5 February 2016, p. 4.

48 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 36.

3.55 Amnesty further argued that the caveats and immunities within Australian law (discussed above) which may prevent prosecution of persons guilty of people smuggling offences, were in breach of the *UN Convention on Transnational Organised Crime*, the "parent Convention" to the Migrant Smuggling Protocol.[49]

3.56 With regard to international laws for the protection of safety of life at sea (SOLAS), RILC observed that if media reports of the incident were accurate, including allegations that officials put the asylum seekers on boats with insufficient fuel to reach their destination, Australia may have breached its SOLAS obligations: 'even in as much of a controlled process as Operation Sovereign Borders would purport to say that operation might have been, it is putting people's lives at risk'.[50]

3.57 The government did not agree with this, telling the committee that it had met its SOLAS obligations by providing the asylum seekers 'with the means—with safe means—to be able to return to their country of departure'.[51] Commander of the Operation Sovereign Borders Joint Agency Task Force (OSB JATF), Major-General Andrew Bottrell, added that:

> I refute quite strongly any suggestion that the men and women of the Australian Border Force or the Australian Defence Force that were involved in any of these activities would take any action that would knowingly put any of the lives of any of these people in harm's way…I acknowledge that they are operating within the confines of what is seen, in many areas, as a tough policy, but they work extremely carefully and they have learnt quite a lot over the last number of years to make sure that any and all of their activities are undertaken as safely as possible.[52]

3.58 Professor Cassimatis advised the committee that, if the government's account of the incident were truthful—that is, if Australian officials had responded to a distress call from the boat in question—that fact would be relevant to the safety of life at sea obligations incurred, but 'would not affect the people-smuggling concerns, because they are totally discrete'.[53]

3.59 RILC assessed that Australia's actions may also place it in breach of international maritime laws, including the United Nations Convention on the Law of the Sea.[54]

3.60 Dr Cassimatis and Ms Drummond argued that Australia may also have violated aspects of the *Lombok Treaty*, a bilateral defence and security cooperation agreement between Australia and Indonesia, by using its intelligence services or other

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49 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 33.

50 Mr Greg Hanson, *Committee Hansard*, 5 February 2016, p. 5.

51 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 24.

52 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 25.

53 Professor Anthony Cassimatis, *Committee Hansard*, 5 February 2016, p. 6.

54 RILC, *Submission* 11, pp 11-12.

resources, including the payment of money, in ways that would harm the interests of Indonesia.[55]

3.61 The government rejected suggestions that laws may have been breached during the May 2015 incident, emphasising to the committee that all actions undertaken by Operation Sovereign Borders complied with domestic and international law. Major-General Bottrell told the committee that:

> I take regular, detailed and clear advice from a range of legal minds within the bureaucracy, and I am very confident, under all of this activity, that our actions are consistent with domestic law and our obligations under international law.[56]

Indonesian law

3.62 Submitters noted that Indonesia has implemented the offences in the Migrant Smuggling Protocol into its domestic legislation, through offences of people smuggling and assisting smuggling in articles 120 and 124 of its Law 6/2011 on Immigration.[57] Professor Saul observed that '[j]ust as Australia has successfully sought the extradition of suspected people smugglers from some other countries, it may be possible for Indonesia to request the extradition of suspected Australian smugglers'.[58]

3.63 Professor Saul noted that exemptions and defences available to ASIS officers under Australian law would not be applicable in any proceedings brought before Indonesian courts. He also discussed the potential impact of the doctrine of foreign state immunity on Indonesia's ability to prosecute Australian officials:

> Under public international law, there is a separate question whether Australian officials would enjoy state immunity from the enforcement jurisdiction of foreign criminal courts. Current senior government officials enjoy personal immunity while in office, but this does not extend to lower officials such public servants, including ASIS officers.
>
> State officials also enjoy functional immunity for official acts, but there is uncertainty whether serious violations of international law are exempted, whether because they may not be characterised as 'official acts' or because ratification of specific treaties amounts to a waiver of immunity in respect of a particular crime. On the present facts, it is certainly arguable that Australia's adherence to the Migrant Smuggling Protocol constitutes a waiver of any immunity for Australian officials engaging in smuggling.[59]

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55 Dr Cassimatis & Ms Drummond, *Submission 8*, pp 13-14.

56 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 27.

57 Professor Saul, *Submission 1*, p. 3; Kaldor Centre, *Submission 3*, pp 10-11; RILC, *Submission 11*, p. 12.

58 Professor Saul, *Submission 1*, p. 3.

59 Professor Saul, *Submission 1*, p. 5. See also Dr Cassimatis & Ms Drummond, *Submission 8*, pp 17-18.

3.64 Professor Cassimatis also discussed the issue of foreign state immunity at the committee's public hearing, arguing that Australia's position of 'neither confirming nor denying' the payment could expose its officials to prosecution in Indonesia:

> …if the Indonesian government…did actually commence criminal proceedings, the Australian government would be compelled, in a sense, to protect its officials by publicly acknowledging the conduct in order to ensure the [foreign state] immunity under international law…
>
> …
>
> …for the international immunity, the case law is clear: in order for an official acting on behalf of the state to gain immunity from prosecution in a foreign state, the government concerned would need to adopt that conduct.[60]

3.65 The government declined to 'speculate' on this issue, reiterating that all Operation Sovereign Borders activities were undertaken in compliance with Australian and international law, and that 'there is no suggestion of any criminal action by Indonesian authorities or any international bodies against Commonwealth officials with respect to the May 2015 venture'.[61]

3.66 The Kaldor Centre assessed that in any case, it was unlikely that Indonesia would attempt to extradite and prosecute Australians for this incident:

> Rather than pursuing legal action against Australia, Indonesia is much more likely to continue to put diplomatic pressure on the Australian government to reveal further information about the alleged payment, and may seek an undertaking from the Australian government that it will not make such a payment again.[62]

The policy implications of payments for turn backs

3.67 Beyond possible breaches of law involved in the alleged conduct of the May 2015 incident, several submitters raised concerns about the policy implications of any Australian government practice of making payments to people-smugglers.

The impact on bilateral relations between Australia and Indonesia

3.68 Several submitters claimed that the alleged incident would have a negative effect on the bilateral relationship between Australia and Indonesia. For example, the HRLC stated:

> Australia's relationship with Indonesia has already been strained by its policy of boat turnbacks. 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

60 Professor Anthony Cassimatis, *Committee Hansard*, 5 February 2016, p. 4.

61 Department of Immigration and Border Protection, answers to questions on notice, 5 February 2016 (received 22 February 2016), p. 3.

62 Kaldor Centre, *Submission 3*, p. 11.

> integrity" and that "any such violation of whatever basis constitutes a serious matter in bilateral relations of the two countries".
>
> 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. This latest incident, and the Government's continued secrecy, undoubtedly further damages our relationship with our close neighbour.[63]

3.69 UnitingJustice Australia was equally concerned that a finding that Australian officials paid Indonesian people smugglers to turn back a boat would 'further undermine the Australian Government's bilateral relationship with Indonesia'.[64] CLA raised the potential for Indonesia 'to respond to a perceived major slight in terms of trade, military, police or personal relationships…without direct reference' to this incident. CLA believed that 'only a full and open accounting by Australia for what occurred will address Indonesian concerns'.[65]

3.70 RILC submitted that the incident had not only had a 'serious adverse impact' on Australia's relations with Indonesia, but had also damaged Australia's international reputation and credibility more broadly, in relation to refugee and humanitarian issues.[66]

Possible negative consequences of providing payments to boat crews

3.71 Submitters also claimed that the alleged conduct of providing people smuggling boat crews with financial incentives and/or resources could have a number of negative consequences for Australia's efforts to combat people smuggling.

3.72 One of the key criticisms raised in this regard was that such conduct served to provide substantial incentives to people smugglers.[67] Professor Saul described this effect as 'putting the sugar back on the table', encouraging other smugglers to make the trip in the hope of similar payments,[68] and RILC characterised it as 'poor, unethical government policy'.[69] CLA and RILC observed that such payments would increase the profitability of the people smugglers' 'business model' by offering the potential for financial compensation even if the venture did not succeed.[70]

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63 HRLC, *Submission 10*, p. 6. See also: UnitingJustice Australia, *Submission 7*, p. 5; Dr Cassimatis & Ms Drummond, *Submission 8*, p. 11.

64 UnitingJustice Australia, *Submission* 7, p. 5.

65 CLA, *Submission 2*, [p. 11].

66 RILC, *Submission 11*, pp 14-15.

67 Professor Saul, *Submission 1*, p. 5; UnitingJustice Australia, *Submission 7*, p. 5; HRLC, *Submission 10*, p. 7; RILC, *Submission 11*, p. 14.

68 Professor Saul, *Submission 1*, p. 5.

69 Mr Greg Hanson, *Committee Hansard*, 5 February 2016, p. 2.

70 Civil Liberties Australia, *Submission 2*, [p. 11]; RILC, *Submission 11*, p. 14.

3.73 RILC added its concerns that payments would provide 'vulnerable unskilled and often desperate' persons recruited by people smugglers to pilot asylum seeker vessels with significant incentives to make further voyages, and could also result in asylum seekers making a higher number of attempted journeys.[71] UnitingJustice Australia believed that '[i]t is just as likely that lives will be lost at sea on the return journey as on the journey over'.[72]

3.74 Other criticisms were that paying people smugglers to return asylum seekers to Indonesia shifted the burden of managing persons in need of protection to Indonesia, and further endangered or victimised those people who were already victims of people smuggling operations.[73]

Committee view

3.75 In the previous chapter, the committee acknowledged that it was unable to reach a conclusion as to the definitive facts of the May 2015 incident.

3.76 The evidence summarised in this chapter makes clear that, if the incident occurred as reported, it potentially involved serious breaches of both Australian and international law. The committee observes that the government's assurances that no laws were broken are difficult to accept at face value in the absence of transparency about what occurred.

3.77 The evidence received by the committee would nevertheless suggest that, whatever the facts of the May 2015 incident (and any others like it), these are unlikely to be dealt with through court action in either Australia or Indonesia.

3.78 Within Australia, the legal obstacles presented by the Attorney-General's effective veto on prosecutions for people smuggling under the Criminal Code, and the other immunities potentially available to officials breaking the law during Operation Sovereign Borders, underline further the lacuna in accountability in this area of government activity which is of concern to many submitters, and to the committee.

3.79 The committee is also cognisant of the analysis offered by many submitters that payments to people smugglers would have disturbing ramifications for Australia's very important relationship with Indonesia, and also for the objective that Operation Sovereign Borders is supposed to serve: disrupting the business model of people smuggling operations, in order to "stop the boats" and prevent deaths at sea. Such payments are indeed likely to provide an incentive to people smugglers, and the committee finds it difficult to imagine how they could possibly constitute good policy in that regard.

3.80 Bearing in mind these considerations, the following chapter sets out the evidence received by the committee to date in relation to issues of transparency and

71 RILC, *Submission 11*, p. 14.

72 UnitingJustice Australia, *Submission 7*, p. 6.

73 Professor Saul, *Submission 1*, p. 5; RILC, *Submission 11*, p. 14.

accountability for Operation Sovereign Borders, and the committee's consideration of the need for further pursuit of these issues.