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Senate Legal and Constitutional Affairs References Committee

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Dear Committee

Inquiry into Payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats

In sum, this submission argues that the alleged conduct, depending on the facts:

1. Could constitute the federal offences of people smuggling, providing material support or resources for it, and/or complicity in (aiding or abetting) it;
2. Could constitute the offence of people smuggling and/or participating as an accomplice under the Protocol against the Smuggling of Migrants;
3. If committed by ASIS officers, is likely subject to statutory exemption from liability under Australian law, but not under the Protocol or foreign laws; in addition, the defence of lawful authority would be available to an ASIS officer; and there is uncertainty whether state immunity would apply in foreign courts;
4. Is inconsistent with Australia's international obligations to cooperate in suppressing people smuggling, guarantee non-refoulement, and respect Indonesian sovereignty; and
5. At a policy level, encourages smuggling by 'putting the sugar back on the table', shifts the burden onto other countries, and perversely seeks to combat the crime of people smuggling against Australia by facilitating it against others.

1. The Commonwealth Offences

The alleged conduct that is the subject of this inquiry may constitute:

- (1) The offence of people smuggling under s. 73.1(1) of the Criminal Code, which occurs where a person intentionally 'organises or facilitates' the entry of another person into any foreign country; the person's entry does not comply with the foreign country's law; and the person smuggled is not a citizen or permanent resident of that country (absolute liability attaches to the latter element: s. 73.1(2)). The crime is aggravated if five or more persons are smuggled (s. 73.3).

As a matter of interpretation, in this context 'organise' means to 'arrange personally; take responsibility for providing (something)' (*PJ v R* [2012] VSCA 146; *R v Bahar* [2011] WASCA 249).¹ To 'facilitate' means 'make easy or easier; promote; help forward (an action result etc)' (*PJ v R* [2012] VSCA 146; *R v Mahendra* [2011] NTSC 57; *R v Bahar* [2011] WASCA 249).

Moreover, 'organise' and 'facilitate' describe conduct directed at producing a result or outcome,² namely bringing about entry into another country. A person

¹ Judicial College of Victoria, Victorian Criminal Charge Book, 9.3: Bench Notes – People Smuggling (last updated 2013) (concerning the equivalent language in the comparable Migration Act offences).

will possess the intention to organise or facilitate entry if he or she means to engage in that conduct (Criminal Code, s. 5.2(1)) and is aware of the purpose and destination of the voyage (*Bahar v R* [2011] WASCA 249). There is no requirement that the offence be committed to obtain profit or other benefit.

In this case, Australian officials allegedly paid crew members to take migrants back into Indonesian waters. For present purposes, it is assumed that the payments were made outside Indonesian waters, that the migrants were not Indonesian citizens or residents, and that they had no right of entry to Indonesia.

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. It is unnecessary to establish that the Australian personnel were the sole organisers of illegal entry; liability for organizing entry can be shared between multiple perpetrators, including the crew members. It is also not to the point that Indonesia was the place of original departure.

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.

- (2) The offence of intentionally providing material support or resources that aids someone to engage in people smuggling, under s. 73.3A of the Criminal Code. On the present facts this offence overlaps considerably with that of ‘facilitating’ people smuggling above: payments both facilitate and aid illegal entry. The offence also 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.
- (3) The offence of complicity (‘aiding and abetting’) the offence of people smuggling by the crew members, which itself is an offence under s. 11.2 of the Criminal Code, in conjunction with s. 73.1. On the assumed facts this offence would be committed for similar reasons explained in (2) above.

The jurisdictional elements (s. 73.4) for these offences under would be satisfied if either the perpetrator is Australian and the conduct occurred outside Australia, or the conduct occurs wholly or partly in Australia and its result is intended to occur outside Australia.

Under s. 73.5 the Attorney-General’s consent is required to prosecute. As a matter of policy, while this may be intended to operate as a safeguard it also potentially permits political interference in objective, impartial, apolitical law enforcement.

² Ibid. See *PJ v R* [2012] VSCA 146.

2. Offences under the Protocol against the Smuggling of Migrants

The Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime 2000³ 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’ (article 3(a)). Australia and Indonesia are both parties to the Protocol.⁴

The alleged conduct that is the subject of this inquiry may constitute either or both:

- (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’⁵ to capture motives other than obtaining a financial benefit.
- (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.
- (3) The offence of organizing or directing other 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.

The Protocol does not establish any international court or tribunal with jurisdiction to prosecute its offences. Instead, it relies on states parties to implement its offences into domestic criminal law. The Criminal Code provisions implement them (albeit shorn of the Protocol’s requirement that the offences be motivated by financial or material gain).

Other states which are parties to the Protocol and have implemented its offences would have jurisdiction to prosecute foreigners, including Australians, in their courts. People smuggling and assisting smuggling are offences under Indonesian law (articles 120 and 124 of Law 6/2011 on Immigration). Just 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.⁶

³ Adopted 15 November 2000, entered into force 28 January 2004, 2241 UNTS 507.

⁴ Australia ratified on 27 May 2004 and Indonesia ratified on 28 September 2009.

⁵ UNODC Legislative Guide to the Protocol, Interpretive Note to article 2.

⁶ See Extradition treaty between Australia and the Republic of Indonesia 1992, article 2(2).

3. Exemptions for ASIS Officers; and the Defence of Lawful Authority

If payments were made by ASIS officers outside Australia, they may be immune from liability under s. 14(1) of the Intelligence Services Act 2001: ‘A staff member or agent of an agency 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.’ Those in Australia connected with activities overseas are also immune (s. 14(2)).

The functions of ASIS are set out in s. 6(1) of the Act and mostly concern intelligence gathering and counter-intelligence activities (see (a)-(d)), rather than direct operational action to disrupt crimes, which are more typically undertaken by law enforcement authorities such as the Australian Federal Police.

However ASIS’ functions also include ‘(e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia’. This deliberately open-ended function enables the Minister to order operational activities of the kind at issue on the alleged facts. ASIS has publicly acknowledged that it has been tasked to address people smuggling.⁷

The protection of s. 14 would only apply if the payments were ordered by the Minister. Under s. 14(2B) the Inspector-General of Intelligence and Security may give a certificate in writing certifying any fact relevant to the question of whether an act was done in the proper performance of an ASIS function, including under s. 14(1)(e).

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.

Additionally, the defence of ‘lawful authority’ under s. 10.5 of the Criminal Code would also be available to an ASIS officer: ‘A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law.’ The relevant law justifying or excusing the conduct is ss. 6(1)(e) and 14(1)-(2) of the Intelligence Services Act 2001. Again, this is not a mere procedural immunity from enforcement, but eliminates liability (‘[a] person is not criminally responsible’).

Exemptions and the defence are inconsistent with Australia’s Protocol Obligations

I would emphasise, however, that the Migrant Smuggling Protocol does not contain or permit any national security exceptions which exempt intelligence officials from criminal liability for people smuggling. The exemptions for ASIS in Australian law are therefore inconsistent with Australia’s strict obligation to suppress and prosecute people smuggling under the Protocol, including when committed by Australian officials.

Australia has no international legal right to unilaterally engage in people smuggling against other countries in order to prevent people smuggling into Australia – *just as Australia would have no right to pay terrorists to attack Indonesia instead of Australia.*

⁷ ASIS Director General, ‘ASIS at 60’, Speech at the Lowy Institute, 19 July 2012, <http://www.asis.gov.au/media/Images/ASIS-at-60-speech.pdf>.

Exemptions and the defence do not apply in foreign courts

The exemptions and defence available to ASIS officers under Australian law have no applicability in foreign legal systems, including before the Indonesian courts.

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,⁸ but this does not extend to lower officials such as 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.

4. Inconsistencies with Australia’s International Obligations

If the allegations are true, Australia may be in breach of a range of specific obligations under the Migrant Smuggling Protocol. These include Australia’s obligations to:

- ‘cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea’ (article 7) – and not to commit, facilitate people smuggling;
- cooperate with Indonesia in respect of Indonesian flagged vessels (article 8(2));
- ensure the safe and humane treatment of the persons on board (article 9(1)), and to provide protection and assistance to them (article 16);
- not interfere with Indonesia’s maritime and flag-state rights (article 9(3));
- ensure the orderly, safe and dignified return of the passengers (article 18(5));
- not to prejudice other relevant international obligations, specifically under human rights and refugee law, and including non-refoulement (article 19(1));

In addition, depending on the facts, Australia may have violated its obligations to ensure the safety of life at sea, and not to interfere in Indonesia’s maritime sovereignty.

5. Policy Considerations

At a policy level, the alleged conduct: (1) encourages more smuggling – and deaths at sea – by ‘putting the sugar back on the table’; (2) shifts the burden onto other countries; (3) irresponsibly combats smuggling to Australia by committing the crime of smuggling to Indonesia; and (4) further victimizes the victims of smugglers. There is also a broader policy question whether it is appropriate at all for ASIS to be directed by governments to divert its limited resources from genuine national security threats (such as protecting Australians from terrorism) to focus on the lesser, criminal problem of smuggling.

Yours sincerely
[Ben Saul]

⁸ James Crawford, *Brownlie’s Principles of Public International Law* (8th ed, Oxford, 2008), 499-500.