

Submission by Civil Liberties Australia



The Chair and Members
Legal and Constitutional Affairs References Committee
The Senate
Parliament of Australia
CANBERRA ACT 2000
By email: legcon.sen@aph.gov.au
Attention: Sophie Dunstone

Dear Chair and Committee Members,

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

Civil Liberties Australia's thanks the Committee for the opportunity to make the following submission, July 2015:

Introduction

Even if one has never taken a voyage like it, any reasonable mind can grasp the dangers inherent in people boarding small, unreliable, possibly crowded boats, supplied by people smugglers, to sail across open ocean, probably without adequate food and water and life preserving equipment, and almost certainly without medical care.

In character and substance, to interrupt the journey of such a boat, not to rescue, not to save, but to compel its passengers and crew to sail in a different direction, in even smaller boats, with indifference to their fate except that they should not come to Australia, is no different from initiating the original people smuggling enterprise.

CLA opposes the policy of turning back boats because doing so is inherently dangerous – as the Australian Government claims in relation to those boats in those waters – and also is inimical to Australia's obligations of basic humanity and to formal international commitments to asylum seekers' rights.

The recent episode is not a justifiable action to respond to an incident of people smuggling because the actions of officials paid scant regard to the welfare of those being trafficked. And it is even more concerning because, prima facie, it has involved Australians committing crimes under the Criminal Code, as discussed below.

The Government has refused to publicly discuss the incident in any meaningful way. Whatever the government's rationale, it is effectively hindering the investigation of potentially criminal conduct, and therefore is itself in breach of Australian law as well as of international conventions. The matter could hardly be more serious.

For those reasons Civil Liberties Australia supports the work of the Committee in investigating the incident. The Committee cannot try those involved, but if the Committee considers it possible that crimes have been committed, the Committee's duty is to refer the matter to appropriate authorities for further investigation.

Background facts

Apart from initial denials that the payments had been made – by the Foreign Affairs Minister and the Immigration Minister that they have since declined to repeat – the Australian Government has not sought to deny the factual content of media reports about the incident and in particular the reports to do with the payments. Instead the Government, including the Prime Minister, has refused to comment on what they call 'on water matters', citing without any (or any meaningful) elucidation supposed 'national security interests' as excusing the need for an explanation required by Australians for the behaviour of officials acting in the name of the people.

If the payments have not been made, it would be a simple matter for the Government to confirm that is the case. If such a denial could potentially harm the nation's security, the Government must articulate how that would come about. CLA's view is that no such interest has been identified nor harm articulated because they do not exist. Therefore, CLA contends, it is reasonable for the Committee to draw on media reports for what are the facts, so far not contradicted by the Government.

Chronology of the boat's journey

Five crew from Manado in North Sulawesi and one from Jakarta were recruited by people smugglers in early April 2015.

The men were enlisted by someone identified by the initials AJ in Jakarta to work on a fishing boat with a promise of wages of about 150 million rupiah (about \$14,000).

On April 16 they gathered at a hotel where they stayed for two nights before being bussed to Tegal on the north coast of Java.

They stayed at a hotel in Tegal while looking for a suitable boat. Once a boat was found, the crew travelled by sea to Cidaun beach on the south coast of West Java.

About 2:00am on May 5, the 65 asylum seekers began being delivered to the boat.

The passengers included 10 Bangladeshis, 54 Sri Lankans and one person from Myanmar. Among them were three children and four women, one of whom was pregnant.

A man identified as AY, who had also been involved with providing accommodation for the crew, told them that the 65 people should be taken to New Zealand.

Around 4:00am the boat departed towards New Zealand through the Java Sea. The police document said the boat passed Bali and continued further east past West Timor.

Near East Timor the boat was allegedly crossing international waters when an Australian Customs ship stopped it.

Customs explained to them that their boat could not enter Australian waters and warning cards were distributed, saying: "Without a visa you cannot enter Australia."

After Customs gave a warning to the crew and the asylum seekers, they were released and continued towards Australian waters for about four days.

They were stopped again and detained by personnel from a Customs boat and Australian Navy ship, allegedly in international waters.

Then the captain, Yohanis Humiang, allegedly went to the Customs ship, was interrogated, and told the boat could not reach New Zealand because of the boat's condition and the waves.

The Indonesian police document alleges there was a deal between Australian Customs and Yohanis Humiang that the asylum seeker boat would be secured and escorted to Australian waters by Customs and the Navy — a trip that took four days.

When they arrived in the area they were registered and identified by the Customs officials.

After their details were taken, some of the asylum seekers asked to board to the Customs ship but some stayed on the boat captained by Yohanis Humiang.

The boat was then taken back towards Australia's Ashmore Reef and anchored there for two days.

The crew of the boat and the rest of the asylum seekers then asked to go on board the Navy ship.

Two wooden boats belonging to Australia, called *Jasmine* and *Kanak*, were then provided and the group split in two, with 32 passengers transferred to one boat, 33 asylum seekers put on the other and three crew transferred to each boat.

They were given lifejackets, a map and directions to Rote Island. The ABC has previously reported that food and other supplies were also provided to those on board.

It was at this point that the captain was allegedly given as much as \$US6,000 while the crew were given \$US5,000 each, bringing the total paid to \$US31,000.

The crew then took the asylum seekers towards Indonesian waters and Rote Island, a voyage that took about eight hours.

When they approached Rote Island, *Jasmine* ran out of fuel and *Kanak* had to take the passengers on board, meaning all 71 people were on board the one boat.

Indonesian police were told some asylum seekers then started getting angry, began fighting with each other and also threatened the crew because they wanted to go to New Zealand.

About 5:00pm on May 31, *Kanak* crashed onto a reef at Landu Island, near Rote Island, which is off West Timor.

Some people jumped from the boat and made it to the nearest village.

Locals then helped to evacuate the rest of the asylum seekers from the stricken boat.

The document said the boat crew hired a small canoe to take themselves to land, understood to be Rote Island.

One of the villagers called local police, telling them that an asylum seeker boat had crashed on Landu Island.

The southwest Rote police chief went to Landu Island to "secure" the asylum seekers and search for the crew.

According to the locals, cited by the document, the crew fled to Rote Island but around 9:00pm police arrested the six crew members.

They remain in custody and could each face a maximum of 15 years in jail and up to 1.5 billion rupiah (\$145,000 AU) in fines.

Immigration authorities are holding the 65 asylum seekers at a hotel in Kupang, West Timor.

The Criminal Code provisions

Relevant provisions of the Commonwealth criminal code are:

11.2 Complicity and common purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
 - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
 - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
 - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
 - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
 - (a) terminated his or her involvement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:

(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or

(b) is guilty of that offence because of the operation of subsection (1);

but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

Division 73 People smuggling and related offences

Subdivision A People smuggling offences

73.1 Offence of people smuggling

(1) A person (the first person) is guilty of an offence if:

(a) the first person organises or facilitates the entry of another person (the other person) into a foreign country (whether or not via Australia); and

(b) the entry of the other person into the foreign country does not comply with the requirements under that country's law for entry into the country; and

(c) the other person is not a citizen or permanent resident of the foreign country.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) Absolute liability applies to the paragraph (1)(c) element of the offence.

(3) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of people smuggling.

73.2 Aggravated offence of people smuggling (danger of death or serious harm etc.)

(1) A person (the first person) commits an offence against this section if the first person commits the offence of people smuggling (the underlying offence) in relation to another person (the victim) and either or both of the following apply:

(b) in committing the underlying offence, the first person subjects the victim to cruel, inhuman or degrading treatment;

(c) in committing the underlying offence:

(i) the first person's conduct gives rise to a danger of death or serious harm to the victim; and

(ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

(2) There is no fault element for the physical element of conduct described in subsection (1), that the first person commits the underlying offence, other than the fault elements (however described), if any, for the underlying offence.

(2A) To avoid doubt, the first person may be convicted of an offence against this section even if the first person has not been convicted of the underlying offence.

73.3 Aggravated offence of people smuggling (at least 5 people)

(1) A person (the first person) is guilty of an offence if:

(a) the first person organises or facilitates the entry of a group of at least 5 persons (the other persons) into a foreign country (whether or not via Australia); and

(b) the entry of at least 5 of the other persons into the foreign country does not comply with the requirements under that country's law for entry into that country; and

(c) at least 5 of the other persons whose entry into the foreign country is covered by paragraph (b) are not citizens or permanent residents of the foreign country.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

(2) Absolute liability applies to the paragraph (1)(c) element of the offence.

(3) If, on a trial for an offence against subsection (1), the trier of fact is not satisfied that the defendant is guilty of that offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence against subsection 73.1(1), the trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of an offence against subsection 73.1(1), so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

73.3A Supporting the offence of people smuggling

(1) A person (the first person) commits an offence if:

(a) the first person provides material support or resources to another person or an organisation (the receiver); and

(b) the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) Subsection (1) does not apply if the conduct constituting the offence of people smuggling relates, or would relate, to:

(a) the first person; or

(b) a group of persons that includes the first person.

(3) To avoid doubt, the first person commits an offence against subsection (1) even if the offence of people smuggling is not committed.

73.4 Jurisdictional requirement

A person commits an offence against this Subdivision only if:

(a) both:

- (i) the person is an Australian citizen or a resident of Australia; and
 - (ii) the conduct constituting the alleged offence occurs wholly outside Australia; or
- (b) both:
- (i) the conduct constituting the alleged offence occurs wholly or partly in Australia; and
 - (ii) a result of the conduct occurs, or is intended by the person to occur, outside Australia.

73.5 *Attorney-General's consent required*

- (1) Proceedings for an offence against this Subdivision must not be commenced without the Attorney-General's written consent.
- (2) However, a person may be arrested, charged, remanded in custody or released on bail in connection with an offence against this Subdivision before the necessary consent has been given.

Contentions about the Criminal Code provisions: offences which appear to have been committed

Civil Liberties Australia contends, based on the factual account recited earlier, it is highly likely offences have been committed against ss73.1, 73.2, 73.3 and 73.3A of the Code.

73.1 *Offence of people smuggling*

Each of the elements of the offence of people smuggling appear to have been satisfied in this case in that:

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.

The entry of the passengers into Indonesia does not comply with that country's requirements for entry.

CLA is not in a position to offer an authoritative view on Indonesian law governing entry into that country. However a cursory examination of Indonesian Immigration Law UU6-2011 suggests entry in the circumstances described would not comply with its provisions, in particular Article 9 requiring that entry be through examination by immigration officers.

It is reasonably clear the passengers are not citizens or permanent residents of Indonesia.

The offence is one of absolute liability, which CLA understands to mean that the motivations of the Australians involved are irrelevant to the commission of the offence.

73.2 Aggravated offence of people smuggling (danger of death or serious harm etc.)

The passengers and crew of the intercepted boat, including children and a pregnant woman, were placed on two smaller boats supplied by Australians. They were also supplied with fuel and other provisions and directions to Rote Island. One boat ran out of fuel and its passengers and crew boarded the second boat. The second boat foundered on a reef off Landu Island. Some passengers had to be rescued by locals.

The facts suggest not enough fuel was provided for a safe journey to Rote Island and the journey itself was inherently dangerous, as the fate of the second boat bears out. It was reckless of those involved to oblige the passengers and crew to undertake the journey.

It was reckless to place children and the pregnant woman in a situation of danger.

It is reasonable to surmise no one considered taking the passengers, or at least the children and pregnant woman, to safety in Australia. Instead the sole objective seems to have been to enforce the ill-conceived boat turn back policy regardless of the safety of the passengers and crew. In short, the passengers and crew of the original boat were forced on to the Australian-supplied boats and recklessly left to their fates.

CLA contends those facts would support the view the offence of aggravated people smuggling under s73.2(1)(c).

73.3 Aggravated offence of people smuggling (at least 5 people)

This offence is constituted by organising and facilitating the entry, into a foreign country – in this case Indonesia – of a group of at least 5 people, in circumstances where that entry does not comply with that country's entry laws.

The Australian enterprise – supplying boats, money, provisions and directions – was in substance directed to sending some 65 passengers into Indonesia. The passengers were not Indonesian citizens: it is extremely unlikely they were its permanent residents and, as submitted above, their entry could not have complied with Indonesian legal entry requirements.

The crime is one of absolute liability, thus the motivations of those involved is irrelevant.

73.3A Supporting the offence of people smuggling

This offence is constituted by one person providing material support or resources, that enable another person to engage in people smuggling. In the incident in question Australians appear to have provided material support and resources, to the crew, in the form of boats, money, provisions, fuel, maps and directions. Even if it were the case that no Australian committed the underlying offence, it is reasonably clear Australians have provided material support and resources to people smugglers in the terms of s 73.3A.

73.4 Jurisdictional requirement

The jurisdictional requirements apply in respect of Australian citizens or permanent residents, whom the Australians involved would almost certainly be.

Because some of the transactions involved – money changing hands, the boats being supplied and so on – happened near Ashmore reef and so in Australian territory, it may be that the requirement of s73.4(a), that the conduct in question needs to have occurred wholly outside of Australia, is not met.

However the conditions in s73.4(b) have been met, in that the conduct occurred wholly or partly in Australia and the result of the conduct – the supplied boats sailing in the direction of Rote Island and the eventual entry into Indonesia of the passengers and crew – occurred outside Australia. Therefore the jurisdictional requirement has been met.

73.5 Attorney-General's consent required

Consent is required only for the taking of proceedings for the offence, that is the prosecution itself. The investigation of the allegations does not require consent. According to s73.5(2), arrests can be made, charges laid, persons can be remanded in custody or released on bail before the consent is obtained. CLA submits the Attorney-General would be more likely to give consent if presented with evidence supporting the view that offences have been committed. Therefore it is critical that the Committee persists with its inquiries and refers its findings and any evidence to the Australian Federal Police.

11.2 Complicity and common purpose

CLA submits that anyone who has been involved in the decision making that led to the incident in question is potentially guilty of adding 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.

Other breaches including of international law

CLA merely notes it does not appear any offence has been committed under the people smuggling measures in the Migration Act, because they are concerned only with people smuggling into Australia. CLA notes the views of academics and other experts that the conduct in question breaches international law.

CLA submits that, whether ASIS (or other security and/or police or defence or Customs) personnel were involved, and whether they may have some immunity from prosecution, is not germane to the Committee's consideration of the issues. CLA respectfully submits the Committee's task is to come to a view about whether offences have been committed rather than speculate about whether some of the Australians involved may have good defences.

The Committee should also inquire into what resources, aid and equipment may have been provided with/to the two smaller vessels by Australian personnel. As one vessel appears to have run out of fuel, and as another ran on to a reef, it may be that the Australian personnel failed in their duty to ensure the safety of life at sea if inadequate resources were provided for what was hazardous voyaging.

Particular matters in the terms of reference

a. The Government's reply to a Senate order for production.

CLA understands from media reports the Minister has declined to provide requested documents on the basis that their release would 'undermine the tactical advantage of civil maritime surveillance assets over people smuggler (sic)', would 'undermine the effectiveness of Border Protection Command assets' and would 'enable the exploitation of confidential methodology and processes'. With due respect to the Minister's important position, those assertions are nonsensical.

The events in question have been widely reported in the Australian and world media. It is difficult to see how confirming the events took place as reported can in any sense surrender some advantage which it is thought is held Australian authorities. Whatever damage might be done to the bodies concerned has already been done, the attitude of Australia towards the safety of lives at sea has been exposed, and the practice(s) of Australia in relation to refugees in similar circumstances have been revealed

The Senate should insist on the production of relevant documents. If necessary, arrangements could be made to preserve from publication any documents containing information the content of which has not already effectively been disclosed by the media reports of the incident.

b. to f. Terms to do with the payments and similar since September 2013

About the legality of Australian conduct in the events in question, CLA refers to its submission above.

CLA supports the scope of the inquiry including other possible incidences of payments to people smugglers. It respectfully suggests the particular incident in question, which may well be unique, should be kept separate from other possible incidents and be a matter of particular focus for the Committee.

Investigation of other possible payment to people smugglers might usefully explore whether money has been paid to stop people putting to sea in the first place: that is, whether the 'threat' of a boat leaving a fishing village or port has occasioned payment by Australians to locals.

The Committee may consider it appropriate to inquire of the current and previous Governments an accounting for the total of the sums of money that have been paid out in relation to "people smuggling", whether payment was made on water or on land.

g. The damage done to the relationship with Indonesia

The damage done to the relationship can be gauged from the widely reported comments of Indonesian officials including Mr Sidiq, the Chairman of the

Parliamentary Commission One. CLA suspects that only a full and open accounting by Australia for what occurred will address Indonesian concerns.

It should be noted that Indonesia is a highly sophisticated nation in terms of foreign affairs, with millennia of dealings with other countries and states. There are many opportunities for Indonesia to respond to a perceived major slight in terms of trade, military, police or personal relationships...without direct reference to the 'Payments for Turning Back the Boats' affair.

h. Whether the payments are an incentive to people smugglers

It is reasonably simple to grasp the notion that, if people smugglers understand they may be paid by Australian authorities to return to Indonesia, they will have extra incentive to make the journey since they will be rewarded even though the original enterprise does not succeed. That simple logic makes the Government's more recent refusal to deny the payments were made all the more perplexing, unless of course they have been made.

i. Payments to people smugglers as standard practice

CLA would be concerned about any such practice in circumstances where the payment is part of an Australian enterprise that endangers the lives of passengers. The payment in question, in the events before the Committee, is a payment of that kind and should never be repeated.

Yours sincerely

Dr Kristine Klugman
President

CLA Civil Liberties Australia A04043
Box 7438 Fisher ACT Australia
Email: [secretary \[at\] cla.asn.au](mailto:secretary[at]cla.asn.au)
Web: www.cla.asn.au
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Lead author: Umberto Torresi; associate author: Bill Rowlings