

24 July 2015

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

PAYMENTS OF CASH OR OTHER INDUCEMENTS BY THE COMMONWEALTH IN EXCHANGE FOR THE TURN BACK OF ASYLUM SEEKER BOATS

1. Thank you for the opportunity to provide comments to the Senate Legal and Constitutional Affairs References Committee (**the Committee**) Inquiry into the above matter.
2. The Law Council has restricted its comments to paragraph (f) of the terms of reference for the Inquiry. The Law Council confines its comments to summarising certain aspects of domestic and international law, which may assist the Committee.¹
3. This submission does not speculate as to the possible legality or otherwise of certain hypothetical or alleged incidents.

Domestic law considerations

People smuggling offences

4. People smuggling offences may be relevant to the Committee's consideration of the terms of reference.
5. People smuggling is a crime under Australian law. Australia's legislative framework for criminalising people smuggling is set out in the *Migration Act 1958* (Cth) (**Migration Act**) for the organisation or facilitation of travel for people entering Australia and the *Criminal Code Act 1995* (Cth) (**Criminal Code**) for the organisation or facilitation of travel in all instances.

¹ For a comprehensive summary of the international law that applies in respect of asylum seekers, see: Law Council of Australia, *Asylum Seeker Policy* (September 2013), [8], available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf ('LCA Policy').

6. Under section 233A of the Migration Act a person commits an offence, punishable by a maximum of 10 years imprisonment, if s/he organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia of a non-citizen who has no lawful right to come to Australia. An aggravated offence, punishable by a maximum of 20 years imprisonment, is committed where a person commits a people smuggling offence and there is a danger of death or serious harm.² An aggravated offence, punishable by a maximum of 20 years imprisonment, may also be committed where a person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia of 5 or more non-citizens (who have no lawful right to come to Australia).³ It is also an offence to support the offence of people smuggling and to conceal and harbour non-citizens.⁴
7. These offences are largely replicated in Division 73 of the Criminal Code, which sets out people smuggling offences for organising or facilitating of entry of another person into the foreign country (whether or not via Australia) where that person is not a citizen or permanent resident of the foreign country. The Attorney-General's consent is required to prosecute offences under the Criminal Code.⁵
8. The terms 'organises' or 'facilitates' are not defined. As the words are not defined, they should be given their ordinary meaning. Accordingly, it is arguable that 'facilitates' may include the financing of people smugglers. If a court were to determine that financing did not constitute facilitating, financing could still amount to aiding and abetting in the relevant offence of people smuggling (for example, sections 73.1, 73.2, 73.3 or 73.3A of the Criminal Code), which is an offence under section 11.2 of the Criminal Code.
9. A person may potentially use the defence of lawful authority under the Criminal Code, which provides that a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law.⁶ This could potentially include where a staff member of an Australian Government agency makes a payment in accordance with his or her statutory responsibilities.
10. The offences of bribery under Australia's domestic law would not appear relevant to the Committee's inquiry as these apply to bribing a foreign public official rather than payments to people smugglers.⁷

Immunities for certain intelligence officers

11. While Australian law criminalises people smuggling, certain Australian public officials may be immune from prosecution for engaging in otherwise unlawful conduct.
12. For example, under subsection 14(1) of the *Intelligence Services Act 2001* (Cth) (**the ISA**) a staff member or agent of the Australian Secret Intelligence Service

² Section 233B of the *Migration Act 1958* (Cth).

³ Section 233C of the *Migration Act 1958* (Cth).

⁴ Sections 233D and 233C of the *Migration Act 1958* (Cth).

⁵ Section 73.5 of the *Criminal Code Act 1995* (Cth).

⁶ Section 10.5 of the *Criminal Code Act 1995* (Cth).

⁷ Section 70.2 of the *Criminal Code Act 1995* (Cth).

(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.

13. A person is not subject to any civil or criminal liability for any act (whether done inside or outside Australia) if:
 - (a) the act is preparatory to, in support of, or otherwise directly connected with, overseas activities of the agency concerned; and
 - (b) the act:
 - (i) taken together with an act, event, circumstance or result that took place, or was intended to take place, outside Australia, could amount to an offence; but
 - (ii) in the absence of that other act, event, circumstance or result, would not amount to an offence; and
 - (c) the act is done in the proper performance of a function of the agency.⁸
14. These provisions apply despite anything in a law of the Commonwealth or of a State or Territory, unless the law expressly provides otherwise.⁹
15. Functions of ISA agencies are specified in Part 2, Division 1 of the ISA. The functions of ASIS are broad and include, for example, undertaking 'such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia'.¹⁰ The responsible Minister for ASIS is the Minister for Foreign Affairs and Trade, who may direct ASIS to undertake activities only if s/he:
 - (a) has consulted other Ministers who have related responsibilities, which may potentially include the Minister for Immigration and Border Protection or the Minister for Defence; and
 - (b) is satisfied that there are satisfactory 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
 - (c) is satisfied that there are satisfactory arrangements in place to ensure that 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.¹¹
16. In performing its functions, ASIS is not prevented from providing assistance to Commonwealth authorities, which may include the Department of Immigration and Border Protection or the Australian Defence Force.¹²
17. Such immunities would not apply if ASIS officers were to be prosecuted under the domestic law of a foreign country.

⁸ Subsection 14(2) of the *Intelligence Services Act 2001* (Cth).

⁹ Subsection 14(2AA) of the *Intelligence Services Act 2001* (Cth).

¹⁰ Paragraph 6(1)(e) of the *Intelligence Services Act 2001* (Cth).

¹¹ Subsection 6(2) of the *Intelligence Services Act 2001* (Cth).

¹² Subsection 6(7) and section 3 of the *Intelligence Services Act 2001* (Cth).

International law considerations

18. As a party to the *Vienna Convention on the Law of Treaties*, Australia is obliged to interpret a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'¹³

The Convention against Transnational Organised Crime and its Protocol against the Smuggling of Migrations by Land, Sea and Air

19. Australia is a party to the United Nations *Convention against Transnational Organised Crime* and its *Protocol against the Smuggling of Migrations by Land, Sea and Air* (**Protocol**), and must therefore interpret the provisions of the Protocol in such a way that goes to its purpose: the Protocol is aimed at preventing and combating the smuggling of migrants, as well as promoting cooperation among States Parties, including Australia, while protecting the right of smuggled migrants and preventing migrant exploitation in the smuggling process.¹⁴
20. Further to Australia's obligations to interpret the Protocol in good faith and in accordance with its object and purpose, there are provisions in the Protocol that articulate Australia's particular responsibilities in respect of people smuggling. The following are relevant to this Inquiry:
- (a) Article 3 of the Protocol defines people smuggling 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'.
 - (b) Article 6 of the Protocol requires States party, including Australia, to criminalise smuggling-related activities within their domestic laws. The Migration Act and Criminal Code offences implement Australia's obligations under the Protocol.
 - (c) Article 7 provides that States Parties shall cooperate to the fullest extent possible and suppress the smuggling of migrants by sea. Article 11 requires States Parties to strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.
 - (d) Article 16 requires States to take the necessary measures – including legislative measures – to preserve and protect the rights of people the subject of people smuggling, as set out at Article 6.
 - (e) Article 19 states that this Protocol does not affect other rights, obligations and responsibilities on States and individuals under international law, particularly those found in the *Convention relating to the Status of Refugees*, as amended by its 1967 Protocol (**the Refugee Convention**).
21. The Law Council notes that as a matter of international law, Australia's international obligations apply wherever Australia exercises effective control over, including custody of, a person.¹⁵ This includes in Australia's territorial waters, contiguous

¹³ Article 31(1).

¹⁴ Article 2.

¹⁵ Human Rights Committee, *Munaf v Romania*, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009) [14.2] (and the jurisprudence cited therein). This case provides that the relevant question to determine whether the State's obligations apply extraterritorially is whether the State has

zone, and exclusive economic zone; on the high seas, and within the territorial waters or other maritime areas of any other state (where Australia exercises custody or control of a person).¹⁶

22. Pursuant to Article 20 of the Protocol, disputes concerning the interpretation or application of the Protocol are to be settled by negotiation, and in the event that an issue cannot be settled, by arbitration. If States are unable to come to an agreement six months after the request for arbitration, the matter may be referred by either State to the International Court of Justice.
23. A breach of the Protocol could arise in certain circumstances if an intercepting country obtains a financial or other material benefit by paying smugglers to return asylum seekers to a transit country. A 'material benefit' must also be a kind of profit or gain.¹⁷

Other relevant international treaties

24. Most significantly for the purpose of this Inquiry, the Refugee Convention prohibits Australia from expelling or returning a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened' as a result of that person's refugee status.¹⁸ This principle is also found in other instruments to which Australia is party, including the *International Covenant on Civil and Political Rights (ICCPR)* and its *Second Optional Protocol*; the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* and its *Optional Protocol*; and the *Convention on the Rights of the Child (CROC)*.
25. Australia's other obligations under international law, including international human rights law and the law of the sea, are also relevant to this Inquiry, including:
 - respecting the internationally recognised right to seek asylum,¹⁹ 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 rights set out in CROC, which include the requirement that in all actions concerning children, the best interests of the child be a primary consideration;
 - ensuring the safety of life at sea;²⁰

'power or effective control' over an individual to whom the State has obligations to respect and ensure that person's rights.

¹⁶ LCA Policy, [8].

¹⁷ Jane McAdam and Sophie Duxson, *In Focus: Paying people smugglers - Did the Australian government breach international law?* (1 July 2015) Andrew and Renata Kaldor Centre for International Refugee Law, available at: <http://www.kaldorcentre.unsw.edu.au/news/focus-paying-people-smugglers-did-australian-government-breach-international-law#sthash.ayR84sP9.dpuf>.

¹⁸ Article 33.

¹⁹ At art 14 of the *Universal Declaration of Human Rights* ('UDHR').

²⁰ Art 98(1) of the *United Nations Convention on the Law of the Sea* ('UNCLOS'). See also Chapter V, Reg 33(1) of the *International Convention for the Safety of Life at Sea and Interim Measures for Combatting Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*, MSC/Circ.896/Rev.1, 12 June 2001.

- treating humanely all people in its custody or control;²¹
- respecting freedom of navigation on the high seas;²²
- respecting the sovereign maritime boundaries and areas of other countries;²³ and
- providing accessible, timely and effective remedies for alleged violations of Australia's international human rights law obligations.²⁴

26. Any breaches of Australia's obligations under international human rights law would be determined by reference to the relevant treaty. For example, pursuant to Article 41 of the ICCPR, another State Party may make a communication to the Committee (HRC) to the effect that Australia is not fulfilling its obligations under the ICCPR. The HRC has never received such a Communication. Individuals may also submit Communications,²⁵ and after consideration of this Communication, the HRC may issue a non-binding view on the State's conduct.

27. Thank you again for the opportunity to provide these observations.

Yours faithfully

MARTYN HAGAN
SECRETARY-GENERAL

²¹ See, for example: UDHR, arts 2, 7 and 10 of the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights*.

²² Article 110 UNCLOS: Interference with the freedom of navigation of foreign vessels outside territorial sea is only permissible under treaty arrangements (including in the case of rescue at sea), with authorisation of the flag State, or in cases such as slave trading or piracy.

²³ Art 2 of the UNCLOS provides that the sovereignty of a coastal state extends to its territorial sea. Under UNCLOS coastal states also enjoy certain rights in their contiguous and exclusive economic zones.

²⁴ Article 2 ICCPR.

²⁵ Under the Optional Protocol to the ICCPR, which establishes an individual complaints mechanism for the ICCPR.