



Refugee & Immigration Legal Centre Inc

Submission to the Senate Legal and Constitutional Affairs Committee: *Inquiry into the payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats*

1 Introduction

- 1.1 The Refugee and Immigration Legal Centre (**RILC**) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.¹ Since its inception over 25 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.
- 1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection's Immigration's Advice and Application Assistance Scheme (**IAAAS**). RILC has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.
- 1.3 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats (**the Inquiry**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

2 Outline of submission

- 2.1 In summary, our submission provides as follows:

Legality

- Under Australian domestic law, the alleged payments or other incentives provided to people smugglers **may constitute offences under the *Criminal Code Act 1995*** (Cth) making Australian officials involved liable to prosecution for criminal offences carrying a penalties of up to 20 years imprisonment;
- The alleged conduct by Australian government officials **may constitute a breach of the *Protocol against the Smuggling of Migrants by Land, Sea and Air***, to which Australia is a signatory;
- The relevant Australian government officials **may have committed criminal offences under Indonesian domestic law**, and be liable to criminal prosecution in that jurisdiction; and
- Australian officials involved in the alleged conduct, as well as those not directly involved but nonetheless aware of its occurrence, **may be in breach of the *Public Service Act 1999***, the Australian Public Service (APS) Code of Conduct, APS Values and APS Employment Principles, and also own individual APS employment contracts.

¹ RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

Risk of harm

- The alleged actions by Australian officials expose desperate and vulnerable people, many of whom may be victims of torture and serious trauma, to a **serious risk of further harm**.

Incentives for people smuggling

- The alleged practice provides **significant incentives** to those individuals and organisations responsible for transporting people to Australia from other countries (the people smugglers), and represents poor and unethical policy.

Implications for Australia's international standing

- The alleged conduct has had, and will continue to have, **serious implications** for Australia's authority, reputation and relations within the international community.

2.2 The assessments made in our submission are based on the account of the alleged payments and assistance as reported by the Australian Broadcasting Corporation.² A brief summary of the reported events can be found at **Attachment A**.

3 Legality of the alleged payments under Australian law

3.1 Criminal Code

3.1.1 We consider that the Australian officials engaged in the alleged conduct may be liable to criminal prosecution under the *Criminal Code Act 1995* (Cth) (**the Criminal Code**) for committing one or more of the following offences:

- Section 73.1 – Offence of people smuggling;
- Section 73.2 – Aggravated offence of people smuggling (danger of death or serious harm etc);
- Section 73.3 – Aggravated offence of people smuggling (five or more people);
- Section 73.3A – Supporting the offence of people smuggling; and
- Section 11.2 – Complicity and common purpose.

3.1.2 Section 73.1 of the Criminal Code specifies that a person is guilty of a criminal offence punishable by a term of imprisonment of 10 years, 1,000 penalty units, or both, if that person “organises or facilitates the entry of another person (the other person) into a foreign country (whether or not via Australia)” and “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 that other person is not a citizen or permanent resident of that other country. It is possible that providing cash payments and vessels, along with a map and directions to Rote Island, could arguably constitute “organizing and facilitating” the entry of the asylum seekers to Indonesia, falling within the scope of this offence.

² ABC News, Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew, George Roberts, 17 June 2015 - available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> [accessed 24/07/2015]

- 3.1.3 Section 73.2 specifies that a person is guilty of aggravated offence of people smuggling punishable by a term of imprisonment of 20 years, 2,000 penalty units, or both, if in committing the offence of people smuggling, the conduct gives rise to a danger of death or serious harm to the victim(s) and that person is reckless as to the danger of death or serious harm to the victim that arises from the conduct. The Criminal Code defines “serious harm” as harm that endangers, or is likely to endanger, a person’s life. The conduct in question caused asylum seekers to turn around on the high seas, after already spending many days at sea, and make a highly dangerous voyage back to Indonesia. According to the accounts reported by the media, one of the small wooden boats provided by Australian officials to the smugglers ran out of fuel before reaching land and passengers on board were rescued by the other boat. Later that boat containing all 71 passengers (including women and children) became shipwrecked on a reef some distance from land.³ 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.
- 3.1.4 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 the circumstances known to him or her, it is unjustifiable to take the risk.⁴ 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.
- 3.1.5 Section 73.3 of the Criminal Code specifies a further aggravated offence, punishable by imprisonment for 20 years, 2,000 penalty units, where a person commits offence of people smuggling involving at least 5 people. The alleged conduct by Australian officials involved 65 people.
- 3.1.6 Section 73.3A specifies that a person is guilty of a criminal offence punishable by a term of imprisonment of 10 years, 1,000 penalty units, or both, if that person “provides material support or resources to another person or an organisation (the receiver)” and “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”. The Explanatory Memorandum to the Bill that introduced these offence provisions⁵ provides the following guidance on what may constitute ‘material support or resources’:

The term ‘material support or resources’ is not defined in Commonwealth legislation. However, drawing reference from section 2339A of the United States of America Criminal Code, ‘material support or resources’ may include, but is **not limited to: 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**.

³ ABC News, Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew, George Roberts, 17 June 2015 - available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> [accessed 24/07/2015]

⁴ s.5.4; determining whether a risk is unjustifiable requires a moral or value judgment concerning the accused’s advertent disregard of the risk: *R v Saengsai-Or* (2004) 61 NSWLR 135.

⁵ Anti-People Smuggling and Other Measures Bill 2010

[...]

This offence targets those involved in **supporting and facilitating people smuggling**. This is an important strategy in tackling serious and organised crime. Organised criminal syndicates depend on enablers and facilitators who play a vital role in supporting the criminal economy. Targeting those who organise, finance and provide other material support to people smuggling operations is an important element of a strong anti-people smuggling framework.

[...] The Government is determined to reinforce the message that people should use authorised migration processes for seeking asylum and migrating to Australia, and that people in Australia should **not assist people smuggling by providing finance or other assistance**.⁶ [emphasis added]

- 3.1.7 The Explanatory Memorandum confirms Parliament's intention that a broad interpretation be given to 'material support or resources'. Accordingly, the alleged conduct by Australian officials in question may have also contravened s.73.3A (supporting the offence of people smuggling) and those responsible would be liable to prosecution on that basis (including those officials that reportedly provided the smugglers with the two small wooden boats to transport the passengers back to Indonesia).
- 3.1.8 The alleged conduct may also breach section 11.2 of the Criminal Code, which provides that any 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. This secondary liability applies irrespective of whether the principal offender is found guilty of the offence⁷ but does not apply if it can be shown that the person terminated his or her involvement in that act and also took all reasonable steps to prevent the commission of the offence. The alleged conduct by Australian officials may constitute aiding and abetting the commission of a people smuggling offence by the crew members.
- 3.1.9 Further, it is possible that other government officials involved in the alleged conduct may be considered to have aided, abetted, counselled or procured the commission of the above criminal offences, and failed to take reasonable steps to prevent it and terminate their involvement, such that they also would have committed an offence. This would depend on the facts determined by the inquiry about the involvement of those other officials (if any).
- 3.1.10 Amendments to section 11.2 proposed by the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (**the POOM Bill**)-⁸ As detailed by the Committee in its report for this Bill dated 16 June 2014⁹, Schedule 5 to the POOM Bill proposes to amend s.11.2 of the Criminal Code to create an additional form of criminal responsibility of an accused person being "knowingly concerned" with the commission of an offence permits the person to be punished as a principal offender in circumstance where they may have become involved *after* the relevant act for the offence has been completed. In the context of the alleged cash payments, other inducements and material such as alternative vessels, provided to people

⁶ Anti-People Smuggling and Other Measures Bill 2010, Explanatory Memorandum – available at: <https://www.comlaw.gov.au/Details/C2010B00041/Explanatory%20Memorandum/Text> [accessed 23/07/2015]

⁷ s.11.2(5)

⁸ Introduced in the House of Representatives on 19/03/2015 and Referred to Committee (26/03/2015): Senate Legal and Constitutional Affairs Legislation Committee; Committee report (16/06/2015)

⁹ The Senate Legal and Constitutional Affairs Legislation Committee, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, 16 June 2015 – available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Power_and_Offences_Bill/Report [accessed 23/07/2015]

smugglers on the high seas, we understand this amendment may mean that other Australian officials and other persons may be guilty of serious people smuggling crimes and liable to criminal prosecution even if they have not committed any overt act in furtherance of a people smuggling crime but have merely become “knowingly concerned” about the circumstances in which the relevant conduct constituting the offence occurred.¹⁰

3.1.11 The Committee recommended in its Report that the POOM Bill be passed subject to a recommendation relating to an unrelated amendment.¹¹ RILC contends that for the purposes of the Inquiry this extension to the grounds for secondary liability proposed by the POOM Bill will mean that government officials and other persons will be liable to criminal prosecution if they aid, abet, counsel, procure the commission of a people smuggling offence outlined above, or have at some point in time during or following the commission of that offence become knowingly concerned in the commission of that offence and they cannot show that prior to the commission of the offence they took all reasonable steps to prevent the offence from occurring (that is, even if they only became aware of it after the fact). We submit that in practice this may expose a large number of Australian government officials and others to criminal liability if the alleged conduct by Australian officials occurred again following the commencement of the POOM Bill.

3.1.12 Section 73.4 provides a geographical limitation to these offence provisions, stating that an offence would not be committed unless: (1) the person is an Australian citizen or a resident of Australia, and the conduct constituting the alleged offence occurs wholly outside Australia; or (2) the conduct constituting the alleged offence occurs wholly or partly in Australia, and a result of the conduct occurs, or is intended by the person to occur, outside Australia. Depending on the facts ascertained by the inquiry, it would appear that one or either of these requirements will be satisfied.

3.1.13 In our view the main legal obstacle further preventing any criminal prosecution under the above offence provisions is s.73.5 of the Criminal Code. Section 73.5 provides that, although a person may be arrested, charged, remanded in custody or released on bail in connection with such an offence, the Attorney-General’s written consent is required prior to any prosecution (by the Commonwealth Director of Public Prosecutions). Further, actions by Australian Secret Intelligence Service officials may be covered by immunities under the *Intelligence Services Act 2001* (Cth).¹² However, we nonetheless consider the possible breaches of these criminal offence extremely serious (that is illegal/criminal conduct), irrespective of whether those allegedly involved may be ultimately immune from criminal prosecution.

3.2 *Public Service Act*

3.2.1 We also wish to draw the Committee’s attention to section 13 of the *Public Service Act 1999* (**the Public Service Act**) which provides that under the Australian Public Service Code of Conduct “[a]n APS employee, when acting in connection with APS employment, must comply

¹⁰ See: Liberty Victoria, Victorian Council for Civil Liberties submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, 07/05/2015, at [32].

¹¹ The Senate Legal and Constitutional Affairs Legislation Committee, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, 16 June 2015, at p(iv) – available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Power_and_Offences_Bill/Report [accessed 23/07/2015]

¹² See: s.6(1)(e) of the *Intelligence Services Act 2001*

with all applicable Australian laws”.¹³ The APS Commission states that APS employees “have an unequivocal responsibility to comply with all applicable Australian laws” including (but not limited to) the Criminal Code and the Public Service Act¹⁴ and “must also conform with the law, and may be held to account through the legal system”.¹⁵

3.2.2 The Public Service Act also requires APS employees to “at all times behave in a way that upholds: (a) the APS Values and APS Employment Principles; and (b) the integrity and good reputation of the employee’s Agency and the APS”¹⁶. The APS Commission also advises that “[w]here an employee observes what they suspect may be a breach of the Code of Conduct on the part of another employee, consistent with their obligations under the APS Values and Code of Conduct to behave ethically, honestly and with integrity in the course of their employment, they should report it in accordance with relevant agency instructions on reporting breaches of the Code of Conduct”.

3.2.3 Thus any contravention of the Criminal Code (irrespective of whether prosecution occurs) is a breach of the Public Service Act, the APS Code of Conduct, the APS Values and APS Employment Principles. Furthermore, we consider that other government officials not directly involved in the relevant actions may also be in breach of their individual obligations under the APS Values and Code of Conduct if they failed to formally report the conduct in question to the Commonwealth agency employer or APS Commission.

3.2.4 RILC is also of the view that any APS employee or contractor would also likely be in breach of the terms of their employment contracts if they failed to comply with Australian law and the obligations under the Public Service Act (including the APS Code of Conduct, APS Values and APS Employment Principles).

3.3 *Migration Act*

3.3.1 It is unlikely that the conduct in question by Australian officials would constitute a breach of the people smuggling criminal offence provisions in the *Migration Act 1958* because those offences only apply to the bringing of people *into* Australia territory.¹⁷

4 International law

4.1 We submit that the payments of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats is inconsistent with Australia’s obligations under the following instruments:

- United Nations Convention against Transnational Organized Crime (**the Transnational Organized Crime Convention**)¹⁸ and supplementary Protocol against the Smuggling of

¹³ s.13(4)

¹⁴ Enhancing Ethical Awareness in the APS, APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads, Australian Public Service Commission, p12 – available at: http://www.apsc.gov.au/_data/assets/word_doc/0018/7821/APS-Values.docx [accessed 23/07/2015]

¹⁵ Ibid, at p9

¹⁶ s.13(11)

¹⁷ See: ss 233A and 233D

¹⁸, United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000, United Nations, Treaty Series, vol. 2225, p. 209; signed by Australia 13/12/2000 and ratified 27/05/2004 – see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en. [accessed 23/07/2015]

Migrants by Land, Sea and Air (**the Protocol**)¹⁹;

- United Nations Convention relating to the Status of Refugees²⁰, as amended by the 1967 Protocol (**the Refugee Convention**)²¹ and other human rights instruments that impose duties not to return people to countries where they are at risk of serious harm²²;
- Convention on the Rights of the Child (**CROC**)²³; and
- numerous international maritime instruments that dictate how the Australian government is required to act at sea²⁴.

4.2 *The Smuggling Protocol*

4.2.1 The stated purpose of the Protocol, provided for in Article 2 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”. By signing and ratifying an international instrument the Australian government consents to be bound by its terms and to perform them in good faith.²⁵

4.2.2 RILC contends that payments of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats would *prima facie* be acts contrary to the purpose of the Smuggling Protocol, as detailed in Article 2. If these allegations are true, such conduct may mean that Australia is failing to comply with the terms that it agreed to implement and observe in good faith, and critically, be doing exactly what it has previously announced to the international community it would not do.

4.2.3 The Protocol 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”.²⁶ It further defines *illegal entry* to mean “crossing borders without complying with the necessary requirements for legal entry into the receiving State”.²⁷ Asylum seekers present in Indonesia often do not have the permission of the Indonesian government (that is, a valid visa in effect) to reside or re-enter

¹⁹ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000, United Nations, Treaty Series, vol. 2241, p. 507; Doc. A/55/383; signed by Australia 21/12/2001 and ratified 27/05/2004 – see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en. [accessed 23/07/2015]

²⁰ United Nations Convention relating to the Status of Refugees, General Assembly resolution 429(V) of 14 December 1950, United Nations, Treaty Series, vol. 189, p. 137; signed by Australia 22/01/1954 – see: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en [accessed 23/07/2015]

²¹ Protocol relating to the Status of Refugees, General Assembly resolution 219 (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 606, p. 267; signed by Australia 13/12/1973 – see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&lang=en [accessed 23/07/2015]

²² For example, International Covenant on Civil and Political Rights; the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; the Convention on the Rights of the Child; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²³ United Nations Convention on the Rights of the Child, General Assembly resolution 44/252 of 20 November 1989, United Nations, Treaty Series, vol. 1577, p3; signed by Australia 22/08/1990 and ratified 17/12/1990 – see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en [accessed 25/07/2015]

²⁴ For example, United Nations Convention on the Law of the Sea; International Convention for the Safety of Life at Sea; and International Convention on Maritime Search and Rescue

²⁵ Vienna Convention on the Law of Treaties 1969, Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331

²⁶ Article 3(a).

²⁷ Article 3(b)

that country.²⁸ Payments of cash or other inducements by the Commonwealth of Australia in exchange for persons in control of vessels at sea containing asylum seekers turning those vessels around and returning the passengers to Indonesian territory (where they would likely have no legal right to enter or reside) would in our view, in very basic terms, amount to the Australian government providing assistance to the smuggling of migrants.

4.2.4 We further contend that the political and financial benefit²⁹ perceived by the Australian government in providing assistance such as that alleged might of itself amount to a direct or indirect material benefit (which includes a benefit beyond mere payment of money³⁰). If this were the case, the alleged payments and other inducements by Australian government officials would of themselves be defined to be ‘smuggling of migrants’.

4.2.5 Following this, RILC submits that payments of cash or other inducements by the Commonwealth of Australia in exchange for persons in control of vessels at sea containing asylum seekers turning those vessels around and returning the passengers to Indonesian territory (where they would likely have no legal right to enter or reside) would, under international law, amount to the Australian government providing direct assistance to the smuggling of migrants. Furthermore, this conduct may also engage the following offences that the Protocol specifies states must enact under domestic legislation: the offence of people smuggling³¹; the offence of participating as an accomplice in people smuggling³²; and/or the offence of organizing or directing other to commit people smuggling³³.

4.2.6 The Protocol obligates signatory states to take all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of smuggling under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.³⁴ It further requires member states to afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of smuggling³⁵, and take into account the special needs of women and children.³⁶ RILC contends that these actions by the Australian government fail to meet these international obligations for reasons that include the following:

- By facilitating the turning around of overcrowded and unseaworthy vessels at sea, the Australian government is directly responsible for exposing the passengers onboard (which was reported to include children and women³⁷) to a real likelihood of death through drowning and serious injury.
- Indonesia is not a signatory to the Refugee Convention. It has no obligation under

²⁸ See: The Conversation, Asylum seekers in Indonesia: why do they get on boats?, Associate Professor Savitri Taylor, 20 July 2012 – available at: <https://theconversation.com/asylum-seekers-in-indonesia-why-do-they-get-on-boats-8334> [accessed 27/07/2015]

²⁹ For example, it might be argued that there would be indirect financial benefits in the long term through less persons having their protection claims assessed in Australia or at offshore processing centres funded by the Australia Government.

³⁰ ‘The International Law of Migrant Smuggling’, Anne T. Gallagher, Fiona David, Cambridge University Press, 21 July 2014

³¹ under Article 6(2)(a)

³² under Article 6(2)(b)

³³ under Article 6(2)(c)

³⁴ Article 16(1)

³⁵ Article 16(3)

³⁶ Article 16(4)

³⁷ ABC News, Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew, George Roberts, 17 June 2015 - available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> [accessed 24/07/2015]

international law *not* to return (*'refoule'*) a person who may be a refugee to a country where they face a real chance of being killed or suffering other serious human rights abuses. By providing payments and other incentives to people smugglers to turn boats around and re-enter Indonesia the Australian government may expose those aboard to *refoulement* (we deal with this issue in further detail below). The Department of Foreign Affairs and Trade (DFAT) currently advises that “[a]ny breach of Indonesian immigration regulations may result in you being fined, jailed, *deported* or banned from re-entering Indonesia for a period of time” [emphasis added]³⁸.

- It has been consistently documented in the media and reported by reputable international organisations that asylum seekers and refugees in Indonesia are deprived of basic rights (including to access health care and the right to work) and are often detained and exploited by corrupt government officials (who demand bribes for their release).³⁹ The United Nations High Commissioner for Refugees (UNHCR) has recently reported the detention of asylum seekers and refugees in Indonesia remain key protection challenges, particularly for a growing number of children and detainees with specific needs.⁴⁰

4.2.7 Furthermore, as a signatory to the Protocol the Australian government is also obligated to act in good faith to cooperate to the fullest extent possible with its neighbouring states to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.⁴¹ It would appear that the conduct in question by Australian officials to facilitate the return of those onboard, was undertaken in secret without informing the Indonesian authorities. In this regard, the conduct further undermines Australia’s obligations under the Protocol.

4.2.8 This practice is also entirely inconsistent with the Regional Cooperation Framework (RCF) established through the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process). The RCF was specifically established to facilitate the necessary practical arrangements aimed at ensuring, among other things, consistent processing of asylum claims, durable solutions for refugees, the sustainable return of those found not to be owed protection, and relevantly, targeting people smuggling enterprises. However, it would appear that the alleged conduct at the center of the Inquiry was undertaken in secret without the knowledge or consultation of Indonesia, one of the member states.

4.3 *Refugee Convention and other human rights instruments*

4.3.1 As a signatory to the Refugee Convention, Australia is prohibited from returning (*'refouling'*) asylum seekers to any country where, either: his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion⁴²; or they are at risk of being returned to another country where they have a well-founded fear of persecution.⁴³

³⁸ DFAT Travel Advice – Indonesia, 13 July 2015 – available at: <http://www.smartraveller.gov.au/zw-cgi/view/Advice/Indonesia> [accessed 25/07/2015]

³⁹ See: The Conversation, Asylum seekers in Indonesia: why do they get on boats?, Associate Professor Savitri Taylor, 20 July 2012 – available at: <https://theconversation.com/asylum-seekers-in-indonesia-why-do-they-get-on-boats-8334> [accessed 27/07/2015]

⁴⁰ See: 2015 UNHCR subregional operations profile - South-East Asia – available at: <http://www.unhcr.org/pages/49e488116.html> [accessed 23/07/2015]

⁴¹ Articles 7, see also Articles 14 and 15

⁴² Article 33

⁴³ See, e.g., the decision of the European Court of Human Rights in *T.I. v. The United Kingdom*, Application No. 43844/98, Decision as to Admissibility of 7 March 2000, p. 15. See also Committee against Torture General Comment No. 1, which,

- 4.3.2 Indonesia lacks domestic legal protections preventing asylum seekers and refugees from being forcibly returned to their country of persecution. As stated previously, Indonesia is not a signatory to the Refugee Convention, and refugees and asylum seekers in Indonesia are routinely detained and officially denied the right to work. RILC submits that even if an asylum seeker is not forcibly returned to his home country of persecution, detention of an arbitrary nature (that is not merely due to a generally applicable law) by the Indonesian authorities for reason of their status as an asylum seeker, and being exposed to financial exploitation by having to pay bribes to secure release, would nonetheless likely constitute a threat to liberty under international law.
- 4.3.3 Australia is also a signatory to other international human rights instruments, including: the International Covenant on Civil and Political Rights (**ICCPR**)⁴⁴; the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty⁴⁵; CROC⁴⁶; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁷ Under these instruments Australia has a non-derogable duty not to send persons to a country where they may be at risk of other kinds of serious harm, including (but not limited to): denial of liberty (such as through arbitrary detention); torture; cruel, inhuman or degrading treatment or punishment; and the death penalty.
- 4.3.4 Following this, the alleged practice may create a serious risk of Australia breaching its obligations under the Refugee Convention and other international human rights instruments to which it is a signatory.
- 4.3.5 On the facts reported in the media, the Australian government was allegedly not only responsible for providing sufficient financial and other incentives for those in control of the vessels to voluntarily turn the vessels back and return to Indonesia, but also for preventing the relevant vessels and those aboard from either entering Australia or travelling through international waters to New Zealand, for the purposes of seeking asylum. Under the Refugee Convention, where a person seeking asylum seeks to enter another country without a visa, that person is not allowed to be treated as an illegal entrant.⁴⁸ Further, Article 31 clearly states that

inter alia, states that ‘The Committee is of the view that the phrase “another State” in article 3 [of the Convention against Torture] refers to the state to which the individual concerned is being expelled, returned or extradited, as well as to any state to which the author may subsequently be expelled, returned or extradited’. UN Committee against Torture, General Comment No. 1, above note 22, para. 2. See also UNHCR EXCOM Conclusion No. 58 (XL), 1989, Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, para. f(i)

⁴⁴ International Covenant on Civil and Political Rights, opened for signature at New York on 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407; signed by Australia 18/12/1972 and ratified 13/08/1980 – see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&lang=en [accessed 25/07/2015]

⁴⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature at New York on 15 December 1989, United Nations, Treaty Series, vol. 1642, p. 414; acceded by Australia 02/10/1990 – see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-12&chapter=4&lang=en [accessed 25/07/2015]

⁴⁶ Convention on the Rights of the Child, opened for signature at New York on 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; depositary notifications C.N.147.1993.TREATIES-5 of 15 May 1993 [amendments to article 43 (2)]1; and C.N.322.1995.TREATIES-7 of 7 November 1995 [amendment to article 43 (2)], signed by Australia 22/08/1990 and ratified 17/12/1990 – see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en [accessed 24/07/2015]

⁴⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85; signed by Australia 10/12/1985 and ratified 08/08/1989 – available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&lang=en [accessed 24/07/2015]

⁴⁸ See: ‘Are They Illegals? No, And Scott Morrison Should Know Better’, Prof. Jane McAdam, The Sydney Morning Herald, 23 October 2013 – available at: <http://www.smh.com.au/comment/are-they-illegals-no-and-scott-morrison-should-know-better-20131022-2vz6a.html> [accessed 24/07/2015]

refugees should not be penalised for arriving without valid travel documents. Following this, what may be considered an illegal action under normal circumstances (e.g. entering a country without a visa) should not be considered illegal if a person is doing so for the purpose of seeking asylum. The drafters of the Refugee Convention, which included Australia, recognised that the very nature of refugee flight might make it impossible to obtain travel documents.⁴⁹ Following this, in the event that the Australian government precluded those on board from entering Australia or travelling in international waters to a third country such as New Zealand and/or having their claims for asylum determined according to law prior to forcing them to return to Indonesia, this would also likely breach Australia's obligations under the Refugee Convention.

4.3.6 We refer to the allegations in the media that there were children present on the asylum seeker boats involved.⁵⁰ CROC requires Australia to ensure that the best interests of the child are a primary consideration in any actions involving a child.⁵¹ This includes individual decisions by Australian officials, as well as those by the government generally about policy and practice, must have regard to the best interests of the children aboard these vessels as a *primary consideration*. Further, the ICCPR requires Australia to take such measures of protection as are required by a child's status as a minor.⁵² Any failure to do this would be inconsistent with Australia's international obligations under this instrument.

4.4 *Maritime law*

4.4.1 It has been reported that the relevant interceptions of the asylum seeker boat occurred on two occasions in international waters.⁵³ It was also alleged that the passengers and crew were detained and moved to two new vessels provided by the Australian government.⁵⁴

4.4.2 Under the United Nations Convention on the Law of the Sea (**UNCLOS**), vessels in international waters such as this are subject to the exclusive jurisdiction of the State in which the vessel is registered.⁵⁵ For this reason, any interception by Australian officials of vessels in international waters of a sea vessel is unlawful, unless specific exceptions apply. These exceptions are limited to:

- where permission is given by the state in which the boat is registered ('the flag state', which in this case may be Indonesia);
- if it is necessary to prohibit the transportation of slaves or repress piracy;
- in the case of a rescue operation; and
- if it is a proportional response in exercising the control necessary to prevent the

⁴⁹ Ibid

⁵⁰ For example, ABC News, Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew, George Roberts, 17 June 2015 - available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> [accessed 24/07/2015]

⁵¹ Article 3

⁵² Article 24(1)

⁵³ ABC News, Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew, George Roberts, 17 June 2015 - available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> [accessed 24/07/2015]

⁵⁴ Ibid

⁵⁵ See: 'Turning back boats', Andrew & Renata Kaldor Centre for International Refugee Law, 4 August 2014 - Available at: http://www.kaldorcentre.unsw.edu.au/publication/%E2%80%98turning-back-boats%E2%80%99#footnote45_i3jmysc [accessed 24/07/2015]; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 International Journal of Refugee Law 174, 186

infringement of domestic immigration laws.⁵⁶

- 4.4.3 It is RILC's submission that none of the first three exceptions apply to the alleged events as reported by the media (including because there was no indication in the reports that that the vessel in question indicated it was in distress and required rescue). Also, with regard to the latter exception, whereby an interception is a proportionate response undertaken in the control of Australia's immigration laws, we contend that the proportionality of any such response in international waters is strictly limited by two key factors. First, Australia's legal obligations under international law. This includes, but is not limited to its obligation under the Refugee Convention addressed above that requires it to permit asylum seekers to enter its territory irrespective of whether they have a valid visa. Secondly, it has been recognised that such action is limited to a right to approach, inspect and warn a vessel, rather than to take enforcement measures such as arrest, diversion or the forcible escort to a port.⁵⁷
- 4.4.4 RILC is also of the view that in the event the vessels involved were unseaworthy, in failing to render appropriate assistance and by forcing the vessels to travel large distances unaided and put the occupants' safety at risk, Australia may also be in breach of its international obligations under the UNCLOS⁵⁸, the International Convention for the Safety of Life at Sea⁵⁹, and the International Convention on Maritime Search and Rescue.⁶⁰

5 Indonesian domestic law

- 5.1 Under Indonesian domestic law it is an offence for a person to engage in people smuggling. Specifically, Article 120 of *Immigration Law UU6-2011* provides for the offence of people smuggling. In summary, it provides that foreign nationals will be guilty of a criminal offence if they conduct, or attempt to conduct, with the aim of seeking a direct or indirect advantage, the taking of a group of people into Indonesian Territory where those people were without any legal right to enter Indonesian territory. This offence is punishable by a maximum term of imprisonment of 15 years and fines of between Rp 500,000,000 (five hundred million Indonesian Rupiah) and Rp 1,500,000,000 (one billion five hundred million Indonesian Rupiah).
- 5.2 Following this, RILC submits that it is possible that those Australian officials responsible for facilitating the payments may be liable to criminal prosecution in Indonesia, subject to any

⁵⁶ 'Turning back boats', Andrew & Renata Kaldor Centre for International Refugee Law, 4 August 2014 - Available at: http://www.kaldorcentre.unsw.edu.au/publication/%E2%80%98turning-back-boats%E2%80%99#footnote45_i3jmysc [accessed 24/07/2015]

⁵⁷ See: 'Turning back boats', Andrew & Renata Kaldor Centre for International Refugee Law, 4 August 2014 - Available at: http://www.kaldorcentre.unsw.edu.au/publication/%E2%80%98turning-back-boats%E2%80%99#footnote45_i3jmysc [accessed 24/07/2015]; Maarten den Heijer, *Europe and Territorial Asylum* (Leiden University, 2011) 233, citing D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009) 12–13, D P O'Connell, *The International Law of the Sea, Vol I* (Oxford: Clarendon Press, 1982) 1058, A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 330.

⁵⁸ UNCLOS, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) United Nations Convention on the Law of the Sea, General Assembly resolution 3067 (XXVIII) of 16 November 1973; signed by Australia 10/12/1982; ratified 5/10/1994 – see: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en [accessed 23/07/2015]

⁵⁹ International Convention for the Safety of Life at Sea, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980)

⁶⁰ International Convention on Maritime Search and Rescue (SAR), opened for signature 27 April 1979, 1403 UNTS 118 (entered into force 22 June 1985)

applicable foreign immunity laws. However, as we do not practice in this jurisdiction we consider this issue uncertain and are unable to advise further.

6 Ultimate harm

6.1 Notwithstanding the serious domestic and international legal implications of the conduct in question, RILC is profoundly concerned with the prolonged danger that these acts undoubtedly expose to already highly vulnerable and desperate people, many of whom may be victims of past torture and serious trauma. As detailed previously, the severe dangers imposed on these vulnerable people by Australian officials is not just limited the perilous journey on the high seas to land in Indonesia in a vessel that may be seriously overcrowded and unseaworthy, but also the subsequent suffering these people would likely face on return in Indonesia.

6.2 As the media has reported, on return these people were detained by Indonesian law enforcement on return. This is consistent with current DFAT advice that “[a]ny breach of Indonesian immigration regulations may result in you being fined, *jailed*, *deported* or banned from re-entering Indonesia for a period of time” [emphasis added]⁶¹. Relevantly, The United States Department of State relevantly reported in its *2014 Country Reports on Human Rights Practices – Indonesia*:

[...] Despite high profile arrests and convictions, **widespread corruption** in the government, judiciary, and security forces remained a problem.

[...]

Conditions in the immigration detention centers were often overcrowded, and there were occasional incidents of violence. The government prohibited refugees from accessing public elementary education and public health services [...]

[...]

[...] there was a **widespread domestic and international perception that corruption remained endemic.**

[...]

Police commonly extracted bribes ranging from minor payoffs in traffic cases to large bribes in criminal investigations. **Corrupt officials sometimes subjected migrants returning from abroad, who were primarily women, to arbitrary strip searches, theft, and extortion.** On July 26, the KPK raided the terminal at Jakarta's Soekarno-Hatta International Airport that is responsible for facilitating the departures and arrivals of Indonesian international migrant workers, and detained 18 people, including police and military personnel, **for extorting money from migrant workers and foreigners at the facility.**⁶² [emphasis added]

6.3 RILC is profoundly concerned that these actions by the Australian government directly expose highly vulnerable and desperate people, to further risks of serious human rights abuses both in Indonesia and the country they originally fled in fear of their lives. Irrespective of the individual circumstances of these people affected, it is abundantly clear that the harm that the returnees suffer as a consequence in Indonesia include, includes, but is not limited to:

⁶¹ DFAT Travel Advice – Indonesia, 13 July 2015 – available at: <http://www.smarttraveller.gov.au/zw-cgi/view/Advice/Indonesia> [accessed 25/07/2015]

⁶² United States Department of State, 2014 Country Reports on Human Rights Practices - Indonesia, 25 June 2015 – available at: <http://www.refworld.org/docid/559bd56228.html> [accessed 25/07/2015]

- arbitrary and prolonged detention in crowded and inhumane conditions;
- extortion by corrupt government officials who are known to target both legal and ‘illegal’ migrants for exploitation;
- denial of access to basic health care services and the right to work; and
- liability of being deported to the country that they fled in fear of their lives.

7 Unethical dealings and incentives for people smugglers

7.1 RILC strongly believes that the practice of providing people smugglers with financial incentives (such as cash payments) and resources (such as sea vessels) is not only highly unethical but also:

- it provides substantial incentives for further smuggling attempts;
- it increases the profitability of the people smuggler’s ‘business model’ by providing those involved with financial compensation for any unsuccessful ventures (insurance);
- it provides vulnerable unskilled and often desperate persons recruited by people smuggler to pilot asylum seeker vessels, with significant incentives to make further voyages and risk serious criminal penalties in Indonesia if caught;
- it may lead to asylum seekers making a higher number of (attempted) dangerous journeys by maintaining the profitability for people smugglers of failed attempts, and consequently increase the risk of more deaths at sea; and
- these covert actions by the Australian government shifts the ultimate burden of managing persons in need of protection to Indonesia, a country that has no domestic legal frameworks for doing so and is not a signatory to the Refugee Convention.

8 Australia’s international reputation and relations

8.1 Historically Australia has had a strong reputation for its generosity in its refugee and humanitarian policies and practices. Australia has been involved in the UNHCR resettlement program since 1977 and has consistently ranked as one of the top three resettlement countries in the world.⁶³ As provided for in the *Report of the Expert Panel on Asylum Seekers* “[a]s a member of the international community, Australia shares responsibility for protecting refugees and resolving refugee situations. Australia is an active contributor to the system of international refugee protection, working with UNHCR and the international community to contribute towards comprehensive, integrated responses to refugee situations”.⁶⁴

8.2 However, the alleged practices that are the subject of the Inquiry has undoubtedly caused serious long term damage to its reputation and credibility in this context.⁶⁵ This purportedly covert

⁶³ Refugee resettlement to Australia: what are the facts? Parliament of Australia, Parliamentary Library – Research Paper Series, 2014-15, Elibritt Karlsen, Law and Bills Digest Section – available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/RefugeeResettlement#_Toc410727183 [accessed 27/07/2015]

⁶⁴ Air Chief Marshal Angus Houston AC, AFC (Ret’d), Paris Aristotle AM and Professor Michael L’Estrange AO, August 2012

⁶⁵ The Guardian, ‘UN weighs in on outcry over reports Australia paid people smugglers’, Shalailah Medhora, 14 June 2015 – available at: <http://www.theguardian.com/australia-news/2015/jun/14/united-nations-weighs-in-on-outcry-over-reports-australia-paid-people-smugglers> [accessed 25/07/2015]

conduct by Australia has also had a serious adverse impact on Australia's diplomatic relations with Indonesia with the Indonesian government publically stating that this conduct amounts to a "new low" if it occurred as reported.⁶⁶

9 Conclusion

9.1 RILC is profoundly concerned with the alleged conduct at the focus of the Inquiry. The reported acts exist in direct opposition to Australia's expressed commitment to uphold international law principles in good faith, likely amount to criminal offences under Australian and Indonesian law, and have a longstanding negative impact on Australia's international reputation and foreign relations. These alleged practices undermine the Government's stated intention to save lives at sea and ultimately threaten the lives and wellbeing of highly vulnerable people in a way that is morally and legally unjustifiable.

Refugee and Immigration Legal Centre Inc.

10 August 2015

⁶⁶ The Guardian, 'Australia has hit 'new low' amid claims of payment to people smugglers', 13 June 2015 – available at: <http://www.theguardian.com/australia-news/2015/jun/13/pressure-on-abbott-over-claims-people-smugglers-were-paid-to-turn-back-boats> [accessed 25/07/2015]

ATTACHMENT A

The following is a brief account of the alleged payments and assistance as reported by the Australian Broadcasting Corporation on 17 June 2015⁶⁷:

- 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.
- 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.
- Among them were three children and four women, one of whom was pregnant.
- Near East Timor the boat was allegedly crossing international waters when an Australian Customs ship stopped it and gave them a formal warning not to enter Australian waters, the vessel was then later stopped again and detained by personnel from a Customs boat and Australian Navy ship, allegedly in international waters.
- 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 \$US 6,000 while the crew were given \$US 5,000 each, bringing the total paid to \$US 31,000.
- The crew then took the asylum seekers towards Indonesian waters and Rote Island, a voyage that took about eight hours. However, during that journey one of the boats ran out of fuel and the other had to take the passengers on board, meaning all 71 people were on board the one boat.
- About 5:00pm on May 31, the one small wooden boat carrying all 71 passengers 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 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 and the police arrived to “secure” the asylum seekers; and
- All 65 asylum seekers are being held by Indonesian law enforcement in custody and the crew who received the payments from Australian officials are facing a maximum of 15 years in jail and up to 1.5 billion rupiah (\$145,000) in fines.

⁶⁷ ABC News, Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew, George Roberts, 17 June 2015 - available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> [accessed 24/07/2015]