

The Senate

Legal and Constitutional Affairs
References Committee

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

Interim report

May 2016

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Members of the committee

Members

Senator Glenn Lazarus (GLT, QLD) (Chair)

Senator the Hon Ian Macdonald (LP, QLD) (Deputy Chair)

Senator Catryna Bilyk (ALP, TAS)

Senator Jacinta Collins (ALP, VIC)

Senator the Hon Joe Ludwig (ALP, QLD)

Senator Linda Reynolds (LP, WA) until 12.10.2015

Senator Dean Smith (LP, WA) from 12.10.2015

Substituted Member

Senator Katy Gallagher (ALP, ACT) to replace Senator Jacinta Collins (ALP, VIC) from 07.09.2015

Participating Member

Senator Sarah Hanson-Young (AG, SA)

Secretariat

Ms Sophie Dunstone, Committee Secretary

Ms Shennia Spillane, Principal Research Officer

Mr CJ Sautelle, Principal Research Officer

Ms Jo-Anne Holmes, Administrative Officer

Suite S1.61

Telephone: (02) 6277 3560

Parliament House

Fax: (02) 6277 5794

CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

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Abbreviations

ABC	Australian Broadcasting Corporation
ABF	Australian Border Force
AFP	Australian Federal Police
ASIS	Australian Secret Intelligence Service
CAT	Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
CLA	Civil Liberties Australia
CRC	Convention on the Rights of the Child
DIBP, the department	Department of Immigration and Border Protection
HRLC	Human Rights Law Centre
ICCPR	International Covenant on Civil and Political Rights
ISA	<i>Intelligence Services Act 2001</i>
LCA	Law Council of Australia
OSB	Operation Sovereign Borders
OSB JATF	Operation Sovereign Borders Joint Agency Task Force
RAN	Royal Australian Navy
RILC	Refugee and Immigration Legal Centre
SOLAS	Safety of Life at Sea

Recommendation

Recommendation 1

4.35 The committee recommends that, should it be unable to complete its inquiry prior to the 2016 national election, the Senate refer this matter, in the same terms, to the Legal and Constitutional Affairs References committee in the 45th Parliament.

Chapter 1

Introduction and background

Referral and conduct of the inquiry

1.1 On 24 June 2015 the Senate referred the following matter to the Senate Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 15 September 2015:

The payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats, with reference to:

- a) the reply of the Government to the order for production of documents ordered by the Senate in the amended general business notice of motion no. 724 moved by Senator Hanson-Young on 16 June 2015;
- b) any money paid to anyone on board a vessel en route to Australia or New Zealand by any Customs, Immigration or other Commonwealth officer from September 2013 to date;
- c) the facilitation or authorisation of the payment of any money to anyone on board a vessel en route to Australia or New Zealand by any Customs, Immigration or other Commonwealth officer from September 2013 to date;
- d) any payments made to any such vessels' captain, crew or passengers;
- e) any payments made in relation to the passage of any such vessels, their passengers or crew;
- f) the legality, under international and domestic law, of the above matters;
- g) the damage caused by the above matters to the bilateral relationship between Australia and Indonesia;
- h) the extent to which any such bribes constitute an incentive for people-smuggling operations to Australia;
- i) whether it is standard practice for Australia to pay cash or other inducements to the captains or crew of boats carrying asylum seekers and, if so, how long this practice has been carried on and how much has been spent on this policy in the past, including what payments have been made to particular individuals and the amount of any such payments;
- j) any related matters.¹

1 *Journals of the Senate* No.101, 24 June 2015, p. 2804.

1.2 The Senate agreed to extend the reporting date for the inquiry four times: to 11 November 2015,² 4 February 2016,³ 15 March 2016,⁴ and, on 1 March 2016, to 22 June 2016.⁵

1.3 In accordance with usual practice the committee advertised the inquiry on its webpage and in *The Australian* newspaper on 8 July 2015. The committee also wrote to a number of organisations and individuals inviting written submissions by 24 July 2015. The committee received 12 submissions (listed at Appendix 1). On 29 October 2015 the committee received a letter from Amnesty International, attaching a report it had publicly released that day on issues relevant to the inquiry, and requesting that it be considered by the committee. The committee accepted the material from Amnesty International as additional information.

1.4 The committee held a public hearing in Canberra on 5 February 2016. A list of the witnesses who appeared at the public hearing is at Appendix 2, and additional information received by the committee is listed at Appendix 3.

This interim report

1.5 Over some ten months the committee has progressed a fair distance toward completion of this inquiry. In view of the upcoming election, this interim report seeks to summarise the evidence received and the reflections of the committee to date.

1.6 The terms of reference for the inquiry are detailed and specific, and the committee has been unable to answer many of them in precise terms. However, the matters referred by the Senate to the committee can be summarised into four significant questions:

- What actually took place during the reported incident in May 2015?
- If payments were made by the Government of Australia to people smugglers to turn back the asylum seekers on that occasion, was it an isolated incident, or is it a recurrent practice?
- What are the legal and policy implications of the Australian government making payments to people smugglers?
- How should the Senate (further) respond to the public interest immunity claim made by the Minister for Immigration and Border Protection in relation to these matters?

1.7 Following the background information provided in this chapter, chapter 2 discusses evidence received in relation to the first two of the above questions, and the

2 *Journals of the Senate* No. 111, 7 September 2015, p. 3039.

3 *Journals of the Senate* No. 120, 13 October 2015, p. 3224.

4 *Journals of the Senate* No. 127, 23 November 2015, p. 3420.

5 *Journals of the Senate*, No. 143, 1 March 2016, p. 3858.

committee's views in that regard. Chapter 3 summarises the evidence received on the third question, particularly the issue of what laws may have been breached if the incident occurred as reported.

1.8 The committee has not yet completed its investigation of the fourth question in particular, relating to the minister's public interest immunity claim of June 2015, and the broader issue of the transparency and accountability of the executive government in relation to the conduct of Operation Sovereign Borders. Chapter 4 summarises the committee's work and the evidence received to date in this regard, and offers initial comments from the committee.

1.9 The committee assesses that further inquiry is needed in order to reach final conclusions and recommendations on these matters, and is therefore of the view that, if the inquiry lapses before the committee is able to complete it, the Senate should refer this matter to the new committee in the 45th Parliament for further consideration. A recommendation in this regard is offered in chapter 4.

A note on references

1.10 References to the committee Hansard in this report are to the Proof Hansard. Page numbers may vary between the Proof and the final Hansard transcript.

Background

The incident reported to have occurred in May 2015

1.11 On 10 June 2015 an article in the *Sydney Morning Herald* reported that Australian officials had 'paid thousands of dollars to the captain and crew of a boat carrying asylum seekers, who were then returned to Indonesia, according to passengers and an Indonesian police chief'.⁶ The article alleged that the incident occurred during May 2015 and that the crew of the boat had each been paid AU\$7000, wrapped in black plastic bags. According to an Indonesian police chief 'an Australian customs officer called Agus, who spoke fluent Indonesian' paid the boat's captain. The article stated:

Nazmul Hassan, a Bangladeshi on board the boat, said he saw the skipper put money in his pocket.

He said the crew initially told Australian officials they couldn't go back to Indonesia because they could be jailed for people smuggling.

However, after a meeting the captain reportedly said: "We have to go back. Australia want to pay for us."

6 Jewel Topsfield, Sarah Whyte and Karuni Rompies, 'Australian officials paid people smugglers to turn back to Indonesia, says police chief', *Sydney Morning Herald*, 10 June 2015, available: <http://www.smh.com.au/national/australian-officials-paid-people-smugglers-to-turn-back-to-indonesia-says-police-chief-20150609-ghk63g.html> (accessed 2 July 2015).

"After they finished the meeting, everyone looked happy and they agreed to the proposal", Mr Hassan said from Inaboi, a hostel in Kupang, Indonesia, where the asylum seekers are being detained.⁷

1.12 On 13 June the Australian Broadcasting Corporation (ABC) reported that the Indonesian foreign minister, Her Excellency Retno Marsudi, had raised the matter with Australia's ambassador in Jakarta, Mr Paul Grigson. Ms Marsudi stated that Mr Grigson 'promised to take my question, my inquiry, to Canberra and he promised to get back to me again'.⁸ *The Guardian* reported the same day that Indonesia had also launched its own investigation into the claims. An Indonesian foreign ministry spokesperson stated that if reports the navy paid people-smugglers were true, 'it would be a new low for the way the government of Australia handles the situation on irregular migration'.⁹

1.13 A report from the ABC on 17 June 2015 revealed details of documents obtained by the ABC from the Indonesian police, following its investigation of the alleged incident.¹⁰ The Indonesian police documents reportedly revealed that interviews with six witnesses as well as the captain and crew of the boat had elicited the following details:

- the boat departed from the coast of West Java on 5 May 2015, headed towards New Zealand, with 65 asylum seekers and five crew on board. The passengers comprised 54 Sri Lankans, 10 Bangladeshis and one person from Myanmar, including four women (one of whom was pregnant) and three children;
- the boat was stopped near East Timor, allegedly in international waters, by an 'Australian Customs' vessel, and those on board were warned that they could not enter Australian waters, before they were released and continued towards Australian waters for about four days;
- the boat was stopped again, allegedly in international waters, and detained by personnel from a Customs boat and a Royal Australian Navy (RAN) ship. Following discussion between Australian Customs personnel and the captain

7 Jewel Topsfield, Sarah Whyte and Karuni Rompies, 'Australian officials paid people smugglers to turn back to Indonesia, says police chief', *Sydney Morning Herald*, 10 June 2015.

8 ABC/Reuters, 'Asylum seekers: Indonesian foreign minister wants answers over allegations Australia paid people smugglers', *ABC News*, 13 June 2015, available: <http://www.abc.net.au/news/2015-06-13/indonesian-fm-wants-answers-over-smuggling-pay-allegations/6544206> (accessed 2 July 2015).

9 *The Guardian*, 'Australia has hit "new low" amid claims of payment to people smugglers', *The Guardian*, 13 June 2015, available: <http://www.theguardian.com/australia-news/2015/jun/13/pressure-on-abbott-over-claims-people-smugglers-were-paid-to-turn-back-boats> (accessed 2 July 2015).

10 George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, available: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> (accessed 29 July 2015).

of the boat, during which the captain was told the boat could not reach New Zealand because of its condition and the waves, an agreement was allegedly struck that the boat would be secured and escorted to Australian waters by Customs and the RAN;

- following four days' further journey, having arrived in Australian waters, those on the boat were registered and identified by the Customs officials. Some of the asylum seekers boarded the Customs ship, at their request. 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 board the RAN ship;
- [some days later] two wooden boats belonging to Australia, called *Jasmine* and *Kanak*, were provided and the group was split in two and transferred to the boats, with three crew on each. They were given lifejackets, a map and directions to Rote Island (near West Timor), food and other supplies;
- it was at this point that the captain was allegedly given as much as US\$6,000 while members of 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, 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;
- at about 5:00pm on 31 May, *Kanak* crashed onto a reef at Landu Island, near Rote Island, with some people jumping from the boat and swimming ashore to the nearest village, and locals then helping to evacuate the rest of the asylum seekers from the stricken boat;
- according to local people, the crew fled to Rote Island but at around 9:00pm police arrested the six crew members. They were in custody, each facing a potential maximum of 15 years' imprisonment and up to 1.5 billion rupiah (approximately AU\$145,000) in fines. The 65 asylum seekers were detained by immigration authorities at a hotel in Kupang, West Timor.¹¹

1.14 On 17 June 2016, *The Australian* newspaper reported that payment to the boat crew in the alleged incident was facilitated by an Australian Secret Intelligence Service (ASIS) officer dressed in civilian clothes, aboard the RAN vessel *HMAS Wollongong*. The article stated that the asylum seeker boat was 'deemed unsafe'

11 George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> (accessed 29 July 2015).

because it was 'leaking and judged to be in danger of sinking...and its engine was also malfunctioning'.¹²

1.15 *The Australian* observed that '[t]he revelation that the boat was judged unseaworthy does not explain the mystery as to why payments were allegedly made to up to six of the boat's crew'.¹³ The article noted that the Australian government had refused to confirm the payment or disclose any aspect of the incident.¹⁴

1.16 A further article in the *Australian* on 18 June, citing an unnamed source, reported that:

The Australian Secret Intelligence Service is believed to have offered financial incentives to the crews of asylum-seeker boats several times in the past to persuade them to turn their vessels back to Indonesia.

But unlike the upfront payments allegedly made to the crew of an asylum boat last month, the previous payments were made discreetly, and only after the asylum-seekers were returned to Indonesia.

...

It is understood that there is no fixed practice of offering payment to the crews of asylum-seeker boats, but that the option is employed on a case-by-case basis if it is believed it will help to turn the boat around.¹⁵

1.17 The article referenced comments made by the asylum seeker boat captain to Indonesian media that the boats provided by Australia for the return journey were unseaworthy and had insufficient fuel, but stated that 'sources in Canberra' rejected those claims, saying the boats were provided with enough fuel and escorted safely by the Australian ships back to Indonesian waters then tracked by radar until they reached the coast.¹⁶

The government's response to the reports

1.18 At the time of the media reports in June 2015, the Australian Prime Minister and other ministers repeatedly declined to confirm or deny 'operational details' in relation to the alleged incident, including whether or not any payment had been made

12 Cameron Stewart, 'Sinking fears sparked emergency rescue of asylum 'bribes' boat', *The Australian*, 17 June 2015, p. 1.

13 Cameron Stewart, 'Sinking fears sparked emergency rescue of asylum 'bribes' boat', *The Australian*, 17 June 2015, p. 1.

14 Cameron Stewart, 'Sinking fears sparked emergency rescue of asylum 'bribes' boat', *The Australian*, 17 June 2015, p. 1.

15 Cameron Stewart, 'Spies have form in handing cash to asylum crews', *The Australian*, 18 June 2015, p. 1.

16 Cameron Stewart, 'Spies have form in handing cash to asylum crews', *The Australian*, 18 June 2015, p. 1.

to the asylum-seeker boat crew.¹⁷ Minister for Immigration and Border Protection the Hon Peter Dutton (the minister) stated that any information would be provided 'at a time which is operationally appropriate'.¹⁸

1.19 In the submission of the Operation Sovereign Borders Joint Agency Task Force (OSB JATF) to this inquiry, dated 30 July 2015, Major General Andrew Bottrell, CSC and Bar, DSM, Commander OSB JATF provided the following information, which he said had been deemed to be 'no longer operationally sensitive':

In late May 2015, a vessel was observed by, then, Border Protection Command assets north of Australia operating in poor weather conditions, which were rapidly deteriorating. The Master of the vessel indicated they were experiencing difficulty and requested assistance. Border Protection Command assets rendered immediate assistance in accordance with our international safety [of] life at sea obligations and assisted the safe return of the people to Indonesia.

I believe our actions to assist this vessel were necessary to preserve the safety of life of those on board. The officers on board the Border Protection Command vessels operated in dangerous sea conditions to render assistance to the distressed vessel.¹⁹

Consideration by the Senate

1.20 On 16 June 2015, the Senate agreed to an order for the production of documents moved by Senator Hanson-Young, requiring that:

- (a) there be laid on the table by the Assistant Minister for Immigration and Border Protection, by 3 pm on 17 June 2015, all documents containing information pertaining to:
 - (i) any money paid to anyone on board a vessel en route to Australia or New Zealand by any Customs, Immigration or other Commonwealth officer from September 2013 to date, and
 - (ii) the facilitation or authorisation of the payment of any money to anyone on board a vessel en route to Australia or New Zealand by any Customs, Immigration or other Commonwealth officer from September 2013 to date, and

17 See Emma Griffiths, 'Tony Abbott, Julie Bishop and Peter Dutton refuse to answer Opposition questions about paying people smugglers', *ABC News*, 15 June 2015, available at: <http://www.abc.net.au/news/2015-06-15/people-smugglers-abbott-bishop-dutton-refuse-discuss-payments/6547224> (accessed 29 September 2015).

18 'Tony Abbott rebuffs Indonesian questions on alleged cash payments to people smugglers', *ABC News*, 15 June 2015, available at: <http://www.abc.net.au/news/2015-06-14/abbott-dodges-questions-again-about-boat-turn-back-claims/6544558> (accessed 20 April 2016).

19 *Submission 9*, p. 2.

in relation to any such payment, a document containing information pertaining to the details of the interception of the vessel, the amount of money paid, to whom and for what purpose; and

- (b) there be laid on the table by the Assistant Minister for Immigration and Border Protection, by 3 pm on 17 June 2015, any documents produced by the office of the Minister for Immigration and Border Protection, the Department of Immigration and Border Protection or the Australian Customs and Border Protection Service regarding;
- (i) the interception of a vessel en route to Australia or New Zealand in May 2015,
 - (ii) any orders to turn back or take back that vessel, its passengers or crew,
 - (iii) any payments made to the vessel's captain, crew or passengers, and
 - (iv) any payments made in relation to the passage of the vessel, its passengers or crew.²⁰

1.21 On 17 June 2015, Senator the Hon Michaelia Cash, then Assistant Minister for Immigration and Border Protection, tabled a letter from herself attaching a letter from the minister, to the Clerk of the Senate, in response to the order for the production of documents.²¹

1.22 In his letter, the minister submitted that the requested documents should be withheld from the Senate on public interest immunity grounds. He stated that the documents requested related to operational matters, which should not be disclosed because:

- they would, or could reasonably be expected to, cause damage to national security, defence, or international relations, including disclosure of documents or information obtained in confidence from other governments; and
- they contained material relating to law enforcement or the protection of public safety which would, or could reasonably be expected to:
 - prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance;
 - endanger the life or physical safety of any person;
 - disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;

20 *Journals of the Senate* No. 96, 16 June 2015, pp 2665-2666.

21 *Journals of the Senate* No. 97, 17 June 2015, p. 2680.

-
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety.²²

1.23 The minister's letter stated more specifically that the requested documents may disclose information which revealed the location, capacity, patrol and tactical routines relevant to Australian Defence Force and Customs and Border Protection vessels and aviation assets, undermining the tactical advantage of civil maritime surveillance assets over people smugglers and the ability of Australia to protect people from the practices of people smugglers and other serious criminal activities.²³ The minister further stated that such disclosure would 'enable an exploitation of confidential methodology and processes used by Australian Defence Force and Australian Customs and Border Protection vessels and assets'.²⁴

1.24 In relation to the impact on Australia's foreign relations, the letter stated that the confidentiality of communications between Australia and other sovereign states 'could not be maintained where the protection of material recording such communications could not be assured'. In addition, the minister submitted that disclosure of information relating to the handling of illegal maritime arrivals would cause serious damage to international relations between Australia and regional partners including Indonesia and Papua New Guinea by undermining international cooperation on these matters, and 'further increas[ing] the tactical advantage of people smugglers and consequently increas[ing] the risk to the wellbeing' of illegal maritime arrivals.²⁵

1.25 The full text of the minister's letter is at Appendix 4.

1.26 On 22 June 2015, on the motion of Senator Hanson-Young, the Senate resolved that it:

does not accept the claim of public interest immunity made by the Assistant Minister for Immigration and Border Protection in failing to provide the documents that were ordered by the Senate on 16 June 2015, namely, all documents relating to the payment of money to turn back or take back vessels bound for Australia and New Zealand.²⁶

22 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, pp 2-3.

23 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, p. 3.

24 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, p. 3.

25 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, pp 3-4.

26 *Journals of the Senate* No. 99, 22 June 2015, p. 2746.

Chapter 2

Seeking the facts

2.1 This chapter examines the evidence obtained by the committee in relation to the factual circumstances of the reported incident of May 2015, and other alleged occurrences of the payment of people smugglers by the Australian government.

What happened in May 2015? Conflicting versions of events

2.2 The majority of submissions made to the committee's inquiry were unable to offer any insight into what actually occurred in the May 2015 incident, beyond the media reporting and the information released publicly by Indonesian authorities discussed in chapter 1.

2.3 The only participants in the inquiry who offered evidence about the facts of the May 2015 incident were the government and Amnesty International. Two further submissions offered information and views alleging a previous history of payments to people smugglers by the Australian government.

2.4 The committee notes that it invited the Government of the Republic of Indonesia (through the Indonesian Ambassador to Australia) to provide evidence to the inquiry, but it declined to do so. The committee also requested evidence from a number of specific Australian government representatives and agencies, including the Australian Secret Intelligence Service (ASIS) and the Royal Australian Navy (RAN). These also declined to engage directly with the committee, referring the committee to the Operation Sovereign Borders Joint Agency Task Force (OSB JATF).

The Amnesty report

2.5 The report provided to the committee and published by Amnesty International in October 2015 (the Amnesty report) set out details of that organisation's own investigation into 'Australia's abuse of asylum seekers at sea', including the May 2015 incident.¹ Amnesty's research, conducted between August and October 2015, included interviews with the 65 asylum-seekers and six crew members on board the vessel allegedly intercepted by Australian authorities in May 2015, as well as Indonesian police and government officials.

2.6 Amnesty International reported that the participants it interviewed consistently offered the following account of events:

- two Australian ships intercepted the asylum seeker boat a first time on 17 May 2015, in international waters. The boat was boarded without permission by six uniformed Australian Border Force (ABF) personnel, who inspected and took photographs on board, then disembarked, leaving leaflets with the passengers and crew which stated that they could never enter Australian waters;

1 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, October 2015, provided to the committee as additional information, received 29 October 2015.

- the two Australian ships continued to follow the boat for several days;
- on 22 May 2015, the boat was intercepted a second time. The crew believed they were in Indonesian waters at the time, while the Australian officials claimed they were in international waters. Eight Australian personnel boarded the boat and took its captain back to their vessel for several hours. The captain told Amnesty that an Australian officer on board the vessel told him that the Australians were worried about the boat and offered to take the passengers to Australia, and the crew by plane back to Indonesia;
- that evening, the captain returned to the boat, accompanied by eight RAN personnel. That night, according to the passengers, the adult male passengers were kept outside the cabin by armed Australian personnel, in very hard rain with no protection from the elements. Some were sick and vomiting but were prevented from going inside the cabin. No passengers (including the women inside the cabin) were given any food that night;
- the asylum seeker boat was escorted by the Australian ships to waters off Greenhill Island, an Australian territory near Darwin, where all the passengers and crew were interviewed and photographed by Australian officials. The asylum seekers were told that if they boarded the ABF ship, they would be permitted to bathe. Fifty passengers agreed to board the ship, while fifteen remained on their boat;
- it was at this time, on the original boat, that Australian officials gave money to the crew. Crew members told Amnesty International that two of them received US\$6000 each, and the other four US\$5000 each. It was not clear why the amounts differed. The payment was witnessed by at least one of the fifteen passengers who had remained on their boat;
- meanwhile, the 50 passengers who had boarded the ABF ship were detained there for what they estimated to be seven days, and 'subjected to various forms of ill-treatment' including being held in small, hot and airless 'cells' with 25 persons in each and no fans or windows, the confiscation of all their belongings including phones and food; and denial of medicines and medical care, despite the presence of a doctor on board;
- following the transfer of some further passengers from the original boat to the ABF ship, and the travel of the entire convoy to Ashmore Reef, a RAN officer informed the crew that they and the passengers would all be returning to Indonesia, on different boats;
- early on the morning of 31 May 2015, the asylum seekers and the crew were divided and transferred on to two Australian-supplied boats, the *Kanak* and the *Jasmine*. The crew described the condition of these boats as 'okay', but not as good as the original boat (they were small, with no toilets) and stated that the party was provided with no food, and with very little fuel – only one drum per boat. The crew stated that the Australian officials gave them a global positioning system (GPS) and marked maps, and instructed them to land on Rote Island, in Indonesian territory;

- the boats were escorted for a few hours by the Australian ships, which then departed. A few hours later, the *Jasmine* ran out of fuel, and the crew members transferred all the passengers to the *Kanak*. A few hours later, close to Landu Island in Indonesia, the 'overcrowded' *Kanak* struck a reef. Local people rescued those on board and took them to shore.²

2.7 Amnesty told the committee that '[a]ll of the people we interviewed denied they were in distress',³ and said that the evidence gathered by it 'points to Australian officials intercepting and boarding a vessel in international waters without permission'.⁴ Amnesty stated that:

Despite claims that this operation was there for the safety of the people who were supposedly rescued according to the government, we have highlighted that the individuals say they were never at risk and never put out a distress signal.⁵

2.8 With regard to the alleged payment made to the crew, the Amnesty report stated that the Indonesian police had confirmed publicly, as well as to Amnesty, that US\$32,000 in cash had been confiscated from the boat crew upon their apprehension in Indonesia. Amnesty's researchers had sighted the money, described as 'dozens of new-looking 100 USD bills' and a document listing the serial numbers of the bills.⁶

2.9 Amnesty stated that the circumstances of its interviews 'made it challenging to determine the precise understanding that was reached' in relation to the payment. The boat's captain stated that he believed when he first received the money that it was 'to start a new life', as the crew were told they would be flown back to Indonesia.⁷

2.10 At the committee's public hearing, Amnesty reiterated these findings, and elaborated on them. Amnesty stated that:

...the report goes into the detail of how it was witnessed by the passengers—one passenger, in particular, who we interviewed, witnessed money changing hands. We also have the testimony from the crew—who were obviously very distressed about the fact that they were not going to get any material gain, having been intercepted by the Australians—that they were told that they would be given this money and, initially, they were told that the passengers would be taken to Australia and they would be flown back to Indonesia. Subsequently they were told that, no, they would have

2 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 14-20.

3 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 13.

4 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 10.

5 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 13.

6 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 18.

7 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 18-19.

passenger ships that had been brought by the Australian government, not their initial ship...

...

[The crew] made it very clear that this was the money the Australian government was giving to them to take these vessels back. The mood changed quite significantly, as outlined in our report, and they were very clear on what the money was being provided to them for.⁸

2.11 At the time of publication of the Amnesty report in October 2015, the crew of the boat had been charged with a number of offences under Indonesian law and were in custody awaiting trial.⁹ At the committee's hearing in February 2016, Amnesty advised that in January 2016 the captain and crew had been fined and sentenced to jail terms of over five years for their role in the people smuggling incident of May 2015. Amnesty stated that the court cited the receipt of money from 'Australian Customs' as proof that the defendants derived a profit from people smuggling.¹⁰

2.12 Beyond the question of payments, Amnesty was of the view that the Australian Government had shown disregard for the safety and wellbeing of the asylum seekers in the way it handled the incident. In relation to the boats and equipment provided for the group's return to Indonesia, Refugee Coordinator Dr Graham Thom stated that:

If we get to the point of 'safe return', it is quite clear that it was not a safe return. The evidence is very clear that one of the boats ran out of fuel on the high seas, that the passengers then had to change ships [*sic*] completely unaided. They had been abandoned by the Australians at that point in time. We know from the Indonesian authorities that we interviewed that the boat ran ashore, and it was very risky—the Indonesian officials have used words like 'suicide mission'—so this is very serious and very much at odds...there are clearly contradictions there that we think need to be investigated in an open way.¹¹

2.13 Amnesty told the committee that it had video footage of the transfer of the asylum seekers from the *Jasmine* to the *Kanak* at sea, which it described as 'very chaotic', leaving the single remaining boat 'dangerously overcrowded'.¹²

2.14 Amnesty advised the committee that it had shared its findings with the Australian Federal Police (AFP), and understood that the information was being evaluated by the AFP. Amnesty also stated that it had:

received correspondence from the immigration minister in response to our report, denying that any ill-treatment occurred but stating that any

8 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 13.

9 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 21.

10 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

11 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 16.

12 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

allegations of mistreatment are taken seriously and will be assessed. We are unsure whether such an assessment has taken place.¹³

The government's version

2.15 As discussed in chapter 1, in the period immediately following the reported incident in May 2015, the government refused to provide any information about it, and declined to confirm or deny that money was paid to the boat crew by the government.

2.16 Subsequently, in its submission to this inquiry in July 2015, OSB JATF provided a few sentences of new information about the alleged events. As quoted in chapter 1 above, the submission stated that the vessel had been observed by Australian border protection assets experiencing difficulty in poor and deteriorating weather conditions, and the master of the vessel had requested assistance. Australian authorities had 'assisted the safe return of the people to Indonesia' in accordance with Australia's safety of life at sea (SOLAS) obligations.¹⁴

2.17 At the committee's public hearing on 5 February 2016, Major-General Andrew Bottrell, the Commander of OSB JATF, added that:

The prevailing weather conditions at the time were rough and were forecast to deteriorate significantly, which was a particular concern of mine. Had the vessel master not sought our assistance when he did so, I held serious concerns for the continued safety of all on board. Following the provision of initial assistance, all passengers and crew were assisted in a safe return to Indonesia on alternative vessels, as their vessel was no longer suitable.¹⁵

2.18 Major-General Bottrell stated that his 'primary concern' was 'the prevailing weather conditions that were about to hit them over the coming days'.¹⁶ He said that:

We know, for example, that many of the crews of people-smuggling vessels are under considerable pressure from the organisers back in their departure countries to complete their voyages, regardless of the state of their vessels or the prevailing weather conditions. The extent to which they have knowingly or unknowingly risked their lives and, by extension, the lives of their even more vulnerable passengers is shocking.¹⁷

2.19 There was only one element of the incident upon which the government was willing to provide more information at the committee's public hearing. In response to allegations in the Amnesty report that asylum seekers were forced to stay out all night on the deck of their vessel in the rain, while Australian officials stayed in the cabin, Major-General Bottrell stated that:

13 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

14 Operation Sovereign Borders Joint Agency Task Force, *Submission 9*, p. 2.

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

16 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 26.

17 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 23.

I specifically went back and looked at the allegation that we had placed people on the deck overnight, and yes that did occur. I will explain that it was for a very real and very practical reason. The vessel was in sea state 5, so we are talking winds of up to 21 knots and waves of up to two metres. We had put a steaming party on board—and I will not describe the makeup of that—but we had put some Australian personnel on board that vessel. The seas were too rough to be able to extract the people off that vessel. Those individuals, the passengers and crew, were put on the deck. We provided them with life jackets, because if that vessel then went down it was easier to rescue them from the deck of the vessel, as opposed to if they were below decks. So, we had individuals who were below deck trying to maintain their engine and elsewhere on the vessel. That is about all I can explain.

The first and overriding concern of the Australian vessel master was for the provision of their life. Life and the safety of life was the first concern. Subsequent comforts and life support were provided when the weather had improved and when we had transferred them to other vessels. That is about all I can explain under those circumstances, but it should give you some sense that the safety of the individuals was the first and overriding concern and why specific actions were taken. I know they were reported as an allegation, but that perhaps provides some context as to why those actions occurred.¹⁸

2.20 Major-General Bottrell told the committee that he had deemed that particular information to be no longer operationally sensitive, because 'providing that information now will not undermine our ability to use that approach in the future' if a 'genuine' SOLAS issue arose.¹⁹

2.21 The government's senior representatives repeatedly refused to confirm or deny to the committee whether payments had been made to the crew of the boat. When invited to simply refute the allegation that this had occurred, without divulging any operational details, the government maintained its refusal. Secretary of the Department of Immigration and Border Protection (the department), Mr Michael Pezzullo, stated that the government was 'neither confirming or denying it; we are just simply not commenting on it'.²⁰

2.22 Major-General Bottrell sought to explain the rationale for this position, referring to the grounds of public interest immunity claimed by the minister:

Material the disclosure of which could reasonably be expected to cause damage to national security, defence or international relations, including the disclosure of documents or information obtained in confidence from other governments—that is one. There are a number of others that I could refer to more broadly. Any and all engagements that we undertake as part of a

18 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 32.

19 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 32.

20 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 28.

return that may give people smugglers a sense that they have a better understanding of our tactics will not be discussed here today.²¹

2.23 The government representatives nevertheless sought to assure the committee that all of the actions that had taken place during that incident were both lawful, and authorised by government policy:

Setting aside any particular operational method, because neither General Bottrell nor I can confirm or deny that any such activities took place, for reasons that have been explained previously; but any operational method, tactic, technique, manoeuvre, procedure is conducted within the auspices of the Operation Sovereign Borders policy, yes—and then, obviously, within the further framing reference of applicable legislation, be it the Migration Act, the Maritime Powers Act or other acts of parliament.²²

2.24 The government advised the committee that it had undertaken an internal investigation into the allegations of mistreatment of asylum-seekers raised in the Amnesty report, by way of reference to the Integrity and Professional Standards Branch of the department. As of February 2016, some initial findings had been made, but the investigation had not been completed.²³

2.25 Mr Pezzullo said that the department's internal investigation 'did not go to the issue of alleged payments, because there is nothing to investigate', although this was not to be interpreted as a statement that the payments did not happen, which Mr Pezzullo again refused to confirm or deny.²⁴

Was this an anomalous event?

2.26 The committee received two submissions alleging that the reported payment of people smugglers by the Government of Australia in May 2015 was not an isolated incident.²⁵ Researcher Ms Marg Hutton asserted that '[f]or at least 15 years, Australian officials have paid money to people involved with people-smuggling. While she stated that these payments were 'usually in exchange for information', Ms Hutton submitted, citing previous Senate debate on people smuggling issues, that:

There have long been questions about what is being done in Australia's name to stop asylum seeker boats—that it has been done under the cloak of secrecy; that Australian Federal Police (AFP) and Australian Secret Intelligence Service (ASIS) "sailed close to the wind in Indonesia" and that it has been difficult for parliamentarians to find out what is being done by Australian officials to combat people smuggling.²⁶

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

22 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 28.

23 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 30.

24 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 30.

25 Ms Marg Hutton, *Submission 4*; Ms Marilyn Shepherd, *Submission 12*.

26 Ms Marg Hutton, *Submission 4*, p. 1 (internal footnotes removed).

2.27 Despite this 'shady fifteen year history of Australia entering into financial arrangements with people smugglers as part of the disruption program', Ms Hutton believed that making 'payments to people smugglers to induce them to turn boats around appears to be a new practice'.²⁷

2.28 Aside from the reported incident in May 2015, Amnesty International's report raised six other incidents brought to light in its research which it argued suggested a 'pattern of...abuse of asylum-seekers by Australian officials' between 2013 and 2015.²⁸

2.29 Five were alleged encounters between December 2013 and mid-2014, and in three of these, witnesses claimed that asylum-seekers were subjected to verbal and/or physical abuse including beatings, use of pepper spray, and violent threats from Australian officials.²⁹ Amnesty stated that although the accounts provided by six witnesses of these incidents were not as detailed as the 2015 incidents, they were consistent with the *modus operandi* of the incidents reported in May 2015 and in July, as noted below.³⁰

2.30 The sixth incident was alleged to have occurred in July 2015. According to Amnesty a boat containing 25 asylum-seekers seeking to travel from Indonesia to Australia was intercepted by two Australian ships on 25 July 2015, and the passengers and crew were made to return to Indonesia.³¹ In interviews with 15 of the passengers, Amnesty was told that the boat was not in good condition and had begun taking on water soon after its departure from Indonesia on 22 or 23 July. Two Australian ships—one ABF and one RAN—arrived alongside the boat on the morning of 25 July, at which point those on board signalled for several hours that the boat was in distress. The ship was boarded by Australian authorities six to eight hours later, and those on board were interviewed, photographed and detained aboard the ABF vessel, for seven days.³²

2.31 According to the passengers, on 1 August 2015 they were transferred on to a boat called the *Harum*, which was similar to their original boat, and sent back toward Rote Island in Indonesia. At this time, the passengers stated, the attitude of the crew had changed, and some reported that the crew had 'two bags' in their possession that they had not had before. When the passengers objected to returning to Indonesia, and

27 Ms Marg Hutton, *Submission 4*, p. 3.

28 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 40.

29 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 28-29.

30 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 28

31 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 25.

32 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 26-27.

threatened to search the two new bags in the crew's possession, the crew sailed back to the RAN vessel, at which time armed Australian officials boarded the boat, ordered them to return and escorted the *Harum* to 'near Kupang'. Passengers reported that the Australian officials told them not to touch the crew's baggage, and threatened that if they returned again, 'we'll shoot you'. The *Harum* ran out of fuel before reaching land but was intercepted by Indonesian police and taken to Tablolong, Indonesia, where the passengers were detained.³³

2.32 In its evidence at the public hearing, Amnesty International said that these reports indicated that 'Australian officials may have made a second secret payment to a boat crew, which is a strong allegation that needs to be examined further'.³⁴

2.33 Amnesty further claimed that:

We know of at least one more pushback, in November [2015], that crashed off the coast of Kupang as well, potentially putting the crew and passengers at risk. The only reason we know about this pushback is that it was spotted off the coast of Christmas Island, where it was visible to onlookers. They could see the pushback occurring. We have no other way of knowing how many other pushbacks have occurred since that time because that information is kept secret.³⁵

Committee view

2.34 The committee has been able to consider several explanations of the incident of May 2015: from the Australian media, Amnesty International and (in part) the Australian government, as well as reported findings of the Indonesian police. There is some common ground in these accounts: there is no doubt that an asylum seeker boat was intercepted by Australian authorities in May 2015 in waters somewhere between Australia and Indonesia, and that Australian authorities ultimately placed the crew and passengers on two alternate boats which returned to Indonesia. This much has been confirmed by the Australian government.

2.35 But key parts of the narrative remain contested. One of these is whether the original asylum seeker boat was in distress and 'rescued' by Australian ships as a matter of humanitarian assistance, or whether an otherwise seaworthy boat was intercepted in international waters and turned around as a deliberate action to prevent it from completing its intended journey to New Zealand.

2.36 The other major unresolved element of the story, central to this inquiry, is whether representatives of the Australian government made cash payments to the captain and crew of the boat—and if so, upon whose authority, and why.

2.37 Due to the government's refusal to provide a full explanation of events, the committee unfortunately finds itself unable to answer these questions. The Australian

33 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 27-28.

34 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

35 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

government's unwillingness to offer any alternative narrative to the largely consistent versions offered by the Australian and Indonesian media, Amnesty International and the Indonesian police and government, may appear to suggest where the truth lies. Nevertheless, it is not possible for this committee, on the basis of the evidence (and lack of evidence) before it, to reach a conclusion on these points.

2.38 What the committee does wish to record is that the various reports of the events involve matters and give rise to allegations of a serious nature. In that light the unwillingness of the government so far to submit to any meaningful accountability in relation to this incident, and particularly its repeated refusal to deny that payments were made, is of concern.

2.39 Evidence received by the committee relating to the legal and policy implications of paying people smugglers to turn back asylum seeker boats is discussed in the following chapter, while issues around transparency and accountability of the executive government to parliament and the people in relation to Operation Sovereign Borders are discussed in chapter 4.

Chapter 3

The legal and policy implications of paying people-smugglers

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

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

Australian law

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

The Migration Act

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

The Criminal Code

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

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

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

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

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

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

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

Commission of offences

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

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

3.12 CLA argued that this had indeed occurred:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In these circumstances, we consider that if Australian officials are found to have committed the offence of people smuggling, the alleged conduct in question also gave rise to a danger of death or serious harm to the asylum seekers on the boat.

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

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

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

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

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

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

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

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

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

Complicity and common purpose

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

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

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

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

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

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

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

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

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

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

Caveats and immunities

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

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

There may well be...serious violations of not only international law but domestic law in Australia, and yet the gatekeeper for whether there is a proper investigation under the ordinary protections of Australian law is the Attorney-General, and that is potentially a serious problem here for obvious reasons, given the potential conflict of interest that arises...

...

The end point of all this—and it is a dramatic consequence—is that Commonwealth officials can be directed to commit serious criminal offences which put people's lives in danger, as we have potentially seen here, and prosecution can be immunised by politicians, by the executive. What this points to is the real potential for an exercise of largely arbitrary power outside of the ordinary legal constraints and ordinary legal scrutiny under the rule of law in our country.¹⁶

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

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

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

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

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

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

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

3.29 Professor Saul advised in his submission that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Civil liability

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

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

International law

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

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

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

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

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

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

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

The Migrant Smuggling Protocol

3.37 The purpose of the Migrant Smuggling Protocol is 'to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants'.²⁹ It defines smuggling of migrants as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.³⁰

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

[P]aying people smugglers to transport asylum seekers to any country they cannot lawfully enter is contrary to the stated purpose of the Protocol... The practical effect of the alleged payment—and any other payments that may have been made in the past under both the current Coalition and the previous Labor government—is the creation of incentives for people smugglers to continue their activities, in the hope that they may also be paid to return their passengers. This clearly undermines the purpose of the Migrant Smuggling Protocol.

...[T]he additional requirement in the Protocol's purpose – that the rights of smuggled migrants be protected – suggests that any action that could result in refoulement or otherwise put asylum seekers' lives or safety at risk would be contrary to the treaty.³¹

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

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

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

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

29 Migrant Smuggling Protocol, Article 2.

30 Migrant Smuggling Protocol, Article 3(a).

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

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

(1) The offence of people smuggling under article 6(1)(a) of the Protocol. Paying the crew to turn back the boat procured the illegal entry of the asylum seekers into Indonesia, in order to obtain the 'material benefit' of directly preventing imminent irregular entry to Australia. A 'material benefit' is not exhaustively defined, is to be interpreted 'understood broadly' to capture motives other than obtaining a financial benefit.

(2) The offence of participating as an accomplice in people smuggling, under article 6(2)(b) of the Protocol. Complicity encompasses conduct that aids, abets or facilitates people smuggling. This could include paying the crew to procure the migrants' illegal entry, where the crew do so for financial benefit. The financial benefit obtained by the crew need not be their exclusive motivation to do so; for instance, threat of prosecution by Australia may also have motivated them.

(3) The offence of organizing or directing other[s] to commit people smuggling, under article 6(2)(c) of the Protocol. The payments, coupled with the Australian naval interdiction of the vessel, a policy of forcible turn backs of boats, and the threat of prosecution unless the crew agreed to Australia's request, could cumulatively amount to organizing or directing the crew to commit people smuggling.³³

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

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

Assuming the allegations are true, the benefit gained by the Commonwealth includes preventing the entry of the vessel and its crew to Australia and the associated perceived political gain of "stopping the boats". There are reasonably strong arguments that these constitute "material benefits" and accordingly that paying people smugglers to smuggle people back to Indonesia in these circumstances would be a breach of the Protocol.³⁵

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

3.44 The Kaldor Centre submitted that:

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

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

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

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

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

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

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

The Refugee Convention and non-refoulement

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

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

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

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

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

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

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

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

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

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

The actions of the Australian authorities in diverting the asylum-seekers to Indonesia are contrary to the object and purpose of the [Refugee Convention], including to assure to refugees the widest possible exercise of their fundamental rights and freedoms, and to deal with the problem of refugees through international cooperation (preamble). Australia has been a party to the Refugees Convention since 1954.

The Convention implicitly requires States Parties to consider the refugee status claims of asylum-seekers who are subject to their control. This involves assessing claims of refugee status in good faith and through a robust determination process. The circumstances of the transaction between Australian authorities and the Indonesian boat crew suggests that no substantive or comprehensive assessment of the asylum-seekers' protection claims were carried out.⁴⁴

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

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

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

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

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

Other international laws

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Indonesian law

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

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

Under public international law, there is a separate question whether Australian officials would enjoy state immunity from the enforcement jurisdiction of foreign criminal courts. Current senior government officials enjoy personal immunity while in office, but this does not extend to lower officials such public servants, including ASIS officers.

State officials also enjoy functional immunity for official acts, but there is uncertainty whether serious violations of international law are exempted, whether because they may not be characterised as 'official acts' or because ratification of specific treaties amounts to a waiver of immunity in respect of a particular crime. On the present facts, it is certainly arguable that Australia's adherence to the Migrant Smuggling Protocol constitutes a waiver of any immunity for Australian officials engaging in smuggling.⁵⁹

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

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

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

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

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

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

...if the Indonesian government...did actually commence criminal proceedings, the Australian government would be compelled, in a sense, to protect its officials by publicly acknowledging the conduct in order to ensure the [foreign state] immunity under international law...

...

...for the international immunity, the case law is clear: in order for an official acting on behalf of the state to gain immunity from prosecution in a foreign state, the government concerned would need to adopt that conduct.⁶⁰

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

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

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

The policy implications of payments for turn backs

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

The impact on bilateral relations between Australia and Indonesia

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

Australia's relationship with Indonesia has already been strained by its policy of boat turnbacks. When Australia breached Indonesian territorial waters six times in the space of two months last year, the Indonesian Government made its displeasure clear, saying in a statement that it "deplores and rejects the violation of its sovereignty and territorial

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

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

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

integrity" and that "any such violation of whatever basis constitutes a serious matter in bilateral relations of the two countries".

Australia has kept turning back boats regardless. Indonesia demanded answers in response to the reports that Australia paid people smugglers to smuggle people into Indonesia, but Australia refused to provide any. This latest incident, and the Government's continued secrecy, undoubtedly further damages our relationship with our close neighbour.⁶³

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

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

Possible negative consequences of providing payments to boat crews

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

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

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

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

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

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

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

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

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

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

Chapter 4

Operation Sovereign Borders: transparency and accountability

4.1 This inquiry had its genesis in the Senate's order for the government to provide information about the alleged incident in May 2015 (as well as any other such incidents), and the government's refusal to do so. The Senate has already rejected the public interest immunity claim made by the minister in that regard; the terms of reference for this inquiry require the committee to consider that claim, and how this stand-off between the executive and the parliament may be addressed.

4.2 In calling for submissions and speaking with witnesses, the committee received evidence of widespread disquiet about the government's secrecy in the face of this particular incident, and more broadly, the lack of transparency and accountability surrounding the conduct of Operation Sovereign Borders.

The minister's public interest immunity claim

4.3 As discussed in chapters 1 and 2 of this report, the government did make a submission to the inquiry. That brief submission provided little substantive information to assist the committee, and instead referred again to the minister's 2015 public interest immunity claim.¹

4.4 A few days prior to the committee's public hearing for this inquiry, the committee received a letter from Minister Dutton. The minister noted the committee's invitations to the Department of Immigration and Border Protection (the department) and the Operation Sovereign Borders Joint Agency Task Force (OSB JATF) to appear at the hearing, and observed that:

the Terms of Reference for the inquiry are such that some information and documents which may be requested are likely to contain information similar in nature to material which was subject to my earlier claim of public interest immunity...

I have reviewed my earlier claim for public interest immunity. I remain of the view that the disclosure of operationally sensitive information pertaining to the activities of Operation Sovereign Borders, and to the allegations of payments in exchange for the turnback of asylum seeker vessels should not be disclosed...²

4.5 The minister reiterated in brief the grounds of his 2015 claim for public interest immunity. The minister's letter did not acknowledge that that claim had already been rejected by the Senate.

1 Operation Sovereign Borders Joint Agency Task Force (OSB JATF), *Submission 9*.

2 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, letter to the committee Chair, received 3 February 2016 (unpublished).

4.6 The committee replied to the minister prior to the hearing, noting that any claim of public interest immunity in response to a request for documents or information made during the course of this committee's inquiry should be made in response to a specific request, stating the grounds for the claim. The letter also noted that the committee was empowered to receive documents and information *in camera*.³

4.7 The government was represented at the committee's public hearing on 5 February 2016 by Mr Michael Pezzullo, Secretary of the department, and Major-General Andrew Bottrell, Commander of OSB JATF. At the commencement of their appearance, Mr Pezzullo indicated that the officials would rely on the minister's 2015 public interest immunity claim, as well as a 'longstanding practice' of refusal to disclose intelligence information:

The first point I wish to make, on behalf of the General and myself, is that the committee would be aware of and seized of two letters written to the committee [*sic*] by the Minister for Immigration and Border Protection—one from June 2015 and one, more recently, from January 2016—asserting claims of public interest immunity. They cover, in totality, all of the operational matters that I am sure are of concern and of interest to this committee. As a result of that assertion of the claim of public interest immunity by the minister, we will be severely constrained in what we can disclose in an open session such as this that goes to operational details. Having heard some of the questions and testimonies previously given, I want to respectfully foreshadow to the committee that whilst, of course, you are well within your rights to ask whatever questions you like, we are well within our rights to refer to that claim of immunity by the minister—and we will, most certainly, be doing so.

...

Secondly, in relation to media speculation that has been the subject of matters that are before the committee that relate to potential operations or alleged operations by intelligence services, in addition to the minister's claim of public interest immunity, I foreshadow the longstanding practice—that governments of all persuasions and officials have always observed—of neither confirming nor denying specific intelligence matters. We will, of course, consider each of your questions on their merits, but I can tell you right now that in our answers we will be applying the principle as well.⁴

4.8 Toward the conclusion of the public hearing, members of the committee raised with the government's representatives the possibility of seeking evidence on these matters *in camera*, in order to obviate the government's concerns, as expressed in the minister's public interest immunity claim, about 'operational matters' becoming known to people smugglers. Major-General Bottrell responded that '[g]oing *in camera* does not change my ability to disclose any information based on the minister's public interest immunity claim',⁵ although he did not specify which elements of the claim

3 Senator Glenn Lazarus, letter to the Hon Peter Dutton MP, 4 February 2016 (unpublished).

4 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 22.

5 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 33.

would be relied upon in that circumstance. While the officials acknowledged that this was ultimately a matter for the minister, Mr Pezzullo advised the committee that '[m]y advice to the minister would be that [going *in camera*] would not change the circumstances in any event'.⁶

Concerns of submitters

4.9 A number of submitters were critical of the public interest immunity claim made by the minister in 2015, and more broadly, viewed the government's public statements on this issue as evidencing an unacceptable lack of transparency and accountability for the conduct of serious and potentially illegal activities.

4.10 The Human Rights Law Centre (HRLC) argued that :

The current government's refusal to discuss "operational matters" impairs the ability of both the Australian legal system and the Australian people to properly evaluate government conduct.

There is no justification for the continued secrecy around these issues. If the government authorised the payment of taxpayer funds for this purpose, it should disclose this and explain how it believes the payments are lawful and in the national interest. If the Government did not make the payments, it should confirm this as the continued failure to deny the payments acts as an incentive to other people smugglers to seek a similar payment.⁷

4.11 Civil Liberties Australia (CLA) rejected the minister's public interest immunity claim as '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 [by] 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.⁸

4.12 Non-government witnesses at the committee's public hearing also expressed frustration with the unwillingness of the government to accept greater transparency (and consequent accountability) for the events which occurred. During discussion about the possible events under discussion being merely 'allegations', RILC observed

6 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 33.

7 Human Rights Law Centre (HRLC), *Submission 10*, p. 7.

8 Civil Liberties Australia (CLA), *Submission 2*, [p. 10].

that leaving such allegations without investigation was 'unacceptable in a constitutional democracy':⁹

The ordinary way of resolving them is to subject those allegations to proper processes by which we can resolve whether the allegations are true or not. The unconventional way in which to handle allegations is to essentially not allow them to be subject to proper scrutiny, and that is what has occurred.¹⁰

4.13 The Refugee & Immigration Legal Centre (RILC) concluded that:

...the Australian government, the executive, to whom the allegations have been made, has failed consistently to provide any serious or substantial response to the serious allegations. The way in which to further the matter would be for the executive to provide a proper response and one that provides sufficient accountability and disclosure. That has not occurred...

...what we are left with is these very serious allegations of the potential placing of lives at risk, the potential serious breaches of law and an executive saying, 'Just trust us, just leave it to us.' I am sorry to say that, under the rule of law, that is a wholly unsatisfactory response.¹¹

Operation Sovereign Borders and executive accountability

4.14 Beyond the particular incident of May 2015, submitters and witnesses expressed serious concern about the overall climate of secrecy surrounding Operation Sovereign Borders, and the commensurate lack of oversight and accountability in this area of government activity.

4.15 Dr Cassimatis and Ms Drummond argued that:

The Australian government's response to these issues...raises concerns regarding respect for the rule of law nationally and internationally. The lack of official information from the Australian government regarding the circumstances surrounding the alleged payments and Australian officials handing over control of asylum seekers to people smugglers also raises serious concerns. Independent oversight is essential to avoid abuse of power and to ensure the protection of the rights of some of the world's most vulnerable human beings.¹²

4.16 UnitingJustice Australia agreed that 'the secrecy associated with so-called "on-water" activities', along with increasing ministerial discretion over these matters, 'threatens the level of accountability required in a robust democracy'.¹³

4.17 RILC proposed a special parliamentary commission to examine the alleged payment incident and related matters:

9 Mr David Manne, *Committee Hansard*, 5 February 2016, p. 8.

10 Mr David Manne, *Committee Hansard*, 5 February 2016, p. 7.

11 Mr David Manne, *Committee Hansard*, 5 February 2016, p. 8.

12 Dr Cassimatis & Ms Drummond, *Submission 8*, p. 19.

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

These matters are profoundly serious; this is about our obligations to people who may well be at risk of persecution and whose lives may well be placed in further danger because of these alleged acts. In the absence, at the moment, of a change in the law, which would allow for proper investigation and potential prosecution under the ordinary legal processes in this country, it seems to me that we also have a potential gap here in accountability mechanisms even in the Parliamentary process, and that is that—unlike, it seems to me, in some other countries, like the US—we do not seem to have appropriate procedures or, indeed, fully use procedures that might be available to have a special commission where there can be a proper investigation of these matters—potentially, in camera if it is claimed by the government that there are sufficiently sensitive matters that need to be examined in camera—for parliamentarians to be able to properly investigate these matters, see the inside evidence and get to the bottom of it...we know that there have been some very serious matters that have been investigated in such a way in special commissions in the US. I think there should be some serious consideration of it, because otherwise we are left with mechanisms which essentially stifle any proper accountability or investigation of these types of matters—matters that are not only about the safety and the lives of people, and that is a critical issue, but also about responsibilities within the international community in these international compacts that we have signed up to.¹⁴

4.18 Dr Emma Larking agreed:

Undoubtedly, there is a heavy responsibility on the executive and on the government to take the matters very seriously and respond with full information. If there is a claim that that information cannot be publicly aired without putting people's lives at risk then, as Mr Manne has suggested, there should be set up a commission or some other body that is capable of assessing what has happened.¹⁵

4.19 More broadly, Amnesty International proposed that:

If Australia is to continue with this pushback policy, and Amnesty International strongly believes it should not, we recommend a mechanism is put in place to ensure independent monitoring of all activities undertaken by Operation Sovereign Borders. That includes any operations to intercept and turn back boats.¹⁶

4.20 Amnesty International's report called for a Royal Commission into Operation Sovereign Borders, 'to investigate and report on allegations of criminal and unlawful acts committed by Australian government officials'; for Australia to ensure effective remedy and reparation to those whose rights were violated in incidents of abuse; and

14 Mr David Manne, *Committee Hansard*, 5 February 2016, p. 7.

15 Dr Emma Larking, *Committee Hansard*, 5 February 2016, p. 8.

16 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

for the government to 'overhaul its approach to asylum-seekers and refugees arriving by boat', making a number of specific recommendations in that regard.¹⁷

4.21 Amnesty elaborated at the committee's public hearing:

What we are concerned about is what tactics are being used to convince the crew and the passengers to sail back to Indonesia. What tactics, in terms of Australian law and in terms of international law, are being applied in order to convince people to do this, and is it being done in a way that is lawful. That is why we think there needs to be a royal commission. We also think there needs to be an independent observer on those boats who can make sure that this is occurring in a lawful manner...We are just worried that [payment of people smuggling boat crews] is part of the pattern being adopted by Australian officials in order to implement this policy, and that this policy is taking Australia increasingly to a place where it is breaching not only international law but also Australian law. That is why we think there needs to be a royal commission.¹⁸

4.22 In its submission, OSB JATF sought to justify the government's need to withhold information about Operation Sovereign Borders. The submission stated that:

The Commander of the [JATF] has always been required to balance the public's right to know with the safety of all involved when it comes to the release of information. People smugglers use information about on-water procedures to instruct crew and passengers on how to limit the effectiveness of our procedures, for example, by disrupting lawful boardings. In some cases this has led people to sabotage their own vessel, putting their lives and the lives of Australian officials who attempt to save them at risk.

Public knowledge regarding our maritime operations may lead people to make dangerous assumptions about our maritime assets, and ill-informed judgements about voyage planning, including the selection of the route, crew and vessel. Passengers may be told by people smugglers not to be concerned by the poor state of their vessel, inexperience of their crew, or lack of provisions based on incorrect assumptions about how Australian assets will respond. Public acknowledgement of our techniques and procedures can foster these misconceptions, and has the very real potential to place responders, as well as passengers and crew, in danger.¹⁹

4.23 At the public hearing, Major-General Bottrell elaborated further:

...I fully expect that people smugglers will continue to attempt to use the divergence of views and will continue to peddle misinformation on Australia's policies, operations and tactics to cultivate their illicit trade. In the current environment, working within the Joint Agency Task Force and with our international law-enforcement counterparts, we have information superiority over the people smugglers, which means that we maintain a high

17 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 8.

18 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 19.

19 Operation Sovereign Borders Joint Agency Task Force (OSB JATF), *Submission 9*, p. 2.

degree of situational awareness that enables us to employ a variety of operational responses. It is my intention to keep it this way.²⁰

4.24 At the public hearing committee members discussed in some length with the government's witnesses their concerns about the perceived lack of accountability of the executive government for activities undertaken as part of Operation Sovereign Borders. The government offered repeated assurances to the committee that all of the activities undertaken by the Operation Sovereign Borders task force were legal, but could not go further:

Mr Pezzullo: ...All of the actions undertaken by the Operation Sovereign Borders joint task force are undertaken lawfully.

Senator GALLAGHER: And what is the scrutiny of that? Do we just take your word for it, Mr Pezzullo?

Mr Pezzullo: In this context you are going to have to...²¹

4.25 The government refused to provide any of the legal advice with which it had been furnished, citing 'longstanding practice' of governments not providing such advice to parliamentary committees, but acknowledged to an extent the committee's frustration about the absence of oversight of the executive on these matters:

Your point is well made and well understood. It is always a difficult challenge when agents of the executive undertake activities which are the subject of ministerial oversight and scrutiny. It is very difficult to canvass these matters, obviously, in open session with Senate committees, particularly when claims of public interest immunity are made. I will reiterate several things: one is that the operation itself is under the direct supervision of a minister of the Crown who, in turn, obviously works with his colleagues in terms of general policy. Secondly, each of us is bound by the relevant legislation that is applicable. As you well know, even as creatures of the executive...legislation is also applicable...

...So the scrutiny is, I guess, several-fold: one is that there is a minister of the Crown who oversees the operations in very close detail—and, obviously, nothing is held back from him. As a minister he is entitled to all the information that he needs to do his job to oversee us. Secondly, we give him advice—and, indeed, he seeks that advice—on what we are lawfully permitted to do to give effect to the strategic direction of the government.²²

Committee view

4.26 The committee recognises that even in a democracy, governments must keep certain information out of the public domain. In this case, the government has argued that the integrity of its operations to "stop the boats" and combat people smuggling, and the conduct of its relations with regional partners, require that details of the alleged incident in May 2015, and related issues, be kept secret. However, this does

20 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 23.

21 *Committee Hansard*, 5 February 2016, p. 29.

22 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, pp 29-30.

not address the committee's concerns as to why information could not be discussed at an *in camera* session, particularly in light of the Senate's rejection of the minister's public interest immunity claim.

4.27 The lengthy public interest immunity claim made by the minister to the Senate in June 2015, while citing several purported grounds for immunity, essentially related to the government's concern about two groups of people seeing information about the incidents: people smugglers and foreign governments. Speaking to the government's repeated refusals to even confirm or deny the allegation that payments were made to the boat crew, Major-General Bottrell said that '[t]he issue here is not about the Australian public; the issue that I am primarily concerned about is the people smugglers'.²³

4.28 Based on the above reasoning and on its discussions with the government to date, the committee is not convinced that significant further information relevant to the committee's inquiry could and should not be provided by the government to this committee, utilising the provision to give evidence *in camera* where appropriate. The committee has not yet exhausted its attempts to pursue this with the government, and intends to do so prior to concluding the inquiry.

4.29 More broadly, the committee recognises the concerns expressed by submitters and witnesses, and increasingly being felt in the Australian community, about the secrecy and lack of accountability surrounding the government's conduct of Operation Sovereign Borders. The committee notes the suggestions offered by some for new accountability mechanisms in this regard. The committee is also cognisant of a history of consideration by this committee, other committees and the Senate itself, of issues relating to executive accountability to parliament, including in relation to orders for the production of documents and claims of public interest immunity.

4.30 Allegations of a serious nature have been very publicly aired through media and other reporting of the events of May 2015. These include the possibility that government officials have breached national and international laws, placed innocent people in harm's way, and undermined the government's own border protection policies. These allegations must be subjected to proper scrutiny and accountability. "Trust us, we're the government" is not good enough.

4.31 As one senator remarked during this inquiry:

...what keeps a minister accountable is the parliament, and the parliament is not being kept informed. So how do we do our job to make sure that the executive is kept accountable? What we have going on here—the issue that is raised by this situation—is that we have the government talking to the government, taking legal advice from the government, which then advises the government that what the government is doing is in accordance with government policy. And the job that we are charged to do, which is to keep the government accountable, is not able to be done because of the fact that

23 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 32.

Operation Sovereign Borders is veiled in secrecy and information that will enable us to do our job is not provided.²⁴

4.32 As such, the committee believes that it would be appropriate for this committee, and through it, the Parliament, to give further consideration to how greater oversight and accountability can be achieved in relation to the incident central to this inquiry specifically, and Operation Sovereign Borders more generally, without compromising the level of secrecy necessary for effective border security. The committee has not yet fully explored this area of its inquiry.

4.33 The committee intends to continue its inquiry in this direction, but recognises that the impending national election may interrupt that effort before the committee is able to conclude. Should this occur, the committee strongly recommends to the new Senate that it refer this matter anew, and that a future committee draw upon this interim report to continue the inquiry and to reach final conclusions and recommendations, particularly on the matters raised in this chapter.

4.34 In that regard, should a new committee take up the inquiry, this committee urges it to pursue efforts to obtain evidence from the government *in camera*, noting the need for greater executive accountability to the parliament in relation to these matters, and that the Senate has already rejected the minister's previous public interest immunity claim.

Recommendation 1

4.35 The committee recommends that, should it be unable to complete its inquiry prior to the 2016 national election, the Senate refer this matter, in the same terms, to the Legal and Constitutional Affairs References committee in the 45th Parliament.

Senator Glenn Lazarus
Chair

24 Senator Katy Gallagher, *Committee Hansard*, 5 February 2016, p. 30.

Dissenting report of Government Senators

1.1 Government members of the committee do not support the report of the Labor, Greens and Independent majority in the conduct of the 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').

1.2 Government members of the committee are disturbed that the Senate Committee process, which for years has fulfilled its purpose of providing impartial and authoritative reporting to the Parliament, has once again been co-opted to advance the political objectives of the Opposition, the Greens political party and some crossbench senators.

1.3 The inquiry has been based entirely on speculation and was established to provide Greens political party, Independent and Labor Senators with an opportunity to publish unsupported claims of conspiracy theories regarding Operation Sovereign Borders. These claims appear unambiguously designed to deflect attention away from the resounding success of Operation Sovereign Borders.

1.4 On 1 March 2016 the committee sought an extension of the reporting date for the inquiry to 22 June 2016. The committee majority's interim report that is scheduled to be tabled in the Senate on 4 May 2016 seeks to finalise the inquiry based on the evidence taken up to that date. Government Senators note that the evidence before the committee has not been properly tested and that correspondence with the minister regarding the inquiry has not been concluded. As such the inquiry is inherently incomplete and any conclusions that are drawn, or recommendations made, are done without the benefit of the full facts and should therefore be treated with scepticism.

1.5 Government members of the committee also note that the evidence provided by Amnesty International in answers to questions on notice does not offer any certainty on the substance of the questions that were asked. The video submitted does not show any panic at all and shows calm seas, and questions about running aground were not answered with any particularity. In general the answers provided by Amnesty International are evasive and fail to provide detailed analysis which the questions sought.

1.6 The majority report places undue weight on the so-called 'evidence' of Amnesty International which, on a reading of their submission and report, is based on hearsay, assumption and the reports of others. Amnesty conducted interviews of various groups, including criminal people smugglers, and unsurprisingly the alleged conversations with illegal maritime arrivals and criminal people smugglers are self-serving. It can only be assumed that all groups, prior to Amnesty's interviews, were able to converse amongst themselves and resolve to do everything possible to advance their case to settle in Australia outside the normal rules that apply to genuine refugees. In contrast to the questionable evidence provided by illegal maritime arrivals and criminal people smugglers, the evidence given by Major-General Bottrell and other Australian officials has been tested and is far superior to that of illegal arrivals and criminal people smugglers.

1.7 The Government Senators disagree with the content and conclusions of the majority report, and consider both to be based on incomplete, untested and unverifiable speculation. No direct evidence, relevant in time, has been given to the committee by witnesses who are prepared to identify themselves.

1.8 Chapter 3 of the majority report is an exercise in pure speculation regarding the possible legal ramifications of events that have been alleged but not proven. Government Senators are concerned that the resources of the Senate—resources provided by the Australian taxpayer—are being used to pursue pointless and speculative lines of inquiry that are based on inferences, not facts. If Greens Political Party, Opposition or Independent Senators wish to engage in a public relations exercise regarding border protection policies, they should do so on their own time and with their own money.

1.9 The lack of any factual or even persuasive evidence of the events upon which the inquiry was based is highlighted by the fact that the final 'Committee view' section of the majority report quotes an Opposition Senator, not a submission, nor a transcript of evidence nor any other authoritative source.

1.10 Specifically the Government Senators reject the decision of Labor, Greens political party and some crossbench senators not to accept the government's public interest immunity claim and agree that the claim is valid and should be accepted.

1.11 Government Senators agree with the point made at paragraph 2.37 of the report that the committee, because of a lack of evidence, could not make any justifiable conclusion on the principal question referred to the committee.

1.12 The majority report's single recommendation is that, due to the incomplete nature of the inquiry, this same inquiry subject be referred to the Legal and Constitutional Affairs References Committee in the 45th Parliament. Government Senators disagree with this recommendation and instead recommend that the inquiry be abandoned completely and indefinitely. The parliamentary committee process has limited time and limited resources during each parliamentary term and the pursuit of this kind of speculative and wasteful inquiry should be considered reckless and irresponsible. The Senate Estimates process provides a more reliable and effective enquiry for any genuine concerns senators may have in relation to this and any other border protection matters.

Senator the Hon Ian Macdonald
Deputy Chair

Senator Dean Smith
Senator for Western Australia

Labor Senators' additional comments

1.1 Labor Senators support the committee's recommendation that, should it be unable to complete its inquiry prior to the 2016 national election, the Senate refer this matter, in the same terms, to the Legal and Constitutional Affairs References committee in the 45th Parliament.

1.2 The Coalition Government has stubbornly refused to rule out whether it gave cash to criminal people smugglers to turn boats around at sea and this has frustrated the ability of the committee to undertake its appropriate scrutiny role and complete the inquiry.

1.3 The Australian community deserves to be told whether this government has used taxpayers' money to pay people smugglers to turn boats around at sea.

Senator Katy Gallagher
Senator for the Australian Capital Territory

Appendix 1

Public submissions

1. Professor Ben Saul
2. Civil Liberties Australia
3. Andrew & Renata Kaldor Centre for International Refugee Law
4. Ms Marg Hutton
5. Law Council of Australia
6. Professor Hilary Charlesworth, Dr Emma Larking and Ms Jacinta Mulders
7. UnitingJustice Australia
8. Dr Anthony Cassimatis and Ms Catherine Drummond
9. Operation Sovereign Borders Joint Agency Task Force
10. Human Rights Law Centre
11. Refugee & Immigration Legal Centre Inc.
12. Ms Marilyn Shepherd

Appendix 2

Public hearings and witnesses

Friday 5 February 2016—Canberra

BOTTRELL, Major General Andrew, Commander, Joint Agency Task Force, Operation Sovereign Borders, Australian Border Force, Department of Immigration and Border Protection

CASSIMATIS, Prof. Anthony Emanuel, TC Beirne School of Law, University of Queensland

COUSINS, Ms Stephanie, Government Relations Manager, Amnesty International Australia

HANSON, Mr Greg, Solicitor and Registered Migration Agent, Refugee Legal

LARKING, Dr Emma, Private capacity

MANNE, Mr David Thomas, Executive Director, Principal Solicitor and Registered Migration Agent, Refugee Legal

PEZZULLO, Mr Michael, Secretary, Department of Immigration and Border Protection

THOM, Dr Graham, Refugee Coordinator, Amnesty International Australia

Appendix 3

Answers to questions on notice and additional information

Answers to questions on notice

Friday, 5 February 2016 – Canberra

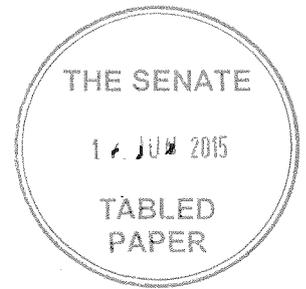
- 1 Department of Immigration and Border Protection - answers to questions taken on notice from public hearing 5 February 2016 (received 22 February 2016)
- 2 Amnesty International Australia - answers to questions taken on notice from public hearing 5 February 2016 (received 3 May 2016)

Additional information

- 1 Additional information from Amnesty International (received 29 October 2015)
- 2 Additional information from Amnesty International – Report: *By hook or by crook* (received 29 October 2015)

Appendix 4

**Minister for Immigration and Border Protection,
*Response to Order for Production of Documents—Vessels
en route to Australia, 17 June 2015***



Senator the Hon Michaelia Cash

ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTION
MINISTER ASSISTING THE PRIME MINISTER FOR WOMEN
SENATOR FOR WESTERN AUSTRALIA

17 June 2015

Ms Rosemary Laing
Clerk of the Senate
Parliament House
Canberra ACT 2600

Dear Clerk

Order for Production of Documents – Vessels en route to Australia

I refer to your letter dated 16 June 2015, regarding the motion agreed to by the Senate in relation to the Tabling of Documents.

Please find enclosed the response provided by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP.

Yours sincerely

Senator the Hon Michaelia Cash
Assistant Minister for Immigration and Border Protection
Minister Assisting the Prime Minister for Women
Senator the Western Australia

- cc. Senator the Hon George Brandis QC, Acting Leader of the Government in the Senate
Senator the Hon Mitch Fifield, Manager of Government Business in the Senate
Senator the Hon Penny Wong, Leader of the Opposition in the Senate
Senator Claire Moore, Manager of Opposition Business in the Senate
Senator Sarah Hanson-Young
Senator Jacqui Lambie
Senator Glenn Lazarus
Senator John Madigan
Senator Nick Xenophon
Senator Bob Day
Senator David Leyonhjelm
Senator Ricky Muir
Senator Zhenya Wang



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Dr Rosemary Laing
Clerk of the Senate
Parliament House
CANBERRA ACT 2600

Dear Dr Laing

I refer to the motion moved on 16 June 2015, in which Senator Hanson-Young moved that:

- (a) *There be laid on the table by the Assistant Minister for Immigration and Border Protection, by 3pm on 17 June 2015, all documents containing information pertaining to:*
- (i) *any money paid to anyone on board a vessel en route to Australia or New Zealand by any Customs, Immigration or other Commonwealth officer from September 2013 to date, and*
 - (ii) *the facilitation or authorisation of the payment of any money to anyone on board a vessel en route to Australia or New Zealand by any Customs, Immigration, ASIS or other Commonwealth officer from September 2013 to date, and in relation to any such payment, a document containing information pertaining to the details of the interception of the vessel, the amount of money paid, to whom and for what purpose; and*
- (b) *there be laid on the table by the Assistant Minister for Immigration and Border Protection, by 3pm on 17 June 2015, any documents produced by the Office of the Minister for Immigration and Border Protection, the Department of Immigration and Border Protection or the Australian Customs and Border Protection Service regarding:*
- (i) *the interception of a vessel en route to Australia or New Zealand in May 2015,*
 - (ii) *any orders to turn back or take back that vessel, its passengers or crew, and*
 - (iii) *any payments made to the vessel's captain, crew or passengers, and;*
 - (iv) *any payments made to the vessels captain, crew or passengers and any payments made in relation to the passage of the vessel, its passengers or crew.*

Regarding the documents for which the notice of motion calls, I submit that such documents should be withheld from the Senate on the following grounds of Public Interest Immunity:

- material the disclosure of which could reasonably be expected to cause damage to national security, defence, or international relations, including disclosure of documents or information obtained in confidence from other governments;
- material relating to law enforcement or protection of public safety which would, or could reasonably be expected to:
 - prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance;
 - endanger the life or physical safety of any person;
 - disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
 - prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

Reasons

The magnitude of the irregular maritime people smuggling problem and the related social and economic damage provides context to this public interest immunity claim. Between the years 2008 and 2013, Australia saw dramatic increases in maritime people smuggling. Annual arrivals rose from 161 illegal maritime arrivals in the 2008 calendar year to 20,720 in the 2013 calendar year. The tragic reality of this escalation was the number of people known to have lost their lives at sea. People smuggling is known to have cost the lives of at least 1,203 people between August 2008 and December 2013. Of these, 1,194 people have lost their lives since October 2009. Those fortunate enough to survive these tragedies at sea face enduring trauma. Many survivors cope with ongoing and significant physical injury.

Conversely, only one people smuggling venture has reached Australian shores since mid-2014. Additionally, there have been no known deaths at sea since December 2013. The confidence of the Australian public in the integrity of Australia's migration programme and the security of our borders has been restored.

The financial cost associated with handling illegal maritime arrivals has decreased over this same period, with the success of Operation Sovereign Borders and its flow-on effects delivering more than half a billion dollars of savings in the 2015-16 Budget. Specifically, the release of the documents requested relate to operational matters, which should not be disclosed for the following reasons of public interest:

- they would, or could reasonably be expected to, cause damage to national security, defence, or international relations, including disclosure of documents or information obtained in confidence from other governments; and
- they contain material relating to law enforcement or the protection of public safety which would, or could reasonably be expected to:
 - prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance;
 - endanger the life or physical safety of any person.

- disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety; or

Specifically, the requested documents may:

- Disclose information which reveals the location, capacity, patrol and tactical routines relevant to Australian Defence Force and Customs and Border Protection vessels and aviation assets. The release of this information:
 - Would undermine the tactical advantage of civil maritime surveillance assets over people smugglers, who may use this information to avoid or trigger detection, or to precipitate a search and rescue response. People smugglers have shown a high level of sophistication when it comes to forward planning and the use of entry corridors when initiating and conducting people smuggling and other serious criminal activities. The provision of information such as that contained in the documents requested will further enhance the knowledge of people smugglers in this context;
 - Would undermine the Commonwealth of Australia's ability to protect vulnerable Illegal Maritime Arrivals from the practices of people smugglers and other serious criminal activities.
 - Would undermine more generally the effectiveness of Border Protection Command assets which seek to maintain maritime security awareness more generally, and in response to a broad range of maritime security threats including the security of oil and gas platforms and the illegal exploitation of natural resources.
- Enable an exploitation of confidential methodology and processes used by Australian Defence Force and Australian Customs and Border Protection vessels and assets. Information about the arrival of ventures, in breach of communications protocols established by Commander JATF, including the timing of arrival, the composition of passengers including ethnicity, sex and age may be used by people smugglers to:
 - Provide 'proof of arrival' and the basis for release of payment for people smuggling ventures;
 - Provide a basis for further positive marketing by people smugglers of illegal transport arrangements
 - Undermine communications strategies aimed at clarifying current policy arrangements for irregular maritime arrivals;
- Impact upon Australia's relations with foreign States. Australia relies heavily on the ability and motivation of neighbouring sovereign States to contribute and cooperate in respect of search and rescue and/or safety of life at sea activities. The confidentiality of communications and information between the Commonwealth and the sovereign States is essential to the candid and collaborative liaison between the respective government agencies that undertake such activities. Such confidentiality could not be maintained where the protection of material recording such communications could not be assured. In addition, information relating to the handling of ventures and IMAs would cause serious damage to international relations between Australia and regional partners including Indonesia and Papua New Guinea in that it:

- Undermines the further development of international agreement and cooperation;
- Undermines the working relationship between operational agencies in relation to safety of life at sea;
- Further increases the tactical advantage of people smugglers and consequently increases the risk to the wellbeing of IMAs.

I reiterate that similar statements have also been made regarding the operational sensitivity of the information by the former Commander of the Joint Agency Taskforce, Lieutenant-General Campbell, and the current Commander, Major General Andrew Bottrell who recently stated before a Senate committee:

“Despite the results achieved under Operation Sovereign Borders to date, people smugglers continue to try to take advantage of vulnerable people by convincing them to get on boats for Australia. They use misinformation or distort available public information to encourage men, women and children to risk their lives at sea.... I intend to maintain the existing protocols established for the release of operational information, which are designed to balance the public's right to know, the safety of all personnel involved and the success of the mission. I do not intend to release details surrounding capacity or tactics relating to on-water operations but will release generic details on returns in monthly updates after they have been completed and when they are no longer operationally sensitive.”

Accordingly the Government does not believe it is in the public interest to release information that may compromise current and future operations under Operation Sovereign Borders that has resulted in a substantial and sustained reduction in maritime ventures and potential illegal immigrants attempting to reach Australia.

Yours sincerely

PETER DUTTON

17/6/15