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Submission to the 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



UnitingJustice Australia is a
unit of the Uniting Church in
Australia Assembly

Introduction

UnitingJustice Australia is the justice policy and advocacy arm of the Uniting Church in Australia. The Uniting Church has been concerned for human rights, particularly of the world's most vulnerable people, since its inception in 1977. In the *Statement to the Nation* made that same year, the Uniting Church promised to seek the correction of injustices wherever they occur, work for the eradication of poverty and racism and oppose all forms of discrimination which infringe basic rights and freedoms.¹ The Uniting Church approaches the issue of asylum seekers and refugees in the context of the Christian call to welcome the stranger, love our neighbours and care for those who are persecuted and vulnerable. The Uniting Church believes that principles of justice and the inherent dignity of all people should underpin Australia's policies, legislation and practices toward asylum seekers, refugees and humanitarian entrants.

The Uniting Church's 2015 statement, *Shelter from the Storm*, sets out a number of important principles for policy responses to asylum seekers including that the Australian Government must help those who arrive on our shores seeking protection and Australia's policies and legislation should reflect a compassionate and informed response to asylum seekers and refugees and a commitment to their rights and safety.² The Church believes that the Government should clearly distinguish these from issues of border protection and security, and from attempts to deal with people smuggling. The Government must be transparent in the implementation of its policies, and open to scrutiny by the courts and media, and to critique and advocacy from civil society.³

We welcome the invitation to comment on the Legal and Constitutional Affairs References Committee's inquiry into 'The payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats' and look forward to the outcome of the inquiry. We are not in a position to comment on whether these actions took place, but instead offer comment on the implications of such actions from a human rights perspective. We will address four of the Terms of Reference.

If representatives of the Commonwealth of Australia were involved in payment of cash or other inducement to people smugglers, such actions would compromise the integrity and reputation of the Australian Government, risk encouraging the people smuggling trade and call into question the Government's true concern for the safety of lives at sea. It is also likely that giving cash payments to people smugglers is against both international law and domestic law.

¹ Uniting Church in Australia, *Statement to the Nation*, 1977, <http://unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation>

² *Shelter from the Storm: A Uniting Church in Australia statement on asylum seeker and refugee policy*, adopted July 2015, unconfirmed minute at time of writing, available on request

³ *ibid*

Legality, under international and domestic law

There are a number of ways that payment of cash or other inducement to people smugglers breaches domestic and international law.

In 2003 the UN General Assembly agreed on a *Convention on Transnational Organised Crime* (the Convention). The Convention is supplemented by three protocols. *The Protocol against the Smuggling of Migrants by Land, Sea and Air* (the Protocol) aims to suppress the people-smuggling trade, while also obliging state parties to protect the rights of smuggled people (Article 2). Australia is a signatory to both the Convention and the Protocol. Article 3 of the Protocol defines 'smuggling of migrants' as:

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.⁴

It would need to be established that the people in the boat were not nationals or permanent residents of Indonesia, and that they had no lawful right to enter Indonesia, and that the crew obtained some financial or other material benefit from the movement of these people. Reports suggest that this was the case.

If representatives of the Australian Government made payments to the crew of a people-smuggling vessel, this would violate Australia's obligations under the Protocol. Paying people smugglers to transport asylum seekers to any country they cannot lawfully enter (i.e. including Indonesia) is contrary to the purpose of the Protocol (Article 2):

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The purpose of this 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.

The practical implication of payments made to people smugglers is an increased incentive for people smugglers to continue their activities, which clearly undermines the purpose of the Protocol.

⁴ UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/479deeo62.html> [accessed 7 July 2015]

The Protocol also indicates (Article 3) that receiving a financial or other material benefit could render the state party (the Australian Government) guilty of engaging in smuggling of migrants. It is possible that the political benefit gained from such actions could be interpreted as a "other material benefit".⁵

Additionally, the incident may have violated the principle of non-refoulement under Article 33 of the Refugee Convention, which prohibits states from sending asylum seekers to any country where they would have a well-founded fear of persecution or face a risk of significant harm. Since Indonesia is not a party to the Refugee Convention and does not have adequate national refugee status determination procedures in place, turning boats back to Indonesia creates an inherent risk of refoulement.⁶

The *Convention on Transnational Organised Crime* obliges member states to establish domestic criminal offences related to smuggling of migrants. Article 6 of the Protocol sets out requirements for states parties to have legislation in place to criminalise the smuggling of people. The *Commonwealth Criminal Code* (CCC) sets out these requirements for Australia. Payments made to people smugglers in exchange for the turn back of boats could be in breach of domestic laws made to criminalise such actions under the CCC. For example, an Australian official could be prosecuted for committing one of the following offences under the CCC:

- a person (the first person) commits an offence if they organise or facilitate the entry of another person (the second person) into a foreign country (whether or not via Australia), where the entry is irregular and the second person is not a citizen of the foreign country (section 73.1). The offence carries a penalty of 10 years imprisonment or a penalty of 1,000 points or both;
- a person commits the aggravated offence of people smuggling if he or she smuggles five or more people into a foreign country (section 73.3). The offence carries a penalty of 20 years imprisonment or 2,000 penalty points or both; and
- a person commits an offence if they provide material support or resources that aids someone to engage in people smuggling (section 73.3A) also carrying a penalty of 10 years imprisonment or 1,000 penalty points or both.^{7, 8}

The *Anti-People Smuggling and Other Measures Act 2010* provides that the person (an Australian official) would be found guilty of an offence under the CCC section 73.3A if they provided material support to aid in people smuggling and were reckless as to the circumstances of that support.⁹

⁵ Kaldor Centre, *In Focus: Paying People Smugglers*, 1 July 2015, <http://www.kaldorcentre.unsw.edu.au/news/focus-paying-people-smugglers-did-australian-government-breach-australian-law>

⁶ *ibid*

⁷ *ibid*

⁸ *Criminal Code Act 1995*, https://www.comlaw.gov.au/Details/C2015C00254/Html/Volume_1#_Toc422320203

⁹ Kaldor Centre, 2015, *op. cit.*

The damage caused to the bilateral relationship between Australia and Indonesia

The Convention requires states parties to enhance mutual co-operation in extradition and law enforcement in relation to smuggling of migrants. The alleged payment of people smugglers to return to Indonesia, without the knowledge or consent of the Indonesian Government, undermines these principles of international cooperation. Specifically, Article 7 of the Protocol requires states to engage in cooperative activities to prevent and disrupt people smuggling.¹⁰ Such actions would likely be seen as Australia acting unilaterally and without proper consultation with neighbours. The report entitled *Beyond the Boats*, the result of a high-level roundtable on refugee policy, reflected similar sentiments - that a track II Dialogue is needed to establish a truly multilateral, durable solution to the situation of asylum seekers arriving by boat.¹¹

A finding that ASIS officials paid Indonesian people smugglers to turn back a boat would further undermine the Australian Government's bilateral relationship with Indonesia. Indonesian officials have indicated that the policy of turning back boats is interfering with Indonesia's sovereignty.¹² There is also concern that Indonesia could prosecute Australian Government officials. Indonesia has ratified the *Transnational Crime Convention* and the *Migrant Smuggling Protocol*, and has legislation in place (Law 6/2011 on Immigration) which could enable it to prosecute Australian government officials for acts aiming to seek advantage from taking someone or a group of people without the right to enter Indonesia. These human smuggling charges are punishable by prison sentences of between 5 and 15 years (Article 120). Assisting illegal migrants is an offence under Article 124 and carries an imprisonment for 2 years and a fine up to AU\$19,500 in Indonesia.¹³

The extent to which such bribes constitute an incentive for people-smuggling operations to Australia

As stated above, the Protocol aims to suppress the people-smuggling trade, while also obliging state parties to protect the rights of smuggled people (Article 2). UnitingJustice is concerned that, contrary to the purpose of the Protocol, the practical effect of an alleged payment is that it would create incentives for people smugglers to continue their activities in the hope they would also be paid to return their passengers.

¹⁰ UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air*, op cit

¹¹ B. Douglas, C. Higgins, A. Keski-Nummi, J. McAdam and T. McLeod, *Beyond the boats: building an asylum and refugee policy for the long term*. Report following high-level roundtable, Australia21, November 2014, <https://cpd.org.au/2014/11/beyond-boats-refugee-report/>

¹² Lateline, *Indonesian MP Tantowi Yahya says Coalition's asylum seeker policy threatens to damage relations*, ABC, 19th September 2013, <http://www.abc.net.au/news/2013-09-19/indonesian-mp-says-turn-back-the-boats-policy-is-offensive-and-/4966934>

¹³ Kaldor Centre, 2015, op. cit.

Any related matters

The Australian Government should be transparent in the implementation of its policies. UnitingJustice is deeply concerned that the secrecy associated with so-called 'on-water' activities, and the increase in decision making power afforded to the Minister for Immigration and Border Protection over the past year threatens the level of government accountability required in a robust democracy.¹⁴

Paying people smugglers to turn back a boat also calls into question the claim that the Government is concerned for the humanitarian needs and safety of asylum seekers.¹⁵ It is just as likely that lives will be lost at sea on the return journey as on the journey over. By taking all means necessary to turn back boats, including the alleged payment of people smugglers to take people back to Indonesia, the Government is trading the human rights and the welfare of vulnerable people for its own political gain and undermining the international protection regime.

¹⁴ *Shelter from the Storm*, op. cit.

¹⁵ A. Maguire, *Is it an offence if Australians pay people smugglers to turn back?*, The Conversation, 11 June 2015, <https://theconversation.com/is-it-an-offence-if-australians-pay-people-smugglers-to-turn-back-43054>

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