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The Parliament of the Commonwealth of Australia

# **Troubled Waters**

**Inquiry into the arrangements surrounding  
crimes committed at sea**

**House of Representatives  
Standing Committee on Social Policy and Legal Affairs**

June 2013  
Canberra

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## Foreword

Australians love to travel, to see new places and experience other cultures. More and more of us are doing this by cruise ship, and cruising is becoming more popular in Australia year after year. Like any other international travel, cruising has its risks, and this inquiry has focussed on preventing crime and accidents from occurring on cruise ships, as well as making sure that justice is served when crimes are committed.

When crimes occur at sea, the results can be profoundly tragic. Most Australians know the name Dianne Brimble because of her horrendous death in 2002, because of the poor response of P&O, operators of the ship on which she died, and because of the subsequent coronial inquiries into persons of interest. Although the industry has cleaned up its act since 2002, there is still more for the Australian Government and industry to do to keep Australians safe on cruise ships.

International law puts limits on what Australia can do as a nation. As a Committee, we are disappointed that the Australian Government cannot do more because of those limits. However, the complexity of international law is no comfort to victims of crime on cruise ships, and neither should it be an excuse for government inaction. We have identified the other ways that the Australian Government can make cruising safer and improve justice for victims of crime on cruises.

I would like to make a special note of thanks to Mark Brimble, the former husband of Dianne Brimble. Mark fought for years to ensure that justice was served for Dianne's death, and he has made an enormous contribution to the safety of all cruise passengers, around the world. He gave valuable assistance to the inquiry, and his evidence has been crucial to the Committee's deliberations and to this report. Mark's tireless and unwavering commitment to justice, and to the safety of all cruise passengers, has been inspirational to many people, and on behalf of all Australians, I thank him for his steadfastness.

This inquiry has highlighted the risks of cruising, and the Committee is convinced that more can be done to keep Australians safe on cruise ships. With increasing numbers taking cruises, the Australian Government must act in every direction to the limits of its capacity, and the industry must commit itself to investing in an even safer cruising environment. Past tragedies have shown us what needs to be done, and I look forward to seeing action to ensure that tragedies and mistakes do not occur again.

**Graham Perrett MP**  
**Chair**



## **Membership of the Committee**

<b>Chair</b>	Mr Graham Perrett MP
<b>Deputy Chair</b>	The Hon. Judi Moylan MP
<b>Members</b>	The Hon. Laurie Ferguson MP (From 22 April 2013) The Hon. Shayne Neumann MP (To 22 April 2013) Ms Michelle Rowland MP Ms Laura Smyth MP The Hon. Dr Sharman Stone MP Mr Ross Vasta MP

## **Committee Secretariat**

<b>Secretary</b>	Dr Anna Dacre
<b>Inquiry Secretary</b>	Mr Thomas Gregory (from 18 March 2013) Ms Natalya Wells (until 8 March 2013)
<b>Senior Researchers</b>	Dr John White Ms Lauren Wilson



## **Terms of reference**

The Committee will inquire into the arrangements surrounding crimes committed at sea, with a focus on crimes against the person.

The Committee will, having regard to the principles of international law:

- (a) examine the effectiveness of current arrangements for the investigation and prosecution of alleged offences under the *Crimes at Sea Act 2000* and the Intergovernmental Agreement–Crimes at Sea 16 November 2000;
- (b) examine the cross jurisdictional issues that face the States, Territories and the Commonwealth, including the overlap of various coronial jurisdictions;
- (c) consider whether improvements could be made in relation to the reporting, investigation and prosecution of alleged crimes committed at sea; and
- (d) examine support available to victims of crime committed at sea.







## List of abbreviations

ASA	Australian Shipowners Association
CCTV	Closed-circuit television
CLIA	Cruise Lines International Association
CDPP	Commonwealth Director of Public Prosecutions
DFAT	Department of Foreign Affairs and Trade
FBI	Federal Bureau of Investigation (USA)
Government Response	The Government Response to the recommendations of the NSW Coroner's inquiry into the death of Ms Dianne Brimble
ICVA	International Cruise Victims Association
IMO	International Maritime Organisation
Intergovernmental Agreement	The Intergovernmental Agreement – Crimes at Sea 2000
Kerry Act	The Cruise Vessel Safety and Security Act 2010 (USA)
Legal Advice	Legal Advice obtained by the Committee from the Australian Government Solicitor relating to 'Imposition of conditions on port access for cruise ships: requirements regarding crimes at sea'

Milledge Recommendations	The NSW Coroner's inquiry into the death of Ms Dianne Brimble
MOB detection	Man-overboard detection systems
NPRCS	National Protocols for Reporting Crimes at Sea
NSWPF	New South Wales Police Force
RSA	Responsible service of alcohol
SA Commissioner	South Australian Commissioner for Victims' Rights
TSB	Territorial sea baseline
UNCLOS	United Nations Convention on the Law of the Sea



## List of recommendations

### Recommendation 1 ..... 20

The Committee recommends that the Australian Institute of Criminology should compile, maintain and publish statistics on crimes committed at sea by or against Australians.

### Recommendation 2 ..... 39

The Committee recommends that the Australian Government dramatically increase its efforts to achieve greater cruise passenger safety and crime prevention strategies within the International Maritime Organisation and other organisations as appropriate, including pursuing cooperative agreement for the following urgent priorities:

- The installation and real-time monitoring of CCTV;
- The installation of 'man-overboard' alarm systems to alert on-board security to passengers going overboard;
- The adoption of reporting protocols analogous to those in the Kerry Act; and
- A Responsible Service of Alcohol code.

### Recommendation 3 ..... 39

The Committee recommends that the Australian Government vote in favour of the *Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected*, at the upcoming International Maritime Organisation Assembly in November 2013.

**Recommendation 4 ..... 61**

The Committee recommends that the Australian Government conduct a comprehensive review and report on cruise vessel operators' liability for cruise tickets purchased in Australia, including Australia's capacity to provide legislative safeguards for Australian consumers.

**Recommendation 5 ..... 61**

The Committee recommends the Australian Government legislate such that all cruise operators must distribute to all cruise passengers, when boarding a cruising vessel at an Australian port, a brochure that provides information on the following:

- What to do in case of an accident or a potential crime being committed on board;
- The rights of passengers in the case of injury or death;
- The numerous jurisdictions that may apply to a vessel that is travelling through numerous national waters and international waters;
- Contact details for cruising operator support services, as well as other support services, such as rape crisis services;
- Contact details for Australian consular assistance throughout the world; and
- Contact details for Australian Police agencies.

**Recommendation 6 ..... 62**

The Committee recommends the Department of Foreign Affairs and Trade provide general safety advice on the *Smartraveller* website about cruising and how passengers may ensure their own safety, as well as providing individual advice on each major cruising operator visiting Australian ports.

**Recommendation 7 ..... 83**

The Committee recommends the Australian Government make vessel operators' use and enforcement of the *IMO Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected* a condition of entry to Australian ports, should the Guidelines be adopted by the IMO Assembly.

**Recommendation 8 ..... 83**

The Committee recommends the Australian Government develop crime scene management protocols (in collaboration with all Australian police forces), with which vessel operators would need to comply in order to access Australian ports.

**Recommendation 9 ..... 84**

The Committee recommends the Australian Government develop and legislate for a mandatory crime at sea reporting scheme, with which vessels would have to comply in order to enter Australian ports. Under such a scheme, reports must be made:

- Of allegations about criminal acts that are crimes under the *Crimes At Sea* Act regime;
- Where the accuser or accused is Australian.

Such reports must be made to an Australian police force *as soon as possible* after a member of the vessel's staff becomes aware of the act or allegation.

**Recommendation 10 ..... 92**

The Committee recommends that the Australian Government, in cooperation with the States, establish a regular timeframe and formal process for reviewing the National Protocols for Reporting Crimes at Sea.

**Recommendation 11 ..... 92**

The Committee recommends that the Australian Government, in cooperation with the States, establish a formal protocol ensuring clarity in the arrangements between the Australian Federal Police and State Coroners.



## Introduction

- 1.1 Almost 700 000 Australians took a cruise in 2012, and the Australian cruising market has been growing strongly for nearly a decade. It is almost five times bigger than it was ten years ago. For most cruising passengers, cruises are a time of relaxation, celebration and adventure. Most Australian cruise passengers expect that the cruising environment reflects Australian social and legal standards, especially as cruising operators have Australian companies and run cruises from Australian ports. However, cruises are an international destination in themselves, and passengers must treat them as such.
- 1.2 On the infrequent occasions that accidents or crimes occur on a cruise, the cruising environment can pose particular challenges to safety and justice. Cruise ships can hold over 5 000 people, and are often a long way from law enforcement. Additionally, establishing which country has jurisdiction to enforce its laws can be extremely complex.
- 1.3 Past crimes and accidents have highlighted the risks of cruising to Australian consumers. The tragic death of Ms Dianne Brimble in 2002<sup>1</sup>, and the recent disappearance overboard of Mr Paul Rossington and Ms Kristen Schroder in May 2013<sup>2</sup> serve as reminders that an accident or crime at sea can be profoundly tragic. This inquiry focusses on the proactive ways that Australian and foreign cruise passengers can be kept safe at sea, on the actions the Australian Government can take to improve safety and justice on cruises, and on the steps that industry and government need to take to ensure that their responses to tragedies are appropriate.

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1 Ms Brimble's death is discussed in Chapter 2.

2 Whilst discussed in this report, the disappearance of Mr Rossington and Ms Schroder is not considered suspicious. It is considered further in Box 2, in Chapter 2.

## Referral of the inquiry

- 1.4 On 11 September 2012, the Attorney General the Hon Nicola Roxon MP asked the Social Policy and Legal Affairs Committee to inquire into the arrangements surrounding crimes committed at sea. The Committee agreed to adopt the terms of reference for the inquiry, as referred by the Attorney General, on Thursday 13 September 2012.
- 1.5 The inquiry was referred to the Committee in the context of the New South Wales Coroner's inquiry into the death of Ms Dianne Brimble, who tragically died in 2002 on board a P&O cruise ship.<sup>3</sup> The recommendations of that coronial inquiry (conducted by Coroner Jacqueline Milledge) will be referred to in this report as 'the Milledge Recommendations'. The Australian Government's response to the recommendations will be referred to as 'the Government response'.
- 1.6 The terms of reference direct the Committee, having regard to the principles of international law, to:
- Examine the effectiveness of current arrangements for the investigation and prosecution of alleged offences under the *Crimes at Sea Act 2000* and the *Intergovernmental Agreement – Crimes at Sea* (made on 16 November 2000);
  - Examine the cross jurisdictional issues that face the States, Territories and the Commonwealth, including the overlap of various coronial jurisdictions;
  - Consider whether improvements could be made in relation to the reporting, investigation and prosecution of alleged crimes committed at sea; and
  - Examine support available to victims of crime committed at sea.

## Scope of inquiry

- 1.7 The terms of reference proposed by the Attorney General were broad in their scope, potentially incorporating a range of illegal activities that occur at sea, such as people smuggling, drug trafficking and piracy.
- 1.8 The Committee resolved to conduct the inquiry with a focus on serious crimes against the person, including fatal, non-fatal and sexual offences. The Committee considered that this narrowed scope is consistent with the intent of the inquiry referral, originating as it does from the coronial

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3 The P&O brand is a part of the Carnival Australia company, which participated in the inquiry.



recommendations following the inquest into the death of Ms Brimble.

- 1.9 The Milledge Recommendations included a number of issues to be taken into account in the Committee's inquiry.<sup>4</sup> These include:
- Issues addressed by the *US Cruise Vessel Safety and Security Act 2010* (the *Kerry Act* – discussed below) and the need to adopt the Act to the specific demographics of Australia;
  - Legislating for the attachment of Australian Federal Police to ships to ensure an appropriate response to crimes;
  - The recommendations made by Mr Mark Brimble and the International Cruise Victims of Australia to the inquest; and
  - The submission made by P&O to the inquest and the reforms undertaken by P&O [part of Carnival Australia].
- 1.10 The Committee examined the above issues during the course of its inquiry.
- 1.11 The *Cruise Vessel Safety and Security Act 2010*, also known as the *Kerry Act*, was passed by the US Congress in 2010. It was the result of a number of congressional hearings into the cruising industry, as well as sustained lobbying by victims' groups. The *Kerry Act* provides for comprehensive regulation of the cruising industry in the USA, and will be discussed in numerous parts of this report.

## Conduct of the inquiry

- 1.12 The inquiry was advertised on the Committee's website, and a call for submissions was made in October 2012. The Committee received 22 submissions and five supplementary submissions, which are listed at Appendix A. These are published on the Committee's website.<sup>5</sup>
- 1.13 The Committee received six exhibits, listed at Appendix B. These are also published on the Committee's website.
- 1.14 The Committee held five public hearings, in Canberra, Brisbane and Sydney, and conducted a site inspection in Sydney. These activities are listed at Appendix C.
- 1.15 The Committee had legal advice prepared by the Australian Government Solicitor (the Legal Advice) relating to Australia's rights under international law in relation to incidents on ships that call at Australian

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4 The Milledge Recommendations, Appendix E.

5 < <http://www.aph.gov.au/spla> >

ports. The advice has been published on the Committee's website, and is included at Appendix D. The decision to obtain Legal Advice is discussed in Chapter 3.

- 1.16 The Committee has decided to publish five additional documents in this report's appendices, to ensure that future consideration of these issues has reliable access to important resources:
- The Milledge Recommendations are included at Appendix E;
  - The Government Response is included at Appendix F;
  - The National Protocols for Reporting Crimes at Sea are included at Appendix G;
  - The Intergovernmental Agreement – Crimes at Sea is included at Appendix H; and
  - Carnival Australia's and Royal Caribbean Cruise Lines' responses to the Committee regarding the flagging of their cruise vessels are included at Appendix I.
- 1.17 The Committee conducted a private hearing with victims and family members of victims of crimes committed at sea. This made a very valuable contribution to the inquiry, and the Committee thanks those individuals who participated for giving their time and sharing their experiences.
- 1.18 The Committee made direct invitations to a number of cruise operators to appear at a public hearing, however only Carnival Australia and Royal Caribbean Cruise Lines were willing to participate in the inquiry. The Committee thanks these companies for their willingness to provide every assistance to the Committee. The Committee especially notes the contribution of Mrs Christine Duffy, from the Cruise Lines International Association, who travelled from the USA to give evidence to the inquiry. The Committee is disappointed that other companies did not contribute to the inquiry. An overriding concern of the inquiry is that the Committee did not receive evidence from other operators, and that as the Australian market grows they could undercut the two major players that have improved their operations in the past decade.

## **Purpose of inquiry**

- 1.19 The coronial inquest into the death of Ms Brimble outlined a number of serious failings in the handling and investigation of the incident that resulted in her death in 2002.
- 1.20 This inquiry is a review of the arrangements that have been put in place since then to ensure that similar failings do not occur again.

- 1.21 This inquiry further reviews the efficacy of arrangements among various Australian jurisdictions for the investigation and prosecution of crimes committed at sea.
- 1.22 In its response to the coronial recommendations, the Australian Government stated that it was of the view that the current arrangements for investigating and prosecuting crimes at sea are appropriate, but considered that 'there is value in the Committee considering whether these arrangements can be improved'.<sup>6</sup>
- 1.23 Accordingly, it is important to note that this inquiry is a review of current arrangements and the scope to strengthen procedures rather than an investigation into the events of 2002.

## Structure of the report

- 1.24 Chapter 2 discusses cruising tourism, which is growing in Australia. In particular, it discusses the global cruising industry, the Australian market and the available crime statistics.
- 1.25 Chapter 3 outlines the interaction of various jurisdictions at sea. It commences with a general discussion of international law and the United Nations Convention on the Law of the Sea (UNCLOS). It then considers Australia's maritime jurisdiction.
- 1.26 Chapter 4 deals with preventing crime and keeping safe at sea. It considers the Milledge Recommendations, the improvements made by cruising operators over the past decade, and other ways to promote safety and prevent crimes at sea. It also discusses the role of consumer information and travel advice in optimising the personal safety of passengers.
- 1.27 Chapter 5 deals with the response to crimes at sea by ship operators. This is divided into three main sections – support and care for crime victims, preservation of the crime scene, and reporting crimes.
- 1.28 Chapter 6 deals with the investigation of crimes committed at sea, primarily by police, and the coroner's inquiries that may result. The Chapter completes the report with the Committee's concluding comments.

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6 Government Response, Appendix F, p. 5.



## Cruise tourism

- 2.1 Cruising is becoming ever-more popular for Australian tourists, with consistent growth in passenger numbers year after year. In 2011 the number of passengers grew by 34 per cent, and in 2012 they grew by an additional 11 per cent. This trend has been sustained over the past decade: with nearly 700 000 passengers in 2012, Australian cruising is now almost six times the size it was in 2002.
- 2.2 Remarkably, the Australian cruising industry has now had eight consecutive years of double-digit growth,<sup>1</sup> and growth is expected to continue. Carnival Australia, a subsidiary of the world's largest cruising company, states that it 'is focussed on seeing more than one million Australians take a cruise holiday by 2020.'<sup>2</sup>
- 2.3 The global industry has also seen healthy growth over the past decade, with an almost doubling of total passenger numbers between 2002 and 2012.<sup>3</sup> Global cruising operators are very active in Australia, and Australia is one of the two fastest growing cruising markets in the world. It can be expected that such growth will attract further attention from the global industry, potentially expanding the number of cruising operators in the Australian market.
- 2.4 Whilst the growth of the industry is well documented, there remains relatively little information about the rate of crimes at sea. The industry prides itself on its image as a safe way to holiday, claiming that it is safer

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1 <http://www.etravelblackboard.com/article/142676/australia-cruising-to-new-heights>, viewed 29 May 2013.

2 Carnival Australia, *About Carnival Australia*, <<http://www.carnivalaustralia.com/about-us/about-carnival-australia.aspx>>, viewed 29 May 2013.

3 Mrs Christine Duffy, Cruise Lines International Association, *Committee Hansard*, 7 February 2013, p. 11; Department of Transport and Regional Services, *Container and Ship Movements through Australian Ports 2004-05 to 2024-25*, 2006, p. 94.

to be on a cruise than to be in a small city let alone a large one.<sup>4</sup> However, there is a lack of sufficient data to substantiate this claim.

- 2.5 This Chapter will consider the Australian and global cruising industries, including the demographics of cruising passengers, and will discuss the available data about crimes committed at sea.

**Box 1 – the death of Dianne Brimble**

Accompanied by her daughter, her sister and her sister's daughter, Ms Brimble boarded the P&O Pacific Sky in Sydney on 23 September 2002 for a cruise holiday to the South Pacific.

Tragically, she died on the ship early the next morning, only 100 nautical miles (nm) from the New South Wales coastline. Medical staff on the ship pronounced Ms Brimble dead and notified the NSW Marine Area Command as the death was considered suspicious. An autopsy was conducted on 28 September 2002, which found a lethal level of Gamma Hydroxybutyrate (GHB) in Ms Brimble's body.

The inquest, held by Magistrate Milledge, identified eight men as 'persons of interest'. Despite the inquest's finding that Ms Brimble's death was caused by the effects of GHB, administered by a 'known person', and numerous prosecutions, no manslaughter conviction was secured, and no custodial sentences were imposed.

Following her death, a number of questions were raised regarding the ship's 'party' culture, the harassment of women on board, the preservation of the crime scene, the investigation process and the support provided to Ms Brimble's family on board.

## **Cruising industry – an overview**

- 2.6 The global cruising industry is estimated to be worth US\$36.2 billion in 2013, with growth of 4.5 per cent over the previous year. There were almost 21 million cruising passengers worldwide in 2012, and two companies dominate the industry.<sup>5</sup>
- 2.7 The biggest player, Carnival Corporation & PLC (the parent of Carnival Australia and Holland America) has had (to date) almost 50 per cent of total world-wide passengers in 2013.<sup>6</sup> Carnival owns many well-known brands, such as P&O Cruises, Cunard, Princess Cruises, Costa and

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4 Mrs Christine Duffy, Cruise Lines International Association, *Committee Hansard*, 7 February 2013, p. 15.

5 Cruise Market Watch, *2013 World Wide Market Share*, <<http://www.cruisemarketwatch.com/market-share/>>, viewed 29 May 2013.

6 Cruise Market Watch, *2013 World Wide Market Share*, <<http://www.cruisemarketwatch.com/market-share/>>, viewed 29 May 2013.

Carnival Cruise Lines.<sup>7</sup> Carnival's total revenue in 2012 was US\$15.2 billion.

- 2.8 The next largest operator is Royal Caribbean Cruises Ltd, which has had just over 23 per cent of total world-wide passengers in 2013.<sup>8</sup> Royal Caribbean has six brands, including Royal Caribbean International and Celebrity Cruises.<sup>9</sup> Royal Caribbean's 2012 revenue was US\$7.7 billion.
- 2.9 The remaining 28 per cent of the market is shared by over 30 smaller companies, of which the largest accounts for roughly 7 per cent of total passengers.<sup>10</sup>
- 2.10 The cruising industry is acutely sensitive to customer perceptions and concerns, particularly relating to health and safety. As noted by the Bureau of Transport and Regional Economics:

Australia's international cruise shipping market grew strongly until 2000-01 ... and then it declined sharply in 2001-02 and 2002-03, largely as a result of the September 11 terrorist attacks in the USA and the Severe Acute Respiratory Syndrome (SARS) epidemic in Asia.<sup>11</sup>

A considerable reduction in passenger numbers occurred in these two years:

The total (both inbound and outbound) number of international sea passengers increased by an average annual rate of 17.9 per cent a year during 1993-94 to 2000-01 and then declined by 32.5 per cent in 2001-02 and 36.7 per cent in 2002-03.<sup>12</sup>

Whilst the number of passengers subsequently returned to, and surpassed the levels before that period, it remains an important demonstration of the susceptibility of the cruising industry to customer perceptions about health and safety.

- 2.11 A more recent example is that of the *Costa Concordia* grounding and sinking, which had immediate implications for Carnival Corporation, the ship's operator. As stated in a Carnival Corporation media release:

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7 Carnival Corporation & PLC, *Corporate Fact Sheet*, <<http://phx.corporate-ir.net/phoenix.zhtml?c=200767&p=irol-factsheet>>, viewed 29 May 2013.

8 Cruise Market Watch, *2013 World Wide Market Share*, <<http://www.cruisemarketwatch.com/market-share/>>, viewed 29 May 2013

9 Royal Caribbean Cruises Ltd, *2012 Annual Report*, p. 2.

10 Cruise Market Watch, *2013 World Wide Market Share*, <<http://www.cruisemarketwatch.com/market-share/>>, viewed 29 May 2013.

11 Department of Transport and Regional Services, *Container and Ship Movements through Australian Ports 2004-05 to 2024-25*, 2006, p. 93.

12 Department of Transport and Regional Services, *Container and Ship Movements through Australian Ports 2004-05 to 2024-25*, 2006, p. 93.

Since the date of the *Costa Concordia* incident in mid-January through February 26 [2012], fleetwide booking volumes, excluding Costa, have shown improving trends but are still running high single digits behind the prior year at slightly lower prices. There has been less impact on the company's North American brands than European brands. Booking volumes for Costa during the same period are running significantly behind the prior year at lower prices, however, Costa has curtailed virtually all of its marketing activities during this period.<sup>13</sup>

## The Australian cruising market

2.12 Australia represents 3.4 per cent of the global cruise market, and Carnival Australia has the majority of cruising business in the Australian market.<sup>14</sup> Royal Caribbean has a smaller presence in Australia, but in 2012 expressed its intention that:

In 2013, we will continue to focus on the development of key markets in Asia and we will focus on sourcing guests and adding capacity to other markets where we expect significant growth and profitability, such as Australia.<sup>15</sup>

2.13 The Australian cruising market is the amongst the healthiest in the world, measured in a number of different ways:

- Market penetration – 3% of Australians went on a cruise in 2012, which is second only to the USA, in which 3.3% of the national population went on a cruise;
- Growth in numbers – the Australian market grew by 11% in 2012, the highest rate of growth, equalled only by Germany;
- Continued growth – as noted above, the Australian market has grown by at least 10% for eight years in a row; and
- Annual average growth – the average yearly growth of the market, over the past decade, is 20%.<sup>16</sup>

2.14 Cruising is also performing very well in comparison with other Australian tourism sectors:

The Australian cruise sector has undergone strong growth in the last five years. This growth has taken place against a backdrop of

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13 Carnival Corporation & PLC, *First Quarter Results*, 9 March 2012.

14 Carnival Australia, *Submission 9*, p. 2.

15 Royal Caribbean Cruises Ltd, *2012 Annual Report*, p. 46.

16 Cruise Lines International Association Australasia, *Cruise Industry Report Australia 2012*, pp. 8-9.



stagnation in the wider tourism sector (as measured in total visitor nights). International tourism to Australia, while having grown in visitor nights, has been affected in recent times by the exchange rate through lower yields. Likewise, the domestic tourism sector has struggled as the exchange rate has made overseas travel relatively more affordable for Australian travellers.<sup>17</sup>

- 2.15 Research commissioned by Carnival Australia has estimated the contribution of cruising to the Australian economy, finding that in 2010-11, 'the cruise sector contributed almost \$830 million in value added to the Australian economy.'<sup>18</sup> The report also forecasted that, by 2020, the industry would contribute \$2.28 billion to the Australian economy, and that by 2020, 'the cruise tourism contribution as a proportion of Australian GDP is expected to double to 0.12%, from 0.06% in 2010-11.'<sup>19</sup>
- 2.16 The vast bulk of passengers who depart on cruises from Australian ports are Australians, at 86%. The remaining 14% are foreign tourists who fly to Australia and then board cruises. Whilst many Australians board cruises in Australian ports, Australians are also increasingly flying to other countries and then going on cruises.<sup>20</sup>

#### **Box 2 – the disappearance of Paul Rossington and Kristen Schroder**

Mr Rossington and Ms Schroder were travelling on board a Carnival cruise ship in May 2013. When the ship docked at the Sydney Overseas Passenger Terminal, they could not be found on board.

A review of security camera footage confirmed that the pair had gone overboard, almost 15 hours before the ship reached Sydney. It was only when the ship docked that their absence from the ship was discovered.

A search commenced in the area where the pair were believed to have gone overboard. The NSW Police's Marine Area Command, the Australian Maritime Safety Authority and Royal Australian Navy conducted the search, over an area of 1360 square nautical miles.

On Friday 10 May 2013, NSW Police called off the search as they were unable to locate any sign of the couple.

At the time of preparing this report, their disappearance remained under investigation.

17 Deloitte Access Economics Pty Ltd, *The economic contribution of the cruise sector to Australia*, February 2012, p. 5.

18 Deloitte Access Economics Pty Ltd, *The economic contribution of the cruise sector to Australia*, February 2012, p. 5.

19 Deloitte Access Economics Pty Ltd, *The economic contribution of the cruise sector to Australia*, February 2012, p. 6.

20 Cruise Lines International Association Australasia, *Cruise Industry Report Australia 2012*, p. 9.

## Cruising demographics

- 2.17 Of Australian cruising passengers, most come from New South Wales and Queensland, although the Australian Capital Territory has the highest percentage of residents cruising (at 5.5%).<sup>21</sup> Most Australian cruising passengers depart from Australian ports, with departures available from all mainland state capitals.<sup>22</sup>
- 2.18 The popularity of cruising differs according to age group. In 2012, one-third of Australian passengers were aged 61 years and over. The full range of age groups is as follows:
- Under 40            25%
  - 41 – 45            14%
  - 46 – 50            8%
  - 51 – 55            9%
  - 56 – 60            11%
  - 61 – 65            11%
  - 66 – 70            10%
  - Over 70            12%
- 2.19 Cruise Lines International Association notes that, with 25% of passengers under the age of 40, cruising is popular amongst families.<sup>23</sup> Carnival Australia has attempted to make its cruises more appealing to families, and has banned so-called ‘schoolies cruises’. It has applied for and received an exemption from the Human Rights and Equal Opportunities Commission for this ban. Additional steps have been taken to make cruises more family-oriented:
- The marketing emphasis has shifted to promote cruising as a relaxed family holiday for all age groups;
  - The former 'party ship' focus has been eliminated;
  - Former practice of permitting quad cabins to be shared by unrelated passengers has been stopped.<sup>24</sup>

Further discussion of schoolies cruises is in Chapter 4.

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21 Cruise Lines International Association Australasia, *Cruise Industry Report Australia 2012*, p. 8.

22 Cruise Lines International Association Australasia, *Cruise Industry Report Australia 2012*, p. 8.

23 Cruise Lines International Association Australasia, *Cruise Industry Report Australia 2012*, p. 9.

24 Carnival Australia, *Submission 9*, p. 6.

## Foreign involvement in the Australian market

- 2.20 The Australian cruise market is growing very quickly, and Australians are increasingly going cruising. However, in contrast to many passengers' expectations, the industry is largely regulated beyond Australia.
- 2.21 Whilst Carnival Australia is an Australian company, its parent company is based in Florida and the United Kingdom (UK); Royal Caribbean Cruises Australia operates out of Sydney, however Royal Caribbean International is also based in Florida.
- 2.22 As noted by the Government Response, there are currently no 'large passenger vessels' registered (or 'flagged') in Australia.<sup>25</sup> In many circumstances, the law of the 'flag-state' will apply on-board a vessel, even when it is in the waters of another country. The legal reasons for this will be discussed in Chapter 3, as this has significant consequences for the extent of Australian jurisdiction over what happens on cruising vessels in Australian ports or with Australian passengers.
- 2.23 Despite Carnival and Royal Caribbean being American and UK companies, their vessels are often registered outside those countries. For example, there is only one cruise ship registered in the United States of America (USA), despite being the largest cruising market.<sup>26</sup>
- 2.24 Many cruising vessels are not flagged in the countries of their owners, and are rather registered in countries that offer attractive conditions and light regulation of shipping. Often said to be 'flags of convenience', these countries have registries far bigger than their national shipping would fill. Many of these countries rely on the registration fees of the vessels for revenue. The International Transport Workers' Federation (ITWF) maintains a list of countries it considers to be 'flag of convenience countries', which includes some of the countries with high numbers of cruise ship registrations, such as Bermuda, the Bahamas and Panama.<sup>27</sup>
- 2.25 Reliable statistics for the entire industry are hard to come by, but in 2000, '90 of the world's 223 cruise ships were registered in Panama or Liberia.'<sup>28</sup>
- 2.26 Given this lack of information, the Committee asked both Carnival Australia and Royal Caribbean Cruises to provide details of the flagging of their vessels that are expected to visit Australia in future. Carnival

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25 Government Response, Appendix F, p. 7.

26 Norwegian Cruise Line, *Pride of America: Overview*, <[http://www.ncl.com/cruise-ship/pride\\_amer/overview](http://www.ncl.com/cruise-ship/pride_amer/overview)>, viewed 29 May 2013.

27 International Transport Workers' Federation, *FOC Countries*, <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm>, viewed 31 May 2013.

28 A Wright, 'Beyond the Sea and Spector: reconciling port and flag state control over cruise ship onboard environmental procedures and policies', *Duke Environmental Law & Policy Forum*, 18:215, p. 220.

Australia provided a table of ships in the group 'that are booked to visit Australia until 2019'. Of the 24 ships listed, thirteen are flagged in 'flags of convenience' states (they appear on the ITWF list). These states are Bermuda, Panama, Malta and the Bahamas.<sup>29</sup> Royal Caribbean Cruises provided details of ships in its 'published cruise programs through to April 2015', of which there are six. All six ships are flagged in states that the ITWF considers 'flags of convenience' states, being the Bahamas and Malta.<sup>30</sup> The details of these ships are published at Appendix I.

## Crimes on cruises

2.27 Cruise ships can accommodate thousands of people, and the largest cruise ship can carry a maximum of 6 296 passengers and 2 394 crew members.<sup>31</sup> As noted by numerous submissions, this amounts to the population of a small town, in which there will always be a certain level of crime. As pointed out by the International Cruise Victims Association:

Crime on a cruise ship is no less an undeniable reality than it is for any rural town or metropolitan city. After all, cruise ships, which now have the capability to embark over 6000 passenger and over 2000 crew members, are small floating cities. It is unrealistic to believe that even in the enclosed environment of a cruise ship that criminal activity stops at the gangway; especially since the ship does not have a police force.<sup>32</sup>

2.28 As for the actual level of crime on cruise ships, Carnival Australia stated that 'the rate of alleged crime on cruise ships is significantly less than that of the general community.'<sup>33</sup> Dr Kate Lewins, in evidence that was supported by Carnival Australia<sup>34</sup>, suggested that:

With such a concentrated population, one might expect that cruise ships would suffer the same rate of crime per head of population as a town of equivalent size. However, industry statistics show that the rate of crime on cruise ships is very low indeed, even pegging the likelihood of being the victim of crime on a cruise ship as being the same as the risk of being hit by lightning.<sup>35</sup>

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29 Carnival Australia, *Supplementary Submission 9.2*.

30 Royal Caribbean Cruises Ltd, *Submission 23*.

31 <http://maritime-connector.com/worlds-largest-ships/>.

32 International Cruise Victims Association, *Supplementary Submission 12.2*, p. 7.

33 Carnival Australia, *Submission 9*, p. 7.

34 Carnival Australia, *Submission 9*, p. 7.

35 Dr Kate Lewins, *Submission 1*, p. 1.

- 2.29 Whilst there is clearly a belief that crimes on cruise ships are rare – and the rate of crime lower than in the general community – there are also factors on cruise ships that would tend to increase the probability of crimes. As also pointed out by Dr Lewins:
- ... the population aboard [a cruise ship] is transient. Passengers include vulnerable people such as children, the disabled and the elderly. Alcohol flows freely and inhibitions can be low. Multiply these risk factors across the current fleet of approximately 200 cruise ships sailing internationally and it is impressive that crimes on board cruise ships are not more prevalent.<sup>36</sup>
- 2.30 In respect of sexual assault, for example, Holiday Travel Watch suggested that:
- There is a general acknowledgement that vulnerability will arise and that the propensity for sexual attacks will increase when the victim has been drinking (or taken drugs).
- There is also a general assumption that persons relaxing on board a ship are more likely to "let their guard down" and to perhaps drink more than if not on holiday.
- It is therefore a possibility that this combination makes persons easy targets for offences to be committed against them...<sup>37</sup>
- 2.31 Beyond this generalised picture, however, there is a lack of comprehensive and independent data about the prevalence of crimes on cruise ships. It must also be remembered that not all victims will report a crime<sup>38</sup>, and so the level of criminality is likely higher than any official reporting suggests.
- 2.32 Chapter 4 considers the responsibility of cruising operators to report crimes and alleged crimes to law enforcement authorities.
- 2.33 In the following two sections, crime statistics for Australia and the USA are considered. While statistics from the USA are more comprehensive, they can only provide a general indication of what complete Australian crime statistics might be, if available.

## **Australian crime statistics**

- 2.34 The Committee sought to obtain the best available statistics on crimes committed against Australians at sea. Such data, inasmuch as it is available, tends to be collected by law enforcement agencies. However,

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36 Dr Kate Lewins, *Submission 1*, p. 1.

37 Holiday Travel Watch, *Submission 3*, p. 12.

38 Holiday Travel Watch, *Submission 3*, p. 14.

evidence tended to emphasise the undifferentiated nature of any such statistics. For example, the South Australian Police submitted that:

While [South Australian Police] data management systems do not enable crimes at sea to be readily identified it is believed that SAPOL's involvement in such matter, should it have occurred, would be limited to death/s through illness or violence between crew members. The Criminal Investigation Branch (CIB) with overall responsibility for managing the response advise that there have been no incidents reported to SAPOL in recent years of offending within coastal waters or Territorial Sea where SAPOL was required to respond.<sup>39</sup>

- 2.35 The New South Wales Police Force (NSWPF) also indicated that its data is relatively unsophisticated, though it does enable the identification of broad trends:

The NSWPF have identified an estimated 91% increase in Cruise ship visitation and 11% increase in international freight into NSW ports between 2008 and 2012. However, NSWPF records indicate that there has been no marked increase in reported crime during the same period.<sup>40</sup>

- 2.36 Evidence suggested that there are no reliable, national statistics on crimes committed against Australians at sea. As described by Commander Errol Raiser (Australian Federal Police) there are a number of potential collectors and holders of data, without any clear national reporting process:

We potentially would have data not held by the states and territories. I think I mentioned earlier that we may receive a referral from [the Australian Maritime Safety Authority] that may not go to the states and territories. There is, as far as I am aware, no centralised consolidated recording of all crime types. It is appropriate that I mention whaling. In the Federal Police, my area, we look after whaling. I do not think any of the jurisdictions would have any record of that type, and yet we would argue that that certainly falls within the bailiwick of crimes at sea, albeit not to your questions around the safety of passengers. So, equally, the risk with collecting that type of data is that you create as many questions as you might answer.<sup>41</sup>

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39 South Australian Police, *Submission 21*, p. 1.

40 New South Wales Police Force, *Submission 20*, p. 1.

41 Cmdr Errol Raiser, Australian Federal Police, *Committee Hansard*, 15 February 2013, p. 25.

2.37 The South Australian Commissioner for Victims' Rights noted the difficulty of accessing statistics on crimes committed at sea:

Unfortunately, I was unable to attain local and national crime statistics pertaining to crimes at sea. The South Australia Police record crime on vessels and ships but it is not readily evident which of those crimes happened on, for instance, a cruise ship docked in local waters. Approximately 50 to 100 crimes that happened on either a vessel or ship each year for the past three years are known to the police in South Australia. Notwithstanding the lack of data[,] information gleaned from international sources show violent and property crimes [can] happen on ships; indeed, ... such crimes cover much of the array of offences in Australia's criminal laws.<sup>42</sup>

2.38 The Attorney-General's Department provided information about Australian involvement in the prosecutions of crimes that occurred beyond 12 nautical miles from the Australian coast. For such Australian prosecutions (under the *Crimes at Sea Act 2000*) the Federal Attorney-General must give consent, and this is discussed in greater detail in Chapter 3. The Department provided a table containing the 'outcomes of all prosecutions that have proceeded following consent being issued by the Attorney-General under the *Crimes at Sea Act*', which included 8 prosecutions between 2001 and 2013.<sup>43</sup> The crimes prosecuted included manslaughter, murder, assault, theft, indecent acts and theft.

2.39 In contrast to the Australian picture, statistics relating to US citizens are somewhat more complete, as discussed below.

## US crime statistics

2.40 There are more comprehensive sources of crime statistics relating to the USA, particularly through the work of criminologists. This has been supplemented by the reporting requirements of the *Kerry Act*, which is also discussed below.

2.41 Dr James Fox, Professor of Criminology at Northeastern University in Boston, USA, has compared the number of crimes on board ships that embark from or disembark to US ports that were reported to the FBI (Federal Bureau of Investigation, USA) and subsequently no longer under FBI investigation with the number of similar crimes cleared by 'arrest or exceptional means' in selected US cities of various size.<sup>44</sup>

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42 Commissioner for Victims' Rights, South Australia, *Submission 7*, p. 2.

43 Attorney-General's Department, *Submission 22*, Attachment A.

44 Exhibit 1, p. 1.

- 2.42 According to Dr Fox, the rate of crime overall on cruise ships is lower than that of most US cities.<sup>45</sup> The average rate of sexual assaults on cruise ships does, however, exceed the comparable rate of some US cities.<sup>46</sup> The rate of sexual assault differs among cruise lines, with Holland America and Disney Cruise Line's rates higher than the US averages.<sup>47</sup>
- 2.43 Dr Ross Klein, Professor of Social Work at the Memorial University of Newfoundland, Canada, told a US Senate Committee hearing in 2008 that:
- The integrity of [industry] data is unclear (e.g., what definitions were used to include/exclude incidents) given that it has not been available for independent analysis and verification.<sup>48</sup>
- 2.44 Dr Klein notes that Royal Caribbean International was required to disclose data on sex-related incidents during a lawsuit. The data demonstrated that the rate of sexual assault on Royal Caribbean cruise ships between 2003 and 2005 was almost twice that of the US land rate.<sup>49</sup>
- 2.45 Dr Klein and Dr Jill Poulston obtained FBI data of crimes reported by cruise ships in 2007-2008 through a Freedom of Information request.<sup>50</sup> It showed that one cruising line reported 92 sex-related incidents, or 115 per 100 000, during that period, which averaged to four incidents per ship.<sup>51</sup> According to the authors, comparable statistics do not exist for the USA, but in the case of Canada, the rate of sex-related incidents reported in 2007 was 68 per 100 000.<sup>52</sup>
- 2.46 Since the *Kerry Act* was passed in the US in 2010, all incidents on US-owned vessels or in US territorial waters and all incidents involving US citizens on the high seas or on a vessel that departed from or will arrive at a US port, must be reported to the FBI.<sup>53</sup> The *Kerry Act* also requires that these reports be collated and made publicly available on a website on a quarterly basis.<sup>54</sup>

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45 Exhibit 1, p. 2.

46 Exhibit 1, pp. 4-5.

47 Exhibit 1, p. 3.

48 Dr Ross Klein, Testimony to US Senate Committee on Commerce, Science, and Transportation, Hearings on "Cruise Ship Safety: Examining Potential Steps for Keeping Americans Safe at Sea", 19 June 2008, p. 4.

49 Dr Ross Klein, Testimony to US Senate Committee on Commerce, Science, and Transportation, Hearings on "Cruise Ship Safety: Examining Potential Steps for Keeping Americans Safe at Sea", 19 June 2008, p. 5.

50 Dr Jill Poulston, *Submission 5* (Attachment A), p. 7.

51 Dr Jill Poulston, *Submission 5* (Attachment A), p. 7.

52 Dr Jill Poulston, *Submission 5* (Attachment A), p. 8.

53 Section 3507(g)(3)(A)(1), Title 46 (shipping), USA Code.

54 United States Coast Guard, *Cruise Line Incident Reporting Statistics*  
<<http://www.uscg.mil/hq/cg2/cgis/CruiseLine.asp>> viewed 25 February 2013.



- 2.47 However, shortly before the legislation was enacted, an amendment was made that limited the information required to be released.<sup>55</sup> Only reported crimes that have been under FBI investigation and subsequently closed are published.<sup>56</sup> This means that alleged crimes that the FBI does not investigate, has not finished investigating, or are investigated by another jurisdiction (such as state police) are not recorded on the website.

### **Committee Comment**

- 2.48 The cruising industry continues to grow around the world. Despite events that can dampen demand – such as the SARS outbreak and the global financial crisis – cruising is now twice the size it was a decade ago.
- 2.49 Cruising in Australia has grown with even more speed than the rest of the world: there are now five times as many Australians cruising as there were in 2002. The growth of the Australian market continues to be very strong, with eight years of growth above 10%. Companies that operate in the Australian market are benefiting from very high consumer demand, and foresee continued growth with the expectation of 1 million annual passengers by the end of the decade.
- 2.50 Now is a particularly appropriate time for a review of the industry and Australian regulation of cruising: the industry is strong, healthy and continues to grow. Additionally, there have never been so many Australian citizens taking cruises, and so it is appropriate for the Australian Government to consider how it might better protect Australians who take cruises.
- 2.51 However, there are impediments to Australian regulation of this industry. The cruise companies that carry most Australian passengers are based in other countries, and none of the vessels are registered in Australia.
- 2.52 Further complicating policy in this area, there is a serious deficit of data about the prevalence of crimes committed at sea. Governments have limited information to inform action; short of the occasional tragedy reported in the media, Australian consumers do not have a source of information about the safety of cruising. The cruising industry may well advance its genuine belief that crimes at sea are rare, but there is no independent source of data to inform government policy or prove the rarity of crimes to consumers.

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55 Dr Kate Lewins, *Submission 1*, p. 18; Ross Klein, Testimony to US Senate Committee on Commerce, Science, and Transportation, Hearings on “Oversight of the Cruise Industry”, 1 March 2012, pp. 11–12.

56 Section 3507(g)(4), Title 46 (shipping), USA Code.

- 2.53 In the absence of data, widely-reported tragedies will remain a central source of safety information for consumers who are considering taking a cruise – however misleading this may be. To enable cruising operators to prove their claims about the safety of cruising, and for consumers to have access to accurate information, the compilation of data and statistics for crimes committed at sea is essential
- 2.54 To this end, the Committee recommends that the Australian Institute of Criminology compile and maintain statistics on crimes committed at sea by or against Australians. This work should be coordinated with police agencies and the mandatory reporting scheme recommended in Chapter 4.

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**Recommendation 1**

- 2.55 **The Committee recommends that the Australian Institute of Criminology should compile, maintain and publish statistics on crimes committed at sea by or against Australians.**

## **Jurisdiction at sea: international law and domestic law**

- 3.1 The dramatic growth in cruising in Australia and around the world makes regulation of the industry more important than ever. The inquiry is particularly focussed on the ability of the Australian Government to improve crime prevention and investigation on cruise vessels. This ability depends on both the extent of Australia's jurisdiction and the vigour of its international cooperation.
- 3.2 Questions of jurisdiction at sea – under the system established by the *United Nations Convention on the Law of the Sea 1982 (UNCLOS)* – are notoriously complex and often misunderstood. A key purpose of this inquiry is to ascertain the scope of Australian jurisdiction and whether Australia is currently exercising the full extent of this jurisdiction.
- 3.3 Where Australia is not able to exercise jurisdiction, the inquiry has investigated the extent to which Australia is actively participating in international fora and leading international efforts to ensure the safety of passengers and the full prosecution of crimes committed at sea.
- 3.4 This Chapter will consider the following questions of jurisdiction and international cooperation:
- Understanding jurisdiction.
  - Enforcement jurisdiction under international law:
    - ⇒ The *United Nations Convention on the Law of the Sea 1982 (UNCLOS)* ;
    - ⇒ Territorial jurisdiction;
    - ⇒ Extra-territorial jurisdiction;
    - ⇒ Flag-state jurisdiction; and
    - ⇒ Legal Advice.
  - Domestic Australian jurisdiction:

- ⇒ *Crimes At Sea Act*; and
- ⇒ *Criminal Code Act*.
- Intergovernmental cooperation through the International Maritime Organisation.

## Understanding Jurisdiction

- 3.5 Crimes committed at sea present a ‘dynamic legal scenario’<sup>1</sup> where international law recognises a multitude of domestic jurisdictions existing concurrently. At all times, a ship is subject to the domestic laws of the country in which it is registered, but it can also be within the territorial jurisdiction of another country whilst transiting its waters and in its ports, and thereby subject to that second country’s laws.
- 3.6 Further, where a citizen is involved in a criminal offence, either as an alleged perpetrator or as a victim, their country of citizenship is recognised under international law as also having jurisdiction to investigate and prosecute the crime. A criminal act committed on board will therefore often lead to potentially competing jurisdictional claims.<sup>2</sup>
- 3.7 Jurisdiction refers to the ability of a country both to make and to enforce its laws. It is generally considered that there are two basic types of jurisdiction: prescriptive jurisdiction and enforcement jurisdiction. Prescriptive jurisdiction is the power to regulate people and situations regardless of their location. Enforcement jurisdiction on the other hand is the ability of a country to legally arrest, try, convict and gaol an individual for a breach of its laws.<sup>3</sup>
- 3.8 It is important to note that the ability to legislate in relation to particular conduct may not necessarily give rise to a corresponding power of enforcement with respect to that same conduct.<sup>4</sup> The subject of this inquiry has raised questions of both prescriptive jurisdiction and enforcement jurisdiction.
- 3.9 Many of the victims’ groups that participated in the inquiry campaign to prevent accidents and crime as a primary focus. Preventative measures – through better regulation, consumer information and vessel equipment

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1 Dr Kate Lewins, *Submission 1*, p. 3.

2 Dr Kate Lewins, *Submission 1*, p. 3.

3 D Rothwell, et al (eds), *International Law: Cases and Materials with Australian Perspectives*, 2011, p. 294.

4 Legal Advice, Appendix D, p. 3.

- rely on prescriptive jurisdiction. The investigation and prosecution of crimes, through enforcement jurisdiction, is usually a secondary aim.
- 3.10 However, in the context of crimes at sea, international law limits Australia’s prescriptive jurisdiction to pass laws and regulations about the design, construction, manning and equipment of foreign ships unless those laws give effect to generally accepted international standards or rules.<sup>5</sup> Similarly, international law places limitations upon Australia’s law enforcement authorities (both federal and state or territory) to investigate alleged criminal conduct.
- 3.11 Clearly establishing the circumstances in which Australia may claim jurisdiction is important for ascertaining the duties of domestic law enforcement agencies and the challenges they encounter. It is also important to guide this Committee about the kinds of recommendations it may make to the Australian Government.
- 3.12 The Committee obtained legal advice from the Australian Government Solicitor on a number of issues, including the impact of jurisdictional limitations on Australia’s legislative options in this area. As noted in Chapter 1, the Legal Advice is included at Appendix D.
- 3.13 Given the severe limitations on both enforcement and prescriptive jurisdiction, there is a pressing need for the Australian Government to ensure it utilises the full extent of its jurisdiction to address both prevention and justice for crimes at sea. Where the limits of jurisdiction bar Australia from taking action, the Australian Government must lead international efforts to improve safety and justice for cruising passengers.

## **Enforcement jurisdiction under international law**

- 3.14 A country will only be entitled to prosecute a crime (exercising enforcement jurisdiction) if it has recognised grounds to claim jurisdiction over the event in international law, and its domestic law expressly asserts that jurisdiction.<sup>6</sup>
- 3.15 As a matter of general international law, a country may invoke jurisdiction – and apply its domestic laws and enforce sanctions for criminal conduct – in a variety of circumstances, including:
- Where criminal conduct occurs within their territory (*territorial principle*);

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5 Legal Advice, Appendix D.

6 Dr Kate Lewins, *Submission 1*, p. 2.

- Where one of their citizens is involved (for example, as either a victim or perpetrator) in the crime (*nationality principle and the passive personality principle*);
- Where the conduct is so heinous and so widely condemned that all nations proscribe and punish its occurrence (for example, piracy, genocide and hostage taking) (*universal principle*); and
- Where the criminal conduct has a significantly adverse impact on its national security or governmental process (*protective principle*).<sup>7</sup>

3.16 Importantly, general international law recognises a multiplicity of jurisdictions existing concurrently. Dr Kate Lewins, a specialist in international maritime law at Murdoch University, submitted:

The result, more often than not, is that there might be multiple [countries] entitled to claim jurisdiction over a particular criminal act, based on the flag and location of the ship and the nationalities of the people involved. [Which country will take the lead] may well end up being one negotiated through diplomatic channels, largely based on pragmatism.<sup>8</sup>

### **United Nations Convention on the Law of the Sea 1982 (UNCLOS)**

3.17 The international rules and principles governing the regulation of ocean space are captured by UNCLOS. Participating in all three negotiating conferences on the Law of the Sea (1958, 1960 and 1973-1982), Australia became a party to UNCLOS in 1994, the year that UNCLOS came into force.

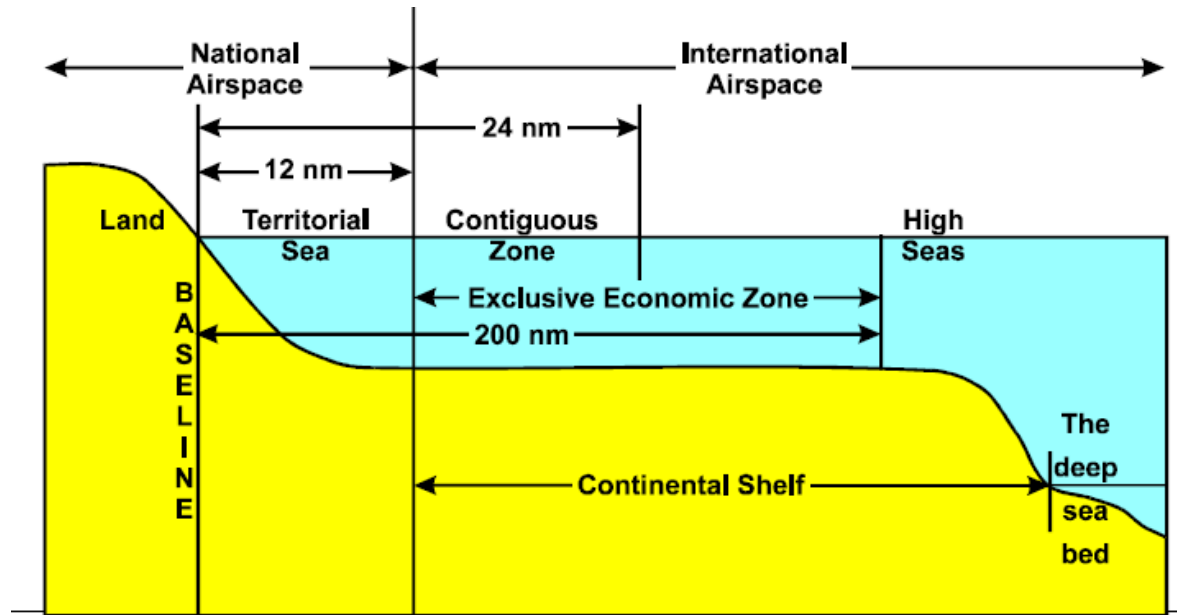
3.18 UNCLOS accords countries with specific jurisdictional zones and corresponding rights in ocean space adjacent to their territory. Territorial jurisdiction operates like concentric circles, ranging from full territorial sovereignty within internal waters, to almost no sovereign rights on the high seas. As demonstrated in Figure 1, these maritime zones are measured from the Territorial Sea Baseline (TSB), the low-water line along the coast.

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7 See: Dr Kate Lewins, *Submission 1*; Legal Advice, Appendix D.

8 Dr Kate Lewins, *Submission 1*, p. 2.

Figure 1 Maritime zones



Source C Schofield, 'Maritime Zones and Jurisdictions', p. 18, [www.gmat.unsw.edu.au/ablos/ABLOS03Folder/SESSION3.PDF](http://www.gmat.unsw.edu.au/ablos/ABLOS03Folder/SESSION3.PDF)

3.19 Under UNCLOS, the zones in which Australia can exercise its territorial jurisdiction can be classified in the following order (with diminishing capacity to enforce domestic law the further out from the TSB):

- Internal waters (all waters landward of the TSB);
- Territorial sea (12 nautical miles (nm) from the TSB)
- Contiguous zone (from 12nm to 24nm from the TSB);
- Exclusive economic zone (no further than 200nm from the TSB);
- Continental shelf; and
- High seas.

3.20 High seas, or 'international waters', are 'open to all States, whether coastal or land-locked'.<sup>9</sup> International waters are considered to be outside the *territorial* jurisdiction of any country. However, in limited circumstances, Australia may exercise *extra-territorial* jurisdiction.

3.21 Both territorial jurisdiction and extra-territorial jurisdiction are discussed below.

### Territorial jurisdiction

3.22 There are two categories of territorial jurisdiction that would allow Australia to enforce its criminal laws against an alleged criminal act committed whilst at sea: *Port State jurisdiction* and *Coastal State*

9 UNCLOS, Article 87(1).

*jurisdiction*.<sup>10</sup> Jurisdiction beyond these two categories – in the ‘contiguous zone’ and the ‘exclusive economic zone’ – is severely limited, and will be discussed briefly below.

### **Port state jurisdiction**

3.23 If a criminal act occurred when the ship is in internal waters (all waters landward of the TSB) having visited a port or about to visit a port, or when the ship has departed the port and is now in the territorial sea of Australia (12nm from the TSB), then Australia can claim jurisdiction over the alleged criminal offence, provided that the relevant criminal legislation expresses its extra-territorial application.<sup>11</sup>

3.24 However, minor matters, such a petty theft, are often left to the Master of the Ship. Dr Lewins explains:

... it is commonplace for the port State to leave the minor matters on board to the so called ‘internal economy’ of the ship. The ship is not, after all, a lawless place; as the laws of the flag State apply to it.<sup>12</sup>

3.25 The concept of a ‘flag State’ and its jurisdiction are described later in this Chapter.

3.26 More significant crimes, such as assault, manslaughter or murder, are said to engage the ‘interests’ of the port State. Consequently, the laws of the port State can and will apply as their enforcement is an exercise of sovereignty and relate to the ‘peace, good order and government’ of the State.<sup>13</sup>

### **Coastal state jurisdiction**

3.27 Under limited circumstances, a coastal State may exercise its territorial jurisdiction if the ship is not visiting a port of that State but is travelling through its territorial sea (out to 12 nm from the TSB).

3.28 UNCLOS provides that a State may only exercise this type of jurisdiction where:

- The ‘consequences’ of the crime extends to the coastal State;
- Is of a kind to disturb the peace of the State or the good order of the State’s territorial sea;
- If the assistance of the State is requested by the Master of the Ship; or

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10 Dr Kate Lewins, *Submission 1*, p. 5.

11 UNCLOS, Articles 25- 27.

12 Dr Kate Lewins, *Submission 1*, p. 5.

13 *CSL Pacific* [2003] CLR 397.



- The matter involves the specific case of the illicit traffic of narcotic drugs.<sup>14</sup>
- 3.29 Commenting on the connection between enforcement jurisdiction and prescriptive jurisdiction, Dr Lewins disputes the position set out in the Government Response. She considers that coastal State authority enables Australia to make entry to Australian ports or internal waters conditional upon compliance with certain regulations:

I do believe that Australia is entitled to impose certain regulations on ships that visit its ports, and to this extent I respectfully disagree with the government response to [the Milledge recommendations]. I view the ability to regulate as stemming from the fact that we are allowing these vessels into our ports and we have an entitlement then – a sovereign entitlement – to dictate the terms of that entry. ... I do not believe that measured regulations would interfere with our obligation to allow innocent passage through territorial waters, which I think is a slightly different point.<sup>15</sup>

### **Jurisdiction in the Contiguous and Exclusive Economic Zones**

- 3.30 Australia may only exercise control in the contiguous zone that is necessary to prevent or punish infringement of customs, fiscal, immigration or sanitary laws and regulations.
- 3.31 Similarly, Australia may only exercise jurisdiction over its exclusive economic zone and continental shelf for purposes relating to economic exploitation and environmental protection. This does not extend to criminal matters.
- 3.32 Should Australia wish to exercise jurisdiction over an alleged crime occurring within its contiguous zone, exclusive economic zone, continental shelf or on the high seas, it can only do so under certain circumstances. Such an exercise of jurisdiction is called extra-territorial jurisdiction. Extra-territorial jurisdiction is provided in general international law and is beyond the scope of UNCLOS.

### **Extra-territorial jurisdiction**

- 3.33 Countries can claim extra-territorial jurisdiction, concurrent with flag state jurisdiction, over crimes committed on foreign-flagged ships that occur beyond its territory based on a number of principles.

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14 UNCLOS, Article 27.

15 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 2.

### **Next port jurisdiction**

- 3.34 Australia may validly exercise jurisdiction over an alleged crime on board a ship beyond the territorial sea if that ship next docks in an Australian port.<sup>16</sup>
- 3.35 In such circumstances, it is common for the Master of the ship to report the incident to the authorities of the next-port State. In practice, Dr Lewins explains, this means that Australian authorities would lead subsequent investigations and the collection of evidence. Depending on the nature of the alleged crime, it may also mean that Australian authorities detain the accused.<sup>17</sup>
- 3.36 This claim for extra-territorial jurisdiction is provided under the *Crimes at Sea Act 2000* (Cth) which is discussed further below.<sup>18</sup>
- 3.37 Even where criminal proceedings are commenced in an alternative jurisdiction, such as that of the flag-state, the investigative work of the next-port jurisdiction may be strongly relied upon in those proceedings.

### **Jurisdiction based on the nationality of the accused or victim**

- 3.38 As noted above, Australia may claim jurisdiction under general international law where an Australian citizen is either an accused or a victim of the alleged crime. These are understood as the nationality principle and the passive personality principle respectively.
- 3.39 International law provides that when a criminal act is committed by an Australian citizen, Australia has the power to prosecute that citizen according to its domestic laws no matter where the crime took place.<sup>19</sup>
- 3.40 The *Crimes at Sea Act 2000* (Cth) applies Australian criminal law extraterritorially using the above two principles. Beyond 200 nm from the TSB, or the outer limit of the Continental Shelf (the high seas), the criminal law of the Jervis Bay Territory applies to a criminal act on an Australian ship, by an Australian citizen (other than a crew member) on a foreign-flagged ship, or by any person on a foreign-flagged ship whose next port of call is Australia.<sup>20</sup> This is further explained in the next section, regarding Australian domestic jurisdiction.
- 3.41 The passive personality principle provides for Australia to prosecute crimes committed against its own citizens outside its territory under

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16 Dr Kate Lewins, *Submission 1*, p. 7.

17 Dr Kate Lewins, *Submission 1*, p. 7.

18 *Crimes at Sea Act*, Section 6(3).

19 *Nottebohm Case (Liechtenstein v. Guatemala)*; *Second Phase*, ICJ Decision, 6 April 1955.

20 *Crimes at Sea Act*, Sections 6(2), 6(3).

certain circumstances.<sup>21</sup> Following the 2002 terrorist bombings in Bali, Australia relied on this principle to pass legislation to this effect.<sup>22</sup>

- 3.42 Dr Lewins suggested that this might enable Australia to prosecute crimes committed against Australians on board a ship at sea:

Where a crime occurs on a cruise ship, legislation that relies on passive personality principles to ground an assertion of jurisdiction over a particular crime might well be justified in circumstances where the flag State does not intend to prosecute. [This] is a realistic scenario given that most cruise ships are flagged in open registries. Therefore this head of jurisdiction may be useful for a State looking to ensure that the accused is required to face due process in their courts if the alternative is that the accused will not face justice at all.<sup>23</sup>

- 3.43 Dr Lewins told the Committee that Australia should apply the passive personality principle to crimes committed at sea:

If there are other reasons we could claim jurisdiction over things that happen on that outward voyage then I believe we should do so. We already claim it on the whether the accused is Australian – I say we should also claim it if the victim is Australian. This notion that we can claim jurisdiction over criminal acts where an Australian is the victim anywhere in the world has been controversial in the past, but we are suitably deferential to the overriding right of the flag state to deal with things. It is a useful second stage. In fact, it becomes the de facto first stage because so often the flag state is not in a position to deal with criminal acts on board its many ships.<sup>24</sup>

- 3.44 Currently the United States is the only country to apply the passive personality principle specifically to crimes committed at sea, claiming jurisdiction in relation to a crime committed by or against an American national on the high seas or on any voyage that departed from or arrived in the United States.<sup>25</sup>

## Flag state jurisdiction

- 3.45 As indicated above, under UNCLOS the flag state (the country in which the ship is registered) has primary responsibility over its ship, including

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21 Dr Kate Lewins, *Submission 1*, p. 7.

22 Dr Kate Lewins, *Submission 1*, p. 8.

23 Dr Kate Lewins, *Submission 1*, p. 8.

24 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 5.

25 Dr Kate Lewins, *Submission 1*, p. 8.

criminal jurisdiction, even when the ship is outside the flag state's territorial waters.<sup>26</sup>

- 3.46 However, given that vessels are generally flagged in distant states, flag states' ability to play an active role in investigations and/or prosecutions can be extremely limited.
- 3.47 This head of jurisdiction is unlikely to be invoked by Australian law enforcement as few ships are registered in Australia, other than passenger ships such as *Spirit of Tasmania* and merchant ships. Of particular relevance to this inquiry, no cruise ships are registered in Australia.<sup>27</sup>
- 3.48 Ms Camille Goodman, from the Attorney General's Department, explained how the laws of the flag-state are 'carried' by the vessel:
- A general principle is that ... the internal operation of a ship which is regulated by the laws of a foreign state on an ongoing basis, as ships move around the world and the general law that the flag state has primacy of jurisdiction on the high seas.<sup>28</sup>
- 3.49 Evidence received during the inquiry indicated that in many cases, the flag state is simply a flag of convenience and does not have the interest, will or resources to deal with a crime.<sup>29</sup> In such cases, other states with concurrent jurisdiction may be able to come to an agreement with the flag state to investigate and prosecute the alleged crime.

## Legal Advice

- 3.50 The preceding paragraphs of this Chapter amply demonstrate the complexity of international law as it applies to vessels that travel internationally. Various sources of evidence to the inquiry have pointed out that this is a notoriously complex area of law that does not readily provide rules for straightforward application. For example, the Attorney-General's Department submitted that:

In practice, the application of these principles [of international law] requires a balancing of the rights and obligations of flag States and coastal States, as well as a consideration of both Australia's international legal obligations and matters of international practice and comity.<sup>30</sup>

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26 UNCLOS, Article 27.

27 Government Response, Appendix F.

28 Ms Camille Jean Goodman, Attorney General's Department, *Committee Hansard*, 14 March 2013, p. 2.

29 See: Dr Kate Lewins, *Submission 1*, p. 4; Holiday Travel Watch, *Submission 3*, pp. 10-11; Commissioner for Victims' Rights South Australia, *Supplementary Submission 7.1*, p. 2.

30 Attorney-General's Department, *Supplementary Submission 22.1*, p. 2.

3.51 The Milledge Recommendations suggested Australia consider passing legislation that would be similar in effect to the *Kerry Act*. Evidence to the inquiry supported such a step.<sup>31</sup> However, the Government Response indicated that it does not support the adoption of legislation similar to the *Kerry Act* in Australia, saying:

The Government considers that the current arrangements already cover the areas raised in the *Kerry Act* to the extent possible under Australia's obligations pursuant to international law.<sup>32</sup>

3.52 This question of whether Australia has the jurisdiction to enact legislation similar to the *Kerry Act* was a contentious issue during the inquiry. The Attorney-General's Department reiterated the position put forward in the Government Response:

In particular, under article 21 of [UNCLOS] we cannot pass laws and regulations about the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international standards or rules. That makes it very difficult for Australia to pass something analogous to the *Kerry act*.<sup>33</sup>

3.53 However, Dr Kate Lewins, for example, submitted that:

While Australia might consider it unpalatable to demand ship design or infrastructure changes such as heightened ship rails, it could nonetheless introduce a version of [the *Kerry Act*] dealing with, for example, on board CCTV monitoring, formal reporting standards for criminal acts aboard, and requiring evidence of training in medical treatment for sexual assault, and crime scene management.<sup>34</sup>

3.54 The Committee sought to establish definitively whether Australia would be able to enact legislation similar to the *Kerry Act*. To this end, it decided to obtain legal advice, which is referred to in various parts of this report. Whilst the Legal Advice gave the opinion that certain measures covered by the *Kerry Act* could be regulated under Australian law, it did not support a general adoption of similar legislation in Australia.

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31 See: Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 2; Commissioner for Victims' Rights South Australia, *Submission 7*, p. 10; Mr Mark Brimble, *Committee Hansard*, 1 February 2013, p. 7.

32 Government Response, Appendix F, p. 7.

33 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 2.

34 Dr Kate Lewins, *Submission 1*, p. 19.

## Jurisdiction under domestic Australian maritime law

- 3.55 If it can be established that Australia has jurisdiction relating to a matter under international law, the next step is to consider how the matter is dealt with under domestic law. As a federation, there are divisions of jurisdiction depending on where crimes occur in Australia.
- 3.56 To resolve complexities presented by Australia's federal system, the Australian Government, the States and the Northern Territory agreed in November 2000 to a cooperative scheme that provides clarity to the overlapping jurisdictions at the different levels of government. This scheme is referred to as the *Intergovernmental Agreement – Crimes at Sea 2000* (the Intergovernmental Agreement).<sup>35</sup>
- 3.57 The Intergovernmental Agreement provides for the extraterritorial application of the criminal law of the States in the waters adjacent to the coast of Australia. It also provides for the division of responsibility for administering and enforcing the law relating to crimes at sea.
- 3.58 The cooperative scheme is given the force of law by the following:
- *Crimes at Sea Act 2000* (Commonwealth);
  - *Crimes at Sea Act 1998* (New South Wales);
  - *Crimes at Sea Act 1999* (Victoria);
  - *Crimes at Sea Act 2001* (Queensland);
  - *Crimes at Sea Act 2000* (Western Australia);
  - *Crimes at Sea Act 1998* (South Australia);
  - *Crimes at Sea Act 1999* (Tasmania); and
  - *Crimes at Sea Act 2000* (Northern Territory).
- 3.59 The application of Australian criminal law to matters beyond 200nm can only be applied to an act committed on an Australian ship, an act committed by or against an Australian citizen, or to instances on board a non-Australian ship not involving an Australian citizen but where the next port of call is an Australian port or an external territory of Australia.<sup>36</sup> This reflects the international jurisdictional rules as explained above, particularly those under UNCLOS.
- 3.60 Whenever a Federal, state or territory prosecutor seeks to commence criminal proceedings for an alleged criminal act on board a foreign-registered ship, the Federal Attorney-General must give consent before the

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35 Intergovernmental Agreement – Crimes at Sea, Appendix H.

36 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 1.

matter proceeds to a hearing or determination.<sup>37</sup> The purpose of the Attorney-General's consent is to ensure consultation with foreign governments who hold concurrent jurisdiction, particularly the flag State.

- 3.61 The Intergovernmental Agreement states that, while the Australian Government, the States and the Northern Territory are empowered under the cooperative scheme to investigate and prosecute crimes that fall within their relevant jurisdictions, the applicable international legal obligations must be observed:

In exercising or performing powers, duties and functions under the cooperative scheme, the parties and their agencies must act so as to avoid any breach by Australia of its international obligations, in particular under the United Nations Convention on the Law of the Sea, having regard especially to the responsibilities of Australia with respect to ships of the Australian flag, and to the rights of other countries in the maritime areas to which the arrangements in this Agreement apply.<sup>38</sup>

- 3.62 As previously indicated, the Intergovernmental Agreement is given legal force at the federal level by the *Crimes at Sea Act 2000* (Cth) (the *Crimes at Sea Act*). The *Crimes at Sea Act*, and the cooperative jurisdictional arrangement are further discussed below.

## Crimes at Sea Act

- 3.63 The *Crimes at Sea Act* provides for the application of Australian criminal law on a territorial basis. The *Crimes at Sea Act* is the primary act that seeks to claim jurisdiction over crimes at sea.
- 3.64 As explained above, it also gives legislative effect to the cooperative approach set out in the Intergovernmental Agreement. The agreement provides for a system to clearly identify the appropriate domestic jurisdiction in Australia's federal system when a crime has occurred.

## Establishing the relevant domestic jurisdiction in a federal system

- 3.65 The *Crimes at Sea Act* establishes three 'zones' – the inner adjacent area, the outer adjacent area and the area outside the adjacent area. These areas are illustrated in the figure on the following page. Mirroring UNCLOS maritime boundaries, the 'inner adjacent area' is that area within a 12nm belt of sea as measured from the baseline of the State (its internal waters). The outer adjacent areas is that area beyond 12nm up to a distance of

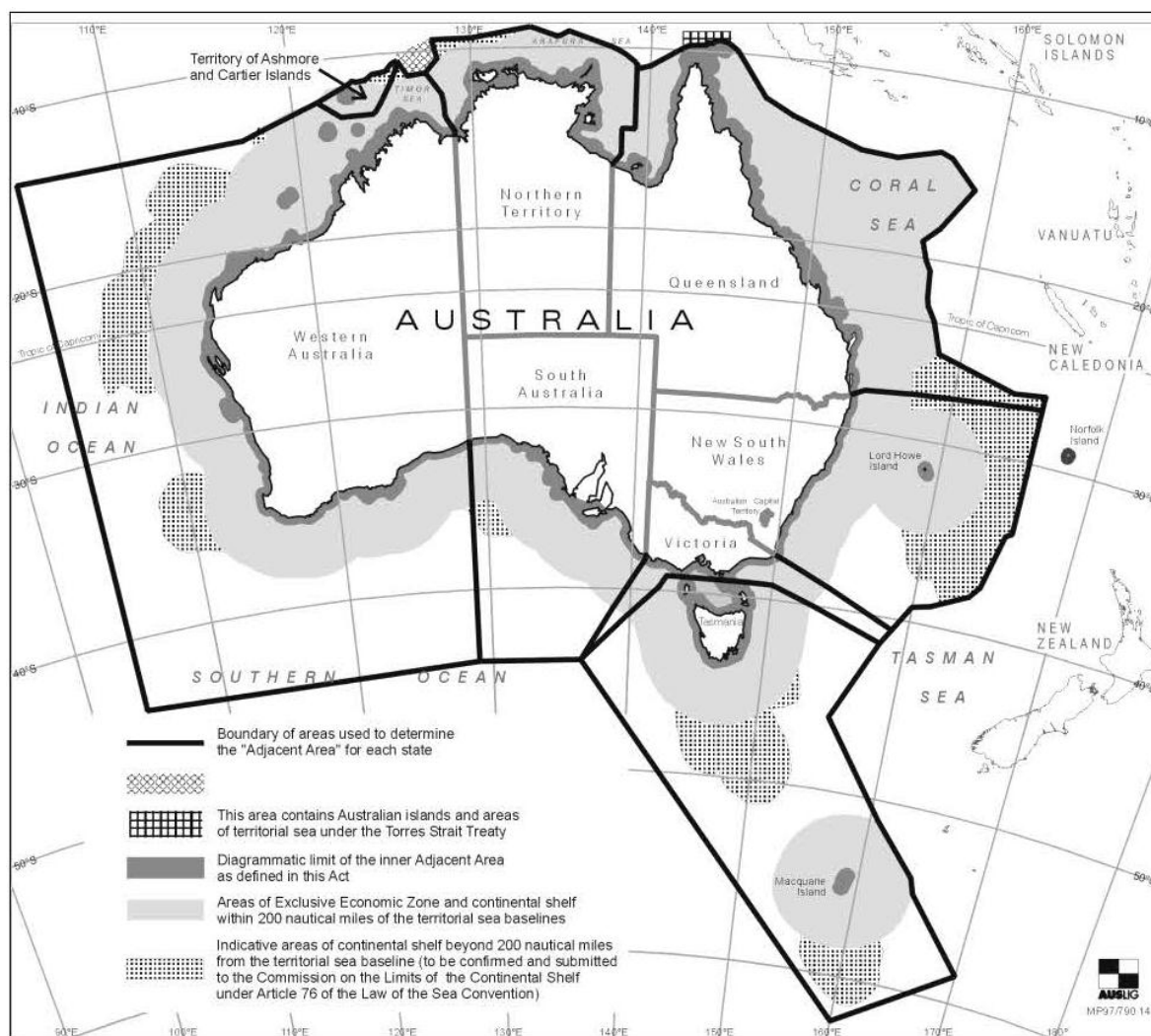
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37 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 1, 8.

38 Intergovernmental Agreement – Crimes at Sea, Appendix H, p. 2.

200nm from the baseline for the State or the limit of the continental shelf (whichever is the greater distance).<sup>39</sup>

**Figure 2** Indicative Map of Intergovernmental Agreement jurisdictions



Source Schedule 1, *Crimes At Sea Act 2000*

3.66 For criminal acts alleged to have been committed within the adjacent area (both outer and inner), the cooperative scheme established by the Intergovernmental Agreement, applies the substantive criminal law of the adjacent state or territory.<sup>40</sup>

3.67 The cooperative scheme provides that the substantive criminal law of the state applies to alleged criminal conduct within the *inner adjacent area* of a state. The responsibility for commencing prosecutions of such offences generally rests with the adjacent state's relevant prosecuting authorities.

<sup>39</sup> Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

<sup>40</sup> *Crimes at Sea Act 2000*, Schedule 1, Part 2.



However, it is possible for the Commonwealth Director of Public Prosecutions (CDPP) to conduct such prosecutions in accordance with existing joint trial arrangements with the states.<sup>41</sup>

- 3.68 Similarly, the cooperative scheme outlined that in the case of the *outer adjacent area* of a State, 'the provisions of the substantive criminal law of that State apply by force of the law of the Commonwealth. Accordingly, offences under the applied State law in the outer adjacent area are technically Commonwealth offences'.<sup>42</sup> The responsibility to prosecute alleged offences within this area may rest with the adjacent State, another State or the Commonwealth. The Intergovernmental Agreement provides some guidance on this matter and outlines some indicative circumstances to determine the relevant jurisdiction.<sup>43</sup> Where the authority to commence a prosecution is contested by multiple jurisdictions, the Intergovernmental Agreement requires a consultative process to determine how the matter should proceed.<sup>44</sup>
- 3.69 For criminal acts alleged to have been committed *outside the adjacent area*, the jurisdiction which carries responsibility to investigate and prosecute is determined in accordance with section 6 of the *Crimes at Sea Act*. Commonwealth law, by way of the Jervis Bay territory, applies to alleged criminal conduct within this area, and consequently, the responsibility for prosecuting alleged offences rests with the CDPP.

## Criminal Code Act

- 3.70 The *Criminal Code Act 1995* (Cth) asserts Australia's jurisdiction to alleged criminal conduct where an Australian citizen or resident of Australia is seriously harmed even where that conduct occurs outside of Australia's territory where it can claim jurisdiction. This reflects the 'nationality principle' under international law as explained earlier in this Chapter.
- 3.71 Mr Iain Anderson, First Assistant Secretary, Criminal Justice Division, from the Attorney-General's Department commented that the *Criminal Code Act*:

... does not in itself empower the AFP to go offshore and carry out investigations. Realistically it is always going to be a question of negotiations with the jurisdiction where such an offence occurs as to whether they are going to prosecute and whether we might

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41 Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

42 Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

43 Intergovernmental Agreement – Crimes at Sea, Appendix H, Clause 4; Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

44 Intergovernmental Agreement – Crimes at Sea, Appendix H, Clause 6; Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

carry out investigations. That is just a limitation on the practical utility of those offences.<sup>45</sup>

- 3.72 The process and challenges of conducting investigations will be discussed in greater detail in Chapter 5 of this Report.
- 3.73 As stated earlier, Dr Lewins expressed concern that Australia does not assert its internationally accepted jurisdiction where an Australian falls victim to a crime as frequently as when it does where an Australian is the alleged perpetrator of a crime.<sup>46</sup> Section 115 of the *Criminal Code Act* asserts Australia's jurisdiction over events where an Australian is a victim of a crime outside of its territory.
- 3.74 However, Dr Lewins expressed concern that it is not clear how the assertion of Australian jurisdiction where an Australian is a victim (in line with the national personality principle) interacts with the *Crimes at Sea Act*,<sup>47</sup> where the national personality principle is not included.

## Improvements through international bodies

- 3.75 Although there are considerable limits on Australia's ability to pass legislation about matters in the *Kerry Act*, Australia has considerable opportunities to improve cruise passenger safety through multilateral bodies such as the International Maritime Organisation (IMO).
- 3.76 The development of consistent international maritime rules is particularly important for an island nation like Australia, and Australia has a proud history of involvement in developing international law and regulation including UNCLOS.
- 3.77 The Office of International Law at the Attorney Generals' Department is currently involved in discussions of this kind within the auspices of the IMO. Mr Anderson stated:

Australia is also actively involved in seeking to develop or help negotiate new standards to the extent that that is possible. These things take a while; UNCLOS itself was negotiated over 200 years. That is a side process because it is a multilateral process, but the Office of International Law is involved in discussions with other countries under the umbrella of the International Maritime Organisation. We are trying to look at the new standards.<sup>48</sup>

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45 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 2.

46 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, pp. 1-2.

47 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 2.

48 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 3.

3.78 Australia has been involved in IMO work to develop guidelines for dealing with crimes on vessels:

Australia actively participates in the IMO Legal Committee and Australia's engagement is led by our [the Office of International Law, Attorney-General's Department]. At the last meeting, in April 2012, Australia was supportive of the guidelines being included on the committee's work program.<sup>49</sup>

3.79 Those guidelines are titled *Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected*. The guidelines were adopted by the IMO Legal Committee in early 2013, and it is widely anticipated that they will be adopted when they are put to the full IMO Assembly in November 2013. The guidelines are discussed in greater detail in Chapters 4 and 5.

3.80 This is a good example of the productive work that can be done in international fora. However, the extent of the Australian Government's involvement in this matter is not immediately clear from the records of the IMO Legal Committee. Although Australia participated in the Committee's meetings, other delegations (such as from the Philippines and the United Kingdom) took leading roles.<sup>50</sup>

3.81 In addition, the matters covered by the guidelines do not exhaust the avenues for further passenger safety on cruising vessels. Recent tragedies discussed in Chapter 2 highlight the continuing need for improved vessel safety. Areas that need urgent international cooperation include:

- The installation of security cameras with a closed-circuit television monitoring system (CCTV), including real-time monitoring by security;
- The installation of 'man-overboard' alarm systems to alert on-board security to passengers going overboard;
- The adoption of mandatory crime reporting protocols analogous to those in the *Kerry Act* (see Chapter 5); and
- The implementation of *Responsible Service of Alcohol* (RSA) protocols (including training) for bar and security staff.

3.82 Despite the fact that some cruise operators have implemented some of these measures on certain vessels, there remains no mandatory standard applied across the industry. These safety measures are discussed further in the following Chapter.

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49 Ms Camille Goodman, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 6.

50 International Cruise Council Australasia, *Submission 11*, Attachment A.

- 3.83 It is clear that there is both the need and the opportunity for Australia to make a much greater contribution to the development of international standards to improve cruising passengers' safety.

## Committee Comment

- 3.84 It comes as no comfort to a victim of crime at sea, or to someone who suffered an accident at sea, or their families, that international law does not allow for greater Australian regulation of the cruising industry. It is wholly irrelevant to their needs as victims. The complexity and vagueness of maritime law and regulation may be an inherent feature of international law today, but it cannot be an excuse for inaction.
- 3.85 Australia's capacity to legislate for particular vessel requirements is limited, under international law, to matters about which Australia can exercise prescriptive jurisdiction. The following Chapter outlines actions that the Australian Government make take in regard to this. UNCLOS provides that states may not make laws pertaining to the design, construction, manning or equipment of foreign ships unless according to accepted international standards.<sup>51</sup>
- 3.86 The Legal Advice confirms the limits of Australia's capacity for unilateral regulation of the cruising industry, but this does not preclude active and creative work to improve safety and justice for cruising passengers through cooperative international work.
- 3.87 Pursuing negotiated changes to passenger protection strategies within the IMO will require long-term commitment. As is often the case with multilateral organisations, change takes a significant and continued commitment. Yet, protracted negotiations and debate should not be a deterrent to pursuing valuable endeavours to prevent crimes at sea.
- 3.88 Indeed, whilst the collaborative nature of international maritime law is a barrier to Australia unilaterally imposing better regulation of the cruise industry, the cooperative nature of the international maritime legal system is also a strength as the reach of its standards and protocols is expansive. Widespread and pervasive elements of treaty law can with time become customary law, binding on all states, regardless of whether or not they are party to the treaty in question.
- 3.89 The Australian Government should, as an urgent priority, pursue the development of international agreements to standardise cruising vessel safety equipment and procedures, and in particular:
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51 UNCLOS, Article 21.

- The installation and real-time monitoring of CCTV;
- The installation of 'man-overboard' alarm systems to alert on-board security to passengers going overboard;
- The adoption of reporting protocols analogous to those in the *Kerry Act* (see Chapter 5); and
- A Responsible Service of Alcohol code.

## **Recommendation 2**

3.90 **The Committee recommends that the Australian Government dramatically increase its efforts to achieve greater cruise passenger safety and crime prevention strategies within the International Maritime Organisation and other organisations as appropriate, including pursuing cooperative agreement for the following urgent priorities:**

- **The installation and real-time monitoring of CCTV;**
- **The installation of 'man-overboard' alarm systems to alert on-board security to passengers going overboard;**
- **The adoption of reporting protocols analogous to those in the Kerry Act; and**
- **A Responsible Service of Alcohol code.**

3.91 In order to promote the adoption of the most recent IMO guidelines, the Australian Government must continue to strongly voice its support for them, and vote in their favour at the IMO Assembly in 2013.

## **Recommendation 3**

3.92 **The Committee recommends that the Australian Government vote in favour of the *Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected*, at the upcoming International Maritime Organisation Assembly in November 2013.**



## Promoting safety and crime prevention

- 4.1 The main interest of victims' groups is to ensure that the tragedies they suffered do not occur again. For these groups, improved on-board safety measures and better crime prevention are the central focus of their work. These things may rely on changes to the law, as well as improved passenger information and the promotion of more accountable corporate cultures.
- 4.2 This Chapter will consider two main categories of measures to improve safety and crime prevention:
- On-board crime prevention and safety measures:
    - ⇒ The Milledge Recommendations;
    - ⇒ Alcohol service;
    - ⇒ On-board security;
    - ⇒ Video monitoring; and
    - ⇒ Operators' liability for negligence.
  - Pre-departure preparation and awareness of passengers:
    - ⇒ Consumer information; and
    - ⇒ The *Smartraveller* website.

### On-board crime prevention and safety measures

- 4.3 The Milledge Recommendations contained a number of suggested measures to increase safety on cruise ships, aimed at preventing the committing of crimes. Amongst these were:
- The attachment of a Federal Police Officer (or Officers) to travel with ships;

- Drug detection scanning for passengers and crew boarding all vessels at Australian ports; and
  - Drug detection dogs used at all Australian ports.
- 4.4 These measures reflect the principle that protecting the rights of individuals relies on the prevention of crime and accidents, as well as the prosecution of perpetrators through the criminal justice system.
- 4.5 In the United States, the *Kerry Act* requires cruise ships that come within its ambit to conform to certain design standards for greater passenger security, such as rails that are at least 42 inches high, peep holes in cabin doors, security door latches, 'man-overboard' (MOB) detection technology, and video surveillance.<sup>1</sup>
- 4.6 As discussed in Chapter 3, the Legal Advice makes it clear that UNCLOS restricts the regulation of the design, construction, manning and equipment of foreign-flagged ships unless those laws give effect to generally accepted international standards or rules.<sup>2</sup> The United States is not a party to UNCLOS and is therefore able to regulate under the *Kerry Act*. Australia is more limited in its ability to legislate for matters contained in the *Kerry Act*. Hence the Australian Government must direct its efforts to intergovernmental work in fora such as the IMO in relation to some of the safety and prevention measures discussed in this Chapter.

## Alcohol service

- 4.7 The recreational nature of cruise ships means that passengers are more likely to consume alcohol, and probably more than they would on land. Providing evidence about the consumption of both alcohol and drugs, the Australian National Council on Drugs said that:

There is a limited research available on the higher levels of drug or alcohol use (and other 'risk-taking' activities) among people who are travelling or on holiday, without being specific to cruise ships. Higher consumption of alcohol or drugs among this group may relate to these activities being associated with pleasurable experiences or leisure time, to the use of alcohol or other drugs as social lubricants, to their role for some in celebrations, or to other factors. Some of the research has noted that drug use while away from home is regarded by some as being less risky than drug use at home. It could be inferred that higher levels of use on cruise ships (compared to use in the general population) would not be unexpected given this research. However, there needs to be

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1 Section 3507-8, Title 46 (shipping), USA Code.

2 Legal Advice, Appendix D, p. 2.



caution using this information given the clear differences that exist for cruise ship passengers compared to land based travellers.<sup>3</sup>

- 4.8 General evidence to the inquiry suggested that high consumption of alcohol is a feature of cruise ships. According to the International Cruise Victims Association, excessive alcohol consumption leads to numerous risks:

The over-indulgence of alcoholic beverages by cruise ship passengers on a carefree holiday has led on more than one occasion to safety related accidents onboard ship, physical and sexual assaults, and even the unfortunate death of passengers who have fallen over the ship's railing while becoming sick after consuming too much alcohol. While most adult passengers are responsible enough to control their drinking activities as they would in any other social setting, many other passengers, including juvenile underage drinkers are the most vulnerable to the party-like environment of a cruise ship where alcohol is virtually available, 24 hours a day.<sup>4</sup>

- 4.9 The consumption of alcohol can have a direct impact on the level of crime. As stated in an academic paper by Ross Klein and Jill Poulston:

Around half of all sexual assaults are associated with alcohol consumption...of either the perpetrator or victim.  
[...]

Although most cruise ships prohibit the consumption of alcohol purchased elsewhere...alcohol is also a major factor in sexual crimes committed on cruise ships.<sup>5</sup>

- 4.10 Numerous examples of current or past cruising policies demonstrate how retail and bar policies can encourage of excessive alcohol consumption. Examples include:

- Promotional events, such as 'happy hours' or 'two-for-one specials';
- Purchase of bulk drinks packages;<sup>6</sup>
- Alcohol sales-commissions for staff; and
- The consumption of duty-free alcohol purchased in ports.<sup>7</sup>

- 4.11 However, the cruise industry claims that it has made some efforts in recent years to prevent alcohol from driving dangerous or criminal

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3 Australian National Council on Drugs, *Submission 8*, p. 1.

4 International Cruise Victims Association, *Supplementary Submission 12.2*, p. 18.

5 Dr Jill Poulston, *Submission 5*, (Attachment A), p. 7.

6 International Cruise Victims Association, *Supplementary Submission 12.2*, p. 52.

7 Carnival Australia, *Submission 9*, p. 4.

behaviour on board ships. Ms Ann Sherry, CEO of Carnival Australia, considers that the cruising industry has undergone a 'transformation', including in relation to alcohol service:

The transformation has involved a significant number of changes, so there is now zero tolerance of excessive behaviour on board any Carnival Australia cruise ships. This policy has seen the introduction of a series of significant changes. We have now strict policies and procedures to ensure responsible service and consumption of alcohol and no bar staff are on incentives to sell alcohol, nor do any of our ships in this region have unlimited drinking packages.<sup>8</sup>

4.12 Since 2002, Carnival Australia has taken the following steps to reduce the abuse of alcohol:

- Ending alcohol sales-commissions for staff;
- Confiscation of alcohol that passengers attempt to bring on board;
- Compulsory *Responsible Service of Alcohol* (RSA) training for crew; and
- Additional controls to prevent alcohol service to minors.<sup>9</sup>

Royal Caribbean Cruise Lines, the other major player in the Australian cruise industry, advised that commissions are not paid for the sale of alcohol.<sup>10</sup>

4.13 Evidence given by cruise company representatives detailed how such changes have been implemented. In respect of confiscation of off-ship alcohol:

On P&O ships no alcohol is allowed on board as passengers embark, and that was a decision we made at the time that there were suggestions that that was how people were circumventing the rules. Everyone is screened, like with airport screeners, both shore-side and on the ship. So it is impossible, basically, for you to have a bottle of alcohol sitting under your jacket and for us not to find it, although people do try. With some of our companies that have older passengers and passengers who are paying a lot more for their cruises we have an option of bringing a special bottle of wine on board, but it is very limited. People buying duty-free alcohol have it given to them as they disembark the ship at their home port, so you do not have the opportunity to buy lots and lots of duty-free alcohol and have that in your cabin and be drinking it

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8 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 1.

9 Carnival Australia, *Submission 9*, p. 4.

10 Mr Gavin Smith, Royal Caribbean Line Cruises Ltd, *Committee Hansard*, 15 February, p. 10.

rather than engaging in the public spaces where we have more visibility.<sup>11</sup>

And for the *Responsible Service of Alcohol*:

Rather than dealing with people after they get to the stage of needing more intervention, we have supervisors in all of the bars, whom we call RSA supervisors, who watch the dynamic of what is going on. If we see people who are clearly drinking too fast or getting too drunk, we stop serving them alcohol. We have a lot of authority on board the ships to stop serving. The RSA supervisors will often suggest to people and their friends that maybe they cool off or even that it is time to call it a night. We are much more involved in making sure that everyone on board the ship has a great time. Often that requires us to say to the people who are absolutely at the margin of that, 'You are disrupting people and perhaps it is time you went to bed.' Most of our passengers are very happy to do so once someone comes up to them and says, 'Maybe it is time to call it a night,' and it is very rare that we are required to even contemplate something like holding people or doing that.<sup>12</sup>

- 4.14 Retail management systems on cruising vessels give companies ample information about passengers' spending and drinking habits, which can strengthen the *Responsible Service of Alcohol*:

The issue with alcohol consumption is that there is no suggestion within the cruise line management that there is a revenue orientation towards alcohol consumption. We look at guests, from the young child through to the older guest, and look at their spend across the ship – between shore tours, the casino, shop purchases and beverages. The relationship that we have with our guests is very broad. Part of that is the responsible service of alcohol if that indeed is part of their consumption.<sup>13</sup>

Because we are in a controlled environment, we have the capability to shut the account of that guest so that they can no longer make any purchases...on the ship.<sup>14</sup>

[the passenger cannot go to another bar on ship] because every single transaction is undertaken using their electronic card, which

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11 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 14.

12 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 9.

13 Mr Gavin Smith, International Cruise Council of Australasia, *Committee Hansard*, 7 February 2013, p. 12.

14 Mr Gavin Smith, International Cruise Council of Australasia, *Committee Hansard*, 7 February 2013, p. 14.

is their pass key. Once they are cut off, which is the standard industry phrase, they are cut off. Again, we are well practised in making sure that another guest does not start purchasing for a guest that has been cut off. If that does happen, and it must happen in pubs and clubs ashore, if somebody does that, they are cut off as well. That is exercised very diligently.<sup>15</sup>

### Schoolies cruises

4.15 Until 2007 Carnival operated designated 'schoolies cruises', aimed at school-leavers. However, it eventually discontinued such cruise marketing, concerned about the risk of 'risk of secondary supply of alcohol on board its cruise ships to passengers under the age of 18'<sup>16</sup> on schoolies cruises. There are many other risks associated with 'schoolies' events on land, including risky behaviour, alcohol-fuelled violence and drug use.<sup>17</sup>

4.16 In order to effect such a ban, Carnival Australia had to secure an exemption from anti-discrimination law:

We have banned schoolies cruises, a change that required obtaining a unique exemption from the Australian Human Rights Commission and the Age Discrimination Act. We have radically shifted our emphasis so that cruising is now promoted as a relaxed family holiday for all age groups.<sup>18</sup>

4.17 The exemption from the Human Rights Commission is to allow Carnival Australia to restrict the carriage of passengers as follows:

... between 1 November and 7 January annually, passengers who are under the age of 19 must be accompanied by a responsible adult (the 'Responsible Adult Requirement'); and

... between 8 January and 31 January annually, [Carnival] will permit a quota of 60 passengers per cruise who are under 19 years of age and not accompanied by a responsible adult. After this quota is filled, [Carnival] will apply its requirement that

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15 Mr Gavin Smith, International Cruise Council of Australasia, *Committee Hansard*, 7 February 2013, p. 14.

16 Australian Human Rights Commission, *Notice to Grant a Temporary Exemption*, Applicant: Carnival Australia, 2010, p. 2.

17 See for example: House of Representatives Standing Committee on Family, Community, House and Youth, *Avoid the Harm - Stay Calm / report on the inquiry into the impact of violence on young Australians*, July 2010; Legislative Assembly of Queensland Law Justice and Safety Committee, *Inquiry into Alcohol-Related violence - final report*, March 2010.

18 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 2.

passengers under 19 years of age must be accompanied by a responsible adult.<sup>19</sup>

- 4.18 The Human Rights Commission exemption expires on 22 June 2013, and Carnival Australia will have to reapply in order to seek a further exemption. Although Carnival Australia has taken decisive action to abandon the 'schoolies' part of the market, other operators may continue to do so, and new entrants into the market may seek to profit from such cruises. The Committee's conclusions about this matter are included in the Committee Comment section at the end of this Chapter.

### **On-board security**

- 4.19 Evidence from cruise operators emphasised the role of security staff in all aspects of ship operations. As expressed by Cruise Lines International Association: 'Major lines have sophisticated security departments run by former federal, state or military law enforcement officials and staffed by competent, qualified security personnel.'<sup>20</sup> Carnival Australia noted that improved security arrangements are part of its response to tragedies in the past, stating that there are 'Highly trained security teams on-board (at least 20 security personnel on each P&O Cruises cruise).'<sup>21</sup>
- 4.20 Internationally, the International Cruise Victims Association (ICVA) has proposed an independent enforcement agency, the Cruiseline Law Adherence Monitoring Personnel.<sup>22</sup>
- 4.21 Security officers have numerous roles to play on a ship, but they are particularly important in preventing dangerous or criminal behaviour. As pointed out by the ICVA, on-board security is the closest thing to a police force whilst at sea:

While the ship has many employees, one noticeable element missing from this well-staffed city at sea, is a police force with jurisdictional authority over its citizens. That is not to say that the seagoing city is not without security. On the contrary, it maintains a contingent of paid employees that enforce the ship's security policies. They are, for all intent purposes, paid to keep the

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19 Australian Human Rights Commission, *Notice to Grant a Temporary Exemption*, Applicant: Carnival Australia, 2010, p. 1.

20 Cruise Lines International Association, *Submission 11*, p. 1.

21 Carnival Australia, *Submission 9*, p. 3.

22 International Cruise Victims Association, *Cruiseline Law Adherence Monitoring Personnel (CLAMP)* <<http://internationalcruisevictims.activeboard.com/t10401106/icv-outlines-proposal-for-independent-security-personal-on-c/>> viewed 29 January 2013.

gangways operating smoothly and or to prevent unauthorized access to bars and casinos.<sup>23</sup>

- 4.22 Security officers evidently have a very important role in monitoring the safety of all passengers, and in overseeing the supply of alcohol, as noted above. Security officers also have particular obligations to perform when a crime has been committed, which is discussed further in Chapter 4.
- 4.23 Concerns raised about security during the inquiry focussed on:
- Background and training of officers;
  - Potential conflict between interests of passengers and interests of the vessel owner; and
  - Police officers attached to vessels.

### Background and training

- 4.24 Carnival Australia told the Committee that police background checks are conducted on all crew members every two years, and every 12 months for crew who work with children.<sup>24</sup>
- 4.25 It is not clear if the cruise industry outside Australia operates in a similar way. On an inspection of *MS Amsterdam*, a Holland America Line ship docked at Sydney, a child care worker told the Committee that she could not recollect undergoing a background or qualifications check since the commencement of her employment eight years ago.<sup>25</sup>
- 4.26 As noted in Chapter 1, the Committee did not hear from the smaller companies in the cruise industry. Mr Mark Brimble noted that:
- While P&O Cruises Australia has agreed to improve certain of its current procedures and implement new procedures in light of the events surrounding the death of Dianne Brimble, the actions of only one Cruise Line do not provide protection to passengers travelling on ships of other cruise lines.<sup>26</sup>
- 4.27 The Legal Advice provided to the Committee expresses doubt that Australia would be able to impose conditions on entry to Australian ports around the training or background of security staff:
- The imposition of conditions requiring ships to ... have carry crew with particular training are also likely to be regarded as going

23 International Cruise Victims Association, *Supplementary Submission 12.2*, p. 7.

24 Ms Ann Sherry, *Carnival Australia, Committee Hansard*, 15 February, p. 2.

25 Site inspection, 15 February 2013, Appendix C.

26 M Brimble and International Cruise Victims (Australia), *Submission to the Coroner's Court of New South Wales Inquest into the Death of Dianne Brimble on the P&O Pacific Sky on 24 September 2002*, p. 6 <[www.internationalcruisevictims.org/files/DOC121110.pdf](http://www.internationalcruisevictims.org/files/DOC121110.pdf)>.

beyond what Australia is entitled to require as a condition of port access.<sup>27</sup>

### **Conflict of interest**

4.28 Some submissions questioned the capacity of security officers to protect both the interests of passengers and the interests of the cruise operator, their employers, when these conflicted. The ICVA submitted that:

The safety of passengers and crew aboard a cruise and that is reflected in the professionalism of its security staff. The ability to react with decisiveness and with authority must be combined with professionally trained personnel using modern resources and training methods. With respect to cruise ships, the response of the security force to incidents has predictable responses. This stems from the fact that security officers on cruise ships are paid employees of the cruise lines and not an independent law enforcement representative with any authority (other than what the cruise lines give them). Their capacity to act officially in an investigation when an alleged crime has been committed is limited to the direction given by the Captain and/or the cruise lines.<sup>28</sup>

4.29 Provisions of the *Kerry Act*, for example, impose mandatory reporting and confidentiality requirements that would reduce the possibility of vessel operators putting their own interests before the interests of passengers.

### **Police officers attached to vessels**

4.30 The Milledge Recommendations proposed attaching police officers to cruising vessels:

Consideration should be given to the use of Federal Police Officers as 'on board' investigators travelling with the ship at all times. It would not be intended that their presence be intrusive but they would be reactive to crime reporting and could ensure a timely investigation. They would also have significant impact on crime prevention.<sup>29</sup>

4.31 Mr Brimble and International Cruise Victims (Australia) recommended, in their evidence to the inquest:

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27 Legal Advice, Appendix D, p. 2.

28 International Cruise Victims Association, *Supplementary Submission 12.2*, p. 6.

29 Milledge Recommendations, Appendix E, p. 3.

A requirement to place independent security personnel or having a rotation of Federal or State police onboard ships to overcome any conflict of interest for employed security.<sup>30</sup>

4.32 The Government response rejected this particular recommendation, citing 'a number of complex legal, jurisdictional and practical impediments to complying with it'.<sup>31</sup> The Australian Government indicated that such legislation would face considerable difficulties, including the:

- Likelihood of exceeding the permissible international legal limits on extraterritorial jurisdiction;
- Inability of an Australian Federal Police officer to exercise any enforcement powers, such as arrest, on a foreign vessel except with the consent of the flag state; and
- Potential challenges to an Australian Court's jurisdiction over any resultant prosecution on account of irregular arrest.<sup>32</sup>

4.33 Moreover, criminal acts on cruise ships tend to be related to the crimes that State and Territory police agencies are responsible for.<sup>33</sup>

4.34 Ms Ann Sherry, CEO of Carnival Australia, told the Committee that 'sea marshals' had been trialled in the past in New South Wales, whereby off-duty or holidaying police officers travelled on cruise ships.<sup>34</sup> The practice was discontinued when Carnival Australia and the New South Wales police force concluded that it was an ineffective measure.<sup>35</sup>

4.35 Mr Giglia, Director Fleet Security and Investigations for Royal Caribbean Cruise Line, suggested that there are two practical obstacles to the effectiveness of 'sea marshals': the ability to have multiple governments agree on a single representative to wield jurisdiction in all areas, and the constitutional limits on the authority of a government official.<sup>36</sup>

4.36 Mr Ken Moroney, in a private capacity, suggested that sea marshals would be less effective than good security officers:

I am not all that convinced that sea marshals would work, because it is like policing land side: it is about the visibility of people

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30 M Brimble and International Cruise Victims (Australia), *Submission to the Coroner's Court of New South Wales Inquest into the Death of Dianne Brimble on the P&O Pacific Sky on 24 September 2002*, p. 6 <[www.internationalcruisevictims.org/files/DOC121110.pdf](http://www.internationalcruisevictims.org/files/DOC121110.pdf)>.

31 Government response, p. 10.

32 Government response, p. 11.

33 Government response, p. 11.

34 Sherry, 15 February 2013, p. 7.

35 Sherry, 15 February 2013, p. 7.

36 Mr Michael Giglia, Royal Caribbean Line Cruises, *Committee Hansard*, 15 February 2013, pp. 11-12.



engaged in security. It is about the visibility of the police on the street. You know yourselves, you are driving your own car down the street and you look in the rear-vision mirror and there is a highway patrol car behind you, you tend to feel for the seatbelt and you tend to check the speedo, even though you may be stationary. You tend to do all those things because of that awareness of who is around you. One of the important issues of land-based policing, in terms of prevention, then, is about the visibility of the operative. My preference would be to strengthen the role and function of security staff in terms of visibility and their operation and effectiveness rather than deploy covert sea marshals.<sup>37</sup>

## Video monitoring

- 4.37 Evidence to the inquiry frequently raised questions about the use of closed-circuit television cameras (CCTV). CCTV can make a considerable contribution to on-board safety through:
- Deterring individuals from committing criminal acts;
  - Rapidly identifying dangerous or criminal conduct as it is occurring; and
  - Recording evidence for later use by ship security and police agencies.
- 4.38 Carnival Australia has improved on-board installation of CCTV on its ships. Ms Sherry provided that: 'There are now up to 600 CCTV security cameras introduced to public areas of our ships, as well as infra-red cameras along the sides of our ships.'<sup>38</sup> Ms Sherry further noted, 'I think the focus – and the reason for having so much CCTV – is actually on early intervention.'<sup>39</sup> More generally, Mr Gavin Smith, of ICCA said that:
- [security officers work] in a very controlled environment. The point you raise is in respect of all public areas throughout the ship, which are monitored by CCTV. There are anywhere from 500 to 600 cameras, to more than a thousand cameras, depending on the size of the ship. So all of the activities of staff and guests in all public areas across the ship are monitored and recorded.<sup>40</sup>
- 4.39 While CCTV can help interrupt dangerous or criminal behaviour if it continuously monitored, it is not clear that this continuous monitoring is

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37 Mr Ken Moroney, *Committee Hansard*, 15 February 2013, p. 40.

38 Ms Ann Sherry, *Carnival Australia*, *Committee Hansard*, 15 February 2013, p. 1.

39 Ms Ann Sherry, *Carnival Australia*, *Committee Hansard*, 15 February 2013, p. 9.

40 Mr Gavin Smith, *International Cruise Council of Australasia*, *Committee Hansard*, 7 February 2013, p. 14.

occurring. Whilst Ms Sherry emphasised the continuous monitoring of these camera systems at the Committee's public hearing, subsequent media statements cast doubt on her evidence. The public hearing included the following exchange:

Dr STONE: The 600 cameras that you referred to in your evidence, is that across your ships or per ship?

Ms Sherry: That is per ship.

Dr STONE: Including infrared alongside.

Ms Sherry: Yes. It is in public areas. It is clearly not in people's cabins, but it is in all of the public areas so that we have got capacity to monitor what is happening on board the ship.

Dr STONE: Is that continuously monitored or is it just checked when there is an incident?

Ms Sherry: It is continuously monitored by staff dedicated to that.<sup>41</sup>

However, a different practice is suggested by recent media reports relating to the disappearance of the two passengers from a cruising vessel (discussed in Chapter 2):

...Ms Sherry says not all CCTV footage is monitored all the time.

"CCTV is monitored, but not every camera is monitored," she said.

"At that time of night, it was the last night of a cruise. Virtually everybody else was in the public spaces on the ship and they're the areas that we focus on at those times."<sup>42</sup>

- 4.40 CCTV can provide cruise vessel operators with effective knowledge about events in public areas of the vessel, in real time. However, in order to be fully effective, CCTV must be monitored by staff, with appropriate systems for reporting and taking action when cameras show that dangerous or criminal behaviour may be taking place. In the absence of such monitoring and systems, CCTV will serve merely to record evidence rather than contributing to prevention and safety.
- 4.41 In addition to CCTV, other equipment and systems can contribute to passenger safety. In addition to passively capturing images if an individual falls from the ship, other systems are intended to sound an alert when the individual's fall is detected. So-called 'man overboard' (MOB) detection systems have been considered by CLIA, particularly given

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41 Ms Ann Sherry, *Carnival Australia*, *Committee Hansard*, 15 February 2013, p. 7.

42 ABC News, *Hope fades for couple missing at sea*, <http://www.abc.net.au/news/2013-05-09/search-on-for-two-missing-from-cruise-ship/4680056>.

requirements of the *Kerry Act* to integrate such technology to the extent that it is available.

- 4.42 CLIA's white paper on this issue provides the summary that: 'CLIA believes that reliable MOB detection technology is not currently available. CLIA believes that image capture technology has been successful and is currently in use today.'<sup>43</sup> The white paper also reports that:

CLIA recognizes that many systems exist and are suitable in a static land based environment. However, the cruise industry has evaluated and demonstrated numerous MOB detection systems, and most have been determined to be unworthy of further consideration on board cruise ships in transit...To date, no current MOB technology has proven to be reliable in a cruise ship environment. Nonetheless, CLIA member lines continue to research, test and evaluate existing and future technologies.<sup>44</sup>

- 4.43 Although increasing use of CCTV has been made in the cruising industry, according to the Legal Advice received by the Committee, there is no scope for the Australian Government to mandate its installation or use on foreign flagged vessels<sup>45</sup>, which account for almost all cruising operations visiting Australian ports. However, this is no reason for inaction.
- 4.44 Given recent tragedies, it is an urgent priority for the cruising industry to source or develop appropriate MOB detection technology to increase vessel safety. The Australian Government also has a role in improving international regulation of these matters, which is discussed in the Committee Comment section at the end of this Chapter.

## **Operators' liability for negligence**

- 4.45 The Committee has considered, above, the various on-board systems and protocols to improve the safety of passengers at sea. In addition to improving active safety systems, the prospect of liability for negligence can encourage cruise operators to improve safety. The potential of substantial financial penalties for negligent acts or omissions is an added incentive for better on-board passenger protection systems.
- 4.46 When accidents occur at sea, passengers rightly expect that they are entitled to compensation. Recent examples demonstrate the different ways this can be dealt with. Passengers who had been on board the *Costa*

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43 Cruise Lines International Association, *White paper - Capture or Detection Technology Cruise Vessel Security and Safety Act of 2010*, p. 2.

44 Cruise Lines International Association, *White paper - Capture or Detection Technology Cruise Vessel Security and Safety Act of 2010*, pp. 1-2.

45 Legal Advice, Appendix D, p. 2.

*Concordia* when it ran aground in January 2012 were offered small compensation payments in exchange for agreeing not to pursue legal action.

4.47 In contrast, a class action lawsuit has been filed against Carnival Corporation in the USA, relating to events on the vessel *Carnival Triumph* in February 2013. An engine fire on the *Triumph* caused the ship to lose propulsion and drift in the Gulf of Mexico for five days without a working sewerage system or usual on-board amenities.

4.48 Dr Kate Lewins gave evidence that Australian cruise customers are unprotected in case of accidents. She said that:

The legal rights of Australians are woefully unprotected in relation to their rights to civil remedies against cruise ships. Cruise ship lines carry passengers according to their own conditions of carriage, and that may require people to sue in overseas countries; it may require them to sue in a place that does not have English as an official language. It may also restrict their rights to damages and injuries to an amount as little as one-tenth of what the protocols would entitle someone to recover.<sup>46</sup>

4.49 Dr Lewins was concerned that Australia has enacted neither the 1990 nor 2002 Protocols of the *Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974* (the Athens Convention). Dr Lewins describes the Athens Convention as essentially a trade-off between 'the right of freedom of contract (which allows a carrier to exclude liability to its passengers entirely) in exchange for the carrier being able to impose caps on liability'.<sup>47</sup>

4.50 Carnival Australia noted in their submission that 'while the Athens Convention has entered into force internationally, Australia is not a party to it'.<sup>48</sup> Accordingly, Carnival Australia notes:

...that it does not refer to the Athens Convention in any of its Australian passage contracts or brochures. Similarly, Carnival Australia does not attempt to apply a monetary limit to its potential liability to passengers.<sup>49</sup>

4.51 Carnival Australia's Cruise Ticket Contract (*Important Terms and Conditions of Contract*) states at item 28 'Limitation of Liability' that:

With the exception of Consumer Guarantees, to the extent permitted by law, we exclude:

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46 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 2.

47 Dr Kate Lewins, *Submission 1* (Attachment A), p. 3.

48 Carnival Australia, *Submission 9*, p. 13.

49 Carnival Australia, *Submission 9*, p. 13.

- any term, condition or warranty that may otherwise be implied by custom, law or statute;
  - any liability for loss, including loss arising out of:
    - i) the death or physical or mental injury of a passenger; or
    - ii) damage to any luggage or other belongings, caused by our negligence or the negligence of our servants or agents; and
  - any liability for Consequential Loss.<sup>50</sup>
- 4.52 In the increasingly common situation where an Australian consumer purchases a ticket online, the action of proceeding to payment is sufficient for the consumer to agree to these conditions of liability.<sup>51</sup> However, these conditions may be contested under Australia's consumer protection laws.
- 4.53 Dr Lewins submitted that enacting the Athens Convention would be 'an act of consumer protection with the added benefit of certainty for cruise ship operators'.<sup>52</sup>
- 4.54 Carnival Australia agreed with Dr Lewins that:
- Australia's consumer protection laws are a complicating factor when it comes to what might be covered in a cruise contract. We agree there is merit in considering whether a civil liability regime would give a clearer outcome.<sup>53</sup>
- 4.55 The Committee's conclusions about operators' liability for negligence are included in the Committee Comment section at the end of this Chapter.

## **Pre-departure preparation and awareness of passengers**

- 4.56 Alongside improving on-board crime prevention and safety measures, passenger safety may be improved by increased pre-departure advice and information to alert consumers to taking basic precautionary measures.
- 4.57 Consumers can be empowered to improve their own cruising safety, through better information about their rights and responsibilities, and by registering their travel with the Australian Government.

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50 Carnival Australia, *Cruise Ticket Contract*, item 28, <<http://www.carnival.com.au/Terms.aspx>>, accessed 24 May 2013.

51 Carnival Australia, *Cruise Ticket Contract*, item 3, <<http://www.carnival.com.au/Terms.aspx>>, accessed 24 May 2013.

52 Dr Kate Lewins, *Submission 1 (Attachment A)*, p. 13.

53 Carnival Australia, *Submission 9*, p.13.

## Consumer information

4.58 The provision of better advice about consumers' rights and responsibilities should ideally occur well before passengers embark on a vessel. The two major cruise operators in Australia provided evidence on the information given to passengers. Royal Caribbean explained:

[the] security guide describes the medical and security resources available onboard each ship, as well as jurisdiction if a crime occurs – various folks may have jurisdiction. So, the guide is provided... With regard to who to contact, we also provide, in each stateroom and the other venues I just described, the list of embassy contact information as well as the local law enforcement officials in each port of call. That is available in the manner I described. Also, each day in each stateroom, along with that description you get each day when you are on a cruise – of what events are occurring in that particular port, such as the weather and that sort of thing – included will be the law enforcement agency in the port that you are going to. So, if a crime were to befall you, either on the ship or while you were visiting the port, you would have that contact information.<sup>54</sup>

Carnival Australia supported these claims, stating that:

That is also true on all of our vessels. There is information in the cabins, as has been described, and we also have a television message that runs when you come onboard, advising you of the things to think about and look out for – what your responsibilities are as well as your rights onboard and so on. So, where you can go for help is very clear on all ships now, as well as what the rights and responsibilities of all passengers are.<sup>55</sup>

4.59 As noted by both Royal Caribbean and Carnival Australia, this information is provided in a variety of formats and means of communication. However, there is no standard requirement imposed by the Australian Government about what should be contained in consumer information. In the absence of prescriptive rules about what information should be provided, consumers must rely on the judgment of cruising operators about what kinds of information is relevant. There may be instances where the interests of the operator and consumer diverge with regard to what information should be provided.

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54 Mr Michael Giglia, Royal Caribbean Line Cruises, *Committee Hansard*, 15 February 2013, p. 12.

55 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 13.

4.60 By contrast, legislation in the USA is prescriptive about what information should be provided. Under the *Kerry Act*, passengers that come within its ambit must be provided with a *Security Guide* by the vessel owner. The *Security Guide* must be written in plain English and must provide:

a description of medical and security personnel designated on board to prevent and respond to criminal and medical situations with 24 hour contact instructions;

and must describe:

the jurisdictional authority applicable, and the law enforcement processes available, with respect to the reporting of homicide, suspicious death, a missing United States national, kidnapping, assault with serious bodily injury [and other crimes covered by the Act]... together with contact information for the appropriate law enforcement authorities for missing persons or reportable crimes which arise –

- (I) in the territorial waters of the United States;
- (II) on the high seas; or
- (III) in any country to be visited on the voyage.<sup>56</sup>

4.61 In contrast to land-based holidays outside Australia, cruising gives vacationers a strong sense of security and familiarity with their surroundings. However, passengers must also exercise basic personal safety measures and remember that they are sharing a vessel with potentially thousands of strangers, in a foreign setting. Normal holiday precautions are essential to remaining safe at sea, particularly when travelling long distances from Australia.

### **Smartraveller website**

4.62 The Department of Foreign Affairs and Trade maintains the *Smartraveller*<sup>57</sup> website, which provides travellers with authoritative advice on foreign travel destinations. The website provides advice on a country-specific basis, including regular updates and an 'alert level', which ranges from the straightforward 'exercise normal safety precautions' to 'do not travel'.

4.63 However, given that cruises often traverse the waters of many countries, as well as travelling through international waters, it is unrealistic to expect potential cruising customers to research the advice relating to all potential jurisdictions to which they might be subject at some point in a cruise.

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56 Section 3507(c), Title 46 (shipping), USA Code.

57 < <http://www.smartraveller.gov.au/> >

- 4.64 *Smartraveller* also provides advice on the basis of ‘issues and events’, such as ‘avian influenza’ and ‘piracy’, which does not necessarily specify particular countries. This kind of advice is more general, and provides links to further advice on particular matters such as health organisations. However, no specific advice regarding travel by cruise ships is provided.
- 4.65 *Smartraveller* hosts a service under which Australians can register their travel plans before they depart. Under the current arrangements, travellers must enter each planned port as a separate destination, as well as recording the cruising operator in their contact details. This is not conducive to cruise ship passengers registering their travel and may contribute to a misplaced sense of safety amongst cruise travellers.
- 4.66 Australians are famous for their international travelling, exploring the continents of the world, often from their first years of adulthood. Australian travelling culture is alive to the risks of foreign travel, and Australians generally travel with careful attention to safety.
- 4.67 However, there is a perception amongst Australian cruising passengers that the ‘international’ aspect of a cruise is the foreign ports that are visited, rather than the travel by cruise itself. The fact that they are often travelling with a majority of fellow Australians may add to this misplaced confidence. This is a concerning impression, as even in an Australian port cruise ships are partly subject to foreign laws. A cruise vessel is an international destination in and of itself.
- 4.68 When cruising, passengers should be aware that they are in an environment where, at the very least, there is the potential for confusion or competing claims about which country’s laws and regulations apply.
- 4.69 Unfortunately, the *Smartraveller* website’s silence about cruising contributes to the misplaced perception of passengers that the cruise vessel is governed by Australian laws and standards even as it travels in international waters and towards foreign ports.
- 4.70 *Smartraveller* fails to identify cruising as an international destination itself, and not just a form of transit. Pre-departure advice should reflect cruising’s status as a holiday destination and not just a means of transport.

### **Committee Comment**

- 4.71 Crime prevention measures are central to the safety of passengers on cruises. Whilst they will not prevent all crimes, they can improve the security of all people on board a cruising vessel, including through avoiding accidents.
- 4.72 The *Responsible Service of Alcohol* is a fundamental responsibility of any company or organisation that sells alcohol. Anecdotal accounts of



tragedies at sea clearly demonstrate the dangers of intoxication on large ocean-going vessels.

- 4.73 Some cruising operators have evidently learnt the lessons of past tragedies, and ensure that customer safety is not endangered by irresponsible alcohol policies. The Committee commends the improvements made in alcohol service in the cruising industry, and strongly supports their retention and improvement.
- 4.74 However, the cruising industry is large and diverse, and as the Australian market continues to grow, there is a possibility that responsible operators may be undercut by new entrants to the market who do not adhere to the voluntary RSA practices.
- 4.75 Carnival Australia's decision to ban schoolies cruises is a responsible one. However, there is a possibility that other operators will seek to take advantage of the 'schoolies' market and run such cruises in future. The Committee believes that operating 'schoolies cruises' is irresponsible, and expects that operators, informed by the tragedies of recent years, will refrain from doing so.
- 4.76 The Committee notes that Carnival Australia will soon have to reapply for an exemption for its schoolies-cruise ban. The Human Rights Commission must consider such an exemption on its merits, and the Committee is fully supportive of Carnival's decision to ban schoolies cruises.
- 4.77 On-board security staff play a number of linked but separate roles on a cruising vessel. As noted above, they have a responsibility to their employer that might, at times, conflict with the interests of passengers. Such conflicts of interest must be managed by the cruising operator, and security staff should be well aware of their responsibilities to protect the welfare of all passengers, including those who have suffered an accident or are victims of on-board crime.
- 4.78 Although the attachment of police officers to cruising vessels might, in some cases, assist in the prevention and investigation of crimes, there are a number of practical and legal barriers to such a regime being put in place. The Committee does not believe that such policing attachments should be made.
- 4.79 The role of CCTV in preventing and investigating crime can be significant, and the cruising industry is to be commended for increasing its use of CCTV to keep passengers safe. However, there remain questions about the monitoring and use of CCTV footage. If CCTV is properly monitored, on-board security can immediately respond when an accident or crime is actually occurring.

- 4.80 The Committee is not convinced that continuous monitoring of CCTV is occurring. Recent tragedies suggest that the monitoring of cameras is inadequate, and that passenger safety is at risk as a result. Even a short delay in identifying dangerous or criminal behaviour can mean the difference between safety and tragedy.
- 4.81 The Committee therefore strongly urges all cruise ship operators to improve passenger safety, particularly through the provision of continuous monitoring of CCTV and the development of reliable MOB detection technologies.
- 4.82 While the issue of passenger liability is not a central tenet of this inquiry, the Committee has deep reservations about the limited civil protections provided under Australian law for Australian passengers on cruise ships.
- 4.83 Carnival Australia's evidence that it provides *no financial limit* on its potential liability to passengers is literally consistent with its Cruise Ticket Contract, insofar as that contract absolves Carnival from *any liability for negligent conduct*. The Committee is of the view that this type of carrier contract is unfair, and may result in cases where Australians with legitimate claims against negligence would not be able to be adequately compensated.
- 4.84 Further, the Committee is concerned that many passengers on cruise ships may be unaware of the limited liability condition, particularly when booking their tickets online. This is particularly worrying to the Committee, given the potential financial gravity of the contractual waiver. The Committee therefore calls on the cruise industry to ensure that consumers are more actively made aware of these contract conditions, particularly on online booking systems.
- 4.85 Given that the cruise industry in Australia continues to grow at an exceptional rate, the Committee does not view the provision of legal protections against negligence to passengers as an unfair financial burden to be placed upon those companies.
- 4.86 The Committee considers that the current position of absolution from any liability may operative to diminish incentives for the cruise industry to maintain high standards of on-board safety.
- 4.87 The Committee sees merit in Australia enacting an Athens Convention based liability regime, but does not have the capacity in this inquiry to fully canvass all options and legislative arrangements. The Committee therefore recommends that the Australian Government conduct a comprehensive review of cruise vessel operators' liability for cruise tickets purchased in Australia, in order to develop appropriate safeguards for Australians travelling at sea.

#### **Recommendation 4**

- 4.88 **The Committee recommends that the Australian Government conduct a comprehensive review and report on cruise vessel operators' liability for cruise tickets purchased in Australia, including Australia's capacity to provide legislative safeguards for Australian consumers.**
- 4.89 The Committee believes that passengers will be safer on cruises if they are given more information about their rights and responsibilities, as discussed above. For this reason, the Committee recommends the Australian Government legislate that cruise operators distribute mandatory safety information to passengers about their rights and responsibilities. Ideally, such information should be prepared with the involvement and input of cruise victims organisations.

#### **Recommendation 5**

- 4.90 **The Committee recommends the Australian Government legislate such that all cruise operators must distribute to all cruise passengers, when boarding a cruising vessel at an Australian port, a brochure that provides information on the following:**
- **What to do in case of an accident or a potential crime being committed on board;**
  - **The rights of passengers in the case of injury or death;**
  - **The numerous jurisdictions that may apply to a vessel that is travelling through numerous national waters and international waters;**
  - **Contact details for cruising operator support services, as well as other support services, such as rape crisis services;**
  - **Contact details for Australian consular assistance throughout the world; and**
  - **Contact details for Australian Police agencies.**
- 4.91 The Committee believes that greater use can be made of the *Smarttraveller* website. In particular, the website should provide general safety advice about travelling on cruising vessels, as well as posting advice about each major cruising operator visiting Australian ports. The Committee

therefore recommends that the Department of Foreign Affairs and Trade post additional cruising safety information on the *Smartraveller* website.

### **Recommendation 6**

- 4.92 **The Committee recommends the Department of Foreign Affairs and Trade provide general safety advice on the *Smartraveller* website about cruising and how passengers may ensure their own safety, as well as providing individual advice on each major cruising operator visiting Australian ports.**

## Responding to crimes at sea

- 5.1 Despite the efficacy of crime prevention and passenger safety measures, there will be occasions where passengers are victims of crimes on cruise ships. In the aftermath of such a crime, victims rely almost entirely on the ship's crew to respond appropriately.
- 5.2 This Chapter considers how cruise operators respond to crimes at sea and how this responsibility is delineated and imposed. This includes a discussion on Australia's capacity to dictate the response of cruise ship operators to crimes at sea, including through crew training and obligations to report incidents.
- 5.3 The safety of passengers and personnel on board a ship is the responsibility of the company that owns the ship, which, in turn is vested in the Master (often the captain) of the Ship. The Master of the Ship is responsible for following international law and the domestic criminal law of the country in which the ship is registered (the flag state). Additionally, the Master may have obligations to follow the domestic law of a port or national waters as relevant.
- 5.4 As Royal Caribbean Cruise Lines confirmed:
- (I)t has been the longstanding maritime law and tradition that the master of the ship is completely responsible for the safety of the ship and all the passengers and crew. Maritime tradition and law gives the master almost unlimited authority to do what he or she needs to do to protect the ship and its passengers.<sup>1</sup>
- 5.5 While the Master of a Ship must ensure the safety of all those on board, an additional responsibility of the Master is to manage the circumstances that follow the committal of a crime on board. This responsibility will be particularly important during the time between the criminal act and the

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1 Mr Michael Giglia, Royal Caribbean Line Cruises, *Committee Hansard*, 15 February 2013, p. 12.

arrival of police investigators to commence a formal criminal investigation, arrest suspects and interview victims and witnesses.

5.6 The Committee has considered two examples of rules regarding vessel operators' responses to crimes committed at sea: the *Kerry Act* and Guidelines being considered by the IMO. These will be discussed in detail throughout the Chapter as applicable, however, in general:

- The *Kerry Act* imposes certain obligations on cruising operators relating to these areas of responsibility. The *Kerry Act* applies to vessels that are:
  - ⇒ Authorized to carry at least 250 passengers;
  - ⇒ Have on-board sleeping facilities for each passenger;
  - ⇒ Are on a voyage that embarks or disembarks passengers in the United States; and
  - ⇒ Are not engaged on a coastwise voyage.<sup>2</sup>
- The IMO Guidelines (awaiting adoption):
  - ⇒ Have been approved by the Legal Committee of the IMO;
  - ⇒ Are titled '*Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected*';
  - ⇒ Will be referred to the session of the IMO Assembly in November 2013 for adoption;
  - ⇒ Australia is a member of the IMO, and the NSW Police Force suggested that an industry 'code of practice' covering similar matters should be considered;<sup>3</sup>
  - ⇒ The relevant resolution of the IMO Assembly (which directed the Legal Committee to prepare Guidelines) notes that:
    - ... while voluntary, such guidance would assist shipowners, ship operators and shipmasters in cooperating with relevant investigating authorities and contribute to effective and efficient criminal investigations in cases of serious crime or missing persons from ships and would further facilitate and expedite cooperation and coordination between investigating authorities, consistent with international law.<sup>4</sup>

5.7 The responsibility of responding to crimes at sea is made up of three distinct parts, which will be discussed below:

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2 Section 3507(k) Title 46 (shipping), USA Code.

3 NSW Police Force, *Submission 20*, p. 2.

4 Resolution A.1058(27), International Maritime Organisation, p.2.

- Protecting victims' welfare;
- Preserving the crime scene; and
- Reporting crimes.

## Protecting victims' welfare

5.8 Following a crime or alleged crime at sea, the primary concern of the vessel operator must be to ensure the safety and welfare of the victims and family. It is important to note that, in addition to the primary victim of a crime, the immediate target of the criminal act, there are secondary victims to crime who are equally in need of protection.

5.9 When a ship is far from port, the responsibility for the welfare of both the victim and family resides with the ship personnel. The following section outlines victims' needs and the Guidelines in place to ensure these needs are met.

5.10 P&O displayed an appalling lack of care for and sensitivity to the family of Dianne Brimble in the hours and days following her tragic death. Mr Mark Brimble gave evidence about the absence of concern for their welfare, including the fact that the family who had been on board with Ms Brimble were 'literally left at the gangplank in Noumea', without a hotel room or advice about how to get home. As Mr Brimble further stated:

The first time I received communication from the cruise company [P&O] was at the coronial inquest, which was some two years later. I was handed back money that was belonging to Dianne that the cruise company had held in its accounts for two years. There are a number of things that the cruise company at that time knew; they knew they had made some fundamental errors right up until that day. It seemed that nobody cared.<sup>5</sup>

5.11 The South Australian Commissioner for Victims' Rights provided a summary of the major needs of victims of crimes:

1. victims want re-establishment of their esteem, dignity and equality of power and value as people;
2. victims want relief from the effects and from the stigmatisation, as well as acknowledgement;
3. victims want equal rights under law and the provision of justice and prevention of further victimisation;

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5 Mr Mark Brimble, *International Cruise Victims Australia, Committee Hansard*, 1 February 2013, pp. 1-2.

4. victims want the international community to combat impunity and provide and maintain equal justice and reasonable redress.<sup>6</sup>

5.12 Whilst such needs depend in large part on the justice system, there is an immediate role for a cruise ship operator to play in protecting the welfare of victims. Delayed attention to a victim's welfare could itself cause additional harm.

5.13 These victims' needs are expressed in the United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* as outlined in the submission from the South Australian Commissioner for Victims' Rights (SA Commissioner):

- Victims should be treated with compassion and respect for their dignity;
- Victims should be informed of their rights in seeking redress;
- Victims should be informed of their role and the scope, timing and progress of the proceedings;
- Victims should be allowed to present their views and have them considered at appropriate stages;
- Measures should be taken to:
  - a) minimise inconvenience to victims;
  - b) protect victims privacy and ensure their safety;
- Victims should receive necessary material, medical, psychological and social assistance;
- Victims should be informed of the availability of health and social services;
- Police, justice, health, social service and others should receive training to sensitise them to victims' needs and to ensure proper and prompt first aid;
- Attention should be given to victims with special needs arising from race, colour, sex, age, religion, ethnic or social origin, disability etc <sup>7</sup>

5.14 As discussed by the SA Commissioner, particular attention should be given to the possibility that the treatment of a victim can lead to secondary victimisation:

The victim of crime at sea who chooses to [report] a crime encounters a culmination of attitudes, behaviours, legal and procedural restrictions as well as other obstacles. Such encounters can cause secondary victimisation, or result in a 'second injury'.<sup>8</sup>

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6 Commissioner for Victims' Rights, South Australia, *Submission 7*, p. 9.

7 Commissioner for Victims' Rights, South Australia, *Submission 7*, pp. 11-15.

8 Commissioner for Victims' Rights, South Australia, *Submission 7*, p. 5.



- 5.15 Anecdotal evidence from witnesses highlighted the potential for poor attention to victims' needs to further injure victims:

I was then taken down to the doctor, who asked me a few questions. I [didn't] want to talk with him and just said that I had been raped. I was given some pills which I threw out. I then was taken to the purser's office and asked if I wanted to make a statement. I said yes. They brought in a security officer who said it will never go anywhere and I will never be able to prove what happened. The purser decided he was right and that police need not come on board; after all, I was drinking and the crew [didn't] like me. The statement I wrote was ripped up in front of me. My manager was brought in; he told them that I was a very outgoing, funny personality and he was shocked that such a thing would have happened to me. The captain never saw me and never said anything to me about this.<sup>9</sup>

- 5.16 Mr Mark Brimble described the appalling attitude adopted by P&O towards Ms Brimble's family on board the ship, causing further trauma:

The care of the family is a side that I think was fundamentally wrong, and I think it has been recorded many times as to what happened to the family on board the ship. They were the victims. They seemed to be treated almost as if they were guilty of something, and I still to this day wonder why they were treated that way.<sup>10</sup>

- 5.17 The SA Commissioner suggested that cruise ships should operate on a presumption in favour of victims:

... incidents involving either passengers or crew of the nature raised [in evidence to the Committee] should be approached by all from the perspective that 'This might not be a crime but it might be. This person or these people are seeking our help - now.' The provision of such help should foremost be directed towards attaining a comprehensive understanding of the 'victim' as well as a proper assessment of his or her physical, psychological, social, cognitive and legal situation and needs.

As a 'victim', he or she should be promptly informed by first responders of his or her rights to assistance, protection,

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9 International Cruise Victims Association, *Submission 12* (Attachment A), p. 8.

10 Mr Mark Brimble, International Cruise Victims Association, *Committee Hansard*, 1 February 2013, p. 4.

information, legal help and so on, as well as informed on how to access these rights.<sup>11</sup>

- 5.18 The cruising industry has, in some cases, made efforts to improve the support provided to victims of crimes at sea. Carnival Australia provided information to the Committee about its *CARE* program:

Under the CARE program, passengers, their family members (including family members on shore) and crew receive emotional and practical face to face support during times of need.

When onboard, the majority of passenger-facing crew members are CARE-trained. They are supported by shore-side CARE team members who are on call for deployment when necessary. As of 1 November 2012 Carnival Australia has 120 CARE-trained staff working shore-side.

Dedicated CARE team members are assigned to passengers, their family members (including family members on shore) and crew in the event of an emergency or traumatising event (including events of a personal nature, such as a family emergency on shore). Each of Carnival's operating companies around the world has a CARE team which may be deployed to support any Australian passengers overseas.

All CARE team members receive specialised training, so they can assist people affected by trauma. We acknowledge the assistance of Mr Mark Brimble in the development of this training.

Certain CARE team members are also specifically trained to be able to assist sexual assault complainants if necessary.<sup>12</sup>

- 5.19 A second Carnival program is aimed at assisting passengers who disembark early or irregularly from ships:

Under the Cruise Care program, passengers are assisted if they are disembarked for any reason, or otherwise need any form of administrative and emotional assistance in the course of their relationship with a Carnival Australia cruise ship. This program is operated by three full-time members of staff who are dedicated to providing practical and emotional support for passengers. These staff are also on call 24 hours per day over the weekend to provide support as needed.<sup>13</sup>

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11 Commissioner for Victims' Rights, South Australia, *Supplementary Submission 7.1*, p. 1.

12 Carnival Australia, *Submission 9*, p. 12.

13 Carnival Australia, *Submission 9*, p. 12.

5.20 The Department of Foreign Affairs and Trade (DFAT) provided information about the consular support available to Australians who are victims of crime at sea:

DFAT provides consular assistance to Australian citizens and permanent residents travelling or living abroad. This includes where Australians are victims of crimes committed at sea where these crimes are not in Australian territorial waters. The Smartraveller website, [www.smartraveller.gov.au](http://www.smartraveller.gov.au), provides useful information for Australians travelling by seas, including on safety and security issues.<sup>14</sup>

5.21 The *Kerry Act* contains provisions that deal with the treatment of victims of crime, which is aimed at preventing further harm being caused. For example, the *Kerry Act* mandates that vessels have available on board at all times medical staff who can provide assistance in the event of an alleged sexual assault. Such staff must have:

received training in conducting forensic sexual assault examination, and is able to promptly perform such an examination upon request and provide proper medical treatment of a victim, including administration of antiretroviral medications and other medications that may prevent the transmission of human immunodeficiency virus and other sexually transmitted diseases...

5.22 Additionally, such a member of staff must be able to verify that he or she 'meets guidelines established by the American College of Emergency Physicians relating to the treatment and care of victims of sexual assault'.<sup>15</sup>

5.23 Further, the vessel owner must provide the victim of sexual assault with free and immediate access to:

contact information for local law enforcement, the Federal Bureau of Investigation, the United States Coast Guard, the nearest United States consulate or embassy, and the National Sexual Assault Hotline program or other third party victim advocacy hotline service;<sup>16</sup>

and

a private telephone line and Internet accessible computer terminal by which the individual may confidentially access law enforcement officials, an attorney, and the information and support services available through the National Sexual Assault

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14 Department of Foreign Affairs and Trade, *Submission 10*, p. 1.

15 Section 3507(d)(3), Title 46 (shipping), USA Code.

16 Section 3507(d)(5)(A), Title 46 (shipping), USA Code.

Hotline program or other third party victim advocacy hotline service.<sup>17</sup>

5.24 The *Kerry Act* also provides that information obtained through the examination, and during support and counselling must be kept confidential, and must not be disclosed 'to the cruise line or other owner of the vessel or any legal representative thereof' unless it is in order to report a crime to police, to secure the safety of passengers or crew, or when in response to law enforcement officials.<sup>18</sup>

5.25 However, as already discussed, the Legal Advice expresses the clear opinion that it would not be possible for Australia to mandate particular training for security or medical staff:

The imposition of conditions requiring ships to ... carry crew with particular training are also likely to be regarded as going beyond what Australia is entitled to require as a condition of port access.<sup>19</sup>

5.26 While many witnesses made a compelling case for Australia to follow the US and legislate similarly to the *Kerry Act*, including regulating matters such as staff training and procedures to ensure victim welfare, the Legal Advice confirms that this would be beyond Australia's jurisdiction. The Australian Government must therefore make use of other opportunities to improve the regulation of the cruising industry to ensure victim welfare is protected on cruising vessels.

## IMO Guidelines

5.27 As noted above, the IMO Legal Committee has approved Guidelines that deal, in part, with the pastoral and medical care of persons affected by crimes on ships. The Guidelines state that:

it is of the utmost importance that allegations of sexual assault and other serious crimes are taken seriously, that the persons affected are protected and that their pastoral needs are fully addressed.<sup>20</sup>

5.28 At a principled level, the Guidelines state that all persons affected by serious crime 'deserve full consideration of the allegations and should receive pastoral and medical care, as appropriate.'<sup>21</sup>

5.29 The Guidelines provide that:

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17 Section 3507(d)(5)(B), Title 46 (shipping), USA Code.

18 Section 3507(e), Title 46 (shipping), USA Code.

19 Legal Advice, Appendix D, p. 2.

20 Attorney-General's Department, *Supplementary Submission 22.1*, p. 11.

21 Attorney-General's Department, *Supplementary Submission 22.1*, p. 13.

In cases of allegations of a serious crime, especially sexual assaults and serious physical attacks, the persons affected should receive *respect for coming forward, recognition that the allegation will be reported and given support* during this time of trauma. They should be given *every opportunity to explain what has happened, give a full account of the incident, and be assured that every effort will be made to protect them from any further harm while they remain on board the vessel.* The persons affected should also be free of any burden of decision-making in relation to the alleged perpetrator. [emphasis added].<sup>22</sup>

5.30 Finally, the Guidelines also state that:

The persons mentioned in this section should have access to medical care and attention by a medical professional either on board or ashore, as necessary. The privacy of the person affected should be respected during this process. Where relevant, radio medical advice should be sought.<sup>23</sup>

5.31 While Australia is a member of the IMO, the Guidelines are voluntary and have not as yet been adopted by the IMO Assembly.

5.32 The Legal Advice does, however, suggest that Australia might be able to make compliance with the IMO Guidelines a condition of entry to Australian ports, if they are adopted by the IMO Assembly:

If the guidelines are adopted by the IMO with broad support of the States members, and particularly if the relevant flag States support their adoption, then there would probably be good arguments that it is reasonable for Australia to make it a condition of entry to Australian ports that the owners/operators of a cruise ship have adopted those guidelines as part of the normal practice for the operation of the vessel.<sup>24</sup>

5.33 The IMO Guidelines could also have added force under international law, to the extent that they are considered to reflect 'customary law'. If the Guidelines are accepted to reflect customary law, they would become binding on all countries, and not just those who are members of the IMO.

5.34 The Committee addresses the enforcement of IMO Guidelines in its comments at the conclusion of this Chapter.

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22 Attorney-General's Department, *Supplementary Submission 22.1*, p. 13.

23 Attorney-General's Department, *Supplementary Submission 22.1*, p. 13.

24 Legal Advice, Appendix D, p. 15.

## Crime scene preservation

- 5.35 The second key element of responding to crimes committed at sea is the preservation of the crime scene and associated evidence. The prospects of justice for victims are strongly linked to preserving the crime scene, and prosecutions of crimes are profoundly dependent on good evidence collection and preservation. Mr Mark Brimble spoke powerfully of the consequences when evidence is not properly preserved.<sup>25</sup> Carnival Australia emphasised the fundamental importance of ensuring that crime scenes are preserved, without tampering, so that evidence can be collected by law enforcement officers for the prosecution of crimes.<sup>26</sup>
- 5.36 In addition to preserving the actual crime scene, cruising operators may need to preserve other evidence, including other locations on board and movable objects. Further responsibilities may include taking statements from the victim, perpetrator and witnesses whilst the event is fresh in their minds.
- 5.37 Some witnesses observed that the preservation of a crime scene and the collecting of other evidence must be done in such a way that it is unimpeachable. The ICVA pointed out the importance of dealing very carefully with evidence, so that it can be used in future prosecutions:
- The importance of physical evidence as well as testimonial evidence from the victim, witnesses and suspect thus is paramount in any criminal investigation and, must be conducted using standardized methodology.<sup>27</sup>
- 5.38 As described by ICVA, crime scene preservation must be done without delay, in order to protect evidence in situ:
- The Golden Hour Principle is a term police use to describe taking quick and positive early action in securing significant material (evidence) that would otherwise be lost to in the investigation. In short, crucial evidence should be identified within the first hour after a crime...Even where the incident happened some time before Security or the police are alerted, effective early action often leads to the recovery of material which enables the investigation to make rapid progress.<sup>28</sup>

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25 Mr Mark Brimble, International Cruise Victims Association, *Committee Hansard*, 1 February 2013, p. 4.

26 Carnival Australia, *Submission 9*, p. 4.

27 International Cruise Victims Association, *Supplementary Submission 12.2*, p. 49.

28 International Cruise Victims Association, *Supplementary Submission 12.2*, p. 49.

5.39 Evidence also underlined the power and responsibility of a Ship's Master to exert physical control over the ship, particularly in the aftermath of a crime being committed. As described by Assistant Commissioner Mark Hutchings, of the New South Wales Police Force:

... the captain of the ship has primacy over what occurs at sea, as master of that ship. If you have an assault in a bar on a ship, or it could be a merchant ship, the captain has got a lot of power. They will arrest the alleged offender and put him in his cabin, they will do their best to maintain the crime scene and grab the CCTV footage, and they will dispel any further violence that could happen on the ship using security. That might mean that the person will be in custody until they get back to the next port of call.<sup>29</sup>

5.40 Crime scene preservation relies on well trained staff, as well as strong leadership from the Master:

I sat in on training programs that Graeme O'Neill and others developed. One that particularly stood out was in relation to the preservation of crime scenes and the authority of the security officer to prevent people from contaminating the crime scene. Sitting in the audience was the captain. My understanding of the authority of a captain of a ship at sea is that it is quite deliberate and fixed, but to my great surprise and endorsement, I distinctly recall the captain – and I do not think it was said for my sake – at the end of Graeme O'Neill's presentation on crime scene preservation, standing up and reinforcing the role and function of the security officers. That is where the leadership has to come from: it has to come from the captain, not the head security officer. That is important.<sup>30</sup>

5.41 Carnival Australia has improved its own crime scene preservation measures in the past decade. Its submission briefly details 'training programs for crime scene preservation, response and investigation':

- Security personnel have specialised training
- Allegations are treated as suspicious pending investigation by relevant authorities
- Allegations of crime are fully investigated
- Procedures are in place for the collection of evidence, the preservation of crime scenes and the obtaining of statements<sup>31</sup>

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29 Assistant Commissioner Mark Hutchings, New South Wales Police Force, *Committee Hansard*, 15 February 2013, p. 23.

30 Mr Ken Moroney, *Committee Hansard*, 15 February 2013, p. 39.

31 Carnival Australia, *Submission 9*, p. 5.

- 5.42 The Committee sought clarification about Australia's ability to enforce standard protocols for the preservation of a crime scene and evidence when crimes are committed at sea. The Legal Advice prepared for the Committee suggested that there might be some scope to incorporate requirements about crime scene preservation into Australian legislation:

It may also be possible to impose some conditions relating to the preservation of evidence and the standard of investigation of offences in relation to which Australia has jurisdiction, provided these do not interfere with the concurrent jurisdiction of other States, and notably the jurisdiction of the flag State.<sup>32</sup>

- 5.43 In addition to the option of unilaterally regulating crime scene management through Australian law, the IMO Guidelines also hold some potential to improve crime scene preservation practices on cruise ships.

### **IMO Guidelines**

- 5.44 The aforementioned IMO Guidelines provide guidance relating to the preservation and collection of evidence on board a ship. The Guidelines carry the caveat that:

The master is not a professional crime scene investigator and does not act as a criminal law enforcement official when applying these Guidelines. These Guidelines should not be construed as establishing a basis of any liability, criminal or otherwise, of the master in preserving and/or handling evidence or related matters.<sup>33</sup>

- 5.45 The Guidelines focus on the efforts that can be made on board a vessel until appropriate law enforcement authorities arrive to conduct a formal investigation. The Guidelines also point out that the 'overriding role of the Master is to ensure the safety of passengers and crew, which should take precedence over any concerns related to the preservation or collection of evidence.'<sup>34</sup>

- 5.46 The Guidelines advise that:

The master should attempt to secure the scene of the alleged crime as soon as possible, with the main aim of allowing professional crime scene investigators to be able to undertake their work. The best option for preserving evidence is to seal the space, if practicable, and for all persons to be prevented from entering it. An example would be where an incident has taken place in a

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32 Legal Advice, Appendix D, p. 14.

33 Attorney-General's Department, *Supplementary Submission 22.1*, p. 11.

34 Attorney-General's Department, *Supplementary Submission 22.1*, p. 12.



cabin, then the best option would be for the cabin door to be locked, the key secured and notices posted which would inform that no one should enter.

Where an incident has occurred in a space that cannot be seated, the master should aim to collect the evidence, as may be instructed by the flag State Administration, or as otherwise guided by the law enforcement authorities. While recognizing that collecting evidence will likely only be carried out in limited and exceptional circumstances, in such cases the master could use the techniques and procedures outlined in appendix 2.

Following the allegation of a serious crime, and given the master's inherent authority on board the ship, the master should draw a list of persons who may have information and invite them to record their recollection of events on the pro forma attached as appendix 1. Any person may refuse to provide their recollection of events. Whenever possible, the master should attempt to obtain accurate contact information for persons believed to have information about an alleged crime or missing person to facilitate subsequent contact by law enforcement officials or other professional crime scene investigators.<sup>35</sup>

- 5.47 As noted above, if these Guidelines are adopted by the IMO, Australia might be able to make entry to Australian ports dependent on their incorporation into cruising companies' operations. The Committee addresses this and other options for enforcing crime scene preservation protocols in its comments at the end of this Chapter.

## Reporting crimes

- 5.48 The third element of response to crimes committed at sea is the reporting of all alleged crimes and potentially criminal acts to the appropriate law enforcement authorities. This ensures that crimes can be properly investigated and prosecuted, and that accurate crime statistics can be maintained. Importantly, whilst victims on land may make their own complaint to police in person or on the phone, victims on cruise ships are much more reliant on the vessel operator assisting or reporting on their behalf.
- 5.49 As Ms Ann Sherry detailed, reporting is crucial to a suitable response being made by law enforcement agencies:

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35 Attorney-General's Department, *Supplementary Submission 22.1*, p. 13-4.

Crimes at sea are a rare recurrence. However, we have introduced policies and procedures that are strictly followed in the event that a crime is reported...The national protocol [for reporting crimes at sea] is aimed to ensure that, when a crime at sea has been reported, regardless of which agency receives the report a response is initiated without delay. The response protects the rights of victims and suspects, secures evidence and sets out guidelines for investigations and prosecutions.<sup>36</sup>

These policing protocols are discussed further in Chapter 6.

- 5.50 Recognising the importance of reporting in order that expert investigation can be conducted, the section discusses the reporting that is required in Australian law. It then goes on to consider whether current reporting reflects the actual rate of crime at sea, and examines how reporting might be improved.

### Existing Australian reporting requirements

- 5.51 The existing arrangements for the mandatory reporting of crimes to Australian authorities are relatively weak. As noted by the Government Response, reporting requirements are currently contained in Australian legislation, although 'most are limited in their application to Australian flagged vessels, which currently do not include any large passenger vessels.'<sup>37</sup> Dr Kate Lewins provides that the reporting requirements:

... mostly relate to 'accidents' and define 'accident' in terms of workplace safety. It may be somewhat of a long bow to call sexual assault of a minor on a cruise ship a 'maritime accident'. The *Navigation Act 2012* (Cth), once in force [the second half of 2013], will require reporting of such crimes as a 'marine incident'. A marine incident is defined as an event resulting in a death or serious injury on board or the loss of a person from a ship (s185).<sup>38</sup>

- 5.52 As Dr Lewins further points out, reporting requirements may apply to both Australian and foreign ships, but are only operative on a foreign vessel if it is:

- In an Australian port; or
- Entering or leaving an Australian port; or
- In the internal waters of Australia; or

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36 Ms Ann Sherry, *Carnival Australia*, *Committee Hansard*, 15 February 2013, p. 1.

37 Government Response, Appendix F, p. 8.

38 Dr Kate Lewins, *Submission 1*, p. 19.

- In the territorial sea of Australia.<sup>39</sup>
- 5.53 Dr Lewins suggested that these limits
- ...when read together, seem to impose the reporting obligation only for voyage transiting territorial waters and the port. If that is the case, then the reporting obligation will end at the limits of the territorial sea.<sup>40</sup>
- 5.54 By contrast, the *Kerry Act* imposed a reporting regime that is not bound by such geographical limits. The legislation imposes a reporting requirement for:
- an incident involving homicide, suspicious death, a missing United States national, kidnapping, assault with serious bodily injury, [certain sexual assaults], firing or tampering with the vessel, or theft of money or property in excess of \$10,000<sup>41</sup>
- where:
- (i) the vessel, regardless of registry, is owned, in whole or in part, by a United States person, regardless of the nationality of the victim or perpetrator, and the incident occurs when the vessel is within the admiralty and maritime jurisdiction of the United States and outside the jurisdiction of any State;
  - (ii) the incident concerns an offense by or against a United States national committed outside the jurisdiction of any nation;
  - (iii) the incident occurs in the Territorial Sea of the United States, regardless of the nationality of the vessel, the victim, or the perpetrator; or
  - (iv) the incident concerns a victim or perpetrator who is a United States national on a vessel during a voyage that departed from or will arrive at a United States port.<sup>42</sup>

## Current reporting

- 5.55 Whilst there are some reporting requirements under Australian law, these are inadequate. Without a strong enforceable requirement, reporting of crimes will not reflect the actual rate of crimes committed at sea. ICVA suggested that, in the absence of legal obligations to report crimes, reporting will not occur:

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39 *Navigation Act 2012*, Section 9.

40 Dr Kate Lewins, *Submission 1*, p. 20.

41 Section 3507(g)(3)(A)(1), Title 46 (shipping), USA Code.

42 Section 3507(g)(3)(B), Title 46 (shipping), USA Code.

Since the cruise ships do not investigate crimes and report them only on a voluntary basis, most criminals are not apprehended or punished for the crimes they commit on cruise ships. As United State Representative Christopher Shays indicated, “it is the perfect place to commit a crime.”<sup>43</sup>

- 5.56 A submission made to the IMO Legal Committee when it was preparing the Guidelines discussed above suggests that there is a ‘compelling need’ for such guidance for Ships’ Masters. The submission argues that:

In addition to the immediate securing of the scene of the incident and the care of victims, it is of great importance that the investigating agencies are informed of the incident. By informing the investigating authorities, proper coordination between them can be undertaken which will contribute to effective and efficient criminal investigations especially when more than one State seeks to assert jurisdiction.<sup>44</sup>

- 5.57 The cruising industry is clearly aware of the need to improve the reporting of crimes committed at sea. The Australian Shipowners Association submitted that:

ASA recommends that any measures taken to improve the reporting, investigation and prosecution of crimes committed at sea must take into account initiatives being discussed at an international level. Formal guidance, if it were to be created, should consider that not all vessels will have the ability to follow prescriptive guidelines which fail to take into account the size and operation of the vessel and its crew. *ASA supports the development of formal guidelines created in the context of the comments above.* [emphasis added].

- 5.58 Dr Jill Poulston added weight to the need for improved reporting, given her research that incidents of sexual assault and sexual victimization are significantly more common on cruise ships than on land:

I support this inquiry because of my understanding of the frequency and causes of sexual assaults both on land and at sea, and the view that poor jurisdiction over crimes at sea means they are difficult to bring to a satisfactory resolution from the perspective of victims and their families. I submit the view that improvements are needed in relation to the reporting, investigation and prosecution of alleged crimes committed at sea.<sup>45</sup>

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43 International Cruise Victims Association, *Supplementary Submission 12.1*, p. 3.

44 International Cruise Council Australasia, *Submission 11 (Attachment A)*, para. 9.

45 Dr Jill Poulston, *Submission 5*, p. 2.

- 5.59 The SA Commissioner forcefully supported increased reporting requirements:

Thus, I also urge the Australian Government to reconsider its opposition to adopting legislation like the [*Kerry Act*]. If it is not willing to do so, then others in the Parliament of Australia should act to prevent crimes at sea; to reduce the harm done to victims; and, to ensure transparency on reporting crimes at seas so that Australia's policies and laws are properly informed (evidence-based).<sup>46</sup> [emphasis added]

- 5.60 Anecdotal evidence also demonstrated that individuals believe that criminal acts have been unreported:

I still can't fathom that Captain's total disregard for not only the welfare of my child, but also the potential danger to every kid on that Holiday cruise. *Despite my repeated requests, they wouldn't even call the Police.*<sup>47</sup> [emphasis added]

The cruise line failed to report that Merrian was missing to the FBI until five weeks after she went missing and only after we contacted the cruise line.<sup>48</sup>

## **Making improvements to reporting requirements**

- 5.61 There is a clear need for improved reporting requirements, amply demonstrated by the evidence cited above. Some participants in the inquiry support the establishment of a legislative reporting regime similar to that under the *Kerry Act* in the USA. Evidence also supported the improvement of reporting standards through the IMO Guidelines, as well as other international efforts and bilateral agreements.

- 5.62 Criticisms have been made of the reporting requirements under the *Kerry Act*, as noted in Chapter 2. Nonetheless, evidence to the inquiry frequently supported the *Kerry Act* as a model that Australia should emulate:

It would be preferable for the reporting obligation to be enunciated more broadly; for example to report a crime occurring en route to an Australian port, or en route from an Australian port. In order to protect Australian citizens and those visiting our shores to embark on a cruise, is also desirable for a foreign cruise ship to be obliged to report deaths, serious injuries and other possibly criminal acts on board to a central authority in Australia, even if they did not occur as a result of an 'event'. This may well

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46 Commissioner for Victims' Rights, South Australia, *Submission 7*, p. 10.

47 International Cruise Victims Association, *Submission 12 (Attachment A)*, p. 3.

48 International Cruise Victims Association, *Supplementary Submission 12.1*, p. 1.

already be the practice of some cruise lines, but it ought to be required.<sup>49</sup>

- 5.63 The Legal Advice suggested that it would be possible for Australia to introduce a mandatory reporting requirement as a condition for entry to Australian ports. In particular, it gave the opinion that:

...conditions that are not particularly onerous, that are related to matters in relation to which Australia has jurisdiction and do not interfere with other States' jurisdiction could probably be imposed consistently with international law. Such conditions would include, for example, that the master or shipowner undertakes to inform Australian authorities of alleged offences in relation to which Australia has jurisdiction.<sup>50</sup>

However, this would need to be carefully delineated, so as not to over-extend Australian jurisdiction:

A condition requiring Australian authorities to be notified of incidents on board in relation to which Australia has no claim to criminal jurisdiction, and which do not otherwise involve Australian nationals or Australian interests, would also run a significant risk of being considered contrary to international law, in our view.<sup>51</sup>

- 5.64 The IMO Guidelines provide general advice about reporting crimes to the appropriate authorities:

Generally, the master should report to the flag State, other interested States and parties involved, including law enforcement authorities, alleged or discovered serious crimes. These could include, but are not limited to, a suspicious death or disappearance, a criminal act leading to serious bodily injury, sexual assault, conduct endangering the safety of the vessel, or substantial loss of currency or property.<sup>52</sup>

In its detailed advice, it further provides that:

Once an allegation of a serious crime on board a ship has been made, the master should, as soon as possible, report the allegation to the flag State. The master should, as appropriate, also report the allegation to the interested States and parties involved, including law enforcement authorities.<sup>53</sup>

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49 Dr Kate Lewins, *Submission 1*, p. 20.

50 Legal Advice, Appendix D, p. 14.

51 Legal Advice, Appendix D, p. 14.

52 Attorney-General's Department, *Supplementary Submission 22.1*, p. 11.

53 Attorney-General's Department, *Supplementary Submission 22.1*, p. 12.

- 5.65 The Australian Shipowners Association (ASA) frequently reiterated the need for any standards to reflect the diversity of the shipping industry:

Given the global nature of the industry, it is, however, important that any formalisation of guidance that is to be utilised in the industry, such as that currently being developed at the [International Maritime Organisation], be sufficiently cognisant of the wide variety of vessels in operation in the global industry.<sup>54</sup>

- 5.66 ASA also suggested that agreements between Australia and other countries should be pursued:

Pragmatic measures that will clarify responsibility in incidents of alleged crimes at sea, which may come in the form of bilateral arrangements between sovereign States, are supported. Ensuring clear information on reporting obligations of ship operators is available and widely understood will also assist investigating agencies to prevent accidental delays in the notification of incidents to the appropriate body.<sup>55</sup>

- 5.67 Carnival Australia cited the protocols agreed between national police forces as suitable to improve the handling of crime reports:

We report alleged crimes to police for investigation and all necessary steps are taken to preserve any crime scenes. Also in place are agreed protocols with the Australian Federal and State police and police in the Pacific Islands and New Zealand to deal with crimes at sea should they occur while the ship is at sea in that region.<sup>56</sup>

- 5.68 Cruise Lines International Association (CLIA) gave evidence that the industry is working towards an international standard on the reporting of crimes:

Operating within this structure, CLIA is working proactively with the IMO towards adoption of crime reporting provisions of [the *Kerry Act*]...

Irrespective of the legal requirements, all CLIA members are required to comply with CLIA policies. These include the reporting of crimes and missing persons, which was developed as part of the industry's effort to unify crime reporting practices consistent with [the *Kerry Act*] wherever our memberships travel and to make sure that serious crimes are always officially and promptly reported to the appropriate authorities.

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54 Australian Shipowners' Association, *Submission 13*, p. 4.

55 Australian Shipowners' Association, *Submission 13*, p. 5.

56 Carnival Australia, *Submission 9*, p. 4.

- 5.69 The Committee's conclusions about improved reporting are included below.

## **Committee Comment**

- 5.70 Passengers expect that, above all, the Ship's Master will keep them safe. Cruises are increasingly being marketed to families as a safe holiday that provides a familiar cultural environment, and cruise customers rightly expect that their safety is the primary consideration in all decisions made by the Master and vessel owner.
- 5.71 The most important moral duty of a Ship's Master is to keep everyone on board safe. This is an unwavering responsibility, reinforced by numerous international treaties and domestic Australian legislation. In this, the captain must be fully supported by the vessel's owner, both in respect of the vessel itself and the training and management of its crew.
- 5.72 The tragedies discussed at the beginning of this report are unsettling, as they suggest that sometimes cruise operators have failed to do everything possible to keep passengers safe. Whilst in recent years the industry has taken significant steps to improve on-board safety and crime prevention, there remain some deficiencies in the way operators respond to crimes committed at sea. The Committee believes that these deficiencies can and must be addressed through action by the Australian Government.
- 5.73 The Committee expresses its disappointment and frustration that Australia is not in a position to clearly and definitively legislate to enforce appropriate standards for cruising operators to respond to crimes at sea. However, a critical outcome of this inquiry is clarity regarding where Australia may take unilateral action and legislate, and where Australia should instead pursue a multilateral approach to improve the regulation of cruising.
- 5.74 When crimes or accidents occur, the first responsibility of a ship's Master is to protect the welfare of the victim. Victims should be treated with dignity and respect, their immediate medical and pastoral care needs met, and they should be offered every assistance to report crimes and make arrangements to return home. The Committee agrees with the SA Commissioner who stated that cruising operators should operate on a presumption in favour of victims, rather than casting doubt on victims' claims.
- 5.75 When serious crimes occur, the securing and preservation of evidence is crucial to prosecutions. When this does not occur, prosecutions can be impossible. Justice for victims demands that those with the power to take



charge of crime scenes (in this case, the vessel's Master) do so with professionalism and resolutely, even in the face of protest from alleged perpetrators. In the case of sexual assault, the use of a rape kit is usually appropriate, and this must be done with sensitivity and confidentiality.

- 5.76 As discussed throughout this Chapter, Guidelines on managing crimes at sea will be referred to the IMO Assembly later in 2013. If adopted, vessel operators' use and enforcement of these Guidelines should be a condition of entry to Australian ports. The Committee therefore recommends the Australian Government legislate that, as a condition of entry to Australian ports, all ocean vessels use and enforce the IMO Guidelines in their operations, following the adoption of the Guidelines by the IMO Assembly.

### **Recommendation 7**

- 5.77 **The Committee recommends the Australian Government make vessel operators' use and enforcement of the IMO *Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected* a condition of entry to Australian ports, should the Guidelines be adopted by the IMO Assembly.**

- 5.78 As noted in this Chapter, there is a limited capacity for Australia to introduce requirements around crime scene management, relating to crimes for which Australia has jurisdiction. Accordingly, other mechanisms must be used and it is imperative that the Australian Government exercise its powers and make use of its expertise to the fullest capacity possible. The Committee therefore recommends the Australian Government develop crime scene management protocols (in collaboration with all Australian police forces), with which vessel operators would need to comply in order to access Australian ports.

### **Recommendation 8**

- 5.79 **The Committee recommends the Australian Government develop crime scene management protocols (in collaboration with all Australian police forces), with which vessel operators would need to comply in order to access Australian ports.**

- 5.80 Finally, vessel operators have a responsibility to properly report crimes to authorities, rather than passively leaving such matters to victims. As noted in this Chapter, victims on vessels have even less agency than victims on land. It is, however, clear that reporting is not standard and that, in the absence of a reporting requirement, operators may fail to report all incidents.
- 5.81 For this reason, the Committee recommends that a legislative mandatory reporting scheme, reflecting Australia's jurisdictional powers discussed in Chapter 3, be introduced. Entry to Australian ports should be made dependent on complying with the scheme.
- 5.82 The Legal Advice gave the firm opinion that Australia was within its powers to legislate for such a scheme. The Australian Government must act to ensure that, where there are allegations of crimes committed at sea, vessel operators are obliged by law to report those crimes.
- 5.83 The Committee, therefore, recommends the Australian Government introduce a mandatory crimes at sea reporting scheme.

### **Recommendation 9**

- 5.84 **The Committee recommends the Australian Government develop and legislate for a mandatory crime at sea reporting scheme, with which vessels would have to comply in order to enter Australian ports. Under such a scheme, reports must be made:**

- **Of allegations about criminal acts that are crimes under the *Crimes At Sea Act* regime;**
- **Where the accuser or accused is Australian.**

**Such reports must be made to an Australian police force *as soon as possible* after a member of the vessel's staff becomes aware of the act or allegation.**

## Investigating crimes at sea

- 6.1 Victims and their families expect justice for crimes, wherever crimes are committed. However, when crimes occur at sea, the response of the criminal justice system can be complicated by the jurisdictional questions discussed in other Chapters.
- 6.2 When a serious crime at sea is reported to Australian police, officers swiftly make arrangements to commence an investigation. Because of Australia's federal structure, this will often include immediate discussions with counterparts from other police agencies. Where Australia has jurisdiction to investigate and prosecute crimes committed at sea, appropriate intergovernmental arrangements are necessary to provide for a cooperative response by investigating authorities.
- 6.3 As part of this inquiry, the Committee examined the protocols setting out the investigative response between jurisdictions and the effectiveness of current arrangements.
- 6.4 This Chapter considers the following matters:
- Establishing domestic jurisdiction;
  - Investigating and prosecuting crimes committed at sea;
  - Coronial jurisdictions and investigations; and
  - The Committee's concluding comments.

### Establishing domestic jurisdiction

- 6.5 When a crime at sea is reported, police establish jurisdiction to investigate that offence based on the *Intergovernmental Agreement – Crimes at Sea 2000* (the Intergovernmental Agreement)<sup>1</sup> as discussed in Chapter 3.

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1 Intergovernmental Agreement – Crimes at Sea, Appendix H.

- 6.6 In terms of investigating and prosecuting the alleged offence, the purpose of the Intergovernmental Agreement is to harmonise the approach taken by the relevant jurisdictions to 'enable more effective law enforcement'.<sup>2</sup> The Intergovernmental Agreement states that:

A decision of an authority of the State (or the Commonwealth) having primary responsibility under clause 4 whether to investigate, or further investigate, or prosecute or seek extradition, must be taken in the same manner and subject to the same considerations and policies as apply to decisions in relation to other similar alleged offences against the laws of that State or the Commonwealth.<sup>3</sup>

- 6.7 The Intergovernmental Agreement also sets out that the relevant parties will undertake to consult and assist with the investigation and prosecution of the alleged offence.<sup>4</sup>
- 6.8 In circumstances where a person has died at sea from unknown or apparent unnatural causes, the relevant Coroner (according to jurisdiction) assumes legal control over the body of the deceased. The Coroner must then establish the circumstances surrounding the death, how the death occurred, the cause of death, and the particulars needed to register the death.

## **Investigating and prosecuting crimes committed at sea**

- 6.9 Australia's federal structure necessitates cooperative systems for effective law enforcement, both on the Australian mainland, and at sea. Chapter 3 outlined the jurisdictions of law enforcement set out in the Agreement. The evidence suggests that the interaction between Commonwealth and State law enforcement agencies and their capacity to investigate and prosecute alleged crimes at sea are operating effectively.

### **Police investigations**

- 6.10 In 2010, all Australian police jurisdictions endorsed the National Protocols for Reporting Crimes at Sea (NPRCS). The New South Wales Police Force (NSWPF) stated that the NPRCS 'aims to ensure that all reported crime is thoroughly investigated by the responding agency as if the crime had
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2 The Hon Dr Stone MP, Parliamentary Secretary to the Minister for the Environment and Heritage, Crimes at Sea Bill 1999, Second Reading Speech, *House Hansard*, 30 September 1999, p.1034.

3 Intergovernmental Agreement – Crimes at Sea, Appendix H, p.3.

4 Intergovernmental Agreement – Crimes at Sea, Appendix H, p.3.

occurred in their own area of jurisdiction', and 'to ensure the rights and needs of victims of crimes at sea are protected'.<sup>5</sup>

6.11 The intention of the NPRCS is to confirm:

- An appropriate police response to crimes at sea reported to Australian law enforcement agencies who are participants in this agreement;
- That the rights and needs of victims and perpetrators of crimes at sea are protected;
- That evidence is obtained and or secured at the earliest opportunity in accordance with guidelines and policies of the jurisdiction investigating the crime;
- That where appropriate, prosecutions are commenced in accordance with existing laws and agreements/protocols; and
- A cooperative approach to the commencement of an investigation by the police jurisdiction receiving the report if it is required.<sup>6</sup>

6.12 The Australian Federal Police (AFP) gave evidence that it was satisfied that the existing arrangements between police jurisdictions were working. Commander Errol Raiser from the AFP said that:

Whilst some of those jurisdictional overlaps can appear confusing, most of that we deal with very well through some of the cooperative arrangements and relationships that we have built over the years.<sup>7</sup>

6.13 Commander Raiser further said that:

As the Federal Police, you would appreciate that we work with and rely very heavily on our colleagues in the states and territories for their community policing skills and the resources that they have available. We certainly say that, due to the federal structure, the Commonwealth, state, territory and foreign police jurisdictions are not mutually exclusive. We often find that there are overlaps and that it is very much through negotiation and some of the protocols that you have already touched on that we arrive at a final decision on who will take the lead. We would also say that that flexibility really lends itself in the traditional world of policing in any respect, short of getting too prescriptive. Whilst many of the instances are complex, at a practical level, they are resolved very

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5 New South Wales Police Force, *Submission 20*, p. 1.

6 National Protocols for Reporting Crimes at Sea, Appendix G, p. 4.

7 Cmdr Errol Raiser, Australian Federal Police, *Committee Hansard*, 15 February 2013, p. 20.

effectively, and we would like to think probably in a more efficient manner by utilising the relationships that we have.<sup>8</sup>

- 6.14 Assistant Commissioner Mark Hutchings from the New South Wales Police Force (NSWPF) agreed that the present system was adequate, commenting that:

...not only in maritime situations are we confronted with this. In almost all serious major crime there is consideration about working with other agencies and other jurisdictions. This is normal investigative behaviour at this level. We simply do not have the volume of these types of issues reported to us for it to become a problem where simply picking the phone up is going to stop the timeliness of an investigation.<sup>9</sup>

- 6.15 Additionally, Assistant Commissioner Hutchings drew the Committee's attention towards the need for the development of either a national maritime law manual, or consistent individual state manuals to provide guidance for police in investigating crimes at sea. While the NSWPF has developed a Maritime Law Manual, the Committee did not receive evidence that police in other jurisdictions were provided with similar guidance.<sup>10</sup>

- 6.16 The Committee received evidence that, in partnership with the relevant authorities, Carnival Australia had developed and adopted reporting protocols with police in Australia, New Zealand and the Pacific Islands.<sup>11</sup>

- 6.17 In 2009, Carnival developed and adopted the Pacific Island Chiefs of Police Crime Reporting Guidelines. According to Ms Ann Sherry, Carnival Australia's Chief Executive Officer, this protocol 'has a similar effect to the Australian protocols' (the NPRCS).<sup>12</sup>

## **Prosecuting crimes**

- 6.18 The Commonwealth Director of Public Prosecutions (CDPP) provided the Committee with an overview of its role in prosecuting crimes committed at sea, in cooperation with the prosecuting authorities of the States:

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8 Cmdr Errol Raiser, Australian Federal Police, *Committee Hansard*, 15 February 2013, p. 19.

9 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 1.

10 Assistant Commissioner Mark Hutchings, New South Wales Police Force, *Committee Hansard*, 15 February 2013, p. 19. The NSWPF provided the Committee with a copy of its Maritime Law Manual. As the Manual contains operational details of the NSWPF, the Committee resolved to take this document as confidential evidence.

11 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 1.

12 Ms Ann Sherry, Carnival Australia, *Committee Hansard*, 15 February 2013, p. 2.

The CDPP is an independent prosecuting service established by the Director of Public Prosecutions Act 1983 (Cth) to prosecute alleged offences against Commonwealth law. The functions of the CDPP include prosecuting offences under the law as applied by the provisions of the CAS Act, a function it shares with the prosecuting authorities of the States (in this submission, as in Schedule 1 of the CAS Act, a reference to the States includes the Northern Territory).<sup>13</sup>

- 6.19 The CDPP raised no concerns about the existing arrangements under the cooperative Intergovernmental Agreement.

## Coronial jurisdictions and investigations

- 6.20 The effectiveness of State Coronial systems for investigating unnatural or unexplained deaths at sea requires cooperation between discrete jurisdictions. State Coronial jurisdictions are consistent with the adjacent areas of each State, as set out in Figure 2 (Chapter 3).

- 6.21 Each State Coroner operates in accordance with their relevant Coroners Act, which include provisions for overcoming questions of jurisdiction. For example, the *New South Wales Coroners Act 2009* states that:

A coroner does not have jurisdiction to hold an inquest concerning a death or suspected death unless it appears to the coroner that:

- (a) the remains of the person are in the State, or
- (b) the death or suspected death or the cause of the death or of the suspected death occurred in the State, or
- (c) the death or suspected death occurred outside the State but the person had a sufficient connection with the State, as referred to in subsection (2).<sup>14</sup>

A person had a sufficient connection with the State if the person:

- (a) was ordinarily resident in the State when the death or suspected death occurred, or
- (b) was, when the death or suspected death occurred, in the course of a journey to or from some place in the State, or

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<sup>13</sup> Commonwealth Director of Public Prosecutions, *Submission 6*, p. 1.

<sup>14</sup> *New South Wales Coroners Act 2009*, Section 13C(1).

(c) was last at some place in the State before the circumstances of his or her death or suspected death arose.<sup>15</sup>

6.22 However, there are provisions within the relevant Coroners Acts to enable cooperation between State Coroners where jurisdiction is unclear, or where assistance is required. According to the *New South Wales Coroners Act 2009*:

- The State Coroner may request in writing that the person holding a corresponding office in another State or a Territory provide assistance in connection with the exercise by the State Coroner or another coroner of any power under this Act.
- The State Coroner, at the written request of the person holding a corresponding office in another State or a Territory, may provide assistance to that person or a coroner of that State or Territory in connection with the exercise of a power under the law of that State or Territory.
- For the purpose of providing assistance, the State Coroner or a coroner may exercise any of his or her powers under this Act irrespective of whether he or she would, apart from this section, have authority to exercise that power.<sup>16</sup>

6.23 In presenting the outcomes of the inquest into the death of Ms Brimble, Coroner Milledge recommended that the Federal Attorney General establish a Federal Coronial Jurisdiction. This recommendation was not supported by the Government in its response to the inquest findings.<sup>17</sup>

6.24 At a public hearing in Sydney, the Committee received evidence that establishing a Federal Coroner would be unworkable and unnecessary. Both Mr Don McLennan (Manager, New South Wales Coronial Services) and Mr Greg Cavanagh (Coroner, Northern Territory Office of the Coroner) did not support the establishment of a Federal Coronial Jurisdiction.<sup>18</sup>

6.25 Similarly, the Western Australian Coroner submitted that establishing a Federal Coroner was unnecessary because the present system was working effectively. The Coroner said that:

...in the 16 years during which I have been State Coroner I cannot recall a single case where there have been problems as a result of

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15 *New South Wales Coroners Act 2009*, Section 13C(2).

16 *New South Wales Coroners Act 2009*, Section 54A(2).

17 Government Response, Appendix F, p. 12.

18 See: *Committee Hansard*, 15 February 2013, p. 31.



overlap of coronial jurisdictions which could not be resolved quickly over the telephone.<sup>19</sup>

- 6.26 The Western Australian Coroner raised concerns that State Coroners are unable to direct members of the AFP in the same way as they are empowered to direct State police. The Coroner submitted that:

In my view in cases where the AFP is conducting an investigation on behalf of a State Coroner, there should be a provision which would enable a coroner to give a direction to officers acting as coroner's investigators to ensure that adequate investigations are conducted and important issues adequately addressed.<sup>20</sup>

- 6.27 The Western Australian Coroner also remarked on a lack of clarity in the arrangements between the Commonwealth and the States in relation to costs. The Coroner remarked that:

In cases where there is Commonwealth involvement, such as deaths of asylum seekers whose bodies have been taken to Christmas Island and then to Western Australia, while appropriate costing decisions have eventually been made, there do not appear to be appropriate arrangements in place on an ongoing basis which would establish which costs are to be borne by the Commonwealth and which costs are to be borne by the State.<sup>21</sup>

- 6.28 These two concerns were consistent with the evidence provided to the Committee by Mr Cavanagh (Northern Territory Office of the Coroner).<sup>22</sup>

## Committee Comment

- 6.29 The Committee is encouraged by the evidence it received about the cooperative arrangements set out in the Intergovernmental Agreement, and the subsequent protocols (NPRCS) agreed to by Commonwealth and State authorities.
- 6.30 The Committee was also encouraged by the evidence it received about the arrangements for State Coronial investigations, particularly the cooperative approach taken by Coroners to establish jurisdiction and obtain evidence.
- 6.31 Given the complexities inherent in Australia's federal system, the Committee views the proactive and cooperative approach taken by these

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19 State Coroner on behalf of the Coroner's Court of Western Australia, *Submission 18*, p. 1.

20 State Coroner on behalf of the Coroner's Court of Western Australia, *Submission 18*, p. 1.

21 State Coroner on behalf of the Coroner's Court of Western Australia, *Submission 18*, p. 2.

22 *Committee Hansard*, 15 February 2013, pp. 30-31.

various authorities as vital for ensuring that crimes committed at sea are appropriately investigated and prosecuted, and that the rights of victims and perpetrators are protected adequately. The Committee is satisfied that current arrangements are operating adequately.

- 6.32 However, the Committee did not receive evidence that a formal review process has been established to ensure the effectiveness of the NPRCS. The Committee therefore recommends that a formal review of the protocols be undertaken regularly by the Commonwealth, in cooperation with the States, to ensure that the NPRCS are operating effectively into the future and are updated as required.

### **Recommendation 10**

- 6.33 **The Committee recommends that the Australian Government, in cooperation with the States, establish a regular timeframe and formal process for reviewing the National Protocols for Reporting Crimes at Sea.**
- 6.34 The Committee notes that the NSWPF has developed a Maritime Law Manual, and strongly endorses the development of comprehensive operational guidelines for maritime law within all jurisdictions to provide authorities with the relevant information about their jurisdictional responsibilities in accordance with the NPRCS.
- 6.35 The Committee was concerned by the evidence it received that arrangements between the AFP and State Coroners was unclear. The Committee recommends that arrangements for cooperation between the AFP and State Coroners be agreed to, and formally clarified.

### **Recommendation 11**

- 6.36 **The Committee recommends that the Australian Government, in cooperation with the States, establish a formal protocol ensuring clarity in the arrangements between the Australian Federal Police and State Coroners.**
- 6.37 Australia's federal system vests each State with the constitutional authority to make criminal laws. Though criminal laws are broadly consistent throughout the jurisdictions, the Committee received evidence that the procedures of law enforcement authorities and state/territory Coroners differ slightly throughout the various jurisdictions. The Committee encourages greater dialogue between jurisdictions to create a

more consistent approach in these procedures so as to ensure more consistent policing, prosecution and Coronial investigation arrangements.

## Concluding Comments

- 6.38 The Committee has conducted this inquiry because it is concerned to ensure that tragedies like the death of Dianne Brimble do not happen again. The inquiry was referred so that the Committee could conduct a review of the arrangements put in place since that tragedy, both within the industry and government. Whilst there have been some notable improvements, there remains important work to be done by both cruising operators and the Australian Government to protect passengers on cruise ships, and to ensure that victims of crime receive justice. It is the conclusion of the Committee that the Australian Government and industry have more work to do in their approach to ensuring an effective safety framework for cruise ship passengers.
- 6.39 The cruising industry is growing around the world, and is growing particularly quickly in Australia. This means that the industry has both the need and the capacity to improve its operations to keep passengers safe. As more passengers embark on cruises, the risk of accidents and crime is increased. At the same time, healthy growth means that the industry has the resources to invest in better safety and crime prevention, as well as to provide better responses to crimes committed at sea.
- 6.40 The Committee notes the significant changes that have taken place since the death of Ms Brimble over a decade ago. These changes have included improved safety measures on Carnival Australia's vessels, clarity in policing protocols and international guidelines on responding to crimes at sea.
- 6.41 These measures are all to be applauded and it is the view of the Committee that many deficiencies have been rectified. However, there remain a number of areas of concern, and the victims and families affected by crimes at sea are rightfully concerned at Australia's lack of action across a number of areas. The Committee reiterates its frustration that some actions are beyond Australia's jurisdiction. However, this does not mean that Australia is powerless to lead or effect change.
- 6.42 Despite the growth of the Australian cruising market, there is a worrying lack of data about the prevalence of crimes being committed at sea. The Committee believes that both industry and government need a better understanding of crime statistics if they are to operate and regulate cruising in a responsible way. Consumers also need an independent source of information about the safety of cruising, and this will give industry an opportunity to prove its claims about the rarity of crimes at sea. The Committee has accordingly recommended the compilation and publication of data on crimes at sea committed by or against Australians.

- 6.43 Questions of jurisdiction underlie almost every aspect of the cruising industry. From staffing to ship construction, ports, seas, crime investigations and liability for passengers' losses, debates about the ability of Australia to regulate the industry have enlivened the inquiry. Given the complex application of international law to the cruising industry, the Committee obtained legal advice so that it could have a firm basis on which to make its recommendations. The Legal Advice makes it clear that there are significant limits on Australia's ability to legislate for the cruising industry.
- 6.44 Many Australian consumers would be surprised about the limits on Australia's ability to regulate the cruising industry. The Committee is disappointed that these limits prevent the adoption of comprehensive cruising regulation in Australia like the USA's *Kerry Act*. However, given the clarity of the Legal Advice, the Committee has been able to recommend definite action of various kinds as appropriate.
- 6.45 Where Australia has jurisdiction, the Committee has recommended the Australian Government act to improve the conduct of cruising as it affects Australians. Where Australia does not have jurisdiction, the Committee has made clear recommendations about Australia working harder at the international level to bring about change to the industry. Using both of these approaches, the Committee is confident that the Australian Government can do more to ensure that all cruising passengers are safer at sea, and that justice is served when they are victims of crime.
- 6.46 In relation to specific international work, the Committee has recommended the Australian Government advocate for and vote in favour of the IMO Guidelines addressing crime response and pastoral care for victims at sea which are being considered at the IMO Assembly later this year. This was supported by CLIA, in evidence given at the public hearing on 7 February.
- 6.47 The Committee has considered measures to promote safety and prevent crimes on cruising vessels. Four areas of vessel management have been considered in detail: alcohol service, security staffing, video monitoring and 'man-overboard' detection systems. Despite the fact that Australia is severely limited in its ability to regulate these aspects of vessel management, the Committee believes that action can be taken by the industry to improve safety and crime prevention on cruising vessels. The Committee has also recommended the Australian Government work harder at the international level to improve passenger protection systems, such as CCTV, 'man-overboard' detection, the responsible service of alcohol and mandatory crime reporting.

- 6.48 The Committee has also considered the liability of vessel operators for negligence. Australia is not a party to the international agreements that regulate this area, and the Committee is concerned that Australian consumers would lack protection if cruise operators are negligent. Clear liability for negligence will give the industry additional financial motivation to redouble its efforts to ensure passenger safety. The Committee recommends the Australian Government address the issue by reviewing current arrangements, and taking action as necessary to ensure that Australian consumers are not deprived of reasonable compensation when vessel operators are negligent.
- 6.49 The Committee is also concerned to ensure that consumers are well informed about their rights and responsibilities when cruising. The Australian Government must do more to ensure that passengers understand that cruising is itself international travel. Australians taking cruises must understand that they should exercise the precautions that they would take on any international journey. The Committee has therefore recommended the Australian Government legislate to require that safety brochures with important information are distributed to all vessel passengers. The Committee has also recommended the *Smartraveller* website provide specific information about being safe on cruises as well as advice on the individual cruise operators in the Australian market.
- 6.50 When a crime does occur on a ship at sea, cruising operators have three primary responsibilities when they respond. They must ensure that the victims' welfare is protected, that the crime scene is preserved, and that crimes are reported to law enforcement agencies. Whilst operators are aware of these responsibilities, it is not clear that staff on vessels have the necessary training and resources to carry out these responsibilities fully. If vessel operators are deficient in any of these things, irreparable additional trauma can be done to victims, causing revictimisation.
- 6.51 Australia's ability to regulate the response of vessel operators to crimes is limited, however the Committee has made recommendations for unilateral Australian Government action where appropriate. In particular, the Committee has recommended the Australian Government make entry to Australian ports dependent on vessel operators' use and enforcement of the IMO Guidelines in their operations. The Committee has also recommended the Australian Government develop crime scene management protocols for use by vessel operators, compliance with which would also be a condition of entry to Australian ports. Thirdly, the Committee has recommended the Australian Government legislate for a mandatory crime reporting scheme. Vessels would also need to comply with such a scheme in order to enter Australian ports.

- 6.52 When crimes occur on vessels, victims ultimately rely on police, prosecutors and coroners to ensure that justice is served. Given Australia's federal structure, the criminal justice system must work collaboratively and cooperatively to investigate and prosecute crimes committed at sea. The Committee believes that the existing cooperative arrangements provide the necessary flexibility when dealing with the relatively rare occurrence of crimes at sea and also ensure that there is clarity about jurisdiction for investigation and prosecution. A regular review of the current protocols is recommended to ensure that the system – which is used relatively infrequently – is operating well. In addition, the Committee has recommended protocols to provide clear arrangements between state and territory coroners and the Australian Federal Police
- 6.53 A small but dedicated group of victims and their families have lobbied and advocated for improved safety and crime prevention for all cruise passengers, in Australia and around the world. They have contributed greatly to the inquiry, and shared their expertise and given their time to improve the safety of others. They have been motivated to do so through their own personal tragedies, and the Committee commends them for their passion and steadfast resolve to improve cruising for everyone, to prevent others from going through such tragedies. The Committee believes that this report will provide additional support for their campaigns for improved cruise vessel safety internationally, and thanks them for their significant contribution to the inquiry.

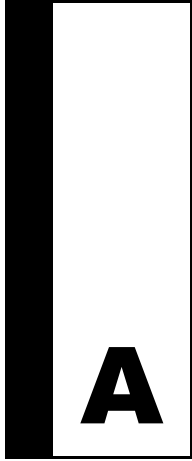
**Mr Graham Perrett MP**

**Chair**

17 June 2013







## **Appendix A – List of Submissions**

- 1 Dr Kate Lewins
- 2 Mr John O'Brien and Ms Strahan
- 3 Holiday Travel Watch
- 4 International Chamber of Shipping
- 5 Dr Jill Poulston
- 6 Commonwealth Director of Public Prosecutions
- 7 Commissioner for Victims' Rights, South Australia
- 7.1 Commissioner for Victims' Rights, South Australia  
(supplementary submission)
- 8 Australian National Council on Drugs
- 9 Carnival Australia
- 9.1 Carnival Australia (supplementary submission)
- 9.2 Carnival Australia (supplementary submission)
- 10 Department of Foreign Affairs and Trade
- 11 International Cruise Council Australasia
- 12 International Cruise Victims Association
- 12.1 International Cruise Victims Association (supplementary  
submission)
- 12.2 International Cruise Victims Association (supplementary  
submission)
- 13 Australian Shipowners Association
- 14 Department of Infrastructure and Transport
- 15 Northern Territory Attorney-General

- 16 Queensland Government
- 17 New South Wales State Coroner
- 18 State Coroner Western Australia
- 19 Tasmania Police
- 20 New South Wales Police
- 21 South Australia Police
- 22 Attorney-General's Department
- 22.1 Attorney-General's Department (supplementary submission)
- 23 Royal Caribbean Cruises Ltd



## **Appendix B – List of Exhibits**

- 1 Cruise Lines International Association  
*Comparison of Crime Rates aboard Cruise Ships and Various City Benchmarks*
- 2 Holland America Line  
*From the Captain*
- 3 Royal Caribbean Cruises LTD  
*Model Course CVSSA 11-01*
- 4 Carnival Australia  
*Notice to grant a temporary exemption - Australian Human Rights Commission*
- 5 International Cruise Victims Association  
*United States Senate - John D Rockefeller*
- 6 International Cruise Victims Association  
*US Coast Guard List of Causality Investigations Involving Cruise Ships 2008-present*





## **Appendix C – List of Public Hearings**

**Thursday, 1 November 2012 - Canberra**

**Murdoch University**

Dr Kate Lewins, Associate Professor, School of Law

**Friday, 1 February 2013 - Brisbane**

**International Cruise Victims Association**

Mr Kendall Carver, Chairman

**International Cruise Victims Australia**

Mr Mark Brimble, Director

**Queensland Government**

Ms Nicola Doumany, Director, Victim Assist Queensland, Department of Justice and Attorney-General

**Thursday, 7 February 2013 - Canberra**

**Cruise Lines International Association**

Mrs Christine Duffy, President and CEO

**International Cruise Council of Australia**

Mr Gavin Smith, Chairman

**Friday, 15 February 2013 - Sydney**

**Individuals**

Mr Kenneth Moroney

**Australian Federal Police**

Ms Leoni Amos, Senior Legislation Officer, Legislation Program  
Commander Errol Raiser, Manager Special References

**Australian Shipowners Association**

Ms Angela Gillham, Acting Executive Director

**Carnival Australia**

Ms Dimity McCredie, Vice President, Legal  
Ms Ann Sherry, CEO

**New South Wales Police**

Mr Mark Hutchings, Assistant Commissioner

**Northern Territory Office of the Coroner**

Mr Greg Cavanagh, Coroner

**NSW Police Force**

Mr Darren Schott, Crime Manager, Marine Area Command

**NSW State Coroner's Office**

Mr Don McLennan, Manager, Coronial Services NSW

**Queensland Police Service**

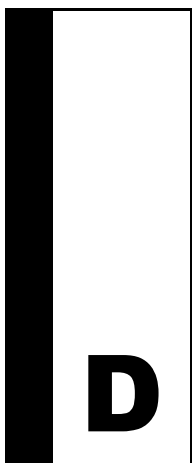
Inspector Christopher Emzin, State Water Police Coordinator  
Det Super Int Brian Wilkins, Detective Superintendent, Homicide Group,  
State Crime Operations Command

**Royal Caribbean Cruises LTD**

Mr Michael Giglia, Director  
Mr Gavin Smith, Regional Vice President Asia Pacific

**Thursday, 14 March 2013 - Canberra****Attorney-General's Department**

Mr Iain Anderson, First Assistant Secretary, Criminal Justice Division  
Ms Camille Goodman, Principal Legal Officer, International Law, Trade  
and Security Branch  
Ms Tara Inverarity, Acting Assistant Secretary, Criminal Law and Law  
Enforcement Branch



## **Appendix D – Legal Advice**



Our ref. 13058729

10 May 2013

Mr Graham Perrett MP  
Chair  
House of Representatives Standing Committee  
on Social Policy and Legal Affairs

**Australian Government Solicitor**  
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Canberra  
Sydney  
Melbourne  
Brisbane  
Perth  
Adelaide  
Hobart  
Darwin

Dear Mr Perrett

**Imposition of conditions on port access for cruise ships: requirements regarding crimes at sea**

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1. Thank you for your letter on behalf of the House of Representatives Standing Committee on Social Policy and Legal Affairs (**the Committee**) requesting advice on Australia's rights under international law in relation to the investigation of incidents on cruise ships that call at Australian ports.

**BACKGROUND**

2. The Committee is currently conducting an inquiry into the arrangements surrounding crimes committed at sea, and has sought confidential legal advice from the Australian Government Solicitor to inform the inquiry. In particular, the Committee has asked for advice on Australia's right to legislate on mandatory measures to improve passenger safety on board passenger ships and its jurisdiction over the reporting and investigation of criminal acts on board ship.
3. As mentioned in your request for advice, s 112 of the *Navigation Act 2012* (**Navigation Act**) confers power to make regulations concerning passenger vessels. Such regulations may apply to both regulated Australian vessels and foreign vessels. However, their application to foreign vessels is limited by s 9 of the Navigation Act, which provides that the master or owner of a foreign vessel does not commit an offence or contravene a civil penalty provision, in relation to the vessel, unless, at the time when the conduct constituting the alleged offence or contravention occurs, the vessel is:
  - (c) in an Australian port; or
  - (d) entering or leaving an Australian port; or
  - (e) in the internal waters of Australia; or



- (f) in the territorial sea of Australia, other than in the course of innocent passage.
4. Related to this, and with reference to the provisions of the *United Nations Convention on the Law of the Sea*<sup>1</sup> (UNCLOS), the Committee is seeking advice as to whether:
- Australia would be within its rights under international law to require certain reporting and standards as a condition for entry to port, namely to regulate the activities of those ships visiting Australian shores and embarking and disembarking passengers for reward?
  - Australia's jurisdiction would cover matters such as on board CCTV monitoring systems, management by the ship personnel of a reported crime, and reporting of serious crimes on board to Australian authorities?

#### SUMMARY OF ADVICE

5. The rules of international law on this subject are far from clear. Our conclusions in this advice are based on the application of certain basic principles of international law in a way that in our view is both logical and reasonable.
6. In our view there is probably scope for Australia to impose some conditions for entry by cruise ships to Australian ports, that relate to the way in which offences at sea are handled. In our view, conditions could probably be imposed consistently with international law if they are not excessively onerous, and are related to matters in relation to which Australia has jurisdiction and do not interfere with the jurisdiction of the flag State or other States with concurrent jurisdiction. (For example, we think that it could be a condition of entry to Australian ports that cruise ships provide information to Australian authorities about any offences on board the ship, anywhere in the world, alleged to have been committed by Australian nationals.)
7. However, we think that there is a substantial risk that the imposition of conditions, and denial of port access for failure to comply with them, would be considered to breach international law if they appear to be aimed at asserting Australian jurisdiction in circumstances where such jurisdiction is not recognised according to the general principles of international law, or at overriding the concurrent jurisdiction of other States (particularly the flag State). (These might be, for example, conditions that would prevent the flag State from investigating offences on board the ship, or that would impose requirements in relation to the investigation of incidents outside Australia that do not involve Australian nationals.)
8. The imposition of conditions requiring ships to have particular equipment or structural features (eg CCTV, peepholes in cabin doors) or to carry crew with particular training are also likely to be regarded as going beyond what Australia is entitled to require as a condition of port access.

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<sup>1</sup> Montego Bay, 10 December 1982, [1994] ATS 31.

9. If the IMO adopts guidelines on dealing with crimes on ships with broad support of the States members, and particularly if the relevant flag States support their adoption, then there would probably be good arguments that it is reasonable for Australia to make it a condition of entry to Australian ports that the owners/operators of a cruise ship have adopted those guidelines as part of the normal practice for the operation of the vessel, at least for incidents over which Australia has concurrent jurisdiction.
10. Before imposing conditions of entry to Australian ports, it would be necessary to consider whether doing so is consistent with Australia's obligations under international trade law, and under treaties containing provisions on port access, such as the *Convention on the International Regime of Maritime Ports (1923 Convention)*<sup>2</sup> and bilateral friendship, commerce and navigation treaties.

## REASONS

### General principles relating to jurisdiction

11. The questions you have asked raise issues concerning the jurisdiction of States under international law. There are two issues to consider, in relation to a State's jurisdiction under international law: a State's right to impose rules in relation to conduct (**prescriptive jurisdiction**); and a State's right to enforce its law in the event of a breach of such rules (**enforcement jurisdiction**).<sup>3</sup> A State that has the power to legislate in relation to particular conduct does not necessarily have a power of enforcement with respect to that conduct. This advice focuses principally on prescriptive jurisdiction. As necessary background to our answer to your specific questions, the general principles relating to jurisdiction under international law are described, very briefly, below.

### *Territorial jurisdiction*

12. Under international law, territoriality is the primary basis for jurisdiction. Within its territory, a State may apply and enforce its law in relation to both its own nationals and non-nationals. In general terms, a State has territorial jurisdiction over its internal waters and, subject to an important exception for innocent passage of foreign ships, over its territorial sea. Maritime zones beyond its territorial sea (contiguous zone, exclusive economic zone (**EEZ**), continental shelf, high seas) are not part of its territory.<sup>4</sup>

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<sup>2</sup> Geneva, 9 December 1923 [1926] ATS 14.

<sup>3</sup> Enforcement jurisdiction can also be divided into the competence to arrest (arrest jurisdiction) and the competence of courts to deal with alleged breaches of the law (judicial jurisdiction).

<sup>4</sup> The coastal state has certain sovereign rights in relation to the EEZ and continental shelf, in relation particularly to natural resources and protection of the marine environment. It also has rights in the contiguous zone, with regard to preventing and punishing infringements in its territory or territorial sea of customs, fiscal, immigration and sanitary laws.

*Nationality jurisdiction*

13. International law also recognises other secondary bases of jurisdiction, apart from territoriality. The most generally accepted is nationality. A State has prescriptive jurisdiction over its nationals when they are abroad, but does not have enforcement jurisdiction in another State's territory. Prescriptive jurisdiction on the basis of nationality is concurrent with the primary jurisdiction of the territorial State. Therefore, China, for example, may impose laws that apply to the conduct of Chinese nationals while they are in Australia, but cannot enforce those laws against its nationals while they are in Australian territory. Australian law will also apply to the conduct in question, concurrently with Chinese law.

*Jurisdiction other than territorial and nationality jurisdiction*

14. Generally, a State does not have prescriptive jurisdiction over persons who are not its nationals and who are not within its territory. However, there are some circumstances where such jurisdiction is recognised.<sup>5</sup> Arguable grounds for jurisdiction include the 'protective security' principle (jurisdiction over extra-territorial acts of non-nationals to protect the State's vital security interests, territorial integrity or political independence<sup>6</sup>); the 'passive personality' principle (jurisdiction over a non-national in relation to acts taking place outside the State if those acts harm a national of the State<sup>7</sup>); and cases of 'universal jurisdiction' in relation to a limited number of crimes such as piracy.<sup>8</sup> However, the scope of most of these further bases for jurisdiction remains uncertain.
15. This advice does not deal with the extent to which Australia can or should assert extraterritorial jurisdiction on any of these bases. We point out that any decision to do so needs to take account of the government's view of the current state of international law on the issue, and a broad range of related considerations. These include that Australia's assertion of a particular basis of jurisdiction in one context may make it difficult for Australia to object to other States asserting similar jurisdiction over Australian nationals on Australian vessels or in Australian territory in a similar or different context. We note that the *Crimes at Sea Act 2000*<sup>9</sup> and the *Criminal Code*<sup>10</sup> require the Attorney-General's consent to prosecutions of foreign nationals for extra-territorial offences, which provides a means of avoiding an exercise of jurisdiction that may be excessive in the particular circumstances.

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<sup>5</sup> Jennings and Watts, *Oppenheim's International Law* (9th ed, 1992), vol 1 ('*Oppenheim*'), p 457-8.

<sup>6</sup> See *Oppenheim*, p 470-471.

<sup>7</sup> See *Oppenheim*, p 471-472. See also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002 (*Arrest Warrant Case*) (Separate Opinion of Judges Higgins, Kooijmans and Buergenthal at [47]-[48]).

<sup>8</sup> See *Arrest Warrant Case*, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

<sup>9</sup> Schedule 1, item 7.

<sup>10</sup> See for example ss 16.1, 70.5, 71.20, 72.7, 73.5

**Law of the sea and questions of jurisdiction**

16. In addition to the general principles of international law relating to jurisdiction, described above, the international law of the sea has rules relating to jurisdiction of States over vessels and conduct on board vessels. Many of these rules are set out in UNCLOS, to which Australia and most other States are parties. However, many of the provisions of UNCLOS reflect customary international law which is binding also on non-parties.
17. A fundamental concept is flag State jurisdiction. Flag State jurisdiction can be regarded as a form of nationality jurisdiction.<sup>11</sup> The flag of a ship establishes its nationality.<sup>12</sup> Article 92(1) of UNCLOS states that, on the high seas, where no State has territorial jurisdiction, the flag State has exclusive jurisdiction over the vessel. However, other States may have concurrent jurisdiction in relation to persons on board the vessel. In relation to the conduct of a national of one State who is on a ship flagged to another State, both States have prescriptive jurisdiction, but Churchill and Lowe note that 'the expectation is that in this case of concurrent jurisdiction it is the flag State whose jurisdiction has primacy (see, eg, [UNCLOS], art 94)'.<sup>13</sup>
18. In general terms, the flag State is responsible for the vessels flying its flag, and it is subject to a many obligations under international law in relation to those vessels. Article 94 of UNCLOS sets out 'duties of the flag State', including:
  1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
  2. In particular every State shall:
    - ...
    - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
  3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
    - (a) the construction, equipment and seaworthiness of ships;
    - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
    - (c) the use of signals, the maintenance of communications and the prevention of collisions.
  - ....
  6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the

<sup>11</sup> *Oppenheim*, p 734; Churchill and Lowe, *The law of the sea*, 3rd ed, ('Churchill and Lowe'), p 257.

<sup>12</sup> UNCLOS, art 91.

<sup>13</sup> Churchill and Lowe, p 209.

facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

...

### ***Territorial sea***

19. As already mentioned, a coastal State has sovereignty over its territorial sea<sup>14</sup>, and can therefore apply its laws to foreign vessels in the territorial sea, with one major limitation. That limitation is that it must respect the right of innocent passage of foreign vessels.<sup>15</sup> Generally speaking, the right of innocent passage entitles foreign vessels to navigate through the coastal State's territorial sea, for the purpose of proceeding to or from its internal waters (eg a port), or traversing the sea without entering internal waters. Passage is 'innocent' so long as it is not prejudicial to the peace, good order or security of the coastal State. Article 19(2) of UNCLOS lists certain activities which render passage non-innocent, but these do not appear relevant to this advice. The coastal State may 'take the necessary steps in its territorial sea to prevent passage which is not innocent'.<sup>16</sup>
20. Where a foreign ship is engaged in innocent passage, under art 21(1) of UNCLOS the coastal State has rights to regulate that passage in respect of various matters, such as the safety of navigation and the regulation of maritime traffic, protection of the environment of the coastal State, and prevention of infringement of fisheries laws, and customs, fiscal, immigration or sanitary laws,<sup>17</sup> provided the laws are non-discriminatory and do not have the practical effect of denying or impairing the right of innocent passage.<sup>18</sup> (Failure to comply with an applicable law of the coastal State does not necessarily render passage non-innocent.) However, art 21(2) provides:
  2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.
21. Of particular relevance to your question is the rule set out in art 25(2) of UNCLOS that, in the case of ships proceeding to a port or other internal waters, the coastal State has the right to take in the territorial sea the necessary steps to prevent any breach of the conditions to which their entry is subject. Therefore, the coastal State can, for example, take steps in the territorial sea to prevent a foreign vessel from entering port if it does not comply with conditions for entry.
22. With regard to offences committed by a person who is on board a foreign vessel in the territorial sea, art 27 of UNCLOS sets out the general principle that the criminal

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<sup>14</sup> UNCLOS, art 2.

<sup>15</sup> UNCLOS, art 17ff.

<sup>16</sup> UNCLOS, art 25(1)

<sup>17</sup> UNCLOS, art 21(1).

<sup>18</sup> UNCLOS, art 24(1)(a).



jurisdiction of the coastal State should not be exercised on board a foreign ship, except in certain specified situations. Article 27 provides:

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
  - (a) if the consequences of the crime extend to the coastal State;
  - (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
  - (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
  - (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.
2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

***Internal waters: ports***

23. A State's internal waters, including its ports, are part of its territory, over which it has territorial jurisdiction, as it has over its land territory. It therefore has jurisdiction over vessels in its ports and persons on those vessels. However, the flag States of the vessels also have jurisdiction over them.
24. *Oppenheim* describes the situation of foreign flag ships in ports as follows:

Private foreign vessels present in ports or any other internal waters are in principle subject to the local law and the jurisdiction of the local courts both in criminal and civil matters. Since, however, vessels all have nationality, there is also a concurrent jurisdiction by the flag State, which, at any rate in all matters concerning the internal discipline of the vessel, will normally be the convenient one to apply.<sup>19</sup>
19. Accordingly, matters relating solely to the 'internal economy' of a foreign flag ship in port tend to be left to the authority of the flag State. Churchill and Lowe summarise general international practice as follows:

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<sup>19</sup> p 622.

By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships. But since ships are more or less self-contained units, having not only a comprehensive body of laws - that of the flag State - applicable to them while in foreign ports, but also a system for the enforcement of those flag State laws through the powers of the captain and the authority of the local consul, coastal States commonly enforce their laws only in cases where their interests are engaged. Matters relating solely to the 'internal economy' of the ship tend in practice to be left to the authorities of the flag State.

... Thus, local jurisdiction will be asserted when the offence affects the peace or good order of the port either literally (for example, customs or immigration offences), or in some constructive sense. ...

... Coastal States will, of course, exercise their jurisdiction in matters which do not concern solely the 'internal economy' of foreign ships. Pollution, pilotage and navigation laws are routinely enforced against such vessels and, as we have noted, ships may be arrested in the course of civil proceedings in the coastal State. But, with the exception of the categories described above, States do not exercise their jurisdiction in respect of the internal affairs of foreign ships in their ports even though, as a matter of strict law, they would be entitled to do so because of the voluntary entry of those ships within their territorial jurisdiction.<sup>20</sup>

20. The Anglo-American position (which as far as we are aware is shared by Australia) is that this non-exercise of jurisdiction over the internal economy of ships in port is a matter of the voluntary non-exercise of jurisdiction - a rule of comity, rather than a rule of international law.<sup>21</sup> However, some countries may take the view that, as a matter of international law, the port State has no jurisdiction over the purely internal affairs of foreign ships.<sup>22</sup> In any case, Churchill and Lowe note that the practice of refraining from exercising such jurisdiction is 'remarkably consistent'.<sup>23</sup>

#### ***Control over entry into ports***

25. You have asked specifically for advice about the power to impose conditions for the entry of foreign cruise ships into Australian ports. Those conditions would relate to offences committed on board ship. It is our understanding that your question does not relate only to incidents occurring in situations which could be covered by regulations under s 112 of the Navigation Act, as restricted by s 9. That is, we understand that you would not intend conditions on port access to be restricted to incidents occurring on the ship in an Australian port, when the ship is entering or leaving an Australian port, or in other internal waters of Australia, or in the territorial sea of Australia other than in the course of innocent passage.

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<sup>20</sup> *The law of the sea*, 3<sup>rd</sup> ed, pp 65-68.

<sup>21</sup> See *Re Maritime Union; ex p CSL Pacific* (2003) 214 CLR 397, 417-418.

<sup>22</sup> See Churchill and Lowe, p 66; *Oppenheim*, pp 622-624. This was traditionally the French view.

<sup>23</sup> Churchill and Lowe, p 66.

*Whether foreign ships have a right of access to ports*

26. Whether foreign ships have a general right under customary international law to enter a State's ports (other than in cases of distress) has been the subject of some controversy.<sup>24</sup> The arbitral tribunal in the *Aramco arbitration*<sup>25</sup> in 1958 stated that 'according to a great principle of public international law, the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require'. However, Churchill and Lowe state that there is no other support for the existence of such a general principle at customary international law, and take the view that tribunal's statement was incorrect.<sup>26</sup> A study of treaties and State practice by UNCTAD in 1975 also concluded that the question of the right of foreign merchant vessels to port access remained under debate and that insufficient evidence existed for such a right to be recognised as a custom in international law.<sup>27</sup>
27. In support of their view, Churchill and Lowe note that:
- While it is undoubtedly true that the international ports of a State are presumed to be open to international merchant traffic..., this presumption has not quite the status of a *right* in customary law. Moreover, any such right would be subject to substantial restrictions.
28. They point out that there is a long-standing rule that States have the right to nominate which of their ports are open to international trade, and that 'it is generally admitted that a State may close even its international ports to protect its vital interests without thereby violating customary international law, and it would be difficult to establish that any interests invoked by a State were inadequate to justify closure'. They add:
- Furthermore, States have a wide right to prescribe conditions for access to their ports.<sup>28</sup>
29. The International Court of Justice appears to have recognised such a right in the *Nicaragua case* when it noted that:
- It is also by virtue of its sovereignty [over its internal waters] that the coastal State may regulate access to its ports.<sup>29</sup>
30. Although UNCLOS does not specifically provide that a coastal State has the right to impose conditions on entry into its ports, some of its provisions assume that this is the case. In particular, as we have mentioned, art 25(2) allows the coastal State to take measures in the territorial sea in relation to ships proceeding to its internal waters to 'prevent any breach of the conditions to which admission of those ships to

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<sup>24</sup> Churchill and Lowe, p 61-62.

<sup>25</sup> *Aramco v Saudi Arabia*, 27 ILR 167 at 212.

<sup>26</sup> See Churchill and Lowe, p 61.

<sup>27</sup> *Economic co-operation in merchant shipping-treatment of foreign merchant vessels in ports*, UNCTAD/TD/B/C.4/136, 9 September 1975.

<sup>28</sup> Churchill and Lowe, p 62.

<sup>29</sup> *Nicaragua v USA* [1986] ICJ Rep. 14 at 111.



internal waters ... is subject'. In addition, art 211 requires States which establish requirements for the prevention, reduction and control of pollution of the marine environment 'as a condition for the entry of foreign vessels into their ports or internal waters' to give due publicity to those requirements and communicate them to the competent international organisation.

31. In our view, foreign ships do not have a right under customary international law or UNCLOS to enter a State's ports, except where the ship is in distress.<sup>30</sup> It seems clear that, as a matter of general principle, a State can impose conditions for entry into its ports.<sup>31</sup> However, there is little guidance, either in treaties or in the academic literature, about the sorts of conditions of access which would be permitted.
32. Rothwell and Stephens in *The international law of the sea*,<sup>32</sup> state:

[UNCLOS] is silent as to whether foreign ships have a right of access to port. However there is both treaty law and case law in support of the general principle that a state does not have an unlimited power to prohibit access to its ports.<sup>33</sup>
33. This would also suggest that they consider that the right of a coastal State to impose conditions on access to a port is also limited. However, they note examples of States having, on a non-discriminatory basis, barred port access to certain types of vessels, notably Australia's prohibition on access by foreign whaling vessels in the absence of written permission,<sup>34</sup> and New Zealand's ban on nuclear powered ships.
34. Churchill and Lowe, while taking the view that conditions can be imposed, state that:

It is, however, possible that closures or conditions of access which are patently unreasonable or discriminatory might be held to amount to an *abus de droit*, for which the coastal State might be internationally responsible even if there were no right of entry to the port.<sup>35</sup>
35. The existence and scope of the principle of *abus de droit* (abuse of right) in international law is not clear. *Oppenheim* describes it as follows:

A further restraint on the freedom of action which a state in general enjoys by virtue of its independence, and territorial and personal supremacy, is to be found in the prohibition of the abuse by a state of a right enjoyed by it by virtue of international law. Such an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage.... The Permanent Court of

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<sup>30</sup> This is the view expressed in Churchill and Lowe, p 61-62.

<sup>31</sup> This right is subject to any contrary international law obligations, and in particular treaty obligations, that the state may have. We discuss some of these later in this advice.

<sup>32</sup> 2010, p 55.

<sup>33</sup> Original footnote: O'Connell, *The international law of the sea*, (n6) 848; Colombos, *The international law of the sea* (n 15) 176-177.

<sup>34</sup> *Environment Protection and Biodiversity Conservation Act 1999*, s 236.

<sup>35</sup> Churchill and Lowe, p 63.

International Justice expressed the view that, in certain circumstances, a state, while technically acting within the law, may nevertheless incur liability by abusing its rights.... Individual judges of the International Court of Justice have sometimes referred to it; possibly it is implied in the frequent judicial affirmation of the obligation of states to act in good faith.... However, the extent of the application of the still controversial doctrine of the prohibition of abuse of rights is not at all certain.<sup>36</sup>

36. Article 300 of UNCLOS arguably recognises the existence of such a doctrine as part of international law by providing:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

37. Akehurst argues that the exercise of legislative jurisdiction 'can give rise to genuine examples of abuse of rights - the State has a right to legislate and acts illegally only because it abuses that right'.<sup>37</sup> One situation in which he suggested that abuse would occur was 'if legislation is aimed at advancing the interests of the legislating State illegitimately at the expense of other States'. Akehurst provided the following example:

[D]uring the 1920s proposals were made in the United States Congress to alter United States law in order to give foreign seamen (serving on foreign ships) a contractual right to demand half their wages when the ship arrived in a United States port, even though the law of the flag State postponed the time for payment; in calculating the wages due to the seamen, advances paid in foreign countries were to be disregarded (i.e. the employer would have to pay again). Wages on United States ships were higher than wages on foreign ships, and the purpose of the proposed legislation (which was never passed) was to encourage foreign seamen to desert from foreign ships and to take up work on United States ships, thereby reducing labour costs and rectifying a shortage of labour on United States ships and increasing labour costs and causing general inconvenience on foreign ships. It is not surprising that foreign States protested that the proposed legislation was contrary to international law.<sup>38</sup>

38. Whether conditions imposed on port entry could potentially be considered to be an abuse of right, or a failure to act in good faith, or otherwise to go beyond what is permissible, would of course depend on the nature of the conditions in question. In our view, if conditions imposed by Australia appear to be aimed at supplanting the jurisdiction of the flag State in situations where the flag State has primary jurisdiction the flag State may consider the imposition of conditions to be an abuse of right or otherwise impermissible. This risk would be greater if the conditions imposed requirements in situations where Australia has no reasonable claim to even concurrent jurisdiction. We discuss this issue further later in this advice.

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<sup>36</sup> *Oppenheim*, pp 407-408.

<sup>37</sup> M Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 *British Yearbook of International Law*, 145 at 189, referred to in M Byers, 'Abuse of Rights: An old principle, a new age', (2002) 47 *McGill Law Journal* 389, at 409.

<sup>38</sup> At 189-190, quoted in Byers, at 409. (See note above.)

***Treaty provisions requiring (equal) access to ports***

39. In any case, the right of a coastal State to impose conditions on entry to its ports, and to deny entry to foreign vessels that do not comply with those conditions, is necessarily subject to any treaty obligations assumed by that State that would limit its rights in this regard. It is not possible in the context of this advice to provide a detailed analysis of all of the potentially relevant treaty obligations to which Australia is subject, but we note here some treaties which would need to be considered.
40. Australia is a party to the 1923 Convention and therefore, any restrictions imposed on a vessel flying the flag of another party to the 1923 Convention,<sup>39</sup> would have to be consistent with its obligations under that Convention. Churchill and Lowe refer to this Convention as providing 'for a reciprocal right of access to, and equality of treatment within, maritime ports'. However, at first sight, we think it can be argued that the relevant provision - art 2 of the Statute attached to the Convention - does not provide for a right of access, but only imposes an obligation of non-discrimination on the port State. It provides, in part:
- Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.
41. (The reservation in art 8 is that if one party gives notice that it does not consider that another party is applying equality of treatment to the first party's vessels, cargo and passengers, the first party can suspend the benefit of equality of treatment in its own ports for any vessel of the second party.)
42. To provide a confident interpretation of the extent of the obligation under art 2 of the 1923 Convention it would be necessary to consider such matters as the circumstances of the conclusion of the Convention, and any subsequent agreement or subsequent practice regarding its interpretation and application.
43. Further, bilateral treaties of 'friendship, commerce and navigation' commonly deal with entry to ports. Australia succeeded to a large number of such treaties concluded by the United Kingdom. We have not examined all of these, either to interpret them or to establish whether they are still in force. However, on the basis of a very brief examination, it appears that most could be interpreted as providing, like the 1923 Convention, that ships of one party are to be treated no less favourably than ships of the other party in relation to access to that other party's ports, rather

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<sup>39</sup> The parties include the UK and a number of European countries, but not the US or other major flag States such as Panama or Liberia (but note our comments below on the effect of a network of non-discrimination requirements). The parties to the 1923 Convention are listed at <http://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=558&lang=en>.

than providing a positive right of access. Nonetheless, Australia's obligations under all of these treaties will need to be considered if it is proposed to impose conditions on entry into ports by foreign cruise ships.

***Free trade agreements/GATS***

44. Another issue that is beyond the scope of this advice, but which would need to be taken into account in any decision regarding the imposition of conditions on allowing cruise ships to enter Australian ports and embark and disembark passengers, is consistency with Australia's international trade law obligations. The imposition of such conditions would probably restrict international trade in services and denial of access to Australian ports would certainly do so. Negotiations relating to the application of the WTO General Agreement on Trade in Services to international maritime transport have been complex and difficult. We have not attempted, for the purposes of this advice, to ascertain the extent of Australia's relevant obligations - notably most favoured nation and national treatment obligations - in relation to allowing port access to cruise ships, but this would need to be done if a proposal to limit that access were developed.
45. In addition, a number of Australia's free trade agreements include provisions on trade in services. We have not sought to establish whether the imposition of conditions on port entry for passenger vessels would potentially breach any of these agreements - this is a complex issue, and the answer would probably depend on the particular conditions imposed - but it is a matter that would need to be considered before any such measure was adopted.

*Potential effect of non-discrimination provisions*

46. A central issue in relation to international trade obligations, if any, would probably be whether measures were discriminatory, as between service providers of different foreign States (contrary to most favoured nation requirements) or as between foreign providers and Australian providers (contrary to national treatment requirements). We have also noted earlier in this advice a number of treaties which provide, probably not for free access to Australian ports, but for non-discriminatory access. We point out that the general effect of multiple non-discrimination requirements is that the most favourable treatment that Australia must give to any one State is likely to be the treatment that must be given to all of the States with which Australia has relevant treaty relations.
47. We also note that it can not necessarily be assumed that, because the same conditions apply on their face to Australian ships<sup>40</sup> and to all foreign ships, there is no discrimination. Particularly in the context of international trade law, the practical effect of the requirements on service providers of different nationalities needs to be considered.

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<sup>40</sup> We understand from information before the Committee this would be theoretical, because there are no Australian flagged cruise ships.

**Conclusions with regard to Australia's right to impose conditions on port entry for cruise ships**

48. As discussed above, we consider that Australia does have a general right to impose non-discriminatory conditions for entry to its ports on foreign cruise ships. However, that right is probably subject to some limitations. At least, it is probable that other States would take that view. As we have indicated, however, there is very little guidance as to what conditions are acceptable, and which are not.
49. We think that there is a substantial risk that the imposition of conditions, and denial of port access for failure to comply with them, would be considered to breach international law if the conditions appear to be aimed at asserting Australian jurisdiction in circumstances where such jurisdiction is not recognised according to the general principles of international law, or at overriding the concurrent jurisdiction of other States (particularly the flag State).
50. In our view, conditions that are not particularly onerous, that are related to matters in relation to which Australia has jurisdiction and do not interfere with other States' jurisdiction could probably be imposed consistently with international law. Such conditions would include, for example, that the master or shipowner undertakes to inform Australian authorities of alleged offences in relation to which Australia has jurisdiction. It may also be possible to impose some conditions relating to the preservation of evidence and the standard of investigation of offences in relation to which Australia has jurisdiction, provided these do not interfere with the concurrent jurisdiction of other States, and notably the jurisdiction of the flag State. Conditions that would impede the flag State in carrying out its own investigation according to its own laws would in our view also run a substantial risk of being considered contrary to international law.
51. A condition requiring Australian authorities to be notified of incidents on board in relation to which Australia has no claim to criminal jurisdiction, and which do not otherwise involve Australian nationals or Australian interests, would also run a significant risk of being considered contrary to international law, in our view.
52. Requiring ships to have on board and operate CCTV monitoring systems as a means of deterring crime and obtaining evidence throughout their voyage, in our view, is likely to be regarded as going beyond what Australia is entitled to require as a condition of port access. As we have mentioned, UNCLOS expressly provides that the coastal State cannot regulate ships in innocent passage in the territorial sea in relation to 'the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards'. While this restriction relates to restrictions on innocent passage in the territorial sea, a condition of port entry that required ships to have a particular equipment - CCTV monitoring systems - while they were in the territorial sea heading to or from a port might be considered to be an attempt to overcome this limitation on the coastal State's rights by indirect means. This objection might be reduced if such a condition were limited to requiring the CCTV to be installed and in operation only while the



ship is in port. However, even such a requirement might well raise objections from other States. As we have discussed above, the normal international practice is for States to refrain from regulating the internal economy of foreign ships in their ports. Australia's view is that this is a matter of comity, rather than a legal requirement, but even so a departure from that practice may well raise objections from other States.

53. The same arguments as apply to requiring CCTV also probably apply to conditions relating to the manning of the ship, including that the ship carry crew with particular training, and requirements concerning the structure of the ship (such as high railings to deter suicide and reduce the risk of accident, and peeholes for cabin doors).
54. We think that there would be a significant risk in seeking to impose a condition that would require, as a condition of entry, that foreign ships adopt practices dictated by Australia in relation to the preservation of evidence and investigation of crimes on board wherever the ship is in the world, and whatever the nationality of the persons involved. This could be regarded as an attempt to supplant the jurisdiction of the flag State, which is recognised under customary international law, and by art 94 of UNCLOS.
55. However, the IMO currently has under consideration draft Guidelines on dealing with crimes on ships, which were approved by the Legal Committee at its 100th session, 15 to 19 April 2013. The draft guidelines, which focus on what can practically be carried out on board a ship to preserve and/or collect evidence and protect persons affected by serious crimes, until such time that the relevant law enforcement authorities commence an investigation, will be submitted to the IMO Assembly 28th session, in November 2013, along with an associated draft resolution, for consideration with a view to adoption.<sup>41</sup> (We note however that we have not seen the content of the draft guidelines.) If the guidelines are adopted by the IMO with broad support of the States members, and particularly if the relevant flag States support their adoption, then there would probably be good arguments that it is reasonable for Australia to make it a condition of entry to Australian ports that the owners/operators of a cruise ship have adopted those guidelines as part of the normal practice for the operation of the vessel. However, whether Australia could reasonably deny port access to a cruise ship on the basis that its crew had failed to follow the guidelines in a case in which Australia had no jurisdiction would be subject to doubt.
56. Generally, the adoption of draft guidelines in the IMO with broad support would increase the likelihood that any conditions reflecting those guidelines imposed by Australia would be regarded as reasonable, particularly by the States that had supported their adoption. Similarly other international practice, such as the adoption of requirements by a large number of other States for cruise liners operating in their ports or under their flag, would increase the likelihood that such requirements would be regarded as reasonable as conditions of port entry. Also, if the cruise industry

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<sup>41</sup> Taken on 8 May 2013 from IMO media release at <http://www.imo.org/MediaCentre/PressBriefings/Pages/11-LEG-100-outcome.aspx>

generally adopts particular practices, conditions requiring the application of those practices are less likely to be objected to by other States, at least if Australia does not appear to be attempting to displace other States' jurisdiction.

57. We point out that there is a particular risk of other States regarding conditions of port access as unacceptable if those conditions would require the master or crew to breach the law of the flag State, which applies on board the ship. For example, requiring monitoring by CCTV and possibly other steps to secure evidence, and requirements to notify Australian authorities of incidents and the identity of persons involved, might breach applicable privacy laws or other laws such as protecting the identity of the alleged victims of sexual offences or the identity of alleged offenders.
58. As already mentioned, it would need to be considered whether any conditions are consistent with Australia's obligations under treaties dealing with port access and free trade.

***Agreement of the flag State/owners and operators***

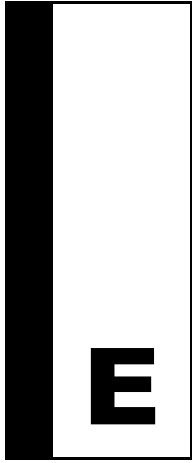
59. We point out that objections on the basis of interference with other States' jurisdiction would be avoided if the States concerned agreed to the conditions in question. Also, voluntary arrangements with the owners or operators of cruise ships, assuming that they did not breach the law or otherwise deny the legitimate jurisdictional claims of other States, and assuming they did not result in discrimination between ships of different nationalities, would not appear to create difficulties under international law.
60. Mr Robert Orr QC, Chief General Counsel, has read and agrees with this advice.
61. Please let us know if we can be of further assistance.

Yours sincerely

**Susan Reye**  
Senior General Counsel







## **Appendix E – Milledge Recommendations**

## **THE “BRIMBLE” RECOMMENDATIONS**

The Inquest into the cause and manner of Dianne Brimble’s death was terminated under the provisions of Section 19 Coroners Act 1980 (the old Act).

The inquest has been resumed pursuant to Section 79 Coroners Act 2009 (the new Act) for the purpose of coronial recommendations.

Section 82 (the old Section 22A) provides:

- (1) *A coroner (whether or not there is a jury) or a jury may make such recommendations as the coroner or jury considers necessary or desirable to make in relation to any matter connected with the death, suspected death, fire or explosion with which an inquest or inquiry is concerned*
- (2) *Without limiting subsection (1), the following are matters that can be the subject of a recommendation:*
  - a. *public health and safety,*
  - b. *that a matter be investigated or reviewed by a specified person or body.*
- (3) & (4) *not applicable*

Formal findings of fact were published 30 November 2010. These recommendations should be considered with reference to those findings.

The coroner has been greatly assisted in formulating recommendations by the comprehensive and very relevant submissions of parties to the inquest:

- Mr Mark Brimble and the International Cruise Victims (Australia) Pty Ltd and
- Mr Sheahan SC and his client P&O Cruises Australia

I have given careful consideration to matters raised in each submission and whilst there are some differences, for the most part they are complimentary. Clearly the objectives are the same.

In its submissions P&O Cruises Australia sets the tone for the changes that were very much needed within the cruise industry: I quote from the beginning of their document:

*“The death of Ms Brimble was an unexpected tragedy that has affected the lives of many people, most especially her family.*

*“P&O Cruises Australia (P&O Cruises) has done and continues to do all it that it can to ensure that such a tragic event never occurs again, and that for Ms Brimble there is a legacy of constructive reform.*

*“Since 2002, and particularly since 2006, P&O Cruises has fundamentally changed its operations. The inquest has been the catalyst for many of these reforms. As P&O Cruises has acknowledged and deeply regrets, there were shortcomings in its response to Ms Brimble’s tragic death. P&O Cruises has sought to ensure that they will never occur again”*

Mr Brimble's detailed submission contains extracts from the **International Covenant on Civil and Political Rights**.

He and his Association use the Covenant as a backdrop to weigh in favour of legislative reform of the cruise industry. Significantly he quotes **Article 6(1)** which provides that **"Every human being has the inherent right to life. This right shall be protected by law"**.

Mr Brimble asserts that Article 6 "requires Government to take appropriate steps to safeguard the lives of those within its jurisdiction. Consequently there is a positive obligation to prevent death"

He further submits:

**"The Human Rights Committee** has stated:

*The right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.*

Accordingly, it is incumbent upon the State and Commonwealth Governments to take steps to address the short comings in regulating the Cruise Ship Industry to protect the rights of those that board these ships".

In July 2010, the United State Congress passed the **Cruise Vessel Security and Safety Act** (the 'Kerry' Act).

Difficulties within the cruise industry were identified by a number of sub committees reporting to the Congressional Committee of Inquiry. The Senate and the House of Representatives made formal findings and they are set out in the preamble to the Act. The issues that were identified are the same issues that face Australian Authorities when attempting to regulate in the areas of safety, crime prevention, reporting of crime and its subsequent investigation.

**The 'Kerry' Act legislates** in the following areas:

- Vessel Design, Equipment, Construction, and Retro Fitting Requirements
- Video recording – maintaining surveillance
- Safety Information – Crime prevention and Response Guide
- Sexual Assault – provision for medical assistance, counselling and other services
- Confidentiality Requirement for all medical, psychological and other related services accessed by passengers/staff
- Controlled Access to Passenger Staterooms
- Maintaining Log Books and Strict Reporting of Crimes. Incident Data to be Reported and Available via Internet
- Importantly there are Enforcement provisions for individuals and corporations that fail in the requirements of the Act.

The facts as they relate to the death of Dianne Brimble illustrate the need for the Australian Federal Government to adopt an identical approach to Federal legislation as the United States Congress.

President Obama signed the Bill into Law on 29 July 2010. The International Cruise Victims Australia with Mr Brimble as its Director, were active and influential in its introduction.

**I Recommend that the Australian Federal Government establish a special Parliamentary Committee to consider the same issues that have been addressed in the 'Kerry' Act.**

***The committee should have specific regard to:***

- ***cross jurisdictional issues that face the States, Territories and the Commonwealth***
- ***the overlap of the various Colonial Jurisdictions with power to investigate the 'cause and manner' of death (even extending beyond the limits set by the Crimes at Sea Act ) and those of the many State, Territory and Federal Police Forces and other investigative bodies***
- ***the need to adopt the 'Kerry' Act to the specific demographic of this country***
- ***ensuring that when determining the jurisdiction to be the 'lead investigator' into serious crime, that the competency of the jurisdiction to ensure best practice be the foremost consideration***
- ***Flag State status of the vessel be disregarded if that State (Country) is not equipped to undertake the rigor of a thorough and competent investigation***
- ***ensuring that the prosecution of offenders be firmly within the jurisdiction of Australian authorities***

With regard to the latter requirement, it is respectfully suggested that a similar provision to Section 272 of the Criminal Code that provides Australian citizens in foreign countries to be prosecuted for specific sexual offences could be implemented by the Commonwealth to deal with its citizens when travelling on ships registered and controlled outside Australia.

The nature and the mechanics of any provision of this legislation would require detailed analysis by the Commonwealth Attorney General's Department and the various Parliamentary Committees.

Consideration should be given to the use of Federal Police Officers as 'on board' investigators travelling with the ship at all times. It would not be intended that their presence be intrusive but they would be reactive to crime reporting and could ensure a timely investigation. They would also have significant impact on crime prevention.

**I recommend that the Federal Parliamentary Committee consider legislating for the attachment of a Federal Police Officer (or Officers) to travel with a ship to ensure a timely and appropriate response to crime.**

The Crimes at Sea Act 2000 empowers the State to act in criminal matters up to a distance of 12 nautical miles from the baseline of the State and the Commonwealth beyond 12 and up to 200 nautical miles. This means that when a ship travels

beyond those jurisdictional limits the Flag State of the vessel may be a determinant in the jurisdiction to act.

It appears that this is a significant impediment to the investigative agencies timely understanding of which country has the lead in the criminal investigation. Given that each cruise must be chartered prior to embarkation, consideration should be given to where the jurisdiction would lie at each point in the journey.

Until there is Commonwealth Legislation that can give certainty to the issues of jurisdiction and crime investigation, each State and Territory Police Force should provide guidelines for their investigators.

The guidelines should set out the powers police have to conduct investigations on board ships. The guidelines should re enforce the powers that the Master of the Vessel has in detaining and otherwise dealing with suspects and other miscreants and how they can supplement and support the police.

**I recommend that the Federal, State and Territory Police Commissioners devise, in consultation with each other, firm guidelines clearly setting out the geographical jurisdiction of each investigative agency.**

**The Coroners of each State and Territory should be consulted to ensure the requirements of their respective Coroners Acts are not overlooked particularly when dealing with the coroner's ability to deal with persons who have died, or suspected to have died outside the jurisdictional limits of the Commonwealth.**

In recent years there have been a number of deaths reported to the New South Wales State Coroner under the provisions of Section 13C (now Section 18 new Act). The 2000 and 2002 Bali Bombing victims, the Tsunami Victims 2004, the murder of the 'Balibo Five' journalists, the shooting of Private Jake Kovco and many others.

Investigating the death of Dianne Brimble and the resulting inquest was resource poor but complex and challenging for the limits of the State jurisdiction. There is a real and pressing need for these 'mega' inquests to be undertaken by a Federal Coroner who would have the investigative and administrative resources that are lacking at State level. I agree with Counsel Assisting that these significant and important investigations would often have a substantial impact on the Commonwealth.

The Federal Coroner should be a Federal Court Judge to reflect the importance and scope of the role.

**I recommend that the Commonwealth Attorney General establish a Federal Coronial Jurisdiction. A Federal Court Judge should be appointed as the Federal Coroner.**

The Ports Authority and Australian Customs should increase their drug detection and deterrent procedures to ensure that all passengers, visitors, crew and staff of every ship are properly scanned. Scanning should not be random or target based but every individual should undergo its rigors.

The use of drug detection dogs at each and every port is required.

**I recommend that passengers and crew boarding all vessels at Australian ports be subjected to the rigors of drug detection scanning.**

**I recommend the drug detection dogs be used at all Australian ports.**

I adopt the submissions of Mr Brimble and the International Cruise Victim's Association. I support his careful analysis of the industry and the recommendations he believes would equate to best practice.

I also acknowledge the significant improvements to safety and security implemented by P&O Cruises Australia. I commend them for their immediate response to their deficiencies as evidenced at inquest.

The timely and appropriate action has eliminated the need for the coroner to make recommendations on many of the issues of concern.

Whilst I accept Mr Brimble's submission that P&O is only one of many cruise lines that carry Australian citizens and operate in our waters, P&O has undergone substantial reform, no doubt at significant cost but in doing so has ensured its corporate integrity and the comfort and safety of future passengers.

Mr Sheahan has urged the coroner to regard the reforms P&O has introduced as 'best practice for the industry'. Whilst I have no difficulty in doing that, I agree with International Cruise Victims Australia and Mr Brimble that 'best practice' must be seen as complete legislative reform visa vis the 'Kerry' Act.

It should be relatively simple to incorporate the already existing good work of P&O into Federal legislation.

The current protocols that are relied on:

- National Protocols for Reporting Crimes at Sea
- Pacific Islands Chiefs of Police

have no effect at law.

P&O concludes in its submission "the broader adoption across Australian cruise industry of the kinds of reforms that P&O Cruises has voluntarily undertaken in the course of this inquest (and that are envisaged by the Kerry Act), would assist in ensuring the safety and security of all passengers, regardless of the identity of the particular cruise operator." I agree.

**I recommend that the Federal Government Committee established to consider the legislative reform of the cruise industry (in the same terms as the 'Kerry'**

**Act) have regard to the issues and recommendations of Mr Mark Brimble and the International Cruise Victims of Australia. These recommendations are supported by the coroner.**

**I recommend to that Committee that they have regard to the submission and reforms undertaken by P&O Cruises Australia when considering the development of legislation and policy.**

Following a number of concerns that were raised by Professor Dufrou, Institute of Forensic Medicine Glebe, regarding the preservation of the body awaiting post mortem and the collection of specimens needed for forensic medical examination (eg the taking of samples from the 'vitreous humor' to ensure the best possible analysis for drug detection), NSW Health and Commonwealth Health should convene a joint committee to have regard to the needs all aspects of post mortem examination and autopsy.

**I recommend that Commonwealth Health and New South Wales Health establish a committee to set 'best practice' guidelines for the preservation of bodies requiring examination 'post mortem' where the death occurs outside the jurisdiction limits of the State, Territories and Commonwealth.**

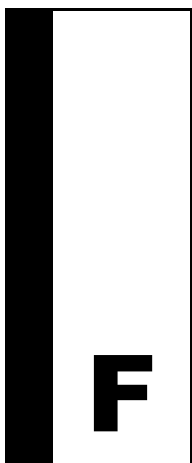
I direct that these recommendations and copies of the submissions for P&O Cruises Australia (withholding sensitive material that is ordered not to be published or displayed) and those of Mr Mark Brimble and International Cruise Victims Association Pty Ltd together with my 'finding; be sent to:

- The Prime Minister
- The Commonwealth Attorney General
- Minister for Infrastructure and Transport
- Minister for Health and Aging
- The Commissioner, Australian Federal Police
- The Premier of New South Wales
- The NSW Attorney General
- Minister for NSW Health
- NSW Police Commissioner

Magistrate Jacqueline M. Milledge  
(Former Senior Deputy State Coroner)  
3 December 2010







## **Appendix F – Government Response**

**GOVERNMENT RESPONSE TO THE RECOMMENDATIONS OF THE NSW CORONER  
FOLLOWING THE INQUEST INTO THE DEATH OF MS DIANNE BRIMBLE**

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The tragic death of Dianne Brimble has caused much sadness and pain for Ms Brimble's family and friends.

The Government commends Ms Brimble's family and friends, particularly Mr Mark Brimble, for their patience through the many processes arising from her death, including most recently, the Government's careful consideration of the former New South Wales (NSW) Coroner's findings.

On 3 December 2010, the former NSW Senior Deputy State Coroner, Magistrate Jacqueline M. Milledge, made the "Brimble" recommendations (the recommendations) following the inquest into the death of Ms Dianne Brimble on board the P&O cruise ship 'Pacific Sky' on 24 September 2002.

The Government has accepted recommendations 1, 3, 7, 8 and 9 of the coroner, (either wholly or in part). The Government will refer some of the issues raised by the Coroner to the House Standing Committee on Social Policy and Legal Affairs.

There are a number of areas covered by the Coroner's recommendations in which improvements have been made to existing practices following the death of Ms Brimble or there are already arrangements in place which largely address the issues raised by the Coroner. The Government has referred to these arrangements where relevant.

The recommendations cover a broad range of matters, including police and coronial jurisdictions, the United States (US) Kerry Act, federal police presence on ships, drug scanning and drug detection dogs at ports, and coronial best practice.

These recommendations have been considered by the Commonwealth Government departments and agencies with responsibility for and expertise in matters relating to the maritime sector including the regulation of Australian-flagged ships, maritime safety, the control of Australia's borders, crime prevention, reporting of crime and the investigation of crimes that occur on ships within Australia's jurisdiction. The responsibility for responding to the recommendations has been shared across a number of departments and agencies.

The departments and agencies involved included the:

- Attorney-General's Department, including the Office of International Law
- Australian Federal Police (AFP)
- Australian Customs and Border Protection Service (ACBPS)
- Department of Foreign Affairs and Trade
- Department of Infrastructure and Transport, including the Office for Transport Security and the Australian Maritime Safety Authority (AMSA)
- Department of Resources, Energy and Tourism
- Department of Health and Ageing, and
- Department of Defence.



Australia's maritime regulatory framework regarding maritime safety and the regulation of Australian flagged ships, is comprised of policies, requirements and guidelines relating to ship construction standards, ship survey and safety, crewing, seafarers' qualifications and welfare, occupational health and safety, carriage and handling of cargoes, passengers and marine pollution prevention. Enforceable requirements are legislated through Marine Orders under the *Navigation Act 1912* (Cth).

ACBPS chairs the National Sea Passengers Facilitation Committee (NSPFC), a joint government and industry forum established to discuss and develop collaborative approaches to managing cruise vessel issues. Ms Milledge's recommendations were noted at the NSPFC meeting in April 2011.

AMSA is the national maritime regulator and is responsible for developing and implementing national and international maritime safety standards, including monitoring compliance with operational standards for ships, administering training standards, and providing search and rescue services in cooperation with the States and Territories. AMSA works closely with the National Marine Safety Committee to improve consistency and safety outcomes across state and territory marine authorities through the National Marine Safety Strategy.

In relation to the reporting of crime and the investigation of crimes at sea, including on cruise ships, Australia's domestic legislation applies to the full extent possible under international law. The Commonwealth is limited in its criminal jurisdiction, however, by section 51 of the Australian Constitution.

The *Crimes at Sea Act 2000* (Cth) (Crimes at Sea Act) was enacted partly in response to the findings of a Coastal Surveillance Task Force established on 12 April 1999, chaired by the then Secretary of the Department of the Prime Minister and Cabinet, Mr Max Moore-Wilton, in the context of people smuggling. The Task Force reported in June 1999 that '[c]urrent maritime enforcement legislation does not implement fully the powers available under international law'<sup>1</sup> and recommended that 'comprehensive legislative amendments be introduced to further strengthen maritime investigatory and enforcement powers against both Australian and foreign flag vessels'.<sup>2</sup>

The Second Reading Speech to the Bill states, 'The new crimes at sea scheme will be simpler to understand and apply, and will result in more effective law enforcement.'<sup>3</sup>

Under the Crimes at Sea Act, the Commonwealth and the States have agreed to a cooperative scheme to apply the criminal law of the States extraterritorially in the

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<sup>1</sup> Prime Minister's Coastal Surveillance Task Force, *Report of the Prime Minister's Coastal Surveillance Task Force*, June 1999, para 34

<sup>2</sup> *Report of the Prime Minister's Coastal Surveillance Task Force*, Recommendation 17

<sup>3</sup> The Hon Dr Stone MP, Parliamentary Secretary to the Minister for the Environment and Heritage, Crimes at Sea Bill 1999, Second Reading Speech, *House Hansard*, 30 September 1999, p 11034



areas adjacent to the coast of Australia. Under the scheme, the criminal law of each State is to apply in the area adjacent to the State:

- (a) for a distance of 12 nautical miles from the baseline for the State—by force of the law of the State, and
- (b) beyond 12 nautical miles up to a distance of 200 nautical miles from the baseline for the State or the outer limit of the continental shelf (whichever is the greater distance)—by force of the law of the Commonwealth.

Beyond 200 nautical miles from the baseline for the State or the outer limit of the continental shelf, the substantive criminal law of the Jervis Bay Territory applies at sea to a criminal act:

- on an Australian ship or in the course of activities controlled by an Australian ship
- that is committed by a person who has abandoned or temporarily left an Australian ship and has not returned to land
- that is committed by an Australian citizen who is not a crew member on a foreign ship, in the course of activities from the foreign ship, or who has abandoned or temporarily left a foreign ship, or
- on a foreign ship, in the course of activities controlled by a foreign ship or that is committed by a person who has abandoned, or temporarily left, a foreign ship if the first country at which the ship calls or the person lands after the criminal act is Australia or an external territory.<sup>4</sup>

In terms of enforcement, the AFP has primary responsibility for investigating Commonwealth offences that are not applied State offences<sup>5</sup> throughout Australia, including in the adjacent maritime areas. It also has jurisdiction to investigate applied State offences and State offences with a federal aspect.<sup>6</sup> State police generally have responsibility for the enforcement of State criminal law, whether 'pure' State law or applied under Commonwealth law, including the Crimes at Sea Act. This comprises the majority of the criminal law applicable in Australia and its waters.

Under the Crimes at Sea Act, before prosecuting offences that occurred on a foreign flagged ship or outside the adjacent area (but where there is a relevant nexus with Australia, as listed above), the relevant State or Federal authorities must obtain the consent of the Attorney-General before a prosecution can proceed.<sup>7</sup> In providing this consent, the Attorney-General must take into account the views of the flag state.<sup>8</sup>

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<sup>4</sup> Subsection 6, *Crimes at Sea Act 2000* (Cth)

<sup>5</sup> An offence will be an applied State offence where the laws of a State are applied to a Commonwealth place (a place acquired by the Commonwealth for public purposes) pursuant to section 4 of the *Commonwealth Places (Application of Laws) Act 1970* (Cth).

<sup>6</sup> See section 3AA, *Crimes Act 1914* (Cth)

<sup>7</sup> Subsection 6(4) and Schedule 1, subsection 7(1), *Crimes at Sea Act 2000* (Cth)

<sup>8</sup> Subsection 6(5) and Schedule 1, subsection 7(2), *Crimes at Sea Act 2000* (Cth)

Some crimes committed at sea, including causing death or injury to a person, are also covered by the *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) which implements the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.<sup>9</sup> Proceedings under this Act may be brought if the ship was on or scheduled to engage in an international voyage or in the territorial sea or internal waters of a foreign country, and the alleged offence had:

- an Australian element (the ship was an Australian ship or the offender was an Australian national), or
- a Convention State element (the ship was flying the flag of or was in the territorial sea or internal waters of a State Party to the Convention, the alleged offender was a national or stateless resident of a Convention State, a national of a Convention State was seized, threatened, injured or killed, or the alleged offence was committed in an attempt to compel a Convention State to do or abstain from doing any act).<sup>10</sup>

Before prosecuting such an offence, the consent of the Attorney-General or authorised person is required.<sup>11</sup>

Australian law enforcement agencies have effective legislative and operational systems in place to respond to alleged crimes at sea.

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<sup>9</sup> UN General Assembly, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, No. 29004, available at: <<http://www.unhcr.org/refworld/docid/3ae6b3664.html>>

<sup>10</sup> Section 18, *Crimes (Ships and Fixed Platforms) Act 1992* (Cth)

<sup>11</sup> Section 30, *Crimes (Ships and Fixed Platforms) Act 1992* (Cth)



**Recommendation 1:**

That the Australian Federal Government establish a special Parliamentary Committee to consider the same issues that have been addressed in the 'Kerry' Act.

The committee should have specific regard to:

- a. Cross jurisdictional issues that face the States, Territories and the Commonwealth
- b. The overlap of the various Coronial Jurisdictions with power to investigate the 'cause and manner' of death (even extending beyond the limits set by the Crimes at Sea Act) and those of the many State, Territory and Federal Police Forces and other investigative bodies
- c. The need to adapt the 'Kerry' Act to the specific demographic of this country
- d. Ensuring that when determining the jurisdiction to be the 'lead investigator' into serious crime, that the competency of the jurisdiction to ensure best practice be the foremost consideration
- e. Flag state status of the vessel be disregarded if that State (Country) is not equipped to undertake the rigor of a thorough and competent investigation
- f. Ensuring that the prosecution of offenders be firmly within the jurisdiction of Australian authorities

Agreed in part

The Government agrees to refer some of the issues raised above to the House Standing Committee on Social Policy and Legal Affairs ('the Committee') for consideration. The Government does not consider it necessary to establish a special Parliamentary committee when there is already a committee with the capacity to conduct such an inquiry.

In relation to the specific issues identified, the Government's response is as follows.

(a) Cross-jurisdictional issues

The Government will refer to the Committee consideration of the effectiveness of current arrangements for the investigation and prosecution of alleged offences under the Crimes at Sea Act and the Intergovernmental Agreement.

The Government notes that in relation to the police and coronial investigation into Ms Brimble's death, New South Wales (NSW) had, and continues to have, primary jurisdiction by virtue of the Crimes at Sea Act and the *Coroners Act 2009* (NSW). The inquest report of the Coroner does not identify any specific deficiencies in existing protocols and arrangements for determining cross-jurisdictional issues in response to the incident. Accordingly the Government is of the view that the current arrangements are appropriate. However, there is value in the Committee considering whether these arrangements can be improved.

The Intergovernmental Agreement made under clause 5 of Schedule 1 of the Crimes at Sea Act sets out the geographical jurisdiction of State, Territory and Federal agencies for the investigation and prosecution of crimes at sea. This includes the



allocation of primary investigative responsibility and mechanisms to resolve concurrent jurisdiction.

Due to Australia's federal structure and the operation of international law, however, Commonwealth, State, Territory and foreign police jurisdictions are not mutually exclusive: any incident at sea may involve more than one jurisdiction concurrently. While consideration of criminal jurisdiction for crimes at sea may in some cases be complex, this complexity is dealt with at an operational level through long-established mechanisms of cooperation amongst the jurisdictions.

Commonwealth, State and Territory Police Commissioners have already taken steps to formalise arrangements where jurisdiction over an incident at sea may be unclear, or overlap. On 29 April 2010, it was agreed by all Police Commissioners, including the AFP Commissioner, to establish the *National Protocol for Receiving Reports of Crimes At Sea* (the Protocol). The Protocol aims to ensure that where a crime at sea has been reported, regardless of which agency has received the report, an appropriate response is initiated without delay. This includes:

- protecting the rights of victims/suspects
- ensuring evidence is obtained and secured at the earliest opportunity
- ensuring prosecutions are commenced in accordance with existing laws/protocols, and
- ensuring a cooperative approach to investigations is undertaken where required.

#### (b) Overlap of coronial and police jurisdictions

The Government will refer to the Committee consideration of cross jurisdiction issues that face the States, Territories and the Commonwealth, including the overlap of various Coronial Jurisdictions.

The Government notes that there are existing cooperative arrangements in relation to the overlap of coronial and police jurisdictions, however it is of the view that there is value in further examination of these arrangements.

#### *Coronial inquiries*

The laws governing which deaths are reportable to, and examinable by, a coroner are similar throughout Australia.<sup>12</sup> While extraterritorial jurisdiction is conferred on all State and Territory coroners in relation to people normally resident within that State or Territory (irrespective of where they died), some jurisdictions also confer extraterritorial jurisdiction where a person was on a journey to or from the State or Territory.<sup>13</sup>

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<sup>12</sup> *Coroners Act 2009* (NSW); *Coroners Act 2008* (Vic), *Coroners Act 2003* (Qld); *Coroners Act 1996* (WA); *Coroners Act 2003* (SA); *Coroners Act 1995* (Tas); *Coroners Act 1997* (ACT); *Coroners Act* (NT).

<sup>13</sup> Section 18, *Coroners Act 2009* (NSW); section 8, *Coroners Act 2003* (Qld); section 3, *Coroners Act 1995* (Tas).



It is understood that practice among the coronial jurisdictions is highly cooperative. For instance, in practice, the findings of an inquest in one jurisdiction may be adopted by another jurisdiction rather than a second inquest being undertaken. There is also assisting legislation in all jurisdictions, for instance enabling States and Territories to provide investigative assistance to each other.<sup>14</sup>

The Government also notes that in the matter of Ms Brimble's death, the NSW State Coroner's jurisdiction was clear under the *Coroners Act 2009* (NSW).

### *Police investigations*

The Intergovernmental Agreement under the Crimes At Sea Act and the *National Protocol for Receiving Reports of Crimes At Sea* referred to in the response to recommendation 1(a) address the overlap between State, Territory and Federal Police Forces.

### (c) Adoption of the Kerry Act

The Government considers that the current arrangements already cover the areas raised in the Kerry Act to the extent possible under Australia's obligations pursuant to international law.

The Government also acknowledges the Coroner's reference to the reforms to safety and security implemented by P&O Cruises Australia and supports the development of similar safety and security measures by other ship operators.

The *Cruise Vessel Security and Safety Act* (US) (the Kerry Act) applies to all passenger vessels authorised to carry at least 250 people that embark or disembark passengers in the United States (US), wherever the vessel is registered. It creates obligations regarding vessel design, equipment, construction, video surveillance, safety information, sexual assault responses, crew access, and log books and reporting. By way of enforcement, it imposes civil and criminal penalties, and the possibility of denial of entry for contravention.

Adopting the Kerry Act may be inconsistent or in conflict with Australia's existing international maritime obligations, including international conventions to which Australia is a party. For example, the United Nations Convention on the Law of the Sea (UNCLOS) Article 21 provides that although coastal states can adopt certain laws relating to innocent passage through its territorial sea "such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards".

Australia regulates matters similar to those covered by the Kerry Act, although most are limited in their application to Australian flagged vessels, which currently do not

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<sup>14</sup> Section 102, *Coroners Act 2009* (NSW); section 51, *Coroners Act 2008* (Vic), section 71A, *Coroners Act 2003* (Qld); section 31, *Coroners Act 1996* (WA); section 31, *Coroners Act 2003* (SA); section 33, *Coroners Act 1995* (Tas); section 17, *Coroners Act 1997* (ACT); section 18, *Coroners Act* (NT).



include any large passenger vessels. For example, reporting requirements which fulfil many of the objectives of section 3507(f)(3) of the Kerry Act include:

- AMSA's national Rescue Coordination Centre (RCC Australia) provides a Maritime Assistance Service (MAS) in accordance with International Maritime Organization (IMO) Assembly Resolution 950(23), which can assist ships of all flags to communicate with, and receive direction from, relevant government agencies (including law enforcement)
- section 18 of the *Transport Safety Investigation (TSI) Act 2003* (Cth) requires a responsible person<sup>15</sup> to report marine accidents and serious incidents to a nominated official (including a member of AMSA staff) as soon as is reasonably practicable
- section 417 of the *Navigation Act 1912* requires that reports of deaths or disappearances must be submitted by Australian ships at all times and other ships during a voyage within Australian waters or on voyage to an Australian port, and
- section 107 of the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) requires Australian flagged ships to report any accident that results in the death of, or serious personal injury to any person.

Additionally, AMSA requires and approves training courses which implement international minimum standards for training and certification of vessel security personnel, which are equivalent to section 3508(b) of the Kerry Act.

In general, under international law, the State to which a vessel is flagged has jurisdiction over that vessel and the extent to which Australia can regulate foreign flagged ships is limited. The majority of (if not all) passenger cruise vessels that operate into and out of Australia are registered under the laws of another country.

Regulating the conduct of crew members at sea, including the master of the vessel, by requiring certain responses to incidents, the provision of information to passengers, the maintenance of confidentiality of information, and the regulation of crew member access to passenger cabins is also a matter for the flag state. Under the Kerry Act, certain crimes must be reported to the Federal Bureau of Investigations (FBI). In the Australian context, crimes committed on board cruise ships should generally be reported to the State or Territory jurisdiction with a nexus to the incident, that is:

- the departing jurisdiction
- the arriving jurisdiction, or
- the jurisdiction in which the victim resides.<sup>16</sup>

If, however, an issue is reported to the wrong jurisdiction, the *National Protocol for Receiving Reports of Crimes At Sea* ensures that investigations and management of victims, witnesses and offenders (amongst other things) commences immediately.

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<sup>15</sup> A responsible person is defined by regulation as the Master or person in charge of the ship, the owner or operator or the agent, or a pilot who has duties on board the ship.

<sup>16</sup> A decision to investigate is based upon a policy determination based on whether the offence has an effect in the State – see for example section 10C of the *Crimes Act 1900* (NSW). This is based on the consequence test under common law.



The imposition of ship design or manning requirements as a condition of entry into Australian ports is likely to elicit protest from the flag states of foreign vessels.

(d) Competency to be considered in determining 'lead investigator'

The Government considers that the current legal framework for determining investigative jurisdiction functions well, in accordance with international and domestic law.

The Government is of the view it would be impractical and inappropriate to attempt to assess the level of investigative 'competency' of jurisdictional agencies before determining which agency should take the lead in a particular case.

At international law, under Article 91 of the UNCLOS, ships have the nationality of the state whose flag they fly. Under Article 92, a ship is subject to the exclusive jurisdiction of its flag state on the high seas (save for exceptional circumstances recognised in UNCLOS or other international treaties). Even where a vessel is in the territorial waters of a foreign state or in a foreign port, the jurisdiction of the flag state of the vessel operates concurrently with the criminal jurisdiction of the coastal or port state. A state has a positive duty under Article 94 of the UNCLOS to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag', and must assume jurisdiction under its internal (domestic) law over ships flying its flag and the ship's master, officer and crew in respect of those same matters.

At domestic law, under section 6(4) of the Crimes at Sea Act, before prosecuting an offence that occurred on a foreign flagged vessel, the relevant State or Federal authorities must obtain the consent of the Attorney-General before a prosecution can proceed. In providing this consent, the Attorney-General must take into account the views of the flag state.

(e) Disregarding Flag State status

In light of the position at international and domestic law discussed under recommendation 1(d) above, Australia cannot 'disregard' the flag state's jurisdiction.

(f) Jurisdiction over offenders for crimes at sea

The Government will refer to the Committee consideration of whether improvements could be made in relation to the reporting, investigation and prosecution of alleged crimes committed at sea.

The Government notes that the Crimes at Sea Act provides an appropriate legal framework for the prosecution of offenders for crimes at sea. However, the Government is of the view that consideration should be given to whether this framework can be improved in any way.

The Crimes at Sea Act establishes the jurisdiction of Australian authorities to prosecute offenders to the fullest extent permissible under international law. Australia has comprehensive jurisdiction over offenders, including foreign nationals, who



commit crimes on board Australian or foreign flagged vessels, in both Australian and international waters, provided those crimes have a connection with Australia.

Specifically, the criminal law extends to acts that occur at sea outside Australia by operation of the Crimes at Sea Act, whereby the substantive criminal law of the Jervis Bay Territory applies at sea to a criminal act:

- on an Australian ship or in the course of activities controlled by an Australian ship
- that is committed by a person who has abandoned or temporarily left an Australian ship and has not returned to land
- that is committed by an Australian citizen who is not a crew member on a foreign ship, in the course of activities controlled from the foreign ship, or who has abandoned or temporarily left a foreign ship, or
- on a foreign ship, in the course of activities controlled by a foreign ship or that is committed by a person who has abandoned, or temporarily left, a foreign ship and the first country at which the ship calls after the criminal act is Australia or an external territory.<sup>17</sup>

This covers a similar range of circumstances outside Australia (ie on foreign flagged ships) to the example given by the NSW Coroner of Division 272 of the *Criminal Code Act 1995* (child sex offences outside Australia).<sup>18</sup> This Division extends to conduct committed wholly outside Australia if the perpetrator was an Australian citizen, Australian resident, a body corporate incorporated under Australian law, or any other body corporate that carries on its activities principally in Australia.<sup>19</sup>

**Recommendation 2:**

That the Federal Parliamentary Committee consider legislation for the attachment of a Federal Police Officer (or Officers) to travel with a ship to ensure a timely and appropriate response to crime.

**Not agreed**

The Government has considered this recommendation and found a number of complex legal, jurisdictional and practical impediments to complying with it.

On balance, overcoming these difficulties presents a much greater challenge than the benefit that would be derived from the implementation of this recommendation due to the nature of criminal behaviour on cruise ships.

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<sup>17</sup> Section 6, *Crimes at Sea Act 2000* (Cth)

<sup>18</sup> The "Brimble" Recommendations, p 3

<sup>19</sup> Section 272.6, *Criminal Code Act 1995* (Cth)

In relation to the maritime environment, Australia has jurisdiction and the AFP or State or Territory Police may take action under the Crimes at Sea Act inside the adjacent area, or outside the adjacent area in relation to a criminal act:

- on an Australian ship or in the course of activities controlled by an Australian ship
- that is committed by a person who has abandoned or temporarily left an Australian ship and has not returned to land
- that is committed by an Australian citizen who is not a crew member on a foreign ship, in the course of activities from the foreign ship, or who has abandoned or temporarily left a foreign ship, or
- on a foreign ship if the first country at which the ship calls after the criminal act is Australia or an external territory.

There are considerable, and potentially insurmountable, difficulties with legislating for the attachment of an AFP officer to a foreign cruise ship throughout its journey.

First, this is likely to exceed the permissible international legal limits on extraterritorial jurisdiction. Secondly, an AFP officer could not exercise any enforcement powers, such as arrest, on a foreign vessel except with the consent of the flag state. Even if Australia were to secure flag state consent, there are issues regarding the applicable law under which the AFP officer would be operating while on the vessel (which would generally be the law of the flag state), and potential challenges to an Australian Court's jurisdiction over any resultant prosecution on account of irregular arrest.

It is a long held tradition that the master of the vessel has overall responsibility for security on board his or her vessel. The Government is not aware of any precedent where police officers from one sovereign nation are routinely placed on board vessels of a different nation-state to undertake community policing duties. As stated above, few if any cruise ships have Australian flag state status.

In relation to Australian flagged vessels, although Australia has jurisdiction, there are practical difficulties in attaching an AFP officer to a domestic cruise ship. Criminal behaviour on cruise ships generally relates to the types of offences that State and Territory police forces deal with. The creation of such a police presence on board cruise vessels would also be extremely resource-intensive.



**Recommendation 3:**

That the Federal, State and Territory Police Commissioners devise, in consultation with each other, firm guidelines clearly setting out the geographical jurisdiction of each investigative agency. The Coroners of each State and Territory should be consulted to ensure the requirements of their respective Coroners Acts are not overlooked particularly when dealing with the coroner's ability to deal with persons who have died, or suspected to have died outside the jurisdictional limits of the Commonwealth.

**Agreed in principle**

The current arrangements under the Crimes at Sea Act and the *National Protocol for Receiving Reports of Crimes At Sea* (the Protocol) are adequate to address the issues raised in recommendation 3. The Intergovernmental Agreement made under clause 5 of Schedule 1 of the Crimes at Sea Act sets out the geographical jurisdiction of State, Territory and Federal agencies for the investigation and prosecution of crimes at sea. This includes the allocation of primary investigative responsibility and mechanisms to resolve concurrent jurisdiction, and does not affect State and Territory coronial jurisdiction.

**Recommendation 4:**

That the Commonwealth Attorney-General establish a Federal Coronial Jurisdiction. A Federal Court Judge should be appointed as the Federal Coroner.

**Not agreed**

The Government considers that there is not a demonstrated need for a federal coronial jurisdiction at this time, due to the collaborative arrangements currently in place to facilitate a cross-jurisdictional approach. There is no evidence of a gap in the current coronial system in Australia.

Collaboration amongst State and Territory coroners is well developed. For example, coroners regularly meet to discuss issues of a cross-jurisdictional nature and have an established practice of regular liaison and cooperation on operational issues. State and Territory coroners have collaborated in the past in conducting inquests, such as following the Bali Bombings.

The Government will give consideration to establishing a federal coronial jurisdiction if a need is identified.

**Recommendation 5:**

That passengers and crew boarding all vessels at Australian ports be subjected to the rigors of drug detection scanning.

**Not agreed**

The Government is of the view that the current law enforcement arrangements are adequate to address the issues raised in recommendation 5. The AFP and ACBPS will continue to monitor the effectiveness of current arrangements for detecting drugs at Australian ports.

Following the tragic death of Ms Brimble in 2002, P&O reported that it introduced drug screening of all passengers.<sup>20</sup> The screening includes baggage screening and personal X-rays on embarkation in addition to random drug screens at overseas ports. It is understood that other companies undertake similar activities. This is consistent with arrangements at other similar private-public places of this nature.

Currently all passengers departing Australian ports are required to present their passport and the Outgoing Passenger Card to Customs and Border Protection for immigration and border clearance purposes. Additional checks on passengers and/or crew may be undertaken on an intelligence-led risk basis.

Commonwealth law enforcement activities in the maritime context are intelligence-led and risk-based. This ensures that resources are directed to the highest threats to the Australian border. This recommendation, effectively a mass screening approach, is not as effective as Australia's intelligence-led approach to managing border risks.

The costs and economic impact of this recommendation outweigh the potential benefit. In the last decade, cruise operators have already directed significant effort to security and risk targeting hundreds of vessels and tens of thousands of passengers to ensure an incident of this nature has not been repeated.

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<sup>20</sup> Safety and Security, P&O Cruises Australia:  
<<http://www.pocruises.com.au/aboutus/pages/safetyandsecurity.aspx>>



**Recommendation 6:**

That drug detection dogs be used at all Australian ports.

**Not agreed**

The Government is of the view that the current approach to managing border risks is sufficient.

As part of increased security measures implemented by P&O, it reports that it currently uses drug detection dogs at the start of all cruises,<sup>21</sup> and it is understood that other companies undertake similar activities. This is consistent with arrangements at other similar private-public places of this nature.

As stated in response to recommendation 5, a mass screening approach is not as effective as Australian law enforcement's intelligence-led approach to managing border risks. The ACBPS deploys resources as necessary where a specific risk is identified, and regularly reviews its approach to managing border risks, including risk assessing sea passengers.

The AFP and ACBPS will continue to monitor the effectiveness of current port drug detection arrangements.

**Recommendation 7:**

That the Federal Government Committee established to consider the legislative reform of the cruise industry (in the same terms as the 'Kerry' Act) have regard to the issues and recommendations of Mr Mark Brimble and the International Cruise Victims of Australia. These recommendations are supported by the coroner.

**Agreed in part**

The Government will refer to the Committee consideration of some of issues and recommendations of Mr Mark Brimble and the International Cruise Victims of Australia to the Committee in so far as they reflect the agreed terms of the inquiry in Recommendation 1.

Mr Brimble and the International Cruise Victims of Australia would be encouraged to appear as witnesses before the inquiry.

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<sup>21</sup> Safety and Security, P&O Cruises Australia:  
<<http://www.pocruises.com.au/aboutus/pages/safetyandsecurity.aspx>>

**Recommendation 8:**

That the Committee have regard to the submission and reforms undertaken by P&O Australia when considering the development of legislation and policy.

**Agreed**

The Government will ask the Committee to have regard to the reforms undertaken by P&O Australia.

A number of the P& O reforms address the recommendations of Mr Brimble and International Cruise Victims Australia, including:

- Installation of closed circuit television surveillance operating on a 24 hour rolling basis;
- Introduction of procedures for collecting evidence and preserving the crime scene, supported by a training programme for security personnel.
- Improved medical and security procedures for dealing with serious allegations;
- Working with Australian and South Pacific police to develop protocols for managing crimes at sea;
- Implementation of Responsible Serving of Alcohol procedures, including compulsory training for staff.

**Recommendation 9:**

That Commonwealth Health and New South Wales Health establish a committee to set 'best practice' guidelines for the preservation of bodies requiring examination 'post mortem' where the death occurs outside the jurisdiction limits of the State, Territories and Commonwealth.

**Agreed in principle**

There are established fora where 'best practice guidelines' can be considered without the need to create a new committee. The Government will refer such guidelines to the Standing Council on Health for consideration and further work.

The Government notes that guidelines for the management of human remains at sea can already be found in the *International Medical Guide for Ships (3<sup>rd</sup> Edition) 2007* (the relevant extract of the Guidelines is at Attachment A), published by the World Health Organization (WHO) in collaboration with the International Labour Organisation (ILO) and the International Maritime Organization (IMO). The guidelines include advice for dealing with the remains of anyone who dies in circumstances that are 'unusual, sudden or unknown, or if there is any possibility of criminal intent'.



# International Medical Guide for Ships

*3rd edition*

Including the ship's medicine chest



**World Health  
Organization**

# Death at sea

When nothing can be done to save a patient's life, everything should be done to alleviate the patient's suffering and loneliness in the final moments of life.

## SIGNS OF DEATH

- Early signs of death:
  - the heart has stopped:
    - › there is no pulse and no heart sounds can be heard with a stethoscope;
  - breathing has stopped:
    - › with your ear over the patient's nose and mouth, you feel no air and see no chest or abdominal movement;
    - › no breath sounds can be heard with a stethoscope;
  - there is no activity in the brain:
    - › the pupils are very large, and do not become smaller when you shine a bright light directly into them;
  - the patient looks dead:
    - › eyes dull;
    - › skin pale.
- A person who is suffering from extreme cold (hypothermia) may look dead but still be alive (see Chapter 28, *Medical care for survivors at sea*).
- A person who has been struck by lightning may have large unresponsive pupils and still be alive (see Chapter 9, *Burns, chemical splashes, smoke inhalation, and electrocution*).
- If you are not confident declaring a patient dead from the early signs, wait for rigor mortis to appear (see below).
- Later signs of death:
  - stiffness of the muscles (rigor mortis) sets in three to four hours after death:
    - › most easily felt in the jaw, elbow, and knee;
  - reddish or purplish patches resembling bruises (post-mortem lividity or staining) appear on the lower parts of the body (back, and back of the limbs, if the body has been placed or left face upwards after death);
  - the cornea takes on a milky appearance about 15 hours after death;
  - changes due to decomposition can be seen two to three days after death, usually first appearing in the abdomen, which may turn a greenish colour: this is a certain sign of death:
    - › discoloration spreads to the rest of the abdomen and trunk, then upwards to the neck and head and downwards into the limbs.

### ✓ What to do

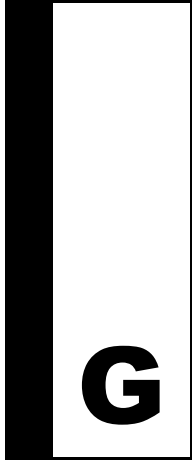
- If the dead person was ill on board, consult any records that were made of the nature and course of the illness and the treatment given.
- If the person was injured, investigate and record the circumstances of the injury or injuries.

- If the circumstances of death were unusual, sudden, or unknown, or if there is **any** possibility of criminal intent, a post-mortem examination is indispensable. You may be suspected of concealing a crime if a person is buried at sea under these circumstances:
  - to preserve the body for examination put it in a body bag and then in a refrigerator or cold-store;
  - failing this, place the body in a bath in which you have put a large amount of ice.
- Only if the ship is not near a port and the body cannot be kept on board because it poses a risk of infection should you proceed to burial at sea:
  - seek medical advice to confirm that it is dangerous to keep the body on board and record this advice in the log;
  - examine the body thoroughly (see below, *Examining a dead body*);
  - if the patient's identity is not known, look for signs that might assist in subsequent identification.
- Strip the body of all clothing, without tearing or cutting any clothes:
  - note if there is blood on the clothing.
- List each item of clothing briefly and note any initials or names on the garments.
- Remove and clean any dentures and place them with the other articles to be kept for future examination.
- List any papers, wallet, money, etc., that you find.
- Dry any wet articles and put them into a plastic bag, which you should seal, label, and keep in a safe place for delivery to the police or to other authorities at the next port.
- Have a witness present while you do this and have them sign all the records you make of your findings.

## EXAMINING A DEAD BODY

- Record the exact time and date of the examination.
- Use universal body fluid precautions (gloves, eye protection, gown, if necessary).
- If the circumstances of death were unusual, photograph the body where it was found from several angles. When the body is moved, take more photographs of the scene to show any blood on the deck or any other evidence.
- Photograph the unclothed body, particularly any wounds, scars, and injuries.
- Photograph the face from the front and the side.
- Record the dead person's:
  - skin colour
  - approximate age
  - height
  - body size and shape (fat, thin, wasted, muscular, etc.)
  - hair length and colour

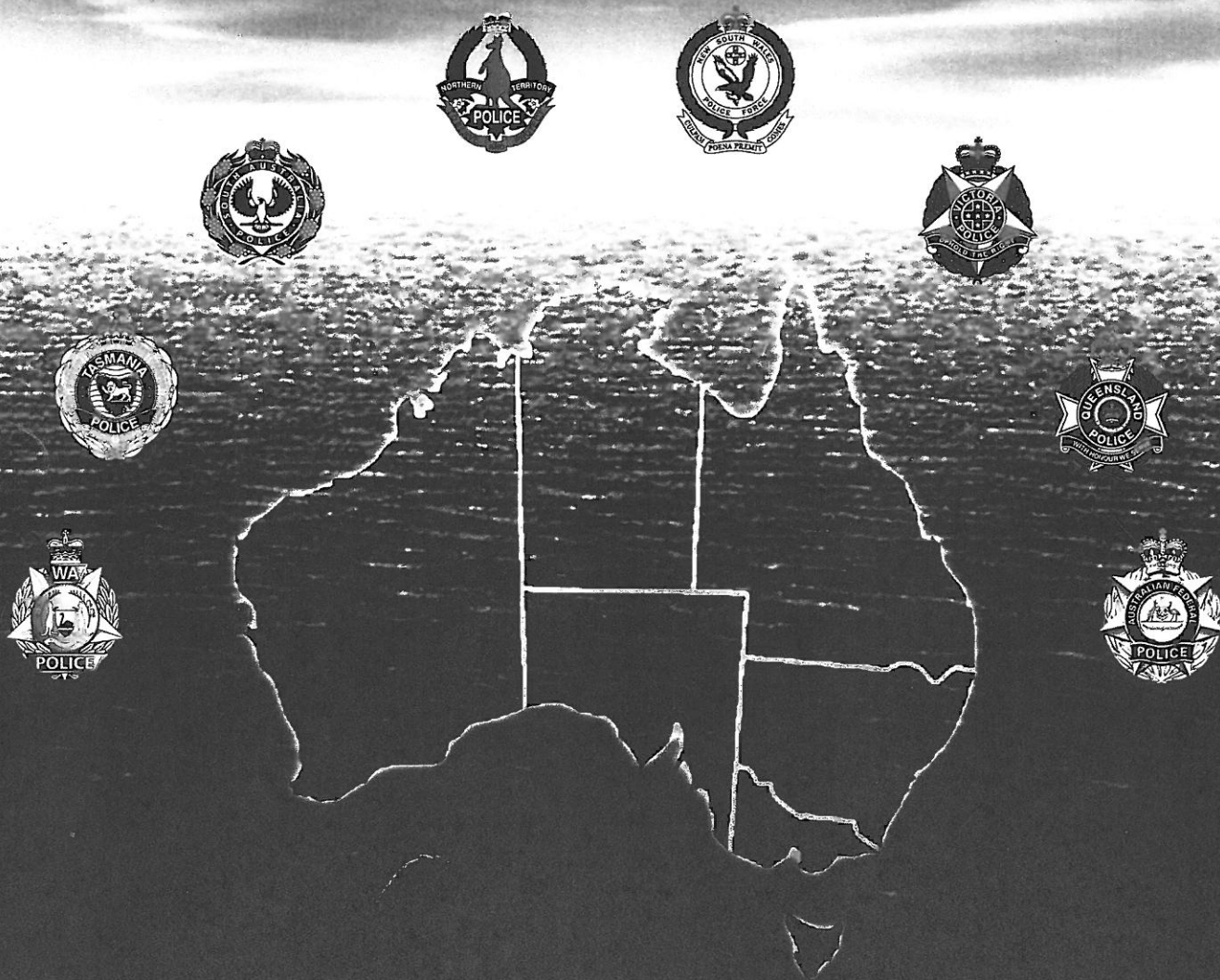




## **Appendix G – National Protocols for Reporting Crimes At Sea**



# National Protocols for Reporting Crimes at Sea





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**AGREEMENT**

**For a National Protocol for Receiving Reports of Crimes at Sea**

**BETWEEN**

THE NORTHERN TERRITORY POLICE  
-AND-

THE NEW SOUTH WALES POLICE FORCE  
-AND-

THE QUEENSLAND POLICE SERVICE  
-AND-

THE SOUTH AUSTRALIA POLICE  
-AND-

THE TASMANIA POLICE  
-AND-

THE VICTORIA POLICE  
-AND-

THE WESTERN AUSTRALIA POLICE SERVICE  
-AND-

THE AUSTRALIAN FEDERAL POLICE

("the parties/signatories")



This agreement is made on the        day of  
enforcement agencies agree to this Protocol:

2009 and the following Australian law

THE NORTHERN TERRITORY POLICE  
AND

THE NEW SOUTH WALES POLICE FORCE  
AND

THE QUEENSLAND POLICE SERVICE  
AND

THE SOUTH AUSTRALIA POLICE  
AND

THE TASMANIA POLICE  
AND

THE VICTORIA POLICE  
AND

THE WESTERN AUSTRALIA POLICE SERVICE  
AND

THE AUSTRALIAN FEDERAL POLICE

---

## **1. Purpose**

1.1 The parties have determined the need to document the following agreement between them for the purpose of better responding to reports of crimes at sea.

## **2. Objective**

2.1. This Protocol aims to ensure:

- 2.1.1 an appropriate police response to crimes at sea reported to Australian law enforcement agencies who are participants in this agreement.
- 2.1.2 that the rights and needs of victims and perpetrators of crimes at sea are protected
- 2.1.3 that evidence is obtained and or secured at the earliest opportunity in accordance with guidelines and policies of the jurisdiction investigating the crime,
- 2.1.4 that where appropriate, prosecutions are commenced in accordance with existing laws and agreements/protocols.
- 2.1.5 a cooperative approach to the commencement of an investigation by the police jurisdiction receiving the report if it is required.

Agreement - For a National Protocol for Receiving Reports of Crimes at Sea

### **3. Application**

- 3.1 The parties expressly acknowledge that this agreement is not a substitute for, and cannot override any provision in International or Australian law that is inconsistent with this agreement.
- 3.2 The parties acknowledge the Intergovernmental Agreement – Crimes At Sea as referred to in the Crimes at Sea Act 2000 (Cth) Schedule 1, Part 3, Clause 5. (See Schedule 1 to this agreement) The parties accept that this protocol operates in conjunction with the Intergovernmental Agreement – Crimes At Sea
- 3.3 This Protocol applies to criminal acts committed on vessels at sea which are:
- 3.3.1 reported to Australian law enforcement agencies, and
  - 3.3.2 subject to any law of the Commonwealth or any State or Territory.

### **4. Primary Responsibilities**

- 4.1 It is agreed that:
- 4.1.1 when a crime at sea is reported to one of the parties, the party receiving the report will commence an investigation as soon as practicable,
  - 4.1.2 consideration of the most appropriate jurisdiction for further investigation and prosecution will be undertaken after the investigation has commenced. This consideration should not in any way impede or delay any investigation.
- 4.2 In the event that a crime occurs at sea and is reported to one of the parties, that party agrees to follow their organisational policies and procedures for:
- 4.2.1 receiving reports of crime
  - 4.2.2 investigation of crimes
  - 4.2.3 management of victims, witnesses and offenders
  - 4.2.4 seizure and security of physical evidence,
  - 4.2.5 referral to, or liaison with other jurisdictions where appropriate, and
  - 4.2.6 commencement of legal proceedings where jurisdiction is established.
- 4.3 Consideration should also be given to:
- 4.3.1 victim care and support

- 4.3.2 appropriate management of offenders
- 4.3.3 gathering and dissemination of intelligence
- 4.3.4 appropriate use of resources
- 4.3.5 compliance with clearance processes by relevant border agencies
- 4.3.6 adherence to standing media policy.

4.4 Due to the sometimes complicated nature of jurisdictional law arising from crimes occurring at sea, legal support and advice should be sought at an early stage of the investigation and maintained throughout.

## **5. Undertaking to assist other parties**

5.1 All parties to this Protocol agree to:

- 5.1.1 assist other parties in their investigations when requested and appropriate,
- 5.1.2 engage with other jurisdictions in determining which party should have the responsibility for continuing the investigation of the matter.

5.2 Each party will nominate a principal point of contact in respect of this agreement. (See Schedule 2 to this agreement)

## **6. Promotion of this Protocol**

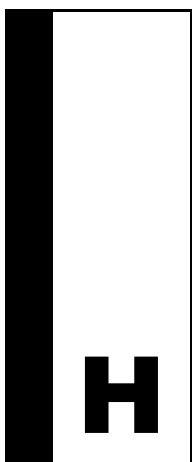
6.1 It is agreed that:

- 6.1.1 each party will promote this Protocol within their own agency
- 6.1.2 the Commissioner of each party will highly recommend to the cruise industry, national shipping industry, shipping agents and other industries that conduct their business at sea that they develop, and implement, complementary protocols about the reporting of crimes at sea to Australian law enforcement agencies.

## **7. Review**

7.1 This Protocol after being implement will be reviewed after twelve months.





## **Appendix H – Intergovernmental Agreement – Crimes at Sea**

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## Government Departments

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Attorney-General

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### Intergovernmental Agreement — Crimes at Sea

This Agreement is made on 16 November 2000

#### Between

the Commonwealth of Australia  
the State of New South Wales  
the State of Victoria  
the State of Queensland  
the State of Western Australia  
the State of South Australia  
the State of Tasmania  
the Northern Territory

#### GIVEN THAT

- (a) the Commonwealth and the States have agreed to a cooperative scheme to apply the criminal law of the States extraterritorially in the areas adjacent to the coast of Australia; and
- (b) the cooperative scheme is given the force of law by the following laws:
  - (i) *Crimes at Sea Act 2000* (Commonwealth);
  - (ii) *Crimes at Sea Act 1998* (New South Wales);
  - (iii) *Crimes at Sea Act 1999* (Victoria);
  - (iv) *Crimes at Sea Act 2000* (Queensland) [*as anticipated*];
  - (v) *Crimes at Sea Act 2000* (Western Australia);
  - (vi) *Crimes at Sea Act 1998* (South Australia);
  - (vii) *Crimes at Sea Act 1999* (Tasmania);
  - (viii) *Crimes at Sea Act 2000* (Northern Territory) [*as anticipated*]; and
- (c) clause 5 of the cooperative scheme authorises the making of an intergovernmental agreement providing for the division of responsibility for administering and enforcing the law relating to crimes at sea.

Clause 1

**THE COMMONWEALTH AND THE STATES AGREE AS FOLLOWS**

**1 Definitions**

In this Agreement:

*adjacent area* means an area where the law of a State is applied by Commonwealth law.

*adjacent State*, in relation to an adjacent area, means the State whose laws are applied to that area by Commonwealth law.

*applied laws*, in relation to a State, means the substantive and procedural laws applied to the State by clauses 2 and 3 of the cooperative scheme.

*arrival State* means the participating State in which an Australian ship next arrives, with the alleged offender on board, after an offence has been committed on or from that ship within the adjacent area of another participating State.

*Australian ship* has the meaning given by clause 1 of the cooperative scheme.

*authority* has the meaning given in clause 3 of the cooperative scheme.

*Commonwealth* means the Commonwealth of Australia.

*cooperative scheme* means the legislative and administrative scheme for applying and enforcing criminal law in the areas adjacent to the coast of Australia, set out in Schedule 1 to the *Crimes at Sea Act 2000* (Commonwealth).

*participating State* means a State that is party to the cooperative scheme and this Agreement.

*State* has the meaning given by clause 1 of the cooperative scheme.

**2 Duty etc of an authority of an adjacent State**

An authority (other than a court) of a State that has a power, duty or function (other than a power, duty or function involving the exercise of judicial power) under a provision of the criminal law of that State that is also an applied law, has a corresponding power, duty or function under the applied law.

**3 International obligations to be observed**

In exercising or performing powers, duties and functions under the cooperative scheme, the parties and their agencies must act so as to avoid any breach by Australia of its international obligations, in particular under the United Nations Convention on the Law of the Sea, having regard especially to the responsibilities of Australia with respect to ships of the Australian flag, and to the rights of other countries in the maritime areas to which the arrangements in this Agreement apply.

## Clause 7

**4 Application of primary responsibility**

- (1) In respect of an alleged offence in an adjacent area, the adjacent State has primary responsibility for taking investigation and prosecution action under its applied laws in any of the following circumstances:
  - (a) the conduct occurs on, from or in relation to, a fixed or floating platform or other installation in that area;
  - (b) the conduct occurs on or from an Australian ship and the next place of entry to Australia is, or is intended to be at the time the conduct occurs, within that State;
  - (c) the alleged offender is an Australian citizen whose next place of entry to Australia is, or is intended to be at the time the conduct occurs, within that State.
- (2) However:
  - (a) the arrival State has primary responsibility for taking investigation and prosecution action if the conduct occurs on or from an Australian ship and the next place of entry to Australia is within that State; and
  - (b) the Commonwealth has primary responsibility for taking investigation and prosecution action in respect of any alleged offence on or from an Australian Defence Force ship when it is outside the limits of a State.

**5 Investigatory etc decision to conform to standard**

A decision of an authority of the State (or the Commonwealth) having primary responsibility under clause 4 whether to investigate, or further investigate, or prosecute or seek extradition, must be taken in the same manner and subject to the same considerations and policies as apply to decisions in relation to other similar alleged offences against the laws of that State or the Commonwealth.

**6 Undertaking to consult**

- (1) Where more than one party may take investigation or prosecution action in relation to the same alleged offence, the parties concerned must consult at the request of any of them on how the matter should be dealt with.
- (2) If, following consultation, it appears that one of those parties may more conveniently take action to investigate or prosecute the alleged offence, it should do so.

**7 Undertaking to assist other parties**

Bearing in mind the possible difficulties for any single party of taking action at sea in relation to an alleged offence:

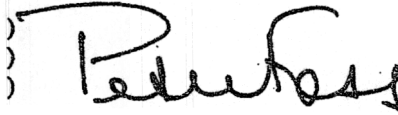
- (a) any other party must, on request, give whatever assistance it considers practicable to the party with primary responsibility in relation to the alleged offence; and



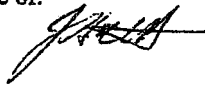


SIGNED by the Honourable Attorney-General  
of the State of Western Australia,  
in the presence of:



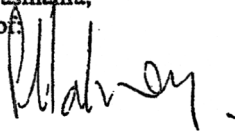
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SIGNED by the Honourable Attorney-General  
of the State of South Australia,  
in the presence of:



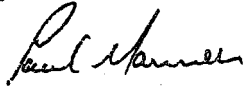
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SIGNED by the Honourable Attorney-General  
of the State of Tasmania,  
in the presence of:

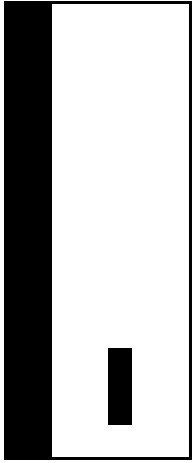


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SIGNED by the Honourable Attorney-General  
of the Northern Territory,  
in the presence of:



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## **Appendix I – Vessel Flag States**

## Supplementary Submission 009.2

From: Peter Taylor/PandO/AU

Date: 07/06/2013 10:08 AM

Subject: Crimes at sea inquiry - request for information

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Dear Thomas,

I am writing on behalf of Carnival Australia's CEO, Ann Sherry, in response to a request for additional information regarding our fleet of cruise ships from the Standing Committee on Social Policy and Legal Affairs in relation to its current inquiry into Arrangements Surrounding Crimes Committed at Sea.

I understand the Committee specifically seeks a list showing the name of each vessel in the Carnival Group fleet that is scheduled or likely to visit Australia in the next five years and the flag state of each of those vessels.

Please find below a table detailing ships within the Carnival Group only, that are booked to visit Australia until 2019. Please note, while the following list provides a reasonable indication of the range of ships scheduled to visit Australia in the next 5 years, it is by no means complete. Ship schedules are only confirmed 18 months to two years ahead of the departure date, so bookings beyond this time frame are tentative and it is quite possible other ships may be added.

I also note that this list of cruise ships covers the Carnival Group only. The other main operator of cruise ships to Australia is Royal Caribbean.

Finally, I also note in brief, points made in our original submission to the Committee that in the very few investigations we are aware of as having been reported to the flag state of our ships, the current legislation does provide a regime for dealing with crimes on foreign flagged ships.

If you have any further questions or require additional information please do not hesitate to contact me.

Kind regards,

Peter

**Peter Taylor**  
Vice President Corporate Affairs  
Carnival Australia  
15 Mount Street, North Sydney NSW 2060

## Supplementary Submission 009.2

<u>SHIPS NAME</u>	<u>CRUISE BRAND</u>	<u>FLAG STATE</u>
Amsterdam	Holland America	Netherlands
Arcadia	P&O UK	Bermuda
Aurora	P&O UK	Bermuda
Carnival Legend	CCL	Panama
Carnival Spirit	CCL	Malta
Costa Deliziosa	Costa Cruises	Italy
Costa Neo Romantica	Costa Cruises	Italy
Dawn Princess	Princess Cruises	Bermuda
Diamond Princess	Princess Cruises	Bermuda
Ocean Princess	Princess Cruises	Bermuda
Oosterdam	Holland America	Netherlands
Oriana	P&O UK	Bermuda
Pacific Dawn	P&O Australia	British
Pacific Jewel	P&O Australia	British
Pacific Pearl	P&O Australia	British
Pacific Princess	Princess Cruises	Bermuda
Queen Elizabeth	Cunard	British
Queen Mary 2	Cunard	British
Queen Victoria	Cunard	British
Sea Princess	Princess Cruises	Bermuda
Seabourn Odyssey	Seabourn	Bahamas
Seabourn Sojourn	Seabourn	Bahamas
Sun Princess	Princess Cruises	Bermuda
Volendam	Holland America	Netherlands



07 June 2013

Dr Ann Dacre  
Secretary  
House of Representative Standing Committee on Social Policy and Legal Affairs  
Parliament House  
CANBERRA 2600

Dear Dr Dacre,

Thank you for your letter of 3 June 2013 requesting the registration details of cruise vessels RCCL will be deploying in Australia over the next five years. Please be advised that we have published our cruise programs through to April 2015 and I am able to confirm details for those specific ships.

For the Committee's guidance Royal Caribbean International register their ships in the Bahamas, while Celebrity Cruises and Azamara Club Cruises are registered in Malta. The ships operating over the next two seasons and their nation of registration are set out below.

Royal Caribbean International:

Radiance of the Seas	Bahamas
Rhapsody of the Seas	Bahamas
Voyager of the Seas	Bahamas

Celebrity Cruises:

Celebrity Century	Malta
Celebrity Millennium	Malta
Celebrity Solstice	Malta

I would also like to take this opportunity to address issues that were raised in the media by the Chairman of the Committee, Mr Perrett over the last week concerning allegations that evidence of crimes is covered up by cruise companies.

The Sunday Telegraph on May 26 reported:

A "culture of cover ups" remains entrenched on Australia's cruise ships despite moves to improve safety and reduce crime, industry insiders claim.

Federal Labor MP Graham Perrett, who is chairing a Parliamentary inquiry into crimes at sea, said evidence from cruise industry sources suggested a lack of transparency with reporting serious incidents.

"When you get on a cruise ship, people think that the long arm of the law covers them, but the reality is they are covered by a contract with the cruise company rather than the Crown and the police," Mr Perrett said.

He said concerns had been raised about cruise lines under-reporting crimes once ships left port.

We have certainly had evidence of people saying there is a culture of cover-up rather than revealing," he said.

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■ WWW.ROYALCARIBBEAN.COM.AU



“It is the old problem – if the people doing the investigating are also the ones that would be in the firing line if things go wrong, it can lead to complications, he said.”

The basic premise of Mr Perrett’s comments regarding the coverage of criminal law is not correct. Whilst passengers on cruise ships are subject to the terms of their contract of carriage, this does nothing to displace the criminal law of the relevant jurisdiction applying at the time of any incident. I believe it is a serious overstatement to suggest that the “long arm of the law” does not apply on board cruise ships or any other ship for that matter.

In respect to the suggestions of a “culture of cover ups” and “under-reporting of crimes”, our examination of the publicly available evidence of the Committee does not reveal any statements to this effect from industry witnesses who gave evidence in open hearings. During the Canberra hearings the Chairman stated that the Committee had received evidence from a former security officer regarding alleged cover ups on board cruise ships. In response to that Mrs Duffy and I spelled out the current industry position in which all crimes are reported to the appropriate law enforcement authorities. Please see the transcript extract below. My concern is that the evidence received by the so called industry insiders does not reflect that contemporary situation. As it would appear that this evidence was made in private I am unable to determine whether the witness has recent experience of cruise ship security. I am quite certain that their comments do not reflect the security arrangements on board RCCL ships.

*Mr Smith: In regard to Mrs Duffy’s response, the desire of the industry is to establish a global reporting regimen through the IMO, and, if the Australian delegation to the IMO could support that, we would be looking at a standard implementation of a reporting regime that would take away any doubt of any interpretation of the obligation to report crime. In my experience, cruise lines report crime, and jurisdiction is established very quickly between coastal waters, international waters and next port of call.*

*The cruise lines will report a crime to the next port in the event they need the support of the local law enforcement officers. They will report that crime in the case of anything around Australia and to do with an Australian citizen to the Australian Federal Police, or indeed the water police. If the ship was on a round trip; Sydney. If it was an itinerary, then it would be also reported to the water police. Then between those law enforcement agencies they would establish primacy, and that is very much based on practicality.*

*So, in the case of Mrs Brimble, New South Wales Water Police established primacy, and they travelled to Noumea to attend the vessel. The habit of cruise lines is to report and report very quickly. We do not judge crime. We report it and then we work with those law enforcement agencies as they establish primacy—and indeed attend the vessel on arrival at the port or on return to the port. It is a very well established practice.*

**CHAIR: We had evidence and information provided from people in the security industry to the committee saying that because reporting a crime is not something that is going to make it onto the brochure for the cruise line—that is just the reality; you do not want rape, assault and murder in your brochures—the idea is to conceal information. If there were crimes that could not be made public—**

*Mr Smith: Disclosed.*

*CHAIR: then it was in the best interests of those in the job to keep it quiet.*

*Mr Smith: From a practical sense I do not see how that could be reasoned because, if an individual has a crime committed against them and they seek recourse against either the individual or the company, I do not know how they can do that.*

*CHAIR: It is Joe Blow and Bill Blow coming to fisticuffs.*

*Mr Smith: Yes.*



*CHAIR: If it happened in the main street of Brisbane, the Crown would step in and say, 'You're both charged.'*

*Mr Smith: Yes.*

*CHAIR: Whereas, if it happens on a ship, the idea being: 'You lost a tooth; you lost a tooth. Let's just keep it that way.'*

*Mr Smith: I do not believe that to be the case because the greater behaviour of passengers is for them to return ashore, consult with their families and take action. They cannot take action if the matter has not been reported. The behaviour of the cruise companies is to report the crime. I have not read the accusation that cruise lines have not reported. I do not have a public account of a crime that has not been reported.*

*Mrs Duffy: I would just add that I think that was also the point made in the committee hearings held in Washington. Also, the FBI verified that all crimes are being reported. There has not been a case found where a crime went unreported by the cruise line. I do not know whether what you have heard is anecdotal or is actually backed by—*

*CHAIR: It was evidence presented to the committee.*

*Mrs Duffy: Okay.*

The current state of industry practice was also referred to at the Sydney hearings by former NSW Police Commissioner Ken Moroney AO APM, who studied cruise industry security arrangements and dismissed the suggestion that those investigating on board incidents would be inclined to under report. The transcript extract is also repeated below:

*“CHAIR: Would that mean that, if something happens on your watch, you would be more likely to cover up than to report it—if you are going to have your employment terminated whenever the data starts to show that there are some troubles in the ranks?*

*Mr Moroney: No, I do not think so.*

*CHAIR: That was a very leading question. I realise that.*

*Mr Moroney: I think potentially you would be terminated for not bringing issues to notice rather than covering them up. You might cover it up once or twice. Inevitably, as I know from my own background, the truth will surface. It may take a week, a month or a year, but it will surface. So, in that sense, it is that constant renewal of training and lifting the professional standards of the security staff, indeed valuing the security staff amongst the staff of a cruise ship itself. That is why I was so encouraged, as I said, to hear the captain of the ship that I was on—and I do not think it was said for my sake—say who you the security officer represent when you are simply walking through the bar or doing some other activity relevant to your duty. I think it is about the valuing of the job. Indeed, we see that land side, where there has been a complete re-evaluation of security staff. It is not about bulk and brawn anymore; it is about intellectual capacity. Physical capacity is important, given the nature of the confrontations you sometimes deal with.”*

On the same day Michael Giglia, Director Fleet Security and Investigations, Global Security, Royal Caribbean Cruises Lines Ltd pointed out that RCCL not only reports all incidents to the appropriate law enforcement agency but publishes the number of alleged serious crimes in our annual Stewardship report, whether these result in prosecutions or not. Additionally Mr Giglia described in detail the training and procedures for security staff in reporting crime and crime scene prevention:

*Mr Giglia: Most definitely. The training that you may be most interested in is training and crime reporting and crime preservation. We have always trained our security officers in that but the Cruise Vessel Security And Safety Act—a federal law passed in the United States, sometimes known as the Kerry act—requires that all of our ships have at least one person certified in a very specific course in crime reporting and evidence preservation. The course is known as the model course. The syllabus was produced by the United States Coast Guard, the United States Merchant Marine Academy and the Federal Bureau of Investigation. Every one of our chief security officers and deputy security officers must complete this government mandated course and be certified in order for a vessel to be allowed into United States ports.*



*It is a business decision—and I believe it is true in all the cruise lines: it is easier for us to train all of our security officers, regardless of what port they are going to. Every one of them is trained, because ships move around, as do our personnel.*

*CHAIR: Mr Giglia, are we able to have that document?*

*Mr Giglia: Indeed.*

*CHAIR: We will collect it and put it into evidence.*

*Mr VASTA: So it is a standardised requirement now?*

*Mr Giglia: Yes, it is. In addition to other regulatory requirements and other training required by company policy. This, again, is known as the 'model course' produced by those three United States government agencies.*

*Dr STONE: That is what I was going to say: it applies to your ships, obviously. Have you voluntarily adopted, then, the Kerry law protocols into your practice?*

*Mr Giglia: Yes, indeed.*

*CHAIR: For Australian waters?*

*Mr Giglia: Yes, indeed. Preceding Kerry in 2007, CLIA, the trade association, entered into a voluntary agreement with the FBI as to how evidence would be preserved and what sort of crimes the FBI needed reported and the manner in which they were to be reported. That volunteer agreement was in effect for three years, which we applied worldwide. Those were incorporated into the Cruise Vessel Security and Safety Act 2010, in which those same protocols became law. They are also applied universally."*

In conclusion I would like to thank the Committee for its work in what, to our industry, is the most fundamental responsibility we have, the safety and security of our passengers and crew which remains our primary concern.

Yours sincerely

Gavin Smith  
Regional Vice President