

# Uncertain Maritime Incidents

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The report of the Senate Select Committee's 'children overboard' inquiry is possibly the most political document the committee system has generated. For many of those involved, it raised more questions than it answered and invited the Government to support further inquiry. The Government is not likely to accept the invitation.

The committee produced a majority report, supported by all the non-government members, the government members produced a vitriolic minority report (which complained about the language of the majority) and there were three individual statements offering additional views.

Every member agreed that no children were thrown overboard from the boat in question, but there were basic differences about why the Government continued to propagate the opposite view after the facts became known.

## Majority report

Committee chair Peter Cook wrote a foreword to the majority report which said that this had been a most unusual inquiry. Senate inquiries typically reviewed legislation or examined some element of public policy, he said. This had been an inquiry into an event and the chain reaction it set off in the Australian Defence Force (ADF), the bureaucracy and the government.

What gave the proceedings heightened significance was that the 'children overboard' claim was made and given dramatic media prominence immediately after a federal election had been called in which border protection and concerns about asylum seekers were central issues...

On the 'children overboard' question the Committee had, in reality, been conducting an investigation, one that was expanded significantly when the terms of reference were extended at the start to include other 'suspected illegal entry vessels (SIEVs)' apart from SIEV 4 (the 'children overboard' boat). This brought into the purview of the inquiry the tragic story of SIEV X and the 353 men, women and children who drowned on its ill-fated voyage.

Senator Cook said the hearing program was slowed at various points because of delays in the office of Defence Minister Robert Hill and key documents were withheld for an inordinate length of time. He said tension developed between the committee and the minister when Senator Hill began to question the committee's procedures, refused to allow certain witnesses to appear and when he challenged the committee's right to pursue its inquiries in the manner it thought most appropriate.

In Question Time before the first hearing, Senator Hill had attacked the inquiry as 'a Labor stunt' and that view 'seemed to inform his approach'.

Senator Cook said:

A question has hung over this inquiry that it did not and could not address. It is 'Did the overboard story and the emotional reaction it provoked influence the outcome of the federal election?' This question invites a number of subsidiary questions:

- If it did influence the outcome would the truth have led to a different result?
- Would an appropriate and timely correction of the record have changed the direction or influenced the presentation of the issues in the campaign?
- Would the credibility of the key players have been affected in the judgment of electors if the truth had been uncovered and exposed outside official channels during the campaign period?

These are not questions about the duty and obligation of the government and the public service to keep the community properly informed. They are speculative questions that go to the politics of the 'overboard' issue and its timing in relation to the federal election.

The committee's efforts were aimed at getting at the truth of the matter so there is an accurate public record of the events. Any judgments about what would have occurred had the 'overboard' story never seen the light of day are subjective and for others to make.

He said the outcome of the inquiry raised a major constitutional issue: the extent to which the parliament is able to effectively scrutinise the actions of the executive. The Estimates process gathered a lot of

relevant information but ultimately the executive, in the form of the Cabinet, checked the inquiry's ability to examine relevant witnesses.

This meant the executive was able to exercise its power to prevent full parliamentary scrutiny of itself. 'This is not open government. What should be done about it is now an important matter for national debate,' said Senator Cook.

## Minority report

The minority report from the Government members (senators George Brandis, Lib Qld, Brett Mason, Lib Qld, and Alan Ferguson, Lib SA) also sought to define the political landscape up front.

For 15 hearing days between 25 March and 30 July 2002 the solemn farce of the Senate Select Committee on a Certain Maritime Incident created an undignified sideshow in Australian politics.

In form, the committee's terms of reference directed it to examine matters of serious national concern, relating in general to the government's border protection policies, and in particular to a specific incident ... on 7 October last year when an apparently incorrect report that asylum-seekers had thrown a child or children into the ocean, originally emanating from within the military and quickly gaining public currency, became something of a cause celebre.

In truth, neither the inquiry, nor the majority report, have had anything to do with the 'children overboard', the structure of the Australian Defence Force or the Australian Public Service, the 'Pacific solution', or any broader policy issue.

... the 'children overboard' inquiry was nothing more and nothing less than a political show-trial, driven by the misplaced sense of self-righteous outrage by the Australian Labor Party at its defeat at the 2001 Federal elections.

At the time the inquiry was established, Labor Party politicians made extravagant claims attacking the integrity of the Prime Minister, senior ministers and their staff—and, by innuendo, the reputations of some of this nation's most distinguished military officers and public servants.

If there were any doubts about the preordained political agenda of this inquiry, they must entirely disappear when the extraordinary language of the majority report is considered.

In a manner for which we can find no precedent in the history of the Senate, 'findings' about the truthfulness of individuals are asserted which are either entirely unsupported by the evidence or, in some cases, at variance with the evidence; lurid conspiracy theories are intimated (indeed,

flaunted); and the good reputations of senior public servants and military officers attacked by innuendo, their motives questioned on the basis of pure conjecture and surmise, and allegations made against them which, in some cases, were never put to them during the hearing to allow them the opportunity to respond.

Any pretence that this inquiry has been engaged in an exercise of fact-finding or analysis cannot survive a dispassionate scrutiny of the majority report: it is a document which simply cannot be taken seriously.

The findings that so upset the minority were presented under a heading *Findings of fact* and said:

No children were thrown overboard from SIEV 4.

A report that a child or children had been thrown overboard from SIEV 4 arose from a telephone conversation early on 7 October 2001 between Commander Norman Banks, the Commanding Officer (CO) of HMAS Adelaide and Brigadier Mike Silverstone, Commander Joint Task Force (CJTF) 639, which was established to oversee the operation to deter people smuggling.

Air Vice Marshal Alan Titheridge, Head of Strategic Command, passed on the report to the office of Defence Minister Peter Reith; Mr Bill Farmer, Secretary of the Department of Immigration and Multicultural Affairs, passed it on to his minister, Phillip Ruddock.

Photographs released to the media on 10 October as evidence of children thrown overboard on 7 October were actually pictures taken the following day, 8 October, while SIEV 4 was sinking.

By 11 October, the naval chain of command had concluded that no children had been thrown overboard from SIEV 4. The Chief of the Defence Force (CDF), Admiral Chris Barrie, was informed at the very least that there were serious doubts attaching to the report.

On October 11, Mr Reith and his staff were separately informed that the photographs were not of the alleged children overboard events, but of the foundering of SIEV 4 on 8 October.

On or about 17 October Admiral Barrie informed Mr Reith that there were serious doubts about the veracity of the report that children had been thrown overboard from SIEV 4.

On 7 November Air Marshal Angus Houston, who was acting CDF, informed Mr Reith that children had not been thrown overboard from SIEV 4.

On four other occasions the lack of, or dubious nature of, evidence for the 'children overboard' report was drawn to the attention of the minister or his staff by officers from Defence.

On no occasion did the Defence organisation produce any evidence to the Department of the

Prime Minister and Cabinet (PM&C), and through it to the office of the Prime Minister, which corroborated the original report that children had been thrown overboard. However, on no occasion did the Defence organisation provide definitive advice to PM&C or the inter-departmental task force on people smuggling that children were not thrown overboard from SIEV 4 or that the photographs were not of that alleged incident.

On 7 November Mr Reith informed the Prime Minister that, at the least, there were doubts about whether the photographs represented the alleged children overboard incident or whether they represented events connected with SIEV 4's sinking.

Despite direct media questioning on the issue, no correction, retraction or communication about the existence of doubts in connection with either the alleged incident itself or the photographs as evidence for it was made by any member of the Federal Government before the election on 10 November.

Mr Reith made a number of misleading statements implying that the published photographs and a video supported the original report that children had been thrown overboard well after he had received definitive advice to the contrary.

The committee finds that Mr Reith deceived the Australian people during the 2001 Federal election campaign concerning the state of the evidence for the claim that children had been thrown overboard from SIEV 4.

It is not possible to make a finding on what the Prime Minister or other ministers had communicated to them about this incident due to the limitations placed on this inquiry by the order of the Cabinet for ministerial staff not to give evidence.

The Committee went on to note three 'unusual aspects' to the handling of SIEV 4.

The vessel was identified and intercepted on the afternoon of 6 October 2001. That evening, a "special arrangement" was put in place in order to meet a request from Mr Reith that he be briefed early on the following morning with the latest news on SIEV 4.

The arrangement implemented by Defence to meet this request was for the Commander of the HMAS Adelaide to speak to his superior officer, Brigadier Silverstone, at a prearranged time early on 7 October 2001 and for Brigadier Silverstone in turn to communicate the content of that discussion to AVM Titheridge.

The conversation between Commander Banks and Brigadier Silverstone occurred in the middle of an operationally hectic period for the Adelaide, and it was from this conversation that the report that a child or children had been thrown overboard emerged. Brigadier Silverstone told the committee that he would never have had that conversation had the

'special arrangement' not been in place, and that without that conversation the 'children overboard' affair would never have occurred.

Also on the evening of 6 October 2001, news of the interception of SIEV 4 was leaked to the media. The committee was unable to determine who was responsible for that leak, but heard from Ms Jane Halton, then chair of the People Smuggling Taskforce, that the usual practice was not to comment on operational details while operations were underway. She was, she said, surprised that the detail of SIEV 4 was in the public domain by early in the morning of 7 October 2001.

The third unusual feature of the handling of SIEV 4 identified by the committee was the 'heated' conversation which took place on 8 October between Admiral Barrie and the Secretary of PM & C, Mr Max Moore-Wilton. Admiral Barrie told the committee that soon after he had been advised that SIEV 4 was sinking, he had had a telephone conversation with Mr Moore-Wilton, who instructed the CDF to make sure that everyone rescued went on board HMAS Adelaide and not to Christmas Island.

Admiral Barrie told Mr Moore-Wilton that he could not guarantee any such outcome, and that safety of life was to be the paramount consideration. In this emergency, if people had to be rescued and landed at Christmas Island that would have to happen. Admiral Barrie said that he had informed the Minister for Defence of this conversation, ensuring that he understood that the Defence forces were not 'in absolute control of where people would end up'.

The committee found that these unusual features pointed to the likelihood that the Government had decided to make an example of SIEV 4, the first boat to be intercepted after the announcement of the Federal election. 'Its handling was to be a public show of the Government's strength on the border protection issue.' It said:

It is in this context that one might best understand why the Secretary of PM&C wanted to ensure that the asylum seekers involved not set foot on Australian territory. It is also in this context that it is possible to understand why it may have been thought by the Government to be politically difficult to correct or retract claims made in relation to the passengers aboard SIEV 4 once they were suspected or known to be false.

## Role of senior officers in the Australian Defence Organisation

A third feature of the 'children overboard' affair highlighted by the Committee relates to the role played by senior officers in the Australian Defence Organisation in advising

Government and senior officials of problems with the original story.

The Committee analyses in particular the adequacy of the advice provided by Admiral Chris Barrie, then Chief of Defence Force, AVM Titheridge, Head of Strategic Command and the senior Defence representative on the People Smuggling Taskforce. The Committee said it was struck by the fact that Admiral Barrie, AVM Titheridge and Dr Allan Hawke, then Secretary of the Department of Defence, all said they were uncertain until well after the election on 10 November that children had not been thrown overboard from SIEV 4.

Admiral Barrie and Dr Hawke had said they knew that the photographs had been wrongly connected with the alleged child throwing incident, but AVM Titheridge maintained that he had been unaware of even that fact.

As a consequence, none of these senior officers provided definitive advice to the Government concerning the veracity of reports of the incident, although Admiral Barrie communicated the fact that there were 'serious doubts' about it to Mr Reith.

Admiral Barrie did inform the Minister that the photographs were being wrongly portrayed and Dr Hawke instructed his Head of Public Affairs and Corporate Communication to inform the Minister's Office of the same fact.

The Committee found that AVM Titheridge failed to register the importance of clarifying the truth of the report that children had been thrown overboard, despite having twice been directly asked to provide evidence and advice on the matter by the chair and another member of the People Smuggling Taskforce.

It said Dr Hawke was remiss in failing to press Minister Reith on the question of whether he intended to correct the public record in relation to the photographs.

The Committee majority report said that many of the questions and concerns that animated the inquiry arose from considerations of accountability. Key features of the management and distribution of information about the 'children overboard' incident and its aftermath stood out as inimical to the transparency, accuracy and timeliness necessary for proper accountability.

As a consequence, fair dealing with both the public and the agencies involved was

seriously prejudiced. Factors contributing to these problems included:

- a purist view of the Defence 'diarchy' which militated against clear, comprehensive and accurate advice being provided to the Minister for Defence
- the strict control by the Minister's office of information related to the operation against people-smuggling, which prevented normal checks and balances and hampered the whole-of-government approach to people smuggling
- ministerial staff inserting themselves into both the military and administrative chains of command, thereby destabilising proper operational practice and reporting back.
- an inadequate governance framework within the People Smuggling Taskforce, which failed to clearly define its accountability and reporting arrangements with the participating agencies
- the tendency of ministerial staff to act as quasi-ministers in their own right, and the lack of adequate mechanisms to render them publicly accountable for their actions.

The report said the Defence 'diarchy' was ostensibly about bringing together the responsibilities and complementary abilities of public servants and military officials. But between the CDF and the Secretary, there was a mandated divide between 'operational' responsibility and the management of other Defence activities which resulted in adoption of the 'purist view' of the diarchy.

This view seemed to be more extreme than was necessary to enable the CDF to run military operations without interference. It impeded the kinds of interactions needed to effectively discharge Defence's mission 'to defend Australia and its interests', especially given a whole-of-government perspective and its attendant responsibilities and accountabilities.

Dr Hawke had told the Committee that he refused to cut across the CDF by giving advice to the minister on 'operational' matters that were properly the responsibility of the CDF. This applied notwithstanding that Dr Hawke knew about the misrepresentation of the photographs, and the absence of corroborating evidence in Defence intelligence material and reports.

The diarchy is not an end in itself. It is meant to facilitate accuracy, timeliness and accountability. It is certainly not meant to be an impediment to full and frank advice going to the minister, said the report.

## The Taskforce

The Committee said it had examined the operations of the People Smuggling Taskforce in the light of all contemporary notions of public sector accountability. The saga of 'children overboard' had revealed 'quite starkly' some of the vulnerabilities to which whole-of-government approaches were subject.

As the value and frequency of such approaches increases, more intense becomes the imperative that they be conducted in a robust and coherent way. The participating agencies must be effective collaborators without putting at risk their discrete responsibilities. This inevitably means adjustments to 'business as usual', and such adjustments must be understood, accommodated, and communicated within each agency.

The Committee said it did not question the integrity of the individual participants on the Taskforce, but found substantial weaknesses in its basic administrative operations, including record keeping, risk management and reporting back.

## Ministers' offices

The report said the inquiry had highlighted an accountability 'vacuum' at the level of ministers' offices. It appears to be partly a result of the increased size of ministers' staffs, but more significantly, the evolution of the role of advisers to a point where they appeared to enjoy 'a level of autonomous executive authority separable from that to which they have been customarily entitled as the immediate agents of the minister'. It went on to observe:

While ministers and public servants regularly account for their actions directly to parliament and by appearance before its committees, this is not the case for ministerial advisers. In the past, it has been generally accepted that advisers' accountabilities are rendered via ministers, it being understood that advisers act at the direction of ministers and/or with their knowledge and consent. This seems to be no longer a legitimate assumption.

The Committee said two courses of action were needed to resolve these issues. The first was to bring ministerial advisers within the scope of parliamentary committee scrutiny, in a manner similar to that applying to public servants. The second was a Code of Conduct and Set of Values for ministerial advisers within a legislative framework.

The Committee noted that none of the ministers closely involved in the 'children overboard' affair appeared to have taken any action to reprimand or discipline advisers or officials who performed inadequately or inappropriately. It was reasonable to infer, therefore, that they had acted with ministerial approval and that the government was not displeased with their conduct.

## SIEV X

The committee report devoted two chapters to the matter of the SIEV X.

At about midday on 19 October 2001, a day after departing Indonesia bound for Christmas Island, a vessel organised by people smuggler Abu Qussey and laden with nearly 400 people foundered. Close to 24 hours later two Indonesian fishing boats picked up 44 survivors; 352 people drowned when the boat now known as SIEV X sank.

During the Committee's inquiry, serious questions were raised about the extent of Australia's responsibility for and response to the tragedy of SIEV X. In particular, the following questions were posed:

- whether Australian agencies could have found and rescued the vessel before it sank;
- whether Australian agencies could have rescued the passengers and crew of SIEV X from the water; and
- whether the fact that no specific search and rescue operation was mounted for SIEV X was evidence either of intelligence failure or of negligence in relation to the welfare of the vessel's passengers and crew.

The Committee said that in evaluating the Australian response to the SIEV X episode, it took note of three important factors:

1. The operational climate surrounding SIEV X involved reports of a 'surge' in possible arrivals in the people smuggling pipeline, with up to six vessels expected to leave Indonesia in close succession. The build-up of people and boats led to an expansion in Australia's disruption campaign within Indonesia. It would also have translated into increased intelligence traffic on potential boat and people arrivals, with a corresponding increase in the burden for intelligence staff sifting through incoming reports.
2. The intelligence received on possible boat arrivals from Indonesia was imperfect and treated with caution. Intelligence sources were often unreliable and difficult to corroborate. The intelligence itself was of uneven quality, marred by contradictory information and tended to inflate the numbers of expected boats. Tracking

boat movements was a particular problem for intelligence analysts. It was common for intelligence to report vessels as departing Indonesia, only for it to emerge later that the vessels were delayed, had moved to another port or turned back due to weather conditions, mechanical failure or other reasons.

3. Intelligence played a limited role in daily operational decisions. Surveillance and interception strategy was built on the assumption that intelligence could not be counted on to provide detailed warning of SIEV departures and arrivals.

The Committee found that there were several gaps in the chain of reporting of intelligence, but that even if it had been functioning optimally, it was unlikely that the Australian response to SIEV X would have been different. The committee found no grounds for believing that negligence or dereliction of duty was committed in relation to SIEV X.

However, it said, it was disturbing that no review of the SIEV X episode was conducted by any agency in the aftermath of the tragedy. 'No such review occurred until after the committee's inquiry had started and public controversy developed over the Australian response to SIEV X.'

...the committee finds it extraordinary that a major human disaster could occur in the vicinity of a theatre of intensive Australian operations, and remain undetected until three days after the event, without any concern being raised within intelligence and decision making circles.

The Committee recommended that operational orders and mission tasking statements for all ADF operations, including those involving whole-of-government approaches, explicitly incorporate relevant international and domestic obligations.

## Commentators and conclusions

Whether this whole, extraordinary affair will produce positive results is doubtful. Government ministers and members have taken every opportunity in Parliament to deride and ridicule the report and, indeed, the whole inquiry.

Writing in the November issue of *The Public Service Informant* section of the *Canberra Times*, Dr Jenny Stewart, Associate Professor in Public Sector Management at the University of Canberra, said it would be a pity if the Government paid no attention to the findings and recommendations on ministerial advisers and the management of inter-departmental committees.

She said the need for better control of ministerial advisers had been apparent for a long time, even if successive ministers thought it was smart to perpetuate ambiguity. Eventually, she suggested, ministers were likely to find they were not well served 'by having people working for them who are authorised to act in their name, but have neither the skills nor the experience to exercise their roles properly.'

And despite the increasing importance of inter-departmental committees, the inquiry had shown a worrying lack of structure

and process. The failings suggested that '...in these days of managerial slickness and political savvy, some basic principles which should be part of every public servant's professional tool kit are likely to be forgotten or pushed aside when conditions become turbulent'.

Unsurprisingly, in a letter published by the *Australian Financial Review* on October 29 Peter Reith said the Committee's report was 'Labor's report' and the Committee was guilty of abuse of process.

There are still suggestions that there may be action in the Senate to pursue the SIEV X matter further, particularly those aspects dealing with the impact of Australian-sponsored action within Indonesia to disrupt people smuggling.

The matter took on added piquancy during the November Senate estimates hearings when it became known that the Commissioner of the Australian Federal Police Mick Keelty had asked to be released from any obligation to answer questions about AFP tracking of people-smuggling boats.

## APPENDIX 1

### Membership of the Committee

Senator Peter Cook, **Chair**, WA, Labor

Senator George Brandis, **Deputy Chair**, Qld, Liberal

Senator Andrew Bartlett, Qld, Democrat

Senator Jacinta Collins, Vic., Labor

Senator John Faulkner, NSW, Labor

Senator Alan Ferguson, SA, Liberal

Senator Brett Mason, Qld, Liberal

Senator Shayne Murphy, Tas., Ind.

## APPENDIX 2

### Terms of Reference

The Select Committee on a Certain Maritime Incident was appointed to inquire into and report on the following matters:

- (a) the so-called 'children overboard' incident, where an Indonesian vessel was intercepted by HMAS Adelaide within Australian waters reportedly 120 nautical miles off Christmas Island, on or about 6 October 2001;
- (b) issues directly associated with that incident, including:
  - (i) the role of Commonwealth agencies and personnel in the incident, including the Australian Defence Force, Customs, Coastwatch and the Australian Maritime Safety Authority,
  - (ii) the flow of information about the incident to the Federal Government, both at the time of the incident and subsequently,
  - (iii) Federal Government control of, and use of, information about the incident, including written and oral reports, photographs, videotapes and other images, and the role of Federal Government departments and agencies in reporting on the incident, including the Navy, the Defence organisation, the Department of Immigration and Multicultural Affairs, the Department of the Prime Minister and Cabinet, and the Office of National Assessments; and
  - (c) operational procedures observed by the Royal Australian Navy and by relevant Commonwealth agencies to ensure the safety of asylum seekers on vessels entering or attempting to enter Australian waters.
  - (d) in respect of the agreements between the Australian Government and the Governments of Nauru and Papua New Guinea regarding the detention within those countries of persons intercepted while travelling to Australia, publicly known as the 'Pacific Solution':
    - the nature of negotiations leading to those agreements,
    - the nature of the agreements reached,
    - the operation of those arrangements, and
    - the current and projected cost of those arrangements.