

Chair's Foreword

This has been a most unusual inquiry. Senate inquiries typically review legislation or examine some element of public policy. This has been an inquiry into an event and the chain reaction that event set off in the defence forces, 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. In our remit only the Pacific solution element is the more usual type of subject for senate committees.

Unsurprisingly, most of our time was consumed by the 'children overboard' question. On this subject the Committee has, in reality, been conducting an investigation. The breadth of that investigation was significantly expanded when the terms of reference were extended at the start to include other SIEVs apart from SIEV 4 (the 'children overboard' boat). This brought the tragic story of SIEV X and the 353 men, women and children who drowned on its ill-fated voyage within our purview.

The Committee's approach to the investigative parts of the terms of reference has been to simply allow the evidence to point the direction it should take. This approach of following the evidence meant some changes in normal Senate committee operations. First, the Committee adopted a practice of not limiting its examination of witnesses by, as is normally done, imposing and rigidly adhering to a timetable for the day's proceedings. Instead it took as long as needed to thoroughly examine each witness.

This left the Committee open to some criticism. Because it was not possible to be absolutely certain when the next witness would be called, on occasion, senior officers and key personnel were kept waiting for long periods and were sometimes required to make last minute alterations to their other commitments. The Committee apologised then and I apologise now for that inconvenience. However the Committee believed that if it had not followed the practice of completing the examination of each witness thoroughly, the inquiry could have suffered from the more serious criticisms that it was incomplete, superficial, or worse - a 'cover up'.

Second, the Committee could not always be sure whom it would want as the next witness. The inquiry posted a hearing list in advance in order to keep the story unfolding in as sequential a way as possible. But often the last witness's evidence was the key to deciding who the Committee wanted to hear from next, whether it should get on with the narrative, or spend more time and speak to more witnesses in order to establish the facts at some decisive point in the story.

Early on, the press got a little testy about the inquiry because the Committee would not say if it intended to call Mr Reith. In the event, Mr Reith was requested on at least three occasions to appear but the requests were made only when the Committee

believed that it had justifiable grounds for doing so and it had reached the appropriate stage of the investigation to call him.

Third, the Committee started out coordinating its work with a liaison group appointed for the purpose by the Australian Defence Organisation (ADO). This enabled both the inquiry and the ADO to balance their needs and to program witnesses at mutually convenient times. While this arrangement was in place it worked well and I wish to thank the officers concerned for the manner in which they discharged their duties. Soon after the inquiry commenced, however, this arrangement was terminated by the Minister for Defence, Senator Hill, and the Committee was told that it would have to make any requests of the Australian Defence Force (ADF) and the Department of Defence through the Minister's office. I never considered this new arrangement was necessary, adding as it did a new level of complexity and red tape. Nor did it work well.

The hearing program was slowed down at various points because of delays in the Minister's office and key documents were withheld for an inordinate length of time. Tension developed between the Committee and the Minister when he 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.

As well, the Minister's Chief of Staff, Mr Matt Brown, behaved towards the Committee secretariat in a way that could only be described as discourteous and unprofessional. In Question Time, prior to the first hearing, Senator Hill attacked the inquiry as 'a Labor stunt'. This view seemed to inform his approach. In other inquiries, even those in which tensions between political parties have been high, the liaison between ministers, their departments and the committees has worked smoothly. A notable feature of this inquiry is that in this case it did not.

The Committee's decision to follow the evidence meant that it started the inquiry with the 'children overboard' incident itself and made an effort to establish what actually happened. Next it followed how a message came to be transmitted that children had been thrown into the sea when they had not, and how that message travelled inside and outside of the defence chain of command to the bureaucracy, ministers, the Prime Minister and the press. When it had been established that it quickly became known among key people that the 'overboard story' was false and the media had been misled about the photographs, the inquiry turned its focus to questions of public accountability and what was done and by whom to correct the record.

It was in this phase of the inquiry that it hit a brick wall. The inquiry was able to piece together quite effectively a reasonably clear picture of what happened about correcting the record up to ministerial and prime ministerial level. There was enough information to cause the inquiry to make the majority findings about Mr Reith's conduct that appear in the report but it was not possible to go further. The inquiry was blocked by a cabinet decision. Cabinet decided to fence off ministerial and prime ministerial conduct from the reach of the inquiry by refusing access to ministerial and prime ministerial staff and to public servants serving in ministerial offices at the time.

This inquiry would have been aided considerably, and possibly able to fully discharge the obligations imposed on it by the Senate under its terms of reference, if it could have called as a witness the Prime Minister's international adviser Mr Miles Jordana, and former minister Peter Reith's advisers, Mr Mike Scafton, Mr Ross Hampton and Mr Peter Hendy. Mr Scafton is now a senior public servant with the Department of Defence. Mr Hampton is adviser to the Minister for Education Science and Training, Dr Nelson. Until recently, Mr Hendy also worked for Dr Nelson as his Chief of Staff.

Senator Hill went beyond the Cabinet decision and deemed that it was not appropriate for the Committee to request the appearance of some witnesses who were members of the ADO, and he refused permission for them to do so. The two people of interest to the Committee were Rear Admiral Raydon Gates and Ms Liesa Davies. Rear Admiral Gates had led a taskforce on issues relevant to the inquiry and Ms Davies was, and still is, the Defence Departmental Liaison Officer in the Minister's office.

For his part, Mr Reith was not entitled to immunity from this inquiry as he was no longer a serving member of the House of Representatives, but bolstered by an opinion from the Clerk of the House of Representatives, he rejected three formal requests to appear. Mr Reith was an essential witness but I will say more about this later. The Reith case has sparked a continuing exchange of conflicting opinion between the Clerk of the Senate and the Clerk of the House about Senate committee powers. I note here the Committee, by a majority, accepts the views of the Clerk of the Senate. Because the inquiry attached considerable importance to this matter all the correspondence relating to it is published as an appendix to this report.

Given the disposition of the Committee to favour the Senate Clerk's view, the Committee had to contend with the question: should it approach the Senate with a request that Mr Reith be compelled to appear before the committee by way of a summons. The Committee was divided on this issue but the majority view was that any summons to Mr Reith would be contested in the courts with the taxpayer having to foot the bill and with the inquiry having to mark time until the issue was settled. It is for this reason that the Committee took the unusual step of asking Mr Stephen Odgers SC to make an assessment of the evidence. This he has done and his report is available with the Committee's report.

Unable to pursue the 'overboard story' to its conclusion, the inquiry gave its attention to the Pacific solution element of the terms of reference and to what has become known as the SIEV X issue. Both these matters were also plagued by particular problems.

In the case of the Pacific solution, the Committee received correspondence from many of the asylum seekers who were on 'the overboard boat' SIEV 4. The Committee's jurisdiction is limited to Australia and its territories. These asylum seekers were in detention on Manus Island at all the relevant times of this inquiry. This meant that their evidence could not be heard under privilege, nor could the usual protections be extended to them should they be adversely treated as a consequence of what they may have said.

It has always seemed to me to be one-sided that the asylum seekers as key players in the event could not have their evidence heard and tested by the inquiry. Given the limitations it is not surprising that the asylum seekers themselves declined to participate in a telephone link-up with the Committee. Some Committee members questioned the value of any information obtained by telephone link and this is an important consideration. DIMIA also advised that if something was said on the link-up that might relate to an application for asylum, then there was no legal way that information could be prevented from being used in an assessment of an individual's eligibility.

Notwithstanding all these concerns, it is still a pity that the people at the heart of this incident and about whom allegations were made are known only by photographs, one letter and the balanced and humane description of them given to us by Commander Banks of the *HMAS Adelaide*.

Jurisdictional and operational limitations also circumscribed the extent to which the inquiry was able to examine what happened in Indonesia up to and including the departure of the ill-fated vessel SIEV X. Statements of those who survived the sinking of SIEV X and who were picked up at sea over 24 hours later by Indonesian fishing boats are included in the records of this inquiry. When they were received these statements were immediately approved for public release. Anyone reading them cannot fail to be moved by these accounts of the loss of life, the human suffering and the tragedy surrounding that catastrophe. While the Committee is divided on some of the issues of this inquiry it is united in its shock at this event and its sympathy for the victims.

Separate from the inquiry, Senator Faulkner has raised concerns about the 'disruption' activities in Indonesia in a series of speeches in the Senate. A majority finding of the Committee is that an independent inquiry is necessary to ascertain what occurred on that question and other issues related to SIEV X. In this report we assessed the evidence that was available to the inquiry but because of the limitations on jurisdiction the Committee did not feel confident that it could report the full story.

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 judgement 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 judgements about what would have occurred had the ‘overboard’ story never seen the light of day are subjective and for others to make. A question does arise which is addressed. It concerns what can be done to prevent a recurrence of the behaviour that led to the public receiving false or inaccurate information.

A number of recommendations on this subject have been made that, if pursued, will go some way to ensuring that these circumstances are not repeated. As reform measures these recommendations will be successful if accompanied by a strengthening of the traditional values of the public service.

The outcome of this inquiry opens up a major constitutional issue: the extent to which the Parliament is able to effectively scrutinise the actions of the Executive. First, it should be said that the normal parliamentary means of scrutiny worked very well in this matter. This is particularly true of the Estimates process that gathered a lot of relevant information much of which has been incorporated into the inquiry’s evidence. 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.

Of particular note here is also the matter of how Mr Reith centralised all critical ADF contact with the media through his office. I acknowledge that Senator Hill has changed this order, but the fact that such an order did exist raises questions about the manipulation of military information for partisan political advantage.

The Committee wishes to record its thanks to three separate groups:

- To those witnesses who assisted the inquiry. It would not have been possible to have conducted such a detailed examination without their cooperation. Public service witnesses appeared knowing that their departments had been instructed by Cabinet not to provide a submission. This meant that the Committee was unable to examine them against the points made in a departmental statement. That made their job and our job harder. Most managed this difficulty and the other pressures the Cabinet decision imposed competently and well. Our thanks go to them. All the experts that served on our round-table discussion brought valuable context to the inquiry and alerted us to wider questions as well. They deserve our thanks.
- The Committee was impressed by the professionalism of the ADF officers who were closely involved with SIEV 4 and its aftermath. Many of them and others in the chain of command had attempted to ensure that the public record concerning ‘children overboard’ was corrected.
- During this long and sometimes difficult inquiry, the Secretariat to the inquiry gave the Committee unstinting support and professional assistance in every way. Their commitment and willingness to work long and onerous

hours made the Committee's task manageable, and especially my own, as Chair. They should be acknowledged. The Committee's thanks go to: Mr Brenton Holmes, Secretary; Mr Alistair Sands, Principal Research Officer; Dr Sarah Bachelard, Principal Research Officer; Ms Kerry Olsson, Principal Research Officer (on secondment) and Ms Judith Wuest, Executive Assistant.

Senator Peter Cook

Chairman