

## **Chapter 4**

### **Operation Sovereign Borders: transparency and accountability**

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

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

#### **The minister's public interest immunity claim**

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

### *Concerns of submitters*

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

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

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

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

4.11 Civil Liberties Australia (CLA) rejected the minister's public interest immunity claim as 'nonsensical':

The events in question have been widely reported in the Australian and world media. It is difficult to see how confirming the events took place as reported can in any sense surrender some advantage which it is thought is held [by] Australian authorities. Whatever damage might be done to the bodies concerned has already been done, the attitude of Australia towards the safety of lives at sea has been exposed, and the practice(s) of Australia in relation to refugees in similar circumstances have been revealed[.]

The Senate should insist on the production of relevant documents. If necessary, arrangements could be made to preserve from publication any documents containing information the content of which has not already effectively been disclosed by the media reports of the incident.<sup>8</sup>

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

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

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

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

that leaving such allegations without investigation was 'unacceptable in a constitutional democracy':<sup>9</sup>

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

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

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

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

### **Operation Sovereign Borders and executive accountability**

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

4.15 Dr Cassimatis and Ms Drummond argued that:

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

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

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

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

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

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

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

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

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

4.18 Dr Emma Larking agreed:

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

4.19 More broadly, Amnesty International proposed that:

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

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

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

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

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

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

4.21 Amnesty elaborated at the committee's public hearing:

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

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

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

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

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

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

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

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

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

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

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

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

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

**Mr Pezzullo:** In this context you are going to have to...<sup>21</sup>

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

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

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

### Committee view

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

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

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

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

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

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

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

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

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

4.31 As one senator remarked during this inquiry:

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

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



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

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

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

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

### **Recommendation 1**

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

**Senator Glenn Lazarus**  
**Chair**

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

