

Dissenting Report – Coalition Members of the Committee

Introduction

1.1 The claim of public interest immunity in regard to documents relating to 'on water operations' made by the Assistant Minister for Immigration and Border Protection, Senator Cash, is valid and necessary to protect public interest.

1.2 Substantial information was provided by the Government to the Senate where it was not against the public interest to do so. Significant efforts were also made to provide further information to the Opposition and the Australian Greens to ensure that the Senate's ability to hold the Government to account on this issue was maintained.

1.3 Specific mention should be made of the fact that during the 42nd Parliament, 33 orders for the production of documents were not complied with by the former Government, and 9 were only partially complied with.¹ Further, during the 43rd Parliament, 26 orders for the production of documents were not complied with, and 7 were partially complied with.²

Public interest immunity claim

1.4 Coalition Members note the motion regarding public interest immunity claims moved by Senator Mathias Cormann and tabled by the Senate on the 13th of May, 2009,³ along with the advice received by Senator Cormann on the 24th of March from Mr Harry Evans, then Clerk of the Senate, which stated the following information:

The recognised grounds for public interest immunity claims consist of the following:

- Prejudice to legal proceedings
- Prejudice to law enforcement investigations
- Damage to commercial interests
- Unreasonable invasion of privacy
- Disclosure of Executive Council or cabinet deliberations
- Prejudice to national security or defence

1 *Journals of the Senate* – Orders for the Production of Documents – 42nd Parliament No. 129–24 June 2010, pp 1–22.

2 *Journals of the Senate* – Orders for the Production of Documents – 43rd Parliament, No. 155–28 June 2013, pp 1–19.

3 *Journals of the Senate*, No. 68–13 May 2009, p. 1941.

- Prejudice to Australia's international relations
- Prejudice to relations between the Commonwealth and the states.

[...]

The Government Guidelines for Official Witnesses before Parliamentary Committees, issued in 1989 and still in force recognised the principles which had been expounded by the Senate. Paragraph 2.28 of the guidelines confirm that claims of public interest immunity should only be made by Ministers:

Claims that information should be withheld from disclosure on grounds of public interest (public interest immunity) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney-General and the Prime Minister).

Paragraph 2.32 recognises the principle that mere claims of confidentiality are not sufficient for a claim of public interest immunity, but that harm to the public interest must be established.⁴

1.5 Senator Cash establishes in her response to Dr Rosemary Laing, Clerk of the Senate, on 10 December 2013, the grounds as to why it is not in the public interest to release certain requested information and why public interest immunity is being claimed.

1.6 The response further details how stemming the flow of information available to people smugglers remains a core element of decreasing their tactical advantage and aids the fulfilment of the Coalition Government's election promise of stopping the boats.

1.7 This necessity for confidentiality in this matter is further strengthened by the remarks of Lieutenant General Angus Campbell, Commander of Operation Sovereign Borders and the Joint Agency Taskforce. Lieutenant General Campbell notes that:

1. These documents may reveal the location, capacity, patrol and tactical routines relevant to Navy and Customs vessels and air assets.

- Such information can undermine our tactical advantage over people smugglers, who seek to use this information to avoid or trigger detection, or to precipitate a search and rescue response.

- Information of this type can also undermine our ability to protect Illegal Maritime Arrivals from the practices of people smugglers and other serious criminal activities

- Finally, it can undermine more generally the effectiveness of Australian assets to maintain maritime security awareness in the broad sense.

4 Mr Harry Evans, then Clerk of the Senate, *Advice to Senator Mathias Cormann Regarding Notice of Motion*, 17th March 2009.

2. Secondly, the kinds of documents that are sought, from my perspective, may enable an exploitation of confidential methodologies and procedures used by Navy and Customs vessels and assets. Information about the arrival of ventures, including the timing of the arrival and the composition of passengers can be used by people smugglers, and has been used by people smugglers, to:

- Provide 'proof of arrival' and the basis for payment;
- Provide a basis for further positive marketing of their business; and
- Undermine communications strategies aimed at potential illegal immigrants.

3. Finally, those documents may impact upon Australia's relations with foreign States and damage those relationships, undermining the potential for international agreements and cooperative behaviours and also the working relationships necessary between operational agencies in relation to safety of life at sea or generally on-water cooperative operations.⁵

1.8 The Hon. Scott Morrison in a statement made to the Committee on the 31st January 2014 further stated:

Prior to the last election the Coalition gave an undertaking that we would take advice from the Joint Agency Task Force to be formed to implement Operation Sovereign Borders, on the public release of information relating to operations.

The Government honoured this commitment and, as a consequence, operational information is not publicly released or subject to public commentary by the Government.

The Government believes that disclosure of such operational information, which includes but is not limited to on water tactics, training procedures, operational instructions, specific incident reports, intelligence, posturing and deployment of assets, timing and occurrence of operations and the identification of individual attempted voyages, passenger information, including nationalities involved on those voyages, as this would prejudice current and future operations, it would put at risk people who are involved in our operations and unnecessarily cause damage to Australia's national security, defence and international relations.

In short, in the Government's view, it would not be in our national interest or the public interest, to disclose this information that would impede our ability to continue to stop the boats.⁶

1.9 Furthermore, during the hearings the Opposition and the Greens both acknowledged that there will be 'times when information must not or cannot be

5 Lieutenant General Angus Campbell, *Proof Committee Hansard*, 31 Jan 2014, pp 12–13.

6 The Hon. Scott Morrison, MP, Minister for Immigration and Border Protection, *Proof Committee Hansard*, 31 Jan 2014, pp 10–12.

fleshed out thoroughly'.⁷ Additionally, that there are genuine issues of commercial secrecy and national security that 'require there not be public disclosure'.⁸

1.10 It is worth noting that claims of public interest immunity were regularly made by representatives of the former Labor Government in the 42nd and 43rd Parliaments. These claims related to a number of issues including sports and recreation facilities, environmental issues, the carbon pollution reduction scheme, private health insurance reforms, employment services, chemotherapy treatment and aged care providers.⁹

1.11 In evidence to the Committee, the Clerk of the Senate stated that it was 'not uncommon' for Ministers to refuse to refuse orders for the production of documents, also stating that '[i]t is certainly a fact that there is a degree of noncompliance with orders for the production of documents'.¹⁰

1.12 The Clerk provided evidence that in the 42nd Parliament, 33 orders for the production of documents were not complied with, and in the 43rd Parliament, 26 were not complied with.¹¹

1.13 There was no evidence provided to the Committee that demonstrated there was a genuine public interest in having the categories of information, as detailed below, being released:

- Activity summaries
- Briefings internally and externally, including Minutes and Talking Points as necessary
- Case note entries and taskings, timelines and charts
- Chronology reporting of SIEV, SOLAS and SAAR events
- Coordination messaging
- Electronic External Enquiry forms
- Email correspondence
- Entry reporting including interviews, nomination rolls, screening reports
- Guidelines
- Information and subject reports
- Input into databases and information storage systems (and related reporting outputs)

7 Senator Sarah Hanson-Young, *Senate Hansard*, 4 December 2013, p. 69.

8 Senator the Hon Kim Carr, *Senate Hansard*, 4 December 2013, p. 69.

9 Senator Zed Seselja, *Proof Committee Hansard*, 31 January 2014, p. 5.

10 Dr Rosemary Laing, Clerk of the Senate, *Proof Committee Hansard*, 31 January 2014, p. 5.

11 Dr Rosemary Laing, Clerk of the Senate, answer to question taken on notice, received 31 January 2014.

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- Intelligence reporting including requests, plans, interview reports, contacts, recommendations
 - Ministerial and Cabinet correspondence and advice, including related briefing and comments
 - Operation plans, orders, scans, situational reports
 - Records of conversations
 - Reviews and input to reviews
 - Sighting reports including related intelligence, visual contact, interaction, vessel reporting and asset taskings/movements
 - Vessel broadcasts.¹²

Provision of Information

1.14 Dr Rosemary Laing, Clerk of the Senate stated in Advice to the Committee dated 7th January 2014 that:

There are parliamentary mechanisms...such as the receipt of evidence in camera or the provision of confidential briefings to know against the public interest in that particular information remaining confidential.¹³

1.15 Substantive action was undertaken by the Minister and the Assistant Minister to provide the information requested in an altered form to ensure the need to ensure that information remained confidential was adequately balanced against the Senate's need to hold the Government to action.

1.16 Minister Morrison made himself available to the Committee on his own initiative. This occurrence is the first time in 22 years that a House Minister has testified at a Senate Committee Hearing.

1.17 A number of avenues of information have been offered and provided to Members of Parliament, the media and the public by both The Hon. Scott Morrison and Senator Cash in relation to the Government's successful Operation Sovereign Borders policy.

1.18 In addition to testifying before the Senate Committee, the Minister for Immigration and Border Protection has also offered confidential briefings to representatives from Labor and Greens in relation to Operation Sovereign Borders. As yet, it is the understanding of Coalition Members that no Greens representative has taken up the offer by the Minister.

12 Mr Martin Bowles, Secretary of the Department of Immigration and Border Protection, *Correspondence to the Committee*, 29 January 2014.

13 Dr Rosemary Laing, Clerk of the Senate, *Advice to the Legal and Constitutional Affairs References Committee*, 7 January 2014, p. 3.

1.19 Weekly updates have also been provided which detail a number of statistics relating to the programme, including:

- The number of persons who have illegally entered Australia by boat and transferred to immigration authorities
- The number of transfers to offshore processing facilities and the standing population of those facilities as well as at Christmas Island
- The number of voluntary or involuntary returns; and
- The details of any incidents, arrests or significant disruptions as appropriate.¹⁴

1.20 Both the Minister and Assistant Minister continue to make themselves available, conduct interviews, appear at press conferences and respond to media enquiries on a regular basis.

1.21 The provision of information and the offer of confidential briefings (if taken up) provided significant opportunity for the Committee to determine whether a claim of public interest immunity was valid. The argument that the non-release of a schedule of documents was an obstacle to determining the validity of the claim could have been resolved through the use of confidential briefings as offered by the Minister.

Conclusion

The Coalition Members do not support the majority report. We particularly reject Recommendation 1 of the majority report.

The claim of public interest immunity is valid.

**Senator Zed Seselja, Deputy Chair
Liberal Senator for the ACT**

**Senator the Hon. Ian Macdonald
Liberal Senator for Queensland**

14 The Hon. Scott Morrison MP, Minister for Immigration and Border Protection, *Proof Committee Hansard*, 31 January 2014, pp 10–12.