

GOVERNMENT MEMBERS' REPORT

I

PREAMBLE

When you say to me, "You know what I feel," in answer to my first question, of course I know what you feel. I understand why you feel like that. But I hope you understand the way that some of us on our side of the parliament feel when we see some of our colleagues who are not returned in a federal election.

Senator Faulkner to Admiral Barrie¹

1. For fifteen 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 (the "certain maritime 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*.

2. In truth, neither the Inquiry, nor the Majority Report, have had anything to do with the "children overboard" incident, the structure of the Australian Defence Force or the Australian Public Service, the "Pacific Solution", or any broader policy issue. As Senator John Faulkner revealed, in the rare unguarded remark quoted at the head of this Chapter, 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.

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

¹ *Transcript of Evidence*, [CMI Inquiry] 12 April 2002, p. 771

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.

4. The peculiarly insidious intellectual dishonesty which corrupts the Majority Report is particularly manifest in the use of two techniques which could come straight from the pages of George Orwell. The first is to assert conclusions about the culpability (or motives) of individuals on the basis of surmise alone – or, on occasions, surmise garnished by selective and misleading reference to the evidence. By way of example only (for the instances are too numerous to deal with separately):

SIEV 4 was 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. The behaviour of the unauthorised arrivals was to be a public justification for the policy.²

The other technique is the use of “open findings”, in the form of assertions that the Committee is unable to determine a question one way or the other – and thus leaving an air of doubt about whether wrongful conduct was engaged in - in circumstances where there is simply no evidence whatsoever to suggest that wrongful conduct occurred. An example of that form of innuendo is paragraph 6.101:

The Committee is unable to determine whether on 7 November Mr Reith, in telephone conversations with him, informed the Prime Minister that there was no other evidence supporting the claim, and that he had been informed by the Acting CDF that the incident did not take place.³

Given that (a) not only is there not a syllable of evidence to support either of those propositions, but (b) both the Prime Minister and Mr. Reith made statements on the public record unequivocally stating that no such matters were discussed between them; and (c) there is no other evidence – documentary, hearsay, circumstantial or otherwise – to contradict them, Government Senators are at a loss to see how the question (in the sense of there being an area of doubtful or disputed fact) remains uncertain.

² *Majority Report* p. 7

³ *Majority Report*, p. 78

5. What the use of such techniques underlines is that the Majority Report is a document of no forensic standing whatever: it is a political polemic, not an attempt to analyse evidence in order to find facts. It is the product of minds uninfluenced by the evidence.

6. The foremost target of the Labor Party is the former Defence Minister, Mr. Reith. Only a fool would believe that the Labor Senators' minds on the subject of Mr. Reith were not set in stone before the first syllable of evidence was heard. However, the hypocrisy of the Labor Senators in regard to Mr. Reith is not limited to predetermining the Committee's conclusions. There are two particular matters to which, by way of preamble, the Government Senators wish to draw attention.

7. In the first place, throughout the life of the Inquiry Labor Senators, and in particular the Labor Senate Leader, Senator Faulkner, demanded that Mr. Reith should be called before the Inquiry. No fewer than four requests were issued, to all of which Mr. Reith declined to respond. The Committee received advice from both the Clerk of the Senate and from Mr. Bret Walker SC, to the effect that the Senate undoubtedly had the power to summon Mr. Reith (and Ministerial advisers). Mr. Reith's failure to appear was the subject of repeated denunciation. Yet ultimately, when at a private meeting of the Committee on 22 May 2002 Senator Bartlett (the Australian Democrat member of the Committee) moved that Mr. Reith be summoned, the three Labor Senators voted to defeat the motion, while the Government Senators abstained. Why, if the Labor Senators were serious about calling Mr. Reith to account, did they retreat when told by Government Senators that we would not stand in their way? The considerations, referred to at paragraph 7.146 of the Majority Report, which might have caused the Committee to stay its hand before summoning Ministerial advisers, could have no application to Mr. Reith. To add further to the air of solemn farce, the majority of the Committee then appointed another Senior Counsel, Mr. Stephen Odgers SC (at the expense of \$38,500 in professional fees), to suggest a series of questions which *could* have been asked of Mr. Reith *had* he been called – and then proceeded to prepare the Majority Report *before Mr. Odgers' report was even received!* (Nor was the Report altered in any material respect in subsequent drafts.)

8. The core allegation against the Government revealed in the Majority Report is not an allegation about facts – it is an allegation about motives. Put simply, it is asserted that members of the Government and their staff contrived to maintain a public falsehood (i.e., that a child or children had been thrown overboard from a vessel containing unlawful immigrants attempting to enter Australian waters) in order to improve the Government's prospects during an election campaign. The chief target of that allegation is Mr. Reith himself. The problem for the Majority Report is that, insofar as its approach and conclusions are based upon speculations about motive, the existence of any

such motive is comprehensively rebutted by other evidence to which the Majority Report does not so much as refer (and which was unchallenged). We refer to the evidence that Mr. Reith was, during the course of the election campaign, informed of much more widespread misconduct by potential illegal immigrants – in some cases, of an even more serious character than that concerning which he is alleged to have misled the public about the “certain maritime incident”. Yet none of those other episodes were ever publicly revealed – notwithstanding the fact that, if the Labor Senators’ attribution of malign motives to Mr. Reith were credible, it would have been very much in the Government’s political interests for him to reveal them.

9. In Appendix 1 to the Government Senators’ Report, we set out the evidence of what several of the senior military witnesses – including the Chief of the Defence Force, Admiral Barrie; the Chief of Navy, Vice Admiral Shackleton; the Commander of Operation Relex, Rear Admiral Smith; the Head of Strategic Command, Air Vice-Marshal Titheridge and the Commanding Officer of the HMAS *Adelaide*, Commander Banks – identified as a “pattern of conduct” by potential illegal immigrants in order to create safety of life at sea situations, and otherwise to expose Australian personnel to moral blackmail (and, in many cases, actual physical danger). Originally, the Government Senators decided to lead this evidence in relation to Term of Reference ©, and in order to place the operation carried out by *Adelaide* on 6-9 October 2001 in context. What the evidence also revealed, however, is that Mr. Reith, well knowing of the litany of disgraceful conduct described in Appendix 1, summarized in the document which became known as the “Titheridge Memorandum” (Appendix 2) and particularized by the document put into evidence by Rear Admiral Smith and colloquially known as the “matrix document” (Appendix 3), forebore from attempting to turn that knowledge to the Government’s political advantage: the very sin of which he stands accused – on the most specious analysis of the evidence – by the Majority Report.

10. One of the strongest pieces of evidence to this effect is that of Admiral Barrie:

Senator MASON – So what has been hidden somewhat but is starting to emerge is that, despite claims from the Opposition that the Government used SIEV 4 for political purposes, the Government had so much more information on quite serious threats to life, sabotage and a child dropped overboard in one particular instance, yet that was not made known to the public. Until Senator Brandis raised those issues a week or so ago, we did not know about it. Why didn’t we? There are two possibilities: either the Minister knew about it and decided not to release it, and so he did not make political capital out of it; or he did not know. It looks like it was the former, which gives the lie to a lot of what the Opposition is claiming.

Adm BARRIE – I think the Minister was in possession of the knowledge. Certainly on a few occasions I can attest to that personally.⁴

The Chairman of the People Smuggling Taskforce, Ms. Jane Halton, observed, in response to questions from Senator Mason, as follows:

Senator MASON – The claim is made – and it has been made again by Senator Cook – that this information about a claim on SIEV 4 that a child was thrown overboard travelled at the speed of light. The implication was that the Government made political capital from that. The question that keeps raising its head is that – I have just mentioned SIEV 7 but there are other very serious incidents – SIEVs 7, 9 and 10 and of course 12 – Admiral Barrie said that operationally they were much more significant than SIEV 4, yet until recently we had heard a bit about SIEV 10 and none of the other SIEVs. Why is that?

Ms. HALTON – You tell me, Senator.

Senator MASON – The point is that all that information was not used for political purposes.

Ms. HALTON- The comment I would make, and it goes to my remarks which some have taken objection to, is that the task force always operated in a manner which was completely professional and consistent with Public Service practice and values – and that is precisely the point I will underscore – in passing on where relevant and appropriate information to the Minister. I cannot comment on the comment about the speed of light because, as I have already outlined, I was not aware of it. It is my understanding that people were informed about what actually happened in respect of each of these SIEVs.⁵

To similar effect is the evidence of Rear Admiral Ritchie at p. 382; Brigadier Silverstone at pp. 409-11; Rear Admiral Smith at p. 654; Vice Admiral Shackleton at p. 68 and Air Vice-Marshal Titheridge at pp. 693-4.

11. In Chapter II of this Report, the Government Senators have attempted to approach the issue forensically, free of rhetoric or polemic, to try to get to the bottom of what in fact did happen at the time of, and following, the “children overboard” report. We regard this as the core and substance of the Committee’s work. And, since the Majority Report shows no evident willingness to prefer analysis to rhetoric, we have attempted to redress the balance. As well, in the Appendices, we collate the evidence of the “pattern of

⁴ *Transcript of Proceedings*, p. 805

⁵ *Transcript of Evidence*, p. 1010.

conduct” of the potential illegal immigrants, which provides background and context to the central issue.

12. Although we have concentrated on the “children overboard” issue, there are two other aspects of the Majority Report upon which Government Senators wish to comment briefly: “SIEV X” and the Pacific Solution.

13. In regard to SIEV X, Government Senators support the general conclusions and findings in Chapters 8 and 9. In particular we agree with the finding in paragraph 9.142, which states “On the basis of the above, the Committee cannot find grounds for believing that negligence or dereliction of duty was committed in relation to SIEV X.” This should be all that is said in relation to this part of the Inquiry, which took up an inordinate amount of time to attempt to deal with the submission of one person, Mr. Tony Kevin, based upon dubious information and scant knowledge of the facts. We cannot help but wonder, though, whether the conspiracy theories so sedulously fostered by other Senators in relation to SIEV 4 may have nurtured the febrile climate of suspicion in which Mr. Kevin’s fanciful allegations were able to establish a foothold of credibility. The exhaustive nature of the public hearings into the scenario promulgated by Mr. Kevin and the conclusion and findings of this Committee should put an end to further public speculation.

14. In relation to the Pacific Solution, the Government Senators do not generally support the views expressed in Chapters 10 and 11. The Australian Government entered into negotiations for the processing of asylum seekers in several Pacific nations rather than “onshore” in Australia or its territories for two principal reasons. First, to ensure that those arrivals not found to be refugees do not have access to lengthy appeal processes in the Australian Courts. Offshore processing ensures that asylum seekers have access to neither the *Migration Act* 1958 nor judicial review under Australian law. Moreover, even those asylum seekers who are successful in their claim for refugee status have no presumed right to resettlement in Australia. As even the Majority Report concedes,⁶ the Pacific Solution has achieved this objective. Secondly, a major aim of the Pacific Solution was to deter unauthorized boat arrivals. While it is true, as the Majority Report indicates,⁷ that offshore processing of asylum seekers is more expensive than onshore processing of equivalent numbers, it is critical in deterring and offering a preventive measure to people smugglers and unauthorized arrivals. With the advent of the Pacific Solution and the offshore processing of asylum seekers, no new unauthorized boat arrivals have sought to enter Australian waters since December 2001. Had this strategy not been adopted it is impossible to estimate the number of unauthorized boat arrivals which would have occurred. What can be said, with reasonable certainty, is that the flow of people attempting to circumvent Australia’s immigration laws would have continued unabated – in which event,

⁶ Majority Report, para. 11.106

⁷ Majority Report, paras. 11.60 – 11.92

the onshore costs may well have exceeded the costs of the Pacific Solution. The Pacific Solution passed a basic test of public policy: it was completely successful in achieving its stated objective.

15. Except to the extent otherwise indicated, the Government Senators dissent from the Majority Report in its entirety.

GEORGE BRANDIS

BRETT MASON

ALAN FERGUSON