Australian Democrats Additional Comments

Introduction

I support the recommendations of the Senate Committee into a Certain Maritime Incident. I agree broadly with the thrust of the report and the assessments made, without agreeing with every single comment in the full report. I will draw some of my reservations to the attention of the Senate in due course.

The reporting of a child thrown overboard was the catalyst for the Senate inquiry and my conclusion is that the deliberate attempts to continue to mislead the public are to be condemned. Nevertheless, there are far more serious ramifications in a policy sense contained in the Pacific Solution. I remain convinced that the far more important issue is the systematic abuse of human rights inherent in the Pacific Solution, rather than one particular incident which was, in reality, only a symptom of the problem.

SIEV X and the Pacific Solution

I agree with the conclusions and the recommendations of the Committee regarding the sinking of the SIEV X and the Pacific Solution. However, I believe stronger emphasis needs to be given to the manifest failures of government policy that these matters highlight.

I believe that the SIEV X incident, like the 'children overboard' affair, is symptomatic of flaws inherent in the new border protection regime policy, and that it exposes major failures in the implementation of that policy.

Fundamental to the new border protection regime is an underlying lack of respect for the value of human life and human rights. This inherent bias was exposed in the application of the policy in relation to SIEV 4, SIEV 6 and SIEV 10, among others.

Of equal concern is the border protection regime's strategy to disrupt, deter and deny entry of asylum seekers appears to be in direct conflict with the *Navigation Act 1912* and our obligations under the *1974 United Nations Convention for the Safety of Life at Sea*. It is important that those obligations are spelt out here so that the operational failure over SIEV X is fully understood.

The 1974 SOLAS Convention provides regulations and codes of conduct requiring vessels at sea to render their assistance in circumstances where they receive signals that vessels are in distress. In particular, Regulation 15 (5) of the Convention declares:

> Each contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of people in distress at sea around its coasts.

Also of note, Section 207 the *Navigation Act 1912* (Cth) defines a 'seaworthy' vessel as:

> 207 (1) A ship shall not be deemed seaworthy under this Act unless
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> i) It is in a fit state as to condition of hull and equipment, boilers and machinery, stowage of ballast or cargo, number and qualifications of crew including officers and in every other respect to encounter ordinary perils of the voyage then entered upon and
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> ii) It is not overloaded

These two points should be borne in mind in the discussion on SIEV X that follows.

SIEV X

In assessing the SIEV X episode, the Committee examined whether there was enough information available to warrant Australian officials acting to rearrange the maritime surveillance pattern and the deployment of RAN vessels with a view to saving survivors in the water or searching for the vessel before it sank.[1]

Crucial to an assessment of this question is the intelligence gathered by Australian agencies and, moreover, *how* it was used in decision making.

The Committee noted that 'intelligence did suggest a vessel had left a location in South West Java and, if concerns had triggered a response, it is possible that a search could have been mounted based on these coordinates'. However, the Committee found that because the information received on the vessel's point of departure was incorrect (SIEV X in fact departed from Sumatra, not Java), a search 'may not have found the vessel'.[2]

The Committee also concluded that, because the intelligence on SIEV X was imprecise and not supported by the normal signs of a vessel in distress or potential peril, it could not 'find grounds for believing that negligence or dereliction of duty was committed in relation to SIEV X'.[3]

I consider, however, that to understand the SIEV X tragedy fully, two key characteristics of the Government's border protection regime need to be highlighted. First, the response of Australian officials to the SIEV X intelligence reveals the inherent bias, noted already, pervading the Government's border protection regime in its totality – a bias that is skewed towards 'detecting, deterring and denying' asylum seekers rather than reacting to warnings of the danger to people attempting the

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1 Majority Report, 9.132

2 Majority Report, 9.135

3 Majority Report, 9.136

passage to Australia in unseaworthy vessels. This bias can be seen in the mindset of those handling and analysing the intelligence on SIEV X.

It is evidenced in HQNORCOM's explanation of the frame of reference through which boat arrival intelligence was viewed and interpreted. HQNORCOM, the operational command centre for Operation Relex, described the relationship between operational priorities and intelligence in the following manner:

> HQNORCOM's priority task was to detect, deter and, if directed, return SIEVs attempting to gain access to Australian territory. Consequently, the priority intelligence focus within HQNORCOM was, and continues to be, the determination of when and where SIEVs will arrive in Australia's contiguous zone.[4]

While HQNORCOM did say that SOLAS concerns figured in intelligence assessments when relevant and the information was consistent and credible,[5] it is clear that such concerns were a lesser order priority than the primary focus on detection and interception.

It is within this framework that the intelligence on SIEV X was analysed and interpreted. It is little wonder, then, that the warning signs of SIEV X's plight were discounted or overlooked by Australian authorities. This is apparent in the response by various agencies to the vital AFP intelligence of 20 and 22 October.

As the Committee report details, the personal assessment of the AFP officer handling these reports from a source in Indonesia was that the vessel was at increased risk owing to overcrowding. It does not require 20-20 vision in hindsight to recognise that 400 passengers on a vessel belonging to a people smuggler, well known to Australian officials as using smaller than normal vessels, was a tragedy in the making.

And yet Coastwatch appears to have considered that this piece of the intelligence on SIEV X did not warrant passing on to the ADF. While there may have been doubts about the veracity of the source of this intelligence, the danger signs contained in this information should have prompted a search for corroborating intelligence and 'collateral information' about the vessel's condition. That is how an intelligence system should operate. That it did not reflects not only a mindset geared towards deterring and denying asylum seekers, but also an intelligence system that had serious organisational flaws and failings.

Which brings me to my second concern about how the SIEV X tragedy reveals the nature of the border protection regime. The flaws inherent in the policy itself were also manifest in the organisational arrangements – the grandiosely named 'architecture' – put in place to support it. A policy made on the run results in an organisational framework patched together in an ad hoc fashion. Witness for instance

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4 Defence Answers to Questions on Notice, 20 September 2002 W66.

5 Defence Answers to Questions on Notice, 20 September 2002 W67.

the Navy's admission to the Committee that frontline ships of the fleet had to be rushed home from Southeast Asia for redeployment in Operation Relex.

It is within this context that the communication breakdowns with the SIEV X intelligence need to be understood. As the Committee report notes, there were four instances that we know of when intelligence on SIEV X was mishandled:

- Coastwatch's failure to convey the report that the vessel was at increased risk due to overcrowding to the ADF on 20 October;
- The failure, presumably of Coastwatch again, to forward the intelligence to DIMIA, the peak agency for intelligence matters on border protection;
- The failure to raise the substance of the AFP intelligence of 20 October at the meeting that day of the People Smuggling Taskforce; and
- The partial transmission of the AFP intelligence of 22 October from Coastwatch to the search and rescue authorities at AusSAR, which omitted the critical information that SIEV X was thought to be overcrowded with 400 passengers on board.

The Committee rightly notes that these failings indicate systemic problems in the intelligence 'architecture'. It is possible that if the AFP intelligence reports had been sent in their entirety to all in the decision making system, then more vigorous action might have been taken, even if this only amounted to requests to the source intelligence agencies for urgent corroboration of the initial warning signals.

In any event, the Committee report is right to conclude that the original breakdowns in the intelligence handling were compounded by the subsequent failure to conduct a review of the SIEV X episode. More recent investigations of the intelligence system for the border protection regime have shown that the organisational weaknesses exposed by the SIEV X are not isolated but systemic in nature. An audit earlier in 2002 by of the Australian National Audit Office (ANAO) identified manifold problems in the management framework for the inter-agency intelligence system to counter illegal immigration. The ANAO found:

- that DIMIA did not develop a strategy or a framework for investigating organised people smuggling resulting in
- a lack of clarity across the organisation concerning the objectives scope and focus of the People Smuggling Taskforce.
- an inability to provide assurance of PST performance insufficient development of processes and procedures to support investigations and limited intelligence to drive and support investigations.
- limited planning documents or standard operating procedures to guide staff and support the operation of the departments intelligence function and its interaction with other agencies.

- the department did not have a formal risk identification monitoring and management process in place at the corporate or operational level. There was no systematic or proactive approach to identify manage or monitor various risks associated with measures to prevent detect and disrupt unlawful entry. *This risk management strategy is not expected to be operational until 2003.*

- No structural process for identifying priority areas

- DIMIA should conduct a formal assessment of risks and controls in relation to prevention of unlawful entry to Australia. [6]

- Intelligence Analysis Section did *not* have a database to store, manage or analyse information.[7]

- The extent to which activities contribute to deterring unauthorised boat arrivals is difficult to measure. [8]

The evidence before the committee regarding the 'children overboard incident' and the sinking of the SIEV X highlights the dangers of implementing policy on the run. The government has instituted a policy designed to ensure that people cannot access their fundamental rights under international law. There is no doubt that this policy implemented a system dangerously different from the previous policy regarding the detection of asylum seekers arriving by boat.

Perhaps the most poignant way of demonstrating this is to note what would have occurred if the SIEV X had been intercepted by an Australian vessel *before* it sank. It is almost certain, based on what has occurred in all other situations since the implementation of Operation Relex, that the first action would *not* have been to ensure the safety of those on board. What would almost certainly have occurred would have been an attempt to turn this horrendously overcrowded boat around and make it sail back to Indonesia.

The Pacific Solution

The Committee failed to make findings or recommendations in regard to a number of significant aspects of the Pacific solution raised in the report. These include the impact of denying access to Australian law by detaining people under these arrangements, the changes to the visa regime and, central to the inquiry, the policy of deterring refugees from applying for asylum in Australia.

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6 Australian National Audit Office, Performance Audit Report, *Management Framework for Preventing Unlawful Entry into Australian Territory*, 2001-2002, p 46

7 Australian National Audit Office, Performance report ' *Management Framework for Preventing Unlawful Entry into Australian Territory*' 2001-2002, p..61

8 ibid, p. 68

The Pacific solution is in clear breach of the Refugee Convention.[9] Article 31 of the Convention requires that contracting states shall not impose penalties on asylum seekers on account of their illegal entry or presence. The detention of refugees is considered to be an exceptional measure, which should be applied on a case-by-case basis with reference to domestic, international refugee and human rights law. Asylum seekers and refugees should not be detained for the purpose of deterrence.[10]

There is no doubt that the drastically different processing regime placed upon those who arrive by sea is not only a penalty, but also a method of Australia avoiding responsibility as a contracting state. The Prime Minister himself has stated that the decision regarding those who come into the country will not be made according to international refugee law but according to criteria set by the Australian government, declaring that 'We will decide who comes to this country and the circumstances by which they come'.[11]

The Australian government has expressly pursued a border protection regime which has the goal of sending a message to those who seek to come to Australia in this manner.[12] Central to this policy is the concept of deterrence. The policy involves preventing asylum seekers from reaching Australia, through the disruption of people smuggling plans or by towing boats back to international waters. Asylum seekers are denied entry and sent to a declared country where they are detained indefinitely.

People detained under the Pacific solution arrangements are prevented from accessing the Australian courts. Their status as refugees is assessed through a different process than that which applies to those who reach the mainland, with no recourse to independent advice or Australian jurisprudence. If they are successful in achieving recognition as refugees, they have no presumption of protection in Australia.

The Pacific Solution also involves the introduction of new visa regimes. Those lucky enough to be granted a visa to Australia are only given temporary protection. This is radically different to those who are granted protection visas offshore. In other words, one class of temporary visa is granted on the sole basis of place of arrival, the other class of visa on the basis of actions taken whilst in transit before seeking asylum. This approach is not only inconsistent and unnecessarily complex, it is also a reflection of the inherently discriminatory and unfair nature of the Government's border protection regime. It should be abolished immediately.

The fact that Temporary Protection Visas also prohibit any form of family reunion is an additional travesty. It should be noted that many of the people on the SIEV X would not have needed to task the risky and ultimately fatal option of trying to travel to Australia by boat if the option of family reunion had been open to them. The fact

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9 Convention Relating to the Status of Refugees (UN, 1951)

10 ibid, p.3

11 September 2001 Re-Election statement

12 SBS Four Corners Program, *The Inside Story* 2001

that there were such a large number of women and children who lost their lives is no coincidence, but a direct result of the fact that no other options were available to some of them to reunite with their immediate family.

Recommendation

That the Australian government immediately abolish temporary protection visas and the Pacific Solution, and that acceptance of asylum seekers and processing of claims be done onshore.

Children Overboard

An unusual aspect of this Inquiry was the provision of a submission by the Federal Parliamentary Press Gallery. This submission was useful in demonstrating how attempts to report accurately and fairly are compromised when Governments or Ministers deliberately seek to conceal or distort facts. However, it also brings into focus the need for media outlets to correct or follow-up stories which have been shown to be inaccurate. This is particularly important in sensitive or potentially inflammatory areas, such as we have seen with asylum seeker stories.

A good example of this was the *Daily Telegraph* story of 13th October, 2001. This front page story gave detailed allegations including that boat people broke the arm of a little girl, that Special Air Service troops conducted covert surveillance of a man believed to be a sleeper agent with connections to Osama bin Laden and that a woman tried to throw her daughter over the side of the landing craft. It also concluded that a total of 36 hours of video footage and 800 digital photos showing riots, fights and ship damage had been taken by the Maritime Commander for review and evidence. In response to questioning about this report, Rear Admiral Smith gave the following response:

> We investigated it and found that there was no evidence to support any of those allegations: no evidence to support the child having her arm broken; no evidence to support any covert surveillance of anybody—I think a small camera was mentioned in that particular article—it did not happen. There was no evidence to support someone trying to drop a child over the side of the LCM. So in fact, with all those claims, there was no evidence to support them.[13]

As far as I am aware, these very serious allegations, which were made in a front-page story of the *Daily Telegraph*, have not been corrected. If they have, I doubt very much is was in large print on the front page. This Committee has rightly pointed out the importance of Ministers and politicians correcting the record when a mistaken allegation has been made. The same responsibility should apply to the media.

Whilst supporting the Committee's findings in this area, I comment on the decision of the Committee not to utilise all its powers in attempting to get key witnesses before the Committee. It is clear that key questions have remained unanswered. The

13 *Transcript of Evidence*, CMI 464

Committee's unwillingness to issue summons, particularly in regards to Mr Reith, is a disappointment. Whilst I accept that this decision not to act may have been made in good faith, I don't believe the alternative course of action that was adopted was an effective option. Whilst the issuing of a summons by a Committee of Parliament should not be undertaken lightly, I believe the issue and the principle involved was of sufficient importance to pursue that course of action on this occasion.

I support the Committee's findings on developing ways of ensuring greater accountability for Ministerial advisers in the future.[14]

Senator Andrew Bartlett

Australian Democrats, Qld

14 See also 'Ministerial advisers must account for their actions', Senator Andrew Murray, *Canberra Times*, 9th April 2002