

EXECUTIVE SUMMARY

The report of the Select Committee on a Certain Maritime Incident addresses four major sets of issues. They are:

- (1) the so-called ‘children overboard’ incident involving the HMAS *Adelaide* and the vessel known as SIEV 4, and the management of information concerning that incident by the Federal Government and Commonwealth agencies;
- (2) accountability issues arising from the ‘children overboard’ incident, including the adequacy of administrative practices in certain Commonwealth agencies, and the accountability framework for Ministers and their staff;
- (3) other matters arising out of the Australian Defence Force operation ‘to deter and deny’ asylum seekers from arriving in the Australian migration zone in an unauthorised manner by boat, with particular reference to the vessel now known as SIEV X; and
- (4) the nature of the agreements reached, the operation and cost of detaining persons in Nauru and Papua New Guinea as part of the so-called ‘Pacific Solution’.

In addition, in the first two chapters of the report, the Committee outlines the broader context for these issues, focusing particularly on the post-*Tampa* border protection regime and the related Australian Defence Force operation, Operation Relex.

This executive summary outlines the main lines of argument and the findings made in relation to these issues. The Committee emphasises, however, that the executive summary is unable to convey fully the complex and detailed nature of the evidence on each of the matters before it. The summary is accordingly provided as a guide to the report. It is not intended to substitute for it.

The Committee also notes that it has been considerably hampered in its work by the refusal of the government to allow certain witnesses to provide evidence to the inquiry.

A New Border Protection Regime – Chapters 1 and 2

The rescue on 26 August 2001 by the Norwegian container ship the MV *Tampa* of Afghan asylum seekers en route from Indonesia to Australia, and their subsequent transportation to waters off Christmas Island, proved to be the catalyst for a new border protection regime intended to prevent unauthorised boat arrivals from reaching Australia. The number of such arrivals had risen substantially over the previous two years, from less than a thousand per year to over four thousand, and there was a view that Australia’s refugee determination procedures were leading to it being targeted by organised people smuggling operations.

The timing of the *Tampa* incident in the lead up to the 2001 Federal election provided an opportunity for a hardline political response to unauthorised arrivals. The first Chapter of the report outlines in brief the events which followed the *Tampa* rescue, the policy and legislative changes which constituted the new border protection regime, and the role of the People Smuggling Taskforce in providing whole-of-government oversight and coordination.

Chapter 1 also examines the disruption and deterrence activities which were implemented to pre-empt people smugglers and asylum seekers before they could organise to leave Indonesia. Since the close of the Committee's hearings on the inquiry, more information has emerged on the public record about the nature of this disruption activity.

The Committee considers that the gravity of that information has raised more questions about the methods and tactics employed under the auspices of disruption campaign. The Committee therefore believes that a full independent inquiry into what disruption actions did occur prior to refugee vessels departing Indonesia is required. The focus of such an inquiry should be on the activity that Australia initiated or was instrumental in setting in motion through both its partners in the Indonesian government and its own network of informants.

RECOMMENDATION 1

The Committee recommends that a full independent inquiry into the disruption activity that occurred prior to the departure from Indonesia of refugee vessels be undertaken, with particular attention to the activity that Australia initiated or was instrumental in setting in motion through both its partners in the Indonesian government and its own network of informants.

The second chapter of the report looks at the implementation of the Australian Defence Force's expanded role under the new border protection regime, *Operation Relex*, and the extensive inter-agency intelligence capability which informed it. Since 3 September 2001, the ADF has been tasked with a lead role in the area of unauthorised boat arrivals. It has designated its corresponding operation as Operation Relex.

Operation Relex involved a significant increase in not only the scope but also the scale of Australian border protection operations, and particularly the nature of the assets deployed. The RAN's major fleet units, frigates, amphibious ships and auxiliaries, now played a lead role in interception and boarding operations in addition to Customs and Coastwatch craft. A 'layered surveillance' operation, utilising RAAF P-3 Orions, Navy helicopters, and Coastwatch aircraft, supported the Navy's interdiction effort.

Under *Operation Relex*, twelve Suspected Illegal Entry Vessels were intercepted between 7 September and 16 December 2001. Where previously the Navy's role had been to escort unauthorised arrivals to an Australian port for reception and processing by relevant agencies, the new ADF role was to thwart their objective of reaching Australian territory. The new Australian response led to a corresponding change in the

behaviour of the asylum seekers. From being cooperative and compliant, their behaviour changed to include threatened acts of violence, sabotage and self-harm, designed to counter the Navy's strategies.

The Committee finds two aspects of *Operation Relex* particularly notable. The first is the Royal Australian Navy's commitment to the fulfilment of safety of life at sea obligations, and to meeting the humanitarian needs of those on board the intercepted vessels. The second notable characteristic is the strictly centralised control through the Minister's office of information concerning the operation, which is examined further in following chapters in regard to the 'children overboard' controversy.

'Children Overboard' - Chapters 3 - 6

The basic outlines of the 'children overboard' controversy are by now well known.

On 7 October 2001, the Minister for Immigration, Mr Philip Ruddock, announced to the media that 'a number of children had been thrown overboard' from a vessel suspected of being an 'illegal entry vessel' just intercepted by the Australian Defence Force. The 'children overboard' story was repeated in subsequent days and weeks by senior Government ministers, including the Minister for Defence, Mr Peter Reith, and the Prime Minister, Mr John Howard. The story was in fact untrue.

The peculiar sensitivity associated with the claim that children had been thrown overboard was that it was made at the beginning of and sustained throughout a Federal election campaign, during which 'border protection' and national security were key issues. That asylum seekers trying to enter Australia by boat were the kinds of people who would throw their children overboard was used by the Government to demonise them as part of the argument for the need for a 'tough' stand against external threats and in favour of 'putting Australia's interests first'.

The key question for the Committee in relation to this issue was thus:

Why was the false claim that children had been thrown overboard made in the first place, and why was it not corrected or retracted prior to the Federal Election on 10 November 2001?

Questions that fall out of that key issue include:

- how did the false claim or mistaken report that children had been thrown overboard arise in the first place, and how was it passed to ministers?
- who knew, and at what time did they know, that the report was untrue?
- what efforts were made to pass advice to that effect to ministers, and was that advice adequate?
- what was the role of various Commonwealth agencies in managing this information and in taking responsibility for the integrity of the public record?
- what, if any, role was played by ministerial staff in promulgating and sustaining the original report after it was known to be untrue?

- what, if any, was the role played by ministers and the Prime Minister in promulgating and sustaining the original report after it was known to be untrue?

At the broadest level, the Committee has found that a number of factors contributed to the making and sustaining of the report that children had been thrown overboard from SIEV 4. They included genuine miscommunication or misunderstanding, inattention, avoidance of responsibility, a public service culture of responsiveness and perhaps over-responsiveness to the political needs of ministers, and deliberate deception motivated by political expedience. It has been the Committee's task to disentangle those factors as they led different individuals, and even the same individuals at different times, to act or to fail to act as they did.

In chapter 3, the Committee outlines the events of 6-10 October 2001 as recorded and reported by the logs, situation reports and statements of the HMAS *Adelaide* and its personnel. The Committee then discusses in detail the evidence pertaining to a telephone conversation which took place on 7 October 2001 between Commander Banks and his senior officer, Brigadier Michael Silverstone, out of which arose the original report that a child or children were thrown into the water from SIEV 4.

In chapter 4, the Committee discusses how this oral and uncorroborated report made in the midst of a complex tactical operation came to be disseminated so quickly and so widely. It outlines how doubts concerning the veracity of the report arose in the Defence chain of command over the period from 8 to 11 October, the search for evidence to corroborate it, and the point at which different elements in that chain reached the conclusion that the incident had not occurred. Finally, the Committee discusses how photographs taken of the sinking of SIEV 4 on 8 October came to be publicly misrepresented as being photographs of the 'children overboard' event.

In chapter 5, the Committee outlines the nature of the advice both about the original report that children had been thrown overboard and about the misrepresentation of the photographs which came from Defence in the period from 10 October to 8 November 2001. Advice, of varying comprehensiveness and authority, went on these matters from Defence to the Minister for Defence and his staff on eight separate occasions, and to officers of the Department of the Prime Minister and Cabinet and to the People Smuggling Taskforce on three occasions.

In chapter 6, the Committee examines the role played by Mr Reith and his staff in sustaining the original mistaken report and the photographs as evidence for it. It goes on to canvass the evidence which is available concerning the knowledge of the office of the Prime Minister of corrective advice from Defence. The Committee then assesses whether, in its view, officers of the Defence organisation could have done more to ensure that the record was corrected prior to the election on 10 November.

FINDINGS OF FACT

No children were thrown overboard from SIEV 4.

A report that a child or children had been thrown overboard from SIEV 4 arose from a telephone conversation between Commander Norman Banks, CO *Adelaide*, and Brigadier Mike Silverstone, CJTF 639, which occurred early in the morning of 7 October 2001.

The Government was advised of the report in the first instance through two channels: Air Vice Marshal Titheridge told the office of Minister Reith; Mr Bill Farmer, Secretary, Department of Immigration and Multicultural Affairs, told Minister Ruddock.

Photographs released to the media on 10 October as evidence of children thrown overboard on 7 October were actually pictures taken the following day, 8 October, while SIEV 4 was sinking.

By 11 October 2001, the naval chain of command had concluded that no children had been thrown overboard from SIEV 4. The Chief of Defence Force, Admiral Chris Barrie, was informed at the very least that there were serious doubts attaching to the report.

On 11 October 2001, Minister Reith and his staff were separately informed that the photographs were not of the alleged children overboard events of 7 October, but were of the foundering of SIEV 4 on 8 October.

On or about 17 October 2001, Admiral Barrie informed Minister Reith that there were serious doubts about the veracity of the report that children had been thrown overboard from SIEV 4.

On 7 November 2001, the then Acting Chief of Defence Force, Air Marshal Angus Houston, informed Minister Reith that children had not been thrown overboard from SIEV 4.

On four other occasions the lack of or dubious nature of evidence for the 'children overboard' report were drawn to the attention of the Minister or his staff by officers from Defence.

On no occasion did the Defence organisation produce any evidence to PM & C, and through it to the office of the Prime Minister, which corroborated the original report that children had been thrown overboard. However, on no occasion did the Defence organisation provide definitive advice to the Department of the Prime Minister and Cabinet or the People Smuggling Taskforce that children were not thrown overboard from SIEV 4 or that the photographs were not of that alleged incident.

On 7 November 2001, Minister Reith informed the Prime Minister that, at the least, there were doubts about whether the photographs represented the alleged children

overboard incident or whether they represented events connected with SIEV 4's sinking.

Despite direct media questioning on the issue, no correction, retraction or communication about the existence of doubts in connection with either the alleged incident itself or the photographs as evidence for it was made by any member of the Federal Government before the election on 10 November 2001.

Minister Reith made a number of misleading statements, implying that the published photographs and a video supported the original report that children had been thrown overboard well after he had received definitive advice to the contrary.

The Committee finds that Mr Reith deceived the Australian people during the 2001 Federal Election campaign concerning the state of the evidence for the claim that children had been thrown overboard from SIEV 4.

It is not possible to make a finding on what the Prime Minister or other Ministers had communicated to them about this incident due to the limitations placed on this inquiry by the order of the Cabinet for ministerial staff not to give evidence.

In addition to these findings of fact, the Committee's examination of the evidence has led it to note several features of the 'children overboard' affair which it now highlights.

First, the Committee has noted that there were three unusual aspects to the handling of SIEV 4.

The vessel was identified and intercepted on the afternoon of 6 October 2001. That evening, a 'special arrangement' was put in place in order to meet a request from Minister Reith that he be briefed early on the following morning with the latest news on SIEV 4. The arrangement implemented by Defence to meet this request was for the Commander of the HMAS *Adelaide* to speak to his superior officer, Brigadier Silverstone, at a prearranged time early on 7 October 2001 and for Brigadier Silverstone in turn to communicate the content of that discussion to Air Vice Marshal Titheridge, Head of Strategic Command.

The conversation between Commander Banks and Brigadier Silverstone in fact occurred in the middle of an operationally hectic period for the *Adelaide*, and it was from this conversation that the report that a child or children had been thrown overboard emerged. Brigadier Silverstone told the Committee that he would never have had that conversation had the 'special arrangement' not been in place, and that without that conversation the 'children overboard' affair would never have occurred.

Also on the evening of 6 October 2001, news of the interception of SIEV 4 was leaked to the media. The Committee was unable to determine who was responsible for that leak, but heard from Ms Jane Halton, then Chair of the People Smuggling Taskforce, that the usual practice was not to comment on operational details while operations were underway. She was, she said, surprised that the detail of SIEV 4 was in the public domain by early in the morning of 7 October 2001.

The third unusual feature of the handling of SIEV 4 identified by the Committee was the ‘heated’ conversation which took place on 8 October between Admiral Barrie and the Secretary of PM & C, Mr Max Moore-Wilton. Admiral Barrie told the Committee that soon after he had been advised that SIEV 4 was sinking, he had had a telephone conversation with Mr Moore-Wilton, who instructed the Chief of Defence Force to make sure that everyone rescued went on board HMAS *Adelaide* and not to Christmas Island.

Admiral Barrie told Mr Moore-Wilton that he could not guarantee any such outcome, and that safety of life was to be the paramount consideration. In this emergency, if people had to be rescued and landed at Christmas Island that would have to happen. Admiral Barrie said that he had informed the Minister for Defence of this conversation, ensuring that he understood that the Defence forces were not ‘in absolute control of where people would end up’.

FINDINGS

The sequence of ‘unusual’ features surrounding the treatment of SIEV 4 - the leaking of the fact of SIEV 4’s interception to the media, the ‘special’ arrangement for Air Vice Marshal Titheridge to contact Brigadier Silverstone directly for the latest news, and Mr Moore-Wilton’s ‘heated’ insistence that the SIEV’s passengers not be landed on Christmas Island - all point to the likelihood that the Government had decided to make an example of SIEV 4.

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. It is in this context that one might best understand why the Secretary of PM & C wanted to ensure that the asylum seekers involved not set foot on Australian territory. It is also in this context that it is possible to understand why it may have been thought by the Government to be politically difficult to correct or retract claims made in relation to the passengers aboard SIEV 4 once they were suspected or known to be false.

A second important feature of the ‘children overboard’ affair was the interaction between Minister Reith and Ms Jane Halton, Chair, People Smuggling Taskforce, on 10 October 2001.

It was clear in evidence to the Committee that, up until 10 October, Ms Halton and her colleague Ms Katrina Edwards, First Assistant Secretary, Social Policy Division, PM & C, were dissatisfied about the amount of detail being provided to them about the alleged ‘children overboard’ incident from Defence. From about 8 October to 10 October they were, through their staff, actively seeking further details from Defence’s Strategic Command Division.

In response to this search, Strategic Command sent a chronology of events relating to SIEV 4 during the day on 10 October. At the end of the chronology, there was a series

of four bullet points under the heading, 'EVENTS'. The last bullet point, which has also been described as a footnote, said:

There is no indication that children were thrown overboard. It is possible that this did occur in conjunction with other SUNCs jumping overboard.

On the evening of 10 October, at the same time as Ms Edwards was drawing this bullet point to Ms Halton's attention, Minister Reith rang Ms Halton directly. At the end of the 'unusual' event of Mr Reith's phone call, he told Ms Halton that he had just released photographs to the media which showed children having been thrown into the water from SIEV 4. He also told her that there was a video of the event, and that witness statements were being collected from the crew.

Although Ms Halton maintained that she had no recollection of having been shown the chronology and its bullet point by Ms Edwards, she imagined that any doubt that may have been raised by this information was simply overridden by the evidence of which Mr Reith spoke.

Ms Halton insisted that, in addition to the advice from Mr Reith, and the lack of any definitive advice from Defence confirming that the incident did not happen, 'our interpretation of the facts of the case' was put in front of the evening meeting of the People Smuggling Taskforce, and no one demurred from the view that it had been established that children had been thrown overboard.

The Committee notes, however, that the talking points provided to the meeting on 10 October 2001 were derived from the Strategic Command chronology. They referred to '15 suspected unauthorised arrivals' who 'either jumped or were thrown overboard', but made no reference to children thrown overboard. If the 'facts' of the children overboard story were presented and agreed at the meeting, then they certainly were not highlighted in the material prepared for subsequent public consumption. These talking points were provided to Mr Miles Jordana, International Adviser to the Prime Minister, and, at Ms Halton's direction, to staff in the offices of Minister Ruddock, Minister Reith and Minister Downer.

The Committee is puzzled as to why, if Ms Halton considered that the claim that children had been thrown overboard from SIEV 4 had been definitively established, that claim was not reflected in the talking points prepared and disseminated on 10 October;

The Committee also notes, however, that Strategic Command never returned to the PST with definitive advice overturning the report that children had been thrown overboard. The Committee is aware that officers from PM & C had had to seek permission from the office of the Minister for Defence to pursue their earlier inquiries with Strategic Command. It would presumably have been very difficult for Ms Halton's division tacitly to register its scepticism of Mr Reith's advice by continuing such investigations.

In relation to Mr Reith, the Committee notes that:

- at the time of Mr Reith's telephone call to Ms Halton, his senior military adviser, Mr Mike Scrafton had been informed that the video did not show children being thrown overboard. No one knew what the witness statements would contain, but simply that at best they 'may' corroborate the original report. In relation to the photographs, the Minister's media adviser, Mr Ross Hampton, had been left a voicemail message, which he claims that he never got, telling him that they were being connected to the wrong events. He had certainly been told that there were doubts attaching to their veracity;
- despite this lack of evidence and in the face of public and official questioning of the allegations, the Minister confirmed the veracity of the original report in the media and advised Ms Halton, the senior official responsible for the whole-of-government management of 'border protection' issues, that he had evidence which backed up the claim.

A third feature of the 'children overboard' affair highlighted by the Committee relates to the role played by senior officers in the Australian Defence organisation in advising Government and senior officials of problems with the original story.

The Committee analyses in particular the adequacy of the advice provided by Admiral Chris Barrie, Chief of Defence Force, Air Vice Marshal Alan Titheridge, Head of Strategic Command and the senior Defence representative on the People Smuggling Taskforce, and Dr Allan Hawke, Secretary, Department of Defence.

The Committee was struck by the fact that none of these three senior officers considered themselves certain until well after the election on 10 November 2001 that children had not been thrown overboard from SIEV 4 on 7 October 2001. Both Admiral Barrie and Dr Hawke knew, they said, that the photographs had been wrongly connected with the alleged child throwing incident, but Air Vice Marshal Titheridge maintained that he had been unaware of even that fact.

As a consequence, none of these three officers provided definitive advice to government concerning the veracity of reports of the incident, although Admiral Barrie communicated the fact that there were 'serious doubts' about it to Minister Reith. Admiral Barrie did inform the Minister that the photographs were being wrongly portrayed and Dr Hawke did instruct his Head of Public Affairs and Corporate Communication to inform the Minister's office of the same fact. Dr Hawke did not himself directly communicate, either orally or in writing, with the Minister on this issue, and Admiral Barrie's discussion with the Minister did not, he said, at any stage go to the question of what was to be done to correct the public record.

At issue, for the Committee, was the question of why none of the three most senior officers in the Australian Defence Organisation considered himself to be in a position to provide serious and robust advice to the government in relation to the truth of the original report that children had been thrown overboard, or in relation to the need for the correction of the public record in relation to the photographs.

The Committee acknowledges that part of the explanation here is that all three were managing unprecedentedly heavy workloads. Whether children had been thrown

overboard or not was not significant from a military or operational point of view, and resolution of the question was, they say, therefore accorded very little priority. However, the Committee also notes that all three officers did in fact address the matter at least once. Each had the opportunity to seek and provide definitive advice, but did not do so.

FINDINGS

Admiral Barrie neither accepted the judgement of his chain of command that children had not been thrown overboard, nor did he possess any additional information on the basis of which he could justify holding to a different conclusion. It seems to the Committee that Admiral Barrie did not so much make an *assessment* of the advice from his chain of command, so much as make a *decision* to stick with the original verbal report.

Given that Admiral Barrie had been forthrightly advised by COMAST and Chief of Navy that the photographs were wrong and that the Minister was on the public record stating an untruth, the Committee is of the view that Admiral Barrie should have been determined to ensure that the minister understood clearly that there was an error and that the public record needed correcting.

The vague nature of Admiral Barrie's statements to the Powell and Bryant inquiries concerning the advice he had given to the Minister prior to 10 November 2001, and Admiral Barrie's adherence to his original position through until 24 February 2002, had the effect of protecting the Minister's position in the face of various findings and assessments to the contrary.

Air Vice Marshal Titheridge failed to register the importance of clarifying the truth of the report that children had been thrown overboard, despite having twice been directly asked to provide evidence and advice on the matter by the Chair and another member of the People Smuggling Taskforce.

Dr Hawke was remiss in failing to press Minister Reith on the question of whether he intended to correct the public record in relation to the photographs.

Accountability – Chapter 7

Many of the questions and concerns that animated the Select Committee's inquiry arose from considerations of accountability. Key features of the management and distribution of information about the 'children overboard' incident and its aftermath stand out as inimical to the transparency, accuracy and timeliness requirements that are vital for proper accountability. As a consequence, fair dealing with both the public and the agencies involved was seriously prejudiced.

Several features contributed to the accountability problems that marred the 'children overboard' affair. These included:

- a purist view of the Defence 'diarchy' which militated against clear, comprehensive and accurate advice being provided to the Minister for Defence;

- the strict control by the Minister's office of information related to Operation Relex which prevented normal checks and balances from occurring, and hampered the whole-of-government approach to people smuggling;
- ministerial staff inserting themselves into both the military and administrative chains of command, thereby destabilising proper operational practice and reporting back.;
- an inadequate governance framework within the People Smuggling Taskforce which failed to clearly define its accountability and reporting arrangements with the participating agencies;
- the tendency of ministerial staff to act as quasi-ministers in their own right, and the lack of adequate mechanisms to render them publicly accountable for their actions.

The Committee acknowledges the complexity of accountability in modern governance arrangements, and accepts the fact that there is a continuum of accountability relationships, both vertical and horizontal, between the public service, the government, the parliament and Australia's citizens. In the whole-of-government approaches involving discrete agencies working collaboratively towards the same policy outcome, notions of 'navigational competence' and 'the proper use of authority across a multirelationship terrain' seem particularly apt. Instead of thinking about a 'line of accountability', one should think in terms of a 'culture of responsibility'.

The 'diarchy' and accountability

The Defence 'diarchy' is ostensibly about bringing together the responsibilities and complementary abilities of public servants and military officials. But there remains, between the CDF and the Secretary, a mandated divide between 'operational' responsibility and the management of other Defence activities which has resulted in the adoption of a 'purist view' of the diarchy. This purist view seems to be more extreme than is necessary to enable the CDF to run military operations without interference. It impedes the kinds of interactions needed to effectively discharge Defence's mission 'to defend Australia and its interests', especially given a whole-of-government perspective and its attendant responsibilities and accountabilities.

The Secretary of Defence, Dr Hawke, advised the Committee that he refused to cut across the CDF by giving advice to the minister on 'operational' matters that were properly the responsibility of the CDF. This applied notwithstanding that Dr Hawke knew about the misrepresentation of the photographs, and the absence of corroborating evidence in Defence intelligence material and reports.

The diarchy is not an end in itself. It is meant to facilitate accuracy, timeliness and accountability. It is certainly not meant to be an impediment to full and frank advice going to the minister. Departmental secretaries have a particularly important part to play in serving the government as a whole, and especially in ensuring that they convey to their ministers advice on issues that may have a political dimension. The diarchy inhibited Dr Hawke from discharging those responsibilities. In short, the diarchy contributed to the failure by ministers to correct the public record.

FINDINGS

The diarchy concept served the Australian Defence Organisation well during the period where received notions of its purpose emphasised its fundamentally military functions. Now that the ADO's mission has shifted to 'defend Australia and its national interests' it has broader tasks and functions that demand a more nuanced articulation of the diarchy concept.

The diarchy proved inimical to the effective handling of the 'children overboard' controversy. In relation to its impact on accountability, the pursuit, by the ADO's leaders, of a purist view of the Defence diarchy:

- a) constrained the nature, timeliness and frankness of advice available to the minister from the defence organisation as a whole, thereby contributing to the failure to correct the record concerning the claims that children were thrown overboard from SIEV 4;
- b) militated against the proper exercise of the kinds of (horizontal) accountability necessary where whole-of-government operations are concerned; and
- c) is not consistent with the day-to-day practical realities and interactions between military and civilian personnel when they are involved in matters which go beyond conventional notions of 'military operations'.

The restrictive arrangements put in place for the management of information concerning Operation Relex were against the best interests of the ADF and contrary to conventional public affairs practices, including those being pursued with respect to other operations in which the ADF was involved. In particular, the Operation Relex Public Affairs Plan and Defence Instructions (General) No.8 required by Minister Reith were inimical to ensuring the integrity of information flowing to the Australian public about border protection activities.

The People Smuggling Taskforce

The Committee has examined the operations of the People Smuggling Taskforce in the light of all contemporary notions of public sector accountability. The saga of 'children overboard' reveals quite starkly some of the vulnerabilities to which whole-of-government approaches are subject. As the value and frequency of such approaches increases, more intense becomes the imperative that they be conducted in a robust and coherent way. The participating agencies must be effective collaborators without putting at risk their discrete responsibilities. This inevitably means adjustments to 'business as usual', and such adjustments must be understood, accommodated, and communicated within each agency.

According to its chair, Ms Jane Halton, the People Smuggling Taskforce was set up and run on the basis that it provided advice on policy and operational issues as they arose. One of the group's key jobs was information exchange to ensure that all agencies were kept aware of relevant and emerging facts. On most occasions, Taskforce meetings would result in the drafting, by Ms Halton and PM&C officers, of advice or briefings for the Prime Minister. Taskforce members were not always

directly involved the drafting of this advice, a task that appears to have been ‘jealously guarded’ by PM&C. Copies of the advice were never distributed back to the participating Taskforce agencies.

The proper accountability of this Taskforce was, in the Committee’s view, not simply a line of accountability to the Prime Minister, for example. It should have embraced the departments who both informed the Taskforce and had to implement the decisions which arose from its advice. It required the kind of accountability better expressed by the phrase a ‘culture of responsibility’.

The Taskforce comprised high level officials who worked on the assumption that the contributions from the individual members were authoritative. The input of flawed information on the morning of 7 October cannot result in the Taskforce’s being blamed for including ‘children thrown overboard’ in the advice that was sent to the Prime Minister that evening. It was the rapid verbal transmission of the flawed information out of the group as a result of a phone call to a Taskforce participant from the Minister for Immigration that resulted in its quick entry into the public arena, thereby triggering the controversy.

Notwithstanding Ms Halton’s view to the contrary, the Committee contends that the political import of the ‘children overboard’ advice would not have been lost on the senior figures who comprised the Taskforce. This was potentially headline-making information, and Taskforce members would have been under no illusion about the level of public interest it would arouse.

It is unfortunate that the ‘children overboard’ report had barely been presented before it was passed outside the key group responsible for providing accurate, timely and considered advice to the government. The source of the report, AVM Alan Titheridge, who conveyed it by phone to the PST chair (Ms Halton) was not present to contextualise the information, or to caveat it with appropriate reference to its status, or to explain how it emerged as a result of a special arrangement which had extracted the information out of the normal chain of command.

The Taskforce meeting of 7 October was described by one participant as ‘shambolic’ with ‘mobile phones ringing constantly.’ The Committee is not surprised by, and understands, the intense dynamics that were manifest at the meeting. What the Committee finds unacceptable is that the structural and procedural framework of the Taskforce operations was not sufficiently robust to deal with the demanding, highly fluid, and frequently dramatic nature of the task for which it was responsible. Such weaknesses become even more significant in the context of the Taskforce operating during a period when caretaker conventions are meant to apply.

FINDINGS

The People Smuggling Taskforce received a report that a child had been thrown overboard from SIEV 4 and included that report in formal advice prepared for the Prime Minister. The report that a child had been thrown overboard from SIEV 4 was

also passed verbally outside the Taskforce when the Minister for Immigration contacted a Taskforce member by phone early in its meeting on 7 October 2001.

The Taskforce failed to observe certain key principles of best practice in the conduct of its operations, thereby exposing itself to inappropriate levels of risk in the management of information. The Taskforce failed to establish at the outset a control structure appropriate to the nature of the activities upon which it was embarked. Overall, it lacked a clear governance framework defining accountability and reporting arrangements and the roles and responsibilities of the various participants. In particular:

Copies of advices to the government prepared by the Taskforce and other outcomes of Taskforce deliberations, were not distributed to the participating agencies that contributed to those deliberations, thereby denying agencies the opportunity to correct errors or to clarify misleading information.

The Taskforce's proceedings and decisions were not sufficiently well minuted, thereby preventing a reasonable record of the Taskforce's activities from being available to its many participants, and rendering the activities of the Taskforce largely inaccessible to subsequent scrutiny.

There was considerable variation in the manner of 'reporting back' by participants to their home agencies. In many instances it was insufficient to ensure a coherent engagement of the agencies with the Taskforce and inhibited the adequate 'hand over' of advice between the various representatives from the same agency who attended Taskforce meetings on different occasions.

Within the Taskforce and between the Taskforce and agencies and/or ministers, information flows were often poorly managed with inadequate attention being paid to risk mitigation and the detection and correction of errors in information.

The Committee is not questioning the integrity of the individual participants on the Taskforce, but finds substantial weaknesses in its basic administrative operations, including record keeping, risk management and reporting back.

RECOMMENDATION 2

The Committee recommends that the Australian Public Service Commission convene a Working Group that includes representatives of the Australian National Audit Office and the Department of Prime Minister and Cabinet with the task of producing comprehensive, service-wide guidelines for the establishment, operations and accountabilities of Inter-Departmental Committees (IDCs). The report of the Working Group shall be published as part of the *Better Practice* series produced by the ANAO. On the production of such a report, individual agencies shall develop a manual for the participation of its staff in IDCs which are consistent with the report while attending to the specific operational and administrative arrangements of the agency concerned.

RECOMMENDATION 3

The Committee recommends that pending the development of a service-wide approach to the operation of IDCs, as an interim measure the Department of Defence should promulgate to all agencies a copy of its Guidelines regarding the participation of Defence personnel in whole-of-government committees. Agency heads should ensure that their personnel observe similar practices until such time as whole-of-service guidelines are available.

RECOMMENDATION 4

The Committee recommends that the Australian Public Service Commission prepare a discussion paper on record-keeping in the Australian Public Service with a view to the development of a service-wide policy and practical guidelines on this issue for public servants.

RECOMMENDATION 5

The Committee recommends that the Australian Public Service Commission, through its Leadership, Learning and Development Group, make provision for executive and senior executive level public servants, as part of their professional development obligations, to undertake specific training in the principles and practical exercise of accountability associated with whole-of-government operations.

RECOMMENDATION 6

The Committee recommends that the Australian Public Service Commission, in consultation with the Department of Prime Minister and Cabinet, prepare guidelines addressing the responsibilities of agency heads in circumstances where a minister fails to act on advice which corrects factual misinformation of public importance. The guidelines should give particular consideration to ensuring that the Prime Minister is provided with the correcting information, if the Minister refuses to correct the public record.

Ministerial advisers, ministers and accountability

The Committee's inquiry has highlighted a serious accountability vacuum at the level of ministers' offices. It appears to be a function partly of the increased size of ministers' staff, but more significantly of the evolution of the role of advisers to a point where they appear to enjoy a level of autonomous executive authority separable from that to which they have been customarily entitled as the immediate agents of the minister.

While ministers and public servants regularly account for their actions directly to parliament and by appearance before its committees, this is not the case for ministerial advisers. In the past, it has been generally accepted that advisers' accountabilities are rendered via ministers, it being understood that advisers act at the direction of

ministers and/or with their knowledge and consent. This seems to be no longer a legitimate assumption.

There now exists a group of people on the public payroll – ministerial advisers – who seem willing and able, on their own initiative, to intervene in public administration, and to take decisions affecting the performance of agencies, without being publicly accountable for those interventions, decisions and actions. The Committee has considerable sympathy for the view that ministerial advisers and public servants should have similar public accountability requirements.

Ministerial advisers are appointed under the *Members of Parliament Staff Act*, (*MoPS Act*). Under this Act, the Prime Minister establishes conditions of employment for all ministerial staff, on an individual basis. The Act does not require those conditions to take any particular form. The main guidance given to ministerial staff lies in the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*. Section nine of the *Guide* concerns 'ministerial staff conduct'. Most of its content pertains to conflict of interest issues – essentially those between advisers' individual self interest and the interests of their minister. The Committee is concerned by the lack of congruence between the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* and what is contained in the *Members of Parliament Staff Act*.

The Committee has detailed in its Report the role played by the Defence minister's staff in the handling of the 'children overboard' affair. The Committee is deeply disturbed by many of the actions and omissions attributable to them. They played a significant part in the failure of ministers to correct the public record. Their interactions with public servants and Defence officials, and the way in which they managed information flows in and out of ministers' offices, raise numerous questions about the appropriateness of their performance, let alone matters of courtesy and fair dealing.

Throughout its inquiry the Committee, as a result of a cabinet decision, has been denied access to the ministerial staff in question. The Minister for Defence (Senator Robert Hill) has also refused the appearance of certain officials who, as public servants, do not fall under the cabinet prohibition on the appearance of *MoPS Act* staff. Such bans and refusals are anathema to accountability.

The Committee sought the views of both the Clerk of the Senate and the Clerk of the House of Representatives on the matter of whether any immunities attach to ministerial advisers with respect to appearing before parliamentary committees. The Committee was also provided with a legal opinion by Bret Walker SC which concluded that 'former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee.' This opinion was consistent with the advice provided by the Clerk of the Senate.

Faced with the continued refusal of prospective witnesses to respond to invitations to appear, and with correspondence from ministers indicating that advisers and certain officials would not appear, the Committee decided not to seek to compel their

attendance, and thereby expose the advisers and officials to the risk of being in contempt of the Senate should they not respond to the summons. Part of its reason not to summon was based on the Senate resolution that it would be unjust for the Senate to impose a penalty on a person who declines to provide evidence on the direction of a minister. The penalties for contempt include a gaol term and/or a heavy fine.

Instead, the Committee resolved to appoint an Independent Assessor to perform the following task and report to the committee:

To assess all evidence and documents relevant to the terms of reference of the committee, obtained by the committee or by legislation committees in estimates hearings, to:

determine what evidence should be obtained from the persons referred to in paragraph (1) [Former minister Reith and his advisers], and what questions they should answer, to enable the committee to report fully on its terms of reference; and

formulate preliminary findings and conclusions which the committee could make in respect of the roles played by those persons with the evidence and documents so far obtained.

An eminent barrister (Stephen Odgers SC) was duly recruited to fulfil the role of 'Independent Assessor'. His report was tabled in the Senate along with the Committee's Report.

The Committee received evidence from expert witnesses about best practice in public administration and accountability, and noted in particular the promulgation in the United Kingdom of a *Code of Conduct for Special Advisers*. Part of the UK initiative includes the establishment of a complaints structure to address any public servant's concern that an adviser has acted beyond their authority or in breach of the Code.

The Committee believes that two courses of action are needed to satisfactorily resolve the issues around ministerial advisers that have been brought sharply into focus as a result of the 'children overboard' affair. The first requires the bringing of ministerial advisers properly within the scope of parliamentary committee scrutiny, in a manner similar to that which currently applies to public servants. The second requires the articulation of a Code of Conduct and Set of Values for ministerial advisers within a legislative framework – possibly a modified *MoPS* Act. Such a code might include general guidelines as to how advisers might go about their business, and what limits might be placed on their power to direct public servants. It might also be desirable for the Code to state what they *cannot* do.

In the Committee's view, the issue of integrity of public information lies behind much that has been of concern to the Inquiry into a Certain Maritime Incident. The Committee examined the role of the former Minister for Defence (Mr Reith) in this respect, and considered the question of ministerial accountability and the extent to which Mr Reith fulfilled his accountability responsibilities. In particular, the

Committee assessed Mr Reith's performance against the requirements of the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*.

Throughout the 'children overboard' affair, Mr Reith failed to adhere to the Prime Minister's *Guide*. Mr Reith's shortcomings were manifest not only in his own public statements and his interactions with Defence officials, but also in his communications with the Prime Minister and in his mismanagement of the advisers for whom he was responsible. The Committee is in no doubt that the conduct of former Minister Reith in relation to the 'children overboard' affair undermined public confidence and severely weakened the trust between the Defence department and the ministerial office.

Accountability extends beyond an individual minister to the executive as a whole, especially where the executive is pursuing a policy on a strong whole-of-government basis. The executive as a whole has been very keen to take the credit for what it regards as a successful operation on border protection and the handling of asylum seekers. In the Committee's view, the executive is therefore similarly obliged to take corporate responsibility for any shortcomings.

In particular, the Committee notes that:

- Within hours of the alleged incident having taken place government ministers were on the public record condemning the SIEV 4 occupants for their abhorrent attempts to confect a 'safety of life at sea' situation.
- Within days, the Defence chain of command had determined that the incident had not occurred. During the days and weeks that followed questions continued to be asked of, and statements continued to be made by, senior government ministers, concerning the events. The public record remained uncorrected throughout – for some a deliberate deceit, for others an unwitting perpetuation of a falsehood because of inadequate advice.
- The findings of the Routine Inquiry by Major General Powell (the Powell Report) formally repudiated the original report of 'children overboard', as did the Bryant Report, tabled in the parliament by the Prime Minister. A period of four months had elapsed.
- The CDF, Admiral Barrie, finally conceded in late February 2002 that children had not been thrown overboard from SIEV 4. The government's response – instead of being a forthright acknowledgment of the sustained error - was one of grudging acceptance of the CDF's advice, combined with a reiteration of its defence of ignorance due to faulty advice.

The Committee notes that none of the ministers closely involved in the 'children overboard' affair appear to have taken any action to reprimand or discipline advisers or officials who have performed either inadequately or inappropriately in their various roles. It is reasonable to infer, therefore, that they had acted with ministerial approval and that the government was not displeased with their conduct.

Moreover, the government's attitude to the Senate Inquiry into a Certain Maritime Incident has been characterised by minimal cooperation and occasionally outright resistance. During the early days of the Inquiry, and notwithstanding that some agencies had already indicated to the Committee that they were preparing submissions to it, the government prohibited Commonwealth agencies from providing submissions. Cabinet also made a decision, about which the Committee learned via media reports, that it would not allow *MoPS* Act staff (ministerial staff) to appear before the Committee.

Even though the Prime Minister was explicit in telling the parliament that the ban affected only *MoPS* Act staff, and that public servants would be allowed to appear, the Minister for Defence (Senator Hill) refused permission for certain public officials to appear. In the Committee's view, the government's actions during the Inquiry into a Certain Maritime Incident do not promote transparency, and are inimical to accountability.

It is imperative that the executive accept corporate responsibility for, and deliver corporate accountability in respect of, any failures associated with the whole-of-government approach to people smuggling. These failures, as this report has described, include acts and omissions by senior officials, inadequate interdepartmental committee procedures, and the involvement of ministerial advisers and a former minister in the deception of the public about events surrounding SIEV 4.

FINDINGS

The actions of the then minister, Mr Reith, and of key members of his staff, undermined important aspects of the relationship between the ADF and the government, with adverse consequences for accountability.

There is a serious accountability vacuum at the level of ministers' offices arising from the change in roles and responsibilities of, and the kinds of interventions engaged in by, ministerial advisers. In particular:

It is no longer the case that advisers' accountabilities are adequately rendered via ministers' accountability to parliament because it can no longer be assumed that advisers act at the express direction of ministers and /or with their knowledge and consent. Increasingly, advisers are wielding executive power in their own right.

Advisers are increasingly inserting themselves into agencies below the level of agency senior managers, thereby intervening inappropriately in agency operations and corrupting the proper administrative channels or chain of command. In so doing they are tending to create confusion and undermining trust and procedural fairness and integrity. There are at present no direct and transparent mechanisms by which advisers can be called to account for such actions.

The provisions of the *MoPS* Act under which advisers are employed no longer provides an appropriate institutional framework for that employment. In particular:

Its provisions are inappropriate to the needs of contemporary public administration and fail to capture important ethical and accountability requirements which should be observed by people employed under the *MoPS Act*.

There is a lack of congruence between the *MoPS Act* and the relevant sections of the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* dealing with ministerial staff.

The former Minister for Defence (Mr Reith) was, on several counts, in breach of the requirements of the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*. In particular:

Mr Reith undermined public confidence in himself and in the government by his handling of the 'children overboard' controversy during the period October-November 2001, and in the course of various inquiries related to the matter conducted by Defence, PM&C and the Senate.

Mr Reith was not honest in his public dealings in that, having placed inaccurate statements on the public record, he persisted with those statements having received advice to the contrary, and did not seek to correct any misconceptions arising from his statements.

Mr Reith engaged in the deliberate misleading of the Australian public concerning a matter of intense political interest during an election period. Mr Reith failed to provide timely and accurate advice to the Prime Minister concerning the matters associated with the 'children overboard' controversy.

Mr Reith failed to cooperate with the Senate Select Committee established to inquire into the 'children overboard' controversy, thereby undermining the accountability of the executive to the parliament.

Mr Reith failed to respect the conventions of the relationship between a department and a minister as specified in the Prime Minister's *Guide*. In particular, Mr Reith required the Department of Defence to act in ways which called into question their political impartiality – in express contravention of the Prime Minister's *Guide*.

Mr Reith bears responsibility for the haranguing interventions of his ministerial staff into the Department of Defence, and for their failure to adequately assess and give proper weight to advice from the department. Mr Reith therefore failed to maintain the standards specified in the Prime Minister's *Guide* with respect to the conduct of ministerial advisers.

Mr Reith and his staff frequently acted in ways which undermined the establishment and maintenance of trust between public servants and the ministerial office, thereby contravening the provisions of the Prime Minister's *Guide*.

Throughout the Inquiry into a Certain Maritime Incident, the actions of the government have militated against the efficient and comprehensive conduct of the Committee's activities. In particular:

The government directed Commonwealth agencies not to provide submissions to the Committee. Such an action is almost unprecedented and contravenes the accountability obligations of the executive to parliament.

The Minister for Defence refused to agree to the appearance of certain Commonwealth officials in breach of a government undertaking that officials other than *MoPS* Act employees would not be prevented from appearing before the Committee. The Minister's refusal hampered the Committee in fulfilling its obligations to the Senate.

RECOMMENDATION 7

The Committee recommends that the Minister for Defence develop a clear statement of the roles, responsibilities, accountability expectations and practical implementation of the so-called 'diarchy' in Defence and of the relationship of the 'diarchy' to the Minister. Such a statement should be articulated in the Ministerial Directive that specifies the outcomes required of Defence and the manner in which accountability for them is to be rendered to the Minister.

RECOMMENDATION 8

The Committee recommends that the Australian Defence Organisation should develop operational and administrative procedures that give practical effect to the 'diarchy' as newly articulated in that Ministerial Directive. In particular, Defence procedures should ensure that the Department's involvement in whole-of-government operations proceed via senior officers from both the military and civilian arms of Defence working as a team.

RECOMMENDATION 9

The Committee recommends that the Chief of the Defence Force and the Secretary of the Department of Defence jointly develop a statement of Preferred Public Affairs Protocols to serve as guidelines by which future ministerial directives concerning public communications might be formulated. The Preferred Protocols should optimise the autonomy of the ADF and the Department of Defence in deciding the level and nature of operational information communicated direct to the press and the public. The Protocols should also indicate the kinds of circumstances in which departures from the Preferred Protocols might be appropriate, and all such departures should be authorised by the minister in consultation with the CDF and Secretary.

RECOMMENDATION 10

The Committee recommends that an appropriate parliamentary committee develop recommendations concerning suitable frameworks, mechanisms and procedures by which ministerial advisers may be rendered directly accountable to parliament in ways commensurate with those which currently apply to public servants.

RECOMMENDATION 11

The Committee recommends that the Australian Public Service Commission convene a Working Group of senior officials of the Department of Prime Minister and Cabinet and senior parliamentary officers of both Houses of Parliament, to develop a Code of Conduct for ministerial advisers incorporating a Statement of Values commensurate with Conduct and Values provisions that apply within the Australian Public Service. The report should also make any recommendations concerning mechanisms for dealing with any breaches of such a Code, or the handling of complaints arising from the actions of ministerial advisers.

RECOMMENDATION 12

The Committee recommends that, on the basis of the APSC Working Group report, and of the report of the parliamentary committee addressing the accountability of ministerial advisers, the Minister Assisting the Prime Minister for the Public Service amend the existing *MoPS* Act. This amended legislation should incorporate a Code of Conduct and Statement of Values for ministerial staff in a manner similar to the *Australian Public Service Act 1999*. It should also establish relevant mechanisms for dealing with breaches or complaints.

RECOMMENDATION 13

The Committee recommends that the Prime Minister ensure that his *Guide on Key Elements of Ministerial Responsibility* is revised so as to ensure that it is consistent with any new legislation or parliamentary procedures introduced to regulate the conduct of ministerial advisers and to render them publicly accountable.

SIEV X - Chapters 8 and 9

At about midday on 19 October 2001, a day after departing Indonesia bound for Christmas Island, a vessel organised by people smuggler Abu Qusey and laden with nearly 400 people foundered. Close to 24 hours later two Indonesian fishing boats picked up 44 survivors. 352 people drowned when the boat now known as SIEV X sank.

During the Committee's inquiry, serious questions were raised about the extent of Australia's responsibility for and response to the tragedy of SIEV X. In particular, the following questions were posed:

- whether Australian agencies could have found and rescued the vessel before it sank;
- whether Australian agencies could have rescued the passengers and crew of SIEV X from the water; and

- whether the fact that no specific search and rescue operation was mounted for SIEV X was evidence either of intelligence failure or of negligence in relation to the welfare of the vessel's passengers and crew.

In evaluating the Australian response to the SIEV X episode, the Committee took note of three important factors. These factors are essential to understanding not only how the SIEV X intelligence was interpreted but also the extent to which it could have affected operational decisions.

First, the operational climate surrounding SIEV X involved reports of a 'surge' in possible arrivals in the people smuggling pipeline, with up to six vessels expected to leave Indonesia in close succession. The build-up of people and boats led to an expansion in Australia's disruption campaign within Indonesia. It would also have translated into increased intelligence traffic on potential boat and people arrivals, with a corresponding increase in the burden for intelligence staff sifting through incoming reports.

Second, the intelligence Operation Relex received on possible boat arrivals from Indonesia was imperfect and treated with caution. It suffered from four main shortcomings. Intelligence sources were often unreliable and difficult to corroborate. The intelligence itself was of uneven quality, marred by contradictory information and tended to inflate the numbers of expected boats. Tracking boat movements was a particular problem for intelligence analysts. It was common for intelligence to report vessels as departing Indonesia, only for it to emerge later that the vessels were delayed, had moved to another port or turned back due to weather conditions, mechanical failure or other reasons. All of these constraints bred an air of scepticism about the credibility of the intelligence among those dealing with it, and a wariness about making decisions based on it without corroborating information.

Third and relatedly, although an extensive intelligence system sat behind Operation Relex, intelligence played a limited role in daily operational decisions. The surveillance and interception strategy for Operation Relex was built on the assumption that intelligence could not be counted on to provide detailed warning of SIEV departures and arrivals. Where intelligence on boats did play a role, it was limited to ensuring that surveillance assets were operating within pre-designated corridors of interception around Christmas Island and Ashmore Reef.

In Chapter 8, the Committee outlines the intelligence system which surrounded Operation Relex and the role played by different government agencies within it. The Committee provides a detailed account of the intelligence on SIEV X which was received and handled by various agencies during the critical six days, from 17 to 23 October 2001. Finally, it discusses the surveillance that took place during the critical period of SIEV X's transit, foundering and the rescue of survivors, that is, 18 to 20 October. The Committee examines the relevant surveillance area in general and then details the surveillance patterns and results for the key period.

The Committee notes that during that key 'time window' maritime surveillance for Operation Relex continued as scheduled (except on 19 October when an extra flight

occurred because of an unserviceable helicopter). However, neither the ADF nor any other Australian agency took decisive action directly in relation to SIEV X.

In Chapter 9, the Committee discusses the question of whether such action was warranted by the information available to Australian agencies at the time. Accordingly, the Committee examines the response of Australian agencies to the intelligence on SIEV X and the reasons for that response. It then makes an assessment about whether the Australian response to SIEV X was adequate.

Against this backdrop, the Committee makes the following findings in relation to the SIEV X episode.

FINDINGS

The Committee finds that there were several gaps in the chain of reporting of intelligence, but that even if it had been functioning optimally, it is unlikely that the Australian response to SIEV X would have been different. This is because the quality and detail of the intelligence available to the authorities at the relevant times was insufficient to have warranted the launching of a specific search and rescue operation, especially since a comprehensive surveillance of the area was already being undertaken. 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.

The Committee, nevertheless, finds it disturbing that no review of the SIEV X episode was conducted by any agency in the aftermath of the tragedy. No such review occurred until after the Committee's inquiry had started and public controversy developed over the Australian response to SIEV X.

While there were reasonable grounds to explain the Australian response to SIEV X, the Committee finds it extraordinary that a major human disaster could occur in the vicinity of a theatre of intensive Australian operations, and remain undetected until three days after the event, without any concern being raised within intelligence and decision making circles. The Committee considers that it is particularly unusual that neither of the interdepartmental oversight bodies, the Illegal Immigration Information Oversight Committee and Operational Coordination Committee, took action to check whether the event revealed systemic problems in the intelligence and operational relationship.

The Committee also considers that more should be done to embed SOLAS obligations in the planning, orders and directives of ADF operations, especially when these are undertaken in a whole-of-government context. The Committee has noted elsewhere in the report that international and legal obligations to protect safety of lives at sea constrained Operation Relex's mission of 'detecting, deterring and returning SIEVs', and that the Committee is impressed at the RAN's serious commitment to this imperative. Nonetheless, the Committee has a degree of concern about the extent to which this imperative was understood by and figured in the mission tasking of other arms of the government architecture involved in Operation Relex.

RECOMMENDATION 13A

The Committee recommends that operational orders and mission tasking statements for all ADF operations, including those involving whole of government approaches, explicitly incorporate relevant international and domestic obligations.

‘Pacific Solution’ – Chapters 10 and 11

The final two chapters of the report address the operation and cost of detaining and processing unauthorised boat arrivals in Nauru and Papua New Guinea, arrangements which have become known as the Pacific Solution. The catalyst for the implementation by Australia of new ‘border protection’ arrangements, of which the Pacific Solution is an element, was the rescue in August 2001 by the Norwegian freighter the *MV Tampa* of 433 Afghan asylum seekers en route from Indonesia to Australia, and their subsequent arrival in waters adjacent to Christmas Island.

The *Tampa* incident was represented as a metaphor for the threat posed by unauthorised boat arrivals to Australia’s right to control its borders, notwithstanding Australia’s protection obligations as a signatory to the Refugee Convention. The Australian government responded by indicating that those rescued would not be allowed to land in Australia. The impasse that followed led to the development of the Pacific Solution arrangements, appealing to public sentiment in favour of a more stringent approach to unauthorised arrivals in the period leading up to the calling of a Federal election.

The solution to the crisis over where the asylum seekers were to be taken was resolved through the negotiation of agreements with Nauru and New Zealand that all of the people rescued by the *Tampa* would be processed in those countries rather than in Australia or Australian territories. An agreement with Papua New Guinea in relation to the establishment of a processing centre in Manus Province was also later announced. The arrangements were the outcome of a suite of negotiations in which Australia also approached, with varying degrees of formality, East Timor, Kiribati, Fiji, Palau, Tuvalu, Tonga and France (in relation to French Polynesia).

The agreements reached in relation to the processing in these countries of asylum seekers trying to reach Australia are outlined in Chapter 10. In essence, the offer by New Zealand was a straightforward arrangement under which New Zealand accepted 131 persons, mainly women and children, from the *Tampa*, processed their claims for refugee status, and agreed to accept for resettlement those who were found to be refugees. New Zealand has subsequently resettled a further 194 people from the Nauru and Manus processing centres.

The agreements reached with Nauru and Papua New Guinea are of a very different nature, and mark a substantial shift in Australia’s treatment of asylum seekers. Nauru and Papua New Guinea are hosting processing centres paid for and operated by Australia, and Nauru is receiving \$26.5 million in additional aid monies to do so. Moving asylum seekers to a safe third country where refugee status processes are available is not, in the Committee’s view, a formal breach of the obligations conferred

by the Convention Relating to the Status of Refugees, although it is arguably contrary to its humanitarian spirit.

The agreements reached with Nauru and PNG are on the basis that no asylum seekers will be left behind in those countries. At their peak capacity, 1515 asylum seekers were accommodated at the offshore processing centres. The agreement with Papua New Guinea had a termination date of 21 October 2002. That with Nauru has no specific termination date but can be terminated by either party at any time. Critics of the arrangement have contended that Australia is using its economic power to export its problems to its poorer neighbours, imposing significant pressures on already limited natural resources and undermining regional aid objectives of good governance and sustainable development.

Asylum seekers processed on Nauru and Manus do not have access to the refugee status determination procedures applied on the Australian mainland. Depending on where they are held and when they arrived, asylum seekers' claims may be processed by either the United Nations High Commissioner for Refugees (UNHCR), or by Australian immigration officials applying processes stated to be in accordance with those of the UNHCR. The only avenue of appeal against an adverse finding is to a review of the decision by a higher level official. The centres are managed by the International Organisation for Migration under a service agreement with Australia, with Australian Protective Services involved in security arrangements.

There is a lack of independent oversight of the processing arrangements and the treatment of the asylum seekers, and efforts by non-government groups to gain access to the centres have been largely unsuccessful. The Committee was unable to reach a determination of the conditions in the centres, given the paucity of direct evidence, although measures appear to have been implemented to address deficiencies which initially arose from the speed of implementation of the arrangements.

Chapter 11 examines the results so far of refugee status determination processes, and resettlement and return outcomes. As of 16 September 2002, protection claims for 1,495 asylum seekers on Manus and Nauru had received an initial decision. Of this number 520 people were approved as meeting the criteria for refugee status, and 975 had been refused. Initial decisions for Iraqi claimants were successful in 67% of cases, compared to just over 7% for Afghan claimants. The low proportion of Afghan's receiving positive decisions reflects the changed circumstances in that country, with the result that those that earlier may have had valid claims no longer met assessment criteria.

Review decisions so far have bough the total number of people processed under Pacific Solution arrangements and found to be refugees to 701, comprising 524 Iraqis, 133 Afghans, and 44 people of other nationalities. Six hundred and seventy eight people have been found not to be refugees, and 81 still await a review decision.

If asylum seekers are found to meet refugee criteria, they have no presumption of entry to Australia, and international resettlement places are sought for them.

Nevertheless, despite efforts to secure resettlement places overseas, the only countries to accept any significant number of refugees from the offshore processing centres to date have been New Zealand and Australia

As of 1 October 2002, 200 people processed on Nauru or Manus had been allowed into Australia, most on three or five year temporary protection visas. The majority were women or children with family in Australia. Those on five year visas, available to people who had not landed on one of the excised offshore places such as Christmas Island or Ashmore Island, will be able to apply for a permanent protection visa at the end of that time if still in need of protection. Those on three year visas will be eligible for subsequent three year temporary protection visas if required, but cannot apply for permanent protection. Five people have been granted temporary humanitarian stay visas, which are not dependent on refugee status and are of a duration determined by the Minister.

Resettlement places so far have fallen well short of the number of people who have been found to be refugees, with no countries other than New Zealand and Australia offering a substantial number of places. The length of time taken in processing claims so far, and the continued accommodation in the processing centres of several hundred people found to be refugees but as yet without a resettlement place, is a matter of concern for the Committee. Outcomes for those not determined to meet refugee criteria are even more uncertain, with a small number having voluntarily returned to their countries of origin, some with the assistance of a reintegration package. The Committee is not convinced that the safe return to their countries of origin of all of those found not to meet refugee convention criteria is necessarily possible within a short timeframe.

Chapter 11 also examines the cost of the Pacific Solution arrangements. Although substantial information is available on the costs associated with the operation of the offshore processing centres in Nauru and PNG, the Committee has not been able to collate an accurate picture of the full cost of the Pacific Solution. This is because comprehensive costings for the Defence Force component were not identifiable.

The establishment and operational costs of the Nauru and Manus facilities lie with the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). The Department's budget for these activities in 2001-02 was \$114.5 million, although recent advice is that the total cost for that financial year was \$80 million. DIMIA's 2002-03 budget for the offshore reception and processing of asylum seekers in third countries is \$129.3 million. Forward year budgets are \$99.3 million for 2003-04, \$100.5 million for 2004-05, and \$101.7 million for 2005-06.

DIMIA has also identified considerable savings associated with on-shore processing centres as their functions are replaced by processing in third countries and in Australia's external territories. These savings, however, cannot be considered solely in the context of the Pacific Solution, as operational costs for processing in Australia's external territories, as well the \$195 million capital cost of the new purpose built Christmas Island facility, are also pertinent.

In addition to the cost of establishing and operating the third country processing centres, and the \$26.5 million inducement to Nauru, other costs of the Pacific Solution policy include over \$2.5 million for the activities of the Department of Foreign Affairs and Trade in Nauru in 2001/02 and 2002/03.

In regard to the effectiveness of the Pacific Solution policy, the Committee notes that the arrangements have been effective in preventing on-shore processing of unauthorised boat arrivals. The arrangements ensure that those amongst the arrivals who are found not to be refugees do not have access to lengthy appeal processes, and those who are successful in their claims have no presumed right to resettlement within Australia.

The number of boats carrying asylum seekers attempting to reach Australia has also declined dramatically, although the effect of the offshore processing arrangements and the new legislative regime in halting the flow of illegal boat arrivals is difficult to isolate from the influence of other factors such as enhanced surveillance, disruption activities, regional anti-smuggling initiatives, the SIEV X disaster, global developments including increased border security in the aftermath of September 11, and the changed circumstances in Afghanistan.

Should the reduction in asylum seeker numbers continue, the new purpose built processing facility on Christmas Island should provide a sustainable alternative to third country processing.

FINDINGS

In respect of the agreements between the Australian Government and the Governments of Nauru and Papua New Guinea regarding the detention within those countries of persons intercepted while travelling to Australia, known as the 'Pacific Solution', the Committee finds that the arrangements reached are not a formal breach of Australia's obligations under the 1951 Convention Relating to the Status of Refugees. However the Committee finds that the level of consultation during the development of the arrangements, and the level of transparency and independent oversight in their implementation, has been inadequate.

In respect to the arrangement with Nauru, the Committee finds that the use of developmental aid to ensure the continued cooperation of the Government of Nauru distorts Australia's aid priorities in the region, and does not promote good governance in Nauru.

RECOMMENDATION 14

The Committee recommends that people within the Papua New Guinea and Nauru processing centres who have been determined to be refugees should be offered durable and effective protection, in accordance with Australia's human rights values, as soon as practicable. Should resettlement places not be available in other countries, Australia should accept its protection responsibilities and offer temporary protection within Australia.

RECOMMENDATION 15

The Committee recommends that the Department of Immigration and Multicultural and Indigenous Affairs implement arrangements which facilitate access to the offshore processing centres by independent observers.

RECOMMENDATION 16

The Committee recommends that the Department of Immigration and Multicultural and Indigenous Affairs implement interim protection arrangements for those asylum seekers in the offshore processing centres who have not been determined to be refugees on convention grounds, but nevertheless cannot safely return to their homelands at this time.