

**REPORT OF**

**INDEPENDENT ASSESSOR**

**TO**

**SENATE SELECT COMMITTEE**

**ON A**

**CERTAIN MARITIME INCIDENT**

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# REPORT TO SENATE SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT

## 1. INTRODUCTION

1.1 On 13 February 2002 the Australian Senate established a “Select Committee on a Certain Maritime Incident” to inquire and report on a number of matters, including the so-called “children overboard” incident of 7 October 2001. In June 2002 I was briefed to assist the Committee in a number of respects. This Report is the result of that brief.

### Nature of Brief

1.2 I was briefed to assist the Select Committee in the following terms:

“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:

- (a) determine what evidence should be obtained from former minister Mr PK Reith and advisers, Peter Hendy, Michael Scrafton, Ross Hampton and Miles Jordana, and what questions they should answer, to enable the Committee to report fully on its terms of reference; and
- (b) 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.”

### Senate Select Committee Terms of Reference

1.3 The terms of reference for the Select Committee are in the following terms:

“For inquiry and report on:

- (a) the so-called ‘children overboard’ incident, where an Indonesian vessel was intercepted by HMAS *Adelaide* within Australian waters reportedly 120 nautical miles off Christmas Island, on or about 6 October 2001;
- (b) issues directly associated with the incident, including:
  - (i) the role of Commonwealth agencies and personnel in the incident, including the Australian Defence Force, Customs, Coastwatch and the Australian Maritime Safety Authority,

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- (ii) the flow of information about the incident to the Federal Government, both at the time of the incident and subsequently,
  - (iii) Federal Government control of, and use of, information about the incident, including written and oral reports, photographs, videotapes and other images, and
  - (iv) the role of Federal Government departments and agencies in reporting on the incident, including the Navy, the Defence organisation, the Department of Immigration and Multicultural Affairs, the Department of the Prime Minister and Cabinet, and the Office of National Assessments; and
- (c) operational procedures observed by the Royal Australian Navy and by relevant Commonwealth agencies to ensure the safety of asylum seekers on vessels entering or attempting to enter Australian waters;
- (d) 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, publicly known as the ‘Pacific Solution’:
- (i) the nature of negotiations leading to those agreements,
  - (ii) the nature of the agreements reached,
  - (iii) the operation of those arrangements, and
  - (iv) the current and projected cost of those arrangements.”

### **Material Briefed**

1.4 I have been briefed with transcript from the Select Committee hearings, as well as transcript from hearings of a number of Senate estimates hearings. In addition, I have been provided with copies of two earlier reports into the ‘children overboard’ affair (the Powell<sup>1</sup> and Bryant<sup>2</sup> reports) and associated documents. I did not attend any of the hearings nor have I communicated in any way with any of the persons involved in the affair.

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<sup>1</sup> Major General RA Powell, The Report of the Routine Inquiry into Operation Relex: The Interception and Boarding of SIEV IV by HMAS Adelaide (14 December 2001).

<sup>2</sup> Jennifer Bryant, Investigation into Advice Provided to Ministers on “SIEV 4” (21 January 2002).

## 2. BACKGROUND TO REPORT

2.1 The background to the Select Committee inquiry, and to this Report, may be expressed in brief and relatively uncontroversial terms.

2.2 On 6 October 2001, in Australian waters in the vicinity of Christmas Island, HMAS *Adelaide* made initial contact with an Indonesian vessel (sometimes referred to as “SIEV4”) which was suspected to be carrying a number of persons intending to make an illegal entry into Australia. This contact was part of a defence force operation called Operation Relex.

2.3 On 7 October an incident occurred in which a number of persons on the Indonesian vessel went overboard and were rescued by crew from the *Adelaide* who returned them to the vessel. The precise nature of this incident is discussed below, but the overwhelming weight of the evidence now available indicates that only one of these persons was a child (13 years or older) and that no children were thrown into the water. Some of this incident was video-recorded from the *Adelaide*. Some hours after the incident, the Minister for Immigration, Mr Ruddock, was informed that “children had been thrown in the water” by other persons on the vessel and he released that information to the media.

2.4 On 8 October SIEV4 began to sink and a number of passengers, including women and children, entered the water. All were rescued by crew from the *Adelaide*. During that rescue, a number of photographs were taken showing, among other things, children in the water.

2.5 On 10 October, two of these photographs were released by the then Minister for Defence, Mr Reith, as evidence of the incident on 7 October. Mr Reith also stated in a radio interview that a video existed of the incident on 7 October which showed children being thrown into the water. In fact, it did not.

2.6 On 7 November an article appeared in the *Australian* which reported that officers on the *Adelaide* had told Christmas Islanders that no children had been thrown into the water. On 8 November, Vice Admiral Shackleton, Chief of the Navy, was interviewed by the media and made a statement that included the words “Our advice was that there were people being threatened to be thrown in the water, and I don’t know what happened to the message after that.” Later that day, Vice Admiral Shackleton issued a clarifying statement to the effect that Defence had initially advised Mr Reith that children had been thrown into the water. The Federal election was held on 10 November 2001.

2.7 In October and November 2001, three of the staff in Mr Reith’s office were Mr Peter Hendy, Mr Michael Scrafton and Mr Ross Hampton. Mr Hendy was Mr Reith’s Chief of Staff. Mr Scrafton was Mr Reith’s Senior Adviser (Defence). Mr Hampton was Mr Reith’s Media Adviser. Mr Miles Jordana was a member of the Prime Minister’s staff.

### **3. APPROACH TO REPORT**

3.1 It is apparent from this background that the primary aspects of the Committee's terms of reference which require to be addressed for the purposes of my brief are (b)(ii) and (iii).

3.2 The rules of evidence do not apply to the inquiry or my Report. Nevertheless, they provide some assistance in the approach to be taken to evidence before the inquiry. For example, hearsay evidence, and particularly remote hearsay evidence, should be approached with great caution.

3.3 Equally important, the nature of my brief and the material briefed necessarily circumscribes the proper approach to this Report. Because I have not attended any of the select committee hearings or communicated with any of the persons involved in the affair, great caution is required in drawing any factual conclusions.

3.4 Another important point is that none of the specified persons (Mr Reith, Mr Hendy, Mr Scrafton, Mr Hampton and Mr Jordana) has given evidence before the Select Committee, although the first four persons made statements to the Bryant Inquiry. All were given the opportunity to contribute to the Select Committee in writing and in person. All declined, as was their right. As a result, I do not have their (full) account of events. Further, they have not had the opportunity to test or challenge the evidence relating to them. Accordingly, no firm conclusions should be drawn on factual issues relating to them where any possibility of controversy exists.

3.5 For the most part, only factual conclusions which are entirely uncontroversial will be drawn. Where uncertainty or dispute exists and it is necessary for a some factual determination to be made in order to comply with the brief, only tentative or provisional views will be expressed. The brief requires only "preliminary findings and conclusions" and that requirement will be rigidly adhered to.

### **4. THE 7 OCTOBER INCIDENT AND INITIAL REPORTS**

4.1 In order to comply with the brief it is necessary to come to a preliminary conclusion on the question of whether any children were thrown into the water from SIEV 4 on 7 October 2001. As indicated above, the overwhelming weight of the evidence now available indicates that only one of the persons who entered the water on that day might be regarded as a child (aged somewhere between 13 and 20 years) and that this person jumped into the water voluntarily.

4.2 It is true that one of the crew of the Adelaide who was operating the Electrical Optical Tracking System (EOTS), which produced the video partially recording the incident, subsequently stated that he witnessed persons "jumping off the siev by their

own choice, and I believe one child also went overboard”.<sup>3</sup> However, whatever was intended to be conveyed by this statement, no other member of the Adelaide crew reported a child being thrown into the water, there is no other direct evidence tending to suggest that it happened and it may now safely be concluded at least on a provisional basis that no children were thrown into the water.

4.3 There is no doubt that, some hours after the incident, the Minister for Immigration, Mr Ruddock, was informed by Mr Bill Farmer, the Secretary of his Department, that “children had been thrown in the water” by other persons on SIEV4. Mr Ruddock was informed that the information came from “Defence”. At the time Mr Farmer conveyed this information, he was attending a meeting of the “People Smuggling Taskforce” Inter-Departmental Committee. The information had been passed to the Chair of the Taskforce (Ms Halton) by Air Vice Marshal Titheridge (Head of the Strategic Command Division). The information was recorded in a written note prepared by the Taskforce for the Prime Minister later that day.<sup>4</sup> Air Vice Marshal Titheridge also passed on the information to Mr Hendy and Mr Reith. On the same day, the Maritime Commander, Australia (Rear Admiral Smith), passed on the information to Dr Brendan Nelson, Parliamentary Secretary for Defence.

4.4 The source of the information for both Air Vice Marshal Titheridge and Rear Admiral Smith was Brigadier Silverstone (Commander Joint Task Force 639) who had spoken to the captain of the Adelaide, Commander Banks, on the morning of 7 October and understood from that conversation that a “child” had been thrown over the side of SIEV4. It is not clear whether that was said by Commander Banks, or whether there was some misunderstanding. For the purposes of this brief, it is not necessary for me to attempt to resolve the issue. Equally, it is not necessary to determine how it was that “child” became “children”. It is sufficient to conclude that senior Defence personnel did in fact communicate to the Government on 7 October that children had been thrown in the water.

4.5 On 9 October 2001, the Office of National Assessments issued a report<sup>5</sup> which stated that “asylum seekers wearing lifejackets jumped into the sea and children were thrown in with them”. No source was identified in the report but it was subsequently established that it was based on media statements by Mr Ruddock, Mr Reith and Mr Howard.

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<sup>3</sup> On one interpretation, the EOTS operator was drawing a distinction between the child (who he believed went overboard) and others who “jumped off ... by their own choice”. However, later in his statement he stated that “all persons who dove overboard did so by there [sic] own choice”. Of course, the word “dove” is also somewhat ambiguous. The EOTS operator also stated that “all this was recorded on video tape”. It is clear that the video tape did not show any children being thrown overboard.

<sup>4</sup> Department of the Prime Minister and Cabinet, “Options for Handling Unauthorised Arrivals: Christmas Island Boat” 7.10.01.

<sup>5</sup> ONA 226/2001.

## **5. THE TWO PHOTOGRAPHS AND THE “EOTS” VIDEO**

5.1 During the sinking and rescue on 8 October, a number of photographs were taken showing, among other things, children in the water. On 9 October, these photographs were sent electronically by email from the Adelaide to a number of addresses. The emails included explanatory text which made it clear that the photographs were taken during the rescue on 8 October. The explanatory text read:

“ABBM Laura Whittle was recently photographed as the Navy value ‘COURAGE’. During the 08 Oct rescue of 223 SUNCs<sup>6</sup> from a sinking Indonesian fishing vessel, Able Seaman Laura Whittle again typified this true quality through her immense courage in leaping 12 metres from the ship’s 02 deck into the water to drag women and children to the safety of a liferaft. Selflessly she entered the water without a lifejacket and without regard for her own safety to help others in need.

LSCK Jason ‘Dogs’ Barker shows dogged determination as he helped rescue women and children by dragging them to safety during the rescue of 223 SUNCs from a sinking Indonesian fishing vessel. The big hearted Leading Seaman also demonstrated Navy’s core value of COURAGE.”

5.2 However, on 9 October, the two photographs subsequently released by Mr Reith were sent to his Media Adviser, Mr Hampton, without the explanatory text. On 10 October, Mr Reith called the Chief of the Defence Force, Admiral Barrie, to discuss whether the photographs could be released. Admiral Barrie stated that Air Vice Marshal Titheridge would call back with advice. Titheridge advised that he had no objection to release and, later on that day, the two photographs were released by Mr Reith as evidence of the incident on 7 October.

5.3 In relation to the “video”, some of the incident on 7 October was video-recorded by the EOTS system from the Adelaide. Rear Admiral Ritchie testified before the Select Committee that he was advised on 10 October that the video “showed that there were no children thrown overboard” or, at least, it did not provide evidence that children had been thrown overboard. A copy of the video was sent from the Adelaide to Rear Admiral Smith on 14 October. The video was released on 8 November and it is clear that it does not show any children being thrown into the water.

## **6. CORRECTION OF THE 7TH OCTOBER INCIDENT REPORT WITHIN THE DEFENCE FORCE**

6.1 On 7 October an operation report sent by Maritime Command stated:

“Fourteen SUNCs have jumped or have been thrown overboard.”

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<sup>6</sup> “SUNC” is an acronym for Suspected Unauthorised Non-Citizen.

It was based on a situation report sent from the Adelaide on that morning. On 8 October, in an “update brief”, Strategic Command reported that persons on the ship “threaten or throw themselves overboard”<sup>7</sup>, and did not state that children had been thrown overboard. This report was distributed throughout the Defence Force and, according to the distribution list, the Government (although not, apparently, to the Department of the Prime Minister and Cabinet<sup>8</sup>). The copy addressed to the Chief of the Defence Force was sent to his Chief of Staff but it was not shown to the Chief of the Defence Force.<sup>9</sup>

6.2 On 10 October, the captain of the Adelaide sent a signal to the Maritime Commander, Australia (Rear Admiral Smith) containing a “list of chronological events”. It referred to threats to throw children overboard but did not contain any statement that a child was thrown into the water. Equally, it did not contain a clear statement that no child was thrown into the water. However, by the middle of the day, the captain of the Adelaide had concluded that no children had been thrown overboard and he communicated this conclusion to Brigadier Silverstone and Rear Admiral Smith. It was also communicated at some stage to Rear Admiral Ritchie.

6.3 On the same day, 10 October, Strategic Command produced a chronology of events which concluded with the statement “There is no indication that children were thrown overboard. It is possible that this did occur in conjunction with other SUNCs jumping overboard”. This statement has been referred to in the Select Committee hearings as the “footnote” and this expression is used in this Report, although the Head of Strategic Command emphasised to the Select Committee that it “was in no sense a mere ‘footnote’.”<sup>10</sup>

6.4 On the morning of 11 October, the Chief of the Defence Force, Admiral Barrie, was telephoned by Rear Admiral Ritchie and a conversation took place in which Admiral Barrie was at the very least informed that there were doubts about whether children were ever thrown overboard. Later that day, Brigadier Silverstone notified Rear Admiral Ritchie that no one on the Adelaide had seen children being thrown overboard. By this stage, Rear Admiral Ritchie was satisfied that no children had been thrown overboard. However, this information from Brigadier Silverstone may not have been passed on to Admiral Barrie.

6.5 While Admiral Barrie was informed on 11 October that there were doubts about whether children were ever thrown overboard, and informed by Air Marshal Houston on 12 November that he (Air Marshal Houston) believed that no children had been

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<sup>7</sup> Australian Defence Headquarters, OPERATION GABERDINE/OP RELEX - 0800 AEST 8 OCT 01 (HSC O01/1109).

<sup>8</sup> Written Response from Department of Defence to question on notice 32 asked by Senator Faulkner.

<sup>9</sup> Written Response from Department of Defence to question on notice 19 asked by Senator Faulkner.

<sup>10</sup> Written Response from Air Vice Marshal Titheridge to written question on notice W54 asked by Senator Cook.

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thrown overboard (CMI 743) , Admiral Barrie testified to the Select Committee it was not until 24 February 2002, when he spoke to the captain of the Adelaide, that he became convinced that no child had been thrown into the water (CMI 744-5). Until that time, his view had been that, without compelling evidence that no children had been thrown into the water, he would stand by the original advice given to the Government.

6.6 Some other members of the Defence Force, outside the chain of command, also may not have known for some time. Air Vice Marshal Titheridge, Head of Strategic Command, informed Ms Bryant on 21 December 2001 that he had not become aware of doubts about the incident until late November. He informed the Select Committee (CMI 700) that he had not been made aware by his staff of the 10 October chronology which ended with the words “[t]here is no indication that children were thrown overboard”. Rear Admiral Smith has testified that, in a conversation between him and Air Vice Marshal Titheridge on 17 October, Smith had told him that “none of it was true” (CMI 586). However, Air Vice Marshal Titheridge informed the Select Committee that he had no recollection of this conversation (CMI 717-8). Rear Admiral Ritchie told Ms Bryant on 20 December 2001 that he did not know if Air Vice Marshal Titheridge received the results of the initial inquiry revealing that there was no evidence to show that children had been thrown overboard.

## **7. CORRECTION OF THE 7TH OCTOBER INCIDENT REPORT OUTSIDE THE DEFENCE FORCE**

7.1 Before summarising the available evidence regarding correction of the 7th October incident report outside the Defence Force, it should be noted that the Public Affairs Plan for Operation Relex contained a paragraph which stated that “[a]ll comment and media response/inquiries [in relation to Operation Relex] is to be referred to MINDEF [Minister of Defence] Media Advisor, Mr Ross Hampton”.<sup>11</sup> This meant that Defence’s capacity to correct the public record was limited (see CMI 1122). The Director General of Communication Strategies within the Department of Defence, Mr Brian Humphreys, testified before the Select Committee that “the minister’s office was responsible for decisions as to information going out and the clarifying statements” and he agreed that corrections could not be made “unless the Minister agreed to those corrections or misrepresentations being corrected” (CMI 1156). He understood from discussions with staff in Mr Reith’s office that the guiding motivation of this plan

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<sup>11</sup> Written Response from Department of Defence to question on notice 31 asked by Senator Faulkner.

“was to ensure that the minister’s office could see the information before it was released, was aware of information before it was released and had had an ability or opportunity to decide which information was released.”<sup>12</sup>

7.2 In terms of correction of the 7th October incident report within the Government itself, it is clear that, to put it neutrally, there were problems with effective communication. To give one example, Ms Halton, Deputy Secretary in the Department of the Prime Minister and Cabinet and Chair of the “People Smuggling Taskforce” Inter-Departmental Committee which met on 7 October, testified to the Select Committee that, between 7 October and the beginning of November, there was never a suggestion made to her that there was doubt about the incident having occurred (CMI 941). It is true that, on 9 October, she asked officers in the Department of the Prime Minister and Cabinet to obtain elaboration and confirmation of details of the incident from Defence. However, although the “update brief” of 8 October from Strategic Command was distributed throughout the Government, she was never made aware of it. In relation to the Strategic Command chronology (with footnote) of 10 October, it was emailed to the Social Policy area of the Department of the Prime Minister and Cabinet. Ms Halton testified that she was not made aware of this document but one of her officers, Katrina Edwards, did receive a copy of the chronology and understood on 10 October that Strategic Command had no documentary evidence that children were thrown into the water. However, either just before, or immediately after, being informed that Strategic Command had no evidence that children were thrown into the water, Ms Halton, according to her testimony before the Select Committee (CMI 961), received a telephone call from Mr Reith who referred to the existence of a video. In addition, either Mr Reith or Air Vice Marshal Titheridge told her about the photographs and the existence of witness statements (CMI 953, 1015, 2073). As Ms Halton testified, “[t]he issue of the footnote was not taken further as it was overtaken by the information that there were photos of the event that had been released to the media, there was a grainy video and Defence was collecting witness statements” (CMI 902).

7.3 Ms Halton testified (CMI 902) that the next time an issue was raised about SIEV4 was in November, when she was informed of “tearoom gossip” from an officer in Defence that the photographs released on 10 October were in fact taken on the day of the sinking. The origin of this “gossip” was a conversation on 11 October between Commander Chatterton, Navy Director of Operations within the Defence Department, and Commander Steffan King, the Australian Defence Force Liaison Officer in the International Division of the Department of the Prime Minister and Cabinet. Commander Chatterton informed Commander King that the photographs related to 8 October and not 7 October (CMI 1163, 1166, 1490). Commander King decided to

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<sup>12</sup> CMI 1150. Mr Humphreys also testified that he was told that one aspect of the instructions received from Mr Hampton was that no personalising or humanising images were to be taken of persons on the boats intercepted by the Navy (CMI 1151-2). Mr Humphreys pointed out that “this is in the context of not identifying potential asylum seekers because it interferes with their claims” (CMI 1152) but it should also be noted that he stated that no photographs were to be taken even if individuals could not be identified (CMI 1161).

“provide this advice to my two senior officers in International Division, such that they could advise their seniors as appropriate” (CMI 1491). He spoke to his supervisor within the Department of the Prime Minister and Cabinet, Ms Harinder Sidhu (Senior Adviser, Defence Branch) and her superior, Dr Hammer (Assistant Secretary, Defence Branch) on that day (CMI 1491). It is apparent that Commander King, Ms Sidhu and Dr Hammer have given somewhat different accounts of what was said on this occasion. For the purposes of this Report, it is not necessary to determine what exactly was said. What is clear is that neither Ms Sidhu nor Dr Hammer took any steps to pass on the information received from Commander King<sup>13</sup>, although on 7 November Ms Halton was informed that “rumours” or “gossip” were “circulating in Defence that the photos have been wrongly attributed” (CMI 1289-1290).

7.4 There is no evidence that any officials within the Department of Immigration provided advice to the Minister that there was doubt about the veracity of the original claims (see CMI 1256). The Secretary of the Department, who had passed on the initial information to the Minister on 7 October, testified to the Estimates Committee that he was unaware of any doubts about the incident until 7 November.<sup>14</sup> There is no evidence that any officials within the Department of the Prime Minister and Cabinet provided advice to the Prime Minister that there was doubt about the veracity of the original claims (see CMI 1256).

7.5 On 7 November an article appeared in the *Australian* which reported that officers on the Adelaide had told Christmas Islanders that no children had been thrown into the water. On 8 November, Vice Admiral Shackleton was interviewed by the media and made a statement that included the words “Our advice was that there were people being threatened to be thrown in the water, and I don’t know what happened to the message after that.” The press report included the proposition that “the navy had never advised Defence Minister Reith that boat people threw children overboard from an Indonesian vessel”. Subsequently, Vice Admiral Shackleton issued a statement to the effect that Defence had initially advised Mr Reith that children had been thrown into the water.

## **8. EVIDENCE RELATING TO THE FIVE NAMED PERSONS**

8.1 At this point, it is appropriate to summarise the evidence relating to the five named persons in my brief. A chronological approach will be adopted.

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<sup>13</sup> Equally, it is not necessary for the purposes of this Report to determine why no further action was taken by those two persons.

<sup>14</sup> Senate Legal and Constitutional Legislation Committee, Consideration of Additional Estimates, 22 February 2002, L&C 371. See also at L&C 374.

### **7-9 October 2001**

8.2 There is evidence that Mr Reith, Mr Hendy, Mr Hampton and Mr Jordana are all (orally) informed on 7 October that children had been thrown into the water by other persons on SIEV4. The “People Smuggling Taskforce” Inter-Departmental Committee also prepared written advice which referred to “passengers throwing their children into the sea”.

8.3 Ms Edwards informed the Select Committee that she believed that “Mr Jordana rang either Ms Halton or myself or both on either October 8 or 9 seeking further details around the events of 7 October”.<sup>15</sup>

8.4 About 12.30 on 9 October, Mr Bloomfield, Director of Media Liaison within the Defence Public Affairs and Corporate Communications Section, informed Mr Hampton of the existence of digital photographs taken by crew of the Adelaide (and referred to by the captain of the Adelaide in an interview with a Channel 10 reporter). Mr Bloomfield, in an interview with Ms Bryant in December 2001, stated that he described the photographs to Mr Hampton as “UBAs in the water”.<sup>16</sup> He told Ms Bryant that he had been aware that the photographs related to the sinking but he had not stated this to Mr Hampton in this or subsequent conversations with him and he told Ms Bryant that he “could not be certain that Mr Hampton was similarly aware”. Mr Bloomfield assumed that Mr Hampton was aware and did not correct any misconception. He accepted that it may have been the case that Mr Hampton was not aware that the photographs related to the sinking on 8 October.

8.5 Mr Hampton stated in a letter he wrote to Mr Hendy on 12 November, which was provided to the Powell Inquiry, that

“on Tuesday 9 October, 2001 I spoke with someone from Defence Public Affairs to confirm that they had two still photos taken after the children were thrown into the water. Unfortunately I did not keep a record of that person’s name. I was sent the two still photos with no accompanying text by Mr Andrew Stackpool. I printed the photos for the Minister.”

8.6 An email from Mr Stackpool, Media Liaison Officer, sent to Mr Hampton at 15.26 on 9 October, contained the two digital photographs with titles (“laura the hero1.jpg” and “dogs and his family1.jpg”) but no other information about them. In particular, the email did not include the explanatory text noted at paragraph 5.1 above, which had been in the email sent from the Adelaide. In interviews with Ms Bryant in December 2001, Mr Bloomfield agreed that there had been “a breakdown in the system when the photographs were provided to the Minister’s office without ‘captions’ (explanatory text)”. Later in the afternoon, Mr Hampton was advised by an

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<sup>15</sup> Written Response from Ms Edwards to question on notice 3 asked by Senator Faulkner.

<sup>16</sup> “UBA” is an acronym for unauthorised boat arrival.

email from Mr Bloomfield that the media was seeking “copies of photographs” that were understood to have been “sent to Defence Canberra by HMAS Adelaide”.

### **10 October 2001**

8.7 Rear Admiral Ritchie testified before the Select Committee that he had a telephone conversation with Mr Scrafton early (CMI 370) on 10 October in which Mr Scrafton asked for evidentiary support for the claim that children had been thrown overboard (CMI 368-9). Rear Admiral Ritchie testified that he was advised later on 10 October that the video

“showed that there were no children thrown overboard. It showed that there was one child held over the side, that people were jumping over the side of their own volition and that one 13-year-old - and he has variously been described as 13 to 15, or 17 to 18 but at that time I recorded him as a 13-year old - was pushed over. I was also told that the CO Adelaide had thought that there might be reports able to be taken from sailors who were on the disengaged side - that is, the side that the camera could not see - that indicated that there might be children in the water. At 12.42, I passed that information back to Mr Scrafton.” (CMI 368-9; see also CMI 370)

It may be noted that there is a little ambiguity as to what information was communicated to Mr Scrafton, but Rear Admiral Ritchie clearly testified later that Mr Scrafton was informed that “the video” did not show that children had been thrown overboard (CMI 370-1).

8.8 A copy of a contemporaneous diary note made by Rear Admiral Ritchie was provided to the Powell Inquiry:

“Kids - was reported  
EOTS footage - people jumping, 1 13 yr old pushed over side, 1 man holding baby over the side - RHIB paused underneath and stopped it  
On disengaged reports from sailors picking up children from the water told M Scrafton”.

It should be noted that the words “13 yr old” are placed above a word “child” which has been crossed out. Rear Admiral Ritchie has never been asked when he made the change.

8.9 Mr Scrafton’s account, given on 14 December 2001 to Ms Bryant, is recorded as follows by Ms Bryant:

“Mr Scrafton stated that he (or the office more generally) had become aware fairly early that there was a tape ‘confirming that the incident had happened’, but that it was of poor quality. The office asked to see the tape initially, but this was then overtaken by other issues and not followed up.”

Ms Bryant also recorded the following: “Mr Scafton said he did not recall being told clearly by Admiral Ritchie in their conversation on 10 October that children had not been thrown overboard. He did recall that statutory declarations were being collected from the sailors. Mr Scafton said that his recollection was that Rear Admiral Ritchie stated that he had not seen the tape.”

8.10 Ms Halton, Chair of the “People Smuggling Taskforce” Inter-Departmental Committee, testified that on the afternoon of 10 October, after being told by Mr Reith “that there was a video”, she spoke to Mr Scafton “who confirmed that that was accurate” (CMI 992).

8.11 In his statement to the Powell Inquiry of 20 November 2001, Mr Reith stated:

“Michael Scafton, from my Canberra office, told me that we had a film of a child being pushed into the water and that children were in the water on their own, separated from any adults.”

8.12 As noted above, Mr Hampton was sent the two photographs showing children in the water on 9 October. Mr Hampton stated in a letter he wrote to Mr Hendy on 12 November, which was provided to the Powell Inquiry, that the following occurred on 10 October:

“Whilst I was in the Minister’s office prior to us departing for the ABC for a 3LO interview, Peter Reith called the Chief of the Defence Force (CDF) Admiral Chris Barrie. He wanted to check that the two still photos of children in the water after being thrown overboard could be released to the media. ADM Barrie agreed to this as long as identities were obscured. He provided additional information to Peter Reith including the fact that a female sailor jumped 12 metres from the ship into the water to save people. Peter Reith used some of this information in his subsequent media interviews.”

8.13 In an interview with Ms Bryant conducted on 21 December 2001 (subsequently verified by Mr Hampton on 8 January 2002), Mr Hampton agreed that, in hindsight, “the extra information CDF had provided about the female sailor jumping overboard to rescue people indicated that he may have ‘mixed up’ information”. He stated that the CDF was not asked explicitly if the photographs related to the 7 October incident because this was assumed to be the case.

8.14 Mr Reith gave his version of events in his statement to the Powell Inquiry of 20 November 2001:

“On 10 October my office was besieged by media requests for photos in the possession of Defence which showed children in the water. Mr Ross Hampton, my Media Adviser, told me that he had received a phone call from the public affairs unit of Defence that they had the photos but that they were not available for the press. Mr Hampton received two photos from Defence which depicted people in the water being rescued by ADF personnel. Ross had these two colour photos printed on our black-and-white printer and he brought them into

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my office and put them on my desk. ... I thought it prudent to ring the Chief of the Defence Force, Admiral Barrie, to discuss whether the photos should be released. He was aware that there were requests from the media for photos which supported the claim that children were thrown into the water. I asked him if there was any reason why the photos could not be distributed. He said there was no reason for them not to be distributed but he wanted to make sure that there was no particular problem with showing the identity of the ADF personnel and he said that he would have AVM Titheridge phone me back.”

8.15 Admiral Barrie testified before the Select Committee (CMI 742):

“On 10 October, in the afternoon, Minister Reith telephoned me about the release to the media that afternoon of certain photos that he had in his possession. I told him that I had not seen any photographs. But because the operation with SIEV4 had been successfully concluded, I could see no reason why photographs should not be released into the public domain, subject to a security check by the Head of Strategic Command Division that the identities of ADF personnel involved were not compromised. I then telephoned HSCD about the minister’s requirements and tasked him to vet the photographs and advise the minister appropriately.”

8.16 In an interview between Mr Reith and Ms Bryant on 17 January 2001, the following is recorded:

“Mr Reith commented that a suggestion that Admiral Barrie had not seen the photographs and had accepted Mr Reith’s description of them, was ‘the wrong way round’. He said that it had been Admiral Barrie who was describing the incident. He further stated that there was no confusion over what the subject matter was - no-one would have been in any doubt that they were discussing the overboard incident as the media were seeking proof of this incident. However, he agreed that in hindsight it was reasonable to conclude that it was possible that Admiral Barrie may have confused the details of the two incidents, given his comments about a sailor jumping off the Bridge, which Mr Reith went public with. Mr Reith stated that he had not asked Admiral Barrie whether he had seen the photographs. Mr Reith said that he had had two black and white photographs in front of him while he was speaking to Admiral Barrie.”

8.17 In his statement to the Powell Inquiry of 20 November 2001, Mr Reith stated that, after he had spoken to Admiral Barrie, “AVM Titheridge rang me back within about five minutes or so and said that from his point of view the photos could be released.”

8.18 Air Vice Marshal Titheridge gave his account to Ms Bryant on 18 January 2002:

“I recall there being two lots of photographs in existence - one lot on the sinking and another lot taken after the rescue. I also recall that the second lot had at least one photograph of UBAs on the deck of Adelaide and photos with naval personnel visible. Although I do not recall the telephone call, CDF would have, as he told the Minister he intended to do, rang me to see if there was an issue with releasing photographs of service personnel. I would have believed he was referring to the second lot of photos and rang the Minister to tell him there were no problems with photographs of service personnel in such a situation. I do not recall whether or not I actually checked the post rescue photos; it was the principle that I would have cleared and there was no need to check. To infer that I had cleared for release the photographs of the sinking is incorrect.”

He gave much the same account to the Select Committee (CMI 732-3). He emphasised in a written answer to a question on notice that he had “no recollection of the call although I do not dispute that it took place”.<sup>17</sup>

8.19 In his letter of 12 November, Mr Hampton wrote that after Mr Reith had spoken to Admiral Barrie:

“I called Defence Public Affairs and advised Mr Tim Bloomfield that CDF and the Minister had approved release of the two still photos to the media. I had a discussion with Mr Tim Bloomfield of Defence Public Affairs about removing the captions from the two still photos which read ‘laura the hero’ and ‘dogs and his family’. It was mutually agreed with Mr Bloomfield that these captions should be removed as they could identify the two sailors.”

Mr Bloomfield does not dispute the substance of this account.

8.20 Brigadier Bornholt (Military Adviser, Defence Public Affairs and Corporate Communication) testified before the Senate Foreign Affairs, Defence and Trade Estimates Committee on 20 February 2002 that he became aware on 10 October that Mr Hampton wanted to release photographs of the incident on 7 October.<sup>18</sup> In his testimony, he said that he telephoned him and said:

“My advice to you is that the photographs could not be of 7 October because Strategic Command have informed us that that, of the 14 people that they understood were in the water, there were no women or children.”<sup>19</sup>

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<sup>17</sup> Written Response from Air Vice Marshal Titheridge to written question on notice W55 asked by Senator Cook.

<sup>18</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 145.

<sup>19</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 147.

According to Brigadier Bornholt, Mr Hampton “expressed concern about my advice and told me that the CDF had confirmed with the minister that the photographs could be released and that there were women and children in the water.” Brigadier Bornholt testified that he said “I can’t believe that”. He further testified:

“[I]t became apparent to me that the minister’s media adviser and I were actually talking about two different sets of pictures. I did not have the two photographs during that telephone conversation that were subsequently released. The only photographs that I had on my system were the five photographs that had been sent from Strategic Command. They were the shots ... that showed, at a distance, the SIEV sinking and, eventually, the people in the water.”<sup>20</sup>

8.21 A contemporaneous note apparently made by Brigadier Bornholt appears to show that Mr Hampton was told that there were “no children in the water”. It records that Brigadier Bornholt “spk to RH + briefed him on this detail” (the detail including the proposition that no children were in the water”). It goes on to note:

“Hampton was concerned when I raised issue of photos + veracity. He said CDF had provided them to the Minister include cfm that they were of the 7 Oct overboard event”.

It is apparent that this note was not strictly contemporaneous in that it also refers to events which occurred later in the day. However, Brigadier Bornholt confirmed to Ms Bryant on 18 December 2001 that “he informed Mr Hampton in his first phone call that there were no children in the water”.

8.22 Mr Hampton gave an account of this telephone conversation in the letter he wrote to Mr Hendy on 12 November:

“[Brigadier Bornholt] said there may have been a mix up and the photos may be of the wrong event. He said he was looking at a set of four photos of people on a ship and as the people were not in the water they clearly were not of the throwing overboard event. When I said we had been sent from Defence Public Affairs a set of two photos not a set of four - and they showed people, including children, in the water Brigadier Bornholt concurred that he must be talking about something altogether different. He agreed he hadn’t seen these particular photos and he must be looking at another set of photos. I proceeded from the conversation confident that a mistake had not been made and that Brigadier Bornholt had additional photos showing the asylum seekers after their vessel sank”.

8.23 A contemporaneous note apparently made by Mr Hampton records:

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<sup>20</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 148.

“3.30 10/10 Gary B - Strategic don't have breakdown of the nos of kids & adults who jumped/pushed - They do have 4 photos - Not the 2 photos we've referred to today - Different set of photos - OK

13 people jumped or were thrown off - Doesn't talk about other photos - some came by way of written brief/Navy”

8.24 Mr Reith's interview was held at 16.10. He referred to the photographs. He also stated:

“The fact is that children were thrown into the water. ... I have subsequently been told that they have also got a film. That film is apparently on HMAS Adelaide. I have not seen it myself and apparently the quality of it is not very good, and it's infra-red or something but I am told that someone has looked at it and it is an absolute fact, children were thrown into the water.”

8.25 In the Estimates hearing, Brigadier Bornholt testified that, after the telephone call with Mr Hampton, he went to another Defence Department building and found the two photographs that were later released. It was clear from the accompanying text that they were taken on 8 October.<sup>21</sup> He discussed the issue with Ms McKenry, Head of Defence Public Affairs and Corporate Communication, who advised him to inform Mr Hampton. Before 17.00 he telephoned Mr Hampton and

“left a message on his mobile phone answering machine to say, essentially, ‘The advice I had given you earlier is correct. Those photographs do not represent the events of 7 ... October’.”<sup>22</sup>

8.26 In an interview with Ms Bryant on 21 December 2001, Mr Hampton is recorded as saying that

“he had not received a message on his mobile phone from Brigadier Bornholt later that day. However, he noted that he received a large number of messages when an interview such as 10 October occurs, and that he may have therefore missed a message from Brigadier Bornholt due to a full mailbox.”

8.27 Ms Halton testified that, on the afternoon of 10 October, she received a telephone call from Mr Reith who referred to the existence of a video. “Based on that conversation” she then rang Air Vice Marshal Titheridge. Either Mr Reith or Air Vice Marshal Titheridge told her about the photographs and the existence of witness statements (CMI 953, 1015). Ms Halton testified that “[t]he issue of the footnote [in the Strategic Command chronology] was not taken further as it was overtaken by the

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<sup>21</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 148.

<sup>22</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 148. Confirmation of this telephone call is contained in Brigadier Bornholt's diary notes.

information that there were photos of the event that had been released to the media, there was a grainy video and Defence was collecting witness statements” (CMI 902). This account was confirmed in general terms by Ms Edwards (CMI 1705). Ms Halton testified that she passed on this information to Mr Jordana and the Secretary of the Department of Prime Minister and Cabinet (CMI 990).

8.28 Ms Edwards informed the Select Committee that, pursuant to the request from Mr Jordana on either October 8 or 9 seeking further details around the events of 7 October, he was provided on 10 October with “talking points derived from the [Strategic Command] chronology” (the “talking points” did not mention children overboard). Ms Edwards did not suggest that he was given the chronology (with the footnote) although “I assumed at the time, however, that Ms Halton would also advise Mr Jordana of the difficulties around the chronology, as well as the ‘footnote’, as well as the subsequent advice from Mr Reith and his office of that afternoon”. However, as noted above, Ms Halton testified that she had no memory of the chronology or the footnote, although she did not dispute Ms Edwards’ account that she had been advised of the chronology (notwithstanding her lack of recollection). But, also as noted above, her account was that “[t]he issue of the footnote was not taken further as it was overtaken by the information” she received from Mr Reith and his office on the afternoon of 10 October, and which she passed on to Mr Jordana.

8.29 Admiral Barrie was informed on the evening of 10 October by both Rear Admiral Ritchie and Vice-Admiral Shackleton that the two photographs released by Mr Reith related to the sinking of SIEV4 on 8 October and not the incident of 7 October.

### **11 October 2001**

8.30 On the morning of 11 October, the Secretary of the Department of Defence, Dr Allan Hawke, was informed that the two photographs had been taken on 8 October and not 7 October (CMI 3) and he directed the Head of Defence Public Affairs and Corporate Communication, Ms Jenny McKenry, to contact Mr Scafton “to inform him of the misrepresentation” (CMI 4). He testified that “I also asked that this advice be put in writing”, although Ms McKenry herself testified that she could not recall the words “in writing” used (CMI 1102). Dr Hawke did not give any direction in relation to Mr Reith nor did he advise Mr Reith himself, either in person or in writing.

8.31 Ms McKenry testified that she then spoke by telephone to Mr Scafton. During this conversation Brigadier Bornholt was with her. Brigadier Bornholt confirmed this in the Senate Foreign Affairs, Defence and Trade Estimates Committee hearings on 20 February 2002. Ms McKenry testified to the Select Committee regarding her conversation with Mr Scafton:

“We discussed the photographs that had been released. We made it very clear that they did not represent what they were purported to represent. Brigadier Bornholt did explain the attempts to clarify that the previous day with Mr

Hampton. We then talked about what our limited understanding at that time was of how the photographs had been released. He then phoned off to go and check the photographs, because I said to him, ‘There are captions which actually say that the photographs were taken on the 8th.’ He rang off, he went to check the photographs and at that stage he came back and said there were no captions to his knowledge in the minister’s office. ... We then described the photos to make sure we were talking about the same photos. “ (CMI 1100-1101)

Ms McKenry then “told him that I had an email and that I would send him my email, which quite clearly had the date on it”. The substance of this account was corroborated by Brigadier Bornholt in the Senate Foreign Affairs, Defence and Trade Estimates Committee hearings.<sup>23</sup>

8.32 Subsequently, according to Ms McKenry, she sent him a copy of the email with both the photographs and the explanatory text. She testified further:

“He did acknowledge receipt of that email in the sense that he phoned back because there was information on that email which we raised in conversation afterwards.” (CMI 1101)

Ms McKenry was “left in no doubt that Mr Scafton understood what we were saying about the photographs” (CMI 1101), that there had been a “misrepresentation” (CMI 1102). However, Ms McKenry accepted that no advice was put in writing to the effect that there had been a misrepresentation in relation to the photographs. If Dr Hawke gave an instruction in that regard, it was not carried out (see CMI 38).

8.33 Mr Scafton’s account, given on 14 December 2001 to Ms Bryant, is recorded as follows by Ms Bryant:

“Mr Scafton said that he was later contacted by Ms McKenry (on 11 October), who advised him that the photographs were being misrepresented, and that they related to the sinking rather than the ‘children thrown overboard’ incident. Mr Scafton stated that he discussed this advice with Mr Hampton, including the issue of whether Mr Hampton had directed that the ‘captions’ be removed. Mr Hampton said that he had asked for titles to be removed because they contained people’s names. Mr Scafton stated that he then had another discussion with Ms McKenry, and was told that the photos were all over the Defence “Restricted” system and asked her to compile a record of events, including the advice received by Mr Bloomfield from Mr Hampton. Mr Scafton said that he did not advise Mr Reith, as this would have been Mr Hampton’s role. He said that he does not know whether Mr Reith was informed about the true nature of the photographs.”

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<sup>23</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 148.

8.34 In the letter he wrote on 12 November, Mr Hampton gave an account of the information he received about the two photographs on 11 October:

“... someone from Defence - I do not recall who - informed our office that there may be new doubt about whether the two still photos supplied were taken after the children were thrown from SIEV 04 or after SIEV 04 sank. This doubt was based on the fact that the separately recorded video of the jumping overboard incident was reportedly ‘infra-red’ - suggesting it must have been dark when the jumping overboard incident occurred. There was also a suggestion that text accompanying the photos cast doubt about which event was depicted. The official Strategic Command Minute to the Minister and log describing the events were immediately checked and it showed that the time the children were thrown from SIEV 04 was about 6.00 am Christmas Island Time. Checking revealed this was half an hour after sunrise which therefore supported the initial advice that the photos were of the jumping overboard incident as the two still photos (taken in a non infra-red camera) were clearly taken in daylight hours. On Thursday October 11, I telephoned John Clarke, Media Adviser to Chief of Navy, to try to obtain a copy of the original email (with the 2 still photos attached) which had been sent to Defence Public Affairs from HMAS ADELAIDE to clarify the situation regarding supposed additional text which we had not seen. John Clarke sent me that email. This email had the text attached which suggested the two still photos were of the rescue after the sinking of SIEV 04. I also note that at this time Mr Mike Scrafton, Senior Adviser to the Minister, sought from Defence Public Affairs a copy of the email carrying the two still pictures that had been sent to me. What was initially sent to Mr Scrafton following this request was an email attaching the two still photos with extra text. It was immediately apparent that this was not the email that was originally sent, as this original email contained no explanatory text - just the two captioned still photos. Mr Scrafton then again sought, and received from the Department of Defence, a copy of the actual email sent to me - which contained just the two still photos. Given all this the Minister asked for a formal response from Defence as to the veracity of the still photos and definitive advice of the time they were taken. The Minister was aware of rumours that the photos may have depicted events after SIEV 04 had sunk, but the Minister decided not to respond to these rumours because the matter is not yet resolved. It should be emphasised that there have been two instances, noted above, of where Defence Public Affairs have provided obviously incorrect advice and the status of the photos is still uncertain. First Defence suggested the two still photos were taken when it was dark when the two still photos themselves were clearly taken in broad daylight, and secondly Defence sent on the wrong email when a copy was requested. At this time we have not yet received a conclusive reply to this matter from Defence.”

8.35 The email from John Clarke to Mr Hampton was sent at 11.00 on 11 October. In an email to Ms Bryant on 17 January 2002, Mr Hampton explained that the information about the 7 October incident occurring “during night hours” was “quickly proven incorrect and doubt was therefore cast on the email author as well - we had to

ask ourselves whether perhaps” the explanatory text was the result of a mix-up. “The text of the email ... was therefore not considered official advice from defence”. In the interview with Ms Bryant on 21 December 2001, Mr Hampton is recorded as saying that “he had not seen the email advice from Jenny McKendry to Mike Scrafton of 11 October”.

8.36 Mr Hendy gave his account in a conversation on 8 January 2002 with Ms Bryant during her inquiry (subsequently verified by Mr Hendy on 16 January 2002). He is reported as saying that

“he recalled being told that the Department said the reason for their doubt was that the children overboard incident had occurred at night but that the photos were clearly taken in daylight. Mr Scrafton had found the ship’s log of the event and ascertained that the event had occurred after sunrise. The Department had been told they needed a better reason for doubt, and they were told to check and come back.”

8.37 At this point it may be noted that Mr Scrafton, in his interview with Ms Bryant on 14 December 2001, does not refer to this question of whether the incident occurred before sunrise. He does not say whether he examined the ship’s log. If he did, it would have been apparent that there was no written account in the log of children being thrown into the water.

8.38 Mr Hendy was reported as saying on 8 January 2002 that “they never got a clear answer on whether or not the photos were from the sinking”. He was asked about the email advice sent by Ms McKenry, which included the explanatory text, and he is reported as saying “people were not as clearcut in their oral advice”. Ms Bryant’s note of the conversation with Mr Hendy continues:

“Mr Hendy said that when the question of the accuracy of the attribution of the photos came up, the Minister made the decision within 24 hours that he would not change the public record until he had conclusive advice about what had actually happened with the original reports and the photos. The Minister had asked for an Inquiry, which was the Inquiry conducted by General Powell.”

He also said “that email advice from Jenny McKenry in relation to the photos did not provide conclusive advice because PACC were among the people under investigation”.

8.39 It may be noted at this point that the Powell Inquiry was commissioned by the Chief of the Defence Force on 20 November 2001. In an interview between Mr Reith and Ms Bryant on 17 January 2001, Mr Reith is recorded as saying that “he had not set General Powell’s inquiry in train - CDF had initiated it and informed Mr Reith”. No written request was ever made by Mr Reith to Defence to investigate the SIEV4 incident.

8.40 During a doorstep interview on 11 October, Mr Reith was reported as saying that the video might never be released to the public because it was unnecessary and there may be “operational security” problems.

8.41 At some point on 11 October a telephone conversation took place between the Chief of the Defence Force and Mr Reith. The contents of the conversation appear to be in dispute.

8.42 Admiral Barrie testified (CMI 742):

“The following day [11 October] I had a telephone conversation with Minister Reith about photographs. I told him that I had been advised that the photographs he had put out did not describe the events as he portrayed on the *7.30 Report*. I cannot remember his precise response, save that we had a discussion about there being a great deal of confusion about the photographs. But I do recall that our conversation was testy. It concluded with an agreement between us that never again would we discuss photographs without ensuring that we both had the same photographs in front of us.” (see also CMI 751-2)

Admiral Barrie testified that “I had no reason to believe that [Mr Reith] did not understand” that an error had been made in relation to the photographs (CMI 783). In a written response to a question on notice he referred to a “statement” by Mr Reith “that he would ‘drop’ the issue of the confusion over the photographs”.<sup>24</sup>

8.43 In his statement to the Powell Inquiry of 20 November 2001, Mr Reith stated:

“I spoke to the CDF on 11 October 2001 and he said he had had a tape on my remarks in the doorstep [interview] which was broadcast on the radio and that what I had said was factually correct. He said the video was on board HMAS Adelaide. I was told that it would be forwarded to Maritime Headquarters. The CDF said that he would get hold of the video and advise in due course.”

In an interview between Mr Reith and Ms Bryant on 17 January 2001, the following is recorded:

“Regarding comments that CDF had said that Mr Reith had ‘agreed to drop the issue’, Mr Reith disagreed that he had ever made such an agreement with Admiral Barrie - indeed, he considered that at that point neither he nor Admiral Barrie had thought there was an issue. Mr Reith reiterated that, as he said in his statement, there had never been any suggestion made to him that children had not been thrown from SIEV 4.”

Later in the interview, the following is recorded:

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<sup>24</sup> Written Response from Department of Defence to written question on notice W6 asked by Senator Cook.

“Mr Reith stated that the doubts raised about the photographs on 11 October were themselves contradictory. He noted that one doubt was based on timing of the incident, and a suggestion that the video was infra-red and taken at night. When pressed, this advice was found to be incorrect. He said that he and the office remained sceptical and uncertain that the photographs were not from the overboard incident. He stated that saying he had ‘made the decision not to change the public record’ implied that he accepted that the photographs had been misrepresented, whereas the reality was that there was continuing uncertainty and he was not willing to make further public comments which may themselves not have been correct.”

8.44 Later on 11 October, Admiral Barrie was telephoned by Rear Admiral Ritchie and a conversation took place. Again, the contents of this conversation are the subject of some dispute.

8.45 Rear Admiral Ritchie testified that he told Admiral Barrie that “it [children being thrown overboard] probably did not happen” (CMI 372). Rear Admiral Ritchie informed Ms Bryant on 20 December that Admiral Barrie also told him in this conversation that Mr Reith “had been advised that the photos were not of the child throwing incident and the Minister had agreed not to pursue the issue”. Rear Admiral Ritchie made a diary note which reads: “Min had been advised by CDF and agreed to drop the issue. Min advised that photos as published were not of this incident and were captioned so.” In his testimony to the Select Committee Rear Admiral Ritchie testified that he understood that Admiral Barrie was referring to the issue of whether of whether children were thrown overboard (CMI 375).

8.46 According to Admiral Barrie’s account of the conversation given to the Select Committee, Rear Admiral Ritchie “told me that there were now doubts about whether children were ever thrown overboard. I do not remember his being more definite than that” (CMI 742). Admiral Barrie testified that he said to Rear Admiral Ritchie that “there was obviously confusion about what took place, until he could produce evidence to show that what had been originally reported to me was wrong, I would not change my advice to the minister”. He directed Rear Admiral Ritchie “that witness statements and any other evidentiary material should be collected” (CMI 742). Admiral Barrie did not direct Rear Admiral Ritchie to report back to him once “the witness statements and any other evidentiary material” had been collected. He explained to the Select Committee that he wanted the evidence collected but did not intend to find out the outcome of that process (CMI 779-780). Admiral Barrie was asked at the Select Committee hearings (CMI 754) whether Rear Admiral Ritchie’s account that “CDF said that he had advised the minister and the minister had agreed to drop the issue” was “a fair reporting of at least part of that conversation” and he answered “Yes, I think that is right”. Later in the hearings he referred to it as: “a photograph management issue, not an event management issue” (CMI 757) and “we were not going to talk about photographs again” (CMI 784).

8.47 Rear Admiral Ritchie informed Ms Bryant on 20 December 2001 that, at 13.45 on 11 October, he received email advice from Brigadier Silverstone that “no one on

the Adelaide had witnessed the incident”. However, he had no record of informing Admiral Barrie of this although he was “fairly confident” that he would have told him “in accordance with normal practice”.

### **14 October 2001**

8.48 On the Sunday Sunrise program, Mr Reith was asked why he had released the photographs “to prove your point that they did throw children overboard”, but not the video. Mr Reith said that he hadn’t yet seen the video, but that “I was happy to have the Department release a couple of photos, because there was a claim we were not telling the truth about what happened.” When asked if he would release the video he said “We will have a look at it and see. I am also told the quality of it is not very good, although it is quality enough to make out what it is said that is on the film, so I am not worried about that. Look, we ought to just have a look at it”.

### **On or about 17 October 2001**

8.49 Admiral Barrie testified that, possibly on 17 October, but certainly before 25 October, he had a conversation with Mr Reith “in which I informed him that I had been told by the Chief of the Navy and COMAST that there were doubts about whether children had ever been thrown over the side of SIEV4. I said to him the doubts seemed to be based on what the photographs showed - or did not show - and an inconclusive video. I said that I had indicated to them my position was that, until evidence was produced to show the initial report to me was wrong, I would stand by it. As at that date, no further evidence had been provided to me.” (CMI 742-3)

Later in his evidence he characterised the conversation as him giving “clear advice” to Mr Reith “that either there was no evidence or at a minimum there were serious question marks about evidence in relation to the children overboard issue” (CMI 763-4).

8.50 In the materials with which I have been briefed I have been unable to find any account of this conversation by Mr Reith.

### **31 October 2001**

8.51 On 31 October, Brigadier Silverstone had a conversation with Mr Reith. There was a discussion about the video.

8.52 Brigadier Silverstone discussed this conversation with Ms Bryant on 19 December 2001 but he did not have clear recollection of what was said. He got the impression that Mr Reith believed that the video may show children being thrown into the water. Silverstone told him that he had not seen the

video but that it did not show children being thrown into the water. He told Ms Bryant that he could not recall whether he informed Mr Reith that no children were in fact thrown into the water. Brigadier Silverstone gave a slightly different account to the Select Committee (on 4 April 2002). He told the Select Committee that he

“used words to the effect of ‘Well, Minister, the video does not show things clearly and does not show children overboard. We also have concerns that no children were thrown in the water at all and we have made an investigation of that’.” (CMI 346)

Brigadier Silverstone told both Ms Bryant and the Select Committee that Mr Reith then said “Well, we had better not see the video then” (CMI 346, 361). He told the Select Committee that the words were said to one of Mr Reith’s staff, overheard by Brigadier Silverstone, after the conversation between him and Mr Reith had concluded (CMI 361).

8.53 Brigadier Silverstone reported this conversation to Rear Admiral Ritchie (CMI 363). Rear Admiral Ritchie confirmed (CMI 368) that Brigadier Silverstone told him about it and referred to having informed Mr Reith about “questions” regarding whether children had been thrown overboard and Mr Reith responding to being told that the video did not show children being thrown overboard with the words noted above.

8.54 In an interview between Mr Reith and Ms Bryant on 17 January 2002, the following is reported:

“The conversation about the video was a casual one in which Brigadier Silverstone’s comments were made ‘in passing’ ... Brigadier Silverstone had said that he had not seen the video himself, and therefore Mr Reith would not have expected him to have definitive information about what it showed. ... In this context, Mr Reith did not attach a lot of weight to Brigadier Silverstone’s comment. ... Mr Reith said that he may have made some comment about not seeing the video at all, but could not remember the conversation in any detail. He considered that using the quote from Brigadier Silverstone’s statement would be inappropriate, as it could be construed in a number of ways, and it was not clear how it was meant. ... Mr Reith stated that he would not have continued to request access to the video if he had no intention of seeing it.”

## **7 November 2001**

8.55 In the morning an article appeared in the *Australian* which reported that officers on the Adelaide had told Christmas Islanders that no children had been thrown into the water. The Acting Chief of the Defence Force, Air Marshal Houston, spoke to Air Vice Marshal Titheridge about the video and was informed that it “did not show any women or children going into the water” (CMI 1059). Air Marshal Houston then

spoke to Brigadier Bornholt and was informed that the published photographs related to the sinking on 8 October (CMI 1068). He examined the signal sent from Adelaide on 10 October and concluded that “there no evidence available to support the fact that a child had been thrown overboard” (CMI 1068). In Senate Estimates hearings in February 2002, he testified that he telephoned Mr Reith about the middle of the day:

“I started off by telling him that I felt that it was a very confused situation, but from this evidence that I had seen it appeared to me that there had been a boarding operation on the 7th, people had jumped into the water, there had been an incident with a child being held over the side, but fundamentally there was nothing to suggest that women and children had been thrown into the water. I then went on, as I recall it, to describe the fact that on the second day there was a rescue operation when the vessel sank and that the photographs, from what I had just been advised, related to the events of 8 October. After I had given him this run down of what happened there was silence for quite a while. It seemed to me that he was stunned and surprised. Essentially, he then said, ‘Well, I think we’ll have to look at releasing the video’. I omitted to say earlier on that I also explained to him that the video was inconclusive in proving whether any women or children were thrown into the water due to its poor quality.”<sup>25</sup>

8.56 Brigadier Bornholt, who appeared before Senate Estimates on the same occasion, corroborated this account, noting that the telephone conversation occurred on speaker phone while he was present with Air Marshal Houston.<sup>26</sup> Before the Select Committee, Air Marshal Houston gave substantially the same account (CMI 1068, 1069). He testified that Mr Reith “did not indicate” that he “may not have been hearing what” Air Marshal Houston was saying (CMI 1086, 1087) and that Mr Reith’s only response was the one he referred to in the Estimates Committee.<sup>27</sup>

8.57 In a statement dated 21 February 2002, Mr Reith responded to the account given by Air Marshal Houston before the Senate Foreign Affairs, Defence and Trade Estimates Committee on the previous day. He wrote:

“I can confirm that I did speak with Air Marshal Angus Houston on Wednesday 7 November 2001. I had asked that Air Marshal Houston contact me that day regarding reports that had appeared in that morning’s press. Clearly Air Marshal Houston’s evidence yesterday afternoon reinforces the fact that I had not been acting in any way to conceal or cover up evidence relating to the children overboard incident. My recollection of our conversation is that

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<sup>25</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 104-5.

<sup>26</sup> Senate Foreign Affairs, Defence and Trade Committee, Consideration of Additional Estimates, 20 February 2002, FAD&T 110-111

<sup>27</sup> Written Response from Air Marshal Houston to written question on notice W30 asked by Senator Cook.

he had that morning examined some material in the Chief of the Defence Force's office which had caused him to deduce that as there was no evidence to support the claim that children had been thrown overboard then the event had not happened. Such a conclusion contradicted advice provided to me previously by the Australian Defence Force. I asked him questions to the effect whether all the information was available, including statements from defence personnel and whether there had been a thorough investigation and a properly concluded view formed. I was concerned that I had not had the opportunity to speak to the Chief of the Defence Force and had not had a proper detailed and conclusive report. Although he had a report on the video, he had not seen the video. I immediately arranged for a person from my office to view the video. I was still under the impression that the video supported earlier advice and thought it should be released. Later on that day I recommended the release to the Prime Minister. I am certain I did not discuss Air Marshal Angus Houston's comments with the Prime Minister because I felt it was wrong to do so without talking first to the CDF; I thought the video should be reviewed and I wanted some further advice on the investigation."

8.58 In this regard, it should be noted that Air Marshal Houston testified: "I think the Acting CDF has all the powers of the real CDF. If the real CDF is out of the country and something happens, the Acting CDF has to act in exactly the same way as the CDF would and would provide the necessary advice to government on whatever matter is before him" (CMI 1087). The Chief of the Defence Force, Admiral Barrie, returned to Australia on the day of the election, 10 November.

8.59 Mr Scafton visited Maritime Headquarters on the afternoon of 7 November and viewed the video. Mr Scafton's account, given on 14 December 2001 to Ms Bryant, is recorded as follows by Ms Bryant:

"Mr Scafton said he considered that the tape clearly didn't show that the incident had happened. However, neither did it provide conclusive evidence that the incident didn't happen. ... He said he spoke to the Prime Minister a couple of times that evening about the tape and informed him that it was inconclusive".

8.60 Ms Bryant, Assistant Secretary in the Department of the Prime Minister and Cabinet (and the person who conducted the Bryant Inquiry) testified that Mr Jordana contacted her on 7 November "looking for Defence sit reps [situation reports] and Defence material" (CMI 1289). Her diary note recorded: "Miles - Aust - people thrown overboard. Check sitreps and Defence material. Adelaide SIEV 4".<sup>28</sup> Ms Bryant was informed by one of her officers, Ms Wildermuth, that she had spoken to Ms Sidhu in the International Division of the Prime Minister and Cabinet and been told of "rumours circulating in Defence that the photos have been wrongly attributed" (CMI 1289). The information was described as "gossip" (CMI 1289). She

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<sup>28</sup> Written Response from Ms Bryant to question on notice 2 asked by Senator Faulkner.

communicated this information to Ms Halton on 7 November (CMI 1290). Ms Halton contacted Mr Jordana when she was informed by Ms Bryant that there was “tearoom gossip” that the photographs released on 10 October related to the sinking and not the incident on 7 October. She testified that he responded “that there was already speculation to this effect in the press and the matter was being discussed with Mr Reith’s office.” (CMI 902)

8.61 Evidence was given to an Estimates Committee by an officer from the Office of National Assessments that he was asked by Mr Jordana late on the afternoon of 7 November “whether ONA had published any reports containing references to children having been thrown overboard in this incident”.<sup>29</sup> Later that evening Mr Jordana was sent an ONA report<sup>30</sup> published on 9 October which stated that “asylum seekers wearing lifejackets jumped into the sea and children were thrown in with them”. No source was identified in the report. Mr Jordana was told that “we had not been able to identify fully the source of the information in the report on the ‘children overboard’ question and that we were continuing research on that. I said that it could have been based on ministers’ statements but there may also have been Defence reporting for which we were still searching”.

## **8 November 2001**

8.62 Early in the morning, Mr Scrafton telephoned Ms McKenry and informed her that the Government had decided to release the video. It was released later that day.

8.63 Vice Admiral Shackleton, Chief of the Navy, was interviewed by the media and made a statement that included the words “Our advice was that there were people being threatened to be thrown in the water, and I don’t know what happened to the message after that.” The press report included the proposition that “the navy had never advised Defence Minister Reith that boat people threw children overboard from an Indonesian vessel”. He was telephoned by Mr Hendy who, according to Vice Admiral Shackleton (CMI 59), “said that he clearly recalled the minister being advised by Navy people of this incident - which is of children being thrown in the water - and he suggested to me that I should issue a clarifying statement to remove the apparent contradiction”. Vice Admiral Shackleton testified that he “gained a strong impression that he [Mr Hendy] had not been told that the original report was incorrect”. Subsequently, Vice Admiral Shackleton issued a statement to the effect that Defence had initially advised Mr Reith that children had been thrown into the water. At the Select Committee hearings, Vice Admiral Shackleton rejected any suggestion that he had been “coerced into making a form of retraction” (CMI 59).

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<sup>29</sup> Senate Finance and Public Administration Committee, Consideration of Additional Estimates, 18 February 2002, F&PA 138.

<sup>30</sup> ONA 226/2001.

8.64 The Deputy Chief of the Navy, Rear Admiral Adams, informed Major General Powell on 14 December 2001 that, on 8 November, he was informed by the Acting Chief of the Defence Force (Air Marshal Houston) that “the Minister had informed him that all questions about the children in the water aspect of the boarding were to be referred to his office”. I have not been able to find any evidence from Air Marshal Houston in this regard.

8.65 In a Press Club speech, the Prime Minister, Mr Howard, refers to the ONA report of 9 October when asked about the ‘children overboard’ incident.

8.66 On 8 November, Mr Reith was reported as saying: “The advice I had at the time, and the statements that I made was that I had received advice which said that the video confirmed the advice that I had.”

### **10 November 2001**

8.67 Federal election held. Admiral Barrie returns to Australia.

### **12 November 2001**

8.68 Office of National Assessments informs the Prime Minister’s office that the ONA report of 9 October was based on media statements by Mr Ruddock, Mr Reith and Mr Howard.

### **13 November 2001**

8.69 The Prime Minister initiates the Bryant Inquiry into the affair.

### **20 November 2001**

8.70 The Chief of the Defence Force initiates the Powell Inquiry into the affair.

8.71 In his statement to the Powell Inquiry made on this date, Mr Reith wrote: “As at the date of this memorandum I have still not seen the video and the reason for not seeing the video is that the claims I made were based on verbal advice from Defence, and not on the video”. He also stated:

“At no stage have I received advice that the children were not thrown overboard. There has been no evidence presented to me which contradicts the earlier and first advice.”

He also referred to the fact that “a written briefing from the Office of National Assessments did include a claim that children were thrown overboard”. Finally, he stated that he had read the letter written by Mr Hampton dated 12 November 2001 and then wrote: “The letter reflects the facts of the situation as I remember them”.

### **Undated**

8.72 Ms Bryant asked Air Vice Marshal Titheridge whether he recalled a discussion with Mr Scrafton “in which he was querying whether there was certainty around the facts in this case” and in which Titheridge “indicated that the story was true”. Air Vice Marshal Titheridge replied that he had many conversations with Mr Scrafton and “cannot recall the details of those conversations or when they took place as there were simply too many of them”. However, given the fact that Air Vice Marshal Titheridge also informed Ms Bryant on 21 December 2001 that he had not become aware of doubts about the incident until late November, it is entirely possible that he conveyed this to Mr Scrafton.

## **9. QUESTIONS THAT EMERGE FROM THE EVIDENCE RELATING TO THE FIVE NAMED PERSONS**

9.1 In my opinion, a number of questions emerge from the evidence detailed above. I will formulate them in the first person.

### **Mr Michael Scrafton**

9.2 You are reported as having told Ms Bryant on 14 December 2001 that you “or the office more generally” had “become aware fairly early that there was a tape ‘confirming that the incident had happened’, but that it was of poor quality”. Do you know who provided this information?

9.3 You are reported as having told Ms Bryant on 14 December 2001 words to the effect that you “did not recall being told clearly by Admiral Ritchie in their conversation on 10 October that children had not been thrown overboard”. Do you recall what he said about the video? Were you informed that “the video” did not show that children had been thrown overboard? Was there a reference to a “13 yr old being pushed over the side”? Was there a reference to “a child being pushed over the side”? Were you told that the captain of the Adelaide believed that there might be reports able to be taken from sailors who were on the disengaged side (that is, the side that the camera could not see) that indicated that there might be children in the water?

9.4 In his statement to the Powell Inquiry of 20 November 2001, Mr Reith stated “Michael Scrafton, from my Canberra office, told me that we had a film of a child

being pushed into the water and that children were in the water on their own, separated from any adults.” Do you say this to Mr Reith? If so, when?

9.5 You are reported as having told Ms Bryant on 14 December 2001 that you were told by Ms McKenry on 11 October “that the photographs were being misrepresented, and that they related to the sinking rather than the ‘children thrown overboard’ incident”. According to Ms McKenry, she sent you an email with both the photographs and the explanatory text and you acknowledged receipt of that email. Is that correct? Did you accept that the photographs related to the sinking on 8 October and not the “children overboard” incident on 7 October? Was that “the true nature of the photographs” to which you are reported to have referred when you spoke to Ms Bryant on 14 December 2001? Did you convey your views on this question to Mr Hampton? Why did you consider it Mr Hampton’s role to inform Mr Reith about “the true nature” of the photographs?

9.6 Mr Hendy told Ms Bryant that, around 11 October 2001, you had “found the ship’s log of the event and ascertained that the event had occurred after sunrise”. On the assumption you could not have examined the ship’s log, what document (if any) did you examine? Did the document contain any support for the proposition that children were thrown into the water?

9.7 When did you first become aware that a doubt existed as to whether any children had been thrown into the water on 7 October?

### **Mr Ross Hampton**

9.8 Why did the Public Affairs Plan for Operation Relex mandate that all “comment and media response/inquiries” in relation to Operation Relex were to be referred to you? Did you tell Mr Humphreys that no “personalising” or “humanising” images were to be taken of persons on the boats intercepted by the Navy? If so, why?

9.9 During his ABC radio interview on 10 October, Mr Reith stated that the video was infra-red. Were you aware on 10 October that he said this? Was it your understanding on that day or the following that the video was infra-red? If so, did this affect your assessment of the two photographs, which were plainly taken during daylight?

9.10 In your letter of 12 November, you stated that on 11 October 2001 “... someone from Defence - I do not recall who - informed our office that there may be new doubt about whether the two still photos supplied were taken after the children were thrown from SIEV 04 or after SIEV 04 sank. This doubt was based on the fact that the separately recorded video of the jumping overboard incident was reportedly ‘infra-red’ - suggesting it must have been dark when the jumping overboard incident occurred. There was also a suggestion that text accompanying the photos cast doubt about which event was depicted.” Have you now recalled who from Defence raised the first doubt? In respect of the first doubt, you stated that checking revealed the 7

October incident occurred “about 6.00 am Christmas Island Time, which was half an hour after sunrise”, and then stated that this “therefore supported the initial advice that the photos were of the jumping overboard incident as the two still photos (taken in a non infra-red camera) were clearly taken in daylight hours.” Why do you say this information “supported” the initial advice? It may have removed the first doubt but do you accept that it did not assist in deciding whether the photographs were taken on 7 October or when the sinking occurred on 8 October? Who was it that checked “the log describing the events [which] showed that the time the children were thrown from SIEV 04 was about 6.00 am Christmas Island Time”? Were you aware that there was no written indication in Defence documents that children were thrown into the water?

9.11 In your letter of 12 November, you stated that the email which you received from John Clarke provided the explanatory text for the two photographs. Is it not the case that this information clearly showed that the photographs related to the sinking on 8 October and not the incident on 7 October? Did you discuss this with Mr Scrafton? What was his view? Who else did you discuss the issue with? Why was it necessary for the Minister, Mr Reith, to ask “for a formal response from Defence as to the veracity of the still photos and definitive advice of the time they were taken”? From whom in Defence did the Minister seek “a formal response”? To your knowledge, did the proximity of the election play any part in the decision not to make any public statement about what was, at the very least, the gravest doubt about the public attribution of the photographs?

9.12 In your letter of 12 November, you stated that “[i]t should be emphasised that there have been two instances, noted above, of where Defence Public Affairs have provided obviously incorrect advice and the status of the photos is still uncertain. First Defence suggested the two still photos were taken when it was dark when the two still photos themselves were clearly taken in broad daylight, and secondly Defence sent on the wrong email when a copy was requested. At this time we have not yet received a conclusive reply to this matter from Defence.” Was it not your assertion that “Defence” told you the 7 October incident occurred in darkness, rather than that the photographs “were taken when it was dark”? How did the timing of the 7 October incident bear on the significance of the explanatory text for the two photographs? How did the fact that “Defence sent on the wrong email [that is, the photos with explanatory text, rather than without explanatory text] when a copy was requested” constitute “incorrect advice”? While it may explain how you made the initial mistake, how could it justify the Minister’s decision not to respond to rumours that “the photos may have depicted events after SIEV 04 had sunk”?

### **Mr Peter Hendy**

9.13 During his ABC radio interview on 10 October, Mr Reith stated that the video was infra-red. Were you aware on 10 October that he said this? Was it your understanding on that day or the following that the video was infra-red? If so, did this

affect your assessment of the two photographs, which were plainly taken during in daylight?

9.14 You told Ms Bryant on 8 January 2002 words to the effect that you “recalled being told that the Department said the reason for their doubt was that the children overboard incident had occurred at night but that the photos were clearly taken in daylight”. Who told you this?

9.15 On 11 October, were you aware that Ms McKenry and Brigadier Bornholt advised that the photographs were taken during the sinking on 8 October? On that day, did you read the explanatory text relating to the two photographs? Given that the 8th October sinking had occurred during daylight, how could establishing that the 7th October incident had occurred during daylight have been seen as evidence that the photographs were of that incident? How did you know that “Mr Scrafton had found the ship’s log of the event”? Were you told anything about this document, other than that it showed “that the event had occurred after sunrise”? Were you shown this document? On 11 October, did you discuss the issue of the dating of the photographs with Mr Scrafton? What was his view? To your knowledge, did the proximity of the election play any part in the decision not to make any public statement about what was, at the very least, the gravest doubt about the public attribution of the photographs?

9.16 Were you aware on 11 October of a discussion between Mr Reith and the Chief of the Defence Force in which the topic of doubt about the dating of the photographs was raised?

9.17 You told Ms Bryant on 8 January 2002 words to the effect that “when the question of the accuracy of the attribution of the photos came up, the Minister made the decision within 24 hours that he would not change the public record until he had conclusive advice about what had actually happened with the original reports and the photos. The Minister had asked for an Inquiry, which was the Inquiry conducted by General Powell.” Are you aware that the Powell Inquiry was commissioned by the Chief of the Defence Force on 20 November 2001? Are you aware that, in an interview between Mr Reith and Ms Bryant on 17 January 2001, Mr Reith is recorded as saying that “he had not set General Powell’s inquiry in train - CDF had initiated it and informed Mr Reith”? Are you aware that there is no record in Defence of a written request ever being made by Mr Reith to investigate the SIEV4 incident?

### **Mr Peter Reith**

9.18 Do you accept that you had responsibility for the actions, or inactions, of your staff (particularly Mr Peter Hendy, Mr Michael Scrafton and Mr Ross Hampton) in relation to this affair?

9.19 Why did the Public Affairs Plan for Operation Relex mandate that all “comment and media response/inquiries” in relation to Operation Relex were to be referred to Mr Hampton?

9.20 When did you first become aware of the written briefing dated 9 October 2001 from the Office of National Assessments which included that claim that children were thrown overboard? Did you make any inquiries regarding the source or sources of that claim?

9.21 Did Admiral Barrie tell you on 11 October that he had been advised that the two photographs were not taken during the 7 October “children overboard” incident? Did you come to an agreement with him that you would never again discuss photographs without ensuring that you both had the same photographs in front of you? Did you say to Admiral Barrie that you would “drop the issue” of the photographs? If so, what did you mean?

9.22 In an interview between you and Ms Bryant on 17 January 2001 you are recorded as stating “that the doubts raised about the photographs on 11 October were themselves contradictory. He noted that one doubt was based on timing of the incident, and a suggestion that the video was infra-red and taken at night. When pressed, this advice was found to be incorrect”. During an ABC radio interview you gave on 10 October, you stated that the video was infra-red. Did this affect your assessment of the two photographs, which were plainly taken in daylight? Why did you agree to the release of the photographs on 10 October as evidence that the children overboard incident occurred? Given that the 8th October sinking had occurred during daylight, how could establishing that the 7th October incident had occurred during daylight have been seen as evidence that the photographs were of that incident?

9.23 In your statement to the Powell Inquiry made on 20 November, you wrote that you had read the letter written by Mr Hampton dated 12 November 2001 and stated: “The letter reflects the facts of the situation as I remember them”. In the letter, Mr Hampton refers to the explanatory text with the photographs. Did you read that explanatory text on 11 October or subsequently? In his letter Mr Hampton stated that “[t]he Minister was aware of rumours that the photos may have depicted events after SIEV 04 had sunk, but the Minister decided not to respond to these rumours because the matter is not yet resolved”. What rumours had you heard? From whom? Mr Hampton stated that “the Minister asked for a formal response from Defence as to the veracity of the still photos and definitive advice of the time they were taken”. From whom in Defence did you seek “a formal response”?

9.24 Do you accept that after 11 October 2001 you had an obligation to correct the public record in relation to the two photographs? Did the proximity of the election play any part in your decision not to make any public statement about what was, at the very least, the gravest doubt about the public attribution of the photographs?

9.25 On the Sunday Sunrise program on 14 October 2001, you were asked why you had released the photographs to prove that children had been thrown overboard and you are recorded as saying “I was happy to have the Department release a couple of photos, because there was a claim we were not telling the truth about what happened.” Do you think that was an appropriate response given the doubt that existed by 14 October about the attribution of the photographs? Do you accept that your response was misleading?

9.26 Did you have a conversation with Admiral Barrie between 11 October and 25 October in which he informed you that he had been told by the Chief of the Navy and COMAST that there were doubts about whether children had ever been thrown over the side of SIEV4? Did he say to you that the doubts seemed to be based on what the photographs showed - or did not show - and an inconclusive video? Did Admiral Barrie give you clear advice that either there was no evidence or at a minimum there were serious question marks about evidence in relation to the children overboard issue? Did Admiral Barrie say his position was that, until evidence was produced to show the initial report to him was wrong, he would stand by it, and that, as at that date, no further evidence had been provided to him? If you did have this conversation with Admiral Barrie, why did you make no public statement revealing the doubt about the incident? Did you make a request for formal and definitive advice from Defence on the issue? If not, why not? Did the proximity of the Federal election play a part in your failure to seek such advice or make a public statement on the issue?

9.27 In the interview between you and Ms Bryant on 17 January 2002 in relation to the conversation with Brigadier Silverstone on 31 October 2001 you are reported to have said that you “may have made some comment about not seeing the video at all, but could not remember the conversation in any detail”. Do you agree that Silverstone told you that the video did not show children being thrown into the water? If so, what did you do to have the video checked? Why did Mr Scrafton only view it on 7 November? Do you agree that on 31 October 2001 you said “Well, we had better not see the video then” to one of your staff after the conversation between you and Silverstone had concluded? If you do, what do you believe you meant by this comment?

9.28 Did Brigadier Silverstone tell you on 31 October 2001 that Defence had concerns that no children were thrown in the water at all? If so, do you accept that you had an obligation to require further inquiry by the Defence Force? Do you accept that you had an obligation to correct the public record in relation to the existence of doubt regarding whether children were ever thrown overboard?

9.29 In your statement dated 21 February 2002, you stated that Air Marshal Houston told you on 7 November 2001 that “there was no evidence to support the claim that children had been thrown overboard” and that Air Marshal Houston had concluded that “the event had not happened”. Given that this contradicted advice provided to you previously by the Australian Defence Force, why was your only immediate response to release the video? Given what Brigadier Silverstone had told you about the video on 31 October, and what Air Marshal Houston told you about it on 7

November, why did you say on 21 February 2002 that, as at 7 November, you “were still under the impression that the video supported earlier advice”? Given that Air Marshal Houston informed you that the photographs related to the events of 8 October and thus did not provide evidence to support the claim that children had been thrown overboard, why was this not made public? Were you aware that Air Marshal Houston was acting Chief of the Defence Force on 7 November 2001? Were you aware on that date that Admiral Barrie was overseas and would not return until the day of the election? Why did you tell Major General Powell on 20 November 2001: “At no stage have I received advice that the children were not thrown overboard”? Was not what Air Marshal Houston told you “advice”?

9.30 Did you say to Air Marshal Houston on 7 or 8 November 2001 words to the effect that “all questions about the children in the water aspect of the boarding were to be referred to [your] office”? If you did, why did you say this?

## **10. PRELIMINARY FINDINGS AND CONCLUSIONS**

10.1 As I explained in Part 3 of this Report, where it is necessary for a factual finding or conclusion to be made in order to comply with the brief, but uncertainty or dispute exists, I will express only tentative or provisional views. The brief requires only “preliminary findings and conclusions” and that requirement will be adhered to. All the conclusions expressed below should be understood in this light, for the reasons I have given in Part 3.

### **Release of the photographs on 10 October 2001**

10.2 In her Report, Ms Bryant wrote: “Evidence from a number of witnesses indicates that Mr Hampton’s practice of directly contacting multiple areas and individuals within Defence to obtain information, and his apparent insistence on immediate action, contributed to the undermining of normal clearance and checking processes for the release of information into the public domain”.<sup>31</sup> Mr Hampton strongly disagreed with this conclusion. I have not formed a view on this issue because, in my opinion, it involves a clash between public service and political imperatives which I am singularly unsuited to resolve. What appears clear, however, is that the photographs were released by Mr Reith and his staff on 10 October in the belief that they were taken during the incident on 7 October. While Brigadier Bornholt expressed the view to Mr Hampton that they were not photographs of that incident, Mr Hampton discounted that opinion on the basis that he understood the photographs had been verified by the Chief of the Defence Force and because it became apparent that he and Brigadier Bornholt were talking about two different sets of photographs.

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<sup>31</sup> Jennifer Bryant, Investigation into Advice Provided to Ministers on “SIEV 4” (21 January 2002) page 23.

### **Initial reports about the video**

10.3 Mr Scrafton has stated that “he (or the office more generally) had become aware fairly early that there was a tape ‘confirming that the incident had happened’, but that it was of poor quality”. While Rear Admiral Ritchie has testified that he informed Mr Scrafton on 10 October that “the video” did not show that children had been thrown overboard, I am unable to conclude on the evidence available to me that this was conveyed to Mr Scrafton. The contemporaneous diary note made by Rear Admiral Ritchie is referred to at paragraph 8.8. A number of points should be made about it. It confirms that Mr Scrafton was told something about the video (the “EOTS footage”). It does not clearly confirm Rear Admiral Ritchie’s assertion that Mr Scrafton was told that the video did not show that children had been thrown overboard. It shows that Mr Scrafton was told that the video showed a young person being “pushed” over the side. It may be noted that a question mark hangs over the fact that the word “child” has been written and crossed out, replaced with the words “13 yr old”. Rear Admiral Ritchie has never been asked when he made the change. It may be accepted that he believes that he informed Mr Scrafton that the video did not show that children had been thrown overboard. However, the possibility cannot be excluded that he is mistaken about this. In my opinion, it may be concluded that Mr Scrafton was told on 10 October either that the video showed a “13 year old” being “pushed” over the side or that it showed a “child” being “pushed” over the side. On the evidence I have reviewed, I cannot conclude that he was told that the video did not show that children had been thrown into the water.

### **Communications regarding the photographs**

10.4 In her Report of 21 January 2002, Ms Bryant concluded:

“I am therefore unable to reach a finding about whether Admiral Barrie provided definitive advice to Mr Reith that the photographs were from the sinking, not the overboard incident. Nevertheless, it is clear that Mr Reith was aware on 11 October that there was considerable doubt that the photographs depicted children thrown overboard on 7 October. It is also clear that Defence had advised both Mr Hampton and Mr Scrafton of the true nature of the photographs by 1100 on 11 October 2001.”<sup>32</sup>

I agree with these conclusions.

10.5 Admiral Barrie is emphatic that he advised Mr Reith on 11 October that he had been advised that the two photographs were not taken during the 7 October “children overboard” incident, and Rear Admiral Ritchie made a diary note on that day based on what he was told by Admiral Barrie which reads “Min advised that photos as

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<sup>32</sup> Jennifer Bryant, Investigation into Advice Provided to Ministers on “SIEV 4” (21 January 2002) at 4.2.3.

published were not of this incident and were captioned so”. Nevertheless, Mr Reith has not to date clearly addressed this issue and, like Ms Bryant, I am unwilling to make even a preliminary finding on the question at this stage.

10.6 Nevertheless, as Ms Bryant concluded, it is clear that Mr Reith was aware on 11 October that there was considerable doubt that the photographs depicted children thrown overboard on 7 October. The explanatory text to the photographs raised the gravest doubts about their attribution. Strong views had been communicated to Mr Reith’s staff by the Head of Defence Public Affairs and Corporate Communication and the Military Adviser, Defence Public Affairs and Corporate Communication, that the photographs related to the sinking on 8 October. Mr Scrafton, Mr Reith’s Senior Adviser (Defence) appears to have accepted on 11 October “the true nature of the photographs”.

10.7 Further, I share Ms Bryant’s scepticism regarding the reasons advanced as why there was “continuing uncertainty” on the part of Mr Reith and his advisers regarding the photographs, which was the explanation given as to why the public record was not corrected. As Ms Bryant observed in her Report,

“It is also difficult to understand how, given that both incidents had occurred during daylight hours, establishing that the overboard incident had occurred during daylight could have been seen as evidence that the photographs were of that incident. Furthermore, during his ABC radio interview on 10 October, Mr Reith stated that the video was infra-red and this understanding clearly did not affect the belief held by the Minister’s office on that day that the photographs and video depicted the same incident.”<sup>33</sup>

As regards Mr Hampton’s reliance on the fact “Defence sent on the wrong email [that is, the photos with explanatory text, rather than without explanatory text] when a copy was requested” to constitute “incorrect advice”, while it may explain how the initial mistake was made, I do not understand how could it justify the Minister’s decision not to respond to rumours that “the photos may have depicted events after SIEV 04 had sunk”.

10.8 It also appears to be clear that Mr Hendy was wrong when he told Ms Bryant on 8 January 2002 that “when the question of the accuracy of the attribution of the photos came up ... the Minister had asked for an Inquiry, which was the Inquiry conducted by General Powell.” The Powell Inquiry was commissioned by the Chief of the Defence Force on 20 November 2001 and Mr Reith is recorded as saying that “he had not set General Powell’s inquiry in train - CDF had initiated it and informed Mr Reith”. Further, although Mr Hampton stated that Mr Reith asked for “a formal response from Defence as to the veracity of the still photos and definitive advice of the time they were taken” (a proposition which appears to have been endorsed by Mr Reith on 20

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<sup>33</sup> Ibid.

November 2001) so far as I am aware there is no record in Defence of a written request ever being made by Mr Reith for such advice.

10.9 Further, Mr Reith's reported assertion on 17 January 2002 that, after 11 October 2001, "there was continuing uncertainty [about the photographs] and he was not willing to make further public comments which may themselves not have been correct" does not sit well with what he said in an interview on 14 October 2001. On the Sunday Sunrise program, Mr Reith was asked why he had released the photographs to prove that children had been thrown overboard, but not the video. Mr Reith said that he hadn't yet seen the video, but that "I was happy to have the Department release a couple of photos, because there was a claim we were not telling the truth about what happened." It is true that there is no explicit deception, because Mr Reith was referring to his state of mind on 10 October. However, in my opinion, the clear implication of what he said was that he continued to assert that the photographs showed that he was "telling the truth about what happened", that is, that children had been thrown overboard. Of course, the photographs only showed children in the water, but they were relied on as some corroboration of the incident. In my opinion, it was misleading of Mr Reith not to refer in the interview on 14 October to the doubt he knew existed in relation to the attribution of the photographs.

### **Doubts about the incident**

10.10 Rear Admiral Ritchie testified that he was advised on 10 October that the video "showed that there were no children thrown overboard ... I passed that information back to Mr Scafton". This appears to be a case of imprecise language. What Rear Admiral Ritchie clearly meant to say was that the video did not show children being thrown overboard. I have dealt with that issue above. In my opinion, it is clear that Mr Scafton was not told on 10 October that it had been established that no children were thrown overboard. Indeed, while it may be accepted that Rear Admiral Ritchie was aware that real doubt existed about whether children were thrown overboard<sup>34</sup>, it cannot be concluded that Mr Scafton was alerted to this on 10 October.

10.11 There is no evidence that Mr Reith received written advice indicating that there was doubt as to whether children were thrown into the water, let alone written advice that it had not happened. Rear Admiral Ritchie testified to the Select Committee that he understood that Admiral Barrie informed Mr Reith on 11 October that there was doubt about the incident but it appears likely that Admiral Barrie was referring only to the issue about the photographs. Admiral Barrie testified that the conversation with Mr Reith on 11 October related to the photographs and preceded the later conversation with Rear Admiral Ritchie where he was informed about the doubts as to whether any children were thrown overboard.

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<sup>34</sup> Although it is apparent that he had not, at that stage, been informed that the captain of the Adelaide had concluded that no children had been thrown overboard.

10.12 Admiral Barrie has testified that he did have a conversation with Mr Reith on or about 17 October in which he informed him that he had been told by the Chief of the Navy, Vice Admiral Shackleton, and Rear Admiral Ritchie, that there were doubts about whether children had ever been thrown over the side of SIEV4. He conveyed to Mr Reith that the video was inconclusive. According to Admiral Barrie, he had previously informed Mr Reith that the photographs were not taken on 7 October. However, Admiral Barrie added that he informed Mr Reith that his position was that, until evidence was produced to show the initial report to him was wrong, he would stand by it, and that, as at that date, no further evidence had been provided to him. Given that Admiral Barrie was informed by Rear Admiral Ritchie on 11 October about the doubts as to whether any children were thrown overboard, it would be surprising if he did not communicate those doubts to Mr Reith before Admiral Barrie went overseas on 25 October. It follows that I think it likely that Mr Reith was advised by Admiral Barrie before 25 October that there were serious doubts about whether children had ever been thrown into the water. However, I stress that this is only a preliminary conclusion and that Mr Reith has not to date given his account of this alleged conversation.

10.13 On the assumption that Mr Reith was advised by Admiral Barrie before 25 October that there were serious doubts about whether children had ever been thrown into the water, the question arises as to why he made no public statement revealing this. He could simply have relied on the fact that Admiral Barrie stood by the initial advice until evidence was produced to show the initial report was wrong. However, if that was the reason it is surprising that, on the evidence available to me, Mr Reith did not make a request for formal and definitive advice from Defence on the issue.

### **Communications regarding the video**

10.14 Whilst I have been unable to conclude that Mr Scafton was informed by Rear Admiral Ritchie on 10 October that the video did not show children being thrown overboard (paragraph 10.3), I accept that, by 11 October, Rear Admiral Ritchie had concluded that the video was inconclusive and had communicated this to Admiral Barrie. I have concluded above (paragraph 10.12) that it is likely that Mr Reith was advised by Admiral Barrie on or about 17 October that there were doubts about whether children had ever been thrown into the water. I also conclude that it is likely that Mr Reith was advised by Admiral Barrie at the same time that the video was “inconclusive”, that is, it did not show any children being thrown in the water. I stress again that this is only a preliminary conclusion and that Mr Reith has not to date given his account of this alleged conversation.

10.15 Mr Reith accepts that he was told by Brigadier Silverstone on 31 October that the video provided no evidence to support the proposition that children had been thrown overboard. Mr Reith has asserted that this conversation about the video was a casual one in which Brigadier Silverstone’s comments were made “in passing” and that because Brigadier Silverstone had said that he had not seen the video himself, Mr

Reith did not regard his comment as “definitive”. However, in the context of my preliminary finding that he had already received the same advice from the Chief of the Defence Force, this explanation for Mr Reith’s subsequent inaction appears less plausible.

10.16 If Mr Reith did indeed say, after speaking to Brigadier Silverstone, “Well, we had better not see the video then”, the danger in drawing any inference adverse to Mr Reith must be recognised. One possible interpretation of the words is that he wished to maintain the claim that children had been thrown overboard and did not want to examine evidence which might indicate the contrary. He may have wanted to maintain the claim that the video supported the children thrown overboard claim. Alternatively, he could simply have meant that there was no point in looking at it if it did not assist on the question of whether children were thrown overboard or not.

10.17 However, the sequence of events suggests an unwillingness to correct the public record. On 10 October, on the basis of what he had been told by Mr Scrafton, Mr Reith stated in an interview that “I am told that someone has looked at [the video] and it is an absolute fact, children were thrown into the water”. On 14 October, Mr Reith stated in an interview that the quality of the video was sufficient “to make out what it is said that is on the film” (that is, it shows children were thrown into the water) and that “we will a look at it and see” before deciding whether to release it. A copy of the video was sent to Rear Admiral Smith, the Maritime Commander, Australia, on 14 October. Notwithstanding what he was told by Brigadier Silverstone and, on my preliminary finding, the Chief of the Defence Force, the video was not viewed by anyone from Mr Reith’s office until 7 November, after the article in the *Australian* had been published and the conversation between Mr Reith and Air Marshal Houston took place.

### **Vice Admiral Shackleton’s clarifying statement on 8 November 2001**

10.18 At the Select Committee hearings, Vice Admiral Shackleton rejected any suggestion that he had been “coerced into making a form of retraction” and, in my opinion, there is no reason not to accept this or to conclude that Mr Hendy acted improperly in any way. As I have concluded above, it is clear that senior Defence personnel did in fact initially communicate to the Government that children had been thrown in the water. In my opinion, it was not inappropriate to make the clarifying statement.

### **Mr Jordana**

10.19 Ms Halton testified that she informed Mr Jordana on the afternoon of 10 October that she had been told by either Mr Reith or Air Vice Marshal Titheridge that there were photographs of the 7 October event that had been released to the media, that there was a “grainy video” of it and that “Defence was collecting witness

statements”. There is no reason to believe from the evidence available to me that Mr Jordana was alerted on 10 October to the existence of doubt surrounding the incident.

10.20 Ms Bryant, Assistant Secretary in the Department of the Prime Minister and Cabinet testified that Mr Jordana contacted her on 7 November “looking for Defence sit reps [situation reports] and Defence material”. This was an understandable inquiry given the Australian article in the morning and the fact that the Prime Minister was to make a speech to the National Press Club on 8 November. It is not surprising that Mr Jordana wanted to review previously provided material to assist in preparation of that speech. Later that day, Ms Halton contacted Mr Jordana when she was informed by Ms Bryant that there was “tearoom gossip” that the photographs released on 10 October related to the sinking and not the incident on 7 October. She testified that he responded “that there was already speculation to this effect in the press and the matter was being discussed with Mr Reith’s office”. Again that is hardly surprising in the circumstances and I can see no basis for any criticism of Mr Jordana.

10.21 The evidence indicates that Mr Jordana was told on 7 November 2001 that, as at that date, the Office of National Assessments had not been able to identify fully the source of the reference in the 9 October report to children having been thrown overboard and that “it could have been based on ministers’ statements but there may also have been Defence reporting for which [ONA] were still searching”. In those circumstances, I do not see any basis for criticism of Mr Jordana from the fact that the Prime Minister referred to the ONA report in his Press Club speech of 8 November.

**S. J. Odgers SC**

**Forbes Chambers**

**21 August 2002**

