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TERMS OF REFERENCE

A Select Committee on a Certain Maritime Incident has been appointed to inquire into and report by 23 October 2002 on the following matters:

- (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 that 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,
 - (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.

ACRONYMS AND ABBREVIATIONS

ABBM	Able Seaman
ACS	Australian Customs Service
ADE	[HMAS] <i>Adelaide</i>
ADF	Australian Defence Force
ADFA	Australian Defence Force Academy
ADO	Australian Defence Organisation
AEST	Australian Eastern Standard Time
AFP	Australian Federal Police
AMSA	Australian Maritime Safety Authority
ANAO	Australian National Audit Office
APS	Australian Protective Services
APS	Australian Public Service
AQIS	Australian Quarantine and Inspection Service
ASIO	Australian Security and Intelligence Organisation
AST	Australian Theatre
ASTJIC	Australian Theatre Joint Intelligence Centre
AusSAR	Australian Search and Rescue
AVM	Air Vice Marshal
CDF	Chief of Defence Force
CEO	Chief Executive Officer
CMI	Certain Maritime Incident
CJTF	Commander Joint Task Force
CMSP	Civil Maritime Surveillance Program
CN	Chief of Navy

CO	Commander
COMAST	Commander Australian Theatre
DFAT	Department of Foreign Affairs and Trade
DIMA	Department of Immigration and Multicultural Affairs
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DJOPS	Director Joint Operations
DLO	Departmental Liaison Officer
DML	Director Media Liaison
DSD	Defence Signals Directorate
DTRS	Department of Transport and Regional Services
EOTS	Electro-Optical Tracking System
EXCOM	Executive Committee
FAA	First Administrative Arrangements
HPACC	Head Public Affairs and Corporate Communication
HQNORCOM	Head Quarters Northern Command
HSC	Head Strategic Command
IAS	Intelligence Analysis Section
IDC	interdepartmental committee
INP	Indonesian National Police
INTSUM	Intelligence Summary
IOC	Information Oversight Committee
IOM	International Organisation for Migration
IRDS	Infra-Red Detection System
LSCK	Leading Seaman Cook
MAPACC	Military Adviser Public Affairs and Corporate Communication

MC	Maritime Commander
MINDEF	Defence Minister
MoPS	Members of Parliament Staff
MOU	Memorandum of Understanding
NCC	Naval Component Commander
NORCOM	Northern Command
ONA	Office of National Assessments
OPSUM	Operations Summary
OSCA	Office of Strategic Crime Assessments
PACC	Public Affairs and Corporate Communication
PM & C	Department of the Prime Minister and Cabinet
PNG	Papua New Guinea
PST	People Smuggling Taskforce
PUAs	possible unauthorised arrivals
RAAF	Royal Australian Airforce
RAN	Royal Australian Navy
RCC	Rescue Coordination Centre
RHIB	rigid hull inflatable boat
ROE	Rules of Engagement
SAS	Special Air Services
SCD	Strategic Command Division
SIEV	Suspected Illegal Entry Vessel
sitrep	situation report
SOLAS	Safety of Life at Sea
SUNC	suspected unauthorised non-citizen
TSE	Transit Security Element

UA unauthorised arrival

UBA unauthorised boat arrival

UNHCR United Nations High Commissioner for Refugees

Chair's Foreword

This has been a most unusual inquiry. Senate inquiries typically review legislation or examine some element of public policy. This has been an inquiry into an event and the chain reaction that event set off in the defence forces, the bureaucracy and the Government. What gave the proceedings heightened significance was that the 'children overboard' claim was made and given dramatic media prominence immediately after a federal election had been called in which border protection and concerns about asylum seekers were central issues. In our remit only the Pacific solution element is the more usual type of subject for senate committees.

Unsurprisingly, most of our time was consumed by the 'children overboard' question. On this subject the Committee has, in reality, been conducting an investigation. The breadth of that investigation was significantly expanded when the terms of reference were extended at the start to include other SIEVs apart from SIEV 4 (the 'children overboard' boat). This brought the tragic story of SIEV X and the 353 men, women and children who drowned on its ill-fated voyage within our purview.

The Committee's approach to the investigative parts of the terms of reference has been to simply allow the evidence to point the direction it should take. This approach of following the evidence meant some changes in normal Senate committee operations. First, the Committee adopted a practice of not limiting its examination of witnesses by, as is normally done, imposing and rigidly adhering to a timetable for the day's proceedings. Instead it took as long as needed to thoroughly examine each witness.

This left the Committee open to some criticism. Because it was not possible to be absolutely certain when the next witness would be called, on occasion, senior officers and key personnel were kept waiting for long periods and were sometimes required to make last minute alterations to their other commitments. The Committee apologised then and I apologise now for that inconvenience. However the Committee believed that if it had not followed the practice of completing the examination of each witness thoroughly, the inquiry could have suffered from the more serious criticisms that it was incomplete, superficial, or worse - a 'cover up'.

Second, the Committee could not always be sure whom it would want as the next witness. The inquiry posted a hearing list in advance in order to keep the story unfolding in as sequential a way as possible. But often the last witness's evidence was the key to deciding who the Committee wanted to hear from next, whether it should get on with the narrative, or spend more time and speak to more witnesses in order to establish the facts at some decisive point in the story.

Early on, the press got a little testy about the inquiry because the Committee would not say if it intended to call Mr Reith. In the event, Mr Reith was requested on at least three occasions to appear but the requests were made only when the Committee

believed that it had justifiable grounds for doing so and it had reached the appropriate stage of the investigation to call him.

Third, the Committee started out coordinating its work with a liaison group appointed for the purpose by the Australian Defence Organisation (ADO). This enabled both the inquiry and the ADO to balance their needs and to program witnesses at mutually convenient times. While this arrangement was in place it worked well and I wish to thank the officers concerned for the manner in which they discharged their duties. Soon after the inquiry commenced, however, this arrangement was terminated by the Minister for Defence, Senator Hill, and the Committee was told that it would have to make any requests of the Australian Defence Force (ADF) and the Department of Defence through the Minister's office. I never considered this new arrangement was necessary, adding as it did a new level of complexity and red tape. Nor did it work well.

The hearing program was slowed down at various points because of delays in the Minister's office and key documents were withheld for an inordinate length of time. Tension developed between the Committee and the Minister when he began to question the Committee's procedures, refused to allow certain witnesses to appear and when he challenged the Committee's right to pursue its inquiries in the manner it thought most appropriate.

As well, the Minister's Chief of Staff, Mr Matt Brown, behaved towards the Committee secretariat in a way that could only be described as discourteous and unprofessional. In Question Time, prior to the first hearing, Senator Hill attacked the inquiry as 'a Labor stunt'. This view seemed to inform his approach. In other inquiries, even those in which tensions between political parties have been high, the liaison between ministers, their departments and the committees has worked smoothly. A notable feature of this inquiry is that in this case it did not.

The Committee's decision to follow the evidence meant that it started the inquiry with the 'children overboard' incident itself and made an effort to establish what actually happened. Next it followed how a message came to be transmitted that children had been thrown into the sea when they had not, and how that message travelled inside and outside of the defence chain of command to the bureaucracy, ministers, the Prime Minister and the press. When it had been established that it quickly became known among key people that the 'overboard story' was false and the media had been misled about the photographs, the inquiry turned its focus to questions of public accountability and what was done and by whom to correct the record.

It was in this phase of the inquiry that it hit a brick wall. The inquiry was able to piece together quite effectively a reasonably clear picture of what happened about correcting the record up to ministerial and prime ministerial level. There was enough information to cause the inquiry to make the majority findings about Mr Reith's conduct that appear in the report but it was not possible to go further. The inquiry was blocked by a cabinet decision. Cabinet decided to fence off ministerial and prime ministerial conduct from the reach of the inquiry by refusing access to ministerial and prime ministerial staff and to public servants serving in ministerial offices at the time.

This inquiry would have been aided considerably, and possibly able to fully discharge the obligations imposed on it by the Senate under its terms of reference, if it could have called as a witness the Prime Minister's international adviser Mr Miles Jordana, and former minister Peter Reith's advisers, Mr Mike Scafton, Mr Ross Hampton and Mr Peter Hendy. Mr Scafton is now a senior public servant with the Department of Defence. Mr Hampton is adviser to the Minister for Education Science and Training, Dr Nelson. Until recently, Mr Hendy also worked for Dr Nelson as his Chief of Staff.

Senator Hill went beyond the Cabinet decision and deemed that it was not appropriate for the Committee to request the appearance of some witnesses who were members of the ADO, and he refused permission for them to do so. The two people of interest to the Committee were Rear Admiral Raydon Gates and Ms Liesa Davies. Rear Admiral Gates had led a taskforce on issues relevant to the inquiry and Ms Davies was, and still is, the Defence Departmental Liaison Officer in the Minister's office.

For his part, Mr Reith was not entitled to immunity from this inquiry as he was no longer a serving member of the House of Representatives, but bolstered by an opinion from the Clerk of the House of Representatives, he rejected three formal requests to appear. Mr Reith was an essential witness but I will say more about this later. The Reith case has sparked a continuing exchange of conflicting opinion between the Clerk of the Senate and the Clerk of the House about Senate committee powers. I note here the Committee, by a majority, accepts the views of the Clerk of the Senate. Because the inquiry attached considerable importance to this matter all the correspondence relating to it is published as an appendix to this report.

Given the disposition of the Committee to favour the Senate Clerk's view, the Committee had to contend with the question: should it approach the Senate with a request that Mr Reith be compelled to appear before the committee by way of a summons. The Committee was divided on this issue but the majority view was that any summons to Mr Reith would be contested in the courts with the taxpayer having to foot the bill and with the inquiry having to mark time until the issue was settled. It is for this reason that the Committee took the unusual step of asking Mr Stephen Odgers SC to make an assessment of the evidence. This he has done and his report is available with the Committee's report.

Unable to pursue the 'overboard story' to its conclusion, the inquiry gave its attention to the Pacific solution element of the terms of reference and to what has become known as the SIEV X issue. Both these matters were also plagued by particular problems.

In the case of the Pacific solution, the Committee received correspondence from many of the asylum seekers who were on 'the overboard boat' SIEV 4. The Committee's jurisdiction is limited to Australia and its territories. These asylum seekers were in detention on Manus Island at all the relevant times of this inquiry. This meant that their evidence could not be heard under privilege, nor could the usual protections be extended to them should they be adversely treated as a consequence of what they may have said.

It has always seemed to me to be one-sided that the asylum seekers as key players in the event could not have their evidence heard and tested by the inquiry. Given the limitations it is not surprising that the asylum seekers themselves declined to participate in a telephone link-up with the Committee. Some Committee members questioned the value of any information obtained by telephone link and this is an important consideration. DIMIA also advised that if something was said on the link-up that might relate to an application for asylum, then there was no legal way that information could be prevented from being used in an assessment of an individual's eligibility.

Notwithstanding all these concerns, it is still a pity that the people at the heart of this incident and about whom allegations were made are known only by photographs, one letter and the balanced and humane description of them given to us by Commander Banks of the *HMAS Adelaide*.

Jurisdictional and operational limitations also circumscribed the extent to which the inquiry was able to examine what happened in Indonesia up to and including the departure of the ill-fated vessel SIEV X. Statements of those who survived the sinking of SIEV X and who were picked up at sea over 24 hours later by Indonesian fishing boats are included in the records of this inquiry. When they were received these statements were immediately approved for public release. Anyone reading them cannot fail to be moved by these accounts of the loss of life, the human suffering and the tragedy surrounding that catastrophe. While the Committee is divided on some of the issues of this inquiry it is united in its shock at this event and its sympathy for the victims.

Separate from the inquiry, Senator Faulkner has raised concerns about the 'disruption' activities in Indonesia in a series of speeches in the Senate. A majority finding of the Committee is that an independent inquiry is necessary to ascertain what occurred on that question and other issues related to SIEV X. In this report we assessed the evidence that was available to the inquiry but because of the limitations on jurisdiction the Committee did not feel confident that it could report the full story.

A question has hung over this inquiry that it did not and could not address. It is 'Did the overboard story and the emotional reaction it provoked influence the outcome of the federal election?' This question invites a number of subsidiary questions:

- If it did influence the outcome would the truth have led to a different result?
- Would an appropriate and timely correction of the record have changed the direction or influenced the presentation of the issues in the campaign?
- Would the credibility of the key players have been affected in the judgement of electors if the truth had been uncovered and exposed outside official channels during the campaign period?

These are not questions about the duty and obligation of the government and the public service to keep the community properly informed. They are speculative questions that go to the politics of the 'overboard' issue and its timing in relation to the federal election. The Committee's efforts were aimed at getting at the truth of the

matter so there is an accurate public record of the events. Any judgements about what would have occurred had the ‘overboard’ story never seen the light of day are subjective and for others to make. A question does arise which is addressed. It concerns what can be done to prevent a recurrence of the behaviour that led to the public receiving false or inaccurate information.

A number of recommendations on this subject have been made that, if pursued, will go some way to ensuring that these circumstances are not repeated. As reform measures these recommendations will be successful if accompanied by a strengthening of the traditional values of the public service.

The outcome of this inquiry opens up a major constitutional issue: the extent to which the Parliament is able to effectively scrutinise the actions of the Executive. First, it should be said that the normal parliamentary means of scrutiny worked very well in this matter. This is particularly true of the Estimates process that gathered a lot of relevant information much of which has been incorporated into the inquiry’s evidence. But ultimately the Executive, in the form of the Cabinet, checked the inquiry’s ability to examine relevant witnesses. This meant the Executive was able to exercise its power to prevent full parliamentary scrutiny of itself. This is not open government. What should be done about it is now an important matter for national debate.

Of particular note here is also the matter of how Mr Reith centralised all critical ADF contact with the media through his office. I acknowledge that Senator Hill has changed this order, but the fact that such an order did exist raises questions about the manipulation of military information for partisan political advantage.

The Committee wishes to record its thanks to three separate groups:

- To those witnesses who assisted the inquiry. It would not have been possible to have conducted such a detailed examination without their cooperation. Public service witnesses appeared knowing that their departments had been instructed by Cabinet not to provide a submission. This meant that the Committee was unable to examine them against the points made in a departmental statement. That made their job and our job harder. Most managed this difficulty and the other pressures the Cabinet decision imposed competently and well. Our thanks go to them. All the experts that served on our round-table discussion brought valuable context to the inquiry and alerted us to wider questions as well. They deserve our thanks.
- The Committee was impressed by the professionalism of the ADF officers who were closely involved with SIEV 4 and its aftermath. Many of them and others in the chain of command had attempted to ensure that the public record concerning ‘children overboard’ was corrected.
- During this long and sometimes difficult inquiry, the Secretariat to the inquiry gave the Committee unstinting support and professional assistance in every way. Their commitment and willingness to work long and onerous

hours made the Committee's task manageable, and especially my own, as Chair. They should be acknowledged. The Committee's thanks go to: Mr Brenton Holmes, Secretary; Mr Alistair Sands, Principal Research Officer; Dr Sarah Bachelard, Principal Research Officer; Ms Kerry Olsson, Principal Research Officer (on secondment) and Ms Judith Wuest, Executive Assistant.

Senator Peter Cook

Chairman

EXECUTIVE SUMMARY

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

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

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

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

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

A New Border Protection Regime – Chapters 1 and 2

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

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

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

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

RECOMMENDATION 1

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

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

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

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

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

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

'Children Overboard' - Chapters 3 - 6

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

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

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

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

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

Questions that fall out of that key issue include:

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

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

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

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

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

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

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

FINDINGS OF FACT

No children were thrown overboard from SIEV 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS

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

SIEV 4 was the first boat to be intercepted after the announcement of the Federal Election. Its handling was to be a public show of the Government’s strength on the border protection issue. The behaviour of the unauthorised arrivals was to be a public justification for the policy. It is in this context that one might best understand why the Secretary of PM & C wanted to ensure that the asylum seekers involved not set foot on Australian territory. It is also in this context that it is possible to understand why it may have been thought by the Government to be politically difficult to correct or retract claims made in relation to the passengers aboard SIEV 4 once they were suspected or known to be false.

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

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

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

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

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

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

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

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

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

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

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

In relation to Mr Reith, the Committee notes that:

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

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

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

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

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

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

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

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

FINDINGS

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

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

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

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

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

Accountability – Chapter 7

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

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

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

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

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

The 'diarchy' and accountability

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

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

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

FINDINGS

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

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

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

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

The People Smuggling Taskforce

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

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

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

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

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

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

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

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

FINDINGS

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

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

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

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

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

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

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

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

RECOMMENDATION 2

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

RECOMMENDATION 3

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

RECOMMENDATION 4

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

RECOMMENDATION 5

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

RECOMMENDATION 6

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

Ministerial advisers, ministers and accountability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In particular, the Committee notes that:

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

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

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

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

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

FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATION 7

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

RECOMMENDATION 8

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

RECOMMENDATION 9

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

RECOMMENDATION 10

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

RECOMMENDATION 11

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

RECOMMENDATION 12

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

RECOMMENDATION 13

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

SIEV X - Chapters 8 and 9

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS

The Committee finds that there were several gaps in the chain of reporting of intelligence, but that even if it had been functioning optimally, it is unlikely that the Australian response to SIEV X would have been different. This is because the quality and detail of the intelligence available to the authorities at the relevant times was insufficient to have warranted the launching of a specific search and rescue operation, especially since a comprehensive surveillance of the area was already being undertaken. On the basis of the above, the Committee cannot find grounds for believing that negligence or dereliction of duty was committed in relation to SIEV X.

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

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

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

RECOMMENDATION 13A

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

‘Pacific Solution’ – Chapters 10 and 11

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS

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

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

RECOMMENDATION 14

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

RECOMMENDATION 15

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

RECOMMENDATION 16

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

Chapter 1

Border Protection: A New Regime

Introduction

1.1 On Sunday 26 August 2001, a 20-metre wooden Indonesian fishing boat with 433 Afghan asylum seekers on board was in distress in the Indian Ocean 140 kilometres north of Christmas Island.¹ The boat was within the Indonesian search and rescue zone, but it was a routine surveillance flight by Coastwatch which spotted the vessel and so it was the Australian Search and Rescue (AusSAR) which broadcast a call to ships in the vicinity to render it assistance. A Norwegian container ship, the MV *Tampa*, with a crew of 27 and licensed to carry no more than 50 persons, responded to the call.

1.2 Guided by Coastwatch, the *Tampa's* captain, Arne Rinnan, reached the stricken boat, the *Palapa*. He took on board the *Palapa's* passengers and crew and began to head for Indonesia. A number of those rescued, however, objected to being returned to Indonesia and threatened to commit suicide if the captain did not take them to Australia. Captain Rinnan accordingly changed his course for Christmas Island.

1.3 As the *Tampa* approached Christmas Island on 27 August, however, Australian authorities directed the captain to keep out of Australian territorial waters and to take his rescued passengers back to Indonesia. The Prime Minister, Mr Howard, insisted that: 'I believe that it is in Australia's national interest that we draw a line on what is increasingly becoming an uncontrollable number of illegal arrivals in this country', and stated that those rescued by the *Tampa* would not be allowed to land in Australia.²

1.4 What followed was to become known as 'the *Tampa* crisis'. It was in essence a five day 'stand off' between the Australian government and the captain of the *Tampa* over where the rescued Afghans were to be taken. The crisis proved to be the catalyst for a new so-called 'border protection' regime in Australia.

1.5 This chapter outlines the response to the *Tampa* crisis, out of which grew a new legislative framework for handling unauthorised boat arrivals, the so-called Pacific Solution, a new framework for whole-of-government coordination of these issues, and operational strategies of disruption, interception and deterrence. This regime forms the background to the events and policies which are the subjects of the Committee's inquiry.

1 Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs (& summary) [2001] FCA 1297 (11 September 2001).

2 Transcript of the Prime Minister, the Hon. John Howard, interview on Radio 3AW, Melbourne, 31 August 2001.

The Resolution of the *Tampa* Crisis

1.6 From 27 August 2001, Captain Rinnan began to express concern about the medical condition of some of the asylum seekers on board his vessel.³ Intensive communication on this and other issues ensued over the next two days between the *Tampa*, Coastwatch, the Rescue Coordination Centre (RCC) at AusSAR, the Australian Federal Police (AFP) on Christmas Island, the Department of Foreign Affairs and Trade (DFAT), the Department of Defence (particularly Maritime Headquarters), the Royal Flying Doctor Service, the Indonesian search and rescue authority, the Australian Embassy in Jakarta, the Departments of Transport and Regional Services (DTRS), the Prime Minister and Cabinet (PM & C), and Immigration and Multicultural Affairs (DIMA), and the Joint Rescue Coordination Centre Stavanger in Norway.⁴

1.7 At 11.15pm on Tuesday 28 August, the Royal Flying Doctor Service sent a fax to the AusSAR's Rescue Coordination Centre after having just spoken to the master and first officer of the *Tampa*. These officers had advised that there were 438 people on board of whom 15 were unconscious. Further, there was one sick child, one person with a broken leg, and a large number of people with open sores and skin infections. The adults had begun a hunger strike and were suffering abdominal pains and diarrhoea. The Royal Flying Doctor Service assessed that there was a 'mass situation medical crisis and that medical attention was urgently required'.⁵

1.8 Overnight and in the early hours of 29 August, the *Tampa* sent increasingly insistent calls for medical assistance. Australian authorities indicated that they were working urgently on the matter, but they continued to forbid the *Tampa* to enter Australian waters.⁶ At 11.26am, Captain Rinnan sent a message to the RCC, saying that he had tried to accommodate the wishes of the Australian authorities, but that the situation was deteriorating rapidly and getting out of hand. He advised his intention of proceeding to the nearest shore immediately.⁷

1.9 At 11.39am on 29 August 2001, the *Tampa* entered Australian waters. The RCC sent a message advising the master that such action was 'a flagrant breach of Australian law', and that the Australian Government was initiating 'necessary actions to board the vessel under appropriate legal powers'.⁸ Shortly after 12.35pm, the *Tampa* was boarded by 45 Australian SAS members. On the same day, the Prime Minister tabled the Border Protection Bill 2001. Essentially the Bill sought to put beyond doubt the domestic legal basis for actions taken in relation to foreign ships

3 Answers to Questions on Notice, Australian Maritime Safety Authority (AMSA), 5 July 2002, *Timeline for Tampa Incident*, p.5.

4 Answers to Questions on Notice, AMSA, 5 July 2002, *Timeline for Tampa Incident*, pp. 4-9.

5 Answers to Questions on Notice, AMSA, 5 July 2002, *Timeline for Tampa Incident*, p.9.

6 Answers to Questions on Notice, AMSA, 5 July 2002, *Timeline for Tampa Incident*, p.10.

7 Answers to Questions on Notice, AMSA, 5 July 2002, *Timeline for Tampa Incident*, p.10.

8 Answers to Questions on Notice, AMSA, 5 July 2002, *Timeline for Tampa Incident*, p.11.

within the territorial sea of Australia, to have retrospective effect from the morning of 29 August 2001. The Bill also sought to confine judicial review of the direction or enforcement action taken in relation to such vessels.⁹

1.10 In the early hours of 30 August, however, the Senate rejected the Bill, with the Opposition criticising the width of the proposed powers, and contending that it would not necessarily resolve the legal issues surrounding the *Tampa*.¹⁰

1.11 The crisis, generated by the Government's rhetorically charged insistence that no asylum seeker aboard the *Tampa* was to set foot on Australian soil, was finally resolved through the assistance of neighbouring countries. On 1 September 2001, the Prime Minister announced that agreements had been reached with the governments of New Zealand and Nauru for the people rescued by the *Tampa* to be conveyed to, and their claims to asylum assessed in, those two countries. On 2 September, an agreement with Papua New Guinea was announced, allowing for the transshipment of people from the *Tampa* through Port Moresby, on the Australian troopship HMAS *Manoora*.¹¹

1.12 Having achieved an 'ad hoc' solution to the *Tampa* crisis, the government moved to institute a comprehensive new border protection regime.

A New Regime

1.13 The post-*Tampa* regime for handling 'unauthorised boat arrivals' (UBAs) was developed quickly and 'on the run'. This was because even before the fate of those on board the *Tampa* had been resolved, the government knew of three more boats carrying up to 900 people that were due in Australian waters at any time.¹²

1.14 In general terms, the central aim of the government's new regime was identical to the stand taken by the Prime Minister during the *Tampa* crisis, that '[w]e will not allow these people to land in Australia'.¹³ In other words, the government's new policy was that it would not allow 'unauthorised arrivals' to land on Australian territory, in a manner uncontrolled by the Australian government, for the purpose of claiming refugee status. Individuals seeking asylum must be processed 'off-shore', and then decisions about whether to accept them as refugees to Australia made in the same way as decisions are made in relation to the claims of those assessed as refugees in camps elsewhere in the world.

9 Nathan Hancock, *Refugee Law – Recent Legislative Developments*, Current Issues Brief No.5 2001-02, Department of the Parliamentary Library, p.4.

10 Nathan Hancock, *Refugee Law – Recent Legislative Developments*, p.4.

11 Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs.

12 PST Notes, High Level Group - 28 August 2001.

13 Transcript of the Prime Minister, the Hon. John Howard MP, Doorstop Interview, Melbourne, 31 August 2001.

1.15 The difficulty for the government in implementing this policy, however, is that, under the *1951 Convention Relating to the Status of Refugees*, Australia's protection obligations are engaged when asylum seekers enter Australia's jurisdiction by entering its territorial seas.¹⁴ The *Migration Act 1958*, and access to administrative and judicial review opportunities, apply to reception and processing within Australia's migration zone.

1.16 If the government wished to ensure that it controlled exactly who it would accept as refugees and when it would accept them, it needed to make sure that individuals without proper authorisation could no longer reach Australia's migration zone, but without breaching its protection responsibilities under the Convention.

1.17 In order to prevent 'unauthorised arrivals' from landing on Australian territory, then, the government implemented a multi-faceted strategy. One facet of the strategy involved legislation which excised certain islands to the north of Australia from the ordinary visa application and processing regime under the *Migration Act 1958*. This meant that, for example, even if asylum seekers landed on an Australian territory such as Christmas Island or Ashmore Reef, they did not have the same access to visas as people landing on the mainland.

1.18 A second facet of the strategy involved establishing agreements with certain Pacific countries so that 'offshore entry persons' could be transferred to those countries and have their claims to asylum processed there. This part of the new regime is known as the 'Pacific Solution'. Plans were also subsequently announced for a new processing centre on Christmas Island, one of the new 'excised offshore places'.

1.19 The new regime also required much greater interagency coordination between the relevant government bodies, and for this reason an interdepartmental committee (IDC) known as the People Smuggling Taskforce (PST) was established to coordinate the activities of different agencies and to provide whole-of-government advice to ministers.

1.20 Finally, in an attempt immediately to reduce the numbers of people travelling to Australia by boat, strategies for both preventing asylum seekers from leaving Indonesia and strategies for intercepting them at sea before they reached landfall in Australian territory were implemented.

1.21 In the remainder of this chapter, the Committee will provide a brief outline of each of these facets of the new border protection regime. They constitute the framework within which specific issues, such as SIEV 4 and 'children overboard', the sinking of SIEV X and the Pacific Solution, must be considered.

14 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.34.

Legislation

1.22 On 26 September, the second last sitting day of 2001, the Senate passed the following bills relating to border protection:

- *Migration Amendment (Excision from Migration Zone) Act No.127 2001;*
- *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act No.128 2001;*
- *Migration Legislation Amendment (Judicial Review) Act No.134 2001;*
- *Migration Legislation Amendment Act (No. 1) No.129 2001;*
- *Migration Legislation Amendment Act (No. 6) No.206 2001;* and
- *Border Protection (Validation and Enforcement Powers) Act No.126 2001.*

1.23 The Australian National Audit Office, as part of its report on the *Management Framework for Preventing Unlawful Entry into Australian Territory*, has summarised the major features of the changes to the legislative framework surrounding the management of migration and refugee issues since September 2001. They include:

- measures to strengthen the deterrence of unauthorised arrivals. These include a new tiered visa regime for refugees engaged in ‘secondary movement’, or movement from a country in which they have or can access protection, but who choose to travel to Australia nevertheless for reasons which are not ‘Refugees Convention related’. They also include minimum prison terms for people convicted of people smuggling;
- the exclusion of certain territories from Australia’s migration zone, including Christmas Island, Ashmore and Cartier Islands, and the Cocos (Keeling) Islands. This means that unauthorised arrivals to these territories cannot apply for a visa, except by ministerial discretion;
- the possible detention and removal from those territories of unauthorised arrivals to ‘declared countries’ where they have access to refugee assessment processes modelled on those of the United Nations Commissioner for Refugees (UNHCR);
- a clarification of the circumstances in which Australia owes a person protection under the Refugees Convention, including addressing key concepts in the definition of a refugee;
- a limit to the grounds for judicial review;
- prohibition of class actions in migration litigation; and
- the possibility that adverse inferences may be drawn when visa applicants fail to provide supporting information, including documentation, without reasonable explanation.¹⁵

15 Australian National Audit Office (ANAO), *Management Framework for Preventing Unlawful Entry into Australian Territory*, Audit Report No. 57, 2001-2002, p.80.

1.24 The Senate referred a further related Bill, the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, to the Senate Legal and Constitutional Affairs References Committee on 25 June 2002. The Bill has the effect of expanding the definition of ‘excised offshore place’ to include the Coral Seas Territory and certain islands that form part of Western Australia, Queensland and the Northern Territory.

1.25 Aspects of the legislative framework for the new border protection regime are discussed in more detail in the context of the so-called ‘Pacific Solution’, in Chapter 11.

Pacific Solution

1.26 Both Nauru and Papua New Guinea are declared countries under the newly inserted s198A of the *Migration Act 1958*,¹⁶ providing the legislative framework for the establishment of offshore processing centres in those countries. The agreements reached with Nauru and Papua New Guinea mark a substantial shift in Australia’s treatment of asylum seekers. Both countries are hosting processing centres paid for and operated by Australia, and Nauru is receiving \$26.5 million in additional aid monies to do so.

1.27 Since the establishment of the offshore processing centres 1515 people have been transferred to Nauru or PNG. A breakdown of these numbers by nationality, and an outline of the agreements reached with Nauru and PNG, is provided in Chapter 10. As of 1 October 2002, 960 persons remained on Nauru, and 102 on Manus.¹⁷

1.28 Asylum seekers processed on Nauru and Manus do not have access to the refugee status determination procedures applied on the Australian mainland. Refugee claims on Nauru may be processed by either the United Nations High Commissioner for Refugees (UNHCR), or by Australian immigration officials applying processes stated to be in accordance with those of the UNHCR. All refugee determinations on Manus are undertaken by Australian officials. The centres are managed by the International Organisation for Migration (IOM) under a service agreement with Australia. The cost of these arrangements is considered in Chapter 11.

1.29 As of 17 September 2002, protection claims for all 1,495 people who had sought a refugee status determination on Manus and Nauru had received an initial decision.¹⁸ Of this number 520 people were approved as meeting criteria for refugee status, and 975 had been refused. Four hundred and thirty two of the successful

16 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia’s Relationship with Papua New Guinea and Other Pacific Island Countries, p.34.

17 *Refugees Arrive in Australia from Manus*, Media Release 77/2002, DIMIA, 1 October 2002.

18 *Outcome of Processing of Offshore Entry Persons*, DIMIA, Response to Question 6, Senate Inquiry into Migration Amendment (Further Border Protection Measures) Bill 2002, Tabled 17 September 2002. *Outcome of Processing of Offshore Entry Persons*

claimants were Iraqis, 59 Afghans, and 29 of other nationalities.¹⁹ Initial decisions for Iraqi claimants were successful in 67% of cases, compared to just over 7% for Afghan claimants.

1.30 The only avenue of appeal against an adverse refugee status determination is to a review of the decision by a higher level official. As of 17 September 2002, a further 181 people had been found to meet refugee criteria on review of their previously negative decisions, bringing the total number of people found to be refugees to 701, including 524 Iraqis, 133 Afghans, and 44 people of other nationalities. Eighty one review decisions are still pending.²⁰

1.31 Resettlement of asylum seekers who are found to meet refugee status criteria is reliant upon a place being found for them in Australia or another country.

1.32 As of October 2002, 200 people processed on Nauru or Manus had been allowed into Australia, most on three or five year temporary protection visas. The majority were women or children with family in Australia. A further 194 people from Nauru and Manus had been accepted by New Zealand, and eight refugees had been resettled in Sweden.²¹

Whole-of-government coordination

1.33 The central body established to coordinate the government's post-*Tampa* border protection regime was an interdepartmental committee (IDC) known as the People Smuggling Taskforce (PST).

1.34 The PST held its first meeting on Monday 27 August 2001, while the *Tampa* crisis was yet to be resolved. Between 27 August and 9 November 2001, the PST met at least 53 times, sometimes two or three times in a single day.²²

1.35 Over that period, the PST was chaired by Ms Jane Halton, then Deputy Secretary, Social Policy Division, PM & C and its membership consisted of (usually) high level representatives from the following agencies:

- Australian Federal Police (AFP);
- Attorney-General's Department;
- Australian Maritime Safety Authority (AMSA);
- Australian Protective Services (APS);
- Australian Quarantine and Inspection Service (AQIS);

19 *Asylum Review Decisions on Nauru and Manus*, Media Release DPS 72/2002, DIMIA, 18 September 2002.

20 *Asylum Review Decisions on Nauru and Manus*.

21 *Outcome of Processing of Offshore Entry Persons*.

22 See PST Notes, High Level Group.

- Coastwatch;
- Australian Customs Service (ACS);
- Department of Defence and the Australian Defence Force (ADF);
- Department of Foreign Affairs and Trade (DFAT);
- Department of Immigration and Multicultural Affairs (DIMA);²³
- Department of Transport and Regional Services (DTRS); and
- Department of the Prime Minister and Cabinet (PM & C).

1.36 According to evidence provided to the Committee by the PST Chair, the primary role of the body was to provide a forum for information sharing and coordination of activities among the agencies involved in various facets of the government's border protection strategy. The Taskforce also provided advice and policy options for government.

1.37 Matters discussed at PST meetings included the logistics of accommodating and catering for the humanitarian needs of asylum seekers in both offshore processing centres and on Christmas, Ashmore and Cocos Islands; the logistics of transporting intercepted asylum seekers to Nauru, Manus and elsewhere; the time at which new arrivals were anticipated; and the success of 'disruption' and 'deterrence' strategies in slowing the rate of new arrivals.²⁴

1.38 The Committee discusses the role and activities of the PST in more detail in Chapter 7.

Disruption and deterrence activities

1.39 Finally, at the operational or 'sharp end' of the new border strategy, a twin pronged approach was adopted. One prong of the strategy is a 'disruption' campaign aimed at pre-empting people smugglers and asylum seekers *before* they could organise to leave Indonesia.

1.40 Prior to the Committee's inquiry, little was known on the public record of the nature, scope and workings of the disruption strategy. Members of the Committee questioned a number of agencies, particularly the AFP and DIMIA, on how the strategy is directed and operates.

1.41 The AFP Commissioner, Mr Mick Keelty, defined the nature and scope of the disruption strategy in the following terms:

By disruption, we mean the use of the Indonesian national police to divert potential passengers to the International Organisation for Migration or the

23 Note that after the Federal Election on 10 November 2001, the Department of Immigration and Multicultural Affairs (DIMA) became the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

24 See PST Notes, High Level Group.

interception by the Indonesian national police of passengers prior to boarding vessels. What would happen ... is that potential passengers are gathered sometimes in a number of locations and at the last moment they are provided with details or transport to an embarkation point and they are placed on the vessels at the embarkation point. Often a disruption activity would be to prevent the passengers from getting to the point of embarkation or, if we knew who the people smuggler was, to have the Indonesian national police arrest the organiser, or in other ways to disrupt the gathering of the people prior to the vessel departing.²⁵

1.42 Additional activities under the strategy include:

- collecting intelligence to assist both the disruption campaign within Indonesia and the naval interception of SIEVs transiting to Australian territory;²⁶
- targeting key figures in the people smuggling pipeline with the aim of dismantling the syndicates organising smuggling activities;²⁷
- information campaigns inside Indonesia, particularly amongst fishing crews and port areas, warning that people smuggling is a criminal activity and of the legal penalties in Australia;²⁸ and
- Indonesian authorities apprehending vessels attempting to depart illegally from Indonesian ports.²⁹

1.43 The organisational framework involves the AFP and the Indonesian National Police (INP) as the lead agencies in each country. On the Australian side, DIMIA, DFAT and AusAID also support the AFP. Disruption activities were also canvassed at meetings of the People Smuggling Taskforce during the September to November 2001 period.³⁰

1.44 In addition to the INP, Indonesian defence and immigration agencies are also involved in disruption actions on the ground in Indonesia.

1.45 At the bilateral level, the disruption strategy comes under the auspices of a specific protocol between the AFP and INP to target people smuggling syndicates operating out of Indonesia. The Protocol was established on 15 September 2000 and is part of a broader Memorandum of Understanding (MOU) between the AFP and INP

25 *Transcript of Evidence*, CMI [Certain Maritime Incident] 1930. See also *Transcript of Evidence*, CMI 1995.

26 *Transcript of Evidence*, CMI 1925 and 1934. See also section on intelligence in Chapter 2.

27 *Transcript of Evidence*, CMI 1933.

28 *Transcript of Evidence*, CMI 1999.

29 *Transcript of Evidence*, CMI 2001.

30 See Notes, High Level Group (PST).

to cooperate on investigations into transnational crime. That MOU was originally agreed on 27 October 1995 and renewed on 13 June 2002.³¹

1.46 According to the AFP:

The Protocol allowed for the AFP and INP to provide advice regarding target selection, technical and management support of operations, informant management, information facilitation and assistance in financial reporting.³²

1.47 Under the provisions of the Protocol, the INP established five Special Intelligence Units dedicated to people smuggling operations. AFP instructors have trained these units in such matters as investigation and surveillance techniques. The AFP has also provided almost A\$100,000 to the INP units to defray operational costs such as the INP informant network, IT and communications equipment, transport, travel and meals. This was funded from the Law Enforcement Cooperation Program.³³

1.48 The principal point of contact between the AFP and INP is the AFP Liaison Officers based in Jakarta, who have the discretion to deal with their Indonesian counterparts on operational matters. Commissioner Keelty emphasised to the Committee that the AFP neither directs nor dictates the INP's operations against people smuggling. It is only in a position to seek the cooperation of the Indonesian authorities and to provide advice and assistance.³⁴

1.49 In terms of outcomes, Commissioner Keelty informed the Committee that 'since February 2000, the Indonesian authorities have diverted over 3,000 people suspected of intending to enter Australia illegally into legitimate migration processes under the auspices of the United Nations conventions'.³⁵

1.50 Members of the Committee questioned the AFP about the Indonesian response to the disruption campaign. Commissioner Keelty advised the Committee that in September 2001 the Indonesian government suspended the people smuggling protocol, which was not re-adopted formally until renewal of the MOU in June 2002.³⁶

1.51 When pressed by Committee members about the reasons for the suspension, the Commissioner appeared uncertain, indicating that the Indonesian foreign ministry had concerns that the disruption activities should come under a 'more formal

31 *Transcript of Evidence*, CMI 1924.

32 Answers to Questions on Notice, AFP, 30 July 2002, p.1.

33 Answers to Questions on Notice, AFP, 30 July 2002, passim.

34 *Transcript of Evidence*, CMI 1934

35 *Transcript of Evidence*, CMI 1925. Note that later written answers to question on notice received from the AFP puts the number of unauthorised arrivals prevented from departing for Australia at 4,000.

36 *Transcript of Evidence*, CMI 1938-39.

government-to-government' agreement.³⁷ The Commissioner also noted that his counterparts in Indonesia had informed him of tensions within the INP over resourcing disparities and the extra funding provided to the Special Intelligence Units, but he stated that these factors did not, in his opinion, cause the suspension.³⁸

1.52 The Commissioner further advised the Committee that despite visiting his counterpart in the INP to discuss this matter, he was unable to shed any more light on the decisions behind the Indonesian action.³⁹ The Commissioner argued that it was a matter for DFAT to take up with the Indonesian foreign ministry, and that if the AFP had decided to pursue the issue it would have gone through DFAT channels, not the AFP-INP connection. The AFP did not pursue the matter further, even though the Commissioner conceded that 'we were taken by surprise a bit, because things were working so well'.⁴⁰

1.53 Following the suspension of the protocol, the AFP experienced a reduction in the level of cooperation from the INP, with responses to requests for support being dealt with on a case by case basis and more slowly than previously. The five INP Special Intelligence Units continued operations but were not dedicated solely to people smuggling, instead focusing on broader transnational crime issues.⁴¹ However, the AFP maintained that the spirit of cooperation between both parties continued. In particular, the AFP pointed to the arrest of an 'allegedly significant' people smuggler in Australia on 5 October 2001 as a notable outcome of the ongoing cooperation between both police forces.⁴²

1.54 Members of the Committee were also concerned to ascertain if the Australian Government had sought legal advice about the nature of the activities and methods employed under the disruption strategy. Witnesses from the AFP and DIMIA,⁴³ as well as the former Chair of the PST, Ms Jane Halton,⁴⁴ stated that no such advice had been sought or received. In response to a question about whether legal advice had been sought, Commissioner Keelty said:

No, there is no reason to. Nothing untoward came to our attention. As far as we are aware and can possibly be aware, the Indonesians were acting lawfully in Indonesia and we were acting lawfully in Australia.⁴⁵

37 *Transcript of Evidence*, CMI 1938-39.

38 *Transcript of Evidence*, CMI 1969-70.

39 *Transcript of Evidence*, CMI 1953.

40 *Transcript of Evidence*, CMI 1955.

41 *Transcript of Evidence*, CMI 1944; Answers to Questions on Notice, AFP, 30 July 2002, p.5.

42 Answers to Questions on Notice, AFP, 30 July 2002, p.5. See also *Transcript of Evidence*, CMI p.1941.

43 DIMIA, *Transcript of Evidence*, CMI 2002-3.

44 Ms Halton. *Transcript of Evidence*, CMI 2008.

45 *Transcript of Evidence*, CMI 1943.

1.55 The Committee notes that it has not been able to gather more detailed information on the exact nature of the disruption measures employed in Indonesia. Further, it is concerned about the general lack of transparency surrounding elements of the strategy itself. In particular, the inability of the AFP to provide clear and precise information about the factors behind the Indonesian Government suspending the protocol governing the disruption effort compounds the sense of concern that a key diplomatic partner had cause to abrogate an element of the bilateral relationship. The Committee finds it perplexing that neither the AFP nor any other Australian agency took action to get to the bottom of this matter. The Committee considers that this matter warrants further investigation and reporting back to the Parliament.

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

Recommendation

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

1.58 The second prong of the new border strategy is a deterrence strategy, implemented by the Navy under the auspices of Operation Relex. In the next chapter the Committee considers the detail of Operation Relex.

Chapter 2

Operation Relex

‘The safety of ADF personnel and the wellbeing of the unauthorised boat arrivals and the Indonesian crew members is to be held paramount’. That is an extant direction that overrides everything. We are talking about people coming to Australia illegally. It is not World War III.¹

‘Was this a new style of operation for the Navy?’ the answer is yes. We had not done this style of operation before.²

Introduction

2.1 With the Government’s adoption of a more assertive posture towards preventing both asylum seekers and people smugglers from entering Australian waters, came a new role for the Australian Defence Force.

2.2 Since 1988, the ADF has supported the activities of Coastwatch and the Department of Immigration and Multicultural and Indigenous Affairs in ‘national surveillance’.³ This work, according to Maritime Commander, Rear Admiral Geoffrey Smith, has been carried out under the auspices of Operation Cranberry and, in relation to matters such as illegal fishing and other Customs support, continues still.⁴

2.3 Since 3 September 2001, however, in the area of unauthorised boat arrivals the ADF has become the ‘lead’ rather than a supporting agency. It has designated its corresponding operation, Operation Relex.⁵

2.4 This chapter provides an outline of Operation Relex: its aim, operational arrangements, and an overview of its interception activities from the arrival of Suspected Illegal Entry Vessel (SIEV) 1 on 7 September 2001 to the arrival of the last illegal entry vessel, SIEV 12, on 16 December 2001.

Aim

2.5 Operation Relex’s strategic aim was an extension of the Government’s new border protection policy: to *prevent*, in the first instance, the incursion of unauthorised

1 Rear Admiral Chris Ritchie, *Transcript of Evidence*, CMI 405.

2 Vice Admiral David Shackleton, *Transcript of Evidence*, CMI 60.

3 Additional Information, Department of Defence, Talking points for Senate Legislation Committee Additional Estimates Hearing, February 2002.

4 *Transcript of Evidence*, CMI 472.

5 *Transcript of Evidence*, CMI 472.

vessels into Australian waters such that, ultimately, people smugglers and asylum seekers would be *deterred* from attempting to use Australia as a destination.⁶

2.6 Rear Admiral Chris Ritchie, Commander Australian Theatre (COMAST), described the nature and scope of Operation Relex as follows:

The mission statement, for example, was to conduct surveillance and response operations in order to deter unauthorised boat arrivals from entering Australian territorial waters within the designated area of operations. The area of operations was quite expansive – it encompassed Christmas Island at the one end and Ashmore at the other.⁷

2.7 As an operation aimed at preventing unauthorised vessels from crossing into Australia's so-called 'contiguous zone', Relex was fundamentally a forward deterrence strategy. This marked a shift in border protection strategy and the nature of previous operations, away from the more reactive posture associated with Operation Cranberry that sought to detect and intercept unauthorised boats *inside* Australian waters and escort them to Australian ports.⁸

2.8 The 'primary mission' of deterrence was constrained, in operational terms, by the overriding obligation to ensure the safety of all persons that became involved in Royal Australian Navy (RAN) encounters with SIEVs. Both Rear Admirals Ritchie and Smith emphasised this aspect of Relex operations to the Committee. Rear Admiral Smith indicated that ensuring the personal safety of all involved was inherent in his operational orders:

My orders and instructions stressed the overarching requirement for commanding officers of RAN ships to take every reasonable means to achieve the mission without needlessly risking the safety and wellbeing of their ships' companies, their vessels and the lives of the unauthorised arrivals on board the SIEVs.⁹

2.9 Similarly, Rear Admiral Ritchie cited a relevant part of the Chief of Defence Force (CDF) directive to him on Operation Relex:

In the notion of returning the vessels to Indonesia or the place whence they came, the uppermost issue was always:

The safety of ADF personnel and the wellbeing of the unauthorised boat arrivals and Indonesian crew members is to be held paramount.

6 Additional Information, Department of Defence, Talking points for Senate Legislation Committee Additional Estimates Hearing, February 2002.

7 *Transcript of Evidence*, CMI 404.

8 *Transcript of Evidence*, CMI 448 and 490.

9 *Transcript of Evidence*, CMI 448 and 460.

That is an extant direction that overrides everything.¹⁰

2.10 As an ‘extant direction’, the directive to ensure safety of life at sea is contained in the Maritime Commander’s Orders that cover all RAN commanding officers.¹¹ These orders reflect relevant provisions in both international agreements and Australian law. Two international covenants – the *1974 International Convention for the Safety of Life at Sea* and the *1982 Law of the Sea Convention* – impose obligations on ‘mariners to assist other mariners in distress’.¹² The Commonwealth *Navigation Act 1912* contains the provisions of both these international agreements.

2.11 The Committee is satisfied that, in fact, the Royal Australian Navy’s commitment to meeting the humanitarian needs of those on board the intercepted vessels went well beyond the fulfilment of safety of life at sea obligations. Rear Admiral Smith advised the Committee that:

Standard practice throughout the operation was to provide a safe, clean and secure environment, sufficient food, water, personal items, bedding and shelter and, where possible, alleviate the cramped and overcrowded conditions that prevailed.

Deployed medical and dental staff provided a range of ongoing health services during Operation Relex, including emergency assessments, treatment, health screening and clinics during the boarding, containment and transportation operations. For example, during transportation of unauthorised arrivals on board *Manoora* and *Tobruk* the ships’ companies went to great lengths, despite the difficult and trying circumstances, to provide fresh clothing and laundering services, toiletries, toys, videos and games, and to prepare halal meals and national dishes. Saltwater showers were rigged along with squatting stands in toilets to accommodate cultural differences. Whenever the ship’s program allowed, exercise periods on the upper decks were scheduled.¹³

2.12 Where necessary, the RAN was also equipped to supply things such as nappies, babies’ bottles and formula.¹⁴

2.13 In addition to its provision of material assistance, the Committee learnt that the RAN was clearly committed to ensuring that the attitude of its personnel towards the unauthorised arrivals was professional and humane. Testifying to the attitude of

10 *Transcript of Evidence*, CMI 404-5. The Chair of the PST, Ms Halton, also emphasised the primacy given to safety of life at sea when operational matters were being considered, such as whether SIEVs could be safely towed back to international waters. See *Transcript of Evidence*, CMI 945.

11 *Transcript of Evidence*, CMI 470.

12 *Transcript of Evidence*, CMI 470. See also Answers to Questions on Notice, Department of Defence, Question 8.

13 *Transcript of Evidence*, CMI 449.

14 *Transcript of Evidence*, CMI 167.

his crew during the rescue of passengers from the sinking SIEV 4, for example, Commander Norman Banks said that:

I was particularly proud of ... the ship's company when this situation developed into a humanitarian assistance task - of how they performed a miracle and they went about their business in a very humane and compassionate way and everyone chipped in and lent a helping hand, beyond their specialisation and their training and their category, and just got on with the job. It was some time later, when it had all stabilised, that we noted that nobody had whinged about the fact that they had not had a meal - this is the ship's company - that they had not had a break. They had just got on with it.¹⁵

2.14 The Committee was both impressed and heartened by the seriousness with which the officers and sailors of the Royal Australian Navy treated the humanitarian and personal needs of those they encountered on the vessels entering Australia illegally, under what were, for all concerned, very difficult circumstances.

Establishment and Operational Arrangements

2.15 As noted earlier, Relex formed the operational component or 'working end' of the new whole-of-government response to the issue of unauthorised boat arrivals post-*Tampa*. As such, the basis for Relex lay in the raft of legislative and policy changes and measures that the Government enacted in late August and September 2001.

2.16 The shape of the operation itself was developed within the Australian Defence Force, following a 'CDF warning order' dated 28 August 2001.¹⁶ Thus the original military order to start planning Relex arose immediately around the time of the *Tampa* crisis which started on 26 August.

2.17 The warning order directed the ADF to 'provide a maritime patrol and response option to detect, intercept and warn vessels carrying unauthorised arrivals for the purpose of deterring SIEVs from entering Australian territorial waters'.¹⁷

2.18 The CDF's order went to Rear Admiral Ritchie, who as Commander Australian Theatre had responsibility for the 'planning and conduct' of all ADF operations. Under Rear Admiral Ritchie's command, Australian Theatre Headquarters developed the 'broad concept' for the operation - 'the way in which we would do this particular business'¹⁸ - and the Naval Component Commander, Rear Admiral Smith, started the detailed planning for the operation in 'late August/early September'.¹⁹

15 *Transcript of Evidence*, CMI 166.

16 *Transcript of Evidence*, CMI 451.

17 *Transcript of Evidence*, CMI 451.

18 *Transcript of Evidence*, CMI 403.

19 *Transcript of Evidence*, CMI 451.

2.19 Since Relex involved mainly naval forces, Rear Admiral Smith (who was also Maritime Commander) was assigned direct command of the operation.

2.20 The development of the operational concept and strategy also required a new set of rules of engagement (ROE) to be tailored to fit the requirements of the enhanced border protection policy and anticipated behaviour of those on the SIEVs. These rules concerned the ‘specific levels of force that you can use’²⁰ in this type of operation, that is, the degree of non-lethal force permitted for different levels of confrontation.

2.21 On 1 September 2001, the Minister for Defence, Mr Reith, approved the ROE for the Operation, and the Prime Minister’s ‘concurrence’ was sought on 2 September.²¹ Operation Relex started at midnight 3 September 2001.²²

2.22 In what follows, the Committee briefly outlines the structural and operational framework within which individual interceptions under Operation Relex were effected and managed. That framework includes:

- command structure;
- force deployment and intelligence;
- public affairs plan; and
- standard operating procedures.

Command structure – the chain of command

2.23 Command and control of Operation Relex was based on the established chain of command within the ADF. The Chief of Defence Force, Admiral Barrie, sat at the top of this structure and delegated command for the operation down through the ADF hierarchy.

2.24 The chain of command for Operation Relex was explained to the Committee by the Chief of Navy (CN), Vice Admiral Shackleton:

For Operation Relex, Brigadier Silverstone [Commander Northern Command] was also designated as the Commander of Joint Task Force 639 (CJTF 639). In this role, he had tactical command of units assigned to him and he was responsible to the Naval Component Commander, Rear Admiral Smith, who himself had been designated as the lead component commander for this operation. In turn, he was responsible to COMAST [Commander Australian Theatre] and thence to CDF. At the time of the SIEV4 incident, *Adelaide* was under the tactical command of CJTF 639.²³

2.25 Vice Admiral Shackleton summarised these arrangements thus:

20 *Transcript of Evidence*, CMI 403.

21 Answers to Questions on Notice, Ms Jane Halton, 14 May 2002, p.2.

22 *Transcript of Evidence*, CMI 451.

23 *Transcript of Evidence*, CMI 56.

In summary, the operational chain of command for *Adelaide* for Operation Relex was to CJTF 639, to the Naval Component Commander, to COMAST and to CDF. Or put alternatively, it was Banks to Silverstone to Smith to Ritchie and then to Barrie. This system is flexible and it works.²⁴

2.26 While the chain of the command is the traditional framework for ADF operations, the arrangements for Operation Relex also involved two important features.

2.27 The first was placing ‘tactical control of the operation’ in the hands of Commander Northern Command (NORCOM), Brigadier Silverstone, who as a result became Commander Joint Taskforce 639. This represented a ‘new operational concept’, according to Brigadier Silverstone, who also noted that Operation Relex was the first time that the Maritime Commander had put a major fleet unit such as a frigate under NORCOM’s control.²⁵

2.28 Between them, Rear Admiral Smith and Brigadier Silverstone (that is, the Naval Component Commander and the Joint Taskforce Commander) made the daily operational decisions. Together they would review the current situation, agree upon ‘where the priority of effort would be’ and then Brigadier Silverstone would relay orders to the unit commanders.²⁶ Brigadier Silverstone would issue updated orders during the day if new information was received, such as the sighting of a SIEV, whereupon a unit would be ordered to intercept or sail to the zone where the vessel was expected.²⁷

2.29 The second noteworthy element of Operation Relex was the ongoing flow of directives from the Government on operational decisions. While the ADF’s basic mission for Relex was set, a number of decisions were made as the operation unfolded and the Government decided on the course of action to be taken at certain points.

2.30 Some of these were about relatively minor issues such as the warnings that the Navy should issue to SIEVs to get them to turn away from entering Australian waters. More important matters included the Government’s directive on 12 October authorising the Navy to escort or ‘tow-back’ SIEVs from the Australian contiguous zone to the edge of Indonesian waters.²⁸

2.31 This ‘micro-management’ from Canberra reflected, as Brigadier Silverstone observed, the fact that Operation Relex was ‘occurring in a very fluid policy environment’,²⁹ with ‘a very high degree of interagency coordination’.³⁰

24 *Transcript of Evidence*, CMI 56.

25 Enclosure 1 to the Powell Report, Statement by Brigadier Silverstone, pp.2, 5.

26 *Transcript of Evidence*, CMI 454.

27 *Transcript of Evidence*, CMI 324.

28 See the discussion on tow-back in *Transcript of Evidence*, CMI 508, 876, 915-17, 945.

29 *Transcript of Evidence*, CMI 350.

Force deployment and intelligence

2.32 Operation Relex involved a significant increase in not only the scope but also the scale of Australian border protection operations and particularly the nature of the assets deployed. As Rear Admiral Smith stated to the Committee:

Operation Relex required the establishment of an enhanced and continuous presence and response capability by the Australian Defence Force deep offshore to in effect establish a barrier between Christmas Island and Ashmore Island. Larger and more capable surface combatant vessels were therefore required in order to effectively intercept, warn and, if necessary, board in an attempt to turn away the SIEVs to a position just outside the Australian contiguous zone.³¹

2.33 The Director General, Coastwatch, Rear Admiral Mark Bonser, informed the Committee that prior to Operation Relex, RAN Fremantle class patrol boats and Royal Australian Airforce (RAAF) PC-3 Orion aircraft had supported vessels from Coastwatch and the Customs National Marine Unit in undertaking 'civil maritime surveillance and response'.³²

2.34 Under Relex, the RAN's major fleet units – frigates, amphibious ships and auxiliaries – played a lead role in interception and boarding operations. The Committee was advised by Defence that a total of 25 RAN vessels have been involved in Operations Relex and Cranberry since August 2001, in addition to Customs and Coastwatch craft.³³

2.35 In addition, three Transit Security Elements (TSEs), each comprising 52 Army soldiers, were deployed to assist RAN personnel. The role of the TSE was to maintain security on vessels, once a SIEV was boarded by naval personnel or when asylum seekers and SIEV crews were transferred to Navy ships.³⁴ Each ship involved in the Operation also had at least one medical officer embarked upon it. Rear Admiral Smith noted that these extra medical personnel were drawn largely from the naval reserve.³⁵

2.36 As the lead agency, the ADF assumed responsibility for patrolling the major area of operations. This area stretches east-west from Gove to Christmas Island and south to Port Hedland. Coastwatch redeployed its patrol craft from Christmas Island to

30 *Transcript of Evidence*, CMI 365.

31 *Transcript of Evidence*, CMI 448.

32 *Transcript of Evidence*, CMI 1628.

33 Department of Defence, Questions on Notice, Question W59.

34 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.135. See also Department of Defence, Questions on Notice, Question W59.

35 *Transcript of Evidence*, CMI 453.

concentrate on supporting Defence in the Timor and Arafura Sea approaches to Australian waters.³⁶

2.37 A 'layered surveillance' operation supported the Navy's interdiction effort. This involved two RAAF P-3 Orions flying out of bases in Darwin and Learmonth in Western Australia, Navy helicopters based on RAN vessels and Coastwatch aircraft. The surveillance effort was 'layered' in that the P-3s provided long-range coverage close to Indonesia while the Navy's ships were stationed closer to Christmas Island and Ashmore Reef 'where', according to Rear Admiral Smith, 'we felt them best positioned to maximise our chances of interception'.³⁷

2.38 Aerial surveillance extended to 24 nautical miles out from the territorial 'baseline' for the Indonesian archipelago. A 12 nautical mile buffer zone outside the Indonesian boundary was maintained to limit the risk of RAAF planes straying inadvertently into Indonesian airspace.³⁸

Intelligence

2.39 'Sitting behind' both operations and surveillance was an extensive inter-agency intelligence capability. Reflecting the whole-of-government nature of the border protection strategy, the agencies involved in the gathering, analysis and distribution included:

- DIMIA as the lead coordinating agency;³⁹
- Australian Federal Police (AFP);
- Australian Customs Service and Coastwatch;
- Defence;
- Department of Foreign Affairs and Trade;
- Australian Security and Intelligence Organisation (ASIO);
- Office of National Assessments (ONA); and
- Office of Strategic Crime Assessments (OSCA).⁴⁰

2.40 Prior to Operation Relex, a number of inter-departmental committees and other joint agency bodies had been established to help coordinate the intelligence effort on unauthorised arrivals. These included the:

- Illegal Immigration Information Oversight Committee (IOC), chaired by ONA;

36 RADM Bonser, *Transcript of Evidence*, CMI 1629.

37 *Transcript of Evidence*, CMI 488.

38 Attachment A, Minister for Defence to CMI, (undated, received 4 July 2002), pp.1-2.

39 *Transcript of Evidence*, CMI 1826-8.

40 ANAO, *Management Framework for Preventing Unlawful Entry into Australian Territory*, Audit Report No. 57 2001-2002, p.51.

- Operational Coordination Committee, chaired by DIMIA; and
- the Joint AFP-DIMIA People Smuggling Strike Team.⁴¹

2.41 The intelligence used in Relex came from a wide range of both onshore and offshore sources (ie. Australian and overseas). Called ‘all source’ intelligence, it included both open source material (ie. publicly available information) and official information sourced from the agencies listed above.⁴² It also involved ‘collateral information’ collected overseas, particularly in Indonesia, by Australian agencies, their overseas partners and ‘human sources’.⁴³

2.42 Operational intelligence, from surveillance flights or boarding parties, was also fed back into the intelligence system. Signals intelligence contributed only rarely.⁴⁴

2.43 Within the ADF, the many streams of intelligence were channelled through the Australian Theatre Joint Intelligence Centre (ASTJIC). ASTJIC’s role is to provide operational level information to ADF operations. For Relex, it coordinated incoming intelligence from other government agencies and passed it to Rear Admiral Smith and Brigadier Silverstone, in addition to other regular ‘customers’.⁴⁵ A ‘small analytical team’ of between two and four analysts was established specifically to support Relex operations.⁴⁶ It worked seven days a week on extended hours, from 0500 hours to 2100 hours and occasionally later. ASTJIC also had an intelligence watch system running 24 hours a day to pass on critical intelligence directly to operational commanders when required.⁴⁷

2.44 During the course of the operation, responsibility for analysing intelligence shifted from ASTJIC to NORCOM, which proved to have greater familiarity with people smuggling and illegal immigration issues than other areas in Defence.⁴⁸

41 ANAO, *Management Framework for Preventing Unlawful Entry into Australian Territory*, pp.38-39, 46 and 51-52. See also *Transcript of Evidence*, CMI 859, 1997-98.

42 *Transcript of Evidence*, CMI 1884-1885, 1996.

43 *Transcript of Evidence*, CMI 1925.

44 *Transcript of Evidence*, CMI 1780. Colonel Gallagher told the Committee that Defence Signals Directorate (DSD) material went to both the ADF and DIMIA (CMI 1733). The limited use of signals intelligence might reflect the fact that many of the SIEVs were not equipped with radio or telecommunications. Air Commodore Byrne, Commander of the RAAF Maritime Patrol Group, told the Committee that, in his knowledge, ‘no intelligence from a radio beacon has been pertinent to Operation Relex over the last 11 months’, *Transcript of Evidence*, CMI 2162.

45 *Transcript of Evidence*, CMI 1892-3.

46 *Transcript of Evidence*, CMI 1895.

47 *Transcript of Evidence*, CMI 1895.

48 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.161. See also Colonel Gallagher, *Transcript of Evidence*, CMI 1888-89.

2.45 The intelligence arrangements between Defence and other agencies for Operation Relex are discussed further in Chapter 8, which deals with SIEV X.

Public affairs plan

2.46 The architecture surrounding Operation Relex included a public affairs plan, which established both what images could be collected and who could provide public information on Operation Relex activities. The plan was unusual in that, according to Mr Brian Humphreys, Director-General, Defence Communication Strategies, it was inconsistent with the overarching Defence Organisational Communication Strategy.⁴⁹

2.47 The Committee heard evidence from a number of witnesses indicating that the general Defence instructions in relation to public affairs were considerably more restrictive under Minister Reith than they had been previously.⁵⁰ In particular, the general instructions required that the facts, policy and content of draft media releases be cleared at one star level or equivalent in Defence,⁵¹ with a subsequent clearance by officers from the Public Affairs and Corporate Communication (PACC) area on the 'public affairs considerations'.⁵²

2.48 Where matters fell into the category of 'topical issues' that might attract media interest, the instructions required Defence personnel likely to speak on them in public forums to notify PACC in advance. In turn, PACC was required to report to the Minister's office on any contact with Defence by the media on 'sensitive issues'.⁵³

2.49 The public affairs plan for Operation Relex was more restrictive again than these general instructions.

2.50 Mr Humphreys told the Committee that he and his staff had drafted a proposed public affairs plan for Relex, which provided for Ministers and the Prime Minister to make 'strategic level announcements',⁵⁴ with the 'release of operational detail' to come 'from a military or uniformed officer'.⁵⁵ The draft plan proposed that there be daily media briefings on the operation by both government and Defence officials.⁵⁶

49 *Transcript of Evidence*, CMI 1149.

50 The relevant instruction was Defence Instruction (General) (DIG 08-1) of August 2001. For comment on the instruction, see *Submission No. 13*.

51 The ranks of Brigadier (Army), Commodore (RAN) and Air Commodore (RAAF) are at the one star level.

52 Answers to Questions on Notice, Department of Defence, Question 25.

53 Answers to Questions on Notice, Department of Defence, Questions 25 and 26.

54 *Transcript of Evidence*, CMI 1143.

55 *Transcript of Evidence*, CMI 1144.

56 *Transcript of Evidence*, CMI 1143.

2.51 This plan, however, was rejected by the staff of the Minister for Defence, in favour of one proposed by the Minister's media adviser, Mr Ross Hampton.⁵⁷ The essential feature of that plan was that all information about Operation Relex, whether strategic or operational, was to be released by the Minister's media adviser. Paragraph 14 of the plan states:

Teams will be resourced with digital imagery capability to allow for send-back. It is imperative that all imagery, both digital video and digital stills, is transmitted or relayed to the Directorate of Digital Media at PACC for clearances. No imagery is to be released outside this system. All comment and media response/inquiries is to be referred to MINDEF [Defence Minister] Media Advisor, Mr Ross Hampton.⁵⁸

2.52 Questioned about his understanding of the reasons for that approach to public affairs in the case of Operation Relex, Mr Humphreys offered two explanations:

- first, he thought that 'the guiding motivation of Mr Hampton was to ensure that the minister's office could see the information before it was released and had an opportunity to decide which information was released';⁵⁹
- second and relatedly, Mr Hampton wished to be the 'only point of information coming out from Defence' because of his responsibility for coordinating the release of information from Defence with that released by ministerial staff from other portfolio areas.⁶⁰

2.53 The Committee notes that the strictly centralised control of information through the Minister's office during Operation Relex meant that Defence was unable to put out even factual material without transgressing the public affairs plan.

2.54 Significantly, the instruction that no information concerning Operation Relex was to be released to the media by Defence personnel was explicitly reinforced on the day after Minister Reith had been told by Air Marshal Houston that no children were thrown overboard from SIEV 4.⁶¹ As Mr Humphreys said, no public correction to information could be made unless the minister agreed to those misrepresentations being corrected.⁶²

2.55 The Director of Media Liaison, Mr Tim Bloomfield, further informed the Committee that, not only was no information to be released by Defence unless through

57 *Transcript of Evidence*, CMI 1148. The Ministerial staff involved in the discussions were Mr Ross Hampton, media adviser, Mr Mike Scrafton, military adviser, and Mr Peter Hendy, chief of staff.

58 Answers to Questions on Notice, Department of Defence, Question 31.

59 *Transcript of Evidence*, CMI 1150.

60 *Transcript of Evidence*, CMI 1150.

61 Enclosure 1 to Powell Report, Statement by Rear Admiral Adams, Deputy Chief of Navy.

62 *Transcript of Evidence*, CMI 1156.

the Minister's office, but that no imagery was to be collected by the Public Affairs area. He said:

We were given direction that we were not to deploy ... photographers or public affairs officers to Operation Relex to the point where at the very beginning we had sent a military public affairs officer to Christmas Island for the *Tampa* and we were directed to return her immediately back to Australia - and we did.⁶³

2.56 The imagery that was collected was taken by ADF personnel participating in the Operation. Mr Humphreys told the Committee that Mr Hampton gave directions about what was to be collected by these personnel in the following terms:

Essentially, we were told to concentrate on the ADF activities at the time - so the work of ADF personnel in relation to Operation Relex, first of all, as targets of opportunity for photographers. We were then given instructions in regard to photographing SUNCs [suspected unauthorised non-citizens] - or whatever the latest term is. We were certainly aware that Immigration had concerns about identifying potential asylum seekers, so we got some guidance on ensuring that there were no personalising or humanising images taken of SUNCs.⁶⁴

2.57 Although Mr Humphreys said that this direction was given in the context of not *identifying* the asylum seekers, he confirmed that the words 'personalise' and 'humanise' were both used.⁶⁵ Pressed on the point, he agreed with the proposition that 'what we have is the Minister for Defence saying in the immediate post-*Tampa* environment, 'Don't humanise the refugees'.⁶⁶ The basic instruction, Mr Humphreys said, was that no photographs of asylum seekers were to be taken at all.⁶⁷ He noted that Mr Hampton informed him that he was in daily discussion with ministerial officers from Immigration, Foreign Affairs, and Attorney-General's, and with the Prime Minister's office concerning public affairs handling of Operation Relex.⁶⁸

2.58 The Committee notes that their refusal to give evidence to the inquiry meant that it was unable question either Mr Hampton or Mr Reith or the Prime Minister's Office about the basis for the instruction that refugees were not to be 'humanised'.

2.59 On the evidence available, however, it seems to the Committee that the public affairs plan for Operation Relex imposed upon the Department of Defence by the Minister's Office had two clear objectives. The first was to ensure that the Minister

63 *Transcript of Evidence*, CMI 1179.

64 *Transcript of Evidence*, CMI 1151.

65 *Transcript of Evidence*, CMI 1152.

66 *Transcript of Evidence*, CMI 1152.

67 *Transcript of Evidence*, CMI 1152, 1161.

68 *Transcript of Evidence*, CMI 1154; Correspondence from Mr Brian Humphreys, dated 29 April 2002.

retained absolute control over the facts which could and could not become public during the Operation. The second was to ensure that no imagery that could conceivably garner sympathy or cause misgivings about the aggressive new border protection regime would find its way into the public domain.

2.60 Even before the ‘children overboard’ story broke, then, the facts show there was a determination on the part of the Minister and his office to manipulate information and imagery in support of the government’s electoral objectives. Such preparedness to manipulate the factual record would be abhorrent and inimical to good governance at any time. That it occurred during the caretaker period of an election campaign, in which issues relating to ‘border protection’ were extremely significant, is inexcusable.

Standard operating procedures

2.61 Rear Admiral Smith explained to the Committee that standard operating procedures were developed for the Operation, but that these evolved both in response to policy changes from government and in response to the reactions of the passengers and crew of the incoming boats.

2.62 The first stage involved the detection and interception of the illegal entry vessels, through a combination of air and sea surveillance.⁶⁹ The Navy had no authority to board these vessels in international waters. In the first instance, then, warning messages were delivered to the masters of the boats, advising them that ‘they were suspected of having illegal people on board and that they should not take the people to Australia because they were not welcome’.⁷⁰

2.63 According to testimony received by the Committee, one of the tactics adopted by the ‘people smugglers’ and their passengers was to generate ‘safety of life at sea’ or SOLAS situations by sabotaging their boats or jumping overboard. In such a manner, they hoped to compel the Navy to rescue them and take them to Australia.

2.64 In order to counter such tactics, the Navy’s standard procedure was to keep their large frigates ‘over the horizon’ and out of sight, and send forward the ‘fast RHIBs [rigid hulled inflatable boats] - what we call a long range insertion’.⁷¹ The RHIBs carried the warning messages, which included notification of the penalties under Australian law for people smuggling, and which were provided in English and Bahasa.⁷²

2.65 As Rear Admiral Smith noted, however, these messages were ignored ‘[a]lmost without exception’,⁷³ calling forth the next phase of the interception

69 *Transcript of Evidence*, CMI 502.

70 *Transcript of Evidence*, CMI 502.

71 *Transcript of Evidence*, CMI 502.

72 *Transcript of Evidence*, CMI 503.

73 *Transcript of Evidence*, CMI 502.

procedure once the vessel entered Australia's contiguous zone, 24 nautical miles out from Christmas Island.⁷⁴

2.66 In the early stages of Operation Relex, the Rear Admiral said, as the vessels approached the contiguous zone, the Navy sought permission to board them 'from Canberra through the IDC process'. From that point:

Our policy then was to reinforce the warning and turn the vessel around and either steam it out of our contiguous zone ourselves under its own power or - as had happened on a number of occasions - if the engine had been sabotaged in our process or boarding, we would then tow the vessel outside our contiguous zone into international waters. At that point, our boarding party withdrew as we had no jurisdiction in international waters. Our initial policy was to do that up to three times and, after having done it the third time, to seek further advice from government with the view to those vessels then being taken to Ashmore Island or to Christmas Island. But that was a government decision through the IDC process.⁷⁵

2.67 Rear Admiral Smith noted that the requirement for government approval to board vessels was 'relaxed as the operation unfolded'. Nevertheless:

once we had intercepted, everything that occurred after that in terms of major decisions - such as boarding, removal of people or whatever it happened to be - actually came from Canberra.⁷⁶

2.68 The Committee asked Rear Admiral Smith whether the government's instructions to the Navy in relation to the interception of vessels contained provisions for handling any claims made by those on board to refugee status. He replied:

It had no relevance for us. Our mission was clear - that is, to intercept and then to carry out whatever direction we were given subsequent to that. The status of these people was irrelevant to us ... Claims from the UAs [unauthorised arrivals] were not factors to be taken into account in terms of how we conducted that mission.⁷⁷

2.69 Following the RAN's experience with SIEVs 1-4, their instructions were altered. Rear Admiral Smith stated:

From the commencement of Operation Relex on 3 September, the initial policy that we were given to implement was to intercept, board and hold the UAs [unauthorised arrivals] for shipment in sea transport - or air transport, but primarily sea transport - to a country to be designated. With SIEV 5, we

74 *Transcript of Evidence*, CMI 462.

75 *Transcript of Evidence*, CMI 504.

76 *Transcript of Evidence*, CMI 457.

77 *Transcript of Evidence*, CMI 661.

received new instructions which were to, where possible, intercept, board and return the vessel to Indonesia.⁷⁸

2.70 As part of that new policy, the requirement to issue a warning to vessels in international waters was cancelled. This allowed ‘surface units to remain out of visual range of the SIEV ... to give unauthorised arrivals and SIEV crews minimal time to sabotage their vessels’ and thus minimise the chances of a safety of life at sea incident.⁷⁹

2.71 With the removal of the requirement to issue warnings in international waters, ADF personnel needed to board each vessel only once, when the SIEV had entered the Australian contiguous zone.⁸⁰

2.72 The Committee notes, finally, that it followed from the Government’s directive to Navy about preventing asylum seekers from entering Australian territory, that they could not be embarked upon Australian naval vessels unless absolutely necessary. In terms of standard operating procedures, this requirement meant that the unauthorised arrivals were to be kept aboard their own vessels as long as they were even ‘marginally seaworthy’.⁸¹ In the next chapter, the Committee will discuss the extent to which this requirement may have unnecessarily endangered the lives of the passengers on SIEV 4, and may have involved naval personnel in a game of brinkmanship over the imminence of a safety of life at sea situation.

Overview of Operation Relex Activities

2.73 In total, twelve Suspected Illegal Entry Vessels were intercepted by the RAN under the auspices of Operation Relex.⁸² As noted earlier, SIEV 1 arrived on 7 September 2001 and the last illegal entry vessel, SIEV 12, arrived on 16 December 2001.

2.74 SIEVs 5, 7, 11 and 12 were escorted back to Indonesia. SIEVs 4, 6 and 10 sank at some point during the interception or tow-back process. Their passengers were rescued, with the loss of two lives on SIEV 10, and transported in the first instance to Christmas Island. The passengers from SIEV 4 were eventually taken to Manus for processing, and the passengers from SIEVs 6 and 10 to Nauru. The remaining vessels

78 *Transcript of Evidence*, CMI 508.

79 Answers to Questions on Notice, Department of Defence, Question 11.

80 Answers to Questions on Notice, Department of Defence, Question 11.

81 See, for example, *Transcript of Evidence*, CMI 296.

82 In addition to the twelve numbered SIEVs, a small number of boats have attempted to land outside the designated area of Relex’s operation in the period since 3 September 2001. See Additional Information, Department of Defence, Talking points for Senate Legislation Committee Additional Estimates Hearing, February 2002.

were intercepted, their passengers held in custody and then transported for processing.⁸³

2.75 Naval officers emphasised in their testimony that Operation Relex was a new and difficult type of operation, which was undertaken with minimum time for preparation and training. Rear Admiral Smith told the Committee that:

When Relex was commenced, the ships that were initially committed to Operation Relex were in fact in South-East Asia participating in a number of activities in that area. They were brought back and thrown straight into the patrol line. We were expecting that there could be activity that would not be the sorts of things that our boarding parties would be used to encountering, so we developed quickly a training package. A number of members of what we call our 'sea training group', which is a group that works for me that does all our operational training, were deployed to the ships where they were in theatre. They conducted training on the spot to try to prepare the boarding parties for what could eventuate out of this particular activity. We have been able to do subsequent rotations of vessels into Operation Relex in a more considered way and have prepared them before they have deployed by providing them appropriate training.⁸⁴

2.76 A particularly difficult feature of the Operation for both unauthorised arrivals and naval personnel, it seemed to the Committee, was the length of time that some of the SIEVs and their passengers were detained in custody while decisions were being made about where to take them, or while appropriate transport arrangements were made.

2.77 For example, SIEV 3 was intercepted on 12 September near Ashmore Island with 129 people on board. They included 54 children and a heavily pregnant woman, who subsequently gave birth while being transported to Nauru by HMAS *Tobruk*.⁸⁵ These people were held in custody on their crowded vessel in Ashmore Lagoon for ten days, until 22 September before being transferred to the *Tobruk*.⁸⁶ Rear Admiral Smith told the Committee that:

That was a constraint under which we operated: that there was a requirement for them to remain in location there for that period of time. We were very conscious of our responsibilities to these people in providing them with humanitarian assistance and we did everything within our power to be able to make life as comfortable for them as was possible.⁸⁷

83 Matrix, tabled by Rear Admiral Smith, 5 April 2002.

84 *Transcript of Evidence*, CMI 452.

85 Matrix, tabled by Rear Admiral Smith, 5 April 2002; *Transcript of Evidence*, CMI 506.

86 *Transcript of Evidence*, CMI 507.

87 *Transcript of Evidence*, CMI 507.

2.78 This assistance, the Committee learnt, included logistical feats such as preparing meals on naval vessels for up to 200 people and then ferrying them across to the detained SIEVs using the RHIBs.⁸⁸

2.79 Operation Relex, however, was not only new in the sense that the actual tasks and logistics involved were different to those required under Operation Cranberry. It was new also in the sense that it helped to create a very different environment in which those tasks had to be performed.

2.80 In other words, as Rear Admiral Smith put it, previously the Navy's role had been to escort unauthorised arrivals to an Australian port for reception and processing by relevant agencies. Under these circumstances, the individuals 'were invariably cooperative and compliant, with Navy boarding parties able to operate in a relatively benign environment'.⁸⁹ When under Operation Relex, however, 'their apparent aim of being taken to Australia was frustrated by the Navy's intervention', then '[n]umerous instances of threatened or actual violent actions against Australian Defence Force personnel occurred, as well as various acts of threatened or actual self harm and the inciting of violence'.⁹⁰ The Rear Admiral commented:

Australian Defence Force personnel had not previously encountered these circumstances during non-warlike operations. They were extremely hazardous and volatile situations. What was a law enforcement activity had real potential to rapidly escalate into a violent situation or just as quickly deteriorate into a major safety or preservation of life situation or, worse, both.⁹¹

2.81 Rear Admiral Smith drew a clear link between the changed behaviour exhibited by the unauthorised arrivals and the change in the Australian government policy. He said:

It is certainly fair to say that the change in the behaviour pattern of these people is directly linked to the change in the attitude of the Navy, generated by the policy that was implemented.⁹²

2.82 Vice Admiral Shackleton, Chief of Navy, noted that the unauthorised arrivals 'were learning from each event that they interacted or experienced with us and ... they were starting to understand our approach to how we operated'.⁹³ This 'learning',

88 *Transcript of Evidence*, CMI 512.

89 *Transcript of Evidence*, CMI 448.

90 *Transcript of Evidence*, CMI 448.

91 *Transcript of Evidence*, CMI 448.

92 *Transcript of Evidence*, CMI 490.

93 *Transcript of Evidence*, CMI 62.

according to naval witnesses, meant that those aboard later boats seemed more prepared to counter the Navy's tactics, and more aggressive than earlier arrivals.⁹⁴

2.83 Officers spoke of a 'pattern' of behaviour exhibited by the asylum seekers over the period, which involved acts and threats of self-harm and aggression, including threats to children, sabotage of vessels and of equipment, jumping overboard and attempts to create safety of life at sea situations.⁹⁵

2.84 The Chief of Navy summed up the experience of Operation Relex thus:

This has been very hard work, and the sailors have acquitted themselves in a way in which I think most Australians would be very proud of. In my own sense, I cannot be any more proud of them than I am. The point is that this has been very difficult. The people who are engaged in the SIEV - that is, the people themselves - are in difficult circumstances. The point is that they are trying to get to Australia. It has been the Navy's task to stop them doing that.⁹⁶

2.85 In the next chapter, the Committee considers in detail events which occurred on one SIEV which was intercepted during Operation Relex, and which became notorious as the so-called 'children overboard' incident.

94 *Transcript of Evidence*, CMI 62.

95 *Transcript of Evidence*, CMI 68ff and passim.

96 *Transcript of Evidence*, CMI 68.

Chapter 3

The ‘Children Overboard’ Incident: Events and Initial Report

‘[E]ven without the subsequent furore and the repeated investigations, the rescue of 223 unauthorised arrivals by HMAS *Adelaide* would always have stayed in my immediate recall as a most memorable incident’.¹

Introduction

3.1 In the early afternoon of 6 October 2001, in response to ‘shore based intelligence’, HMAS *Adelaide* and a Royal Australian Airforce P3-C Orion aircraft intercepted a wooden hulled vessel with 50 people visible on its deck. The 20 to 25 metre vessel was at this time about 100 nautical miles north of Christmas Island, well outside Australia’s area of jurisdiction, but was heading south at about eight knots. ‘There was every expectation’, according to the *Adelaide*’s Commander Norman Banks, ‘that this was a SIEV bound for Christmas Island’.²

3.2 By late afternoon on 10 October 2001, the SIEV’s 223 passengers and crew had been transferred from HMAS *Adelaide* to the custody of the Australian Federal Police on Christmas Island.³

3.3 The events and the reports of the events of the intervening 4 days formed the basis for what has become known as the ‘children overboard’ incident.

3.4 In this chapter, the Committee outlines the events of 6-10 October 2001 as recorded and reported by the logs, situation reports and statements of the HMAS *Adelaide* and its personnel.

3.5 The Committee then discusses in detail the evidence pertaining to a telephone conversation held on 7 October 2001 between Commander Banks and his senior officer, Brigadier Michael Silverstone, out of which arose the original report that a child or children were thrown into the water from SIEV 4.

3.6 The aim of this chapter is to provide a factual foundation on the basis of which analysis can be made in subsequent chapters of matters arising from the original report and the attempts to correct it.

1 Commander Norman Banks, *Transcript of Evidence*, CMI 156-157.

2 *Transcript of Evidence*, CMI 159.

3 *Transcript of Evidence*, CMI 167.

HMAS Adelaide and SIEV 4

3.7 In accordance with the overall aim of Operation Relex, HMAS *Adelaide*'s task following its initial interception of SIEV 4 was to deter the SIEV and its passengers from entering Australian waters. If the vessel did gain entry to Australia's contiguous zone, a boarding party was to detain the SIEV, sail it to the outer edge of the zone and release it if it were safe to do so. If the vessel re-entered the contiguous zone, then a boarding party was to detain the SIEV, its passengers and crew, pending further direction from government. 'At no stage', however, 'were unauthorised arrivals to have access to the Australian migration zone'.⁴

Attempts to deter entry

3.8 The first phase of the *Adelaide*'s engagement with SIEV 4 accordingly involved the attempt to persuade the crew and passengers aboard the SIEV to turn their vessel back to Indonesia.

3.9 To this end, while the vessel was still in international waters, the *Adelaide* commenced delivering warning messages from the Department of Immigration and Multicultural Affairs to the SIEV. The messages advised the master and crew of the vessel that 'it is an offence under the Australian Migration Act to bring to Australia non-citizens who do not have authority to come to Australia'. They advised that penalties, including lengthy gaol terms and fines of up to \$220,000, were imposed on those found guilty of such offences.⁵

3.10 Some of these warning messages were conveyed by the *Adelaide*'s long-range RHIB, while others were conveyed by loud hailer from the *Adelaide* itself.⁶ Between 6.13pm⁷ on 6 October and 4.32am on 7 October, five DIMA warning notices were issued, some several times, in both written and spoken form, and in English, Bahasa and Arabic.⁸

3.11 Those on board SIEV 4 ignored these attempts to warn them off. They refused to identify the master and crew, refused to accept delivery of the written warnings and did not respond to the verbal warnings.⁹ They displayed, in CO (Commander) *Adelaide*'s [Commander Banks's] words, 'visible and oral aggression' and continued to make way steadily towards Christmas Island.¹⁰ Commander Banks told the

4 *Transcript of Evidence*, CMI 158. Note that these instructions were altered for boats arriving subsequent to SIEV 4, to allow for SIEVs to be towed back to Indonesia rather than simply escorted to the edge of the Australian contiguous zone. See *Transcript of Evidence*, CMI 508.

5 *Transcript of Evidence*, CMI 503.

6 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01.

7 The time is the time at HMAS *Adelaide* or 'Golf' time.

8 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01.

9 *Transcript of Evidence*, CMI 159.

10 *Transcript of Evidence*, CMI 159.

Committee that, in view of this initial non-compliance, he assessed that ‘any subsequent boarding would be problematic and that a non-compliant action, potentially employing the graduated use of force, was likely to be necessary’.¹¹

3.12 By 2.30am on 7 October, SIEV 4 had entered Australia’s contiguous zone¹² and at 3.35am, after several calls for the vessel to ‘heave-to’ had been ignored, Brigadier Michael Silverstone, CJTF 639, directed Commander Banks ‘to conduct a positive and assertive boarding’.¹³

3.13 At 3.59am, with approval from Brigadier Silverstone, CO *Adelaide* commenced firing warning shots ahead of the vessel. Commander Banks said:

The SIEV was, at this stage, well inside the Australian contiguous zone, approximately two to three miles from the Australian territorial waters of Christmas Island, and proceeding directly towards Christmas Island at about seven knots. I need to emphasise that only aimed shots were fired directly into the water, [in] an area 50 to 75 feet ahead of the vessel. A searchlight was used to illuminate both the weapon firer and the area in the water ahead of the vessel where the rounds were to land. This ad hoc process was introduced by me to clearly show my intent.¹⁴

3.14 Warnings by loudspeaker continued, said Commander Banks, ‘throughout’, but the vessel still did not heave-to. At 4.30am, the *Adelaide* manoeuvred ‘more aggressively close to the vessel to slow it down’, and this ‘distraction ... allowed an assault type non-compliant boarding, using the RHIB, to be effected whilst the vessel was still under way’.¹⁵

3.15 By 4.45am on 7 October 2001, the *Adelaide*’s boarding party had taken control of SIEV 4 and its course was altered towards Indonesia.

Man overboards

3.16 According to signals from the *Adelaide* around the time of the boarding party’s insertion, its control of the situation on SIEV 4 was tenuous. The signals reported that the SIEV’s passengers were angry and disappointed at being turned north,¹⁶ and that they were ‘irate, aggressive and to some extent hysterical’.¹⁷

3.17 CO *Adelaide* also reported via signal that a number of the unauthorised arrivals were threatening to commit suicide, gesturing with wooden sticks and

11 *Transcript of Evidence*, CMI 160.

12 *Transcript of Evidence*, CMI 160.

13 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01.

14 *Transcript of Evidence*, CMI 160.

15 *Transcript of Evidence*, CMI 160.

16 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 062200Z Oct 01 (Sitrep 8).

17 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 062300Z Oct 01 (Sitrep 9).

beginning to sabotage their vessel.¹⁸ It was at this stage that some began to jump overboard.

3.18 Commander Banks told the Committee that the first ‘man overboard’ took place after first light, at 5.06am, and that subsequent ‘man overboards’ took place between 5.43am and 5.56am. He continued:

Fourteen unauthorised arrivals jumped or were thrown overboard. I use the words ‘thrown overboard’ here advisedly. Those were the words that were used in my signal and reported repeatedly. They jumped or were thrown overboard in a series of voluntary actions by the unauthorised arrivals. All were recovered by the *Adelaide’s* RHIBs and returned to the SIEV.¹⁹

3.19 The question of whether or not a child or children were thrown overboard from SIEV 4 amounts to the question of whether or not a child or children were among this group of fourteen unauthorised arrivals who were recovered from the water by one of the *Adelaide’s* RHIBs. This matter is discussed in detail in the next section of the chapter.

3.20 At 6.01am, a second boarding party was inserted onto the SIEV in order, remarked Commander Banks, ‘to better restore control and, hopefully, to prevent a mass exodus to force a safety of life at sea situation, a consideration which was very much on my mind’.²⁰

3.21 The *Adelaide’s* boarding party and medical teams provided medical assistance to the SIEV’s passengers and the threat of mass exodus did not eventuate. Nevertheless, the situation remained tense and difficult, with ‘force used occasionally to maintain control’.²¹ Commander Banks described it in the following terms:

Efforts to provide assistance, such as water, were not welcomed. Indeed, on occasions, the water that we provided was thrown overboard by the unauthorised arrivals on receipt ... With 200-plus irate personnel on board and a boarding team of 18, all operating in a small and very unfamiliar vessel, it was not a surprise to me that the vessel was continually being sabotaged. The steering and the engines were disabled at various times. Vandalism and arson had been conducted and continued.²²

3.22 ‘However’, he continued:

18 *Transcript of Evidence*, CMI 161; and Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01.

19 *Transcript of Evidence*, CMI 162.

20 *Transcript of Evidence*, CMI 162; Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01; and Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 070015Z Oct 01 (Sitrep 10).

21 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 070145Z Oct 01 (Sitrep 12).

22 *Transcript of Evidence*, CMI 163.

ground was made northward, and the boarding party were extracted from the SIEV at 1029G [10.29am], as the SIEV exited out of Australian jurisdiction 24 miles from Christmas Island. The SIEV and the SUNCs were directed to Indonesia. They were shown a chart, and I also provided a hand-held compass to assist them with that. They had earlier thrown their own compass overboard.²³

3.23 SIEV 4 began heading north at slow speed.²⁴ Commander Banks signalled:

Weather deteriorating, winds freshening, sea and swell make for an uncomfortable ride north.²⁵

Tow, sinking and rescue

3.24 Despite having successfully achieved his mission's aim in preventing the SIEV from gaining access to Christmas Island, Commander Banks said that he was not comfortable that 'a win-win situation' had been accomplished.²⁶ He was concerned about the deteriorating afternoon weather conditions, the seaworthiness of the vessel and in particular, the condition of the steering which had been disabled by the SUNCs and repaired in a makeshift fashion by the *Adelaide*. He also feared that the unauthorised arrivals might again seek to generate a safety of life at sea situation.

3.25 For these reasons, he entertained the 'likely appreciation' that 'the boat would eventually declare itself in distress' and accordingly decided to remain 'out of obvious visual range but took station a prudent five nautical miles clear of the SIEV, such that I maintained radar and Electro-Optical Tracking System (EOTS) surveillance'.²⁷

3.26 At 12.19pm on 7 October 2001, the SIEV was observed 'dead in [the] water'. At 1.35pm it appeared to be flying a white flag, and at 1.59pm, with the *Adelaide* drawing near, other distress signals were displayed.²⁸ The boarding party and security team were despatched to the SIEV to investigate and found that there was water in the fuel, that the starter motor was damaged and the diesel rocker cover removed.²⁹

3.27 The boarding party assessed that the mechanical equipment had been deliberately destroyed 'in [a] bid to be taken to Australia and is ... most likely unrepairable'.³⁰ Accordingly, the SIEV was deemed to be a vessel in distress and CO

23 *Transcript of Evidence*, CMI 163.

24 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01.

25 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 070330Z Oct 01.

26 *Transcript of Evidence*, CMI 163.

27 *Transcript of Evidence*, CMI 163.

28 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 110002Z Oct 01.

29 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 070829Z Oct 01 (Sitrep 16).

30 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 070829Z Oct 01 (Sitrep 16); and Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 110002Z Oct 01.

Adelaide, in consultation with Brigadier Silverstone, determined to tow it to Christmas Island to await further instructions from government.³¹

3.28 Commander Banks told the Committee that this second boarding party insertion and tow proceeded without incident for just over 24 hours until the afternoon of Monday, 8 October.³² In contrast to the earlier insertion, he noted that:

Throughout, the unauthorised arrivals were almost delighted to be in our care, and the mood and bonhomie had decidedly changed. Disturbances and aggression were no longer evident.³³

3.29 However, some difficulties did arise during night, when the bilge levels in SIEV 4 began to rise.³⁴ The SIEV's generator had failed and could no longer power the bilge pumps.³⁵ In the hours between 2.04am and 4.03pm on 8 October 2001, CO *Adelaide* put in place a number of different strategies designed to deal with the bilge levels on the SIEV. These included providing the SIEV with hand and peri-jet pumps, and sending one of the *Adelaide's* RHIBs to Christmas Island to pick up four stroke fuel to power the SIEV's own pumps.

3.30 By 4.03pm, the bilge levels had reduced to 0.5m from a high of 1.2m but the SUNCs were 'agitated' by water coming in over the freeboard and boarding party officers continued to be concerned.³⁶ At 4.30pm, the *Adelaide* commenced serving the evening meal on the SIEV, but just before 5.00pm and 'largely without warning' it began to sink rapidly. Commander Banks informed the Committee that it was then 'in a position 16 nautical miles north-west of Christmas Island'.³⁷

3.31 At 5.08pm, passengers from the SIEV began entering the water as its bow went under, and the first of the *Adelaide's* life rafts was launched.³⁸ Commander Banks described the situation to the Committee as a 'controlled abandon ship' directed by the boarding party embarked on SIEV 4.³⁹ In all, the *Adelaide* launched six 25-man life rafts which, together with the two 7.2 metre RHIBs, rescued all the unauthorised arrivals from the water.⁴⁰

31 *Transcript of Evidence*, CMI 163.

32 *Transcript of Evidence*, CMI 164.

33 *Transcript of Evidence*, CMI 163.

34 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 110002Z Oct 01.

35 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 072239Z Oct 01 (Sitrep 18).

36 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 110002Z Oct 01.

37 *Transcript of Evidence*, CMI 164.

38 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 110002Z Oct 01.

39 *Transcript of Evidence*, CMI 164.

40 *Transcript of Evidence*, CMI 164.

3.32 The Committee notes that during the afternoon just prior to the sinking and while various efforts were underway to reduce the level of water on SIEV 4, the boarding officer had requested of Commander Banks that the women and children be moved off the vessel. That request was made, according to the Ops Room Narrative, at 2.51pm.⁴¹ It was refused.

3.33 Commander Banks was asked why he had refused the request to disembark the women and children from what was clearly only a ‘marginally seaworthy’ vessel onto the *Adelaide*. He replied:

Because if I disembarked some to the *Adelaide* I would have failed in my mission aim and I might as well have embarked all of them. In my judgment we still had a boat that was still marginally seaworthy and I still had control of the situation.⁴²

3.34 Commander Banks emphasised that his ‘instructions were clear that there was to be no loss of life or injury’.⁴³ Nevertheless, it was also clear that he was not to ‘give up’ on his mission aim too easily. That aim was, in the first instance, to deter and deny access to Australia’s migration zone. Commander Banks said that ‘[i]f forced to abandon that aspect of the mission, I was to contain the situation until a decision could be made as to where the SUNCs would be transferred’.⁴⁴

3.35 As Commander Banks noted, it was clear by this stage that he had been unable to achieve the first aim of his mission since the SIEV’s engine had seized up and the vessel was having to be towed by the *Adelaide*. But to have embarked its passengers onto the *Adelaide* immediately would have, in his view, made it impossible ‘to get them off ... without the use of force’.⁴⁵

3.36 In other words, Commander Banks said that as long as the SUNCs were on board their own vessel, he had greater control over the situation and the government retained more options in relation to what was to be done with the asylum seekers. He put it thus:

Clearly, if the aim was always to deter their arrival in Australia, embarking them on the *Adelaide* was another step towards their achieving that goal and our being unable to reverse the process.⁴⁶

3.37 For example, he noted:

41 Ops Room Narrative, p.80; see also *Transcript of Evidence*, CMI 294-295.

42 *Transcript of Evidence*, CMI 296. See also *Transcript of Evidence*, CMI 185: ‘Transferring the people to the *Adelaide* would have been a mission failure ... Taking them on board *Adelaide* in other than a safety of life at sea situation would have been a mission failure’.

43 *Transcript of Evidence*, CMI 298.

44 *Transcript of Evidence*, CMI 297.

45 *Transcript of Evidence*, CMI 297.

46 *Transcript of Evidence*, CMI 299.

it could have been that I was directed to tow them back to Indonesia and transfer control to Indonesia. Having embarked them in *Adelaide*, that would have been an impossibility.⁴⁷

3.38 The Committee notes that the consequence of the fact that the asylum seekers were not embarked on HMAS *Adelaide* as soon as any concerns about the seaworthiness of the vessel were expressed was that they all, women and children included, were forced to enter the water when the vessel sank.

3.39 The Committee accepts completely that Commander Banks made the best professional judgement that he could in the circumstances and that, as soon as the vessel began to founder in earnest, he moved decisively and effectively to rescue the passengers of SIEV 4. The Committee is concerned, not with the judgements or actions of Commander Banks, but with the brinkmanship implicit in the policy that he was charged with implementing.

3.40 It is clear that the policy ‘to deter and deny’ makes the requirement to ensure safety of life at sea paramount. At the same time, however, it requires that naval commanders do all in their power to avoid having to embark unauthorised boat arrivals on RAN vessels. *In practice*, there is significant tension between these two requirements just because, in practice, the line between a ‘marginally seaworthy’ vessel and a sinking fishing boat can be swiftly and unexpectedly crossed. When it is, the lives of both asylum seekers and naval personnel are placed suddenly in peril.

3.41 The Committee is gravely concerned about two aspects of the tension between the requirement to ensure safety of life at sea and the requirement to avoid embarking unauthorised arrivals onto RAN vessels until the last possible moment. First, the Committee is concerned at the risk to the lives and well-being of both naval personnel and the passengers on board SIEVs.

3.42 Second, the Committee is concerned about what may be described as the ‘moral risk’ in which the Commanding Officers are placed by the policy. What, for example, would Commander Banks’s feelings have been had any of the passengers on board SIEV 4 drowned as a consequence of the delay in embarking them on the *Adelaide*? He told the Committee that it was: ‘To my personal relief, [that] the unauthorised arrivals’ leaders confirmed there was no loss of life and, importantly, that no-one was missing’.⁴⁸ In a signal sent shortly after the rescue, CO *Adelaide* indicated the care that he had taken to assure himself that indeed everyone had been rescued:

All SUNCs onboard ADE [*Adelaide*] are content that their loved ones are with them and it appears repeat appears that no one is missing. An

47 *Transcript of Evidence*, CMI 300.

48 *Transcript of Evidence*, CMI 166.

exhaustive search of area has been conducted by RHIBs and only flotsam and jetsom remains.⁴⁹

3.43 The Committee is concerned at the *personal* consequences that may be suffered by commanders such as Commander Banks if these situations ‘go wrong’, and at the government’s apparent obliviousness to the risk it is asking these individuals to run.

3.44 In the event, Commander Banks spoke of the successful rescue of the SIEV’s passengers and crew with justified pride, telling the Committee that:

The performance of the ship’s company of *Adelaide* to make this rescue happen was unparalleled, and can best be described by the simple superlative ‘superb’ ... A number of the ship’s company acted selflessly and several - seven, to be exact - entered the water to assist and, on occasion, help rescue the unauthorised arrivals. The photographs of A.B. Whittle and Leading Seaman Cook Barker are indicative of that effort, but many more of team *Adelaide* contributed than just those seen in the two much-publicised images.⁵⁰

3.45 By 7.08pm on 8 October 2001, all the unauthorised arrivals had been embarked on the HMAS *Adelaide* and their number confirmed at 223.⁵¹ The leaders of the group confirmed that there was no loss of life and that no-one was missing.⁵² By 7.36pm, the two RHIBs had also been recovered and all the *Adelaide*’s personnel accounted for.⁵³

3.46 Following the rescue, Brigadier Silverstone directed that the *Adelaide* was to remain at sea overnight on 8 October and to prepare to transfer the unauthorised arrivals to the authorities on Christmas Island at 9.00am the next day. Later, these instructions changed and eventually the *Adelaide* ‘secured to the buoy at Flying Fish Cove’ at about 2.00pm on Wednesday, 10 October, disembarking the SUNCs into the custody of the Australian Federal Police by 5.00pm that afternoon.⁵⁴

3.47 The *Adelaide* then made up its depleted life raft capacity and prepared to return to Fleet Base West for its next tasking.⁵⁵

49 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M dated 081336Z Oct 01 (Sitrep 27).

50 *Transcript of Evidence*, CMI 166.

51 *Transcript of Evidence*, CMI 166; and Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 110002Z Oct 01.

52 *Transcript of Evidence*, CMI 166.

53 Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 110002Z Oct 01.

54 *Transcript of Evidence*, CMI 167.

55 *Transcript of Evidence*, CMI 167.

Children Overboard?

3.48 Commander Banks was emphatic in his evidence before the Committee that ‘no children were thrown overboard [from SIEV 4], no children were put in the water, no children were recovered from the water’.⁵⁶

3.49 Since, however, a report of children thrown overboard *did* arise from the events just outlined, the Committee questioned Commander Banks extensively about the nature and provenance of the *Adelaide’s* various records and reports of the ‘man overboard’ incidents.

3.50 In addition to the testimony of relevant individuals before the Committee, there are six ‘primary’ sources which pertain to the original report of ‘children overboard’. They are:

- recollections and notes of a phone call between Commander Banks on HMAS *Adelaide* and Brigadier Silverstone in Darwin, early in the morning on 7 October 2001;
- situation reports eight and nine from HMAS *Adelaide*;
- logs of the HMAS *Adelaide*;
- Commander Banks’s summary chronology of events of 10 October 2001;
- witness statements collected from the crew of HMAS *Adelaide* on 10 October 2001; and
- Commander Banks’s statement of 11 October 2001.

3.51 In what follows, the Committee will analyse this evidence in some detail. The aim of the discussion is to give a comprehensive account of how a report that children were thrown overboard came to be made and considered credible.

Initial report

3.52 It is uncontroversial that the original report that a child had been thrown overboard was conveyed by Brigadier Silverstone to Air Vice Marshal Alan Titheridge, Head, Strategic Command Division and to Rear Admiral Geoffrey Smith, Maritime Commander, on the morning of 7 October 2001.⁵⁷ Brigadier Silverstone made this report, believing himself to be passing on information that he had just been told in a telephone conversation with Commander Banks.

3.53 There is, however, disagreement between Commander Banks and Brigadier Silverstone about a number of aspects of their telephone conversation, including whether Commander Banks ever said that a child had been thrown overboard.

56 *Transcript of Evidence*, CMI 273.

57 Enclosure 2 to the Powell Report, email from JOO-NORCOM on 11/10/2001 13:45; and, *Transcript of Evidence*, CMI 342-342, 349.

3.54 According to Brigadier Silverstone, he spoke with Commander Banks at 7.20am Darwin ('India-Kilo') time on 7 October 2001. The time difference between Darwin and the *Adelaide* was then two and half hours, meaning that, on Brigadier Silverstone's account, the time on the *Adelaide* ('Golf' time) would have been 4.50am. The conversation lasted for less than five minutes⁵⁸ and conveyed to him the following information:

- the vessel had disabled its steering, and was dead in the water 7-8 nautical miles south;
- there was a threat of mass exodus;
- there were men in the water and a child thrown over the side, 5,6 or 7 years of age;
- some had discarded their life jackets, but to the best of CO *Adelaide's* knowledge everyone had been recovered.⁵⁹

3.55 Brigadier Silverstone told the Committee that both his contemporaneous notes and his recollection of the conversation confirm this account.

3.56 The contention between Brigadier Silverstone and Commander Banks with regard to their recollections of this conversation is focused on two matters. They are, first, the time at which the conversation took place and, second, whether Commander Banks said that a child had been thrown over the side.

Time of telephone conversation

3.57 In relation to the first issue, the time of 0720 (7.20am) is noted at the top of Brigadier Silverstone's diary notes of the conversation. However, the Brigadier informed the Committee that he had only inserted that notation of the time three to four days after the conversation, 'when it became apparent that this was the subject of some interest'.⁶⁰ Questioned as to how he could be confident that that was the correct time, Brigadier Silverstone said:

I had a requirement to pass the latest information to Air Vice Marshal Titheridge by 0730 Darwin time that morning and I had previously arranged with CO *Adelaide* to talk to him at 0720 in order to get a report on what was happening.

Senator Brandis - And you met that deadline to speak to Air Vice Marshal Titheridge by 0730am?

58 *Transcript of Evidence*, CMI 335-336.

59 *Transcript of Evidence*, CMI 341-342; Enclosure 2 to the Powell Report, email from JOO-NORCOM on 11/10/2001 13:45; and diary note tabled by Brigadier Silverstone on 4 April 2002.

60 *Transcript of Evidence*, CMI 329.

Brigadier Silverstone - Indeed. My recollection is of sitting there at about 0728. I called him at that time and then called Rear Admiral Smith directly after that.⁶¹

3.58 To set against this confidence, however, is the problem that if the phone call took place at that time, then the events which formed its content do not seem, according to the *Adelaide's* boarding logs, to have yet taken place.

3.59 Commander Banks testified that, to the best of his recollection, the conversation occurred at about 6.00am his time, and thus at 8.30am in Darwin time.⁶²

3.60 The discrepancies between the two sets of recollections and reconstructions of the time of the phone call were extensively canvassed by the Committee in its hearings.⁶³ The main features of the evidence which support each version of events are outlined below.

3.61 The following considerations speak in favour of Commander Banks's account of the time:

- the *Adelaide's* boarding log contains no entries at around 4.50am which refer to persons in the water or recovery of SUNCs from the water, whereas the entries at around 6.00am refer to both those things;⁶⁴
- at around 6.00am, according to a boarding log entry and subsequent witness statements from the crew, a child was being held over the side of SIEV 4 and being threatened with being thrown overboard;⁶⁵
- Commander Banks testified that he only recalled one telephone call with Brigadier Silverstone which involved reference to a child, and that this call occurred at the time that the child was being held over the side;⁶⁶
- a statement made on 10 October 2001 by the *Adelaide's* Principal Warfare Officer, Lieutenant Commander Daniel Hynes, reports on the incident of a child held over the side a few minutes prior to 6.00am. It continues: 'The adult then brought the child inboard after a few minutes when it was evident that the SUNCs that were jumping in the water were being returned. At this time I moved into the bridge where the Commanding Officer was on the phone to the Brigadier, where I heard him state quite clearly that the SUNCs were throwing

61 *Transcript of Evidence*, CMI 337.

62 *Transcript of Evidence*, CMI 226, 248.

63 See particularly the evidence of Commander Banks, Brigadier Silverstone, Rear Admiral Smith, Rear Admiral Ritchie and Air Vice Marshal Titheridge.

64 *HMAS Adelaide Boarding Log*; and Enclosure 2 to the Powell Report, HMAS Adelaide SIC I3M/LAB dated 101136Z Oct 01, 'SIEV 04 List of Chronological Events'.

65 *HMAS Adelaide Boarding Log*; and Enclosure 1 to the Powell Report, Statements from HMAS *Adelaide* crew in the matter of Man Overboard Incident SIEV 04.

66 *Transcript of Evidence*, CMI 226, 248-249.

themselves overboard and threatening to throw a child in the water in an attempt to cause a SOLAS [safety of life at sea] situation'.⁶⁷

- Commander Banks's statement made on 11 October 2001 concerning his telephone conversation with Brigadier Silverstone uses the present tense in relation to his report of a child being held over the side. This gives support to Commander Banks's recollection that the phone call happened *as* he was witnessing the incident. The statement reads, in part, 'I believe I told him [Silverstone] that they were threatening to throw children overboard and I had witnessed such an event. I believe the CJTF asked me to confirm that children were involved and I believe I advised him that *I could see* a young child being held over the side. I believe he asked me some questions about this and could I definitely confirm this. I am positive I stated that quote I had seen it myself unquote'. At the end of the statement, Commander Banks summarised: 'I advised CJTF 639 ... that *I could see* a man threatening to put a child over the side' [emphasis added].⁶⁸

3.62 Finally, the Committee notes that at 4.50am, the sun had not yet risen at the *Adelaide's* position. Commander Banks told the Committee that the boarding party was inserted in darkness (between 4.39am and 4.42am),⁶⁹ and Brigadier Silverstone noted that, at 4.50am, first light would have been '10 or 15 minutes away'.⁷⁰ Sunrise did not take place until 5.39am.⁷¹ This fact seems difficult to reconcile with the claim that Commander Banks or his crew would have been able to see sufficiently well to specify the age of any child, at 4.50am, as 5, 6 or 7 years old.

3.63 The following considerations, however, speak in favour of Brigadier Silverstone's account of the time:

- Brigadier Silverstone was instructed by Rear Admiral Smith, on the evening of Saturday 6 October, to contact Air Vice Marshal Titheridge at 7.30am (Darwin time) with the latest update on SIEV 4. The Brigadier said: 'The only reason I had that conversation with CO *Adelaide* on that morning was that I was required to talk to Air Vice Marshal Titheridge at 0730';⁷²
- it is Brigadier Silverstone's clear recollection that the telephone conversation with Commander Banks was prearranged to occur at 7.20am, and that he called Air Vice Marshal Titheridge following that conversation at 7.28am;⁷³

67 Enclosure 1 to the Powell Report, Statements from HMAS *Adelaide* crew in the matter of Man Overboard Incident SIEV 04.

68 Enclosure 2 to the Powell Report, HMAS *Adelaide* SIC ADA/I3M dated 110330Z Oct 01, 'Op Relex - Commanding Officers Statement Reference SIEV 04 Manoverboards'.

69 *Transcript of Evidence*, CMI 161.

70 *Transcript of Evidence*, CMI 417.

71 *Transcript of Evidence*, CMI 161.

72 *Transcript of Evidence*, CMI 349; see also *Transcript of Evidence*, CMI 335, 337.

73 *Transcript of Evidence*, CMI 337, 336.

- telephone logs indicate that the *Adelaide* made a telephone call at 0721 (Darwin time) to the NORCOM watchkeeper, which could have been the call to Brigadier Silverstone;⁷⁴ and
- Rear Admiral Smith testified that he received a call from Brigadier Silverstone at about 8.00am eastern standard time (7.30am, Darwin time). According to Rear Admiral Smith, Brigadier Silverstone advised him that, as instructed, he had spoken to Commander Banks and passed on the latest information about SIEV 4 to Air Vice Marshal Titheridge. Following this conversation, Rear Admiral Smith said: ‘I rang Admiral Ritchie, according to my mobile telephone record, at 8.02am that morning to advise him of this information’.⁷⁵

3.64 Brigadier Silverstone was asked if he could explain why, assuming his note and recollections of the timing of the telephone call were correct, there was no record of the events spoken of by Commander Banks in the *Adelaide*’s boarding logs at the relevant time. Brigadier Silverstone said:

from my point of view it does not matter what it says in the ship’s log in that the ship’s log reflects a whole collection of material that is sifted through. Reports are made, reports are not made; things are included in it. All I know is that we had that conversation at about 0720 or 0721 and he reported those things to me. It was at the time that the ship’s boarding party had just gone on board and there was a great deal of confusion there. My sense of that is that we were having this conversation at that time and there may have been a range of contrary reporting occurring. I was not there; all I know is what he told me.⁷⁶

3.65 Shortly afterwards, he elaborated on this point:

The only explanation I can offer, not having been there, involves the confusion of the boarding party boarding ... I would suggest that in the darkness there is a range of confusion and that it is at that time that I ring, that it is when they are still trying to assert control on this darkened vessel that I get this report. That is the only possible explanation I can give, because I was not there.⁷⁷

3.66 Finally, the Committee sought advice from Air Vice Marshal Titheridge, asking whether he was able to corroborate Brigadier Silverstone’s account of the time at which their conversation had occurred.

74 *Transcript of Evidence*, CMI 425.

75 *Transcript of Evidence*, CMI 534, 679, 427.

76 *Transcript of Evidence*, CMI 418.

77 *Transcript of Evidence*, CMI 419.

3.67 The Air Vice Marshal had no independent recollection or record of the timing of that particular phone call, but he was able to provide the Committee with his mobile telephone record for the relevant period.⁷⁸

3.68 Other evidence, to be discussed in detail later, shows that Air Vice Marshal Titheridge telephoned Ms Jane Halton, then Chair of the People Smuggling Taskforce in the Department of the Prime Minister and Cabinet, with the information that a child or children had been thrown into the water from SIEV 4. Air Vice Marshal Titheridge's telephone records indicate that he called Ms Halton at 8.05am (AEST), and again at 9.17am and 9.21am on Sunday 7 October 2001.⁷⁹

3.69 If the relevant call was made at 8.05am, that would tend to corroborate Brigadier Silverstone's testimony that he called Air Vice Marshal Titheridge at about 7.30am (Darwin time) and hence at about 8.00am (AEST). However, if the relevant call was made at 9.17am, that would tend to corroborate Commander Banks's testimony that the information was passed to Brigadier Silverstone at 8.30am (Darwin time) and hence at about 9.00am (AEST).

3.70 Air Vice Marshal Titheridge's view, inferred from the pattern of calls on his telephone record, was that the relevant call from Brigadier Silverstone had occurred at about 9.00am (AEST). He emphasised, however, that he had reached this view only by way of inference from the pattern of the calls he made and that 'I could be wrong'.⁸⁰

3.71 Air Vice Marshal Titheridge's reasoning, however, is supported by Ms Halton's evidence. In relation to advice to her that children had been thrown overboard, she told the Committee that:

I am ... very clear that the first I knew of the matter was in a telephone call from Air Vice Marshal Titheridge. Ms Edwards records this in her notes as being at 9.15am, and I understand that Air Vice Marshal Titheridge's telephone records show a call to me at 9.17[am]... My handwritten records show that the advice to me from Air Vice Marshal Titheridge was that the potential unauthorised arrivals were: '... throwing kids o/b and trying to disable steering'.⁸¹

Mention of child thrown overboard

3.72 The second area of contention between Commander Banks and Brigadier Silverstone in relation to their telephone call on 7 October 2001 concerns whether the Commander actually said that a child had been thrown into the water from SIEV 4.

78 *Transcript of Evidence*, CMI 687.

79 Answers to Questions on Notice, Department of Defence, Question W58.

80 *Transcript of Evidence*, CMI 736; see also *Transcript of Evidence*, CMI 720-721.

81 *Transcript of Evidence*, CMI 900.

3.73 Brigadier Silverstone told the Committee that both his clear recollection and his contemporaneous notes of their conversation testify to the fact that Commander Banks advised him that ‘a child was thrown over the side’.⁸²

3.74 Commander Banks, by contrast, was equivocal about the accuracy of his recollection and he took no contemporaneous notes. Nevertheless, he said that he did not think that he had told Brigadier Silverstone that a child had been thrown over the side. He said:

My recollection of that conversation is not very clear. I do recollect parts of the conversation. I do recollect, in the telephone conversation at about six o'clock - and the times are a little in dispute there - being asked about a child and describing that I could see with my own eyes a man holding a child over the side. I recollect being asked about that and saying, ‘I can see it with my own eyes’. I do not recollect saying that a child had been thrown overboard or that a child had been recovered from the water ... Earlier conversations, to my recollection, did not make reference to children at all.⁸³

3.75 Commander Banks did concede in evidence to the Committee that, during the man overboard events of the morning of 7 October 2001, there were reports being made by members of the *Adelaide's* crew that children were among those involved. These reports were reflected in Commander Banks's statement of 11 October 2001. Paragraph 11 of the statement reads in part:

UBAs [unauthorised boat arrivals] were also entering the water from the vessel's stbd [starboard] side out of my view but I could later see their heads bobbing in the water. I received frequent radio reports about these manoverboards and quote possibly unquote heard that children were also in the water.⁸⁴

3.76 Paragraph 14 of the same statement reads:

Throughout, my boarding party and the other witnesses on the bridge wings were advising that they could see more jumpers, some men, some boys and some children. Reports of the number who entered the water varied greatly.⁸⁵

3.77 Given that reports such as these were being made in the confusion of events, Commander Banks conceded that it was possible, although he had no recollection of doing so, that he had told Brigadier Silverstone at the time that children were in the

82 *Transcript of Evidence*, CMI 340.

83 *Transcript of Evidence*, CMI 200.

84 Enclosure 2 to the Powell Report, HMAS Adelaide SIC ADA/I3M dated 110330Z Oct 01, ‘Op Relex - Commanding Officers Statement reference SIEV 04 Manoverboards’.

85 Enclosure 2 to the Powell Report, HMAS Adelaide SIC ADA/I3M dated 110330Z Oct 01, ‘Op Relex - Commanding Officers Statement reference SIEV 04 Manoverboards’.

water. Thus, Commander Banks conceded that it was possible that Brigadier Silverstone's recollection of the telephone conversation was correct.⁸⁶

3.78 The relative situation of each party to the conversation also seems to speak in favour of an assessment that Brigadier Silverstone would be likely to have the clearer recollection of it. Vice Admiral David Shackleton, Chief of Navy, said in evidence to the Foreign Affairs, Defence and Trade Legislation Committee that he had said as much to Commander Banks when they spoke of the matter on 8 November 2001. Vice Admiral Shackleton recounted that discussion in the following terms:

He [Commander Banks] was ambivalent about whether he had actually said to Brigadier Silverstone that a child had been thrown in the water. I discussed this with him a bit. When we talked it through I said, 'Well, frankly, I would think that you probably said at the time what the brigadier wrote down in his notes, because the brigadier was in the comfort of an office that wasn't rolling around, and people shouting and asking him to do all kinds of other things'.⁸⁷

3.79 However, despite acknowledging his imperfect recollection of the conversation, Commander Banks was steadfast in his unwillingness simply to accept Brigadier Silverstone's account of it.⁸⁸ His reasons were threefold.

3.80 First, as noted earlier, his recollection of the content of the relevant conversation was supported by the statement made by the *Adelaide's* Principal Warfare Officer on 10 October 2001. Lieutenant Commander Daniel Hynes's statement reads:

At this time I moved into the bridge where the Commanding Officer was on the phone to the Brigadier, where I heard him state quite clearly that the SUNCs were throwing themselves overboard and threatening to throw a child in the water in an attempt to cause a SOLAS [safety of life at sea] situation.⁸⁹

3.81 Commander Banks told the Committee that:

One of the reasons I am so adamant - perhaps too strong a word - is that in my sworn statement, which I submitted on 11 October, I relied on the principal warfare officer, my operations officer, who was standing adjacent to me. His recollection of that conversation was that I did not say 'throwing children overboard'.⁹⁰

86 *Transcript of Evidence*, CMI 260.

87 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 21 February 2002, p.147.

88 *Transcript of Evidence*, CMI 260.

89 Enclosure 1 to the Powell Report, Statements from HMAS *Adelaide* crew in the matter of Man Overboard Incident SIEV 04.

90 *Transcript of Evidence*, CMI 200-201.

3.82 Second, Commander Banks noted that the situation reports that he sent concerning these events made no reference to a child thrown overboard. Speaking of the relationship between the telephone call and these reports, Commander Banks said:

What I can say is that shortly thereafter, and within minutes, I was transcribing a sit rep - a situation report - in the continuance of those sit reps throughout that event, and I made no reference to it [child overboard] in that sit rep. Therefore, I am more comfortable in my mind, with the passage of time, that obviously I did not say that, because I did not report it in any subsequent correspondence.⁹¹

3.83 Finally, by the time he gave evidence to the Committee, Commander Banks seemed prepared to accord only limited authority to the notes of the conversation taken by Brigadier Silverstone.

3.84 Commander Banks advised the Committee that he only became aware of the discrepancy between his and Brigadier Silverstone's recollection of their conversation on 9 or 10 October 2001.⁹² By this time the report that 'children had been thrown overboard' had become a matter of public controversy, and the Maritime Commander, Rear Admiral Smith, was seeking clarification and written evidence concerning the initial report.⁹³

3.85 When he first became aware of the discrepancy and its significance, Commander Banks said, he was confused and in a 'precarious' state of mind.⁹⁴ He told the Committee:

I had believed that I had reported the events clearly. On 9 and 10 October, I was made aware that the information was not so clear. I had discussions with Commander NORCOM, CJTF 639, on the phone ... where he spoke to me and said - and I am paraphrasing here - 'There was confusion, Norm. I thought you said this; in fact, Norm, I recollect that you said this, and I have taken notes.

I was in a dilemma here. I had my immediate operational commander telling me I said something that I do not clearly recollect saying but cannot categorically deny because I knew that, at the time these events were happening, all of these things were to varying degrees true and were being reported by different people at various instances in time as being true to their recollection of their viewing.⁹⁵

3.86 However, Commander Banks also said that when Brigadier Silverstone first told him that he had a record of what he [Banks] had said, he 'read out what I thought

91 *Transcript of Evidence*, CMI 206.

92 *Transcript of Evidence*, CMI 201ff.

93 *Transcript of Evidence*, CMI 202.

94 *Transcript of Evidence*, CMI 255.

95 *Transcript of Evidence*, CMI 255.

were sentences'. Banks noted: 'I was surprised later on to find out that he actually had very short notes'.⁹⁶ It was in the context of that discovery, that Commander Banks spoke of the support provided for his version of the conversation by the Principal Warfare Officer's statement and the silence in the relevant situation reports.⁹⁷

Conclusion

3.87 The telephone conversation on 7 October 2001 during which Brigadier Silverstone either heard or thought he heard Commander Banks tell him that a child had been thrown over the side of SIEV 4 was one of about nine conversations between the two officers that day.⁹⁸ Many of these had taken place in the very early hours of the morning, in the flurry of events surrounding the boarding of the vessel.⁹⁹

3.88 The Committee itself does not consider that it is possible to arrive at a definite conclusion about what exactly was said and not said at the time. It has, however, complete confidence in the integrity of both Commander Banks and Brigadier Silverstone and complete confidence that at all times each has said only what he believed to be the truth.

3.89 Brigadier Silverstone expressed the view in an email to Rear Admiral Smith on 11 October 2001 that, 'whether a child was disposed over the side or not is immaterial'.¹⁰⁰ Questioned on the sense in which it was 'immaterial', the Brigadier told the Committee:

In the sense that we had a report that ultimately proved incorrect, that it was a tactical report which was frangible information at the time, and that, as soon as we became aware that it may not be correct, we sought to fix it. In the kaleidoscope of events of the type that were occurring that morning sometimes these reports are wrong, whether they are written or oral.¹⁰¹

3.90 It is not unimportant to understand how a report, subsequently deemed to be incorrect, came to be made in the first place. The Committee concurs with Brigadier Silverstone, however, in thinking that by far the more significant issue concerns how an early and frangible report came to be so publicly disseminated and how attempts to correct it were met. It is to these matters that the Committee now turns.

96 *Transcript of Evidence*, CMI 206.

97 *Transcript of Evidence*, CMI 206.

98 *Transcript of Evidence*, CMI 326.

99 *Transcript of Evidence*, CMI 250.

100 Enclosure 2 to the Powell Report, email from JOO-NORCOM on 11/10/2001 13:45.

101 *Transcript of Evidence*, CMI 343.

Chapter 4

The Report of Children Overboard: Dissemination and Early Doubts

Introduction

4.1 As discussed in the previous chapter, the report that a child or children had been thrown overboard from SIEV 4 originated in the telephone conversation between Commander Banks and Brigadier Silverstone on the morning of Sunday 7 October 2001.

4.2 At about 11.15am (AEST) on the same day, that report was made public by Mr Philip Ruddock, Minister for Immigration and Multicultural Affairs, during the course of a press conference.¹ As Ms Jennifer Bryant remarked in her report:

In total, only around four hours elapsed between the commencement of boarding [of SIEV 04 by HMAS *Adelaide*] and reports [of children thrown overboard] being made public in the media.²

4.3 In this chapter, the Committee first discusses how an oral and uncorroborated report made in the midst of a complex tactical operation came to be disseminated so quickly and so widely. The Committee then outlines how doubts concerning the veracity of the report arose in the Defence chain of command, and the point at which different elements in that chain reached the conclusion that the incident had not occurred. Finally, the Committee discusses how photographs taken of the sinking of SIEV 4 on 8 October came to be publicly misrepresented as being photographs of the ‘children overboard’ event.

4.4 In the following chapter, the Committee will consider the role played by a range of agencies and individuals in relation to attempts to correct the original and mistaken report that children had been thrown overboard.

Dissemination

4.5 The mechanics of the public dissemination of the report that a child or children had been thrown overboard from SIEV 4 were as follows:

- report originates from a telephone conversation between Commander Banks and Brigadier Silverstone early in the morning of 7 October 2001;

1 Ms Jennifer Bryant, *Investigation into Advice provided to Ministers on ‘Siev 4’: Report prepared on behalf of the People Smuggling Task Force* [hereafter Bryant Report], 21 January 2002, p.9; and, *Transcript of Evidence*, CMI 888.

2 Bryant Report, p.iii.

- Brigadier Silverstone immediately transmits the report by telephone to Air Vice Marshal Titheridge and to Rear Admiral Smith very shortly afterwards;
- Rear Admiral Smith passes the report by telephone to Rear Admiral Chris Ritchie, Commander Australian Theatre (COMAST) within minutes of Brigadier Silverstone's call to him;
- by 9.30am (AEST),³ Air Vice Marshal Titheridge reports the news by telephone to Ms Jane Halton, then Chair of the People Smuggling Taskforce (PST) in the Department of the Prime Minister and Cabinet (PM & C), and also to Mr Peter Hendy, chief of staff to Mr Peter Reith, then Minister for Defence, and to the Chief of Defence Force, Admiral Chris Barrie;⁴
- Ms Halton conveys the report verbally to members of the PST who were present at a meeting on the morning of Sunday 7 October;⁵
- at 9.51am, Mr Bill Farmer, Secretary of the then Department of Immigration and Multicultural Affairs, is rung by his Minister, Mr Philip Ruddock, at the PST meeting.⁶ Mr Farmer tells Mr Ruddock that members of the PST had just had advice that, among other things, passengers on SIEV 4 were 'throwing children overboard';⁷
- at 11.15am, Mr Ruddock, who was at a public forum speaking about other aspects of the government's policy in relation to asylum seekers, passes on that information to the press;⁸
- Mr Ruddock telephones Mr Reith and the Prime Minister from a car on the way to the airport at 12.30pm, advising them of the report that children had been thrown into the water from SIEV 4;⁹
- later in the day, Rear Admiral Smith mentions the report to Dr Brendan Nelson, Parliamentary Secretary for Defence, in the course of a discussion on board HMAS *Manoora*;¹⁰
- an options paper prepared for the Prime Minister during the day, and authorised by members of the PST at an evening meeting on Sunday 7 October, states that attempts by the HMAS *Adelaide* to deter SIEV 4 have been 'met with attempts

3 Answers to Questions on Notice, Department of Defence, Question W58.

4 *Transcript of Evidence*, CMI 684-686.

5 *Transcript of Evidence*, CMI 900.

6 *Transcript of Evidence*, CMI 886.

7 *Transcript of Evidence*, CMI 888.

8 *Transcript of Evidence*, CMI 888; and Bryant Report, p.9.

9 Bryant Report, p.9.

10 Enclosure 1 to Powell Report, Statement by Rear Admiral Geoffrey Smith; Bryant Report, p.6.

to disable the vessel, passengers jumping into the sea and passengers throwing their children into the sea'.¹¹

4.6 While these facts concerning the dissemination and publication of the initial report that children had been thrown overboard are relatively well established, there are two matters raised by them which have yet to be fully explained. They are, first, the reasons for Brigadier Silverstone's early morning telephone call to Air Vice Marshal Titheridge, and second, the media's prior knowledge of SIEV 4's interception. The Committee will discuss these matters in turn.

Update for Air Vice Marshal Titheridge

4.7 As was noted in the previous chapter, Brigadier Silverstone was instructed by Rear Admiral Smith on the evening of 6 October to telephone Air Vice Marshal Titheridge at 8.00am (AEST) on 7 October 2001 with the very latest information about SIEV 4.¹² This was an unusual or 'special' arrangement, which was not repeated for any other SIEV incident.¹³

4.8 As Brigadier Silverstone said, this requirement caused him to interrupt Commander Banks at a time when he would not otherwise have done so. He told the Committee:

I think that, from my perspective, if it had not been for the requirement to provide this information to Air Vice Marshal Titheridge for the IDC [interdepartmental committee], or whoever was going to use that information, I would not have called Commander Banks or spoken to Commander Banks at 7.20 on that day. It is my pronounced practice, pronounced in terms of my policy, that I do not ring my staff and the various COs working for me - indeed, it is my actual practice - when they are in the middle of boarding operations. I do not ring them when they are dealing with crises. I rely on them sending the op reps [operation reports], and I remain available to them at all hours to answer questions on issues of concern. That is my practice, but on this particular morning, because of the requirement to pass this information to Air Vice Marshal Titheridge and because we had become more imbued with a sense of providing information to government as it requires, we did this.¹⁴

4.9 Brigadier Silverstone noted that, had he relied as he normally did only upon the formal op rep signal traffic, the so-called 'children overboard' issue would never have arisen.¹⁵

11 'Options for Handling Unauthorised Arrivals: Christmas Island Boat', included in Enclosure to Bryant Report, under statement by Ms Jane Halton.

12 *Transcript of Evidence*, CMI 349.

13 *Transcript of Evidence*, CMI 466.

14 *Transcript of Evidence*, CMI 347-348.

15 *Transcript of Evidence*, CMI 349.

4.10 Given both the singularity and the effect of this instruction to Brigadier Silverstone to brief Air Vice Marshal Titheridge directly, the Committee sought to establish what had generated the requirement in the first place. It was, however, unable to satisfy itself fully about the matter.

4.11 Brigadier Silverstone advised the Committee that when Rear Admiral Smith was giving him the directive to ring Air Vice Marshal Titheridge, 'he [Smith] mentioned that it was to do with the Treasurer appearing on current affairs programs that [Sunday] morning'.¹⁶ Brigadier Silverstone also said that he 'formed the view that it flowed from the requirements of the IDC'.¹⁷

4.12 Rear Admiral Smith, however, informed the Committee that he had been told that it was the then Minister for Defence, Mr Reith, who required the latest information from Air Vice Marshal Titheridge. Characterising how the arrangement came about, he said:

I had a call from Admiral Ritchie on the Saturday evening at about 9.30pm, explaining to me that our minister was due to appear on a television show on the Sunday morning, and I just assumed that to be the *Sunday* program or something. He had agreed with Air Vice Marshal Titheridge that he, Titheridge, should be rung at eight o'clock eastern standard time to be updated on the events that had occurred given that we were already in contact with this SIEV, and Brigadier Silverstone was to do that.¹⁸

4.13 This account was corroborated by Rear Admiral Ritchie, who recalled that Air Vice Marshal Titheridge had rung him

and suggested that he had to brief - or had been requested to brief - the minister on the Sunday morning on what was going on with SIEV 4 and asked if it would be okay if he spoke directly to Silverstone in order to cut out the middleman, if you like, on that one - and that one only - particular occasion. I agreed with that and asked Admiral Smith to arrange it.¹⁹

4.14 Air Vice Marshal Titheridge could not recall with certainty who had spoken to him requesting the Sunday morning brief, but told the Committee that the 'request itself I believe emanated from the minister's [ie. Mr Reith's] office'.²⁰

4.15 As noted earlier, Air Vice Marshal Titheridge's telephone records indicate that he spoke to Ms Halton, Mr Peter Hendy, chief of staff to Minister Reith, and Admiral Barrie shortly after speaking to Brigadier Silverstone. There is no record, nor

16 *Transcript of Evidence*, CMI 351.

17 *Transcript of Evidence*, CMI 351.

18 *Transcript of Evidence*, CMI 466.

19 *Transcript of Evidence*, CMI 372.

20 *Transcript of Evidence*, CMI 705.

did the Air Vice Marshal have any recollection, of conveying the update on SIEV 4 to the Treasurer.²¹

4.16 On the basis of this evidence, therefore, the Committee considers that the special arrangement for Brigadier Silverstone to telephone Air Vice Marshal Titheridge on Sunday 7 October was made in order to supply Mr Reith, and possibly the PST, with the latest information on SIEV 4. The Committee was unable, however, to establish exactly why that information was required at that particular time.

4.17 Questioned about this issue, Air Vice Marshal Titheridge said that: 'My recollection is that it may have had something to do with a media appearance, but I cannot help you any more than that'.²²

4.18 There was, however, no media appearance by the Minister for Defence on that Sunday morning and his records indicate that Air Vice Marshal Titheridge did not contact Mr Reith directly until 1.51pm in the afternoon.²³ The Treasurer did appear on the *Sunday* program on the morning of 7 October, but did not speak about SIEV 4.

Media prior knowledge of SIEV 4

4.19 There is no indication that the report that children had been thrown overboard from SIEV 4 would have been published in the media as an immediate consequence of the telephone calls made by Air Vice Marshal Titheridge early on 7 October 2001.

4.20 The report was in fact passed to the media by the Minister for Immigration and Multicultural Affairs, Mr Ruddock, who learned of it almost accidentally. That is, he learned of it by way of an unscheduled telephone call to his departmental secretary, who passed on the advice he had just been given at the PST meeting.

4.21 Mr Ruddock was in Sydney to address a public meeting on the subject of the government's 'border protection' legislation.²⁴ An unexpectedly large media contingent was present because, as Mr Ruddock and his officers learned, there had been a report on the ABC news early that morning that a vessel had been intercepted the previous night. Anticipating that there would be questions from the media about the interception, Mr Ruddock called Mr Farmer to find out the latest information.²⁵

4.22 In other words, the fact that the media already knew about the interception of SIEV 4 created pressure for further detailed information to be made public. But, as Ms Halton testified, the fact that the media had been told about the interception by this stage was unusual and contrary to previous practice.

21 *Transcript of Evidence*, CMI 706, 719.

22 *Transcript of Evidence*, CMI 719.

23 Answers to Questions on Notice, Department of Defence, Question W58.

24 *Transcript of Evidence*, CMI 886.

25 *Transcript of Evidence*, CMI 886.

4.23 Ms Halton advised the Committee that she knew *that* information about the interception of SIEV 4 had appeared in the public arena on the morning of 7 October, but that she did not know *how* it had. She explained:

I should say that my knowledge at that point of where that information had come from was nonexistent. I knew there was a vessel. I was not aware that that information had been released to anybody. The general habit had been not to comment on operational details while operations were in train. I was a bit surprised that the detail of that vessel seemed to be in the public arena.²⁶

4.24 The Committee received no further information concerning how or why the news of the interception of SIEV 4 was already in the public domain by early in the morning of 7 October 2001.

4.25 The Committee notes a further unusual feature of the handling of SIEV 4. This was the ‘heated’²⁷ conversation between Admiral Barrie and the Secretary of PM & C, Mr Max Moore-Wilton, concerning where the rescued passengers of SIEV 4 were to be taken after their boat had sunk. Admiral Barrie told the Committee that soon after he had been advised, on 8 October, that SIEV 4 was sinking, he had had a telephone conversation with Mr Moore-Wilton. The latter, said Admiral Barrie:

told me to make sure that everyone rescued went on board HMAS *Adelaide*. I said to him that we could not guarantee that and safety of life was to be the paramount consideration. In this emergency, if people had to be rescued and landed at Christmas Island that would have to happen. The CO had already called for urgent assistance from the island from whatever assets were available. It was for the commander of the *Adelaide* to make the call.²⁸

4.26 Admiral Barrie informed the Committee that he had then immediately telephoned Minister Reith and told him of the conversation, and been assured by the Minister that his approach was appropriate. Elaborating on his reasons for informing the Minister of his discussion with the Secretary of PM & C, Admiral Barrie said that:

I did want the minister to understand that there was this view, if you like, that somehow or another we were in absolute control of where people would end up, even though they were all in the water. I just wanted the minister to be quite aware that we were not able to guarantee any of those sorts of results.²⁹

4.27 The sequence of ‘unusual’ features surrounding the treatment of SIEV 4 - the leaking of the fact of SIEV 4’s interception to the media, the ‘special’ arrangement for Air Vice Marshal Titheridge to contact Brigadier Silverstone directly for the latest news, and Mr Moore-Wilton’s ‘heated’ insistence that the SIEV’s passengers not be

26 *Transcript of Evidence*, CMI 948.

27 *Transcript of Evidence*, CMI 786.

28 *Transcript of Evidence*, CMI 741-742.

29 *Transcript of Evidence*, CMI 787.

landed on Christmas Island - all point to the likelihood that the Government had decided to make an example of SIEV 4.

4.28 SIEV 4 was the first boat to be intercepted after the announcement of the Federal Election. Its handling was to be a public show of the Government's strength on the border protection issue, and the behaviour of the unauthorised arrivals a public justification for the policy. It is in this context that one might best understand why the Secretary of PM & C wanted to ensure that the asylum seekers concerned not set foot on Australian territory. It is perhaps also in this context that it is possible to understand why it was so politically difficult for the Government to correct or retract claims made in relation to the passengers aboard SIEV 4 once they were known or suspected to be false.

Conclusion

4.29 A number of witnesses commented unfavourably on the haste with which the report that children had been thrown into the sea from SIEV 4 was passed from Defence personnel, to the broader public service and Ministers, and out into the public domain. Major General Powell's report notes that the mistaken reporting 'was a direct result of the conflicting balance between the provision of timely information *versus* accurate information',³⁰ and that:

The risks of passing information outside established formal lines of communication to achieve the time demands of a given Government imperative must be clearly understood by the provider and the recipient of that information.³¹

4.30 Brigadier Silverstone remarked that the episode 'reinforces the risks of making public the details of developing tactical situations, especially when the operational chain of command and formal reporting processes are bypassed',³² and expressed the view that 'it is inappropriate for those not in the direct military chain of command to make comment or report on the emerging details of current operational events to the media or any other source'.³³

4.31 In a similar if more colourful vein, a former Chief of Navy, Vice Admiral Sir Richard Peek, exclaimed:

[I]n the proper chain of command, the captain of *Adelaide* sent a signal, as I understood it, giving the details of what happened. For somebody to suggest that the initial process of telephone calls, when the radio was available for an official report, and the initial report had been demanded because some

30 Powell Report, p.4.

31 Powell Report, p.5.

32 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, p.5.

33 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.5.

clot in Canberra wanted to talk on a television station - God, it makes me speechless!³⁴

4.32 Somewhat by way of contrast to these remarks, however, Rear Admiral Ritchie wrote of the issue in the following terms:

It will be argued that this incident demonstrates the danger of putting too much credibility in initial and unsubstantiated reports from the scene of action, and so to an extent it does. This view is not entirely relevant to this sequence of events however because, in this case, the information released in the heat of the moment was thought to be genuine and remained so for three days. There was no reason not to inform Ministers and Senior Officers, as was done. Once that information has been passed, Defence has little control over its further dissemination.³⁵

4.33 Rear Admiral Ritchie's point is that:

Any failing on Defence's part is not in how the information was managed or passed in the first instance [but] rather, in the process for refuting the information when it was found to be false.³⁶

4.34 In the next section, the Committee discusses how doubts concerning the veracity of the report began to surface within the Defence chain of command, and the point at which different elements in that chain reached the conclusion that the incident had not occurred. In the light of that discussion, the next chapter provides a comprehensive account of the adequacy of the 'process for refuting the information'.

Doubts and the Search for Evidence

4.35 The report that children had been thrown overboard from SIEV 4 excited immediate and extensive media coverage and political commentary. Aware of this public interest in the matter, Brigadier Silverstone and Rear Admiral Smith each became concerned when in the days following the initial report they saw no written confirmation of it in the signal traffic.³⁷

4.36 In his statement to the Powell inquiry, Brigadier Silverstone recorded that:

It was not until either 8 or 9 Oct[ober], when viewing the media coverage of the child overboard incident, that I could not recall seeing any written reporting of this incident. On Tue[sday] 9 Oct[ober], following the sinking of SIEV 04, I directed a review of *Adelaide's* Opreps and confirmed that no written advice of the incident existed. Subsequently, I directed CO *Adelaide*

34 *Transcript of Evidence*, CMI 1210.

35 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie, p.4.

36 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie, p.4.

37 Enclosure to Bryant Report, Statement by Brigadier Mike Silverstone, p.1; Enclosure to Bryant Report, Statement by Rear Admiral Geoffrey Smith, p.1; *Transcript of Evidence*, CMI 360, 584.

to gather statements from those involved in order to confirm whether or not a child had been thrown overboard. At about this time I discussed my concerns and intentions with NCC AST [Naval Component Commander Australian Theatre] and COMAST.³⁸

4.37 On that same day, 9 October 2001, Rear Admiral Smith independently contacted Commander Banks about the same issue. He told the Committee that:

I was very much aware of the media coverage that this incident had been receiving. I was becoming quite concerned that none of the operational reports that had come to me through the JTF commander at any time contained information saying that a child had been thrown overboard. I had been briefed by Brigadier Silverstone that there was a difference of view between himself and Commander Banks. That concerned me. So I took the unusual step of contacting Commander Banks direct on 9 October and I asked him for his account of what had occurred and what evidence he had to support the allegation of a child being thrown in the water. In that telephone call, he advised me that he himself had not seen such an event, that he had heard a number of his ship's company indicate that they had seen the event occur. I told him to get out there, to interview his people and to determine, once and for all, did this incident occur or not. That was on Tuesday morning.³⁹

4.38 Rear Admiral Smith then said that he had rung Rear Admiral Ritchie, telling him that he 'had serious concerns as to our ability to prove that this incident had in fact occurred'.⁴⁰

Potential sources of verification

4.39 On 9 October, it seemed that there were three sources from which evidence to support the report that a child had been thrown overboard might emerge. They were:

- Commander Banks's eyewitness account;
- witness statements from the *Adelaide's* crew; and
- Electro Optical Tracking System (EOTS) recording [the video].

4.40 The Committee questioned naval witnesses extensively about each of these sources. It wished to assure itself, not only that the witnesses themselves considered that there was no evidence to support the initial report, but also of the basis upon which they did so. In other words, the Committee wished to make its own assessment of the evidence on the basis of which the judgement was reached by Commander Banks and subsequently by others in the naval chain of command that children had not been thrown overboard. The Committee considers this evidence below.

38 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.3; see also, Enclosure to Bryant Report, Statement by Brigadier Mike Silverstone, p.2.

39 *Transcript of Evidence*, CMI 584-585.

40 *Transcript of Evidence*, CMI 585.

Commander Banks's eyewitness account

4.41 Commander Banks testified that it was only when Brigadier Silverstone rang him on 9 October that he realised that they had different recollections of their conversation on 7 October 2001. In particular, he said that it was only then that he realised that Brigadier Silverstone had reported him as saying that a child had been thrown overboard.⁴¹ These differences were rehearsed in detail in the previous chapter.

4.42 Brigadier Silverstone accepted that Commander Banks did not recollect saying that a child had gone over the side of SIEV 4 and was not a witness to such an event.⁴²

4.43 Brigadier Silverstone said, however, that on 9 October and early on 10 October, Commander Banks still considered the report credible. That is, he still considered it possible that the incident had occurred and that other sailors may have witnessed it although he had not.⁴³

4.44 In support of this view, Brigadier Silverstone recalled a conversation with Commander Banks early in the morning on 10 October,

in which he indicated that no one as yet could confirm that a child had been recovered from the water. However, he said that he was still waiting to question someone who had been on the far side of the SIEV, away from *Adelaide's* position at the time of the incident. Neither at this point, nor at any earlier stage, did he suggest that a child had not been thrown in the water.⁴⁴

4.45 The Committee notes that this evidence is consistent with the fact that on 7 October there were reports from at least some crew members that they thought they had seen children in the water.⁴⁵

4.46 Later on the morning of 10 October, however, according to notes in Brigadier Silverstone's notebook, Commander Banks reported 'that it was apparent to him that no children had been thrown in the water'.⁴⁶

41 *Transcript of Evidence*, CMI 255.

42 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2. Brigadier Silverstone in fact wrote: 'I'm not surprised that CO *Adelaide* cannot clearly recall just what he said on AM 7 Oct 01, given the rapidly changing situation associated with the management of SIEV 04 at the time I phoned'.

43 Enclosure 2 to Powell Report, email JOO-NORCOM dated 11/10/2001 13:45.

44 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.3.

45 *HMAS Adelaide Boarding Log*; and, Enclosure 2 to Powell Report, HMAS *Adelaide* SIC ADA/I3M dated 110330Z Oct 01, 'Op Relex - Commanding Officers Statement Reference SIEV 4 Manoverboards'.

46 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.3.

4.47 Commander Banks's own evidence was equivocal as to the time at which he ceased to deem the report credible.

4.48 At one point, Commander Banks suggested that he had been 'adamant' since some time during 7 October 2001 that no children had been thrown in the water.⁴⁷ His certainty, he said, was based on his knowledge that those recovered from the water 'were all male and that none were children'.⁴⁸

4.49 Elsewhere, however, Commander Banks indicated that it took longer for him to be sure of this fact. He said:

I believe that by the 11th, certainly in my mind, the evidence was clear that no children had been thrown overboard. I had provided a statement that said that, and there were other statements, which I subsequently read, that confirmed that.⁴⁹

4.50 The statement that Commander Banks prepared on 11 October reveals the difficulty of attaining certainty under the circumstances. It reads, in part:

I have since been questioned repeatedly about this event (and to a lesser extent others) and I am now so full of conflicting information of what was seen and heard by others and me, and stated by others and me that it is difficult to recall with absolute veracity.⁵⁰

4.51 The Committee notes, however, that Commander Banks has never equivocated about the fact that he himself did not see a child thrown overboard. He continued on from the paragraph quoted above, saying:

Nevertheless I am prepared to attest to what I saw. For the record quote I saw a child held over the side by a man. I did not see any children in the water. I did see 13 UBAs [unauthorised boat arrivals] voluntarily enter the water from the SIEV and watched their subsequent recovery. I advised CJTF 639 that this had happened and that I could see a man threatening to put a child over the side. I advised that there had been no loss of life. I signalled ashore that SUNCs were making threats to jump overboard and some had done so and that some had been thrown overboard unquote.⁵¹

4.52 Any evidence in support of the initial report, then, had to be found in witness statements from the crew or in the EOTS film.

47 *Transcript of Evidence*, CMI 281.

48 *Transcript of Evidence*, CMI 280.

49 *Transcript of Evidence*, CMI 278.

50 Enclosure 2 to Powell Report, HMAS *Adelaide* SIC ADA/I3M dated 110330Z Oct 01, 'Op Relex - Commanding Officers Statement Reference SIEV 4 Manoverboards'.

51 Enclosure 2 to Powell Report, HMAS *Adelaide* SIC ADA/I3M dated 110330Z Oct 01, 'Op Relex - Commanding Officers Statement Reference SIEV 4 Manoverboards'.

Witness statements from crew

4.53 Following his conversations with Brigadier Silverstone and Rear Admiral Smith on 9 October, Commander Banks called on members of his crew involved with, or having a recollection of, the man overboard incidents of 7 October 2001 to contact the ship's coxswain and provide written information.⁵² In response to this call, sixteen crew members made sworn statements on 10 October 2001.

4.54 Of these, one statement, made by Able Seaman Wade Gerrits, provides support for the report that a child entered the water. Able Seaman Gerrits, who was on the bridge operating EOTS at the relevant time, stated that he saw SUNCs jumping from the SIEV and that 'I believe one child also went overboard'.

4.55 He went on to say, however, that:

All persons who dove overboard did so by there [sic] own accord and were all wearing life jackets. All personal [sic] were also recovered by *Adelaide's* seaboats and returned to the SIEV.⁵³

4.56 Thus, even if Able Seaman Gerrits's statement can be said to provide support for the claim that a child was in the water, it does not support the claim that a child was *thrown* into the water.

4.57 Of the remaining fifteen statements, ten state specifically either that no children were witnessed in the water or that no one was witnessed being thrown overboard.⁵⁴ Five statements do not explicitly indicate that children were not in the water, but provide no evidence to support the report.⁵⁵

4.58 The majority of statements report an incident of a child held up to or over the side, but are unanimous in saying that this child was not thrown overboard. Seven of the statements report that one of those who jumped overboard voluntarily was a teenaged boy. It is possible that this is the 'child' referred to by Able Seaman Gerrits, since this would account for him saying both that he believed a child went overboard and that all those who went overboard did so of their own accord.

4.59 In short, the witness statements provided by the crew of HMAS *Adelaide* provide no evidentiary support for the report that children had been thrown overboard.

52 *Transcript of Evidence*, CMI 203.

53 Enclosure 1 to Powell Report, Service Police Statement by Able Seaman Wade Theo Gerrits (10 October 2001), submitted as part of Statement by Commander Norman Banks.

54 These are the statements from Letts, Koller, Chapman, Blennerhassett, Heedes, von Kelaita, Walker, Black, Gullidge, and Skells. Enclosure 1 to Powell Report, submitted as part of Statement by Commander Norman Banks.

55 These are the statements from Hynes, Naree, Nixon, Barker, and Piper. Enclosure 1 to Powell Report, submitted as part of Statement by Commander Norman Banks.

EOTS film

4.60 On 10 October 2001, Commander Banks produced a ‘chronological review of the EOTS video footage’.⁵⁶ The EOTS tapes themselves were despatched to Rear Admiral Smith at Maritime Command on Sunday 14 October. A copy had earlier been transferred to the Australian Federal Police at Christmas Island.⁵⁷

4.61 Commander Banks told Rear Admiral Smith on 10 October that there was no evidence on the EOTS footage ‘that children had been thrown overboard’.⁵⁸

4.62 Although, Rear Admiral Smith’s statement to Ms Bryant indicates that he did not recall having seen the EOTS transcript at that time,⁵⁹ Rear Admiral Ritchie recorded some details about the EOTS footage on 10 October, which he believed had come from a conversation between Rear Admiral Smith and Commander Banks. These details were:

- no children shown being thrown overboard;
- one child held over the side;
- people jumping of their own volition; and
- one 13 year old pushed over.⁶⁰

4.63 By late on 10 October, therefore, it had become apparent that there was to be no evidence forthcoming from Commander Banks, his crew or from the EOTS footage that could support the report that a child had been thrown overboard.

4.64 The following time line summarises how this knowledge progressed up the relevant chain of command between 9 and 11 October 2001.

Knowledge in the chain of command

- 9 October 2001
 - Brigadier Silverstone and Rear Admiral Smith ask Commander Banks to provide any information which would confirm or corroborate the report that a child had been thrown overboard from SIEV 4.
 - Commander Banks calls on those with knowledge of the man overboard incidents on 7 October to make statements to the ship’s coxswain.⁶¹
- 10 October 2001, early

56 *Transcript of Evidence*, CMI 168.

57 *Transcript of Evidence*, CMI 168.

58 Enclosure to Bryant Report, Statement by Rear Admiral Geoffrey Smith, p.1.

59 Enclosure to Bryant Report, Statement by Rear Admiral Geoffrey Smith, p.2.

60 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie, p.2.

61 *Transcript of Evidence*, CMI 203.

- Commander Banks tells Brigadier Silverstone that no one could yet confirm that a child had been recovered from the water. According to Brigadier Silverstone, however, Commander Banks notes that he is still waiting to question someone who had been on the far side of the SIEV, away from the *Adelaide's* position, at the time of the incident.⁶²
- Strategic Command tells Rear Admiral Ritchie that they hold no evidence of children being thrown overboard, prompting the question 'were they?'⁶³
- Rear Admiral Ritchie speaks to Rear Admiral Smith, who advises him that the Electro Optical film shows no children being thrown overboard,⁶⁴ but that, according to CO *Adelaide*, there may yet be witness statements from sailors on the disengaged side to support the initial report. Rear Admiral Ritchie advises Mr Mike Scrafton, Military Adviser to the Minister for Defence, accordingly.⁶⁵
- 10 October, later
 - Sixteen sworn statements are taken from members of the *Adelaide's* company.⁶⁶ Able Seaman Wade Gerrits states that he saw SUNCs jumping from the SIEV and that 'I believe one child also went overboard'. He goes on to say that: 'All persons who dove overboard did so by there [sic] own accord and were all wearing life jackets. All personal [sic] were also recovered by *Adelaide's* seaboats and returned to the SIEV'.⁶⁷ No other crew member's statement indicates that a child went or was thrown overboard, although a number mention that a teenaged boy jumped of his own accord.
 - Commander Banks tells both Rear Admiral Smith and Brigadier Silverstone that no children had been thrown in the water.⁶⁸
 - Rear Admiral Smith directs Commander Banks to produce a chronology of events and to signal that to him as a personal message.⁶⁹

62 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.3.

63 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie, p.2.

64 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie, p.2. Rear Admiral Ritchie states that he believes this information to have come from a conversation between Rear Admiral Smith and Commander Banks. The statement notes that the video shows one child held over the side, people jumping of their own volition, and a 13 year old pushed over.

65 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie, p.2; *Transcript of Evidence*, CMI 368-369.

66 *Transcript of Evidence*, CMI 262.

67 Enclosure 1 to Powell Report, Service Police Statement by Able Seaman Wade Theo Gerrits (10 October 2001), submitted as part of Statement by Commander Norman Banks.

68 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.3; *Transcript of Evidence*, CMI 585.

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- According to Rear Admiral Smith, he rings Rear Admiral Ritchie immediately following his conversation with Commander Banks, telling him that he [Smith] is now convinced that the incident had never occurred.⁷⁰
 - According to Rear Admiral Smith, Rear Admiral Ritchie advises him that he will relay that same information to Admiral Barrie, Chief of Defence Force, and rings back to confirm that he has done so.⁷¹
 - 11 October
 - Commander Banks's signal chronology arrives at Rear Admiral Smith's headquarters.⁷²
 - Commander Banks commences writing his own statement, as directed by Brigadier Silverstone, and subsequently forwards it by signal to Brigadier Silverstone and Rear Admiral Smith.⁷³
 - Commander Banks forwards copies of his crew's statements by email to Rear Admiral Smith and to Brigadier Silverstone.⁷⁴
 - Brigadier Silverstone forwards those crew statements with his own covering remarks to Rear Admirals Smith and Ritchie in an email dated 11 October 01 (13:45). He also discusses the contents of the email with Rear Admiral Ritchie on the same day.⁷⁵
 - Rear Admiral Ritchie sees the statements from the *Adelaide's* crew and concludes that no children were thrown overboard.⁷⁶
 - Rear Admiral Ritchie believes that, in accordance with his usual practice, he would have briefed Air Vice Marshal (AVM) Titheridge that
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69 *Transcript of Evidence*, CMI 585. The chronology is contained at Enclosure 2 to Powell Report, HMAS *Adelaide* SIC I3M/LAB dated 101136Z Oct 01, 'Op Relex - Siev 04 List of Chronological Events for the 07 Oct 01 Boarding'.

70 *Transcript of Evidence*, CMI 585. Note that Rear Admiral Ritchie's testimony is silent on this conversation, and states that he only became fully convinced that there was no evidence supporting the claim on 11 October 2001.

71 *Transcript of Evidence*, CMI 585. See note above.

72 *Transcript of Evidence*, CMI 585.

73 *Transcript of Evidence*, CMI 243, 274. This statement is contained at Enclosure 2 to Powell Report, HMAS *Adelaide* SIC ADA/I3M dated 110330Z Oct 01, 'Op Relex - Commanding Officers Statement Reference SIEV 04 Manoverboards'

74 *Transcript of Evidence*, CMI 274; Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.3.

75 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 2, p.3. The email is contained at Enclosure 2 to Powell Report, JOO-NORCOM on 11/10/2001 13:45, 'Op Relex - Statements'.

76 *Transcript of Evidence*, CMI 369.

there is no evidence to support the claim that children have been thrown overboard.⁷⁷

- Rear Admiral Ritchie briefs Admiral Barrie, telling him that there is no evidentiary support for claims that children had been thrown overboard.⁷⁸ There is disagreement between Rear Admiral Ritchie and Admiral Barrie over how categorical was the former's advice that it had been established that children were not thrown overboard. This matter is discussed in more detail in following chapters.

Conclusion

4.65 The developing understanding of the absence of evidence which would support the report of a child thrown overboard was well summarised by Rear Admiral Ritchie. In his statement to the Powell inquiry, he said:

My overriding recollection of these events is that up until 10 or 11 Oct[ober] 01, all in the command chain believed that a child had been thrown overboard. By the 10 Oct[ober] 01 we knew it was not supported by the video, but believed other sailors on the disengaged side had seen such events. By the 11 Oct[ober] we knew that no such witnesses were forthcoming.⁷⁹

4.66 In the following chapter, the Committee discusses what happened to that information after 11 October 2001. Before it turns to that matter, however, the Committee discusses the photographs disseminated from HMAS *Adelaide*.

4.67 In particular, the Committee is concerned with the question of how photographs taken during the sinking of SIEV 4 on 8 October came to be publicly misrepresented as evidence of children overboard on 7 October 2001.

Photographs

4.68 During the period of HMAS *Adelaide's* engagement with SIEV 4, from 6 to 10 October 2001, 420 digital photographs were taken.⁸⁰ These photographs were taken

77 Enclosure to Bryant Report, Statement by Rear Admiral Chris Ritchie. His belief is corroborated by Rear Admiral Smith's recollection of a conversation between himself and Air Vice Marshal Titheridge. A week or two after 11 October, Rear Admiral Smith said that he was speaking to AVM Titheridge and asked him 'if he knew that there was no evidence to support the claim that children were thrown overboard. Air Vice Marshal Titheridge confirmed that he knew this'. Enclosure to Bryant Report, Statement by Rear Admiral Geoffrey Smith.

78 *Transcript of Evidence*, CMI 373.

79 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie, p.3.

80 *Transcript of Evidence*, CMI 157; Air Commodore P.D. Ekin-Smyth, *The Report of the Routine Inquiry into Operation Relax: Suspected Illegal Entry Vessel (SIEV 4) Handling of Photographic and other Imagery and Implementation of the Public Affairs Plan*, [hereafter Ekin-Smyth Report] 6 March 2002, p.4. Note that it is possible that 'individual members of the company of HMAS *Adelaide* created other images for personal purposes despite instructions by the Commanding Officer that this was not to occur'. Ekin-Smyth Report, p.3.

by two crew members, Petty Officer J.A. Nixon and Leading Seaman D.K. Blanchard, at the direction of Commander Banks.⁸¹

4.69 Of these 420 photographs, two have become notorious. They are the photographs of Able Seaman Laura Whittle and Leading Seaman Cook Jason Barker, taken during the rescue of passengers of SIEV 4 while the boat was sinking on 8 October, but published in the media as evidence of the rescue of children thrown into the water on 7 October 2001.⁸²

4.70 In what follows, the Committee discusses, first, how these two photographs came to be released to the media as evidence that children were thrown overboard on 7 October, and second, when officers in the relevant Defence chain of command knew that the photographs were being misrepresented. The question of the efforts made to correct the record in relation to the photographs is addressed in the next chapter.

Release of photographs

4.71 Early in the morning on 9 October, Commander Banks sent the two photographs by email to ten addressees in Defence.⁸³ The first photograph was saved as ‘laura the hero’ and was attached to the email under the words ‘Whittle “COURAGE”’. The accompanying text stated:

ABBM Laura Whittle was recently photographed as the Navy Value ‘COURAGE’. During the 08 Oct rescue of 223 SUNCs 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.⁸⁴

4.72 The second photograph was saved as ‘dogs and his family’ and was attached to the email under the words ‘Barker “COURAGE and DETERMINATION”’. The accompanying text said:

LSCK Jason ‘Dogs’ Barker shows dogged determination as he helped rescue women and children by dragging them to safety during the rescue of

81 Ekin-Smyth Report, p.4.

82 *Transcript of Evidence*, CMI 166; see also, Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 3, email JOO-NORCOM dated 9/10/01 18:08 [which attaches Commander Banks’s original email, and the titles given to the photographs].

83 Bryant Report, p.14; Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 3, email JOO-NORCOM dated 9/10/01 18:08 [which attaches Commander Banks’s original email, and the titles given to the photographs].

84 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 3, email JOO-NORCOM dated 9/10/01 18:08.

223 SUNCs from a sinking Indonesian fishing vessel. This big hearted Leading Seaman also demonstrated Navy's core value of COURAGE.⁸⁵

4.73 Knowledge that the photographs existed became public when Commander Banks gave an unauthorised interview to Channel 10 on 9 October.⁸⁶ The Commander spoke of the rescue on 8 October and of his pride in his crew, and mentioned that he had sent photographs of the rescue to Defence headquarters.⁸⁷ Channel 10 then called Mr Tim Bloomfield, Director of Media Liaison (DML) seeking copies of those photographs.⁸⁸

4.74 Mr Bloomfield immediately advised the Minister's media adviser, Mr Ross Hampton, and relevant personnel in Defence that the interview had occurred, and began seeking copies of the photographs.⁸⁹ These he subsequently received from Lieutenant Andrew Herring (Fleet Public Affairs Officer - Sydney), on Defence's secret email system, and from Mr John Clarke, Strategic Communications Adviser to Chief of Navy (CN), on the restricted email system.⁹⁰

4.75 In his Minute of 11 October 2001 to Head Public Affairs and Corporate Communication (HPACC), Mr Bloomfield indicated that both sets of photographs that he received had the accompanying text, or captions, attached.⁹¹ Confirming this evidence, Mr Clarke's statement to the Powell inquiry gave no indication that the photographs he sent to Mr Bloomfield were unaccompanied by captions.⁹² However, Mr Bloomfield's evidence to the Bryant inquiry was less sure on this point. He said that 'he was "pretty sure" both the emails he received with the photographs included the explanatory text. He was clear that Lieutenant Herring's did, but he was a little less certain about the copy from Mr Clarke'.⁹³

4.76 However, Mr Bloomfield was never in doubt about what the photographs depicted and said that he was focusing on the possibility of using them for a 'good news' story about the Navy.⁹⁴ His main concerns related to the quality of the pictures,

85 Enclosure 1 to Powell Report, Statement by Brigadier Mike Silverstone, Attachment 3, email JOO-NORCOM dated 9/10/01 18:08.

86 Bryant Report, p.15; *Transcript of Evidence*, CMI 167.

87 Bryant Report, p.15; *Transcript of Evidence*, CMI 167.

88 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

89 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

90 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001; Enclosure to Bryant Report, Statement by Mr Tim Bloomfield.

91 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield.

92 Enclosure 1 to Powell Report, Statement by Mr John Clarke.

93 Enclosure to Bryant Report, Statement by Mr Tim Bloomfield.

94 Enclosure to Bryant Report, Statement by Mr Tim Bloomfield.

to the fact that ‘they could have been taken anywhere’, and whether it would be permissible to show the faces of naval personnel and/or of the persons being rescued.⁹⁵

4.77 Mr Bloomfield advised Mr Hampton on the same afternoon, 9 October 2001, that he had received the photographs, describing them, he said, as ‘UBA’s [unauthorised boat arrivals] in the water’, but not ‘very good shots’.⁹⁶

4.78 The key factor in the eventual misrepresentation of the photographs was the detachment of the captions from their respective images. A detailed account of how the photographs were transmitted to the media on 10 October 2001 without their explanatory text is provided in the Bryant Report. The Committee took little new evidence on this question.

4.79 In what follows, therefore, the Committee highlights three main elements which contributed to the public misrepresentation of the photographs. They were:

- technological problems;
- pressure for urgent clearance of photographs; and
- miscommunications.

Technological problems

4.80 The Defence email system has two levels. There is the secret system, to which not all Defence personnel have access, and the restricted system, which is used for unclassified information.⁹⁷

4.81 The photographs were sent from the *Adelaide* on the secret system. They were copied, together with their accompanying text, onto the restricted system by Commander Piers Chatterton, Director Operations at Naval Headquarters. He had assessed that they contained nothing of a classified nature and that they depicted a ‘good news’ story which should be available to public affairs personnel.⁹⁸

4.82 Although it is not entirely clear just who had copies of the photographs on which system and at which time, part of the explanation for the detachment of the text from the photographs lies in the difficulties experienced by various officers in opening the files on their desktops.

95 Enclosure to Bryant Report, Statement by Mr Tim Bloomfield.

96 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

97 Enclosure to Bryant Report, Statement by Mr Andrew Stackpool; *Transcript of Evidence*, CMI 1138.

98 Enclosure 1 to Powell Report, Statement by Commander Piers Chatterton; *Transcript of Evidence*, CMI 1162.

4.83 For example, when Mr Hampton asked Mr Bloomfield to send him the photographs on the afternoon of 9 October, Mr Bloomfield could not open the relevant files on his secret system. He asked another PACC officer, Mr Andrew Stackpool, urgently to send across the copies that he had received on the restricted system. But, as it turned out, Mr Stackpool had had to save the photographs onto his desktop in order to open them, which meant that they were saved as 'jpg' files with no explanatory text attached.⁹⁹

4.84 Mr Stackpool stated that he would most likely have created a new email and attached the saved copies of the photographs from his desktop. This would mean that the photographs went to Mr Hampton without explanatory text.¹⁰⁰ Mr Stackpool said that at the time he was not aware of the significance of the explanatory text, and that the 'issue was to ensure that the photographs were provided to the Minister's Office as quickly as possible'.¹⁰¹

4.85 On the following day, Mr Hampton was having his own 'computer problems' and asked Mr Bloomfield to forward copies of the photographs to the Departmental Liaison Officer (DLO), Ms Liesa Davies, in the Minister's Canberra office (Mr Hampton and the Minister were in Melbourne).¹⁰² Again they were sent without the explanatory text.

4.86 This time, according to Mr Bloomfield, the captions were left off at Mr Hampton's request. Mr Hampton does not recall talking about the captions at this time.¹⁰³ As he pointed out, however, he had not seen the explanatory text and would have assumed that, by captions, Mr Bloomfield meant simply the labels or titles which they had mutually decided were inappropriate and could identify the sailors involved.¹⁰⁴

4.87 The same explanation accounts, according to Mr Hampton, for his direction that only the photographs, without captions, be provided to the media on the afternoon of 10 October 2001.¹⁰⁵

99 Enclosure to Bryant Report, Statement by Mr Andrew Stackpool.

100 Enclosure to Bryant Report, Statement by Mr Andrew Stackpool.

101 Enclosure to Bryant Report, Statement by Mr Andrew Stackpool.

102 Bryant Report, p.18; Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

103 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

104 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

105 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

Pressure for urgent clearance of photographs

4.88 The backdrop to the public release of the photographs on 10 October was the media pressure on the government to produce evidence supporting the claim that children had been thrown overboard. For example, Mr Hampton told Ms Bryant that:

I recall mentioning to Mr Bloomfield that the Prime Minister had been asked a number of questions at his morning media conference about the ‘Throwing overboard incident’ and if we had photos available we’d better move quickly to get them cleared for release.¹⁰⁶

4.89 Indeed, Mr Hampton said that he had only moved to release the photographs following ‘a phone call from Mr O’Leary in the Prime Minister’s office’.¹⁰⁷

4.90 This backdrop appears to have led the Minister to seek immediate authority to release the photographs from the Chief of Defence Force, rather than to go back through the official Defence clearance process.¹⁰⁸ It also appears to have led Mr Hampton to neglect or downplay the concern expressed by Brigadier Bornholt, Military Adviser, PACC, that the photographs might not depict the events of 7 October at all.¹⁰⁹

4.91 The Minister sought CDF’s clearance to release the photographs to the media during the afternoon of 10 October 2001.¹¹⁰ Admiral Barrie asked Air Vice Marshal Titheridge to ‘screen the photographs for operational sensitivities and to advise the Minister’s office’.¹¹¹ Air Vice Marshal Titheridge called the Minister five minutes later and approved the release.¹¹² Neither Admiral Barrie nor Air Vice Marshal Titheridge had copies of the photographs available to them at the time, and were focused on the issues of operational security and the privacy of Defence personnel rather than on the correct attribution of the photographs themselves.¹¹³

4.92 Following that approval, however, Mr Bloomfield was asked to provide the photographs (without captions) to the Minister’s Canberra office on 10 October ‘under considerable pressure from Ministerial staff in the Minister’s Office at 1444 [2.44pm] where they were immediately made available by Ministerial Staff to members of the

106 Enclosure to Bryant Report, Statement by Mr Ross Hampton; see also Enclosure to Bryant Report, Statement by Captain Belinda Byrne, which speaks of Mr Hampton’s ‘agitation’ on 10 October when she told him ‘that she had not found information to confirm that children had been thrown overboard’.

107 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

108 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

109 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

110 Bryant Report, p.20.

111 Answers to Questions on Notice, Department of Defence, Question W5.

112 Bryant Report, p.20.

113 Bryant Report, p.22.

Parliamentary Press Gallery'.¹¹⁴ Subsequently he was asked to provide them to the media upon request, again without captions.¹¹⁵

4.93 Mr Bloomfield noted that, had the photographs been released through Defence, then they would have been cleared through the appropriate authority. He emphasised that: 'Had I been asked to clear the pictures for release I would have sought clearance from Brigadier Bornholt. I was not asked for such clearance'.¹¹⁶

4.94 According to Admiral Barrie, the clearance procedure broke down
when Ministerial staff directly approached Public Affairs and Corporate Communication media room staff in an effort to obtain the photographs rather than going through Ms McKenry and Brigadier Bornholt.¹¹⁷

4.95 Despite this, Brigadier Bornholt, who was the releasing authority for images from Operation Relex, did become aware during the afternoon of 10 October that the Minister's office was seeking to release photographs of the SIEV 4 incident.¹¹⁸

4.96 Mr Hampton had contacted the Brigadier's Staff Officer, Captain Belinda Byrne, early in the afternoon of 10 October seeking information about how many children were among the 14 manoverboards from SIEV 4.¹¹⁹ Captain Byrne had in turn sought the information from Strategic Command, but was told by the watchkeeper that he had been unable to find any report which confirmed that children had gone overboard. When Captain Byrne relayed this information to Mr Hampton, she said, he 'was agitated and told her that there were photos of children in the water'.¹²⁰

4.97 Following this conversation, at about 3.30pm on 10 October, Captain Byrne asked Brigadier Bornholt whether he knew of such photographs.¹²¹ He did not, but he knew from Strategic Command that they could find no evidence of children in the water on 7 October. Brigadier Bornholt subsequently obtained copies of the photographs and their explanatory text from Strategic Command, noting that they 'clearly described the events as having occurred on 8 Oct 01'.¹²²

114 Enclosure to Bryant Report, Statement by Mr Tim Bloomfield.

115 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

116 Enclosure to Bryant Report, Statement by Mr Tim Bloomfield.

117 Answers to Questions on Notice, Department of Defence, Question W5.

118 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

119 Enclosure to Bryant Report, Statement by Captain Belinda Byrne.

120 Enclosure to Bryant Report, Statement by Captain Belinda Byrne.

121 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

122 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

4.98 Brigadier Bornholt telephoned Mr Hampton twice during the afternoon of 10 October, at about 3.45pm and 4.45pm. According to his statements to both the Powell and Bryant inquiries, the Brigadier thought that he had copies of the two photographs together with their accompanying text when he first spoke to Mr Hampton. However, as Ms Bryant noted, he spoke only of the fact that there was no evidence for children in the water and not of the captions, which indicates that he had not seen them at that time.¹²³

4.99 This supposition is corroborated by Mr Hampton's diary notes of that first conversation, which record that Brigadier Bornholt spoke of four photographs, not two: 'different set of photos - OK'.¹²⁴ It is further corroborated by the fact that, when Mr Hampton told him that the CDF had provided the photographs for release and confirmed that they were of 7 October, the Brigadier began to seek additional clarification of the issue.

4.100 However, it is clear that Brigadier Bornholt did raise questions about whether the photographs were correctly connected to the events of 7 October.

4.101 Mr Hampton, according to Brigadier Bornholt, 'was irate at his news'¹²⁵ and told him that the 'MINDEF was doing a 1630hrs doorstep and the photographs would be released'. Brigadier Bornholt said that he 'advised that there remained a question as to their veracity'.¹²⁶

4.102 Even if, then, neither Mr Hampton nor the Minister had received definitive advice that the photographs were incorrectly attributed prior to the Minister speaking publicly of them and formally releasing them as evidence of the 'children overboard' incident, questions had been raised both about them and about whether, on 7 October, there were children in the water at all.

4.103 In the Committee's view, the pressure to produce evidence to corroborate the report of children overboard seems to have propelled the Minister and Mr Hampton into releasing material over which at least some doubts had been cast. It is arguable that, prior to the release, the doubts expressed were not terribly strong and were themselves liable to doubt and amenable to rationalisation. However, had the focus been on the need to be *certain* about the evidence, rather than on the need simply to *produce* evidence, then it seems that it should have been possible to wait for full corroboration.

123 Bryant Report, p.23. Ms Bryant also notes that the timing of the email which conveyed the two photographs to Brigadier Bornholt is consistent with the finding that he had not received them at the time of his first conversation with Mr Hampton.

124 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

125 Enclosure to Bryant Report, Statement by Brigadier Gary Bornholt.

126 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

Miscommunications

4.104 The final contributor to the public misrepresentation of the photographs was a series of miscommunications between the Minister's office and Defence personnel.

4.105 Two of these have already been mentioned, namely, the confusion between Mr Bloomfield and Mr Hampton over what constituted the 'captions' to the photographs, and the lack of clarity between CDF and the Minister, and between Mr Hampton and Brigadier Bornholt, about what the photographs depicted.

4.106 The central miscommunication, however, related to the differences in Mr Hampton and Mr Bloomfield's understandings of the purpose for which the photographs were being released.

4.107 As noted earlier, Mr Bloomfield was always aware that the photographs depicted the rescue of the SIEV's passengers from their sinking vessel on 8 October 2001.

4.108 He first spoke of the photographs with Mr Hampton in the context of telling him about Commander Banks's interview with Channel 10, which itself focused on the sinking of SIEV 4 and the rescue of its 223 passengers. At this stage, however, Mr Bloomfield did not have copies of the photographs and when he subsequently described them to Mr Hampton, he did so in general terms as being of 'UBA's in the water'.¹²⁷

4.109 According to Mr Bloomfield's recollection, he had the photographs forwarded to Mr Hampton before he sent an email brief about the content of Commander Banks's interview.¹²⁸ The brief did not explicitly advise that the photographs were of the sinking of the vessel on 8 October, but it did mention the photographs in the context of the interview. It read:

I received a call ... from channel ten seeking a photograph of Commander Norm Banks and copies of photographs that she understood had been forwarded to Defence Canberra by HMAS *Adelaide*. Following a brief discussion it transpired that CH10 had conducted an interview with CMDR Banks in relation to the most recent UBA's ... At my request, [Andrew Herring Fleet Public Relations Officer] contacted CMDR Banks ... and gained the following appreciation of the interview.¹²⁹

4.110 The interview content, he advised, included discussion of the rescue of the UBAs, the provision of food and water, the austere accommodation arrangements,

127 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

128 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

129 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield, Minute to Head Public Affairs and Corporate Communication (HPACC) dated 11 October 2001.

medical treatment and personal encounters. The brief went on to say that Mr Bloomfield was unaware of what else was said but was ‘advised it was a lengthy interview’.

4.111 Mr Bloomfield told Ms Bryant that although ‘he considered it was clear that the photos were directly related to Commander Banks’s interview which was about the sinking and rescue, rather than the child overboard incident’, he accepted in retrospect that Mr Hampton may have been thinking of them differently.¹³⁰

4.112 Mr Hampton was less prepared than Mr Bloomfield to accept that there was miscommunication based on mutual misconception of what each had uppermost in his mind. He said that at the time of the release of the photographs, ‘everyone was talking about the children overboard incident - no-one was talking about the sinking. Conversations were in the context of finding a way to back up Mr Ruddock’s comments given questioning in the media’.¹³¹

4.113 Mr Hampton thought that the only possible explanation for Mr Bloomfield not alerting him to the true subject matter of the photographs was that at the time he had not himself read their accompanying text. Mr Hampton insisted that:

there was no doubt we were supplying the photos to the media on the basis that they were photos of the first jumping/throwing event. It is just not believable that Mr Bloomfield thought it was otherwise. It is also unbelievable that if he had on his computer screen before him text - ostensibly proving that the photos were of another event - that he wouldn’t have alerted me to the fact that we [were] about to possibly mislead the media and public.¹³²

4.114 The Committee considers, however, that the miscommunication could well have arisen precisely because of the different ‘top of mind’ concerns present for each party.

4.115 Mr Hampton was clearly focused on proving the report that children had been thrown overboard. Mr Bloomfield was worried primarily about Commander Banks’s unauthorised interview and about its contravention of the explicit public affairs directive for Operation Relex that no media comment at all was to come from within Defence.¹³³

4.116 As Ms Bryant pointed out, ‘the loose terms in which the photographs were discussed between Mr Bloomfield and Mr Hampton (“UBA’s in the water”)’ meant that neither became aware of the other’s misconception, which was then not corrected before the photographs were released

130 Enclosure to Bryant Report, Statement by Mr Tim Bloomfield.

131 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

132 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

133 Enclosure 1 to Powell Report, Statement by Mr Tim Bloomfield.

Defence knowledge of misrepresentation

4.117 The realisation within Defence that there was no evidence to support the report that children had been thrown overboard from SIEV 4 arose gradually over the period from 8 or 9 October to 11 October. As was discussed earlier in this chapter, that realisation was communicated over that period up the chain of command, landing with Rear Admiral Ritchie and Admiral Barrie by 11 October 2001.

4.118 By contrast, knowledge that the photographs of Able Seaman Laura Whittle and Leading Seaman Cook Barker were being misrepresented when they were published in the media on 10 October was available immediately to anyone who had seen the photographs with their captions on the Defence email network.

4.119 Thus, information about the incorrect attribution was passed through the military chain of command within minutes of the photographs appearing on the ABC's *7.30 Report* on the evening of 10 October. Rear Admiral Smith contacted Rear Admiral Ritchie (COMAST) and Vice Admiral Shackleton (CN) to tell them of the misrepresentation,¹³⁴ and COMAST and CN in turn both rang Admiral Barrie.¹³⁵

4.120 Knowledge that the photographs were being publicly misrepresented was available on the civilian side of Defence even before the *7.30 Report* was broadcast, with Brigadier Bornholt having confirmed that afternoon that they depicted the events of 8 rather than 7 October 2001. The Brigadier had left a message on Mr Hampton's mobile phone to that effect at 4.45pm, but Mr Hampton said that he never received it.¹³⁶

4.121 In the late afternoon of 10 October, Brigadier Bornholt sent an email to the Head of Public Affairs and Corporate Communication, Ms Jenny McKenry, informing her that Mr Hampton had not returned his call. He suggested that Mr Mike Scrafton, Military Adviser to Mr Reith, needed to be informed of the misrepresentation of the photographs in writing.¹³⁷ The Secretary of the Department of Defence, Dr Allan Hawke, was told the next day that the photographs were being publicly misrepresented.

Conclusion

4.122 By 11 October 2001, the Chief of Defence Force, Admiral Barrie, had been told that there was no evidence to support the report that children had been thrown overboard from SIEV 4 and that the photographs published purportedly as evidence of that incident were actually of a different incident and taken on a later day.

134 Enclosure 1 to Powell Report, Statement by Rear Admiral Ritchie.

135 *Transcript of Evidence*, CMI 370, 57.

136 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

137 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

4.123 On 11 October 2001, the Secretary of the Department of Defence, Dr Allan Hawke, was likewise told that the photographs published on television on the evening of 10 October and in the print media on 11 October were falsely represented as evidence of ‘children overboard’.

4.124 The question to which the Committee turns in the next chapter is what happened next to that information, and how the record was allowed to stand uncorrected.

Chapter 5

The Attempt to Correct the Record: Advice from Defence

[T]o be frank, whether this incident - the child, that is - occurred or not in my view is irrelevant. There was a series of activities happening. From the naval perspective, what was important was that that information was reported as having occurred and was relayed to government and several days later that information was corrected - which would be our normal way - and that information was relayed. What I do not have visibility of, and it is not my place to comment on, is how that information was handled at the end of the chain.¹

Introduction

5.1 The Committee accepts that Defence did, in the first instance, mistakenly advise that children had been thrown overboard from SIEV 4. That report was conveyed to the People Smuggling Taskforce, and thence passed on to and released by Minister Ruddock.

5.2 In the matter of the misrepresentation of the photographs, the Committee argued in the previous chapter that the Minister for Defence's office released the pictures in haste, and after significant doubts had been raised about their status as evidence for the 'children overboard' event.

5.3 The key question for the Committee is how both mistakes were able to stand uncorrected throughout the period of an election campaign, during which 'border protection' was a significant and sensitive issue.

5.4 In addressing this question, the Committee will need to evaluate three matters. They are:

- the adequacy of the advice from Defence about both issues;
- the extent to which those who received clear advice deliberately and consciously ignored it; and
- the extent to which those who received less definite advice were culpable for their failure to seek a clear understanding of the facts.

5.5 Accordingly, in this chapter, the Committee outlines the nature of the advice on these matters which came from Defence in the period from 10 October to 8 November 2001.

5.6 In the following chapter, the Committee turns to the question of how that advice was received by the Minister for Defence and his office. Finally, the

1 Rear Admiral Smith, *Transcript of Evidence*, CMI 592.

Committee makes its assessment of the adequacy of the advice from Defence and of the factors which contributed to the failure to correct the record.

Correcting the Record: Advice to the Minister and his Office

5.7 From 10 October 2001 to 8 November 2001, Defence personnel gave advice relating to the veracity of the report that children had been thrown overboard on five separate occasions to Minister Reith or his office. In addition, Vice Admiral Shackleton commented on the matter to the media on 8 November 2001.

5.8 From 10 October 2001 to 8 November 2001, Defence personnel gave advice relating to the misrepresentation of the photographs on three separate occasions to Minister Reith or his office.

5.9 In what follows the Committee outlines the nature of each of these contacts.

Ritchie to Scrafton

5.10 Minister Reith's Senior Adviser (Defence), Mr Mike Scrafton, told Ms Bryant that following Mr Ruddock's comments on 7 October, he had been involved in 'a number of telephone discussions with AVM Titheridge, Rear Admiral Smith, and Commodore Gately, in which he was querying whether there was certainty around the facts in this case'.² He advised Ms Bryant that his discussions 'particularly with AVM Titheridge and Rear Admiral Ritchie, indicated that the story was true'.³

5.11 The first of the five pieces of advice known to the Committee concerning the veracity of the claim that children had been thrown overboard, was provided to Mr Scrafton by Rear Admiral Ritchie on 10 October 2001.

5.12 Rear Admiral Ritchie told the Committee that Mr Scrafton had rung him on the morning of 10 October, asking about evidence that would support the claim that children had been thrown overboard.⁴ This call prompted Rear Admiral Ritchie, he said, to contact Rear Admiral Smith seeking further information. At about midday, Rear Admiral Smith advised him that:

the electro-optical film - the video that we all talk about - 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 ... was pushed over.

2 Enclosure to Bryant Report, Statement from Mr Mike Scrafton.

3 Enclosure to Bryant Report, Statement from Mr Mike Scrafton.

4 *Transcript of Evidence*, CMI 368.

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 indicated that there might be children in the water.⁵

5.13 Rear Admiral Ritchie said that he passed this information back to Mr Scrafton at 12.42pm on the same day.⁶ Rear Admiral Ritchie noted that, at the time of this conversation, he himself believed that children had been thrown overboard although there was as yet no evidence to confirm the initial report. He suggested that Mr Scrafton was in a similar frame of mind and was seeking to know not whether the claim was true, but whether there was any evidence to support it.⁷

5.14 Rear Admiral Ritchie told the Committee that Mr Scrafton would 'have walked away from that conversation' knowing that there was so far no evidence to confirm the first report, but 'believing that there still might be evidence that supports [it]'.⁸

Bornholt to Hampton

5.15 Later that afternoon, Mr Ross Hampton, media adviser to Mr Reith, was also told that there was no evidence available to Strategic Command which would support the claim that children had been thrown overboard.

5.16 As was discussed in the previous chapter, Mr Hampton had rung Captain Belinda Byrne, staff officer to Brigadier Gary Bornholt, seeking to know the numbers of children who were in the water on 7 October.⁹ This contact was in connection with the imminent release of the two photographs to the media. Captain Byrne told Mr Hampton that 'she had been unable to find reports to indicate that children were thrown overboard'.¹⁰

5.17 Having been told of Mr Hampton's anger at this news from Captain Byrne, Brigadier Bornholt undertook to deal with the matter himself.¹¹ The Brigadier confirmed with Strategic Command that they had no evidence that women or children were among the 14 passengers from SIEV 4 who had entered the water on 7 October. He told the Senate Foreign Affairs, Defence and Trade Committee's Estimates hearing on 20 February 2002 that:

5 *Transcript of Evidence*, CMI 368-369.

6 *Transcript of Evidence*, CMI 369; Enclosure to Bryant Report, Statement by Mr Mike Scrafton.

7 *Transcript of Evidence*, CMI 371.

8 *Transcript of Evidence*, CMI 371.

9 Enclosure to Bryant Report, Statement by Captain Belinda Byrne.

10 Enclosure to Bryant Report, Statement by Captain Belinda Byrne.

11 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.105.

I then called the minister's media adviser at about quarter to four on that day [10 October], and I said to him, 'My advice to you is that the photographs could not be of 7 October because Strategic Command have informed us that, of the 14 people that they understand were in the water, there were no women or children' ... He 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. I said, 'I can't believe that'.¹²

5.18 It then became apparent, Brigadier Bornholt said, that he and Mr Hampton had different photographs before them. He told Mr Hampton that he would check the details and get back to him.¹³ At 4.45pm, Brigadier Bornholt left a message on Mr Hampton's mobile telephone, 'to the effect that I had now confirmed my previous advice that the photographs were incorrect in that they did not depict the events which the minister was intending to portray'.¹⁴ In the meantime, during an interview on ABC radio at 4.10pm, the Minister had released the photographs as evidence that children had been thrown overboard.

5.19 Mr Hampton disputed elements of Brigadier Bornholt's account of this contact. In particular, he said that when he and Brigadier Bornholt realised that they were looking at different photographs, he did not recall that the Brigadier had said that he would check and get back to him.¹⁵ He also said that he never received the message from Brigadier Bornholt, although he noted that he received a large number of messages following the Minister's media interviews 'and that he may have therefore missed a message from Brigadier Bornholt due to a full mailbox'.¹⁶

5.20 The Committee is not entirely convinced by this explanation for the 'missed call'. As far as the Committee is aware, mobile telephone messaging facilities always advise callers if, for whatever reason, a message is unable to be recorded. It is not the case that a caller would be allowed to leave a message, but that the message bank would not record it.

Barrie to Minister

5.21 The first definitive advice provided from Defence to the Minister and his office correcting elements of the children overboard story related to the misrepresentation of the photographs. On 11 October 2001, Admiral Chris Barrie spoke to the Minister directly about the matter and, on the same day, Ms Jenny McKenry and Brigadier Gary Bornholt spoke to Mr Mike Scrafton.

12 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.106.

13 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

14 Enclosure 1 to Powell Report, Statement by Brigadier Gary Bornholt.

15 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

16 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

5.22 Admiral Barrie told the Committee that he was made aware by both Rear Admiral Ritchie and Vice Admiral Shackleton on the evening of 10 October, that the photographs were being connected to the wrong events in the media. On 11 October, he rang the Minister:

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.¹⁷

5.23 Questioned as to whether he was sure that Minister Reith understood the import of this advice, Admiral Barrie said that:

I had no reason to believe that he did not understand that. Indeed, in my frame I would say that was the reason we then went on to have a discussion about the photographs that was a bit testy. That all seemed to line up for me.¹⁸

McKenry and Bornholt to Scrafton

5.24 Meanwhile, on the morning of the same day, the Head of Defence Public Affairs and Corporate Communication, Ms Jenny McKenry, and PACC's military adviser (MAPACC), Brigadier Bornholt, gave the same advice to Mr Scrafton.¹⁹ Ms McKenry told the Committee that the conversation was in several facets. She explained:

The first facet was with Brigadier Bornholt in the room. We discussed the photographs that had been released. We made it very clear that they did not represent what they were purported to represent in the press. Brigadier Bornholt did explain the attempts to clarify that the previous day with Mr Hampton.²⁰

5.25 Ms McKenry told Mr Scrafton that 'There are captions which actually say that the photographs were taken on the 8th'.²¹ Mr Scrafton went to check the photographs, but phoned back to say that there were no captions on the photographs in the Minister's office. Ms McKenry then sent to Mr Scrafton, at 11.04am, her email of the photographs which 'quite clearly had the date on it'. She said that Mr Scrafton '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'.²²

17 *Transcript of Evidence*, CMI 742.

18 *Transcript of Evidence*, CMI 783.

19 Enclosure 1 to Powell Report, Statements by Ms Jenny McKenry and Brigadier Gary Bornholt.

20 *Transcript of Evidence*, CMI 1101.

21 *Transcript of Evidence*, CMI 1101.

22 *Transcript of Evidence*, CMI 1101.

5.26 Later, Ms McKenry forwarded to Mr Scafton a chronology prepared by Mr Bloomfield, which outlined the sequence of events relevant to the provision of the photographs to the Minister's office.²³

5.27 Questioned as to her confidence that Mr Scafton understood that the photographs were incorrectly connected to the events of 7 rather than 8 October 2001, Ms McKenry said:

I have no doubt because we went through the photographs. We talked about the photographs. We described the photographs. He later phoned back, having received the photographs. I had mentioned in the course of my email to him that the photographs I had discovered were on the unrestricted system within the defence department, which meant that they were readily distributable. He indicated to me that I should pursue getting them off the unrestricted system.²⁴

Barrie to Minister

5.28 The next piece of advice which, to the Committee's knowledge, was provided by Defence to the Minister on the children overboard issue came on 'possibly' 17 October 2001.²⁵ On that day, Admiral Barrie had a conversation with Mr Reith in which he informed the Minister that 'I had been told by the Chief of Navy and COMAST that there were doubts about whether children had ever been thrown over the side of SIEV 4'.²⁶ Admiral Barrie went on to say to the Minister that:

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.²⁷

5.29 The Committee questioned Admiral Barrie at length about his reasons for not providing definitive advice to the Minister on whether or not children had been thrown overboard.

5.30 Admiral Barrie explained his position by saying that he did not feel that he himself had been given definitive advice. His recollection, he said, of Rear Admiral

23 See email from Jenny McKenry, dated Thursday, 11 October 2001 16:37, attached to Enclosure 1 to Powell Report, Statement by Ms Jenny McKenry.

24 *Transcript of Evidence*, CMI 1102. (Note: the term 'unrestricted' used here refers to the email system for unclassified information, which in Defence is technically called the 'restricted' system as opposed to the 'secret' system.)

25 Admiral Barrie noted that he was 'quite hazy' as to exactly what the date of the conversation was. It was, however, before he left Australia for East Timor and elsewhere on 25 October 2001. *Transcript of Evidence*, CMI 742, 755.

26 *Transcript of Evidence*, CMI 742.

27 *Transcript of Evidence*, CMI 742-743.

Ritchie's advice to him on 11 October was that he spoke of 'doubts ... I do not remember his being more definite than that'. Admiral Barrie continued:

I recall that he [COMAST] referred to the photographs and to the video, and whether or not they were conclusive one way or the other. I said to him that photographs alone were only part of the evidentiary material and that 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'.²⁸

5.31 At this stage, Admiral Barrie said that he also directed Rear Admiral Ritchie to ensure that witness statements and other evidentiary material was collected 'while this was fresh in everyone's mind'.²⁹ The Committee notes that such a collection was already underway independently of Admiral Barrie's instruction, and that much of it had already been seen and assessed by the chain of command.

5.32 Later in evidence, Admiral Barrie elaborated on the issue of how definite COMAST's advice to him had been, telling the Committee that:

I think the issue I discern is just how definite was Rear Admiral Ritchie in his understanding of what took place and how indefinite is my recollection. But I would put it in this context ... I offered the commanders an opportunity to come back and convince me that I was wrong if they had material that was evidence and compelling. On the night of 20 February in estimates, when Rear Admiral Ritchie and I were looking at that message of 10 October,³⁰ he said to me 'If I'd only had that at the time we had that discussion, I would have come back to you'. So in my view I do not think that the discussion was as definite as Rear Admiral Ritchie recalls. I think he understood that an opportunity had been given to him to come back and fight a repechage if wished to, and at no time did he.³¹

5.33 Admiral Barrie said that 'in 20/20 hindsight ... I would say that on 11 October when Rear Admiral Ritchie had that conversation with me, rather than leaving it loose and hanging and waiting for him to come back to me, I should have directed him to resolve it and reported back.'³² Since this did not happen, however, Admiral Barrie said that he did not take the view that he had been definitively informed that children had not been thrown overboard.

28 *Transcript of Evidence*, CMI 742.

29 *Transcript of Evidence*, CMI 742.

30 See Enclosure 2 to Powell Report, HMAS *Adelaide* SIC I3M/LAB dated 101136Z Oct 01, 'Op Relex - SIEV 04 List of Chronological Events for the 07 Oct 01 Boarding'.

31 *Transcript of Evidence*, CMI 749.

32 *Transcript of Evidence*, CMI 756.

5.34 Accordingly, his advice to the Minister was that ‘there were serious question marks about evidence in relation to the children overboard issue’,³³ but not that he was retracting the initial advice that children had been thrown overboard.

5.35 In the next chapter, the Committee discusses in detail the adequacy of Admiral Barrie’s advice to the Minister at this time.

Silverstone to Minister

5.36 The next piece of advice to the Minister for Defence concerning the veracity of the report that children had been thrown overboard from SIEV 4 came from Brigadier Silverstone on 31 October 2001.

5.37 Brigadier Silverstone gave evidence to both the Powell and Bryant inquiries stating that on the afternoon of Wednesday 31 October, Mr Reith and his party visited the Brigadier’s headquarters in Darwin. In his statements, he said that Mr Reith had spoken of the video of SIEV 4 ‘and seemed to think that the video held the key, showing a child, or children in the water’.³⁴ Brigadier Silverstone said that he had told the Minister that he had not seen the video himself, ‘but that he understood that it wasn’t very clear and did not show children in the water’.³⁵

5.38 Brigadier Silverstone elaborated on his conversation with Mr Reith in evidence to the Committee. He said that:

My recollection of the discussion with Minister Reith on the afternoon of the 31st is that, when he raised the issue of the video, I was uncertain about what he had been told. It was inconceivable to me that the CDF had not informed him of this issue at that time. I also had concerns for where we stood, under the caretaker role, in terms of the passage of information.

While I was thinking of these issues, I 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’. Then I paused, expecting to hear a ‘yes’. He then said, ‘Well, we had better not see the video then,’ and left my office.³⁶

5.39 When asked to comment on what he thought the Minister had meant by that, Brigadier Silverstone said that:

33 *Transcript of Evidence*, CMI 763.

34 Enclosure to Bryant Report, Statement by Brigadier Michael Silverstone.

35 Enclosure to Bryant Report, Statement by Brigadier Michael Silverstone.

36 *Transcript of Evidence*, CMI 346, 361.

They are the words the minister used. He could have meant a range of things - literally or as a side comment. As he left my thoughts were, 'He hasn't listened to what I said'.³⁷

5.40 Brigadier Silverstone told the Committee that after the Minister left his office, he had informed Rear Admiral Ritchie of the conversation.³⁸

5.41 The Committee notes that by the time of this interchange, Admiral Barrie had informed the Minister directly that the video was inconclusive, and Rear Admiral Ritchie had informed Mr Scrafton that the video did not show children thrown overboard.

Houston to Minister

5.42 The final piece of advice provided directly to the Minister for Defence on this issue came from the then Acting CDF, Air Marshal Angus Houston, on 7 November 2001. That advice was that there was no evidence to support the claim that children were thrown overboard from SIEV 4.

5.43 Air Marshal Houston informed the Senate Foreign Affairs, Defence and Trade Committee at Estimates that, on the morning of 7 November, he had contacted Air Vice Marshal Titheridge in order to discuss an article in that day's *The Australian* newspaper.³⁹ The article raised questions about the authenticity of the photographs which purported to be evidence of children thrown overboard, and also reported that residents of Christmas Island were alleging that naval officers had told them that the reports of that incident were untrue.⁴⁰ Air Vice Marshal Titheridge told the Acting CDF that the Minister wished to speak to him urgently about the report.⁴¹

5.44 Air Marshal Houston noted that he had then set about discovering as much as he could about the events of 7 and 8 October 2001, in order to be in a position to advise the Minister. He spoke to Air Vice Marshal Titheridge of the video, which was also mentioned in *The Australian's* article. AVM Titheridge had informed him that he had not seen the video but that he had been briefed in some detail about it. He described it, according to Air Marshal Houston, in the following terms:

He indicated that it was an infra-red video, quite grainy and of quite poor quality and, although it showed people jumping overboard, it did not show any women or children going into the water. The point he did make, though,

37 *Transcript of Evidence*, CMI 346.

38 *Transcript of Evidence*, CMI 346, 363. This evidence was corroborated by Rear Admiral Ritchie, who confirmed that Brigadier Silverstone had told him of this conversation around 31 October. *Transcript of Evidence*, CMI 368.

39 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.75.

40 *Transcript of Evidence*, CMI 1058.

41 *Transcript of Evidence*, CMI 1059.

was that there was a child that was taken to the side of the vessel and held over the side of the vessel.⁴²

5.45 Air Marshal Houston inquired about whether he could see the video, but the copy held by Maritime Command in Sydney was unable to be broadcast through to Canberra. The Air Marshal then spoke to Brigadier Gary Bornholt, who showed him a copy of the signal chronology of 10 October from HMAS *Adelaide*.⁴³ Air Marshal Houston told the Senate Estimates Committee that:

From that [chronology] it became clear - as it appeared to me - that, yes, people had jumped into the water, but there was no evidence there to suggest that women and children had jumped in the water. There was one reference, however, to a child being held over the side. I think in the actual message reference was made to that, in terms of the child being dressed in a life jacket and then being put in a position on the side.⁴⁴

5.46 Brigadier Bornholt also told Air Marshal Houston that the photograph which had appeared again in *The Australian* that morning did not depict the events of 7 but rather the 8 October 2001.⁴⁵

5.47 Having gathered this information, Air Marshal Houston telephoned the Minister. He provided, he said, the following advice to the Minister:

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 can recall it, to describe the fact that on the second day there was a rescue operation when the vessel sank and that the photograph [sic], 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'.

42 *Transcript of Evidence*, CMI 1059.

43 *Transcript of Evidence*, CMI 1062; Enclosure 2 to Powell Report, HMAS *Adelaide* SIC I3M/LAB dated 101136Z Oct 01, 'Op Relex - SIEV 04 List of Chronological Events for the 07 Oct 01 Boarding'.

44 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, pp.75-76.

45 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.76.

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.⁴⁶

5.48 Members of the Committee were concerned to understand how Air Marshal Houston had reached the conclusion that no children had been thrown overboard on the basis of the signal chronology. Senator Brandis said:

I cannot see any reference in this document to the proposition or the question of whether or not there was a child in the water. I agree it is silent on the matter. It just does not tell you one way or another.⁴⁷

5.49 In response, Air Marshal Houston stated that: ‘If a child had been in the water, it would have been reported in the text of the message’.⁴⁸ He based that assessment, he said, not only on his many years’ experience of military messaging in joint operations,⁴⁹ but also on the fact that although the signal made a number of specific references to children on board SIEV 4, there were no references to children overboard. He noted that:

all the references in this signal relate to the fact that the children are on the vessel: ‘children taken to the side’, ‘child held over the side’, ‘child not thrown overboard’, ‘male SUNCs in the vicinity of wheelhouse threatened to throw women and children overboard. This did not occur’.⁵⁰

5.50 In other words, the chronology was explicitly concerned with the whereabouts of children on the vessel. Since the fate of children was of explicit concern, the Committee like Air Marshal Houston is satisfied that the absence of reference to children in the water is evidence, not of neglect of the question by the signal’s author, but of the fact that indeed they were not in the water.

Shackleton

5.51 The day after Air Marshal Houston’s conversation with Mr Reith, Vice Admiral Shackleton, Chief of Navy, commented on the ‘children overboard’ story to the media, saying:

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.⁵¹

46 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.76.

47 *Transcript of Evidence*, CMI 1064.

48 *Transcript of Evidence*, CMI 1064.

49 *Transcript of Evidence*, CMI 1065.

50 *Transcript of Evidence*, CMI 1067.

51 *Transcript of Evidence*, CMI 97.

5.52 After these remarks had been made public, Vice Admiral Shackleton was contacted on the afternoon of 8 November by Mr Peter Hendy, chief of staff to Minister Reith. Mr Hendy told the Vice Admiral that what he had said was being portrayed in the media as contradicting the Minister. Mr Hendy said that he clearly recalled Mr Reith being advised by Navy that children had been thrown overboard, and suggested that Vice Admiral Shackleton issue ‘a clarifying statement to remove the apparent contradiction’.⁵²

5.53 During this conversation, Vice Admiral Shackleton said, he ‘gained the strong impression that he [Mr Hendy] had not been told that the original report was incorrect, and this came as a surprise to me’.⁵³

5.54 The Vice Admiral acknowledged that it was true that the Minister had originally been advised that children had been thrown overboard, and that his own remarks had been mistaken in that regard.⁵⁴ He therefore agreed to issue a clarifying statement addressing that issue. It said:

My comments in no way contradict the minister. I confirm the minister was advised that Defence believed children had been thrown overboard.⁵⁵

5.55 The Committee discusses the circumstances surrounding Vice Admiral Shackleton’s ‘clarifying’ statement in the next chapter.

Summary

5.56 The following two tables illustrate the timing, formality and definitiveness of advice provided to the Minister and his office from Defence concerning the veracity of both the ‘children overboard’ story itself and the misrepresentation of the photographs.

5.57 The Committee considers formal advice to be that provided by either the CDF, the Secretary or by an officer responsible for a relevant area, and part of whose role it is to provide definitive advice to the Minister or his office. This is not to say that advice provided by other officers or in other contexts is invalid or inappropriate. It is simply that, in such cases, the Minister or his staff may be entitled to deem such advice as less weighty, or to deem the officer as less likely to know all the relevant information.

52 *Transcript of Evidence*, CMI 59.

53 *Transcript of Evidence*, CMI 59.

54 *Transcript of Evidence*, CMI 59.

55 *Transcript of Evidence*, CMI 97.

Table 5.1: Advice relating to veracity of children overboard incident

Date	Formal	Informal
10 October 2001	COMAST to Mr Scrafton: non-definitive	
10 October 2001		MAPACC to Mr Hampton: non-definitive
17 October 2001	CDF to Minister Reith: non- definitive	
31 October 2001		NORCOM to Minister Reith: non-definitive
7 November 2001	A/CDF to Minister Reith: definitive	
8 November 2001		CN to media: non-definitive

Table 5.2: Advice relating to misrepresentation of the photographs

Date	Formal	Informal
10 October 2001	MAPACC to Mr Hampton: definitive ⁵⁶	
11 October 2001	CDF to Minister Reith: definitive	
11 October 2001	HPACC and MAPACC to Mr Scrafton: definitive	

5.58 In the next chapter, the Committee will analyse the role played by the Minister's office in allowing the record to stand uncorrected in relation to both aspects of the children overboard story. Before it turns to that issue, however, the Committee briefly outlines the nature of the advice provided by Defence to individuals and agencies other than the Minister and his office.

56 Note Mr Hampton said that he did not receive Brigadier Bornholt's 'definitive' message, left on his mobile phone message bank. At the least, however, Mr Hampton received 'non-definitive' advice from Brigadier Bornholt on the afternoon of 10 October.

Correcting the Record: Advice to PM & C and PST

5.59 There were three particular occasions upon which advice about evidence relating to the correction of the initial children overboard report was provided by Defence to those other than the Minister and his staff.

5.60 It should be noted that the ‘three’ occasions are three specific or new events. Ms Katrina Edwards indicated in her evidence to the Committee that there were other conversations between officers in the Social Policy Division of PM & C and officers in Strategic Command where the lack of written evidence held by Strategic Command was discussed.⁵⁷

5.61 The three occasions were:

- Group Captain Walker’s advice to the People Smuggling Taskforce on 7 October 2001;
- Strategic Command’s chronology of events supplied to the Social Policy Division in PM & C on 10 October 2001; and
- advice from Commanders King and Chatterton to the Defence Branch, International Division, in PM & C on 11 October 2001.

5.62 To the Committee’s knowledge, apart from this advice to the PST and to other areas of the Department of the Prime Minister and Cabinet, Defence provided advice relating to the correction of the initial children overboard report to no other agency or individual.

5.63 In what follows, the Committee outlines the nature of the advice provided to the PST and PM & C, and analyses the adequacy of PM & C’s response to that advice.

Advice from Group Captain Walker to PST

5.64 On 7 October, Group Captain Steven Walker, Director, Joint Operations (DJOPS) attended the morning meeting of the PST in the place of Air Vice Marshal Titheridge.⁵⁸ At that meeting, he said, he learnt from Ms Jane Halton, Chair of the PST, that the passengers aboard SIEV 4 ‘were throwing children into the water’.⁵⁹

5.65 Since, as Group Captain Walker said, this ‘news ... was new to me’, after the meeting he went back to his headquarters to try to confirm the information.⁶⁰ He told the Committee that:

I could find nothing in the written message traffic that mentioned children. I returned to the evening IDC and, when it came my turn to speak, I pointed

57 *Transcript of Evidence*, CMI 1710.

58 *Transcript of Evidence*, CMI 1681.

59 *Transcript of Evidence*, CMI 1683.

60 *Transcript of Evidence*, CMI 1684.

out that I had no written confirmation that children had gone into the water. That was not to say that it did not happen, but what I was trying to stress was that I had no auditable evidence that children had gone into the water.⁶¹

5.66 Ms Katrina Edwards, former First Assistant Secretary, Social Policy Division, PM & C and then notetaker for the PST meetings, confirmed Group Captain Walker's evidence in this regard, saying that he had 'not been able to provide any updated information on what had occurred, nor had he been able to validate the "children" issue'.⁶²

5.67 Despite Group Captain Walker's advice, the options paper prepared for the Prime Minister on 7 October 2001 included the statement: 'This [ie. the attempt to deter SIEV 4's entry] has been met with attempts to disable the vessel, passengers jumping into the sea and passengers throwing their children into the sea'.⁶³

5.68 This paper was cleared by members of the PST at the evening meeting on 7 October. According to the evidence provided by Ms Edwards, that meeting started at 5.30pm with the same group attending as at the morning meeting.

Air Vice Marshal Titheridge arrived somewhat later. I have since established from Department of the Prime Minister and Cabinet security records that he entered the building at 6.25pm. My recollection, verified by the editing record of the document, as well as building security records, is that the paper was completed and cleared by all of those present. Group Captain Walker remained after Air Vice Marshal Titheridge's arrival for the bulk of the meeting, but left shortly before the end, once the Defence related material had been completed.⁶⁴

Reponse from PM & C

5.69 Ms Halton told the Committee that she did not recall Group Captain Walker telling the evening meeting of the PST that he had been unable to find signal traffic which corroborated the morning's advice that children had been thrown overboard. However, she said, 'such a comment would not have raised particular concerns as our experience to date had been that signal traffic could often be slow in arriving'.⁶⁵

5.70 She also noted that, during the detailed editing of the options paper prepared by the PST for the Prime Minister, certain of the information from Defence, such as the number of those on board SIEV 4, was explicitly tempered by a caveat in that

61 *Transcript of Evidence*, CMI 1684.

62 *Transcript of Evidence*, CMI 1715.

63 'Options for Handling Unauthorised Arrivals: Christmas Island Boat', attached to Enclosure to Bryant Report, Statement by Ms Jane Halton.

64 *Transcript of Evidence*, CMI 1705.

65 *Transcript of Evidence*, CMI 901; see also *Transcript of Evidence*, CMI 985.

paper. By contrast, she remarked, the Defence representatives did not suggest that the report that children had been thrown overboard needed to be similarly tempered.⁶⁶

5.71 The Committee was concerned at the contradiction between Ms Halton's evidence concerning the editing process undertaken during the preparation of the options paper on 7 October, and evidence received from Air Vice Marshal Titheridge.

5.72 According to Ms Halton, members of the PST attending the evening meeting on 7 October were involved in an extensive process of editing the 'first cut' of the paper which she had dictated during the afternoon. There was, she said, a 'line by line discussion of the paper'.⁶⁷ She had 'a vivid memory of my assistant running in and out with the paper as the edits were coming out',⁶⁸ and emphasised that, when it was all agreed, the document 'ultimately came back for one last read'.⁶⁹ She told the Committee that:

My memory is that Group Captain Walker had left by that point. My memory is that he stayed for the period when all the Defence material and issues that were material to Defence were dealt with but that when that material had been completed and all the edits had been agreed he left. Air Vice Marshal Titheridge was there until the completion of the meeting.⁷⁰

5.73 The Committee notes that this evidence is consistent with that quoted from Ms Edwards's testimony above. The account is, however, at variance with that of Air Vice Marshal Titheridge who, in a written answer to a Question on Notice about his involvement in developing the options paper, said:

I was one of the team that provided oral advice for a draft paper on broad handling strategies for unauthorised arrivals. I was not given a copy of the draft. I did not see elements of the final document until it was released by Ms Bryant.⁷¹

5.74 Ms Halton insisted to the Committee that her version of events was verifiable from her own notes and from other sources:

[T]he document was edited whilst Air Vice Marshal Titheridge was there in the room. That is the memory of the officers from Prime Minister and Cabinet who came in and out of the room taking the edits away, and it is consistent with the security camera details from the department and the times at which the document was edited.⁷²

66 *Transcript of Evidence*, CMI 1013, 1016.

67 *Transcript of Evidence*, CMI 2046.

68 *Transcript of Evidence*, CMI 2046.

69 *Transcript of Evidence*, CMI 2069.

70 *Transcript of Evidence*, CMI 2069.

71 Answers to Questions on Notice, Department of Defence, Question 49.

72 *Transcript of Evidence*, CMI 2071.

5.75 Ms Halton has subsequently provided the Committee with information detailing the times at which PST members entered and left the building. She has also provided details about the period over which the draft options paper was edited, and the scale and nature of the changes made.⁷³

5.76 Ms Halton advised that members of the PST had been provided with numbered copies of the draft which, ‘because they were sensitive issues’, were taken back ‘when everyone had finished the editing process’.⁷⁴ The ‘document did not change after people had left the building’.⁷⁵

5.77 The Committee notes that the account of this very detailed process for editing and finalising the options paper on 7 October is to some extent inconsistent with the account provided by Mr Bill Farmer of the general process surrounding the development of advice from the PST. This matter is discussed in chapter 7.

5.78 In relation to the specific question of whether the PST, and Ms Halton in particular, should have taken more seriously Group Captain Walker’s advice on the evening of 7 October, the Committee notes the following points. First, Group Captain Walker told the Committee that he had no ‘auditable evidence that it had happened,’ but:

[t]hat was not to say that it did not happen. It appeared to me that people in a different communication chain had different information, and they obviously had information that they had confidence in.⁷⁶

5.79 In his evidence to Major General Powell’s inquiry, Group Captain Walker conceded that Strategic Command (SCD) was not always confident that it had all the relevant information. He stated:

By the time that it appeared the ‘children’ information was in the public domain, there were a number of rumours that other evidence was abroad. At the SCD level, it was then assumed that Navy, NORCOM, AST or Coastwatch had the fuller picture than our message traffic.⁷⁷

5.80 Second, the Committee notes that neither Group Captain Walker nor Air Vice Marshal Titheridge inserted a caveat in relation to the ‘children overboard’ claim into the options paper prepared at the evening meeting of the PST, although other elements of the Defence information were explicitly caveated.

73 Additional Information and Answers to Questions on Notice, Ms Jane Halton, dated 15 August 2002.

74 *Transcript of Evidence*, CMI 2069.

75 *Transcript of Evidence*, CMI 2071.

76 *Transcript of Evidence*, CMI 1696.

77 Enclosure 1 to Powell Report, Statement by Group Captain Walker.

5.81 Given the nature of Group Captain Walker's cautionary words, the absence of a caveat on this item seems somewhat strange. If Air Vice Marshal Titheridge 'was not given a copy of the draft' options paper, and 'did not see elements of the final document until it was released by Ms Bryant',⁷⁸ then no opportunity to caveat the relevant sentence in the options paper was available to the Defence representatives. This would mean that the lack of a caveat could not properly be used by Ms Halton to justify ignoring Group Captain Walker's advice.

5.82 However, the Committee notes that the Air Vice Marshal's evidence in this regard is contradicted by evidence from both Ms Halton and Ms Edwards.

Strategic Command Chronology

5.83 According to her evidence to the Bryant inquiry, Ms Halton noted the media speculation about the 'children overboard' incident on 8 October and told Defence representatives at the meeting on 9 or 10 October that:

they had better be certain about the veracity of the initial reports and they should do some checking.⁷⁹

5.84 In her evidence before the Committee, Ms Halton confirmed that she had asked this to be done at the meeting of 9 October 2001.⁸⁰ Ms Edwards elaborated on the context of this request, saying that the Social Policy Division had begun seeking more details about the incident from Strategic Command on 8 October following the receipt of Situation Report 59 from the Department of Foreign Affairs and Trade which did not mention children thrown overboard.⁸¹

5.85 Ms Edwards said: 'I can remember being concerned about the lack of mention of children or people being pushed overboard. While it is not unusual for sit reps to be short on the details of events, Ms Halton and I agreed that, in the circumstances, we should follow up to obtain further details of the incident'.⁸²

5.86 Ms Halton told the Committee that she had no memory of seeing DFAT sitrep 59 on that day, and that it was not the lack of mention of children overboard in that document which prompted her to seek further details of the event. From her perspective, she said, 'the trigger point was media reporting'. She noted that: 'It may well have been that the trigger point for her was sitrep 59. In any event, we agreed we should get the detail'.⁸³

78 Answers to Questions on Notice, Department of Defence, Question 49.

79 Enclosure to Bryant Report, Statement by Ms Jane Halton.

80 *Transcript of Evidence*, CMI 901.

81 *Transcript of Evidence*, CMI 1705.

82 *Transcript of Evidence*, CMI 1705.

83 *Transcript of Evidence*, CMI 2061.

5.87 Ms Edwards advised that:

Between 8 October and 10 October my group made vigorous inquiries of Defence, including seeking a full chronology of the events. As I recall, Defence asked that we clear the request with the office of the Minister for Defence, which we did. In response to these requests, Strategic Command forwarded a chronology to the Social Policy Division at lunchtime on 10 October.⁸⁴

5.88 Ms Edwards said that during the afternoon her staff advised her that they felt that there were a number of inconsistencies in the document, which they then pursued with Strategic Command.

5.89 At the end of the chronology, however, there was a series of four bullet points under the heading, 'EVENTS'. The last bullet point, which has also been described as a footnote, said:

There is no indication that children were thrown overboard. It is possible that this did occur in conjunction with other SUNCs jumping overboard.⁸⁵

5.90 Ms Edwards said that she met with Ms Halton later in the afternoon, after the latter had returned from interstate, and just prior to a meeting of the PST that evening. She told the Committee that:

I vividly recall reading out the words of the footnote to her and then handing her the chronology. She indicated some surprise at the wording of the document, as she seemed to be aware of other supporting evidence for the original claims.⁸⁶

5.91 Ms Halton stated that she had 'no memory' of having seen the chronology. She said, however, that she did not doubt Ms Edwards's recollection of briefing her, but that the advice in the chronology would have been overridden, for her, by this 'other supporting evidence'. As Ms Edwards and Ms Halton each explained to the Committee, knowledge of it had just then been supplied to Ms Halton in a telephone call from Minister Reith.⁸⁷

5.92 It consisted of photographs, a video of the incident and witness statements which were being collected from the crew.⁸⁸

5.93 Ms Halton indicated initially that while she was sure it was Mr Reith who had told her about the video, it may have been Air Vice Marshal Titheridge who informed

84 *Transcript of Evidence*, CMI 1705.

85 Enclosure to Bryant Report, 'Strategic Command SIEV 04/01 Sitrep Event Log Christmas Island - starting 06 Oct 01', attached to Statement by Ms Katrina Edwards.

86 *Transcript of Evidence*, CMI 1705.

87 *Transcript of Evidence*, CMI 1048, 955, 2066.

88 *Transcript of Evidence*, CMI 953, 992.

her about the photographs and the witness statements.⁸⁹ However, she noted later that Mr Reith had also informed her in the course of their conversation that he had just given a media interview.⁹⁰ This was the interview at which he had released the photographs. Given that, and given that Air Vice Marshal Titheridge had not by that stage seen the photographs in question, the Committee thinks it reasonable to assume that it was Mr Reith who informed Ms Halton of all three pieces of ‘evidence’ for the claim that children had been thrown overboard.

5.94 The Committee notes that this judgement is also consistent with Ms Edwards’s recollection that, following her conversation with Mr Reith, Ms Halton had sought confirmation not only of the existence of the video, but also of the photographs and the witness statements.⁹¹

Response of PM & C

5.95 On the evening of 10 October, then, Ms Halton and Ms Edwards were faced with two pieces of advice.

5.96 The first was the chronology from Strategic Command Division. The chronology did not rule out the possibility that children had been thrown overboard, but said that ‘there was no indication’ that the incident had occurred. The second was verbal advice from the Minister from Defence, stating that he had three pieces of evidence for the incident and that, by implication, so satisfied was he of their veracity that he had publicly released the photographs.

5.97 Ms Halton emphasised that she did not simply take the Minister at his word. She had not previously heard of the existence of the video, and so she made a number of calls to confirm the Minister’s information on this point. She called Air Vice Marshal Titheridge, Mr Hampton, Mr Hendy and at last Mr Scrafton, who finally confirmed that the video existed.⁹²

5.98 According to Ms Edwards’s sense of Ms Halton’s conversations with members of the Minister’s office, she was advised:

that there was no doubt that the incident had occurred and that a video of the incident existed, although it was of poor quality, that there were photos and that statutory declarations were being gathered from crew members.⁹³

89 *Transcript of Evidence*, CMI 953, 961.

90 *Transcript of Evidence*, CMI 972.

91 *Transcript of Evidence*, CMI 1705. Ms Halton said: ‘I have been told by a minister that certainly there is a video and we know there is uncertainty whether he told me about the photos, but it sounds like he probably did and I think Katrina might actually think that that conversation included a discussion of the photos’. *Transcript of Evidence*, CMI 1049.

92 Enclosure to Bryant Report, Statement by Ms Jane Halton.

93 *Transcript of Evidence*, CMI 1705.

5.99 Questioned about why she had made the decision to trust Mr Reith's verbal advice rather than the more cautious written advice from Strategic Command Division, Ms Halton told the Committee that there were three main reasons.

5.100 The first was her sense that, if the Strategic Command advice had been really important, someone would have contacted her directly about it. She pointed out repeatedly that the advice appeared as a 'footnote' on a fax sent to 'a junior officer',⁹⁴ which was not accompanied by a telephone call to her,⁹⁵ or a 'red light flashing and a warning bell problem type alert'.⁹⁶ She said that if Defence had really intended to inform the PST of problems with the children overboard report:

You do not go to a junior officer in the social policy division by fax with no follow-up phone calls ... If you have an issue of substantial concern in relation to what was going on in this context, you pick up the phone and ring me or, if you cannot find me, you ring Katrina Edwards. This did not happen.⁹⁷

5.101 The Committee notes that this so-called 'junior officer' was a member of Ms Edwards's Social Policy Division who had been specifically tasked with seeking further advice on the children overboard report from the Strategic Command Division.

5.102 The second reason Ms Halton gave for discounting the Strategic Command advice at this time was her view, evident in the discussion about Group Captain Walker's advice, that Strategic Command did not necessarily have the most up to date information from the chain of command. The third was that at the meeting of the PST that same evening, no one demurred from the view that it had been established that children had been thrown overboard.

5.103 Elaborating on both these points, Ms Halton said:

we were advised by senior people who were, as best you could tell, more connected to the actual day-to-day operations of this whole process, that there was ... documentary evidence ... and that comprised the photographs.

The photographs were then duly published ...the simple reality is that people who were more intimately involved with this than Strategic Command told us there was a video, there were photos - which then duly emerged - and there were witness statements. Not only did we do that, but our interpretation of the facts of the case was put in front of the evening meeting of the 10th. Those facts were not denied.⁹⁸

94 *Transcript of Evidence*, CMI 941, 942, 943.

95 *Transcript of Evidence*, CMI 943.

96 *Transcript of Evidence*, CMI 953.

97 *Transcript of Evidence*, CMI 945.

98 *Transcript of Evidence*, CMI 957; see also *Transcript of Evidence*, CMI 941, 953, 958, 984.

5.104 The Committee notes, first, that Ms Halton was mistaken in advising the Committee that the Defence representative at that meeting was Air Vice Marshal Titheridge.⁹⁹ The Defence attendee was actually Commander Paul Davies from Strategic Command, whose first and only meeting of the PST this was.¹⁰⁰ The Committee has some concerns about whether Commander Davies would actually have been in a position to confirm or call into question any presentation of the ‘facts’ as then known.

5.105 It is also not clear to the Committee just how explicitly the issue was canvassed in the PST meeting on 10 October. There are no records of such a discussion in the notes of the meeting,¹⁰¹ but Ms Edwards, the notetaker, told the Committee that she had been called away to a telephone call ‘for at least a substantial initial period of that meeting’.¹⁰² She informed the Committee that it was possible that the discussion had taken place while she was absent.

5.106 The Committee notes, however, that the talking points provided to the meeting on 10 October 2001 were derived from the Strategic Command chronology.¹⁰³ They referred to ‘15 suspected unauthorised arrivals’ who ‘either jumped or were thrown overboard’, but made no reference to children thrown overboard.¹⁰⁴ If the ‘facts’ of the children overboard story were presented and agreed at the meeting, then they certainly were not highlighted in the material prepared for subsequent public consumption. These talking points were provided to Mr Miles Jordana, International Adviser to the Prime Minister, and, at Ms Halton’s direction, to staff in the office of Minister Ruddock, Mr Ross Hampton in the office of Minister Reith and to Minister Downer’s office.¹⁰⁵

5.107 Finally, the Committee notes that the photographs which were ‘duly published’ depicted two women and a girl in the water,¹⁰⁶ but that Ms Halton recalled being told that ‘We didn’t think any women had gone in’.¹⁰⁷ She explained that she ‘tended to ask whether any women or girls had gone in the water’, because she knew that ‘most of these women wear the hajib or something of that sort. The notion that

99 *Transcript of Evidence*, CMI 984.

100 Notes, High Level Group - 10 October 2001, 6pm.

101 Notes, High Level Group - 10 October 2001, 6pm.

102 *Transcript of Evidence*, CMI 1739.

103 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 3.

104 Mr John Drury, Deputy Chief Executive Officer, Australian Customs Service, emphasised this point in his evidence to Ms Bryant. See Enclosures to Bryant Report, Statement by Mr John Drury.

105 PM & C Emails requested by the Senate Select Committee on a Certain Maritime Incident, No. 75.

106 Transcript of the Hon. Peter Reith MP Radio Interview with Virginia Trioli, Melbourne Radio 3AK, 10 October 2001.

107 *Transcript of Evidence*, CMI 1001.

somebody who is unlikely to swim ... and the notion of ending up in the water wearing a full hajib caused me some concern'.¹⁰⁸ She remarked too that she believed that the child or children thrown overboard were male: 'The impression I had was of no girls and no women'.¹⁰⁹

5.108 It might be argued that the contradiction between Ms Halton's 'impression' of who was in the water and what the photographs depicted should have led her to interrogate the veracity of the pictures released by Mr Reith.

5.109 Nevertheless, the Committee notes both that Strategic Command never returned to the PST with definitive advice overturning the report that children had been thrown overboard, and that Ms Halton was advised positively and directly by the Minister for Defence that he had evidence to support the claim.

5.110 The Committee is aware that officers from PM & C had had to seek permission from the office of the Minister for Defence to pursue their earlier inquiries with Strategic Command.¹¹⁰ It would presumably have been very difficult for Ms Halton's division tacitly to register its scepticism of Mr Reith's advice by continuing such investigations.

5.111 The Committee considers that the chronology provided by Strategic Command Division to PM & C should have sounded a significant warning note in relation to the sustainability of the original report that children had been thrown overboard.

5.112 The Committee is satisfied that its significance was appreciated by Ms Edwards, and that it was properly brought to the attention of Ms Halton.

5.113 The Committee notes Ms Halton's evidence that 'I did not see the chronology; I did not receive it'.¹¹¹ However, the Committee also notes that the talking points prepared on 10 October in PM & C were based on that Strategic Command chronology. Those talking points were provided to PST members at the meeting on 10 October and, according to Ms Edwards, were sent that evening to Mr Miles Jordana, international adviser to the Prime Minister.¹¹²

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

108 *Transcript of Evidence*, CMI 1001.

109 *Transcript of Evidence*, CMI 1001.

110 *Transcript of Evidence*, CMI 1705.

111 *Transcript of Evidence*, CMI 2066.

112 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 3.

5.115 Nevertheless, the Committee acknowledges that, in the face of the direct advice from the Minister for Defence to Ms Halton and in the absence of any more positive advice from the Defence department itself, Ms Halton was placed in a position from which it would have been difficult, and perhaps seemingly redundant, to seek further clarifying advice.

5.116 In the next chapter, the Committee will discuss the extent to which Mr Reith may be said to have knowingly misled Ms Halton at this time.

Advice from Commander King

5.117 The final piece of advice that came directly from Defence to the Department of the Prime Minister and Cabinet related to the misrepresentation of the photographs.

5.118 On 9 October 2001, Strategic Command Division sent the email of the two photographs taken from the sinking of SIEV 4 on 8 October to Commander Piers Chatterton, Director of Operations, Navy. Commander Chatterton told the Committee that the reason for him getting the pictures was that he was ‘the point of contact for Strategic Command Division inside Navy headquarters at staff level, and the officer sending me those pictures would know that I would be the person to pass them on to the appropriate person within Navy headquarters’.¹¹³

5.119 Commander Chatterton assessed that the photographs depicted ‘a good news story of RAN sailors doing a courageous and brave act and that this was a public relations matter’.¹¹⁴ He duly sent them to Mr John Clarke, Strategic Communications Adviser to the Chief of Navy.¹¹⁵

5.120 On 10 October, Commander Chatterton saw that the photographs were being portrayed on television as evidence of the report that children had been thrown overboard on 7 October, rather than as pictures of the rescue of passengers during the sinking of SIEV 4 on 8 October.¹¹⁶

5.121 On 11 October 2001, Commander Chatterton advised Mr Clarke of the error.¹¹⁷ He also advised Commander Stefan King, who was then, according to Commander Chatterton, the Defence Force Liaison Officer in PM & C.¹¹⁸ Commander Chatterton told the Committee that he thought it was appropriate for him to pass this information to Commander King for the following reason:

113 *Transcript of Evidence*, CMI 1162.

114 *Transcript of Evidence*, CMI 1162.

115 *Transcript of Evidence*, CMI 1162.

116 *Transcript of Evidence*, CMI 1162.

117 *Transcript of Evidence*, CMI 1163.

118 *Transcript of Evidence*, CMI 1163.

I believed that he should be made aware of that information, as it involved Defence and high profile activity which was occurring that involved the political level at which he was the liaison officer. That is why I gave him that information.¹¹⁹

5.122 Commander King in turn expressed the view that he considered that the advice passed on by Commander Chatterton to him ‘was a briefing by a relevant person for a relevant purpose’.¹²⁰

5.123 Accordingly, also on 11 October, he passed on the advice to his immediate supervisor in PM & C’s Defence Branch, International Division, Ms Harinder Sidhu, and they together informed their branch head, Dr Brendon Hammer.¹²¹

Response of PM & C

5.124 It became clear in evidence to the Committee, that Commander King had a very different sense of the weight to be attached to the information than did his supervisors in PM & C.

5.125 In part, this appears to have been the result of the fact that, while Commanders Chatterton and King considered Commander King to have a liaison function between the departments of Defence and PM & C,¹²² Ms Sidhu and Dr Hammer considered him to be a ‘seconded’ to the Department of the Prime Minister and Cabinet with no formal liaison role.¹²³

5.126 Dr Hammer observed before the Committee that:

I gather from the testimony that has come before this committee that that [liaison officer] is the designation of his position within the Department of Defence, but within the Department of the Prime Minister and Cabinet he is a secondee from the Defence organisation. He has no formal role in liaison with Defence ... For the period of his secondment he was a line member of my branch, very much like any other member of the branch.¹²⁴

5.127 For this reason, according to Dr Hammer, he did not consider Commander King to be a ‘special’ or ‘formal’ conduit of information from Defence to PM & C, nor to be the appropriate person through whom information of this kind, were it true, would be conveyed.¹²⁵

119 *Transcript of Evidence*, CMI 1166.

120 *Transcript of Evidence*, CMI 1491.

121 *Transcript of Evidence*, CMI 1491-1492.

122 *Transcript of Evidence*, CMI 1491.

123 *Transcript of Evidence*, CMI 1550, 1856.

124 *Transcript of Evidence*, CMI 1856-1857.

125 *Transcript of Evidence*, CMI 1857, 1812.

5.128 Ms Sidhu described her sense of what had been conveyed to her by Commander King in the following terms:

I was informed by Commander Stefan King ... that he had just returned from an interdepartmental meeting at Strategic Command in Defence regarding Operation Slipper. He said to me that, in the margins of the meeting, he had overheard a conversation between other Defence officials regarding the SIEV 4 incident. He said the nature of the discussion was that the photographs which had been published in the media depicting the 'children overboard' incident were not of the alleged incident; rather they had been taken a day later when the Navy was conducting a rescue of asylum seekers once their boat had sunk into the water.¹²⁶

5.129 In a similar vein, Dr Hammer told the Committee that Commander King had advised him that:

'I have heard there is a rumour circulating over in Defence that there is something wrong to do with the timing of the photographs in relation to children being thrown overboard' ... I recall thinking, 'Another rumour from Defence - I wonder what this is about'. There was no reason at that time to expect that there was anything unreasonable, false or what have you about the photographs. I did not have any indication from anywhere that there was a difficulty with the photographs, and I was a bit intrigued that I was even being bothered, frankly, with a rumour - through an entirely inappropriate channel, incidentally - about something that I did not have within my area of responsibility.¹²⁷

5.130 Dr Hammer said that he assumed that if there was anything in the 'rumour' then it would be passed 'through the proper, appropriate and predetermined channels for liaison between Defence and PM & C on people-smuggling and illegal immigration'.¹²⁸ That is, he assumed that it would be passed to Ms Halton by the Defence representatives on the PST. Accordingly, he determined that he did not need to do anything with the information. His thoughts, he said, were: 'This is not a significant input in that it is a rumour and that it is coming through a junior officer and through the wrong channel'.¹²⁹ This was where the matter rested until 7 November 2001.

5.131 On the evening of November 7, an officer from the Social Policy Division, Ms Catherine Wildemuth spoke to Ms Sidhu, seeking any information held by the Defence Branch on SIEV 4. As they were searching for that information on her computer, Ms Sidhu repeated Commander King's information.¹³⁰ According to Ms

126 *Transcript of Evidence*, CMI 1550.

127 *Transcript of Evidence*, CMI 1805-1806.

128 *Transcript of Evidence*, CMI 1806.

129 *Transcript of Evidence*, CMI 1806.

130 *Transcript of Evidence*, CMI 1550.

Sidhu, what she said ‘was practically a throwaway comment: “Haven’t you heard there are rumours circulating in Defence that the photographs are not actually as they have been presented?”’¹³¹

5.132 Ms Wildemuth, however, seemed shocked and surprised by the comment,¹³² and passed it on straightaway to her supervisor, Ms Bryant. Despite the fact that Commander King’s information was by now being characterised as ‘tearoom gossip’, Ms Bryant contacted Ms Halton who immediately rang Mr Miles Jordana, international adviser to the Prime Minister.¹³³ Ms Halton told the Committee that:

I still have quite a strong memory of that phone call and I have a memory of thinking there was something out of Defence yet again I did not know about ... I did what I had always done right throughout this process and that is immediately pass the information on. Again, I have a clear memory of ringing Mr Jordana about that and saying to him, ‘Jenny Bryant’s just told me this piece of gossip’. He said to me ... that this issue had already been canvassed in the papers and that they were having a discussion with Mr Reith’s office and ... the issue was in hand.¹³⁴

5.133 After her conversation with Mr Jordana, Ms Halton said she ‘had the clear impression that the matter was in hand. I had a clear impression that it was being dealt with and I did not need to worry about it’.¹³⁵

Dr Hammer’s response to initial advice

5.134 The Committee’s evaluation of the responses of Ms Sidhu and particularly of Dr Hammer to Commander King’s advice is as follows.

5.135 First, the Committee acknowledges that this issue did not fall directly within Dr Hammer’s area of responsibility and that he was extremely busy with other matters.¹³⁶ Second, the Committee acknowledges that Dr Hammer could reasonably have expected the information, if it were true, to be passed directly from the high level Defence representatives on the PST to Ms Halton. The Committee will address what was clearly a failure of communication from Defence at that level in the next chapter.

5.136 Certainly, with the benefit of hindsight, it is clear that an email from Dr Hammer to Ms Halton may have led to the misrepresentation of the photographs being corrected almost immediately. The Committee accepts, nevertheless, that although it is easy with the benefit of hindsight to say that Dr Hammer ‘ought’ to have passed the advice on, this was a judgement that may have not been obvious at the time.

131 *Transcript of Evidence*, CMI 1563.

132 *Transcript of Evidence*, CMI 1564-1566.

133 *Transcript of Evidence*, CMI 902.

134 *Transcript of Evidence*, CMI 1023.

135 *Transcript of Evidence*, CMI 1023

136 *Transcript of Evidence*, CMI 1806 and passim.

5.137 However, the Committee also notes the following points:

- Commander King was a serious and conscientious officer who, according to Ms Sidhu, never acted inappropriately and ‘was more inclined to err on the side of caution and seek advice on how to proceed before saying or doing anything’;¹³⁷
- Commander King and Ms Sidhu mutually agreed that the report or rumour was at least potentially significant, or potentially forming, in Ms Sidhu’s words, ‘part of a larger story’;¹³⁸
- Dr Hammer agreed that sometimes even reports characterised as rumours or as informal advice do turn out to be significant.¹³⁹

5.138 In the light of these points, the Committee is concerned about what seems to have been the *mode* of Dr Hammer’s judgement that he need take no responsibility for passing on or verifying the information. It is a mode which also characterised Ms Halton’s dismissal of the weight that should be attached to the Strategic Command chronology.

5.139 The Committee is referring to Dr Hammer’s consistent use of descriptors such as ‘rumour’, ‘junior officer’, ‘scuttlebutt’,¹⁴⁰ and ‘unreliable channel’ as justification for not taking the advice seriously. Similarly, Ms Halton speaks of the advice from Strategic Command being faxed to a ‘junior officer’, although he is an officer tasked with seeking just that advice, of the ‘footnote’ and ‘tearoom gossip’.

5.140 The Committee is unsure about whether this mode is adopted by way of retrospective justification of judgements made, or whether it infuses the making of the judgements themselves, but in either case it could lead to failures to take advice from other individuals or agencies sufficiently seriously.

5.141 The Committee considers that the use of this language unfairly denigrates the officers to whom it is applied.

Ms Halton’s response to ‘tearoom gossip’

5.142 Ms Halton was asked whether she should have done more to verify the content of the ‘rumour’ about the misrepresentation of the photographs, which she first heard on November 7.¹⁴¹

5.143 Although she passed the information on to the Prime Minister’s office, she did not embark on her own investigation of the truth of this significant matter. Senator Faulkner asked:

137 *Transcript of Evidence*, CMI 1760.

138 *Transcript of Evidence*, CMI 1764.

139 *Transcript of Evidence*, CMI 1864.

140 *Transcript of Evidence*, CMI 1806.

141 *Transcript of Evidence*, CMI 1025.

to what extent was it important for you to follow up with whomever - and not just with Mr Jordana, a member of the Prime Minister's staff who at a minimum had an absolute axe to grind three days out from an election - to ensure that the public record was corrected?¹⁴²

5.144 In response, Ms Halton noted that, by the time it reached her, the 'gossip' was sixth or seventh hand. Once she knew, she said, that a spokesman for the responsible minister, namely Mr Reith, had denied the report, she was satisfied that there was no truth to it.¹⁴³

5.145 It is to the role of Mr Reith and his office in sustaining the original report of children overboard that the Committee now turns.

142 *Transcript of Evidence*, CMI 1025.

143 *Transcript of Evidence*, CMI 1026.

Chapter 6

The Failure to Correct the Record

My German engineer very argumentative and tiresome. He wouldn't admit it was certain that there was not a rhinoceros in the room.¹

Introduction

6.1 The aim of this chapter is to analyse the factors which led to the failure to correct the record publicly in relation to the 'children overboard' story, prior to 10 November 2001. The chapter is in three parts.

6.2 The Committee begins by examining the role played by Mr Reith and his staff in sustaining the original mistaken report and the photographs as evidence for it. It goes on to canvass briefly the evidence which is available concerning the knowledge of the office of the Prime Minister of the amended advice from Defence.

6.3 Finally, the Committee assesses whether, in its view, officers of the Defence organisation could have done more to ensure that the record was corrected prior to the election on 10 November. That assessment will form the framework for a broader discussion, in the following chapter, of the lessons to be learned from this episode in relation to public administration and accountability in Australia.

Role of Minister for Defence and his Office

6.4 The actions taken by Mr Reith and his staff in their attempt to confirm and sustain the original report that children were thrown overboard from SIEV 4 may be divided into three phases, as follows:

- the search for confirmation, 7 to 11 October;
- response to advice relating to the photographs on 11 October; and
- response to advice from Air Marshal Houston on 7 November.

6.5 In considering these actions and the reasons for them, the Committee is hampered by the fact that none of the individuals concerned chose to give evidence to its inquiry, despite numerous requests that they do so. In the following discussion, therefore, the Committee relies upon the statements that each made to Ms Bryant's inquiry, upon the evidence of others involved in relevant discussions and upon the public record.

1 Bertrand Russell speaking of Wittgenstein in a letter to Lady Ottoline Morell, 1 November 1911.

The search for confirmation

6.6 The search for details of the ‘children overboard’ incident began almost as soon as the Minister was first informed of it.

6.7 The watchkeeper from Strategic Command Division (SCD), Flight Lieutenant Jason Briggs, informed Ms Bryant that Mr Ross Hampton, the Minister’s media adviser, had rung him on the morning of Sunday 7 October asking for any information on children being thrown into the water.²

6.8 At this stage, Flight Lieutenant Briggs said he had never heard of Mr Hampton and told him that he could not provide the information requested. He directed Mr Hampton to contact the Defence Liaison Officer in the Minister’s office. Subsequently, the Head Strategic Command (HSC), Air Vice Marshal Titheridge, called the watchkeeper authorising him to provide Mr Hampton ‘with a run down of what was happening on SIEV 4’.³

6.9 Flight Lieutenant Briggs then told Mr Hampton that there was no information on children being thrown into the water. ‘Soon after that’, he told Ms Bryant, ‘Group Captain Walker ... returned from the IDC meeting and asked the same question’.⁴ Again the watchkeeper checked all the written material, and then contacted Australian Theatre to ask if they had any information about the incident. They did not.

6.10 In response to demands from Mr Hampton, however, Flight Lieutenant Briggs began to compile faxes for him paraphrasing the situation reports from HMAS *Adelaide*. He stated that: ‘Each fax was sent in response to one or more calls from Mr Hampton’. He further noted that:

When there was an apparent lag in the flow of information, Mr Hampton had complained. Flight Lieutenant Briggs stated that at this point he had told Mr Hampton that no faxes had been sent because there was no information worth telling him - particularly, nothing that he did not already know, judging by the conversation ... Mr Hampton had seem agitated and quite angry at times, saying that he was under pressure from media outlets to meet their publication deadlines.⁵

6.11 The Committee notes that faxes were sent to Mr Hampton from Strategic Command at 2.00pm, 2.15pm, 7.15pm and 8.10pm on 7 October, and at 5.20pm on 8 October 2001.⁶ None of the faxes refer to children in the water.

2 Enclosure to Bryant Report, Statement by Flight Lieutenant Jason Briggs.

3 Enclosure to Bryant Report, Statement by Flight Lieutenant Jason Briggs.

4 Enclosure to Bryant Report, Statement by Flight Lieutenant Jason Briggs.

5 Enclosure to Bryant Report, Statement by Flight Lieutenant Jason Briggs.

6 Enclosure 1 to Powell Report, Statement by Group Captain Steven Walker.

6.12 On 10 October, prior to the release of the photographs to the media, Mr Hampton again sought detailed information about the incident, this time from Public Affairs and Corporate Communication. As outlined in the previous chapter, both Captain Belinda Byrne and Brigadier Gary Bornholt told Mr Hampton that Strategic Command had no evidence that any of the fourteen SUNCs who entered the water on 7 October were women or children.

6.13 Finally on 11 October, a message reached Rear Admiral Ritchie via Maritime Command and NORCOM, that Mr Hampton wanted to speak directly to CO *Adelaide* about the ‘children overboard’ incident. Rear Admiral Ritchie refused permission for him to do so, and directed instead that the witness statements from HMAS *Adelaide* be collected and forwarded up the chain of command.⁷

6.14 Over the same period, Mr Scrafton also sought further information and confirmation of the ‘children overboard’ report.⁸ At about 9.30am on 10 October, he rang Rear Admiral Ritchie about the matter, and at 12.42pm Rear Admiral Ritchie telephoned back with his advice.⁹

6.15 As outlined in the previous chapter, Rear Admiral Ritchie told Mr Scrafton that there was as yet no evidence available to support the report that children had been thrown overboard. However, CO *Adelaide* had said that ‘he had reports of sailors on the camera’s disengaged side picking up children from the water’,¹⁰ so Rear Admiral Ritchie thought that the original report might be confirmed by witness statements which were in the process of being taken from the crew.

6.16 On the afternoon of 10 October, Mr Reith gave an interview on ABC radio. In this interview, he produced the photographs as evidence of the report that children had been thrown overboard, noting that they depicted women and children as well as one man in the water. He also said:

I have subsequently been told that they have also got 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. So do you still question it?¹¹

7 *Transcript of Evidence*, CMI 353, 393.

8 Enclosure to Bryant Report, Statement by Mr Mike Scrafton.

9 *Transcript of Evidence*, CMI 370.

10 Enclosure 1 to Powell Report, Statement by Rear Admiral Chris Ritchie; *Transcript of Evidence*, CMI 370-371.

11 Transcript of the Hon. Peter Reith MP Radio Interview with Virginia Trioli, Melbourne Radio 3AK, 10 October 2001.

6.17 Later that same afternoon, Mr Reith took the relatively unusual step of telephoning Ms Jane Halton, Chair of the People Smuggling Taskforce.¹² He told her that he had just released photographs, which were evidence of the children overboard incident, and that there was a video and witness statements from the crew which supported the original story.¹³

6.18 This telephone call occurred at the end of the day during which officers from Ms Halton's Social Policy Division had been seeking evidence for the report of children thrown overboard from Defence's Strategic Command Division. In response to these inquiries, Strategic Command had provided a chronology of events which said there was 'no indication' that children were thrown overboard, although it conceded that it may have happened in conjunction with other SUNCs jumping overboard.¹⁴

6.19 As discussed earlier, Ms Halton said that this information was not acted upon 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 were collecting witness statements'.¹⁵

6.20 The Committee notes that at the time of Mr Reith's telephone call to Ms Halton, Mr Scrafton had been informed that the video did not show children being thrown overboard, although he had been told that it showed a 13 year old being 'pushed'. No one knew what the witness statements would contain, but simply that at best they 'may' corroborate the original report. In relation to the photographs, Mr Hampton had been left a message, which he claims that he never got, telling him that they were being connected to the wrong events. He had certainly been told that there were doubts attaching to their veracity.

Conclusion

6.21 Although by 11 October the Minister and his staff had not been told unequivocally that the original report of children thrown overboard was incorrect, each of their numerous inquiries had been met with the advice that there was not any evidence to support the claim.

6.22 Despite this lack of evidence and in the face of public and official questioning of the allegations, the Minister confirmed the veracity of the original report in the media and advised Ms Halton, the senior official responsible for the whole-of-government management of 'border protection' issues, that he had evidence which backed up the claim.

12 Ms Halton said that she 'had very few conversations with Mr Reith'. *Transcript of Evidence*, CMI 1033.

13 *Transcript of Evidence*, CMI 953, 992.

14 *Transcript of Evidence*, CMI 902.

15 *Transcript of Evidence*, CMI 902.

6.23 The Committee is struck by the minister's keenness to persist with the original story in the face of repeated advice that there was no evidence available to corroborate it. The original report was extremely useful politically to a government making much of its tough stance on border protection.

6.24 It is interesting to contemplate what might have been the minister's approach if he had been presented with a report that served to work *against* the government's view. Would the minister have persisted with such a report if there had been no evidence to corroborate it? On the contrary, it seems highly likely that he would have been emphatic that the absence of corroborating evidence was an excellent reason for dismissing the original report. If the original report had been 'inconvenient', would the minister's office have sought so assiduously to pursue the evidence behind it?

Response to advice relating to the photographs on 11 October

6.25 On the morning of 11 October, Mr Scafton and Mr Reith were each informed that the photographs released the previous day had been connected to the wrong events.

6.26 Ms Bryant questioned both men, as well as Mr Hampton and Mr Hendy, about their response to that advice. In particular, she sought to understand why there had been no public retraction of the claim that the photographs were evidence for the 'children overboard' incident on 7 October.

6.27 The explanation appears to be in two parts. First, the Minister and at least some of his staff convinced themselves that there was doubt about the veracity of the correction itself. Second, no one took responsibility for the integrity of the public record.

Doubting the veracity of the correction

6.28 Mr Reith said that the doubts raised about the photographs on 11 October 'were themselves contradictory'. He noted:

that one doubt was based on the 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.¹⁶

6.29 Mr Hampton and Mr Hendy also spoke of doubt being cast on the advice concerning the misrepresentation of the photographs because of timing issues. Mr Hendy said that he recalled being told that the Department's reason for doubt 'was that the children overboard incident had occurred at night but the photos were clearly taken in daylight'.¹⁷

16 Enclosure to Bryant Report, Statement by Mr Peter Reith.

17 Enclosure to Bryant Report, Statement by Mr Peter Hendy.

6.30 When Mr Scrafton found the ship's log of the event and ascertained that the event had occurred after sunrise, then, according to Mr Hendy:

The Department had been told they needed a better reason for doubt, and were told to check and come back.¹⁸

6.31 Mr Hampton gave a similar account of the reason for doubting the advice, despite the fact that on 11 October he had obtained a copy of the original email with the photographs, correctly captioned and dated.¹⁹

6.32 He said that Defence had advised that the photographs could not be from the overboard incident, as that had been captured on infra-red camera in darkness. Since the office established that the overboard incident occurred after dawn, they still thought that the photographs could be of that event.²⁰ Moreover, Mr Hampton also thought that the sinking occurred in darkness, so the photographs could not be of that incident.

6.33 When Ms Bryant asked Mr Hampton about the significance of the dated captions, he said that:

I acknowledge the email received by myself on Oct 11 had accompanying text to the two photos which *at face value* placed the photos at the sinking incident. I believe I passed that email on to the Minister and Mike Scrafton. The difficulty the Minister had however was that information was also coming to the office saying that the photos must have been wrong because they were taken during night hours. That was quickly proven incorrect and doubt was therefore cast on the email author as well... [emphasis added]²¹

6.34 Mr Hampton also said that:

One must remember that all the information supplied to the Government to this point from various quarters had been in support of the allegation that children were thrown overboard and that these photos depicted this event.²²

6.35 The Committee notes, first, that the sinking of SIEV 4 occurred late in the afternoon (in daylight) and that all the SIEV's passengers were embarked on the *Adelaide* prior to sunset.²³ Thus, Mr Hampton's claim that the sinking occurred at night and that the photographs could not be of that incident is incorrect. Further, the Committee notes that, as outlined in the previous section, *no* information apart from

18 Enclosure to Bryant Report, Statement by Mr Peter Hendy.

19 He obtained these 'under duress' from Mr John Clarke, as a result of a phone call which, according to Mr Clarke, was aggressive and demanding. Enclosure to Bryant Report, Statement by Mr John Clarke.

20 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

21 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

22 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

23 See Enclosure 2 to Powell Report, HMAS *Adelaide* SIC I3M dated 081052Z Oct 01, Sitrep 25.

the initial report had been supplied to Government ‘in support of the allegation that children were thrown overboard’.

6.36 According to Ms McKenry and Brigadier Bornholt, they did not raise the issue of the timing of the incident as a reason for doubting the veracity of the photographs, nor did their discussion with Mr Scrafton touch in any way on the ‘infra red video’.²⁴ As Ms Bryant pointed out in her report:

It is ... difficult to understand how, given that both incidents clearly 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.²⁵

6.37 Like Ms Bryant, the Committee was unable to establish which area, if any, in Defence had provided the advice that the misrepresentation of the photographs was proven with reference to ‘timing’ issues. Given as well the lack of any coherence attaching to a discussion about ‘timing’ as a factor that would settle things one way or another, the Committee regards the attempts by the minister and his staff to introduce such a consideration is simply an attempt to further muddy the waters. Neither Ms McKenry nor Brigadier Bornholt were asked to do any further checking of the photographs.²⁶

Refusal of responsibility

6.38 The Committee notes that, Mr Scrafton, who spoke directly with Ms McKenry and Brigadier Bornholt, did not raise the timing ‘problem’ as the reason for not acting on the correction they provided. However, nor did he take any responsibility for ensuring that the record was corrected.

6.39 Mr Scrafton stated in evidence to Ms Bryant that he had discussed the PACC advice with Mr Hampton. However:

Mr Scrafton 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.

Mr Scrafton said that he was aware of some discussion of retraction within the office (including between Mr Hampton and Mr Hendy). However, he

24 Enclosure to Bryant Report, Statements by Ms Jenny McKenry and Brigadier Gary Bornholt.

25 Bryant Report, p.41.

26 Enclosure to Bryant Report, Statements by Ms Jenny McKenry and Brigadier Gary Bornholt.

noted that it was a political issue and that therefore Mr Scafton was not involved in any decision making.²⁷

Mr Scafton said that in his assessment, there was a judgement made that the photographs had been quite widely distributed on the Restricted [Defence email] system and were available to a large number of people. He considered that the political solution was 'not to raise' the issue. He was not sure if Mr Reith had been party to these judgements.²⁸

6.40 Mr Hampton said that Mr Scafton, not he, was involved in the discussion about a possible retraction:

Ms Bryant asked if the Minister's office had considered issuing a retraction or correction. Mr Hampton stated that at that stage it was between the Minister, Mr Hendy and Mr Scafton, and that he couldn't comment on what consideration, if any, was given to a retraction.²⁹

6.41 Mr Hendy said that 'they never got a clear answer on whether or not the photos were from the sinking'. Questioned about the email advice from Ms McKenry which included the dated captions, Mr Hendy said that 'people were not as clear cut in their oral advice'. He noted 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.³⁰

6.42 According to Mr Hendy, the email advice from Ms McKenry 'did not provide conclusive advice', because in view of the mistakes made by Defence in providing information an 'independent inquiry would be necessary to get to the facts' and 'PACC [would be] among the people under investigation'.³¹

6.43 Finally, Mr Reith himself stated that it was not that he 'made the decision not to change the public record', because that implied that he accepted that the photographs had been misrepresented. Rather, he said, 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'.³²

6.44 On 14 October 2001, three full days after having been advised of the misrepresentation of the photographs by CDF and by Ms McKenry and Brigadier

27 Note that Mr Scafton advised earlier in his statement that he was a senior adviser responsible for 'Defence business', and was not a political staffer.

28 Enclosure to Bryant Report, Statement by Mr Mike Scafton.

29 Enclosure to Bryant Report, Statement by Mr Ross Hampton.

30 Enclosure to Bryant Report, Statement by Mr Peter Hendy.

31 Enclosure to Bryant Report, Statement by Mr Peter Hendy.

32 Enclosure to Bryant Report, Statement by Mr Peter Reith.

Bornholt, Mr Reith appeared on the Sunday Sunrise program. Asked why he had released the photographs, but not the video, of the so-called ‘children overboard’ incident, he replied that he had not 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.³³

Conclusion

6.45 The Committee is extremely disturbed by the lack of responsibility that was taken by the Minister and his staff for the integrity of the public record.

6.46 Mr Scrafton took no responsibility for ensuring that the Minister was made aware of the advice concerning the misrepresentation of the photographs from Defence. Neither he nor Mr Hampton took responsibility for advising the Minister of the need for a retraction of the claim that the photographs were evidence of the children overboard report. Mr Hendy justified the Minister’s refusal to correct the record by claiming that PACC itself needed to be investigated, and Mr Reith continued to make public comments that may have been technically correct but were blatantly misleading.

6.47 Given that neither Ms McKenry nor Brigadier Bornholt were asked to do any further checking on the photographs, the Committee concludes that the quibbling about the timing ‘problem’ was not only illogical, but also a convenient rationalisation by means of which the Minister and his staff absolved themselves of any obligation either to correct the record or definitively to establish the truth of the matter.

Response to advice from Air Marshal Houston

6.48 On about 17 October, Admiral Barrie told the Minister that there were serious doubts about the veracity of the original report that children had been thrown overboard.³⁴ However, as discussed in the previous chapter, Admiral Barrie virtually guaranteed Minister Reith immunity in relation to the claims, saying that he would stand by the original report until someone produced what he considered to be ‘conclusive’ advice to the contrary.

6.49 On 7 November, the then acting CDF, Air Marshal Houston, advised the Minister that in his view ‘there was nothing to suggest that women and children had been thrown into the water’.³⁵ He also told the Minister that the photographs that had been released were of the sinking the day after the alleged event and that the video, while inconclusive, provided no support for the report of children overboard.

6.50 The next day, Vice Admiral Shackleton made his comments to the media.

33 Transcript of interview, Sunday Sunrise, 14 October 2001.

34 *Transcript of Evidence*, CMI 742.

35 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.76.

6.51 The response from Mr Reith and his office was again twofold. First, they either denied or denied responsibility for the advice. Second, they attempted to set up a smokescreen.

Denial of advice

6.52 Mr Reith wrote in his statement to the Powell inquiry that:

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.³⁶

6.53 Mr Hampton said that he had never received any advice that the event had not occurred. Mr Hendy said that:

for most of the period it was still the case (at least for him) that they had been advised that children had been thrown and that this was a fact. He said that he had heard some gossip (*mostly* subsequent to the election) but had never received further advice about whether or not the incident had occurred [emphasis added].³⁷

6.54 Mr Scrafton also said that ‘he had never been formally advised that it wasn’t true’. However:

he noted that he obviously spent time talking to people from the Department and got the feeling that the claims may not have been correct.³⁸

6.55 Despite this ‘feeling’, Mr Scrafton, so far as the Committee is aware, did nothing to ascertain the truth of the matter nor did he suggest to others in the Minister’s office that this would be the correct course to take.

Smokescreen

6.56 Air Marshal Houston said that, following the ‘stunned silence’ with which Mr Reith greeted his advice, the Minister said, ‘Well, I think we’ll have to look at releasing the video’.³⁹

6.57 Mr Reith asked Mr Scrafton to view, on 7 November, the copy of the video held at Maritime Command in Sydney. Mr Scrafton said that ‘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’.⁴⁰

36 Enclosure 1 to Powell Report, Statement by Mr Peter Reith.

37 Enclosure to Bryant Report, Statement by Mr Peter Hendy.

38 Enclosure to Bryant Report, Statement by Mr Mike Scrafton.

39 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.76.

40 Enclosure to Bryant Report, Statement by Mr Mike Scrafton.

6.58 The Prime Minister spoke to Mr Scafton ‘a couple of times that evening about the tape’, and was informed that the video ‘was inconclusive’. The tape was nevertheless released the next day, on 8 November, with no accompanying publication of Air Marshal Houston’s advice. The Chief and Deputy Chief of Navy were advised by the Acting CDF, 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’.⁴¹

6.59 Later on 8 November, Mr Hendy contacted Vice Admiral Shackleton about correcting or ‘clarifying’ his remarks insofar as they ‘appeared to contradict the Minister’ by implying that the Minister had not originally been told that children had been thrown overboard.

6.60 Telling the Committee of his conversation with Mr Hendy, the Vice Admiral said:

In talking to Hendy, I gained a strong impression that he had not been told that the original report was incorrect, and this came as a surprise to me.⁴²

6.61 Because it has been unable to question the relevant witnesses about the information flows within the Minister’s office, the Committee is not in a position to judge whether Mr Reith ever apprised Mr Hendy of Air Marshal Houston’s advice.

6.62 Nevertheless, it is clear that Mr Reith himself must have been aware that the Vice Admiral’s clarifying statement, to the effect that the Minister was advised that Defence believed children had been thrown overboard, was, while technically correct, no longer the whole truth.

Conclusion

6.63 The role played by Minister Reith and his staff in the failure to correct the original and mistaken report that children had been thrown overboard from SIEV 4 was decisive.

6.64 Through a combination of denial, obfuscation, and misleading statements, the media, senior officials and the public were deliberately and systematically deceived about the evidence for and the veracity of the claim.

6.65 The Committee finds it particularly galling that none of the individuals concerned, nor the executive they served, has been held accountable for their disregard for the integrity of the public record. The issue of the accountability of both ministerial advisers and the executive will be discussed further in the next chapter.

41 Enclosure 1 to Powell Report, Statement by Rear Admiral Adams, Deputy Chief of Navy.

42 *Transcript of Evidence*, CMI 59.

Role of the Office of the Prime Minister

6.66 Again because of its inability to question the relevant witnesses, the Committee has been unable fully to determine the extent, if any, to which the office of the Prime Minister knew prior to 10 November 2001 that the veracity of the initial report that children had been thrown overboard from SIEV 4 was in doubt.

6.67 In what follows, the Committee briefly outlines the information that it does possess about the involvement of the Prime Minister's office in this issue. The major activity known to the Committee centres around two periods, namely from 7-10 October, and from 7-8 November 2001.

7-10 October

6.68 The Prime Minister was first made aware of the report that children had been thrown overboard by Minister Ruddock, during the day on 7 October 2001, after the latter had spoken of it to the media. The report was mentioned in an 'options paper' provided to the Prime Minister by the PST on the same evening.

6.69 In subsequent days, the Prime Minister made public comments, relying on the initial verbal report and its iteration in the PST paper.⁴³

6.70 On 8 or 9 October 2001, the Prime Minister's international adviser, Mr Miles Jordana, contacted PM & C asking if they were following up the details of the report.⁴⁴ Ms Edwards informed the Committee that she thought that Mr Jordana had rung 'either Ms Halton or myself or both on either October 8 or 9 seeking further details around the events of 7 October'.⁴⁵ Ms Halton, however, said that Mr Jordana had not rung her at that time, nor had she been aware of his ringing Ms Edwards.⁴⁶ Nevertheless Ms Halton did ring him, she said, on 9 October to tell him that she had requested members of the PST to provide 'clarification' of the details of the event.⁴⁷

6.71 On 10 October, the chronology from Strategic Command was sent to the Social Policy Division in PM & C. Ms Edwards said that 'talking points derived from the chronology [were provided to] Mr Jordana that evening'.⁴⁸ As the Committee has previously noted, the talking points prepared on 10 October did not refer to children thrown overboard from SIEV 4. Ms Edwards expressed the view that:

I assumed at the time ... that Ms Halton would also advise Mr Jordana of the difficulties around the chronology, as well as the 'footnote', as well as

43 See for example, interview on radio 2UE on 8 October, and comments on Capital TV on 9 October 2001.

44 *Transcript of Evidence*, CMI 1711.

45 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 3.

46 *Transcript of Evidence*, CMI 2065.

47 *Transcript of Evidence*, CMI 2065.

48 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 3.

the subsequent advice from Mr Reith and his office of that afternoon. In any event, no further follow up action was requested.⁴⁹

6.72 As noted earlier, Ms Halton's evidence conflicted with Ms Edwards's sharply on this point. She told the Committee that:

As I have said to you previously, I did not receive the chronology and, again, Ms Edwards and I have different but not inconsistent recollections in relation to the chronology. I did not see the chronology; I did not receive it ... In terms of advice to people about that issue, no, I was not providing advice to people about that issue. I was not undertaking that work.⁵⁰

6.73 In response to Ms Edwards's 'assumption' that she would speak to Mr Jordana about the 'difficulties' around the chronology, Ms Halton remarked:

I do not know why she would have thought that I had done it. To my certain knowledge there were about five minutes between when I walked into the building, when we agreed we had a conversation about the difficulty of the facts, a series of phone calls and chairing a meeting. Quite when I was meant to have done this, I do not know.⁵¹

6.74 In earlier evidence, however, Ms Halton said that she had briefed both Mr Jordana and Mr Moore-Wilton on 10 October about what had happened during that day.⁵² She told the Committee that:

As I have already said to you, in the evening meeting [of the PST] of the 10th we put the facts, as we knew them, to the group. No-one demurred, and I am pretty confident that those facts as we knew them would have been communicated to Mr Jordana.⁵³

6.75 The Committee also notes that, after the PST meeting, the talking points were sent at Ms Halton's direction to staff of Minister Ruddock, Minister Reith and Minister Downer.⁵⁴

6.76 On the basis of this evidence, the Committee is unable to determine precisely what Mr Jordana was told on 10 October about the nature of the evidence for the report that children had been thrown into the water from SIEV 4. The Government's refusal to allow Mr Jordana to answer questions about these matters has seriously hampered the Committee's ability to discharge fully its obligation to the Senate in this regard.

49 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 3.

50 *Transcript of Evidence*, CMI 2066.

51 *Transcript of Evidence*, CMI 2067.

52 *Transcript of Evidence*, CMI 990.

53 *Transcript of Evidence*, CMI 990.

54 PM & C Emails requested by the Senate Select Committee on a Certain Maritime Incident, No. 75.

6.77 Also on 9 October, the Office of National Assessments (ONA) made available to Ministers and the Prime Minister a report (ONA report 226/2001) which, as part of a general briefing on 'developments in the people smuggling issue in the region',⁵⁵ mentioned that children had been thrown overboard.⁵⁶ Although, as will be discussed shortly, the ONA had no basis other than Ministers' statements for this report, it may have been seen as a 'reconfirmation' of the original verbal report.⁵⁷

7-8 November

6.78 On 7 November, doubts about the veracity of the report that children were thrown overboard and about the connection of the published photographs to that event, were raised in the media. On that day also, Air Marshal Houston told Mr Reith that, in his judgement, the initial report could not be supported.

6.79 The Prime Minister was due to speak at the National Press Club on the following day, 8 November.

6.80 On the afternoon and evening of 7 November, Mr Jordana contacted both PM & C and the Office of National Assessments, seeking what evidence they possessed which supported the report of children thrown overboard. Neither could provide any additional evidence.

6.81 Ms Bryant told a Senate Estimates committee that Mr Jordana had rung her 'after around 5pm'⁵⁸ on 7 November, asking to be provided with situation reports or other defence material held by PM & C which related to the 'children overboard' report.⁵⁹

6.82 In her answers to questions on notice from this Committee, Ms Bryant advised that she and her staff did not succeed in locating any such material on 7 November. Her telephone records indicate that she had informed Mr Jordana of that fact at 6.28pm.⁶⁰ The following day, the search for the material continued, and fax records show that at 6.20pm on 8 November a fax of 11 pages was sent to the Prime Minister's Office, comprising DFAT Sitreps 59 and 60 and a Strategic Command Operation Gabardine/Operation Relex report of 8 October 2001.⁶¹ None of this material mentioned children thrown into the water.

55 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, p.96.

56 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, pp.97-98.

57 Bryant Report, p.8; Enclosure to Bryant Report, Statement by Mr Mike Scafton.

58 Answers to Questions on Notice, Ms Jennifer Bryant, Question 2.

59 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, p.86.

60 Answers to Questions on Notice, Ms Jennifer Bryant, Question 3.

61 Answers to Questions on Notice, Ms Jennifer Bryant, Question 3.

6.83 Mr Kim Jones, Director-General, ONA, informed a Senate Estimates committee that Mr Jordana had telephoned him 'latish in the afternoon' on 7 November, asking 'whether ONA had published any reports containing references to children having been thrown overboard in this incident'.⁶² At about 7pm, Mr Jones faxed a note to Mr Jordana advising that he had found such a report, ONA report 226/2001.⁶³ He also, he said, provided the following advice to Mr Jordana:

I made the point that it was published on 9 October and that the statements made by several ministers about this incident had been made on 7 and 8 October, and therefore the ONA report could not have been a source of the information used in their statements ... I told him 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.⁶⁴

6.84 On November 12, Mr Jones sent further advice to the Prime Minister's Office on this matter which confirmed that the only basis for the 'children overboard' reference in the ONA report was indeed ministers' statements and that ONA did 'not have independent information on the incident'.⁶⁵

6.85 Over the same period that Mr Jordana was seeking evidence for the report from PM & C and the ONA, the Prime Minister was in touch with the office of the Minister for Defence.

6.86 As was noted earlier, following the advice from Air Marshal Houston, Mr Reith had directed Mr Scafton to view the video of the so-called 'children overboard' incident held at Maritime Command. Mr Scafton did so, saying that he considered that the video did not show that the event had happened, but that neither did it provide conclusive evidence that it did not occur. In his statement to Ms Bryant, Mr Scafton said that:

the Prime Minister rang him later that evening. He said he spoke to the Prime Minister a couple of times that evening about the tape and informed him that it was inconclusive.⁶⁶

6.87 Here again, the Committee's inquiry has been significantly hampered by Mr Scafton's refusal to testify before it. The Committee finds it difficult to believe

62 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, p.99.

63 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, pp.99-100

64 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, p.99.

65 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, p.100; see also Bryant Report, p.8.

66 Enclosure to Bryant Report, Statement by Mr Mike Scafton.

that it required two separate conversations for Mr Scafton to convey to the Prime Minister the information that the videotape was ‘inconclusive’.

6.88 The question of the extent of the Prime Minister’s knowledge of the false nature of the report that children were thrown overboard is a key issue in assessing the extent to which the Government as a whole wilfully misled the Australian people on the eve of a Federal election. Its inability to question Mr Scafton on the substance of his conversations with the Prime Minister therefore leaves that question unresolved in the Committee’s mind.

6.89 In this regard, the Committee also notes the disclaimer made by Mr Scafton at the outset of his statement to the Bryant Report. He advised Ms Bryant that:

he had been involved in or aware of a number of discussions between Mr Reith’s office and the Prime Minister’s Office and the Prime Minister, which he could not discuss.⁶⁷

6.90 Regardless of the extent of his knowledge of the facts of the case, it seems clear that by the evening of 7 November the Prime Minister knew that there were doubts surrounding the connection of the photographs to the alleged events of 7 October. In an interview with the ABC, the Prime Minister said that he had spoken on the evening of 7 November to Mr Reith, who told him, in relation to the photographs, that there was ‘some debate about whether they were one day or the next’ and that ‘there was doubt about it’.⁶⁸ Both Mr Howard and Mr Reith insist that Mr Reith did not mention the telephone call he received from Air Marshal Houston.⁶⁹

6.91 This evidence, that the Prime Minister was aware of doubts attaching to the photographs, is consistent with the fact that when Ms Halton rang Mr Jordana to tell him of the ‘tearoom gossip’ concerning their potential misrepresentation on the evening of 7 November, Mr Jordana reassured her that it was being ‘dealt with’.⁷⁰ In Ms Halton’s words: ‘They were discussing it with Minister Reith’s office, and I had no sense from that conversation of concern in any way, shape or form’.⁷¹

6.92 Early on the following day, 8 November 2001, at about 7.15am, Mr Scafton called Ms McKenry from Sydney to say that ‘the government had decided to release the video of the footage taken of UBAs on SIEV 4 on the day before the boat sank’.⁷²

67 Enclosure to Bryant Report, Statement by Mr Mike Scafton.

68 Transcript, ‘Too Good to be False’, Four Corners, 4 March 2002, www.abc.net.au/4corners/stories/s496427.htm, (23 July 2002), p.12 of 25.

69 Transcript, ‘Too Good to be False’, Four Corners, 4 March 2002, www.abc.net.au/4corners/stories/s496427.htm, (23 July 2002).

70 *Transcript of Evidence*, CMI 1038.

71 *Transcript of Evidence*, CMI 1038.

72 Enclosure 1 to Powell Report, Statement by Ms Jenny McKenry.

6.93 According to Ms McKenry, the ‘government’ wanted the video released by noon which required her staff to work urgently with PACC personnel in Sydney to ensure that copies of the video were flown to Canberra as soon as possible. She advised that:

Later that morning I had a conversation with Tony O’Leary from the Prime Minister’s Office on the suggestion of Mike Scrafton. Tony was after confirmation that we would meet the deadline and asked about the availability of copies of the video in Canberra. I also had a conversation with Peter Hendy, COS [chief of staff] for Minister Reith, re the timing of the release ... The video was released by PACC in Sydney in time for the midday news bulletins.⁷³

6.94 At lunchtime on 8 November, the Prime Minister appeared at the National Press Club. In answer to a question about the alleged misrepresentation of the photographs, the Prime Minister said that his comments on ‘children overboard’ were based not on the photographic evidence but on his discussions with Ministers Ruddock and Reith. He then quoted from the ONA report which, he noted, he had received on 9 October.⁷⁴

6.95 In the afternoon of 8 November (AEST), Vice Admiral Shackleton made his comments to the media concerning the nature of the ‘original advice’ to Ministers. As already discussed, Mr Hendy from Minister Reith’s office contacted the Chief of Navy and Ms McKenry saying that he thought a statement was required clarifying that the Minister had been advised that children were thrown overboard.⁷⁵

6.96 Mr Hendy said that he would leave the content of the ‘clarifying statement’ to PACC and the Chief of Navy, but he asked that a copy of the statement be sent to Mr Arthur Sinodinos in the Prime Minister’s Office.⁷⁶

Conclusion

6.97 The Committee is unable to conclude with any certainty whether the advice given to Minister Reith, which overturned the report of the incident itself and the photographs as evidence of it, was communicated fully to the Prime Minister and his staff.

6.98 Instead, the Committee draws attention to the following points:

73 Enclosure 1 to Powell Report, Statement by Ms Jenny McKenry.

74 Transcript, ‘Too Good to be False’, Four Corners, 4 March 2002, www.abc.net.au/4corners/stories/s496427.htm, (23 July 2002).

75 Enclosure 1 to Powell Report, Statement by Ms Jenny McKenry.

76 Enclosure 1 to Powell Report, Statement by Ms Jenny McKenry.

- after 10 October, the Prime Minister's Office was relying for confirmation and evidence of the initial report on Minister Reith's endorsement of the photographs, the video and witness statements;
- Mr Jordana was moved to seek further confirming evidence on 7 November, presumably in the wake of increased media speculation and in preparation for the Prime Minister's forthcoming address to the National Press Club;
- by the evening of 7 November, Mr Jordana and the Prime Minister both knew of doubts attaching specifically to the provenance of the photographs, and the Prime Minister knew that the video was inconclusive and did not prove the report;
- also by the evening of 7 November, Mr Jordana had gained no further written evidence to confirm the original report. He had been advised by the ONA that their report may have been based upon Defence sources, but also that it may have been based solely on ministerial statements;
- on 8 November, the Prime Minister did not respond to a direct media question about the attribution of the photographs, but referred to advice received from Ministers Ruddock and Reith, and the ONA; and
- on the evening of 8 November, the Prime Minister again cited the 'unconditional' ONA advice as the basis for his repetition of the claim. On the matter of the photographs, he referred the media to Mr Reith.⁷⁷

6.99 There is no evidence that, prior to 7 November 2001, the Prime Minister knew that any aspect of the 'children overboard' story was false.

6.100 The Committee is of the view that no later than 7 November, the Prime Minister knew that, at the least, there were genuine doubts about the connection of the photographs to the alleged 'children overboard' incident and that the video was inconclusive.

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

Adequacy of Defence's Advice

6.102 In this third and final section of the chapter, the Committee assesses whether, in view particularly of the lack of response to their advice from Minister Reith, the senior officers of the ADF and the Defence department could and should have done more to ensure that the record was corrected prior to the election on 10 November.

6.103 In this discussion, the Committee focuses on roles played by the officers who were potentially direct conduits of information to either the Minister himself or to Ms

77 Transcript, 'Lateline', 8 November 2001, www.abc.net.au/lateline/s412276.htm (23 July 2002).

Halton and through her to the whole-of-government taskforce dealing with these matters. In other words, the Committee focuses on the adequacy of the attempts to ensure that the record was corrected by Admiral Chris Barrie, Air Vice Marshal Alan Titheridge, and Dr Allan Hawke.

Admiral Chris Barrie

6.104 At the outset, the Committee notes that the period from 7 October to 10 November and beyond was a period of intense activity and commitment for the Australian Defence Force. Admiral Barrie eloquently expressed the pressures under which he and other officers were operating at the time, saying that:

we have got an organisation which at the strategic and operational level is under more stress in terms of operations about to be conducted and being conducted than at any time since I have joined the outfit - in 41 years.⁷⁸

6.105 He outlined the range of those operations as follows:

We were barely three weeks out from the brutal images of aircraft smashing into the World Trade Center in New York and we were about to join the launch of a dangerous mission to Afghanistan, Operation Enduring Freedom. In short, I was focused on the imminent war in Afghanistan and the urgent need to safeguard our homeland from a possible terrorist attack, the risk of which I considered real and unprecedented.

As well, we were in East Timor, as we are now as part of our commitment to peacekeeping, having played a major role there in the INTERFET days. We were, and are now, in Bougainville preserving the peace. And we are in Bosnia, the Middle East, Cyprus, Egypt, Sierra Leone and Solomon Islands. In addition, we were supporting as required the government's border protection policy.⁷⁹

6.106 The Committee acknowledges that judgements about the advice to be given in relation to the children overboard incident were not being made 'at leisure', and that, in Admiral Barrie's words, 'this was not uppermost in my mind'.⁸⁰

6.107 Having said that, however, the Committee notes the suggestion from Professor Hugh Smith, School of Politics, Australian Defence Force Academy (ADFA), that Admiral Barrie was remiss in not pursuing more vigorously the persistent doubts about the veracity of the event. Professor Smith said:

Certainly there is a feeling that the CDF should have been able to pick up more rapidly and more strongly than he did that this was a politically significant piece of corrected information and he should have taken greater efforts to convey it to the minister. ... A lot of people say that it did not

78 *Transcript of Evidence*, CMI 778.

79 *Transcript of Evidence*, CMI 741.

80 *Transcript of Evidence*, CMI 756.

seem significant at the time. But, I think, one of the responsibilities of people in high office is to have an idea of what is going to be significant before the problem arises. Certainly senior officers are expected to have some political acumen, some political insight into what is important and what is not important, what the minister must know and must be told, even if it is inconvenient, and other information which is less important. ... You could argue that even at the time the wider political significance was clearly important given the nature of the election campaign.⁸¹

6.108 Admiral Barrie clearly did not ignore the issue, and clearly he did provide advice about it to the Minister. The Committee, however, is concerned about several features of Admiral Barrie's approach to addressing the issue with the Minister. They are that:

- he appears neither to have adopted the advice sent up through the chain of command nor to have made an independent assessment of the evidence supporting the initial report. As a result, he was unable to advise the Minister definitively about whether children had been thrown overboard or not, and virtually guaranteed Minister Reith immunity in relation to his claim that the incident had actually occurred;
- his advice in relation to the misrepresentation of the photographs appears to have been weak; and
- he apparently continued to protect the Minister's position up until 24 February 2002.

6.109 The Committee will address these issues in turn.

Failure to provide definitive advice on incident itself

6.110 The Committee has referred elsewhere to Defence personnel and others explaining the 'frangible' nature of original reports, and indeed how the chain of command recognises that initial information may be proved wrong later. Professor Smith expressed the point thus:

On the specific case of tactical information—reports of an immediate situation being made up the chain of command—yes, it is true that the immediate commander will normally rely on the information coming to him or her. Often, it is the only information that is available, it is necessary for immediate action and it can be critical. ...But it is certainly recognised by those in command in the military that information can be wrong. This is one of the great problems of command. You have to, in many cases, take decisions knowing that information is unreliable, incomplete and might change at any moment.

... I think it is recognised that a lot of the initial information—that is the only information available and the commander must act on it—is doubtful. It may be proved wrong later. It is, in Brigadier Silverstone's word,

81 *Transcript of Evidence*, CMI 1232.

‘frangible’; it is not rock solid. So the military have procedures for correcting information, for providing up-to-date reports as the commanders—the chain of command—require.⁸²

6.111 Major General Powell, who conducted the Defence routine inquiry into the whole affair, elaborated this in the following terms:

[O]perational information should be corroborated at each level of command after commanders and staff have had a reasonable opportunity to review, analyse and assess, in a deliberate manner, the situation and/or events being reported. This process must take place at each level of command and must be completed before information is passed to superior commanders and their staffs.⁸³

6.112 The Committee considers that, on the basis of this usually well-observed practice, it would have been standard practice for Admiral Barrie to take as correct, and act on, the advice that emerged from his senior officers via the chain of command.

6.113 By 11 October, as discussed in Chapter 4, the chain of command had made the relevant inquiries and assessed the relevant messages, signals, statements, video footage and chronologies, and had reached its verdict: the original report was mistaken.

6.114 Admiral Barrie was advised to that effect on 11 October by Rear Admiral Ritchie, Commander Australian Theatre, and the officer ‘directly responsible to the CDF’ for ‘the planning and conduct of ADF operations, including the operation which is under discussion here, Operation Relex’.⁸⁴

6.115 Rear Admiral Ritchie confirmed to the Committee that he was satisfied by 11 October ‘that there is no evidence ... to support the claim that children had been thrown overboard’.⁸⁵ He conveyed this to the CDF in a ‘long conversation’ on that day.⁸⁶ When pressed by the Committee whether he was confident that he made clear to the CDF that there was ‘no evidentiary support for ...children...overboard’, Rear Admiral Ritchie replied: ‘Yes, I am confident’.⁸⁷

6.116 Rear Admiral Ritchie said that, on the basis of what he recorded in his notebook immediately after his conversation with the CDF, he was ‘fairly confident’ that he had told Admiral Barrie that the video showed no children thrown overboard. He also said that he had referred to the statements from the *Adelaide*’s crew that Rear

82 *Transcript of Evidence*, CMI 1206.

83 Powell Report, p.4.

84 *Transcript of Evidence*, CMI 367.

85 *Transcript of Evidence*, CMI 371.

86 *Transcript of Evidence*, CMI 372.

87 *Transcript of Evidence*, CMI 373.

Admiral Smith had ordered Commander Banks to collect.⁸⁸ Rear Admiral Ritchie said that he:

gave no consideration to sending those things [the statements] to CDF or passing them on any further. They had come as far as they needed to go. We had formed the view and said that, in all probability, this did not happen. The advice I got back was that the issue would not be pursued any further.⁸⁹

6.117 As was discussed in Chapter 5, however, Admiral Barrie conveyed a different picture to the Committee of his conversation with Rear Admiral Ritchie. For Admiral Barrie, the discussion was not as definite as Rear Admiral Ritchie claimed.⁹⁰ He told the Committee that he thought that Rear Admiral Ritchie ‘understood’ that he had the opportunity to ‘come back and convince me that I was wrong if they had material that was evidence and compelling’.⁹¹

6.118 Following this conversation, Admiral Barrie waited for about a week before advising the Minister that there were any doubts about the original report and finally did so in terms which indicated that he would ‘stand by’ it until further evidence was produced.⁹²

6.119 The Committee remains perplexed about two matters. The first is why, on 17 October, Admiral Barrie was still saying that the countervailing evidence had not been produced. Certainly sufficient material had been gathered, read, analysed and assessed through the chain of command to convince Brigadier Silverstone, and Rear Admirals Smith and Ritchie that the initial report was wrong.

6.120 Second, if it were true that he remained unconvinced by the advice provided to him, the Committee does not understand why Admiral Barrie did nothing further to attain certainty about the incident in his own mind. To put these points differently, the Committee does not understand the basis upon which Admiral Barrie chose not to take the advice provided to him by his senior officers.

6.121 When asked by the Committee if he had ever previously given advice to a Minister which contradicted that passed to him through the chain of command, the CDF replied:

88 *Transcript of Evidence*, CMI 375.

89 *Transcript of Evidence*, CMI 375. Consistent with this also is Rear Admiral Smith’s recollection that Rear Admiral Ritchie had confirmed with him that he had relayed the conclusion reached by the chain of command on this issue to CDF. *Transcript of Evidence*, CMI 585.

90 *Transcript of Evidence*, CMI 749.

91 *Transcript of Evidence*, CMI 749.

92 *Transcript of Evidence*, CMI 742-743.

Yes. I always try to provide the best quality advice to Government, based on my own assessment of advice I have been given.⁹³

6.122 However, it seems to the Committee that Admiral Barrie did not make an *assessment* of the advice, so much as make a *decision* to stick with the original verbal report from Commander Banks to Brigadier Silverstone. He certainly had access to no material or information that was unavailable to his senior officers, and on the basis of which he might justify reaching a different conclusion.

6.123 In relation to this point, Admiral Barrie told the Committee that by October 11, he had been apprised of ‘no new fact or piece of information which would satisfy [him] that the initial report was wrong’.⁹⁴ He implied that Rear Admiral Ritchie merely alerted him to the fact that ‘some’ were doubting that the incident had occurred, but that he had not provided him with any reason for accepting that doubt.⁹⁵

6.124 Even if that is true, which in view of Rear Admiral Ritchie’s testimony seems unlikely, the Committee notes that the CDF did not then proceed to take further action. It is true that he checked that relevant witness statements had been collected, and was advised that they were being held in Perth.⁹⁶ However, he did not send for that material or direct anyone to brief him further on the matter.⁹⁷

6.125 Given the controversy surrounding the issue, the ‘testy’ ministerial conversation about photos, the reports coming to him from senior officers, and Rear Admiral Ritchie’s long conversation with him about the lack of evidence for ‘children overboard’, the Committee regards it as a significant failure on the part of Admiral Barrie not to have attended more diligently to settling the matter when all the relevant material had been assembled as per his instruction.

6.126 Admiral Barrie himself said to the Committee that he regretted not giving to Rear Admiral Ritchie, during their 11 October conversation, a direction ‘to get to the bottom of the issue and make a positive determination one way or the other’⁹⁸ instead of ‘leaving it loose and hanging and waiting for him to come back to me’.⁹⁹

6.127 The problem is that while the CDF may have believed that, in their 11 October conversation, he had given Rear Admiral Ritchie an opportunity to come back at him with a ‘repechage’ of evidence, the latter’s belief was that the matter was settled, and that there was no new task to be pursued arising from their conversation. He was confident, he said, that he had given clear and sufficient advice, and that

93 Answers to Questions on Notice, Department of Defence, Question W9.

94 *Transcript of Evidence*, CMI 791.

95 *Transcript of Evidence*, CMI 791.

96 *Transcript of Evidence*, CMI 742.

97 *Transcript of Evidence*, CMI 761.

98 *Transcript of Evidence*, CMI 757.

99 *Transcript of Evidence*, CMI 756.

Admiral Barrie had accepted that no children were thrown overboard. Rear Admiral Ritchie told the Committee: ‘I came away from the conversation on the 11th convinced that the issue was a dead issue... So I would have had no cause to raise it again’.¹⁰⁰

6.128 On balance, the Committee thinks it reasonable to consider Rear Admiral Ritchie’s belief as justified. The task which CDF claims he directed him to do – namely, collect witness statements and evidence – was already in train. Rear Admiral Ritchie stated in his evidence to the Bryant inquiry that he advised CDF this was happening. By 11 October witness statements had been gathered and passed through the immediate chain of command, and Commander Banks had forwarded a detailed a chronology of events.

6.129 Under these circumstances Admiral Barrie’s direction to collect witness statements and other material was redundant. Moreover, Admiral Barrie himself admits he did not give any specific instructions for Rear Admiral Ritchie to do anything beyond the assembly of material. Given that, in COMAST’s mind, there was a settled conclusion that children had *not* been thrown overboard, and that this conclusion had been reached on the basis of an examination of the relevant material – written and visual – it would be perfectly reasonable for Rear Admiral Ritchie to assume that the assembly of the evidence in one place was simply a prudent and necessary administrative action, not one which would result in an immediate review, once again, of the evidence.

6.130 In summary, then, by 11 October, everyone in the relevant chain of command – Commander Banks, Brigadier Silverstone, Rear Admirals Smith and Ritchie – had concluded that no children had been thrown overboard from SIEV 4. The Committee does not understand how, given the loudly proclaimed significance of the chain of command as the authoritative vehicle for reports and advice and any corrections thereto, Admiral Barrie – having taken no action to assess the evidence himself or to make direct inquiries – nevertheless remained of the view that the initial reports should be upheld. This was very convenient for the Minister.

Nature of advice on photographs

6.131 On the evening of Wednesday 10 October, Admiral Barrie received telephone calls from both Rear Admiral Ritchie and Vice Admiral Shackleton, advising him that photographs that had just been shown on the *7:30 Report* were in fact of the sinking of SIEV 4 and did not connect to the alleged ‘children overboard’ incident.

6.132 Admiral Barrie advised the Committee that he spoke to the Minister the ‘following day’ and ‘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*’. Admiral Barrie went on to say that:

100 *Transcript of Evidence*, CMI 373.

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.¹⁰¹

6.133 According to Admiral Barrie's testimony to the Powell, Bryant and Senate Committee inquiries, however, the focus of this conversation with the Minister was on the 'confusion' about the photographs and the need in future to be sure that 'we were talking about the same documents'.¹⁰²

6.134 The Committee notes that whatever confusion and misunderstanding there may have been between Defence public affairs and ministerial advisers during the transfer of the photographs between their respective offices, there was absolute clarity within Defence about the fact of the photos being of the sinking, and not of the alleged 'children overboard' incident the previous day.

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

6.136 To have concluded his conversation with the minister with 'an agreement ... that never again would we discuss photographs without ensuring that we both had the same photographs in front of us'¹⁰³ was a useful thing. However, it was relatively trivial in comparison with the key issue, namely, that there had been a significant error made concerning an incident that was controversial and probably inflammatory, and that the public record had to be corrected. Admiral Barrie told the Committee that the 'conversation never went at any point to what was going to be done about it'.¹⁰⁴

6.137 The Committee has previously noted that on 14 October, after he had been advised by Admiral Barrie that the photographs were not evidence of children thrown overboard, the Minister said on the Sunday Sunrise program 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.¹⁰⁵

6.138 When the Committee asked Admiral Barrie whether he thought that the Sunday Sunrise statement was consistent with the Minister's agreement days earlier to 'drop the issue',¹⁰⁶ the CDF responded:

101 *Transcript of Evidence*, CMI 742.

102 Enclosure to Bryant Report, Statement by Admiral Barrie.

103 *Transcript of Evidence*, CMI 742.

104 *Transcript of Evidence*, CMI 752.

105 Transcript of interview, Sunday Sunrise, 14 October 2001.

In my view, there was no connection between the Minister's remarks on the Sunday Sunrise program and his statement that he would 'drop' the issue of the confusion over the photographs.¹⁰⁷

6.139 The Committee is of the view that, rather than 'no connection', there was no consistency between the Minister's agreement with CDF and his public statements on Sunday Sunrise.

Protection of the Minister's position

6.140 Regardless of what failure, inadequacy or offence might be discerned in relation to Admiral Barrie's advice about the incident and the photographs, the greater problem was Admiral Barrie's continued reluctance, as opportunities repeatedly presented themselves, to give to the matter the attention it required. This is especially so given the statements and advice about it coming to him, via the chain of command, through the top echelon of the ADF.

6.141 On November 12, Air Marshal Houston briefed Admiral Barrie about Vice Admiral Shackleton's comments to the press about the nature of the original advice to the Minister, and reported to him that 'on the previous day he [Houston] had advised Minister Reith that...children had not been thrown overboard'.¹⁰⁸

6.142 Admiral Barrie told the Committee that:

As a result of what Air Marshal Houston told me and my doubts about what had in fact occurred, I decided to commission an inquiry to establish the facts and see if any corrective action was needed.¹⁰⁹

6.143 The Committee is puzzled as to why Admiral Barrie commissioned a further inquiry at this stage. He did not first speak to Air Marshal Houston about 'the basis of his advice to the Minister',¹¹⁰ and he had, on his own account, barely a month earlier directed the taking of evidence that he knew had resulted in key documentary material being gathered and assembled in Perth, and which was available to him at any time he might ask for it.

6.144 On 17 December, Major General Powell presented his report to Admiral Barrie, and briefed him on his key findings – notably that no children had been thrown overboard from SIEV 4. This considered report and its conclusions, based on substantial evidence, and including numerous statements, eyewitness accounts, signals

106 According to Rear Admiral Ritchie, CDF told him of this 'agreement' by the Minister on 11 October. Enclosure 1 to Powell Report, Statement by Rear Admiral Ritchie.

107 Answers to Questions on Notice, Department of Defence, Question W6.

108 *Transcript of Evidence*, CMI 743.

109 *Transcript of Evidence*, CMI 743.

110 *Transcript of Evidence*, CMI 743.

and logs, was still not enough it seems for Admiral Barrie to change his advice to the minister.

6.145 The Committee is surprised that the CDF, as the government's principal military adviser, apparently did not even foreshadow with the minister's office the potential difficulties that the Powell Report might bring once its findings were made public. Moreover, he sought to defer any action on the basis of the Report, making the judgment that:

[B]efore analysing the evidence and dealing with his [Powell's] recommendations I would await the Bryant report. This report would also be covering many of the issues, and was expected by late December. I thought the most efficient and reliable way to get to the bottom of things was to have the benefit of both reports and the entirety of the evidence upon which they were based.¹¹¹

6.146 Again, the Committee is struck by this judgement which seems to be entirely at odds with the CDF's stated view that he alone asserts the right and responsibility to make the call in relation to Defence operational matters. While the full complement of controversy certainly embraced the civilian as well as the military arms of the ADO, Admiral Barrie had consistently stuck to a view which was grounded in, and informed by, strictly operational considerations – namely, Commander Banks's original, in situ, verbal report as recorded by Brigadier Silverstone.

6.147 On 24 January 2002, the Bryant Report was received by the Defence Department Secretary, but it seems Admiral Barrie was not alerted to its arrival before he departed on leave on 27 January. Admiral Barrie returned to Australia on 19 February and appeared before Senate Estimates on 20 February 2002.

6.148 During the Estimates hearings, Admiral Barrie maintained that he was never 'persuaded myself that there was compelling evidence that the initial report of the commanding officer was wrong. It was my view that the photographs were simply part of the evidentiary material. The really important aspects of this are witness statements and perceptions, and that initial report, so far as I was concerned, ought to stand. I never sought to recant that advice which I originally gave to the minister'.¹¹²

6.149 The Committee notes that the Secretary of the Department of Prime Minister and Cabinet, Mr Max Moore-Wilton, maintained similarly during the Estimates hearings that he also was not persuaded that the absence of evidentiary material by itself 'proved' that the incident had not occurred. He said: 'I am not aware that children have not been thrown overboard. I do not think anyone has yet established

111 *Transcript of Evidence*, CMI 743.

112 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.73.

whether children have been thrown overboard or not. What they have established is that there is no documentary evidence'.¹¹³

6.150 During the Estimates hearings, however, the nature of the different advice provided to the Minister by Admiral Barrie and Air Marshal Houston was made public for the first time.

6.151 Also during those hearings, Admiral Barrie's attention was finally drawn to the chronology from CO *Adelaide* dated 10 October 2001 which did not report a child being thrown overboard. This was the first time Admiral Barrie had read the signal, which had been included in the Powell Report Enclosures, and which was a key written message that had led Defence personnel to repudiate the original 'children overboard' report.

6.152 Admiral Barrie stated to the Committee that:

When I left the Senate legislation committee hearings, I was acutely conscious that I would have to determine absolutely one way or another within a short space of time whether or not children were thrown over the side. Over the weekend, I read through the material available to me to see whether it was sufficient to answer all my queries about what had happened. ... As the material did not satisfactorily resolve all the issues in my mind on the evening of Sunday, 24 February 2002 I arranged through Maritime Command in Sydney for the ship to telephone me. I then spoke to Commander Banks. We discussed the events of 7 October 2001, and he informed me that he was sure that no child had been thrown overboard. I questioned him closely to test the basis for his assurance. On the basis of this conversation, which put to rest the concerns that I had about the written material, I was convinced that, despite the initial reports to the contrary, in fact no child had been thrown into the water from SIEV4 on 7 October 2001.¹¹⁴

6.153 The item that galvanised Admiral Barrie's attention during Estimates in February 2002 – the 10 October 2001 signal from Commander Banks – had in fact been brought to his office by Brigadier Bornholt on 11 October 2001. The Brigadier had explained to the CDF's Chief of Staff that the signal, which chronicled the events of 7 October 'indicated that there were no women or children in the water'.¹¹⁵ The significance of Brigadier Bornholt's delivery of the signal was apparently not appreciated by the Chief of Staff.¹¹⁶

113 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration Committee, 18 February 2002, p.37.

114 *Transcript of Evidence*, CMI 745.

115 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.124.

116 In evidence, Admiral Barrie indicated that, from his Chief of Staff's perspective, Brigadier Bornholt did not draw his attention specifically to the significance of the signal. *Transcript of Evidence*, CMI 754.

6.154 It is regrettable that Admiral Barrie was unaware of the contents of the October 10 signal. While the Committee accepts that Admiral Barrie was indeed ignorant of the signal up until 20 February 2002, the fact of his ignorance does not exhaust the account. No doubt a copy of the signal was also with the other material in Perth. It was this same signal that prompted Air Marshal Houston to take the action he did on November 7 when, as Acting CDF, he advised the Minister that no children had been thrown overboard.

6.155 Finally, the Committee is also disturbed by the character of Admiral Barrie's own contributions to the Powell and Bryant inquiries. In his statements to both, Admiral Barrie does not indicate that he ever unequivocally informed the Minister for Defence either that the photographs were misrepresented or that there were serious doubts about the so-called 'children overboard' incident itself.

6.156 For example, in his statement to the Powell inquiry in relation to his advice about the photographs, Admiral Barrie wrote:

It seemed that it had become possible that material released by the Minister, was not the same material I had been advised had been provided to the Minister's office. I could not say whether or not such was true. During this conversation the Minister and I agreed that in future we would need to ensure that we were speaking about the same material if we were to have another discussion about the release of material.¹¹⁷

6.157 His statement for the Bryant Report records that:

Admiral Barrie recalls that he had an informal discussion with someone, but couldn't recall with whom, about doubts concerning the children thrown overboard claim. He said the doubt didn't originate with the *Adelaide*, but there were doubts in headquarters ... Admiral Barrie did not inform the Minister that there was firm evidence to suggest that children were not thrown in the water because he was not aware there was such evidence. In discussion with the Minister, it had become apparent that we were talking about two different sets of photographs and we had a discussion about the future handling to make sure that this would not happen again.¹¹⁸

6.158 The Committee is satisfied that Admiral Barrie's sworn testimony to the Senate inquiry establishes that, in fact, the CDF did give more direct advice, at least about the incorrect attribution of the photographs, than is indicated by these earlier statements. However, the Committee is disturbed at the extent to which these earlier statements themselves appear to aim more at protecting the Minister's position than at conveying forthrightly just what advice the CDF provided to him. This apparently ongoing attempt to 'cover' for the Minister is concerning.

117 Enclosure 1 to Powell Report, Statement by Admiral Chris Barrie.

118 Enclosure to Bryant Report, Statement by Admiral Chris Barrie.

Conclusion

6.159 The Committee does acknowledge the enormous workload under which Admiral Barrie and his senior officers were labouring at the time of the ‘children overboard’ controversy. It acknowledges that, from a military and operational perspective, whether or not children were thrown overboard was an utterly unimportant issue.

6.160 However, the Committee cannot but contrast the approach and mindset of the CDF with that of some of his senior naval colleagues in the chain of command. When these colleagues heard doubts, they actively pursued further inquiries. When they were presented with evidentiary material, they acted in accordance with the evidence. When these colleagues made considered judgments, they promptly passed them up the chain of command, and reported back down it. When they became aware of errors, they quickly advised the relevant parties and pressed for their correction.

6.161 The contrast is illustrated, for example, by the following evidence from Rear Admiral Smith concerning his decision to bypass the chain of command and speak directly to Commander Banks about the ‘children overboard’ claims - an action not lightly taken:

I instigated that action because I was becoming concerned at the different reports that I was getting. I was aware of the different points of view of Commander Banks and Brigadier Silverstone. I was acutely aware of the sensitivity of this particular subject and the visibility it was getting within the media. I just wanted to cut to the chase and find out what actually happened.¹¹⁹

6.162 Although Admiral Barrie clearly had a broader range of responsibilities and was working under correspondingly greater pressure than was Rear Admiral Smith, the Committee notes that Admiral Barrie did nevertheless have a number of conversations with Minister Reith on this matter over the period. It is not clear to the Committee that it would have taken more time and effort for Admiral Barrie to pass on the advice he received from his chain of command in a direct and forthright manner, than it took for him to do so equivocally.

Air Vice Marshal Titheridge

6.163 Like Admiral Barrie, Air Vice Marshal Titheridge’s workload during the relevant period was dominated, he said, by Operation Slipper and the war on terrorism.¹²⁰

6.164 He was nevertheless the chief representative of the Defence forces on the People Smuggling Taskforce, although he noted that by early October ‘the need to focus on planning for the Australian Defence Force’s contribution to the war on

119 *Transcript of Evidence*, CMI 592.

120 *Transcript of Evidence*, CMI 700.

terrorism ... curtailed my personal attendance at the unauthorised arrival management interdepartmental committee and I was increasingly represented by my senior staff'.¹²¹

6.165 He was also the channel through which the initial verbal report that children had been thrown overboard was conveyed from Brigadier Silverstone to Ms Halton on 7 October 2001.

6.166 Air Vice Marshal Titheridge did not at any stage advise Ms Halton or the People Smuggling Taskforce either that there were serious questions about whether children had in fact been thrown overboard or that the photographs released as evidence of that event were actually taken on a different day. He did not do so, he said, because it was not until November 25 that he saw a newspaper article which caused him to doubt the initial report.¹²²

6.167 The Committee notes, however, that Air Vice Marshal Titheridge's evidence about the date on which problems with the 'children overboard' story first came to his attention is in tension with the evidence of a number of other witnesses.

6.168 Rear Admiral Ritchie, for example, told Ms Bryant that he thought that on 11 October he would have informed Air Vice Marshal Titheridge 'in accordance with normal practice' that he had been told there was no evidence supporting the original report.¹²³ Although Rear Admiral Ritchie said that he had no record of informing AVM Titheridge, his assumption that he did is supported by evidence taken from Rear Admiral Smith.

6.169 Rear Admiral Smith told the Committee that he had rung Air Vice Marshal Titheridge, according to his phone records, at 11.58am on 17 October 2001. He said:

I advised him of what was occurring with SIEV5 and then we had a general conversation about the issue of SIEV4, photographs and children overboard et cetera. I made the point to him: did he know that none of it was true? He advised me that yes, he knew. So that again satisfied me that the chain of command were aware that there was no substance to those allegations.¹²⁴

6.170 Rear Admiral Smith went on to say that he had subsequently advised Admiral Ritchie that he had had that conversation with the Air Vice Marshal. He confirmed that he was 'in absolutely no doubt' that the Head of Strategic Command knew that no children had been thrown overboard.¹²⁵

121 *Transcript of Evidence*, CMI 684.

122 *Transcript of Evidence*, CMI 684-685.

123 Enclosure to Bryant Report, Statement by Rear Admiral Chris Ritchie; see also his statement, Enclosure 1 to Powell Report.

124 *Transcript of Evidence*, CMI 586.

125 *Transcript of Evidence*, CMI 586.

6.171 Within Air Vice Marshal Titheridge's own Strategic Command Division, there was also knowledge that, at the least, there were doubts about the availability of evidence to support the report and that the photographs had been misrepresented. The chronology with the notorious 'footnote' that was provided to PM & C on 10 October, for example, was compiled in AVM Titheridge's Division.

6.172 Similarly, the Director Joint Operations, Strategic Command, Group Captain Steven Walker, advised the Committee that he knew from the time of their first publication that the photographs were 'wrong'. He said that he had had a number of conversations with his contact in PACC about that issue, and that he 'presumed' that he had discussed it with the Air Vice Marshal, although he had no specific recollection of doing so. The reason, he explained, for his 'presumption' was that:

We have regular meetings and briefings to share information within headquarters. I presume it would have been covered, because it was a topical issue of concern at the time.¹²⁶

6.173 Finally, Air Marshal Houston told a Senate Estimates committee that, after he had advised the Minister on 7 November that there was no evidence to support the report that children had been thrown overboard from SIEV 4, he 'back-briefed' Air Vice Marshal Titheridge about the conversation.¹²⁷

6.174 The Committee questioned Air Vice Marshal Titheridge at some length about the discrepancies between the recollections of other officers and his own. The Air Vice Marshal reiterated that he had no memory of any doubts being raised in relation to the 'children overboard' story until later in November.¹²⁸ He claimed:

I looked back at that period and I looked at my notes for that period and just about all the references, apart from subsequent SIEVs, are on 'war against terror' and other issues. I think I said to you that I did not focus on it; it was just not an issue for me until late November.¹²⁹

6.175 The Committee notes, however, that according to evidence from Ms Halton and Ms Edwards, two specific requests were made of Air Vice Marshal Titheridge in the days following the dissemination of the report that he confirm the initial advice.

6.176 The first request was made at the PST meeting on 9 October 2001 at which he was the Defence representative. Ms Halton's statement to the Bryant Report, which she confirmed in evidence to the Committee, records that she 'told the Defence rep ...

126 *Transcript of Evidence*, CMI 1701.

127 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Committee, 20 February 2002, p.118.

128 *Transcript of Evidence*, CMI 718, 723, 732, 733.

129 *Transcript of Evidence*, CMI 723.

that they had better be certain about the veracity of the initial reports and they should do some checking'.¹³⁰

6.177 Ms Edwards also noted that there was discussion at that meeting about the adequacy of 'internal information flows ... particularly in response to the lack of detail being sent to DFAT for inclusion in their situation reports (in particular Sitreps 59 and 60)'.¹³¹ As noted earlier, Ms Edwards told the Committee that it was concern about the lack of mention of children overboard in those DFAT Sitreps that had led her and Ms Halton to 'follow up to obtain further details of the incident'.¹³²

6.178 The notes of the PST meeting for 9 October record, under the heading 'Information processes', that:

- in future, Defence will provide PM & C and DFAT with three times daily bulletins
- AVM Titheridge will continue to ring Jane with updates to enable MO [Minister's Office] media people to be briefed
- Noted that the normal link was the field commander through CDF who would brief Minister Reith.¹³³

6.179 Ms Edwards noted in evidence that:

As a result of this conversation Defence provided written updates two or three times a day ... for the remainder of the time the potential unauthorised arrivals remained on the *Adelaide*.¹³⁴

6.180 As has previously been established by the Committee, however, none of those updates contained information that confirmed the initial report that children had been thrown overboard.

6.181 The second request for confirmation of the initial report was made by Ms Edwards. She informed the Committee that once she had received the Strategic Command Chronology on 10 October, she recalled attempting to contact Air Vice Marshal Titheridge 'and initially speaking to one or more officers in his absence'. She then, she said, spoke to the Air Vice Marshal 'personally, seeking clarifications on the material and suggesting that a more definitive answer be sought through the chain of command around whether the events occurred'.¹³⁵

130 Enclosure to Bryant Report, Statement by Ms Jane Halton; *Transcript of Evidence*, CMI 939.

131 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 7.

132 *Transcript of Evidence*, CMI 1705.

133 PST Notes, High Level Group - 9 October 2001.

134 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 7.

135 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 8.

6.182 Ms Edwards said, however, that she did not recall ‘any written material being provided to PM & C in relation to the events of the morning of October 7 other than the chronology’.¹³⁶

Conclusion

6.183 In relation to the role played by Air Vice Marshal Titheridge in the failure to correct the ‘children overboard’ story, the Committee makes two points.

6.184 First, it is clear that he himself did not appreciate the significance of the issue. The Committee acknowledges that Air Vice Marshal Titheridge’s primary focus during this period was on preparations for the war in Afghanistan. Nevertheless, he was also the Australian Defence Force’s senior representative on a high level interdepartmental taskforce which was coordinating activities as a result of which the lives and safety of hundreds of individuals were at stake.

6.185 The Committee finds it difficult to believe, in the face of the testimony of Rear Admirals Ritchie and Smith, Air Marshal Houston and Group Captain Walker, that Air Vice Marshal Titheridge was not informed of the lack of evidence for the initial report that children had been thrown overboard. His failure to register and pass on that information to his colleagues on the PST is rendered particularly serious by the fact that he was directly questioned on two occasions about the veracity of the report by the Chair and another member of that high level interdepartmental committee.

6.186 Second, the Committee notes that no emphasis seems to have been placed on providing Air Vice Marshal Titheridge with the corrected information in order that he might effectively discharge his responsibilities as Defence’s representative on the PST. For example, there is no record of Admiral Barrie ensuring that the Air Vice Marshal was in possession of the correct information so that he could communicate it in the appropriate whole-of-government forum. Defence’s focus seems to have been solely on its ‘vertical’ responsibility to the Minister, rather than on its ‘horizontal’ responsibilities to the wider bureaucracy and, thereby, to the rest of government.

6.187 This focus seems relevant also to an explanation of the role played by the Secretary of the Department of Defence, Dr Allan Hawke.

Dr Allan Hawke

6.188 Dr Hawke became directly involved in what he called the children overboard ‘imbroglio’¹³⁷ on 11 October 2001, in the context of attempts to correct the misrepresentation of photographs purporting to support the view that children had been thrown overboard. On that day, Dr Hawke was advised of the misrepresentation by the Head of Defence’s Public Affairs and Corporate Communication and of the

136 Answers to Questions on Notice, Ms Katrina Edwards, dated 12 June 2002, Question 8.

137 *Transcript of Evidence*, CMI 3.

fact that, as described in Chapter 5, advice to that effect had been passed by phone and email to Mr Hampton and Mr Scrafton in the Minister's office.

6.189 On 8 November, the then Acting CDF, Air Marshal Houston, advised Dr Hawke that he had told Minister Reith that there was nothing in the evidence he had seen to show that children had been thrown overboard.¹³⁸

6.190 On the same day, following the Prime Minister's answers to questions about the photographs at a Press Club luncheon, which included a reference to an ONA report, Dr Hawke asked for a copy of that report and any other Defence intelligence material indicating that children had been thrown overboard. There was none – a fact that Dr Hawke confirmed the following morning with the relevant senior Defence official.¹³⁹

6.191 Later in the afternoon of 8 November, Dr Hawke became aware of comments made by the Chief of Navy, Vice Admiral Shackleton, to the effect that Defence had never advised the Minister that children had been thrown overboard. Dr Hawke later faxed to the head of PM & C, Mr Max Moore-Wilton, a copy of the 'clarifying statement' by Admiral Shackleton about the advice given to the minister.¹⁴⁰

6.192 Dr Hawke told the Committee that he had asked himself whether he 'could have or should have taken a more active involvement' in the provision of advice:

I certainly could have. Whether I should have remains an open question in my mind, with one clear exception. The clear exception where I might well have done more is my involvement in the matter of the photographs. In retrospect, I should have discussed that issue directly with and provided clear written advice to Minister Reith.¹⁴¹

6.193 Responding the question, why did he not write to Minister Reith, Dr Hawke said that:

At the time this was not a big issue. It subsequently became so... It is easy to say that there were a lot of other things going on and that I was attending to those, and that this issue was not very large on the radar screen at the time.¹⁴²

6.194 Similar comments were also made by the CDF and others, but the Committee is equivocal about such an assessment. The matter seemed to be on the 'radar screen' of the media. For example:

138 *Transcript of Evidence*, CMI 4.

139 *Transcript of Evidence*, CMI 4.

140 *Transcript of Evidence*, CMI 4.

141 *Transcript of Evidence*, CMI 4.

142 *Transcript of Evidence*, CMI 54.

- it is incontrovertible that there was significant media interest in the events at the time – the photographs were released in response to emphatic calls from the press for ‘proof’ of ‘children overboard’;
- on 12 October, the *Sydney Morning Herald (SMH)* reported statements by Deputy Prime Minister Anderson that ‘from time to time’ asylum seekers threw children into the water in order to compel the navy to help them. The *SMH* also reported that the Immigration Minister could not verify such claims;
- on 7 November an article in *The Australian* reported comments from Christmas Island residents claiming that HMAS *Adelaide* crew members had said that children had not been thrown overboard.¹⁴³ This article was of sufficient moment to prompt the Minister to seek an urgent conversation with the Acting CDF;¹⁴⁴
- Vice Admiral Shackleton’s comments of 8 November were headline news, and Dr Hawke had been associated with the release of the subsequent ‘clarifying statement’.

6.195 Even setting aside the press and television interest, the Committee notes that on 9 November 2001, the *Sydney Morning Herald* wrote to Dr Hawke, Admiral Barrie, Minister Reith and Minister Ruddock and others in the following terms:

Today the Sydney Morning Herald is putting a series of questions to officials, defence personnel, ministers and ministerial staff on asylum seeker issues, including the circumstances surrounding claims that children were thrown off the asylum seeker vessel intercepted in the vicinity of Ashmore Reef last month.

Your response will assist tomorrow’s news coverage and analysis.

In the event responses are not received, consideration will be given to publishing ‘The questions they would not answer’ and who refused to answer them.¹⁴⁵

6.196 The questions sent to Dr Hawke included one asking whether he was aware ‘of an official cover-up of the circumstances surrounding the incidents of October 7-8, notably in relation to the false claim that children were thrown overboard?’¹⁴⁶

6.197 In response to this letter, Defence’s Public Affairs and Corporate Communication sent a fax, which said:

I am not in a position to release the information requested. As you would be aware this is a whole of Government issue. In view of the foregoing, you may wish to direct your inquiries to the Minister for Defence.¹⁴⁷

143 *Transcript of Evidence*, CMI 1058.

144 *Transcript of Evidence*, CMI 1059.

145 Attachment to *Submission No. 13*.

146 Attachment to *Submission No. 13*.

6.198 By this stage it was presumably clear to Dr Hawke that the Minister had no intention of retracting his claims about the photographs, and that he had not publicly responded to or acknowledged the advice of Air Marshal Houston two days earlier. Even so, and with the media actively seeking the truth about this issue, Dr Hawke did not put advice in writing or express his concern to the Minister about either matter.

6.199 The Committee notes, then, that there are potentially three grounds for criticising Dr Hawke's actions in this period. They are that he:

- did not put advice in writing to the Minister in relation to the photographs;
- did not pursue the Minister in relation to the advice provided by Air Marshal Houston; and
- did not communicate any of this advice to PM & C or the PST.

6.200 On the first matter, Dr Hawke has acknowledged the deficiency of his actions and told the Committee that he had offered his resignation to the incoming Minister for Defence, Senator Hill, on the grounds that he felt 'in retrospect' that he should have put that advice in writing.¹⁴⁸

6.201 On the second matter, Dr Hawke expressed the view that it was an 'operational' matter, and thus the province of the CDF. Moreover, at the time that Air Marshal Houston gave his advice to Mr Reith, Dr Hawke said that he 'was aware that CDF (Admiral Barrie) held to his original view, so it was a matter within the Australian Defence Force'.¹⁴⁹

6.202 The Committee discusses Dr Hawke's 'strict' view of the diarchy between himself, as civilian head of Defence, and CDF, as military and operational head of Defence, in the next chapter. It notes that there is at least some argument to be made that, in an operation essentially under civilian whole-of-government control, the Secretary of Defence should have played a larger role in ensuring that the Minister did not promulgate misleading information.

6.203 Finally, the question of Dr Hawke's responsibility for providing clarifying or corrective advice to the whole-of-government taskforce dealing with these issues was raised explicitly in evidence to the Committee. The question invites reflection on how accountability is to be properly effected in whole-of-government operations.

6.204 Ms Halton, for example, wondered why Dr Hawke, who was a relatively close colleague of hers, did not pick up the phone and talk to her about the problems he had come to know about. She said:

I had a small number of calls with people in Defence through this period. I had a conversation with Ms McKenry; I had a conversation with Dr Hawke.

147 Attachment to *Submission No. 13*.

148 *Transcript of Evidence*, CMI 49, 53.

149 *Transcript of Evidence*, CMI 19.

Some of those people have been known to me for very many years. The notion is that it was not possible for one of those people, or any of those other people for that matter—bureaucracies are a big place and a small place and inevitably there are people that you have worked with in various environments in all sorts of agencies—to pick up the phone—on a couple of occasions I was explicitly asking about things—and say, ‘You just need to know that this looks a bit dodgy’ or ‘We are a bit concerned.’ As I said, not only were we not told; it was never alluded to—there was never the slightest suggestion. I am probably as perplexed as you as to why, given some of the personal connections with people in that agency, that did not happen.¹⁵⁰

6.205 Professor Patrick Weller, an academic expert on public administration, elaborated on the issue in the following terms:

If a secretary ... is advising his minister about an issue and he knows that the Prime Minister is also on the public record about that incident, but he feels that the minister is not passing on the information to the Prime Minister, does that secretary not have an obligation to make sure that at least the Prime Minister and his department are aware that there are facts wrong and that there is severe doubt about what is happening?

In those circumstances I would have thought the appropriate role for the secretary of such a department would be to ring the secretary of the Prime Minister’s department and say, ‘We’ve got problems. We have severe doubts. The Prime Minister has been on the record that this happened. He did say “if the reports are correct”. The reports are not correct.’ It seems to me that the system again has failed in that case. If this stayed within the Department of Defence, the minister may or may not have been briefed, may not have appreciated the brief or may have just decided that he did not want to pass on the brief, but it seems to me that the department still has a responsibility to the government as a whole and particularly to the Prime Minister to make sure that the Prime Minister’s department knows that something is wrong or there is a correction coming through about what has been said in those circumstances. In those senses I would be critical of some of the advice that has been given up and whether or not the system worked.¹⁵¹

6.206 Dr Hawke responded to the comments of Ms Halton and Professor Weller in a letter to the Committee.¹⁵² The essence of the response was that CDF was responsible for directing Defence’s involvement in border protection and for reporting to the government on these matters. The CDF had, until 24 February 2002, held to the position that he was ‘yet to be convinced that the original report that children had been

150 *Transcript of Evidence*, CMI 1036-1037.

151 *Transcript of Evidence*, CMI 1232.

152 Letter from Dr Hawke to Senator the Hon. Peter Cook, dated 3 June 2002.

thrown overboard was incorrect, and so advised the Minister for Defence'.¹⁵³ Dr Hawke stated:

For my part, I believe it would have been quite wrong for me to have cut across the considered position of the CDF on the initial allegations by contradicting it before the Minister for Defence or, more especially, anyone outside of Defence.¹⁵⁴

6.207 Dr Hawke concluded the letter by referring to the Ministerial Directive that:

made it absolutely clear that my actions must not be inconsistent with 'the CDF's role as principal military adviser and his statutory responsibilities and authority as commander of the Defence Force'.¹⁵⁵

6.208 The Committee notes that Dr Hawke's letter, beyond noting that the Minister was advised about the misrepresentation of the photographs on 11 October, does not go to the question of the responsibility of either himself or CDF, through Air Vice Marshal Titheridge, to inform agencies or individuals outside Defence of that information.

6.209 Clearly an issue that emerges from this affair is the question of the relative significance of 'vertical' as opposed to 'horizontal' lines of accountability for contemporary governance. The Committee discusses that broader issue in the next chapter.

153 Letter from Dr Hawke to Senator the Hon. Peter Cook, dated 3 June 2002.

154 Letter from Dr Hawke to Senator the Hon. Peter Cook, dated 3 June 2002.

155 Letter from Dr Hawke to Senator the Hon. Peter Cook, dated 3 June 2002.

Chapter 7

Accountability

Introduction

7.1 Many of the questions and concerns that animated the Select Committee's inquiry arose from considerations of accountability. These revealed forcefully what academic analysts have recently been asserting – that accountability is 'a notoriously imprecise term'¹, something that must be approached 'as a problem with multiple levels and more than one possible meaning'² and that balancing accountability with the need for flexibility of action is 'the ongoing challenge of public policy in Australia.'³

7.2 This chapter explores some of these major themes by drawing on particular examples relevant to the 'children overboard' controversy, and teasing out aspects which reveal how, in practice, people understand and exercise their accountability responsibilities. Consideration will be given to the actions and decisions of some key officials involved, up to and including ministerial staff. Attention will then turn to broader questions of how reporting arrangements, lines of authority, and administrative structures facilitate or impede accountability. Finally, consideration will be given to how accountability might be strengthened and what practical mechanisms might be put in place to promote and enhance it.

Accountability in the Public Sector

7.3 The Committee acknowledges the complexity of accountability in modern governance arrangements, and accepts the fact that there is a continuum of accountability relationships, both vertical and horizontal, between the public service, the government, the parliament and Australia's citizens. Nevertheless, there are some fundamental tenets and practices of accountability that are well established in public administration, even though these received notions of accountability are increasingly being stretched.

1 Richard Mulgan, 'Comparing Accountability in the Public and Private Sectors', *Australian Journal of Public Administration* 59(1) (2000), p.87.

2 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p21.

3 Alison McClelland, 'Partnerships and Collaboration: propositions from Experience', in *New Players, Partners and Processes: A public sector without boundaries*, edited by M Edwards and J Langford, (Canberra: 2002).

7.4 Legislative prescription for public service accountability is contained in several pieces of legislation, including the *Public Service Act 1999*, and the *Financial Management and Accountability Act 1997*. Various sets of supporting guidelines are also developed and distributed by the Public Service Commissioner. The Chief Executive's Instructions are explicit about accountability issues. Other material is also promulgated dealing with the accountability attaching to particular arenas of activity – for example, the *Commonwealth Procurement Guidelines* (Department of Finance and Administration) and the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* (Department of the Prime Minister and Cabinet).

7.5 Accountability within the context of the public service is usually described in terms of obligations arising from the relationships of responsibility or authority which pertain between the public service, ministers and the parliament. Departments and public servants must account for their performance, and accept sanctions or redirection;⁴ there are legal obligations to be responsive to the legitimate interests of affected parties; invariably a duty of care is involved; citizens and legislators have a right to information about the expenditure of public funds and how decisions are made.⁵

7.6 Correspondingly, government ministers have, under the constitutional doctrine of responsible government, both collective and individual responsibilities. A minister is accountable to the parliament for the policies and actions implemented by his or her department.⁶

7.7 There are both legal and conventional obligations attached to the performance of ministers - along with political requirements – and these contain their own version of sanction and redirection. The parliament expects ministers to tell the truth. At the heart of the debating and scrutiny process is the securing of sound information. Ministers must immediately correct any mistake they may have conveyed to parliament, and the making of a deliberately misleading statement is usually considered a contempt.

7.8 Against this background of quite unambiguous accountability requirements, at both departmental and ministerial level, key features of the management and distribution of information about the 'children overboard' incident and its aftermath stand out as inimical to the transparency, accuracy and timeliness requirements that are vital for proper accountability. As a consequence, fair dealing with both the public and the agencies involved was seriously prejudiced. That such circumstances should

4 Richard Mulgan, 'Comparing Accountability in the Public and Private Sectors', *Australian Journal of Public Administration* 59(1) (2000), p.87.

5 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p22.

6 Christopher Kam, 'Not Just Parliamentary 'Cowboys and Indians': Ministerial responsibility and bureaucratic drift' *Governance: An International Journal of Policy, Administration and Institutions*, 13 (3) (2000), p.365.

have prevailed in the politically significant context of an election campaign is a matter for grave concern.

7.9 Ministers, as the focus for the accountability of subordinates, and as the agents of accountability to parliament must in their turn promote transparency and ensure the integrity of information that is communicated to the public and the parliament. The Committee has serious concerns in this regard and these are explored in more detail later in this chapter.

Accountability and the Australian Defence Organisation (ADO)

7.10 Before embarking on a detailed account of the accountability and leadership structures in the ADO in the context of ‘children overboard’, it is important to set out briefly the traditional relationship between Australia’s defence forces, the government, and the Australian public. In the Committee’s view, key ministerial decisions about the way in which Defence’s role was communicated to the Australian public had a significant bearing upon the way the ‘children overboard’ fiasco unfolded. These decisions turned on their head some important conventions embedded in how the ADF usually related to the Australian public about its operations, and upset some subtle balances in that traditional relationship.

7.11 This traditional relationship may be characterised in the following terms:⁷

- Military force is exercised in the interests of the nation as a whole as determined by the government of the day. The government exercises a stewardship over the Defence Force on behalf of the nation.
- The Defence Force has a duty to stay out of party politics and the government has an obligation to avoid drawing the military into party political issues.
- Defence policy has been substantially bipartisan.
- Military personnel may speak about operational matters as they see fit, consistent with security and operational requirements, while matters of policy remain open for comment only by ministers.

7.12 In the Committee’s view, the actions of the former minister, Mr Reith, and of key members of his staff, undermined important aspects of the relationship between the ADF and the government. They did this by inserting themselves into both the military and civilian chains of command and by insisting that all public communications about Operation Relex be centralised in the minister’s office.

7.13 The Committee has commented elsewhere on Defence Instructions (General) No. 8 and on the extraordinarily restrictive Public Affairs Plan that the government

7 Account drawn from various sources including Hugh Smith ‘A Certain Maritime Incident and Political-Military Relations’ *Eureka Street* No.387, p.39, and *Transcript of Evidence*, CMI 1194-95, 1199-1201, 1228, 1242-44, 1254-55.

applied to Operation Relex. In the words of one Defence commentator: 'A form of censorship existed which prevented military personnel from providing information and correcting misinformation in the normal way.'⁸

7.14 By making the minister's office the interface between the ADF, the Defence Department and the public, the minister weakened the trust that needed to prevail between these groups. It also substantially undermined both the CDF and the Secretary in that they could not exercise their own discretion concerning information provided to the public. The result was that an important aspect of public accountability evaporated.

The diarchy and accountability

7.15 The dual leadership of the Australian Defence Organisation by the Secretary of the Department of Defence and the Chief of the Defence Force, and the mix of military and civilian regimes which comprise the ADO, has important implications for how accountability is rendered under such conditions.

7.16 For the ADF, the military arm of the organisation, accountability is effected primarily through the 'chain of command' to the Chief of Defence Force (CDF), who has command authority over the whole of the ADF and is the principal military adviser to the government. This is not to deny that those outside the chain of command also have important accountability obligations – and in any event the transiting of decisions and actions from within to without the ADF chain of command is not uncommon. But it has been repeatedly stressed by service personnel that the concept of a 'chain of command' – which entails a chain of iterative reporting and thus accountability - is fundamental to the way service personnel go about their business, whether that be routine or during a military operation.

7.17 Accountability requirements for the civilian arm of the ADO, the Department of Defence, are basically those applicable in any other public service agency. There are some special features of that accountability arising from the joint responsibilities of the Secretary and the CDF under Section 9A of the *Defence Act 1903* and the responsibilities and authority of the Secretary under the *Financial Management and Accountability Act 1997*. These are set out in a ministerial directive.⁹

7.18 The dual leadership of the Australian Defence Organisation is formally expressed by the term 'diarchy', a term regarded as 'useful ... for characterising what is an understandably rare organisational construct.'¹⁰ The Secretary has further elaborated the concept as follows:

8 Hugh Smith 'A Certain Maritime Incident and Political-Military Relations' *Eureka Street* No.387, p.41.

9 Tabled Paper, Ministerial Directive from Hon. Peter Reith, Minister for Defence, 9 April 2001.

10 Dr Allan Hawke, Paper based on *Address to the Royal United Services Institute*, Adelaide, 1 May 2000.

The diarchy is not about striking a balance between ‘opposing powers’. It is about bringing together the responsibilities and complementary abilities of public servants and military officials, to achieve the Defence outcome sought by the Government of the day. Those complementary abilities are about, on the one hand, giving the CDF unfettered focus on the command of the ADF and, on the other hand, allocating clear responsibility to the Secretary for the resource, policy and *accountability functions* [emphasis added] of the largest Department of the Commonwealth Government.¹¹

7.19 The diarchy may have served the Australian Defence Organisation well during the period where received notions of its purpose emphasised its fundamentally military functions. Until 2001, Defence’s mission was ‘The prevention or defeat of armed force against Australia or its interests’. During 2001-02 this outcome became ‘to defend Australia and its national interests’,¹² a considerable broadening of the scope of the ADO’s responsibilities.

7.20 Now that its mission has shifted to ‘defend Australia and its national interests’ there are new tasks and functions in the ADO landscape that may well demand a more nuanced articulation of the diarchy. In the Committee’s view, the way the diarchy impacted upon the ‘children overboard imbroglio’ highlights the need for such refinement.

7.21 In his evidence, Dr Hawke repeatedly asserted what he described as his ‘pure view’ of the demarcation in responsibilities between the Secretary and the CDF concerning ‘operational’ or ‘chain of command’ issues.¹³ In Dr Hawke’s view, the issue of claims about children being thrown overboard from SIEV 4 was ‘an operational matter affecting the chain of command’ which was being ‘run by CDF’ who was ‘in daily contact with the minister’.

So he was providing the advice and discussing these matters with the minister, not me. I do not think I have a role in it—and I suspect if I attempted to, the ADF would be up in arms about it.¹⁴

7.22 It does not seem, however, that the CDF and the Minister necessarily viewed the operational / bureaucratic demarcation of responsibilities in the way that Dr Hawke himself did. While the responsibilities and accountabilities of the ‘diarchy’ incumbents may appear jointly and severally clear - at least on paper – it seems to the Committee that the Secretary, CDF and Minister were not entirely at one when it came to how each interpreted what the diarchy required, and more importantly, how each acted within that arrangement.

11 Dr Allan Hawke, Paper based on *Address to the Royal United Services Institute*, Adelaide, 1 May 2000.

12 Defence Annual Report 2000-01, (Canberra), p.4.

13 *Transcript of Evidence*, CMI 8-11, 18-22.

14 *Transcript of Evidence*, CMI 9.

7.23 For example, Dr Hawke regarded his involvement in attempts to correct the record about falsely attributed photographs as a proper intervention, and consistent with his accountability obligations to the minister. However, when it came to the public release of the photographs, those decisions were made by the minister in consultation with the CDF, not Dr Hawke, suggesting that they did not observe operational / bureaucratic distinctions in the way they were articulated by Dr Hawke.

7.24 The CDF appears not to have sought to engage with Dr Hawke at all on the issue of the handling of photos within the administrative chain. The CDF was quite content to engage directly with Minister Reith about the photos, and approved their release via AVM Titheridge and without reference to Dr Hawke.

7.25 The Committee notes, however, that Dr Hawke was involved in facilitating the preparation and dissemination of Vice Admiral Shackleton's 'clarifying statement', even though it went to questions of advice to the minister that were ostensibly about 'operational' matters.¹⁵

7.26 While Dr Hawke has made clear his reluctance to insert himself into or comment on 'operational' matters, it seems that they are not beyond his ken. Evidence provided by Admiral Barrie to Senate Estimates suggests that Dr Hawke was probably reasonably well-informed about operational matters.

Senator FAULKNER—... Did you raise any of the matters raised with you by either Rear Admiral Richie or Rear Admiral Smith with the Secretary of Defence, Dr Hawke?

Adm. Barrie—I would have to say that I would be surprised if I had not because the secretary of the department and I have a very close relationship.

Senator FAULKNER—Sure. Could you outline for the benefit of the committee ... what the nature of those communications were?

Adm. Barrie—I would be pretty confident in saying that the communications would have been verbal. They would have been issues that we had discussed. We see each other pretty frequently, and almost every day when we are in the headquarters.

...

Senator FAULKNER—Are you able to help us about how well apprised the secretary was about these matters in the broad?

Adm. Barrie—Again, I would say that he would be well apprised. But you would have to ask him; I can only give my impression.

...

Senator FAULKNER—Yes, but, Admiral, you would be aware of briefing material going to Dr Hawke from the ADF.

Adm. Barrie—On operations?

Senator FAULKNER—No, formal briefing material if there were some.

Adm. Barrie—Yes, sometimes.

Senator FAULKNER—Was that taking place?

Adm. Barrie—Not to my certain knowledge. Again, you would have to ask Dr Hawke..... I am not aware of all the briefing material Dr Hawke gets from the ADF. I am also very conscious that Dr Hawke attends the Strategic Command Group, so he gets involved in a whole range of committee work and other things. As I said earlier, I would be very surprised if he was not in the picture.

7.27 The Committee considers that the boundaries around the ‘operational’ or ‘chain of command’ domain are not necessarily as clear, nor should they be as unbreachable, as Dr Hawke might claim. Given the joint responsibilities of the diarchy for Defence overall, and the involvement of both the military and civilian arms of Defence (navy and public affairs respectively) in the government’s handling of people smuggling, the Committee doubts the utility of a strict approach to ‘operational’ boundaries – particularly where the ‘operations’ are not conventional military ones. The Committee considers that a strict separation of the operational from the bureaucratic domain in these kinds of ventures is arguably not only unrealistic but counterproductive.

7.28 As well in this instance, the CDF was overseas for significant periods, with various Acting CDFs serving in his place. Important military operations were already in train in several locations, and further serious deployments were being planned. These required the full attention of the CDF. By comparison, the navy’s role in intercepting SIEVs was a non-military, border protection exercise essentially under civilian control.

7.29 The CDF made much of these factors in his evidence before the Committee, declaring the Australian Defence Force, in October 2001, to be ‘committed as never before’, and that this context was ‘highly pertinent to [the ADF’s] present priorities for action’.

In addition, we were supporting, as required, the government’s border protection policy. I emphasise ‘supporting’. Defence was not and is not running the government’s border protection policy. That is a function of other government departments. Defence’s role was as an agency directed to support a policy being formulated and implemented by other agencies, such

as the departments of Prime Minister and Cabinet, Immigration, Foreign Affairs and Transport.¹⁶

7.30 Under these circumstances, the Committee considers that the civilian half of the diarchy could properly assume a legitimate interest in undertaking a role more deliberately and visibly linked to ‘operational matters’ involving border protection. The diarchy leaders, when both were in town, typically had ‘daily discussions’.¹⁷ Opportunities for the exchange of information, views and proposals would therefore have been relatively abundant.

7.31 Such regular contact should have virtually eliminated any risk of one half of the diarchy cutting across the other in a manner that was adverse to their responsibilities. At the same time, it should have provided ample opportunity for the Secretary to draw anything problematic to the CDF’s attention, and vice versa.

7.32 In short, the realities of the diarchy’s personal interactions, their professional joint responsibilities and the requirements of a whole-of-government approach to border protection matters seem to fly in the face of a purist view of the operational / bureaucratic distinction.

7.33 The Committee has referred elsewhere to the views of Ms Halton and Professor Weller about what they believed would be appropriate action by a departmental secretary where a whole-of-government operation was in train. The implication of those views is that the diarchy, when applied in the manner promoted by the Defence leadership, is against the spirit of the accountability requirements for such operations.

7.34 Again, in the context of the broad responsibilities of departmental heads, the Committee notes the following advice from the Public Service Commissioner, Mr Podger, in re-issuing his predecessor’s guidance to secretaries about their performance assessment. That advice nominates five areas to focus on.

[These are] whole-of-government support, ministerial support, management, leadership and the promotion of the APS values.

7.35 The Committee is struck by the significance of the fact that whole-of-government support heads the list. Such a requirement has also been emphasised by the Auditor-General in his consideration of the auditing and accountability responsibilities around what is commonly termed ‘joined-up government.’¹⁸

16 *Transcript of Evidence*, CMI 741.

17 *Transcript of Evidence*, CMI 7.

18 Pat Barrett AM, Auditor-General, *Implementing Adequate Supervision – of what kind and how much*, Address to a Laboratory for Politicians and Top Managers from Different Public Institutions in Europe, Regione Lombardia, Italy, April 2002: accessed at <http://www.anao.gov.au/Web/wsPub.nsf/SpeechesByDate/>

7.36 The Auditor-General cited a Canadian-UK report which offered the following comment on the corporate role of permanent secretaries:

Permanent Secretaries have an individual and a collective responsibility. An individual responsibility to serve their respective ministers, to oversee the performance and ongoing improvement of their department. They also have a collective responsibility to serve the government as a whole by supporting and moving forward the government agenda. They have a collective responsibility ... to ensure that [the public service] is up to today's challenges.¹⁹

7.37 The Committee accepts that Dr Hawke held genuinely to his belief, based on the Ministerial Directive and his purist view of the diarchy, about not trespassing on what he regarded as the operational and advisory territory of the CDF. But it remains the case that Dr Hawke possessed knowledge in October 2001 about the misrepresentation of photographs, and in November about the absence of corroborative evidence in Defence intelligence material and reports concerning claims of children being thrown overboard. That several Defence officials knew these things, but for some reason failed, or were ignored, in their attempts to convey such advice to the minister is, in the Committee's view, alarming.

7.38 Dr Hawke has elsewhere observed: 'We're paid to call it as it is – not to provide tailored or filtered advice.'²⁰ In the case of the misrepresented photographs, explicit corrective advice was passed to the Minister's office by senior Defence officials. That this was to no avail in terms of the minister amending the public record is completely unacceptable.

7.39 In making the above points, the Committee does not assign to Dr Hawke the sole responsibility for ensuring Defence's accountability in general nor in the particular case of the 'children overboard' controversy. Several witnesses discussed the role and responsibilities of the CDF, Admiral Barrie, and his handling of the 'children overboard' controversy. The Committee has explored in the previous Chapter the CDF's acts and omissions, and the impact of these on effective accountability.

7.40 The diarchy should be an *enabling* mechanism – and in a conventional military/operational context it no doubt enables clarity of advice to the minister. However, the Committee is of the view that, whatever its strengths in other circumstances, the diarchy proved inimical to the effective handling of the 'children overboard' controversy, and more broadly to Defence's involvement in the whole-of-government approach to border protection.

19 Canadian Centre for Management Development, *Be the Change: Peer Review Report of the Cabinet Office Role in Modernising Government*, (2000) : accessed at www.cabinet-office.gov.uk/moderngov/peerreview

20 Dr Allan Hawke, *Public Service – A Secretary's View*. Paper based on the Telstra Address at the National Press Club, June 2002.

7.41 There may, perhaps, have been a robust exchange of views between the Secretary and CDF about the errors and doubts that, within days of the event, were seriously bothering their colleagues in both the operational and bureaucratic domains. Unfortunately, the diarchy privileged the CDF's position as adviser to the minister about Operation Relex matters and Dr Hawke used the diarchy to justify his decision not to provide separate advice. Thus the diarchy contributed to the failure by the Defence minister to correct the public record.

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

7.43 It must be stated clearly here, however, that the Committee's concerns about the diarchy are of relatively small moment compared to its grave concerns about the role of the minister's office in this whole affair. As has been made clear in Chapter 5, it is incontrovertible that sufficient advice was passed from the ADO to ministerial staff providing ample justification for a correction, by the minister, of the public record.

7.44 For the Committee, there are at least two key lessons to be learned from the consequences of how officials, agencies and ministerial staff interacted during this affair. One is that the role of ministerial staff in shaping the relationship between a department and a minister's office has a crucial impact on the robustness and transparency of the accountability that prevails. The second is that a whole-of-government approach to issues requires a substantial rethinking of concepts of accountability and how senior public servants might exercise their accountability function *horizontally* (across policy and operational alliances) as well as vertically through their own organisation to their minister.

7.45 The questions and tensions surrounding the horizontal and vertical responsibilities and accountabilities within the Defence diarchy are but a local version of broader accountability questions where multiple lines of authority, responsibility and agency are involved. For the Committee, such questions go to the heart of sound administrative practice.

Accountability in a Whole-of-Government Environment

7.46 The challenges to traditional standards and received notions of line authority posed within a modern public service are well expressed in the words of the University of Melbourne's Professor Mark Considine:

We expect public actors to account to the legislature, the courts and the citizenry and to other agencies with whom they coproduce public goods. Multidimensionality therefore begets complexity. ...

In the new world of enterprising government, the public official is expected to both honour his or her official mandate and to move freely outside the hierarchical constraints ... in search of collaborative relationships ...

This multidimensional agency power suggests that accountability cannot be defined primarily either as the following of rules or as honest communication with one's superiors. Rather, it now involves what might be thought of as the appropriate exercise of a navigational competence: that is, the proper use of authority to range freely across a multirelationship terrain in search of the most advantageous path to success.²¹

7.47 In the (increasingly frequent) whole-of-government approaches involving discrete agencies working collaboratively towards the same policy outcome, notions of 'navigational competence' and 'the proper use of authority across a multirelationship terrain' seem particularly apt. Professor Considine also proposes that instead of thinking about a 'line of accountability', one should think in terms of a 'culture of responsibility'.²²

7.48 It is worthwhile examining the implementation of the whole-of-government approach to people smuggling in the light of all these notions. The saga of 'children overboard' reveals quite starkly some of the vulnerabilities to which whole-of-government approaches are subject.

7.49 It is important to attend to these, because whole-of-government approaches are increasingly valuable strategies. As their value and frequency increases, more intense becomes the imperative that they be conducted in a robust and coherent way. The participating agencies must be effective collaborators without putting at risk their discrete responsibilities. This inevitably means adjustments to 'business as usual', and such adjustments must be understood, accommodated, and communicated within each agency.

7.50 The approach on this occasion was via an interdepartmental committee, the People Smuggling Taskforce (PST), chaired by a senior executive of PM&C. The preferred *modus operandi* of an IDC can be broadly expressed in the following terms.

7.51 Interdepartmental committees (IDCs):

- Are usually established to assist in the coordinated handling of major issues where the interests of a number of ministers and the agencies for which they are responsible are critically engaged.

21 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p22.

22 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p23.

- They do not have executive or decision-making powers.
- They typically provide reports containing advice and recommendations to ministers and other decision-making authorities, including to Cabinet.
- While the work of IDCs may affect the policy advising roles of agencies to their ministers it does not displace it. Therefore, when an IDC report is provided to ministers, the representatives of agencies on the IDC should advise their ministers separately of their views on the report.²³

7.52 The Committee has assessed the functioning of the People Smuggling Taskforce (PST) against the preferred model outlined above. The evidence in this regard is somewhat contradictory. Importantly, several aspects of the PST's operations were not conducive to best practice.

The role and operations of the People Smuggling Taskforce IDC

7.53 The establishment of the PST in August 2001 seems to have been at the suggestion of Mr Bill Farmer (Secretary, DIMIA) conveyed to Mr Max Moore-Wilton (Secretary, PM&C)

That was partly in response to the *Tampa* range of issues—because that was developing, as you know, very quickly—but partly also because we had had a range of boats coming into Australia and we thought that you really needed a more concerted focus on what was happening and on government responses.

I certainly thought that in DIMIA, in order to bring together the whole-of-government effort, you needed a mechanism which would do that on an ongoing basis rather than on an ad hoc basis—that is, on the basis of working level contacts and then occasionally phone calls and so on at senior level.²⁴

7.54 There had been earlier, more ad hoc committees, but for the PST:

there were really two changes: firstly, the level of representation, at least from some organisations, and the range of representation; and, secondly, the fact that the committee met in a more intense and regular way.²⁵

7.55 The Secretary of DIMIA (Mr Farmer) was a key player in the People Smuggling Taskforce. He regarded PM&C as the lead agency in the matter,²⁶ and

23 Department of Defence, *Guidelines for Defence involvement in IDCs or like joint government agency groups*. May 2002, paras 2-5.

24 *Transcript of Evidence*, CMI 859-860.

25 *Transcript of Evidence*, CMI 863.

26 *Transcript of Evidence*, CMI 862.

confirmed to the Committee that the PST operated without any specific terms of reference.²⁷ He explained:

We had a job to do, which was to bring together all the government agencies involved to respond to this phenomenon of illegal boat arrivals...[T]he first time I remember meeting with this group was in relation to the *Tampa*.²⁸

7.56 The Taskforce was chaired by a senior PM&C executive, Ms Jane Halton. Ms Halton introduced her account of the PST's purpose and operations in the following way:

The PST was set up and run on the basis that it provided advice on policy and operational issues as they arose. One of the group's key jobs was information exchange to ensure that all agencies were kept aware of relevant and emerging facts. It is important to understand that the role of the PST was not to insert itself into the chain of command within departments or the military.

My habit as chair was to start every meeting with a roundtable update from every agency. I always asked those attending to update the group, to raise any issues that they wish discussed or considered and to ensure that all members were fully informed. The need to ensure we were kept fully informed was reinforced on many occasions. At all times the PST operated in a thorough and professional manner consistent with Australian Public Service practice and APS values. Where issues or concerns emerged, these were followed up and advice provided. With hindsight, it is clear that some information which was available elsewhere was not passed to the PST.²⁹

7.57 According to Ms Halton, the Taskforce reported to the PM&C Secretary (Mr Moore-Wilton) and to the Prime Minister's Office. While the Taskforce brought together 'the collected advice' of the participating agencies about an issue, and the Taskforce might 'come to a view about that particular issue', Ms Halton stated that this 'did not in any way fetter any members of that group from individually advising their minister as to their individual view.'³⁰

7.58 Ms Halton consistently denied that the PST actually took decisions, stating that she was:

struggling to come up with an example of where the IDC took a decision. It had no power to take decisions. Decisions were taken by ministers or where individual departments had delegated authority in respect of those delegations. ...

27 *Transcript of Evidence*, CMI 862.

28 *Transcript of Evidence*, CMI 863.

29 *Transcript of Evidence*, CMI 902.

30 *Transcript of Evidence*, CMI 913.

It discussed issues as they arose and it discussed the handling of those. It provided an opportunity ... for information exchange so all of the agencies that were working on this issue had the opportunity to hear from all of the others precisely what issues were currently emerging. So, ...it was important, for example, for Customs officers, for the Federal Police and for Immigration officers to all understand exactly what was intended in particular respects so that their officers on the ground could be similarly briefed and be working from the same basis. As you know, it is the classic conundrum of whole-of-government exercises that individual departments do not always get the information that other departments have, and this was a mechanism to ensure that those departments were all privy to the same information...

As you know, the group prepared briefing papers and option papers in particular areas, so you are already aware that there was one provided on the evening of 7 October. ... What the paper did...was reflect the views of all of the agencies in respect of a series of issues. In some cases it reflected an accord about issues and in some cases it reflected a difference of view, which again you would expect—agencies come from different perspectives. It was important that in this particular case the Prime Minister understand that the agencies sometimes had a slightly different perspective on those issues.³¹

7.59 Although Ms Halton was categorical in her claims that the PST did not take decisions, nor insert itself into other agencies' chain of command, certain witnesses indicated to the Committee that they had the distinct impression that the PST not only laid out the broad operational framework and rules of engagement, but had a key role in directing the course of events, and indeed made decisions which then simply had to be implemented by the relevant agency.

7.60 On the last point, for example, according to a senior DIMIA official (Deputy Secretary Ed Killesteyn) it was the PST that decided that, in the case of SIEV 4, the people on board should be given a prepared script which would give them certain details about how they were to be transported to 'another place' and processed by Australian officials, but which would not disclose full details of where they were going. The script – one of a series that had been developed - was unique in this respect.³² According to Ms Halton's, the PST 'saw' and 'discussed' such a series of scripts, but the PST 'did not make a particular decision that [asylum seekers] would be misled.'³³

7.61 It is not clear from this evidence whether the PST instigated the modified script for SIEV 4 and directed that it be implemented, or simply endorsed a settled DIMIA decision about how SIEV 4's occupants should be handled. A file note dated 10 October prepared by Deputy CEO, Customs (Mr John Drury), who was present at

31 *Transcript of Evidence*, CMI 910.

32 *Transcript of Evidence*, CMI 866-67.

33 *Transcript of Evidence*, CMI 906-8.

that meeting, listed what he noted as ‘issues [that] emerged today’ at the PST. It is worth quoting at some length for the insights it gives into how the PST went about its business.

- PM&C began the meeting by distributing a press release in the name of the Prime Minister announcing arrangements to transfer SUNCs now held on HMAS Adelaide, to PNG.
- The plan is to disembark from Adelaide tonight and to locate the 223 persons in the Christmas Island sports hall.
- Those on board are not to be told that their destination is PNG at this stage. This is to avoid reaction among the group who may then display resistance to being airlifted onwards to PNG.
- ... [ITEM BLANKED OUT]
- ...[ITEM BLANKED OUT]
- Minister Reith wants Christmas Island relieved of the latest SUNCs by Friday. PM&C and DIMIA say this is impossible until the new PNG facilities are brought up to standard which may take two weeks.
- Manus Island [**Please protect**] is one of the locations in PNG which is being considered.
- Bill Farmer stressed the need for a common Q&A document for AFP, Customs, ACM, and other Government officials on Christmas Island so that there is no mixed messages given to either media or the local representatives on Christmas Island about the handling of, or the intentions towards the latest SUNCs.
- PM&C agreed with Mr Farmer and requested that DIMA action.³⁴

7.62 It remains unclear to the Committee how ‘decisions’ and ‘advice’ were distinguished within the PST. The Committee notes that some Defence personnel clearly believed that the PST was calling the shots, and that it was PST decisions that determined how they were to respond as each situation unfolded. Brigadier Silverstone referred to the ‘micro-management’ from Canberra, which he attributed to ‘a very fluid policy environment’,³⁵ involving ‘a very high degree of interagency coordination.’³⁶

34 File Note of 10 October 2001 attached to Drury witness statement to Bryant Report.

35 *Transcript of Evidence*, CMI 350.

36 *Transcript of Evidence*, CMI 365.

7.63 Rear Admiral Smith told the Committee that he operated under the impression that government directives came from the PST. For example, in describing Operation Relex he stated:

...once the vessels were intercepted in the early stages of Operation Relex, every decision that was taken in terms of what to do with [a] particular vessel and the people in it was in fact directed from Canberra... out of the interdepartmental committee process, and therefore, from our perspective it was a government directive.... [As] these incidents unfolded that particular committee, as I understand it, met regularly and decisions were taken ... as to the next step in the particular operation, whatever the SIEV happened to be.³⁷

7.64 This apparent confusion about the PST's role within the Defence chain of command and elsewhere is puzzling. Were these Defence officials inadequately briefed on the relationship between Operation Relex and the PST, or did Defence as a whole have similar views? Or were there some inadequacies in the PST, either in the way its membership was structured or in the communication protocols that existed between the PST and its contributing agencies ?

7.65 When the Committee sought from DIMIA Secretary Bill Farmer an insider's view of the operations of the PST, Mr Farmer began by describing how PST decisions were made and progressed:

In terms of the decision making [in the PST] ... members of the high-level group were not always involved in the preparation of briefing or advice that went to the Prime Minister from the Department of the Prime Minister and Cabinet. It is quite normal for that sort of advice to be, in effect, jealously guarded by PM&C. In terms of advice to the Prime Minister, we were not involved in... the preparation of every bit of paper. We were on some occasions involved in looking at draft bits of paper prepared by PM&C and offering our comments on those. After those discussions, PM&C would finalise them and send them to the Prime Minister. We were never a party to the broader distribution of those pieces of paper by the Department of the Prime Minister and Cabinet. I think in one case ... one of the reports went to Minister Reith. That may have happened on other occasions, but we were not the master of that information. There was one form of product from the IDC prepared by Prime Minister and Cabinet for the information of, or decision making by, the Prime Minister and possibly other ministers.³⁸

7.66 Ms Halton described the preparation of advice going from the PST to the Prime Minister in somewhat different terms:

The essence of this whole operation was to have agreement amongst the agencies about the text and the advice. I think we have canvassed previously

37 *Transcript of Evidence*, CMI 456.

38 *Transcript of Evidence*, CMI 874.

that ... where there was combined advice required on something, that was always discussed and the material was always agreed.³⁹

7.67 The Committee has been unable to satisfactorily reconcile the discrepancies between these views of how the PST actually operated. Perhaps the difference lies in what Ms Halton is referring to when she says that ‘the material was always agreed’. By ‘material’ does Ms Halton mean the document that was actually signed off by her following the PST’s session, or does ‘material’ refer to the content of the discussion that went on in the PST meeting proper? If the former, there is a clear discrepancy between her account and Mr Farmer’s; if the latter their accounts are more easily reconciled.

7.68 The Committee notes that in the specific case of the options paper prepared on 7 October, Ms Halton consistently told the Committee that the PST worked through an iterative editing process – ‘line by line’ – with everyone present involved, and that the document ‘ultimately came back for one last read’.⁴⁰ As noted earlier, Ms Halton’s account is at variance with that of AVM Titheridge.⁴¹

7.69 If the line by line editing and final read-through process as described by Ms Halton did in fact occur on this occasion – an account which is corroborated by Ms Edwards in her written answers to Questions on Notice - it stands in contrast to how the advices from the PST were generally finalised – at least so far as Mr Farmer’s account is concerned. Mr Farmer’s account conveys a process whereby essentially the PST representatives contributed their perspectives, issues were discussed, and then Ms Halton and her PM&C associates assembled the final advice going to the Prime Minister, without further reference back to the participants.

7.70 Ms Halton also told the Committee that:

There was no point at which that final [October 7 options paper] document – and, indeed, any final document that we put through – was disputed.⁴²

7.71 The Committee received no evidence that would contradict Ms Halton on this point in relation to the October 7 paper. Whether her claim would validly apply to ‘any final document that we put through’ is another question. It seems that the PST as a group rarely had before it a ‘final document’ to consider, and so it is self-evidently the case that no final document was ever disputed. It was not there to be disputed.

7.72 In any event, copies of advices flowing from the PST were not subsequently provided to participating agencies for their information or review. The Committee regards this a serious flaw in the PST’s procedures. Ms Halton told the Committee:

39 *Transcript of Evidence*, CMI 2069.

40 *Transcript of Evidence*, CMI 2069.

41 *Transcript of Evidence*, CMI 2070.

42 *Transcript of Evidence*, CMI 2069.

[N]obody was given a copy of the document to take away – that was standard practice. These materials were considered sensitive, and agencies were not given copies of the document.⁴³

7.73 This strikes the Committee as particularly odd. The document was assembled from the combined inputs of the participating agencies. Any sensitive material would have emanated from the agencies themselves, and presumably their representatives were appropriately cleared to deal with such sensitivities. Why they were not then entitled to or trusted with the final advice, which they supposedly jointly ‘owned’, is a mystery. Such a refusal also impeded representatives from reporting back as fully as they might to their own agencies. The PST was meant to have been a whole-of-government operation, and yet it seems the agencies involved were deliberately deprived of the final whole-of-government view of the PST.

7.74 This rings true with Mr Farmer’s comment that PM&C ‘jealously guarded’ the formulation of the final advice from the PST to the Prime Minister. If whole-of-government processes are to be more frequently used, there will need to be something of a cultural change within PM&C towards a more inclusive ethos. Agencies working on whole-of-government projects are likely to become quickly disenchanted if the lead agency appears patronising, or conveys a lack of confidence in the discretion of the participants, or does not provide adequate feedback on outcomes.

7.75 The Committee also sought a description from Mr Farmer as to how the participating agencies carried out their own roles and how ministers’ decisions were fed back into the PST.

[The] high-level group would also receive back advice from PM&C about decisions that had been taken on a range of issues. ... The high-level group shared information as well as, in a sense, trying to give some strategic direction on the way that the whole particular bits of the strategy were being implemented.⁴⁴

7.76 As far as documentation of PST discussions was concerned, Ms Halton stated that, apart from her own handwritten notes in her ‘running day book’, the PST operated with a note-taker, the notes being converted into minutes, but that the minutes did not go back to the PST at subsequent meetings.⁴⁵

If what you are asking is, ‘Were the minutes reflected back at the next meeting?’ the answer is no. If what you are asking is, ‘Was there a record of key issues raised and/or decisions taken?’—‘decisions’ is probably the wrong way to describe this forum, to be quite frank. ... ‘Outcomes’ would be a better description. Sometimes there was a product of the meeting ... and often the outcome of the meeting would be a thing: a paper or whatever... [T]o be quite frank, we were running so fast and, as you know,

43 *Transcript of Evidence*, CMI 2071.

44 *Transcript of Evidence*, CMI 874-75.

45 *Transcript of Evidence*, CMI 905.

there were a series of issues being dealt with and the issues that came out of particular Taskforce meetings were often then themselves considered in the next meeting. It was the nature of the iterative process of the work. So, no, those minutes were not subsequently referred to me.⁴⁶

7.77 Given the PST's strong reliance on oral advice from those in attendance, and the minimal documentation attached to its operations, Mr Farmer was asked by the Committee whether he had any concerns about the lack of a paper trail.

For me, no. I am concerned with effectiveness and with outcomes. That means that I am concerned about paper trails where there is a quite appropriate requirement for a paper trail, in an audit or other sense, but successive governments have made it clear that they want a public service that is able to be flexible and get the job done. That, for me, does not mean producing huge mounds of paper; it means looking at what is the most appropriate and effective way of getting something done.⁴⁷

7.78 The Committee fully accepts that at times the PST was dealing with very fluid, sometimes volatile, situations, and would not expect the PST to produce 'huge mounds of paper' to explain or justify its actions on those occasions. Nevertheless, the Committee considers that some basic administrative and procedural elements were missing from the PST's operations. For example, it would have been at least prudent – and probably highly desirable – that PM&C circulated back to the participating agencies copies of the advice that PM&C compiled and forwarded to the government on the basis of deliberations at a PST meeting.

7.79 The Committee is not arguing here for red tape, but for a respectable reporting back of PST outcomes to those who contributed to their development. This would have enabled participating departments to routinely check what had gone to government as the PST's considered position, and thereby would have greatly increased the chances that any error, misleading statement or insufficiently caveated advice would have been picked up by the agency concerned and fed back into the PST.

7.80 Information into the PST flowed largely from agency sources via their representatives at the PST meetings. However, the management of that information seems to have lacked the degree of orderliness necessary to ensure thorough consideration and careful assessment of the multiple inputs.

7.81 With regard to these communication flows, DIMIA official Ms Philippa Godwin is recorded in the Bryant Report to have expressed serious concerns.

Ms Godwin...recalled that information flows had become erratic and disjointed... It had therefore been very difficult to check which information was the most up to date, or to check the accuracy of information.

46 *Transcript of Evidence*, CMI 905-6.

47 *Transcript of Evidence*, CMI 882.

Ms Godwin commented that it was clear that some people were getting information ahead of and outside normal channels of communication. ...

Ms Godwin perceived that there was a need to rebuild proper lines of communication. This goes back to the Prime Minister's Coastal Surveillance Taskforce, where a lot of work was put into establishing timely and effective information flows through an established network of contact officers.⁴⁸

7.82 There also seem to have been considerable differences between agencies' representatives in the way they reported back to their home departments or ministers. These ranged from limited oral reports to typed up file notes. The nature of the 'handovers' between different representatives from the one agency who attended various meetings also seem to have been quite variable.

7.83 The PST comprised high level officials who were presumably well placed both to advise the PST and ensure close liaison with their home departments and ministers. The Committee considers that this resulted in a ready acceptance of the veracity of information circulating in the PST which was to prove not fully justified, and for which insufficient feedback and quality control mechanisms had been put in place.

7.84 On the matter of the ready acceptance by the PST of the report that children had been thrown overboard from SIEV 4, Mr Farmer explained that the group always worked on the assumption that contributions from PST members were authoritative.

I have already said that that was a high-level group meeting, that anyone in that meeting who was told anything by me about an immigration matter had the right to assume that that was authoritative advice from the Department of Immigration and Multicultural Affairs. Similarly, I and other DIMA officers had a corresponding expectation that anything said to us by representatives in the high-level group was an authoritative statement from their organisation. If there were caveats about material, then we had a responsibility to reflect those caveats. If there were not—I have already said to you in relation to this particular matter that there were not—then we had the right to take the information given to us by, in this case, Defence.⁴⁹

...[I]f a representative in a high-level group passes on information without caveats, then the other representatives in the high-level group have an expectation that that information is well founded. You do not go into a high-level group and say, 'Well, the Attorney-General's Department says this about the law, but how do we know this? Perhaps the Attorney-General's Department had better check it,' and then go through every bit of advice and

48 Record of interview with Ms Godwin in the Bryant Report.

49 *Transcript of Evidence*, CMI 882.

send people away. You had senior officials there who were supposed to be participating in a high-level group and I think talking authoritatively...⁵⁰

7.85 With respect to the original report to the PST of ‘children overboard’ Mr Farmer observed:

I have certainly come to the awareness that the process that led to that information coming into the high-level group was flawed and that, of course, has been at the centre of much of the discussion in this committee and in other places. I think that is the lesson that others are drawing—that before that sort of statement is made in that sort of meeting, then things should be properly corroborated.⁵¹

7.86 The input of flawed information on the morning of 7 October cannot result in the PST’s being blamed for including ‘children thrown overboard’ in the advice that was sent to the Prime Minister that evening. It was the rapid verbal transmission of the flawed information out of the PST to the Minister for Immigration that resulted in its quick entry into the public arena, thereby triggering the controversy. The Committee notes that the communication with the Minister was not initiated from within the PST. It occurred because of a chance phone call from the Minister seeking an update from the Secretary of DIMA while the PST meeting was in progress.

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

7.88 The Select Committee contends that the political import of the ‘children overboard’ advice would not have been lost on the senior figures who comprised the PST. This was potentially headline-making information, and PST members would have been under no illusion about the level of public interest it would arouse.

7.89 The PST Chair, Ms Halton, had a different view:

I do not think that anyone in that meeting anticipated what was going to happen with that information. This might sound surprising to your very political ears, but I genuinely do not believe that anybody in that room thought it was a particular political issue. I think that people thought that it was regrettable, but I do not believe that it was thought of as being a political issue.⁵²

50 *Transcript of Evidence*, CMI 882-83.

51 *Transcript of Evidence*, CMI 882.

52 *Transcript of Evidence*, CMI 2052.

7.90 The Committee considers it surprising that such a view should be proffered by a very senior PM&C officer. Officials at this level are required to be, and indeed often pride themselves on being, very attuned to the political dimension of matters they are dealing with. The proof of the political significance of the issue was dramatically apparent shortly after the information had been passed outside the PST to Minister Ruddock, and reinforced by utterances of other ministers during that day. It seems unlikely that the seasoned professionals attending the PST on 7 October were uniformly ignorant of the political significance of a report of children being thrown overboard.

7.91 Given that the government was on an election footing, and that the issue of asylum seekers was politically very prominent, there was every good reason for the PST and its members to be particularly scrupulous about its handling of such information.

7.92 It is understandable that officials were anxious to keep ministers as up to date as possible about unfolding events. But there is also a strong requirement on senior public servants to be judicious in that upwards reporting.

7.93 A DIMIA official present at the PST meeting - which she characterised as 'shambolic' with 'mobile phones ringing constantly',⁵³ - was concerned about erratic information flows and the lack of its systematic handling. She added:

Ministers had also inadvertently contributed to the problems themselves. Understandably they wanted to get information as it happened and were reluctant to wait for confirmation. However, this had meant that as soon as anyone got information, they felt pressured to pass it on. Because things were moving very quickly, through mobiles, there was a lack of precision in language used and a 'Chinese whispers' effect.⁵⁴

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

7.95 Little, if any, thought seems to have gone into establishing basic processes for keeping the PST and the participating agencies systematically in touch with the activities and outcomes of the group. No minutes, not even the notes, were circulated. No copies were sent back to departments of the advices that went from the PST, courtesy of PM&C, to government. No guidelines existed as to how PST members

53 Record of interview with Ms Philippa Godwin in the Bryant Report.

54 Record of interview with Ms Philippa Godwin in the Bryant Report.

should report back to their departments, nor how different representatives from the same agency attending different meetings should brief each other by way of handover.

7.96 The Committee has examined the attendance records of the PST. No fewer than one hundred and two different names appeared as having attended the PST at various times between August and December 2001. Some attended only once or twice, others perhaps half a dozen times, with up to twenty appearing more or less regularly. It is difficult to imagine how such an array of participants, unless scrupulously managed, could be conducive to the effectiveness, let alone the accountability, of the PST. It is also difficult to imagine how these participants could be coordinated in such a way as to ensure coherent input from the various organisations they represented.

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

7.98 The Auditor-General has made some particularly pertinent remarks in the context of an ANAO report on the management of unauthorised arrivals.

In situations where there is joint responsibility for overseeing and implementing programs across a number of agencies, a clear governance framework, which clearly defines accountability and reporting arrangements, roles and responsibilities of the various participants, is necessary. Increasingly, relevant governance arrangements need to cross organisational boundaries to better align activities and reduce barriers to effective cooperation and coordination. This is the case in relation to the prevention of unauthorised arrivals, given the various agencies involved, all of which have been required to operate in the context of a rapidly changing and, at times, high-pressure environment.⁵⁵

7.99 The Committee finds that the People Smuggling Taskforce did not operate with 'a clear governance framework which clearly defines accountability and reporting arrangements'. Observations about PM&C's 'jealous guarding' of advice, the PST's 'erratic and disjointed communication flows', and agency participants being 'not masters of that information' suggest that the PST fell far short of what the Auditor-General would rate as a satisfactory mechanism for conducting a whole-of-government operation.

7.100 In making these criticisms, the Committee is assessing the PST from the perspective of best practice, not urging a counsel of perfection. The Committee is not questioning the integrity of the individual participants on the PST, but commenting on weaknesses in its operation, particularly in its control structures.

55 The Auditor-General, Audit Report No. 57, 2001-02 *Management Framework for Preventing Unlawful Entry into Australian Territory* (ANAO, Canberra), p.39.

7.101 By ‘control’ the Committee does not imply rigidity and hierarchy, but a notion that embraces the identification and treatment of risks in order to promote the efficient, effective and ethical achievement of objectives. Control is a process, a means to an end, not an end in itself. It is everyone’s responsibility; it is effected by people at all levels within the group; it encourages a focus on the big picture; and it provides reasonable, not absolute, assurance that outcomes will be achieved.⁵⁶

7.102 A ‘best practice’ control structure comprises five core, inter-related components:

- a. Control environment – sometimes called the ‘tone at the top’.
- b. Risk assessment – identify, analyse, assess, prioritise and treat risks.
- c. Control activities – risk mitigation, detection and correction of errors.
- d. Information and communication – timely and accurate information; communication flows up, down and across; regular internal and external reporting.
- e. Monitoring and review – self-assessment; identify breakdowns, duplication and gaps.

7.103 The Committee cannot make a detailed assessment of the PST against all of these components. However, the Committee encourages Inter-Departmental Committees (IDCs) to devote some attention to establishing reasonable and relevant control structures before making haste in the execution of their important and responsible duties.

7.104 Responsibility also lies with the individual representatives involved in IDCs to report back in at least a minimally adequate way to their own departments. In the case of the People Smuggling Taskforce, the Committee had little material upon which to make an assessment. But there appears to have been considerable variation in the reporting back practices, ranging from the written and detailed to the virtually non-existent.

7.105 In summary, the Committee regards the PST as having embarked upon its demanding task without establishing at the outset a set of procedural and administrative structures and protocols suitable for the undertaking. Basic record-keeping, monitoring and risk management procedures were effectively non-existent. Information channels were not systematically organised so as to provide the necessary checks and balances for a whole-of-government operation.

7.106 In response to the experiences associated with its involvement on the People Smuggling Taskforce, the Department of Defence has produced guidelines for the

56 This discussion of control is based on the ANAO Better Practice Guide *Controlling Performance and Outcomes* (Canberra) 1997.

future participation of Defence personnel in whole-of-government groups. The Committee commends the Department on its initiative. Some of the key guidelines include:

- The lead IDC agency to circulate records of meetings, and provide copies of all advice(s) to Ministers, to all IDC members.
- Copies of IDC records to be provided by the IDC representative to other relevant staff within Defence.
- Where an IDC does not provide records of meetings, Defence representatives to prepare key point summaries for distribution.
- Defence IDC representatives to keep Minister, Parliamentary Secretary, CDF and Secretary informed about major IDC events and milestones.
- If related actions are taken outside formal IDC meetings, other IDC members to be informed, and a report made to the next IDC meeting.
- In relation to important communications, including phone calls, brief notes for file to be prepared.
- IDC reports should be cleared by all IDC members before submission to ministers.
- If a report raises significant issues or disagreements between agencies they should be brought to the attention of senior officials.⁵⁷

Accountability and Ministerial Advisers

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

7.108 While ministers and public servants regularly account for their actions directly to parliament and by appearance before its committees, this is not the case for ministerial advisers. In the past, it has been generally accepted that advisers' accountabilities are rendered via ministers, it being understood that advisers act at the direction of ministers and/or with their knowledge and consent. This seems to be no longer a legitimate assumption.

57 These Guidelines were prepared by the CDF-Secretary Task Force within the Department of Defence. The Task Force, as part of its duties, had been charged with identifying shortcomings in Defence communications and liaison processes and recommending corrective action.

7.109 The situation is that there now exists a group of people on the public payroll – ministerial advisers – who seem willing and able, on their own initiative, to intervene in public administration, and to take decisions affecting the performance of agencies, without there being a corresponding requirement that they publicly account for those interventions, decisions and actions. It is to an exploration of this phenomenon that the Committee now turns.

The changing role and status of ministerial advisers

7.110 An excellent account of changes in the roles of ministerial staff over the past three decades, and of the debate about advisers' accountability, has been produced by Dr Ian Holland of the Parliamentary Research Service. The Committee has drawn extensively on Dr Holland's work in the following discussion.⁵⁸

The growth in numbers of ministerial staff

7.111 Ministers typically have three sorts of staff working for them:

- Personal staff – policy, special and media advisers - who support and assist them in performing their ministerial, parliamentary and party duties. They add a political dimension to the advice available to ministers and often act as spokespersons. They are employed under Part III of the *Members of Parliament (Staff) Act 1984 (MoPS Act)*.
- Departmental Liaison Officers (DLOs), seconded from ministers' departments, who facilitate liaison between the minister's office and portfolio agencies. They remain departmental employees under the *Australian Public Service Act 1999*.
- Electorate staff, who generally do not work in the ministerial office. Ministers' electorate staff are allocated on the same basis as for all other members of parliament.

7.112 The growth in staff providing support to the government has not had a clearly partisan character: the rise and fall in numbers has had more to do with parliamentary reforms, and Prime Ministerial preferences.⁵⁹ The Fraser Government maintained the same sorts of levels of staff as the early Hawke Governments. The current Howard Government is maintaining similar staffing levels as the last Keating Government. The available data suggest also that governments of all persuasions increase the numbers of staff as their period in office lengthens.

58 Ian Holland, *Accountability of Ministerial Staff?* Research Paper no. 19, Department of the Parliamentary Library, Canberra, 2001-02 <http://www.aph.gov.au/library/pubs/rp/2001-02/02rp19.pdf>

59 On Fraser see Pat Weller, *Malcolm Fraser PM*, Penguin Books, Ringwood Vic., 1989, pp.22-5; on Keating see John Halligan, 'Labor, The Keating Term and the Senior Public Service', in Gwynneth Singleton (ed.) *The Second Keating Government*, Centre for Research in Public Sector management, University of Canberra / Institute of Public Administration Australia, Canberra, 1997, p.54.

7.113 The number of staff working in ministers' offices has at least doubled in thirty years. Close examination of that growth reveals it primarily to be the consequence of decisions about the machinery of government, and attempts to make government more 'professional', rather than the desire of governments to secure partisan advantage or gain further dominance over parliament. For the Committee, the key issue is accountability, and the extent to which the numbers of ministerial staff might impede accountability is one, but certainly not the most important, consideration.

The rise in influence of ministerial staff

7.114 Government ministers have traditionally had access to advice and support from the departments that they administer and in particular from the departmental secretary. However, in recent decades ministers have increasingly sought advice from other sources.⁶⁰ In so doing, they have tended to recruit onto their personal staff a hand-picked group, most of whom share the minister's political outlook and have strong commitments to ensuring that their minister is effective in both the party room and the parliament. This is particularly the case with ministerial advisers.

7.115 Ministerial advisers are appointed under the *Members of Parliament Staff Act*, (*MoPS Act*) Under this Act, the Prime Minister establishes conditions of employment for all ministerial staff, on an individual basis. The Act does not require those conditions to take any particular form.

7.116 The main guidance given to ministerial staff lies in the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*. Section nine of the *Guide* concerns 'ministerial staff conduct'. Most of its content pertains to conflict of interest issues. The *Guide* indicates for example that staff :

must divest themselves, or relinquish control, of sensitive interests such as shares or similar interests in any company or business involved in the area of their minister's portfolio responsibilities...

should not contribute to the activities of interest groups or bodies involved in lobbying the government, if there is any possibility that a conflict of interests... may arise

[that] gifts, sponsored travel or hospitality should not be accepted if acceptance could give rise to a conflict of interests...⁶¹

7.117 The main point to note is that, to the extent that ministerial staff have been regulated at all, it has been almost entirely to deal with possible conflicts between their individual self interest and the interests of their minister. None of the guidance

60 Anne Tiernan, 'Problem or Solution? The Role of Ministerial Staff', in Jenny Fleming and Ian Holland (eds.), *Motivating Ministers to Morality*, Ashgate, Aldershot, 2001, p.92; Patrick Weller, *Australia's Mandarins: the Frank and the Fearless?* Allen & Unwin, St Leonards, 2001.

61 Prime Minister *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998.

has been directed at problems that might arise through the ministerial adviser's pursuit of what they perceive as the interests of their minister or their party.

7.118 The Committee is also concerned by the lack of congruence between the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* and what is contained in the *Members of Parliament Staff Act*. As one witness expressed it:

[There] is the need to evolve institutional arrangements that are appropriate to the contemporary reality of government. The Public Service has evolved and has had its arrangements changed to accommodate new realities and new directions. The *Members of Parliament Staff Act* was passed in 1984 in a particular set of circumstances. It no longer provides an appropriate institutional framework for how the system is working.⁶²

7.119 Ministerial advisers have become important participants in the policy process, playing a range of policy roles.⁶³ As their numbers and perceived influence have grown, so their role has become more controversial. Few commentators or senior officials reflecting on the public service over the last decade or so would fail to mention the major changes that have been wrought in pursuit of flexibility and responsiveness. One of these major changes has been in the relationship between departmental secretaries and their ministers, and ministerial advisers.

The pressure on ministers to respond to anything and everything immediately has increased dramatically over the last 25 years or so...It is only natural that ministers require additional resources to help manage all this pressure, and that the resources required are both political and professional. The interface between the politicians and their political advisers, and the Public Service, is accordingly more complex and more fluid.⁶⁴

7.120 Many departmental secretaries find that advisers 'act as a conduit between the secretary and the Minister, often injecting policy advice along the way'.⁶⁵ Opinions vary as to the benefits of such a situation.

If you want to say it's a contest it's increasingly an unequal contest, but we've just got to make it work... it is a very sensitive issue obviously and very easily abused.

62 *Transcript of Evidence*, CMI 1239.

63 James Walter, *The Ministers' Minders: Personal Advisers in National Government*, Oxford University Press, Melbourne, 1986, pp.129-176; Maria Maley, 'Conceptualising Advisers' Policy Work: The Distinctive Policy Roles of Ministerial Advisers in the Keating Government, 1991-96', *Australian Journal of Political Science*, vol. 35, no. 3, 2000, pp.449-70.

64 Andrew Podger (Public Service Commissioner), *Beyond Westminster: Defining an Australian Approach to the Roles and Values of the Public Service in the 21st Century*, Address to IPAA Seminar, May 2002.

65 John Halligan et al, *The Australian Public Service: The view from the top* (Coopers & Lybrand, University of Canberra, 1996), p.71.

You bite your tongue a lot to make sure you have reasonable relations with the senior adviser.⁶⁶

7.121 Not all departmental heads have misgivings about ministerial advisers.

I've always taken the view that there is a real role for ministerial advisers that the public service can't provide, and in many ways it's better not to have somebody from the department there who's a senior adviser...[Advisers have] got a big role that in many respects the public service can't play ... there's a lot of negotiating to be done...with the Senate...with outside bodies and so forth. So I think there's a definite role for ministerial advisers, which in many ways ensures that the public service isn't politicised, because you can get the political stuff done by the ministerial advisers.⁶⁷

7.122 The 'political stuff' referred to by the departmental secretary quoted above seems clearly directed to activity connected with the formulation of policy and the passage of legislation – 'negotiating with the Senate and with outside bodies'. But what has animated much of the debate around 'children overboard' has been the engagement of ministerial staff in 'political stuff' at the interface between ministers' offices, their departments, the media and the electorate.

7.123 In the Committee's view, rather than ministerial advisers serving as a political buffer limiting the risk of politically partisan activity on the part of the public service, they are increasingly interventionist in ways that embroil agencies improperly as means to advisers' politically partisan ends.

A case study in the accountability of ministerial advisers

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

7.125 Throughout its inquiry the Select Committee, as a result of a whole-of-government decision, has been denied access to the ministerial staff in question. The basis for this refusal includes the claim that to question ministerial staff is to undermine the special nature and necessary confidentiality of the relationship between a minister and his or her staff. The Clerk of the House of Representatives has also

66 Secretaries quoted in John Halligan et al, *The Australian Public Service: The view from the top* (Coopers & Lybrand, University of Canberra, 1996), p.71.

67 John Halligan et al, *The Australian Public Service: The view from the top* (Coopers & Lybrand, University of Canberra, 1996), p.72.

argued that a probable immunity of ministerial staff exists by extension of the immunity of members of the House of Representatives (and hence of ministers) from being called before a committee of the Senate – and vice versa.⁶⁸

7.126 The Minister for Defence (Senator Robert Hill) has also refused the appearance of certain officials even though, as public servants, they do not fall under the cabinet prohibition on the appearance of *MoPS* Act staff. Such bans and refusals are anathema to accountability.

7.127 The Committee has considerable sympathy for the view that ministerial advisers and public servants should have similar obligations with respect to public accountability. The Committee is not suggesting that a parliamentary committee would actually censure, penalise or reward ministerial staff according to the content of any information they might disclose under questioning. It is not proposed that they be on trial. The proposal is merely that they provide information.

7.128 Over 25 years ago this same debate took place over the appearance of departmental secretaries before parliamentary committees. Many of the same arguments being made then about public servants are now being made regarding ministerial staff. As Professor Weller pointed out in his evidence to the Committee, the additional transparency that came with making departmental secretaries available to parliamentary committees was ‘probably desirable’ and it had not damaged the machinery of government.⁶⁹ Indeed, the appearance of public servants before committees is now quite routine.

7.129 Professor Weller also highlighted the link between the growth in the role of ministerial staff and the issue of accountability.

[I]f secretaries of departments can be asked to appear before your committee and asked what they told ministers then equally ministerial staff should be able to be called before the committee and asked what they told ministers, because we can no longer assume that telling a minister’s staff is telling a minister.⁷⁰

7.130 Ironically – especially given his role as Defence minister in refusing the appearance of certain witnesses, including public servants, before the Committee – it was Senator Hill who was a strong advocate for accountability in earlier parliamentary debates on these issues. At that time, Senator Hill gave a very clear indication that the immunity of the executive might need to be tempered when it comes to ministerial staff, if executive accountability to parliament is to remain credible. Indeed, in 1994 he led the (then) Opposition’s unsuccessful push to have ministerial staff answer questions in relation to the Community Grants Scheme.

68 Correspondence from the Clerk of the House of Representatives to the Committee, April 2002.

69 *Transcript of Evidence*, CMI 1220.

70 *Transcript of Evidence*, CMI 1219.

7.131 On that occasion he argued it was necessary to seek evidence from staffers following the minister's resignation because 'we are determining the proper response of the Senate in what amounts to a prima facie case of political corruption'.⁷¹ He reasoned that this involved doing 'everything reasonably possible to bring the government to account for improper conduct in the administration of the public purse.'⁷²

7.132 Eight years later during a discussion regarding the 'children overboard' incident in Senate Estimates hearings, he was involved in the following exchange:

Senator Faulkner —What is going to be your approach—and Mr Scafton is just one example—if, perchance, Mr Scafton [as a former MoPS employee] were to be invited by the Senate select committee to provide evidence on this or any other matter?

Senator Hill —I would defer... to a whole of government position on that. To my mind it is treading on very dangerous ground. On the other hand, that must be weighed against the benefit of getting as much relevant information as possible on the public record. I have certainly not been party to a discussion yet on how we should weigh that balance. I will be doing that in due course if the committee gives an indication that it wishes to call *MOPS* staffers.

7.133 In both 1994 and again in 2002, the question was one of how to ensure that 'as much relevant information as possible' was presented to the parliament (and, in both cases, the mechanism was to be a Senate committee). In these cases, as Professor Weller also indicated, this would mean putting questions to ministerial staff.

7.134 The Committee has been struck by the extent to which the question of accountability of ministerial advisers quickly became a topic for public debate as a direct result of the 'children overboard' inquiry. Numerous press articles and editorials addressed the issue; academics and prominent public servants spoke in public forums; and at least two seminars were held under the auspices of universities.

7.135 The tone of this commentary was universally critical of the behaviour of certain ministerial advisers, and was invariably accompanied by calls for reform to ensure that advisers were more directly and properly accountable to the parliament. The following extracts from newspaper editorials and other published articles convey the substance of those critical views.

Minders ought to be accountable: ...There may once have been some justification for a screen... but most of the older reasons for a screen have disappeared, just as the older operating systems have disappeared. The ones which have taken their place are notionally completely unaccountable, and have created a major vacuum in doctrines of ministerial responsibility and in

71 Senator R. Hill, Senate, *Debates*, 3 March 1994, p.1418.

72 Senator R. Hill, Senate, *Debates*, 3 March 1994, p.1419.

the public's right to know about the workings of government... Increasingly, staffers are wielding executive power in their own right, and without reference to the minister... Staffers are taking it upon themselves to decide whether advice given is passed on to ministers, and ministers, from the Prime Minister down, flatly refuse to accept any responsibility for the office if they can claim not to have been told.⁷³

Unelected Rulers: More important in the long term, however, is what may emerge from the inquiry about the role played by ministerial advisers... and the way their employment has distorted the traditional values of the Westminster system of government.. and the notion of an independent public service... What is happening is that ministerial staff are being used to insulate ministers from... responsibilities... [and].. from facts they might not want to know. Ministerial advisers have become an extremely powerful and influential arm of government, but also a secret and irresponsible one.⁷⁴

What lies beneath: Increasingly, the ministerial office has been developing direct links into departments and agencies, managing the nature and quality of advice, and frequently giving directions about what is to be done, often completely away from the formal channels. Strictly, the minister and his private office are subject to the same public service ethical code as ordinary public servants. But the role of the ministerial office is poorly documented, with a strong focus on oral, rather than written, advice, and with the direct role of the minister often left deliberately vague, whether for deniability ... or so as to protect a minister's flexibility when things go awry.⁷⁵

The Select Committee's approach to ministerial advisers

7.136 Notwithstanding cabinet's decision to prevent Commonwealth departments from making submissions to the Inquiry into a Certain Maritime Incident, and to ban ministerial staffers from appearing before the Committee, the Committee made several requests to the relevant advisers for the provision of written submissions, as well as delivering invitations to appear at hearings. Similar invitations were extended to former Minister for Defence, Mr Peter Reith. In the event, none of these people appeared before the Committee, nor did they contribute submissions.

7.137 The Committee sought the views of both the Clerk of the Senate and the Clerk of the House of Representatives on the matter of whether any immunities attach to ministerial advisers with respect to appearing before parliamentary committees. The Clerk of the Senate has argued no immunity attaches to ministerial staff:

73 Editorial *Canberra Times* 11 March 2002, p.10.

74 David Solomon 'Unelected Rulers' *The Courier Mail* 16 March 2002.

75 Jack Waterford 'What lies beneath: Has government accountability become an oxymoron?' in *Eureka Street* 12(3) April 2002, p.21.

...the Senate and comparable houses of legislatures have not recognised any immunity attaching to this category of office-holders. There is also no basis for supposing that they possess any legal immunity...⁷⁶

7.138 Having argued this legal position, the Clerk of the Senate also suggested that calling ministerial staff was a good idea:

...there is a strong case for subjecting ministerial personal staff to compulsion in legislative inquiries, on the basis that their role is manifestly now not confined to advice and personal assistance... they act as de facto assistant ministers and participate in government activities as such... Moreover, ministers no longer necessarily accept full responsibility for the actions of their staff...⁷⁷

7.139 The Clerk of the House of Representatives argued for a probable immunity for advisers arising from their direct association with the minister:

[A] reasonable case could be made out for the immunity operating in respect of Ministers who are current Members of the Parliament also applying to their staff, based on a Minister's need for the assistance of staff to perform their roles and functions, especially in the modern complex world of government and administration.⁷⁸

7.140 The Committee had the benefit of a legal opinion provided to the Clerk of the Senate by Bret Walker SC. This opinion, grounded in an examination of the *Constitution*, the *Parliamentary Privileges Act 1987*, foundation texts in parliamentary practice and relevant High and Appeal Court decisions, concluded that 'former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee.'⁷⁹

7.141 One of the difficulties faced by the Houses of Parliament in attempting to enforce their powers to compel the appearance of witnesses is that they are limited in what they can do to compel appearance. In particular, there exists a difficult ethical question of how to treat public servants who indicate that they have been instructed by their Minister not to answer questions put by the Houses. In 1994, the Senate Committee of Privileges in its report on the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994* noted that it was:

76 Clerk of the Senate, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 22 March, p.2.

77 Clerk of the Senate, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 22 March, p.4.

78 Clerk of the House of Representatives, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 3 April 2002, p.12.

79 Bret Walker SC *Opinion* 'Australian Senate: Witnesses – former Ministers and Ministerial Staff'. Document published by the Select Committee.

well understood that any attempt by a House of the Parliament to impose the extreme penalties of either gaol or a fine upon a public servant who obeyed a ministerial instruction not to comply with an order of that House or a committee, while the minister concerned was immune from its contempt powers, was untenable.⁸⁰

7.142 Despite this remark, the Committee of Privileges included in its final remarks the consideration that:

if an order of a House or committee is not complied with by a public servant acting on the instructions of a minister, it is for the relevant House to take such action under its contempt powers as it considers appropriate in the circumstances.⁸¹

7.143 Thus the Committee of Privileges noted that, on the one hand it was 'well understood' that the exercise of parliament's powers in such cases was untenable, but at the same time endorsed the very exercising of those powers.

7.144 It is worth considering exactly why it is sometimes claimed that public servants should not be confronted by the powers of the chambers of parliament. Implicit in the statement that one should not penalise a public servant who is acting on the directions of a minister is a concession that the minister has the legal authority to issue directions to someone to defy the Senate or House of Representatives. It may be argued that in making this concession, those who claim to be seeking to assert the power of the Senate are in fact deferring to the power of the executive and are unwittingly encouraging the public servants (and probably ministerial staff) to do the same.

7.145 This seems to rest uneasily with the Parliament's declarations on powers and immunities, and the limited case law that exists in this area.⁸² As the Law Institute of Victoria once argued, if a public servant is asked to choose between complying with a Minister's instruction and complying with a House's demands, they should be deferring to the House, not the executive.⁸³

7.146 Faced with the continued refusal of these prospective witnesses to respond to invitations to appear, and with correspondence from ministers indicating that they would not appear, the Select Committee decided not to exercise its power to compel

80 Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (49th Report)*, September 1994 (Parliamentary Paper 171 of 1994), p. 5.

81 Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (49th Report)*, September 1994 (Parliamentary Paper 171 of 1994), p. 13.

82 Senate Privileges Committee, *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1966-1999, (76th Report)*, June 1999.

83 Submission of the Administrative Law Section of the Law Institute of Victoria, cited in the House of Representatives Committee of Privileges, *Report Concerning Proposal to Transfer to the Federal Court Certain Responsibilities in Relation to Disputed Claims for Public Interest Immunity*, November 1994.

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

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

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

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

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

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

7.149 The actions of the Committee in this case reflect the complexity surrounding the conventions that have thus far been observed with respect to ministerial advisers not being called before committees – on the grounds that their accountability is exercised via their minister. The Committee has serious doubts about the efficacy of these conventions in the light of the issues canvassed above, and particularly in the light of the behaviour of the ministerial staff involved in the 'children overboard' affair. The time has come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby to the public.

What is to be done about advisers' accountability

7.150 Every commentator and analyst seems to agree that ministerial staff have grown in importance in the policy process as they have grown in numbers. The more difficult question however is whether their raised profile warrants new rules to govern them. There is evidence that international practice is moving in this direction.

7.151 It is probably also true to say that ministerial staff in Australia have become targets for increasing public scrutiny over the last ten years. Some of the more significant occasions have been the federal travel rorts investigations in 1997 and, perhaps most prominent of all, the 'children overboard' affair.

7.152 Ministerial staff are not subject to any equivalent of the Australian Public Service Code of Conduct that govern public servants under the *Australian Public Service Act 1999*, or the Parliamentary Service Code of Conduct governing

parliamentary employees under the *Parliamentary Service Act 1999*. There is no direct equivalent for staffers of the Australian Public Service Values that establish norms to underpin the way staff approach their work.

7.153 The Public Service Commissioner has suggested that ‘there is a case for some articulation of the values and code of conduct of ministerial officers’.⁸⁴ Public sector analyst and academic Dr John Uhr put this in terms of needing:

to carry forward the spirit of reform so that the kind of pretence to accountability can be more properly enacted by making sure that the people who are holding power and exercising the capacities as public decision makers - ministerial advisers -... really own up when things don’t go as planned...⁸⁵

7.154 Certainly the practice in other countries is generally to regulate or guide ministerial staff more explicitly than in Australia. In the UK a *Code of Conduct for Special Advisers*, promulgated in July 2001, covers matters such as the tasks which special advisers can do, prevention of the use of resources for political party purposes, contact with the media, relations with the government party generally, and the holding by advisers of political party offices.⁸⁶

7.155 It also establishes a complaints structure, stating that:

Any civil servant who believes that the action of a special adviser goes beyond that adviser’s authority or breaches the Civil Service Code should raise the matter immediately with the Secretary of the Cabinet or the First Civil Service Commissioner, directly or through a senior civil servant.⁸⁷

7.156 The Committee is attracted to the idea of a code along the above lines. Dr John Uhr has taken a keen interest in the UK developments, and described the key ways in which such a code captures accountability.

I would suggest three elements: the first is the fact that it is a specified public document that articulates into the other specified public document, the Civil Service Code—the fact that it is out there. Public focus is one element of public accountability so that we know what to expect of these classes of public officials. The second is that, in relation to ministerial staffers, their accountability in terms of their employment relationships is something that is managed by the Cabinet Secretary as the chief adviser to the Prime Minister. It is something that goes right to the heart of government. You can imagine the parallels that there would be here. The third element is that, in terms of public servants feeling that somehow they

84 *Transcript of Evidence*, CMI 1203.

85 John Uhr quoted in *Background Briefing*, ABC Radio National, 24 March 2002.

86 UK Cabinet Office, *Code of Conduct for Special Advisers*, cited: <http://www.cabinet-office.gov.uk/central/2001/codcons pads.htm>

87 UK Cabinet Office, *Code of Conduct for Special Advisers*, Clause 22.

are getting an unfair deal and that the people with whom they are working, the ministerial staffers, are unaccountable and irresponsible in their conduct, they have a right of redress to the Public Service Commissioner—or the equivalent officer there as a central government agency that has a supervisory role. They are the three elements of accountability, none of which we have at all in relation to the workings of ministerial staff.⁸⁸

7.157 Even prior to the Code's introduction, ministerial staff in the UK were not entirely unregulated. In particular there already existed a *Ministerial Code* and a *Model Contract for Special Advisers*, which, together with other policies, covered issues now consolidated in the *Code of Conduct*. There are also proposals currently being considered in the UK for parliamentary regulation of the numbers of advisers: 'there should be a limit on the number of special advisers in each government, set by Parliament at the beginning of each new Parliament.'⁸⁹

7.158 In Canada, there is regulation of ministerial staff, but principally in relation to conflict of interest. This takes place under the *Conflict of Interest and Post-Employment Code for Public Office Holders*.⁹⁰ In some respects this is similar to the Australian arrangement. Unlike Australia, however, the Code is backed by the advice and reporting of the office of the Ethics Counsellor. Staff are thus subject to professional advice and scrutiny in a bid to ensure compliance with the Code.

7.159 All the above arrangements aim to regulate the staff. It might also be possible to approach some aspects of the problem through regulation of interactions with ministerial staff, rather than through the regulation of the staff themselves. The Public Service Commissioner recently outlined such a possibility, discussing the extent to which the Public Service Code of Conduct guides interaction between public servants and ministerial staff:

...we are looking at the guidelines on official conduct. The current guidelines are very brief on the relationship, and I think this is an area we need to expand upon to clarify for public servants their relationship with ministers... there will be a lot of relationships between the minister's office and the staff of an organisation... The relationships are between the staff and their secretary and between the secretary and the minister. Obviously, in making that relationship work, staff would normally expect that, when they are dealing with a minister's office, they will know what the minister is saying, that they will understand the requirements and that this approach will work very easily and properly. But I think there is a need within each agency to clarify the protocols of the relationship.⁹¹

88 *Transcript of Evidence*, CMI 1252.

89 UK Cabinet Office, *Portrait of a Profession Revisited*, Speech by Sir Richard Wilson, 26 March 2002, cited: <http://www.cabinet-office.gov.uk/2002/senior/speech.htm>, p. 20.

90 Canada. Office of the Ethics Counsellor, cited: <http://strategis.ic.gc.ca/pics/oe/coiencod.pdf>

91 *Transcript of Evidence*, CMI 1203.

7.160 The Committee notes the views of the Hon Tony Abbott MP, Minister Assisting the Prime Minister for the Public Service, concerning what he described as the inevitable outcome of controversies – namely, ‘calls for more rules’.

In government administration, problems typically arise from errors of judgment rather than breaches of the law or a total breakdown of ethical behaviour. I’m sceptical about new regulations which might turn out to be better at tripping conscientious people focused on doing their job than trapping villains who know how to cover their tracks.⁹²

7.161 This may be a reasonable view to put forward where the government administration is proceeding according to the norms of best practice, but it is a view which has turned the problem on its head. The view does not address the kinds of behaviour that have been manifest in the controversy at issue. The Committee’s inquiry has revealed behaviour by advisers in their interactions with departments which is inappropriate at best, and grossly improper at worst. Suitable regulations will help insulate ‘conscientious people focused on doing their job’ from the impediment of ‘villains’ seeking to ‘cover their tracks’.

7.162 The Public Service Commissioner, in his evidence to the Select Committee, argued for a clarification of the relationship between public servants and ministers’ offices.

The issue of trust is important until you get the relationship working and ...[it] has got to be professional and cooperative.

In this context, you need to have a close relationship, but the minister’s office is not there as a power to direct. The minister needs an office there to help in the process and to handle the scale of activity, and by nature there will be a lot of relationships between the minister’s office and the staff of an organisation. But I think we do need to clarify, in law, there is no power to direct.⁹³

7.163 The Committee understands the Commissioner to be saying here that ministerial staff have no power to direct in their own right as opposed to their legitimate role in conveying the directions of the minister. It seems that departmental staff can no longer be sure that an instruction or request from a ministerial adviser has the blessing of the minister, or is consistent with the minister’s view on how a matter is to be approached. For departmental secretaries in particular there seems to be a need for greater clarity in the roles and responsibilities of the advisers and secretary respectively.

7.164 The Committee believes that two courses of action are needed to satisfactorily resolve the issues around ministerial advisers that have been emerging for some years

92 Hon Tony Abbott MP, *Address to Institute of Public Administration Australia*, Canberra, May 2002; accessed at <http://www.psmpc.gov.au/minister/abbott220502.htm> p.3.

93 *Transcript of Evidence*, CMI 1203.

and have now been brought sharply into focus as a result of the ‘children overboard’ affair. The first requires the bringing of ministerial advisers properly within the scope of parliamentary committee scrutiny, in a manner similar to that which currently applies to public servants.

7.165 The second requires the articulation of a Code of Conduct and Set of Values for ministerial advisers within a legislative framework – possibly a modified *MoPS* Act. Such a code might include general guidelines as to how advisers might go about their business, and what limits might be placed on their power to direct public servants. It might also be desirable for the code to state what they *cannot* do.⁹⁴

7.166 With respect to the first course of action, the Committee believes that the appearance of ministerial staff before a parliamentary committee will quickly become standard practice. It will, like the appearance of public servants, be guided by a set of procedures that ensure the executive answers to the parliament on matters of policy. And it will, like the appearance of public servants, be likely to enhance rather than undermine ministerial accountability.

7.167 With respect to the second course of action, such a Code of Conduct will not only give clear guidance both to ministerial advisers and to ministers about what is proper practice, but by being enshrined in legislation will facilitate the establishment of mechanisms for redress should such a code be breached.

Ministerial accountability

7.168 The convention of ministerial responsibility is one of the centre-pieces of Westminster style parliamentary democracy. It enshrines the fundamental principle that the government is accountable to parliament through its ministers. It asserts the essential capacity of parliament to acquire accurate information, so that debate can be meaningful and scrutiny effective.

[S]ecuring information is at the heart of the debating or scrutiny process. Ill-informed debate cannot be effective ... the price of democracy is eternal scrutiny ... [and] the success of a democracy is to be judged by the extent to which it can ensure that government is publicly accountable.⁹⁵

7.169 A British observer, not alone in the literature, and in a journal article mischievously titled ‘The right to mislead Parliament?’, has noted that:

94 Such an approach has been recommended by former UK Cabinet Secretary Sir Richard Wilson: ‘This may sound a negative approach. But by defining the area of what was not acceptable it would free up Ministers to deploy their special advisers as they wished within the framework which had been created.’ *Speech Portrait of a Profession Revisited* March 2002; accessed at <http://www.cabinet-office.gov.uk/2002/senior/speech.htm>

95 J Griffith and M Ryle *Parliament: Functions, Practice and Procedure* (London, Sweet & Maxwell, 1989) pp15-16 and p.517.

Recent political practice would seem to indicate... that there is some distance between these grand statements of principle about the supposedly central importance of ministerial responsibility on the one hand and the crude reality of parliamentary practice on the other.⁹⁶

7.170 The Committee acknowledges those grains of truth that lie in such a statement, but reaffirms the fundamental importance of the principles which are its focus. The misleading of the parliament and the public by governments is a very serious business, and for many observers goes to the heart of a government's credibility.

[S]hould we care if a minister lies or fails to correct an untruth? Oh yes, very much. *Very much.*⁹⁷

7.171 There seems to be little point in adding to the voluminous academic discussions about ministers' responsibilities when it comes to rendering service and accountability to the parliament and the public. Rather the Committee will link its discussion to one key practical document - the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*.

7.172 To contextualise this discussion, and to place ministerial responsibility at the heart of it, the Committee draws attention to the following remarks given in evidence by Dr John Uhr:

There are two issues. One is the integrity of Defence intelligence. ... The other issue that the community is...more keenly interested in is the integrity of public information. That is an issue that ...goes to ministerial practices...

...[C]an we start to open this inquiry up as to how ministers themselves satisfy themselves that they have got intelligence of integrity that they can divulge to the community at the time of an election? I think there is a duty on ministers themselves not to mislead the community. In fact, it is part of Prime Minister Howard's commendable ministerial code that ministers are under a duty and obligation not to mislead the community....

I do not think we have had any evidence yet that ministers have been actively involved in testing advice that has come to them. We have lots of evidence before the committee... where ministerial staff acting on behalf of ministers have, in a way, been acting as testers of evidence. But it has been more like cherry picking rather than testing—not subjecting advice to scrutiny to see whether it is ready for public information, but just picking and choosing those parts that they think are of partisan advantage to them. ... I think it is that element... the integrity of public information—that the

96 Adam Tomkins 'The right to mislead Parliament?', *Legal Studies* 16, (1996) p.66.

97 Andrew Bolt 'We were betrayed' *Herald Sun* 18 February 2002.

committee might well start to explore, because it goes to the heart of ministerial and ministerial staffers' responsibilities...⁹⁸

7.173 The Prime Minister's *Guide on Key Elements of Ministerial Responsibility* was issued in December 1998. It covers a range of issues, from constitutional and legal frameworks to ministerial conduct, relations with departments and ministerial staff conduct.

7.174 The opening statement in that part of the *Guide* dealing with Ministerial Conduct states the following:

It is vital that ministers ... do not by their conduct undermine public confidence in them or the government.

- Ministers must be honest in their public dealings and should not intentionally mislead the Parliament or the public. Any misconception caused inadvertently should be corrected at the earliest opportunity.
- Ministers should ensure that their conduct is defensible, and should consult the Prime Minister when in doubt about the propriety of any course of action.⁹⁹

7.175 The Committee is of the view that former minister Reith misled the public in relation to the 'children overboard' affair during October and November 2001. As well, the evidence that emerged in the Bryant report, and the failure of Mr Reith and his staff to submit information to, or appear before, the Inquiry into a Certain Maritime Incident further eroded public confidence in the government.

7.176 It seems extremely unlikely that the former minister was not aware, even if he had not been categorically, unambiguously and directly advised, that the initial 'children overboard' reports were not true. Certainly he had been told that the photographs he had released were not evidence of the event. Mr Reith was therefore clearly in breach of the Prime Minister's guidelines. He did not deal honestly with the public, he did not seek to correct misconceptions, and it is hard to see how his conduct was anything other than indefensible.

7.177 To what extent Mr Reith consulted the Prime Minister, if at all, about the course of action he took, the Committee has been unable to properly determine. Certainly Mr Reith's staff were in touch with the Prime Minister's office about aspects of these matters. Mr Reith had held at least one conversation with the Prime Minister about the photographs. The Prime Minister has consistently asserted that he was never told the 'children overboard' story was untrue.

98 *Transcript of Evidence*, CMI p.1217.

99 Hon John Howard MP, *Prime Minister Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.10.

7.178 The Committee finds that Mr Reith stands condemned for his deliberate misleading of the public, his persistent failure to correct the record, and his refusal to cooperate with the Senate inquiry charged by the parliament to get to the bottom of the affair.

7.179 Previous chapters have dealt in some detail with the interactions between the minister or his staff and various Defence officials. It is clear to the Committee that the way those interactions were conducted failed to respect some important conventions of the relationship between a department and a minister's office.

7.180 On the question of a minister's role in relation to the conduct of ministerial advisers, the Prime Minister's *Guide* states:

Ministers' direct responsibility for actions of their personal staff is, of necessity, greater than it is for their departments.... Ministers therefore need to make careful judgements about the extent to which they authorise staff to act on their behalf in dealings with departments.¹⁰⁰

7.181 On this account, Mr Reith must bear responsibility for the haranguing interventions of his personal staff into the Department of Defence, the insertion of their politically-driven demands into both the operational and administrative chains of command, and their complete failure to adequately assess, and give proper weight to, the advice coming to them from the Department.

7.182 If his ministerial advisers were so dealing with the Department with their minister's authority, foreknowledge and approval – and the Committee has no evidence to suggest otherwise – Mr Reith failed to maintain the standards specified in the Prime Minister's *Guide*.

7.183 As well, the *Guide* highlights the fact that ministers must be scrupulous about not asking public servants to engage in activities 'which could call into question their political impartiality.'¹⁰¹ Such a meticulous requirement is compromised by actions such as the 'special arrangement' that was put in place to interrupt a commander in the middle of an operation in order to transmit information outside the chain of command about matters whose policy context was politically controversial, and with an election looming. It is also compromised by things like the special public affairs plan insisted upon by the minister that prevented Defence from communicating even factual information about Operation Relex to the public – a prohibition that was reinforced by the minister's office to Defence officials the day after Air Marshal Houston advised Mr Reith that no children had been thrown overboard.¹⁰²

100 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13-14.

101 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13.

102 Enclosure 1 to Powell Report, Statement by Rear Admiral Adams, Deputy Chief of Navy.

7.184 The Prime Minister's *Guide*, noting the importance of trust between ministers and public servants, points out that both the minister and the public servant 'must contribute' to its establishment and maintenance.¹⁰³ In the Committee's view, the actions of the minister and his staff were on almost every occasion contrary to such an obligation.

7.185 For Defence officials to know, for example, that they have acted to correct the public record, and to discover that their minister repeatedly declines to do so, is profoundly undermining of trust – not only trust in one's minister, but trust in the leadership of the Department. Thus has the minister doubly damaged professional relationships, as well as sending the message to public servants that their 'frank and fearless' advice may be held in contempt.

7.186 Elsewhere, the Prime Minister has spoken of such relationships of trust, stating that, when advice has been given by a senior public servant it should be 'properly considered and not summarily dismissed'.¹⁰⁴ In the Committee's view, to 'properly consider' advice is not to recklessly prosecute it because of its immediate political advantage, nor in turn to 'summarily dismiss' it if it is politically inconvenient. Mr Reith failed on both these counts.

7.187 The Prime Minister's *Guide* also states that, while it is not for public servants to press their advice beyond the point where the minister has indicated it is not favoured, they:

... should feel free, however, to raise issues for reconsideration if they believe there are emerging problems or additional information that warrant fresh examination.¹⁰⁵

7.188 The Committee's assessment here is that the reluctance of Mr Reith to correct the public record, prefaced by the pursuit by his staff of corroborating evidence when there was none to be had, could easily have led Defence officials to conclude that any pressing by them for such a correction would not be 'favoured'.

7.189 Most of them were diligent in passing corrective advice up the chain of command. But from there, it seems, most were resigned to the fact that they could do no more, and that it was now in the hands of the CDF as the government's principal military adviser. The vertical accountability effort was clearly insufficient to produce the desired corrective outcome.

7.190 Here again, the Committee points to the flaw in the horizontal accountability arrangements which highlights forcefully the need for an improved 'culture of

103 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13.

104 Hon John Howard MP, Speech at the launch of paper 'Ethical standards and values in the Australian public Service', Canberra, May 1996.

105 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13.

responsibility' and for a greater exercise of 'navigational competence' in whole-of-government operations, especially at the top level of the bureaucracy.

7.191 The Committee appreciates that there are tensions associated with the accountability requirements in contemporary public administration. The Committee's earlier discussion of the Defence 'diarchy' and the whole-of-government responsibilities of the Secretary of the Department of Defence explored these tensions in their 'real life' manifestation.

7.192 It is imperative that departmental secretaries pay special attention to their whole-of-government responsibilities, and that both senior public servants and ministers recognise the validity and desirability of horizontal accountability. This may require some adjustment in the attitudes and expectations of both parties.

7.193 The Committee is in no doubt that a diligent pursuit of broader accountability responsibilities at the senior levels of the public service, and a clear acceptance by ministers of the legitimacy of that pursuit, is the only way to effectively meet the challenges of contemporary governance.

Accountability of the executive

7.194 While much of the Committee's critique has been focussed on the former Minister for Defence, his office and department, there are broader aspects of the 'children overboard' affair which go to the question of the responsibility of the executive as a whole. After all, the response to people smuggling at both the policy and legislative levels, as well as in its implementation, was a whole-of-government activity.

7.195 The executive as a whole has been very keen to take the credit for what it regards as a successful whole-of-government operation on border protection and the handling of asylum seekers. In the Committee's view, the executive is therefore similarly obliged to take corporate responsibility for any shortcomings.

7.196 Within hours of the alleged incident having taken place, ministers were on the public record condemning the SIEV 4 occupants for their abhorrent attempts to confect a 'safety of life at sea' situation. During the days and weeks that followed questions continued to be asked of, and statements continued to be made by, senior government ministers, concerning the events. The public record remained uncorrected throughout – for some a deliberate deceit, for others an unwitting perpetuation of a falsehood because of inadequate advice.

7.197 The findings of the Routine Inquiry by Major General Powell (the Powell Report) formally repudiated the original report, and the Bryant Report, tabled in the parliament by the Prime Minister, also found that children had not been thrown overboard. A period of four months had elapsed. The CDF, Admiral Barrie, finally conceded in late February 2002 that children had not been thrown overboard from SIEV 4. The government's response – instead of being a forthright acknowledgment of the sustained error - was one of grudging acceptance of the CDF's advice, combined with a reiteration of its defence of ignorance due to faulty advice.

7.198 The Committee notes that none of the ministers closely involved in the ‘children overboard’ affair appear to have taken any action to reprimand or discipline advisers or officials who have performed either inadequately or inappropriately in their various roles. Dr Hawke offered his resignation on the grounds of his failure to properly advise the former minister, Mr Reith. But no other key figures in the affair have acknowledged any errors or omissions let alone confessed to any deliberate misleading of their ministers or the public.

7.199 Ministers have been quick to assert that they ‘were not told’ or were given ‘faulty advice’, but have been singularly reluctant to admonish those responsible for those failures or faults. The Committee contrasts this state of affairs with what has applied on other occasions. For example, in 1997 the Prime Minister terminated the services of two of his key staff for failing to tell him about a ministerial repayment associated with the ‘travel rorts’ imbroglio, and in 2001 Deputy Prime Minister John Anderson sacked his principal adviser and another staffer for failing to inform him about the politically damaging contents of an Audit Report on the national highways program.

7.200 In the Committee’s view, the examples cited seem to have involved lapses rather than the deliberate, possibly strategic, acts and omissions of advisers associated with Mr Reith. Yet it seems, in the case of ‘children overboard’, no action was taken to convey the government’s displeasure at having been poorly advised or misled. It is reasonable to infer, therefore, that the government was not displeased with the acts and omissions of Mr Reith’s advisers because the outcomes were politically advantageous to the government in an election period.

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

7.202 Even though the Prime Minister was explicit in telling the parliament that the ban affected only *MoPS* Act staff, and that public servants would be allowed to appear,¹⁰⁶ the Minister for Defence (Senator Hill) refused permission for certain public officials to appear.

7.203 In the Committee’s view, the government’s actions during the Inquiry into a Certain Maritime Incident do not promote transparency, and are inimical to accountability.

106 House of Representatives Official Hansard *Parliamentary Debates* 12 March 2002, pp.995 & 998.

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

7.205 In this context, the Committee endorses the views expressed on 2 July 2002 by Professor Richard Mulgan of the Graduate Program in Public Policy at the Australian National University.

The first step will be for the Government to admit the fact of failure... [E]ven if ministers were not personally to blame they should still be held accountable under the normal conventions of ministerial responsibility. The public were misled on a politically sensitive issue when the truth was readily discoverable by the government machine.

Ministers, including the Prime Minister, should ... express regret that such a failure occurred on their watch. ... Only when the failure is openly admitted will there be any chance of seeking to avoid its repetition.¹⁰⁷

107 Richard Mulgan 'APS fails to do its duty to the public' *Canberra Times* 2 July 2002.

Chapter 8

The Sinking of SIEV X: Intelligence and Surveillance

Introduction

8.1 In the early hours (approximately 1.30am ‘Golf’ or local time) of 18 October 2001, a vessel under the pay of alleged people smuggler, Abu Qussey,¹ departed from Bandar Lampung in south Sumatra.² 421 passengers and crew, including 70 children, were on board. Ten people had refused to embark due to the boat’s size. Media reports, based on passenger accounts, claim that the remainder were forced at gun point by Indonesian officials to board the vessel.³

8.2 Before heading to Christmas Island, the vessel stopped near the Karakatau group of islands where 24 passengers disembarked due to concerns about the SIEV’s seaworthiness. 397 passengers and crew remained onboard.

8.3 At about noon on 19 October 2001, the engines on the vessel stalled. By about 2.00pm (GT) the vessel began to take on water out of the sight of land, a situation that deteriorated an hour later when it began to take ‘heavy water, listed violently to the side, capsized and sank within an hour’.⁴ 120 people are estimated to have been in the water after the boat sank; none of the 70 life jackets worked.

8.4 Around noon on 20 October, after close to twenty hours in the water, two fishing boats picked up the survivors. The notes for the People Smuggling Taskforce state:

41 adults and 3 children survived, 352 drowned. Survivors taken to Jakarta – being cared for by IOM [International Migration Organisation] at Bogor

1 There are various spellings of Qussey in the intelligence material. Some use ‘Quassey’ (ADF intelligence review), others ‘Qussay’ (DIMA Intelligence Notes). Hansard follows Rear Admiral Smith’s use of Qussey. Unless citing material, the Committee employs this version in the report.

2 Except where otherwise noted, the account of SIEV X’s passage and sinking is based on the following: ‘SIEV X Chronology’, Attachment A in the declassified summary of the Defence review of SIEV X intelligence, Minister of Defence to CMI, undated, received 4 July 2002; and PST Notes, ‘People Smuggling Taskforce – High Level Group Meeting, 3.15 p.m., Tuesday 23 October 2001’, p.2.

3 *Transcript of Evidence*, CMI 1983.

4 ‘SIEV X Chronology’, p.2.

outside Jakarta. Vessel likely to have been in international waters south of Java.⁵

8.5 The exact location where the boat sank remains in doubt, with speculation that it might have gone down in the Sunda Strait within Indonesian waters. One report received by DIMIA indicated that the vessel capsized ‘between Java and Sumatra’.⁶ A DIMA Intelligence Note issued on 23 October, however, suggested the boat had capsized and sunk approximately 60 nautical miles (NM) south of the Sunda Strait.⁷ Advice provided to the Prime Minister, Mr Howard, on 24 October referred to the vessel sinking in ‘Indonesian waters’, and stated that the ‘boat capsized and sank quickly south of the western end of Java’.⁸

8.6 Survivor testimony claimed that, during the night of 19 October after SIEV X sank, two large vessels approached those in the water. According to the survivors, these vessels shone lights on the people in the water, but did nothing to rescue them.

8.7 The closest RAN vessel, the frigate *HMAS Arunta*, was by the Navy’s estimation at least 150 nautical miles distant from the position where SIEV X is roughly estimated to have foundered.

The Committee’s Inquiry

8.8 During the inquiry a range of concerns arose about Australia’s role in relation to the fate of the Qussey vessel or, as it has now become known, SIEV X. Questions were raised about the extent to which Australian government agencies knew of the vessel’s departure, its unseaworthy state and what actions were taken or not taken in response. In short, did the Australian authorities have sufficient forewarning of SIEV X and its likely fate, such that they could have either acted to avert the disaster or rescued more survivors?

8.9 These concerns were fanned as the evidence to the inquiry gradually unfolded to reveal that early claims from Defence witnesses, that little was known of SIEV X, were at odds with the volume of intelligence gathered on the vessel during Operation Relex.

8.10 In this chapter, the Committee examines the prime sources of potential information about SIEV X available to Australian decision makers: intelligence and maritime surveillance. It attempts, first, to trace the development of the intelligence picture being formed by Australian agencies in the lead up to its passage. The

5 PST Notes, ‘People Smuggling Taskforce – High Level Group Meeting, 3.15 p.m., Tuesday 23 October 2001’, p.2.

6 PM & C e-mail traffic, 24 October 2001.

7 DIMA Intelligence Note 83/2001, 23 October 2001, p.2.

8 *Transcript of Evidence*, CMI 2127. Ms Halton acknowledged that the advice to the PM did not specify whether the location was inside or outside Indonesian *territorial* waters.

Committee then discusses the information available on the level and patterns of maritime surveillance conducted at the time of the SIEV X incident.

8.11 Against this backdrop, in the next chapter the Committee examines the response of Australian agencies to this information, and whether that response and the reasons for it were appropriate.

Evidence available to the Committee

8.12 In addition to the testimony of relevant officials before the inquiry, the Committee has received a range of declassified intelligence and other official material relating to SIEV X. This material is an important source of information for reconstructing the SIEV X episode. The Committee considers, however, that the evidence before it is limited in four respects.

8.13 First, much of the intelligence material has been heavily censored, with agencies citing national security reasons for so doing. In some cases, agencies have stated that they are not able to disclose information because the source agency has not agreed to declassify it. The Committee notes the following explanation provided by DIMIA:

Those [source] agencies have cited reasons of national security, particularly the possibility of exposing intelligence collection capabilities and the need to protect sources from exposure and, in the context of the current people smuggling environment in Indonesia, possible harm.⁹

8.14 Second, as a consequence, gaps exist in the intelligence picture on SIEV X. The Committee has not been able to see original or 'raw' intelligence received from sources. It has also not been able to compare the information it has received on SIEV X with that available to agencies on other boat arrivals. Thus, it has had to rely on witness testimony in making assessments of the extent to which reports on SIEV X fitted the overall intelligence picture on boat arrivals.

8.15 Third, the evidence concentrates mostly on SIEV X *after* it was reported to have departed Indonesia. The Committee has had little in the way of information on SIEV X *before* it left Indonesia. As was outlined in chapter 1, Australian authorities were involved in substantial 'disruption' activities in Indonesia. These activities involved information campaigns, targeting people smuggling syndicates and preventing passengers from embarking on vessels bound for Australia. The Committee was interested to understand the relationship between the disruption activity and the circumstances of SIEV X. However, despite extensive questioning of official witnesses on the disruption strategy, the Committee was provided with limited information.

9 Letter from G.W. Pettitt, Border Protection Branch, DIMIA, undated, received 18 September 2002.

8.16 The fourth problem the Committee encountered with the evidence on SIEV X was the piecemeal manner in which information was provided to the inquiry. During the initial inquiry hearings official witnesses took a blanket approach of reassuring the Committee that Australian authorities had acted properly in relation to SIEV X, rather than providing a more open and detailed account of the intelligence trail about the vessel. Although this stance seems to have reflected the sensitivity surrounding Australia's intelligence capability, it raised more questions than it answered.

8.17 To illustrate the difficulty that this approach posed for the inquiry, the Committee notes the evidence from Rear Admiral Smith, the senior operational commander for Operation Relex. In his opening testimony to the Committee, Admiral Smith declared:

if my memory serves me right, we had some information that a boat might have been being prepared in the vicinity of Sunda Strait but we had no real fixed information as to when it was going to sail. Indeed, the first time that the Navy knew that this vessel had sailed was when we were advised through the search and rescue organisation in Canberra that this vessel may have foundered in the vicinity of Sunda Strait.¹⁰

8.18 Subsequently, Admiral Smith wrote to the Committee to clarify his original testimony.¹¹ Among other things, Admiral Smith referred to intelligence that 'reported' SIEV X as departing Indonesia and as a 'possible' arrival at Christmas Island, prior to the advice that it had foundered. He concluded that:

While the intelligence reports regarding the Abu Qussey vessel were from Coastwatch assessments and normally reliable sources, they provided only an assessment of 'alleged' departures and 'possible' arrival windows. No specific confirmation of departure was ever received. ...

... my Headquarters did not receive any information (intelligence or otherwise) that could lead to a definitive assessment that the vessel had departed Indonesia.¹²

8.19 Although Admiral Smith might have been strictly correct in his original evidence, such a narrowly defined answer provided only a limited portrayal of the complex picture surrounding SIEV X and therefore an inadequate impression of the situation related to the vessel. The Committee continued to experience difficulties in receiving a full account of the SIEV X episode throughout the inquiry. As is discussed later in this chapter, vital information revealing gaps in the chain of reporting of the intelligence traffic emerged only at the Committee's last hearing and afterwards, thus preventing the Committee from exploring it as fully as might have been expected.

10 *Transcript of Evidence*, CMI 461.

11 Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002.

12 Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002, pp.3-4.

8.20 The Committee is mindful of the particular sensitivities and national security interests that attend matters of intelligence. Nevertheless, intelligence agencies and practices are properly the concern of the parliament and cannot be shielded from accountability and review, particularly in cases of public importance such as SIEV X. As the Committee's findings of gaps in the handling of SIEV X intelligence show, parliamentary examination of the intelligence matters is not only a vital accountability mechanism but it is also a key element in strengthening the governance and working of the national security system.

8.21 The Committee considers that the intelligence community should, in consultation with the relevant parliamentary committees, review its approaches to the provision of information to parliamentary inquiries to better balance the flow of information to parliament with the need to protect intelligence capabilities and sources.

The Intelligence System and SIEV X

8.22 The story of what Australian government agencies knew about SIEV X is to a large degree a story of intelligence and its limitations, how it is coordinated and fed into operational decision making.

8.23 Before detailing the intelligence chronology for SIEV X, it is worth reiterating here the key elements of the intelligence system. As noted in chapter 2, an extensive intelligence capability involving several government agencies supported the overall border protection strategy and Operation Relex in particular. The main elements of the system included:

- Wide-ranging 'all source' intelligence on people smuggling and illegal immigration activities, including off-shore sources in countries of origin, first asylum and transit, particularly Indonesia. Information in Indonesia came partly from defence attaches in the Australian embassy but mainly from posted AFP and DIMIA compliance officers, their counterparts in the Indonesian police and military and from 'human sources' (ie. agents or informants on the ground);¹³
- DIMIA served as the central agency for the collection, analysis and production of intelligence on border protection. It produced intelligence reports for a range of 'customer' agencies;
- Australian Theatre Joint Intelligence Centre (ASTJIC) was, during the SIEV X episode, the primary Defence intelligence body. For Operation Relex it received mainly processed intelligence, the 'vast bulk' of which came from DIMIA and Coastwatch,¹⁴ which it in turn analysed and used to produce reports;

13 In addition to the section on intelligence in Chapter 2, see *Transcript of Evidence*, CMI 1889-1890 and 1901 (ADF), 1924-1925 (AFP), 1996-1998, 2001 and 2003 (DIMIA).

14 *Transcript of Evidence*, CMI 1886.

- ASTJIC reports provided ‘a consolidated forecast of SIEV activity to COMAST [Rear Admiral Ritchie] and to subordinate ADF headquarters and units’,¹⁵ as well as ‘intelligence support to people who are deployed and to operational decision makers’.¹⁶ ASTJIC reports formed part of the basis upon which Rear Admiral Smith (Naval Component Commander) and Brigadier Silverstone (HQNORCOM/CJTF 639) made daily operational decisions;
- Coastwatch¹⁷ and to a lesser degree DIMIA¹⁸ regularly briefed the People Smuggling Taskforce (PST) on numbers of potential boat and people arrivals, with forecasts on expected dates and destinations.¹⁹ DIMIA intelligence bulletins, containing more detailed information on arrivals and the state of the people smuggling pipeline, also went to the agencies represented on the PST;²⁰ and
- RAAF and Coastwatch maritime surveillance, as well as operational intelligence gleaned from intercepted arrivals supplemented the intelligence reporting on impending people and boat arrivals. Defence told the Committee that the Defence Signals Directorate (DSD) also produced reports, presumably based on signals intercepts, that ‘may or may not have’ related to SIEV X.²¹ It should be noted, however, that HQNORCOM indicated to the Committee that it received no intelligence based on DSD intercepts of communications from SIEV X.²²

8.24 This is the framework within which domestic and external intelligence on SIEVs was collected, analysed and disseminated to various agencies and then onto decision makers and military units deployed on Relex operations.

SIEV X Chronology

8.25 The period of time from the receipt of the first reports of SIEV X by Australian agencies to its sinking covers three months. It can be divided into two phases:

- July to mid October – when a series of reports about Abu Qusey and possible boat departures began to emerge; and
- 17 to 23 October – the period surrounding the SIEV X disaster.

15 *Transcript of Evidence*, CMI 1885.

16 *Transcript of Evidence*, CMI 1887. For more on the exchange of intelligence across the various agencies engaged in the new border protection strategy, see Answers to Questions on Notice, Defence, 20 September 2002, esp. W65 and W77.

17 Answers to Questions on Notice, Coastwatch 17 June 2002, pp.1-2.

18 For example, *Transcript of Evidence*, CMI 2014.

19 See also PST Notes, particularly for 18-23 October 2002.

20 *Transcript of Evidence*, CMI 1998.

21 Answers to Questions on Notice, Defence, 20 September 2002, Question 33.

22 Answers to Questions on Notice, Defence, 20 September 2002, Question W79.

8.26 The Committee discusses the nature and timing of the information received during these two phases, identifying the key points that emerge and foreshadowing some of the questions that the Committee will deal with in the next chapter.

July to mid October 2001: Early intelligence

8.27 The first reports on SIEV X can be traced to July 2001 when indications were received that a people smuggler, Abu Qussey, was preparing vessels for departure to Christmas Island. The internal ADF review of intelligence on SIEV X identified 20 July as the earliest mention of Qussey. It also noted that ‘DIMA²³ [was] monitoring and reporting on the progress of 10 other SIEV[s] at the time’.²⁴

8.28 Ms Nelly Seigmund, head of the DIMIA Border Protection Branch which includes the Intelligence Analysis Section (IAS), told the Committee:

...we started hearing about this particular organiser with this particular boat – which we initially thought was two boats – back in July. From that period on, the number of passengers varied, not dramatically, in terms of what we had. At one stage we thought there were two boats coming, not one, and the departure points varied.²⁵

8.29 As what follows will show, Ms Siegmund’s statement points to the varying signals on SIEV X that Australian agencies were receiving throughout July to October.

8.30 During August 2001 DIMA Intelligence Notes mentioned Qussey on nine occasions, mainly during the last half of the month. On five occasions these Notes indicated that SIEV X ‘was about to depart or had departed’.²⁶

8.31 Reporting on Qussey increased in September with DIMA Intelligence Notes referring to him on 21 dates. Coastwatch indicated to the Committee that it had received information that SIEV X was about to depart or had departed ‘anywhere within a seven-day block in September’.²⁷

8.32 However, according to ADF evidence it appears that there was only one report in September – 5 September²⁸ – indicating that the ‘Qussey vessel’ had

23 As noted elsewhere in the report, DIMA was the acronym for the Department of Immigration and Multicultural Affairs at the time of Operation Relex in 2001.

24 ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.1.

25 *Transcript of Evidence*, CMI 2012-2013. See also Colonel Gallagher, *Transcript of Evidence*, CMI 1902.

26 ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.1. Coastwatch told the Committee that it had received information of possible/actual departure on only four dates in August, *Transcript of Evidence*, CMI 1630.

27 *Transcript of Evidence*, CMI 1630.

28 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.158.

departed. This appears to be the first instance where a location of departure – ‘south-west Java’ – is mentioned.²⁹

8.33 While DIMA Intelligence Notes referred to Qussey continually through early October, there appears to have been no further reports of the ‘Qussey vessel’ (ie. SIEV X) or departures until around 11-14 October. On 14 October a Coastwatch daily Civil Maritime Surveillance Program (CMSP) Operations Summary (OPSUM), based on an intelligence report of 11 October, suggested that SIEV X had been delayed.³⁰

8.34 No overdue notice or concern seems to have been raised during the period between the September report of SIEV X departing and subsequent 11-14 October intelligence that it had been delayed. This suggests that the intelligence on Qussey or SIEV X at this time was unconfirmed and that Australian analysts discounted these early reports of the vessel’s supposed departure.

17 to 23 October: Ambiguous intelligence

8.35 The intelligence trail on SIEV X resumed on 17 October. Over the next five days a number of reports about the vessel’s apparent movements arrived. The mixed signals seen during the July-early October phase also resumed, but in a more compressed timeframe.

8.36 The chain of events during this critical phase is complex, not least because of the ambiguity of the intelligence and the number of Australian agencies dealing with it. To help make sense of this complexity the Committee examines the incoming intelligence reports and steps taken by the various Australia agencies on each day.

17 October

8.37 Two reports about SIEV X’s movements appear to have entered the intelligence and decision making system on 17 October. At midday DIMIA issued a DIMA Intelligence Note. In a heavily censored section of the version of the Intelligence Note that the Committee received, the following comment is made:

DIMA Jakarta reports that several sources claim [DELETED] moved [DELETED] passengers on [DELETED] last night. The departure of the boat has yet to be confirmed.³¹

8.38 Although it is hard to be certain of the vessel and organiser’s identity to which this passage refers,³² other evidence suggests that it relates to Abu Qussey and SIEV

29 ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.1.

30 *Transcript of Evidence*, CMI 1727 and ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.1.

31 DIMA Intelligence Note 79/2001, 17 October 2001, p.2.

32 In the only other declassified entry in this section, the Intelligence Note states ‘There is no recent reporting about [DELETED] next boat’. DIMA Intelligence Note 79/2001, 17 October 2001, p.2.

X. First, the comment that the report is based on ‘several sources’ sounds akin to the ‘multisource information’ mentioned elsewhere in relation to SIEV X, although it appears that SIEV X was not the only vessel mentioned in this intelligence.³³

8.39 Second, the daily Coastwatch OPSUM is said to have referred to the ‘Quassey vessel moving from port to port’.³⁴ This movement was not seen as unusual. Colonel Gallagher, the current Commander of ASTJIC, explained to the Committee that ‘it is a common occurrence...that the people smugglers would move their vessels through a number of ports’.³⁵

8.40 The second report about SIEV X came much later in the day. At about 10.00pm (Kilo Time or AEST) Coastwatch received information that SIEV X had left central Java on 16 October bound for Christmas Island. It assessed that the vessel was expected to arrive early on 18 October.³⁶ Coastwatch promptly relayed this message by telephone to both HQNORCOM and the ASTJIC watchkeeper.³⁷ (As is now known, SIEV X did not depart Indonesia until 18 October.)

8.41 Both Coastwatch and ASTJIC posted the formal advice of this intelligence the next day.

18 October

8.42 On the day SIEV X sailed from Sumatra, Coastwatch ‘promulgated’ an OPSUM containing the previous night’s report of the vessel’s ‘departure’ on 17 October.³⁸ ASTJIC also reported this information at its daily morning Theatre

33 See the discussion linking ‘multisource’ information to not only SIEV X but also another unnamed organiser’s vessel in the next section on 18 October.

34 ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, pp.1-2. It is not entirely clear, however, if the Coastwatch OPSUM did mention the port-to-port movement. In a letter clarifying his evidence, Colonel Gallagher said that this assessment on ASTJIC’s part was an ‘after-the-fact judgement’, based on the ‘combination of the two differing points of departure reported on 17 and 18 October’ (ie. central Java on 17 October and western Java on 18 October). The 17 October report refers to the *second* Coastwatch intelligence report that day, not the earlier OPSUM. See Answers to Questions on Notice, Defence, 20 September 2002, Question W85.

35 *Transcript of Evidence*, CMI 1897.

36 Answers to Questions on Notice, Defence, 20 September 2002, Question W85. As noted in the Defence review of SIEV X intelligence (Attachment A, p.2), an error in some of the intelligence reporting recorded the departure date as 17 October, not 16 October. The DIMA Intelligence Note of 19 October 2001 talks of the Qussey vessel departing on Tuesday night, ie. 16 October. See DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

37 There is a slight discrepancy between Coastwatch and ASTJIC about the timing of this phone call, which is attributed to the officers involved keeping rough details of such calls. See Attachment A, Answers to Questions on Notice, Coastwatch, 17 June 2002, cf. *Transcript of Evidence*, CMI 1920.

38 ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.1.

intelligence briefing, whereafter it would have been disseminated to the Defence network in a formal message and updated on the ASTJIC webpage.³⁹

8.43 Rear Admiral Smith informed the Committee of the detail of the Coastwatch OPSUM:

The Abu Qussey vessel in the Coastwatch's CMSP OPSUM on PM 18 October through intelligence sources was 'reported' to have departed Indonesia for Christmas Island on 17 October 2001. Coastwatch assessed that the vessel could 'possibly' [original emphasis] arrive at Christmas Island, late 18 October or early 19 October 2001.⁴⁰

8.44 At this time, a question appears to have remained about the exact date when SIEV X was thought to have departed. Colonel Gallagher told the Committee that the 'date of departure was unclear, and to my mind, remains unclear'.⁴¹

8.45 DIMIA also reported on SIEV X's apparent departure, as well as other possible arrivals in its Intelligence Note of 18 October.⁴² This Intelligence Note served as the basis for a discussion on 'prospective arrivals' at that day's meeting of a subgroup of the People Smuggling Taskforce (PST). The notes from that meeting record in bullet point form:

Intelligence re 2 boats with total 600 PUAs [possible unauthorised arrivals] expected at Christmas, with one possibly arriving today, a further 3 boats with total 600 expected at Ashmore, with earliest arriving Monday [22 October]. Some risk of vessels in poor condition and rescue at sea.

No confirmed sightings by Coastwatch, but multisource information with high confidence level.⁴³

8.46 Deciphering these notes requires care. Although Mr Killesteyn of DIMIA (who was present at the subgroup meeting on 18 October) said that 'there is a good deal of symmetry' between the PST meeting notes and the DIMA Intelligence Note,

39 *Transcript of Evidence*, CMI 1897.

40 Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002, p.2.

41 *Transcript of Evidence*, CMI 1897. DIMIA assessed the boat as departing on 'Tuesday night', ie. 16 October. DIMA Intelligence Note 80/2001, 18 October 2001, p.3.

42 *Transcript of Evidence*, CMI 2014. In the declassified version of the DIMA Intelligence Note of 18 October provided to the Committee, there is in the largely censored section called 'Current Situation' a reference to 'DIMA Jakarta [DELETED] the departure of the boat, which should arrive in Australian territorial water sometime today. IAS COMMENT [DELETED]'. Presumably this refers to the Qussey vessel. The only other uncensored statement in this section repeats the same advice from the 17 October DIMA Intelligence Note that 'there is no recent reporting about [DELETED] next boat'. Since DIMIA knew by 18 October that Qussey was now only preparing one boat, not two as thought earlier, this second statement does not appear to be related to Qussey or SIEV X. DIMA Intelligence Note 80/2001, 18 October 2001, p.3.

43 PST Notes, 'People Smuggling Taskforce – High Level SubGroup, Thursday 18 October 2001'. Cited also in *Transcript of Evidence*, CMI 2014.

the meeting notes 'are a cryptic summary' and therefore not entirely accurate.⁴⁴ The following seeks to clarify these notes.

8.47 DIMIA confirmed that the opening reference to '2 boats' referred to SIEV X belonging to Abu Qusey and a second vessel belonging to another people smuggler.⁴⁵ Ms Siegmund said that intelligence was now indicating that there was only one Qusey vessel and no longer two, as had been thought to be the case earlier.⁴⁶

8.48 Members of the Committee were concerned to ascertain whether the reference to 'total 600 PUAs' indicated that SIEV X was expected to be carrying 400 people – and therefore was an early warning of overcrowding – and that the other vessel was carrying 200 people. However, DIMIA advised the Committee that the *opposite* was the case. Ms Siegmund explained how DIMIA arrived at the figure of 'total 600 PUAs':

The numbers we had reported to us in relation to Qusey's boat ranged from 150 to 250 at varying times. The figure of 400 came to our attention after the event of the tragic sinking. On the day that you are referring to, in terms of the task force, there were at least three organisers that we were concerned about who potentially were going to send boats through to Christmas Island. The numbers certainly would have added up to 600-plus, spread across those organisers. But, in terms of the Qusey vessel at that time, our estimate was still that it would be possibly carrying up to 250 passengers.⁴⁷

8.49 The following day's DIMA Intelligence Note reflected these figures. It noted that SIEV 6 was thought to be carrying between 250-300 passengers; that the Abu Qusey vessel was believed to be carrying 250 passengers; and that there had been 'no further reporting on Abdul Paskistani's (aka Mohammed Khan) intentions to send his boat with over 500 passengers to Christmas Island next week'.⁴⁸

8.50 The fluidity in the passenger numbers reflects the flux in the intelligence not only on SIEV X but on possible boat and people arrivals in general. In the next chapter, the Committee discusses this feature of the Operation Relex intelligence.

8.51 Contrary to some of the speculation based on the PST notes, the mention of 'some risk of vessels in poor condition and rescue at sea' did *not* relate to SIEV X but, rather, the condition of the other organiser's vessels. Ms Siegmund mentioned that that particular organiser 'had previously used boats in poor condition'.⁴⁹ The DIMA

44 *Transcript of Evidence*, CMI 2014.

45 *Transcript of Evidence*, CMI 2014.

46 *Transcript of Evidence*, CMI 2014-2015.

47 *Transcript of Evidence*, CMI 2015-2016.

48 DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

49 *Transcript of Evidence*, CMI 2014-2015.

Intelligence Note of 19 October made the same comment and observed that ‘the requirement for a rescue at sea cannot be ruled out’.⁵⁰

8.52 The Committee believes that the second bullet point that talks of ‘no confirmed sightings by Coastwatch’ is probably an instance of a mistake in the PST meeting notes. As noted earlier in the report, at the beginning of Operation Relex the ADF took over surveillance of the Christmas Island and Ashmore Reef zones, while Coastwatch withdrew from these areas to concentrate its efforts on the Timor and Arafura Sea approaches.⁵¹ Based on this, the notes perhaps meant to say that the ADF or RAAF had not reported any sightings of SIEV X at that point. This would be consistent with the evidence provided on air surveillance in the Christmas Island area for 18-20 October that is discussed later in this chapter.⁵²

8.53 The mention of ‘multisource information’ is another example of the need to decipher the PST meeting notes with care. Although it appears that earlier intelligence (17 October) on SIEV X might have been multisource, DIMIA advised the Committee that the intelligence on Qussey on 18 October was *single source*.⁵³ Thus it seems that, again, the PST notes are referring in this instance to the ‘other’ organiser’s vessel, not SIEV X. As the matter of the ‘multisource information’ (the second part of the bullet point) goes to the question of the credibility of this intelligence, the Committee discusses its importance in the next chapter.

19 October

8.54 On the day that SIEV X foundered, no fresh intelligence appears to have been received on it. Coastwatch repeated its advice of 18 October in its OPSUM for the day that a Qussey vessel was a ‘possible’ arrival.⁵⁴ In reference to the Coastwatch OPSUMs for both 18 and 19 October, Rear Admiral Smith observed that ‘neither of these reports were confirmed’.⁵⁵

8.55 On the same day a P3 surveillance flight sighted SIEV 6 near Christmas Island. In reporting the sighting, the DIMA Intelligence Note of the day also commented that ‘the other vessel’ (ie. SIEV X) had not been seen. The Intelligence Note stated:

50 DIMA Intelligence Note 81/2001, 19 October 2001, p.2

51 Rear Admiral Bonser, *Transcript of Evidence*, CMI 1629.

52 Attachment B, Minister of Defence to CMI, undated, received 4 July 2002.

53 Answers to Questions on Notice, DIMIA, 20 September 2002.

54 It was usual for Coastwatch to repeat advice in subsequent OPSUMs until new or additional information was received. Attachment A, Answers to Questions on Notice, Coastwatch, 17 June 2002; Rear Admiral Smith, ‘Clarification of Evidence’, letter to CMI, 22 May 2002, p.2; and ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.2.

55 Rear Admiral Smith, ‘Clarification of Evidence’, letter to CMI, 22 May 2002, p.2.

Abu Qussay's boat carrying up to **250 passengers** [original emphasis] that reportedly departed from probably Cilicap, on Tuesday night has not yet been sighted. It was expected to arrive in the vicinity of Christmas Island late Thursday.⁵⁶

8.56 DIMIA's Intelligence Analysis Section (IAS) attributed the delay to the following factors:

IAS COMMENT: Abu Qussay's boats often take longer to complete the journey to Christmas Island than those organised by [DELETED] for example, possibly because of the departure point (south-west Java) and the prevailing currents and the use of smaller boats.⁵⁷

8.57 In other words, although SIEV X was by DIMIA's reckoning a day overdue at this stage (based on intelligence that it had left Java on 16 October, which turned out to be wrong), it was not seen as unusual given DIMIA's experience with earlier vessels organised by Qussey. Further, adverse weather conditions appear to have prevailed over these days. Bad weather is thought to have forced SIEV X to shelter in the lee of an island in the Indonesian archipelago on 18 October,⁵⁸ and the weather conditions in the area of operations north of Christmas Island were also poor on 19 October.⁵⁹

8.58 The expectation that SIEV X was but one of many people smuggling vessels due to arrive in Australian waters during this period should also be noted. After earlier predictions of an impending influx in boat and people arrivals,⁶⁰ the DIMA Intelligence Note of 19 October made the following assessment:

The sighting of possibly [DELETED]'s vessel [SIEV 6] north west of Christmas Island earlier today is probably the vanguard of the anticipated surge and will probably be followed by Qussay's boat later today. This will probably see approximately 550 people off Christmas Island by the weekend. There will probably be a three to five day break before the first of the Ashmore Island-bound boats are likely to be approaching Australian waters.⁶¹

8.59 The Committee discusses the 'anticipated surge' in chapter 9.

56 DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

57 DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

58 DIMA Intelligence Note 83/2001, 23 October 2001, p.2.

59 Forecast weather conditions in the vicinity of Christmas Island during this period included warnings on thunderstorms and sea squalls. See Answers to Questions on Notice, Defence, 20 September 2002, Question W82. See also the section on Surveillance and SIEV X later in the chapter, especially Air Commodore Byrne's comments on the sea state on 19 October.

60 See DIMA Intelligence Note 80/2001, 18 October 2001, p.3.

61 DIMA Intelligence Note 81/2001, 19 October 2001, p.3.

8.60 One further development should be noted. According to Coastwatch, from 19 October on the AFP became ‘the primary source of information about SIEV X’.⁶² As will be seen, AFP reporting over the next three days is central to the intelligence picture on SIEV X.

20 October

8.61 Two key items of intelligence appeared on 20 October. The organiser of SIEV 6 was identified as not being Abu Qussey,⁶³ indicating that SIEV X was still in transit.

8.62 The second critical item of intelligence arrived early in the morning. The AFP telephoned Coastwatch to advise that a ‘source’ had provided fresh intelligence indicating that a vessel had departed west Java the previous day and that it was reported to be small and overcrowded.⁶⁴ Coastwatch immediately telephoned this advice through to ASTJIC and HQNORCOM and later issued an OPSUM.

8.63 According to Rear Admiral Smith, Coastwatch’s advice indicated:

that the Abu Qussey vessel had allegedly departed Sumar ... on the West Coast of Java early AM hours 19 October instead of Pelabuhan Ratu as previously reported on the previous two days.⁶⁵

8.64 While neither the date nor place of departure was correct, the rest of the message was consistent with the later testimony of SIEV X survivors. Rear Admiral Smith continued:

The vessel was reported by the source ‘allegedly as small and with 400 passengers onboard, with some passengers not embarking because the vessel was overcrowded’.⁶⁶

8.65 In addition to the information that SIEV X was small, carrying 400 passengers and overcrowded, the AFP officer who provided the advice, Ms Kylie Pratt,⁶⁷ also made a risk assessment of the vessel’s capacity to ferry its passengers safely. Rear Admiral Bonser, the Director General of Coastwatch, told the Committee:

When the advice about the vessel’s alleged departure was provided to Coastwatch by phone on 20 October, the AFP officer providing the advice

62 Answers to Questions on Notice, Coastwatch, 17 June 2002, p.5.

63 ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.2.

64 *Transcript of Evidence*, CMI 1631; ‘SIEV X Chronology’, Defence review of SIEV X intelligence, Attachment A, p.2.

65 Rear Admiral Smith. ‘Clarification of Evidence’, letter to CMI, 22 May 2002, p.2.

66 Rear Admiral Smith. ‘Clarification of Evidence’, letter to CMI, 22 May 2002, p.2.

67 *Transcript of Evidence*, CMI 1961. Ms Pratt was an analyst attached to the Joint AFP-DIMA People Smuggling Strike Team, based in Canberra.

also offered a personal opinion that the vessel may be subject to increased risk due to the numbers reportedly on board.⁶⁸

8.66 In the Committee's view, the AFP's advice on 20 October is probably the single most crucial piece of intelligence in the traffic about SIEV X. It reached Australian authorities at a time when it might still have been possible to have launched a search and rescue operation to locate the survivors of SIEV X. The Committee traces the passing of this advice through the intelligence system below, and then in the next chapter examines why it triggered little reaction from operational decision makers.

Coastwatch to ASTJIC and HQNORCOM

8.67 Soon after its receipt, Coastwatch telephoned the AFP advice through to ASTJIC and HQNORCOM. Coastwatch records⁶⁹ show the timing of the sending of this information as:

0930K	Phone call	From AFP to Coastwatch
0950K	Phone call	From Coastwatch to ASTJIC
1000K	Phone call	From Coastwatch to HQNORCOM
1000K	OPSUM	From Coastwatch to Defence addressees

8.68 The news from Coastwatch galvanised ASTJIC into action. In less than 15 minutes ASTJIC had issued an immediate intelligence report on the imminent arrival of another SIEV.⁷⁰ In his recounting of the intelligence traffic on SIEV X, Colonel Gallagher told the Committee 'that even though the point of departure was different [to the 17-18 October reports], the ASTJIC took that report from the AFP via Coastwatch on the morning of the 20th to be corroboration of the fact that the vessel had left'.⁷¹

8.69 Colonel Gallagher also said that this was the only instance when ASTJIC generated a 'specific immediate intelligence report', its uniqueness reflecting the agency's assessment that the information was of 'sufficient moment that people needed to be aware of it'.⁷²

68 Attachment A, Answers to Questions on Notice, Coastwatch, 17 June 2002.

69 Attachment A, Answers to Questions on Notice, Coastwatch, 17 June 2002.

70 In a letter to the Committee, Colonel Gallagher corrected his earlier testimony in which he said that the ASTJIC report was issued at 11.00am (CMI 1896). The report was issued at 10.01 am. See Colonel P.J. Gallagher to CMI Committee, 9 August 2002.

71 *Transcript of Evidence*, CMI 1736. Colonel Gallagher qualified this point by saying that the vessel's departure 'would not have been treated as confirmed'; rather, that it 'is assessed that a vessel has departed', *Transcript of Evidence*, CMI 1910.

72 *Transcript of Evidence*, CMI 1898.

8.70 Elaborating on the reason for ASTJIC issuing an ‘immediate intelligence report’ to HQNORCOM, Colonel Gallagher said that as it was the weekend (20 October was a Saturday) ‘the way to get the attention of people out of normal working hours was to send them an immediate message’.⁷³

8.71 Under the heading ‘Possible boat departure for CI’, the declassified version of the ASTJIC report states:

1. [DELETED] information provided by [DELETED] AFP [DELETED] indicates that an Abu Qussay boat departed [DELETED] the west coast of Java in the early AM hours of Friday 19 OCT 2001. The vessel is described as a small boat and may be carrying up to 400 passengers.
2. [DELETED] ASTJIC assess that the vessel could arrive from late afternoon today (SAT 20 OCT) onwards.⁷⁴

8.72 The ASTJIC report went to a range of recipients, including HQNORCOM, CJTF 639 (ie. Brigadier Silverstone) and the Australian embassy in Jakarta.

8.73 At about midday HQNORCOM issued its own intelligence summary or INTSUM.⁷⁵ In the declassified review of the intelligence on SIEV X, the INTSUM is said to include the following assessment:

NORCOM INTSUM assesses there is a high probability of the vessel arriving vic [vicinity] Christmas Island from 21 Oct 01, and that due to its overcrowding and need to maintain stability it may be limited to a slow passage, and therefore a later time of arrival could be expected.⁷⁶

8.74 The INTSUM also noted that 400 passengers were on board a small vessel.⁷⁷ According to Rear Admiral Bonser of Coastwatch, HQNORCOM repeated the original Coastwatch advice conveyed that morning by telephone to ASTJIC.⁷⁸ It appears that the INTSUM also reflected discussions between HQNORCOM intelligence staff and Coastwatch analysts about the probability of SIEV X’s arrival and the level of confidence that could be placed on such an assessment.⁷⁹ Further, Colonel Gallagher told the Committee ‘that the NORCOM INTSUM on 20 October reflected the fact that they were concerned about overcrowding on the vessel, which is

73 *Transcript of Evidence*, CMI 1906.

74 ASTJIC INTREP 171/01: Possible Boat Departure for CI, Answers to Questions on Notice, Defence, 20 September 2002, Attachment B.

75 *Transcript of Evidence*, CMI 1655.

76 SIEV X Chronology, Defence review of SIEV X intelligence, Attachment A, p.2. See also Answers to Questions on Notice, Defence, 20 September 2002, W76.

77 Answers to Questions on Notice, Defence, 20 September 2002, W76.

78 *Transcript of Evidence*, CMI 1655.

79 Answers to Questions on Notice, Defence, 20 September 2002, W81.

essentially the substance of the intelligence report that was put out by ASTJIC that morning',⁸⁰

8.75 The Committee was initially puzzled, nonetheless, at the apparent omission of the AFP advice that the vessel might be at increased risk because of overcrowding. Subsequent evidence has revealed, however, that HQNORCOM never received this particular piece of information. When asked about the AFP officer's concern about the increased risk to the vessel's safety, Brigadier Silverstone (who doubled as CJTF 639 and Commander NORCOM) stated:

No such report was received by NORCOM from the AFP. On 20 October, Coastwatch advised HQNORCOM of the AFP report describing numbers embarked, a place and approximate time of departure and that some unauthorised arrivals had refused to board the SIEV due to overcrowding. *The advice did not include a report of concern for increased risk to the vessel's safety.* Due to previous conflicting reports, HQNORCOM assessed that the report, except for the departure date probably being correct, as having *low credibility*, with the requirement for confirmation of the remaining details [emphasis added].⁸¹

8.76 When combined with the ASTJIC intelligence report cited above, this statement indicates that Coastwatch failed to pass onto the ADF and Defence network the 'personal assessment' of the AFP officer, Ms Kylie Pratt, regarding the increased risk that the overcrowding posed for SIEV X. This casts a new light on the ADF's response to the SIEV X intelligence, particularly in relation to the question about whether a SOLAS alert was warranted. It also suggests that ASTJIC issued an 'immediate' intelligence report on the morning of 20 October out of concern for the sudden arrival of a new SIEV at Christmas Island, rather than concern for the vessel's safety. In the next chapter the Committee assesses the impact of Coastwatch's handling of the AFP intelligence on the SIEV X tragedy.

ASTJIC to Maritime Patrol Group

8.77 The ASTJIC intelligence report also went to the 92 Wing Detachment at Learmonth in Western Australia, where the Maritime Patrol Group (MPG) P3 Orions were based for Operation Relex. This was the first occasion when the MPG heard of a 'small and overcrowded vessel' which is now known to be SIEV X.⁸² The ASTJIC report was received while the surveillance flight for 20 October was airborne.⁸³

8.78 The new information about SIEV X, however, was not passed to the P3 on task at the time. It was not until the midnight briefing of the aircrew for the following day's surveillance flight that the detail about a small and overcrowded vessel was

80 *Transcript of Evidence*, CMI 1920.

81 Answers to Questions on Notice, Defence, 20 September 2002, W75.

82 *Transcript of Evidence*, CMI 2160.

83 *Transcript of Evidence*, CMI 2176.

provided to any of the MPG aircrews.⁸⁴ When asked to explain why the ASTJIC ‘immediate’ intelligence report was not transmitted to the P3 on patrol on the morning of 20 October, Air Commodore Byrne, the Commander of the MPG, said to the Committee:

The only thing I can think of is that there was nothing of any criticality in that intelligence report to bring to the attention of the crew, which was airborne.⁸⁵

8.79 In subsequent evidence to the Committee, Air Commodore Byrne elaborated on the lack of ‘criticality’ in the ASTJIC report:

The information contained in the STJIC intelligence report of 20 October 2001 was not passed to the P-3C aircraft in the air at the time because the report was assessed as adding *nothing of immediate significance* [emphasis added] to the information already held at Maritime Patrol Group and by the crew flying at the time. The intelligence report described the vessel as ‘small and may be carrying up to 400 passengers’. Additionally, ASTJIC assessed that the vessel could arrive from late that afternoon onwards. There was no information received to suggest that any action other than routine intelligence reporting was warranted. Therefore, the report’s information was collated into the pre-flight intelligence report that afternoon, to brief the crew for the next flight.⁸⁶

8.80 This was not the only instance on 20 October when the AFP intelligence was not passed onto key decision makers. Neither DIMIA nor the afternoon meeting of the People Smuggling Taskforce received the AFP intelligence. The Committee examines these apparent lapses in the communication chain in the next two sections.

Communication breakdown: DIMIA

8.81 While the AFP advice was transmitted rapidly to Coastwatch and the key Defence agencies, it appears not to have reached DIMIA. When asked by the Committee if DIMIA’s Intelligence Analysis Section (IAS) had received the AFP information on 20 October, none of the DIMIA witnesses could recall seeing or knowing of it. In Ms Siegmund’s words, ‘in this instance we were not part of that intelligence loop’.⁸⁷

8.82 DIMIA offered two possible explanations for why it was not in the ‘intelligence loop’ on this occasion. Both relate to operational considerations. While Ms Siegmund indicated that she would have expected that DIMIA’s intelligence

84 *Transcript of Evidence*, CMI 2160.

85 *Transcript of Evidence*, CMI 2176. Air Commodore Byrne also noted that at the time the ASTJIC report was received at Learnmonth, the P3 was ‘three hours from off-task’. *Ibid.*

86 Answers to Questions on Notice, Defence, 20 September 2002, Question 39.

87 *Transcript of Evidence*, CMI 2012.

people would also have been telephoned the AFP advice at some stage during the weekend, she made the observation that:

But I also accept the fact that, in these circumstances – particularly where an agency might feel that it has operational information that has to be passed quickly – the first instinct might be to ring an agency such as Coastwatch or Defence, rather than us, because it is something they are expecting action to be taken on or it is needed more urgently. We might be advised at a later time.⁸⁸

8.83 Mr Killesteyn also suggested that the operational priority would have been to fast track the information to those responsible for surveillance and interception, and that this could have overshadowed the requirement to pass it onto DIMIA for analysis and reporting. In Mr Killesteyn's view:

I suspect that the particular piece of intelligence we are referring to – from AFP to Coastwatch on Saturday 20 – was around the process of interception as distinct from making sure that there was an opportunity to build it into a report. It was very much a focus on interception, and then dealing with the vessel and its passengers at that point.⁸⁹

8.84 The Committee notes two points in relation to this aspect of the SIEV X incident. First, both Ms Siegmund's and Mr Killesteyn's view of the operational importance of the AFP intelligence accords with Colonel Gallagher's evidence that it was of 'sufficient moment' to warrant fast tracking to the joint taskforce headquarters at NORCOM. The Committee discusses this issue in the next chapter.

8.85 Second, the Committee finds this instance of a breakdown in intelligence sharing to be odd for two reasons. First, DIMIA was the clearinghouse for intelligence on people smuggling and therefore the collection point for all relevant onshore and offshore intelligence. Second, the AFP officer who provided the 20 October report was a member of the Joint AFP-DIMIA People Smuggling Strike Team.⁹⁰ According to Ms Siegmund, 'there is a close relationship in terms of information sharing' between the Strike Team and IAS.⁹¹

8.86 The Committee considers that the communication breakdown in this instance might reflect not only operational exigencies but also problems with the processes and procedures in place for intelligence coordination across government agencies. The

88 *Transcript of Evidence*, CMI 2012.

89 *Transcript of Evidence*, CMI 2024. Mr Killesteyn also said: 'I cannot recall whether it was communicated at the People Smuggling Task Force. I would be surprised if it was not because of the level of representation that we had from the various agencies, but I have no specific recollection of that piece of information.'

90 *Transcript of Evidence*, CMI 1961.

91 *Transcript of Evidence*, CMI 1997. AFP Commissioner Keelty also indicated to the Committee that AFP intelligence sourced in Indonesia went to DIMIA through the People Smuggling Strike Team. *Transcript of Evidence*, CMI 1943.

Committee returns to the issue of systemic problems with the intelligence system in chapter 9.

Afternoon meeting of the People Smuggling Taskforce

8.87 The possibility of SIEV X arriving at Christmas Island over the next day or so seems to have been canvassed at the meeting of the PST in the afternoon of 20 October. The meeting started at 4.00pm. That is, the meeting occurred *after* the SIEV X survivors had been rescued.

8.88 After discussing the situation with SIEV 6, the meeting notes record, under the subheading 'Further arrivals':

Second boat expected at Christmas Island tomorrow. If arrives, assessment to be made whether possible to return larger vessel. Arunta to relieve possible overcrowding.⁹²

8.89 Ms Halton thought it 'likely' that this passage referred to SIEV X.⁹³ She also explained that the comment about 'overcrowding' did not relate to passenger numbers on SIEV X but to the mounting pressure on accommodation facilities at Christmas Island. With intelligence reports forecasting possibly SIEV X and another boat arriving with 250 and over 500 passengers respectively, the PST meeting that day was focused on 'a huge accommodation problem'.⁹⁴ Consideration turned to the practicality of returning to Indonesia whichever of the two SIEVs turned out to be carrying the most passengers (ie. the 'larger vessel').⁹⁵

8.90 Ms Halton also stressed that the discussion around the accommodation implications of SIEV X arriving was provisional, reflecting the unconfirmed status of its departure from Indonesia. Referring to the passage from the PST notes cited above, Ms Halton said to the Committee:

If you read that particular sentence, it goes on: 'if arrives, assessment to be made whether'. So we are planning prudently for things that may or may not happen. There is a greater probability with things [intelligence reports] that are multisource ... but here we are still saying 'if arrives'. There is no categorical assurance or understanding in our minds that it is absolutely on its way. It had not been spotted. The confirmation that we always relied on in terms of vessels was them actually being found by an aircraft. Our experience of however many SIEVs beforehand was that sometimes they

92 PST Notes, 'People Smuggling Taskforce – High Level Group Meeting 4.00 PM Saturday, 20 October 2001.

93 *Transcript of Evidence*, CMI 2117.

94 *Transcript of Evidence*, CMI 2115, 2118-2120.

95 *Transcript of Evidence*, CMI 2117; see also CMI 2118-2120.

got unnervingly close to Ashmore or to Christmas Island before they were actually spotted.⁹⁶

8.91 When asked about the AFP intelligence report of that day, Ms Halton told the Committee that neither she nor the PST meeting was made aware of it, even though an AFP officer and Rear Admiral Bonser attended the meeting.⁹⁷ She observed that had a report been received which raised the number of expected passengers on SIEV X from 250 to 400, it would have set ‘alarm bells ... ringing’ because of the acute accommodation situation on Christmas Island.⁹⁸ Ms Halton also said that the meeting received neither the Coastwatch OPSUM nor the any of the Defence intelligence reports for that day.⁹⁹

8.92 The Committee has not been in a position to explore the reasons behind the omission of the content of the 20 October AFP intelligence at the PST meeting that afternoon. One possible explanation might be that the PST did not, according to Ms Halton, ‘sieve through intelligence’ at the level of detail contained in the AFP report.¹⁰⁰ Apart from the odd exception,¹⁰¹ the taskforce received mainly high-level summaries of the intelligence situation;¹⁰² other interdepartmental bodies handled operational intelligence.¹⁰³

8.93 Another explanation might be that, as appears to have been the case on 18 October, the intelligence briefing came from DIMIA officers discussing relevant detail from the current DIMA Intelligence Note.¹⁰⁴ If this was so, the briefing would have reflected the DIMA Intelligence Note of 19 October (there were no DIMA

96 *Transcript of Evidence*, CMI 2099-2100.

97 *Transcript of Evidence*, CMI 2099.

98 *Transcript of Evidence*, CMI 2115.

99 *Transcript of Evidence*, CMI 2117.

100 *Transcript of Evidence*, CMI 2100.

101 *Transcript of Evidence*, CMI 2096. Two exceptions included a report on an organiser who was no longer involved in people smuggling and a report on a vessel described as the ‘poison pill’ boat. The latter refers to intelligence that female passengers on the vessel had been given poison pills and told to threaten to swallow them if the RAN forced the vessel to turn back to Indonesia. The report proved to be unfounded. See DIMA Intelligence Note 50/2001, 10 September 2001, p.2; see also *Transcript of Evidence*, CMI 2035, 2096-2096.

102 Ms Halton said: ‘The task force got, basically, a high-level summary of what might be in prospect in terms of the numbers of people that would need to be managed, rather than a kind of categorical catalogue of every single possibility, every single people smuggler et cetera’. *Transcript of Evidence*, CMI 2100; see also CMI 2094-2095.

103 As discussed in chapter 2, these bodies are the Illegal Immigration Information Oversight Committee chaired by ONA, and the Operational Coordination Committee chaired by DIMIA.

104 *Transcript of Evidence*, CMI 2105.

Intelligence Notes for 20 or 21 October) which reported SIEV X as carrying up to 250 passengers.¹⁰⁵

8.94 However plausible these explanations might be, the Committee finds it inexplicable that some elements of the AFP intelligence were not raised during the meeting. Given that the High Level Group was grappling with, in Ms Halton's words, 'a huge accommodation problem' on Christmas Island, it is hard to fathom why none of the representatives from Defence, Coastwatch and the AFP mentioned the new intelligence that the passenger numbers on SIEV X had risen from 250 to 400. Given also that the meeting was considering the question of returning a 'larger vessel' to Indonesia if required, it is odd that neither the small size of SIEV X nor the concern about its seaworthiness was raised.

8.95 It is possible that none of the officers from Defence, Coastwatch and AFP personally knew themselves of the new intelligence. However, this seems unlikely in relation to Coastwatch and Rear Admiral Bonser, as it was usually Coastwatch's role, according to Ms Halton, to run the intelligence briefings at the taskforce meetings.¹⁰⁶

8.96 In the next chapter, the Committee assesses the impact of these apparent breakdowns in the intelligence chain – Coastwatch's omission of the reported increased risk to the vessel in its briefing to Defence, the failure to pass the AFP report to DIMIA and it not being mentioned at the PST meeting – on Australia's response to SIEV X.

21 October

8.97 A lull appears in the intelligence flow on 21 October. Both the Coastwatch OPSUM and the HQNORCOM INTSUM for the day reported no new information and repeated earlier reports on the boat's possible departure.¹⁰⁷

8.98 In his advice to the Committee, Rear Admiral Smith restated his view of the 'unconfirmed' reports in the Coastwatch OPSUMs of 18 and 19 October, saying that 'again the reports of 20 and 21 October were inconclusive'.¹⁰⁸

8.99 The Committee also notes that the previous day's AFP intelligence was again not canvassed at the PST meeting held late in the afternoon on 21 October.¹⁰⁹

105 DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

106 *Transcript of Evidence*, CMI 2104.

107 SIEV X Chronology, Defence review of SIEV X intelligence, Attachment A, p.2; Attachment A, Answers to Questions on Notice, Coastwatch, 17 June 2002.

108 Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002, p.2.

109 *Transcript of Evidence*, CMI 2119.

22 October

8.100 The first concerns that SIEV X might be overdue surfaced in Australian intelligence circles on 22 October. The AFP contacted Coastwatch again with advice that the vessel had departed Java but on this occasion also assessed that it was overdue. Coastwatch passed this information to not only its regular contacts (ASTJIC and HQNORCOM) but also to the Rescue Coordination Centre (RCC) at the Australian Search and Rescue (AusSAR) organisation.¹¹⁰ The RCC in turn transmitted an overdue message to Australian agencies and to its counterparts in Indonesia.

8.101 The situation concerning SIEV X was also debated at the PST meeting that afternoon.¹¹¹

8.102 Coastwatch, AusSAR and HQNORCOM sent out messages based on the AFP advice during the course of the day. The Committee examines these three messages in the sections below, before turning to the PST meeting of 22 October.

Coastwatch advice to other agencies

8.103 Rear Admiral Bonser outlined to the Committee the chain of reporting on the day:

On the 22nd, we received the information from AFP at 10.03. The assessment was made that the vessel was overdue and AFP were contacted about what information could or could not be conveyed. They requested a stay of the notification while they put together some suitable words. That was provided to us at 13.50. After they authorised release of that at 14.05, Coastwatch advised AusSAR using the words that were provided by AFP.¹¹²

8.104 AusSAR's records show that Coastwatch telephoned through this advice to the Rescue Coordination Centre (RCC) at approximately 2.40pm and then sent a fax with the AFP authorised release at 2.45pm.¹¹³ The Coastwatch fax stated:

A number of sources are reporting that a vessel carrying an unknown number of potential illegal immigrants departed the West Coast of Java on Friday 19 October 2001 transiting the Sunda Strait[s] heading for Christmas Island. By our calculations the vessel is now overdue.¹¹⁴

110 AusSAR is part of the Australian Maritime Safety Authority (AMSA).

111 *Transcript of Evidence*, CMI 2097-2098; PST Notes, 'People Smuggling Taskforce – High Level Group Meeting 22 October 2001'.

112 *Transcript of Evidence*, CMI 1655.

113 Answers to Questions on Notice, AMSA, 5 July 2002. The times on the RCC file notes are UTC or Universal Time Constant. As daylight saving had started, the times on the RCC files are 10 hours behind Australian Eastern Standard Time. See also *Transcript of Evidence*, CMI 1365.

114 Answers to Questions on Notice, AMSA, 5 July 2002.

8.105 Coastwatch also faxed ASTJIC and HQNORCOM, in addition to the standard addressees in Defence.¹¹⁵ It appears that the Coastwatch OPSUM was sent some time later in the day. Rear Admiral Smith said that ‘Late on 22 October 2001, Coastwatch advised my headquarters via the CMSP OPSUM that the Abu Qussey vessel was now considered overdue’.¹¹⁶

8.106 Admiral Bonser told the Committee that Coastwatch viewed the latest AFP advice as ‘corroborating’ the earlier AFP report on 20 October of the vessel’s departure and ‘confirming’ that it was overdue.¹¹⁷ He also said that the AFP’s advice of 22 October had included an assessment that SIEV X was overdue, a conclusion with which Coastwatch agreed based on its own calculations of the likely transit time.¹¹⁸

8.107 These comments need to be set, however, alongside the Coastwatch OPSUM for that day. The OPSUM not only contained more information than that faxed to AusSAR but it also to some extent qualified the overdue notice. According to the Defence review of SIEV intelligence, the OPSUM noted that it was not unusual for a SIEV to be overdue.¹¹⁹ The OPSUM also suggested that the ‘delay could be due to poor condition of the boat and large numbers onboard or the use of an alternative route to avoid detection’.¹²⁰

8.108 As is discussed more fully later in this chapter and in the next, the assessment and its positing of possible reasons for the vessel being overdue seems to have reflected some doubts within Coastwatch over the firmness of the AFP report and whether the vessel had departed.¹²¹ In this regard, the Committee also notes the DIMA Intelligence Note of 22 October which, after discussing SIEV 6, stated:

115 ‘The standard addressee list was from Coastwatch Canberra and it was sent to Commander Australian Theatre, Commander Joint Task Force 639, Maritime Commander Australia, Air Commander Australia, Commander Task Force 641, Commander Task Unit 646.2.2 – which is the ‘P3 world’ – Australian Theatre Joint Intelligence Centre, Task Group 639.0 and the 92 wing detachment at Learmonth, and for information to Australian Defence Headquarters Operations in Canberra, Headquarters Australian Theatre, Maritime Headquarters, Headquarters Air Command Air Operations and my Regional Coastwatch Base.’ *Transcript of Evidence*, CMI 1655.

116 Rear Admiral Smith, ‘Clarification of Evidence’, letter to CMI, 22 May 2002, p.2.

117 *Transcript of Evidence*, CMI 1643. One of those who attended the PST meeting of 22 October, Ms Katrina Edwards of PM&C, also noted that the latest intelligence ‘report seemed firmer than some’. *Transcript of Evidence*, CMI 1727.

118 *Transcript of Evidence*, CMI 1669.

119 SIEV X Chronology, Defence review of SIEV X intelligence, Attachment A, p.2.

120 Rear Admiral Smith, ‘Clarification of Evidence’, letter to CMI, 22 May 2002, p.2.

121 See Ms Katrina Edwards’ recollection of the matter at the PST meeting of 22 October, *Transcript of Evidence*, CMI 1706 and 1727. Her recollection is discussed later in this chapter and in chapter 9.

The other vessel believed to be heading for Christmas Island, organised by **Abu Qussay** and carrying up to **400 passengers** [original emphasis], has not yet been sighted but should be in the vicinity of Christmas Island if it was able to depart successfully from the Cilicap area on Friday morning.¹²²

8.109 The qualification concerning SIEV X's departure from Cilicap – 'if it was able to depart' – contained in this note further hedged earlier DIMIA reports of the boat's 'reported' departure. This suggests that at this stage in DIMIA doubts were also circulating about the accuracy of earlier reports that SIEV X had left Indonesian territory for Australian waters.

AusSAR advice to Australian and Indonesian agencies

8.110 After Coastwatch had contacted the AusSAR Rescue and Coordination Centre (RCC) – initially by telephone¹²³ and then fax – of the concerns about the overdue vessel, the RCC responded with a telephone call to Coastwatch. The RCC files record the conversation as follows:

RCC: Touching base to ensure Defence are aware and that this area is out of our SRR [search and rescue region].

Coastwatch: Yes – realise that – ensuring you are aware and we will keep you in the loop over the coming days.

RCC: Can we use your exact words in a fax to BASARNAS (SAR colleagues in Indonesia).

Coastwatch: Yes – exact words.

RCC: OK, thank you.¹²⁴

8.111 This call occurred at 2.42pm. The RCC staff then did their own calculations to satisfy themselves that the vessel was potentially overdue.¹²⁵ At 3.16pm RCC sent a fax with the overdue message to both BASARNAS (the Indonesian search and rescue authority) and the Australian Embassy in Jakarta, to the Indonesian Embassy and

122 DIMA Intelligence Note 82/2001, 22 October 2001, p.1. Note that this report was made at 11.00 am. DIMIA advised the Committee that, 'From the report, it is apparent we had received AFP-sourced information on Monday morning that the vessel departed with all his [ie.Qussey's] passengers (400+) on one vessel rather than the two we had expected Qussay to use. DIMIA believes that other agencies had assumed that we knew of the sinking.' See Answers to Questions on Notice, DIMIA, 20 September 2002.

123 The RCC files record summarised this initial conversation: 'Coastwatch intell[igence] wants me to advise you of a suspected over due SIEV'. *Transcript of Evidence*, CMI 1875; RCC file Aus/2001/7534.1, Answers to Questions on Notice, AMSA, 5 July 2002.

124 *Transcript of Evidence*, CMI 1876; RCC file Aus/2001/7534.2, Answers to Questions on Notice, AMSA, 5 July 2002.

125 RCC file Aus/ /7534, Answers to Questions on Notice, AMSA, 5 July 2002.

Coastwatch in Canberra and to Maritime Headquarters Australia and Headquarters Australian Theatre. The fax stated:

1. RCC Australia has been advised that a vessel carrying an unknown number of persons departed the West Coast of Java on Friday 19 October 2001 transiting the Sunda Strait[s] heading for Christmas Island. This vessel has not yet arrived and concerns have been expressed for its safety.
2. Passed for information and action as considered necessary.¹²⁶

8.112 No further contact occurred between the RCC and Indonesian authorities in relation to SIEV X.

8.113 At 3.46pm, in response to the RCC fax, Headquarters Australian Theatre (HCAST) telephoned the RCC to check that no new information had come in since the earlier Coastwatch fax of 2.45pm. The nature of that telephone call was recorded as follows:

HCAST: Just got your fax. What is your source?

RCC: Coastwatch.

HCAST: We already have a large search for this vessel for surveillance matters.

RCC: SAR [search and rescue]?

HCAST: No. Only surveillance.¹²⁷

8.114 In Mr Davidson's recollection of the telephone call, the reason behind HCAST contacting the RCC was due to a difference in wording between the Coastwatch and RCC faxes. Unlike the original Coastwatch fax, the RCC one mentioned in relation to the overdue vessel that 'concerns have been expressed for its safety'. Mr Davidson ventured the opinion that 'Defence were trying to confirm whether there was something different or more knowledge that they did not have'.¹²⁸ He thought that the new phrase possibly came from RCC conversations with Coastwatch or the RCC staff itself, as there was no new information on which the phrase might have been based.

8.115 Given that the RCC files record only the one conversation cited above between the RCC and Coastwatch, it seems fair to conclude that the phrase originated within the RCC itself.

126 RCC ref: Y1022196, Answers to Questions on Notice, AMSA, 5 July 2002.

127 *Transcript of Evidence*, CMI 1873-1874; RCC file [no detail], Answers to Questions on Notice, AMSA, 5 July 2002.

128 *Transcript of Evidence*, CMI 1878.

8.116 The Committee notes that AusSAR received only *part* of the information (the estimated departure date and suspected overdue status) that was circulating within the intelligence system and operational commands about the SIEV X's state. Mr Davidson said to the Committee:

The nature of the number of people on board the vessel was unknown, the departure point was unknown, the calculations that were undertaken were based upon assumptions being made by Coastwatch and then confirmed by the RCC and, on that basis, BASARNAS was advised of the information.¹²⁹

8.117 This is the second instance during the 17-23 October period when Coastwatch passed on only part of the information available on SIEV X to other Australian agencies (the first instance occurred, as discussed above, on 20 October).

8.118 It remains unclear to the Committee why Coastwatch did not convey to AusSAR the remaining, and arguably critical, elements of the AFP advice – namely that the vessel was thought to have 400 people on board, that it was considered to be overcrowded and that, on one view of the situation at least, the vessel was at risk. Constraints on the sharing of intelligence sourced from another agency may have limited the extent to which Coastwatch was able to pass on to AusSAR sensitive information of this kind. However, if there were concerns about compromising security, it seems that this could have been easily handled with carefully chosen words that would have alerted recipients to concerns about the risk to the vessel without exposing intelligence sources or methods.

NORCOM INTSUM 22 October

8.119 On the same day that three agencies (AFP, Coastwatch and AusSAR RCC) calculated that SIEV X was overdue and sent messages to that effect, HQNORCOM issued an INTSUM that reached a rather different conclusion. According to the declassified Defence review of the intelligence on SIEV X, the daily NORCOM INTSUM concluded:

NORCOM INTSUM assesses the vessel has *returned* [emphasis added] to the Java coast because of the unfavourable weather and overcrowding, however, that if weather conditions improved, there was a low probability of the vessel arriving at Christmas Island after 24 Oct 01.¹³⁰

8.120 In elaborating on this INTSUM, HQNORCOM emphasised that weather conditions were the main factor that determined the assessment. Brigadier Silverstone, Commander NORCOM, stated:

Weather had been an important factor in previous SIEV movements. The prevailing weather conditions and sea state at the time would certainly have made a transit from Indonesia to Christmas Island difficult for any small

129 *Transcript of Evidence*, CMI 1370.

130 Defence review of SIEV X intelligence, Attachment A, p.3.

vessel. It was assessed that, if the vessel had departed as reported, it would likely return to the Indonesian coastline to seek shelter once encountered adverse conditions. It was further assessed that the crew would not risk a passage (and their lives) if the vessel was insufficiently seaworthy to make a passage in the prevailing weather conditions.¹³¹

8.121 As it transpired, it appears that SIEV X did shelter in the lee of an island due to bad weather at about 9.00am on 18 October, before continuing on its way.¹³²

8.122 Brigadier Silverstone also stated that '[t]he probability of arrival at Christmas Island was reduced to low on the basis that the crew would probably await more favourable weather conditions'.¹³³ The level of 'low probability' given to SIEV X meant that HQNORCOM assessed the likelihood of it arriving at Christmas Island as less than 50 per cent.¹³⁴

8.123 Although weather conditions would have been a major consideration for the vessel's crew, it appears that HQNORCOM played down or overlooked recent intelligence assessments that pointed to other 'push factors' that would have influenced those in charge of SIEV X. DIMA Intelligence Notes on 17, 18 and 19 October concentrated on the expected 'surge' in boat and people arrivals. In particular, the intelligence assessments highlighted the pressures on people smugglers behind the surge. For example, on 18 October DIMIA stated:

8.124 All current major organisers in Indonesia reportedly have clients and boats and are ready to move to alleviate both their financial difficulties and the management problems of keeping large pools of potential clients in Indonesia for extended periods of time.¹³⁵ The impending wet season, which was only weeks away, was an additional factor impelling boat organisers to move quickly. The cumulative pressures or push factors bearing on organisers at the time led DIMIA's intelligence analysts to conclude:

The need to get people (and boats) away has built to such a point that all the major organisers and their clients are ready to move, no matter what the consequences.¹³⁶

8.125 Nonetheless, by this stage HQNORCOM was not alone in thinking that SIEV X was probably no longer bound for Christmas Island. As the next section will show, the PST meeting of 22 October also had strong doubts that the vessel was in transit towards Australian waters.

131 Answers to Questions on Notice, Defence, 20 September 2002, W82.

132 DIMA Intelligence Note 83/2001, 23 October 2001, p.2.

133 Answers to Questions on Notice, Defence, 20 September 2002, W82.

134 Answers to Questions on Notice, Defence, 20 September 2002, W64.

135 DIMA Intelligence Note 80/2001, 18 October 2001, p.3.

136 DIMA Intelligence Note 80/2001, 18 October 2001, p.3.

Afternoon meeting of the PST

8.126 Shortly after Coastwatch contacted AusSAR, the PST met and discussed the matter of SIEV X.¹³⁷ The notes of the meeting record the discussion in the following single line:

Not spotted yet, missing, grossly overloaded, no jetsam spotted, no reports from relatives.¹³⁸

8.127 The evidence to the Committee shows that the tenor of the discussion at the meeting was somewhat different to the meaning apparent in the overdue messages sent out that day by various agencies. It also shows that the notes of the meeting, like those for the meeting on 18 October, are ‘cryptic’ insofar as they do not convey the real sense of the debate that occurred over SIEV X.

8.128 During the meeting, the discussion appears to have been as much about whether SIEV X could still be considered a ‘possible arrival’ as about it being unseaworthy and overdue. Ms Halton, who chaired the meeting, said of the debate about SIEV X: ‘The context was, “Did it leave? Is it really on the water?”’¹³⁹

8.129 The discussion involved primarily DIMIA and Coastwatch, as the two agencies most familiar with not only the intelligence on SIEV X but also boat arrivals in general. According to Ms Halton, the DIMIA representatives indicated to the meeting ‘that they were now starting to think that the boat was not on the water’ (ie. not in transit).¹⁴⁰ She explained the reasons for DIMIA reaching this conclusion:

The DIMIA people advised that, if a vessel had departed and had not arrived – that is, if some tragedy had befallen it – they tended to get phone calls from relatives, because the relatives in Australia knew that the vessel had left. They reported that they had not had any reporting. There was a report that no jetsam had been spotted. In fact, the conversation turned on whether in fact it existed, whether it had returned to Indonesia or what have you. My memory is that the balance of view at that point – we now know that, tragically, this was not the case – was that the vessel was not on the water.
...

137 The PST meeting started around 3.15pm, *Transcript of Evidence*, CMI 1728. It should be noted that these notes mis-attribute SIEV X as ‘SIEV 8’. See the following correspondence to the Committee on the matter: Mr J Whalan, PM & C, 21 June 2002; Rear Admiral R Gates, 21 June 2002; and Minister for Defence, undated, received 25 June 2002.

138 PST Notes, ‘People Smuggling Taskforce – High Level Group Meeting 22 October 2001. Ms Katrina Edwards of PM&C told the Committee that it was seen as significant that ‘there had been no calls from relatives [in Australia], who are often well briefed on when to expect an arrival’. *Transcript of Evidence*, CMI 1706.

139 *Transcript of Evidence*, CMI 2124.

140 *Transcript of Evidence*, CMI 2098.

That it was not en route to Christmas Island. This [assessment] was as a consequence of the DIMIA experience [of vessels that were overdue].¹⁴¹

8.130 The thrust of Ms Halton's recollection of the discussion was corroborated by Mr Vince McMahon, First Assistant Secretary, DIMIA. Mr McMahon said that, from DIMIA's perspective, none of the usual indicators used to verify a boat in transit had been detected.¹⁴²

8.131 Likewise, Ms Halton indicated that the absence of any 'jetsam' or flotsam suggested to Coastwatch that the vessel had not sunk,¹⁴³ leading the meeting to conclude that, on balance, the boat had probably not left Indonesian waters, if it existed all.

8.132 It is in that sense that the PST meeting notes seem to have recorded SIEV X as 'missing': it had disappeared from view, rather than was considered to be missing at sea. In Ms Halton's words, 'the conversation on the 22nd ... was actually a discussion about whether in fact this boat existed'.¹⁴⁴

8.133 Ms Halton also said that the meeting had discussed the possibility that, if in the event SIEV X had been in transit, it now might be in distress and facing a safety of life at sea (SOLAS) situation.¹⁴⁵ However, the absence of any sightings of flotsam and any telephone calls from relatives inclined those present to discount this contingency. Ms Halton said that:

... in assessing whether there was an issue at sea, on balance the advice seemed to be that if there was a vessel out there in distress there would have been phone calls from relatives and something would have been said.¹⁴⁶

8.134 Although 'the view of the people who do this intelligence work was in fact that there was not a safety of lives at sea issue',¹⁴⁷ the discussion went to the question of whether the Australian Maritime Safety Authority (AMSA) should be notified of the situation concerning SIEV X. Ms Halton said:

I think there was an agreement that someone should ring AMSA. I think the basis of the discussion was that there was not necessarily a need for an alert, because the intelligence people thought that there was not likely to be an

141 *Transcript of Evidence*, CMI 2098.

142 *Transcript of Evidence*, CMI 2028.

143 *Transcript of Evidence*, CMI 2098.

144 *Transcript of Evidence*, CMI 2097.

145 *Transcript of Evidence*, 2123-2125

146 *Transcript of Evidence*, CMI 2123.

147 *Transcript of Evidence*, CMI 2125.

issue. Nonetheless, there was a phone call to AMSA. The phone call to AMSA then elucidated the fact that an alert had already been issued.¹⁴⁸

8.135 Ms Halton's record of the key points of the discussion about SIEV X – on the significance that the vessel had not been sighted and that no telephone calls from relatives had been received and thus the conclusion that it was not a matter for alarm – was also corroborated by another senior officer present at the meeting. Ms Katrina Edwards, First Assistant Secretary, PM & C, told the Committee that, while the intelligence on the vessel appeared 'firmer than some', Coastwatch appeared uncertain about the vessel. Ms Edwards remarked:

My recollection is that Coastwatch was seeking to test the assessment of whether or not it had in fact departed.¹⁴⁹

8.136 Ms Edwards also said that the meeting agreed that, owing to the uncertainty surrounding the vessel, there appeared to be insufficient grounds for contacting AMSA/AusSAR.¹⁵⁰

8.137 In light of the doubts over the veracity of intelligence on SIEV X's departure, the decision on the part of the PST meeting to contact AusSAR appears to have been a prudential step, one that is hard to reconcile with claims that the meeting was indifferent to or ignored the vessel's situation.

8.138 In the next chapter, the Committee returns to the discussion at the PST meeting in the context of its assessment of the handling of the SIEV X intelligence.

23 October

8.139 On 23 October, four days after it had foundered, the first reports of SIEV X's sinking filtered into intelligence and decision making circles in Canberra. An AFP federal agent phoned Ms Halton at 2.00 a.m. to say that a boat had sunk.¹⁵¹ At some point in the day ASTJIC provided similar advice to Coastwatch.¹⁵² Later on, CNN reported the sinking of a vessel and rescue of 45 survivors.

8.140 The DIMA Intelligence Note of the day, issued at 2.00 p.m., identified the sunken vessel as that belonging to Abu Qussey. It reported, among other things, that the vessel was 'approximately 60NM [nautical miles] south of the Sunda Strait' when it began to take water before capsizing.¹⁵³

148 *Transcript of Evidence*, CMI 2141.

149 *Transcript of Evidence*, CMI 1706.

150 *Transcript of Evidence*, CMI 1706.

151 *Transcript of Evidence*, CMI 2115.

152 SIEV X Chronology, Defence review of SIEV X intelligence, Attachment A, p.3.

153 DIMA Intelligence Note 83/2001, 23 October 2001, p.2.

8.141 That afternoon at 3.15 p.m., the High Level Group meeting of the PST was briefed (it is thought by the AFP based on a cable from the Jakarta embassy)¹⁵⁴ in detail about the vessel's transit before it sank and was told that 352 people had drowned.

24 October

8.142 Based on the evidence received by the Committee, the intelligence on SIEV X appears to have dried up after 23 October. The only significant mention of it in the material before the Committee appears in an e-mail message originating from DIMIA on 24 October.

8.143 The message contains 'preliminary details' about the size of the vessel ('reportedly 3 x 18 metres'), its transit, sinking and the nationalities of those on board.¹⁵⁵

8.144 One point to note is that the message says that SIEV X 'capsized on 19 October between Java and Sumatra',¹⁵⁶ which seems to contradict the previous day's DIMA Intelligence Note which suggested that the vessel sank 60nm south of Java.

Surveillance and SIEV X

8.145 As mentioned earlier in the report, extensive maritime surveillance, stretching across the 'air-sea gap' in the northern approaches to Australia, was operating almost daily throughout Operation Relex. Rear Admiral Bonser observed:

The whole general area is being covered by what is probably the most comprehensive surveillance that I have seen in some 30 years service.¹⁵⁷

8.146 Despite its comprehensiveness, the surveillance operation did not pick up SIEV X. Rear Admiral Smith told the Committee: 'None of our surveillance that we had operating – aircraft or ships – had detected this vessel'.¹⁵⁸

8.147 This section discusses the surveillance that took place during the critical period of SIEV X's transit, foundering and the rescue of survivors, that is, 18 to 20 October. It examines the relevant surveillance area in general and then details the surveillance patterns and results for the key period.

154 *Transcript of Evidence*, CMI 1706. See also *Transcript of Evidence*, CMI 2128.

155 PM & C e-mail traffic.

156 PM & C e-mail traffic.

157 *Transcript of Evidence*, CMI 1638.

158 *Transcript of Evidence*, CMI 676.

Surveillance operations and patrol areas

8.148 At the time of the SIEV X incident, surveillance was operating in three patrol routes and maritime patrol areas: North of Christmas Island; South of Bali, Lombok and Sumbawa Islands; and the approaches to the Kimberley region of the WA coast.¹⁵⁹ In the division of labour under Relex, the ADF was responsible for patrolling the first and second areas, while Coastwatch concentrated on the third area.

8.149 These three areas reflected the concept of operations guiding Operation Relex in general. The first two areas in particular covered the two key corridors or axes through which the ADF expected SIEVs to transit towards Australian waters. As Rear Admiral Ritchie outlined:

...back in October, there were two main channels of arrival that we were concerned about: the channel which came from Sumatra, the western end of Java, down through the Sunda Strait and into Christmas Island; and the channel which came, generally, through Kupang, Roti and very quickly across the intervening distance down into Ashmore Island.¹⁶⁰

8.150 Within both of these areas, surveillance involved aircraft and surface vessels. The air surveillance was performed primarily by RAAF P3C Orion reconnaissance planes and also ship-borne helicopters. It provided the outer ring of surveillance while RAN ships sat back in so-called 'focal areas' or likely interception zones closer to Christmas Island and Ashmore Island.¹⁶¹

8.151 The relevant area in the case of SIEV X was that to the north of Christmas Island. The ADF referred to it as area 'Charlie'. It was divided into four quadrants: Charlie-Northwest (C-NW), Charlie-Northeast (C-NE), Charlie-Southwest (C-SW) and Charlie-Southeast (C-SE). Area Charlie encompassed a 36,400 square nautical mile (nm) surveillance zone.

8.152 It should be noted that its northern boundary was circumscribed by the instruction for aircraft not to fly within a 24 nm buffer zone from the Indonesian archipelagic baseline. This was designed to prevent RAAF aircraft infringing Indonesian airspace.¹⁶²

159 Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', in the declassified summary of the Defence review of SIEV X intelligence, Minister of Defence to CMI, undated, received 4 July 2002, p.1.

160 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.152.

161 *Transcript of Evidence*, CMI 488; *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.162.

162 See Attachment A, 'SIEV X', p.2 and B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.1.

8.153 The command and control arrangements for the surveillance operation were explained to the Committee by Air Commodore Byrne, the Commander of the Maritime Patrol Group (MPG):

Aircraft conducting Operation Relex surveillance are under the command of Headquarters Air Command and the operational control of Commander NORCOM whilst airborne. In addition, aircraft come under tactical control of RAN ships deployed on Operation Relex while in the search area.¹⁶³

Surveillance 18-20 October

8.154 During the three-day period of SIEV X's ill-fated transit the ADF continued its scheduled aerial surveillance of area Charlie. According to the ADF:

In fact normal surveillance was carried out in the surveillance area, including 100% coverage of the northern reaches, on both 18th and 19th of October 2001. On the 19th of October, the day the vessel is believed to have sunk, an additional flight was flown in the evening to compensate for the unserviceability of HMAS ARUNTA's helicopter. The flight's coverage was limited by adverse weather.¹⁶⁴

8.155 The ADF review of the surveillance findings on these three days also noted: 'Surveillance on these days did not detect any vessel in distress, nor any distress calls on international distress frequencies which are constantly monitored'.¹⁶⁵

8.156 This point should be put, however, in context. Evidence from both Coastwatch and AMSA indicated that it was rare for SIEVs to carry radios¹⁶⁶ or equipment such as emergency position beacons.¹⁶⁷ The Committee notes that this would not exclude the possibility, of course, of a vessel so equipped issuing an alert to other shipping and surveillance authorities of a vessel found in distress.

8.157 The review also noted some of the factors that hindered the surveillance operation:

While the surveillance operations associated with border protection are accurately described as comprehensive – they do not, as some have assumed, provide minute by minute, 24 hours a day scrutiny of the surveillance areas.

A number of factors impact on efficiency of the operations including weather (which impacts both on aircraft and sensor, ie radar and infra-red

163 *Transcript of Evidence*, CMI 2154, see also 2163.

164 Attachment A, 'SIEV X', p.2.

165 Attachment A, 'SIEV X', p.2. See also Air Commodore Byrne, *Transcript of Evidence*, CMI 2154-2155.

166 *Transcript of Evidence*, CMI 1632.

167 *Transcript of Evidence*, CMI 1375.

performance), the veracity of intelligence and the availability of assets – in particular the serviceability of aircraft and aircrew hours.¹⁶⁸

8.158 Air Commodore Byrne also pointed to the constraints facing aircrews searching for wooden-based vessels such as SIEVs. In Air Commodore Byrne's words, 'radar is not brilliant; it loses a lot of effectiveness, particularly against wooden hulled vessels in high sea states'.¹⁶⁹

8.159 At the request of the office of the Minister of Defence, the ADF reviewed the flight data from the P3 patrols over 18-20 October. The following summarises the findings of that review. Maps of the surveillance area and flight path patterns for the period are at the end of the chapter.

18 October

8.160 On 18 October (the day SIEV X set sail to Christmas Island), a P3 flew out of Learmonth (WA) at 7.55am,¹⁷⁰ arrived in area Charlie at 9.35am, patrolled for 4 hours 31 minutes, departed the area at 2.11pm and returned to Learmonth at 5.52pm.

8.161 At this stage, the P3 aircrews were searching for two possible SIEVs,¹⁷¹ based on the intelligence reports discussed earlier in this chapter.

8.162 Due to atmospheric conditions, 'the aircraft's APS115 radar was detecting wooden fishing vessels of 12-20m length at about 12nm thus dictating a search track separation of 24nm'.¹⁷² For this flight the Infra-Red Detection System (IRDS) achieved detection ranges of 1nm for the same type of 'surface contacts'.¹⁷³

8.163 In the aircrew's assessment, the flight achieved 100 per cent surveillance. 25 contacts were located, 21 of which were visually identified as two merchant vessels and 19 fishing vessels. The flight detected four other radar contacts but could not visually confirm these as they were outside the search zone and in the 24nm 'no-go' buffer zone.¹⁷⁴

19 October morning patrol flight

8.164 This flight departed Learmonth at 3.48am, arrived on task at 5.30am, patrolled for 5 hours 14 minutes, departed area Charlie at 10.44am and returned to Learmonth at 14.28pm. While it was on task SIEV X appears to have still been transiting to Christmas Island.

168 Attachment A, 'SIEV X', p.1.

169 *Transcript of Evidence*, CMI 2177.

170 Times are in Timezone Golf, ie, the local time in area Charlie.

171 *Transcript of Evidence*, CMI 2165.

172 Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.1.

173 Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.1.

174 Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.2.

8.165 Weather conditions impacted on the surveillance performance. Intermittent rain in the northwest region (the area that some consider likely to be the most proximate to where SIEV X foundered) reduced visibility to five nm, while atmospheric conditions degraded both radar and IRDS. The P3 flew 20nm 'sweeps' or search tracks, managed 100 per cent surveillance of area Charlie but with 75 per cent detection probability in the northern areas and 80 percent in the southern. IRDS achieved identification ranges of 1.5nm against 'smaller surface contacts'.¹⁷⁵

8.166 Early in the flight the P3 detected SIEV 6. A further 37 contacts were made, with visual identification of eight merchant vessels and 22 fishing vessels. Seven additional but unidentified contacts were also made, two of which were outside the search area to the east and three of which were within the buffer zone.

19 October afternoon/evening patrol flight

8.167 As mentioned above, this unplanned flight was made owing to problems with the helicopter on *Arunta*. It departed Learmonth at 3.05pm, arrived on task at 4.44pm, patrolled for 4 hours 31 minutes, departed 9.15pm and returned to base at 0.52am 20 October.

8.168 As SIEV 6 had been found during the morning patrol, the afternoon flight was searching for the 'second vessel' reported as a possible arrival in the contemporaneous intelligence.¹⁷⁶

8.169 Weather affected the detection performance for this flight more than the other patrols over 18-20 October. According to the ADF:

This flight was notable in that the weather was generally poor and aircrew spent considerable time avoiding storms, particularly in the western quadrant. The need to conduct weather avoidance manoeuvres led to the aircraft reaching its endurance before completing patrol of its designated area.¹⁷⁷

8.170 Visibility was six nm due to haze. Radar range for 12-20m wooden fishing vessels varied because of the weather, achieving only seven nm in poor conditions but up to 12 nm in better conditions. IRDS achieved two nm. These factors dictated a search track separation of 24nm. Air Commodore Byrne, who was a member of the aircrew on this flight, told the Committee that the weather forced the crew to compress the track spacing. He said that 'the wind velocity was high and there was a lot of rain. That makes radar detection performance less than ideal'.¹⁷⁸

175 Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.2.

176 *Transcript of Evidence*, CMI 2165.

177 Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.3.

178 *Transcript of Evidence*, CMI 2170.

8.171 Flight surveillance achieved 95 per cent in C-SW except for a 30nm x 10nm impenetrable storm and 95 per cent in C-SE before the P3 reached its 'prudent limit of endurance'.

8.172 Eight contacts were detected on radar, six of which were visually identified as fishing vessels. Three of the visually identified vessels were close to the line demarcating C-NE and C-SE. The other three identified vessels were to the west of C-SW, that is, outside the designated search area. One of the remaining radar contacts was also outside the search area but was not investigated. The other radar contact was in C-NW but fuel constraints and tasking instructions from *Arunta* to concentrate patrolling on the southern sectors prevented the P3 from diverting north to make a visual identification of this contact.¹⁷⁹

8.173 As this flight occurred when the survivors and wreckage of SIEV X were in the water, the Committee questioned Air Commodore Byrne on whether the radar on the P3 would have been capable of detecting flotsam from the vessel. Air Commodore Byrne observed: 'I would say that in the weather that was present in the area that night it would have been impossible to pick up flotsam or jetsam' with radar.¹⁸⁰ In other words, it is unlikely that either of the two unconfirmed radar contacts was the wreckage of SIEV X.

8.174 Members of the Committee were also concerned to understand the reasons why this flight, unlike the other patrols during 18-20 October, concentrated on the southern search area, at a time when the SIEV X survivors might have been in an area closer to the northern sectors of Area Charlie. When asked to explain why the afternoon flight of 19 October did not patrol as far north as other flights, Air Commodore Byrne said:

... we were tasked by the *Arunta* when we first came on task with searching a sweep from east to west, 10 nautical miles to the south of the area. So we actually initially searched to the south of the area, which obviously takes time. We also had very bad weather. We were deviating around thunderstorms and rain cells for the full 4½ hours on task, and that takes up time and effort. We also deviated out to the west of the area. You will notice on the radar contacts and fishing contacts that were picked up just outside the area, to the west of the area. We were 45 minutes outside the area visually identifying those in the dead of night with infra-red detection gear. That actually involves overflying each contact at 300 feet and looking for hot spots to try and identify suspected illegal entry vessels by multiple hot spots, for example. ... Each contact has to be flown over directly, and that takes time.¹⁸¹

179 *Transcript of Evidence*, CMI 2171. See also Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.3.

180 *Transcript of Evidence*, CMI 2173.

181 *Transcript of Evidence*, CMI 2169-2170.

8.175 The reason for patrolling intensively the southern sectors in precedence to the north reflected, in Air Commodore Byrne's view, an assessment that the south was the 'high probability area' for detecting the second of the two expected possible boat arrivals. As one (SIEV 6) of the two vessels had been detected in the morning, operational commanders would have reasoned that if the second boat was en route to Christmas Island it would probably have transited the northern area after the morning P3 patrol, making it more likely to be in the southern area during the afternoon. In Air Commodore Byrne's view, the Relix commanders:

... were expecting two vessels that day. They had found one in the morning in the south of the area and they wanted to make sure that they sanitised the south of the area before the next flight, which was not coming on until dawn the next day. If indeed they had not sanitised the south of the area, and if there had been something there, it would have reached Christmas Island before the next aircraft came on task at dawn the next day. So the tactical priority was to ensure that there was nothing in the southern part of the area. That is the reality of tasking priorities.¹⁸²

8.176 Air Commodore Byrne went on to say:

But I also highlight that we were not restricted from searching the north of the area, and indeed we were tasked as a next priority with searching the north-west then the north-east. We never made it there because we ran low on fuel. It was just the luck of the game – going around all these thunderstorms in the area.¹⁸³

8.177 He also emphasised that, in his opinion, the focus on patrolling the southern sectors of Area Charlie was a sound tactical decision:

If I were an operational planner I would start by concentrating in the south of the area to make sure that nothing got through in the seven or eight hours subsequent when there was no aircraft on task, whilst there could have been a vessel transiting from north to south.¹⁸⁴

20 October

8.178 On the day the SIEV X survivors were rescued, a P3 departed Learmonth at 4.00am, arrived on task at 5.35am, patrolled for 5 hours 11 minutes, departed at 10.46am and returned to Learmonth at 2.33pm. In other words, it would seem that the survivors were still in the water during this flight's patrol time in area Charlie.

8.179 The P3 achieved 100 per cent coverage of C-SW and C-NW, 90 per cent of C-NE and 45 per cent of C-SE. 21 contacts were made with visual identification of 18 fishing vessels and 3 merchant vessels. Two further radar contacts fell within the

182 *Transcript of Evidence*, CMI 2170.

183 *Transcript of Evidence*, CMI 2170.

184 *Transcript of Evidence*, CMI 2178.

buffer zone and therefore were not identified. Shortage of fuel prevented visual identification of a further two radar contacts late in the flight.¹⁸⁵

8.180 In summing up the surveillance operation during the 18 to 20 October period and the sinking of SIEV X, Air Commodore Byrne said to the Committee:

It was a terrible tragedy but unfortunately we had no safety of life at sea indications and really did not know that it had happened until the 23rd, based upon all of the information that we had at hand.¹⁸⁶

8.181 In the next chapter, the Committee discusses the relationship between intelligence and surveillance during Operation Relex and how it affected the decisions taken towards SIEV X.

185 Attachment B, 'Surveillance in the Christmas Island Area 18-20 Oct 01', p.3.

186 *Transcript of Evidence*, CMI 2178.

Chapter 9

The Response to SIEV X

Relevant signals, so clearly audible after the event, [were] partially obscured before the event by surrounding noise.¹

Introduction

9.1 From 17 to 23 October, the critical ‘time window’ surrounding SIEV X, neither the ADF nor any other Australian agency took decisive action directly in relation to SIEV X. As seen in the previous chapter, maritime surveillance for Operation Relex continued as scheduled (except on 19 October when an extra flight occurred because of an unserviceable helicopter). The surveillance led to the interception of SIEV 6 on 19 October and SIEV 7 on 22 October. On 22 October the Rescue Coordination Centre at AusSAR issued an overdue notice in response to Coastwatch and AFP advice, but no special flights or steps were taken beyond this stage. Neither SIEV X nor any survivors were detected.

9.2 The lack of any direct action in response to the intelligence reporting on SIEV X has raised concerns that these reports were disregarded when more ought to have been done to look specifically for SIEV X either to prevent it sinking or to save more survivors.

9.3 In this chapter the Committee analyses whether Australian agencies responded appropriately to the incoming information on SIEV X. In making an assessment it is necessary to examine three factors relating to the SIEV X incident:

- the operational climate at the time;
- the relationship between intelligence and operational decisions on surveillance and deployment during Operation Relex; and
- the quality of intelligence on boat arrivals generally.

9.4 The first three sections of the chapter look at these issues in turn.

9.5 In the second half of the chapter the Committee discusses the response of Australian agencies to the intelligence on SIEV X and the reasons for that response. It then makes an assessment about whether the Australian response to SIEV X was adequate.

1 Roberta Wohlstetter, *Pearl Harbour: Warning and Decision*, Stanford University Press, California, 1962, p.397.

The Operational Climate

9.6 The operational climate is one of the three factors that shaped the way SIEV X intelligence was handled, interpreted and acted upon. It had possibly the least impact in determining the response to SIEV X, but it still indicates the level of activity, particularly in the intelligence traffic on possible boat arrivals, facing decision makers at the time.

9.7 As discussed in chapter 2, Operation Relex involved the ADF in a demanding law enforcement exercise that had an ‘abnormally high’ operational intensity over an extended time.² Defence was also gearing itself for the war on terror (Operation Slipper), in addition to maintaining numerous other international operations.³

9.8 For the Australian Theatre Joint Intelligence Centre (ASTJIC), with its role to provide intelligence for all Australian operations, Operation Relex coincided with an increasingly heavy workload.⁴ The SIEV X episode occurred during a period when the rising ‘tempo of activity’, among other things, led eventually to the role of intelligence support for Operation Relex shifting from ASTJIC to NORCOM.⁵

9.9 At the same time, reports were coming into the intelligence system from Indonesia indicating a ‘surge’ in possible arrivals in the people smuggling pipeline. Mr Killesteyn told the Committee that ‘we were looking at around that time, in October, where there was clear evidence that there was a build-up potentially of quite a considerable number of vessels’.⁶ Both Coastwatch and DIMIA believed that up to six organisers⁷ were preparing up to possibly six boats⁸ for departure shortly to Australian waters.

9.10 The DIMA Intelligence Note of 18 October provides more colour on the situation in Indonesia at the time. After noting that ‘the need to get people (and boats)

2 *Transcript of Evidence*, CMI 449.

3 See Admiral Barrie, *Transcript of Evidence*, CMI 741.

4 Colonel Gallagher stated: ‘During October 2001, in addition to providing intelligence in support of Operation Relex, the ASTJIC provided high levels of support to actual or potential ADF operations in the Middle East, Central Asia, the Arabian Gulf, East Timor, Bougainville, the Solomon Islands and the Southern Ocean. During the same period, the ASTJIC was also monitoring the security of ADF deployments to Bosnia and Kosovo, Israel and Lebanon, the Sinai, Sierra Leone, Eritrea and Ethiopia, and Mozambique. It was clearly a busy time for the ASTJIC and the Australian Theatre as a whole.’ *Transcript of Evidence*, CMI 1884.

5 The change over occurred on 1 November 2001. *Transcript of Evidence*, CMI 1888-1889.

6 *Transcript of Evidence*, CMI 1995, 2007, 2028.

7 *Transcript of Evidence*, CMI 1630.

8 *Transcript of Evidence*, CMI 2013. The DIMA Intelligence Notes, however, talk of only five boats. See DIMA Intelligence Note 79/2001, 17 October 2001, p.1.

away has built to such a point that all the major organisers and their clients are ready to move, no matter what the consequences’,⁹ the intelligence assessment concluded:

There can be little doubt that the anticipated surge has begun. The impetus was probably the most recent arrivals at Christmas Island and Ashmore Reef, combined with pressure from the reportedly large pool of clients assembled in Indonesia and the impending monsoon season. All current major organisers in Indonesia reportedly have clients and boats and are ready to move to alleviate both their financial difficulties and the management problems of keeping large pools of clients in Indonesia for extended periods of time.¹⁰

9.11 The build-up prompted an extension in disruption activity in Indonesia to pre-empt the boats departing.¹¹ It would also have translated into increased intelligence traffic on potential boat and people arrivals. For intelligence officers, this would have led to a corresponding increase in the burden of sifting through the traffic and seeking to corroborate the more probable reported departures.

9.12 This is reflected in the notes of the People Smuggling Taskforce meetings in mid-October. On 18 October, for instance, the notes mention ‘intelligence re 2 boats with total 600 PUAs expected at Christmas, with one possibly arriving today, a further 3 boats with total 600 expected at Ashmore, with earliest arriving Monday’.¹² The prospect of people arrivals potentially in excess of 1000 also engendered concerns among the People Smuggling Taskforce about logistics and the already stretched state of accommodation on Christmas Island.¹³ In Ms Halton’s view:

... this particular period was unusual because ... there seemed to be more boats in the ether and with a significant number of people. The task force was very focused on the accommodation issues and in particular how, if that number of people turned up, they would actually be accommodated.¹⁴

9.13 In his explanation of the SIEV X episode, Rear Admiral Smith also pointed to the level of Operation Relex activity over the period of the vessel’s reported departure. He noted:

During the period 17-22 October 2001, Maritime Headquarters and the Navy was [sic] busy responding to two SIEVs in the Ashmore Island area

9 DIMA Intelligence Note 80/2001, 18 October 2001, p.2.

10 DIMA Intelligence Note 80/2001, 18 October 2001, p.3.

11 *Transcript of Evidence*, CMI 1995. PST Notes, ‘High Level Group – 12 October 2001’.

12 PST Notes, ‘People Smuggling Taskforce – High Level SubGroup, Thursday 18 October 2001’. Cited also in *Transcript of Evidence*, CMI 2014.

13 See Ms Halton, *Transcript of Evidence*, CMI 2100; PST Notes for 19 and 20 October especially.

14 *Transcript of Evidence*, CMI 2100; see also *Transcript of Evidence*, CMI 2097.

and one in the Christmas Island area in accordance with Government direction.¹⁵

9.14 The SIEVs referred to were SIEVs 6 and 7.

9.15 On the face of it, the upsurge in people smuggling activity and the prospect of six or so boat arrivals might arguably have inclined intelligence staff and other decision makers to upgrade their assessments of intelligence indicating the Qussey vessel had departed. This perspective has to be tempered, however, in light of the accuracy of the intelligence on boat arrivals in general and the reliability of the reports on SIEV X in particular.

Intelligence and Operational Decision Making

9.16 The second key to understanding the ADF response to the reports of SIEV X's possible arrival is the link between intelligence and the decisions taken by operational commanders.

9.17 The Committee heard that intelligence and surveillance are, to a large extent, normally interactive.¹⁶ In the case of Operation Relex, however, intelligence played a limited role in both the general deployment of units and in daily decision making. This reflected two factors: the limitations of the intelligence itself and a preset surveillance and patrol strategy for the operation.

9.18 ADF witnesses explained that the surveillance and interception strategy for Operation Relex was built on the assumption that intelligence could not be counted on to provide detailed warning of SIEV departures and arrivals. Rear Admiral Smith told the Committee that, in the operational design, ADF commanders had 'planned on not knowing' precisely when or from where the SIEVs would depart.¹⁷ He also outlined the limits and gaps in information provided to commanders by intelligence reports, saying:

if we had information that a vessel was being prepared, we would probably have a rough idea of the sorts of *numbers* that might possibly be embarked. We never really had a strong idea of *when* things would sail, but our operation and the disposition of the forces available to us would take into account that we might *not* have any warning at all, and therefore we would be prepared in any eventuality.¹⁸ [emphasis added]

9.19 As mentioned in the previous chapter, the architects of Operation Relex identified two primary routes through which SIEVs had to transit to reach Australian territorial waters. These routes were either the axis from Sunda Strait to Christmas

15 See also Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002, p.3.

16 *Transcript of Evidence*, CMI 1894.

17 *Transcript of Evidence*, CMI 455.

18 *Transcript of Evidence*, CMI 461.

Island or the axis from Roti to Ashmore Reef. ADF surveillance and naval assets were deployed across these two thoroughfares. Colonel Gallagher described to the Committee how the preset plan for surveillance and interception was designed to overcome intelligence shortcomings on SIEVs:

the intelligence relating to these vessels was of insufficient fidelity to allow precise targeting of surveillance assets. My understanding of the approach that was being taken [with Operation Relex] was by a process of logic to work out the tracks that these vessels were likely to take, and to concentrate appropriate resources along those tracks.¹⁹

9.20 As noted elsewhere in the report, the surveillance and patrolling worked in concentric rings or a 'layered surveillance' with RAAF P3s flying close to Indonesia while Navy ships waited in focal areas close to Christmas Island and Ashmore Reef. The Navy avoided deploying ships too far out (or 'up threat') of the intercept line because of the time it would have involved shadowing SIEVs back towards Christmas Island and the risk that other boats could sneak in through the resultant gap.²⁰

9.21 Within this framework, intelligence on boat arrivals was considered an indicator of the possible timing of a boat arriving, rather than an alert or trigger to divert assets to search particular spots.²¹ Rear Admiral Bonser told the Committee that Coastwatch used intelligence reports as 'a guide for informing surveillance activities rather than the foundation on which these activities are programmed'.²² Rear Admiral Smith also stated:

The intelligence reporting from Coastwatch was used as indicators of a possible SIEV arrival in an area within a probable time window [original emphasis].

9.22 The Commander of the Joint Task Force and NORCOM, Brigadier Silverstone, elaborated on the extent to which intelligence interacted with operational planning, particularly surveillance patterns. He stated:

As the quality of the information concerning impending SIEV arrivals constrained NORCOM's confidence in the overall intelligence picture, NORCOM sought to maintain a continuous maritime presence, which usually had the capacity to conduct surface and helicopter surveillance, in close proximity to both Christmas and Ashmore Islands. During periods of assessed low probability of a SIEV arrival [ie, less than 50 per cent], NORCOM would permit greater freedom of movement in the general area of those locations. As assessments of the probability of an arrival rose

19 *Transcript of Evidence*, CMI 1894.

20 *Transcript of Evidence*, CMI 462.

21 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.154.

22 *Transcript of Evidence*, CMI 1630. See also Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002, p.1.

through a medium [50-75 per cent] to a high level [more than 75 per cent], NORCOM would direct its maritime assets to patrol more closely the outer edge of the associated contiguous zones. In conjunction with this, the broader approaches to Australian territory were patrolled from the air on a daily basis.²³

9.23 Where intelligence on boats did play a role, it was limited to ensuring that surveillance assets were operating within the pre-designated areas of operations during indicated 'time windows' and crews were alerted to watch out for possible SIEVs.²⁴ Rear Admiral Ritchie said:

We may alter the pattern of attendance in those areas if we think we have particularly good intelligence about a vessel, but the basic, ongoing surveillance of given, predetermined areas is not based at all on evidence or intelligence of one or more departures.²⁵

9.24 Air Commodore Byrne, Commander of the Maritime Patrol Group (MPG), echoed Admiral Ritchie's point that at times intelligence provided a basis for targeting or assigning priority to certain search zones. As to how much MPG aircrews relied on intelligence reports, the Air Commodore said:

It depends. They are important if they lead us to search an area in a particular way. In the absence of the reports, we will still search the area as best we can. However, if we have queuing information that might lead us to search in one particular area first, then they might become important.²⁶

9.25 Air Commodore Byrne also indicated that intelligence which indicated possible boat arrivals tended to make aircrews more alert to the possibility of sighting vessels while on patrol.²⁷

9.26 When asked if the surveillance area was ever changed to search for a SIEV, Rear Admiral Ritchie replied:

No. We very cunningly put the search areas in the right places in the first instance so that we knew people who were going to get to those destinations would come through them. That is the thrust of my concern with all this [controversy over SIEV X]. There was never, ever any reason, even if we had known there had been 10 SIEV Xs, for us to change the pattern of searching. For those 10 SIEV Xs to get to Christmas Island, they had to

23 Answers to Questions on Notice, Defence, 20 September 2002, W69.

24 *Transcript of Evidence*, CMI 454.

25 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.155.

26 *Transcript of Evidence*, CMI 2161.

27 *Transcript of Evidence*, CMI 2161.

come through the area that we were surveilling. The one SIEV X that we know about never did.²⁸

9.27 As shown in chapter 8, the ADF conducted aerial surveillance of the Sunda Strait to Christmas Island area of operations – Area Charlie – as scheduled on 18-20 October, with an additional afternoon/evening flight flown on the 19th to compensate for *Arunta*'s helicopter being unserviceable. Neither SIEV X, nor any sign of flotsam or survivors, was sighted.

9.28 The evidence of the ongoing scheduled flights in Area Charlie during this period, coupled with knowledge of the pre-designated deployment areas for Relex, refutes the speculation by some that ADF assets were redeployed or withdrawn deliberately from this area to avoid stumbling upon SIEV X.

9.29 In the next section, the Committee considers the quality of intelligence on boat arrivals in general, before going on to analyse whether the intelligence on SIEV X could have provided adequate guidance for a successful search and rescue mission if the ADF had chosen to depart from its usual surveillance pattern.

The Intelligence Puzzle

9.30 In its declassified version of the review into the intelligence on SIEV X, the ADF made the following observation:

Some public comment has inaccurately suggested that information on SIEV X ... was precise. This situation has led to people drawing precise conclusions based on imprecise information.²⁹

9.31 The 'imprecise' nature of the intelligence on not only SIEV X but also forecast boat arrivals in general was a recurring theme in the evidence to the Committee. It was a refrain that came from those engaged at every stage in the intelligence cycle – from collection through analysis to operational command and high level decision making.³⁰

9.32 The limitations of the Operation Relex intelligence provides an important background to understanding the lens through which information on SIEV X was assessed. In the section that follows, the Committee examines the accuracy of the Operation Relex intelligence and how it influenced the perceptions of those handling it.

28 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.162.

29 SIEV 'X', Attachment A in the declassified summary of the Defence review of SIEV X intelligence, Minister of Defence to CMI, undated, received 4 July 2002, p.1.

30 *Transcript of Evidence*, CMI 1630, 1912, 1925, 2028.

Intelligence accuracy on SIEVs

9.33 Despite the sizeable intelligence capability at the disposal of Operation Relex, much of the raw intelligence reporting was neither precise nor conclusive nor, for that matter, reliable. Instead, it appears often to have been hazy, contradictory and complex. Sometimes it was wrong. Occasionally it was deliberately false.

9.34 In general, the value of the intelligence to those using it appears to have been hampered by at least four shortcomings:

- sources that were hard to confirm;
- uneven quality due to gaps and duplication;
- difficulties in tracking boat movements; and
- consequently, a high level of caution placed on intelligence assessments.

Difficulty with corroborating sources

9.35 Representing one of the primary collection agencies, the AFP Commissioner, Mr Mick Keelty, encapsulated the problems that this raw intelligence or ‘collateral information’ on boat and people arrivals posed for analysts, operational commanders and decision makers:

Information we received about SIEVs often contained conflicting dates regarding their departure, deliberate misinformation regarding departure locations, and ambiguity into the transport and staging areas for passengers in Indonesia.³¹

9.36 Commissioner Keelty went on to illuminate of the roots of the problem:

Information was often second-hand and difficult to attribute to specific vessels. As a police organisation, we have extensive experience in addressing the value of information from human sources. We know that it is an imprecise science and it is dangerous to make decisions based on uncorroborated single source information in people-smuggling matters or indeed any criminal matters. We have learnt through experience that the reliability of information, which is sometimes provided anonymously, may be questionable and that the motivation for passing information is usually for self-gain. There are often other motives for passing on information such as deliberate misinformation to divert police attention or to harm a criminal competitor. The methods used by these sources to collect information may result in an incomplete picture and these sources may not have access to first-hand information. ... As a consequence, there is often a need to

31 *Transcript of Evidence*, CMI 1925. HQNORCOM echoed these concerns about the reliability of sources and misinformation encountered with the intelligence. See Answers to Questions on Notice, Defence, 20 September 2002, W68.

conduct additional inquiries to corroborate information from human sources.³²

9.37 In contrast to single source reports, intelligence staff told the Committee that information that could be backed up by reporting from additional sources was viewed as more reliable. Ms Siegmund, the Assistant Secretary in charge of DIMIA's Intelligence Analysis Section, stated:

In general terms, you either get single or you get multisource – obviously. But we would expect multisource information to corroborate. If there was a difference, we would probably report it as such – that one source said this and another source said that – because that is also part of our assessment process that we need to go through with the intelligence.³³

9.38 However, the Committee heard that the AFP was unable during any stage of Operation Relex to corroborate any of the intelligence leads it had on potential boat and people arrivals. Commissioner Keelty emphasised that:

Between August and November 2001, the AFP received an amount of information pertaining to all vessels that were identified during this operation. Additionally, the AFP received numerous pieces of single source information about potential SIEVs. The AFP was *not able to corroborate* [emphasis added] any of those alleged movements until after the vessels were intercepted.³⁴

Uneven quality

9.39 While the quantity of intelligence on SIEVs was large, the quality was uneven. Decision makers faced the problem of dealing with a large stream of individual reports, many of which turned out to be duplicates of the same vessel, leaving other vessels for which there was no forewarning. Rear Admiral Smith told the Committee:

The intelligence reports often appeared duplicative, with the associated difficulty of determining whether the numerous reports referred to a single vessel or multiple vessels. Thus on occasion forecast vessel departures did not eventuate leading to often erroneous or inconclusive assessments that could not be relied upon as the sole source to determine the areas for air surveillance or stationing of ships.³⁵

9.40 Rear Admiral Bonser illustrated the nature of this problem. Pointing to gaps in the intelligence, he said that, 'of the last 15 SIEVs, Coastwatch had prior information of a possible departure date that was within seven days of the vessel's arrival in

32 *Transcript of Evidence*, CMI 1925. See also Ms Siegmund, DIMIA, on intelligence forecasting being 'not an exact science', *Transcript of Evidence*, CMI 2018.

33 *Transcript of Evidence*, CMI 2020.

34 *Transcript of Evidence*, CMI 1925.

35 Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002, p.3.

Australian waters in relation to only eight of the vessels'. But on the other hand, Rear Admiral Bonser noted that 'there were in fact 29 departure dates provided for these eight vessels and in excess of 30 assessments as to the possible additional departures from Indonesia that did not culminate in an arrival. These figures do not include indicators in relation to SIEV X.'³⁶

9.41 Overall, it appears that the intelligence tended to inflate the numbers of *potential* boats compared with the number of *actual* arrivals. Colonel Gallagher, Commander ASTJIC, provided the Committee with the following assessment of the accuracy of the intelligence for Operation Relex:

None of the intelligence that we were receiving regarding any of the SIEVs was definitive. I had a discussion recently with one of my colleagues at Headquarters Northern Command. We came to the view that about 40 per cent of what we received related actually to vessels that turned up or materialised. In the broad scheme of things this is a very imprecise area.³⁷

9.42 HQNORCOM concurred with Colonel Gallagher's assessment of the overall accuracy of the intelligence on boat arrivals.³⁸ Likewise, Ms Halton, the Chair of the PST, also pointed to the contrast in the numbers of boats reported compared to those that eventuated. In seeking to correct the 'misapprehension abroad about the state of our knowledge about vessels leaving' Indonesia,³⁹ Ms Halton commented on the intelligence before the PST:

What we had was often a statement that a source had said that a vessel might leave. For every source that had said a vessel might leave to a vessel that actually turned up, we probably had a hit rate of one to four.⁴⁰

9.43 Similar difficulties were experienced in estimating the number of potential arrivals. Ms Siegmund, head of DIMIA intelligence, observed in relation to SIEV X and other vessels in general:

We did not know exactly how many we were going to get onboard the vessel; we never do. We can only go on the reports that get given to us. Sometimes they are roughly accurate; sometimes they are way off, because you never quite know, at the time that they are boarding the vessel, how many will get on and how many will not.⁴¹

36 *Transcript of Evidence*, CMI 1630.

37 *Transcript of Evidence*, CMI 1891. Rear Admiral Ritchie also observed that: 'I would say to you that there were many more boats mentioned in the intelligence that we actually ever saw'. *Transcript of Evidence*, CMI 153.

38 *Answers to Questions on Notice*, Defence, 20 September 2002, W68.

39 *Transcript of Evidence*, CMI 947.

40 *Transcript of Evidence*, CMI 948.

41 *Transcript of Evidence*, CMI 2017.

Tracking boat movements

9.44 A third problem for those handling the intelligence related to the difficulty in interpreting the movements of SIEVs, particularly while they were still in Indonesian waters. The Committee was told that it was common for vessels to be reported as departing Indonesia, only for it to emerge later that the vessels had moved to another port or turned back due to weather conditions, mechanical failure or other reasons. HQNORCOM stated that, '[i]n the majority of cases, these [departure] dates were ambitious and vessels often were late departing or did not depart at all'.⁴²

9.45 Mr Vince McMahon, one of the DIMIA representatives on the PST, observed to the Committee that:

With a departure, as has happened, we often find that they have returned to port or they have stopped a couple of hundred metres up the road. Certainly, from my perspective ... it simply meant that we had no confirmation of where the boat might be.⁴³

9.46 The Committee was also told that often the intelligence on a boat exhibited a 'stop start' pattern in the vessel's movements.⁴⁴ Commissioner Keelty spoke of how this pattern of movement made it difficult to confirm whether a vessel had departed or not:

we have lots of that sort of information and you would get stop start, stop start, yes no and no yes. Finally, a vessel might depart. But the only time you would confirm that a vessel had departed would be when it was intercepted.⁴⁵

9.47 Rear Admiral Ritchie provided a graphic illustration of the ambiguity that this zigzag pattern created in the intelligence and the quandary it posed for senior commanders. In describing the intelligence on boat departures, he said:

The point is that none of that intelligence is definite; none of it, in general, is specific; and much of it is continually countermanded. For example, it may be reported that a boat possibly sailed from the south coast of Sumatra on this date with this many people; the next day it might be reported that it did not sail from the south coast of Sumatra, it probably sailed from somewhere east of Jakarta and it might be going in the other direction. That was the sort of thing that was happening. So Operation Relex had to consider how best to deal with intelligence as imprecise as that. Do you look, if you could, in every nook and cranny: in every creek and every port in the archipelago? Of

42 Answers to Questions on Notice, Defence, 20 September 2002, W68.

43 *Transcript of Evidence*, CMI 2028.

44 *Transcript of Evidence*, CMI 2013.

45 *Transcript of Evidence*, CMI 1959.

course you do not; you cannot do that because we have no right to take Operation Relex into Indonesian waters.⁴⁶

Circumspect assessments

9.48 The uncertainty surrounding sources of information, the complexity in sifting through the reported numbers of boats and their points of departure and the difficulty in tracking their movements – all three factors engendered a degree of circumspection in the way the intelligence was handled. The problems with corroborating intelligence from ‘human sources’ or informants, for instance, made those handling it wary of leaping to conclusions. Commissioner Keelty stated: ‘As police, knowing these things instils in us a level of caution against making decisions based solely on such information’.⁴⁷

9.49 The Committee heard that intelligence assessments tended to be provisional, their judgements hedged in cautious language. When questioned on the terminology used in DIMA Intelligence Notes, Ms Siegmund emphasised the point that:

We did not want to give the impression that what we were putting out in these intelligence notices was fact – that it was definite. It was very important, given that these notices went out to a very wide range of agencies. So we were very careful about how we worded it. But what you then get is something that says ‘probably’ and ‘possibly’. We have to use that kind of terminology.⁴⁸

9.50 The cautious, hedged tone of the intelligence reports had a flow-on effect for those using them. Brigadier Silverstone, Commander NORCOM, in particular noted that ‘the information that directly related to preparations, departures and arrivals of SIEVs was limited and contradictory. This constrained NORCOM’s capacity to make confident assessments.’⁴⁹

9.51 This is particularly evident in the relationship between the intelligence and operational decisions on aerial surveillance and ship deployment that was discussed in the previous section. It is also important for understanding some of the assessments on SIEV X, particularly over the issue of whether its departure was confirmed or not. In the next section, the Committee revisits the intelligence on SIEV X and examines those assessments.

46 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.153.

47 *Transcript of Evidence*, CMI 1925. See also Ms Siegmund, DIMIA, on intelligence forecasting being ‘not an exact science’, *Transcript of Evidence*, CMI 2018.

48 *Transcript of Evidence*, CMI 2020-2021. For example, Air Commodore Byrne also said of the boat intelligence, ‘The reports, on a daily basis, were providing indications of possible departures’. *Transcript of Evidence*, CMI 2159.

49 Answers to Questions on Notice, Defence, 20 September 2002, W68.

SIEV X Intelligence – ‘Through a Glass Darkly’?

9.52 In the light of this intelligence background, the Committee now turns to consider the specific intelligence on SIEV X itself and its handling by Australian agencies.

9.53 The Committee notes that, in many ways, the information on SIEV X mirrored the general pattern of the intelligence in this area in that it was indefinite and in a state of flux.

9.54 This is evident from the early reports in July of Abu Qussey preparing two boats (not one) for Christmas Island but becomes particularly apparent in the period 17-20 October, where news on the boat changed rapidly.

9.55 On 17 October, for instance, two reports were received. The first indicated that SIEV X was moving from port to port, a development that the Committee heard was not unusual for these vessels.⁵⁰ The second report later that day, however, suggested (mistakenly) that SIEV X had departed Java the previous day bound for Christmas Island. Both of these reports were superseded on 20 October with AFP advice that SIEV X had left on 19 October.

9.56 Similarly, the intelligence kept shifting on where in Indonesia SIEV X had departed and the number of passengers it was carrying. The reports on 17 and 20 October pointed to two different ports of departure in Java, which were far apart (and would therefore have significantly altered calculations of likely transit and arrival times).⁵¹ Rear Admiral Ritchie described the intelligence on Abu Qussey after 5 September as:

Nothing much more was heard of him [after 5 September] until you get into October and there were various reports that he had one boat, he had two boats, that had sailed from here, that had gone back, that had sailed from somewhere else.⁵²

9.57 As for the passenger numbers, these varied from initially 150 to 250 until the AFP reports on 20 and 22 October that revealed 400 people had embarked on SIEV X.

9.58 The reports from 17 to 20 October of SIEV X's movements, coming after similar signals in July to September, paralleled the 'stop start' pattern seen with other boats. Ms Siegmund said:

We had varying reports that the boat had left and from where it left, which were then rescinded. We later found out that it had not sailed. That unfortunate pattern basically started occurring from about September

50 *Transcript of Evidence*, CMI 1894.

51 *Transcript of Evidence*, CMI 1912-1913.

52 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.152.

onwards, where there were stop-starts in terms of reporting that the boat was leaving and then not.⁵³

9.59 Rear Admiral Bonser also drew a comparison between the patterns usually seen in the intelligence on possible boat arrivals and those displayed in the SIEV X signals:

We had similar detail on previous occasions. There is this great history of boats that depart, divert, go to other ports, do different things, perhaps break down – there is no real confirmation of the boat actually departing or the fact that it ha[d] left the archipelago.⁵⁴

9.60 In addition to these mixed signals about SIEV X's movements, it should be remembered that at the time reports were circulating that as many as six people smugglers were organising up to six boats to depart.⁵⁵ For those handling the intelligence, it appears to have been a challenging period, particularly given the difficulty in fathoming the intentions of the various boats and their organisers. Ms Siegmund told the Committee that: 'It is one of the frustrations we had at the time too, trying to keep track of numbers of boats where and when. It is a complex issue'.⁵⁶

9.61 However, it also appears that in some ways the intelligence on SIEV X conveyed details that might arguably have alerted the authorities to the fact that there were different features to this boat, which might require a more decisive or different response. Rear Admiral Bonser himself stated:

The information is remarkably similar about all of the vessels, in particular the on again off again nature of the departures. The only thing that was different about this vessel was that we had information at the last report of the possible departure that it was small and overcrowded.⁵⁷

9.62 It is that seemingly more specific information which has led a witness to the inquiry, Mr Tony Kevin, as well as some in the media to argue that more should have been done by Australian authorities to search specifically for the vessel.⁵⁸

9.63 The Committee considers that for there to have been warrant for undertaking specific searches for SIEV X, knowledge of the following three pieces of information would have been essential:

- confirmation that the vessel *had* departed Indonesia and *when* it departed;
- confirmation of *whence* it had departed; and

53 *Transcript of Evidence*, CMI 2013.

54 *Transcript of Evidence*, CMI 1653.

55 *Transcript of Evidence*, CMI 2013.

56 *Transcript of Evidence*, CMI 2016.

57 *Transcript of Evidence*, CMI 1665.

58 *Transcript of Evidence*, CMI 1325. Submission No. 2A.

- a threshold level of *concern* for its safety.

9.64 In the sections that follow, the Committee examines whether any of this information was possessed by the relevant authorities at the relevant times. At the same time, it considers whether more could have been done by those authorities to gain such information. In the light of that analysis, the Committee then assesses the adequacy of the response of Australian authorities to the intelligence on SIEV X.

Confirmation of Departure and Departure Time

9.65 In his account of the intelligence on SIEV X, Rear Admiral Smith informed the Committee that:

While the intelligence reports regarding the Abu Qussey vessel were from Coastwatch assessments and normally reliable sources, they provided only an assessment of ‘alleged’ departures and ‘possible’ arrival windows. No specific confirmation of departure was ever received.⁵⁹

9.66 The Committee questioned several witnesses at length on this matter. Rear Admiral Bonser was asked why, in the face of several intelligence reports suggesting SIEV X had departed, more was not done to search for the vessel.

9.67 Rear Admiral Bonser told the Committee that up until 22 October (the time of the second AFP report) SIEV X ‘did not meet the threshold of being a confirmed departure or, indeed, being overdue’.⁶⁰ As for the number of signals on SIEV X, the Admiral argued the reports were ‘varied and often contained changing indicators of that particular vessel’s departure, but it was never sighted or detected’.⁶¹ He put the AFP report of 20 October into perspective by comparing it to the background on SIEV X:

It goes back to the fact that this was the fifth report about a departure in that month, plus a range of previous ones in months prior to that, and the history of these boats being recorded as possibly departing and then having no arrivals.⁶²

9.68 Colonel Gallagher also told the Committee that even though ASTJIC saw the 20 October AFP report on SIEV X as ‘corroborating’ earlier intelligence on its departure, in the resultant ASTJIC report that day

... it would not have been treated as confirmed. I do not believe that word would have been used. It would have been along the lines of, ‘It is assessed

59 Rear Admiral Smith, ‘Clarification of Evidence’, letter to CMI, 22 May 2002, p.3.

60 *Transcript of Evidence*, CMI 1641.

61 *Transcript of Evidence*, CMI 1639.

62 *Transcript of Evidence*, CMI 1654.

that a vessel has departed from a certain location at a certain time', which was based on AFP information.⁶³

9.69 As cited in chapter 8, the ASTJIC intelligence report for 20 October bears out Colonel Gallagher's point to a large extent. It was issued under the heading, 'Possible boat departure for CI', and said that AFP information 'indicates', rather than 'confirms', that a Qussey vessel had departed the west coast of Java.⁶⁴

9.70 The highest level of confidence placed on the various reports about SIEV X is found in the INTSUM issued by HQNORCOM on 20 October. Although NORCOM was mainly sceptical about the overall credibility of the AFP intelligence that day, it considered the departure date as 'probably being correct' and assessed SIEV X arriving at Christmas Island as a 'high probability', ie. a more than 75 per cent chance of it occurring.⁶⁵ Despite attaching the top level of probability to SIEV X arriving on 20 October, at no stage did HQNORCOM consider SIEV X to be a confirmed departure.⁶⁶

9.71 The Committee also asked witnesses from DIMIA if the new information that came in during the weekend of 20-21 October corroborated SIEV X's departure. Ms Siegmund said it did not.⁶⁷

9.72 In addition, the Committee questioned DIMIA about the PST minutes for 18 October that attributed the 'intelligence re 2 vessels' (one of which was SIEV X) to 'multisource information with high confidence level'.⁶⁸ Although Mr Killesteyn confirmed that multisource intelligence is normally seen as more reliable than single source, he stated:

... but there is never any definitive advice about the departure of a vessel. We have seen time and time again that information that says the vessel has departed turns out to be incorrect.⁶⁹

9.73 Subsequent to appearing before the Committee, DIMIA advised that the 18 October intelligence on SIEV X was *single* source, not multisource.⁷⁰ Furthermore,

63 *Transcript of Evidence*, CMI 1910.

64 Answers to Questions on Notice, Defence, 20 September 2002, Attachment B.

65 Answers to Questions on Notice, Defence, 20 September 2002, W75.

66 Answers to Questions on Notice, Defence, 20 September 2002, W73.

67 *Transcript of Evidence*, CMI 2022.

68 PST Notes, 'People Smuggling Taskforce – High Level SubGroup, Thursday 18 October 2001'. Cited also in *Transcript of Evidence*, CMI 2014.

69 *Transcript of Evidence*, CMI 2013.

70 Answers to Questions on Notice, DIMIA, 20 September 2002.

the information received on 18 October proved to be wrong on two counts: SIEV X did *not* depart from south west Java, *nor* did it depart on 17 October.⁷¹

9.74 It was not until the ADF advice on 22 October arrived that, in some quarters, SIEV X was assessed as having departed Indonesia. Rear Admiral Bonser told the Committee that, as the report on the 22nd ‘corroborated’ the AFP advice on 20 October, in Coastwatch’s eyes it ‘confirmed for us that this vessel had most probably departed’.⁷² Coastwatch assessed that the information had reached the ‘threshold’ such ‘that we had a confirmed departure and that, indeed, the vessel was now overdue’.⁷³

9.75 Colonel Gallagher, likewise, said that ‘it was not until 22 October that Defence agreed that it was a confirmed departure’.⁷⁴ However, it is clear that this assessment of the vessel’s departure was not shared universally, particularly within the senior operational command in the ADF and the intelligence agencies handling the SIEV X material. Neither Admiral Ritchie nor Admiral Smith believed that SIEV X’s departure was confirmed at any stage during the intelligence traffic on the vessel.

9.76 There is also evidence that Coastwatch was initially more equivocal about the vessel’s status on 22 October than Rear Admiral Bonser’s testimony suggests. As detailed in chapter 8, at the PST meeting on 22 October, Coastwatch appeared to have been undecided initially about the veracity of the latest signals on SIEV X. According to Ms Katrina Edwards’s (First Assistant Secretary, PM & C) recollection of the meeting:

Coastwatch seemed to be trying to get a sense of how strong a report it really was and whether at this point it was appropriate, based on the weight of the report, to report onwards to AusSAR that the boat was overdue.⁷⁵

9.77 Ms Edwards’s testimony on this event gives a strong sense of the uncertainty still in people’s minds about SIEV X as late as 22 October, even though the intelligence was seen as relatively reliable. It also conveys the way in which the updates on SIEV X appeared to conform to the experience with earlier reported boat arrivals that failed to transpire. Ms Edwards said:

As others have testified, it was not unusual for multiple departure dates to be reported for the same boat, for boats to divert en route or to otherwise be delayed. The meeting was told that the boat had not been spotted and that there had been no calls from relatives, who are often well briefed on when to expect an arrival. On the other hand, the original report had seemed firmer than some. As I recall, on balance, the conclusion was drawn that the assessment was not sufficiently firm as to warrant passing the information to

71 As explained in chapter 8.

72 *Transcript of Evidence*, CMI 1643.

73 *Transcript of Evidence*, CMI 1643.

74 *Transcript of Evidence*, 1910.

75 *Transcript of Evidence*, CMI 1727.

AusSAR at that point. The Coastwatch subsequently advised that it had in fact passed the information that the boat was overdue to AusSAR that day and, indeed, while the meeting was in progress.⁷⁶

9.78 Ms Edwards's recall of the meeting, particularly the doubt lingering over SIEV X's departure, was corroborated by two other witnesses present at the PST meeting of 22 October – namely, Mr McMahon, First Assistant Secretary, DIMIA, and Ms Halton, chair of the Taskforce. Members of the Committee questioned Mr McMahon about the passage in the PST notes for that day which recorded the discussion on SIEV X as: 'Not spotted yet, missing, grossly overloaded, no jetsam spotted, no reports from relatives'.⁷⁷ Mr McMahon replied:

I read those now as saying that there was a report, but nothing happened following that report. In other words, there was no information saying that it had left, nothing had been sighted – no flotsam had been sighted – and it was missing. We could have expected, the next day, to find that it had returned to port or that it had not actually left. The state of the intelligence at that stage was such that you would often get quite conflicting information, and in that discussion, as I recall, it simply said that we had no more information on the boat. There are different things you can look for to verify whether or not a boat is on the way, but none of those particular leads had given fruit.⁷⁸

9.79 The Committee notes Mr McMahon's final point that none of the normal 'leads' or avenues for confirming or corroborating a boat's departure had yielded information that was sufficiently sound to confirm that SIEV X had departed. The evidence from Ms Halton, who chaired the meeting of 20 October, supported Mr McMahon on this point. Ms Halton told the Committee:

I actively recall this issue about no calls from relatives as being the kind of thing that they [DIMIA] would use to assess whether in fact the vessel had foundered.⁷⁹

9.80 Ms Halton elaborated on the significance DIMIA attached to relatives contacting government agencies when it was feared that vessels might be overdue or in trouble. She said:

I remember the conversation because it was about the advice from DIMIA that people tended to let their relatives in Australia know as they were

76 *Transcript of Evidence*, CMI 1706. In fact, the PST meeting started at 3.15pm, half an hour after Coastwatch had telephoned and faxed through the overdue notice to AusSAR. According to Ms Halton's evidence, during the meeting the Coastwatch representative contacted AMSA/AusSAR and reported back to the meeting, 'They have already issued an alert'. *Transcript of Evidence*, CMI 2141.

77 PST Notes, 'People Smuggling Taskforce – High Level Group Meeting 22 October 2001'.

78 *Transcript of Evidence*, CMI 2028.

79 *Transcript of Evidence*, CMI 2098.

leaving Indonesia on a vessel. DIMIA's experience had been ... that in the event that a vessel was missing they tended to know about it. I think the comment was that they tended to know about it very quickly because the relatives knew exactly when that vessel was anticipated to arrive at Ashmore, Christmas Island or wherever.⁸⁰

9.81 As discussed in chapter 8, Ms Halton's recollection of the meeting also illustrated the extent to which those handling the intelligence on SIEV X had begun to question whether the boat had left Indonesia or indeed existed at all. Ms Halton told the Committee that at the meeting:

... there was a conversation between a couple of the agencies, principally DIMIA and Coastwatch, and it was about whether this vessel was genuinely there: whether it was on the water and whether it existed. There was a question about whether it was real.⁸¹

9.82 Ms Halton's evidence reveals not only the uncertainty surrounding SIEV X at this stage but also the wider problem agencies faced in evaluating the accuracy of the intelligence on, and thus assessing the probability of, reported boat arrivals.

9.83 The Committee considers that the mixed signals received on SIEV X, mirroring as they did the stop-start movements experienced with other boats, instilled a significant degree of doubt in the minds of those handling the information. Those doubts remained strong, even in the face of new information on 20 and 22 October that, when considered by itself, appeared to corroborate earlier reports of the vessel's departure.

9.84 The absence of other important indicators to verify the whereabouts of SIEV X, or the situation it might be in, appears to have outweighed the importance that the AFP reports have assumed with the benefit of hindsight. On balance, the Committee considers that, based on the range of evidence available to it, there were reasonable grounds at the time for Australian decision makers to have doubted the intelligence that SIEV X had departed Indonesia or remained in transit on 20 and 22 October.

Confirmation of Whence It Had Departed

9.85 In evidence to the Committee, Mr Tony Kevin indicated an area in international waters, where he estimated SIEV X is likely to have sunk. Mr Kevin's calculations were based on, among other things, the fact that the vessel had departed Bandar Lampung early on 19 October, that it had stopped at an island mid-passage where some passengers disembarked and that it had steamed at five knots per hour, the usual speed of these vessels.⁸²

80 *Transcript of Evidence*, CMI 2123.

81 *Transcript of Evidence*, CMI 2123.

82 *Transcript of Evidence*, CMI 343-344.

9.86 On the basis of these calculations, Mr Kevin argued that it should have been possible for the Australian navy, if not to prevent the boat from sinking, at least to have located and rescued more of the survivors.

9.87 Evidence to the Committee, however, suggests that there are two problems with Mr Kevin's argument on this point. One is that calculations of the vessel's transit relative to the impact of tides, currents, weather and its seaworthiness are more haphazard than he suggests.⁸³

9.88 The more significant problem appears to be the knowledge possessed by authorities at the relevant time about the vessel's departure point.

9.89 Mr Kevin based his estimate on the location of boat's sinking on survivor testimony that revealed Bandar Lampung in Sumatra as the place from where SIEV X departed. The Committee notes, however, that this information about SIEV X's actual point of departure was *not* known by Australian agencies until 23 October, that is, three days after the survivors were rescued.

9.90 Prior to this stage, the intelligence suggested that SIEV X had departed from two different locations in *Java*, not Sumatra. Nothing in the intelligence reports indicated the correct departure location. In other words, if an Australian search and rescue operation had been ordered it would have been working off the wrong coordinates.⁸⁴

9.91 When questioned if the 20 October AFP advice contained detailed positional information, Rear Admiral Ritchie said:

... there is no such thing as location attached to that particular report. In fact, that particular report was made available the day after that particular vessel was subsequently known to have sunk. It includes a change in port of embarkation for these people, from one part of the archipelago to a significantly quite distant other part of the archipelago. It did say that it was probably a small vessel and that it had probably 400 people on it. That is all good information, but it is not going to help you find it.⁸⁵

9.92 Air Commodore Byrne made the same point to the Committee. When asked if the Maritime Patrol Group had received any 'special tasking' instructions in light of the information that SIEV X had sunk, the Air Commodore replied: 'No. We did not know where it was, for a start'.⁸⁶

83 See Attachment A, 'SIEV X', Defence review of SIEV X intelligence, pp.2-3.

84 See Colonel Gallagher on the impact of different points of departure on transit calculations, *Transcript of Evidence*, CMI 1912-1913.

85 Rear Admiral Ritchie, *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade Legislation Committee, 4 June 2002, p.156.

86 *Transcript of Evidence*, CMI 2177.

9.93 Air Commodore Byrne also informed the Committee that the method of surveillance required for a SOLAS incident, ‘if it is for somebody in the water who does not have a beacon, ... would be a visual search and it would be restricted to, one hopes, *an accurate datum of the last known position* [emphasis added] and it would have very close track spacing’.⁸⁷

9.94 There has been no evidence presented to the Committee which indicates that Australian authorities knew, *prior* to the testimony of survivors, where the boat had departed from in Indonesia.

9.95 On the other hand, it could be argued that, on the basis of the ADF’s own argument that there was only one corridor or funnel through which all SIEVs bound for Christmas Island must transit, the point of departure was not as critical to a search as has been suggested. The logical area in which to commence a search mission for the vessel was the area of operations – ie. Area Charlie – in which surveillance was ongoing.

9.96 A search and rescue or SOLAS mission would have required not only intensified patrolling in the area (subject to the availability of assets and aircrew) but also specific tasking instructions to look for a foundered vessel and people in the water.⁸⁸ For such a mission to have been authorised, the information in the hands of the Operation Relex authorities and the supporting intelligence agencies would have had to have reached a threshold level of concern for the vessel’s safety. It is to that issue that the Committee now turns.

A Threshold Level of Concern for its Safety

9.97 The key difference between the SIEV X intelligence and intelligence on other boats was, according to Rear Admiral Bonser, the reports that the vessel was small and overcrowded.⁸⁹ These reports came from an AFP source on 20 and 22 October.

9.98 It should be noted, however, that before 20 October it was already known to Australian intelligence that Abu Qussey’s boats tended to be smaller than other people smuggling vessels. The DIMA Intelligence Note of 19 October, for instance, mentioned this characteristic as one of the reasons that Qussey’s boats took longer to complete the journey to Christmas Island and thus as a possible explanation for why SIEV X had not yet been sighted.⁹⁰

9.99 Furthermore, that SIEV X was small and overcrowded was not seen as exceptional by all of those involved in the intelligence cycle. For Air Commodore Byrne, an ‘end user’ of such intelligence, these features were common to most of the SIEVs. Air Commodore Byrne told the Committee:

87 *Transcript of Evidence*, CMI 2165.

88 *Transcript of Evidence*, CMI 2165.

89 *Transcript of Evidence*, CMI 1665.

90 DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

All of the vessels are small and all of those vessels had been overcrowded at some point – it is just that there are varying levels of being overcrowded.⁹¹

9.100 In Air Commodore Byrne's terms, the degree to which SIEV X was overcrowded, such that it might have alerted those handling the intelligence on it, is hard to determine. On the one hand, the report of 400 on board far exceeded the numbers on any of the other SIEVs. At the time of these reports, the numbers on board intercepted vessels ranged from 129 (SIEV 3) to 238 (SIEV 5), the latter being the most populous of SIEVs 1-12.⁹² The only vessel to have carried more asylum seekers was the *Palapa*, with 433 passengers and five crew. It too foundered, but was rescued by the *MV Tampa*.

9.101 On the other hand, intelligence at the time was also indicating another organiser preparing a boat with 500 passengers expected to be on board. It is possible that this larger number of passengers obscured the significance of the report of 400 passengers on SIEV X.

9.102 Nevertheless, the Committee considers that the real significance of the reported 400 passengers on SIEV X lies, not so much in the number itself, but in the fact that it was known to Australian agencies that Qussey's boats tended to be smaller than those of other organisers.⁹³

9.103 The Committee also notes that the AFP report of 20 October, according to the Coastwatch OPSUM, mentioned '400 passengers onboard, with some passengers not embarking because the vessel was overcrowded'.⁹⁴ Again, it is difficult to gauge the degree to which this report might have been seen as a warning signal of the vessel's unseaworthy state. The report that passengers had not embarked because of overcrowding could have been a pointer to its poor condition; it might also have been construed as relieving some of the weight on board.

9.104 In any event, the opinion within Australian intelligence circles was that the AFP intelligence of 20 and 22 October was not entirely reliable. Since it was 'single-source AFP information received third-hand', intelligence analysts at HQNORCOM, the principal operational user of such information, considered the AFP intelligence to be of 'low credibility' requiring corroboration of the details about passenger numbers and overcrowding.⁹⁵

9.105 The other key item of intelligence about SIEV X was the 'personal opinion' of AFP analyst Ms Kylie Pratt, that (in the words of Coastwatch) the 'vessel may be

91 *Transcript of Evidence*, CMI 2180.

92 Matrix of SIEV incidents, tabled by Rear Admiral Smith, 5 April 2002.

93 As revealed in DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

94 Rear Admiral Smith, 'Clarification of Evidence', letter to CMI, 22 May 2002, p.2.

95 Answers to Questions on Notice, Defence, 20 September 2002, W72 and W75.

subject to increased risk due to the numbers on board'.⁹⁶ It is now known that this advice was not passed onto the Operation Relex high command.⁹⁷ To assess the impact of this breakdown in the intelligence cycle, the Committee has attempted to gauge the significance of Ms Pratt's personal risk assessment against other information available to decision makers at the time.

9.106 Judged in hindsight, the AFP officer's warning was obviously prescient. However, it needs to be judged, not with the benefit of hindsight, but rather in terms of the information available to intelligence staff and decision makers at the time the report was received. Three important points should be noted in this respect.

9.107 First, Colonel Gallagher of ASTJIC indicated that most of the SIEVs tended to be in a poor sea state. When asked about the PST notes mentioning 'some risk of vessels in poor condition and rescue at sea',⁹⁸ Colonel Gallagher told the Committee 'that a number of these vessels – even the ones that arrived and were interdicted – were unseaworthy, so it was not an uncommon sort of observation to make about a SIEV'.⁹⁹

9.108 Second, the pre-arrival intelligence on SIEV 6 forewarned that there might 'the requirement for a rescue at sea', but this did not eventuate.¹⁰⁰ It might be that the successful transit of SIEV 6, despite its organiser's reputation for using boats in 'very poor condition', inclined those handling reports on SIEV X to conclude that, on balance, there was no cause for immediate alarm.

9.109 The third point goes back to the general quality of the intelligence on boat arrivals. When asked if safety of life at sea concerns figured in intelligence reports, HQNORCOM informed the Committee that it rarely found such information to be 'consistent and credible data', but when it did so it was included in relevant reporting.¹⁰¹ Given the 'low credibility' attached to the 'single source AFP information received third-hand' on which AFP officer Pratt's opinion was based, it seems unlikely that the operational response would have been any different if Coastwatch had passed this advice onto Defence.

96 Attachment A, Answers to Questions on Notice, Coastwatch, 17 June 2002.

97 Answers to Questions on Notice, Defence, 20 September 2002, W75. See the discussion of this in chapter 8.

98 PST Notes, 'People Smuggling Taskforce – High Level SubGroup, Thursday 18 October 2001'. Cited also in *Transcript of Evidence*, CMI 1844.

99 *Transcript of Evidence*, CMI 1903.

100 DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

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

Should a SOLAS alert have been raised?

9.110 A central question that the Committee explored addressed whether any of the intelligence on SIEV X met the criteria that would warrant a Safety of Life at Sea (SOLAS) alert to be raised.

9.111 Air Commodore Byrne informed the Committee that the following would, in his view as Commander Maritime Patrol Group, constitute a SOLAS situation:

A report from AusSAR or the Australian Maritime Safety Authority or anything that we receive from any other party which would indicate that there was a safety of life at sea situation and anything that we would have picked up airborne. I cannot think of anything else.¹⁰²

9.112 The Committee asked Mr Clive Davidson, the head of the Australian Maritime Safety Authority, about the threshold of information required to trigger a SOLAS or search and rescue mission by Australian Search and Rescue (AusSAR). Mr Davidson indicated that AusSAR would not normally broadcast to shipping an overdue notice unless a distress alert (eg. an SOS, emergency beacon signal and so on) had been received.¹⁰³ He observed that overdue vessels are a daily occurrence.¹⁰⁴

9.113 In the case of SIEV X, the Coastwatch fax to AusSAR on 22 October was considered ‘pre-alert’ information that reached the ‘uncertainty phase’ in search and rescue planning. Mr Davidson defined the uncertainty phase as a stage where ‘there is insufficient information, a concern has been expressed and then people search for collateral or confirming information that warrants some action being taken’.¹⁰⁵

9.114 When asked why AusSAR did not search for ‘collateral or confirming information’, Mr Davidson said to the Committee:

... the nature of the information from Coastwatch was hardly alarmist and hardly raised a high degree of concern. That was confirmed in a conversation with the Headquarters Australian Theatre ... that they were out there looking for it, so if there was a situation they had the assets on the ground [sic] and in the air.¹⁰⁶

9.115 However, the Committee notes that, as discussed in chapter 8, Coastwatch sent only *some* of the information contained in the AFP reports of 20 and 22 October – a general point of departure (South West Java) and that the vessel was considered overdue – but *not* the arguably more crucial detail – that the vessel was overcrowded and a concern for its safety had been expressed.

102 *Transcript of Evidence*, CMI 2178.

103 *Transcript of Evidence*, CMI 1372.

104 *Transcript of Evidence*, CMI 1879.

105 *Transcript of Evidence*, CMI 1879.

106 *Transcript of Evidence*, CMI 1880.

9.116 Members of the Committee asked several witnesses whether, in their opinion, reports indicating a small, heavily overcrowded vessel, which some passengers did not embark upon because of overcrowding, would meet the criteria to warrant a SOLAS or some other form of heightened surveillance operation. Some witnesses thought it would, others did not.

9.117 Both AFP Commissioner Keelty¹⁰⁷ and Ms Halton¹⁰⁸ thought that such information would warrant a SOLAS situation. In the case of Ms Halton, the Committee notes that the critical AFP intelligence report of 20 October was not raised at the PST meeting on that day. The same report was also not provided to DIMIA until sometime after 20 October. It is arguable that had the intelligence on the boat's overcrowded state and the concerns for its increased risk at sea been aired at the meeting, the PST might have concluded that a search and rescue mission should be launched to look for SIEV X.

9.118 The Committee notes, however, a significant factor that counts against this scenario. As Ms Halton reiterated strenuously to the Committee, the PST did not direct line agencies nor insert itself into the chain of command with the Operation Relex authorities. She said in relation to whether the PST should have been responsible for raising a SOLAS alert:

... we did not interfere in the decisions that the relevant line agencies took. As far as I understood it, the declaring of a safety of life at sea issue was a matter, rightly, for the appropriate authority. So Mr Davidson would have alerted his Indonesian colleagues...¹⁰⁹

9.119 Further, at the time of the meeting on 20 October the latest DIMA Intelligence Note had mentioned that boats belonging to Abu Qusey often took longer to complete the journey to Christmas Island.¹¹⁰ SIEV 6, which intelligence suggested might pose the risk of a rescue at sea, had turned up on 19 October.

9.120 Another factor counting against the likelihood of the PST meeting of 20 October concluding that a SOLAS incident had arisen can be inferred from the discussion around SIEV X at the PST meeting of 22 October. As discussed in chapter 8, the usual indicator of a vessel overdue – telephone calls from relatives of those on board – had not been received. Nor had any distress signals been detected.

9.121 Given the absence of additional warning signals, and given other information counting against any cause for alarm, it seems reasonable to conclude that the PST meeting of 20 October would have reacted similarly to the meeting of 22 October, even if the AFP intelligence had been made known at the time.

107 *Transcript of Evidence*, CMI 1973.

108 *Transcript of Evidence*, CMI 2115.

109 See in particular, *Transcript of Evidence*, CMI 2116.

110 DIMA Intelligence Note 81/2001, 19 October 2001, p.2.

9.122 The Committee also put to Air Commodore Byrne the question of whether any of the intelligence on SIEV X met the criteria to satisfy a SOLAS operation for the Maritime Patrol Group. The Air Commodore said that, 'We received no information of an AFP report indicating SOLAS information'.¹¹¹ He also made the observation that:

Really, my judgment is that a report of a small and overcrowded vessel does not, of itself, indicate a safety of life at sea situation.¹¹²

9.123 The Committee considers that, as a highly experienced officer with SOLAS expertise, Air Commodore Byrne's view is authoritative. The additional element in the AFP intelligence, that people had refused to embark on SIEV X due to the overcrowding, is inconclusive as evidence of the boat's seaworthiness (at this stage it was not known that passengers were forced, allegedly at gun point, to board the vessel). The credibility of this information, as with that concerning SIEV X's overcrowded state, was also questioned, at least by HQNORCOM whose analysts had discussed the AFP intelligence with their counterparts in Coastwatch.¹¹³

9.124 Amidst a climate of mounting doubt about whether SIEV X was in transit to Christmas Island, none of the intelligence in the hands of Australian authorities appears to have been of enough concern or credibility to have warranted the raising of a SOLAS alert.

9.125 The Committee also notes that, shortly after AusSAR sent out the overdue notice about SIEV X on the afternoon of 22 October, HQ Australian Theatre contacted AusSAR to clarify if any new information on the vessel lay behind the phrase 'concerns have been expressed for its safety'.¹¹⁴ Rather than displaying indifference to SIEV X, the Headquarters Australian Theatre was clearly checking to make sure that no new information indicating a vessel potentially in distress lay behind the RCC overdue notice.

9.126 The question that remains in the Committee's mind is whether other arms of the government should have also sought to investigate further the situation regarding SIEV X. In raising this point, the Committee is mindful of the climate of doubt surrounding SIEV X by 22 October. This doubt reflected a range of factors (the multiple ambiguous reports, the absence of the usual signs of a vessel in distress and so on), not least the scepticism about the credibility of the AFP intelligence.

9.127 Nevertheless, the door remained open for the reports on SIEV X to be followed up. As mentioned above, AusSAR considered the situation with SIEV X to be at the uncertainty phase in the search and rescue context, a phase warranting the

111 *Transcript of Evidence*, CMI 2173.

112 *Transcript of Evidence*, CMI 2180.

113 Answers to Questions on Notice, Defence, 20 September 2002, W72.

114 *Transcript of Evidence*, CMI 1872-1873; RCC file [no detail], Answers to Questions on Notice, AMSA, 5 July 2002.

search for ‘collateral or confirming information’. In its assessment of the AFP intelligence, HQNORCOM also considered there to be a ‘requirement for confirmation of the remaining details’ about the vessel’s seaworthiness.¹¹⁵ By this, HQNORCOM meant that it would not lend much credence to the report of overcrowding unless corroboration of higher credibility was received. Apart from discussing on 20 October with Coastwatch the probability of SIEV X arriving, it is unclear whether HQNORCOM requested Coastwatch to seek additional information on the question of the vessel’s seaworthiness.

9.128 While it might be that Australian Theatre was merely clarifying that the unconfirmed status attached to SIEV X was unchanged, its action does point to an apparent willingness on the part of the rest of the intelligence system to accept the ambivalent nature of the information without probing more deeply into the reports on SIEV X.

9.129 There were obvious limits on the extent to which agencies could delve into the basis of reports, particularly those from sources operated by other agencies. Apart from anything else, the logistics involved in running informants and delays in receiving intelligence would have hampered the checking of reports. It is possible that the long chain of intelligence reporting, from its source in Indonesia to its end users at Maritime HQ and NORCOM, constrained the ability of officers to obtain ‘collateral or confirming information’ when required.

9.130 Another possible explanation for the apparent passivity on following up ambiguous intelligence could be the seeming tendency of agencies and analysts to rely upon patterns established in the past to guide their assessment of new reports.

9.131 For example, when asked if the intelligence on the boat’s condition and numbers on board might have prompted a change in the surveillance schedule, Rear Admiral Bonser of Coastwatch replied:

In this case, with, as I have said, the imprecise information about departures – the departure after departure that does not eventuate, the comprehensive surveillance that was in place out there and the fact that we did not have a confirmation of the departure and that the vessel was not yet overdue – no.¹¹⁶

9.132 The Committee is not suggesting that intelligence assessments should have discounted the past patterns in the general boat intelligence when analysing the SIEV X reports. Clearly this was an important means of assembling a profile on the tactics and movements of these vessels, upon which analysts could determine the probability of a boat arriving.¹¹⁷

115 Answers to Questions on Notice, Defence, 20 September 2002, W75.

116 *Transcript of Evidence*, CMI 1661.

117 *Transcript of Evidence*, CMI 1892.

9.133 The Committee does wonder, though, if there are not dangers inherent in an embedded analytical focus that struggles to accommodate diverging items of information that do not fit the pattern. There is an element in the handling of the 20 and 22 October AFP reports of the shadow of past patterns (rather than any ‘surrounding noise’) obscuring the potential significance of the new features that emerged in those reports.

Intelligence Handling – Systemic Problems?

9.134 In chapter 8, the Committee identified several instances where the chain of reporting of intelligence broke down or was dysfunctional. Three instances relate to the AFP intelligence of 20 October:

- The failure to provide DIMIA with that intelligence on the same day as it was received and expedited to Defence;
- The failure to raise the substance of that intelligence at the daily meeting of the PST on 20 October, even though it was of direct bearing to the meeting’s discussion of the impact of expected arrivals on facilities at Christmas Island; and
- Coastwatch’s omission of the personal assessment of an AFP officer that overcrowding placed SIEV X at increased risk.

9.135 The fourth instance of questionable handling of intelligence occurred on 22 October when Coastwatch, in forwarding on to AusSAR a sanitised version of an AFP report that SIEV X was overdue, omitted the earlier intelligence that the vessel was overcrowded and had up to 400 passengers on board.

9.136 In this chapter, the Committee has found that intelligence breakdowns occurred. However, the Committee cannot conclude whether intelligence reporting reached a state whereby Australia’s response could reasonably be expected to have been different.

9.137 Having said that, the Committee is concerned at what appear to be systemic problems in the intelligence system with the border protection strategy. As an element of the whole of government approach to illegal immigration, the intelligence system was extensive and involved many links in the chain of communications. In view of the breakdowns with handling intelligence identified in this report, it appears that the extended lines of communication have posed problems with the coordination and sharing of operational intelligence across multiple agencies.

9.138 These problems possibly reflect the administrative weaknesses in the whole of government approach to managing border protection intelligence that the Australian National Audit Office (ANAO) identified in a recent review.¹¹⁸ The Committee notes

118 ANAO, *Management Framework for Preventing Unlawful Entry into Australian Territory: Department of Immigration and Multicultural and Indigenous Affairs*, Audit Report No.57 2001-2002, pp.45-46, 50-57.

the ANAO proposal that DIMIA and its partner agencies identify ‘better practice offshore coordination processes and reporting arrangements and adopting this across all missions’.¹¹⁹ In the Committee’s view, similar reforms may be required at the cross agency level with the *onshore* coordination and sharing of intelligence.

Conclusion

9.139 In summing up the SIEV X episode, the Committee is faced with one critical question: was there enough information available to warrant someone acting to rearrange the maritime surveillance pattern and perhaps deployment of RAN vessels, with a view to reaching the vessel before it sank or saving more survivors while they were in the water?

9.140 The argument that they should have so acted rests on the intelligence that came to light in the AFP report of the morning of 20 October (that is, after SIEV X had sunk). This report indicated that SIEV X was small and overcrowded, with up to 400 passengers on board. However, this report was not passed onto two key bodies (DIMIA and the daily PST meeting), while other elements contained in the AFP intelligence – that some passengers had disembarked because of overcrowding and that the vessel might be at increased risk at sea – did not reach Defence.

9.141 Against this, however, sits the evidence that at the time there remained strong doubts that the vessel had departed (doubts that were well founded in past experience); that there had been no report that the vessel was overdue; that there had been no distress alert issued; that none of the usual indicators that might warn of a vessel in trouble had been received; and that there were no specific coordinates about its likely location available. The intelligence report that the vessel was small and overcrowded was not exceptional. Nor was the source of the report seen as credible, at least by HQNORCOM. Another vessel, SIEV 6, had transited successfully to Christmas Island despite intelligence warning that the vessel might be in risk. A further reason counting against the case for altering the search pattern was that a comprehensive surveillance operation was in place.

9.142 On 20 October, intelligence did suggest that the vessel had left a location in South West Java and, if concerns had triggered a response, it is possible that a search could have been mounted based on these coordinates. As it turned out, that information was incorrect, so that a search may not have found the vessel.

9.143 On the basis of the above, the Committee cannot find grounds for believing that negligence or dereliction of duty was committed in relation to SIEV X.

9.144 Nonetheless, the Committee is disturbed that no review of the SIEV X episode was conducted by any agency in the aftermath of the tragedy. No such review

119 ANAO, *Management Framework for Preventing Unlawful Entry into Australian Territory*, p.52.

occurred until after the Committee's inquiry had started and public controversy developed over the Australian response to SIEV X.

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

9.146 Rather than adopting a business as usual approach following the disaster, a review of intelligence and operational processes should have been carried out promptly, particularly in light of the breakdowns in the intelligence chain that have emerged during the inquiry. The Committee considers that the episode points to two issues that the relevant agencies or IDCs ought to consider with a view to enhancing the intelligence process in cross-agency operations:

- The extended chain of intelligence reporting in whole of government approaches to managing border protection and its impact on the effectiveness of intelligence, particularly the assessments function, in informing operational decisions; and
- The capacity of intelligence analysis and assessments to recognise new information that does not fit established patterns, to interrogate it in a manner that is attuned to alternative implications and to probe more deeply when information of concern emerges.

9.147 At the general operational level, the Committee also considers that more should be done to embed SOLAS obligations in the planning, orders and directives of ADF operations. The Committee has noted elsewhere in the report that international and legal obligations to protect safety of lives at sea constrained Operation Relex's mission of 'detecting, deterring and returning SIEVs', and that the Committee is impressed at the RAN's serious commitment to this imperative.¹²⁰ Nonetheless, the Committee has a degree of concern about the extent to which this imperative figured in the mission tasking of other arms of the government architecture supporting Operation Relex.

9.148 For instance, HQNORCOM informed the Committee that 'the priority intelligence focus within HQNORCOM was, and continues to be, the determination of when and where SIEVs will arrive in Australia's contiguous zone'.¹²¹ Although HQNORCOM also indicated that SOLAS-related information was incorporated in intelligence reports where relevant,¹²² a question remains in the Committee's mind

120 See chapter 2.

121 Answers to Questions on Notice, ADF, 20 September 2002, W66.

122 Answers to Questions on Notice, ADF, 20 September 2002, W67.

over the *degree* of priority intelligence officers and other decision makers attached to these considerations in relation to the primary focus of detection and deterrence.

9.149 In view of the whole-of-government context in which Operation Relex fitted, the Committee is also concerned that the paramountcy of SOLAS imperatives may not be as well recognised or imbued among non-military personnel as they are among the ADF. One example illustrates the basis for the Committee's concern. As noted elsewhere, an unusual feature of the SIEV 4 crisis was the intervention by Mr Moore-Wilton, the Secretary of PM & C, in the Navy's handling of boat's rescued passengers. According to Admiral Barrie, Mr Moore-Wilton attempted to direct the Navy to keep all those rescued on board the HMAS *Adelaide*. In Admiral Barrie's words:

On the night of Monday, 8 October COMAST telephoned me to advise that SIEV4 was sinking, life rafts from HMAS *Adelaide* were in the water and there was an operational emergency. Over 200 people would need to be rescued from the water. I was also advised that the Commanding Officer of *Adelaide* had called for urgent assistance from Christmas Island. Shortly thereafter I had a telephone conversation with Mr Max Moore-Wilton, secretary to the Department of Prime Minister and Cabinet. He told me to make sure that everyone rescued went on board HMAS *Adelaide*. I said to him that we could not guarantee that and safety of life was to be the paramount consideration. In this emergency, if people had to be rescued and landed at Christmas Island that would have to happen.¹²³

9.150 Admiral Barrie informed the Committee that the exchange between he and Mr Moore-Wilton was 'heated', indicating the degree of tension in not only the discussion between the two but also between the SOLAS commitment of the Navy and the apparent expedience of Mr Moore-Wilton's demand.

9.151 In the Committee's view, this case is disturbing not only as an example of a high-ranking bureaucrat attempting to encroach on the chain of command during an operation, but also because it highlights the risk of SOLAS considerations being subverted by external agendas in joint civilian-military operations.

9.152 The Committee believes that international and legal safety obligations should be given prominence in all mission tasking orders for ADF operations. Obligations such as those of a SOLAS nature are especially important in law enforcement operations involving non-combatants. The Committee notes the forecast of Admiral Barrie that the ADF will be increasingly asked to execute this style of essentially civilian operation in concert with civilian agencies.¹²⁴ It is crucial that civilian and uniformed personnel engaged in such operations are reminded of the safety of life obligations that all Australian government agencies and personnel are required to fulfil. To promote awareness of these obligations, operational orders should refer to

123 *Transcript of Evidence*, CMI 741.

124 *Transcript of Evidence*, CMI 747.

them explicitly in writing and accord them the priority required under international and domestic law.

9.153 It is accepted that senior commanders have good reason to assume that amongst their personnel SOLAS obligations can be taken as read. However, the Committee considers it to be prudent that such obligations are codified in operational concepts and orders.

Recommendation

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

Chapter 10

Pacific Solution: Negotiations and Agreements

‘We are currently exploring a number of offshore sites. An assessment team has gone to Kiribati today but will be unlikely to report in under a week given transit times. We have had some interest from Palau who have sought further information but again this will be unlikely to generate any options in the short term. Fiji also remains an option...’¹

Introduction

10.1 When the Prime Minister announced² on 1 September 2001 that an agreement had been reached that all of the people rescued by the *MV Tampa* would be processed in third countries rather than in Australia or Australian territories, it marked a substantial shift in Australia’s arrangements for the reception of asylum seekers arriving by boat.

10.2 The issue of ‘boat people’ is one about which many Australians hold strong views. The idea that Australia may have international protection obligations to people who arrive uninvited and without authorisation is often challenging and unwelcome.³ Boat arrivals are seen as ‘breaking the rules’ and ‘jumping the queue’, or as not being genuine refugees, even though the Department of Immigration and Multicultural and Indigenous Affairs’ own figures show that a significant proportion are subsequently found to be genuinely in need of protection.⁴

10.3 The number of people who arrive in Australia without authority is small both in international terms and compared to the number of visa overstayers.⁵ However, various factors conspired in 2001 to fuel a fear of a greater influx. These included a recent rise in the number of unauthorised boat arrivals (from 921 in 1998/99 to 4175 in 1999/00 and 4137 in 2000/01⁶), reports of several thousand more asylum seekers waiting in Indonesia to make the trip and a view that Australia was being targeted by

1 Department of Prime Minister and Cabinet, *Options for Handling Unauthorised Boat Arrivals: Christmas Island*, 7 October 2001, p.4.

2 Transcript of the Prime Minister the Hon John Howard MP Joint Press Conference with the Minister for Immigration the Hon Philip Ruddock MP, Sydney, 1 September 2001.

3 Mary Crock and Ben Saul, *Future Seekers: refugees and the law in Australia* (Sydney, Federation Press, 2002), p.10.

4 *Boat Arrival Details*, Fact Sheet No.74a, Department of Immigration and Multicultural and Indigenous Affairs, Revised 1 August 2002.

5 Mary Crock and Ben Saul, *Future Seekers: refugees and the law in Australia*, p.23.

6 *Unauthorised Arrivals by Air and Sea*, Fact Sheet No.74, Department of Immigration and Multicultural and Indigenous Affairs, Revised 22 July 2002.

organised people smugglers because our refugee determination outcomes were overly generous.⁷

10.4 The timing of the *Tampa* incident in the lead up to the Federal election provided an opportunity for a hardline political response which reflected popular sentiment. The terrorist attacks in the USA on 11 September further fed fears concerning unauthorised boat arrivals, many of whom were Muslims from Iraq or Afghanistan, through a loose linking of the asylum seeker issue with national security concerns.⁸

10.5 The *Tampa* incident was presented by the Government as a metaphor for the threat posed by unauthorised arrivals to Australia's right to control its borders.⁹ In a move which was well received in the polls,¹⁰ the government initially refused permission for the vessel to enter Australian territorial waters, and when this instruction was not complied with sent SAS troops to take control of the vessel.

10.6 On 29 August 2001 the Prime Minister told Parliament:

It remains our very strong determination not to allow this vessel or its occupants, save and excepting humanitarian circumstances clearly demonstrated, to land in Australia...¹¹

10.7 The impasse between the Captain of the *Tampa* and the Australian Government was resolved when Australia reached an agreement with Nauru and New Zealand to take all of the people aboard the vessel for initial processing.

10.8 New Zealand indicated that those amongst the up to 150 people it had offered to accept who were assessed as being refugees would be allowed to remain in that country.¹²

10.9 The arrangement with Nauru was substantially different. Australia would establish and operate a processing centre on the island, and provide additional development aid to Nauru as part of the arrangement. Those assessed as refugees on Nauru would have to seek resettlement in Australia or other countries.

10.10 On 10 October 2001, the Prime Minister made a further announcement that the Government of Papua New Guinea had also agreed to establish a processing centre for unauthorised boat arrivals.¹³

7 Philip Ruddock, MP, House of Representatives, *Hansard*, 20 September 2001, pp.31188

8 Scott Bennett, Gerard Newman and Andrew Kopras, *Commonwealth Election 2001*, Research Paper No.11 2001-02, Department of the Parliamentary Library, 19 March 2002, p.10.

9 John Howard, MP, House of Representatives, *Hansard*, 29 August 2001, p.30570.

10 Scott Bennett, Gerard Newman and Andrew Kopras, p.6.

11 John Howard, MP, House of Representatives, *Hansard*, 29 August 2001, p.30517.

12 Prime Minister of Australia, *MV Tampa – Unauthorised Arrivals*, Media Release, 1 September 2001.

10.11 The agreements reached between Australia and Nauru and Papua New Guinea (PNG) were the outcomes of a suite of negotiations with Pacific nations undertaken in an effort to ensure that unauthorised boat arrivals were not taken to Australia for processing. In this chapter the committee outlines the nature of those approaches and the agreements reached in relation to the so-called Pacific Solution.

Initial Approaches

10.12 In the initial deliberations concerning options for offshore processing sites East Timor was considered as a possible trans-shipment point or temporary processing centre.¹⁴ Approaches, which coincided with the election period in East Timor, were made to the UN administration and to East Timorese leaders. The East Timorese leadership was quoted expressing a willingness to assist Australia,¹⁵ however there were substantial concerns over the capacity of the new nation and the UN administration was not supportive of the proposal.

10.13 By 31 August 2001, the same day as he approached President Harris of Nauru, the Minister for Foreign Affairs was acknowledging that processing in East Timor was unlikely.¹⁶

10.14 The notes of the People Smuggling Taskforce show that other offshore sites continued to be investigated during September and October, although locations have been deleted in the version provided to the Committee ‘because its publication could reasonably be expected to cause damage to defence or international relations’.¹⁷

10.15 The Department of Foreign Affairs and Trade has advised the Committee that formal consultations were held with Kiribati, Fiji and Palau, and ‘informal soundings’ were taken of officials of the governments of Tuvalu, Tonga and France (in relation to French Polynesia).¹⁸

10.16 The Minister for Foreign Affairs made public statements in September that discussions were being held with President Tito of Kiribati about the possibility of using one of Kiribati’s islands as a processing site.¹⁹ In October President Tito is reported as saying:

13 Prime Minister of Australia, *Arrangement with Papua New Guinea to Process Unauthorised Arrivals*, Media Release, 10 October 2001.

14 *The Prime Minister is happy about the deal with Nauru and New Zealand to take the people from the ‘Tampa’*, Transcript, The Insiders, ABC, 2 September 2001.

15 Mark Dodd, ‘We’ll Take Them, East Timor Says’, *The Age*, 1 September 2001.

16 Minister for Foreign Affairs, Doorstop Interview, Adelaide, 31 August 2001.

17 Correspondence to the Committee from Mr Jeff Whalan, Department of Prime Minister and Cabinet, 6 June 2002.

18 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 2 August 2002, Q1.

19 *Minister discusses terrorism; and the asylum seekers on the ‘Manoora’*, Transcript, Sunday program, Channel 9, 23 September 2001.

When Australia was already asking Kiribati whether there was a possibility of our helping, it naturally occurred to me that if Nauru was in a position to provide some help to Australia with only one island, I thought Kiribati logically should be in a better position to provide some help. It was in response to what we considered to be a need, a genuine need of a good friend of Kiribati reaching out to a good friend in the Pacific.²⁰

10.17 On 7 October an inspection team of Australian officials departed for Kiribati.²¹ Kanton Island, in the Phoenix group of islands, was under consideration as a potential location but presented considerable logistical difficulties.²² Kanton is very isolated and without regular shipping or air services and no arrangement with Kiribati was proceeded with. By this time the community of Kiribati was also expressing some concern at being involved with people from Afghanistan.²³

10.18 Australia also approached the small island states of Palau and Tuvalu. Initial discussions were held with Palau in October, and it was visited in late November or early December by an Australian delegation looking at possible processing centre sites.²⁴

10.19 In their evidence to the inquiry, Oxfam Community Aid abroad indicated that the Secretary to the Government of Tuvalu, Mr Panapa Nelson, had stated that his country received a verbal request from Canberra to process asylum seekers, but no official approach followed.²⁵

10.20 An approach by Australia to Fiji in October was the subject of considerable discussion, much of it critical, within Fiji itself. Strong opposition came from many quarters including the Great Council of Chiefs and the Fiji Muslim League.²⁶

10.21 Fiji's Labor Party leader, Mr Mahendra Chaudry, has been quoted as describing the offer of money to the country in return for hosting a detention centre as 'a shameful display of cheque book diplomacy' and as 'tantamount to offering a

20 Submission 17, *Adrift in the Pacific; the implications of Australia's Pacific refugee solution*, Oxfam Community Aid Abroad (February 2002) p20.

21 *Options for Handling Unauthorised Boat Arrivals: Christmas Island*, p.4.

22 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 2 August 2002, Q1.

23 Submission 17, *Adrift in the Pacific*, p.20.

24 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade, 6 June 2002 p.398.

25 Submission 17, *Adrift in the Pacific*, p.21.

26 Derek Ingram, 'Commonwealth Update', *The Round Table* 364 (2002), p.150.

bribe'.²⁷ Mr Downer noted the widespread debate that the approach had created, and withdrew the request in December.²⁸

10.22 The opposition within Fiji was characteristic of concerns expressed by others within the region that Australia was using its economic power to further its domestic policy agenda by exporting its problems to its poorer neighbours.²⁹ Mr Noel Levi, Secretary General of the Pacific Islands Forum Secretariat, expressed serious reservations over the impact of the Australian government's refugee policy. In October 2001 he said:

The emerging refugees market in the region where Forum Island Countries lease out their territories for quarantine and processing services carries unknown risks. Yet it is evolving rapidly without the necessary legal and policy framework to ensure its proper and equitable regulation. Such a substantial population influx places extreme pressure on our already very limited resources, exposing our small and vulnerable economies to further social and economic problems which we can ill afford.³⁰

10.23 This sentiment was reiterated in a Joint Statement by the Pacific Council of Churches and a number of Pacific non-government organisations, on 26 October 2001:

We also appeal to Pacific Island Governments to carefully consider the long-term impact and consequences of accepting Australian aid deals in connection to the refugees. To welcome and accommodate Australian refugees for the sake of money will add more problems and will have adverse impacts on our communal life as Pacific communities, as well as our sovereignty.³¹

The Agreement with Nauru

10.24 On 31 August, the Minister for Foreign Affairs, the Hon Alexander Downer MP, approached President Rene Harris of Nauru to consider the possibility of hosting a facility on Nauru for processing asylum seekers. On 1 September 2001 President Harris announced that Nauru was interested in Australia's proposal.³²

10.25 On 2 September, an Australian delegation including representatives from the Department of Foreign Affairs and Trade, Department of Defence, Department of

27 Greg Fry, 'The "Pacific Solution"', *Refugees and the Myth of a Borderless World*, (Australian National University, 2002) p.26.

28 Minister for Foreign Affairs, *Fiji Visit*, Media Release, 12 December 2001.

29 Submission 18.

30 Quoted in *Adrift in the Pacific*, p.22.

31 *Refugees in the Pacific*, Joint Statement by the Pacific Council of Churches, Pacific Desk of the World Council of Churches, Pacific Association of Non-Government Organisations and others, 26 October 2001.

32 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

Immigration and Multicultural and Indigenous Affairs, and the Australian Federal Police arrived in Nauru. The Australian officials conducted a number of meetings with Nauruan government members and senior officials between 2 and 7 September to negotiate issues concerning the establishment and operation of the processing centres, and Nauru's economic and development assistance priorities.³³

10.26 The then Minister for Defence, Mr Reith, arrived in Nauru on 9 September to conclude negotiations and a 13 point Statement of Principles and First Administrative Arrangement (FAA) was signed by President Harris and Mr Reith on 10 September 2001.

10.27 The First Administrative Arrangement committed Australia to:

- ensure fuel supplies for power generation on Nauru to 1 May 2002;
- organise the replacement of some generation equipment;
- meet outstanding Australian hospital accounts to approximately A\$1 million;
- double the number of educational scholarships offered by Australia;
- broaden its program of maritime surveillance to enhance coverage of Nauru's exclusive economic zone, although Defence subsequently advised that this matter could not be actioned until global commitments diminished;³⁴
- mitigate the temporary loss of the Topside Sports Oval by the provision of alternative sporting facilities and/or equipment, the gifting of infrastructure provided at the Topside Sports Oval to Nauru as permanent improvement to the site, and the provision of sports scholarships over and above those already provided; and
- review 'options to provide advice or assistance on, but not limited to, telecommunications and aviation infrastructure, the protection of economic resources and any other matters as jointly determined through administrative arrangements'.³⁵

10.28 Nauru undertook to accept those persons at that time on the HMAS *Manoora*, not including those to go to New Zealand. Nauru also agreed to accept additional persons from time to time as mutually determined with Australia in the period to 1 May 2002, with further Australian funding also to be determined.

33 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

34 *Summary of Progress against the First Administrative Arrangement as at 11 December 2002*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 2 August 2002.

35 *First Administrative Arrangement*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

10.29 Under the First Administrative Arrangement an additional \$16.5 million was allocated in development assistance to Nauru including power and water generation, education and health.³⁶

10.30 AusAID estimated the breakup of aid funding under the FAA as fuel \$9.50 million, power and desalination \$4.70 million, in-Australia hospital bills \$1.06 million, aviation \$150,000, kit homes \$110,000, educational scholarships \$100,000, sporting facilities and scholarships \$60,000, telecommunications \$50,000, economic reforms \$70,000, and Departmental administrative expenses \$700,000.³⁷

10.31 The Statement of Principles and First Administrative Arrangement was terminated by the signing on 11 December 2001 of a Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues (MOU).³⁸ President Harris and the Minister for Foreign Affairs, Mr Downer, signed the MOU.

10.32 The terms of the MOU were negotiated by an Australian delegation from the Departments of Foreign Affairs and Trade, AusAID and Immigration and Multicultural and Indigenous Affairs between 4 and 6 December 2001.

10.33 Under the MOU, Nauru agreed to accept 'certain persons' on behalf of Australia 'with the understanding that each individual will be processed within six months of their arrival in Nauru, or as short a time as is reasonably necessary for the implementation of this Memorandum.'³⁹

10.34 The MOU includes the commitment that Australia will ensure that all persons will depart within this six month period, or 'as short a time as is reasonably necessary for the implementation of this Memorandum', with no person to be left behind in Nauru.

10.35 The MOU provides for a maximum of 1,200 people to be accommodated at two sites, known as Topside and Former State House. As of 12 June 2002 long-term lease arrangements for the sites had not been signed.⁴⁰

10.36 Under the MOU Australia fully finances the activities in Nauru and agrees to reasonably compensate Nauru for its assistance and any losses it incurs.

36 *Portfolio Additional Estimates Statements 2001-02*, Foreign Affairs and Trade Portfolio, p83.

37 AusAID Answers to Questions on Notice, Estimates, Senate Foreign Affairs Defence and Trade, 20 February 2002, Q5(iii).

38 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

39 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia*.

40 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q3.

10.37 Australia also agreed to work with Nauru and multilateral partners, including the United Nations and Asian Development Bank, to develop a medium-term sustainable development strategy for Nauru, with an estimated completion date of mid-2002.⁴¹ Specific priority activities in support of the strategy, above and beyond commitments in the Statement of First Principles and Administrative Arrangement, were estimated to cost A\$10 million. The A\$10 million figure comprised \$4.5 million for health services including \$1 million for outstanding Australian medical bills, \$3.45 million for education, \$1 million for waste management infrastructure, \$200,000 for water tank repairs, \$150,000 for police training, and \$700,000 for technical assistance across a range of activities,⁴² including \$200,000 for training of media staff.⁴³

10.38 Australia's commitment to Nauru for extra development assistance under the FAA and MOU totals \$26.5m.⁴⁴ \$19.5m was allocated for 2001-2002⁴⁵ and \$7 million in 2002-2003.⁴⁶

10.39 The MOU continues until terminated by either party, with the understanding that the parties 'will attempt to mutually determine the date of termination in order to allow orderly termination of activities'.⁴⁷

10.40 The approach to Nauru and subsequent agreements have not been without criticism, with a perception that Australia was taking advantage of the desperate state of the Nauruan economy, and in the process undermining its own regional aid priorities of good governance, sustainable development and poverty alleviation.

10.41 Nauru, with a surface area of 21 sq km and a population of just 12,000, has serious cash flow problems, an economy dependent on declining phosphate reserves, and a political system plagued by instability, with nine changes of government since 1996.⁴⁸

10.42 Statistics on the Nauruan economy are scarce. However, according to the Asian Development Bank, the medium-term outlook for the economy is weak. Per capita income is estimated to have fallen from A\$9,000 in fiscal year 1988 to around

41 *Schedule to the Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 2 August 2002, p.1.

42 Minister for Foreign Affairs, Media Release, 11 December 2001.

43 *Schedule to the Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation*, p.3.

44 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

45 *Portfolio Additional Estimates Statements 2001-02, Foreign Affairs and Trade Portfolio*, p83.

46 *Portfolio Budget Statements 2002-03, Foreign Affairs Defence and Trade Portfolio*, p130.

47 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002. P.6.

48 *Republic of Nauru Country Brief*, Department of Foreign Affairs and Trade.

A\$4,600 in fiscal year 1998. The provision of basic public services is regularly disrupted and is at serious risk over the medium term.⁴⁹ The country is also one of 15 jurisdictions named in June 2000 by the Financial Action Task Force on Money Laundering as having serious systematic problems in regard to money laundering,⁵⁰ and continues to have problems in this regard.⁵¹

10.43 Nauruan Member of Parliament, Mr Anthony Audoa, expressed his concern about the Australian offer:

I don't know what is behind the mentality of the Australian leaders but I don't think it is right. A country that is desperate with its economy, and you try to dangle a carrot in front of them, of course, just like a prostitute...if you dangle money in front of her, you think she will not accept it. Of course she will, because she's desperate.⁵²

10.44 There have been also been concerns expressed in Nauru over the impact of the establishment of the detention facility in terms of the provision of basic services for the Nauruan community, particularly potable water which is a scarce commodity.⁵³ The Presidential Counsel and the Senior Medical Officer in Nauru reportedly received letters of suspension without pay from their positions as public servants after they expressed such concerns.⁵⁴

The Agreement with Papua New Guinea

10.45 The Secretary of the Department of the Prime Minister and Cabinet, Mr Max Moore-Wilton, raised the possibility of Papua New Guinea hosting an offshore asylum claims processing facility in a meeting with PNG's Chief Secretary, Mr Robert Igara, in Sydney on the morning of 8 October 2001. Present at the meeting were Mr Michael Potts, First Assistant Secretary, Department of the Prime Minister and Cabinet, Mr Nicholas Warner, Australian High Commissioner to Papua New Guinea, Dr Allan Hawke, Secretary of the Department of Defence, and Mr Ken Baxter, Treasury Adviser to the Papua New Guinea government.⁵⁵

49 Asian Development Bank, *Asian Development Outlook 2002* (Oxford University Press, 2002).

50 Dr George Gilligan, 'International Trends in the Regulation of the Financial Services Sector', *Australian Journal of Corporate Law* 14 (2002), p.66.

51 *Transcript*, Joint Standing Committee on Foreign Affairs, Defence and Trade, 21 May 2002, p.82.

52 Quoted in *Adrift in the Pacific*, p.23.

53 Submission23, p.5.

54 *Transcript of Evidence*, CMI 1399.

55 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

10.46 The 8 October meeting also addressed the first tranche of Australian assistance for the reform of the Papua New Guinea Defence Force, totalling \$20 million.⁵⁶

10.47 The timing of the meeting is significant in that the 'caretaker conventions' relating to the forthcoming election came into effect at midday 8 October. Mr Potts⁵⁷ and Dr Hawke⁵⁸ have indicated that the meeting concluded at approximately 11.30am, just short of the caretaker convention period during which it would have been necessary to consult the Opposition concerning such a substantial new policy initiative.

10.48 The Committee concedes the strict legitimacy of the decision in terms of its occurring prior to the 12 noon deadline. The perception, however, that it was contrived so as to avoid the inconvenience of consultation is not easily set aside.

10.49 The terms of a Memorandum of Understanding between Australia and Papua New Guinea establishing an asylum seeker processing centre in PNG were negotiated in meetings between PNG and Australian officials in Port Moresby on 9 and 10 October.⁵⁹

10.50 The MOU was signed by Australia's High Commissioner to Papua New Guinea, Mr Nicholas Warner, and Papua New Guinea's Secretary of the Department of Foreign Affairs, Mr Evoa Lalatute, on 11 October.

10.51 The objective of the MOU is stated as:

The parties agree that combating people smuggling and illegal migration in the Asia-Pacific region is a shared objective. The establishment of an immigration processing centre as a visible deterrent to people smugglers will enable joint co-operation, including the development of enhanced capacity in Papua New Guinea, to address these issues.⁶⁰

10.52 Australia bears all costs of establishing and operating the immigration processing centre. A trust fund of A\$1 million for the purpose is jointly administered, and replenished by Australia as required. The trust fund is funded by the Department of Immigration and Multicultural and Indigenous Affairs and funds are released on the

56 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade, 3 June 2002 pp.20.

57 *Transcript of Evidence*, Estimates, Senate Finance and Public Administration, 28 May 2002, p.140.

58 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade, 3 June 2002 pp25.

59 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

60 *Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

joint authority of the Papua New Guinea Secretary of Foreign Affairs, the PNG Secretary of Finance, and the Australian High Commissioner.⁶¹

10.53 The offshore processing centre was established on 21 October 2001 and is located in the Lombrum Naval Patrol Boat Base on Los Negros Island, Manus Province.⁶² The facility is commonly referred to as the Manus Island centre.

10.54 There is no additional development aid provided to PNG under the MOU, and in this respect it differs from the arrangement reached with Nauru. However the PNG Minister for Foreign Affairs, Hon Professor John Waiko, noted in February 2002 that the establishment of the facility had 'resulted in the fast tracking of important AusAid projects for Manus, such as the Papitalia High School, Police Housing and upgrading of the Momote airport.'⁶³

10.55 The establishment of the centre has also required the upgrading of infrastructure on the island, including electricity, sewerage and water systems, and improvements have been made to the base hospital and PNG Defence Force Buildings. The camp has also become a major source of local employment.⁶⁴

10.56 The MOU also committed Australia to support PNG, through advice and technical and financial assistance, in its management of nationals from third countries who are illegally entering the country. The Manus centre will be returned to the PNG government in a condition that would enable a similar use in future if required.

10.57 Under the MOU, the Government of Papua New Guinea permitted entry to the 223 persons taken on board HMAS *Adelaide* on 8 October 2001, and two persons taken on board HMAS *Bendigo* on 10 October 2001, to enable processing in accordance with the arrangement. Extension of the agreement to additional persons was possible by joint agreement.

10.58 It was initially agreed that all persons entering Papua New Guinea under the agreement would have left after six months of entering PNG, or as short a time as was reasonably necessary for the implementation of the MOU.⁶⁵

61 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

62 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.32.

63 *Papua New Guinea and Australian Ministers Discuss Issues Concerning Boat People*, Minister for Immigration and Multicultural and Indigenous Affairs Joint Statement with the Hon Prof John D Waiko, PNG Minister for Foreign Affairs, 3 February 2002.

64 Submission 23, p.6.

65 *Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, Relating to the Processing of Certain Persons, and Related Issues*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

10.59 On 18 January 2002, Minister Downer announced that the Government of Papua New Guinea had agreed to an expansion of the asylum seeker processing facility operating at Lombrum to accommodate up to 1,000 people, and to permit persons processed in the centre to stay in Papua New Guinea for up to 12 months.⁶⁶

10.60 An earlier October 2001 request to expand the capacity of the centre to 1,000, and extend the length of the agreement, had been rejected by Foreign Affairs Minister John Pundari. In their submission to the Committee, Oxfam Community Aid Abroad stated that Sir Mekere Morauta sacked Minister Pundari on 26 October for publicly leaking and rejecting Australia's request.⁶⁷

10.61 The Memorandum of Understanding between Australia and Papua New Guinea concludes on 21 October 2002,⁶⁸ and negotiations are reportedly underway to extend the agreement.⁶⁹

Lawfulness

10.62 The Memoranda of Understanding entered into with Papua New Guinea and Nauru oblige both countries to conduct all activities under the MOU arrangements in accordance with their own constitutions and relevant laws.

10.63 In evidence to the Committee, DIMIA advised that the governments of both Nauru and Papua New Guinea have issued temporary entry permits which provide for the legal entry of the asylum seekers into those countries.

The entry permits provide certain conditions which essentially means that the person has to be available for processing during the time that they are in the countries and that means that they are to remain within the sites of the processing centres that have been established. In a legal sense, the entry permits provide for a legal status while they are in the country and ensures that they are available for processing and they remain within the address of the processing centre.⁷⁰

10.64 Submissions to the inquiry have argued that the status of the asylum seekers in Nauru is in breach of Article 5 of that country's Constitution. The group Australian Lawyers for Human Rights contend that:

The asylum seekers are being detained in apparent breach of Nauru's Constitution, which provides that there shall be no detention without trial except on the basis of public health concerns, unlawful entry into Nauru and

66 The Hon. Alexander Downer MP, Minister for Foreign Affairs, Media Release, 17 January 2002.

67 Submission 17, *Adrift in the Pacific*, p.24.

68 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

69 Mark Forbes and Sophie Douez, 'New Deal for Manus', *The Age*, 3 October 2002.

70 *Transcript of Evidence*, CMI, 812.

for deportation, and allows for the right to be informed of reason for detention and of choice of a legal representative.⁷¹

10.65 Similar concerns have been expressed in regard to the lawfulness of the arrangements in PNG.⁷² The Committee notes DIMIA's advice that the requirement that the asylum seekers remain within the processing centres is, in the context of the immigration legislation that is being applied by Nauru and Papua New Guinea, not legally defined formally as detention.⁷³ The Committee, however, is not in a position to provide an opinion on Nauruan or PNG law in this regard.

10.66 Other concerns about the lawfulness of the agreements draw on the 1951 Refugee Convention and related Executive Committee of the United Nations High Commissioner for Refugees (EXCOM) Conclusions, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷⁴ Arguments put forward in relation to the broader mandatory detention policy are beyond the scope of this report.

10.67 The primary source of Australia's international obligations to refugees is the 1951 Convention Relating to the Status of Refugees and the subsequent 1967 Protocol. By signing and ratifying both instruments Australia has assumed certain obligations to those who come within the Convention definition of refugee.⁷⁵ The right to seek asylum and enjoy asylum from persecution is set out in the Universal Declaration on Human Rights, Article 14 (1).

10.68 The core obligation under the Refugee Convention is one of non-refoulement, or not returning refugees to a territory where they could face persecution, or the threat of persecution, on one of the five refugee grounds: race, religion, nationality, membership of a particular social group or political opinion. The obligation does not extend to a refugee whom there are reasonable grounds for regarding as a danger to national security, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.⁷⁶

10.69 The Executive Committee of the UNHCR has concluded that non-refoulement also includes an obligation not to reject a refugee at the frontier (EXCOM Conclusion

71 Submission 19.

72 Submission 23.

73 *Transcript of Evidence*, CMI 812.

74 Submission 25.

75 *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, Senate Legal and Constitutional References Committee (June 2000) p.42.

76 1951 Convention Relating to the Status of Refugees, UNHCR, Article 33(2).

22). States which are not prepared to grant asylum must adopt a course which does not amount to refoulement.⁷⁷

10.70 In evidence to the Committee, Amnesty International argued that Australia's actions under the Pacific Solution breach non-rejection at the frontier, inappropriately apply the 'safe third country' doctrine, and breach Article 31 of the Convention that a state shall not impose penalties for illegal entry.⁷⁸

10.71 In a submission to the Senate Legal and Constitutional Reference Committee's Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, the UNHCR stated that international law does not seem to bar a country from negotiating with another country the admission of asylum seekers for asylum purposes, including but not confined to the processing of asylum requests.⁷⁹ However, the submission further notes that in such circumstances the right to protection from refoulement from third countries must be addressed in an admission agreement.

10.72 The UNHCR also raises issues concerning the ongoing detention of persons recognised as refugees, which is held to be a restriction of freedom of movement in breach of Article 26 of the 1951 Convention, and inconsistent with Article 31(2).⁸⁰

10.73 The *Migration Legislation Amendment (Excision from the Migration Zone) (Consequential Provisions) Act 2001* establishes the basis for the Pacific Solution by inserting an amendment into the *Migration Act 1958* allowing 'offshore entry persons' to be taken to declared countries.

10.74 A declared country is one which the Minister declares in writing:

- provides access to effective procedures for assessing the refugee status of persons;
- provides protection to these persons pending determination of their refugee status;
- provides protection to refugees pending voluntary return to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.

77 Ernst Willheim, 'MV Tampa: the Australian response', presented at *Global Migrations/Domestic Reactions: A Comparative Constitutional Perspective*, Oxford, May 2002. p.12.

78 *Transcript of evidence*, CMI 1456.

79 *Submission No. 30*, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.6.

80 *Submission No. 30*, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.8.

It is not a requirement that the declared country be a signatory to the 1951 Refugee Convention or 1967 Protocol.⁸¹

10.75 Both Nauru and Papua New Guinea are declared countries under the Act. Nauru is not a signatory to the Refugee Convention. Papua New Guinea is a party but does not accept a number of Convention obligations in respect to paid employment, housing, public education, freedom of movement, non-discrimination against refugees who enter illegally, expulsion and naturalisation.⁸²

10.76 Removing asylum seekers to a safe third country where refugee status processes are available is not, in the Committee's view, a formal breach of the obligations conferred by the Convention, although it is arguably contrary to its humanitarian spirit.

10.77 Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment also contains a non-refoulement provision. As a party to the convention Australia is obligated not to return a person to a State where there are substantial grounds for believing that he or she would be in danger of being subject to torture.⁸³

10.78 The torture convention non-refoulement obligation is not confined to persons found to be refugees. It is not clear to the Committee the extent to which processes employed by the UNHCR and Australian officials on Nauru and Manus give due weight to this obligation for persons not determined to be refugees, although evidence given by DIMIA to the Senate Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 indicates that the need for protection under other conventions, including the Convention against Torture, is considered in their review process.⁸⁴

10.79 A further relevant convention to which Australia is a party is the Convention on the Rights of the Child. Article 22 explicitly extends to asylum seeker children the obligations under the refugee and human rights conventions, and also imposes a number of more specific obligations in respect to children. In particular, the best interests of the child must be a primary consideration, unaccompanied asylum seeker children must be afforded special protection and assurance, and no child shall be deprived of his or her liberty unlawfully or arbitrarily.

81 Dy Spooner and Nathan Hancock, Bills Digest No. 70, Department of the Parliamentary Library, 2001.

82 Mary Crock and Ben Saul (Sydney, Federation Press, 2002), p.49.

83 Ernst Willheim, '*MV Tampa: the Australian response*', p.12.

84 *Transcript of Evidence*, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.11.

Number of Asylum Seekers

10.80 As of 16 April 2001, a total of 1511⁸⁵ people were accommodated in the PNG and Nauru centres, down from the original total of 1515.⁸⁶ One thousand one hundred and fifty five people were being housed on Nauru, of whom 525 were being processed by the UNHCR. Table 10.1 provides further details. As of 1 October 2002, 1062 people remained in the offshore processing centres, comprising 960 people remaining on Nauru and 102 on Manus.⁸⁷

Operational Arrangements

10.81 The International Organisation for Migration (IOM) provides reception and processing centre services, including management of accommodation, on both Nauru and Manus under a service agreement with the Department of Immigration and Multicultural and Indigenous Affairs.⁸⁸ The IOM is a leading international organisation of member states which works with migrants and governments on a variety of migration issues worldwide.

10.82 The IOM provides staff to manage the facilities and sub-contracts other functions such as catering and security. Major contractors include Eurest Support Services, Chubb Security Pty Ltd in Nauru and Protect Security at Manus.⁸⁹ Other tasks, such as small construction work, are contracted locally.⁹⁰

10.83 Australian Protective Services (APS) staff provide 'the more active security within the centres in conjunction with the respective police forces'.⁹¹ For example, inside the Nauru processing centres the security is provided by Chubb, under contract to the IOM. Outside of the perimeter Nauruan constabulary and APS officers provide security at the entrance checkpoints.⁹² Public safety and security arrangements in regard to the Nauru centre are governed by a protocol between the Nauru police force, IOM, and the APS.⁹³

85 Tabled by DIMIA, CMI, 16/4/02.

86 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p546.

87 *Refugees Arrive in Australia from Manus*, Media Release DPS 77/2002, DIMIA, 1 October 2002.

88 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 22 February 2002, p.497.

89 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q5.

90 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p.553.

91 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p.551.

92 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 19 February 2002, pp.303.

93 *Public Safety and Security*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 2 August 2002.

Table 10.1⁹⁴
Numbers at Nauru and Manus
16 April 2002

Nauru			
	<i>Number</i>	<i>Gender and age</i>	<i>Claimed nationality</i>
UNHCR asylum claims process			
MV <i>Tampa</i> & SIEV 1	525	397 adult males 51 adult females 41 male minors 40 female minors	292 Afghans 203 Iraqis 25 Palestinians 1 Sri Lankan
Australian asylum claims process – Topside processing centre			
SIEV 2 & SIEV 3	271	151 adult males 51 adult females 34 male minors 35 female minors	133 Afghans 5 Iranians 131 Iraqis 1 Pakistani (claimed Afghan) 1 Palestinian
Australian asylum claims process – State House processing centre			
SIEV6, SIEV 9 & SIEV10	359	243 adult males 23 adult females 32 male minors 31 female minors 30 unaccompanied male minors	351 Afghans 8 Iranians
Total Nauru	1155		
Manus			
	<i>Number</i>	<i>Gender and age</i>	<i>Claimed nationality</i>
SIEV 4	216	96 adult males 46 adult females 38 minor males 36 minor females	213 Iraqis 1 Palestinian 2 Syrians
Transferred from Christmas Island 26-27 January	140	70 adult males 19 adult females 31 male minors 20 female minors	6 Bangladeshis 4 Iranians 117 Iraqis 2 Pakistanis 1 Palestinian 10 Turks
Total Manus	356		

10.84 Eighteen APS personnel⁹⁵ were stationed at the Nauru facility as of May 2002, increased from 9 in February 2002,⁹⁶ and a further 25 were on stand-by to go to the island. A smaller number of APS personnel are stationed at Manus, only one in

94 Tabled by DIMIA, CMI, 16/4/02.

95 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p660.

96 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 19 February 2002, p304.

February 2002. APS costs are met by the Department of Immigration and Multicultural and Indigenous Affairs.

Accommodation

10.85 Due to the short time frame for establishment of the asylum seeker processing facility on Nauru, the Australian Defence Force was deployed in the construction of the facility and provided substantial engineering and air transport assistance. An ADF team numbering 81 personnel at its peak was deployed to Nauru on 13 September 2001, and withdrew by 29 September.⁹⁷

10.86 The ADF team, which included an Army engineering element from 21 Construction Squadron, RAAF personnel and construction equipment, erected a temporary processing facility including accommodation, kitchen and common areas at the Topside site. A police detention centre was also refurbished for use as a temporary segregation facility if required.

10.87 The accommodation at Nauru initially consisted of 'long, barrack style accommodation. Some private accommodation has subsequently been provided.'⁹⁸ In an attachment to their submission to the inquiry, Oxfam Community Aid Abroad note that 'the asylum seekers were originally to be housed in modern air-conditioned housing built for the games of the International Weightlifting Federation, but landowners refused to allow the property to be used, after requests for extra compensation were rejected.'⁹⁹

10.88 Conditions at Nauru have been represented to the Committee as more difficult than either Australian detention centres, or the Manus facility. In this regard the Committee has been limited in its ability to assess conditions at both Nauru and Manus by the isolation of the centres, restrictions on access by third parties including NGOs, and a scarcity of eyewitness accounts. A number of submissions to the inquiry have mentioned restrictions on access and difficulty in obtaining visas, and lack of transparency is a commonly raised concern.¹⁰⁰

10.89 One submission to the Committee expressed these difficulties thus:

Caritas Australia's efforts to investigate conditions in Nauru and Manus Islands has revealed a fundamental fear of independent scrutiny. There appear to be no regular independent visitors to either place. There appears to be no source of independent legal advice available to detainees. Regulations

97 Answers to Questions on Notice, Department of Defence, W62.

98 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p.553.

99 Submission 17, *Adrift in the Pacific*, p.9.

100 *Transcript of Evidence*, CMI 1479; Submission 19; Submission 17; Submission 18; Submission 23; Submission 24.

adopted appear to be completely ad hoc and there is no clear source of authority.¹⁰¹

10.90 Mr John Hodges, Chairman of the Government's Immigration Detention Advisory Group, which examines conditions at mainland immigration processing and detention centres, was one witness before the Committee who had first hand experience of both Nauru and Manus. Mr Hodges visited the Nauru facilities privately at the request of the Minister for Immigration and Multicultural and Indigenous Affairs on 25 and 26 March 2002. In evidence before the Committee he said:

...there are some deficiencies on Nauru. The department know of them. They are moving to rectify some of those deficiencies. For instance, fresh water is a problem on Nauru. Their desalination plant breaks down. Their power breaks down too frequently. They are using a mixture of brackish water and fresh water. There is a plan—I do not know whether it is to be implemented; it was going to cost a lot of money—to supplement the freshwater supply with a further desalination plant. They have installed primary treatment for sewerage at the Topside camp in Nauru. Nauru is by far the worst of the detention centres; it is hot. Both camps are built on areas that have been extensively mined, many years ago, and the facilities are just not as good as they are in Australia.¹⁰²

10.91 Oxfam Community Aid Abroad also comment:

The Topside site was originally a bleak environment lacking water, sanitation or electricity. The asylum seekers are now housed in 'blocks', with a corrugated iron roof, sides of plastic sheeting and green nylon mesh. An independent visitor to the camp has noted: 'Conditions are harsh, with the heat and humidity consistently in the upper thirties and health facilities are basic.'¹⁰³

10.92 In contrast to the situation on Nauru, much of the accommodation at the PNG facility located at the Lombrum Naval Patrol Boat Base was in place prior to the establishment of the processing centre.¹⁰⁴ Accommodation consists of Nissen huts, previously used by naval personnel, supplemented with converted shipping containers.¹⁰⁵ According to DIMIA, facilities include separate ablution blocks for men and women, a separate dining area and sporting and recreational facilities.¹⁰⁶

101 Submission 23, p.4.

102 *Transcript of Evidence*, CMI p1411.

103 Submission 17, *Adrift in the Pacific*, p.9.

104 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p552.

105 Transcript of Joint Doorstop, Leader of the Opposition with Julia Gillard, Shadow Minister for Immigration and Population, Monash University Gippsland Campus, 5 February 2002.

106 *Offshore Processing Arrangements*, Fact Sheet No.76, Department of Immigration and Multicultural and Indigenous Affairs.

10.93 Mr John Hodges visited the Manus facility privately at the request of the Minister from 28 February to 2 March 2002. He described the accommodation as

...not as good as the accommodation that we have in Australia in the mainland detention centres, but it is adequate. They are very pleasant surroundings, because it has the water on one side and the jungle on the other. They are pleasant surroundings in that there is no barbed wire or razor wire.¹⁰⁷

This contrasts with the comments of Caritas Australia, which also visited Manus and describe it as 'tightly secured behind barbed wire.'¹⁰⁸

10.94 The Committee was unable to make any independent determination concerning conditions at the Manus Island facility, notwithstanding that it accommodated the passengers from SIEV 4. The Committee wrote to the SIEV 4 refugees at Manus Island, but they were unwilling to provide evidence to the Committee for fear of adversely affecting the outcome of their applications for refugee status.

10.95 The provisions of parliamentary privilege do not extend beyond the boundaries of Australia's jurisdiction, but the Committee sought from DIMIA a guarantee that anything said to the Committee by the SIEV 4 asylum seekers would not be taken into consideration for the purpose of assessing their refugee status.

10.96 DIMIA declared that no such guarantee could be given because third parties might bring to DIMIA's attention matters aired by people before the Committee, and that officials determining the outcomes of applications would be obliged to take these reports into account.

10.97 DIMIA's approach was challenged at some length during the appearance of DIMIA officials before the Committee.¹⁰⁹ The Committee considers it a matter of grave regret that DIMIA insisted on its view that it could not provide the necessary guarantee, thereby impeding the effective examination of important aspects of the Senate inquiry's remit.

Facilities

10.98 The IOM provides medical treatment facilities on both islands. As of July 2002, six general practitioners, two psychiatrists, four clinical nurses, a public health coordinator and three medical interpreters staffed the Nauru facility.¹¹⁰

107 *Transcript of Evidence*, CMI 1412.

108 *Submission No.23*. p4.

109 *Transcript of Evidence*, CMI 1985ff.

110 Correction to Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 15 July 2002.

10.99 At the Manus centre, DIMIA advised that the doctor to asylum seeker ratio was 1:85 as of 12 June 2002. At that time the medical staff comprised four international doctors (two of whom had tropical medical experience), a psychiatrist, and three medical support staff.¹¹¹

10.100 There have been some reports that when the first group of asylum seekers arrived at Manus the medical facilities were run down, and anti-malarial medication was not immediately provided.¹¹² In answers to questions on notice DIMIA have advised the Committee that all asylum seekers at Manus underwent health checks on arrival and commenced anti-malarial medication.

10.101 Several people in the first group of arrivals at Manus developed malaria symptoms soon after arrival but are believed to have contracted the disease prior to reaching PNG. Two more cases, however, were diagnosed in February 2002. The risk of infection appears to be a significant ongoing concern for both asylum seekers and staff. A range of measures have been introduced to reduce this risk, including improved drug regimes, personal insect repellent, fogging of the centre and enclosed accommodation.¹¹³ Malaria is not a risk on Nauru.¹¹⁴

10.102 The IOM has conducted a psychiatric review of mental health within the asylum seeker populations at the Manus and Nauru centres. DIMIA has advised that as a result of this assessment two minors were identified as being at risk and requiring special attention at Manus.¹¹⁵

10.103 At the Nauru facility, which in May 2002 accommodated 30 unaccompanied minors,¹¹⁶ a program for the adolescent population was implemented by a psychiatrist assigned by the IOM. DIMIA does not have reports of minors identified as requiring special attention on Nauru.¹¹⁷

10.104 DIMIA further advised the Committee that schooling, including English language tuition, is provided on a daily basis at both locations on Nauru with Nauruan teachers conducting 'rudimentary English, math and science classes'.¹¹⁸ At Manus, a

111 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q16.

112 Michael Madigan, *Herald Sun*, 7 February 2002 and Greg Roberts, *The Age*, 6 February 2002.

113 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q16.

114 *Transcript of evidence*, CMI 1412.

115 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q19.

116 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q17.

117 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q19.

118 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q18.

school is established and the IOM has contracted a teacher to provide lessons in both English and Arabic. English lessons and kindergarten are also provided. Satellite television is available on both islands, and there is a range of sporting and cultural activities.

10.105 While DIMIA advised the Committee that prayer and meditation activities are available daily on Manus, Caritas Australia raised a particular concern in relation to Christian services:

There is no source of religious service available to the detainees on Manus. The local priest has been turned away twice and there is no chaplain at the Naval base. Detainees have great need of religious guidance. The number of Christians is small (estimated at 20-30) and they are unable to participate in worship. Islamic religious guidance appears to be entirely a matter for the asylum seekers' own self-organisation.¹¹⁹

Conclusions

10.106 The development and initial implementation of the Pacific Solution policy was on the evidence undertaken in great haste and, while providing financial benefit to the islands involved, has projected a negative image of Australia in the region.

10.107 The Committee does not consider that the processing arrangements entered into are a formal breach of Australia's obligations under the 1951 Convention Relating to the Status of Refugees. However the Committee appreciates concerns raised in regard to other Conventions to which Australia is a party, including the International Convention against Torture and the Convention on the Rights of the Child, and in respect of the ongoing detention of people who have been found to be refugees.

10.108 In relation to conditions within the processing centres, the Committee accepts that early inadequacies caused by the short implementation pathway appear to have now been largely addressed, but notes the lack of independent oversight of the facilities as making a certain determination in this respect difficult. The issue of religious observance, particularly for minority religions within the centres, is one point potentially requiring attention. The ongoing risk of exposure to tropical diseases such as malaria on Manus is of continuing concern.

10.109 Common concerns raised in submissions to the inquiry have been a lack of transparency and accountability in Pacific Solution arrangements, uncertainty as to the future resettlement prospects for those determined to be refugees, and the fate of those determined not to be so.

10.110 In regard to the issue of transparency, the Committee notes that the directive to Departments by the Government that submissions not be provided to this Committee has potentially exacerbated that concern. It is hoped that the information

119 Submission 23, p.5.

outlined in this Chapter has been of some assistance in this regard. Refugee status determination and resettlement are considered in the next chapter.

Chapter 11

Pacific Solution: Outcomes and Cost

‘Australia will ensure that no persons are left behind in Nauru.’¹

Introduction

11.1 Legislative changes in September 2001 restructured the arrangements for the processing of asylum applications made by unauthorised boat arrivals. One effect of these changes was to limit the ability of ‘offshore entry persons’ to make valid visa applications.

11.2 The *Migration Amendment (Excision from Migration Zone) Act No. 127 2001* inserts into the *Migration Act 1958* a new definition of ‘excised offshore place’ and a related definition of an ‘offshore entry person’. Excised offshore places include Christmas Island and Ashmore Island. An offshore entry person cannot make a valid visa application if that person is in Australia and is an unlawful non-citizen, except where the Minister decides that it is in the public interest to allow them to do so.²

11.3 Provisions of the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act No. 128 2001* authorise the removal of offshore entry persons to ‘declared countries’ where their asylum claims can be processed. This Act also included a privative clause, preventing proceedings relating to offshore entry persons except proceedings brought in the original jurisdiction of the High Court.³

11.4 Both Nauru and Papua New Guinea are currently declared countries under Section 198A of the *Migration Act*,⁴ providing the legislative framework for the establishment of offshore processing centres in those countries.

11.5 Such offshore processing ensures that the asylum seekers have access to neither the *Migration Act* review procedures nor judicial review under Australian law.⁵

1 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues*, Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

2 Dy Spooner and Nathan Hancock, Bills Digest No. 69 2001-02, Department of the Parliamentary Library, 26 September 2001, pp.3.

3 Dy Spooner and Nathan Hancock, Bills Digest No. 70 2000-01, Department of the Parliamentary Library, 26 September 2001, p.2.

4 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia’s Relationship with Papua New Guinea and Other Pacific Island Countries, p.34.

11.6 As summed up by the Minister for Immigration and Multicultural and Indigenous Affairs, Mr Philip Ruddock, in foreshadowing the legislation:

What it means is there will be no basis upon which [people] will be able to land on Christmas Island and see it as a taxi rank to brought automatically to Australia, engage our protection obligations, have the opportunity to have their claims considered first by the department, second by the refugee review tribunal and then to enter into the judicial review process which they are doing right now.⁶

11.7 This chapter looks at the refugee status assessment processes in place in PNG and Nauru and the outcomes achieved so far. It also considers the cost of the arrangements.

Assessment of Refugee Status

11.8 Australia's protection obligations under the Refugee Convention extend to refugees who have entered Australia's territorial seas.⁷ These protection obligations do not, however, require the processing of claims in Australia, or by Australian officials.

11.9 Determination of asylum seeker claims on Nauru is being undertaken by officials from both Australia and the United Nations High Commissioner for Refugees (UNHCR). Processing on Manus is being undertaken entirely by Australian officials. Neither Nauru nor PNG has its own refugee status determination process in place, although Australia has implemented mechanisms to train Papua New Guinean officials in such matters.⁸

11.10 Nauru requested the assistance of the UNHCR on or about the time the first processing centre was established, and Australia undertook to meet all costs incurred by the UNHCR related to the processing of asylum claims.⁹

11.11 The UNHCR agreed to conduct processing of the group transported by the HMAS *Manoora* to Nauru.¹⁰ This includes those people rescued by the MV *Tampa*,

5 Ernst Willheim, 'MV *Tampa*: the Australian response', presented at *Global Migrations/Domestic Reactions: A Comparative Constitutional Perspective*, Headington Hill Hall, Oxford Brookes University, 24 May 2002. p.25.

6 *Boats, Christmas Island*, Transcript of Press Conference, Minister for Immigration and Multicultural and Indigenous Affairs, 10 September 2001.

7 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.33.

8 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.34.

9 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q4.

excepting those who were accepted for processing in New Zealand, as well as 237 people intercepted on the *Aceng* in the vicinity of Ashmore Reef. As of 16 April 2002, 525 people on Nauru were being processed by the UNHCR.¹¹

11.12 Subsequent groups transferred to Nauru and all of the people transferred to the Manus facility in PNG have been processed by Australian officials, with the UNHCR indicating that it would not be involved in the processing of any other groups.¹² The asylum seekers on Manus do not have access to the UNHCR, and the UNHCR regional representative has not had the opportunity to present his credentials to the PNG government.¹³ Forty two officers of the Department of Immigration and Multicultural and Indigenous Affairs had been involved in refugee status assessment on Nauru and Manus by May 2002.¹⁴

11.13 Unlike Nauru, Papua New Guinea is a signatory to the Refugee Convention, and would be obliged to consider providing protection to any person seeking asylum there. So far none of the people who are being processed on Manus have sought Papua New Guinea's protection.¹⁵

11.14 Australian officials have stated that they are adopting the UNHCR procedures and standards in the processing of asylum claims. In evidence to the Committee Mr Robert Illingworth, Assistant Secretary, Onshore Protection, DIMIA, advised that:

The processes that are adopted on Nauru by the UNHCR and by the Australian government are essentially the same processes. The Australian processing arrangements have been modelled very closely on the arrangements that the UNHCR follows in Nauru and elsewhere in the world, and we have liaised closely with the UNHCR in refining those arrangements to ensure that is the case.¹⁶

11.15 The determination process relies to large extent on information gained in interviews with claimants 'by a trained officer who actively explores all of the possible reasons that an individual may have for seeking refugee protection, discusses

10 Correspondence from United Nations High Commissioner for Refugees to Counsellor (Immigration), Permanent Mission of Australia to the United Nations Office in Geneva, 22 October 2001.

11 Tabled by DIMIA, CMI, 16/4/02.

12 *Transcript of Evidence*, CMI 812.

13 *Transcript of Evidence*, CMI 1477.

14 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q38.

15 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.34.

16 *Transcript of Evidence*, CMI 809.

country information as relevant with that person and discloses any issues that might need a response from the individual'.¹⁷

11.16 Training received by Australian case officers includes the 1951 Refugee Convention, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, principles of natural justice and Australian domestic legislation in relation to interpretation of the convention, although Australian jurisprudence does not apply.¹⁸

11.17 Asylum claimants receive advice about the determination process, but do not have access to assistance in putting together their claim.¹⁹ DIMIA gave evidence to the inquiry that access to legal or other assistance, if requested, would be a matter for the centre managers (IOM under contract to DIMIA) or the Nauru or PNG Governments.²⁰

11.18 The group Australian Lawyers for Human Rights advised the committee that they had sought to send a team of lawyers to Nauru to provide independent advice to those claiming refugee status, and that the proposal had in-principle support from the UNHCR. As of 10 July 2002 the proposal had not been proceeded with as the Nauruan Government had declined to issue visas to the lawyers.²¹

11.19 The UNHCR, in evidence to the Senate Inquiry into Migration Amendment (Further Border Protection Measures) Bill 2002, advised that it had worked closely with DIMIA officials on Nauru and it appeared that a fair and effective refugee status determination system was in place.²²

11.20 The UNHCR did express concern, however, in regard to one significant point of disparity between DIMIA and UNHCR processes, whereby the UNHCR considered that spouses and minor children of recognised refugees should be granted refugee status, and reunited immediately, while DIMIA required that such spouses and children qualify for refugee status on their own merit.²³

11.21 A further point relating to the assessment of refugee claims has been raised by Dr John Pace, who visited Nauru in November 2001 on behalf of Amnesty International. Dr Pace noted that symptoms of Post Traumatic Stress Disorder had been observed during assessment interviews, and was concerned whether it was

17 *Transcript of Evidence*, CMI 809.

18 *Transcript of Evidence*, CMI 810.

19 *Transcript of Evidence*, CMI 811.

20 *Transcript of Evidence*, CMI 812

21 *Submission No.19A*.

22 *Submission No. 30*, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.7.

23 *Transcript of Evidence*, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, 48.

appropriate to perform refugee screening determination in such situations, when the symptoms of the disorder may seriously affect the eligibility process.²⁴

Claim Decisions

11.22 As of 16 September 2002, 1,495 asylum seekers on Manus and Nauru had received the outcome of their initial refugee status determination. Of this number, 520 people were found to be refugees and 975 were not.²⁵ Review outcomes are outlined later in this chapter.

11.23 Of the 520 people approved on initial assessment, 432 were Iraqis, 59 Afghans, and 29 of other nationalities. The 975 found not to be refugees included 216 Iraqis, 701 Afghans and 58 of other nationalities (see Table 11.1).²⁶

11.24 The initial decision making process is now complete. A small number of people did not receive a decision, generally because they either returned to their country of origin, or were resettled in New Zealand on the basis of a family relationship, prior to a decision on refugee status having been made.

11.25 Initial decisions for Iraqi claimants were successful in 67% of cases, compared to just over 7% for Afghan claimants. The low proportion of Afghans receiving positive decisions reflects the changed circumstances in that country, with the result that those that earlier may have had valid claims no longer met assessment criteria. Afghan decisions were also the most delayed, with people reinterviewed in the light of the overthrow of the Taliban regime, and decision makers waiting 'for the circumstances in Afghanistan to develop'.²⁷

11.26 The remoteness of the locations, logistical and resourcing concerns and a need to coordinate UNHCR and Australian announcements has also affected the length of time taken for processing.

11.27 Processing of claims started on Manus in October 2001, for the group from SIEV 4, and a number of weeks later in Nauru. The first 439 asylum claim decisions, most for Iraqis, were released on 8 April 2002. .²⁸ The majority of decisions for Afghans were handed down in June 2002, some ten months after the rescue of the first

24 Quoted in *Adrift in the Pacific*, p.14.

25 *Asylum Review Decisions on Nauru and Manus*, Media Release DPS 72/2002 , DIMIA, 18 September 2002.

26 *Asylum Review Decisions on Nauru and Manus*.

27 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p.550.

28 *Asylum Seeker Decisions Handed Down on Nauru and Manus*, Media Release DPS 20/2002, DIMIA, 8 April 2002.

Afghans by the MV *Tampa* prompted the Pacific processing arrangements,²⁹ and the last of the initial decisions were not handed down until September 2002.

Table 11.1³⁰
Refugee Determination Processing Status
16 September 2002

NAURU								
	Afghan		Iraqi		Other Nationalities		Pending	TOTAL
	Approved	Refused	Approved	Refused	Approved	Refused		
Initial Decision Australia	27	457	71	68	4	17	0	644
Initial Decision UNHCR	32	244	126	75	14	22	0	513
TOTAL	59	701	197	143	18	39	0	1157
Review Decision Australia	38	399	26	36	0	6	37	542
Review Decision UNHCR	36	198	42	32	12	10	11	341
TOTAL	74	597	68	68	12	16	48	883
MANUS								
	Afghan		Iraqi		Other Nationalities		Pending	TOTAL
	Approved	Refused	Approved	Refused	Approved	Refused		
Initial Decision	n/a	n/a	235	73	11	19	0	338
Review Decision	n/a	n/a	24	22	3	10	33	92

29 *More Asylum Decisions Handed Down on Nauru*, Media Release DPS 38/2002, DIMIA, 20 June 2002.

30 *Asylum Review Decisions on Nauru and Manus*, Media Release DPS 72/2002, DIMIA, 18 September 2002.

11.28 The Committee is concerned at the length of time which has been taken to finalise refugee status determination, and the effects on asylum seekers of such extended periods in the processing centres.

11.29 In comparison to the results on Nauru and Manus, of the 131 people from the MV *Tampa* accepted by New Zealand, 130 have been found to be refugees and resettled in that country.³¹ While the high proportion of successful claims may be accounted for by New Zealand's selection of people it thought were likely to be refugees - children, women and family groups - they are also Afghans,³² who have had a notably low success rate in the other processes.

Review Processes

11.30 If the outcome of a refugee status determination by Australian officials at one of the offshore processing centres is that a person is not a refugee, the only avenue of appeal is internal review by a more senior departmental officer. DIMIA advises that this is consistent with UNHCR procedures on Nauru.³³ This contrasts with the avenues of appeal open to unsuccessful onshore applicants for protection as refugees, who have access to a merits review from the Administrative Appeals Tribunal or Refugee Review Tribunal and judicial review processes.

11.31 As of 16 September 2002, a further 92 Iraqis, 74 Afghans, and 15 people of other nationalities had been found to be refugees through the review process.³⁴ Forty eight review decisions were still pending on Nauru, and thirty three on Manus.

11.32 The total number of people processed under Pacific Solution arrangements and found to be refugees as of September 2002 is 701, comprising 524 Iraqis, 133 Afghans, and 44 people of other nationalities. Six hundred and seventy eight people have been found not to be refugees, and 81 still await a review decision.³⁵

Resettlement

11.33 Resettlement of asylum seekers who are found to meet refugee status criteria is reliant upon a place being found for them in Australia or another country. As DIMIA advised a Senate Committee considering estimates in May 2002,

31 Mary Crock and Ben Saul, *Future Eaters: refugees and the law in Australia* (Sydney, Federation Press, 2002), p.50.

32 Transcript, Interview with Rt Hon Helen Clark, Prime Minister of New Zealand, National Ten Network Meet the Press, 3 March 2002.

33 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q26.

34 *Asylum Review Decisions on Nauru and Manus*.

35 *Outcome of Processing of Offshore Entry Persons*, DIMIA, Response to Question 6, Senate Inquiry into Migration Amendment (Further Border Protection Measures) Bill 2002, Tabled 17 September 2002.

Australia, and the minister, have made it clear that Australia will play a role in relation to resettlement but does not regard it as being the only country with a resettlement obligation or indeed the only country with the ability to offer resettlement places. Our focus will be on people who may have ties or some links with Australia. In relation to resettlement elsewhere, there has been a series of discussions with UNHCR. Essentially we see UNHCR as being the key organisation able to deal with the resettlement issue.³⁶

11.34 As of 1 October 2002, 200 refugees processed on Manus or Nauru had been granted protection in Australia,³⁷ generally with three or five year temporary protection visas. Most were women and children with family members already in Australia.

11.35 Five people had been granted subclass 449 humanitarian stay (temporary) visas, which enable the holders to remain in Australia until a date determined by the Minister.³⁸ Criteria for this class of visa include not being able to return to one's place of residence and grave fear for personal safety because of the circumstances of displacement. In not requiring that the applicant be subject to persecution or substantial harassment, this type of visa may offer protection to those not successful in obtaining refugee status but without a reasonable prospect of safe return to their home country.

11.36 Both the Australian Government and UNHCR have been in discussion with possible resettlement countries on behalf of those asylum seekers on Nauru and Manus found to be in need of protection.

11.37 As of 16 September 2002;

- 179 persons assessed as refugees had been resettled in New Zealand,
- 8 persons assessed as refugees had been resettled in Sweden;
- 15 others had been resettled in New Zealand either before their refugee status had been determined or before receiving the outcome.³⁹

11.38 Ireland was at one time mooted as a potential resettlement country,⁴⁰ and DIMIA officials indicated that following the conclusion of elections in that country

36 *Transcript of Evidence, Estimates, Senate Legal and Constitutional*, 30 May 2002, p.548.

37 *Refugees Arrive in Australia from Manus*, Media Release DPS 77/2002, DIMIA, 1 October 2002.

38 *Outcome of Processing of Offshore Entry Persons*, DIMIA.

39 *Outcome of Processing of Offshore Entry Persons*, DIMIA.

40 Transcript, Minister Ruddock on 7.30 Report, ABC, 10 April 2002.

discussions would continue.⁴¹ The UNHCR had also referred a small number of people with links to Canada and the USA to those countries for consideration.⁴²

11.39 With over 300 recognised refugees still awaiting resettlement, and further review decisions pending, the prospect remains of a large number of people who have been found to be refugees remaining in the processing centres for an indeterminate period.

11.40 The UNHCR has expressed its concerns in relation to the situation of these refugees:

Of concern to UNHCR in the cases of Nauru and Manus Island, is that refugees who have been recognized and therefore have had their status regularised remain detained until a durable solution is found. This detention is without time limits or periodic review. The ongoing detention of persons recognized as refugees is a restriction of freedom of movement in breach of Article 26 of the 1951 Convention. Furthermore, such detention is not consistent with Article 31(2) of the Refugee Convention, which provides that restrictions of freedom of movement shall only be applied until the status of refugees in the country is regularised. Even though these recognised refugees are no longer on Australia's territory, Australia's obligations under the Refugee Convention continue to be engaged until a durable solution is found.⁴³

Reintegration package

11.41 On 16 May 2002 the Governments of Australia and Afghanistan signed a Memorandum of Understanding concerning the voluntary return of refugees and asylum seekers. On 23 May, Minister Ruddock announced that Afghans who had arrived at, or were in transit under Australian control to, a processing centre on Nauru or Christmas Island on or before 16 May 2002 would be eligible to apply for a reintegration package if they opted to return to Afghanistan. The offer also extended to Afghans who had arrived in Australia before that date.⁴⁴

11.42 Persons who have been found not to be refugees, or who are awaiting a decision, are eligible to apply for a package of cash assistance of \$2,000 per person

41 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, p549.

42 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.35

43 *Submission No. 30*, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.8.

44 *Reintegration Package for Afghans Announced*, Media Release MPS 38/2002, Minister for Immigration and Multicultural and Indigenous Affairs, 23 May 2002.

(up to \$10,000 per family), assistance with travel documentation, air fare to Kabul, and some on-arrival support.⁴⁵

11.43 On 30 May 2002 the reintegration package offer was extended to non-Afghans on Nauru and Manus who voluntarily returned to their country of origin or third countries which they had permission to enter.⁴⁶

11.44 The offer must be accepted within 28 days of notification of a negative refugee status assessment, or 28 days from the date of notification of a negative review decision. The package is administered by the IOM, which also distributes the cash payment. Australia reimburses the IOM for its costs.⁴⁷

11.45 Asylum seekers who wish to depart before a decision is made on their claim for refugee status must withdraw the claim in writing.⁴⁸

11.46 As of 28 June 2002, seven people from Nauru had returned to their home countries under the reintegration arrangements. These seven were part of a total of ten who had returned home voluntarily from Nauru, with a further four returning from Manus. A further 27 people on Nauru had signed voluntary reintegration papers.⁴⁹

Visa Regime

11.47 The *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act No. 128 2001* introduced two classes of temporary visa which are relevant to people processed on Nauru and Manus and determined to be in need of protection. As well as meeting the relevant visa criteria, applicants need to demonstrate a compelling case and fall within the relevant quota for the visa class. As summarised by DIMIA officials in evidence to the inquiry:

There are two visas which would be the most relevant. There is the 447 visa, which is a three-year temporary visa which carries the same entitlements as a temporary protection visa onshore carries. That is the visa that should be available to people who are offshore entry persons—that is, people who have landed on an excised offshore place and who are subsequently found to be in need of protection. The other visa, which is a five-year temporary visa,

45 *Reintegration Package for Afghans*, Fact Sheet No.80, Department of Immigration and Multicultural and Indigenous Affairs.

46 *Reintegration Package Extended to non-Afghans*, Media Release, Minister for Immigration and Multicultural and Indigenous Affairs MPS 42/2002, 30 May 2002.

47 *Transcript of Evidence*, Estimates, Senate Legal and Constitutional, 30 May 2002, pp.551.

48 *Reintegration Package for Afghans*, Fact Sheet No.80, Department of Immigration and Multicultural and Indigenous Affairs.

49 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.35

is the subclass 451 visa, and that is available to people who have not landed on an excised offshore place.⁵⁰

11.48 The legislation was enacted in response ‘to the increasing threats to Australia’s sovereign right to determine who will enter and remain in Australia’ resulting from ‘the growth of organised criminal gangs of people smugglers who bypass normal entry procedures’.⁵¹

11.49 It also reflected the Government’s concern at what it called the ‘increasingly broad interpretations being given by the courts to Australia’s protection obligations under the refugees convention and protocol.’⁵² Others have argued that the reaction is inherently flawed in that it punishes the victims exploited by people smugglers in order to combat the crime.⁵³

Offshore entry persons

11.50 The *Migration Amendment (Excision from Migration Zone) Act No. 127 2001* created a separate visa application regime applying to persons, now called offshore entry persons, who arrive unlawfully at certain places that are excised from the migration zone, for the purposes of limiting their ability to make valid visa applications. DIMIA have identified all the people being processed on Manus Island and at the State House site on Nauru as offshore entry persons.⁵⁴

11.51 The category of ‘offshore entry person’ arises from the insertion of a new definition into section 5 of the Migration Act of ‘excised offshore place’.⁵⁵ Such places include Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands and Australian sea and resources installations. They will also include any other external territories, or State or Territory islands, prescribed by regulations. Offshore entry persons are those who have entered Australia at an excised offshore entry place after the excision time and become an unlawful non-citizen by that entry.

11.52 Offshore entry persons who are in Australia and are unlawful non-citizens are barred from making a valid visa application by the newly inserted Section 46A of the *Migration Act*. This bar, however, does not apply to an offshore entry person who is not in Australia, such as those on Nauru and Manus. The relevant visa class for

50 *Transcript of Evidence*, CMI 825.

51 *Explanatory Memorandum*, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.

52 Philip Ruddock, MP, Second Reading Speech Migration Amendment Bill (No.6) 2001, House of Representatives, *Hansard*, p.30420.

53 Submission 25, p.14.

54 Tabled by DIMIA, CMI, 16/4/02.

55 *Migration Amendment (Excision from Migration Zone) Act No.127, 2001*.

offshore entry persons who are not in Australia and are in need of protection is the Secondary Movement Offshore Entry (Temporary) Subclass 447 Visa.⁵⁶

11.53 An applicant for a subclass 447 visa must either be subject to persecution in the their home country; or subject to substantial discrimination, amounting to gross violation of human rights, or a female person who is subject to persecution or is registered as being of concern to the United Nations High Commissioner for Refugees.

11.54 This visa is valid for three years. Holders of the visa are eligible for successive temporary protection visas if there is a continuing protection need, but are not eligible for permanent residence. They are not eligible to bring their families to Australia, and have the same entitlements as onshore temporary protection visa holders. The UNHCR has expressed concern at the transitory solution offered by subclass 447 visas and the negative impact on family reunification and access to travel documents.⁵⁷

Secondary movement relocation visas

11.55 For those persons on Nauru who are found to be refugees and did not reach Australian soil at an excised offshore place, but are considered to have bypassed or abandoned protection en route,⁵⁸ the relevant visa would be the new Subclass 451 Visa, the Secondary Movement Relocation (Temporary) Visa.⁵⁹ Those falling into this category include people from the MV *Tampa* and *Aceng*.⁶⁰

11.56 A person is considered to have bypassed or abandoned protection en route if they have, since leaving their home country, resided for a continuous period of at least seven days in a country, such as Indonesia, in which they could have sought and obtained the effective protection of that country or the offices of the UNHCR in that country.

11.57 The subclass 451 visa is a five year visa which enables a person to gain access to a permanent protection visa after four and a half years if there is a continuing need for protection. The same criteria in respect of persecution or substantial discrimination must be met by applicants for this visa as apply to the subclass 447 visa.

11.58 The Committee finds it curious that those who have been intercepted or rescued at sea have a more favourable potential visa outcome, including the possibility

56 *New Humanitarian Visa System*, Fact Sheet No.65, Department of Immigration and Multicultural and Indigenous Affairs.

57 *Submission No. 30*, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.5.

58 *Transcript of Evidence*, CMI 825.

59 *New Humanitarian Visa System*, Fact Sheet No.65, Department of Immigration and Multicultural and Indigenous Affairs.

60 *Transcript of Evidence*, CMI 813.

of permanent protection, than those who reach Australian soil, simply by virtue of not having completed the journey.

Humanitarian stay (temporary) visas

11.59 According to evidence provided to the Senate Inquiry into Migration Amendment (Further Border Protection Measures) Bill 2002, five humanitarian stay (temporary) subclass visas 449 have been granted to people processed on Nauru or Manus.⁶¹ This class of visa provides temporary protection for people displaced from their place of residence and with a grave fear for their safety because of the circumstances of that displacement, without requiring circumstances of persecution or substantial harassment. The duration of the visa is determined by the Minister.

Cost

11.60 Although substantial information is available on the costs associated with the operation of the offshore processing centres in Nauru and PNG, the Committee has not been able to collate an accurate picture of the full cost of the Pacific Solution. The substantive difficulty arises from the inability fully to identify the cost of the activities of the Australian Defence Force in support of the arrangements.

Processing centres

11.61 The establishment and operational costs of the Nauru and Manus facilities lie with the Department of Immigration and Multicultural and Indigenous Affairs. The Department's budget for these activities in 2001-2002 was \$114.5 million (Table 11.2),⁶² although recent advice is that the total cost for that year was \$80 million.⁶³

Table 11.2⁶⁴

Department of Immigration and Multicultural and Indigenous Affairs
Offshore Asylum Seeker Management Budgeted Costs 2001-2002
Nauru and Manus

	NAURU \$m	MANUS \$m
Establishment and infrastructure provision	10.0	10.0

61 *Outcome of Processing of Offshore Entry Persons*, DIMIA.

62 Answers to Questions on Notice, Estimates, Senate Legal and Constitutional, 19 and 22 February 2002, Q100.

63 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.36.

64 Answers to Questions on Notice, Estimates, Senate Legal and Constitutional, 19 and 22 February 2002, Q100.

IOM - management of facility	46.0	28.0
APS – additional security*	4.5	
UNHCR – processing	1.0	
DIMIA staffing and support costs	2.7	2.0
Asylum seeker transportation	2.0	1.5
Other (including medical and health)	1.3	1.0
Offshore operations contingency*	4.5	
	72.0	42.5

* Available for Nauru and Manus

11.62 DIMIA's 2002-2003 budget for the offshore reception and processing of asylum seekers in third countries is \$129.3 million. Forward year budgets are \$99.3 million for 2003-2004, \$100.5 million for 2004-2005, and \$101.7 million for 2005-2006.⁶⁵

11.63 The Department notes that some savings can be expected in onshore processing costs as a result of the transfer of operations offshore, and have estimated these savings at \$28 million in 2001-2002, and over \$86 million a year from 2002-2003 on.⁶⁶

11.64 These savings cannot be solely offset against the cost of the Nauru and Manus centres as they are achieved through processing on Australian external territories, such as Cocos and Christmas Islands, as well as from the Pacific arrangements. DIMIA's budget for 2002-2003 includes \$81.9 million for the reception and processing of asylum seekers at Australia's external territories, with \$122.8 million for 2003-2004, \$124.4 million for 2004-2005 and \$126.0 million for 2005-2006.⁶⁷

11.65 Also included in the budget are capital costs and expenses for the construction of a new, purpose built, permanent Immigration Reception and Processing Centre on Christmas Island as part of the offshore processing strategy. Capital costs are \$195 million over 2001-2002 and 2002-2003, while expenses are \$9.5 million in 2002-2003 and \$8.3 million in forward years.⁶⁸ The capital cost includes \$74.7 million provided

65 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p71.

66 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p70.

67 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p71.

68 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p68.

in 2001-2002 to DIMIA and \$116.4 million provided across DIMIA and the Department of Transport and Regional Services in 2002-2003.⁶⁹

11.66 The 2002-2003 budget provisions are based on the processing of 4,500 asylum seekers per annum at offshore locations, either in Australia's external territories or in third countries such as Nauru and PNG.⁷⁰

Reintegration package

11.67 The DIMIA budget for 2002-2003 also included a total of up to \$5.1 million over three years in personal reintegration assistance for Afghan asylum seekers in Australia or offshore who wished to voluntarily return to Afghanistan, of which \$2.6 million was specifically identified for Afghans at Nauru⁷¹ (there are no Afghans on Manus). A further \$740,000 was allocated in 2002-2003 to a reintegration package for non-Afghan asylum seekers on Nauru and Manus.⁷²

Additional aid

11.68 Australia's commitment to Nauru for extra development assistance under the FAA and MOU totals \$26.5m.⁷³ \$19.5m was allocated for 2001-2002, \$18.8 million of which was an administered item and \$700,00 a departmental appropriation for expenses such as employee and administrative costs.⁷⁴ \$7 million has been allocated in 2002-2003 to fulfil the requirements of the MOU,⁷⁵ of which \$6.8 million is an administered item and \$200,000 departmental appropriation.⁷⁶ The Budget papers advise that all funding for this package has been in addition to the aid budget.⁷⁷

11.69 Information on AusAID payments to Nauru in 2001-2002 provided to the Senate Estimates process in February 2002 show that up to that time payments for fuel supplies had totalled \$9.738 million, health \$1.524 million, power plant and

69 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p73.

70 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p71.

71 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p72.

72 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p73.

73 Answers to Questions on Notice, Department of Foreign Affairs and Trade, 19 June 2002.

74 *Portfolio Additional Estimates Statements 2001-02, Foreign Affairs and Trade Portfolio*, p83.

75 *Portfolio Budget Statements 2002-03, Foreign Affairs Defence and Trade Portfolio*, p130.

76 *Portfolio Budget Statements 2002-03, Foreign Affairs Defence and Trade Portfolio*, p127.

77 *Australia's Overseas Aid Program 2002-03*, Statement by the Hon Alexander Downer MP, Minister for Foreign Affairs, 14 May 2002, p.26.

desalination \$359,501, education \$47,229, sports \$35,957, telecommunications \$5,659 and aviation \$1,800.⁷⁸

11.70 There is no additional aid component in the agreement with PNG,⁷⁹ which is confined to meeting the costs associated with establishing and operating the site including refurbishment of existing infrastructure and renovation of the naval base.⁸⁰

11.71 In evidence before the Committee, AusAID indicated that there had been no reduction in Australia's financial assistance to other countries as a result of the Pacific Solution funding.⁸¹ Several submissions to the Committee had raised concerns in regard to the impact on Australia's aid budget, and the undermining of the credibility of Australia's good governance programs, which have been a focus of Australia's aid efforts in the region.⁸²

11.72 For the purposes of reporting on Australia's overall overseas development aid level, the operational costs of the offshore processing centres on Manus and Nauru are also categorised as aid, providing a potentially misleading if technically accurate picture of Australia's aid commitment. As AusAID advised a Senate Estimates Committee in June 2002,

... it would fall under that category in the sense that it is assistance being provided to displaced persons in a developing country. It does not matter who they are displaced by.⁸³

Cost of negotiations

11.73 While it is not possible to quantify the cost of the negotiation phase of the Pacific Solution, the Department of Foreign Affairs and Trade advised that the department had absorbed a cost of about \$81,000 in 2001-2002 for liaison with the Norwegian government during the *Tampa* crisis, staffing a crisis centre, and travel within the Pacific 'to talk to some of the countries about possible sites to house asylum seekers'.⁸⁴

78 AusAID Answers to Questions on Notice, Estimates, Senate Foreign Affairs Defence and Trade, 20 February 2002, Q2.

79 *Transcript of Evidence*, CMI 828.

80 *Papua New Guinea and Australian Ministers Discuss Issues Concerning Boat People*, Minister for Immigration and Multicultural and Indigenous Affairs Joint Statement with the Hon Prof John D Waiko, PNG Minister for Foreign Affairs, 3 February 2002.

81 *Transcript of Evidence*, CMI 1454.

82 Submissions 17, 18 and 22.

83 *Transcript of Evidence*, Estimates, Senate Foreign Affairs and Trade, 6 June 2002. p. 442.

84 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade, 6 June 2002, p.398.

Temporary Consul in Nauru

11.74 Under arrangements with Nauru for the processing of asylum seekers Australia has established a Temporary Consul on the island. In 2001-2002 the Department of Foreign Affairs and Trade absorbed the cost of its activities on Nauru, estimated at \$580,000 for the year.⁸⁵ The Department also absorbed costs associated with a liaison officer in Manus.

11.75 For 2002-2003, \$2.1 million of new funding was included in the Departmental budget for Australia's diplomatic presence in Nauru in support of the Memorandum of Understanding.⁸⁶ \$580,000 of the \$2.1 million is provided for salaries, the balance is spread across administrative expenses, property costs, plant and equipment, vehicles and depreciation.⁸⁷ No funding has been identified in the budget papers for forward years.

Defence assistance

11.76 It has not been possible for the Committee to quantify fully the costs of services provided by the Australian Defence Force and Department of Defence in support of the Pacific Solution.

11.77 Within the Defence Portfolio Budget Statements, funding for Operations Gaberdine and Relex is not separately identified. Both fall under the general description of operations to protect Australia's northern and western borders from unauthorised boat arrivals.⁸⁸

11.78 Defence support of the Department of Immigration and Multicultural and Indigenous Affairs in the management of asylum seekers comes under Operation Gaberdine. Under Gaberdine, the ADF assisted with setting up facilities on Nauru, Manus, Christmas Island and Cocos Island, as well as preparing facilities for the accommodation of asylum seekers at defence establishments on the mainland.⁸⁹

11.79 In the 2001-2002 Defence Portfolio Additional Estimates Statements it is noted that Defence will absorb most of the costs of new operations, one of which is the deterrence of unauthorised boat arrivals. New funding of \$19 million, 'for specific additional costs that cannot be readily absorbed',⁹⁰ was provided to Defence in the

85 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade, 6 June 2002, p.397.

86 *Portfolio Budget Statements 2002-03*, Foreign Affairs and Trade Portfolio, p.35.

87 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade, 6 June 2002, p.401.

88 *Transcript of Evidence*, Estimates, Senate Foreign Affairs, Defence and Trade, 4 June 2002, p.134.

89 Answers to Questions on Notice, Department of Defence, Question W62.

90 *Portfolio Additional Estimates Statements 2001-02*, Defence Portfolio, p.12.

2001-2002 Additional Estimates Statements for this purpose, of which \$12 million is listed as operating costs and \$6 million new capital acquisitions related to the deployments.

11.80 The 2002-2003 Portfolio Budget Statements included a further adjustment of \$22.3 million for 2002-2003, of which \$19.6 million was an appropriation for operating costs and \$2.7 million a new capital injection.⁹¹

11.81 There is insufficient differentiation in the figures available to separate the Pacific Solution costs incurred by Defence from the broader picture of new funding and absorbed costs for the deterrence of boat arrivals.

11.82 The Defence Department has, however, provided some information on the level of activity concerned, indicating that assistance to the establishment and management of the asylum seeker processing facilities focussed primarily on the provision of ADF air-lift support, specifically C-130 aircraft.⁹²

11.83 For the period from August to December 2001, Defence flew 1,065 hours in direct support of DIMIA under Operation Gaberdine,⁹³ including a period in August 2001 when up to eight C-130 aircraft were employed on Operation Gaberdine missions.⁹⁴ Defence also chartered civilian transport aircraft to support ADF involvement, and provided advice and planning support to DIMIA and the IOM in the sourcing and chartering of commercial aircraft.⁹⁵

11.84 In regard to Nauru, Defence personnel were involved in developing recommendations on the contents of the First Administrative Arrangement, in discussions concerning security arrangements with the AFP and Nauru Police, and in the inspection of potential sites.⁹⁶

11.85 Three Defence personnel went to Nauru on 12 September to render safe, or dispose of, old and unstable ordinance and weapons, partly in response to a heightened concern on the part of Nauruan police that 'the risk of civil unrest may increase as a result of the arrival of the people on board HMAS *Manoora*'.⁹⁷ Some of the costs associated with their deployment were borne by the Defence Cooperation Program.

11.86 The ADF provided substantial engineering and air transport assistance in the construction of the first site on Nauru. The ADF element involved in the construction

91 *Portfolio Budget Statements 2002-03*, Defence Portfolio, pp71.

92 Answers to Questions on Notice, Department of Defence, Question W63.

93 Answers to Questions on Notice, Department of Defence, Question W62.

94 Answers to Questions on Notice, Department of Defence, Question W63.

95 Answers to Questions on Notice, Department of Defence, Question W62.

96 Answers to Questions on Notice, Department of Defence, Question W61.

97 Answers to Questions on Notice, Department of Defence, Question W62.

of the processing centre comprised a team of up to 81 personnel, including an army engineering element, RAAF personnel and construction equipment. The ADF presence on the island lasted for a period of more than two weeks, with some equipment remaining on loan to the IOM until December 2001.

11.87 Defence also provided limited support to the establishment of the processing centre in PNG, largely in the form of liaison and coordination duties. Defence was involved in discussions concerning the suitability of the site, and later provided engineering assistance and security advice concerning the centre to the PNG Defence Force under the Defence Cooperation Program.

11.88 A liaison officer was maintained on Manus Island until February 2002, and ADF personnel provided ground services support to ADF aircraft landing in PNG on Operation Gaberdine tasks. Defence provided air transport on behalf of the IOM contractor, Eurest, transporting equipment from Port Moresby and Lae to Manus Island.

11.89 The ADF has also transported asylum seekers to the offshore processing centres including, for example, the protracted involvement of the HMAS *Manoora* in the transportation and disembarkation of asylum seekers from the MV *Tampa* and the *Aceng*. These transportation costs have not been able to be identified.

Comparative Cost

11.90 DIMIA have estimated that the average cost for reception, processing and detention of an unauthorised arrival in Australia is about \$29,000, noting that such average figures can be misleading given the large variability in the caseload.⁹⁸

11.91 Based on that average figure the cost for processing onshore the 1,515 people who were at one time accommodated on Nauru or Manus would have been around \$44 million. This figure is simplistic in that it does not consider the cost of any expanded capacity which would have been required if those arrivals had needed to be processed on-shore, nor the financial benefits of the deterrent function of offshore processing.

11.92 Nevertheless, it is apparent that the cost of the Pacific Solution processing arrangements on Nauru and Manus to date, including additional aid funding, have been significantly more expensive than onshore processing of the same number of people. This is true even without a full accounting of the cost of the supporting services provided by the Defence Force.

2002-2003

11.93 The DIMIA budget for the operational costs of offshore processing in 2002-2003, including the Australian external territories of Christmas and Cocos Islands as

98 Answers to Questions on Notice, Department of Immigration and Multicultural and Indigenous Affairs, 12 June 2002, Q14.

well as Nauru and Manus, is based on 4,500 asylum seekers per annum being accommodated through the arrangements.

11.94 If the 4,500 figure is accepted as reasonable, the budgeted per person cost for offshore processing in 2002-2003 is roughly comparable to onshore processing, when projected onshore savings are included. However that assessment does not include the considerable capital cost of the new Christmas Island facility, or, once again, Defence Force expenditure.

11.95 The new Christmas Island permanent Immigration Reception and Processing Centre will have a capacity of 1,200 and is scheduled for completion in January 2003.⁹⁹ There is also some minor capacity on Cocos Island. Being able to process 4,500 people a year offshore, as indicated in the budget papers, is an objective apparently dependent on both Papua New Guinea agreeing to renew its MOU when it terminates in October 2002, and Nauru remaining satisfied to continue its cooperation, which can be terminated by either party at any time.

11.96 Even if both MOUs continue at the current level, in light of the processing and resettlement times achieved for the first group of just over 1,500 people accommodated at Nauru and Manus, processing the 4,500 per year figure on which the costings are predicated would appear difficult to achieve.

11.97 Of course if the current reduction in boat arrivals is maintained such capacity will not be required. It is perhaps worth noting that in the last decade such numbers of unauthorised boat arrivals have been reached only in 1999-2000 and 2000-2001. It has been far more common over that period for annual figures to be in the hundreds rather than thousands.¹⁰⁰

Effectiveness

11.98 No unauthorised boat arrivals have been transferred to the mainland for processing since the Pacific Solution arrangements came on stream,¹⁰¹ and the objective of blocking access to onshore processing arrangements including judicial review opportunities has been achieved.

11.99 The number of unauthorised boats attempting to reach Australia has declined dramatically, although the effect of the offshore processing arrangements and the new legislative regime in halting the flow of illegal boat arrivals is difficult to isolate from the influence of other factors, including disruption activities, regional anti-smuggling

99 *Portfolio Budget Statements 2002-03, Immigration and Multicultural and Indigenous Affairs Portfolio*, p68.

100 *Boat Arrival Details*, Fact Sheet No.74a, Department of Immigration and Multicultural and Indigenous Affairs, Revised 1 August 2002.

101 *Offshore Processing Arrangements*, Fact Sheet No.76, Department of Immigration and Multicultural and Indigenous Affairs.

initiatives, the SIEV X disaster, and global developments such as increased border security in the aftermath of September 11, 2001.

11.100 In a recent submission to another Senate inquiry, DIMIA have advised that:

The anti-smuggling regime adopted by Australia in cooperation with other countries in the region has resulted in a virtual cessation of attempts by asylum seekers to enter Australia illegally by boat. The people smuggling rings have been confounded by the disruption and have had to abandon their usual *modus operandi* to seek alternative methods.¹⁰²

11.101 There has also been a major reduction in the number of Afghans entering the smuggling 'pipeline' in the wake of the fall of the Taliban regime. The exodus from that country has started to reverse with ongoing large scale voluntary repatriation from neighbouring countries, although security concerns remain in some less stable regions and for groups with particular protection vulnerabilities.¹⁰³

11.102 While deterrence objectives appear to be achieved, albeit at considerable cost, outcomes in terms of achieving durable protection for refugees processed under Pacific Solution arrangements, and a timely resolution for those found not to be so, are less positive.

11.103 Over a year after the *Tampa* incident, and more than nine months after the last unauthorised arrivals were transported to the islands, less than 400 of the 701 people found to be refugees have been resettled, and eighty one people still await a final decision on their refugee status. A small number of people have returned to their country of origin, or have been resettled without a refugee determination.

11.104 The remainder, whether they have been found to be refugees or not, remain in situations of uncertainty and indeterminate duration.

11.105 Concerns also remain about the impact of the arrangements on the social fabric of the communities where the processing centres have been established, the capacity of the local resource base to support such numbers on Nauru, and Australia's reputation in the region.

Conclusions

11.106 The so-called Pacific Solution has achieved its objective of preventing on-shore processing of unauthorised boat arrivals. The arrangements ensure that those amongst the arrivals who are found not to be refugees do not have access to lengthy

102 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.36.

93 *UNHCR Note on Basic Considerations Regarding Returns to Afghanistan from Non-Neighbouring States*, 10 July 2002.

appeal processes, and those who are successful in their claims have no presumed right to resettlement within Australia.

11.107 However, lack of transparency in the implementation of the arrangements, and difficulty in accessing comprehensive costings for some of its aspects, has created an atmosphere of obfuscation quite apart from concerns over the legal and human rights merits of the policy.

11.108 Further, the policy does nothing to address the fundamental issues of the break down in the global response to the refugee problem, although the outcomes have been favoured by an emerging resolution in Afghanistan.

11.109 The uncertain outcomes for those being processed in the centres continues to be a substantial concern. There remains a shortfall in resettlement opportunities for those who have been legitimately found to be refugees. The objective of sharing the burden amongst a range of countries has, with the exception of New Zealand's generosity, been largely unsuccessful to date which, given the relative insignificance within the international context of the burden this group imposes upon Australia, is not surprising. The future for those not found to meet refugee criteria but who cannot safely return to their countries of origin is even more uncertain.

11.110 It appears likely that the majority of those found to be refugees will need to be resettled in Australia, as evidenced by the recent arrival of refugees from both Manus and Nauru. As the Department of Immigration and Multicultural and Indigenous Affairs commented in a submission to another current Senate inquiry:

...if other countries are unable or unwilling to provide protection against non-refoulement for refugees who have entered Australian territorial waters seeking asylum, Australia is obliged to ensure that convention protection is provided.¹⁰⁴

Senator Peter Cook
Chairman

104 Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia's Relationship with Papua New Guinea and Other Pacific Island Countries, p.34.

APPENDIX 1**LIST OF SUBMISSIONS**

Submission No.	Submitter
1	Mr Craig John Applegate
2	Mr Tony Kevin
2A	Mr Tony Kevin
3	Australia Defence Association
4	Mr John Martin
5	Manus Asylum Seeker Camp Committee
6	Refugee Action Collective Gippsland
7	Manly Greens
8	Bishop Ambrose Kiapseni, MSC
9	Mr A C Burton
10	Vice Admiral Sir Richard Peek
11	Mr Otto Mueller
12	Mr Robert John O'Neill
13	Parliamentary Press Gallery Committee
14	Dr Alan Grant
15	Dr William Maley, AM, Associate Professor of Politics Australian Defence Force Academy
16	Australian Catholic Migrant and Refugee Office
17	Oxfam Community Aid Abroad
18	National Council of Churches in Australia
19	Australian Lawyers for Human Rights
19A	Australian Lawyers for Human Rights

- 20 Associate Professor Hugh Smith, School of Politics
Australian Defence Force Academy
- 21 Refugee Council of Australia
- 22 Australian Council for Overseas Aid (ACFOA)
- 23 Caritas Australia
- 24 Australian Catholic Social Justice Council
- 25 Amnesty International Australia
- 26 Dr Sam Bateman
- 27 Service for the Treatment and Rehabilitation of Torture
and Trauma Survivors (STARTTS)
- 28 Mr Neville J Roach
- 29 Confidential Submission
- 30 Ms Sue McDonald

APPENDIX 2**WITNESSES AT HEARINGS****Monday, 25 March 2002 - Canberra**

Commander Norman Banks
Commanding Officer, HMAS *Adelaide*, Royal Australian Navy

Dr Allan Hawke, Secretary, Department of Defence

Vice Admiral David Shackleton, Chief of Navy, Royal Australian Navy

Tuesday, 26 March 2002 - Canberra

Commander Norman Banks,
Commanding Officer, HMAS *Adelaide*, Royal Australian Navy

Thursday, 4 April 2002 - Canberra

Commander Norman Banks,
Commanding Officer, HMAS *Adelaide*, Royal Australian Navy

Rear Admiral Chris Ritchie, Commander Australian Theatre,
Royal Australian Navy

Brigadier Mike Silverstone, Commander Northern Command,
Royal Australian Navy

Rear Admiral Geoffrey Smith, Maritime Commander,
Royal Australian Navy

Friday, 5 April 2002 - Canberra

Rear Admiral Geoffrey Smith, Maritime Commander,
Royal Australian Navy

Thursday, 11 April 2002 - Canberra

Rear Admiral Geoffrey Smith, Maritime Commander,
Royal Australian Navy

Friday, 12 April 2002 - Canberra

Admiral Christopher Barrie, Chief of the Defence Force, Department of Defence

Air Vice Marshal Alan Titheridge, Head Strategic Command, Department of Defence

Tuesday, 16 April 2002 - Canberra

Mr William Farmer, Secretary,
Department of Immigration and Multicultural and Indigenous Affairs

Ms Jane Halton, Former Chair, People Smuggling Taskforce, Department of the Prime Minister and Cabinet

Mr Robert Illingworth, Assistant Secretary, Onshore Protection,
Department of Immigration and Multicultural and Indigenous Affairs

Mr Edward Killesteyn, Deputy Secretary,
Department of Immigration and Multicultural and Indigenous Affairs

Mr Vincent McMahon, First Assistant Secretary,
Offshore Centre Management and Infrastructure Division,
Department of Immigration and Multicultural and Indigenous Affairs

Mr Desmond Storer, First Assistant Secretary, Parliamentary and Legal Division,
Department of Immigration and Multicultural and Indigenous Affairs

Wednesday, 17 April 2002 - Canberra

Mr Tim Bloomfield, Director of Media Liaison, Department of Defence

Commander Piers Chatterton, Director of Operations – Navy, Royal Australian Navy

Colonel Stephen Day, Deputy Commandant, Australian Defence Force Academy

Group Captain Gregory Evans, Chief of Staff to Chief of Defence Force,
Department of Defence

Air Marshal Allan (Angus) Houston, Chief of Air Force, Royal Australian Airforce

Mr Brian Humphreys, Director General, Communication Strategies,
Department of Defence

Ms Jennifer McKenry, Head, Public Affairs and Corporate Communication,
Department of Defence

Mr Andrew Stackpool, Public Affairs Officer, Directorate of Media Liaison,
Public Affairs and Corporate Communications, Department of Defence

Thursday, 18 April 2002 - Canberra

Ms Jennifer Bryant, Assistant Secretary, Education and Immigration Branch,
Department of the Prime Minister and Cabinet

Vice Admiral (Retired) Sir Richard Peek

Mr Andrew Podger, Public Service Commissioner,
Public Service and Merit Protection Commission

Associate Professor Hugh Smith, School of Politics,
Australian Defence Force Academy

Ms Anne-Maree Tiernan, Senior Research Assistant, School of Politics,
Griffith University

Dr John Uhr, Senior Fellow, Political Science Program,
Research School of Social Sciences, Australian National University

Professor Patrick Weller, Deputy Director,
Key Centre for Ethics, Law, Justice and Governance,
Griffith University

Wednesday, 1 May 2002 - Canberra

Mr Geoffrey Barker, Journalist, *Australian Financial Review*

Mr Clive Davidson, Chief Executive Officer, Australian Maritime Safety Authority

Mr Graeme Dobell, Foreign Affairs and Defence Correspondent, Radio Australia

Mr James Ensor, Director, Public Policy, Oxfam Community Aid Abroad

Ms Susan Harris, National Refugee Team, Amnesty International Australia

Mr John Hodges, Chairman, Immigration Detention Advisory Group
c/- Department of Immigration and Multicultural and Indigenous Affairs

Mr Tony Kevin, Private Capacity

Mr Ian McPhedran, Bureau Chief, News Ltd

Ms Annmaree O'Keeffe, Deputy Director General, Pacific Contracts and Corporate
Policy, AusAID

Dr John Pace, Expert, Amnesty International Australia

Dr Geoff Raby, First Assistant Secretary, International Organisations and Legal
Division, Department of Foreign Affairs and Trade

Mr Malcolm Reid, Manager, Advocacy, Oxfam Community Aid Abroad

Mr Charles Tapp, Deputy Director General, PNG and Global Programs, AusAID

Dr Graham Thom, Refugee Coordinator, Amnesty International Australia

Mr James Wise, First Assistant Secretary, South Pacific, Africa and Middle East Division, Department of Foreign Affairs and Trade

Thursday, 2 May 2002 - Canberra

Commander Stefan King, Deputy Director, Capability Resourcing, Navy Capability, Performance and Plans Branch, Navy Headquarters, Department of Defence

Ms Harinder Sidhu, Senior Adviser, Defence, Intelligence and Security Branch, International Division, Department of the Prime Minister and Cabinet

Wednesday, 22 May 2002 – Canberra

Rear Admiral Marcus Bonser, Director General, Coastwatch, Australian Customs Service

Ms Katrina Edwards, Former First Assistant Secretary, Social Policy Division, Department of the Prime Minister and Cabinet

Mr Michael James O'Connor, Executive Director, Australia Defence Association

Group Captain Steven Walker, Director of Joint Operations, Strategic Command Division, Department of Defence

Thursday, 13 June 2002 – Canberra

Dr Brendon Hammer, Former Assistant Secretary, Defence, Intelligence and Security Branch, Department of the Prime Minister and Cabinet

Ms Harinder Sidhu, Senior Adviser, Defence, Intelligence and Security Branch, Department of the Prime Minister and Cabinet

Thursday, 11 July 2002 – Canberra

Mr Clive Davidson, Chief Executive Officer, Australian Maritime Safety Authority

Colonel Patrick Gallagher, Commander, Australian Theatre Joint Intelligence Centre

Commissioner Michael Keelty, Commissioner, Australian Federal Police

Mr Edward Killesteyn, Deputy Secretary, Department of Immigration and Multicultural and Indigenous Affairs

Federal Agent Brendon McDevitt, General Manager, National, Australian Federal Police

Mr Vincent McMahon, Acting Deputy Secretary, Department of Immigration and Multicultural and Indigenous Affairs

Ms Nelly Siegmund, Assistant Secretary, Department of Immigration and Multicultural and Indigenous Affairs

Tuesday, 30 July 2002

Air Commodore Phillip Byrne, Commander, Maritime Patrol Group,
Royal Australian Airforce

Ms Jane Halton, Former Chair, People Smuggling Taskforce,
Department of the Prime Minister and Cabinet



President of the Senate
Senator the Hon Margaret Reid



Senator the Hon. Peter Cook
Chair
Select Committee on a Certain Maritime Incident
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

Thank you for your letter to me dated 23rd June 2002.

In your letter you have included a resolution of the committee dated 22nd May 2002 and you ask me to approve the appointment of an Independent Assessor in accordance with Standing Order 27 (18).

I have read the terms of reference for the inquiry and I have difficulty in understanding how a person who has not heard all the evidence put before the committee can be in a better position than the committee to assess the evidence and form conclusions. Indeed, that, it seems to me, is the role of the committee. The Independent Assessor as proposed would seem to me to be usurping the function of the committee.

I would be grateful for the committee's further consideration of this matter and I would appreciate advice as to why the committee feels it cannot fulfil the terms of reference given to it by the Senate without assistance from a person who has not heard the witnesses or the other deliberations of the committee.

Yours sincerely


MARGARET REID
26.06.02

MER:mep



PRESIDENT OF THE SENATE



FAXED

Senator the Hon. Peter Cook
Chair
Select Committee on a Certain Maritime Incident
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

Thank you for your further letter of 27 June 2002 and for the information you have provided.

I remain concerned about the appointment of an independent assessor. I agree with the remark in your letter that the appointment of a specialist *adviser* has ample precedent, and can think of a number of specific examples where such experts have provided technical advice to inform committees in particular fields. I do not think that the proposal outlined for an *assessor* would fulfil the same function.

You advise that the independent assessor would provide "views about the nature of evidence that the absent witnesses could reasonably have been expected to provide".

This concerns me, because I do not know that any person, however professionally qualified, can conclude what a witness who was not present might have said if he or she had been present.

You also advise that the committee has judged that summoning relevant witnesses "...would be counterproductive, and likely to produce no further evidentiary benefit...". How, then, can an independent assessor who it would seem would have no more evidence or other material before him than the committee already has, be able to draw conclusions?

I am therefore concerned that the committee's proposal is flawed in a number of ways because the assessment will necessarily be based on hypothesis, rather than the technical support such advisers usually provide. This would not seem to me to be an appropriate basis for the expenditure of \$38,500 of public funds from the Department of the Senate.

You have advised me that a majority of the committee support the request for an independent assessor to be appointed. I formally approve your request under standing order 27(18). I ask that this letter and my letter to you of 26 June 2002 be included as an annexure to the committee's report.

Yours sincerely

MARGARET REID



AUSTRALIAN SENATE

CLERK OF THE SENATE

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hc/let/13510

19 February 2002

Senator the Hon John Faulkner
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Faulkner

**COMPELLABILITY OF FORMER MEMBERS —
ADVICE BY THE CLERK OF THE HOUSE OF REPRESENTATIVES**

At the estimates hearing yesterday you asked me to indicate the situation in relation to the power of the Senate Select Committee on a Certain Maritime Incident to call the former Minister for Defence, Mr Peter Reith. I indicated that a Senate committee, given by the Senate the power to summon witnesses, could summon any person in the jurisdiction of Australia, and that the only immunity related to current members of the House of Representatives and current state office-holders.

You have now asked for my comments on an advice dated 18 February 2002 provided by the Clerk of the House of Representatives, Mr Ian Harris, to Mr Reith, which appears to postulate some kind of immunity possessed by former ministers, or at least some kind of shield which former ministers may raise against being compelled to give evidence, and which therefore appears to differ from the advice I gave.

With the greatest respect to the Clerk of the House of Representatives, this advice conflates distinct concepts and then draws conclusions from a blurring of the distinction between those concepts which are not justified by the concepts standing alone.

Before proceeding to the conflation on which the advice is based, I note that the exchange at the estimates hearing was about whether Mr Reith could be compelled to attend, and did not go into the question of whether he would have any grounds for asking to be excused from answering any particular questions. Mr Harris' advice passes between each of those questions without clearly distinguishing between them.

The major confusion in the advice is between Mr Reith's status as a former member and his status as a former minister. The presumed immunity to which I referred at the estimates hearing, and which has been recognised by the Senate and by Senate committees in several past cases, is an immunity attaching to members of the House of Representatives as *members*. It rests upon the principle of comity between the two Houses, which is encapsulated in the

procedures of both Houses for having members of either House appear before the committees of the other. In short, neither House seeks to summon the members of the other House. The immunity attaches to House of Representatives ministers only because they are members, not because they are ministers. Mr Harris may be thinking of the principle that each House does not inquire into the proceedings of the other, a principle also recognised by the Senate, so that, even if a member of the House appears before a Senate committee, the committee cannot inquire into the proceedings of the House or that member's participation in those proceedings. On this principle, a former member of the House, or indeed any other witness, would not be questioned about proceedings in the House. This principle, however, has nothing to do with the former member's status as a former member. The immunity of a current member does not in any sense carry over to a former member. And as there is no immunity of a minister as a *minister*, there is no immunity to be carried over by a former minister.

The second confusion in the advice is between the ability of a House to remove, or to impose a penalty on, a minister, and the accountability of a minister, as a *minister*, to a House. It is obvious that the Senate cannot remove a minister from office (technically, nor can the House of Representatives; only the Governor-General has that power). It is also recognised by the Senate that the Senate cannot impose a penalty on a member of the House of Representatives as a *member*, even a penalty of censure. This principle also arises from the comity between the two Houses (I note in passing that the principle has not been recognised by the House of Representatives, which, on the instigation of the government of the day, has purported to impose penalties of censure on senators). This inability of the Senate to impose a penalty on a member as a *member* in effect protects from any substantive penalty members who also happen to be ministers. It has nothing to do with the status of ministers as *ministers*.

These principles are confused in Mr Harris' advice with the question of *accountability*. The circumstances that a member of the House who is also a minister cannot be compelled by the Senate to appear before a Senate committee and cannot be subjected to any penalty by the Senate does not mean that ministers as *ministers* are not *accountable* to the Senate. If it really were an accepted principle that House ministers are not accountable to the Senate, as Mr Harris suggests, governments would never answer questions about the ministries of House of Representatives ministers, or about those ministers' actions, in the Senate or in Senate committees; we would not have the estimates hearings which are going on even as I write, in which many questions are asked and answered about House of Representatives ministers' management and direction of their ministries.

Having deduced an immunity of House of Representatives ministers from *accountability* in Senate forums, Mr Harris then says that it would be anomalous if former ministers were to account for their conduct of their former ministries. There is no anomaly because the premise on which it is based does not exist. There is no immunity of House of Representatives ministers as *ministers* from accountability, therefore no reason why former ministers should not answer for their conduct as *ministers* in Senate forums.

Mr Harris' advice then passes, without clear distinction, from the supposed immunity of ministers and former ministers from Senate inquiries to a supposed ability of former ministers to decline to answer questions about their conduct of their ministerial responsibilities. Of course, governments and ministers may *claim* that there are grounds on which they should not answer particular questions in a public forum, grounds which are now generically called public interest grounds because they are based on a submission that the public interest may

suffer from the public revelation of certain information. Here the advice confuses *claims* with accepted immunities. A claim does not become an immunity until it is accepted by the body seeking the information. Governments and ministers have made claims which have not been accepted by the Senate, and the claims have therefore remained claims. Sometimes claims have been made and have been accepted, and have thereby become applications of immunity. The fact that the Senate has procedures to enable witnesses to make *claims* of immunity, and to have those claims considered, does not mean, as Mr Harris concludes, that claims automatically become immunities, even when they are made by former ministers.

In all the controversy which has surrounded the subject into which the Senate Select Committee is to inquire, no claim has yet been made that there are grounds on which questions about the subject should not be answered because of apprehended damage to the public interest, such as by disclosure of secret operations of the Defence Force, or of internal government deliberations. No minister having raised a claim of public interest immunity in relation to this subject, it is strange indeed that a Clerk of the House of Representatives should suggest to a former minister that such a claim might be raised by the former minister. Current ministers are the ones to make any such claims relating to the public interest. A former minister could submit that he is bound by a claim made by the current ministry in relation to information about government operations in his possession. There is one precedent for a similar submission. But such a submission cannot be made until the current ministry has made such a claim. If the government does not seek to conceal government information, a former minister can hardly do so.

Mr Harris' advice, having mixed up distinct principles, draws out of the mixture a new and hitherto undiscovered power of former ministers to withhold information of which they are no longer the custodians.

As I indicated at the estimates hearing, former House of Representatives ministers, including a former Prime Minister, were summoned to appear and give evidence to a Senate committee. They appeared and gave evidence, reluctantly, under summons. At that time (1994) the presumed immunity of serving House of Representatives members from summons by the Senate was raised by advice to the Senate committee, and was accepted and recognised by the committee and the Senate. If there is also another immunity, an immunity of former ministers from summons or questioning by the Senate or Senate committees, it is strange that it was not discovered at that time.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely



(Harry Evans)



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hc/let/13514

21 February 2002

Senator the Hon John Faulkner
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Faulkner

**COMPELLABILITY OF FORMER MEMBERS —
FURTHER ADVICE BY THE CLERK OF THE HOUSE OF REPRESENTATIVES**

The Clerk of the House of Representatives has indicated that he has given the attached further advice to Mr Reith, and that Mr Reith has released it.

The further advice does not require any elaboration or clarification of the points I made in my note to you of 19 February 2002. I make one supplementary point only: when witnesses who have declined invitations to appear then appear under summons and answer questions, it cannot be said that they have appeared by compulsion but have answered the questions voluntarily.

At the estimates hearing of the Department of Defence yesterday, the current Minister for Defence, Senator Hill, twice stated that Mr Reith should be given the opportunity to respond to evidence which has been given by officers of his former department about his conduct as a minister. This reinforces the point I made about accountability, and also the point that, if the government makes no claim that evidence which Mr Reith might give about his conduct as a minister should not be given, there is no ground on which Mr Reith can decline to give that evidence.

Yours sincerely

(Harry Evans)



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hc/let/13510

19 February 2002

Senator the Hon John Faulkner
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Faulkner

**COMPELLABILITY OF FORMER MEMBERS —
ADVICE BY THE CLERK OF THE HOUSE OF REPRESENTATIVES**

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With the greatest respect to the Clerk of the House of Representatives, this advice conflates distinct concepts and then draws conclusions from a blurring of the distinction between those concepts which are not justified by the concepts standing alone.

Before proceeding to the confluences on which the advice is based, I note that the exchange at the estimates hearing was about whether Mr Reith could be compelled to attend, and did not go into the question of whether he would have any grounds for asking to be excused from answering any particular questions. Mr Harris' advice passes between each of those questions without clearly distinguishing between them.

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procedures of both Houses for having members of either House appear before the committees of the other. In short, neither House seeks to summon the members of the other House. The immunity attaches to House of Representatives ministers only because they are members, not because they are ministers. Mr Harris may be thinking of the principle that each House does not inquire into the proceedings of the other, a principle also recognised by the Senate, so that, even if a member of the House appears before a Senate committee, the committee cannot inquire into the proceedings of the House or that member's participation in those proceedings. On this principle, a former member of the House, or indeed any other witness, would not be questioned about proceedings in the House. This principle, however, has nothing to do with the former member's status as a former member. The immunity of a current member does not in any sense carry over to a former member. And as there is no immunity of a minister as a *minister*, there is no immunity to be carried over by a former minister.

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suffer from the public revelation of certain information. Here the advice confuses *claims* with accepted immunities. A claim does not become an immunity until it is accepted by the body seeking the information. Governments and ministers have made claims which have not been accepted by the Senate, and the claims have therefore remained claims. Sometimes claims have been made and have been accepted, and have thereby become applications of immunity. The fact that the Senate has procedures to enable witnesses to make *claims* of immunity, and to have those claims considered, does not mean, as Mr Harris concludes, that claims automatically become immunities, even when they are made by former ministers.

In all the controversy which has surrounded the subject into which the Senate Select Committee is to inquire, no claim has yet been made that there are grounds on which questions about the subject should not be answered because of apprehended damage to the public interest, such as by disclosure of secret operations of the Defence Force, or of internal government deliberations. No minister having raised a claim of public interest immunity in relation to this subject, it is strange indeed that a Clerk of the House of Representatives should suggest to a former minister that such a claim might be raised by the former minister. Current ministers are the ones to make any such claims relating to the public interest. A former minister could submit that he is bound by a claim made by the current ministry in relation to information about government operations in his possession. There is one precedent for a similar submission. But such a submission cannot be made until the current ministry has made such a claim. If the government does not seek to conceal government information, a former minister can hardly do so.

Mr Harris' advice, having mixed up distinct principles, draws out of the mixture a new and hitherto undiscovered power of former ministers to withhold information of which they are no longer the custodians.

As I indicated at the estimates hearing, former House of Representatives ministers, including a former Prime Minister, were summoned to appear and give evidence to a Senate committee. They appeared and gave evidence, reluctantly, under summons. At that time (1994) the presumed immunity of serving House of Representatives members from summons by the Senate was raised by advice to the Senate committee, and was accepted and recognised by the committee and the Senate. If there is also another immunity, an immunity of former ministers from summons or questioning by the Senate or Senate committees, it is strange that it was not discovered at that time.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely



(Harry Evans)



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hc/let/13514

21 February 2002

Senator the Hon John Faulkner
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Faulkner

**COMPELLABILITY OF FORMER MEMBERS —
FURTHER ADVICE BY THE CLERK OF THE HOUSE OF REPRESENTATIVES**

The Clerk of the House of Representatives has indicated that he has given the attached further advice to Mr Reith, and that Mr Reith has released it.

The further advice does not require any elaboration or clarification of the points I made in my note to you of 19 February 2002. I make one supplementary point only: when witnesses who have declined invitations to appear then appear under summons and answer questions, it cannot be said that they have appeared by compulsion but have answered the questions voluntarily.

At the estimates hearing of the Department of Defence yesterday, the current Minister for Defence, Senator Hill, twice stated that Mr Reith should be given the opportunity to respond to evidence which has been given by officers of his former department about his conduct as a minister. This reinforces the point I made about accountability, and also the point that, if the government makes no claim that evidence which Mr Reith might give about his conduct as a minister should not be given, there is no ground on which Mr Reith can decline to give that evidence.

Yours sincerely

(Harry Evans)



hc/let/13648

22 May 2002

Senator J. Collins
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Collins

**SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT
MR SCRAFTON — LETTER FROM MINISTER'S OFFICE**

You have asked for advice on the letter dated 17 May 2002 apparently signed by a member of the staff of the Minister for Defence, “per” the minister, and relating to the request by the Select Committee on a Certain Maritime Incident that Mr M. Scrafton give evidence before the committee.

The letter indicates that the minister (or the person who signed the letter) has decided what the significance of Mr Scrafton’s evidence is to the committee, what interpretation should be placed on the evidence of another witness about a discussion with Mr Scrafton, and what is the “only contribution” Mr Scrafton’s evidence could make to the committee’s inquiry. The letter then indicates that the minister’s office has contacted Mr Scrafton, and conveys a statement purportedly made by Mr Scrafton that the discussion took place.

Before commenting on these matters in the letter, I note that the letter makes the statement that there is a “longstanding convention that public servants employed under the Members of Parliament (Staff) Act not be called to appear before such committees”. I again state that I know of no basis for the claim that there is any such “longstanding convention”. Such conventions come into existence only by being applied in a long line of precedents which are widely recognised as authoritative. They are not created, even by ministers. The precedents of the Senate are all against the supposed convention.

It is for the committee to decide what the significance of Mr Scrafton’s evidence is to its inquiry, what interpretation is to be placed on another witness’ evidence about a discussion with Mr Scrafton and what evidence Mr Scrafton might be able to give in relation to the committee’s terms of reference. The Senate has not empowered any other person to make these decisions on behalf of the committee. It is also for the committee to determine what questions should be put to Mr Scrafton about the discussion in question. The Senate has similarly not delegated to any person the power to put questions to Mr Scrafton on behalf of the committee.

It is also for the committee to decide whether the committee is satisfied with a purported confirmation by Mr Scrafton that the discussion took place. This does not indicate whether Mr Scrafton recalls the discussion in exactly the same terms as the other witness, or whether he is able to add anything to the terms of the discussion. It also does not indicate Mr Scrafton's conclusions about the discussion or what, if any, action he took as a result of the discussion.

The statement that the minister's office contacted Mr Scrafton and sought his confirmation that the discussion took place also raises the possibility that Mr Scrafton's purported confirmation, even if it is accepted as evidence by him, was not given freely and without interference. The committee has already caused to be referred to the Privileges Committee a case in which an officer who could well be regarded as superior apparently called to a meeting an officer who could well be regarded as subordinate to ascertain the latter officer's recollection of matters relevant to the committee's inquiry. The mere occurrence of such a situation raises, as the chair of the committee pointed out, a strong suggestion that the subordinate officer was put under pressure to make his recollection accord with that of his superior. A person in the minister's office, in the practical, current mode of operation of ministers' offices and the public service, is superior, and a public servant in the minister's department is subordinate, raising the same possibility of corruption of evidence as in the other case. Even if the question was put to Mr Scrafton in the form: "What is your recollection?", rather than: "This is your recollection, isn't it?", the strong possibility of pressure being applied is there. And, even if the superior/subordinate relationship is not present, the problem of a person with an interest in the witness' evidence "getting the story straight" is present.

Whatever the situation, it would be open to the Senate to treat it as improper interference with a witness. The placing of Mr Scrafton's purported statement before the committee makes him a witness in the inquiry, and if it is shown that his statement has been fabricated or improperly influenced, the offence is proved.

I recall a senator many years ago putting to a senior public service witness the proposition that a Senate committee is entitled to at least the same respect as a magistrates' court. The witness felt constrained to agree with that proposition. Perhaps nowadays ministers and their staff would not agree with that proposition. You may imagine, however, the reaction of a magistrates' court to a letter being tendered, in place of the appearance of a material witness, stating: "I act on behalf of this witness' boss, who has decided that the witness is not permitted to appear, but I have decided what relevant evidence the witness could give, I have asked him about it, and this is what he says".

It would be a different matter if a letter were received from the minister, signed by the minister, indicating that the minister raised a claim of public interest immunity in relation to the officer's evidence, and, pursuant to that claim, had instructed the officer not to give evidence. Although such a letter would raise a familiar problem of the rights of the Senate and the claimed powers of the executive government, it would at least raise that problem in a regular and proper way. The manner in which the committee's request for Mr Scrafton to give evidence has been answered, if not a contempt of the Senate, is at least contemptuous.

As indicated, it would be open to the committee to raise this transaction as a possible interference with a witness.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Harry Evans". The signature is cursive and somewhat stylized.

(Harry Evans)



hc/let/13744

26 August 2002

Senator the Hon P. Cook
Chair
Select Committee on a Certain
Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

COMPELLABILITY OF FORMER MINISTERS

The volume of material on this subject has been greatly expanded by the opinions of Professor Lindell and Mr Robertson SC, but not necessarily the clarity of the issue. Uncertainty, which is their bottom line, remains uncertainty when expounded at length.

The question in issue and the possible answers are actually capable of very brief statement. Perhaps I could be allowed to state them again.

The issue is whether, as a matter of law, former ministers who happen to be also former members of the House of Representatives may be compelled to give evidence in a Senate inquiry about their actions *as ministers*.

There is no law on the subject: it is not constitutionally or statutorily prescribed, and there are no cases. The *Egan* judgments are not directly relevant because of the different law under which they were made.

Those who assert the existence of a law have to establish its existence.

It is possible that the courts might find a legal basis for the two relevant matters which have been given parliamentary recognition. They are:

- the two Houses do not summon each other's members
- they do not inquire into each other's proceedings.

Even if the courts were to give legal force to those two principles, would they add them together to make a new legal principle that former ministers who happen to be former members are immune from Senate inquiry into their actions *as ministers*?

My point is simply that the two recognised principles do not add together to make the new one.

It is highly unlikely that a superior court would make that leap.

Whatever is thought of the quality of superior court judges nowadays, they still have a very proper aversion to imposing restrictions on parliamentary processes without a firm basis, and, when confronted with a choice between protecting possible government malfeasance and allowing accountability, they have a very proper tendency to choose the latter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Harry Evans". The signature is written in a cursive style with a large initial "H" and a long, sweeping underline.

(Harry Evans)



AUSTRALIAN SENATE

CLERK OF THE SENATE

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hc/let/13786

14 October 2002

Senator the Hon P. Cook
Chair
Select Committee on a Certain
Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

COMPELLABILITY OF FORMER MINISTERS: A FURTHER POINT

During the Australasian Study of Parliament Group annual conference in Melbourne on 11-12 October 2002, which was devoted to parliamentary privilege, I had a brief debate with Professor Geoffrey Lindell on the question of compellability of former ministers. The committee will recall that Professor Lindell provided an advice giving equivocal support to the position of the Clerk of the House of Representatives that former House of Representatives ministers may not be compelled to give evidence in a Senate inquiry.

Most of the points covered in this discussion were also covered in the material which the committee already has on the subject, but there was one point which is implicit in that material but which was drawn out significantly. The committee may be interested in having a brief note on this point to add to the material in its possession.

The parliamentary convention whereby the Senate does not seek to summon current members of the House of Representatives applies regardless of the subject matter of the inquiry. For example, the Senate could not compel Mr Peter Reith to give evidence about his contacts with the defence contracting firm Tenix so long as he remained a member of the House of Representatives, regardless of whether those contacts had anything to do with his duties as a minister or as a member. Professor Lindell agrees on that point.

I asked whether, if the Senate wished to conduct an inquiry into that matter, it could now compel Mr Reith according to Professor Lindell's view. He indicated that it could, on the basis that the matter did not concern Mr Reith's performance of his functions as a minister. The claimed immunity of former ministers, he said, extends only to matters for which they were accountable to the House of Representatives while they were members of that House. In other words, the immunity of current members, according to this view, survives when they cease to be members, but only partially survives, in relation to particular subjects. The

immunity of current members is unlimited as to subject matter, but when they cease to be members it narrows down to particular subject matters, which means that it transforms from an immunity unrelated to subject to a subject-based immunity. Professor Lindell conceded that point.

This would give rise to very difficult questions and situations in which the courts would be very reluctant to be involved. For example, could not Mr Reith's contacts with Tenix be seen to be intimately related to his functions as a minister? Professor Lindell said no. But it would be highly unlikely that an inquiry into that matter would be limited to Mr Reith's capacity other than as a minister. Would the postulated Senate committee be allowed to summon Mr Reith to give evidence about his contacts with Tenix, but would a court injunction be sought as soon as he was asked questions about contacts with Tenix while he was still a minister? Would a contact be regarded as having been made in his ministerial capacity if it occurred in his ministerial office or on his ministerial telephone? How would a court determine the permissible area of questioning, without closely examining the proceedings of the committee concerned? What would be the legal principle on which the court would decide the permissible area of questioning?

I think it highly unlikely that a court, even if it were to give legal force to the immunity currently having parliamentary recognition, would find a new legal principle which would involve it in such difficult and essentially non-legal issues. I think it more likely that a court would follow another legal principle, that a law should not be found which gives rise to absurdities. It would be an absurdity that a Senate committee could inquire into Mr Reith's contacts with Tenix, which Professor Lindell concedes, but could not inquire into those contacts which were thought to involve his ministerial capacity in some way.

In response to the question of the legal principle on which this narrowing down of the immunity could occur and the subject matters of the immunity could be identified, Professor Lindell's only answer was that such questions are of a kind which lawyers are accustomed to consider.

All this reinforces the point I made in my last note to the committee, that a court is highly unlikely to make the leap from the immunity of a current member to the new, and, as Professor Lindell concedes, quite different supposed immunity of a former member.

As the Senate Committee of Privileges has also been following this question, I have sent a copy of this letter to that committee.

Yours sincerely



(Harry Evans)

AUSTRALIAN SENATE
WITNESSES - FORMER MINISTERS AND MINISTERIAL STAFF

OPINION

The Clerk of the Senate has asked for my opinion on the question whether former Ministers who are no longer Members of either House, and members of Ministers' staff (currently or formerly on staff) have immunity from compulsory summonses to appear before a Senate committee to give evidence concerning their official actions, as Ministers (but not including evidence about Cabinet deliberations or proceedings in a House) or as staff members providing advice and personal assistance to Ministers.

2. The question is about compulsion, and thus concerns the extent of the powers of the Senate - the powers of a committee devolving from those of the Senate itself.
3. The question thus involves the general matter of the Senate's power to summons witnesses (by which I intend also to include compelling them to produce documents), and the particular matter whether former Ministers and Ministerial staff (as I shall term the class described above) have immunity from any such general power.
4. The question does not involve the quite different question whether there is some incapacity in former Ministers and Ministerial staff to give evidence and supply

documents (at least, those which are theirs legally to control) voluntarily. Nothing in this Opinion touches on that matter, except for this comment - I have seen nothing to support any such incapacity.

5. Section 49 of the *Constitution* provides as follows:-

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

6. The long title of the *Parliamentary Privileges Act 1987* is “*An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes*”.

7. Beyond any possible dispute, in 1901 the House of Commons at Westminster had powers to order witnesses to give evidence before the House or a committee: eg see the tenth edition (1893) of the treatise now known as *Erskine May on Parliamentary Practice*, Chapter XVI and esp at pp 400 and 401. Equally, there is no doubt, in 1901 select committees of the House of Commons could be given by the House power to send for persons, papers and records, witnesses being summoned by an order signed by the chairman of the committee and the sanction for disobedience being guilt of contempt of Parliament: see the tenth edition of *Erskine May* at p 384. Also, by reason of 1871 legislation, committees of the House of Commons had power, in 1901, to administer oaths to witnesses, thereby attaching to false evidence the penalties of perjury, as well as involving a serious breach of Parliamentary privilege:

see the tenth edition of *Erskine May* pp 406-407. (Later historical references, including pre-1901 material consistent with these propositions, and post-1901 material of great comparative interest, may be found in the twenty-first edition of *Erskine May* especially at pp 629 and 677, and in the twenty-second edition at pp 64, 616 and 646. References to the House of Lords are perforce of broad comparative relevance only. Otherwise, the current editions demonstrate complete consistency with the conclusions noted above and discussed below.)

8. Does sec 49 and its 1901-House-of-Commons-equivalency provision continue to apply directly? In terms, it does so only “*until*” Parliament has “*declared*” the Houses’, their members’ and committees’ powers, privileges and immunities. If the 1987 Act did so, then the 1901-House-of-Commons equivalency no longer applies directly by reason of sec 49, as the latter part of sec 49 containing that provision would then be spent.

9. This issue was considered by the High Court of Australia in *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157, when the only putative such declarations were what the Court described as “*the two very minor and subsidiary matters*” constituted by the *Parliamentary Papers Act 1908* and the *Parliamentary Proceedings Broadcasting Act 1946*. The Court noted that there was then no legislation “*which purports to be a declaration of the powers, privileges and immunities either of the Senate or the House of Representatives, stating comprehensively what they desire them to be*” (at 92 CLR 167). Their Honours (all seven unanimously) regarded the argument that the latter part of sec 49 no longer had application as untenable, describing the earlier part of sec 49 as “*dealing with the whole content of their powers, privileges and immunities*” and being “*concerned with*

the totality of what the legislature thinks to provide for both Houses as powers, privileges and immunities”, so that the phrase “*until declared*” introducing the latter part of sec 49 meant “*until the legislature undertakes the task of providing what shall be the powers, privileges and immunities*” (at 92 CLR 168).

10. Bearing in mind the long title of the 1987 Act, it must be at least arguable that the event so described by the High Court as not yet having occurred in 1955, has now occurred. On the other hand, a contrary argument would fasten on the Court’s reference to comprehensiveness and totality of legislative provision as to powers, privileges and immunities. The contrary argument would proceed by remarking the self-evident incompleteness of the *Parliamentary Privileges Act* as a code of eg the Houses’ powers. This is particularly so in relation to the specific question I am considering, given that there is no specific provision in the 1987 Act empowering a House or a committee of a House to summon witnesses to give evidence. However, significantly, sub-sec 14(3) of the Act explicitly assumes that a person may be “*required to attend before a House or a committee*”, an assumption which presupposes an existing and continuing power in a House or a committee to impose such a requirement. The lack of comprehensiveness and totality of provision in the 1987 Act is therefore clear - because it could not seriously be argued that in the absence of a specific provision granting that power neither House nor any committee could any longer require the attendance of any person.

11. Were it not for sec 5 of the Act, it might be necessary to resolve the conflicting arguments noted in 10 above. In that event, I think there would be considerable doubt as to the ultimate outcome. This is not merely an academic or theoretical issue, because there could have been real differences between the

interpretation (including by implication) of a 1901-House-of-Commons equivalency directly imposed by the *Constitution*, in 1901, by contrast with a provision to similar effect legislatively imposed in 1987.

12. For the purposes of answering the present question, fortunately, these other issues may be deferred indefinitely. For sec 5 of the *Parliamentary Privileges Act* provides as follows:-

Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as under force in section 49 of the Constitution immediately before the commencement of this Act, continue in force.

13. By this provision, Parliament has ensured that the full content of the sec 49 1901-House-of-Commons equivalency is preserved by force of statute, if no longer (in part at least) by direct force of the latter part of sec 49 itself. The temporal description in sec 5 of the Act (viz “*immediately before the commencement of this Act*”) in turn incorporates the 1901-House-of-Commons equivalency, because that was the position before the 1987 Act essayed its (incomplete) declaration of the Houses’, members’ and committees’ powers, privileges and immunities.

14. It follows that there is no doubt that, today, the Senate and its committees have the power to compel the attendance of witnesses to give evidence. The basis of this undoubted general power is the combination of the position in the House of Commons at Westminster in 1901 (set out in 7 above), sec 49 of the *Constitution* and sec 5 of the *Parliamentary Privileges Act*.

15. I have laboured the point of the source of law providing this general power because none of its components is apt to have bestowed immunities on persons such as former Ministers and Ministerial staff by silent or undetected implication, let alone by interstitial exceptions. First, in my opinion it is impossible to spell out any such immunity from the text of the *Constitution*. That paramount and fundamental law, having Parliamentary government as its elementary framework, could never be read so as to provide such a specific exception from the efficacy of well-understood parliamentary functions such as obtaining information about the operations of government - the Grand Inquest of the Nation, as it has been called. Second, it is futile to search for any such immunity in the specific terms of the other provisions of the *Parliamentary Privileges Act* - and there is no more reason to find it in the general provisions of sec 5 of that Act as there are to find it in the *Constitution*.

16. Third, this leaves the historically ascertainable position in the House of Commons at Westminster in 1901 (ie at the first instant of New Years' Day that year) as the only theoretically available foundation for the existence of such an immunity. The powers of the House of Commons noted in 7 above are described during that period including until 1901 in terms which entirely omit reference to any such immunity. That suffices to conclude the particular matter raised by the present question - there is no immunity for former Ministers and Ministerial staff from compulsory attendance to give evidence before a committee of the Senate.

17. This conclusion is strongly supported by immunities, or exceptions, or established indulgences, which are the subject of considerable reference and discussion as to the relevant powers of the House of Commons and its committees by 1901. Not all of them warrant exposition or discussion for present purposes (eg Peers

of the Realm without a seat in the House of Lords). But some of them are illuminating as to the rationale and principle they suggest for immunities from such a fundamental tool at the disposal of a House and its committees.

18. The most important immunity (which may be a slightly imprecise expression in this context) established by 1901 in relation to the House of Commons' power to summon witnesses before it or one of its committees was the refusal of the House of Lords, being the other House, to countenance any such purported compulsion directed to one of its own Members, and the concomitant self-restraint regarded by the House of Commons as imposed on it against purporting to direct any such compulsion against a Member of the other House.

19. For present purposes, it is important to note the radically different relation of parliamentary history to current parliamentary practice which applied at Westminster in 1901 from that which applies in Canberra in 2002. For one thing, there was never any contest between the Senate and the House of Representatives to produce a slowly evolving and (for most of its history) undemocratic but nonetheless representative lower Chamber, such as characterizes the yoked histories of the Lords and Commons.

20. What matters for present purposes is that as a profound matter of privilege, evinced by elaborate expressions of comity - symbolized by a number of ceremonies - the two Houses at Westminster in 1901, and also at Canberra in 2002, do not claim any power to compel (as opposed to invite) the attendance of a Member of the other House. And the very point of requests or invitations is to leave it to the powers of the other House eg to sanction the conduct of one of its own Members in declining to cooperate with the invitation to attend the requesting House.

21. The most cogent explanation by way of rationale, in 1901 at Westminster and in 2002 at Canberra, of an immunity against compulsion of a Member of the other House is that it is a public duty (not a private interest) of every Member of a House to attend to his or her business in its Chamber, freed of extraneous pressures. In a system of government which integrally involves legislation by proposal, debate and voting, and which involves responsibility of the Executive to the Houses of Parliament, by questions, enquiries, debate and resolutions (involving voting), it is obvious that the attendance of Members is a matter of cardinal importance.

22. As it happens, not accidentally, Parliament has legislated to this end. By sec 9 of the *Parliamentary Privileges Act*, any supposed power to expel a Member is excluded. By sub-sec 14(1) of the Act, Members are granted immunity from compulsory attendance before a court or tribunal (which by sub-sec 3(1) expressly does not include a House or a committee of a House) on days generally related to his or her House's or committee's meetings. By sub-sec 14(2) of the Act, officers of a House have a similar immunity. The officers' immunity is instructive, showing Parliament's current intention to provide immunity for the public purpose of preventing any impediment to the business of a House or one of its committees.

23. The provisions of sub-sec 14(3) of the Act grant a more limited immunity to any "*person who is required to attend before a House or a committee*", more limited by reference to the very day of the required attendance. In my opinion, the specific provisions of sec 14, relating to Members, officers and the general class of persons required to attend, leave no room for some immanent policy by which an immunity from such a requirement as sub-sec 14(3) obviously contemplates, is to be extended to former Ministers or Ministerial staff.

24. This is because former Ministers, as that term is used in this Opinion to include their character of no longer being Members of either House, have no public business to attend the meetings of a House or a committee. There is no functional rationale for any such immunity. The same is also true, it should go without saying, of Ministerial staff, whether or not they still serve as such, are in the public service otherwise, or have become private citizens merely.

25. I have never seen it suggested that former members of the Executive government trail with them, forever until they die, a personal protective immunity from investigation by the Houses of Parliament of their official conduct, and thus an immunity specifically from compulsory attendance to give evidence in relation to such an investigation. In my opinion, merely to state such a novel suggestion is to doubt its possibility as a matter of law (or political science).

26. Who could be better placed than a former Minister to explain what happened, and to give the facts? What more important task, whether for the purposes of legislation or in the course of examining the workings of government, does a House have than finding out what happened and why at the level of the officers of the Commonwealth designated as “*the Queen’s Ministers of State for the Commonwealth*” in sec 64 of the *Constitution*?

27. In my opinion, these rhetorical questions highlight an important aspect of the matter of principle which impels a negative answer to the question of an immunity from compulsory attendance to give evidence for former Ministers and Ministerial staff. The principle is the inherent function of a Parliamentary chamber to investigate governmental administration, and thus bestowing the powers made requisite by the

nature of that function. In my opinion, this follows for the reasons generally illustrated by the decision of the High Court (albeit it concerned the somewhat different question of the powers of the Legislative Council of the Parliament of New South Wales) in *Egan v Willis* (1998) 195 CLR 424. By way of selective example, the references by Gaudron, Gummow and Hayne JJ at [42] and [45] strongly support the function of an Upper House as a place where, as in the Lower House, there is a direct rôle for the House to superintend government by questioning and criticizing on behalf of the people. There is nothing in the 1855 origins of that New South Wales chamber which distinguishes this reasoning from that which in my opinion must be true of the Senate.

28. As noted in the second parenthesis in my statement of the question for this Opinion, at the head of this document, there is no call at present to consider any limitations on the power of the Senate (and thus of its committees) or any immunity granted to particular personages, by reason of the evidence or likely evidence in question concerning what may conveniently be called Cabinet secrets. It is clear that the decision in *Egan v Chadwick* (1999) 46 NSWLR 563 constitutes authoritative support by the New South Wales Court of Appeal, by analogy, for either a lack of power or a corresponding immunity against the production of secret Cabinet documents by order of the House, and in my opinion this would undoubtedly cover as well the issue of compulsory evidence about Cabinet secrets. Because this Opinion need not address the issue, I will say nothing more about it, except that it should not be assumed that in my opinion there is anything like an absolute immunity of the kind which, I concede, may reasonably be gathered from those judicial reasons.

29. For all the reasons given above, in my opinion the question in relation to the so-called former Ministers has only one correct answer: viz they have no immunity from compulsory attendance to give evidence to a Senate committee, because they are no longer Members of either House. So long as no intention appears, or better still all intention is disavowed, of questioning the now private citizen about his or her Cabinet secrets, or conduct in the House of Representatives (being the other House), there is no right in a former Minister who is no longer a Member of the other House to resist an order given under the undoubted power of the Senate. Resistance is, in my opinion, clearly a serious contempt, and punishable as such.

30. Does any circumstance arise in law or practice which could possibly justify less subjection to an order of the Senate of Ministerial staff than of former Ministers? Given their difference of character so far as their offices are concerned, it would be bewildering if it were so. In my opinion, so far as questioning about their conduct or their observations of other conduct, as advisers to Ministers, are concerned, no question of Departmental responsibility arises of a kind which might otherwise have required attention to the wisdom or propriety of a Senate committee interrogating them. It follows that, so long as nothing involving extended breach of Cabinet confidentiality is invited or required, Ministerial staff, whatever place they hold in or out of the public sector at the time they are ordered to appear, must comply with that order to appear and give evidence before a Senate committee.

31. I am asked to assume that no claim of public interest immunity has been raised by the Government in relation to any evidence which former Ministers may give, and so I have not further considered that question. I should not be taken as regarding such a claim as simply analogous to a claim made in similar terms to a court of law. In my

opinion, in general terms, the difference of function and thus of necessary power between a House of Parliament and a court of law is very considerable.

32. I am also asked to assume that the Government has claimed a right to instruct members of Ministerial staff not to appear before Senate committees. I note, so that the point may not be mistaken, that this position is quite different from one which is protective of Cabinet secrets or of the confidential discourse between the Commonwealth (ie the Crown) and its law officers. In relation to Ministerial staff, and assuming that no Cabinet secrets or high matters of legal advice are involved, there is even less reason in principle to consider a right to prevent persons attending to give evidence to a Senate committee in the case of Ministerial advisers than in the case of an ordinary Departmental officer for whom there are public service disciplinary procedures as well as a responsible Minister. In particular as to factual enquiries, as opposed to occasions for a personal apologia, Ministerial advisers have no constitutional, statutory or principled claim to be less susceptible to the demands of the Senate than any other person.

33. I note the experience drawn to my attention in the United Kingdom and in the United States of America by the Clerk, of which I am also otherwise aware. In my opinion, that experience corroborates (for what that is worth) the following aspects of the question I have been asked to address. First, the Executive claims a right to withhold evidence about its own conduct from a chamber of the legislature. Second, no such chamber has conceded that right. Third, there are precedent examples of persons in the relevant position attending to give evidence to such a chamber. There is no support for the position I have been asked to assume about the Government in this material.

34. I therefore advise that former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee.

35. I have not referred to precedents in the Senate, in this regard, in order that my Opinion examine the matter from first principle. However, like the Clerk, in his tenth edition of *Odgers' Australian Senate Practice* (at p 443), I observe that precedent is squarely against any such immunity.

FIFTH FLOOR,
ST JAMES' HALL.

16th May 2002

Bret Walker



OFFICE OF THE CLERK OF THE HOUSE

3 April 2002

Mr Brenton Holmes
Secretary
Select Committee on a Certain Maritime Incident
Room S.157
Parliament House
CANBERRA ACT 2600

Dear Mr Holmes

Request for advice on behalf of Senate Select Committee

Thank you for your letter of 28 March 2002 conveying on behalf of the Senate Select Committee on a Certain Maritime Incident a request for advice on certain powers of parliamentary committees. Specifically, you mentioned the calling, as witnesses, of former ministers and of ministerial advisers. You also mentioned the committee's particular interest in views about any immunities that might attach to these people, and about the nature and extent of any relevant precedents, in the Australian Parliament or in any comparable legislature.

I am happy to provide the points that follow. In passing them on to the committee, I would be grateful if you could inform the committee members that I am not formally trained in the law. However, I have passed my conclusions and observations before a number of legally trained people. I hope my observations will be of some help to the committee which I understand is being required to consider significant matters relating to procedure and substance.

Basic principles

The basic principles as I see them relate to:

Immunity of current members

- The immunity enjoyed by current members of one House of the Parliament, in particular, members who were also Ministers, from being forced to give evidence before a parliamentary committee established by another House of the same Parliament.
- implications of the traditional denial the House has demonstrated under the leadership of Prime Ministers of different political persuasions to the concept that House Ministers are accountable to the Senate.

Continuation of immunity

- The continuation of any immunity extending to a former Minister after her or his period of service in the Parliament in respect of matters relevant to their conduct as Ministers.



Minister's staff

- The application of a similar immunity to staff employed in the Minister's office before and after the Minister's period of service in the Parliament, and

Public interest immunity

- certain matters relating to public interest immunity.

Immunity of current members of Parliament

I propose to discuss this consideration in some detail. I believe that is important to establish the existence of the immunity, and the justification on which it is based, preliminary to discussing the situation of former Members of the Parliament.

There appears to be no doubt as to the existence of an immunity in respect of current members of Parliament. This conclusion is borne out by a perusal of *House of Representatives Practice*¹ and *Odgers Australian Senate Practice*², of which the relevant segments of each would be available to the committee.

Comity

There is less agreement on the justification for the immunity. The Clerk of the Senate has described an immunity of this kind as being "a matter of comity between the houses and of respect for the equality of their powers"³. It is my belief that the principle is a legal restriction based upon the Constitution, whereas the use of the term "comity" may suggest something falling short of a strict legal immunity. The term is derived from the Latin "comitas" and is defined as "courtesy, civility, urbanity, kindly and considerate behaviour towards others"⁴. An electronic search of the Australasian Federal Conventions of the 1890s reveals that the term was used to refer to the friendly relations between nations (and its current legal use relates to a similar meaning in international law), the colonial jurisdictions and the proposed States of the intended Commonwealth of Australia. It does not appear to be used to refer to the relations between the Houses of the proposed Commonwealth.

Nor has the House of Representatives endorsed the ramifications of the concept described by the Clerk of the Senate whereby the Senate will not censure a Member of the House of Representatives "because it is not appropriate for the Senate to seek to censure a member of the House of Representatives other than a minister acting in that capacity on the basis that only the House can examine the conduct of its members other than ministers"⁵.

The House has agreed to a motion repudiating sectarian sentiments attributed to a named Senator⁶, and has agreed to a censure motion in respect of a private Senator for disclosure of a tax file number, and on a separate occasion for failing to observe

¹ *House of Representatives Practice*, 4th edition (hereafter *HRP*), pp34-5,639-42, 729.

² *Odgers Australian Senate Practice*, 10th edition (hereafter *OASP*), pp56, 440-3.

³ *OASP*, p442

⁴ Shorter Oxford Dictionary definition.

⁵ *Senate Procedural Information Bulletin*, No. 122, for sitting period 2-12 March 1998.

⁶ *Votes and Proceedings of the House of Representatives* (hereafter *V&P*), 1970-72, p981.

reasonable standards of behaviour⁷. As recently as 19 March 2002, a motion to suspend standing orders was moved in the House to enable a motion of censure in respect of a Senator⁸.

On occasion in the past, the Senate has also applied a less stringent approach to what has been described as a matter of comity, which also extends to the officers of each House. In 1921, the Senate requested an amendment that would have reduced the salary proposed in Appropriation Bill 1921-22 for the Clerk of the House. On 19 March, the Senate agreed to a censure of the Prime Minister for his actions in respect of a Senator⁹.

Legal restriction

My view is that the immunity of current members of Parliament is soundly based on the powers of the Houses of the legislature under the Constitution. The complete autonomy of the Houses from each other is primarily based on section 49 of the Constitution, and section 50 providing for each to determine its rules and orders. It is amplified in statute and common law, with each House elected on a distinct basis and given the control of its own staffing, finance, accommodation and services¹⁰.

Professor Geoffrey Lindell has commented on the legal basis of the immunity of members of one House from the authority of the other House of the same Parliament:

The same immunity is acknowledged to exist in relation to the Houses of the British Parliament. The immunity is likely to be based on the need for each House to function independently of, and without interference from, the authority of the other House. It appears to make good sense from a policy point of view as well as from an analytical perspective since it may flow directly from the terms of section 49 of the Constitution if, as seems likely, this was an immunity enjoyed by the Houses of Commons at the establishment of the Commonwealth¹¹.

The independence of the houses and the equality of their powers and the application of the probable powers of the United Kingdom House of Commons as at 1901 is stated in Hatsell as follows:

The leading principle, which appears to pervade all the proceedings between the two Houses of Parliament is, That there shall subsist a perfect equality with respect to each other; and that they shall be, in every respect, totally independent one of the other. – From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other; but if, there is any ground of complaint against an act of the House itself, against any individual Member, or against any of the Officers of either House, this complaint ought to be made to that House of Parliament, where the offence is charged to have been committed; and the nature and mode of redress, or punishment, if punishment is necessary, must be determined upon and inflicted by them. Indeed any other proceeding would soon introduce disorder and confusion; as it

⁷ *HRP*, p318.

⁸ *V&P*, p119

⁹ Senate Hansard, 19/3/02, pp 661-676.

¹⁰ *HRP*, p34.

¹¹ *Parliamentary Inquiries and Government Witnesses* (1995), *Melbourne University Law Review*, 383 at 395. See also *Members of Parliament: law and ethics*, G Carney (2000) at pp185-6.

appears actually to be done in those instances, where both Houses, claiming a power independent of each other, have exercised that power upon the same subject, but with different views and to contrary purposes¹².

May expresses a similar view as follows:

Since the two Houses are wholly independent of each other, neither House can claim, much less exercise, any authority over a Member or officer of the other, and thus cannot punish any breach of privilege or contempt offered to it by such Member or officer¹³.

I conclude the section of these notes on of the immunity of current Members of Parliament being on a legal basis rather than a loose concept of comity with reference to a recent resolution of the Senate. In 2001, the Senate authorised Senators to appear before the Committee of Privileges of the House of Representatives “subject to the rule, applied in the Senate by rulings of the President, that one House of the Parliament may not inquire into or adjudge the conduct of a member of the other House”¹⁴. Any statement of practice deriving from this has the advantage of being based on a resolution of the Senate, and appears to confirm the view that something more than custom or convention, and something more akin to a legal immunity, is involved. The courts have not yet adjudicated on the matter, as the Clerk of the Senate has advised¹⁵. However, this may well occur if the penalty under an alleged breach of the senate privilege resolutions is pursued. I will discuss this matter in more detail subsequently.

Restricted immunity?

The issue remains as to whether the immunity is strictly confined to the conduct of a member of the Parliament, as a member of the Parliament. There is the related issue as to whether the immunity does not extend to the conduct of a Minister which did not form part of the proceedings of the House of which the Minister was a member.

The advice of the Clerk of the Senate to Senator Faulkner dated 19 February 2002, a copy of which Mr Evans supplied to me after he understood that Senator Faulkner had released the advice, appears to suggest that the immunity is confined in this way. However, my view is that the rights, privileges and liabilities of Members of Parliament must be construed against the background of the principles of responsible government. There is an abundance of authority to show that those principles underlie our federal Constitution, the Constitutions of the Australian States and the aspects of those constitutions which bear upon the workings and operation of the respective parliaments¹⁶. (I note in passing that Mr Evans’ advice to Senator Faulkner commented that the immunity was based on the principle of the comity between the Houses, which I have indicated not to be the preferable basis).

¹² *Precedents of Proceedings in the House of Commons* (1818), Vol. 3, p.67.

¹³ *May*, 22nd edition, p.34.

¹⁴ *HRP*, p35, *OASP*, p.442.

¹⁵ *AOSP*, p442.

¹⁶ See generally *Lange v Australian Broadcasting Commission* (1997) 189 CLR 579 at pp561-2, *Egan v Willis* (1998) 73 ALJR 75 paras [35] – [42] at pp 82-4, *Egan v Chadwick* [1999] NSWCA 176 (10 June 1999) paras 15-47.

In the general scheme of responsible government in the federal sphere, the House of Representatives is constitutionally the predominant forum, in the sense that executive government depends on majority support in the House.

Your letter to me of 28 March specifically mentioned former Defence Minister Peter Reith, and relates to an examination of conduct which took place after the dissolution of the House of which he was a Member during the subsequent election campaign. From 8 October 2001, the time of dissolution, until 26 November 2001, when the new administration began, Mr Reith was a Minister but not a Member of the House. The Government was operating under caretaker conventions, on the grounds that the Chamber under the principles of responsible government to whom the administration should be accountable does not exist, and the nature of the next administration is unknown¹⁷. The immunity discussed relates to conduct for which the Minister could have been held to account in the House, but Mr Reith could not have been asked questions in a dissolved House and he was not to be a Member of the newly-elected House.

However, I do not believe that this constitutes grounds for rejecting the operation of the immunity on this ground. To do so would constitute a narrow and technical view, especially in the light of the fact that some Minister would ultimately become answerable to one of the Houses in the new Parliament once it was convened.

Legal basis in practice – House Ministers not accountable to the Senate

The existence of the highly probable legal immunity is reflected in the practices and procedures followed by both Houses if a member of the other House of the current Parliament is to be called to give evidence to a parliamentary committee. However, the standing orders have not been interpreted as requiring consent or leave to attend if the Member or Senator is prepared to appear voluntarily¹⁸.

Voluntary appearances before committees

Appearances by Ministers before a committee of either House may be a consequence of a wish to participate in a sharing of views. There are a number of instances over the years of a Minister of one House appearing voluntarily before a committee of the other House. It is quite common for House Members to appear before Senate committees by invitation, and many have done so. According to *Odgers Australian Senate Practice*, this informal procedure of appearance by invitation is appropriate in cases where Members are offering their views on matters of policy or administration under inquiry by Senate committees, but it has not been used where the conduct of individuals may be examined, adverse findings concerning individuals may result or disputes as to matters of fact may occur. In the latter-mentioned instances, the formal process of request for attendance by message to the House and authorisation to appear should be employed¹⁹.

Comment on other administrations

¹⁷ *Cabinet Handbook*, Attachment 1 para.1, *Guidance on Caretaker Conventions*, Department of the Prime Minister and Cabinet, September 2001, para. 1.1.

¹⁸ *HRP*, pp639-42, *OASP*, pp 440-3.

¹⁹ *OASP*, p 441.

Your letter of 28 March sought comment on comparable legislatures.

Australian States

The position of members of the South Australian Parliament being required to give evidence to the other House or its committees at the turn of the 19th into the 20th century appears to have been the same as outlined in the passage from *Hatsell* quoted earlier²⁰. There has not been the opportunity to check on other colonial/State legislatures in the time frame of the completion of this response.

USA I understand that a similar practice in relation to voluntary appearance may occur in the Congress in the United States of America²¹.

India

A similar practice as prevails in the Parliament of the Commonwealth of Australia appears to apply in the Indian national Parliament. However, there is one significant difference. Members of either House of the Indian Parliament are not permitted to give evidence to the other House without the permission of the House of which she or he is a member. They would be considered to be in contempt of the House in which they hold membership if they acted in breach of this rule²².

Compulsory attendance of serving Minister sought and not agreed to by the House
In relation to the Australian Loan Council inquiry, the then Prime Minister indicated to the House in 1992 that, whether or not a House Minister wished to agree to a suggestion that he account for himself to the Senate, the Prime Minister would forbid him going to the Senate to account for himself; no House of Representatives Minister would appear before a Senate committee of any kind while he was Prime Minister²³. On 7 October 1993 the House considered a message requesting the attendance of Mr Dawkins before the Senate Select Committee on the Australian Loan Council. The House resolved that it was not appropriate for the Minister to appear and give evidence against his will, and declined to require him to attend²⁴.

Attendance of former Minister sought and not obtained

In 1981, the Chair of the Senate Standing Committee on Finance and Government Operations wrote to a former Minister regarding an apparent conflict in evidence given to the committee during the course of its inquiry into the Australian Dairy Corporation and its Asian subsidiaries. The former Minister (Mr Sinclair) was still a Member and had another portfolio. He wrote to the committee; there was still a discrepancy between the sworn evidence of a witness and the former Minister's recollections as expressed in the letter. In a personal explanation, the former Minister indicated that he did not believe it appropriate for a House Minister to appear and give sworn evidence before a Senate committee²⁵. The chair of the committee informed

²⁰ *Manual of the Practice, Procedure and Usage of the House of Assembly of the Province of South Australia*, Blackmore, 2nd edition, 1890, p156, and *Manual of the Practice, Procedure and Usage of the Legislative Council of the Province of South Australia*, 1889, p115.

²¹ *Jefferson's Manual and the House of Representatives of the United States 99th Congress*, W Holmes Brown, 1985, pp120,152.

²² Kaul and Shakhder, *Practice and Procedure of Parliament*, GC Malhotra (ed) 5th edition at pp 304-5.

²³ *HR Hansard*, 4/11/1992, page 2547.

²⁴ *Votes & Proceedings*, 7/10/1993, page 342.

²⁵ *HR Hansard*, 7/5/1981, page 2111.

the Senate that Mr Sinclair had made a statement (not within his current ministerial responsibility) to the House of which he was a Member. The House could treat as a contempt a false statement made to it by a Minister in relation to his area of ministerial responsibility. The extent to which the convention of ministerial responsibility extended beyond that was not clear to the committee²⁶.

Senate Censure motions

Appearance before a parliamentary committee is one demonstration of the concept of parliamentary accountability. The asking of parliamentary questions is another. However, the greatest demonstration of parliamentary accountability in the House of Representatives resides in a motion of want of confidence or censure. The successful passage of a House motion of this kind would normally be followed by severe action, resignation in the case of a want of confidence resolution. There have been successful Senate motions censuring Senate Ministers, House Ministers, House and Senate Ministers representing them, the Prime Minister and the Government. However, *House of Representatives Practice* indicates that while action of this kind in the Senate may contribute to the pressure, the passage of a censure motion in the Senate would appear to have no substantive effect²⁷.

The situation is therefore that the House has adopted the attitude over successive administrations that its Ministers are not accountable in their own right to the Senate or its committees.

Continuation of immunity

It is my firm belief that the rationale which supports the probable legal immunity of current Members of Parliament is sufficiently wide to sustain the continuation of immunity in respect of matters relevant to their conduct as Ministers after their cessation of membership. My belief is principally based on the consideration that to regard the immunity otherwise would render it incomplete and defeat the essential objective of that immunity.

The independence and equal authority of each House of Parliament to be the sole judge of the conduct of its own members could be undermined if the other House could postpone the exercise of that authority until the retirement of the member in question. This could prove to be a significant fetter on the freedom of action of both the member and the House concerned.

The failure to observe the continued operation of the immunity in relation to former members could lead to the same sort of friction and recrimination which underlies one of the reasons for continuing the immunity in relation to current members. It would do nothing to reduce the potential for damaging the harmonious and good relations between the two Houses of Parliament.

For either House to act in a way which disregards the continuation of the immunity would not advance the public perception of the parliament. A number of people politically disinterested in the current inquiry have made comments to the effect that

²⁶ *Sen. Hansard*, 14 May 1981, page 2040.

²⁷ *HRP*, page 317.

the compulsory attendance of a former Minister of the House before the committee would have quite unfortunate connotations, and that, whatever the intentions of the committee members, there could be a perception of inevitable risk or prejudice to the former Minister. Terms stemming from the Tudor monarchy have been used. I would never use those terms, but I can understand the perception that leads to a description of this kind. I am certain that in any situation in which I was called upon to provide advice, particularly if the future provided for minority governments in the House of Representatives or for committee inquiries following changes of government, my approach would be that it is not appropriate to act in this way.

There is also the comparison of immunities enjoyed by certain persons or office-holders by reason of their position in relation to the performance of their duties and functions must continue to operate after they cease to hold office. The following comparisons come to mind:

- certain privileges attaching to the proceedings of either House do not cease after a Member of Parliament ceases to be a Member. For example the protection provided by the privilege of freedom of expression in the Houses, their committees or matters incidental to those proceedings;
- the power, ability and obligation of a House to protect witnesses appearing before it or one of its committees does not apply only when the appearance or matters incidental to it are occurring;
- the absolute immunity of judges from any liability in relation to anything said or decided by the judge in determining a case does not cease to operate after a judge has retired;
- the immunities which may exist for federal reasons as regards the inability of a parliament at one level of government to impose discriminatory taxes on public servants employed on the other level of government under Australia's federal system may extend to discriminatory taxes levied on pensions paid to retired public servants²⁸.

Practice in relation to former Ministers not Members of the House

In the Sinclair instance, the former Minister was still a Member of the House (and still a Minister). The Senate appear to be in no doubt that a serving Member cannot be compelled to appear before a Senate committee. In the 1992 Dawkins case cited above, the Clerk of the Senate provided advice that the Senate did not possess the power to compel Members of the House to appear. *Odgers Australian Senate Practice* states that the probable immunity does not apply to former Members²⁹, using the Print Media Committee as the example to prove the case. In 1994, during an inquiry by the Senate Select Committee on the Print Media, two former Treasurers and a former Prime Minister gave evidence after they had ceased to be Members of the House. Former Treasurer Dawkins appeared voluntarily, former Treasurer Kerin and former Prime Minister attended following the issue of a summons.

Limitations of precedent

However, this is a strictly limited precedent, and the basis of this Senate claim in respect of former Members has not been tested. All were former Ministers and former Members (Mr Dawkins had only recently resigned). Mr Dawkins appeared

²⁸ See *West v Commissioner of Taxation (NSW)* 56 CLR 657 eg at pp 666,668,681 and 687.

²⁹ *OASP*, pages 442-3.

voluntarily following a request by the committee. The committee found it a matter of regret that Mr Hawke and Mr Kerin had only attended following the issuing of a summons³⁰. However, both Mr Hawke and Mr Kerin appear to have given evidence voluntarily once they appeared, Mr Hawke successfully seeking the committee's consent to appear before the committee on a second occasion to respond to evidence which he perceived to have reflected adversely on his interests³¹.

Cited authority for precedent

The Clerk of the Senate has provided Senator Faulkner with advice that the probable immunity of former Members of Parliament does not apply.

This reflects a flat assertion in the current edition of *Odgers Australian Senate Practice*³². The discussion of the Clerk of the Senate does not go beyond making the assertion and supporting it by reference to the incident relating to the former Prime Minister and two former Treasurers in the Print Media inquiry. I believe with respect that committees of either House do not have the power to establish the practice of the House in respect of a matter, and that, in the absence of decisions of the House, unelected officials do not have the power to assert with any finality the practices of the House in question are. My attitude would always be to regard myself as the servant of the House for which I work, and not as a determiner of its practices. This is for the House itself to decide. I do not believe the Senate has made a decision on the matter, despite the flat assertions.

Immunity of Minister's staff

Persons employed under the Public Service Act

There are a number of comments I wish to make concerning witnesses before parliamentary committees who are employed under the *Public Service Act 1999*³³. The first relates to the values of the Australian Public Service under section 10 of the Act. Paragraph 10(1)(e) of the Act indicates that:

the APS is openly accountable for its actions, ***within the framework of Ministerial responsibility*** to the Government, the Parliament and the Australian public; (*emphasis added*).

Subsection 10(6) of the Act provides that:

An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

The *Parliamentary Privileges Act 1987*³⁴ contains a provision at subsection 6(2) to the intent that subsection 6(1) of the Act does not apply to actions or words in the presence of a House or a committee. The absence of such a disclaiming provision in the Public Service Act, passed after the Privileges Act, could well be interpreted to mean that it was the intention of Parliament not to relieve persons employed under the

³⁰ *First Report of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media*, June 1994, page 20.

³¹ *Ibid*, pages 20, 27 and 35.

³² OASP, p443.

³³ Act No. 147 of 1999.

³⁴ Act No.21 of 1987.

Public Service Act of their obligation to observe the terms of subsection 10(6), even when appearing before a House or one of its committees.

Persons employed under the MOP(S) Act

It is my understanding that most persons employed in the offices of Ministers are employed under the *Members of Parliament (Staff) Act 1984*³⁵. A reasonable case could be made out for the immunity operating in respect of Ministers who are current Members of the Parliament also applying to their staff, based on a Minister's need for the assistance of staff to perform their roles and functions, especially in the modern complex world of government and administration. Support for this argument can be derived from the following:

- In former times it seems that parliamentary privilege attached to the personal servants of members of the Lords and the Commons, and to their agents or other persons acting on their behalf (eg freedom from arrest or molestation while Parliament was sitting). This particular privilege was abolished by the *Parliamentary Privilege Act 1770* (UK). The status of other privileges not specifically abolished by that enactment has not been determined.
- In *Holding v Jennings*³⁶ it was held that the typing of a statement to be made by a member of parliament attracted absolute privilege. However, under the terms of the Parliamentary Privileges Act it would seem that actions of this kind must relate to matters incidental to proceedings in Parliament, and would not automatically extend to an interpretation that the immunities enjoyed by a Member of Parliament necessarily attach to their staff.

Of course, there is a consideration relating to difficulty in distinguishing members of a Minister's personal staff and public servants employed in the Minister's department. However, the distinction may be found in the fact staff are employed under the MOP(S) Act by the Minister and other Members of Parliament. The employing Member is responsible for their conduct. Moreover, as I have indicated above, statutory restrictions apply to staff employed under the Public Service Act in their dealings with Ministers and their offices.

I believe that committee members would have available to them the response of the Prime Minister in question time on 12 March 2002 concerning the appearance of ministerial staff. In that response, Mr Howard quoted the view of then Senator McMullan that ministerial staff were accountable to the Minister and the Minister was accountable to the Parliament, and ultimately, the electors³⁷.

If there is an acceptable argument in relation to the staff employed by current members, the same argument would apply to the former staff of former members.

The Clerk of the Senate has rejected the existence of an immunity extending to ministerial staff on the basis of the 1995 appearance before a Senate committee of the Director of the National Media Liaison Service³⁸. However, *Odgers Australian Senate Practice* indicates that it was raised in debate on the resolution requiring the Director to appear that the resolution did not set a precedent for the appearance of ministerial

³⁵ Act No. 64 of 1984.

³⁶ [1979] VR 289.

³⁷ *HR Hansard*, 3/12/02, p939.

³⁸ OASP, p 443.

staff. Again, *Odgers Australian Senate Practice* indicates that such persons have no immunity either under the rules of the Senate or as a matter of law³⁹. It may be true that the resolutions of the Senate do not refer at present to the position of such persons, or even former Ministers and Members of Parliament. However, if the immunity flows from the constitutional relationship between the Houses of Parliament, the failure of Senate rules to recognise the immunity could not avail against the Constitution.

Power to compel attendance

There is **precedent** for a Senate committee empowered to summons persons, papers and records, to compel the attendance of anyone who is not a current Member of the House. This is consistent with legal advice to the Senate Print Media inquiry in 1994 provided by Mr D Jackson QC of Snedden Hall and Gallop⁴⁰.

Conduct of committee hearing

However, notwithstanding the Kerin/Dawkins/Hawke precedent, it is my firm belief that someone who is a former Minister could be requested to appear in a personal capacity only, not as a former Minister of the Crown, or if so called, could be constrained in the responses that he or she could make to the committee's questions. I believe that the 1994 view expressed by Mr Jackson QC in relation to the consequences of a person simply refusing to answer a question properly put at a meeting of a Senate committee is subject to the qualification of parliamentary experience. Mr Jackson cites the Senate privilege resolution:

- (12) A witness before the Senate or a committee shall not:
 (b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so.

I believe that a response relating to parallel considerations to public interest immunity or a duty not to provide information would constitute an answer. However, it would be for the committee to decide and for the Senate itself to take any action if it thought it appropriate.

Public interest immunity

The responses to be provided by a former Minister could well be constrained by considerations related to an extension of what has been called Crown or Executive Privilege, now usually known as public interest immunity. Vested in the Executive, the government may, under this philosophy, seek to claim immunity for requests or orders by a committee for the production of certain oral or documentary evidence on the grounds that the disclosure of the evidence would be prejudicial to the public interest⁴¹. The category of submissions precluded on these grounds include:

- the advocating, defending or canvassing the merits of government policies (including policies of previous governments),

³⁹ Ibid.

⁴⁰ *HRP*, pp 642-3.

⁴¹ *HRP*, page 642.

- describing policies and administrative arrangements and procedures involved in implementing them,
- considerations leading to government decisions or possible decisions, in areas of any sensitivities, unless those considerations have already been made public or the Minister authorises their identification⁴².

The Senate's resolutions on parliamentary privilege of 25 February 1988, in providing that witnesses may raise objections to the giving of evidence, implicitly acknowledge the right to make claims for public interest immunity⁴³.

The matter of public interest immunity remains a contentious issue on which there is no judicial resolution, at least as regards inquiries conducted by the Houses of the Commonwealth Parliament and their committees. There have been two important cases dealing with the powers of the NSW Legislative Council to compel Ministers to produce documents. The High Court left open the question as to whether public interest immunity could restrict the legal powers of the Legislative Council in *Egan v Willis*. The NSW Court of Appeal decided in *Egan V Chadwick* that the immunity did not restrict the powers of the Council, except as regards for the production of Cabinet documents and Cabinet deliberations. It was acknowledged that the powers of the NSW Parliament were those implied by reference to what was reasonably necessary to enable a legislature to function. The powers of the Commonwealth Parliament may be more extensive by reason of section 49 of the Constitution. However, the general issue remains unresolved for the Commonwealth Parliament⁴⁴.

Of course, it is the current Minister who normally claims public interest immunity, not a former Minister. The guidelines for their application normally apply to official witnesses, and a former Minister is not normally an official witness (unless subsequently employed in a public service capacity). However, there is a strong possibility that a former Minister would be asked questions relating to decisions or deliberations that took place in an official capacity.

There is also the consideration of documents and other intellectual property of a previous administration. As mentioned previously, the official guidelines make reference to the decisions of a previous government.

The 1994 Senate Print Media report contained a reference to public interest immunity claimed by Treasurer Willis in respect of certain public servants and certain documents⁴⁵. Mr David Jackson QC advised the committee that while the executive government's views were to be respected, they were not decisive. However, 'there seems to be ... no reason why that government should not tell its employees, former employees, advisers and former advisers, **and its own former members**, that it intends to claim that the questions should not be answered or the documents not produced'.⁴⁶ [*emphasis added*].

⁴² *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989*.

⁴³ *OASP*, page 482

⁴⁴ See J McMillan in *Parliament and Administrative Law*, in G Lindell and R Bennett (eds) *Parliament: The Vision in Hindsight*, pp 371-5.

⁴⁵ *Op. cit.*, pages 21-29.

⁴⁶ *Ibid*, page 55.

To my mind, questions that might impinge on public interest immunity or material from a previous administration should be directed to a serving Minister who is in a position to make decisions about them and to be accountable to the legislature.

Odgers Australian Senate Practice makes it clear that the Senate has been unable to provide a definitive statement of agreed procedures or criteria for determining whether a claim for public interest immunity should be granted, despite being considered by several Senate committees. A common thread in the committees' deliberations is that the question is a political, and not a procedural one⁴⁷. Decisions of this kind tend to be made in a political context.

Possibly, there is an **obligation** that a former Minister should, if called, request exemption from providing responses to a Senate committee concerning policy and administrative matters during the time that they served as a Minister. In an area where accountability has never been agreed to by the House, any such obligation would be the more significant if the Minister had served as Leader of the House. This consideration is heightened by my belief that the House of Representatives has a clear and legitimate interest in protecting a former Member against any attempts by the Senate to examine that person.

Comparisons from other administrations

I have not been able to locate any direct comparisons in this regard in other administrations. However, it does appear that there has been a case in the United Kingdom where the Ministry of Defence refused to permit two former civil servants to appear before the House of Commons Trade and Industry Select Committee's inquiry into what was known as the Iraqi Supergun affair. The department apparently claimed that, as civil servants give evidence on behalf of ministers, it would be inappropriate for retired officials to appear before select committees. The subsequent Scott inquiry noted that the failure of the two retired officials may be regarded as a failure to comply fully with the obligations of accountability to Parliament⁴⁸.

The matter of penalty

It remains for me to comment on any action that may be taken should a former Member of Parliament decline to respond to an invitation or a summons to appear before a House or a committee or is deemed not to have answered a question from a committee without reasonable excuse. The House does not as yet have privilege resolutions to act as standing orders to govern proceedings of this kind. The Senate does have such resolutions.

The Parliamentary Privileges Act provides at section 4 the essential element of offences. To constitute an offence against a House, conduct, including the use of words, must amount, or be intended or likely to amount, to an **improper** interference with the free exercise by a House or a committee of its authority or functions, or with

⁴⁷ *OASP*, page 482.

⁴⁸ *Government Information and Parliament: Misleading by Design or by Default*, A Tompkins in *Public Law*, 1966,p483.

the free performance by a member of the member's duties as a member (*emphasis added*). Section 7 applies to penalties for an offence against a House, and includes penalties of imprisonment or fines. The section also provides that where a fine is imposed, it may be recovered in a court of competent jurisdiction.

It is my belief that the action to recover a fine could make the circumstances surrounding the offence justiciable. Where a period of imprisonment is involved, it would probably be justiciable⁴⁹. In this regard I cite again the article by John McMillan on *Parliament and Administrative Law*. Professor McMillan, in discussing a number of unresolved questions in *Egan v Willis* and *Egan v Chadwick*, raises the question of penalty. He indicates that the action taken by the NSW Legislative Council - one day suspension of the Minister - fell within the test of "reasonable necessity". However, he raises the question as to whether a longer suspension or punitive action such as expulsion [not available in the Commonwealth sphere] would have met the test. Professor McMillan also raised the prospect of one House passing a resolution in direct contradiction of the other House⁵⁰.

In comparable circumstances, where one House passed a resolution imposing a penalty and the other House, mindful of its clear and legitimate interest in protecting former members of the House from attempts by the other House to examine that person, could well pass a resolution to that effect. A former Member of Parliament who believed that he or she had acted in a reasonable and justifiable way might wish to have the matter considered in the judicial sphere rather than the political sphere.

In conclusion, I would ask you to thank the committee on my behalf for the opportunity to make these comments, and wish the members well in their endeavours.

Yours sincerely



I C HARRIS

⁴⁹ See *HRP* p719

⁵⁰ *Op.cit.*, p374.



AUSTRALIAN SENATE

CLERK OF THE SENATE

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5 April 2002

Senator the Hon P. Cook
Chair
Select Committee on a Certain
Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

LETTER FROM CLERK OF THE HOUSE OF REPRESENTATIVES, DATED 3 APRIL 2002

Yesterday the committee published a letter dated 3 April 2002 from the Clerk of the House of Representatives, Mr Ian Harris.

The letter refers to issues relating to the compellability as witnesses of former ministers and members of ministerial staff which were the subjects of my letters of 19 February and 21 February 2002 to Senator Faulkner (which were made available to the committee following their release by Senator Faulkner) and my note to the committee of 22 March 2002 (which was also published by the committee yesterday).

Mr Harris' letter contains serious misrepresentations of the actions of the Senate and of my references to those actions in my notes. I must therefore respond to the letter, and ask the committee to receive and publish this response.

These misrepresentations add several more layers of confusion over the issues. I will not attempt to disentangle every one, which would take many pages, but I will refer only to the principal points.

(1) The letter continues to misrepresent the actions of the Senate in relation to ministers as ministers as distinct from its actions in relation to members of the House of Representatives who are not ministers. The fact that the Senate censured the Prime Minister on 19 March last (p. 3) does *not* indicate that "the Senate has also applied a less stringent approach". The Senate has always claimed the right to judge the conduct of ministers as ministers, and has consistently refrained from judging the conduct of members of the House of Representatives as members. Obviously the Prime Minister was censured for his conduct in a ministerial capacity. I need not say that the amendment of a bill in 1921 about the salary of the Clerk of the House of Representatives has nothing to do with this issue.

(2) Similarly, the letter persists in confusing the removability of ministers with their accountability. Censure motions of ministers by the Senate are not failed attempts to remove such ministers. The fact that ministers are not removable by the Senate (pp 6, 9) has nothing to do with the issue of accountability.

(3) The Senate's action in asking the House of Representatives to compel the appearance of a minister before the Senate Select Committee on the Australian Loan Council (p. 8) was explicitly taken because the minister was also a current member of the House. It was not a concession that ministers have some kind of immunity as ministers.

(4) It is obvious that if an office-holder has some immunity in respect of their actions as an office-holder, then that immunity in respect of those actions continues after they leave office (p. 10). Who has ever asserted anything to the contrary? The question is whether the immunity exists in the first place. There are several hints in the letter that Mr Reith might be examined on his actions taken in the course of proceedings in the House. I have distinguished that question, and the committee has not done anything remotely to suggest that it may seek to do anything of the sort.

(5) It is obvious that a decision by a committee does not establish a practice of a House (p. 11). Who has asserted that it does? The decision of a committee, however, is significant. The Senate consistently supported, and certainly did not repudiate, the actions of the Senate Select Committee on the Print Media in 1995. The significance of the occasion is that no one at the time discovered the supposed immunity of former ministers which has now been discovered. It is also obvious that Clerks do not establish practices. Who has asserted that they do?

(6) The pages of the report of the Select Committee on the Print Media referred to in the footnote (p. 11) do not give any support to the remarkable proposition that witnesses who appear under summons may be taken to have given evidence voluntarily.

(7) The reference to section 10(6) of the Public Service Act (p. 12) appears to be an attempt to revive the argument that a statutory secrecy provision (a statutory provision requiring a person to maintain the secrecy or confidentiality of information) operates to modify the powers and immunities of each House of the Parliament. The Senate and its committees have operated for over a decade on the basis that this question was settled in 1991 when the then Solicitor-General, overruling other government legal advisers, conceded that such a provision does not have that effect in the absence of some such indication in the statute. As was pointed out at the time, this proposition would mean that literally hundreds of statutory provisions would prevent parliamentary committees from gaining access to information. It is remarkable that this proposition should again be advanced.

(8) The lack of an immunity of ministerial staff is not asserted "on the basis of" the 1995 precedent (p. 13). It is asserted on the lack of any basis for the immunity. The 1995 precedent establishes that the Senate did not accept at that time that there was an absolute immunity, as distinct from other considerations such as those set out in my note of 22 March.

(9) Of course former office-holders may claim to be bound by a claim of public interest immunity made by the government (p. 16). The point is that, before the former office-holders may make such a claim, there has to be a claim by the government by which the former

office-holders may then claim to be bound. Such a claim by the government is yet to be made.

(10) The “reasonable necessity” test applying to the New South Wales Legislative Council under the judgments in the Egan case is cited as if it would have some significance in a court challenge to the powers of the federal Houses (p. 18), but as it has already been conceded in another context (pp 15-16) that the New South Wales Parliament operates on a different statutory basis, the unqualified reference to the case here is misleading.

(11) The letter conveys that great significance is attached to the word “improper” in section 4 of the Parliamentary Privileges Act (pp 17-18), but it is not stated what the significance is. This may be an attempt to rerun an argument about the significance of that word which was tried on before the Senate Privileges Committee some years ago. In the absence of an explanation, I simply give notice that it may be necessary to return to this point if that argument is raised again.

(12) It is impossible to discern what the letter is saying in many passages. For example, the meaning of the references to “unfortunate connotations” and “perception of inevitable risk or prejudice” and “the Tudor monarchy” (p. 10) is entirely obscure. And what is “this way” which Mr Harris would advise against? I do not suggest, however, that the committee seek clarification.

I have kept these points as brief as possible, and I regret the committee having to be troubled by these matters, but the listed statements in the letter should not go uncorrected.

Yours sincerely



(Harry Evans)



OFFICE OF THE CLERK OF THE HOUSE

8 April 2002

Senator the Hon P Cook
Chair
Select Committee on a Certain Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Additional representation from the Clerk of the Senate

It was no surprise to receive late on Friday 5 April the inevitable response from the Clerk of the Senate concerning points I had made on invitation to the Senate Select Committee on a Certain Maritime Incident. Over the years I have noted a number of occasions when the Clerk of the Senate had responded to comments by people who have a different opinion to his own with accusations of misrepresentation, being confused and creating confusion, and being bellicose. On those occasions, as on this one, the only offence has been to have a different opinion. The ploy seems designed to give weight to the Senate Clerk's opinions by personal attacks on those who think differently.

As in the past such attacks have been made on people with at least the same level of skills and training as the Clerk of the Senate and myself, and in some instances with a higher level of intellect than the Clerk of the Senate and myself, I thought myself in good company and was prepared to let the matter rest there. However, I believe that the most recent attack in the letter to you of 5 April reveals a lack of understanding of the more subtle aspects of the principle of comity upon so much of which the opinion of the Clerk of the Senate relies. Because an understanding of this concept is vital to decisions relating to the principal request for advice, I will only deal with that aspect in this note.

I indicated in my initial advice to the committee that the Senate's action in censuring the Prime Minister on 19 March was because of the Senate's perception of the treatment by the Prime Minister, by definition a Member of the House of Representatives, of a Senator. The intent of my interpretation is, I believe, obvious.



My initial advice to the committee also included a quotation from Hatsell to the effect that the principle of the independence of the Houses from each other extended to the officers of either House. In this regard, the action of the House in 1921 in agreeing to a Bill that fixed the salary of the Clerk of the Senate at a lower level than that of the Clerk of the House was an encroachment on the concept of comity, as was the attempt by the Senate to lower the salary of the Clerk of the House to establish parity.

Because I attempted to respond in detail to the requests for information conveyed to me by the secretary to your committee, my response of 3 April was lengthy. If I can summarise my major points, they were as follows:

- Members of Parliament enjoy something closely akin to a legal immunity from being compelled to submit to examination by the House of which they are not a member, or its committees;
- This immunity most probably extends to former Members of Parliament; and
- The immunity may well extend to former members of staff of former Members of Parliament.

I should add that the reasons in favour of the immunity of members of both Houses does not, in my opinion, mean that former members could not be examined in relation to their conduct as members of those Houses. However, the only House in which this can occur is the House in which the person was a member (with a corresponding allowance for people who were members of both Houses).

The important point in the difference in opinion with which you have been presented is not who if anyone is correct, but rather that the correct answer be obtained. It is a matter in which Members of Parliament of both Houses and their former members have an interest. Could I suggest that the committee may wish to seek the opinion of an independent person well versed in Australian constitutional law?

Yours sincerely

A handwritten signature in cursive script that reads "I C Harris". The signature is written in dark ink and is positioned to the left of the typed name below it.

I C HARRIS



OFFICE OF THE CLERK OF THE HOUSE

8 April 2002

Mr Brenton Holmes
Secretary
Select Committee on a Certain Maritime Incident
Room S.157
Parliament House
CANBERRA ACT 2600

Dear Mr Holmes

Additional representation from the Clerk of the Senate

Would you please pass on the attached letter to the members of the Senate Select Committee on a Certain Maritime Incident. Should the committee decide to authorise the publication of this material, would you please subsequently ensure that a copy is provided to the Clerk of the Senate.

Yours sincerely

A handwritten signature in black ink that reads 'Ian Harris'.

I C HARRIS



**CONCERNING THE OBLIGATION OF A FORMER MEMBER OF THE
HOUSE OF REPRESENTATIVES TO ATTEND AND GIVE EVIDENCE
BEFORE THE SENATE COMMITTEE ON A CERTAIN MARITIME INCIDENT**

OPINION

1. In this matter I am briefed to advise the Clerk of the House of Representatives. The specific points on which my opinion is sought are as follows:
 - (a) whether what is generally agreed to be an immunity between the Houses of what is known as comity has a legal basis, in Hatsell/May/the **Constitution**, or is a looser agreement;
 - (b) if there is something akin to a legal immunity for current Members, whether it could be said to extend to former Members of either House being compelled against their will to attend before the House or one of its committees and to give evidence;
 - (c) whether page 231 of the 10th edition of *Odgers' Senate Practice* provides a basis for concluding that any immunity extends to Members of a dissolved House, and to former Senators and Members in general;

- (d) whether I agree with the Opinion of Bret Walker SC dated 16 May 2002 and entitled *Australian Senate: Witnesses – Former Ministers and Ministerial Staff* provided to the Clerk of the Senate and with which I am briefed.

Question (a)

2. The first step is to identify any relevant immunity and the reasons for it. If it exists and if it is based entirely on pragmatism, that is the practical day to day functioning of each House, then this will have a substantial bearing on the availability of the immunity to a person who is no longer a member of the House of Representatives. If, as is my opinion, it is based on the independence of each House in relation to the other and if that principle extends beyond mere day to day functioning, then there is good reason to think that the independence would be adversely affected by the Member being answerable *at any time* to the other House in respect of the Member's acts while a Member. The prospect or possibility of a Member being subject to examination by the other House once the Member ceases to be a Member and in respect of the Member's acts while a Member would be inconsistent with that independence. Thus the immunity would extend beyond the period of the Member's membership of the House. The party system should not be allowed to obscure the basic distinction between the responsibility of a Member to one House only and a notion of more general accountability to the Parliament as a whole.
3. It is also important, in my view, to distinguish the present question from issues arising from any claim of public interest immunity in relation to particular information. That immunity has a different purpose and history and, although it might provide in a particular case a basis for refusing to answer a question or to provide a document, the present asserted immunity is far broader.

4. Section 49 of the **Constitution** provides, relevantly, that the privileges and immunities of the members of each House shall be such as are declared by the Parliament and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth. Since the **Parliamentary Privileges Act 1987 (Cth)** states in section 5 that privileges in force by virtue of section 49 of the **Constitution** continue in force unless that **Act** expressly otherwise provides and since no provision relevant to the present question is contained in that **Act**, in my view, the identity of the privilege or immunity is the same as the relevant privilege or immunity of the House of Commons and its members as at 1901 and as continued in operation or effect by section 49 of the **Constitution**.
5. The legal basis of the privilege or immunity is that historical position at the establishment of the Commonwealth as so continued in force. In order to identify the privilege or immunity it is necessary to examine the historical position as at 1901 in the United Kingdom. A firm basis for that task is the contemporary publications to which reference is made in Question (a).
6. Thus, in my view, the true foundation of the privilege or immunity goes beyond mere comity and has a legal basis in the **Constitution** operating upon the relevant privilege or immunity of the House of Commons and its members as at 1901 as evidenced by the contemporary publications. Any looseness comes from the difficulties inherent in the task of first identifying the relevant privilege or immunity and then of applying it out of its original context but as the source of present rights and obligations.
7. I turn next to the privilege or immunity itself and its purpose.
8. Hatsell, *Precedents of Proceedings in the House of Commons* (1818) Vol 3 at page 67 speaks of the leading principle being that there shall subsist a perfect equality between the two Houses and total independence in every respect one of

the other. He continues: *“From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other....”*

9. This suggests the existence of an immunity, expressed as a lack of power in the other House. The purpose of the privilege or immunity is founded in institutional independence and not simply in the need for Members freely to perform their duties day to day. This in turn suggests that it would be inimical to that purpose for a Member to be subject to the power of the other House after the Member has ceased to be a Member.
10. *Erskine May on Parliamentary Practice* is important because the tenth edition was contemporaneous with the establishment of the Commonwealth referred to in section 49 of the **Constitution**. At pages 402-403 of that edition it is stated that:

“If the attendance of a peer should be desired, to give evidence before the house, or any committee of the House of Commons, the house sends a message “to the Lords, to request that their lordships will give leave to” the peer in question “to attend, in order to his being examined” before the house or a committee, as the case may be, and stating the matters in relation to which his attendance is required. If the peer should be in his place when this message is received, and he consents, leave is immediately given for him to be examined, if he thinks fit. If not present, a message is returned on a future day, when the peer has, in his place, consented to go. Exactly the same form is observed by the Lords, when they desire the attendance of a member of the House of Commons...Whenever the attendance of a member of the other house is desired by a committee, it is advisable to give him private intimation, and to learn that he is willing to attend, before a formal message is sent to request his attendance.”
(footnotes omitted)

11. This reference suggests a privilege in the House and in each Member but one in which the institutional interest of each House is sufficiently protected by leaving it to the Member to consent to attend the other House or not. There is reference on page 404 of the tenth edition to the course adopted by the Lords having been to permit their members, on their own request, to defend themselves in the House of Commons.

12. But the fact that each House has taken the position that independence of the House and of each Member is sufficiently protected by the discretion of each Member does not suggest that the privilege rests merely in comity, if by that term is meant that the privilege rests entirely, or at all, in the discretion of the House seeking to examine the Member of the other House. Instead, it is clear that the privilege is of each House and Member and is recognised by the other House. Neither does this fact suggest that the privilege is entirely personal with the result that each House would no longer have an interest in the matter once the Member had ceased to be a Member.

13. The twenty-first edition of *Erskine May* contains similar references. At page 629 it is said that a select committee has an unqualified power to send for persons except to the extent that it conflicts with the privileges of the Crown and of Members of the House of Lords, or with the rights of Members of the House of Commons. On the same page the following is said:

“The effect of the qualification to the powers of committees referred to above is that Members of the Commons, including of course many ministers, are not summoned to a select committee but can be invited to attend. Only an order of the House itself can require a Member to attend a committee. In the case of Peers Standing Order No 22 [HL] provides that any Lord requested by a Commons committee to attend before it or any of its sub-committees shall have leave of the House to attend if he thinks fit.”

14. At page 677, under the sub-heading “Attendance of Members of the other House” the twenty-first edition in substance restates what I have set out above from the tenth edition, that is that attendance before a committee of the other House is at the Member’s discretion if the Member or Lord thinks fit.

15. At page 616 of the twenty-second edition of *Erskine May* it is said in relation to committees of the House of Lords that members and officers of the House of Commons may give evidence to select committees but cannot be compelled to do

so. Footnote 4 states that members of the Commons are given leave to attend Lords committees or sub-committees if they think fit. Page 647 contains a passage corresponding with page 629 of the twenty-first edition I have referred to above, that is that a select committee has an unqualified power to send for persons except to the extent that it conflicts with the privileges of the Crown and of Members of the House of Lords, or with the rights of Members of the House of Commons. At pages 648-649 of the twenty-second edition a passage occurs which corresponds with page 677 of the twenty-first edition, that is that attendance before a committee of the other House is at the Member's discretion if the Member or Lord thinks fit.

16. Other references to the corresponding Australian works are collected in GJ Lindell "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 notes 51-52. See also Harris (ed) *House of Representatives: Practice* (4th ed, 2001) at 34-35, 639-642, 729 and Evans (ed) *Oggers' Senate Practice* (10th ed, 2001) at 56, 440-443. I am also referred to a Senate resolution in 2001 which authorised Senators to appear before the House of Representatives Privileges Committee "*subject to the rule, applied in the Senate by rulings of the President, that one House of the Parliament may not inquire into or adjudge the conduct of a member of the other House.*" Plainly, this resolution reflects the same immunity.
17. The scope of the immunity is not, in my opinion, limited to the conduct of the Member as a Member of that House or to that which forms part of the proceedings of that House if those concepts are intended to exclude matters for which a Member who is a Minister is or has been officially responsible. Such a line of distinction would be both impractical in operation and flawed in principle. The immunity must extend, in my view, to the acts of the Member for which the Member could be held to account in that House. In the case of a Minister, those acts would include matters of policy and administration for which the Minister is

responsible, using that word as conveying the principles of responsible government.

18. I answer Question (a): “The immunity has a legal basis and does not rest merely in comity.”

Question (b)

19. For the reasons I have given in answer to Question (a), because the immunity is not merely an immunity based on the day to day functioning of the House, it should extend to a former Member whereby he or she has a legal immunity from being compelled to attend before the House of which they were not a Member, or one of its committees, and to give evidence in relation to that former Member’s acts as a Member. This extension is, however, a matter of less certainty than the immunity of a present Member. The authorities appear to make no express reference to such an extension. Thus it would rest in principle and by analogy to the survival of similar privileges and immunities such as the privilege which attaches to parliamentary proceedings or the protection of witnesses. In each case the purpose of the privilege would be substantially impaired if it had a period of operation temporally coincident with the original occasion for the privilege.

Question (c)

20. Page 231 of the 10th edition of *Odgers’ Senate Practice* concerns standing order 193(3) which is directed to the rules of debate. That standing order provides, relevantly, that a senator shall not use offensive words against either House of Parliament or any member of such House and all imputations of improper motives and all personal reflections on those Houses or members shall be considered highly disorderly.

21. Page 231 states that it would be anomalous if the protection provided by the standing order were to cease simply because a house has been dissolved for an election. There would also be an anomalous distinction between a lower house which has been dissolved and an upper house which has not and the members of which would continue to attract the protection. Therefore members of a house which has been dissolved continue to attract the protection of the standing orders until such time as the successor house meets. Members who retire or are defeated at the election then cease to attract the protection when their successors are in office. New members returned in an election are not protected until they take their seats.

22. In my opinion this discussion suggests that, in the case of the protection provided by standing order 193(3), its purpose lasts no longer than a person is a member. The basis for this conclusion is that, whether the immunity is based on the proper functioning of a member or on a broader but not unrelated notion of the dignity of the Houses and their members, those matters would be unaffected once it is clear that the member in question has ceased to be a member.

23. I would not see the material at page 231 as providing a basis for concluding that any immunity extends to Members of a dissolved House, and to former Senators and Members in general. Indeed, I would regard that material as, if anything, inconsistent with the conclusion that there is an immunity of a former member of the House of Representatives to attend and give evidence before a Senate committee. But it is the purpose of the immunity which should be determinative. In my opinion, the immunity with which standing order 193(3) is concerned does not depend on any fundamental matter such as the mutual independence of the Houses but is concerned rather with matters of decorum.

Question (d)

24. For these reasons, while I agree with Bret Walker SC that a person who is a former Member of the House of Representatives may be obliged to give evidence before the Senate in relation to matters that concern that former Member only in a private capacity (which is here not in issue), I do not agree that a former Member may be obliged to give evidence before the Senate in relation to that former Member's acts while a Member and in that former Member's capacity as a Member. This conclusion derives from the Member's immunity while a Member and continues after membership has ceased in order better to effectuate that immunity.

25. The scope of the immunity is not, in my opinion, limited to the conduct of the Member as a Member of that House or to that which forms part of the proceedings of that House but extends to the acts of the Member for which the Member could be held to account in that House. Thus I disagree with the limitation in paragraph 29 of the opinion of Bret Walker SC that: "So long as no intention appears, or better still all intention is disavowed, of questioning the now private citizen about his or her ... conduct in the House of Representatives (being the other House), there is no right in a former Minister who is no longer a Member of the other House to resist an order given under the undoubted power of the Senate." While I agree that the immunity extends beyond the period the person is a Member, I do not agree that the immunity is limited to the Member's conduct in the House if that is intended to exclude what I have referred to as the acts of the Member for which the Member could be held to account in that House.

Conclusion

26. While the matter is, so far as I am aware, free from judicial authority, in my opinion the better view is that a current Member of a House has a legal immunity

from being compelled to attend before the House of which they are not a Member, or one of its committees, and to give evidence in relation to that Member's acts as a Member and that, less certainly, this immunity extends to a former Member.

26 June 2002

ALAN ROBERTSON

Senate Select Committee on a Certain Maritime Matter – Obligation of former ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees

Comments provided by Professor G J Lindell on the advice given by Mr B Walker SC

1. As I indicated before, the Opinion provided by Mr B Walker SC and dated 16 May 2002 on the above matter, has not led me to alter the views I expressed in my two earlier advices, dated 22 March and 1 April 2002, respectively. I also indicated that I would provide a short written statement of my reasons for adhering to those views and those reasons are now set out below.
2. The same statement does not seek to add anything already said in relation to public interest immunity. It concentrates, instead, on what I perceive to be the main arguments advanced by learned counsel to deny the existence of a legal immunity of former members of the Australian Parliament (and their staff) from having to answer questions relating to their conduct as members when those questions are asked at an inquiry conducted by the House in which they were not members.

(i) Absence of *express* constitutional and statutory recognition of immunity

3. Mr Walker has rightly pointed to the absence of *express* constitutional or statutory provisions to support such an immunity.
4. In addition, and as was emphasised in para 22 of my advice dated 22 March 2002, it is true that there is an absence of direct judicial authority on the matter. It would be surprising if there was such authority given the exclusive control of parliamentary proceedings vested in the Houses of the Australian Parliament by virtue of s49 of the Constitution. It is only since the enactment of the *Parliamentary Privileges Act* 1987 (Cth) and, in particular ss 4,7and 9 of that Act, that such matters have become capable of coming within the scope of judicial review, even if only in a limited way: see para 34 of my advice dated 22 March 2002.
5. Until Parliament otherwise provides, the immunity is to be found in the powers privileges and immunities enjoyed the House of Commons and their members as at the establishment of the Commonwealth in 1901. Please see in that regard para 6-15 of my advice dated 22 March 2002, as regards the position of current members and paras 16-22 of the same advice, as regards *former* members.
6. The failure of the *Parliamentary Privileges Act* to mention that immunity cannot be decisive in the face of provisions which Mr Walker himself relied on to support the continued existence of the pre-existing powers of the Houses and their Committees to compel the answer to questions and the production of documents at parliamentary inquiries. The provisions of s5 of that make it abundantly clear that “[e]xcept to the extent that the same Act expressly provides otherwise” the Act does not alter “the powers, privileges and immunities of each House and of the members and committees of each House” which existed immediately before the

same Act was passed. It will be noticed that the provisions of s5 are not confined to powers but extend to *immunities* as well.

(ii) The alleged basis and rationale for the immunity recognised for *current* members and its alleged non-application to *former* members

7. Mr Walker can be taken as suggesting that the immunity enjoyed by current members is founded on “comity”: at para 20. Furthermore the rationale for its existence is not in his view applicable to the position of former members (and their staff). It is convenient to deal with both of these assertions together: at paras 21-9.
8. I have already explained in the earlier advice why I believe that considerations of both law and policy combine to make the immunity operate as a legal limitation on the powers of inquiry and not just as a matter of comity. In particular the legal limitation should be seen as derived from:
 - the independent and equal nature of the powers enjoyed by both Houses of the Australian Parliament; and
 - the disorder, confusion and the potential for mutual recrimination which could result if both Houses sought to interfere with members of the other House.
9. The passages quoted from Hatsell in paras 10 and 11 in the advice dated 22 March 2002 were important for two reasons. First they showed that the powers of the House of Commons were limited in their failure to extend to members of the House of Lords. Secondly, they highlighted the potential conflict that could otherwise have arisen from arming both those Houses of the British Parliament with coercive powers to compel the answering of questions and the production of documents. In my view the same potential arises from vesting both Houses of the Australian Parliament with the same powers under s49 of the Constitution. This gives rise to the need to reconcile those equal powers by recognising the immunity in question. With respect, none of these matters is addressed in the Opinion provided by Mr Walker.
10. Neither does the Opinion address the functional need for the immunity to continue to operate after a member ceases to be a member if the immunity is to be effective: see paras 16-9 of my advice dated 22 March 2002. Nor did it address the four analogies advanced to illustrate this consideration: at para 18 of the same advice.

(iii) Other arguments and matters

(a) Elected nature of the Senate

11. In para 19 of his Opinion Mr Walker seeks to distinguish British parliamentary history and practice on the ground that the House of Lords was, unlike, the Senate, an unelected body. I fail to see the relevance of this difference. If anything, the elected nature of the House of Representatives and the fact that it is vested with

equal powers (if not even greater powers in the enactment of financial legislation) would seem to strengthen the need to limit the Senate's powers to coerce and exercise authority over current and past members of the former House.

(b) Remarks in *Egan v Willis*

12. Reliance is placed in para 27 of the same Opinion on certain remarks made by Gaudron, Gummow and Hayne JJ in *Egan v Willis* (1998) 195 CLR 424 at pp 451-3, paras 42 and 45. In those remarks their Honours indicated that they could not see anything inconsistent with the way responsible government operated in Australia for the Upper Houses of Australian legislatures to have the power to inquire into the conduct of Ministers who are not members of those Houses. So much may be conceded.
13. As Mr Walker acknowledges, that case involved a different question. It did not involve, and their Honours were not concerned with, the exercise of coercive authority by one House over the members of the other House in a bi-cameral legislature. (The Treasurer who was required to produce certain documents to the New South Wales Legislative Council in that case was a member of the Council.) It is unwise to assume that their Honours meant to suggest that an Upper House could exercise *coercive authority* over members of the other House in a bicameral parliament. For this purpose a distinction can and should be drawn between the ability to *inquire* over a matter and the *authority* that can be exercised in the course of carrying out that inquiry. Finally their Honours were careful to warn that they were not dealing with Houses of a legislature which enjoyed the same powers, privileges and immunities as those enjoyed by the British House of Commons, as is the case with the Houses of the Commonwealth Parliament by virtue of s49 of the Constitution: (1998) 195 CLR 424 at pp 446-7, paras 28-9.

(c) Ability of the House of Representatives to inquire

14. In para 16 of the Opinion a rhetorical question is asked by Mr Walker as to who could be better placed than the former Minister to explain what had happened in relation to his part in the maritime incident under investigation. Doubtless the obvious answer to this question is the former Minister himself. But it by no means follows from that answer that the Senate is the appropriate House of the Parliament to require the former Minister to explain his conduct under compulsion. As I emphasised in the final para of my advice dated 1 April 2002 it remains *legally* open to the House in which he was previously a member to perform this function as the "Grand Inquest of the Nation" regardless of its willingness to do so.

Geoffrey J Lindell
Adjunct Professor of Law
The University of Adelaide

16 August 2002

CONFIDENTIAL

Mr Ian Harris
Clerk of the House of Representatives

Senate Committee on a Certain Maritime Matter - Obligation of former ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees

Comments provided by Professor G J Lindell on advice given by the Clerks of both Houses of the Commonwealth Parliament

1. In an email message dated 26 February, 2002, you asked me to look at the advice you gave to Mr Reith, and the conflicting advice given by the Clerk of the Senate, regarding Mr Reith's obligation to attend and give evidence before the Senate Committee on a Certain Maritime Incident. The comments were sought on a private basis and you indicated that it was not your intention to publish them in any way.
2. I have read the advice in question and the other helpful material supplied in connection with this matter. I am grateful for the photocopied extracts supplied from sources I suggested should be consulted but to which I did not have access in preparing my comments. In view of the urgency of the matter it was agreed with the Deputy Clerk not to defer the provision of these comments until I had consulted certain other books. We thought that I could let you know next week if those books yielded anything material to the views I have expressed in this memorandum.

Relevant issues and summary of my comments

3. I believe the matters dealt with in the relevant advice provided by you and the Clerk of the Senate give rise to issues which can be conveniently summarised in the following way:
 - (i) The immunity enjoyed by current members of one House of the Parliament, and, in particular, members who were also Ministers, from being forced to give

evidence before parliamentary committees established by another House of the same Parliament (*'Issue (1)'*).

- (ii) The continuation of any such immunity after the retirement of the Ministers from Parliament in respect of matters which were relevant to their conduct as Ministers (*'Issue (2)'*).
- (iii) The application of the same kind of immunity to the staff employed in the Minister's office in relation to the same matters, both before and after the Minister's retirement (*'Issue (3)'*).
- (iv) The ability of the Minister to rely on public interest immunity as a ground for refusing to answer questions (*'Issue (4)'*).

I should explain that I understand that you would like to have my comments in relation to *Issue (3)* even though it was not actually dealt with in the advice provided by you and the Clerk of the Senate. It is important to emphasise that these issues arise out of a desire by the relevant Senate Committee to examine the conduct of Mr Reith as the former Minister of Defence after the House of Representatives had been formally dissolved and during the general elections which followed. The conduct in question may not have been strictly related to any proceedings of the House of Representatives or his duties as a member of that House.

4. My responses to these issues may be briefly summarised as follows:

Issue (1): The existence of the immunity of current members (as distinct from its justification) is not in doubt (paras 6 – 13). In my view the immunity is not strictly confined to the conduct of a member of the Parliament, as a member of Parliament or any matter that forms part of the proceedings of the House of which the Minister was a member. It can extend to any matter in respect of which the Minister could be questioned and be held to account for in the House in which he or she is a member (paras 14 – 15).

Issue (2): I believe there are strong and persuasive arguments to support the immunity advanced by you. But, in the absence of direct judicial or other authority on the matter (other than the contrary view expressed by the Clerk of the Senate), there can be no certainty that either the Senate or ultimately a court, will uphold that immunity (paras 16 - 22).

Issue (3): There are also reasonable arguments to support the application of the same immunity to a member of the Minister's staff, both before and after the retirement from Parliament of the Minister who employed the member of staff. But the position in relation to such persons is much more doubtful than that occupied by the Minister (paras 23 - 30).

Issue (4): The use of public interest immunity remains unresolved, at least in the case of the Commonwealth Parliament, and it is open to Mr Reith to raise that immunity. However I adhere to the view I expressed in the article referred to in your email, namely, that the Houses of the same Parliament are not legally bound to observe the same immunity. I believe that the decision of the New South Wales Court of Appeal in *Egan v Chadwick* may lend partial support for my view, except as regards as regards the documents and deliberations of cabinet. Even if, contrary to my view, such immunity limits the powers of federal parliamentary inquiries, the modern trend of judicial authority is to deny that advice given by senior civil servants to Ministers or communications between Ministers will automatically be accepted as covered by that immunity (paras 31- 3).

5. I would add, by way of summary, that it is highly advisable for Mr Reith to obtain his own legal advice on the issues raised by this matter. This is because of the potentially penal consequences that would involve the exercise of the penal jurisdiction of the Senate and could result from a breach of a lawful direction by the Senate to appear and answer questions. Although the issue of the former Minister's liability to answer questions may be reviewed in a court of law to a limited extent, there can be no assurance that a court will recognise his possible immunity referred to in these comments. Such advice could also elaborate the rights he will have as a witness under the Resolution passed by the Senate on Parliamentary Privilege on 25 February 1988 (paras 34 - 5).

Issue (1): Current members

6. I adhere to the view I expressed in my article on the subject of government witnesses and parliamentary witnesses where I referred to "the probable immunity of members of the of one House of the Federal Parliament from the authority of the other House of the same Parliament" and further stated:

“ The same immunity is acknowledged to exist in relation to the Houses of the British Parliament. The immunity is likely to be based on the need for each House to function independently of, and without interference from, the authority of the other House. It appears to make good sense from a policy point of view as well from an analytical perspective since it may flow directly from the terms of section 49 of the Constitution if, as seems likely, this was an immunity enjoyed by the House of Commons at the establishment of the Commonwealth.”

(See “Parliamentary Inquiries and Government Witnesses” (1995) 20 *Melbourne University Law Review* 383 at p 395. The authorities cited in support of this view in notes 51 – 2 included earlier editions of the parliamentary practice manuals of both Houses of the Federal Parliament. A check of the later and current editions of the same works does not disclose the existence of anything that would lead me to alter the view I expressed in the relevant article. See Harris (ed) *House of Representatives: Practice* (4th ed, 2001) (“Harris”) at pp 34 – 5, 639 - 642, 729 and Evans, (ed)

Odgers' Senate Practice (10th ed, 2001) (“Evans”) at pp 56, 440 – 3 and also now G Carney, *Members of Parliament: law and ethics* (2000) at pp 185 – 6.)

7. The existence of the probable immunity is reflected in the practices and procedures followed by both Houses if a member of the other House of the Federal Parliament is to be called to give evidence before a parliamentary committee. This normally requires a request to be forwarded to the other House for that House to consent to the examination of its member. But apparently the relevant Standing Orders have not been interpreted as requiring such leave if the member is prepared to appear voluntarily. (Harris at pp 639 – 642; Evans at pp 440 – 3). I note in passing that a similar practice may usually be followed by the United States Congress. (W Holmes Brown, *Jefferson's Manual and the House of Representatives of the United of the United States 99th Congress* (1985) at pp120, 152.)
8. It is perhaps easier to recognise the existence of the probable immunity than it is to be sure about its precise status and justification. These matters are important since they may have an important bearing on what in question here, namely:
 - (a) the application of the immunity to the examination of matters which involve the conduct of a Minister which may not have been strictly related to any proceedings of the House of Representatives or his duties a member of that House; and
 - (b) the continuation of any such immunity after he ceased to be both a member of Parliament and a Minister of the Crown.
9. The Senate Clerk has described the immunity in question as being “a matter of comity between the houses and of respect for the equality of their powers” (see eg Evans at p 442). The term comity may suggest something falling short of a strict legal immunity, more in the nature of a custom or a convention which the Houses of Parliament may be legally free to ignore in an appropriate case. Elsewhere, however, the Senate Clerk refers to it as “probably an implicit limitation on the power of the Houses to summon witnesses” and “ the “probable immunity of members” (Evans at pp 56 and 443 respectively).
10. It will be clear from the passage I quoted from my article above that my own view is that it is more properly viewed as a legal restriction on the powers of both Houses of the Parliament under s49 of the Commonwealth Constitution. I would suggest that this view is supported by the view taken in at least one respected source on British parliamentary practice which emphasise strongly the independence of both Houses of that Parliament from each other and the equality of their powers. Thus it is stated

“ The leading principle, which appears to pervade all the proceedings between the two Houses of Parliament, is, That there shall subsist a perfect equality with respect to each other; and that they shall be, in every respect, totally independent

one of the other. – From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other; but if, there is any ground of complaint against an Act of the House itself, against any individual Member, or against any of the Officers of either House, this complaint ought to be made to that House of Parliament, where the offence is charged to be committed; and the nature and mode of redress, or punishment, if punishment is necessary, must be determined upon and inflicted by them. Indeed any other proceeding would soon introduce disorder and confusion; as it appears actually to be done in those instances, where both Houses, claiming a power independent of each other, have exercised that power upon the same subject, but with different views and to contrary purposes.” (Hatsell, *Precedents of Proceedings in the House of Commons* (1818) Vol 3 at p 67. See also Harris at pp 34 – 5.)

11. It is also stated in the same work that:

“ The result of the whole, to be collected either from the Journals, or from the History of the Proceedings in the House of Commons, is, 1st, that the Lords have no right whatever, on any occasion, to summon, much less to compel the attendance of, a Member of the House of Commons. 2^{ndly}, That, in asking leave of the House of Commons for that attendance, the message ought to express clearly the ‘cause’ and ‘purpose’ for which attendance is desired; in order that, when the Member appears before the Lords, no improper subject of examination may be tendered to him. 3^{rdly}, The Commons, in answer, confine themselves to giving leave for the member to attend, leaving him at liberty to go or not, ‘as he shall think fit’. And 4^{thly}, The later practice has been, to wait until the Member named in the message is present in his place; and to hear his opinion whether he chooses to attend or not, before the House have proceeded even to take the message into consideration.

As it is essential to the House of Commons, to keep itself entirely independent of any authority which the Lords might claim to exercise over the House itself or any of the Members, they ought to be particularly careful, on this and on all similar occasions, to observe and abide by the practice of their predecessors.” (Vol 3 at pp 20 – 1. Apparently the same procedures were adopted by the House of Commons when it wished to examine a member of the House of Lords. See also to the same effect, E May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (10th ed, 1893) at pp 402 – 3 and (21st ed, 1989) at p 677)

12. The above authorities may help to explain why the Senate in 2001 authorised Senators to appear before the House of Representatives Privileges Committee:

“subject to the rule, applied in the Senate by rulings of the President, that one House of the Parliament may not inquire into or adjudge the conduct of a member of the other House”

(Quoted in Harris at p 35 and see also Evans at p 442.).

13. In my view this ruling goes to the heart of the issues involved in this matter.

14. There remains the issue of whether:

- the immunity is strictly confined to the conduct of a member of the Parliament, as a member of Parliament; and
- does not extend to the conduct of Minister which is did not form part of the proceedings of the House of which the Minister was a member.

The Clerk of the Senate seems to have suggested as much in the advice he gave on this matter. (See eg letter to Senator Faulkner dated 19 February 2002 at pp 1 – 2. My own view is much closer to the contrary view taken by you.

15. My reason for supporting your view is that the rights, privileges and liabilities of members of the Parliament must be construed against the background of the principles of responsible government. There is now an abundance of authority to show that those principles underlie the Constitutions of the Commonwealth and the Australian States and the aspects of those constitutions which bear upon the workings and operation of the respective parliaments. (See generally eg *Lange v Australian Broadcasting Commission* (1997) 189 CLR 579 at pp 561 – 2 (“constitutionally prescribed system of representative and *responsible* government” – italics added for emphasis); *Egan v Willis* (1998) 73 ALJR 75 paras [35] – [42] at pp 82 – 4, *Egan v Chadwick* [1999] NSWCA 176 (10 June 1999 paras 15 - 47) and generally G Lindell, *Responsible Government* in P Finn (ed), (1995) at p 85 n 42). There are problems regarding the precise extent to which the principles of responsible government are *enforceable* as distinct from merely *recognised* in the courts but those problems are not in point for present purposes. It suffices to indicate that that the responsibility of a member who is also a Minister should take account of all matters in respect of which the Minister could be questioned and be held to account. This would encompass any matters relating to public affairs with which he or she is officially connected ... or to any matter of administration for which the Minister is responsible” (Harris at p 525).

Issue (2): Former members who were Ministers

16. In my opinion there are strong and persuasive reasons for recognising that the rationale which supports the probable immunity of current members is wide enough to sustain the continuation of any such immunity after the retirement of the Ministers from Parliament in respect of matters which were relevant to their conduct as Ministers.

17. Shortly stated, those reasons are that the independence and equal authority of each House of the Federal Parliament to be the sole judge of the conduct of its own members could be undermined if the other House could postpone the exercise of that

authority until the retirement of the member in question. The potential ability of the other House to exercise that authority after a member's retirement could act as a significant fetter on the freedom of action of both the member and the House concerned. If, as is the case, one House of the Parliament should not be able to inquire into or adjudge the conduct of a member of the other House in relation to conduct as a member when that person is still a member, it makes no sense to allow that to happen after the person ceases to be a member. In other words the non – recognition of the immunity would render it incomplete and defeat the essential objective sought to be served by that immunity.

18. The fact that immunities enjoyed by certain persons or officers by reason of their position in relation to the performance of their duties and functions must continue to operate after the relevant persons or office holders cease to hold office is also illustrated by the following analogies:

- (a) the privilege which attaches to the proceedings of either House does not cease to operate merely because the actors involved have themselves ceased to be members (or officers) of that House eg as regards the absolute privilege which attaches to statements made in the course of the proceedings of the parliament;
- (b) the power and the ability of either house to protect witnesses who appear before parliamentary committees does not cease to operate after the examination of the witness has been completed;
- (c) a judge's absolute immunity from any liability in relation to anything said or decided by the judge in determining a case does not cease to operate once the judge has retired; and
- (d) the immunities which may exist for federal reasons as regards the inability of a parliament of one level of government to impose discriminatory taxes on public servants employed by the other level of government under Australia's federal system of government may extend to discriminatory taxes levied on pensions paid to retired public servants (as to which see generally *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 eg at pp 666, 668, 681 and 687.)

In each of these cases the protection sought to be accorded to the relevant position or office would be defeated if the immunity only operated while a person occupied the position or office sought to be protected.

19. I would also argue that the failure to observe the continued operation of the immunity in relation to *former* members could lead to the same kind friction and recrimination which underlies one of the reasons for recognising the immunity in relation to *current* members. It seems generally desirable to avoid damaging the harmonious and good relations between the two Houses of the Federal Parliament.

20. One possible obstacle in the way of accepting the view I have advanced relates to the application of the immunity to the examination of conduct which took place after the dissolution of the last Parliament and during the period of the election campaign which followed the dissolution. The immunity asserted here relates to any conduct for which he would have become answerable in Parliament. (See paras 14 – 5.) But because of his retirement from the Parliament he could not have been asked questions in the Parliament which was of course dissolved; and when the government of the day would have been operating under the so – called caretaker conventions of government. To reject the operation of the immunity on this ground seems somewhat narrow and technical, especially as some Minister would ultimately become answerable for the same matter once a new Parliament was convened.
21. Another matter which gives pause for thought relates to the expression of the contrary view by the Clerk of the Senate both recently in his advice to Senator Faulkner and in Evans at p 443. He has flatly asserted that “the probable immunity of members of parliament does not apply to former members”. Reference was made in that connection to the appearance of, and the evidence given by, two former Treasurers and a former Prime Minister before the *Senate Select Committee on Certain Foreign Ownership Decisions in relation to the Print Media* in 1994. All of those persons had by then ceased to be Members of the House of Representatives. It seems that one former Treasurer appeared voluntarily but the other two former members appeared only in response to summonses with the former Prime Minister subsequently reappearing before the same Committee voluntarily. With respect, the discussion of the Clerk’s view, at least as I have read it, does not go beyond making the assertion and supporting it by reference to the incident referred to above. As regards that incident the matter is not one of mere convention or practice and thus the mere fact that some former members appeared under summons does not necessarily mean that the act of summoning them was lawful.
22. Although the expression of the Clerk’s contrary view does not dissuade me from the view you and I have expressed on this matter, the fact does remain that in the absence of direct judicial or other authority on the matter (other than the contrary view expressed by the Clerk of the Senate), there can be no certainty that either the Senate or ultimately a Court, will uphold the immunity we have supported. This point needs to be borne carefully in mind by Mr Reith and his own legal advisers when he decides on the course of action which he will follow. I should also add that even if the immunity discussed above is soundly based, the immunity would not relieve Mr Reith from having obey a summons to attend as a witness at the Senate Committee’s hearings. The immunity would however protect him from having to answer questions which related to his conduct as a former Minister and member of the House of Representatives.

Issue (3) Ministerial staff

23. There remains the further question whether any immunity discussed above can apply to the members of the Minister's staff both before and after the Minister's retirement. If the immunity does not exist in relation to the Minister's staff before the Minister retired from Parliament it is hardly likely to apply after that retirement.
24. I believe a reasonable case can also be made to argue that the immunity which operates in relation to Ministers who are currently members of the Parliament should also apply to their staff. The case would need to rely on the inability of Ministers to perform their roles and functions, especially in the complex world of modern government and administration, without personal staff and advisers to assist them.
25. Some slight support for this notion can be derived for this argument by *two considerations*. The *first* relates to the fact that in former times apparently the privilege of Parliament used to attach to the personal servants of peers and of members of the House of the Commons, and also to other persons acting as their agents or upon their behalf. Consequently no such persons could be arrested or otherwise molested whilst Parliament was sitting or during the time when the privilege of the Parliament was in operation. This particular privilege was abolished by reason of s2 of the *Parliamentary Privilege Act 1770* (UK). See *Halsbury's Laws of England* (2nd ed, 1937) n (t) at pp 348 – 349 and E Campbell, *Parliamentary Privilege in Australia* (1966) at p68. But its abolition still leaves in place the general notion in relation to privileges and immunities not dealt with by that enactment.
26. The second consideration flows from the decision in *Holdings v Jennings* [1979] VR 289. It was held in that case that the typing of a statement to be made by a member of parliament is covered by the absolute privilege from liability in defamation which attaches to statements that form part of the proceedings in Parliament. (Under Article 9 of the *Bill of Rights 1689*). This should not be taken as suggesting, however, that the case decides that the immunities enjoyed by a member of parliament necessarily attach to the staff employed by the member of parliament.
27. If and once the argument is accepted as regards staff employed by *current* members of parliament then the same immunity should apply to the staff employed by *former members* in relation to matters that related to the conduct of the member whilst being a member. The same reasons that were advanced for the continuation of the immunity enjoyed by the member after the same person ceased to be a member would then apply for its continuation in relation to the staff employed by such a member after the member retired from Parliament. (See paras 16 – 22.)
28. There are however a number of grounds that may cast considerable doubt in relation to the view advanced above. *First*, it is difficult to draw a principled distinction

between members of the Minister's personal staff and public servants employed in the Departments of State administered by the Minister. As I indicated in my article referred to earlier it is quite possible that those public servants would not enjoy the same immunities as those enjoyed by the Minister (at p 395). It is not easy to draw a principled distinction between the two classes of public employees. Perhaps the answer to this objection is that such staff employed under the *Members of Parliament (Staff) Act* 1984 are solely responsible for their conduct to the Ministers and other members of Parliament who employ them. The employment of such persons terminates once the Ministers and other members of Parliament who employ them die or cease to hold the respective offices mentioned. Their employment may be terminated at any time at the pleasure of the same Ministers and members of Parliament. (See ss 9, 16 and 23 of that Act.) This is so even though the same employees are employed at public expense.

29. *Secondly*, there is the rejection of the possible immunity by the Clerk of the Senate who also cites an instance where the Senate has ignored a claim based on the same immunity in 1995 as regards the appearance of the Director of the National Media Liaison Service. It is significant to remember however that it appears that it was stated in debate that the relevant resolution in relation to that incident did not set a precedent in summoning ministerial staff. In the view of the Clerk such persons "have no immunity ... either under the rules of the Senate or as a matter of law". (See Evans at p 443). It may be true that the rules of the Senate do not at present refer to the position of such persons or indeed even that of *former* Ministers and members of Parliament. But if the immunity flows from the constitutional relationship between both Houses of the Parliament then the failure of those rules to recognise that immunity could not avail against the Constitution.
30. But be that as it may, all this means that the position in relation to such persons is much more doubtful than that occupied by the Minister.

Issue (4) Public interest immunity

31. In your advice to Mr Reith you quite properly raised the possibility of claiming public interest immunity or, as it is sometimes called, executive privilege. You will recall that in my article I concluded that the question of the extent, if any, to which such immunity or privilege operates as a legal restriction on the power of the Houses of Parliament to require official witnesses to answer questions or produce documents remains an open question. My own view was that it should not operate as restriction of this kind. There is no need here to repeat the extensive analysis of this issue in my article. (See 20 MULR at pp 394 – 404 and esp pp 398 - 9.)
32. It remains the case that there is no judicial resolution of this contentious issue at least as regards inquiries conducted by the Houses of the Federal Parliament and their committees. As you are aware, however, there have been two important cases which dealt with the powers of the New South Wales Legislative Council to compel Ministers to produce documents. The High Court left open whether public interest

immunity could restrict the legal powers of the Legislative Council in *Egan v Willis* (1999) 73 ALJR 75 at pp 86 – 7, 117, 120. The New South Wales Court of Appeal decided in *Egan v Chadwick* [1999] NSWCA 176 (10 June 1999) that the immunity did *not* restrict the powers of the Legislative Council, *except* as regards for the production of Cabinet documents and also the deliberations of Cabinet. There may be other exceptions based on the principles of collective and individual responsibility of Ministers, the nature of which was not, however, made clear. The existence of the latter exceptions was upheld only by a majority (Spigelman CJ and Meagher AJ) with the remaining member of that Court dissenting on the existence of that qualification (Priestley AJ). The relevance of the position of the Houses of the New South Wales Parliaments needs to be approached with some caution since it was acknowledged that the powers of the same Parliament in this regard were those implied by reference to what was reasonably necessary to enable a legislature to function. The powers of the Houses of the Federal Parliament may be more extensive by reason of s49 of the Commonwealth Constitution. (See *Egan v Willis* above at pp 81 – 2). In addition the cases in question were only concerned with the powers of the Legislative Council to compel a Minister to produce certain documents when the Minister was himself a member of the same Council. (See also generally, J McMillan, “Parliament and Administrative Law” in G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (2001) Ch 8 at pp 371 - 5 who also confirms that the general issue remains unresolved for the Federal Parliament.

33. Even if, contrary to my view, the immunity does operate to constrain the powers of a Senate Committee, it would of course still be necessary to substantiate whether the immunity was attracted by the former Minister’s conduct. I am not of course in a position to express any view on that issue and I will confine myself to making two few brief comments. First, any attempt to invoke the immunity based on any possible harm that could result to national security and defence and also the conduct of foreign affairs may at the very least require the support of the relevant Ministers who are currently responsible for those matters in the Parliament. Secondly, my general impression regarding the state of the judicial authorities is that merely because the disclosure of evidence would discourage candour on the part of public officials, would not by itself be sufficient to attract the immunity. This means that we have departed from the days which treated the secrecy of the Counsels of the Crown as inviolate; or that we can continue to assume that advice given by senior public officials to Ministers will always attract the immunity. The same will probably be also thought regarding communications between Ministers. Cabinet documents and deliberations will no doubt, however, continue to attract the immunity absent any breach of the criminal law or the need for evidence in a criminal trial. (See generally *Commonwealth v Northern Lands Council* (1993) 67 ALJR 405 and also p 409 as to breach of the criminal law and at pp 406 – 7 as to the candour point.)

Other matters

34. There remains a few other matters that I should mention. *First*, I think it is highly advisable for Mr Reith to obtain his own legal advice on the issues raised by this

matter. This is because of the potentially penal consequences that would involve the exercise of the penal jurisdiction of the Senate and could result from a breach of a lawful direction by the Senate to appear and answer questions. It is true that the issue of the former Minister's liability to answer questions may be reviewed in a court of law to a limited extent (ie justiciable). But this would only arise *if and once* a warrant of imprisonment is issued so as to attract the jurisdiction of the courts as a result of the combined operation of ss 4, 7 and 9 of the *Parliamentary Privileges Act 1987* (Cth) when read in conjunction with the remarks of the High Court in *R v Richards Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at p 162 (as to which see generally my article (1995) 20 MULR at pp 413 – 8). Needless to say, this seems to be a drastic and risky option. Mr Reith may well wish to avoid going down this path especially when it is recalled that there can be no assurance that a court will recognise his possible immunity referred to in these comments.

35. I would not wish to be taken as suggesting that there was anything unwise or improper to provide the advice you gave to Mr Reith. The House of Representatives has a legitimate interest in allowing you to provide information and advice to former member of the House especially where that interest coincides with that the former member. This arises where the former member's conduct is questioned or impugned in relation to the performance of his functions as a member and Minister. But those interests may not always coincide and in view of the potentially penal consequences that could flow from Mr Reith's failure to answer questions, his self interest would be better served by obtaining his own legal advice on these matters. Such advice could also explain the rights he will have as a witness under the Resolution passed by the Senate on Parliamentary Privilege on 25 February 1988.
36. *Secondly*, I have already referred to the basis upon which I have provided the comments outlined in this memorandum. As mentioned in para 1 above they have been provided on a private basis and they should not be published without my permission. Given my retirement, I would generally prefer to avoid becoming involved in a public debate about the matters dealt with in my comments.

Geoffrey J Lindell
Adjunct Professor in Law
The University of Adelaide

22 March 2002

CONFIDENTIAL

Senate Committee on a Certain Maritime Matter - Obligation of former ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees

***Supplementary comments* provided by Professor G J Lindell on advice given by the Clerks of both Houses of the Commonwealth Parliament**

1. I refer to my earlier comments on the above matter contained in the memorandum dated 22 March.
2. I indicated in the earlier comments that I might wish to look at further books after I provided those comments. I have now been able to do so with the permission of the Librarian at the South Australian Parliamentary Library. I can now indicate that the books in question did not yield any new material that would have led me to alter any of the views I expressed in my earlier memorandum.
3. I would however make *two observations*. The *first* is that, not surprisingly, the position of members of the South Australian Parliament being required to give evidence to the other House or its Committees, at the turn of the last century, was the same as was explained for members of the British Parliament and explained in para 11 of my earlier comments. (See Blackmore, *Manual of the Practice, Procedure and Usage of the House of Assembly of the Province of South Australia* (2nd ed, 1890) at p 156 and *Manual of the Practice, Procedure and Usage of the Legislative Council of the Province of South Australia* (1889) at p 115. But unfortunately, nothing was said about the position of former members.
4. It is interesting to note in the same connection that a book consulted in relation to the Indian Parliament indicated that at least as at 1967 the same position may have prevailed there with reliance being placed on precisely the same passage from Hatsell as was set out in para of 11 of my earlier comments. One point of difference with the Australian Federal Parliament worth noting, however, is that members of either House of the Indian Parliament are not permitted to give evidence to the other House without the permission of the House of which they are members. They would be considered to be in contempt of the latter House if they acted in breach of this rule. (See M Paul & S Shakhder, *Practice and Procedure of Parliament with particular reference to the Lok Sabha* (1967) at pp 227 – 8. Compare the position as stated for the Australian Federal Parliament at para 7 of my earlier comments.
5. *Secondly*, it will be clear from paras 16 – 22 of my earlier comments on the position of former members (ie in relation to “Issue (2)”) that I believe the House of Representatives has a clear and legitimate interest in protecting a former member against attempts by the other House to examine that person. It is for the House to consider whether it should assert that interest or whether there are reasons which may make it inadvisable or inappropriate for that interest to be asserted in this occasion.

6. Even if such reasons exist, it should be borne in mind that the failure on the part of the House to assert its interest on this occasion could create a precedent which may make it difficult for the House to assert its interest on similar occasions in the future which may be thought for one reason or another to warrant the assertion of that interest.
7. Finally in the same connection, it is worth reiterating that the underlying reasoning I relied on to argue in favour of the immunity which may exist in relation to former members of the both Houses does not mean that such persons could not be examined in relation to their conduct as members of those Houses. It only means that the only House that can do this is the House in which the person in question was a member.

Geoffrey J Lindell
Adjunct Professor in Law
The University of Adelaide

1 April 2002



OFFICE OF THE CLERK OF THE HOUSE

22 April 2002

Senator the Hon P Cook
Chair
Select Committee on a Certain Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

Further additional representation from the Clerk of the Senate

This morning I received from the secretariat to the Senate Select Committee into a Certain Maritime Incident a copy of a further additional representation, dated 15 April 2002, from the Clerk of the Senate concerning an earlier letter I had sent you. I will only refer to the suggestion in the second-last paragraph of Mr Evans' letter that advice to the committee by an independent person well versed in Australian Constitutional law would be likely to depend on the adviser's position on executive government prerogatives and secrecy as opposed to maximum parliamentary scrutiny and accountability.

It has been my experience that advice from Australia's leading thinkers is not marked by prejudice of this kind. I invariably find that it is beneficial to seek the opinions of those not necessarily similar to my own to test my preliminary and emerging views. Moreover, Members of the committee have probably already been able to separate bias unsustainable by rational analysis in advice proffered to them in the course of this inquiry.

I would welcome the testing by an independent adviser of the points I suggested to the committee on 3 and 8 April. Should the committee be considering relevant action, I would particularly welcome independent review of the existence I identified of something closely akin to a legal immunity for current Members of Parliament from being compelled to submit to examination by the House of which they are not a Member, or its committees. I would also welcome independent examination of the legal basis of this immunity, and its probable extension to former Members of Parliament.



If the committee wishes to pursue further advice on these matters, I can provide a suggestion of a highly regarded professional (subject to that individual's agreement) whose writings are certainly not supportive of what has been called executive privilege, and who is a staunch supporter of full parliamentary accountability and scrutiny. However, I am confident that the committee could identify such a person if it wished to seek independent advice.

Yours sincerely

A handwritten signature in cursive script that reads "I C Harris". The signature is written in black ink and is positioned above the printed name.

I C HARRIS
Clerk of the House



hc/let/13647

21 May 2002

Senator the Hon John Faulkner
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Faulkner

**SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT —
FORMER MINISTERS AND MINISTERIAL STAFF**

You have asked for my comments on a proposal which you have developed to put before the Select Committee on a Certain Maritime Incident as a suggested course of action for the committee to follow in relation to former minister Mr P.K. Reith, former ministerial staff member and now departmental officer Mr Michael Scrafton and current ministerial staff Mr Ross Hampton, Mr Peter Hendy and Mr Miles Jordana, in the light of the refusal by those persons of invitations to appear before the committee to give evidence.

It appears to me that there are four alternative courses for the committee to adopt:

- to summon those persons, but not to recommend to the Senate any substantive action against them if they still refuse to give evidence
- to summon them, and to recommend that the Senate take action against them in the event of default
- not to summon them, and to report to the Senate on the basis of the other evidence the committee has obtained, with any conclusions the committee may draw about their significance to its inquiry and their roles
- not to summon them, and to provide to the Senate some independent assessment of the significance of those persons to the inquiry and of conclusions which might be drawn about their roles.

The first alternative is not tenable. It would devalue the serious step, which Senate committees seldom take, of formally summoning witnesses. Summonses should not be issued unless the committee concerned is willing to take substantive action in the event of default.

In relation to the second option, it is necessary to consider the likely train of events if the committee decides to summon those persons. A summons by the committee, judging by the attitude of the government so far, is likely to be met with refusal to comply. In that circumstance, the committee can take no further action other than to report the default to the Senate. The Senate could then issue further summonses for those persons to appear. It is also likely that those summonses would be met with non-compliance. The only remedy then available to the Senate would be to impose penalties on the defaulters. The Senate declared in a resolution in 1994, however, that it would be unfair to penalise officers for failure to comply with a Senate requirement because of instructions to such officers by a minister. If the Senate continued to adhere to this principle, a penalty would be imposed only on Mr Reith. Any penalties would probably be challenged in the courts. The government would probably indemnify the defaulters, so that the cost of the consequent court proceedings would fall entirely upon the taxpayer. The Senate would ultimately be vindicated in the court proceedings, in that, if the matter were properly argued, the courts, and certainly the High Court, would give no credence to the insupportable view that these persons have some kind of legal immunity from the requirements of parliamentary inquiries. This vindication, however, would be won at great cost to the taxpayer, with little or no burden falling on the defaulters. The evidence required by the committee would also not be obtained, unless the Senate were willing to start the whole process again by again summoning the defaulters and imposing penalties for further refusals.

This lengthy process would serve only as a distraction, probably a complete distraction, from the important issue of uncovering the truth behind the matter into which the committee has inquired.

In effect, this is not a case of reluctant witnesses, but a variation on the theme of Senate/government conflict, of the Senate seeking information and the government refusing it. This case, however, is a significant escalation of that problem. It cannot be satisfactorily resolved by the use of the power to punish contempts.

The third option amounts to the committee making the best report it can without the evidence of the persons concerned.

The method of dealing with the problem which you propose gives rise to the fourth option, and has many advantages.

- (1) The capacity to summon those persons, and the lack of any immunity on their part, would be affirmed, which is important to preserve the integrity of parliamentary inquiries. That capacity must be retained in reserve for appropriate cases.
- (2) The proposal takes full account of the difficulties of the alternative courses mentioned above.
- (3) The proposal would affirm the significant principle that the value of inquiries lies in informing the public, and that the true remedy for government malfeasance lies in the exposure of that malfeasance to the public. These are the principles upon which, in effect, Senate inquiries have always operated and continue to operate, with their compulsory powers in reserve.

- (4) The proposal would bring the committee much closer to discovering the truth behind the subject matters of its inquiry than the alternative course of seeking to impose penalties.
- (5) The proposal would achieve this result at much less cost to the taxpayer.
- (6) The services proposed to be performed for the committee by me and by the Independent Assessor are appropriate services for the Senate Department and an independent adviser to a committee to perform, and involve a more productive use of resources available to the Senate and to its committees than seeking to impose penalties.
- (7) The recommendation for an inquiry into the effect on parliamentary accountability of the current roles of ministerial advisers could result in a valuable contribution to the cause of parliamentary inquiries and accountability.

For all these reasons, I consider that the course of action outlined in your proposal is preferable to summoning the persons concerned and imposing penalties for default. The proposal puts forward a new method of dealing with a new manifestation of executive intransigence in the face of parliamentary scrutiny. I believe that there is no alternative course of action to the one you have proposed which is likely to bring the committee and the Senate closer to discovering the truth about the subject matters of its inquiry.

Yours sincerely



(Harry Evans)



OFFICE OF THE CLERK OF THE HOUSE

19 August 2002

Mr Speaker:

On 15 May 2002, you presented to the House copies of my correspondence with the Chair and Secretary of the Senate Select Committee on a Certain Maritime Incident, including relevant documents from the Clerk of the Senate. The papers related principally to the question of compulsion of former Members of the House to appear before Senate committees.

Advice by Professor Geoffrey Lindell

Before I passed my views to the Senate Committee, I asked that they be tested privately, without intention of publication of the private advice. Professor Geoffrey Lindell, Adjunct Professor of Law at the University of Adelaide, agreed to provide advice on this basis. Professor Lindell is the author of the highly regarded *Parliamentary Inquiries and Government Witnesses (Melbourne University Law Review*, vol. 20, 1995, pp384-91). Professor Lindell provided the advice dated 22 March and 1 April 2002. However, he requested me not to make it public at the time. He gave his full permission for me to make use of the reasoning and arguments contained in his advice, and I did so in the material I provided to the Senate Committee. In summary, the advice I provided was that:

- There appeared to be an agreed immunity for current members of each House from being compelled to attend before the House of which they were not a member, or its committees;
- This immunity probably extended to former Senators and Members; and
- The immunity may extend to ministerial staff.

Professor Lindell has now given permission for his advice to be published, and I have attached a copy. As will be apparent, I included many elements of his advice in the material I provided to the Senate committee.

Advice to the Clerk of the Senate by Mr Bret Walker SC

Since then, the Select Committee has received, by means of the Clerk of the Senate, an opinion by Mr Bret Walker SC on former Ministers and ministerial staff being called as witnesses before a Senate committee. The Senate Committee has authorised the publication of that opinion. A copy is attached. The conclusion of Mr Walker's advice is that former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee.

Opinion from Mr Alan Robertson SC and Professor Lindell on the Walker Advice

I have also sought advice from Mr Alan Robertson SC on the initial questions and on the Walker advice. A copy of his opinion, dated 26 June 2002 is attached. Professor Lindell also provided me with advice on the Walker opinion. A copy of Professor



Lindell's advice, dated 16 August 2002, is attached. I will refer to specific aspects of these opinions where relevant.

Ministerial staff

Much of the Walker opinion, and much of the subsequent action by the Senate Select Committee on a Certain Maritime Incident, relate to the position of ministerial advisers. It is not within my area of administrative responsibility to pursue the situation as regards ministerial staff. I only provided the Senate Committee with my views because I was invited to do so.

However, if a House of Representatives committee asked my advice about the power of compulsion in relation to an adviser for a minister in either House, my response would be that it would not be appropriate to attempt to compel the attendance of the staff person.

Current Members of the House

Mr Walker's opinion at paragraph 20 indicates that the immunity against being compelled to appear before the other House or its committees is centred on the concept of 'elaborate expressions of comity- symbolised by a number of ceremonies' of the two Houses at Westminster in 1901 and Canberra in 2002. However, it has been my contention that the immunity is based on something much more solid than a loose agreement or observance. I have maintained that is something closely akin to a legal immunity, based on the Constitution (sections 49 and 50).

The need for the independence and any consequential immunity is as stated in Hatsell, which is of course relevant in determining the position as it relates to the United Kingdom House of Commons in 1901:

... any other proceeding would soon introduce disorder and confusion; as it appears actually to be done in those instances, where both Houses, claiming a power independent of each other, have exercised that power upon the same subject, but with different views and to contrary purposes.

Senator Ray made comment, in the Senate Finance and Public Administration Committee considering Department of the Prime Minister and Cabinet Estimates, relating to the practical effect of proceeding otherwise. Senator Ray said:

We do not want an internecine warfare between the two houses of parliament, with tit-for-tat calling of witnesses. (Hansard 27/5/02, page F&PA119).

This point has been reinforced by Professor Lindell's opinion of 16 August.

The Senate has given recognition of the principle in its resolution of 2001 containing reference to "the rule, applied in the Senate by rulings of the President, that one House of Parliament may not inquire into or adjudge the conduct of a member of the other House". However, the end result is that the immunity for current members is based on something, I believe, much more concrete than a loose sentiment of comity.

Professor Lindell and Mr Robertson both believe that the immunity for current Members has a legal basis and does not rest merely on comity. Professor Lindell has reinforced the view in his advice of 16 August 2002. The concept is important in the terms of its probable extension to former Members of the Parliament.

Former Members of Parliament

Mr Walker's advice suggests that all of the material necessary for the formation of a sound opinion may not have been made available to him. For example, his discussion of comity does not refer to the quotation from Hatsell made available to the committee, and it does not refer to the Senate resolution of 2001. He suggests that there is a contention that a minister might forever trail an immunity against accountability. However, the belief I expressed, in the context of advice from Professor Lindell, was that a former member retained responsibility to the house of which he or she was a member.

Mr Walker also refers to the undoubted power of the Senate or its committees to compel the attendance of witnesses to give evidence – an “undoubted general power”, as he describes it. However, the power is not an unqualified power. The House of Commons' view is that the House has power over its members and the documents in their possession, but that power is not automatically delegated with the power to send for persons, papers and records (See, for example, the transcript of the 33rd Speakers' and Presiding officers' Conference, 2 July 2002, page 27). Diana Woodhouse in “*Ministers and Parliament Accountability in Theory and Practice*” (Clarendon Press, Oxford, 1994) indicates at page 180 that Commons select committees can exercise unqualified power only with regard to private individuals.

Similarly, as Professor Lindell points out in his advice of 16 August, Mr Walker bases much of his reasoning on the absence of express constitutional or statutory provisions to support such an immunity. I would not attempt to improve on the argument advanced by Professor Lindell to counter this contention. Rather, I would suggest that much of the discussion has centred on the existence or otherwise of an immunity, whereas it is also sustainable to examine the purported power the exercise of which gives rise to the need for an immunity. There is no such express provision as to the right of either House of the British Parliament in 1901 to summon former Members of the other House. Indeed, in relation to the House of Commons in 1901, the possibility of compelling the attendance of former Members of the House of Lords was extremely remote. In the vast majority of instances, it was not possible to be a former member of the House of Lords and still be living. Retired bishops were the major exception. I have checked with colleagues in both Houses in London, and there never has been an instance of compelling the attendance of a former member of the other House. In Australia, it took 94 years before one of the Houses discovered and made use of the purported power.

The current edition of *Odgers Australian Senate Practice* contains the following passage at page 231 :

Members of another house are entitled to the protection of standing order 193(3) [relating to debate] when their house has been dissolved for an election and they are technically not members. It would be anomalous if the protection provided by the standing order were to cease simply because a house has been dissolved for election.

There would also be the anomalous distinction between a lower house which has been dissolved and an upper house which has not and the members of which would continue to attract the protection. Therefore members of a house which has been dissolved continue to attract the protection of the standing orders until such time as the successor house meets. Members who retire or are defeated at the election then cease to attract the protection when their successors are in office.

At first glance, this passage might lead to a belief that there was a ground for some extension of immunity for House Members. However, as Mr Robertson points out, the matter relates to decorum and debate. In any case, the comment is not sourced or referenced, and is one of the examples in *Odgers* where an opinion is stated as a matter of fact. This practice makes it a less than perfect guide in determining appropriate Senate practice.

The publication is updated on a regular basis by means of a supplement. The most recent supplement, updating to 30 June 2002, makes reference in this matter to a claim by the Clerk of the House of Representatives, and advice provided by the Clerk of the Senate and a senior barrister experienced in parliamentary privilege and law which made it clear that there is no such basis for any such immunity. Intellectual integrity would suggest that future updates might remove the semantic innuendo of the distinction between ‘claim’ and ‘advice’, and pay recognition to the opinions of Professor Lindell and Mr Robertson. An update of this kind might also assist in restoring the reputation of *Odgers Australian Senate Practice* as an authoritative guide to Senate practice.

Conclusion

In summary, Professor Lindell’s opinion is:

- The existence of immunity for current Members is not in doubt and is based on a legal restriction on both Houses of the Parliament. It is not strictly confined to the Member’s conduct as a member of parliament or any matter that forms part of proceedings of the House of which he or she was a Member. The immunity can extend to any matter in respect of which the Minister could be questioned and held to account in the House of which he or she is a Member.
- There are strong and persuasive arguments to support immunity for former Members in respect of compulsory attendance before the other House or one of its committees.
- A former Member remains accountable for periods while he or she was a Member to the House to which he or she was a Member.
- There are reasonable arguments to support the application of the same immunity to a Member’s staff, but the position is much more doubtful.
- There is nothing in the opinion by Mr Walker that would lead Professor Lindell to alter his previously-expressed views.

In summary, Mr Robertson's opinion is as follows:

- The immunity of current Members has a legal basis and does not rest merely in comity. It is not limited to the conduct of a Member of that House or to that which forms part of the proceedings of that House if those concepts are intended to exclude matters for which a Member who is a Minister is or has been officially responsible. Such a line of distinction would be both impractical and flawed in principle.
- Because the immunity is not merely an immunity based on the day-to-day functioning of the House, it should extend to a former Member from compelled to appear before the other House or one of its committees.

It appears at this stage that the Senate committee has not proceeded with the proposal to compel the attendance of a former Member of the House. Of course, as Mr Robertson and Professor Lindell indicate, a former Member could be compelled to attend before a Senate committee in a private capacity, as could any private citizen. However, should an attempt be made to compel a former Member to attend before a Senate committee in relation to matters for which he was responsible as a Minister during the period of membership against her or his will, I (and I trust any future Clerk of the House) would advise the Speaker that the House would be fully justified as considering such action as a breach of its privileges, and extending its protection to the former Member.

Further action

After you have had an opportunity to consider the contents of this note, you may care to present it and its contents to the House for the information of Members of the House.



I C HARRIS
Clerk of the House

Australian Democrats Additional Comments

Introduction

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

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

SIEV X and the Pacific Solution

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

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

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

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

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

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

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

207 (1) A ship shall not be deemed seaworthy under this Act unless

- i) It is in a fit state as to condition of hull and equipment, boilers and machinery, stowage of ballast or cargo, number and qualifications of crew including officers and in every other respect to encounter ordinary perils of the voyage then entered upon and
- ii) It is not overloaded

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

SIEV X

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

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

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

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

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

1 Majority Report, 9.132

2 Majority Report, 9.135

3 Majority Report, 9.136

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- the department did not have a formal risk identification monitoring and management process in place at the corporate or operational level. There was no systematic or proactive approach to identify manage or monitor various risks associated with measures to prevent detect and disrupt unlawful entry. *This risk management strategy is not expected to be operational until 2003.*
- No structural process for identifying priority areas
- DIMIA should conduct a formal assessment of risks and controls in relation to prevention of unlawful entry to Australia.⁶
- Intelligence Analysis Section did *not* have a database to store, manage or analyse information.⁷
- The extent to which activities contribute to deterring unauthorised boat arrivals is difficult to measure.⁸

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

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

The Pacific Solution

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

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

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

8 *ibid*, p. 68

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

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

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

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

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

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

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

10 *ibid*, p.3

11 September 2001 Re-Election statement

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

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

Recommendation

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

Children Overboard

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

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

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

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

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

13 *Transcript of Evidence*, CMI 464

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

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

Senator Andrew Bartlett

Australian Democrats, Qld

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

Senator John Faulkner Additional Comments

Introduction

Recently the Federal Government has credited its people smuggling disruption programme as having significantly contributed to the decline in the numbers of people trying to get to Australia illegally.

Minister for Immigration, Philip Ruddock, cited the government's policy of "physically disrupting the work of people smugglers"¹ as one of the main reasons for the decline in asylum seeker boats coming to Australia.

Minister for Justice and Customs, Chris Ellison, also credited the Government's disruption programme as a significant reason why no boat had landed on the Australian mainland in almost 12 months.²

However, from the evidence the Government has given both the Certain Maritime Incident Committee and Senate Estimates hearings, it is unclear exactly what activities occur in Indonesia under the disruption programme.

Within a legal framework and properly administered, disruption is a legitimate tool of Government. However the Australian disruption programme in Indonesia does not appear to have this kind of framework.

The Government has recently provided insufficient answers to questions that go to the extent of the disruption programme in Indonesia and what exactly the programme entails.

Given that the disruption programme in Indonesia is undertaken by the Australian Government and funded by the Australian taxpayer, the Federal Government and Commonwealth agencies must not avoid Parliamentary scrutiny on this matter.

The Australian Government must answer these questions:

- What are the limits to the implementation of the disruption policy, if there are any?
- Precisely what disruption activities are undertaken at the behest of, or with the knowledge of, or even broadly authorised by, the Australian Government?
- What role have Ministers played in issuing Ministerial directions or authorisations covering these activities, and what knowledge do Ministers have about the methods employed, or the outcomes of those activities?

¹ "New Legislation Next Step in Fighting People Smuggling", Immigration Minister Philip Ruddock Press Release, 21 March 2002

² Question Without Notice, Senator Ray question to Senator Ellison, Senate Hansard, 2.35pm, 26 September 2002

- What sort of mechanisms are in place to ensure that Australia is not breaching any laws, here in Australia or in other countries?
- How is the policy of disruption funded?
- How much does it cost to fund, and who actually receives this money?
- Who tasks the Indonesian officials or others to disrupt people smugglers or their clients?
- Are Australians involved in disruption activities in Indonesia?
- What accountability mechanisms are in place in relation to these activities, and what mechanisms ought to be put in place?

What is Disruption?

The policy of disruption aims to disrupt the activities of people smugglers and their clients, asylum seekers wanting passage to Australia. The activities that occur under the disruption programme in Indonesia appear to be quite broad. They range from information campaigns to more direct activities such as preventing vessels from departing Indonesia.

Disruption, by way of an information campaign, includes informing people in Indonesia of the dangers or the risks associated with people smuggling. For example, telling asylum seekers of the dangers of sailing in vessels to Australia, or distributing T-Shirts to the local Indonesian fishermen that explain why they should not crew people smuggler boats.

Department of Foreign Affairs, Assistant Secretary, Geoff Raby, told Senate Estimates that disruption was “collecting information, collecting intelligence, meeting with local police in different areas and local governors, raising the profile of the issue and expressing concerns”.³

At the Senate Select Committee into a Certain Maritime Incident (or CMI Committee), representatives from the Department of Immigration said that the only disruption activity they were involved in was information campaigns, for example, pointing out some of the dangers in travel to potential passengers.⁴

However the policy of disruption is not only about information campaigns in Indonesia.

Disruption is also about physically disrupting the people smuggling syndicates and the asylum seekers who seek their assistance.

Minister Ruddock recently outlined in general terms the more active element of disruption. This includes the “detection and interception of the people smuggler’s

³ Geoff Raby, DFAT, Senate Estimates, FAD&T, 6 June 2002, p.556-557

⁴ CMI Committee, 11th July 2002, p.1999

route” through regional cooperation ranging “from information exchange to joint collaborative action on illegal migration”. It also involves disruption at transit points⁵.

The Australian Federal Police (AFP) is also involved in active disruption in Indonesia.

AFP National General Manager, Federal Agent, Brendan McDevitt, told the CMI Committee that in broad terms the “primary objective” of disruption is to “prevent the departure of the vessel in the first instance, to deter or dissuade passengers from actually boarding vessels”.⁶

The AFP agreed that there were a whole series of methods that could be used to prevent the departure of the vessel and that it was the “discretion of the liaison officer in Jakarta as to the best method to apply”.⁷ There may be disruption of the transport of the passengers to the embarkation point, for instance, or the movement of the boat to that embarkation point.

AFP Commissioner Mick Keelty confirmed the more active nature of the disruption activities, when he said that their purpose is to, “prevent the departure of a vessel ... either by the arrest of individuals or by the detention of individuals, or by ensuring that the individuals don’t reach the point of embarkation if that was known”.⁸

From the evidence received at the CMI Committee and Senate Estimates, it appears that there are no current guidelines on what is acceptable and what is not acceptable when disrupting people smugglers, asylum seekers and the people smuggler vessels. The Government has refused to confirm if the disruption programme in Indonesia ever extended to the physical interference of vessels and whether any consideration is given, in the planning and implementation of disruption, to questions of maritime safety – to the safety of lives at sea.

Kevin Ennis

Channel Nine’s *Sunday* program has recently raised serious questions about the nature of disruption operations in Indonesia.

The most concerning of these allegations is that AFP informant Kevin Ennis admitted, indeed boasted, to reporter Ross Coulthart and two colleagues that he had paid Indonesian locals on four or five occasions to scuttle people smuggling boats with passengers aboard. Mr Ennis claimed the boats were sunk close to land so everyone got off safely.

The AFP recently issued a press statement indicating that “Kevin Ennis has been formally interviewed since the Nine Network’s *Sunday* Program alleged his involvement in the sabotaging of vessels. He emphatically denies any such

⁵ Philip Ruddock, “Border Protection; People Smuggling – Australia’s Experience and Policy Responses – a Background Paper”, DIMIA website, July 2002

⁶ CMI Committee, 11 July 2002, p.1934

⁷ CMI Committee, 11 July 2002, p.1934

⁸ CMI Committee, 11 July 2002, p.1977

involvement”.⁹ However the AFP did not indicate if Mr Enniss had told the *Sunday* crew that he had paid local Indonesians to scuttle four or five boats.

The AFP recently confirmed, as a result of the *Sunday* Program revelations in February, that Mr Enniss was paid at least \$25,000 by the AFP to be an informant. The AFP also admitted that they were aware that Mr Enniss purported to be a people smuggler and on at least one occasion took money from asylum seekers who thought they were buying a passage to Australia.¹⁰ Commissioner Keelty told Senate Estimates: “...we knew he was involved in people smuggling activities because he was telling us what was going on”.¹¹

The Enniss admissions are not consistent with statements by the AFP’s Director of International Operations, Dick Moses, earlier this year. When asked by the *Sunday* program “Has the Australian Federal Police ever authorised any informant to involve themselves in people-smuggling”, he answered “No that’s categorically no, the Australian Federal Police has not done so”.¹²

The *Sunday* program also put evidence on the record from a number of asylum-seekers that Mr Enniss claimed to be an Australian policeman, and that he had information about Royal Australian Navy ships which would ensure that their boats would slip the net and reach Australia.

These admissions contradict evidence given by Commissioner Keelty to the CMI Committee in which he claimed “we obtain information from informants, but informants do not disrupt. They have no power to disrupt”.¹³

Commissioner Keelty also told the CMI Committee that the AFP have no police powers beyond Australia’s borders. Furthermore the AFP could not direct Indonesian Police or other Indonesian authorities to disrupt people smugglers and asylum seekers. They could only seek their assistance and cooperation.¹⁴

But in the case of Mr Enniss this is clearly not what is occurring in Indonesia. The AFP have admitted Mr Enniss in conjunction with the Indonesian police agency POLDA “were engaged in strategies designed to interdict asylum seekers where possible before they could depart for Australia”.¹⁵ This appears to be exactly what the policy of disruption sets out to do.

Active Disruption

Most information about active disruption has come from AFP evidence at the CMI Committee and Senate Estimates. But the AFP is not the only agency involved in these disruption activities. The Department of Foreign Affairs (DFAT), the Australian

⁹ “Senator Faulkner Has Got It Wrong”, Australian Federal Police Press Release, 26 September 2002

¹⁰ “AFP Investigation into Alleged People Smuggler Completed”, AFP Media Release, 24 August 2002

¹¹ Senate Additional Estimates, L&C, 18 February 2002, p.193

¹² AFP Director of International Operations Dick Moses, “The Australian People-Smuggler”, Channel Nine *Sunday* Program Cover story, 17 Feb 2002

¹³ CMI Committee, 11 July 2002, p. 1938

¹⁴ Keelty, CMI Committee, 11 July 2002, p.1924

¹⁵ “AFP Investigation into Alleged People Smuggler Completed”, AFP Media Release, 24th August 2002

Secret Intelligence Service (ASIS), Defence, and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) also play a role in Australia's people smuggling disruption program. As Minister Ellison told the Senate: "[W]e have the Australian Federal Police and officials of the Department of Immigration and Multicultural Affairs and the Department of Foreign Affairs and Trade working in the region for upstream disturbance [disruption]. We have had some success with that. We are working at that end of the market".¹⁶

The evidence received by the AFP at the CMI Committee and Senate Estimates, regarding active disruption has been, at times, contradictory and misleading.

The AFP told the CMI Committee that they work closely with the Indonesian National Police, Indonesian Immigration, the Indonesian Navy and Indonesian Army and Marines when pursuing organised people smuggling activities.

According to the AFP, no payment is made to the Indonesian authorities for carrying out disruption activities.

Commissioner Keelty told the CMI Committee "We do not ask them to carry out a task and then pay for them to do the task. There is a level of cooperation that we have with them under the protocol".¹⁷

The AFP also indicated that they "paid no moneys to any government agency in Indonesia to have them disrupt the activities of people-smuggling organisers".¹⁸

However, Commissioner Keelty did confirm that the AFP provides equipment, training and costs in travel to those Indonesian authorities involved in disruption activities. For instance the AFP's Law Enforcement Cooperation Program provides training and equipment to the Indonesian National Police. Five teams of the Indonesian National Police have been established through this program and are directly involved in disruption activity.¹⁹

Commissioner Keelty also informed the CMI Committee that AFP informants are only paid to provide information about the location of passengers and the activities of organisers and that "no money has been paid to anybody specifically empowered to intervene"²⁰ in people smuggling.

But as a result of an investigation into the activities of Mr Enniss, the AFP confirmed they were aware Mr Enniss purported to be a people smuggler in Indonesia. The AFP also admitted to knowing that Mr Enniss had taken money from asylum seekers on at least one occasion.²¹ According to the *Sunday* program, Mr Enniss has also confessed to paying Indonesians to scuttle people smuggling vessels.²²

¹⁶ Senator Chris Ellison (Minister for Customs and Justice), Migration Amendment (Excision from Migration Zone) Bill 2001 Second Reading Debate, Senate Hansard, 25 September 2001

¹⁷ CMI Committee, 11 July, p.1937

¹⁸ CMI Committee, 11 July 02, p. 1946

¹⁹ Keelty, CMI Committee, 11 July 2002, p.1941

²⁰ Keelty, CMI Committee, 11 July 2002, p. 1945

²¹ "AFP Investigation into Alleged People Smuggler Completed", AFP Media Release, 24 August 2002

²² "The Federal Police and People Smugglers", Channel Nine *Sunday* cover story, 1 September 2002

Commissioner Keelty has told the CMI Committee that it has not come to the AFP's attention that "they were doing anything unlawful or inhumane".²³

However, both the summary of the AFP's investigation into Kevin Enniss, and the Sunday program's investigation, have clearly indicated that at least one Australian was involved in disruption activities of a highly dubious and possibly criminal nature.

Despite the assurance Commissioner Keelty gave to the Senate Select Committee that nothing unlawful or inhumane would occur as a result of the disruption programme, in the same day of evidence Commissioner Keelty could not categorically rule out whether illegal and inhumane disruption activities had occurred. These activities include encouraging fuel suppliers not to supply fuel to vessels, not providing food for the vessels to sail, and putting sugar in the fuel tank or sand in the engine of a vessel. When Commissioner Keelty was asked if he could categorically say whether any of these activities did not occur, he replied "I have no knowledge at all of these things occurring, but it is like anything else I have no knowledge about: I cannot deny that it exists".²⁴

Legality and propriety

Government agencies involved in the disruption programme have told the Senate Select Committee that they never sought legal advice on these activities.

Commissioner Keelty claimed that he was fully accountable for the disruption program²⁵, but it appears that no procedures have been put in place to ensure nothing untoward or illegal is occurring or has occurred. There appear to be no accountability mechanisms in place at all, with most of this activity occurring outside Australian legal jurisdiction.

When Commissioner Keelty was asked at the CMI Committee "so what accountability controls and constraints are on those Indonesian agencies that are conducting this activity? How are you satisfied ... that those activities are conducted in an appropriate way?", Commissioner Keelty replied, "[T]hat is not for me to say. I don't have any power over the Indonesian authorities".²⁶

Furthermore Commissioner Keelty indicated "The AFP, in tasking the Indonesian National Police to do anything that would disrupt the movement of people smugglers has never asked, nor would it ask them to do anything illegal. If we became aware that they were doing something illegal or something that was inhumanitarian (sic), then it would be brought to our notice and we would ask that they not do it that way. The difficulty is once we ask them to do it, we have to largely leave it in their hands as how they best do it".²⁷ It is instructive to note Commissioner Keelty's words here in regard to the broad tasking the AFP has requested of the INP: "in tasking the

²³ CMI Committee, 11 July 2002, p.1981

²⁴ CMI Committee, 11 July 2002, p.1980-1981

²⁵ CMI Committee, 11 July 2002, p.1935

²⁶ CMI Committee, 11 July 2002, p.1938

²⁷ CMI Committee, 11 July 2002, p.1980-1981

Indonesian National Police to do anything that would disrupt the movement of people-smugglers”.

But in earlier evidence, Commissioner Keelty claimed that the AFP couldn't task the Indonesians to disrupt people smugglers stating “We are not tasking them [INP] to do it...we can seek their cooperation. We do not have a line of command over the Indonesian authorities”²⁸. It is unclear if the AFP did in fact task the INP to disrupt people smugglers or whether they simply sought cooperation.

Commissioner Keelty has said that he has not sought legal advice about the disruption activities in Indonesia. It is therefore difficult to understand how Commissioner Keelty can claim to know definitively that none of the disruption activities in Indonesia are illegal or improper.

When the Department of Immigration was asked if they had concerns about the nature or legality of any disruption activities, Deputy Secretary Ed Killesteyn replied “None at all. DIMIA is not an agency that has a role or a function or a mandate to be involved in disruption activities that might invite some sort of question as to its legality. That is not our role. We are not a law enforcement agency”.²⁹

Dr Raby from DFAT also indicated that his department had not sought any legal advice about people smuggling disruption activities.³⁰

It is of concern that these disruption activities are occurring in Indonesia at the request of the Australian government and yet no legal advice has been sought nor are any mechanisms in place to ensure nothing illegal or untoward is occurring in Indonesia.

Legal advice given to the *Sunday* program indicated that the alleged behaviour of Mr Ennis in Indonesia is probably criminal, and that the AFP has possibly acted outside the law.

Highly respected legal expert Professor Mark Findlay said of Mr Ennis on Channel Nine's *Sunday* Program: “Well, under Australian law if he's a people smuggler it's a crime. If he's not a people smuggler but purporting to be one, that's a misrepresentation. And to obtain a financial advantage as a consequence, that's a crime – you can't have it both ways”.³¹

Professor Findlay also rejected Commissioner Keelty's claim at Senate Estimates that informants like Mr Ennis are protected by the controlled operations legislation.

Controlled Operations are defined as:

“an operation that: involves the participation of law enforcement officers; is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence; and may involve a law enforcement officer or other person in acts, or omissions to act, that would, apart

²⁸ CMI Committee, 11 July 2002, p.1938

²⁹ CMI Committee, 11 July 2002, p. 2003

³⁰ Senate Estimates, FAD&T, 6 June 2002, p.560

³¹ “The Federal Police and People Smugglers”, Channel Nine *Sunday* cover story, 1 September 2002

from certain exemptions, constitute a Commonwealth offence or an offence against a law of a State or Territory”³².

Professor Findlay argued that there were possibly three reasons to suggest that Mr Ennis was not covered by the controlled operations legislation: firstly, the legislation does not cover controlled operations in Indonesia; secondly, informers are not covered by the legislation, and thirdly the legislation does not cover individuals who are involved in entrapment procedures which is the work that Mr Ennis appears to have been doing in Indonesia.³³

The suggestion made by Commissioner Keelty means that there are grounds to suspect that the AFP itself may have been involved in, or may have authorised or condoned, activities outside of the law, or even in breach of Australian law.

In this regard it should be noted that amendments extending the controlled operations provisions of the *Crimes Act 1914* to cover people smuggling offences only entered into effect on 1 October 2001.

Role of Ministers

Beyond the activities of AFP informant, Mr Ennis, there are serious questions about the disruption programme and the behaviour of certain Australian agencies in Indonesia.

It is unclear to what extent Immigration Minister Philip Ruddock, Foreign Affairs Minister Alexander Downer, Justice and Customs Minister Chris Ellison and Attorney General Daryl Williams, had authorised, or had knowledge of or involvement in the disruption activities in Indonesia.

At the CMI Committee, Assistant Secretary Nelly Siegmund from the Immigration Department indicated that she had specifically briefed Minister Ruddock about AFP reports relating to “Indonesian involvement in being able to stop certain vessels from departing”.³⁴

However, generally Immigration officials at the CMI Committee were vague about their knowledge of disruption, mainly referring to information campaigns.³⁵

For instance Ed Killesteyn described his knowledge of disruption activities on the ground as “only generalities...about information campaigns and providing an opportunity for people to be delivered to the IOM [International Organisation for Migration] processing areas”.³⁶

This contrasts with Minister Ruddock’s Background Paper, released a few weeks after Immigration officials’ evidence to the CMI Committee, that outlined the policy of

³² Crimes Act 1914 Part 1AB Controlled Operations, Sixth Annual Report under Section 15T 2001-2002

³³ “The Federal Police and People Smugglers”, Channel Nine *Sunday* cover story, 1 September 2002

³⁴ CMI Committee, 11 July 2002, p. 2001

³⁵ CMI Committee, 11 July 2002, p. 1999

³⁶ CMI Committee, 11 July 2002, p. 1999

disruption including “Disruption at Transit Points” which “can be either through apprehension of those unlawfully in a transit country prior to their onwards travel or by interception at the actual point of attempting to continue their journey, either by sea or air”.³⁷

The CMI Committee’s work has found that the Prime Minister established the People Smuggling Taskforce, headed by PM&C, to share high-level information, and that this taskforce discussed disruption activities on a number of occasions. It is unclear, however, what briefings this taskforce provided the Prime Minister about the nature and extent of disruption activities undertaken by, or condoned by, Commonwealth agencies.

On 27 September 2000, the Minister for Justice and Customs, issued a ministerial direction that the AFP “give special emphasis to countering and otherwise investigating organised people smuggling. The AFP should also ensure that it provides an effective contribution to the implementation of the Government’s whole of government approach to unauthorised arrivals”.³⁸ Minister Ellison, who became the Minister for Justice and Customs in January 2001, has not indicated how this direction was put into operation.

Last year Minister Ellison told the Senate that Australia’s upstream disturbance program (or disruption programme) had successfully stopped 3,700 asylum seekers from embarking on voyages to Australia:

“[I]n the period February 2001 to June 2001, due to the efforts of the Australian Federal Police, Immigration and Foreign Affairs and, particularly, cooperation from the Indonesian authorities, we have prevented a potential 3,700 illegal entrants coming to Australia. That has been very good work that we have done overseas in attempting to avoid this problem reaching Australia, and I want to place on record our appreciation to the Indonesian authorities...What they have to look at are the facts, because the facts demonstrate successes in relation to upstream disturbance. We have set up a people smuggling Taskforce made up of the Australian Federal Police and Immigration officials...We have tasked and resourced the Australian Federal Police to work with Indonesian authorities in relation to upstream disturbance in relation to people smuggling”.³⁹

Foreign Affairs Minister, Alexander Downer, has also not confirmed whether he authorised the Australian Secret Intelligence Service (ASIS), either prior to or following the commencement of the Intelligence Services Act, to engage in disruption activities. If such authorisation occurred, the Minister should explain what sort of disruption activities took place in Indonesia as a result of any such Ministerial authorisation.

Section 6(1)(e) of the Intelligence Services Act, which commenced on 29 October 2001, requires the Foreign Minister to put into writing any ministerial direction authorising ASIS to engage in so-called “other activities”, that is any activities relating to people or organisations outside Australia other than intelligence collection.

³⁷ Philip Ruddock, “Border Protection; People Smuggling – Australia’s Experience and Policy Responses – a Background Paper”, DIMIA website, July 2002

³⁸ Keelty, CMI Committee, 11 July 2002, p.1924

³⁹ Questions Without Notice, Senate Hansard, 2.19pm, 30 August 2001

Disruption activities would be categorised as “other activities” for ASIS under the provisions of the Intelligence Services Act.

The question of provision for the authorisation of “other activities” was a government priority when the Intelligence Services Bill was before the Parliament last year.

Direct Parliamentary scrutiny of the role of ASIS is not possible. Nor is it possible for the Joint Committee on ASIO, ASIS and DSD to examine these matters as they may be current operational matters. It is also possible that such an examination falls outside the powers of the Inspector General of Intelligence and Security.

If ASIS has been involved, the critical aspect would be the behaviour of its agents not its intelligence officers. Ultimately supervision in this area, and responsibility in this area lies with the Foreign Minister. If ASIS has been involved, then Minister Downer should brief the Leader of the Opposition on this subject.

Response from Ministers

Australian Ministers who have been questioned about the disruption programme have so far provided unsatisfactory responses. It is not enough for Ministers to dismiss the suggestion that illegal activities might be occurring, as a result of the disruption programme, when there is obviously no system in place to ensure that this is not occurring.

When Minister Ellison was recently asked on ABC’s Radio’s AM programme if any Australian agents or their informants had been involved at all in the sabotaging vessels, he replied “Well it's not the policy of the Australian Government”. Again, when reporter Matt Brown asked “But what about individuals? Has that happened?” Minister Ellison replied “Well I can only speak for the Australian Federal Police and they have said to me that the Australian Federal Police has never been involved in sabotaging vessels”.⁴⁰

Furthermore, Minister Downer has not ruled out the possibility that someone may have sabotaged vessels in Indonesia as a result of Australia’s disruption programme:

“The Australian Government certainly did not sabotage any boats. Did anyone ever sabotage a boat, I've no idea, but did the Australian Government ever sabotage a boat, or was a boat sabotaged and sunk on the instructions of the Australian Government, if I may say so, anybody would know that no Australian Government would do that”.⁴¹

When recently asked if anyone in Indonesia had sabotaged people smuggling vessels as a result of the disruption programme, would the Government want to know, Defence Minister, Robert Hill, replied: “Well, if I'm confident that no law authority, no Australian institutional body would act in this way, it's inappropriate to therefore speculate and hypothetically ask me the next question”.⁴²

⁴⁰ ABC Radio, AM Program, 26 September 2002

⁴¹ ABC Radio, PM program, 26 September 2002

⁴² Sunday Program, Laurie Oakes interview with Robert Hill – Defence Minister, 29 September 2002

Minister Ruddock's response to questions about Australia's disruption programme is also unsatisfactory:

“Ministers and public servants are entitled to be angry about the way in which those sorts of imputations are drawn when there is no evidence for them to be drawn in that way”.⁴³

So far none of the Ministers involved in the people smuggling disruption programme has categorically ruled out if the disruption programme in Indonesia ever involved anyone sabotaging a people smuggling vessel.

Australian Embassy in Jakarta

Questions also remain about how much direction regarding disruption activities comes from the Australian Embassy in Jakarta, and what sort of direction the Embassy is receiving from officials or Ministers in Canberra.

DIMIA has three Compliance Officers working out of the Jakarta Embassy. Two of these positions were created in the last two years. Their major priority is to work on people smuggling issues.

Two AFP agents also work from the Embassy in Jakarta. These agents work closely with the Indonesian National Police, Indonesian Immigration, Indonesian Navy and Indonesian Army and Marines.⁴⁴ They report directly to the Director of International Operations – Mr Dick Moses and the General Manager of International Operations – Mr Shane Castles.⁴⁵

Both Mr Moses and Mr Castles were regular attendees of the Prime Minister's People Smuggling Taskforce last year. They would inform the Taskforce of the criminal aspects of people smuggling - involvement with the people smuggling teams and disruption activities.⁴⁶

At the Australian Embassy in Jakarta an Inter-Agency Co-ordination Group on People Smuggling has also been established. The portfolios represented at these meetings are DFAT, DIMIA, AFP and Defence. The purpose is to share information and assessments and to represent the agencies' view in relation to people smuggling matters.⁴⁷ Geoff Raby from DFAT has indicated disruption activities are a key focus of this group.⁴⁸

Australia's Indonesian Ambassador Ric Smith recently wrote a letter to the *Canberra Times* ruling out the possibility that any official of the Embassy was engaged “in any

⁴³ “Fed: Government and AFP slam sabotage suggestions”, AAP Wire, [Thursday, 26 Sep 2002 at 6:29pm](#)

⁴⁴ Keelty's Answers to Questions on Notice, Senate Estimates, L&C, Question On Notice 129

⁴⁵ Senate Estimates, L&C, 28 May 2002, p.257

⁴⁶ John Davies, Senate Additional Estimates, L&C, 19 Feb 2002, p. 209.

⁴⁷ Raby, DFAT, Senate Estimates, FAD&T, 6 June 2002, p. 553

⁴⁸ Senate Estimates, FAD&T, 6 June 2002, p.557

activity to disable or attempt to disable any vessel on which potential illegal immigrants were embarked”.⁴⁹

However, it is unclear what directions were given from the Australian Embassy to Indonesian or Australian authorities involved in disruption activities and whether these directions came from Canberra officials or Ministers and furthermore how any such directions were interpreted.

On the 13 June 2001 the Minister for Immigration Philip Ruddock travelled to Jakarta. He had meetings with the Australian Ambassador Ric Smith and the Inter-Agency People Smuggling Group. He also met with the Indonesian Minister for Justice and Human Rights and the Indonesian Minister for Foreign Affairs.⁵⁰

By September 2001 something concerned the Indonesian Foreign Affairs Department enough to request the protocol between the AFP and the Indonesian National Police be set aside.

Protocol – Memorandum of Understanding

AFP Commissioner Keelty told the CMI Committee that on the 15th September 2000 a “specific protocol under the MOU [Memorandum of Understanding] to target people smuggling syndicates operating out of Indonesia” was agreed to by the AFP and their counterparts the Indonesian National Police.⁵¹ The CMI Committee requested the Protocol and MOU but so far the AFP has not provided a copy.

Under this protocol the AFP provides equipment and training to the Indonesian National Police.⁵²

At the CMI Committee Commissioner Keelty revealed that the Protocol under the MOU was set aside by the Indonesian government in September 2001 – due to concerns the Indonesian Foreign Affairs Department (DEPLU) had in relation to disruption.⁵³

Commissioner Keelty could not or would not tell the committee why the Protocol was cancelled by the Indonesian Government.

Despite the Protocol being set aside, probably due to concern about the disruption activities that were conducted by the AFP and the Indonesian National Police, Commissioner Keelty told the CMI Committee he was not aware of the full detail of the Indonesian complaints.⁵⁴

Repeatedly Commissioner Keelty was asked at the CMI Committee the reasons behind the Indonesian authorities cancelling the protocol.

⁴⁹ Ric Smith letter to the Canberra Times, 4 October 2002

⁵⁰ Senator Cook to Senator Hill, Question Without Notice, 26 September 2002

⁵¹ CMI Committee, 11 July 2002, p.1924

⁵² CMI Committee, 11 July 2002, p.1937

⁵³ CMI Committee, 11 July 2002, p.1938

⁵⁴ CMI Committee, 11 July 2002, p.1939

Faulkner: What concerns did the Indonesians express in relation to the disruption operation?

Keelty: I do not have a briefing on that and I do not know that anyone in the AFP does.

Faulkner: I would be surprised—very surprised—if the AFP was not informed of what these concerns might have been.

Keelty: It was a decision by the Indonesian government in their DEPLU, so I would not necessarily expect them to tell me why.⁵⁵

Later at the CMI Committee, Commissioner Keelty was asked:

Faulkner: Commissioner, did you ask why the protocol was cancelled?

Keelty: I do not specifically recall.

Faulkner: You do not know if you asked why?

Keelty: I answered you. I do not specifically recall.⁵⁶

Despite the concerns the Indonesian Foreign Affairs Department had about the Protocol, the AFP says it continued to cooperate with the Indonesian National Police until June 2002.

The breakdown in the Protocol doesn't appear to have stopped disruption activities from occurring in Indonesia. Between September 2001 and June 2002 the activities continued on a case-by-case arrangement between the AFP and the INP.⁵⁷

In October 2001 the High Level PM&C People Smuggling Taskforce notes indicate that disruption activities were discussed on a number of occasions. For example on the 10th October 2001 the Taskforce notes state “Discussion on the ‘architecture’ – disruption, regional conference proposal, UNHCR positions”⁵⁸ and on the 12th October the Taskforce notes state “Discussion of disruption activity, and scope for beefing up”.⁵⁹

At the CMI Committee the Head of the People Smuggling Taskforce, Ms Jane Halton, indicated there were a “couple of discussions” regarding disruption at the Taskforce meetings, however she would not or could not elaborate further. Ms Halton had no memory of the “beefing up” discussion except she thought it might refer to T-shirts.⁶⁰ Ms Halton also told the committee that the Taskforce had never tasked any agency to disrupt in Indonesia.

⁵⁵ CMI Committee, 11 July 2002, p. 1939

⁵⁶ CMI Committee, 11 July 2002, p. 1971

⁵⁷ CMI Committee, 11 July 2002, p. 1939

⁵⁸ People Smuggling Taskforce Notes, 10 October 2001, 6pm

⁵⁹ People Smuggling Taskforce Notes, 12 October 2001: Present: Jane Halton, four DIMA officials, Shane Castles from AFP etc

⁶⁰ CMI Committee, 30 July 2002, p. 2089

But according to Ed Killesteyn from DIMIA, who attended the 10th and 12th October Taskforce meetings, the “People Smuggling Taskforce was concerned about the evidence of a surge and was, in a sense, giving a direction to the responsible areas to look for further opportunities for disruption”.⁶¹

Commissioner Keelty also indicated that the People Smuggling Taskforce was tasking agencies to beef up the disruption activities. Commissioner Keelty thought it was an “operational call along the lines of ‘The departure of the vessel is imminent; we’d be doing everything we can possibly do’”.⁶²

People Smuggler Vessels

There are a number of people smuggling vessels that have sunk en route to Australia, including the KM Palapa that was rescued by the Tampa, the Norwegian cargo ship. Stories from survivors indicate that, on some occasions, the Indonesian National Police were involved with the people smugglers in organising the departure of the vessels. As journalist Lindsay Murdoch in the Sydney Morning Herald reported last year, “boats [from Indonesia] carrying hundreds of people have sunk, drowning all aboard...Some survivors say Indonesian authorities have, at times, helped push boats out to sea knowing they are not seaworthy”.⁶³

Survivors from the KM Palapa recently told a court case in Perth that Indonesian National Police were involved in the people smuggling operation that organised the departure of the KM Palapa from Indonesia⁶⁴.

The vessel, now referred to as SIEV X which was organised by notorious people smuggler Abu Quassey, sank on the 19th October 2001, a day after it set sail, drowning 353 people including 142 women and 146 children.⁶⁵

Survivors have provided information about the condition of the vessel and the circumstances that led to over 400 asylum seekers embarking on the voyage. This information raises serious questions.

Survivors have indicated that SIEV X before it departed was very low in the water and horribly overcrowded, carrying four times the number of passengers that a vessel that size should carry. Reports also suggest that the vessel was overloaded with fuel⁶⁶.

According to survivors, many were forced by gunpoint onto the vessel. There were about 30 Indonesian police present and police beat them and forced them by gunpoint

⁶¹ CMI Committee, 11 July 2002, p. 2007

⁶² CMI Committee, 11 July 2002, p. 1932

⁶³ “Shipwrecked in Indonesia; Destination Australia Following the Asylum Seekers”, by Lindsay Murdoch, *The Age*, 6 September 2001

⁶⁴ “Smugglers ‘got help from Police’”, by Kathryn Shine, *The Australian*, 20 September 2002

⁶⁵ SIEV X survivor’s oral videoed accounts taken at the UN hostel in Bogor, Indonesia on 23 October 2001, translation and transcription by Keysar Trad, Vice President of the Lebanese Muslim Association of NSW; Attached to Mr Tony Kevin’s submission to CMI Committee, Submission Number 2

⁶⁶ “Overload Kills On Voyage Of Doom” by Don Greenlees, *The Australian*, 24 October, 2001

to get on the boat. The police appeared to be actively involved in the people smuggling operation⁶⁷.

SIEV X survivor Issam Ismail stated:

“The Indonesian Police were there. They were carrying automatic guns. They were so comfortable. They were the ones who gave the signals with their torches. Turning on the torch was a signal to send out people. Turning off the torch meant stop. That was how it was done. We saw them with our own eyes. They had weapons we had never seen before. The latest brands”⁶⁸.

Survivors from SIEV X have also suggested that the vessel only took about 15 minutes to sink. Bahram Khan, from Jalalabad in Afghanistan, said “The hull sprang a hole. The mechanic could not fix it and the boat sank”⁶⁹.

On the 25 October 2001 Prime Minister Howard was reported to be seeking more information about whether the reports that Indonesian security personnel forced asylum seekers onto SIEV X at gunpoint were true. Prime Minister Howard stated on regional ABC radio “It has been an appalling tragedy, it really is a desperately sad event, and if those allegations are true it reflects very badly on the authority to allow that to happen”⁷⁰.

Since then the Prime Minister has not made public what information, if any, he received about the situation surrounding the departure of SIEV X.

It is still unclear what occurred in Indonesia before SIEV X departed. However, given the evidence from survivors, the Government should make a public statement about their full knowledge of the conditions surrounding the departure of this vessel. Furthermore it should reveal whether disruption activities were directed at this vessel and if so what those activities entailed. Other people smuggler vessels that left Indonesia for Australia and sank en route should be included in such a statement.

Conclusion

What is most concerning about the policy of disruption can be seen in the statement made by Commissioner Keelty to the CMI Committee, “The departure of the vessel is imminent; we’d better be doing everything we can possibly do”⁷¹. It begs the question, how far has the policy of disruption gone?

An assurance from the government that illegal activities have not occurred under the disruption programme is not enough.

So far the CMI Committee has not received clear answers to questions that have been raised such as:

⁶⁷ PM Radio ABC radio, Ginny Stein report, 24 October 2001

⁶⁸ The Five Mysteries of SIEV X, by Ghassan Nakhoul, SBS Radio/Arabic Program, 28 August 2002

⁶⁹ Asylum seekers' boat sinks in 10 minutes, killing 350, AAP Wire, 3.09pm, 23 October 2001

⁷⁰ Fed: Howard to investigate reports asylum seekers forced, Melbourne, AAP Wire, 10.14am, 25 October 2001

⁷¹ CMI Committee, 11 July 2002, p. 1932

- What disruption activities are acceptable?
- Who carries them out?
- Who pays for them?
- What accountability and control mechanisms are in place? Who authorises these activities?
- What is the effect of these activities?
- What, if any, consideration was given to questions to the safety of lives at sea?

The issue of the sabotage of people smugglers' vessels has been canvassed by the AFP informant Mr Enniss. Although Mr Enniss has apparently now denied he was involved in sabotaging vessels, it is still unclear whether he paid someone in Indonesia to scuttle people smuggling vessels. Furthermore it is unclear what precise confessions Mr Enniss made to *Sunday* reporter Ross Coulthart and two of his colleagues.

Beyond Mr Enniss, serious questions remain about the disruption programme. For example, it is still unclear whether anyone, as a result of Australia's disruption policy, was directly or indirectly involved in the sabotage of vessels in Indonesia and whether Australian Ministers, officials or agencies have knowledge of such activities.

There are many unanswered questions about the policy of disruption and what it actually meant for those embarking on voyages to Australia.

An independent judicial inquiry into Australia's disruption programme in Indonesia is necessary to comprehensively investigate what has actually happened in the disruption program, what the outcomes of the program have been, the legality and propriety of the methods employed, and what accountability mechanisms ought to be instituted for the future.

SENATOR JACINTA COLLINS ADDITIONAL COMMENTS

In concluding its deliberations the Committee is forced to reflect on an unfortunate lack of outcome that its processes have been able to produce in some key areas. Whilst the government has continued to describe the inquiry, and particularly the consideration of the ill fated SIEV X, as an attack on Australian Defence Forces, it is quite clear that one real outcome of the inquiry has been to confirm the integrity of Defence personnel. Despite obstacles presented by the Government, the inquiry has established that the Australian men and women who form our defence core are humanitarians who seek to protect and defend the lives of all people within their jurisdictions.

What the inquiry has not been able to establish is an explanation for the inappropriate actions and behaviour of some key Defence officials. Further, and perhaps more significantly, the inquiry also failed to fully explain the efforts of the Australian Prime Minister and Cabinet to “deter and deny” the Australian people from the truth about those who have sought asylum in Australia.

As the Majority Report and Odgers Report both show, even from limited evidence, Minister Reith deliberately maintained or created false impressions in order to gain political advantage.

What is also significant is that many trails lead directly to the Prime Minister’s Department, his Office and to the Prime Minister himself. Whilst it has not been claimed, nor proven, that the Prime Minister knew the truth and lied, many reports question his claims that “I never received any written contradiction of that (children thrown overboard), nor did I receive any verbal contradiction of that” and, regarding his office, “No”.

In the months prior to the Governments introduction of its new border protection regime, some senior defence officers were privately raising serious concerns at a new direction and culture developing within the Department of Prime Minister & Cabinet. Defence representatives in the Government’s inter-agency consultations were made to feel like “bleeding hearts” in comparison to a hard-line stance developing out of the Prime Minister’s Department.

The reality of the inquiry into the children overboard affair is that at best there are inconsistencies and contradictions in the evidence given before the Senate Inquiry by some key Defence and public officials. At worst there are fundamental omissions, half-truths, untruths and cover-ups. The Prime Minister has sought to distract from this reality by alleging an attack on the Defence Forces.

A basic consideration of the raw evidence shows that the men and women of the Australian Defence Forces sought to protect life at sea in every demanding instance. The officers and crew of HMAS *Adelaide* deserve recognition for the distinguished way they undertook their operational responsibilities and particularly for the way they kept safety of life at sea (SOLAS) at the forefront of their decision making in regard to SIEV 4. However, what the raw evidence also shows is that the extraordinary direction coming from above was to “deter and deny”, irrespective of the circumstance. This matter is perhaps most evident in the following extracts of the SHIPS LOG, BOARDING LOG & OPS ROOM NARRATIVE of HMAS *Adelaide*.

BOARDING LOG

Adelaide Sunday 7 October

- 05.36 Female (young) fainted onboard SIEV
- 05.46 Max returning female to Adelaide
- 05.47 “SUNCs not to come on board Adelaide, embarking boarding party B” CO

SHIPS LOG

Adelaide Sunday 7 October

Christmas IS AO

- 15.15 Command intention to repair SIEV & send them North
- 15.29 SUNCs claimed UN Assistance due to political problems in their homeland
- 15.44 Brig awaiting Prime Minister to make decision on SIEV
- 15.50 Prime Minister determined ADE will tow SIEV to place to be determined
- 15.54 Command intentions prepare to tow SIEV

BOARDING LOG

Adelaide Sunday 7 October

Christmas IS AO

- 15.27 1 SUNC wants UN to be told of location of SIEV. He has sick women & Children on board
- 15.30 BPO confirms engine beyond repair and steering is also useless.
- 15.30 CO intends to tow awaiting approval from NORCOM
- 15.49 CO advised approval from PMOF (Prime Ministers Office) Aust to tow vessel to place to be determined.

These extracts demonstrate, that although the personnel of the Australian Defence Force sought to carry out their fundamental duties, they were often

restricted by the instruction to await the advice of the senior officials of Defence and PM&C or, more disturbingly, a decision from the Prime Minister himself. Further, the extracts below demonstrate that even in the most desperate and distressing of circumstances, Defence personnel were inhibited in their ability to assist because they were forced to wait for instruction from Federal Government.

OPS ROOM NARRATIVE

Adelaide 7 October

08.35 z Boarding Party has disembarked SIEV. Awaiting intentions from HQNORCOM

08.50z CO 1MC PIPE: Holden won Bathurst and the PM gave permission to tow vessel to a place undetermined yet

15.49z SIEV RQST DR, I SUNC vomiting blood & gone into shock.

Adelaide 8 October

07.38z SUNKS becoming agitated as the current course and swell means we are taking on water. 1.13M of water and increasing

07.51z C B Request to move children & women off.

09.39z Possible SUNC over the side of SIEV. Request stop tow 5cm water stbd side of deck causing lg amount of panic

09.41z CO denies request

09.44z water level increasing rapidly 120cm water doubling, believe serious damage to the bottom of SIEV

09.48z continuing to take on water. CO, Remove personnel aft and 02 deck.

09.49z 110cm water at shallowest point. We are not sinking but taking on lg amounts of water. Believe the boat is slowly sinking

10.09z C B Recommend we put people in the water (x2)

10.29z All personnel have departed SIEV 4

10.36 Contacting parliament on crisis

10.42z A total of 4 liferafts in the water

11.00z RHIB's instructed to bring children onboard
Adelaide

BOARDING LOG

Adelaide 8 October

16.41 5cm free surface water on STBD side of SIEV, BPO RQST to stop, CO stated negative, to not be reactionary to SUNCs requirements

The interference by senior officials of Defence and the public service in the daily operations of the Australian Defence Force is unprecedented. However, also unprecedented is the way in which some senior officials of Defence then allowed the Government to disguise the situation to protect their political position. Perhaps the most obvious examples can be found with Navy Chief Vice Admiral David Shackleton, Chief of Defence, Admiral Chris Barrie, Rear Admiral Geoffrey Smith and Department of Defence Secretary, Dr. Allan Hawke.

Admiral Barrie can be commended for maintaining the SOLAS imperative when rescuing SIEV 4 passengers from the water in a heated exchange with the Secretary of the Prime Minister's Department, Mr Moore Wilton. However, the similarity between his attitude and that of Mr Moore Wilton that the original report had never been disproved (i.e. prove that pigs can't fly) is alarming. This denial has been the source of much of the negative attention of Defence which followed.

Similarly Vice Admiral Shackleton sought to correct the record on the advice that came from Navy about the incident but he appears to have succumbed to political pressure later in the day when he clarified his statement in a way which withheld vital elements of the whole truth.

Rear Admiral Smith needed to clarify his original testimony to the Committee when advised that Rear Admiral Bonser from Coastwatch would testify detail regarding the state of knowledge about SIEV X inconsistent with Rear Admiral Smith's blanket assurance that 'the first time Navy knew that this vessel had sailed was when we were advised through the search and rescue organisation in Canberra that this vessel may have foundered...'

Rear Admiral Smith also declined to amend his evidence on the conduct of asylum seeker on SIEVs – known as the Smith Matrix – when the evidence became clear that a purported 'strangulation' incident had not, in fact, occurred.

As for the Secretary of the Department of Defence, Dr Hawke, he has admitted that he 'could have or should have taken a more active involvement' in the provision of advice. At the time he was happy to sit behind Admiral Barrie's 'considered position' and the Minister for Defence's communication directive.

It is now clear that the most senior of Defence officials were aware that the claims that asylum seekers had thrown their children overboard were without unequivocally substance. However, what must be understood is that the Government ultimately sought to hide the truth from the Australian people.

The likely reality is that on the dawn of a federal election the Coalition government did not want to know the truth. The Coalition Government clearly manipulated the circumstances of people seeking asylum in Australia for electoral gain. The Coalition government has sought to justify Australia's involvement in war on the brutal regimes of Afghanistan and now possibly Iraq, however when the people of these very nations have sought asylum from such brutality the Coalition Government has promoted these people as having values inconsistent with Australians and not the sort of people welcome in Australia. The Prime Minister has stated:

“It doesn't speak volumes for some of the people on the vessel – suggestions that children thrown overboard.”

(Doorstop Interview, Menai, Sydney, 7 October 2001)

“I can't comprehend how genuine refugees would throw their children.”

(The Age, 9 October 2001)

“...I don't want in this country people who are prepared, if those reports are true, to throw their children overboard. And that kind of emotional blackmail is very distressing ... But we cannot allow ourselves to be intimidated by this.”

(Alan Jones, 2UE, 8 October 2001)

In order to maintain these images, it is clear that Mr Reith manipulated the flow of information. What also needs to be addressed is the Prime Minister's connection to such behaviour.

It is known that on October 7 the Minister for Immigration informed the Prime Minister that he had made a media statement that children had been thrown overboard. Further, it is also known that an 'options paper' prepared by the *People Smuggling Taskforce*, including the statement 'passengers throwing their children into the sea' was presented to the Prime Minister later that evening. However, by October 10 Secretary of Prime Minister and Cabinet, Max Moore-Wilton, and the Prime Ministers International adviser had been provided with further information from the *People Smuggling Taskforce* that included a footnote suggesting that there was

“no indication that children had been thrown o/board. It is possible that this did occur ...”.

Indeed, talking points forwarded to the Prime Minister's International Adviser for the Prime Ministers use that same day did not include the statement that children were thrown overboard. Simply, the talking points alluded to a possibility that some asylum seekers could have been thrown, or may have jumped, overboard. When pressed for evidence the Prime Minister suggested on radio:

“As to the question of evidence ... I’ll make some inquiries and see what evidence can be made available... I have been provided with no information since then that would cause me to doubt it.”

Photographs were quickly produced but just as quickly they were recognised within Defence as being of personnel rescuing asylum seekers off a sinking ship and not of children having been thrown overboard. It is notable that it was not until a month later, only days prior to the Federal election, that the Prime Minister’s international adviser attempted to obtain some genuine evidence. Significantly he contacted his own Department whom advised him that there wasn’t any. The Prime Minister himself spoke on two occasions to Mr Reith’s advisor, Mr Scrafton, on the evening of November 7th about the video. The supposed video evidence was known at this stage to be inconclusive but in the absence of any other corroborating material the Government sought to release the videos in time for the midday news on November 8. That same day the Prime Minister appeared at the National Press Club again reiterating his position:

“I don’t regret saying, I should go back and have a look at exactly what was said, but I don’t regret ever saying that people who throw their children overboard are not welcome in Australia ... Well in my mind there is no uncertainty ...”.

He also relied upon the ANO report, which Mr Jordana knew may have been based solely on press reports of statements by Ministers.

By November 12, two days after the Federal Coalition Government was returned to office, it became evident that the only basis for the claim that children were thrown overboard was ministerial statements.

What is further disturbing is that when the Senate decided to conduct an inquiry into the affair the Prime Minister, despite initially declaring that he would cooperate, refused to support the parliamentary process and indeed inhibited its effective implementation. This is evident in the fact that the Prime Minister explicitly stated that only MOPS staff would be banned from the inquiry yet as it transpired key witness such as Rear Admiral Gates were not allowed to testify.

Another concern is pressure exerted on some witnesses not to be forthcoming. The Assistant Secretary of the Prime Minister’s Department social policy branch, Jennifer Bryant, was pressured whilst giving evidence by the Prime Minister as well as the Prime Ministers International adviser and Secretary of PM & C. Jennifer Bryant conceded that in an ‘accidental’ meeting in the Prime Ministers office she was given an ‘impression’ that she should be (in her own

words) “the flatter the better” in her evidence to the Senate (*Transcript of Evidence*, CMI 1271).

Commander Stefan King also reflected on the culture in PM&C. In his submission to the Senate Privileges Committee investigation into possible improper interference, he comments:

“...it has been my perception, from a series of actions and inactions by PM&C that the Department preferred that my evidence not come before the Senate Select Committee and that perhaps agreements or ‘understandings’ may have been formed to contribute to that outcome. This perception is directed more broadly to the Department at large, and not to a particular individual, including Dr Hammer, as I have accepted his public assurances to me.”

The Prime Minister has also attempted to disguise the Government’s inadequate response to SIEV X behind claims that there was a concerted campaign to ‘denigrate and besmirch the reputation of the Royal Australian Navy’ and this tactic is also concerning.

However, it has been established that the operational personnel of the Royal Australian Navy carried out their duty with absolute integrity. What remains unclear is exactly where and how the vessel came to sink and how hundreds of innocent people came to drown in the ocean. Disappointingly the inquiry was not able to produce any certain answers. SIEV X had been known to Australian intelligence. It was known to have left Indonesia bound for Australia with an estimated time of arrival. But even in response to the incident, the facts have not been established. However, the inconsistencies in the Prime Minister’s commentary about SIEV X indicate that there is a greater story regarding SIEV X and the Prime Minister is refusing to tell the story to either the parliament or the public. Such inconsistencies and evasion are evident in the following extract from a Prime Ministerial media interview.

JOURNALIST:

Are you now able to advise where you got the information on or before the 23rd of October that SIEV-X sank in Indonesian waters?

PRIME MINISTER:

I haven't got anything to add to what I've said.

JOURNALIST:

But you recall that I asked you this question last week and you said that you'd have to check.

PRIME MINISTER:

Well I'm telling, you I don't have anything to add to what I've said.

JOURNALIST:

So you're not able to advise -

PRIME MINISTER:

I'm telling you I'm not adding anything to what I've said.

JOURNALIST:

Why not Mr Howard?

PRIME MINISTER:

Because I'm not adding anything to what I've said.

JOURNALIST:

What's your reason for it?

PRIME MINISTER:

I'm not adding anything to what I've said.

(Press Conference, Sydney International Airport, 30 June 2002)

Conclusion

This discussion highlights some of the political context relevant to the 'Children not Overboard' affair. In the lead up to a federal election the Government, without public consultation, at times when the caretaker conventions were in effect, made fundamental changes to our approach to handling asylum seekers arriving by boat. Much of what subsequently transpired related to the Government's attempt to manage this agenda, at times drawing in to compromise, sometimes hapless, defence and public officials. This is not to say that there weren't many examples of defence and public officials who resisted such compromise. In the current political climate they would probably not appreciate being identified by public acknowledgement, but they deserve the gratitude of the Australian community for the distinguished way they have undertaken their responsibilities under difficult circumstances.

Senator Jacinta Collins
ALP, Senator for Victoria



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22 March 2002

Senator the Hon P. Cook
Chair
Select Committee on a Certain
Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

WITNESSES — MINISTERIAL ADVISERS AND PERSONAL STAFF

Thank you for your request, conveyed by letter dated 20 March 2002 from the secretary of the committee, for advice on the power of the committee to call before it current and former ministerial advisers.

This question has a simple answer, but due to past and current discussion of the issue the simple answer requires some exposition. I hope that the following observations will assist the committee.

Advisers and personal staff

The category of public office-holders concerned in this question may be described as ministerial advisers and personal staff. Their defining characteristic is that they are engaged at the discretion of ministers to provide services exclusively to those ministers. Their ostensible function is to provide advice and personal assistance to ministers.

Whether they are employed under the Members of Parliament (Staff) Act is not a defining characteristic. Public servants not engaged under that Act who are seconded to ministerial offices as advisers and personal assistants also fall into the defined category by virtue of their function, even though that function may involve only a temporary change of role. Moreover, the Act contains nothing which bears on the question in issue in any way.

Voluntary and compulsory appearance

The question is whether persons falling into this category of public office-holders are liable to be required to appear, produce documents and give evidence, or should be so required, by a committee of the legislature; that is, whether they may be, or should be, the subject of summonses or subpoenas issued by a committee directing them to appear, produce documents and give evidence.

So far as I am aware no one has suggested that there is any objection to these persons appearing before a committee in response to an invitation and voluntarily with the presumed approval of their ministers. It would in any event be rather difficult to raise such an objection, since there have been several cases of such voluntary appearance before Senate committees. The question is whether they may be, or should be, compelled to appear.

No recognised immunity

As to whether they may be compelled to appear, the simple answer is that the Senate and comparable houses of legislatures have not recognised any immunity attaching to this category of office-holders. There is also no basis for supposing that they possess any legal immunity, that is, an immunity which would be upheld by a court as a matter of law in respect of legislative inquiries as distinct from court proceedings.

The best way to explain what is meant by an immunity recognised by the Senate and comparable houses, and which may have a legal basis, is to refer to the immunities which *have been* recognised.

Two recognised immunities

The Senate has recognised that two categories of office-holders are entitled to be regarded as immune from summons to appear before the Senate and its committees. They are:

- (a) current members of the House of Representatives
- (b) current members of state legislatures and other state office-holders.

The basis for the immunity of category (a) office-holders is the requirement for comity between the two Houses of the Parliament. The Houses do not seek to summon each other's members; if such a power were exercised, they could hinder and ultimately render each other unable to function. The immunity is recognised in the procedures of the Senate, which require that a message be sent to the House of Representatives if the Senate or its committees seek formal evidence from a member of the House. In past cases the Senate and its committees have accepted advice that they may not summon members of the House, and the Senate has sought to secure the attendance of House members by way of message to the House. The immunity may also have some legal basis in that, if a court were ever called upon to determine the question, the court might hold that the immunity exists as a matter of law arising from the bicameral nature of the legislature under the Constitution. There are, however, no directly relevant cases.

The basis for the immunity of category (b) office-holders is the need for comity between the Commonwealth and state levels of government. Again, there is a practical consideration: the Commonwealth and state legislatures could render each other unable to function by summoning each other's office-holders. There is a stronger basis for supposing that this immunity could have a legal status, in that the High Court has held that the Commonwealth is not able to interfere with the vital functions of the states. Again, Senate committees have accepted advice that they are not able to summon state legislators and office-holders and have not sought to do so.

The bases of these two recognised immunities make it clear that there is no such recognised immunity in respect of ministerial advisers and personal staff. The existence of such an

immunity has not been recognised by the legislature, and there is no ground for concluding that such an immunity might be recognised by the courts in respect of legislative inquiries.

In that connection, it must be emphasised that we are here considering legislative inquiries and not court proceedings. It cannot be assumed that the law relating to compellability of witnesses and the admission of evidence applying to court proceedings can be automatically transferred to legislative inquiries. For example, statements are sometimes made as if the law of legal professional privilege, the law relating to the admission of evidence by legal advisers and about legal advice, is applicable to legislative inquiries. There is no ground for this assumption. On the contrary, the Senate and comparable legislatures have never recognised that legal professional privilege automatically defeats a legislative inquiry. Of course, legislatures may voluntarily refrain from taking evidence about legal advice where it is considered that this would not be appropriate. This does not concede any limitation on the legislative power of inquiry.

Should they be compelled?

This leads to the question whether ministerial advisers and personal staff *should* be compelled by legislative inquiries. In other words, given that the Senate and its duly authorised committees have the undoubted power to summon this category of office-holders, and there is no recognised immunity, should there be a self-denying ordinance whereby the legislature refrains from summoning such persons because of their particular role in the system of government?

Statements to that effect have been made from time to time, usually by ministers. Such statements, however, do not amount to establishing a general rule, and certainly not a convention.

In the one instance in which the Senate directed a member of a minister's personal staff to appear before a committee, the case of the Director of the National Media Liaison Service in 1995, there were statements that ministerial advisers and personal staff should not normally be summoned. The preamble to the Senate's order noted that the National Media Liaison Service was publicly funded and not subject to audit, and this may be taken to be a justification for summoning a person who was a member of a minister's personal staff. It was also stated in debate that the order did not set a precedent. The circumstances of the order, however, fall far short of establishing a general rule that ministerial advisers and personal staff will not be summoned, or a convention to that effect.

The circumstance that, in this case, the person concerned, although a member of ministerial staff, directed a publicly funded government agency, draws attention to the principal weakness in the case for such a general rule or convention.

The cases for and against their appearance

The case that such persons should not (normally) be summoned rests on the presumption that their role is to provide advice and personal support to their ministers. Those ministers are responsible for their own decisions and actions, whether or not made or performed on advice, and whether or not facilitated by staff who are only their agents. If the staff were to be compulsorily examined on the advice and personal support they provide, this would tend to destroy the trust and confidentiality which is essential to the effective performance of their tasks. It would discourage frank advice. It would also be unnecessary for legislative and

public purposes, because ministers accept full responsibility for their own decisions and actions, which are the appropriate subjects of legislative and public scrutiny.

The case that ministerial advisers and personal staff should be subject to compulsion in relevant legislative inquiries often begins with a concession that persons who are purely advisers and personal assistants to ministers should not normally be compelled for the reasons stated. This concession may be unwarranted. If the legislature is inquiring into serious malfeasance or malfunction in government administration, and the advice and personal assistance of ministerial staff played an essential role in that malfeasance or malfunction, the legislature would be perfectly justified in calling such staff even if their role was strictly confined to advice and personal assistance, and even if relevant ministers accept full responsibility for their actions. The legislature may well want to uncover problems with the way in which ministers are advised and assisted.

Even if this concession is made, however, there is a strong case for subjecting ministerial personal staff to compulsion in legislative inquiries, on the basis that their role is manifestly now not confined to advice and personal assistance. There is ample evidence that ministerial staff perform other functions. They are said to, and seen to:

- control access to ministers, and determine who has that access
- determine the information which reaches ministers, particularly information flowing from departments and agencies
- control and regulate contact between ministers and other ministers, other members of the Parliament and departments and agencies
- make decisions on behalf of ministers
- give directions about government activities and actions, including directions to departments and agencies
- manage media perceptions and reporting.

In short, they act as de facto assistant ministers and participate in government activities as such.

Moreover, ministers no longer necessarily accept full responsibility for the actions of their staff, as has been demonstrated on several occasions.

In these circumstances, it may be argued that it is appropriate that legislative inquiries into the actions of government be able to summon these staff and to require them to explain their part in those actions.

Public interest immunity

The term public interest immunity is now used as a generic term to describe grounds on which governments may make a claim to withhold information on the basis that the disclosure of the information would be injurious to the public interest. The terms executive privilege or Crown privilege were used in the past. The change of terminology reflects changes in the perception and treatment of the matter. The former terminology suggested that

there was a right possessed by the executive government to withhold information. The current terminology reflects the view that there are grounds on which government may claim to withhold information, but the claims do not become applications of recognised immunity until sustained by the tribunal in question. In legal proceedings, the courts have arrived at a position of not accepting executive claims that information should not be disclosed in those proceedings, but of examining the information in question and determining whether disclosure would be sufficiently injurious to the public interest to outweigh the importance to justice of the admission of the information. If a court decides that a claim of public interest immunity is not sustained, the information must be produced, by hearing relevant evidence or otherwise. Legislatures, particularly in Australia, have adopted the changed terminology because they have maintained a position that it is for the legislature to determine whether a claim that disclosure of information would be injurious to the public interest is sustained. This is the view which has been taken by the Senate in several past cases. Governments have not conceded that position, and have refused to produce information in response to legislative demands. Legislatures have applied various means to compel governments to disclose disputed information. The Senate has obtained such information by directing committee examinations of public officers and has imposed procedural and political penalties on recalcitrant ministers. The New South Wales Legislative Council compelled a minister to produce information by removing him from the Council, and its right to do so was upheld by the Supreme Court, even though the Council does not possess the same constitutional powers as the Senate and most other Australian Houses. No comparable legislature has accepted that government claims of public interest immunity are automatically effective, and they could not make such a concession without seriously weakening their legislative power.

Public interest immunity relates to categories of information, not to categories of office-holders. A postulated application to ministerial staff would rest on the premise that they could give evidence only about advice and personal assistance to ministers, and that that kind of evidence should not be received. That premise is undermined if it is believed that their role goes beyond advice and personal assistance.

Other jurisdictions

The situation in comparable jurisdictions is virtually the same as in Australia. Executive governments have claimed a right to withhold information from legislatures, and legislatures have not conceded any such right. Executive governments have from time to time maintained that their advisers and personal assistants should not be compelled to appear in legislative inquiries, and legislatures have not conceded that there is any general immunity attaching to such persons.

In the United Kingdom, the role of persons described as ministerial advisers has been a matter of great controversy in recent times, and there have been demands for such persons to be made accountable to the Parliament. In part, those demands have arisen from a perception that the “advisers” are not merely advisers but have executive roles, particularly in “spin-doctoring”, or media management, and in taking decisions and directing public service departments. The demand for accountability, however, has been made even where the persons concerned appear to be only advisers. In its 4th report for 2001-2002, the Transport, Local Government and the Regions Committee of the House of Commons vigorously expressed its disagreement with a government decision to prevent a special adviser giving evidence. The committee stated that it would have summoned the adviser if he had not been a member of the House of Lords, and therefore protected by the rule that members of one

House may not be summoned by the other. The committee's report is a ringing declaration of the right of committees to summon advisers.

In the United States, the Congress has similarly not conceded that the executive government may withhold information or that advisers are immune from legislative compulsion. In recent days, the Government Affairs Committee of the Senate has rejected claims by the administration that the Director of Homeland Security should not give evidence before the committee because he is a presidential adviser rather than an executive government office-holder. While this person's larger role has been referred to as a reason for his appearance, it has been pointed out that presidential advisers have testified in past cases.

The courts in the United States have avoided becoming directly involved in such disputes between the Congress and the administration. General constitutional limitations to the legislative inquiry power have been identified, principally relating to the extent of the power to legislate, but these do not bear on the question. It has been indicated that, for the purpose of court proceedings, the doctrine of executive privilege may have some constitutional basis and that the executive may be able to claim immunity for presidential advice. There is nothing to suggest, however, that the Congress does not have the power to compel advisers and personal staff if it chooses to do so and to use its own powers to enforce compliance.

An issue for legislative judgment

In summary, there is no law which prevents a legislative committee summoning ministerial advisers and personal staff. There is also no parliamentary rule which prevents such a course. There is no convention that the legislature should always refrain from summoning such persons.

It follows that former holders of the offices in question possess no such immunity.

Whether such persons should be summoned, and what weight should be given to relevant factors in determining whether they should be summoned, are issues for the judgment of the committee in the first instance and ultimately the Senate in the context of the inquiry concerned.

Remedies

The question arises of the remedies which may be applied in the event of non-compliance with a committee summons.

A committee cannot apply any remedy, but can only report a recalcitrant witness to the Senate, which may impose penalties on such a witness.

In 1994 the Senate had before it a bill which would have sought to involve the courts in determining public interest immunity claims by government. The preamble of a resolution referring the bill to the Privileges Committee noted that "it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acts on the directions of a minister".

The same conclusion might be drawn in respect of ministerial staff who act on the directions of their ministers.

In recommending that the bill not proceed, the Privileges Committee concluded that the determination of such issues between the legislature and the executive government should remain in the legislature's sphere. It may be concluded that the only appropriate remedy is to hold the ministers concerned politically responsible.

This restraint in punishing staff for the actions of their ministerial masters, however, does not establish that ministerial staff have some special immunity not available to other witnesses.

Restricting the legislature a serious matter

A point which should be obvious needs to be stated.

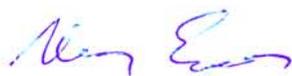
Much of the discussion on this subject seems to be based on an assumption that it is the right of the executive government to keep information secret and the legislature has to establish a case for overcoming the secrecy. At least, it seems to be assumed that there are many grounds for maintaining secrecy and many categories of persons who may assert their right to do so. New grounds and new categories of persons are discovered or invented as new cases arise.

It needs to be stated that to withhold any information about public affairs from the representatives of the public assembled in the constitutionally-empowered legislature is an extremely serious step. It is a step which should be taken only on the most compelling grounds. If withholding information from the legislature becomes routine, constitutional government and the right of the public to control the government through their chosen representatives is fatally undermined. A legislature which cannot discover the truth about executive activities is crippled. The public elect their representatives to determine, through the legislature, where the public interest lies, and if that right is lightly infringed malfeasance and misrule also become routine.

The report of the House of Commons select committee to which I have referred, and press items relating to the dispute between the United States Senate committee and the administration, have been supplied to the committee. *Odgers' Australian Senate Practice*, 10th edition, refers to the past cases in the Senate.

Please let me know if the committee would like to have any elaboration or elucidation of these points.

Yours sincerely



(Harry Evans)

GOVERNMENT MEMBERS' REPORT

I

PREAMBLE

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

Senator Faulkner to Admiral Barrie¹

1. For fifteen hearing days, between 25 March and 30 July 2002, the solemn farce of the Senate Select Committee on a Certain Maritime Incident created an undignified sideshow in Australian politics. In form, the Committee's terms of reference directed it to examine matters of serious national concern, relating in general to the Government's border protection policies, and in particular to a specific incident (the “certain maritime incident”) on 7 October last year when an apparently incorrect report that asylum-seekers had thrown a child or children into the ocean, originally emanating from within the military and quickly gaining public currency, became something of a *cause celebre*.

2. In truth, neither the Inquiry, nor the Majority Report, have had anything to do with the “children overboard” incident, the structure of the Australian Defence Force or the Australian Public Service, the “Pacific Solution”, or any broader policy issue. As Senator John Faulkner revealed, in the rare unguarded remark quoted at the head of this Chapter, the “Children Overboard” Inquiry was nothing more and nothing less than a political show-trial, driven by the misplaced sense of self-righteous outrage by the Australian Labor Party at its defeat at the 2001 Federal elections. At the time the Inquiry was established, Labor Party politicians made extravagant claims attacking the integrity of the Prime Minister, senior Ministers and their staff – and, by innuendo, the reputations of some of this nation's most distinguished military officers and public servants.

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

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

Majority Report is considered. In a manner for which we can find no precedent in the history of the Senate, “findings” about the truthfulness of individuals are asserted which are either entirely unsupported by the evidence or, in some cases, at variance with the evidence; lurid conspiracy theories are intimated (indeed, flaunted); and the good reputations of senior public servants and military officers attacked by innuendo, their motives questioned on the basis of pure conjecture and surmise, and allegations made against them which, in some cases, were never put to them during the hearing to allow them the opportunity to respond. Any pretence that this Inquiry has been engaged in an exercise of fact-finding or analysis cannot survive a dispassionate scrutiny of the Majority Report: it is a document which simply cannot be taken seriously.

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

SIEV 4 was the first boat to be intercepted after the announcement of the Federal Election. Its handling was to be a public show of the Government’s strength on the border protection issue. The behaviour of the unauthorised arrivals was to be a public justification for the policy.²

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

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

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

² *Majority Report* p. 7

³ *Majority Report*, p. 78

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

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

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

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

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

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

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

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

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

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

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

Ms. HALTON – You tell me, Senator.

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

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

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

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

⁴ *Transcript of Proceedings*, p. 805

⁵ *Transcript of Evidence*, p. 1010.

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

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

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

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

⁶ Majority Report, para. 11.106

⁷ Majority Report, paras. 11.60 – 11.92

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

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

GEORGE BRANDIS

BRETT MASON

ALAN FERGUSON

II

THE CONSPIRACY THAT WASN'T

“Like alchemy and astrology, conspiracism offers an intellectual inquiry that has many facts right but goes wrong by locating causal relationships where none exist.”

*Daniel Pipes*¹

1. On Saturday 6 October 2001 HMAS *Adelaide*, an Australian frigate which had been tasked to participate in Operation Relex (the operation conducted by the Australian Defence Force in support of the Government's border protection policy), was patrolling in the Indian Ocean in the vicinity of Christmas Island. Shortly before 1.30 p.m. local time² the commanding officer of the *Adelaide*, Commander Norman Banks, received a signal alerting him to the nearby presence, some 100 nautical miles north of Christmas Island, of a wooden hulled vessel apparently carrying a large number of potential illegal immigrants (“PIIs”³). The vessel was, at the time, in international waters, but was steaming in the direction of Australian territorial waters. Cmdr. Banks was instructed to carry out an interception. The first visual contact with the vessel had been made at 1.13 p.m. by an RAAF Orion patrol aircraft; although it was seaworthy and did not appear to be in difficulties, those on the deck of the vessel were observed to be wearing lifejackets. The vessel was, in due course, assigned the designation “SIEV 4”, indicating that it was the fourth Suspected Illegal Entry Vessel since Operation Relex commenced at midnight on 3 September 2001.⁴

2. Operation Relex was carried out by a Joint Task Force (“JTF 639”) headquartered in Darwin, under the command of Brigadier Mike Silverstone, the Commander of Northern Command (“NORCOM”). In his capacity as Joint Task Force Commander, Silverstone was in tactical command of the *Adelaide* (as well as a number of other participating naval vessels) at the relevant time,

¹ Daniel Pipes, *Conspiracy: How the Paranoid Style Flourishes and Where It Comes From*, New York: Free Press, pp. 30-1

² Local time on board the *Adelaide* was known, in military parlance, as “Golf time”. Unless otherwise indicated, the time of all events on the *Adelaide* are given in Golf time.

³ Occupants of vessels attempting to effect unlawful entry to Australia were identified in Defence communications by a rich variety of acronyms, including “PII”; “UBA” (unauthorised boat arrivals), “UA” (unauthorised arrivals) and “SUNC” (suspected unauthorised non-citizens).

⁴ The Australian Defence Force's involvement in support of the government's border protection policy had in fact commenced the previous week, upon the issuance by the Chief of the Defence Force of a “Warning Order” on 28 August 2002.

while Banks was in operational command. Silverstone was the only person in the chain of command to whom Banks reported, and from whom he received orders.⁵ Silverstone, in turn, reported to the Maritime Commander Australia (“MCAST”) [also referred to as the Naval Component Commander Australia (“NCC AST”)], Rear Admiral Geoffrey Smith, who had overall command of Operation Relex. Smith reported to the Commander Australian Theatre (“COMAST”), Rear Admiral Chris Ritchie, who reported to the Chief of the Defence Force (“CDF”), Admiral Chris Barrie. It is important to mention two other senior officers. Vice Admiral David Shackleton was Chief of Navy (“CN”), however he was not part of the chain of command: no-one reported to him on operational matters concerning Operational Relex, and he did not give orders down the line. Nevertheless, as one of the Service Chiefs, he was in frequent contact with the CDF concerning a wide range of defence matters, in particular as a member of two high-level advisory bodies to the CDF: the Chiefs of Service Committee and the Strategic Command Group. Air Vice-Marshal Alan Titheridge was the Head of Strategic Command (“HSC”). He was not in the chain of command either; he described his role as being, essentially, “the Chief of Defence Force’s staff officer for operations”.⁶ Importantly, he was also Defence’s senior representative on a high-level inter-Departmental Committee (“IDC”) which had been established to co-ordinate the response of the various Departments and agencies involved in the implementation of the border protection policy (although sometimes Titheridge was represented at the IDC by other HSC personnel, particularly his staff officer, Group Captain Steven Walker). The IDC, which was chaired by Ms. Jane Halton, then a Deputy Secretary in the Department of the Prime Minister and Cabinet, was colloquially known as the People Smuggling Task Force (“PST”), and was also referred to sometimes as the “High Level Group”.

3. *Adelaide* reached the vicinity of the SIEV at approximately 1.50 p.m. In compliance with rules of engagement issued by the CDF, which had been approved by the Minister for Defence on 1 September, Banks brought *Adelaide* to a position 9 or 10 nautical miles from SIEV 4, just beyond the horizon. The reason Commander Banks took that course was, as he explained, because of his apprehension that, should the potential illegal immigrants see an Australian vessel, they might precipitate a safety of life at sea (“SOLAS”) situation, thus compelling the *Adelaide* to effect a rescue.⁷ The use of such tactics by potential illegal immigrants had already become apparent in respect of earlier SIEVs. We deal with the pattern of conduct engaged in by the potential illegal immigrants, both prior and subsequent to SIEV 4, elsewhere in this Report.

4. Commander Banks dispatched a long-range rigid hulled inflatable boat (“RHIB”) carried by the *Adelaide*, to deliver warning messages to those aboard SIEV 4, notifying them that they did not have permission to enter Australia

⁵ *Transcript of Evidence, Select Committee on a Certain Maritime Incident* p. 323

⁶ *Transcript of Evidence* p. 684

⁷ *Transcript of Evidence* p. 184

and, were they to do so, they would be committing offences against Australian law. The warnings, both oral and written, were delivered in the English, Bahasa and Arabic languages. They were ignored. Accordingly, Commander Banks decided to bring the *Adelaide* close to SIEV 4, in order to deter unlawful entry into Australian waters. Warning shots were fired from *Adelaide*, the earlier verbal warnings were repeated by loudspeaker from the bridge of the *Adelaide*, and the master of the SIEV was ordered to heave to. These measures were also ignored, and at about 2.30 a.m. on Sunday 7 October the vessel entered the Australian contiguous zone.

5. During the course of the interception of SIEV 4, Banks was in frequent communication by radio telephone with Brigadier Silverstone (the tactical commander). In view of the defiant conduct of those aboard the SIEV, at 3.35 a.m. Silverstone gave the order for the SIEV to be boarded. The boarding operation commenced at about 4.30 a.m.; the boarding party swiftly took control of the SIEV and steered it in the direction of Indonesia (from whence it had come). At the time of the boarding, there was no suggestion of unseaworthiness. Commander Banks described the situation faced by the boarding party, in these words:

The boarding party reported that [the PIIs] were angry, disappointed and making veiled threats to commit suicide, gesturing with wooden sticks and being very vocal.

...

Efforts to provide assistance, such as water, were not welcomed. Indeed, on occasions, the water that we provided was thrown over-board by the unauthorised arrivals on receipt. ... [T]he vessel was continually being sabotaged. The steering and the engines were disabled at various times. Vandalism and arson had been conducted, and continued. ... They had earlier thrown their compass overboard. ... My primary focus here was an expectation that the SIEV was generating a safety of life at sea situation.⁸

6. While the boarding operation was in progress, Commander Banks took a telephone call from Silverstone. Silverstone had arranged to telephone Air Vice-Marshal Titheridge, at 7.30 a.m. Darwin time (which was 8.00 a.m. Canberra time and 5.00 a.m. Golf time), in order to brief him on the situation. Titheridge, although not in the military “chain of command”, was nevertheless the Defence representative on the PST; Ms. Halton, who had been advised of the SIEV 4 interception the previous afternoon, had convened the PST to meet

⁸ *Transcript of Evidence* pp. 161, 163

at 9.00 a.m. that morning. Accordingly, shortly prior to making the call to Titheridge, at 7.20 a.m. Darwin time, Silverstone telephoned Banks (who was on the bridge of the *Adelaide*). They had a brief conversation which Silverstone estimates took approximately one minute.⁹

7. Silverstone's version of the conversation is as follows:

I spoke to Commander Banks at about 0720, as arranged, in order to get a clear view of what was happening. He gave me a quick summary of events, talking about the boat being dead in the water, about the steering being disabled and about it being seven to eight miles south of the contiguous zone. He then indicated that there were men in the water, that a child had been thrown over the side. I asked him then "How old is the child?" He said, "five, six, seven – I can't tell properly." I then said, "Are they wearing life jackets?" He indicated that a man or some of the men were but some of the men had removed their life jackets. I then said to him, "Have you got everybody?" And he said "To the best of my knowledge, yes."

Senator BRANDIS – Was that the end of the conversation?

Brig. SILVERSTONE – It was. I might have then said a few words of encouragement – "Well, get on with it. Get the situation under control" – and then hung up and let him get on with it.¹⁰

Banks' evidence is as follows:

My recollection of that conversation is not very clear. I do recollect parts of the conversation. I do recollect, in the telephone conversation at about six o'clock – and the times are a little in dispute there – being asked about a child and describing that I could see with my own eyes a man holding a child over the side. I recollect being asked about that and saying, "I can see it with my own eyes." I do not recollect saying that a child had been thrown overboard or that a child had been recovered from the water. That is based on that being a six o'clock event. Earlier conversations, to my recollection, did not make reference to children at all.¹¹

⁹ *Transcript of Evidence* p. 336

¹⁰ *Transcript of Evidence* pp. 340-1

¹¹ *Transcript of Evidence* p. 200

8. As he spoke to Banks, Silverstone made a diary note of the conversation. The relevant extract of the diary note reads:

“0720*

Vessel - disable the steering

- dead in water
- 7 – 8 nm sth
- threatened mass exodus
- men child thrown overside 5,6,7

Some discarded life jackets

to best of knowledge got everyone”

The one relevant portion of the diary note which was not contemporaneous is the entry “0720*”, which was inserted some three or four days later to identify the (local) time at which the call was made; Silverstone was able to establish this by reason of the fact that the telephone call with Banks was very short (on his evidence, about one minute), and about “three or four or five minutes” elapsed before he telephoned Titheridge, which he did at 7.28.¹² The word “child” is interlined on the diary note, however Silverstone’s evidence (on which he was not challenged) was that he wrote the word immediately upon the conclusion of the conversation, before he rang Titheridge. By a notation added later, Silverstone explained the circumstances in which the word was interlined.

Senator BRANDIS – As I understand your evidence, all the other ink notes were written as you were talking, the telephone conversation between you and Banks finished and then, in the four or five minutes that elapsed before you telephoned Titheridge, you interlined the word “child”.

Brig. SILVERSTONE – That is correct.

Senator BRANDIS – Why did you do that?

Brig. SILVERSTONE – Because that was central to the report from Commander Banks. At the time he was talking to me, he was talking quite quickly and I was having trouble keeping up. I left the space there, put “thrown over side” and added “child” afterwards, and then the following question was to do with the age of the child.

Senator BRANDIS – You are quite certain that the word “child” was put in before you spoke to Titheridge?

¹²

Transcript of Evidence p. 337

Brig. SILVERSTONE – Absolutely.¹³

It was Silverstone's usual practice to make diary notes of conversations of this kind, i.e. conversations about operational matters.¹⁴

9. Within a few minutes of the conversation, Silverstone telephoned Titheridge (as he had arranged to do) and conveyed to him what Banks had told him. This included the statement in relation to the child. Silverstone's evidence of what he told Titheridge was:

I have a recollection of my conversation with Air Vice Marshal Titheridge and it started with me passing on to him the events of the previous number of hours, all of which he was actually aware of. As I talked through the firing and the authorisation to board, he said, "I am aware of that, I am aware of that." As we stepped through the events, I said "The only other thing is I have just got off the phone to CO *Adelaide* and he has just told me that there are men in the water and that a young child aged five, six or seven has been thrown overboard.

Senator BRANDIS – So you basically told him what you had just been told by Banks?

Brig. SILVERSTONE – Yes.

Senator BRANDIS – And did you use your diary notes as you spoke to Titheridge?

Brig. SILVERSTONE – Yes.¹⁵

As soon as he had finished speaking to Titheridge, Silverstone rang Rear Admiral Smith and conveyed the same information to him.

10. As soon as his telephone call with Silverstone finished, Titheridge telephoned the CDF, Ms. Halton, and Mr. Hendy, the Chief of Staff to the Minister for Defence, Mr. Reith, and conveyed to them what he had been told by Silverstone. As well, on that afternoon, Titheridge spoke to the Minister himself on four occasions, during which he conveyed to him what Silverstone had told him (including the information about the child thrown overboard), together with other information which came in during the course of the day.

¹³ *Transcript of Evidence* pp. 338-9

¹⁴ *Transcript of Evidence* p. 327

¹⁵ *Transcript of Evidence* p. 342

He did not consider it necessary to place qualifications or caveats on the information:

Air Vice Marshal TITHERIDGE – I would have said that this information was passed on to me by the operational commander.

Senator FAULKNER – You believed, at this point, didn't you, that a child or children had been thrown overboard? Is that fair?

Air Vice Marshal TITHERIDGE – Correct. I had no reason not to believe what Brigadier Silverstone told me.

Senator FAULKNER – But did you place any qualifications on this, given the fact that you had not had anything other than telephonic communication with Brigadier Silverstone? Were there any caveats, qualifications or expressions of caution in this at all?

Air Vice Marshal TITHERIDGE – When the operational commander passes me information, apart from the source of it, I see no reason to provide caveats.¹⁶

11. It is uncontroversial that the Banks/Silverstone conversation was the source of the subsequent statements that a child or children had been thrown overboard from SIEV 4. The key question is whether Banks did in fact make that statement to Silverstone. Government Senators do not share the belief, asserted in the Majority Report,¹⁷ that it is not “possible to arrive at a definite conclusion about what exactly was said and not said at the time” - certainly, the Majority Report finds it possible to arrive at quite definite and damning conclusions about other factually controversial issues where the Committee had the benefit of considerably less evidence. In the Government Senators' view, the clear weight of the evidence suggests that Brigadier Silverstone's version of the conversation is correct.

12. The most obvious reason why Silverstone's version should be accepted is the fact that it does not depend upon recollection: he made a contemporaneous diary note of what Banks said to him, the authenticity of which is unchallenged. It is inconceivable that Silverstone would have recorded that he was told that a child had been thrown overboard if he had not heard Banks say so. Banks, the officer on the scene, was narrating to Silverstone events as they unfolded – both what he saw, and what was being

¹⁶ *Transcript of Evidence* p. 707

¹⁷ Paragraph 3.87

reported to him.¹⁸ Silverstone's diary note is a contemporaneous record of that narration. Furthermore, Silverstone prepared his note in circumstances in which he was able to concentrate exclusively upon what Banks was saying, while Banks, as the operational commander dealing with a difficult and highly mobile situation, obviously had many other things on his mind. As the Chief of Navy, Vice Admiral Shackleton, observed:

Brigadier Silverstone probably had a more accurate recollection of what was said than Commander Banks would have had, simply because of the intensity and the stress under which he would have been working at the time. He would have been very focused on what he was doing.¹⁹

...[S]itting in the comfort of an office, that is not rolling around in the ocean with other people trying to get your attention, is a place where you could expect to record more accurately what somebody may have said to you rather than somebody who was not taking notes and had only half a mind on the conversation that he was having with you. ...

Banks was under a great deal of stress – and by that I do not mean that he was unable to deal with it, but he had a lot on his mind and he was pretty busy. Silverstone was sitting in an office where it was a lot easier to write down and take notes of a conversation. Silverstone had no reason whatsoever to phone somebody else and say that there had been children thrown in the water unless he had good reason to do so. So there is a correlation between what he heard and what he did in that context. Banks would have wanted to get off the telephone as quickly as he could and get back to doing what he had to do in terms of his ship.²⁰

Commander Banks himself observed, of Silverstone, that “It would be my assessment that if he recollected that I said something then I would have said it...”²¹

¹⁸ Banks' evidence of what he saw and of his sources of information at the time of the incident appears, in particular, at *Transcript of Evidence* pp. 244-251.

¹⁹ *Foreign Affairs Defence & Trade Estimates Hansard* 20 February 2002 p. 124.

²⁰ *Transcript of Evidence*, pp. 105 & 133

²¹ *Transcript of Evidence* p. 204

13. Brigadier Silverstone also has a clear independent memory, unassisted by the diary note, of what Banks told him. Banks' recollection, however, was equivocal:

Throughout I have been trying to convey the message that I do not have a recollection of that conversation to the degree where I can emphatically say "Yes, I said this; no, I didn't say that."²²

Throughout the whole thing I would love to be emphatic and say, "I said" or "I didn't say". With the passage of time, I have moved much closer to clearly saying, "I believe I didn't say", because of all of the other pieces of information that I have been made privy to. In early October I remained confused and was a bit more able to swing each way.²³

Indeed, Banks conceded that Silverstone's version may be correct. When Silverstone's diary note of their conversation was put to him, Banks' evidence was as follows:

Senator BRANDIS – That is [Silverstone's] recollection, based upon the diary note that he took while you were talking, of his conversation with you. Allowing for the fact that you have very properly said that your memory of the conversation is imperfect, do you accept that Silverstone's recollection of it is correct?

Cmdr. BANKS – No.

Senator BRANDIS – Do you accept that it may be correct?

Cmdr. BANKS – Yes.²⁴

14. The report of children thrown overboard from SIEV 4 became known to the members of the PST when, during the course of its meeting that morning, Titheridge (who had just spoken to Silverstone) telephoned Jane Halton and conveyed to her what he had been told. Another of those present at the meeting, Mr. Bill Farmer, the Secretary of the Department of Immigration and Multicultural Affairs ("DIMA"), later received a telephone call from his Minister, Mr. Ruddock, who had heard reports of the interception of SIEV 4 in the media and wanted to be briefed on the latest developments:

I had the phone call from Mr. Ruddock who, in effect, said that he was going into a media conference and he wanted to know the

²² *Transcript of Evidence*, p. 206

²³ *Transcript of Evidence* p. 213

²⁴ *Transcript of Evidence* p. 260.

latest factual information about this boat that had been reported in the morning. I told him that I was in the high-level group, and I made clear to him that I was doing that because I wanted to make sure that the information I was giving to him was properly understood by me and by the members of the group.

CHAIR – My understanding is that, sotto voce, you had this conversation with the Minister –

Mr. FARMER – No, it was not sotto voce.

CHAIR – You had this conversation with the Minister on your mobile phone –

Mr. FARMER – Yes.

CHAIR – while the high-level group paused and listened in.

Mr. FARMER – That is right. I told him that we had had advice from Defence which was significant because it essentially came in three parts: that passengers were wearing life jackets – and we have talked earlier on about the significance of that – that some were jumping overboard and that passengers were throwing children overboard. Those were the three elements, and they were three new elements.

...

CHAIR – ... that is essentially what the Minister told the media, is it not?

Mr. FARMER – That is right. Those were the factual elements that he received and passed on.²⁵

15. Mr. Ruddock then had a media conference (at about lunchtime), during the course of which he conveyed the information which Mr. Farmer had given him. This was the first public airing of the report. There can be no question that at that time, there was no reason to doubt its correctness.

16. Nevertheless, given the degree of public notoriety the report received, steps were taken, initiated by different actors, to obtain written or photographic evidence. In particular:

²⁵ *Transcript of Evidence* pp. 887-8

- a. On 9 October both Brigadier Silverstone and Rear Admiral Smith (independently of one another) instructed Commander Banks to gather witness statements from the members of the boarding party, which he caused to be taken that day and the following day.
- b. On the morning of Wednesday 10 October, Mr. Mike Scrafton, Mr. Reith's military adviser, telephoned COMAST, Rear Admiral Ritchie to inquire about the availability of evidence.

17. Before tracing the fate of those inquiries, it is necessary to return to events as they were unfolding at the incident locality. After the *Adelaide* boarding party took control of SIEV 4, they discovered that the steering and engines had been sabotaged. The boarding party made makeshift repairs, and steered the vessel in the direction of Indonesian waters. 14 persons were recovered from the water and returned to the vessel; significantly, none of those recovered from the water were children. No report was received of any missing person. *Adelaide* took a position beyond visual range of the SIEV, but kept it under electronic observation. The vessel began to steam away from Australian waters in a northerly direction, at slow speed. However, at 12.19 p.m. it was observed to be dead in the water and an hour later, distress signals were displayed. Another boarding party was dispatched, which found that the engine and steering had, once again, been deliberately sabotaged. Cmdr. Banks considered that a distress situation existed; following a discussion with Silverstone, a decision was made to take the vessel under tow to Christmas Island. The tow continued commenced at 6.03 p.m. on 7 October, and continued satisfactorily for about 24 hours. However the sabotage of the engine made the bilge pumps inoperable; attempts by the crew of the *Adelaide* to deal with the rising bilge levels were initially successful in reducing the level of bilge water, however at about 5.00 p.m. on Monday 8 October the vessel began to sink rapidly. Cmdr. Banks, deciding that a SOLAS situation now existed, instructed the crew of the *Adelaide* to effect a rescue, which was conducted between the hours 5.08 p.m. and 6.41 p.m., in the course of which 223 people were embarked on *Adelaide* with no loss of life. *Adelaide* then made for Christmas Island. There can be no doubt that, throughout the operation, the officers and crew of *Adelaide* acted heroically and with a very high level of professionalism.²⁶

18. The orders of Brigadier Silverstone and Admiral Ritchie for Cmdr. Banks to obtain statements from the boarding party were not given until the day following the sinking (Tuesday 9 October). Banks instructed Chief Petty Officer Koller to take statements from 16 crew members, including members of the boarding party; the statements were taken on Wednesday 10 October.²⁷

²⁶ Information in this paragraph is drawn from Cmdr. Banks' evidence, *Transcript of Evidence* pp. 162-3, and the notes to paragraphs 3.18 – 3.34 of the Majority Report.

19. Meanwhile, also on 9 October, Commander Banks, at his own initiative, emailed two photographs to several addressees, including a number at ADF Headquarters in Canberra, depicting the rescue operation on the previous afternoon. Those photographs included images of children and women being rescued from the water by crew of the *Adelaide*. The photographs were accompanied by captions and text which made it clear that they depicted the sinking of SIEV 4 on 8 October; they obviously did not refer to the events surrounding the boarding of the vessel on the previous day. Also on 9 October, Commander Banks gave an unauthorised interview to Channel 10 during the course of which he referred to the photographs.

20. When news of the existence of the photographs became public on 10 October, Mr. Reith's media adviser, Mr. Ross Hampton, contacted Mr. Tim Bloomfield, the Director of Media Liaison at Navy Public Affairs, to request copies of them. Bloomfield had received the photographs, with identifying captions and text, at 3.14 p.m. Apparently due to technology problems in transferring the photographs by e-mail, when the photographs were transmitted to Mr. Hampton, they were without the accompanying captions and text. The circumstances in which these problems arose, and the confusion surrounding the electronic transmission of the photographs, are discussed at paragraphs 4.80-4.87 of the Majority Report.

22. On the afternoon of 10 October, Mr. Reith sought the clearance of the CDF to release the photographs to the media. According to Hampton, this conversation took place between 3.00 p.m. and 4.00 p.m.²⁸ Admiral Barrie's evidence of the conversation with Mr. Reith is as follows:

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 SIEV 4 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 [Air Vice-Marshal Titheridge] 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 accordingly.²⁹

²⁷ *Transcript of Evidence* pp. 261-2

²⁸ Hampton Statement to the Bryant Report

²⁹ *Transcript of Evidence*, p. 742

Mr. Reith's account of the background and substance of his conversation with Adm. Barrie, given in his statement to the Powell inquiry, is as follows:

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 my office and put them on my desk.

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

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 photographs 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. AVM Titheridge rang me back within about five minutes or so and said that from his point of view the photos could be released.³⁰

23. In several places, the Majority Report, in the most immoderate and inflammatory language, suggests that the release of the photographs on 10 October was, in effect, a sinister deceit practised by Mr. Reith upon the general public. That assertion is entirely unsupported by evidence. In particular, it completely ignores the following highly material circumstances:

(a) Neither party (i.e. Mr. Reith and Admiral Barrie) knew, at the time of the conversation which led to the release and misattribution of the photographs, what the provenance of the photographs was. Both assumed that the photographs were of the event on 7 October. There was simply no advertence to the possibility that the photographs may have depicted something else;

³⁰

Memorandum, Hon. Peter Reith, 20 November 2001, p. 2

(b) At the time of the conversation, Admiral Barrie had not even seen the photographs;

(c) Although by this time doubts were beginning to exist in the minds of some, lower in the chain of command, about the accuracy of the initial report, at the time of the conversation, nobody within the chain of command (or, for that matter, outside it) had expressed any of those doubts to Mr. Reith, Admiral Barrie or Air Vice-Marshal Titheridge. When Mr. Reith spoke to Adm. Barrie on the afternoon of 10 October, the fact that a child or children had been thrown into the water from SIEV 4 was for each of them, at that time, uncontroversial. In that regard, what is particularly revealing is what the conversation (on both men's version of it) does *not* say. There is no suggestion that Mr. Reith was ringing to check the authenticity or provenance of the photographs, or to clarify any confusion in relation to them. Rather, it seems reasonably clear that he was ringing simply to check whether Defence had any problem, from an operational point of view, with their release – hence eliciting two responses of an operational nature, i.e. that the identities of ADF personnel should be obscured, but that otherwise, there was no reason not to release them since, so far as Barrie was concerned, the operation had been successfully concluded. There is no suggestion of there being any question of what the photographs showed.

Only the most enthusiastic conspiracy theorist could conclude that the Chief of the Defence Force, the Head of Strategic Command and the Minister for Defence colluded to invent a barefaced lie about photographs which, at the time the relevant conversation occurred, were not understood by any of them even to be controversial. Sadly, fascination with conspiracy theories of the most Kafkaesque hue is not unknown among members of the Australian Senate.

24. On the afternoon of 10 October, following the release of the photographs, Mr. Reith gave a media conference and an interview on ABC Radio with the journalist Virginia Trioli, during the course of which he stated firmly that the photographs depicted the event of 7 October (not the sinking of SIEV 4 the following day).³¹ For the reasons we have set out in the previous paragraph, there is no reason whatever to believe that, at the time he made that statement, Mr. Reith doubted (or had reason to doubt) its accuracy.

25. That evening, 10 October, the ABC 7.30 *Report* programme broadcast the photographs. The same item carried footage of Mr. Reith's media interview that afternoon. Both Vice Admiral Shackleton and Rear Admiral Ritchie saw the programme; unlike Reith or Barrie, they were aware of the provenance of the photographs, having been informed of the circumstances surrounding the photographs by Rear Admiral Smith earlier that day. Afterwards, they each rang Admiral Barrie (who had not watched the programme) and told him that

³¹ *Interview Transcript, Peter Reith/Virginia Trioli, ABC Radio 10 October 2001*

incorrect claims had been made that the photographs were evidence of the “children overboard” event, and urged him to contact Mr. Reith to explain that the photographs had been misattributed.

25. Admiral Barrie telephoned Mr. Reith the following morning, 11 October. His evidence of that conversation was as follows:

I told [Reith] 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.

...

I think that the Minister was annoyed because there had been a stuff-up on the photographs.

...

The conversation itself concluded with us making the agreement about the management of photographs. The conversation never went at any point to what was going to be done about it.³²

26. The confusion is explicable, at least in part, by the fact that Admiral Barrie and Mr. Reith were apparently at cross purposes. Admiral Barrie had not seen the *7.30 Report*; his evidence was that, based upon what both Shackleton and Ritchie had told him, he understood that Mr. Reith had claimed on the programme that the photographs depicted the “children overboard” incident. But that is not so. As an examination of the tape and of the transcript of the programme reveals, the broadcast portion of Mr. Reith’s doorstep makes no reference to the photographs whatever – he was speaking about a different issue, namely the warning shots fired from the *Adelaide*. Indeed, in the broadcast portion of the interview, Mr. Reith did not even refer to children in the water, he merely said “13 persons were either thrown or jumped overboard. They were all rescued out of the water at that time.” The item then returns to the compere, Fran Kelly, who observed “And, in another unusual move, *the navy* supplied these photos to prove the claim – of two children floating in the sea.”³³ (emphasis added) It is not difficult to

³² *Transcript of Evidence*, pp. 742, 751-2

³³ *7.30 Report Transcript* 10 October 2002 [www.abc.net.au/7.30/s387645.htm]

understand why Mr. Reith and Admiral Barrie were at cross purposes – Admiral Barrie’s side of the conversation proceeded upon the assumptions (a) that Mr. Reith had appeared on the *7.30 Report*; and (b) had made claims about the photographs. In fact, Mr. Reith (a) had only “appeared” on the programme in the sense that footage of an earlier press conference had been used; and (b) had, in the course of the broadcast, not even referred to the photographs. Indeed, it was the Navy which was said to have released the photographs “to prove that claim”.

27. It is clear from Admiral Barrie’s evidence that on 11 October, Mr. Reith was told by Admiral Barrie that the two photographs which had been released by him the previous day did not depict the “children overboard” incident. Although Mr. Reith never again claimed that they did, nor did he correct his earlier statement of 10 October. This is probably explicable by the fact that, as appears from Mr. Reith’s conversation with Adm. Barrie, he apparently believed that there were other photographs of the alleged incident (hence his insistence that, in future, if they talked of photographs they would be sure to have the same set of photographs in front of them). Certainly, there is no reason to believe that, merely because he had been advised that two photographs had been misattributed, the incident never occurred. Indeed, any such conclusion would have been a logical absurdity. The advice which Mr. Reith received on 11 October merely told him that two pieces of evidence which he had believed provided visual proof of the incident were not probative.

28. Meanwhile, earlier in the day on Wednesday 10 October and in response to Scrafton’s request, Admiral Ritchie contacted Admiral Smith seeking documentary or photographic evidence. He was subsequently told that the *Adelaide’s* electro-optical film (referred to throughout the evidence as “the video”) did not show children being thrown overboard. However, since the video only showed the port side of the SIEV, it was inconclusive, as Ritchie recognized. At that stage, the witness statements were not available. Ritchie rang Scrafton back at 12.42 p.m. and conveyed this to him; this was Ritchie’s only contact with Mr. Reith’s office during this period. Importantly, at the time he spoke to Scrafton, he still believed the accuracy of the original report:

Rear Adm. RITCHIE - ... I was advised about mid-day of that day that the electro-optical film – the video that we all talk about – 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 the 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 there might be children in the water. At 12.42, I passed that information back to Mr. Scrafton. That is the only contact that I recall with ministers or ministers’ staff in this period.

Senator FAULKNER – Was Mr. Scrafton basically asking you if you were aware of any sort of evidentiary support for claims that children had been thrown overboard – is that a fair way of putting it?

Rear Adm. RITCHIE – My recollection is, yes, he rang me up and said, “Chris, what have we got that supports the claim that children were thrown overboard?” At this time I still believed that it was true.

...

Senator FAULKNER – [W]ere you able to effectively answer him at 1242 saying, “There is no evidence to support the claim”?

Rear Adm RITCHIE – No.

Senator FAULKNER – You in fact said, “There is none at this point” –

Rear Adm RITCHIE – He would have walked away from that conversation believing that there still might be evidence that supports the claim, because I believed that.³⁴

29. Doubts about the accuracy of the original report first began to form in the minds of both Brigadier Silverstone and Rear Admiral Smith on the morning of 9 October. Each, of his own initiative and independently of one another, instructed Cmdr. Banks to obtain the crew statements and identify other documentary and photographic evidence. Brigadier Silverstone’s fullest account of the development of his doubts appears in his Statement to the Powell Report:

9. Subsequent to reporting to HSC [Titheridge], in light of the tempo of other events, I thought little more about the child overboard report. ... It was not until either 8 or 9 Oct, when viewing the media coverage of the child overboard incident, that I could not recall seeing any written reporting of this incident. On Tue 9 Oct, following the sinking of SIEV 04, I directed a review

³⁴ *Transcript of Evidence* pp. 368-9; 371

of ADELAIDE's OPREPs and confirmed that no written advice of the incident existed. Subsequently, I directed CO ADELAIDE to gather statements from those involved in order to confirm whether or not a child had been thrown overboard. At about this time, I discussed my concerns and intentions with NCC AST [Smith] and COMAST [Ritchie].

10. I recall a discussion with CO ADELAIDE, from early on Wed 10 Oct, in which he indicated that no one as yet could confirm that a child had been recovered from the water. However, he said that he was still waiting to question someone who had been on the far side of the SIEV, away from ADELAIDE's position at the time of the incident. Neither at this point, nor at any earlier stage, did he suggest that a child had not been thrown into the water. In a later conversation, reported in my notebook at 101144/K Oct [i.e., 11.44 a.m. on 10 October], he reported that it was apparent to him that no children had been thrown in the water.³⁵

30. Silverstone received the crew statements on the morning of Thursday 11 October. He then forwarded the statements, together with an e-mail, to Smith and Ritchie at 1.15 p.m. The e-mail contained the following comments:

Until Tue 10 Oct, CO ADE [Banks] believed that the reports of the disposal of a child overboard remained credible. In a later conversation with me on Tue he reported that this now did not appear to be the case.

I believe that there is ample reporting here, pending CO ADE's statement, that there was a great deal of confusion, that the adult SUNC's were intent on provoking an incident and that a report of a child deliberately placed overboard was credible at the time. It is only some days later when that perception was tested that it became clear that no one recovered any children from the water, however, there had persisted a perception among some that this [a child overboard] had happened.³⁶

Although Silverstone does not explicitly say so, it is clear from the e-mail that the substance of his communication was that Cmdr. Banks no longer considered that a child had been thrown overboard, and that he adopted Banks' conclusion.

³⁵ Silverstone Statement to Powell Report. See also Silverstone's evidence at *Transcript of Evidence* p. 358

³⁶ Enclosure 2 to Silverstone Statement to Powell Report

31. Admiral Smith described the development of his thinking, resulting in the same conclusion as that which had been reached by Silverstone, in the following evidence:

I was becoming quite concerned that none of the operational reports that had come to me through the JTF commander at any time contained information saying that a child had been thrown overboard. I had been briefed by Brigadier Silverstone that there was a difference of view between himself and Commander Banks. That concerned me. So I took the unusual step of contacting Commander Banks direct on 9 October and I asked him for his account of what had occurred and what evidence he had to support the allegation of a child being thrown in the water. In that telephone call, he advised me that he himself had not seen such an event, that he had heard a number of his ship's company indicate that they had seen the event occur. I told him to get out there, to interview his people and to determine, once and for all, did this incident occur or not. That was on the Tuesday morning.

I subsequently rang Rear Admiral Ritchie and told him that I had serious concerns as to our ability to prove that this incident had in fact occurred. On the Wednesday morning, 10 October, Commander Banks rang me, told me that he had interviewed the people relevant to this incident, that he was satisfied that he had no evidence whatsoever to prove that this incident had occurred – the child being thrown over. I then directed him to produce a chronology of events and to signal that to me as a personal message, which he did that evening, and it was received in my headquarters on 11 October.

After my call with Commander Banks on 10 October I instantly rang Rear Admiral Ritchie and told him that I was now convinced that the incident had never occurred. He advised me that he would relay that information to the CDF and he subsequently rang me back to advise me that he had made that call and passed that information. From my perspective, from that moment forward I was convinced the incident had not occurred and I was satisfied the chain of command had been informed.³⁷

Although Smith's doubts began to form on the morning of 9 October, he "did believe such an incident had occurred from the period 7 October through to 10

³⁷ *Transcript of Evidence* pp. 584-5

October.”³⁸ Rear Admiral Smith rang Rear Admiral Ritchie because the latter was his immediate superior in the chain of command; at no time did Smith speak to the CDF himself, nor to the Minister.³⁹

32. Rear Admiral Ritchie’s recollection is, however, slightly different. He had, it will be remembered, been approached by Scrafton on the morning of 10 October, seeking photographic evidence.

Rear Adm. RITCHIE - ... I did have contact with Mr. Scrafton on, I believe, 10 October. Mr. Scrafton rang me in the morning and my recollection is that he was asking about evidence in support of the claim that children were thrown overboard. It may not have been in exactly those words, but I have no clear recollection of exactly what it was. At any rate, it caused me to talk to Admiral Smith. I know that Admiral Smith talked to either Silverstone or Commander Banks, and I was advised about mid-day of that day that the electro-optical film – the video that we all talk about – 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 the 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 there might be children in the water. At 12.42, I passed that information back to Mr. Scrafton. That is the only contact that I recall with ministers or ministers’ staff in this period.

Senator FAULKNER – Was Mr. Scrafton basically asking you if you were aware of any sort of evidentiary support for claims that children had been thrown overboard – is that a fair way of putting it?

Rear Adm. RITCHIE – My recollection is, yes, he rang me up and said, “Chris, what have we got that supports the claim that children were thrown overboard?” At this time I still believe that it was true.

Senator FAULKNER – I think it is fair to say that you do not believe it is true for much longer.

³⁸ *Transcript of Evidence* p. 533

³⁹ *Transcript of Evidence* p. 585

Rear Adm. RITCHIE – Not for much longer, no.

Senator FAULKNER – It might be useful for the record if you could say when it became clear to you that children had not been thrown overboard.

Rear Adm. RITCHIE – Again, in my recollection, it is clear to me on the 11th that in all probability children have not been thrown overboard, because on the 11th I see the statements taken from the sailors concerned on the *Adelaide*, and the last vestige of hope, if you like, was the fact that there would be statements taken from sailors. I already knew that there was nothing on the video. I knew that there was nobody coming forward and saying that they had seen it, but I believe that there was a possibility that the statements taken on the 10th would include that. Indeed, as we all know, there is one person, the EOTS operator, who says in his statement that he thought one child was thrown overboard; there are 15 who say that they were not. So, by the 11th, it was clear to me. ... [M]y definite recollection when I saw the statements is that I thought that this in all probability did not happen.⁴⁰

There was no contact from Rear Admiral Ritchie to the Minister's office from the time at which he had arrived at that view (his last contact with the Minister's office having been at 12.42 on the previous day, at which time he still believed the report to be true). Observing the chain of command, Rear Admiral Ritchie raised the matter with his immediate superior, Admiral Barrie.

33. The Ritchie/Barrie conversation, which took place by telephone on the morning of Thursday 11 October sometime *after* the Barrie/Reith conversation concerning the misattribution of the photographs, is thus critical. It occurred at a time by which each officer in the chain of command – Banks, Silverstone, Smith and Ritchie – had arrived at the view either (a) that no children had been thrown overboard; or (b) that there was no documentary or photographic evidence to that effect.

31. Four observations should be made at this point. In the first place, it is by no means clear that any of the officers concerned drew a distinction in their minds between those two propositions: indeed, at least one of them seems to have deduced, from the absence of photographic or documentary evidence, that the incident did not take place. Secondly, they appear to have reached that view for different reasons. For Ritchie, it was the witness statements. For Silverstone, it appears to have been the mistaken attribution of the photographs.

⁴⁰ *Transcript of Evidence* pp. 368-9

For Smith, it was his conversation with Banks. For Banks, it was a variety of circumstances. The third point that should be made is that, even at this stage, Banks quite properly admits that his own recollection of the event was uncertain: in Cmdr. Banks' Statement of 10 October, he said, essentially by way of commentary upon his own state of mind:

21. I have since been questioned repeatedly about this event (and to a lesser [sic.] extent others) and I am now so full of conflicting information of what was [sic.] seen and heard by others and me and stated by others and me that it is difficult to recall with absolute veracity. Nevertheless I am prepared to attest to what I saw.
22. For the record quote I saw a child held over the side by a man. I did not see any children in the water. I did see 13 UBAs voluntarily enter the water from the SIEV and watched their subsequent recovery. I advised CJTF 639 that this had happened and that I could see a man threatening to put a child over the side. I advised that there had been no loss of life. I signalled ashore that SUNCs were making threats to jump overboard and some had done so and that some had been thrown overboard unquote.⁴¹

32. The final observation that should be made is that those who asserted that there was no evidence that a child or children had been thrown overboard, were wrong. There was, of course, clear and strong evidence to support the original allegation – the fact that Banks reported it at the time, a report of which Silverstone made a contemporaneous record in circumstances in which, for the reasons we have discussed, it is most unlikely that he would have been mistaken. A contemporaneous record of events, made by an experienced officer, written as they are being narrated to him, would virtually always be preferred to the piecing together of events by the narrator some days later when his mind was “full of conflicting information of what was seen and heard by others and me and stated by others and me.” Indeed, Cmdr. Banks' description of his approach to the various pieces of “conflicting information” in his statement of 10 October is almost a textbook description of the process of reconstruction – i.e., the arrival at a coherent version of events upon the basis of the reconciliation of a variety of different and in some cases inconsistent information. There is the world of difference between that exercise, and unassisted first-party recollection. That is not meant as a criticism of Cmdr. Banks: on the contrary, one of the professional skills of a commanding officer,

Statement by Commander Norman Banks, 11 October 2001 “Op. Relex – Commanding Officer's Statement Reference SIEV 04 Manoverboards”, p. 4

as the Committee was told, was the *ex post facto* assessment of reports and documentary evidence to arrive at an accurate assessment of what actually took place. That was the task which Cmdr. Banks was attempting to perform in his Statement. The point is, however, that in performing that exercise, he was acting as an analyst, not as a witness. As he narrated events as he saw them and reports as he received them from the bridge on the morning of 7 October, he was acting purely as a witness – reporting what he was seeing and hearing. The witness’s instant, contemporaneous, unassisted, unreflective narrative, as reliably recorded by his interlocutor, would usually carry more evidentiary weight than the analyst’s *ex post facto* reconstruction.

33. The Chief of Navy, Vice Admiral Shackleton, put the same proposition very simply: “it is true to say that often the first call is the right call”:

We place great faith in our commanding officers to make calls as they see it and for those calls – by which I mean, reports – to be informed by all of their experience in interpreting the circumstances as they see them around them. So, when the report would have arrived with the CDF – and he obviously needs to speak for himself – he would have taken that report to have had great integrity and he would not have been easily persuaded to change that assessment, unless the commander himself was quite emphatic about it. But, even then, in the circumstances it is true to say that often the first call is the right call, even though doubts start to come into your mind later on. So I think CDF was presented with a real dilemma.

...

Senator BRANDIS – Accepting what you say, as I do, nevertheless, whether it be an observation or an assessment, it is merely the description of an observed phenomenon – something somebody saw. And even though what he saw he may have seen imperfectly, the proposition I am putting to you is that he will never be in a better position to make that assessment or to say what he saw than he is at the moment of seeing it.

Vice Adm. SHACKLETON – Agreed.

Senator BRANDIS – That is the distinction between narration and recollection. Narration does not depend upon memory and it does not depend upon reconstruction or it does not depend upon doubts, or a man working something over in his own mind, whereas recollection does. Would you agree?

Vice Adm. SHACKLETON – I would agree with that.⁴²

35. A related issue is the very high value which the military places upon the reliability of the observations of commanding officers, whose reports will not lightly be set aside by those higher in the chain of command. The Chief of the Air Force, Air Marshal Houston, gave this evidence:

Senator BRANDIS - ... [A] report from a commander in an operational situation would not lightly be set aside or varied by those further up the chain of command. It may be supplemented or fleshed out by fuller information arriving and assimilated subsequently, but it would not lightly be set aside, would it?

Air Marshal HOUSTON – No, it would not be set aside.

Senator BRANDIS – Of course, it may be wrong. Human error is part of the human condition. I am not saying that there is an absolute and dogmatic adherence to every report from a command situation. The point I am merely trying to get across or to see if you agree with it: if there is a report, those further up the chain of command have an expectation in the military that it is reliable and can and will be relied upon and it would not lightly be set aside. Would you agree?

Air Marshal HOUSTON – I would agree.

...

Senator BRANDIS – I am simply putting the almost banal proposition that, if you want to find out what happened, you go to the man or woman on the spot, whether they be the commander or a person who was directly engaged in the relevant episode. The further away you get from the eyewitness, the less reliable the account will be. Would you agree with that?

Air Marshal HOUSTON – The information that is used further up the chain of command relies totally on the reporting from the tactical level. From that point of view, I would agree.⁴³

34. Admiral Barrie's evidence stressed the importance of both of these values: the presumptive superiority of immediate observation over reconstruction ("the

⁴² *Transcript of Evidence* pp. 107-8

⁴³ *Transcript of Evidence* pp. 1053-4

first call is the best call”); and the necessity for those higher in the chain of command not lightly to interfere with reports from the field:

Senator FAULKNER – [C]an you say now whether Defence has, as we speak, a concluded view on the question of whether kids were thrown overboard from SIEV 4?

Adm BARRIE - My view is that there is no concluded view. I go back to the point I made in my opening evidence. The commanding officer is making the call. He is there – he is the only person there – and we are all the armchair experts. It is my judgment that, in most circumstances, the call a commanding officer is going to make early on is likely to be more accurate than the reconstruction he puts on it after he has thought about it and people have raised some doubt about it ...⁴⁴

Senator BRANDIS – Admiral Barrie, I would be right – would I not? – in thinking that the reliability of reports received up a chain of command or a chain of reporting is a very important value for the Navy –

Adm BARRIE – Yes.

Senator BRANDIS – that one of the professional skills in which naval personnel and in particular commanding officers are trained and in which they accomplish a high level of expertise in fulfilling is the ability to provide reliable reporting –

Adm BARRIE – Yes.

Senator BRANDIS – and the Navy relies heavily upon that capacity in order to make operational and command decisions?

Adm. BARRIE – Correct.

...

Senator BRANDIS – So that initial position, the reliability or, if you like, the authority of that initial report, would not lightly be set aside. It might ultimately have to be, as indeed, in this case, it was. But it would not lightly be set aside – would you agree?

Adm BARRIE – I agree.

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Foreign Affairs, Defence and Trade Estimates Committee Hansard 20 February 2002 p. 128

Senator BRANDIS – Nor should, as a matter of proper procedure, such a report lightly be set aside?

Adm BARRIE – No.

Senator BRANDIS – And you as the ultimate commanding officer of the military would in fact be – may I suggest to you, with respect – behaving quite inappropriately were you to disregard or set aside a report on the basis of which decision had already been made, unless you were well satisfied that it was wrong?

Adm BARRIE – Yes.

Senator BRANDIS – I do not want to fall into lawyers jargon but I may have to be forgive for doing so once. There is sort of an onus of proof on those who seek to establish a contrary version of events to demonstrate that the initial report is wrong, and until that is demonstrated the initial report stands?

Adm BARRIE – These would be my words: as a concept that was what underpinned my response to the raising of doubts – that is, unless you can persuade me that is wrong I will stand by my advice.

...

Senator BRANDIS – Whether we use the language of onus of proof or degree of persuasion or degree of satisfaction, you need to be persuaded –

Adm BARRIE – I need to be satisfied.

Senator BRANDIS – or satisfied that the initial report is wrong before you abandon it?

Adm BARRIE – Yes

Senator BRANDIS – And until you reach that level of persuasion or satisfaction, all you can do is continue to act upon it – would you agree?

Adm BARRIE – That is correct.⁴⁵

⁴⁵ *Transcript of Evidence* pp. 788-90

35. It is in light of those considerations – which all three of the service chiefs who appeared before the Committee (the CDF, the Chief of Navy and the Chief of the Air Force) regarded as core values of the military – that Admiral Barrie’s critical conversation with Admiral Ritchie on 11 October must be considered. In his evidence to the Select Committee, Admiral Ritchie said:

Senator FAULKNER – Are you confident that in your discussion with CDF on 11 October the fact that there was no evidentiary support for claims that children had been thrown overboard was made clear?

Rear Adm RITCHIE – Yes, I am confident.

...

Rear Adm RITCHIE – I only have a direct recollection of raising this particular issue, and the accuracy of what was being reported, twice with CDF – once on the evening of the 10th and then again on the 11th. I came away from the conversation on the 11th convinced that the issue was a dead issue.⁴⁶

However, in his evidence to the Defence Estimates Committee, Admiral Ritchie’s recollection was somewhat different:

I have never said that I said to the CDF, “This definitely did not happen.” What I have said is that there is doubt about the fact that this happened.⁴⁷

36. Admiral Barrie’s version of the conversation is this:
[On 11 October] I was telephoned by COMAST. My recollection of it was that he told me that there were now doubts about whether children were ever thrown overboard. I do not remember his being more definite than that. I recall that he referred to the photographs and to the video, and whether or not they were conclusive one way or the other. I said to him that photographs alone were only part of the evidentiary material and that until he could produce evidence to show that what had been originally reported to me was wrong, I could not change my

⁴⁶ *Transcript of Evidence* p. 373. Both Ritchie and Barrie agree that the only topic discussed on 10th October (which was a brief conversation) was the misattribution of the photographs on the *7.30 Report*, while the conversation on 11th was on the substantive issue of whether the report of children overboard was correct.

⁴⁷ *Foreign Affairs, Defence & Trade Estimates Committee Hansard* 21 February 2002, p. 182

advice to the Minister. I also said to COMAST there was obviously confusion about what took place. I directed COMASR to ensure that while this was fresh in everyone's mind that witness statements and any other evidentiary material should be collected.⁴⁸

... I offered the commanders an opportunity to come back and convince me that I was wrong if they had material that was evidence and compelling. ... So in my view I do not think that the discussion was as definite as Rear Admiral Ritchie recalls. I think he understood that an opportunity had been given to him to come back and fight a *repechage* if he wished to, and at no time did he.

...

I guess the issue for me is that, having offered the opportunity for somebody to come back and persuade me authoritatively otherwise, that did not occur.⁴⁹

Admiral Barrie's evidence before the Select Committee was consistent with his evidence before Defence Estimates. In particular, he did not ascribe the same significance as did Admiral Ritchie to the fact that the photographs had been misattributed the evening before:

In the context of photographs and the judgment about people being thrown or put over the side, the photographs themselves do not constitute the entire evidentiary material. They certainly support witness statements, perceptions formed by the commanding officer and those sorts of things. It is my view that the commanding officer's initial report which was reported to me on the Sunday in the subsequent events while I was CDF [*sic.*] ought to stand – that is, he reported that people were thrown over the side. Although there was discussion and doubt about some of the evidentiary material, it was my judgment that the commanding officer ought to be supported and his judgment ought to stand.

...

⁴⁸ *Transcript of Evidence* p. 742

⁴⁹ *Transcript of Evidence* p. 749

I have to say I was never persuaded myself that there was compelling evidence that the initial report of the commanding officer was wrong. It was my view that the photographs were simply part of the evidentiary material. The really important aspect of this are the witness statements and perceptions, and that initial report, so far as I was concerned, ought to stand. I never sought to recant that advice which I originally gave to the Minister.

...

... I have asked myself: should I have made a lot more effort in discussing with other those doubts that have been expressed to me? To be candid about it, my job is to be the principal military adviser to the government. ... It was my persistent view, until November, that there was no compelling evidence to show that the CO *Adelaide*'s call was wrong. My view – and it goes to the heart of this – is that my people had those discussions with me but I was not persuaded that there was compelling evidence that the CO of *Adelaide* was wrong. Evidentiary material or photographs, which are simply part of that, do not tell the whole story.⁵⁰

38. It is central to the understanding of this case to appreciate that, at the time of his 11 October conversation with Ritchie (which, according to Ritchie's statement to the Powell Inquiry, took place at 10.00 a.m.), Ritchie had not received the e-mail from Silverstone, reporting Silverstone's conversation with Banks and Banks' reassessment of his view that a child had been thrown overboard. (The e-mail was not transmitted until 1.15 p.m.). Nor, at that time, was Ritchie aware of two other important documents prepared by Banks: the "chronology" and Banks' Statement. The former had been transmitted to Smith on 10 October, and the latter in the early afternoon of 11 October. Indeed, the chronology *was never brought to Barrie's attention* until the Estimate hearings on 20 February:

On the night of 20 February in estimates, when Rear Admiral Ritchie and I were looking at that message of 10 October, he said to me "if I'd only had that at the time we had that discussion, I would have come back to you".⁵¹

⁵⁰ *Foreign Affairs, Defence & Trade Estimates Committee Hansard* 20 Feb 2002, pp. 100-02

⁵¹ *Transcript of Evidence* p. 749

“It was in my mind all the time that my duty as the chief in the circumstances – because the reports as I heard them were not any special surprise – was to support the commanding officer.”⁵²

So Admiral Barrie was defending the position of his commanding officer (as he understood it), while leaving it open to those above him in the chain of command to persuade him, with fresh evidence, that the initial call was wrong. Unbeknown to Barrie (for the reports indicating Banks’ considered view were not received until the afternoon of the day of his conversation with Ritchie), Banks did not continue to hold the view of the events of 7 October which Barrie understood him to hold. When those reports (i.e., the Silverstone e-mail, the chronology and the Banks Statement) were received, they were never drawn to Barrie’s attention.

39. In approaching the matter in this fashion, Admiral Barrie behaved in an absolutely proper and appropriate manner. There are three particular respects in which his approach was entirely correct. In the first place, he observed the important principle that “the first call is usually the best call.” Secondly, he recognized that reports from commanding officers in the field ought not lightly to be set aside. Thirdly, he recognized that the photographs were not the whole story and that the misattribution of the photographs did not conclusively establish that the “children overboard” incident did not happen. In other words, Admiral Barrie did not make the logical error (which others apparently did) of concluding that from the fact that a mistake had been made about the photographs – so that they were of no probative value – it followed that therefore the incident never occurred. Nevertheless, Admiral Barrie left it open to his subordinates to persuade him otherwise – but they never did.

40. It was in that frame of mind that Admiral Barrie advised the Minister on 17 October:

On 25 October, I went to East Timor for a short visit. On 29 October, I went to Singapore and Malaysia and then Hawaii before returning to Australia on 10 November. Prior to my departure, and possibly on 17 October, I had a conversation with the Minister in which I informed him that I had been told by the Chief of Navy and COMAST that there were doubts about whether children had ever been thrown over the side of SIEV 4. 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.⁵³

⁵² *Transcript of Evidence* p. 758

⁵³ *Transcript of Evidence* pp. 742-3

Under questioning from Senator Faulkner, Admiral Barrie elaborated:

Senator FAULKNER – Was the 17 October face to face discussion a photograph management issue, or an event management issue?

Adm. BARRIE – No, that was an event management issue. He just needed to know that these doubts had been raised and what I had done about them.

Senator FAULKNER - ... Would you accept that you were told on a number of occasions that children were not thrown overboard and that the photographs that had been published did not depict that event?

Adm. BARRIE – Yes.

Senator FAULKNER – In that circumstance, given that you had had that information – and those matters had been drawn to your attention in the way they were – do you think, beyond what you said to us a moment ago, that you should have taken other action before February to adequately inform government of what had occurred in this incident?

Adm. BARRIE – No, I would not say so. To go back to it, if I had directed Rear Admiral Ritchie to get to the bottom of the issue and make a positive determination one way or the other, in my view that issue would have been resolved within a few days and then I would have reported to government.⁵⁴

The matter was not raised again with Admiral Barrie prior to his departure overseas, either by the Minister, within the ADF, or by the Leader of the Opposition Mr. Beazley, to whom Admiral Barrie provided a number of defence briefings.⁵⁵

41. Admiral Barrie, in effect, told the Minister two things. In the first place, he informed him, as a matter of fact and as was the case, that doubts had been raised about the accuracy of the “children overboard” report. This was the first occasion upon which Admiral Barrie had broached the subject with the

⁵⁴ *Transcript of Evidence* p. 757

⁵⁵ *Transcript of Evidence* pp. 742-3

Minister since his conversation with Admiral Ritchie on 11 October. There is no suggestion that the Minister had received any earlier indication about the existence of doubts. Secondly, the CDF advised the Minister that, notwithstanding those doubts, he adhered to his initial advice, but that he had invited those who expressed the doubts to him to come forward with evidence demonstrating that the original version of events was inaccurate.

42. In those circumstances, it is difficult to see what else the Minister could have done other than accept the CDF's advice. He had no basis upon which to challenge it, nor had he the capacity to second-guess it. The CDF, not the Minister, is the commander of the Australian Defence Forces,⁵⁶ and it is the CDF, not the Minister, who has power to issue orders or directions to members of the ADF. The CDF, under s. 9 of the *Defence Act*, is constituted as the adviser to the Minister "on such matters relating to the command by the Chief of the Defence Force of the Defence Force". The Minister having received that advice, and having no basis to dispute it, was properly bound to accept it.

43. The matter did not resurface for some three weeks. Then, on 7 November *The Australian* published an article called into question the validity of the "children overboard" allegations, based upon interviews with PIIs now at Manus Island. The Acting CDF on that day was Air Marshal Houston (who had assumed the role the previous day). Houston, having seen *The Australian* report, raised the matter with Air Vice Marshal Titheridge, who told him about the video taken by the *Adelaide* EOTS operator. Houston inquired about the possibility of viewing the video, however it was held in Sydney and it was not possible to view it in Canberra. He was nevertheless told by Titheridge that the video did not show children being thrown into the water, and was "inconclusive":

The whole thrust of the conversation was what the video showed and what came out of that was that the video did not show that there was any evidence to support the fact that children had been thrown overboard. I think the word he used was that it was 'inconclusive' in terms of supporting the child overboard proposition.

Senator BRANDIS – "Inconclusive" means it is not conclusive one way or another, doesn't it?

Air Marshal HOUSTON – That was the word he used. I think the reason he used that word was that the video showed what happened down one side of the vessel and did not actually show what had happened on the other side of the vessel. I would assume that is why he came to the view of it being inconclusive.

⁵⁶ *Defence Act* 1903, s. 9

In fact, I think he actually said that. He said, “Therefore, it’s inconclusive.”⁵⁷

44. Houston then had conversations with Lt. Col Day (who was unable to provide him with any relevant information) and with Brigadier Gary Bornholt, the Military Adviser, Public Affairs and Corporate Communication of the ADF. It was Bornholt who brought to Houston’s attention a signal from the *Adelaide*, in the form of a chronology, dated 10 October. The chronology, which was a signal giving an abbreviated summary of the sequence of events against times, does not mention children in the water. As he read the message, it appeared to Houston that the Minister may not be aware of it.⁵⁸ Houston’s evidence was:

The military message, I believe, had not been seen by anybody in the chain of command in Canberra before I saw it. So essentially this was something no other CDF – acting CDF or permanent CDF – had seen previously. ... It was a message on 10 October from the *Adelaide*. It was addressed to the Maritime Commander, I believe. There were no Canberra addressees on the message. This is something that was provided to me by Brigadier Bornholt on the day in question.⁵⁹

45. Mr. Reith, apparently also having seen *The Australian*, was seeking urgent advice from Houston. They spoke by telephone. Air Marshal Houston’s account of the conversation is as follows:

There was obviously a considerable amount of confusion. I understood from my discussion with Air Vice Marshal Titheridge that Minister Reith was very anxious to talk to me to get my advice on this matter. So I phoned him and we had a chat. 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 can recall it, to describe the fact that on the second day there was a rescue operation when the vessel sank and that the photograph, from what I had just been advised, related to

⁵⁷ *Transcript of Evidence* p. 1060

⁵⁸ *Transcript of Evidence* p. 104

⁵⁹ *Foreign Affairs, Defence & Trade Estimates Committee Hansard* 20 February 2002, p. 106

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. I would be quick to add, however, that I did not see the video. I was going on advice that had been provided to me by Air Vice Marshal Titheridge and Brigadier Bornholt. As everybody would know, a short time later the video was released to the public that evening – it may well have been the next morning.⁶⁰

46. After Air Marshal Houston gave this evidence to the Defence Estimates Committee in February, Mr. Reith (by now, of course, a private citizen) issued a statement outlining his memory of the conversation. He said:

I can confirm that I did speak with Air Marshal Angus Houston on Wednesday 7 November 2001.

I had asked Air Marshal Houston contact me that day regarding reports that had appeared in that morning’s press.

...

My recollection of our conversation is that he had that morning examined some material in the Chief of the Defence Force’s office which had cause 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.

⁶⁰

Foreign Affairs, Defence & Trade Estimates Committee Hansard 20 February 2002 pp. 104-5

Although he had a report on the video, he had not seen the video. I immediately arranged for a person in my office to view the video. I was still under the impression that the video supported earlier advice and I 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.⁶¹

47. There are three points to be made about this conversation. The first is that the recollections of Air Marshal Houston and Mr. Reith are in all material respects consistent. Secondly, as Mr. Reith points out, other than what was said in relation to the video, Air Marshal Houston was telling Mr. Reith nothing that Admiral Barrie had not told him weeks earlier, on 17 October, i.e. that there were doubts about the accuracy of the initial "children overboard" report. Mr. Reith, who was undoubtedly aware that Air Marshal Houston had had no prior involvement in or familiarity with the issue, was surely obliged to discuss the matter with Admiral Barrie, upon whose advice he had been acting up to this point, before abandoning that advice on the say-so of a person who did not claim to know anything about the matter. Thirdly, Mr. Reith's reaction was revealing, in two ways. According to Air Marshal Houston, he was "surprised" – a reaction hardly consistent with an antecedent belief that the "children overboard" allegation was inaccurate. Even more revealingly, Mr. Reith's immediate response was to release the video (as was done). He had just been told that the video was "inconclusive" – i.e., that it provided no support for the view that children were thrown overboard. If Reith's motive was to perpetuate in the public mind a story which he believed to be false, that is the last thing he would have done. On the contrary, his decision to release the video, knowing that it did not assist the "children overboard" case (and, in the minds of some, went some way towards refuting it) is only consistent with a readiness to place information in the public arena whether or not it suited the Government's interests.

48. It is not in dispute that Mr. Reith spoke to the Prime Minister on the afternoon of November 7, to recommend the release of the video. Both parties to that conversation are in agreement that Mr. Reith did not discuss with the Prime Minister his conversation with Air Marshal Houston. Mr. Reith's reason for not doing so is perfectly understandable and proper:

⁶¹ Statement by Hon. Peter Reith 21 February 2002.

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.⁶²

Mr. Howard, in a *Four Corners* programme on 4 March 2002, when asked of his conversation with Mr. Reith on 7 November, said:

Well, I haven't had a discussion with Mr. Reith about his discussion with Air Marshal Houston because until the Air Marshal gave that evidence, I didn't know of that discussion.⁶³

The evidence of the only two participants in the conversation is consistent and unequivocal; there is not a syllable of evidence to suggest that the conversation was other than as the two participants remember it. Further, since we know from his statement that Mr. Reith was not prepared to accept Air Marshal Houston's interpretation of events, and so jettison Admiral Barrie's advice, at least until he had had the opportunity to speak with Admiral Barrie again, it is inherently implausible that Mr. Reith would have conveyed to the Prime Minister advice about which he was (to say the least) sceptical and which was at variance with the advice upon which he was relying.

49. Mr. Reith was not only acting reasonably in continuing to put his faith in Admiral Barrie's advice; he was also right to do so. Under questioning before the Select Committee, Air Marshal Houston conceded the tenuous nature of the information upon which he was relying. He had no personal familiarity with the matter. He had spoken to none of the witnesses (nor, indeed, to anyone in the chain of command).⁶⁴ His conclusions were based upon conversations with three people - Air Vice Marshal Titheridge, Lt. Col. Day and Brigadier Bornholt, a second-hand account of the video, and the "chronology document". Of the three people to whom he spoke, one (Titheridge) was still of the opinion that the initial report of "children overboard" was accurate (and was to remain of that view until 25 November⁶⁵), the second, Day, introduced him to "no relevant material fact",⁶⁶ while the third, Bornholt, was not a witness to any of these events, but did introduce him to the chronology.⁶⁷ The video was, as Houston concedes, inconclusive. Houston's entire advice appears to have been based upon the chronology, on the basis of a belief that "If a child had been in

⁶² *ibid* ABC Transcript, *Four Corners* 4 March 2002, p. 19
[www.abc.net.au/4corners/stories/s496427.htm]

⁶⁴ *Transcript of Evidence* pp. 1059-61

⁶⁵ *Transcript of Evidence* p. 684

⁶⁶ *Transcript of Evidence* p. 1061

⁶⁷ *Transcript of Evidence* p. 1062

the water, it would have been reported in the text of the message.”⁶⁸ Yet the chronology itself was equivocal on the issue of whether there were children overboard; it merely reported MOBs (i.e. manoverboards) which, Houston agreed, was a generic term equally apt to cover men, women and children.⁶⁹ As well, Houston appears to have made the logical error of assuming that, simply because the photographic evidence did not establish the accuracy of the initial report, they proved the negative.⁷⁰

50. When another piece of original evidence – the *Adelaide*’s boarding log – was produced to Air Marshal Houston, which contained an entry (“believed child last MOB”) providing some evidentiary support for the initial report that a child had indeed been thrown into the water, he conceded that, had he been aware of it on 7 November, his advice to the Minister would have been different:

Senator BRANDIS – I want you to answer this question. If you had been aware on 7 October [*sic.*] of this piece of information – that is, that the boarding log records at 0550 “believed child last MOB” – would you have advised the Minister that there was no child overboard?

...

Air Marshal HOUSTON – Of course what would have been required was a lot more questions. That would have been documentary evidence that a child perhaps had been in the water. If the captain had confirmed the veracity of that entry in the log and had put it in his summary, of course that would have been the documentary evidence that was required to support the fact that there were children in the water. But that was not here.

...

Senator BRANDIS – May I take it, then, that if the four-page signal upon which you did rely had included the words from the boarding log “0550 believed last child MOB”, you would not have given the advice to the Minister you did give?

Air Marshal HOUSTON – Not in relation to the first part of it, which was the child overboard.⁷¹

⁶⁸ *Transcript of Evidence* p. 1064

⁶⁹ *Transcript of Evidence* p. 1066

⁷⁰ *Transcript of Evidence* pp. 1068-9

⁷¹ *Transcript of Evidence* pp. 1075-6

That is not to say that Air Marshal Houston's advice was, in the end, wrong. But what it does demonstrate was the entire appropriateness of the Minister not abandoning the advice he had received from Admiral Barrie because of the views of another officer whose familiarity with the events was, at best, sketchy and incomplete, and who himself conceded that, had he been aware of other evidentiary material of which on 7 November he was unaware, he would not have given the advice in the first place.

51. In addition to the attacks by innuendo and surmise upon senior politicians and military officers, distinguished public servants also suffered from attempts by Labor senators to assert that in all the circumstances they not only failed in their duty to the Australian public but were complicit in so doing.

52. At Table 5.1 and Table 5.2 the Majority Report details occasions on which Defence notified the Minister for Defence or his staff about assertions relating to the correction of the initial report that children had been thrown overboard.

53. The Majority Report then outlines three other occasions on which Defence allegedly provided evidence relating to the correction of the initial children overboard report. Those stated occasions were:

- Group Captain Walker's advice to the People Smuggling Taskforce on 7 October 2001;
- Strategic Command's chronology of events supplied to the Social Policy Division in the Department of Prime Minister & Cabinet on 10 October 2001; and
- advice from Commanders King to the Defence, Intelligence and Security Branch, International Division, in the Department of Prime Minister & Cabinet on 11 October 2001.⁷²

54. The Majority Report notes that "To the Committee's knowledge, apart from this advice to the PST and to other areas of the Department of the Prime Minister & Cabinet, Defence provided advice relating to the correction of the initial children overboard report to *no other agency or individual*."⁷³

55. It is the contention of government senators that none of the "advice" to the PST and to PM&C warranted a correction by them to the initial advice from Defence that a child or children had been thrown overboard.

⁷² Majority Report, 5.61.

⁷³ Majority Report, 5.62 (emphasis added).

56. Group Captain Walker gave evidence that at the morning meeting of the PST on 7 October he could find no evidence in the written message traffic from defence sources that mentioned children. He told the Committee that he informed the PST's evening meeting on 7 October that he "had no written confirmation that children had gone into the water."⁷⁴

57. The claim is made in the Majority Report⁷⁵ that Ms Halton in particular, and the PST in general, should have been alerted by Captain Walker's observation to the possibility that children had not been thrown overboard from SIEV 4. A complete examination of the evidence, however, shows that this is not the case.

58. Ms Halton's evidence is clear. She told the committee that "... at no time was the PST or I told that children were not thrown over the side of SIEV 4 on 7 October or that the initial advice from Defence was wrong or in doubt."⁷⁶

59. Ms Halton told the Committee that she could not recall Group Captain Walker informing the evening meeting of the PST that he had been unable to find signal traffic to justify the claim made that morning that children had been thrown overboard. "However", Ms Halton said, "such a comment would not have raised particular concerns as our experience to date had been that signal traffic could often be slow in arriving."⁷⁷

60. Moreover, all members of the PST were able to contribute to an options paper that was prepared at the evening meeting of 7 October for the Prime Minister and the Minister for Defence. During an extensive editing process certain information was specifically caveated by Defence; for example, the number of people on board SIEV 4. By way of contrast, Ms Halton told the Committee, "The later statement – that passengers were 'jumping into the sea and passengers throwing their children into the sea' – was not."⁷⁸

61. The options paper was completed on the evening of the 7 October. It was the recollection of witnesses that Group Captain Walker stayed until the end of the discussion of the defence material but that, in any case, Air Vice Marshal Titheridge arrived part way through the meeting to assume responsibility for Defence input into the options paper. Air Vice Marshal Titheridge then stayed until the completion of the options paper and the conclusion of the meeting.

⁷⁴ *Transcript of Evidence* p. 1684.

⁷⁵ Majority Report, 5.69 – 5.82.

⁷⁶ *Transcript of Evidence* p. 900.

⁷⁷ *Transcript of Evidence* p. 901.

⁷⁸ *Transcript of Evidence* p. 901.

62. The critical issue was that Air Vice Marshal Titheridge cleared the options paper that was prepared for the Prime Minister and Minister for Defence. Ms Halton told the Committee that :

The task force member was Air Vice Marshal Titheridge. Air Vice Marshal Titheridge was the senior Defence person who cleared that paper line by line. Group Captain Walker was sitting in Titheridge's chair temporarily at the beginning of that meeting. He did not stay until the end of the meeting; he left before the close of the meeting. The paper was signed off by Air Vice Marshal Titheridge, who had been through it line by line.⁷⁹

63. In response to a question from Senator Faulkner suggesting that it was Ms Halton's responsibility to "... ensure that Air Vice Marshal Titheridge checked the basis of that information [ie relating to claims that children had been thrown overboard] before it was communicated to the Prime Minister",⁸⁰ Ms Halton replied that:

It was always the responsibility of each agency to reconcile its own views in bringing them to the task force. At the end of the day, it was for Air Vice Marshal Titheridge to be satisfied from a defence perspective the advice was correct. He – as you know, because the comment is not caveated – was clearly satisfied.⁸¹

64. In short, even if Group Captain Walker did flag concern that there was no signal traffic confirming that children had been thrown overboard there are two reasons why this does not compromise Ms Halton's claim that there were no doubts on the issue expressed by Defence. First, the experience of the PST was that signal traffic could often be slow in arriving. In a fast moving environment the lack of signal traffic confirming early reports would not have raised any particular concerns.

65. Secondly, and much more importantly, Air Vice Marshal Titheridge was the senior defence representative on the PST. He was the Head of Strategic Command and one of the nation's senior military officers. He cleared the options paper that was submitted to the Prime Minister and the Minister for Defence. While in editing the options paper Defence had tempered or qualified their advice in relation to certain facts, no such qualification or caveat had been sought by Air Vice Marshal Titheridge in relation to the observation in the options paper that children had been thrown overboard.

⁷⁹ *Transcript of Evidence* p. 2044.

⁸⁰ *Transcript of Evidence* p. 2045.

⁸¹ *Transcript of Evidence* p. 2045.

66. The second occasion when Defence provided advice relating to the correction of the initial children overboard report was when it provided a chronology of events of the SIEV 4 incident and its aftermath to the Social Policy Division of the Department of Prime Minister and Cabinet on 10 October.

67. Ms Halton and Ms Edwards sought the information from Defence either because there was no mention of children being thrown overboard in situation report 59 from the Department of Foreign Affairs and Trade on 8 October⁸² or because of continued media reporting about the issue.⁸³

68. Included at the conclusion of the chronology is a footnote which states that “There is no indication that children were thrown overboard. It is possible that this did occur in conjunction with other SUNCs jumping overboard.”⁸⁴ Much was made in the Majority Report about Ms Halton’s failure to act upon receipt of this information. Again, however, the facts belie a conspiracy.

69. Ms Halton stated that she had no memory of seeing the chronology. While Ms Edwards claimed that she did show Ms Halton the chronology, their differing recollections are not critical.⁸⁵ Just prior to the evening meeting of the PST (at the same time Ms Edwards claims that she showed Ms Halton the Chronology) Ms Halton was contacted by the Minister for Defence. Mr Reith explained to Ms Halton that there was other evidence verifying claims that a child or children had been thrown overboard. It consisted of photographs (which he had released that afternoon as evidence of children overboard), a video of the incident and statutory declarations from the crew.

70. Ms Halton explained to the Committee the content of the phone call from Mr Reith:

At the same time, or shortly thereafter in any event or almost contemporaneously, as that footnote – and it was only a footnote and it was not accompanied, as I have already told you, by a red light flashing and a warning bell problem type alert from anyone that I am aware in Defence – we are told about the photos which duly appear on the front page of I do not know how many newspapers the next morning. We were told there was a video. It was acknowledged it was grainy, but we were told there was a video, and we were told there were witness

⁸² *Transcript of Evidence* p. 1705 (per Ms Edwards).

⁸³ *Transcript of Evidence* p. 2061 (per Ms Halton).

⁸⁴ Enclosure to Bryant Report, attached to Statement by Ms Katrina Edwards.

⁸⁵ It certainly does not justify the imputation by Senator Collins that Ms Halton accused Ms Edwards of being a liar. See *Transcript of Evidence* p. 2054.

statements. At the end of the day, with reasonableness and the balance and the weight of the evidence ... we took the facts as we knew them to the evening meeting [of the PST of 10 October]. No-one then came back to us and said, 'You're wrong!' And, as I have said, that was the last time, to my knowledge, that it was discussed. ... We put the information in front of the evening meeting – that was fine – and then it moved on.⁸⁶

71. Ms Edwards clearly corroborates Ms Halton's understanding of those conversations. She (Ms Halton) was advised

that there was no doubt that the incident had occurred and that a video of the incident existed, although it was of poor quality, that there were photos and that statutory declarations were being gathered from crew members.⁸⁷

72. Moreover, Ms Halton checked this information with other sources including Air Vice Marshal Titheridge and members of Mr Reith's staff.⁸⁸

73. Put simply, both the advice she had received as well as the clear balance of the evidence indicated to Ms Halton that there was no reason to doubt the initial Defence reports that children had been thrown overboard from SIEV4. This belief was not unreasonable. Ms Halton had received direct advice from the Minister for Defence that there was clear and positive evidence supporting the claim.

74. In any case, as Ms Halton recalled, this "interpretation of the facts of the case was put in front of the evening meeting of the 10th. Those facts were not denied."⁸⁹ Following this meeting of the 10 October 2001 the evidence is that the children overboard issue was never raised again at PST meetings.⁹⁰ Neither Defence generally, nor Strategic Command specifically, ever supplied definitive advice to overturn the initial report that children had been thrown overboard.

75. The Majority Report implies, however, that the PST operated in conspiratorial mode. The majority asserts that there was doubt about the veracity of the children overboard evidence because of the failure to include any reference to it in the talking points for the PST meeting on the evening of 10 October which were derived from the Strategic Command chronology.

⁸⁶ *Transcript of Evidence*, CMI 953. See also *Transcript of Evidence*, CMI 957.

⁸⁷ *Transcript of Evidence* p. 1705

⁸⁸ Enclosure to Bryant Report, Statement by Ms Jane Halton.

⁸⁹ *Transcript of Evidence* p. 957

⁹⁰ *Transcript of Evidence* p. 953.

Same old tactic. The evidence does not suit the majority so the only explanation is a conspiracy – this time of silence.

76. The final piece of evidence raised before the Committee relating to advice from Defence to the Department of Prime Minister and Cabinet related to the misattribution of photographs taken from the sinking of SIEV 4 on 8 October.

77. On 11 October 2001, Commander Stefan King was advised in informal circumstances by Commander Piers Chatterton, Director of Operations, Navy that the photographs taken of SIEV 4 on 8 October and released by the Navy were being misattributed. The photos were being portrayed in the media as evidence of the report that children had been thrown overboard on 7 October, rather than as photos of the rescue of passengers from the ocean during the sinking of SIEV 4 on 8 October. Later on 11 October Commander King passed this advice to his immediate supervisor in PM&C's Defence, Intelligence and Security Branch, Ms Harinder Sidhu and together they informed their branch head, Dr Brendon Hammer.⁹¹

78. The Majority Report asks why this information was not acted upon by PM&C.⁹²

79. There are three reasons why this information was given little weight by PM&C and, in particular, Dr Hammer.

80. First, the “information” was presented to Dr Hammer by Commander King as a “rumour”.⁹³ The information regarding the photographs was sourced from a conversation that Commander King had overheard in the “margins of a meeting” between Defence officials regarding the SIEV 4 incident.⁹⁴

81. Secondly, as even the Majority Report concedes, this issue did not fall directly within Dr Hammer's area of responsibility and that he was extremely busy with other matters.⁹⁵ So when Dr Hammer was asked by Senator Faulkner why he did not pass on the information, Dr Hammer replied:

... because it was presented to me as a rumour from a relatively junior officer who was not, to my knowledge, involved in any way in illegal

⁹¹ *Transcript of Evidence* p. 1491.

⁹² Majority Report, 5.125 – 5.142..

⁹³ *Transcript of Evidence* p. 1806.

⁹⁴ *Transcript of Evidence* p. 1550.

⁹⁵ Majority Report, 5.136 and *Transcript of Evidence* p. 1809.

immigration and people smuggling issues and who had not been over in the Department of Defence to discuss that matter in any formal way with anyone over there.⁹⁶

82. Thirdly, Commander King was not a formal liaison officer with PM&C. Dr Hammer and Ms Sidhu described him as a ‘seconded’ to PM&C⁹⁷ and, according to Dr Hammer, “...a line member of my branch, very much like any other member of the branch.”⁹⁸ Commander King had no formal or special role as a conduit of information from Defence to PM&C.

83. Thus, if Commander King’s information had veracity, Dr Hammer expected that liaison between Defence and PM&C would have occurred at the high level IDC that had been specifically created to discuss and analyse these issues – the People Smuggling Task Force.⁹⁹ Put simply, if there was any truth to the rumour, senior defence representatives would know about it and would pass the information on to Ms Halton and the PST.

84. It is for these reasons that Dr Hammer did not pass the information on.¹⁰⁰

85. The Majority Report also seeks to make something out of the revelation that on 7 November Ms Sidhu casually mentioned to another PM&C officer, Ms Catherine Wildemuth, that there were rumours circulating in Defence that photographs taken of SIEV 4 had been misrepresented.¹⁰¹ Ms Wildemuth passed this information to her supervisor Ms Bryant, who then contacted Ms Halton. In turn, Ms Halton then immediately rang Mr Miles Jordana, Senior Adviser (International) to the Prime Minister.

86. The Majority Report seeks to blame Ms Halton for “Although she passed the information on to the Prime Minister’s office, she did not embark on her own investigation of the truth of this significant matter.”¹⁰² This is grossly unfair.

⁹⁶ *Transcript of Evidence* p. 1808.

⁹⁷ *Transcript of Evidence* pp. 1550, 1856.

⁹⁸ *Transcript of Evidence* pp. 1857 and 1806-7.

⁹⁹ *Transcript of Evidence* p. 1806.

¹⁰⁰ Mention should also be made of the raising of allegations by Labor senators that Dr Hammer had attempted to interfere with Commander King in his role as a witness before this Committee (see, *Transcript of Evidence* p. 1829 passim). Having investigated the matter, however, the Senate Committee on Privileges “accepted Dr Hammer’s denial of any attempt to influence Cmdr King.” See, Senate Committee of Privileges, *106th Report*, August 2002, 1.40.

¹⁰¹ Majority Report 5.132 – 5.134 and *Transcript of Evidence* pp. 1550 and 1563.

¹⁰² Majority Report 5.144.

87. Ms Halton did not believe that this “sixth or seventh hand gossip”¹⁰³ warranted further investigation for two reasons. First, having passed the information to Mr Jordana¹⁰⁴ she had “the clear impression that the matter was in hand. I had a clear impression that it was being dealt with and I did not have to worry about it.”¹⁰⁵ Secondly, “this gossip or allegation had clearly already been put to the responsible minister and the responsible minister’s spokesman had, as far as I read the report, denied it.”¹⁰⁶

88. As always throughout this matter, Ms Halton acted appropriately, exercised sound judgment, and advised government in accordance with the highest traditions of the public service. Throughout her testimony to the Committee Ms Halton repeatedly asserted that she was never informed that the initial advice from Defence that children had been thrown overboard was wrong.

89. All the instances described above were either unconfirmed utterances, minor details in a report immediately superseded by apparently authoritative advice, or rumour and gossip. No doubt from the perspective of Ms Halton, and others in the Australian Public Service, public policy should not be founded on such evidence. In every case Ms Halton had sound reasons for acting as she did.

90. In hindsight, as Ms Halton herself conceded, perhaps if she had been possessed of more information at the time she might have taken a different approach¹⁰⁷. In the circumstances of the hour, however, Ms Halton acted reasonably and conscientiously. Importantly, the PST under her chairmanship never inserted itself into the chain of command¹⁰⁸. The PST was a forum for the sharing of information and coordination of agency inputs and actions in support of the border protection strategy; it was not part of the military chain of command. It did not give orders. Neither Defence nor any other agency ever provided authoritative evidence to Ms Halton or the PST that the initial reports were incorrect. If Defence had doubts they were not communicated to Ms Halton and the PST.

¹⁰³ *Transcript of Evidence* p. 1025.

¹⁰⁴ Government senators note the criticism of Mr Jordana (and the Prime Minister) in paragraph 6.98 of the Majority Report in relation to his alleged doubts about the provenance of the photographs. Again, there is no evidence to support this contention.

¹⁰⁵ *Transcript of Evidence* p. 1023.

¹⁰⁶ *Transcript of Evidence* p. 1026.

¹⁰⁷ See, for example, *Transcript of Evidence* pp. 977, 1023, 1025.

¹⁰⁸ *Transcript of Evidence* p. 977.

III

CONCLUDING OBSERVATIONS

“There is no *a priori* reason to believe that the truth, when discovered, will prove to be interesting.”

*Sir Isaiah Berlin*¹

1. Conspiracy theories will always hold a morbid fascination for some. The truth is almost invariably more prosaic. The only reasonable conclusion which emerges from a dispassionate analysis of the SIEV 4 episode is that there was a communications failure within the military chain of command. The critical date was 11 October. By 10 October, Cmdr. Banks, having reviewed all of the available evidence and spoken to other members of the *Adelaide* crew, had arrived at the view that in all probability, no child had been thrown overboard from SIEV 4. We think that that conclusion was probably correct. He communicated that view through the chain of command. However, by the time his ultimate assessment of events reached those above him in the chain of command on the afternoon of 11 October, Rear Admiral Ritchie had already had the critical conversation with Admiral Barrie, from which both officers came away with somewhat different perceptions. From Barrie’s point of view, Ritchie was always welcome to come back to him with new information – to “fight a repechage”, as he put it – but, until new information was placed before him, he was not persuaded to depart from reliance upon the initial report. For reasons we have explained in Chapter II, in taking that position, we consider that Admiral Barrie acted entirely reasonably and appropriately. It is not to the point that, by this time, Commander Banks had changed his assessment – Barrie did not know that and, at the time of the critical conversation, neither, it seems, did Ritchie. Put simply, Barrie kept an open mind but was, at that point, unpersuaded.

2. Ritchie’s perception, however, was different: for him, after 11 October, the matter was a dead issue. He did not put further information before Admiral Barrie, and apparently did not consider the matter further. So it was with that state of mind that Barrie briefed Mr. Reith on 17 October; what he told Mr. Reith then was an accurate assessment of the position as he understood it to be. For reasons we have outlined, he was not only entitled to that assessment; it was (given the facts as he then knew them) the correct assessment. Mr. Reith was right to take his advice.

¹ *Personal Impressions* (Oxford University Press: 1979)

3. Equally, Mr. Reith was, in our view, also right not to change his position on the basis of the representations by Air Marshal Houston on 7 November – he was entitled to continue to rely upon the assessment of the CDF in view of the limited information available to Houston. At the very least, he should have waited – as he decided to wait – for Barrie’s return from overseas three days later before abandoning reliance upon his earlier advice.

4. In regard to the misattribution of the photographs, there is no doubt that an error was made. But it was not Mr. Reith’s error: on the afternoon the photographs were released, Admiral Barrie and Mr. Reith shared a belief that they referred to the “children overboard” incident. For the reasons we have explained, that belief was, in the circumstances as they understood them at the time, not only reasonable but natural. However, it is the case that Mr. Reith failed to correct the public record when, after the *7.30 Report* broadcast that evening, the error had been pointed out to him. Nevertheless, there is no reason to believe that Mr. Reith doubted the accuracy of the original report; on the contrary, all of the evidentiary indications are that he had no reason to doubt it – a view in which he was confirmed by Admiral Barrie 6 days later and which he continued to hold in good faith.

5. Mr. Reith’s good faith in the matter is most obviously demonstrated by his reaction to Air Marshal Houston’s advice to him that the video did not show children being thrown overboard (as Mr. Reith had believed). His immediate response was to order the release of the video – not the act of a man who was attempting to conceal inconvenient facts, but an act only explicable by a readiness to have the facts on the public record. Nor did the Committee hear any compelling evidence that Mr. Reith’s staff acted in any way other than honestly and in good faith. Finally, we heard not a syllable of evidence to suggest that the Prime Minister acted other than honestly and in good faith.

6. In relation to the senior public servants concerned, the position is best articulated by Ms. Jane Halton, her position was simple and credible. She never received any sufficient evidence from Defence to persuade her that the initial report that a child or children had been thrown overboard was wrong. She cannot be criticized for holding that view, nor can other senior public servants, including Dr. Hammer, who chose to disregard conjecture which barely rose above the level of gossip.

7. The Government Senators consider that the military officers and senior public servants concerned acted honestly and reasonably at all times. We regard the attacks upon their integrity, suggested in certain parts of the Majority Report, as contemptible.

8. Government Senators were little impressed by counsels of perfection from academics and armchair analysts, operating with the benefit of hindsight and free of the pressures of decision-making in a highly mobile environment in

which judgments must be made swiftly and on the best available information (which is sometimes imperfect and incomplete). Those considerations particularly apply in a military operational environment, such as the circumstances in which *Adelaide* was operating, where the situation was highly unstable and unpredictable, and where lives were at stake.

9. Indeed, it is notable that the only person with senior military experience whom the Labor Party could find to criticize the handling of the issue was the somewhat Gilbertian figure of Sir Richard Peek, a gentleman who, having begun his career in the Royal Australian Navy in 1928 during the Prime Ministership of Stanley Melbourne Bruce, and retired just on 30 years ago, could hardly be regarded as an authoritative commentator on contemporary military systems (and whose contempt for the entire notion of Parliamentary scrutiny of the military could not have been more obvious).

10. The most strident critics of the public servants concerned were the predictable parade of professors who, as is their wont, offered the Committee counsels of perfection which appeared to owe more to the ideals of Plato's *Republic* than to familiarity with the vicissitudes of public administration in the real world.

11. Amid all of these criticisms, it is not to be forgotten that from an operational point of view, the incident involving the HMAS *Adelaide* and SIEV 4 was an outstanding success: in extremely difficult circumstances – generated exclusively by those attempting to illegally enter Australia and ruthlessly using every conceivable technique of moral blackmail to do so – the officers and crew of *Adelaide* performed with superb professional competence and bravery, so that not a single life was lost.

12. From a policy point of view as well the outcome was successful: Australia's maritime borders were not breached, and Operation Relex and the Pacific Solution functioned to deter future incursions of those borders.

13. There is one other overwhelming consideration which must be borne in mind, but upon which we have not yet touched. The Committee was constantly reminded that the events with which we are concerned took place against the background of an election environment. That circumstance was undoubtedly uppermost in the minds of Senator Faulkner, Senator Cook and Senator Collins. But we very much doubt it was uppermost in the minds of Admiral Barrie or Air Marshal Houston or Rear Admiral Ritchie. What, we have no doubt, was uppermost in their minds was that these events were taking place not against the background of an election, but within less than a month of September 11, in the early stages of Australia's involvement in the global war against terrorism, and at a time when the demands upon the Australian Defence Force were higher than they had been for a generation – indeed, arguably, than at any time since the Second World War.

14. We doubt that the Australian people would be troubled to know that an issue which had a particular salience for Labor Party politicians was not regarded by those responsible for defending our country at a uniquely dangerous time as a high order priority. Indeed, the Government Senators find it reassuring to know that the senior ranks of the Australian Defence Forces were totally focussed on military matters rather than on a political *cause celebre*. The same observations also apply to the senior public service officers, including Ms. Halton and Dr. Hammer (who, it will be remembered, at this time had principal responsibility, within the Defence, Intelligence and Security Branch, International Division of the Department of the Prime Minister and Cabinet, for the war on terror).

15. Perhaps the last word should go to Admiral Barrie – a man who impressed Government Senators with his conscientiousness, frankness, and utter lack of cant – and whose overview of the situation he faced in October 2001 has a chilling prescience 12 months afterwards:

In October of last year, the Australian Defence Force was committed as never before to fulfilling its parliamentary and government charter to “defend Australia and its national interests”. We were barely three weeks out from the brutal images of aircraft smashing into the World Trade Centre in New York and we were about to join the launch of a dangerous mission to Afghanistan, Operation Enduring Freedom. In short, I was focused on the imminent war in Afghanistan and the urgent need to safeguard our homeland from a possible terrorist attack, the risk of which I considered real and unprecedented. ... [F]rankly, I had much bigger fish to be fried.²

² *Transcript of Evidence* pp. 740, 778

Appendix 1

The Pattern of Conduct

“Facts are stubborn things, and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.”

*John Adams*¹

Introduction

1.1 Twelve Suspected Illegal Entry Vessels (SIEVs) were intercepted by the RAN under the auspices of Operation Relex.² SIEV 1 arrived on 7 September 2001 and the last illegal entry vessel, SIEV 12, arrived on 16 December 2001.

1.2 SIEVs 5, 7, 11 and 12 were escorted back to Indonesia. SIEVs 4, 6 and 10 sank at some point during the interception or tow-back process. Their passengers were rescued, with the loss of two lives on SIEV 10, and transported in the first instance to Christmas Island.

1.3 Evidence to the Committee demonstrated a clear pattern of objectionable behaviour practised by those aboard the Suspected Illegal Entry Vessels. This conduct was calculated to achieve their objective of reaching Australian territory and also exert ‘moral blackmail’³ upon the defence force personnel attempting to thwart this objective.

1.4 This pattern of behaviour included acts and threats of self-harm and aggression, including threats to children, sabotage of vessels and of equipment, jumping overboard and the attempted creation of safety of life at sea situations.⁴

1.5 Examination of this pattern of conduct was important in the conduct of the Committee’s inquiry. It established the context or atmosphere in which Operation Relex and the events surrounding the interception of SIEV 4 were conducted. The Committee heard that even by the time of the interception of SIEV 4 a pattern of conduct among those on board SIEVs had emerged. For example, concern was expressed by both military and civilian participants that those on board SIEV 4 were wearing life jackets. As Ms Halton recalled:

¹ David McCullough, *John Adams* (New York: Simon & Schuster, 2001), p. 68

² In addition to the twelve numbered SIEVs, a small number of boats have attempted to land outside the designated area of Relex’s operation in the period since 3 September 2001. See Additional Information, Department of Defence, Talking points for Senate Legislation Committee Additional Estimates Hearing, February 2002.

³ *Transcript of Evidence*, CMI, 514.

⁴ *Transcript of Evidence*, CMI 68ff and passim.

...officials were expecting SIEV 4 unauthorised arrivals to be more difficult to handle than previous arrivals. The fact that passengers were wearing life jackets and had made attempts to disable their vessel was consistent with this.⁵

1.6 According to the evidence of Rear Admiral Smith:

Numerous instances of threatened or actual violent actions against Australian Defence Force personnel occurred, as well as various acts of threatened or actual self harm and the inciting of violence throughout Operation Relex. Australian Defence Force personnel had not previously encountered these circumstances during non-warlike operations. They were extremely hazardous and volatile situations. What was a law enforcement activity had real potential to rapidly escalate into a violent situation or just as quickly deteriorate into a major safety or preservation of life situation or, worse, both.⁶

1.7 Evidence was also presented to the Committee that the behaviour exhibited was an organised response by people smugglers which evolved over time. As Vice Admiral Shackleton put it:

It was our understanding that they were learning from each event that they interacted or experienced with us and that they were starting to understand our approach to how we operated. It would not be unreasonable to expect that they were trying to find ways to counter what we were doing. Hence we found, in this particular instance, SIEV4 was giving the appearance of being better prepared and more aggressive than the previous ones that we had dealt with.⁷

1.8 This chapter outlines the emergence of this pattern of behaviour, drawing mainly from written statements provided by the naval personnel involved in these operations. Evidence is presented in relation to incidents aboard ten of the twelve SIEVs, with multiple incidents reported for some boats. SIEV 4 is not addressed in this Chapter. No evidence is presented in relation to SIEV 10, which sank with the loss of two lives, as this matter is under consideration by the Western Australian coroner.

SIEV 1

1.9 The *Aceng*, which came to be designated as SIEV 1, was intercepted by the HMAS *Warramunga* on 7 September 2001 headed towards Ashmore Island. Warnings to the master of the vessel, delivered in English and Bahasa, not to enter Australian waters proved unsuccessful and the *Warramunga* inserted a boarding party

5 *Transcript of Evidence*, CMI 901.

6 *Transcript of Evidence*, CMI 448.

7 *Transcript of Evidence*, CMI, 61.

as the vessel crossed into the Australian Contiguous Zone. The boarding was to be the first of four.⁸

1.10 On the first two occasions the vessel was turned northwards back towards Indonesia, but reset a course for Ashmore Island once the boarding party was extracted. On the second occasion that the boat was turned back, the Master indicated that his life would be in jeopardy if he did not head for Australia.

When the Master realised that again he was heading North towards Indonesia he became nervous and after pointing to himself made slashing motions at his neck and said 'Indonesia'. The Master continued to plead with me to turn back to the South or he would be killed.⁹

1.11 On the third occasion that a boarding party was put aboard to direct the boat out of Australian waters, the behaviour of those on board became abusive, with threats of harm to the boarding party, smashing of windows in the wheelhouse, and objects thrown at the boarding party personnel.¹⁰ An assessment was made by the Boarding Office that medium to high force with possibly lethal force would be required to secure the *Aceng*¹¹, and the boarding party was withdrawn to avoid further conflict.

1.12 At first light on 8 September another boarding party embarked the vessel and all 237 passengers¹² were transferred to the HMAS *Manoora* without further incident. They were transported to Nauru for processing.

SIEV 2

1.13 Suspected Illegal Entry Vessel 2, carrying 130 mainly Afghani unauthorised arrivals, was located on or about 9 September 2001¹³ having already run aground on Ashmore Reef. The condition of the boat was so poor that those on board were transferred to SIEV 1, which had already been emptied but was anchored a short distance away.

8 *SIEV 01 Event Summary*, tabled 5 April 2002 by Rear Admiral Smith.

9 Sub Lieutenant Sojan, HMAS *Warramunga*, 'Statement in the Matter of Op Relex – SIEV 01, 9 April 2002', *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

10 *SIEV 01 Event Summary*.

11 Commander Menhinick, Commanding Officer HMAS *Warramunga*, 'Statement in the Matter of SIEV 01 (Aceng), 25 September 2001', *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

12 *Offshore Processing Arrangements*, Fact Sheet No76, Department of Immigration and Multicultural and Indigenous Affairs, 5 July 2002.

13 *SIEV 02 Event Summary*, tabled 5 April 2002 by Rear Admiral Smith, indicates that the vessel was located 10 September, however Lieutenant Commander Tziolis, Commanding Officer HMAS *Gawler*, 'Statement with Respect to Specific Issues Raised During Holding Operations of Unauthorised Arrivals from SIEV 02 Ratna Mujia from 9-12 September 2001', indicates that HMAS *Gawler* was already on site 9 September 2001.

1.14 On 9 September the crew from the HMAS *Gawler*, which was at that time the On Scene Commander, conducted a compliant search of the those now aboard SIEV 1 and located 15 blades of various sizes, and two ‘improvised nightsticks’¹⁴. A search of baggage brought the total number of knives recovered to approximately 30.¹⁵

1.15 On 10 September, in a discussion with naval personnel concerning their eventual destination, one of the English speaking passengers indicated that his people would ‘throw themselves overboard if they were taken back to Indonesia’.¹⁶ Access to an interpreter and a journalist was also requested at this time, but the passengers were advised that due to the remote location of Ashmore neither was available.¹⁷

1.16 By 12 September a group of 4 or 5 young men had become more agitated and made an undefined threat of suicide. They also indicated that they would not accept any more food and water.¹⁸

1.17 On 13 September, SIEV 1 and the refloated SIEV 2 were roped together to relieve cramped conditions on SIEV 1, and the situation calmed with no more incidents reported. The unauthorised arrivals were embarked aboard the HMAS *Tobruk* on 22 September for transport to Nauru.

SIEV 3

1.18 SIEV 3, the 40 metre wooden cargo vessel KM *Sumber Bahagia*, was intercepted by the HMAS *Warramunga* north of Australia’s Contiguous Zone on 11 September 2001.¹⁹ Once again warnings to the vessel not to enter Australian waters were ignored, and after entering the contiguous zone the vessel was boarded and returned to international waters. A head count at this time identified 115, all Iraqi, potential illegal immigrants aboard, including thirty children, and five Indonesian

14 Lieutenant Commander Tziolis, Commanding Officer HMAS *Gawler*, ‘Statement with Respect to Specific Issues Raised During Holding Operations of Unauthorised Arrivals from SIEV 02 Ratna Mujia from 9-12 September 2001’, 8 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

15 SIEV 02 Event Summary, tabled 5 April 2002 by Rear Admiral Smith.

16 Lieutenant Price, Executive Officer HMAS *Gawler*, ‘Statement with Respect to Specific Issues Raised During Holding Operations of Unauthorised Arrivals from SIEV 02 Ratna Mujia from 9-12 September 2001’, 9 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

17 Statement by Lieutenant Commander Tziolis.

18 Lieutenant Commander Moncrieff, Commanding Officer HMAS *Geelong*, ‘Statement in the Matter of Suspected Illegal Entry Vessel Number Two on 12 September 2001’, 9 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

19 *SIEV 03 Event Summary*, tabled 5 April 2002 by Rear Admiral Smith, indicates that the vessel was intercepted 12 September 2001, however Commander Menhinick, Commanding Officer HMAS *Warramunga*, ‘Statement in the Matter of SIEV 03 (KM SUMBER BAHAGIA), 25 September 2001’, states that contact was established 11 September.

crew. The boat was later determined to be carrying 129 potential illegal immigrants in total.²⁰

1.19 On extraction of the boarding party the SIEV turned south but appeared disoriented, on a course which would miss Ashmore Island but reach the Australian mainland in about 36 hours. Another Rigid Hulled Inflatable Boat (RHIB) was dispatched from the *Warramunga* to warn the vessel again against entering Australian territory, and advise that they should be headed north-west. This approach was greeted with assertions from passengers aboard the SIEV that the boat was 'broken', a charge contradicted by the master. The passengers also advised RHIB that they would not alter course as they wished to go to Australia.²¹ At this point a passenger from the SIEV climbed down its side and attempted to enter the RHIB.

1.20 Some hours later the erratic course of the SIEV raised concerns about the vessel being lost and the potential for a safety of life at sea (SOLAS) situation to develop. The *Warramunga*, which had been tracking the SIEV from beyond its visual range, then moved within sight of the boat and dispatched a RHIB with a marked chart which was provided to the master of the vessel. While a member of the party aboard the RHIB was explaining to the Master the course he had to steer, 'the Master gestured with his hand his throat being cut indicating that he was not safe'.²²

1.21 The SIEV responded to the provision of the chart by changing course for Ashmore Island, and was boarded. As embarkation of the boarding party commenced one woman 'was seen holding a child over the side and threatening to throw the child over the side'²³. The boarding party 'met with violence from the [potential illegal immigrants] and thus could not secure the wheelhouse'.²⁴ The boarding party disconnected the steering from the wheelhouse and commence to steer the boat from the aft on the weatherdeck. Witness statements report the passengers becoming very aggressive towards the boarding party on noticing the change of direction.

1.22 As the Executive officer of the HMAS *Warramunga* described the situation

Tension aboard the SIEV continued as the vessel tracked west with the male PII's [potential illegal immigrants] becoming very aggressive and surging as a mass towards the BP [boarding party]. The situation continued to worsen

20 Commander Menhinick, Commanding Officer HMAS *Warramunga*, 'Statement in the Matter of SIEV 03 (KM SUMBER BAHAGIA), 25 September 2001', *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

21 Able Seaman Dollisson, Electronic Warfare Linguist HMAS *Warramunga*, 'Statement in the Matter of SIEV 03 (KM SUMBER BAHAGIA), 25 September 2001', *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

22 Lieutenant Commander Gregg, Executive Officer HMAS *Warramunga*, 'Statement in the Matter of SIEV 03 (KM SUMBER BAHAGIA), 25 September 2001', *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

23 Statement by Lieutenant Commander Gregg, SIEV 03.

24 Statement by Commander Menhinick, SIEV 03.

with all male PIIs [potential illegal immigrants] starting to riot and threaten the BP [boarding party] as a mass. I assessed that the situation could not be controlled without the use of high force and possibly lethal force. Having two unarmed BP [boarding party] members (the doctor and the interpreter) and no sign of the situation de-escalating without casualties I informed the Commanding Officer that I was conducting an emergency extraction.²⁵

1.23 Shortly after the boarding party left, the SIEV made a hard turn towards the *Warramunga* and the Commander of the navy vessel was forced to use maximum engine power to avoid a collision.²⁶

1.24 From then on the SIEV ignores all warnings from the *Warramunga* that it was headed for the dangers of Ashmore Reef and refused to follow the navy vessel to the safety of Ashmore lagoon. When continuing negotiations failed, the Commander of the *Warramunga* became alarmed at the potential risk to those on board, with 54 children now known to be amongst the passengers.

There appeared to be no formal hierarchy amongst the PIIs [potential illegal immigrants] and shouting, confusion, anger and aggression was the norm. The final demand from them and the only consistent one in the end was for them to embark the WARRAMUNGA. At 2151 a SOLAS situation was imminent. It was dark night with no moon, the reef was 2.5nm ahead. There were 54 children onboard the SIEV with no lifejackets. At 2218 with the reef only 1nm ahead and impact in 10 minutes I was standing off with the WARRAMUNGA 1000 yards to the south for my own safety. In a last attempt to avoid a SOLAS incident and loss of life I agreed to embark the PIIs [potential illegal immigrants] for the night. The SIEV then turned south, missing the reef by less than 1 nm.²⁷

1.25 The deliberate creation of a potential safety of life at sea situation in order to be taken aboard navy vessels and avoid return to Indonesia has been noted as a common element of the pattern of behaviour by potential unauthorised boat arrivals thwarted in their attempts to reach Australian territory by Operation Relex.²⁸

1.26 After embarking the potential illegal immigrants the *Warramunga* escorted SIEV 3 to Ashmore Lagoon, disembarked the passengers back onto the SIEV the next day, and handed over to the HMAS *Geelong*. The potential illegal immigrants were later embarked on the HMAS *Tobruk* and taken to Nauru.

25 Statement by Lieutenant Commander Gregg, SIEV 03.

26 Statement by Commander Menhinick, SIEV 03.

27 Statement by Commander Menhinick, SIEV 03.

28 *Transcript of Evidence*, CMI, 448, 512ff.

SIEV 5

1.27 SIEV5 was intercepted in the vicinity of Ashmore Island on the morning of 12 October 2001. Warnings were passed to the vessel, but it continued into Australia's contiguous zone.²⁹

1.28 The SIEV was boarded and redirected to the north, but on extraction of the boarding party re-entered the contiguous zone. The vessel was escorted to the Ashmore Lagoon. The boat, with about 240 people onboard, remained in custody at the lagoon until 17 October when it was boarded by a party from the HMAS *Warramunga*, including an Army Transport Security Element, with the intention of returning it to Indonesia. Family groups were transferred to the *Warramunga* for the voyage to relieve crowding.³⁰

1.29 Difficulty was encountered in starting the SIEV's engine as the ignition key and fuel transfer pump had apparently been thrown overboard,³¹ later the cooling pump was found to be unserviceable, with sabotage suspected.

1.30 Although the passengers aboard the vessel remained calm for the duration of the return voyage, when the vessel was handed back to the Indonesian Master on 19 October, 19nm from the nearest Indonesian port, the situation aboard deteriorated.³²

1.31 According to evidence tabled by Rear Admiral Smith

[A] riot ensued with one group storming the engine room of the SIEV and disabled the engine. Another PII [potential illegal immigrant] lit a fire up forward and another slashed himself 3 times with a razor blade. Most aggressive PII [potential illegal immigrant] told the Boarding Officer that most would kill themselves if they were returned to ID [Indonesia].³³

1.32 Some of those previously taken to the *Warramunga* had to be forcibly returned to the SIEV. The boarding party and transport security element were extracted, and the SIEV was later observed to be underway and heading into Indonesian Territorial Sea,³⁴ indicating that the engine had been repaired.

SIEV 6

1.33 The HMAS *Arunta* intercepted SIEV 6 on 19 October north of Christmas Island. Warnings not to enter Australian territory were issued, and the Indonesian

29 *SIEV 05 Events Summary*, tabled 5 April 2002 by Rear Admiral Smith.

30 *SIEV 05 Events Summary*.

31 Lieutenant Commander Gregg, Executive Officer HMAS *Warramunga*, 'Statement in Matter of SIEV 05', 9 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

32 Statement by Commander Gregg, SIEV 05.

33 *SIEV 05 Events Summary*, tabled 5 April 2002 by Rear Admiral Smith

34 Statement by Lieutenant Commander Gregg, SIEV 05.

crew were reported as stating that their lives were under threat if the boat did not go to Australia.³⁵

1.34 The SIEV entered the Australian contiguous zone and was boarded without incident. It was escorted to Christmas Island and the custody of the potential illegal immigrants transferred to the AFP and AQIS.³⁶

1.35 A party from the HMAS *Warramunga* reboarded the SIEV on 22 October with the intention of returning it to Indonesia. Family groups and some others were embarked onto the *Warramunga* to relieve overcrowding on the SIEV.

1.36 Extensive sabotage of the SIEV's engineering plant was discovered, and efforts were made by *Warramunga* engineers to repair the boat. Those aboard the SIEV responded aggressively, starting fires, tearing up deckboards, attempting to kick out hull planks and ripping the bilge area apart. The situation was serious enough to cause the *Warramunga* to go to action stations in readiness for a potential safety of life at sea situation, and only resolved when the potential illegal immigrants were shown that they were being videotaped and told that their actions would not assist their case with the Australian government.³⁷

1.37 Repairs were effected by 28 October, and the SIEV was underway towards the Indonesian Territorial Sea. Eleven nautical miles north of Christmas Island problems developed with the bilge pumps, and a decision was made to transfer the passengers to the *Warramunga*. The SIEV could not be saved and was scuttled by the *Warramunga* on 29 October. The passengers were disembarked on Christmas Island on 30 October.

SIEV 7

1.38 SIEV 7 was notable as a child was dropped overboard by a woman aboard. Those on the vessel also seemed to be aware of the return of SIEV 5 to Indonesia, the first boat to be so returned.

1.39 The boat had been intercepted by the HMAS *Bunbury* in the vicinity of Ashmore Island on the morning of 22 October.³⁸ When a boarding party approached the vessel and attempted to give a 'Notice to Master and Crew' one man aboard the SIEV dived overboard. Another is reported to have held up a young girl and

35 *SIEV 06 Event Summary*, tabled 5 April 2002 by Rear Admiral Smith

36 *SIEV 06 Event Summary*.

37 Commander Menhinick, Commanding Officer HMAS *Warramunga*, 'Statement in Matter of SIEV 06, 30 October 2001', *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

38 *SIEV 07 Event Summary*, tabled 5 April 2002 by Rear Admiral Smith.

‘threatened to throw this child over the side of the vessel’.³⁹ The child appeared to be aged 4-5 years, and had a cast on one arm. She was noticeably distressed.⁴⁰

1.40 The SIEV was escorted to anchor in Ashmore Lagoon, where eight irate passengers created a disturbance and demanded to know their destination, apparently aware of the return to Indonesia of SIEV 5. On 24 October a further incident occurred, with fifteen people jumping into the water.

1.41 Two members of the boarding party have made sworn statements that a small child was held over the side by a woman passenger, then dropped into the water. The child was recovered by one of the male passengers already in the water, who bought the child back to the SIEV.⁴¹ All of those who entered the water were safely returned to the SIEV.

1.42 On 28 October HMAS *Arunta* arrived in Ashmore Lagoon and took control of the SIEV in preparation for its escort back to Indonesian waters.⁴² Around ninety passengers from the SIEV were embarked on the *Arunta* to make room for the steaming party and the Transport Security Element, and the voyage was calm until the passengers were advised that they were to be returned to Indonesia.

1.43 At this point:

Threats of self-harm and deliberate damage to the SIEV were made and attempted. Incidents included threats to jump overboard, threats to throw a child overboard, PIIs [potential illegal immigrants] actually jumping into the water, dousing themselves with fuel, damage to guy wires of SIEV mast, damage to railings, starting a fire in the hold, and splashing of fuel on deck. PIIs [potential illegal immigrants] broke through the SIEV’s engineering space bulkhead but were repelled by the TSE [Transport Security Element] using pepper spray.⁴³

1.44 After extraction of the boarding party SIEV 7 followed the *Arunta* for a period, then headed towards the Indonesian territorial sea.

39 Petty Officer Chief Bosun Smart, ‘Statement in the Matter of the Boarding of SIEV 7 on Oct 22 2001’, 10 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

40 HMAS *Bunbury* SIC ADA/LAB dated 200420Z Feb 02 ‘Request for Information – SIEV Incidents’, *Maritime Headquarters Minute, Request for Information – SIEV/SUNC Incidents*, 21 February 2002. This signal refers to the vessel as SIEV 06, however Rear Admiral Smith advised the Committee that it was SIEV 07, see *Transcript of Evidence*, CMI, 480.

41 Able Seaman Flenley, Electronics Technician HMAS *Bendigo*, and Able Seaman Levi, Bosuns Mate, HMAS *Bendigo*, ‘Service Police Statements in the Matter of the Boarding of the SIEV 07 on 22 October 2001’, 25 October 2001, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

42 *SIEV 07 Event Summary*.

43 *SIEV 07 Event Summary*, tabled by Rear Admiral Smith 5 April 2002.

SIEV 8

1.45 SIEV 8 was a boat of Vietnamese origin carrying 31 potential illegal immigrants, initially detected by a Coastwatch aircraft to the north-west of the Tiwi island group on 27 October 2001. HMAS *Wollongong* intercepted the vessel.⁴⁴

1.46 Initial boarding was uneventful, although the passengers became uncooperative when advised that they were to be escorted to Ashmore Island.

1.47 According to the Commanding Officer of the *Wollongong*

At approximately 1415, the [unauthorised arrivals] began staging passive protest by de-rigging their awning in the heat of the afternoon sun, sitting on the awning with children and refusing to allow holding party to re-rig the awning. Steaming party reported to me that [unauthorised arrivals] had become angry, were ripping clothes, shouting at the steaming party and gesticulating in a threatening manner.⁴⁵

1.48 The boarding party was able to determine that the agitation on the part of the passengers was caused by their belief that Ashmore was an Indonesian Island. Repeated assurances that it was Australian territory calmed the situation.

SIEV 9

1.49 SIEV 9, a 30-35 metre vessel of ferry-like appearance, was detected four miles inside the Australian Territorial Sea in the vicinity of Ashmore Island on 31 October, and issued a warning by HMAS *Bunbury*.⁴⁶

1.50 The *Bunbury* boarded the SIEV shortly afterwards, and determined that the fuel lines had recently been cut. A boarding party from the *Arunta* relieved the *Bunbury*, but was unsuccessful in repairing the engine.

1.51 On the morning of 31 October, a riot occurred during which the passengers attempted to kick out the sideboard panels of the vessel. At the same time, a man was observed leaning over the port guard rail with his arms extended holding an infant over the side of the vessel, apparently threatening to drop the child overboard.⁴⁷ The transport security element intervened and child was brought safely back onboard.

1.52 This was to be the first of several incidents upon SIEV 9 reported to involve threats to children, although witness statements in relation to the various incidents are

44 *SIEV 08 Event Summary*, tabled by Rear Admiral Smith 5 April 2002.

45 Lieutenant Commander Heron, Commanding Officer HMAS *Wollongong*, 'Statement in the matter of the Boarding of Suspected Illegal Immigrant Vessel (SIEV) No 8 on 27 October 2001', 9 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

46 *SIEV 09 Event Summary*, tabled by Rear Admiral Smith 5 April 2002.

47 LSCIS Pedersen, HMAS *Arunta*, 'Statement in the Matter of SIEV 09 Incident 2 – approx 1030 local 31 Oct01', 8 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

not always consistent as to the details of the events, as might be expected in the circumstances.

1.53 In the second of the reported incidents, later on 31 October, the same man who had earlier threatened to throw a child overboard was observed to be roughly holding a small infant, apparently threatening to throw it overboard and in a struggle with a woman who also had hold of part of the child.⁴⁸ Some witnesses report that the man held the child over the side of the SIEV before being restrained.⁴⁹

1.54 At the same time as the second incident, a report was made of an attempted strangulation of a child,⁵⁰ although a witness to this event described it as a ‘family domestic incident’, as a father prevented his daughter from joining in a riot by grabbing her near the throat region, pushing her to the ground and making her sit down.⁵¹

1.55 On 1 November, a riot broke out on the SIEV when an attempt was made to take it under tow. Five men jumped overboard, while a woman attempted to throw her young infant overboard, but was restrained.⁵²

1.56 In the final incident involving children, a passenger is reported to have threatened to throw a child overboard if not permitted to cook his own food.⁵³

1.57 Other incidents aboard SIEV 9 included a hunger strike, threats to boarding party members, and self harm. However it is the frequency and severity of incidents involving children which is notable in regard to this vessel. As summed up by the Commander of the Army contingent aboard SIEV 9 during its transit phase,

During the riots, self harm and threats to children became common place and were not seen to be out of the ordinary, almost a ‘modus operandi’.⁵⁴

1.58 SIEV 9 was eventually towed to Ashmore Lagoon. Once those aboard realised that the vessel would not be returned to Indonesia, ‘the level of tension and

48 ABEWL Newham, HMAS *Arunta*, ‘Statement in the Matter of SIEV 09 Incident 3 – approx 2000 local 31Oct01’, 8 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

49 Statement by 5803010 Lt Henry, 9 April 02, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

50 ABCIS Mc Queen, HMAS *Arunta*, ‘Statement in the matter of SIEV 9 Incident 3-2017 local 31Oct01’, 8 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

51 Statement by Lt Henry.

52 Rear Admiral Smith, *Maritime Headquarters Minute, Request for Information – SIEV/SUNC Incidents*, 21 February 2002.

53 ABCIS Bell, HMAS *Arunta*, ‘Statement in the matter of SIEV 9 Incident 5 -1739 local, 2Nov01’, 8 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

54 Statement by Lt Henry.

belligerence decreased significantly'.⁵⁵ The unauthorised arrivals were transferred to HMAS *Tobruk* on 9 November, and transported to Christmas Island.

SIEV 11

1.59 SIEV 11 was an 18 metre long shark boat with a crew of four Indonesians and carrying 18 potential illegal immigrants including fifteen adults, two teenagers and a baby⁵⁶.

1.60 The initial boarding by HMAS *Leeuwin* on 1 December was uneventful. The boat was taken in tow by HMAS *Wollongong* towards Ashmore Island while engine and steering defects were repaired, then commenced passage towards Indonesian waters. By 13 December the passengers had become agitated, asking for UN representation and expressing concern about returning to Indonesia. Some threatened self harm or to jump overboard,⁵⁷ but the boat was released without further incident off the Indonesian coast.

SIEV 12

1.61 SIEV 12 was intercepted by HMAS *Leeuwin* 30nm north-west of Ashmore Island on December 16, and boarded before sunrise on December 17.⁵⁸

1.62 The boarding initially proceeded calmly, before a group of young men started 'yelling and screaming and inciting others to resist us'.⁵⁹ According to one of the boarding party,

I saw several of the young males destroy the boom that was being used as a support for a tarpaulin on the foredeck of the SIEV. They then proceeded to tear apart the tarpaulin and they attempted to throw part of it over the side. I saw one of the [unauthorised arrivals] threaten two members of the boarding team with a piece of this boom. At the same time I saw flames coming from the fore part of the vessel. The ship's boarding party quickly extinguished the fire. I then saw several [unauthorised arrivals] dropping paper, cardboard and other items into the forward hold and noted they were attempting to ignite these items. I also saw several [unauthorised arrivals] freely jumping over the side of the SIEV whilst wearing lifejackets.⁶⁰

55 *SIEV 9 Event Summary*.

56 *SIEV 11 Event Summary*, tabled by Rear Admiral Smith 5 April 2002.

57 Lieutenant Mortimer, 'Statement in the Matter of SIEV 11', 10 April 2002, *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

58 *SIEV 12 Event Summary*, tabled by Rear Admiral Smith 5 April 2002.

59 Lieutenant Casey, 'Statement in the Matter of Boarding Party Operations SIEV 12', *Declassified Witness Statements for SIEVs 1-3 and 5-12*.

60 Statement by Lieutenant Casey.

1.63 Incidents upon the SIEV 12 during its escort back to Indonesian territorial waters included a report of children held over the side, two incidences of self harm, two occasions of sabotage of the vessel, lighting of fires on three occasions, and four incidences of jumping overboard.⁶¹

1.64 The vessel was successfully repaired and released near Indonesia on 20 December 2001.

61 *SIEV 12 Event Summary.*



AUSTRALIAN DEFENCE HEADQUARTERS
Strategic Command

MINUTE

ADHQ 2001/28064
HSC 0249/02

Minister

For Information:

CDF
CN

UNAUTHORISED ARRIVALS INFORMATION

Reference:

A. Telcon COS MINDEF/CN SEC 28 Feb 02

1. The information requested at Reference A is forwarded. The HSC point of contact is DGJOP Brigadier M. McNam tel 62650026.

A.W.TITHERIDGE

AVM
HSC

R5-B-42
Tel: (02) 6265 0088

01 Mar 02

Enclosures:

1. Unauthorised Arrivals Incident Information

UNAUTHORISED ARRIVALS INCIDENT INFORMATION

1. Information has been sought from all ships that have or are participating in operations in northern Australia in support of the whole of Government approach to deter unauthorised boat arrivals (UBAs) as follows:

- a. Firstly, any incident where a child has been actually **dropped or thrown** overboard from a SIEV or other vessels during both current illegal immigration (from TAMPA onwards) and any other dealings that the RAN has had with any Suspected Illegal Entry Vessels (SIEVs).
- b. Secondly, any incident where a child has been **threatened** repeat **threatened** to be dropped or thrown overboard from a SIEV or other vessels during both current illegal immigration (from TAMPA onwards) and any other dealings that the RAN has had with any SIEVs.

2. Details are reported in the following format:

- a. date and time of incident;
- b. advice whether dropped, thrown or threatened;
- c. SIEV number or vessel name;
- d. detail background information;
- e. advice whether statements were taken and where they are held; and
- f. advice whether there is digital imagery or videos of the incident.

3. Ships that have reported incidents in accordance with paragraph one are HMA Ships ADELAIDE, ARUNTA, WARRAMUNGA, LEEUWIN (HS WHITE), WOLLONGONG, BENDIGO, DUBBO, and BUNBURY. The remainder of ships have responded and have indicated that they have no record of incidents of this nature.

Annex:

A. Glossary of Acronyms

Enclosures:

1. HMAS ADELAIDE
2. HMAS ARUNTA
3. HMAS WARRAMUNGA
4. HMAS LEEUWIN
5. HMAS WOLLONGONG
6. HMAS BENDIGO
7. HMAS DUBBO
8. HMAS BUNBURY

GLOSSARY OF ACRONYMS

SIEV	-	Suspect Illegal Entry Vessel
SUNC	-	Suspect Unlawful Non Citizen
PII	-	Potential Illegal Immigrant
MHQ	-	Maritime Headquarters
CJTF 639	-	Commander Joint Task Force 639
HQNORCOM	-	Headquarters Northern Command
AFP	-	Australian Federal Police
ACV	-	Australian Customs Vessel
RHIB	-	Rigid Hulled Inflatable Boat
BP	-	Boarding Party
TSE	-	Transit Security Element (Army)
AI	-	Ashmore Island
PWT	-	Pre Work-up Training
STBD	-	Starboard
EOTS	-	Electro Optical Targeting System
SEPCOR	-	Separate Correspondence

HMAS ADELAIDE

HMAS ADELAIDE was involved in SIEV 04 in vicinity of Christmas Island 7-10 Oct 01. No child, repeat no child was actually ever dropped or thrown overboard.

A small child was threatened only, repeat threatened only, to be dropped or thrown overboard.

Summary details are:

- a. 7 Oct 01
- b. Child **held over the side**
- c. SIEV 04
- d. Timings are from ships log.

0502(G) - having been boarded, it was reported that some SUNC's were threatening to jump overboard from SIEV 04.

0508(G) - one SUNC jumped overboard and was recovered by ADELAIDE RHIB. (SITREP eight – HMAS ADELAIDE 062200z OCT 01 refers).

0543 (G) - 0609(G) 13 SUNC's then jumped overboard in several waves shortly after sunrise 7 Oct 01 (SITREP nine – HMAS ADELAIDE 062300z OCT 01 refers). Most wore lifejackets though some discarded these. All were recovered by ADELAIDE RHIB and all were returned to SIEV 04. One of the overboards was a young male, possibly a teenager, though opinion (not fact) on his actual age varied from 13-15 to 18 - 22. All were males.

Approx 0600(G) - During these man-overboard incidents a man took a child aged approx five (5) years and dressed her in a lifejacket. He then took her to the SIEV's STBD side (aft coach house/superstructure) and held her up and outboard over the guardrail. The RHIB was instructed to intervene. A verbal exchange with the RHIB crew, other SUNC's and the man took place, and the child was then taken back inboard by the man, subsequently assisted by the boarding party. It was assessed at the time that the man's intent was to throw the child overboard as the RHIB was initially not in place and secondly, the height from the coach house was too great to safely pass the child into the boat. The Boarding Party regained control of the situation and the child was taken below deck.

Approx 0739(G) - there was one more adult male overboard (total now 15) - he was subsequently recovered by the RHIB (ADELAIDE SITREP - Eleven 070030Z OCT 01 refers).

- e. ADELAIDE 101136z OCT 01 and 110455z OCT 01 refer in detail to the sequence of manoverboard events. 15 sworn eyewitness statements (passed by secure Email to CJTF 639 and MCAUST on 11 Oct 01) from the ship's company (as viewed from the ship, the RHIB and the SIEV) and a CO's sworn statement (HMAS ADELAIDE ADA/I3M 110330z OCT 01 refers) were provided. Throughout ADELAIDE had a full view of the SIEV's port side and aft from less than approximately 200 yards and the RHIB and boarding party had a close view of the STBD side. At no stage, repeat no

stage was a child recovered from the water. At no stage did the SUNC's subsequently report a missing child. After the subsequent rescue of the 223 SUNC's from the water on 10 Oct, the SUNC's confirmed no one, repeat no one was missing. There was no loss of life ever reported by the SUNC's.

- f. EOTS video footage and some digital stills exist as reported and passed SEPCOR. EOTS video shows a small child being held over ships side by an adult male. Digital stills are inconclusive but show people preparing to jump and subsequently no longer in view, heads bobbing in the water in the distance, and subsequently males/youths recovered into the RHIB. All video and a CD of the 412 stills are held at MHQ.

HMAS ARUNTA

Threats of Children being thrown overboard as follows.

Incident One

- a. 290511Z8Oct 01
- b. During disturbance in which two male adult PIIs **jumped** overboard, one male PII **threatened** to throw child overboard
- c. SIEV 07
- d. SIEV 07 to be escorted by ARUNTA from ASHMORE Island to Indonesian Territorial Waters. During the passage, several incidents occurred including attempts to set fire to vessel and attempts by PIIs to set fire to themselves, including dousing themselves with diesel fuel.
- e. Statements from members of the boarding party taken and held onboard ARUNTA.
- f. A video of this incident (not related to the incident of 24 Oct 01 in Ashmore Lagoon) is held by MCAUST.

Incident Two

- a. 310231Z0-310235Z4 Oct 01
- b. 1 x Male SUNC **threatened** to throw young infant overboard. Restrained by Army TSE personnel onboard SIEV.
- c. SIEV 09 - SINAE BONTANG III.
- d. ARUNTA, in company with BUNBURY and GLADSTONE, intercepted SIEV 09 in the vicinity of Ashmore Islands during the period 31 Oct – 4 Nov 01. SIEV 09 was a 30-35 metre wooden vessel of small ferry like appearance. Engine was damaged by PII/Crew prior BUNBURY BP insertion. ARUNTA boarding party and TSE inserted and conducted handover from BUNBURY. Attempts to rectify defect and re-start engines repeatedly caused tension amongst PIIs and led to a series of incidents where PII were restrained, adult PIIs jumped overboard and threatened to throw children overboard.
- e. Statements from members of the Boarding Party and Boarding Officer taken and held onboard ARUNTA.
- f. Unable to confirm Digital Imagery or Videos

Incident Three

- a. 311217Z5 Oct 01
- b. One PII **attempted** to throw a child overboard, as another PII **attempted to strangle** a child. PII's restrained children safe.
- c. SIEV 09 - SINAR BONTANG III
- d. ARUNTA, in company with BUNBURY and GLADSTONE, intercepted SIEV 09 in the vicinity of Ashmore Islands during the period 31 Oct – 4 Nov 01. SIEV 09 was a 30-35 metre wooden vessel of small ferry like appearance. Engine was damaged by PII/Crew prior BUNBURY BP insertion. ARUNTA boarding party and TSE inserted and conducted handover from BUNBURY. Attempts to rectify defect and re-start engines repeatedly caused tension amongst PII's and led to a series of incidents where PII were restrained, adult PII's jumped overboard and threatened to throw children overboard.
- e. Statements from members of the boarding party and boarding officer taken and held onboard ARUNTA
- f. Unable to confirm digital imagery or videos held

Incident Four

- a. 010851Z5 – 010855Z Nov 01
- b. During a disturbance onboard, 5 male PII's **jumped** overboard whilst 1 x female PII **threatened** to throw young infant overboard. Restrained by Army TSE Personnel onboard SIEV
- c. SIEV 09 – SINAR BONTANG III
- d. ARUNTA, in company with BUNBURY and GLADSTONE, intercepted SIEV 09 in the vicinity of Ashmore Islands during the period 31 Oct – 4 Nov 01. SIEV 09 was a 30-35 metre wooden vessel of small ferry like appearance. Engine was damaged by PII/Crew prior BUNBURY BP insertion. ARUNTA boarding party and TSE inserted and conducted handover from BUNBURY. Attempts to rectify defect and re-start engines repeatedly caused tension amongst PII's and led to a series of incidents where PII were restrained, adult PII's jumped overboard and threatened to throw children overboard.
- e. Statements from members of the boarding party and boarding officer taken and held onboard ARUNTA
- f. Unable to confirm digital imagery or videos

Incident Five

- a. 020739Z1 Nov 01
- b. PII **threatened** to throw children overboard if not permitted to cook own food.
- c. SIEV 09 – SINAR BONTANG III
- d. ARUNTA, in company with BUNBURY and GLADSTONE, intercepted SIEV 09 in the vicinity of Ashmore Islands during the period 31 Oct – 4 Nov 01. SIEV 09 was a 30-35 metre wooden vessel of small ferry like appearance. Engine was damaged by PII/Crew prior BUNBURY BP insertion. ARUNTA boarding party and TSE inserted and conducted handover from BUNBURY. Attempts to rectify defect and re-start engines repeatedly caused tension amongst PIIs and led to a series of incidents where PII were restrained, adult PIIs jumped overboard and threatened to throw children overboard.
- e. Statements from members of the boarding party and boarding officer taken and held onboard ARUNTA
- f. Unable to confirm digital imagery or videos.

Note: Regret inability to confirm status of imagery or video as all key ARUNTA Personnel AOD undertaking PWT. Will forward follow up signal ASAP.

HMAS WARRAMUNGA

During boarding operations in vicinity of Ashmore Island (AI) of SIEV 03 the boarding officer, LCDR Gregg, witnessed one young child (approx age 2-3 years) **being held outboard** by a female PII.

Details as follows:

- a. 12 Sep 01 at 1824(I/K)
- b. **Threatened**
- b. SIEV 03 (KM SUMBER BAHAGIA)
- c. Following is extract of statement by LCDR Gregg – Quote after conducting a visual search of both starboard and port sides of the vessel for any dangers I proceeded to request permission from the master to board KM SUMBER BAHAGIA in both English and Bahasa. Permission was received from the master at 1820 but the boarding area was dominated by male PII's. Negotiations between male PIIs and I were conducted to move them forward of the cargo hold on the weather deck. The majority complied with the request and embarkation of BP commenced at 1831. One female PII was seen **holding a child over the side and threatening to throw the child over the side**. On embarkation of the first element of the BP the remaining male PIIs in the embarkation area were physically moved forward with the other male PIIs. The second BP element embarked at 1823. At 1837, I detained the vessel KM BUMBER BAHAGIA in position 1232.7S-12306.5E, approximately 9nm inside the Australian contiguous zone, approximately 15nm South of Ashmore Island. The Master acknowledged the vessel was being detained in Bahasa. The Department of Immigration and Multicultural Affairs 'notice to master and crew' written in English and Bahasa was signed at 1920 Unquote.
- e. Statement by LCDR Gregg was taken and passed onto AFP Rep in Darwin as part of SIEV 03 evidence pack.
- g. Video or digital imagery was not taken.

HMAS LEEUWIN

- a. 162000Z DEC 01
- b. SIEV 12
- c. **Threatened**
- d. BP boarded SIEV 12 and SUNCs were initially calm. BP attempted to start SIEV engines without success. At this stage there was a sense of tension, then a report of smoke forward was reported. A group of young SUNCs were yelling and then more smoke occurred from an area where fuel drums were present. At the same time a fire was lit aft. At this time the Quick Reaction Party were transferred to the SIEV to assist the BP. Also, at this time SUNCs were threatening to throw children over the side. These threats were intimidated by taking children to side of SIEV and demonstrating intent to drop children into the sea.
- e. No statements held.
- f. No digital imagery or vidoes held of this incident.

HMAS WOLLONGONG

- a. 081650 (I/K Nov 01)
- b. **Not observed**
- b. SIEV 10 – SUMBER LESTARI
- d. As a result of the torching and subsequent sinking of SIEV 10 by PII's, **33 children** under the age of 12 were **recovered from the water** by WOLLONGONG and ACV ARNHEM BAY crew. During the incident, PII's were abandoning ship en masse. Some children were observed being **held by adults as they entered the water**. The method of entry into the water by the remaining children cannot be determined. Members of WOLLONGONG Boarding party do not recall any person physically dropping or throwing a child overboard. Worthy to note that WOLLONGONG and ARNHEM BAY recovered several children without parents in attendance and conducted boat transfers between the vessels for family reunification purposes.
- e. Statements recorded by CO, NO, all members of boarding party, SMET Team, and boat crews. Copies held by CO WOLLONGONG, HQNORCOM J06 and AFP.
- f. No digital imagery or video of the incident exists, however still images and negatives of general SOLAS incident are held by CO WOLLONGONG.

HMAS BENDIGO

- a. 24 Oct 01 1000 I/K (0030Z)
- b. Child approximately three years old was **dangled** over side by the arm and then **dropped** into water.
- c. SIEV 07
- d. BENDIGO had relieved WHYALLA at Ashmore at 232300z and assumed custody of SIEV 07. About one hour after WHYALLA departure approximately fifteen PII's jumped overboard and started swimming away from SIEV 07. Majority of swimmers were wearing life jackets. Three RHIBS were in the water trying to recover swimmers (one from BENDIGO and two from ACV ROEBUCK BAY). Remaining PIIs in SIEV 07 gathered on STBD side of vessel yelling and screaming at men in water. One female PII **dangled a young child over the side by its arm**. Other women in the area were yelling and screaming and the child was screaming. The woman then **dropped** the child into the water. One of the male PIIs in the water swam to the child and recovered it holding it out of the water on his chest. He then returned to SIEV 07 with the child and was assisted by other PIIs to recover himself and the child from the water.
- e. Two statements taken from ABETW Flenley and ABBM Levi. The only two members of boarding party who witnessed entire incident. Other members sighted child in water but did not witness female dropping child. Statements passed to and held by CJTF 639 staff at HQNORCOM.
- f. Nil digital or video imagery of incident.

HMAS DUBBO

- a. 011200Z NOV 99
- b. **Holding children over the vessels side** as BP approached. Not clear to BP whether this was undertaken in a threatening manner or to merely indicate that children were on board SIEV
- c. HARAP AN SATU
- d. DUBBO conducting operations in vicinity of Ashmore Reef investigating and subsequently boarding possible SIEV. After boarding vessel was directed to anchor at AI as propulsion plant had been sabotaged. Once vessel was at anchor a processing and medical team was despatched and passports were found to have been thrown overboard.
- e. Statements were taken, whereabouts unknown (unsigned copy of CO statement held in DUBBO but does not mention incident) members of BP in North Australian Area are POB Watkins (COMAUSNAVPBGRP) and AB Twine (DUBBO)
- f. No imagery

HMAS BUNBURY

HMAS BUNBURY has not observed any children being thrown overboard however during SIEV 06 operations the ship's boat crew and BP observed one child being **threatened**.

- a. 220814(I/K) 7 Oct 01
- b. **Threatened.**
- c. SIEV 06
- d. As BUNBURY Boarding Party closed to board SIEV 06 the boats crew and several members of the Boarding Party observed a large male standing atop the vessel's coachhouse. He picked up a young girl (aged 4-5 years) by one leg and **held her over the STBD side of the vessel** and started yelling. The young girl appeared very distressed. All observers noted that she had a cast on her left arm. As this occurred BUNBURY's CBM started removing his webbing in order to enter the water after the girl. The RHIB was ordered to board the vessel shortly afterwards and as they moved in the man released the child. It was estimated that the child was upside down for approximately 15-20 sec.
- d. Nil statements held.
- e. Nil Imagery

Note: Incident was noted in the Ship's Boarding Log in the handwriting of the previous CO (LCDR Michelle Miller). It is not known whether she observed the incident or noted it in the Log after the BP reported it.

SIEV EVENT	SUNCs/PIIs	DATES	HMAShip/s	Outcome	CHILD THROWN/ DROPPED O/B		THREAT TO CHILD	THREATENING or OFFENSIVE BEHAVIOUR	THREAT OF SUICIDE/ SELF HARM	SABOTAGE / FIRE	SUNC/PII O/B		HUNGER STRIKE	OTHER INCIDENTS
					Actual	Threat					Actual	Threat		
01	228 (51 F/90 Ch)	7-8 Sep	W'MUNGA	Intercepted ivo AI & transferred to MANOORA				X ¹	X ²					Threatened to run aground at AI ³
Tampa & 01 Transport	663	3 Sep – 2 Oct	MANOORA	PII disembarked at Nauru				X ⁴⁵ (4-Offensive Gesturing; 5- Excrement throwing & Spitting)	X ⁶				X ⁷	Refusal to embark from TAMPA (3) ⁸ Hurling Rubbish as MAN approached at AI ⁹ Refusal to accept medical attention, follow directions, or register with IOM ¹⁰ , Refusal to disembark at Nauru. Sit-in demonstration ¹¹ Weapons confiscated ¹² Scuffle/Altercation ¹³
02	132 (25 F/12 Ch)	10-22 Sep	NEWCASTLE GAWLER	Intercepted aground ivo AI; held in custody in 01 at AI Lagoon then transferred to TOBRUK					X ¹⁴			X ¹⁵	X ¹⁶	Weapons (knives, machete) discovered ¹⁷ Scabies Outbreak ¹⁸
03	129 (28 F/54 Ch)	12-22 Sep	W'MUNGA GEELONG	Intercepted ivo AI; held in custody in 03 at AI Lagoon then transferred to TOBRUK		X ¹⁹		X ²⁰	X ²¹					Threatened to run aground at AI ²²

¹ SIEV 01 Folder – Serials 01, 55, 62, 65, 85

² SIEV 01 Folder – Serial 62

³ SIEV 01 Folder – Serial 62

⁴ MAN Folder - Serial 97

⁵ MAN Folder - Serial 35

⁶ MAN Folder - Serial 37 & 50 (Threats)

⁷ MAN Folder - Serial 36 & 37

⁸ MAN Folder - Serial 7

⁹ MAN Folder - Serial 25

¹⁰ MAN Folder - Serial 34

¹¹ MAN Folder - Serial 41

¹² MAN Folder - Serial 86 & 109

¹³ MAN Folder - Serial 34

¹⁴ SIEV 02 Folder – Serial 30

¹⁵ SIEV 02 Folder – Serial 22

¹⁶ SIEV 02 Folder – Serial 30

¹⁷ SIEV 02 Folder – Serial 06

¹⁸ SIEV 02 Folder – Serial 47

¹⁹ SIEV 03 Folder – Serial 109

²⁰ SIEV 03 Folder – Serials 64, 76

²¹ SIEV 03 Folder – Serial 73

²² SIEV 03 Folder – Serial 81

SIEV EVENT	SUNCs/PIIs	DATES	HMAShip/s	Outcome	CHILD THROWN/ DROPPED O/B		THREAT TO CHILD	THREATENING or OFFENSIVE BEHAVIOUR	THREAT OF SUICIDE/ SELF HARM	SABOTAGE / FIRE	SUNC/PII O/B		HUNGER STRIKE	OTHER INCIDENTS
					Actual	Threat					Actual	Threat		
02 & 03 Transport	262 1 Birth	22 Sep – 15 Oct	TOBRUK	PII disembarked at Nauru				X	X ²³		X ²⁴		X ²⁵	Knives/Machete found. Refusal of Medical Treatment ²⁶ Inter racial fracas ²⁷
04	223 (60 F/56 Ch)	6-10 Oct	ADELAIDE	SIEV foundered under tow; PIIs rescued and disembarked at CI		X ²⁸		X	X	X ²⁹	X ³⁰	X ³¹		
05	238 (28 F/29 Ch)	12-19 Oct	W'MUNGA WHYALLA T'VILLE	Intercepted ivo AI and escorted to AI Lagoon to remain in custody before being removed to the ID TS				X ³²	X ³³	X ³⁴				Rioting ³⁵ SW Radio Confiscated ³⁶ Infant Birth prior to WARR interception ³⁷ Infant Birth prior to WARR interception ³⁸
06	227	19-30 Oct	ARUNTA W'MUNGA	Intercepted ivo CI and held in custody by AFP/AQIS. Attempt made to escort to the ID TS but vessel foundered; PIIs returned to CI.		X		X ³⁹		X ⁴⁰				Riot ⁴¹
07	88 (27 F/33 Ch)	22-29 Oct	BUNBURY ARUNTA BENDIGO	Intercepted ivo AI and taken to AI Lagoon to be held in custody; escorted to ID TS ivo Pepella.	X ⁴²	X ⁴³		X ⁴⁴	X ⁴⁵	X ⁴⁶	X ⁴⁷	X ⁴⁸		Anchor Rope slipped in AI Lagoon ⁴⁹ Attempt to overpower TSE (Pepper Spray required) ⁵⁰

²³ TOB Folder - Serial 33 (Threat), Serial 51 (Actual) & 62 (Actual)

²⁴ TOB Folder - Serial 47

²⁵ TOB Folder - Serial 45

²⁶ TOB Folder - Serial 45

²⁷ TOB Folder - Serial 47

²⁸ SIEV 04 Folder – Folios B16, B18, B24

²⁹ SIEV 04 Folder – Folio B31

³⁰ SIEV 04 Folder – Folio B15, B16, B19, D2

³¹ SIEV 04 Folder – Folio B15

³² SIEV 05 Folder – Serials 83, 99

³³ SIEV 05 Folder – Serials 85, 90

³⁴ SIEV 05 Folder – Serials 59, 82, 89

³⁵ SIEV 05 Folder – Serial 83

³⁶ SIEV 05 Folder – Serial 40

³⁷ SIEV 05 Folder – Serial 16

³⁸ SIEV 05 Folder – Serial 21

³⁹ SIEV 06 Folder – Serial 20

⁴⁰ SIEV 06 Folder – Serials 27, 28, 30, 31, 36, 37, 50, 53

⁴¹ SIEV 06 Folder – Serial 36

⁴² SIEV 07 Folder – Serial 13

SIEV EVENT	SUNCs/PIIs	DATES	HMAShip/s	Outcome	CHILD THROWN/ DROPPED O/B		THREAT TO CHILD	THREATENING or OFFENSIVE BEHAVIOUR	THREAT OF SUICIDE/ SELF HARM	SABOTAGE / FIRE	SUNC/PII O/B		HUNGER STRIKE	OTHER INCIDENTS
					Actual	Threat					Actual	Threat		
08	31 (5 F/4 Ch)	28 Oct – 10 Nov	W’GONG	Intercepted NW of Bathurst Is and escorted to AI and held in custody; transferred to TOBRUK.										Agitation ⁵¹
09	152 (30 F/45 Ch)	31 Oct – 10 Nov	ARUNTA BUNBURY GLADSTONE	Intercepted ivo AI and towed to AI Lagoon and held in custody; transferred to TOBRUK.		X ⁵²	X ⁵³ (Strangulation)	X ⁵⁴	X ⁵⁵	X ⁵⁶	X ⁵⁷	X ⁵⁸	X ⁵⁹	
10	164 (21 F/33 Ch) 2 F Deceased	8 Nov	W’GONG	Intercepted ivo AI but when boarded vessel on fire and sinking. SOLAS situation ensued, however, two (2) F PII drowned. Survivors and deceased transported to AI Lagoon for embarkation in TOBRUK.						X ⁶⁰	X ⁶¹			Two deaths by drowning following fire/founding of SIEV ⁶²
08, 09, 10 Transport	338	10-14 Nov	TOBRUK	PII disembarked at CI										One recalcitrant PII monitored closely during embarkation/transit.
11	14 (3 Ch)	11-13 Dec	LEEUWIN	Intercepted ivo AI and escorted to ID TS ivo Roti					X ₆₃			X ⁶⁴		

⁴³ SIEV 07 Folder – Serial 13

⁴⁴ SIEV 07 Folder – Serial 06

⁴⁵ SIEV 07 Folder – Serial 64

⁴⁶ SIEV 07 Folder – Serials 66, 67, 70

⁴⁷ SIEV 07 Folder -Serials 13, 66, 71

⁴⁸ SIEV07 Folder – Serial 66

⁴⁹ SIEV 07 Folder – Serial 14

⁵⁰ SIEV07 Folder – Serial 85

⁵¹ SIEV 08 Folder – Serials 32, 36

⁵² SIEV 09A Folder – Serials 26, 48, 77

⁵³ SIEV 09A Folder – Serial 26

⁵⁴ SIEV 09A Folder – Serials 08, 48

⁵⁵ SIEV 09A Folder – Serial 92

⁵⁶ SIEV 09A Folder – Serials 03, 13

⁵⁷ SIEV 09A Folder – Serial 48

⁵⁸ SIEV 09A Folder – Serials 25, 62

⁵⁹ SIEV 09A Folder – Serials 20, 62

⁶⁰ SIEV 10 Folder – Serials 07, 08

⁶¹ SIEV 10 Folder – Serial 08

⁶² SIEV 10 Folder – Serials 17, 28, 29

⁶³ SIEV 11 Folder –Serial 59

⁶⁴ SIEV 11 Folder –Serial 59

SIEV EVENT	SUNCs/PIIs	DATES	HMAShip/s	Outcome	CHILD THROWN/ DROPPED O/B		THREAT TO CHILD	THREATENING or OFFENSIVE BEHAVIOUR	THREAT OF SUICIDE/ SELF HARM	SABOTAGE / FIRE	SUNC/PII O/B		HUNGER STRIKE	OTHER INCIDENTS
					Actual	Threat					Actual	Threat		
12	162	16-20 Dec	LEEUWIN	Intercepted ivo AI and escorted to ID TS ivo Roti		X ⁶⁵		X ⁶⁶	X ⁶⁷	X ⁶⁸	X ⁶⁹	X ⁷⁰		

⁶⁵ SIEV 12 Folder – Serial 11

⁶⁶ SIEV 12 Folder – Serials 11, 20

⁶⁷ SIEV 12 Folder – Serials 16, 18, 26

⁶⁸ SIEV 12 Folder – Serials 10,15, 28, 42

⁶⁹ SIEV 12 Folder – Serials 12, 17, 39

⁷⁰ SIEV 12 Folder – Serial 14