

Chapter 3

The Scafton Evidence: Conversations with the Prime Minister

3.1 The Select Committee on a Certain Maritime Incident (CMI) was unable to make a finding on what the Prime Minister or other ministers were told about the children overboard claims. A Cabinet directive ordering ministerial staff not to give evidence meant that key witnesses, who were privy to crucial information, were prevented from telling the CMI Committee what they knew. The CMI Committee found its inquiry had been 'significantly hampered' by Mr Scafton's refusal to testify before it.¹ This is what makes Mr Scafton's new evidence so important.

3.2 Mr Scafton was a ministerial adviser to then Defence Minister Peter Reith at the time of the 'children overboard' affair. In this role, he was privy to conversations between Mr Reith, his advisers and the Prime Minister about the children overboard story and the evidence used to substantiate it. Crucially, he had a number of conversations with the Prime Minister before the National Press Club function on 8 November 2001 at which the Prime Minister contended that the original advice that children had been thrown overboard had never been contradicted. Although the CMI Committee knew these conversations had taken place, it was not able to take evidence on what was said. It simply found it 'difficult to believe' that it had taken two separate conversations for Mr Scafton to convey to the Prime Minister that the video was 'inconclusive'.² What Mr Scafton has now put on the public record, albeit belatedly, about what he told the Prime Minister during those conversations has, in a sense, filled some of the gaps in the jigsaw puzzle carefully pieced together by the CMI inquiry.

3.3 This chapter focuses on the key part of Mr Scafton's new evidence, namely the content of his conversations with the Prime Minister on 7 November 2001. First, it sets out Mr Scafton's claims of what he told the Prime Minister during those conversations, both in *The Australian* newspaper and in evidence before this Committee. Second, it looks at the implications of Mr Scafton's claims for the veracity of some of the Prime Minister's subsequent statements in the media and in Parliament about what advice he received on 'children overboard'. Third, in light of the continued denial of Mr Scafton's version of events by the Prime Minister, it looks at the credibility of Mr Scafton's evidence. Other issues brought to light during Mr Scafton's appearance before this Committee are addressed in the next chapter.

1 Select Committee on a Certain Maritime Incident, *Report* (CMI Report), p.123

2 CMI Report, p.124

Mr Scafton's letter to *The Australian*

3.4 On 16 August 2004, *The Australian* newspaper published an open letter from Mr Mike Scafton. In that letter, Mr Scafton stated that he talked to the Prime Minister by his mobile phone on 3 occasions on the night of 7 November 2001. In the course of those phone calls, he told the Prime Minister that:

- a) the tape was at best inconclusive as to whether there were any children in the water but certainly didn't support the proposition that the event had occurred;
- b) that the photographs that had been released in early October were definitely of the sinking of the refugee boat on October 8 and not of any children being thrown into the water; and
- c) that no one in defence that [he] dealt with on the matter still believed any children were thrown overboard.³

3.5 Mr Scafton's letter also said that during the last conversation the Prime Minister had asked how it was that an ONA report confirmed the children overboard incident. Mr Scafton replied that he had gained the impression that the report had as its source the public statements of the then Minister for Immigration, Philip Ruddock. When the Prime Minister queried how this could be, Mr Scafton suggested that question was best directed to the head of ONA, Mr Kim Jones.

3.6 As soon as this letter was published, the Prime Minister issued a press release stating:

It is a matter of public record that I did speak to Mr Mike Scafton on the night of Wednesday 7 November 2001. I told the House of Representatives of this in answer to a question on 19 February 2002, some 2½ years ago. I said in that answer that I had spoken to Mr Scafton entirely about the video. This was reported in the media the following day.

My sole purpose in ringing him on 7 November 2001 was to obtain his assessment of the video which he had just viewed. He gave me a description of the video and expressed the view that it was inconclusive.

I decided that the video should be released. This occurred the next day.

My answer to the House was given more than 2½ years ago. It has not been disputed by Mr Scafton until now. I have been informed that Mr Scafton left the employ of the Public Service on 13 December 2003 ie. nine months ago.

It is also particularly relevant that on 14 December 2001, in an interview with Ms Jenny Bryant of the Department of Prime Minister and Cabinet, who had been appointed to conduct a departmental inquiry into the matter at my request, 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".

3 Mike Scafton, Letter to *The Australian*, 16 August 2004

That was the only reference he made in the interview to his discussions with me on 7 November. He did not refer to the matters mentioned under (b) and (c) in his letter to The Australian newspaper published today viz that the photographs had been of events on 8 October and that nobody in Defence believed any longer that children had been thrown overboard.

In a follow up question the Bryant Inquiry asked Mr Scafton: "Do you recall being advised at any stage that there were no children among those in the water on the 7 October?" To this question Mr Scafton replied "No".

A record of the interview of 14 December 2001 was signed by Mr Scafton on 3 January 2002. His response to the above additional question as well as some other specific questions was also signed on 3 January 2002.

Both of the documents signed by Mr Scafton were made available to the Senate Inquiry. These documents are attached.

I stand by the previous statements I have made on this matter.⁴

3.7 Mr Scafton's letter to *The Australian* created significant media interest for two reasons. First, his account added substantial extra weight to the CMI inquiry's original findings. Second, his account implies that the Prime Minister was directly told of doubts about the 'children overboard' story, and misled the Australian people about it on the eve of the 2001 federal election.

The Prime Minister's public statements on 8 – 9 November 2001

3.8 On 8 November 2001, the day following his conversations with Mr Scafton and two days before the 2001 federal election, Prime Minister Howard gave a speech at the National Press Club in Canberra. After that speech, he was asked a number of questions relating to the alleged 'children overboard' incident and the evidence used by the government as proof it took place. First, ABC journalist Fran Kelly asked about rumours then emerging from Defence that the photos released by the government on 10 October were not in fact of children who had been thrown in the water on 7 October but of people in the water on 8 October because the boat was sinking. The Prime Minister did not respond directly to the question, and asserted that the claim that children had been thrown overboard was based on advice received from Defence sources, not the photos or the video. To support this, he quoted from the ONA report of 9 October. He said:

...if the Defence Minister and Immigration Minister get verbal advice from defence sources and the Prime Minister gets that kind of written advice I

4 Prime Minister, Media Release, Claims by Mr Mike Scafton, 16 August 2004, found at: www.pm.gov.au/news/media_releases/media-Release1074.html, accessed 30 August 2004. Mr Scafton's statements to the Bryant Inquiry are at Appendix 4.

don't think it's sort of exaggerating or gilding the lily to go out and say what I said.⁵

3.9 The Prime Minister's reliance on the ONA report as a source of the 'children overboard' story does not incorporate Mr Scrafton's alleged advice that this report was very likely to have been based on ministers' media statements, not intelligence. It also ignores advice from the head of ONA, Kim Jones, who had faxed that report to the Prime Minister's office that very evening with a covering note stating that the original source of the 'children overboard' advice could not have been ONA, that ONA could not identify the report's sources, and that it may have been based solely on media comments by Mr Ruddock and Mr Reith.⁶

3.10 The Prime Minister's answer also fails to acknowledge the significant doubts about the 'children overboard' incident that flowed from Mr Scrafton's alleged advice that no-one in Defence still believed such an event had occurred.

3.11 In response to a question from Louise Dodson about the uncertainty around the 'children overboard' video, Mr Howard said:

Well in my mind there is no uncertainty because I don't disbelieve the advice I was given by defence. And can I just say again Louise when you get defence giving advice, and the statements I made were based on advice, I wasn't there, neither of the ministers were there. They get advice, it is then confirmed in writing in terms that I have described. I think in those circumstances it's perfectly reasonable and legitimate of me to say what I said and I don't disbelieve the defence advice.⁷

3.12 On the other hand, Mr Scrafton says he had relayed to the Prime Minister only the previous evening that there was no evidence that the incident took place, that no-one in Defence still believed it had happened, and that the 'confirmation in writing' was based on dubious sources. As the CMI Report noted, the Minister for Defence, had been informed of these doubts some four weeks previously.⁸

3.13 On talkback radio on 8 and 9 November 2001, the Prime Minister maintained that his claim that asylum seekers had thrown their children from the SIEV 4 was based on Defence advice and a written ONA report, and that the original advice had

5 Transcript of the Prime Minister, Questions and Answers at the National Press Club Canberra, 8 November 2001, p.3, found at: www.pm.gov.au/news/speeches/2001/speech1325.htm, accessed 23 August 2004

6 ONA Minute to the Prime Minister's office of 7 November 2001, tabled as Additional Information no. 21 by the Select Committee on a Certain Maritime Incident. See also Senate Finance and Public Administration Legislation Committee, *Transcript of Evidence*, Estimates, 18 February 2002, pp.137-142 (Jones)

7 Transcript of the Prime Minister, Questions and Answers at the National Press Club Canberra, 8 November 2001, p.4

8 CMI Report, p.84

never been contradicted. In an interview with ABC Radio's Catherine McGrath, he said:

My understanding is that there has been absolutely no alteration to the initial advice that was given. And I checked that as recently as last night.⁹...

I was informed by both Mr Ruddock and Mr Reith that this had occurred, I subsequently was informed in writing from intelligence sources that it had happened, now in those circumstances I was perfectly justified in making the claim, I don't retreat from it and in a sense it's got nothing to do with the video, the video came along a couple of days after the 10th of October...¹⁰

3.14 Asked directly whether the Navy had reviewed the initial advice, he said:

I have no information or suggestion that they have reviewed their advice, no, I haven't.¹¹

3.15 Cathy van Extel of Radio National asked the Prime Minister whether anyone from either the Navy or the Defence Department had rung his office or the offices of Peter Reith or Philip Ruddock to advise that the initial information about children being thrown overboard was incorrect. Mr Howard replied:

Cathy, nobody rang my office to that effect and I'm not aware that they rang the offices of the other two ministers... The situation is that I have operated in the belief based on advice that there were children thrown overboard and that advice was originally given to me by two ministers on Sunday the 7th of October and it was confirmed in writing by the Office of National Assessment on Tuesday the 9th of October. I therefore have no reason to doubt its believity [*sic*] as to the question of the video, I never saw the video as being the primary source of evidence...the initial advice apparently was conveyed by the captain of the vessel from one of his superior officers. But at no stage was I told that that advice was wrong and in fact to this day nobody is saying that that advice is wrong.¹²

3.16 Also in that interview, he said:

9 Transcript of the Prime Minister, Interview with Catherine McGrath, AM Program, 8 November 2001, p.2, found at www.pm.gov.au/news/interviews/2001/interview1454.htm, accessed 23 August 2004

10 Transcript of the Prime Minister, Interview with Catherine McGrath, AM Program, 8 November 2001, p.2

11 Transcript of the Prime Minister, Interview with Catherine McGrath, AM Program, 8 November 2001, p.4

12 Transcript of the Prime Minister, Interview with Cathy van Extel, Radio National, 9 November 2001, p.1, found at: www.pm.gov.au/news/interviews/2001/interview1457.htm, accessed 23 August 2004

...can I just remind you that it was stated as fact in the advice given to me in writing by the Office of National Assessments. There was no qualification that it was a bare belief. It was a bald statement...¹³

I have no doubt about the general quality of advice I've received from Defence. I mean it's not, I mean it remains the case that we received advice that children were thrown overboard, I have not received any advice from Defence to this moment which countermands or contradicts that.¹⁴

...you are making a statement which is based on the premise that Defence's initial advice was wrong. There is no evidence to establish that. As I speak, Defence has not said to me, or to Mr Reith or Mr Ruddock, look we've got this completely wrong, there was never any basis for these claims that children were thrown overboard.¹⁵

...if there had have [*sic*] been something wrong with the original advice, something fundamentally wrong, then I would have assumed that the Navy would have got in touch with the Minister and said 'look, what you said then is wrong because the facts are as follows'. Now that did not occur, so I am told. I have not been given different advice. If I were given different advice I'd make it public.¹⁶

3.17 Mr Scafton's claims suggest these comments were deliberately misleading. Mr Scafton has stated that he told the Prime Minister that the sources of the ONA were suspect.¹⁷ This is in addition to the head of ONA himself giving similar written advice the same evening.¹⁸ The Prime Minister nonetheless quoted from the ONA report as evidence of the original 'children overboard' advice without admitting that he had been told of doubts about its sources. Mr Scafton has said that he left the Prime Minister in no doubt that there was no evidence to support the claim that children were thrown overboard.¹⁹ At no stage did the Prime Minister acknowledge these doubts or retreat from his original claim.

13 Transcript of the Prime Minister, Interview with Cathy van Extel, Radio National, 9 November 2001, p.1

14 Transcript of the Prime Minister, Interview with Cathy van Extel, Radio National, 9 November 2001, p.2

15 Transcript of the Prime Minister, Interview with Cathy van Extel, Radio National, 9 November 2001, p.3

16 Transcript of the Prime Minister, Interview with Cathy van Extel, Radio National, 9 November 2001, p.3

17 Mike Scafton, Letter to *The Australian*, 16 August 2004, *Transcript of Evidence*, 1 September 2001, p.6 (Scafton)

18 ONA Minute to the Prime Minister's office of 7 November 2001, tabled as Additional Information no. 21 by the Select Committee on a Certain Maritime Incident

19 *7.30 Report* transcript, 'Scafton stands by children overboard claim', 16 August 2004, found at: www.abc.net.au/7.30/content/2004/s1177955.htm, accessed 31 August 2004

3.18 Nor does it appear that, having been alerted to these doubts, the Prime Minister made any serious effort to check the original story. Had he wanted to do so, other information was readily available in his own office as well as several government agencies that would have confirmed the lack of evidence for the 'children overboard' report.²⁰

The Prime Minister's statements to Parliament – February 2002

Claim that there was no advice contradicting the 'children overboard' story

3.19 Mr Scrafton's claims also have implications for the Prime Minister's answers to questions in Parliament on the 'children overboard' affair. During the sittings commencing 12 February 2002, the Prime Minister faced repeated questioning and several censure motions on his failure to correct the record about the 'children overboard' story. He maintained that the original claims were made in good faith based on advice and:

I never received any advice from my department or from any other official or from any of my colleagues indicating that that advice was untrue.²¹

3.20 Other versions of the Prime Minister's statement included:

At no stage was I told by my department or was I told by any member of my staff or was I told by any minister or was I told by any official in any other department that the original advice tendered was wrong. I had no grounds to believe it was.²²

3.21 These and similar statements avoid mentioning ministerial advisers. However, the following statement is all-embracing:

At no stage was I told by Defence, by Mr Reith or by anybody else that the original advice was wrong.²³

3.22 In short, there is a clear conflict between Mr Scrafton's testimony that he told the Prime Minister on 7 November that there was no evidence to support the original claim, and nobody in Defence believed it, and Mr Howard's denial in Parliament that anyone had told him the original advice was wrong.

20 The CMI Report details unsuccessful attempts by the Prime Minister's senior adviser Miles Jordana to locate evidence to support the 'children overboard' claims on 7 November. During this process, Mr Jordana received advice that PM&C could not find material supporting the 'children overboard' report, advice from Jane Halton that there were doubts about the photographs, and a note from Kim Jones saying that the ONA report could not have been the source of the 'children overboard' claims. CMI Report, pp.122-125. Advice from several Defence officials to the Defence Minister to the effect that the 'children overboard' reports were unsubstantiated is described in Chapter 6 of the CMI Report.

21 For example, *House Hansard*, 14 February 2002, p.269 (Howard)

22 *House Hansard*, 19 February 2002 p.437 (Howard)

23 *House Hansard*, 14 February 2002, p.255 (Howard)

Claims about the ONA report

3.23 On 19 February 2002 Mr Howard was asked specifically:

...were you told at any stage before the election, either in writing or orally, that there was any doubt about the veracity of the source of the ONA report, which you relied on at the Press Club to back your 'children overboard' claim?²⁴

3.24 In the course of his answer, Mr Howard said:

I was not told until after the election that the ONA report had been based on media reports. I was not told that and, as I indicated to the press today, if I had known that before the press conference, I would not have used it.²⁵

3.25 This statement is in direct conflict with Mr Scafton's claim that he told the Prime Minister on the night of 7 November 2001 (three days before the federal election) that the 9 October ONA report may have been based on ministers' media statements. This advice was also conveyed in writing by the head of ONA, Mr Kim Jones, to the Prime Minister's office on the evening of 7 November.

Content of conversation with Mr Scafton

3.26 Mr Howard was also asked about whether he had discussed the date of the photos in his conversations with Mr Scafton on 7 November. He said:

From recollection, I spoke to Mr Scafton entirely about the video. The reason I spoke to Mr Scafton was that he was on Mr Reith's staff and he had been asked by Mr Reith to go to Maritime Command in Sydney and have a look at it. I may have spoken to Mr Scafton a couple of times.²⁶

3.27 This answer is in conflict with Mr Scafton's recollection that Mr Howard did discuss the photos with him, and was told that they were taken on 8 October, not 7 October.

Mr Scafton's evidence of his conversations with the Prime Minister on 7 November 2001

3.28 Mr Scafton's account of his telephone conversations with the Prime Minister on 7 November 2001 is a crucial piece of evidence that was not available to the CMI inquiry. As seen above, Mr Scafton's account of those conversations in his letter to *The Australian* would suggest that many of Mr Howard's subsequent statements on the 'children overboard' incident were misleading or untrue.

24 *House Hansard*, 19 February 2002, p.416 (Crean)

25 *House Hansard*, 19 February 2002, p.417 (Howard)

26 *House Hansard*, 19 February 2002, p.433 (Howard)

3.29 In his written statement to this Select Committee on 1 September 2004, Mr Scafton repeated the substance of his letter to *The Australian*, with the caveat that he was uncertain about the number of phone calls. The relevant part of his statement is as follows:

Later in the evening of 7 November 2001 I spoke to the Prime Minister by mobile phone on a number of occasions. My recollection is that it was three times, but it is possible that I have conflated the number of issues discussed with the number of calls.

In the course of those calls I recounted to him:

- that the tape was at best inconclusive as to whether there were any children in the water but certainly did not support the proposition that the event had occurred;
- that the photographs that had been released in early October were definitely of the sinking of the refugee boat on 8 October and not of any children being thrown into the water;
- and that no-one in Defence that I had dealt with on the matter still believed that any children were thrown overboard.

During the last conversation the Prime Minister asked me how it was that he had a report from the Office of National Assessments confirming the 'children overboard' incident. I replied that I had gained the impression that the report had as its source the public statements of the minister for immigration. When queried by him as to how this could be, I suggested that the question was best directed to Kim Jones, then Director-General of ONA.²⁷

3.30 Mr Scafton also said that the next day he had discussed his conversation with the Prime Minister with Ms Jenny McKenry from the Defence Department. He said he felt surprised on reading a transcript of the Prime Minister's 8 November Press Club appearance that the Prime Minister had used the ONA report in an unqualified manner and did not 'correct the record with respect to the truth of the claimed 'children overboard' incident.²⁸

3.31 Mr Scafton said the only other people he had told of the conversations were Major General Roger Powell and Commander Michael Noonan, to whom he had spoken in the context of the military inquiry.²⁹ He said he had told Dr Allan Hawke, then Secretary of the Defence Department, and Admiral Chris Barrie, then Chief of the Defence Force, that he had had discussions with the Prime Minister that he was not going to reveal publicly.³⁰

27 *Transcript of Evidence*, 1 September 2004, p.6 (Scafton)

28 *Transcript of Evidence*, 1 September 2004, p.6, p.45 (Scafton)

29 *Transcript of Evidence*, 1 September 2004, p.44 (Scafton)

30 *Transcript of Evidence*, 1 September 2004, p.44 (Scafton)

The credibility of Mr Scafton's evidence

3.32 The Prime Minister's response to Mr Scafton's claims, set out at 3.6 above, disputes Mr Scafton's version of events. Their conflicting accounts meant that much of this Committee's public hearing time was devoted to testing the credibility of Mr Scafton's evidence. This is considered below.

Statements by Jenny McKenry

3.33 Soon after Mr Scafton's letter was published in *The Australian* newspaper, a former senior Defence official, Ms Jenny McKenry, made a statement to reporters from *The Australian* that: 'she had received a phone call from Mr Scafton on the morning of 8 November 2001, in which he discussed the release of HMAS Adelaide video of the incident'. She is quoted as saying:

He said to me in the course of that conversation that he'd told the Prime Minister there had been nothing conclusive about the video and that there was no evidence to support the children overboard story.³¹

3.34 Ms McKenry repeated this statement on ABC radio, stating that, while the main focus of the conversation was the release of the video, Mr Scafton said he had conveyed to the Prime Minister that there was no evidence to support the children overboard story. When asked about Mr Scafton's claim that he told the Prime Minister that no one he spoke to in Defence believed that children had been thrown overboard, she said:

I had no reason to believe children were thrown overboard.³²

3.35 Asked whether she was concerned about the way the issue was played out in the last days of the election campaign, Ms McKenry replied:

I...well, I had private concerns as an individual. I believe now as I did then that it was not my role at that time as a public servant to enter the debate, or to talk about the...or volunteer information about the private workings or goings on of Government at the time.³³

3.36 The Prime Minister, in media interviews, dismissed Ms McKenry's statements, saying:

31 Steve Lewis and Patrick Walters, "Ex-colleague backs Scafton on PM's call", *The Australian*, 18 August 2004, p.1

32 ABC radio *AM* transcript, "Former senior defence bureaucrat backs Scafton claims", 18 August 2004, found at www.abc.net.au/content/2004/s1179011.htm, accessed 24 September 2004

33 ABC radio *AM* transcript, "Former senior defence bureaucrat backs Scafton claims", 18 August 2004

Well, his [Mr Scafton's] version of the events is not corroborated because she wasn't present at our discussion.³⁴

3.37 Mr Scafton told Ms McKenry of his conversations with the Prime Minister before he knew what the Prime Minister would say at the National Press Club, and consequently the importance that would be placed on his comments.

Mr Scafton's statement to the Powell inquiry: Evidence of Major General Powell and Commander Noonan

3.38 Subsequent to the publication of Mr Scafton's letter, the Prime Minister sought statements from Major General Powell and Commander Noonan. They had interviewed Mr Scafton in December 2001 during the military inquiry into advice provided to government on the 'children overboard' incident.³⁵ The statements of both Major General Powell and Commander Noonan tended to support what Mr Scafton said in his letter to *The Australian*.

3.39 Major General Powell's record of interview read in part as follows:

MAJGEN Powell confirmed that he had read Mr Scafton's letter, published in *The Australian* on 16 August. It had reminded him that Mr Scafton had mentioned that he had spoken to the PM on numerous occasions when he was working for Mr Reith regarding the veracity of the information passed by Defence to the Defence Minister's office. MAJGEN Powell could not recall the exact focus of these conversations, only that Mr Scafton recounted that the calls had taken place and that they had made it evident that there was no substance to the earlier claims that children had been thrown overboard. MAJGEN Powell deduced that the Prime Minister should have been in no doubt that the claims had no basis.³⁶

3.40 Commander Noonan's statement contained the following:

On the details contained in Mr Scafton's published letter, CMDR Noonan recalled Mr Scafton saying that he had had at least two mobile phone calls with either the Prime Minister or his adviser (CMDR Noonan could not recall whether Mr Scafton specified with whom the calls took place, but had given the impression that he had a direct line to the Prime Minister). CMDR Noonan recalled Mr Scafton speaking in general terms about the

34 ABC television *Lateline* transcript, "Public servant backs 'overboard' claims", 18 August 2004, p.2, found at www.abc.net.au/lateline/content/2004/s1179809.htm, accessed 24 September 2004

35 Prime Minister, Media Release, "Claims by Mr Scafton", 27 August 2004, found at: www.pm.gov.au/news/media_releases/media_Release1103.html, accessed 31 August 2004. Major General Powell and Commander Noonan were interviewed by the Acting Chief of the Defence Force, Vice Admiral Shalders, on 26 August 2004. On 1 September 2004, the Committee accepted records made of those interviews as evidence before it (*Transcript of Evidence* pp.79 and 89). They were subsequently published on the Committee's website.

36 Major General Powell's statement, p.1

video tape and pictures, and specifically that Mr Scafton said he had told the Prime Minister that the photographs did not relate to the alleged 7 October children overboard incident. Mr Scafton had given a clear indication that he had given oral advice to the Prime Minister or to his principal adviser that children had not been thrown overboard, and said the Prime Minister knew that children had not been thrown overboard.³⁷

3.41 Appearing before this Committee, both officers confirmed their statements. Major General Powell could not remember the detail of his interview with Mr Scafton in December 2001, but said:

I only recall a clear understanding of the fact that, if what Mr Scafton had told me was accurate, the Prime Minister would have been in no doubt that children had not been thrown overboard.³⁸

3.42 Commander Noonan said that Mr Scafton's evidence to this Committee:

...was certainly quite consistent with my recollection of the conversation that took place between him and General Powell.³⁹

3.43 Commander Noonan stated that he had no reason to doubt the veracity of anything Mr Scafton said at the interview. He said:

I certainly left the interview feeling that he was committed to and believed the contents of the conversations that he had had. I felt that he had been very open with the general and I assumed that that was as a result of their prior relationship. I did not have any reason to think that there was anything but a frank and honest conversation between the general and Mr Scafton.⁴⁰

3.44 The Prime Minister's response to Major General Powell and Commander Noonan's statements was:

They are not evidence of what Mr Scafton said to me. They merely record what Mr Scafton told others, some weeks later, of his conversations with me.⁴¹

3.45 One question emerging from Major General Powell's evidence is why the information Mr Scafton provided to that inquiry did not emerge earlier. Major General Powell gave two reasons for not mentioning it in his report: first, he viewed the comments as falling outside his terms of reference; second, his report was based on written statements only and Mr Scafton, although asked to do so, did not provide a written statement.

37 Commander Noonan's statement, p.1

38 *Transcript of Evidence*, 1 September 2004, p. 78 (Scafton)

39 *Transcript of Evidence*, 1 September 2004, p.90 (Noonan)

40 *Transcript of Evidence*, 1 September 2004, p.90 (Noonan)

41 Prime Minister, Media Release, "Claims by Mr Scafton", 27 August 2004

3.46 On the question of the terms of reference, Major General Powell said that:

From CDF's point of view, my terms of reference were very much to do...with the tactical, operational and strategic passage of information and decision making within the ADF but influenced by the broader defence department organisation.⁴²

3.47 Major General Powell did not think it appropriate to pass this information up the chain of command, as:

In a formal sense I was given very clear terms of reference. My profession, and certainly the broader defence community, were under quite a considerable amount of pressure throughout this whole period and I saw it as my role to stick very much to my terms of reference in a formal sense.⁴³

3.48 The other point of note is that Mr Scafton recounted his conversations with the Prime Minister on the clear understanding that this would be kept confidential. Commander Noonan's statement said that:

...Mr Scafton had told MAJGEN Powell that he was privvy [*sic*] to things and could tell the inquiry things that he would deny if they were ever raised.⁴⁴

3.49 Mr Scafton was assured that his conversations with Major General Powell would be off the record, as only written evidence would be used to write the report.⁴⁵ This guarantee of confidentiality apparently allowed Mr Scafton to tell things to the Powell inquiry that he was unwilling to state publicly.⁴⁶ In the end, Mr Scafton did not provide a written statement to the Powell inquiry. He told this Committee that both Admiral Barrie and Dr Hawke:

...were aware of the fact that, in the end, I did not cooperate with the Powell inquiry and they were comfortable with that as an outcome. They simply were conscious of the fact that I could not speak about issues that had taken place in the minister's office and they did not push me to do so.⁴⁷

3.50 Mr Scafton's unwillingness to go on the record about his conversations with the Prime Minister suggests he understood his professional obligations to mean that he should not talk publicly about conversations within and between ministerial offices. This is important when considering Mr Scafton's evidence to the Bryant inquiry discussed below.

42 *Transcript of Evidence*, 1 September 2004, p. 75 (Powell)

43 *Transcript of Evidence*, 1 September 2004, pp. 76-77 (Powell)

44 Commander Noonan's statement, p.1

45 *Transcript of Evidence*, 1 September 2004, p.91 (Noonan)

46 *Transcript of Evidence*, 1 September 2004, p.91 (Noonan)

47 *Transcript of Evidence*, 1 September 2004, p.19 (Noonan)

Finding

3.51 *The Committee accepts the evidence of both Major General Powell and Commander Noonan that Mr Scafton told them in December 2001 that he had advised the Prime Minister there was no substance to claims that children had been thrown overboard.*

Mr Scafton's statement to the Bryant inquiry

3.52 One issue that has brought the credibility of Mr Scafton's version of events into question is his statement to the Bryant inquiry in 2001. The Prime Minister's media statement of 16 August 2004 cited Mr Scafton's statement to the Bryant inquiry in 2001 in support of the Prime Minister's version of events.⁴⁸ Mr Scafton acknowledged before this Committee that parts of his statement to the Bryant inquiry were misleading or untrue.⁴⁹

3.53 The Bryant inquiry was a public service inquiry carried out within the Department of the Prime Minister and Cabinet (PM&C). Its terms of reference were contained in a letter from the Prime Minister to then Secretary of PM&C, Mr Max Moore-Wilton, and read in part as follows:

I refer to the recent public debate about the advice tendered to Ministers regarding the vessel (SIEV 04) carrying unauthorised boat arrivals which was first sighted north of Christmas Island on 6 October 2001. In particular, I am concerned about the advice provided in relation to the question of children being thrown in the water from the vessel.

I request that the People Smuggling Task Force currently chaired by PM&C to [*sic*] conduct a full examination of:

- the advice that was provided by Australian personnel involved in the sighting and handling of the vessel, as well as any other relevant information;
- how that advice was obtained, and conveyed to authorities in Australia;
- the nature of advice provided to Government ministers, and how it was transmitted.

Should the examination point to shortcomings in the collection and transmission of this advice, I would also appreciate your recommendations on how such shortcomings might be avoided in the future.

3.54 These terms of reference make no mention of communication within ministerial offices. The Committee accepts public servants may have assumed the letter was seeking a report on advice provided by public officials to ministers.

48 Prime Minister, Media Release, Claims by Mr Mike Scafton, 16 August 2004, found at: www.pm.gov.au/news/media_releases/media-Release1074.html

49 For example, *Transcript of Evidence*, 1 September 2004, p.57, p.69, p.70 (Scafton)

3.55 Mr Moore-Wilton's comments about the establishment of Bryant inquiry confirm that it was designed to examine departmental advice to ministers, not the actions of ministerial advisers. In explaining why the inquiry took the form it did, Mr Moore-Wilton said:

The Prime Minister indicated that because the task force had charge of the whole-of-government issue and because the issue might involve *departments* wider than Defence, he wished the task force to undertake an investigation and report to him.⁵⁰ [Emphasis added]

3.56 Ms Bryant's investigation was never designed to be an independent inquiry. Mr Moore-Wilton himself made this point clear at a Senate estimates hearing in 2002, saying:

You use the word 'independence' of Ms Bryant's report. Ms Bryant's report was never to be an independent report. It was a request by the Prime Minister to me for the task force to give him a report.⁵¹

3.57 Being an internal investigation, Ms Bryant did not have powers to compel witnesses. Ms Bryant told the original CMI inquiry that:

My investigation took place under general executive power and relied on the cooperation of individuals. Individuals were not on oath and were not compelled to tell me all that they knew.⁵²

3.58 Moreover, as an internal inquiry, Ms Bryant's inquiry could not offer the same sort of protection for witnesses as, for example, a parliamentary inquiry.

3.59 These points are relevant to considering Mr Scrafton's statement to Ms Bryant. As noted above, Mr Scrafton acknowledged to this Committee that he did not tell everything he knew to the Bryant inquiry and that parts of his statement to that inquiry are untrue.⁵³ He put forward several reasons for this, namely:

- A Cabinet direction that ministerial advisers not appear before the Senate;
- The Bryant inquiry's constrained terms of reference;
- The need, as a senior public servant, to maintain a relationship of trust with ministers; and

50 Senate Finance and Public Administration Legislation Committee, *Transcript of Evidence*, Estimates, 18 February 2002, p.41 (Moore-Wilton)

51 Senate Finance and Public Administration Legislation Committee, *Transcript of Evidence*, Estimates, 18 February 2002, p.129 (Moore-Wilton)

52 Select Committee on a Certain Maritime Incident, *Transcript of Evidence*, 18 April 2002, p.1258 (Bryant)

53 For example, *Transcript of Evidence*, 1 September 2004, p.57 (Scrafton)

- Concerns about the professional consequences of publicly casting doubts on the Prime Minister's Press Club statements.⁵⁴

3.60 In front of this Committee, Mr Scafton said he had never seen the 'Cabinet decision' referred to above, but conceded he may have in mind a Cabinet directive that post-dated the Bryant inquiry, and related to the Senate CMI inquiry.⁵⁵

3.61 Mr Scafton said he felt justified in withholding certain information from the Bryant inquiry because he understood that inquiry to be about advice provided *by departments* to ministers and their offices, not the flow of information within and between ministerial offices.⁵⁶ He said that Ms Bryant made this clear in her letter to witnesses,⁵⁷ and also in her opening discussion with him, where:

...we discussed this letter. We discussed the fact that I had been a ministerial adviser. She said that that was not in the area that she was covering, that this inquiry was about official advice going forward from agencies to government formally, to ministers formally.⁵⁸

3.62 Mr Scafton told Ms Bryant upfront that he could not pass on knowledge of conversations with ministers or the Prime Minister that he gained while a MOPS staffer. His record of interview for her inquiry noted that:

Mr Scafton stated 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.⁵⁹

3.63 This is consistent with the evidence that has emerged from his interview with Major General Powell, that Mr Scafton was unwilling to comment on his conversations with the Prime Minister if there was a possibility those comments would be made public.⁶⁰

3.64 Mr Scafton's said that another factor influencing his evidence to Ms Bryant was his need to maintain trust between him and the government. He told this Committee:

The reality was that the Howard government had been re-elected for another term and as a senior public servant I would be required to work closely with ministers and parliamentary secretaries. My position would have been unworkable if, irrespective of the cabinet decision, I had made

54 *Transcript of Evidence*, 1 September 2004, p.4 (Scafton)

55 *Transcript of Evidence*, 1 September 2004, pp.47-49

56 *Transcript of Evidence*, 1 September 2004, p.4, p.53 (Scafton)

57 *Transcript of Evidence*, 1 September 2004, pp.52-53 (Scafton)

58 *Transcript of Evidence*, 1 September 2004, p.117 (Scafton)

59 Enclosure to Bryant Report, Statement by Mr Mike Scafton, 14 December 2001

60 *Transcript of Evidence*, 1 September 2004, p.82 (Powell) and p.91 (Noonan)

full disclosure about my conversations with the Prime Minister on the evening of 7 November 2001. Apart from any personal enmity towards me that may have arisen in government ranks, I would not have been able to secure the trust and confidence essential to an effective relationship between public servants and ministers.⁶¹

...

The reality was that it would have been completely irrational of me to have declared that I thought that the Prime Minister had misled the country prior to an election and then still expect to work with that government for the rest of the period they were in office.⁶²

3.65 He said that, while he felt obliged to participate in an inquiry that was being conducted at the behest of the Prime Minister by the head of the Public Service, in answering questions he avoided revealing anything critically damaging or controversial about his time in the Minister's office.⁶³ He said:

I went as far as I thought I reasonably could in discussing with Jennifer the things that happened in the minister's office without actually contravening any confidences there.⁶⁴

3.66 He suggested this led to some misleading answers as he sought to prevent certain topics being thoroughly canvassed.⁶⁵

3.67 A fourth reason why Mr Scafton stated he misled the Bryant inquiry was that he feared professional consequences if he gave Ms Bryant a full and frank account of his conversations with the Prime Minister. He said in his opening statement that:

...the prevailing atmosphere in Defence, and in particular the methods and expectations of Max Moore-Wilton as Secretary of PM&C and his close association with the Prime Minister, gave me every confidence that publicly casting doubts on the Prime Minister's Press Club statements would eventually have had a negative professional impact.⁶⁶

3.68 Mr Scafton said under questioning:

...I am somebody who has been personally abused and threatened by Max Moore-Wilton for daring to provide frank and fearless advice to my minister, which was seen to be superior to the advice that Max was giving

61 *Transcript of Evidence*, 1 September 2004, p.4 (Scafton)

62 *Transcript of Evidence*, 1 September 2004, p.57 (Scafton)

63 *Transcript of Evidence*, 1 September 2004, p.55 (Scafton)

64 *Transcript of Evidence*, 1 September 2004, p.54 (Scafton)

65 *Transcript of Evidence*, 1 September 2004, p.18, p.70 (Scafton)

66 *Transcript of Evidence*, 1 September 2004, p.4 (Scafton)

forward...I was confronted in an abusive way. He swore at me in quite derogatory terms, in front of witnesses.⁶⁷

...I had about three engagements with Mr Moore-Wilton, all of which were characterised by the same sort of bullying approach to dealing with people.⁶⁸

3.69 He said he believed that Mr Moore-Wilton would carry a grudge against someone who acted contrary to the Prime Minister's interests.⁶⁹ He said:

The way in which that inquiry was conducted was in a context in which it was almost impossible for me to open up doors which would divulge things that I was being forbidden to do by the government. Did I phrase answers to Jennifer Bryant in a sense the way that closed off those options? Yes, I did. Did I do it for the reasons I have stated: that I think that this was not a genuine inquiry, that in fact it was being conducted at Max's behest in support of the Prime Minister's position? Yes, I did. I was reluctant to say a whole range of things to Jennifer Bryant. And, as I have said in my opening statement, the reaction from ministers' offices, including the Prime Minister's office, about what I might have said is a clear indication that, had I acted as courageously as perhaps an idealistic public servant might have, I would not be sitting here before you today as a former head of infrastructure division; I would have been in the regions somewhere looking after lawn cutting. There was a whole range of reasons why Jennifer Bryant's inquiry was not fully cooperated with by me. I am prepared to accept that.⁷⁰

3.70 Mr Scrafton was concerned that full disclosure would compromise his work as a public servant. As he said:

...after about 16 years of being in the Public Service, with about seven or eight of those years being in senior positions, and a year in Parliament House, ...I fully understood the consequences of calling the Prime Minister a liar under any circumstances.⁷¹

Finding

3.71 *The Committee accepts Mr Scrafton's evidence that he felt constrained by various factors in his submissions to the Bryant Inquiry.*

67 *Transcript of Evidence*, 1 September 2004, p.62 (Scrafton)

68 *Transcript of Evidence*, 1 September 2004, p.63 (Scrafton)

69 *Transcript of Evidence*, 1 September 2004, pp.62-63 (Scrafton)

70 *Transcript of Evidence*, 1 September 2004, p.18 (Scrafton)

71 *Transcript of Evidence*, 1 September 2004, p.60 (Scrafton)

Number and timing of phone calls

3.72 Another matter which was considered in relation to the credibility of Mr Scafton's evidence overall is his uncertainty over the number and timing of his phone calls with the Prime Minister on 7 November 2001. In his initial letter to *The Australian*, Mr Scafton said that he spoke to the Prime Minister three times that evening. This is different to what he told the Bryant inquiry, where he said that he spoke to the Prime Minister 'a couple of times'. Commander Noonan recalled him telling the Powell inquiry there were 'at least two' mobile phone calls with the Prime Minister or his adviser.⁷² In his opening statement to this Committee, Mr Scafton said that he recalled three phone calls, but could have conflated the number of issues discussed with the number of phone calls.⁷³

3.73 At the public hearing on 1 September, this issue was canvassed at length. It was put to Mr Scafton that the Prime Minister's mobile phone record shows that there were only two conversations between him and the Prime Minister on the evening of 7 November 2001.⁷⁴ It was asserted that the first of these started at 8:41 pm and lasted 9 minutes and 36 seconds, and the second started at 10.12 pm and lasted 51 seconds.⁷⁵

3.74 The phone records used as a basis for questioning Mr Scafton were not tabled before the Committee as evidence, and the Committee has not been able to verify the assertions about the number, timing and duration of phone calls. The documents were not provided to Mr Scafton to view whilst he was being questioned, although due process and normal Senate Committee practice would dictate that this would be appropriate.

3.75 Senator Brandis cited security and privacy issues as reasons for declining to table material, purporting to be a complete set of mobile phone records from those present at The Lodge on the evening of 7 November 2001, supplied to him by an unidentified source. Senator Brandis, privately, offered Senator Ray and Senator Faulkner the opportunity to examine these records, but his offer was declined as the original supplier of the records would not be available to verify them by way of evidence before the Committee.

3.76 As these supposed records were used as a premise for questioning Mr Scafton, the Committee has considered whether this line of questioning cast any new light on Mr Scafton's evidence. In earlier evidence, Mr Scafton had given the following account of his conversations with the Prime Minister on 7 November:

I was sitting down to entrée when the Prime Minister rang... I went through the issue of the video with him—what was on it. That was all I was asked to

72 Commander Noonan's statement, p.1

73 *Transcript of Evidence*, 1 September 2004, p.6 (Scafton)

74 *Transcript of Evidence*, 1 September 2004, pp.103-104 (Brandis)

75 *Transcript of Evidence*, 1 September 2004, pp.105-106 (Brandis)

do. He rang me back later with some clarifying questions. My recollection is that I at that point explained to him that not only was the tape inconclusive but nobody I dealt with in Defence believed that the event had taken place—and that the photographs represented the sinking the day after the supposed event. My recollection at that point is that he rang me back again afterwards specifically to ask me about the ONA report that he had. I said that, from my discussions with people in Defence, in Strategic Command, the impression was going around that this must have been based on the minister's statements rather than on intelligence sources. He said, 'How could that possibly be?' I suggested he talk to Kim Jones about it, and that was the end of our discussion.⁷⁶

3.77 Mr Scafton later said it was possible that the third point about the ONA report may have been made in the same phone call as the first two points, not in a separate conversation as he initially recalled.⁷⁷ He said on several occasions that he was not certain about the number of phone calls.⁷⁸

3.78 Mr Scafton also said that during the first phone call the Prime Minister repeated verbatim what Mr Scafton said to him to others in the room, who included Arthur Sinodinos, Tony Nutt and Tony O'Leary.⁷⁹ He said that the Prime Minister did not adopt this practice with the later conversation or conversations.⁸⁰

3.79 Mr Scafton said of the second conversation that he got the sense he was being interrogated over something. His words were:

I am not sure I reflected on it at the time but, thinking about it subsequently, in the first instance he [the Prime Minister] was simply receiving information from me and in the second instance he was interrogating me over something.⁸¹

3.80 While admitting his uncertainty about the number of phone calls, Mr Scafton was adamant about the accuracy of his memory of what he told the Prime Minister. He said:

The very salient issue that is burnt on my mind from that evening is what I said to the Prime Minister. There was more than one phone call. My recollection is that there were three. I am not prepared to go to the grave fighting over that but I have no doubt whatsoever as to what I said.⁸²

76 *Transcript of Evidence*, 1 September 2004, p.36 (Scafton)

77 *Transcript of Evidence*, 1 September 2004, p.98 (Scafton)

78 For example, *Transcript of Evidence*, 1 September 2004, pp.6, 93

79 *Transcript of Evidence*, 1 September 2004, p.39 (Scafton)

80 *Transcript of Evidence*, 1 September 2004, pp.39,96 (Scafton)

81 *Transcript of Evidence*, 1 September 2004, p.96 (Scafton)

82 *Transcript of Evidence*, 1 September 2004, p.94 (Scafton)

3.81 When faced with questioning based on the phone records, Mr Scafton accepted there were probably only two phone calls.⁸³ Challenged with the proposition that he could not have covered all the topics he said were discussed in 51 seconds, he said 'I suspect you are right...'.⁸⁴ However, he maintained his position on what was discussed in those phone calls. He said:

I can only assume that I am not only mistaken about the number of phone calls but what order they were discussed in. It certainly did not take me 10 minutes to tell the Prime Minister about the video. I am not sure what the Prime Minister thinks he rang me back for 51 seconds on afterwards. What I am clear about is that, in the course of those phone calls, the four subjects were discussed.⁸⁵

3.82 Despite Mr Scafton's uncertainty, the brevity of the second phone call does not prove that these points were not covered in that call. Mr Scafton said that the phone calls were conducted with 'no pleasantries'⁸⁶ and he did not engage in much detail.⁸⁷ Apart from discussing the video, the other three points Mr Scafton says he made to the Prime Minister that evening are 1) that the photos of children in the water were from the sinking of the boat on 8 October, not 7 October; 2) that no-one in Defence that he dealt with still believed children had been thrown overboard, and 3) that the ONA report of 9 October may have been based on ministers' media statements, not intelligence. Some have argued it is possible to make all these points in 51 seconds.⁸⁸

3.83 As noted above, Mr Scafton also allowed the possibility that more topics were covered in the first conversation. He thought it unlikely that he had spent nearly ten minutes discussing only the video.

3.84 Although admitting his recollection of the timing and order of topics discussed in his phone calls with the Prime Minister was hazy, Mr Scafton remained adamant about the content of those phone conversations. He said:

Could I be mistaken about which phone call those conversations took place in? Yes. Am I mistaken about that discussion? No.⁸⁹

83 *Transcript of Evidence*, 1 September 2004, p.106 (Scafton)

84 *Transcript of Evidence*, 1 September 2004, p.106 (Scafton)

85 *Transcript of Evidence*, 1 September 2004, p.107 (Scafton)

86 *Transcript of Evidence*, 1 September 2004, p.107 (Scafton)

87 *Transcript of Evidence*, 1 September 2004, p.40 (Scafton)

88 This point was made by professional script writer Bill Garner in a letter to *The Age* newspaper, 9 September 2004

89 *Transcript of Evidence*, 1 September 2004, p.108 (Scafton)

3.85 When it was put to Mr Scafton that, if he could not recall how many telephone conversations he had that evening, he may not be able to recall very clearly a lot of other events that happened, Mr Scafton's response was:

I do not know if you have ever been in the position of having to explain to a Prime Minister that the position he has been taking for a month is wrong. That is not something that somebody with my length of time in the Public Service would ever forget. I am absolutely clear that what I have said in the letter, in the statutory declaration I have made and in the statement I have made before you represents exactly what I have said to the Prime Minister in terms of substance.⁹⁰

3.86 The phone records cited, but not accepted as evidence, during the Committee's proceedings neither prove nor disprove Mr Scafton's claims about what he told the Prime Minister on 7 November 2001.

Finding

3.87 *The Committee notes Mr Scafton's lack of certainty about the number and timing of his phone calls with the Prime Minister on 7 November 2001 and his certainty about the key points discussed during those conversations.*

Statements by the Prime Minister's staff

3.88 Following Mr Scafton's letter to *The Australian*, the Prime Minister had a number of his staff make statements on their recollections of 7 November 2001.⁹¹ Their recollections vary, and they were not subject to scrutiny before this Committee. None of the staff who made statements say that the Prime Minister told them that issues other than the video were discussed. Paul McClintock's recollection was that the result of the first phone call 'was that Mr Scafton would look at the video and let us know what it contained.'⁹² This clearly cannot be the case, as Mr Scafton had already viewed the video by the time this first conversation took place. Several of the staff members do not recollect how many conversations the Prime Minister had with Mr Scafton. Mr Sinodinos said there were 'a number of phone calls', Mr O'Leary spoke only of 'telephone contact'.⁹³

3.89 One common point to emerge from the statements of the Prime Minister's staff is none of them actually heard what Mr Scafton said to the Prime Minister. This is consistent with Mr Scafton's evidence before this Committee. Mr McClintock

90 *Transcript of Evidence*, 1 September 2004, p.15 (Scafton)

91 Prime Minister, Media Release, "Claims by Mr Scafton", 27 August 2004, found at: www.pm.gov.au/news/media_releases/media_Release1103.html, accessed 31 August 2004.

92 Statement by Mr Paul McClintock, attachment to Prime Minister's media release of 27 August 2004

93 Statements by Arthur Sinodinos and Tony O'Leary, attachment to Prime Minister's media release of 27 August 2004

could not recall whether the phone calls actually took place in the same room that the staff were sitting in. The staff were therefore only able to recall what the Prime Minister relayed of those conversations, and the subsequent discussion between the staff and the Prime Minister. In the Prime Minister's own reasoning, the statements of his staff are not evidence of what Mr Scafton told the Prime Minister, only of what the Prime Minister told his staff of those conversations. Even if, as the staff seem to agree, the focus of their discussion with the Prime Minister was the video, this does not prove that Mr Scafton did not raise other issues with the Prime Minister.

Finding

3.90 The Committee accepts the evidence of both Major General Powell and Commander Noonan that Mr Scafton told them in December 2001 that he had advised the Prime Minister there was no substance to claims that children had been thrown overboard.

3.91 The Committee accepts Mr Scafton's evidence that he felt constrained by various factors in his submissions to the Bryant Inquiry.

3.92 The Committee notes Mr Scafton's lack of certainty about the number and timing of his phone calls with the Prime Minister on 7 November 2001 and his certainty about the key points discussed during those conversations.

3.93 The Committee finds Mr Scafton's claim that he told the Prime Minister on 7 November 2001 that there was no evidence to substantiate the 'children overboard' story credible. The clear implication of his evidence is that the Prime Minister misled the Australian public in the lead up to the 2001 federal election.

