

Chapter 4

The Scrafton Evidence: Handling of evidence to support 'children overboard' claims

4.1 Mr Scrafton had knowledge of a number of aspects of the 'children overboard' incident that the CMI Committee was aware of but unable to fully investigate due to the unavailability of MOPS staff to appear before the Committee. In particular, Mr Scrafton was one of Mr Reith's advisers told about the misrepresentation of the supposed 'children overboard' photos soon after they were released on 10 October. The CMI Committee knew this, but was not able to ask him what he did with this information. Mr Scrafton was also aware of the existence of witness statements by members of the *Adelaide's* crew – statements that show that no-one on the *Adelaide* actually saw children being thrown into the water, although some did see a teenage boy in the water. His willingness to appear before this Committee enabled it to add to the CMI Committee's knowledge of the handling of evidence used in support of the 'children overboard' claims.

4.2 This chapter presents Mr Scrafton's evidence on his involvement in 'children overboard' related events in October and early November 2001, including conversations with defence officials, within Mr Reith's office and with the Prime Minister's office. It then considers the implications of Mr Scrafton's evidence for the findings of the original CMI inquiry on the government's control and use of information about the incident, including photos and written reports.¹

4.3 After hearing from Mr Scrafton on 1 September 2004, the Committee resolved to invite a further four witnesses to appear before it to give their version of events and potentially clarify some of these outstanding issues. As noted in Chapter 1, none of these four accepted the Committee's invitation to appear. The evidence presented in this chapter is therefore limited to Mr Scrafton's account. Unfortunately, this means that several key questions remain unanswered.

Mr Scrafton's involvement in the 'children overboard' issue: chronology

4.4 The following table gives a chronological account of Mr Scrafton's recollection of 'children overboard' related events he was involved in as recounted in his evidence before this Committee.

1 The CMI inquiry's terms of reference instructed that Committee to examine: '(b)(iii) Federal Government control of, and use of, information about the incident, including written and oral reports, photographs, videotapes and other images'.

Date	Mr Scrafton's account of events ²
10 October	Photos released
10 October	Mr Scrafton receives phone call from Tim Bloomfield ³ who says there has been a number of 'very difficult' conversations with Ross Hampton ⁴ over the captions and photographs. [p.22] Mr Bloomfield says Mr Hampton has been difficult to deal with and will not take advice that the photographs might be about the wrong thing. He says there is some confusion about who has what photographs and what captions have been put on or left off. [p.11, p.22]
10 October	Mr Scrafton speaks to Mr Hampton about the photos, and makes it clear to him that they may not represent the purported incident. Mr Hampton is 'difficult', and says Defence is giving him confusing information but he has grounds for believing the photos are of children overboard. [p.22]
10 October	Mr Scrafton speaks again to Mr Bloomfield, who is quite concerned. Mr Scrafton suggests Mr Bloomfield keep on file an accurate record of all his discussions with Mr Hampton. [p.22]
10 October	Mr Scrafton speaks to Mr Reith (?) [p.12]
11 October	Mr Scrafton speaks to Brigadier Bornholt ⁵ and Jenny McKenry ⁶ about the photos. They express their very strong view that the photographs do not represent children overboard. [p.11]
11 October	Mr Scrafton passes Brigadier Bornholt and Ms McKenry's views (that the photos are not of children overboard) on to Mr Hampton. [p.11]
11 October	Mr Scrafton receives a phone call from Mr Reith. They have 'a very long discussion about the photographs'. Mr Reith says that the CDF is still telling him that the photos are genuine and he is not prepared

2 This table presents the evidence given by Mr Scrafton in front of this Committee, and should be read in conjunction with the evidence of witnesses to the CMI inquiry presented in Chapter 2. Page references in square brackets refer to this Committee's *Transcript of Evidence*, 1 September 2004

3 Director of Media Liaison, Department of Defence

4 Media Adviser to Mr Reith

5 Military Adviser, Public Affairs and Corporate Communication, Department of Defence

6 Head, Public Affairs and Corporate Communication, Department of Defence

	to accept other advice unless it is conclusive. [p.11]
11 October	Mr Scafton rings Miles Jordana ⁷ in the Prime Minister's office to inform him that there are serious doubts about the photographs. [p.11, p.13] He gives 'prudent rather than categorical' advice. [p.13]
11-12 October?	Mr Reith's staff become aware there is a tape of the incident. [pp.11, 23] Mr Scafton speaks to Strategic Command about what is on the tape and what sort of tape it was. AVM Titheridge ⁸ thinks the tape may be infra-red. [p.23] This causes some confusion about whether the incident occurred during daylight hours. Mr Scafton has another 'long discussion' with Mr Reith, and at Mr Reith's request does some internet research to establish the time of sunrise at the SIEV's location. [p.11]
11-12 October?	Mr Scafton is asked by Mr Reith and Mr Hendy to chase up what was really happening. Mr Scafton speaks to Rear Admiral Chris Ritchie ⁹ and AVM Titheridge. He is informed that there is an instruction to take statements from all crew members of the <i>Adelaide</i> . [p.24] Mr Scafton is told the tape is still at sea, but arrangements will be made to get it across once the ship gets to port. [p.24] Mr Scafton is subsequently involved on 'a number of occasions' in tracking down where the sworn statements and tape had got to. [p.11]
11-12 October	Mr Scafton becomes aware of 'very significant' doubts about the children overboard reports in talking to Rear Admiral Ritchie and subsequent conversations with AVM Titheridge. [pp.15-16]
12-13 October	Mr Scafton discusses the issue of whether photos should be retracted with Peter Hendy. ¹⁰ He says a retraction should be considered, but it is a political decision, so not for him to make. Mr Hendy comes back 'later on' and says 'we have decided' not to retract them. [p.31] Mr Scafton is not sure who is meant by 'we'.
14-15 October	Mr Scafton chases up witness statements with AVM Titheridge. He is told they are moving slowly towards Canberra and he should not ask any more about them. [p.12] (In early to middle October) AVM Titheridge tells Mr Scafton that the witness statements are not

7 Senior Adviser (International) to the Prime Minister

8 Head Strategic Command, Department of Defence

9 Commander Australian Theatre, Royal Australian Navy

10 Chief of Staff to Defence Minister, Peter Reith

	getting moved as quickly as they might normally. [p.25]
15-16 October (?)	Jane Halton ¹¹ rings Mr Scafton and talks about the position of the Defence Minister's office on the photographs. [p.30]
5-6 November	Miles Jordana from PMO calls Mr Scafton to discuss reports of problems with 'children overboard' advice. Mr Scafton reinforces the point that the photos do not represent a 'children overboard' incident. He gives 'unqualified and categorical' advice to this effect. [p.13, pp.33-35]
7 November	Mr Scafton views the tape of the SIEV 4 incident at the Maritime Headquarters in Sydney. [p.36]
7 November - evening	Mr Scafton has telephone conversations with the Prime Minister.

4.5 A number of the points in this chronology contradict what Mr Scafton told the Bryant inquiry, and hence differ from the CMI Committee's understanding of events. Specifically, Mr Scafton's statement to the Bryant inquiry says:

- He did not advise Mr Reith about the misrepresentation of the photos as this would have been Mr Hampton's role, and he did not know whether Mr Reith was informed about the true nature of the photos.
- The discussions he had with AVM Titheridge and Admiral Ritchie following Mr Ruddock's statements in the news indicated that the 'children overboard' story was true.

4.6 The previous chapter presented Mr Scafton's reasons for not giving a fully accurate account of his involvement in these events to the Bryant inquiry. Without being in a position to question the other people involved to test Mr Scafton's account of events, the Committee has based the remarks below on his evidence to this Committee rather than his contribution to an internal government inquiry.

Misrepresentation of the photographs – attempts to correct the record

4.7 The CMI Committee considered at length the government's failure to correct the record after it became clear that photos released as evidence that children were thrown overboard on 7 October were in fact of children being rescued from the sinking vessel on 8 October.¹² The CMI Committee was aware that Mr Scafton was one of the ministerial advisers whom departmental officials told the photos were being misrepresented. The CMI report criticised Mr Scafton for not taking responsibility for ensuring that the Minister (Mr Reith) was made aware of the advice about the

11 Deputy Secretary and Chair of People Smuggling Taskforce, Department of the Prime Minister and Cabinet

12 CMI Report, pp.113-117

misrepresentation and for not advising the Minister to retract the claim that the photos were evidence of the children overboard report.¹³

4.8 As can be seen from the above chronology, Mr Scafton's evidence to this Committee filled in some of the gaps of the CMI inquiry's evidence. The key points to emerge are that Mr Scafton not only alerted Mr Reith's staff to advice he received of doubts about the photos, but also conveyed these doubts to Mr Reith himself and to the Prime Minister's senior adviser on international relations, Mr Miles Jordana. His evidence suggests that a conscious decision was made between Mr Reith's then chief of staff, Peter Hendy, and another person, not to retract the photos even once they were known to have been misrepresented.

Handling of the photos in the Defence Minister's office

4.9 Mr Scafton was alerted to problems with the captions on the photographs on the day the photos were released. Tim Bloomfield, then Director of Media Liaison in the defence department, called Mr Scafton that day to say there had been a number of 'very difficult' conversations with Mr Reith's media adviser Ross Hampton about the captions and the photographs. Mr Scafton then talked to Mr Hampton, who, again, was 'difficult'.¹⁴

4.10 The next day, Brigadier Bornholt and Jenny McKenry contacted Mr Scafton to express their strong view that the photographs did not represent children overboard. Ms McKenry also sent an email of the photographs to Mr Scafton which 'quite clearly had the date on it', that is, 8 October.¹⁵ Mr Scafton told this Committee that he passed this information on to Mr Reith's media adviser Mr Ross Hampton.¹⁶ He said he made clear to Mr Hampton that the photos may not have represented the purported incident.¹⁷

4.11 Mr Scafton also told this Committee that on 10, 11 and possibly 12 October he had 'a series of discussions' with Mr Reith about the validity of the photos. During these discussions he passed on the advice of Brigadier Bornholt and Jenny McKenry that they believed the photos were not of children being thrown overboard but were of the rescue of asylum seekers from the sinking boat.¹⁸ Mr Reith told Mr Scafton that he was getting other advice from Admiral Chris Barrie, who believed the photos may have been of a 'children overboard' incident.¹⁹ (This conflicts with Admiral Barrie's evidence to the CMI inquiry that he informed Mr Reith on 11 October that the photos

13 CMI Report, p.117

14 *Transcript of Evidence*, 1 September 2004, p.22 (Scafton)

15 CMI Report, p.83

16 *Transcript of Evidence*, 1 September 2004, p.11 (Scafton)

17 *Transcript of Evidence*, 1 September 2004, p.22 (Scafton)

18 *Transcript of Evidence*, 1 September 2004, p.12, p.27 (Scafton)

19 *Transcript of Evidence*, 1 September 2004, p.12, p.28 (Scafton)

were not of the 7 October 'children overboard' event.)²⁰ While Mr Scrafton was not in a position to know what Mr Reith believed about the photos, he stated that:

There were a number of discussions when I said to him that the advice that I was receiving was that these were not the photos.²¹

4.12 The third person in Mr Reith's office that Mr Scrafton discussed this matter with was Peter Hendy, then Mr Reith's chief of staff. It was with Mr Hendy that Mr Scrafton discussed retracting the photos. He told this Committee:

In the office there was no clear understanding or really serious questioning about whether the event had taken place, but it became clear in the office – and I will say who was there in a moment – that the photos did not represent the 'children overboard' event. Peter Hendy and I had a discussion, in which I said, 'This is not an issue for me but you need to know that these photographs are available on the "restricted" network in Defence, so lots of people will get access to them.' I am not sure what messages surrounded the photographs as they went out, but the question for Peter to think about was whether or not we retracted them. Later on, Peter came back to me and said, 'We have decided' – and I do not know who he meant by 'we' – 'that we'll just leave them out there, seeing as they're out there.'²²

4.13 In other words, Mr Scrafton felt that the decision of whether to retract the photos was not his to make, but suggested to Mr Reith's chief of staff that he should consider retracting them. Despite it being 'clear' in the office that the photos were not of a 'children overboard' event, Mr Reith's chief of staff, in consultation with unidentified persons, made a conscious decision not to correct the public record. Mr Scrafton believed this took place around 12 or 13 October. He was not aware of whether Mr Reith was involved in that decision or not.²³

4.14 Mr Scrafton's evidence contradicts Mr Reith's statement to the Bryant inquiry, which stated that it was not that he 'made a decision not to change the public record' but rather that 'there was continuing uncertainty and he was not willing to make further public comments which may themselves not have been correct'.²⁴

4.15 This Committee hoped to test Mr Scrafton's account of events by questioning Mr Hendy on his involvement and knowledge of the 'children overboard' photos and the decision not to retract them once the misrepresentation was known. Mr Scrafton's evidence suggests that Mr Hendy was involved in this decision, and could tell this

20 CMI Report, pp.132-133

21 *Transcript of Evidence*, 1 September 2004, p.27 (Scrafton)

22 *Transcript of Evidence*, 1 September 2004, p.31 (Scrafton)

23 *Transcript of Evidence*, 1 September 2004, p.32 (Scrafton)

24 CMI Report, p.116

Committee who else was involved. Mr Hendy's refusal to appear before this Committee means that once again this question remains unanswered.

Prime Minister's office informed of doubts about photos

4.16 Mr Scafton's claims that these doubts were conveyed to the Prime Minister's office would confirm the findings of the CMI Report that, by the evening of 7 November, Mr Jordana and the Prime Minister were aware of doubts about the provenance of the photos.²⁵ Mr Scafton's new evidence suggests that the Prime Minister's office was alerted to 'doubts' as early as 11 October, when he spoke with Miles Jordana, then the Prime Minister's senior adviser on international policy.²⁶ Mr Scafton told this Committee:

As normal practice working between the two offices, as soon as I had had the discussions with Jenny [McKenry], with the Minister and with Ross Hampton I rang Miles and gave him a heads-up saying that there are serious doubts about the photographs that everybody is talking about and you need to be aware of this in case the Prime Minister thinks about using them.²⁷

4.17 Mr Scafton's evidence also suggests that the Prime Minister's office should have been certain by 8 November that the photos were not of a 'children overboard' event. Mr Scafton said his advice to Mr Jordana in October was 'prudent rather than categorical'.²⁸ However, when Mr Jordana rang Mr Scafton on 5 or 6 November 2001 to clarify what the photos represented,²⁹ Mr Scafton said he gave categorical advice that 'the photos did not represent the children overboard incident'³⁰ but were of the sinking of the vessel.³¹

4.18 Thus, according to Mr Scafton, the Prime Minister's office received categorical advice that the photos had been misrepresented before the Prime Minister's Press Club appearance on 8 November. This advice was in addition to the warning Ms Halton of PM&C gave to Mr Jordana on the evening of 7 November that there were rumours in Defence that the photos were not of the 'children overboard' incident.³² As discussed in Chapter 3, the Prime Minister did not take the opportunity at the Press Club, when asked specifically about the photos, to set the record straight.

25 CMI Report, pp.124-126

26 *Transcript of Evidence*, 1 September 2004, p.11 and p. 23 (Scafton)

27 *Transcript of Evidence*, 1 September 2004, p.13 (Scafton)

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

29 *Transcript of Evidence*, 1 September 2004, p.34 (Scafton)

30 *Transcript of Evidence*, 1 September 2004, p.33 (Scafton)

31 *Transcript of Evidence*, 1 September 2004, p.34 (Scafton)

32 CMI Report, p.124

4.19 The Committee had hoped to question Mr Jordana on exactly what information he passed to the Prime Minister and when he did so. This could help answer some of the outstanding questions from the CMI inquiry on what information and advice about 'children overboard' was given to the Prime Minister before the 2001 election. The Cabinet decision blocking former MOPS staffers from appearing has hampered the work of this Committee.

Delays to witness statements and video tape reaching Canberra

4.20 One of the key pieces of evidence suggesting that the original report of children overboard was inaccurate was the witness statements gathered from crew members of the *Adelaide* soon after the incident. These led senior Defence personnel to conclude on 11 October that the 'children overboard' report was not true.³³ Likewise, the video footage of the incident did not show children being thrown overboard, as discussed in Chapter 3. The length of time the video and statements took to reach the hands of those responsible for passing this information to ministers is an issue worthy of attention, especially when contrasted with the lightening speed at which the initial 'children overboard' report was transmitted.

4.21 Mr Scrafton said that in the days following the 'children overboard' report he spoke with Rear Admiral Ritchie and Air Vice Marshal Titheridge, and through this was informed of an instruction to take statements from crew members of the *Adelaide* and of the existence of the video footage.³⁴ He expected Strategic Command to get back to him with advice on the statements and video once they were available.³⁵ However, Strategic Command did not alert Mr Scrafton to the arrival of the video at Maritime Headquarters in Sydney. Nor did the statements themselves make their way to the Defence Minister's office in Canberra.

4.22 Despite not actually seeing the statements, Mr Scrafton's evidence suggests that the Defence Minister's office became aware that these statements cast significant doubt on the original report very early in the piece. He said:

I became aware that there were very significant doubts about [reports of 'children overboard'] when talking to Admiral Ritchie on, I think, 11 or 12 October – I forget the exact dates – and in subsequent discussions with Air Vice Marshal Titheridge, who are people I was talking to on a regular basis every day. They were firming up the fact that the sworn statements by the *Adelaide* crew, which Admiral Smith at that stage knew, indicated that at no stage did anybody clearly see children being thrown into the water.³⁶

33 CMI Report, p.65

34 *Transcript of Evidence*, 1 September 2004, p.24 (Scrafton)

35 *Transcript of Evidence*, 1 September 2004, p.24 (Scrafton)

36 *Transcript of Evidence*, 1 September 2004, p.16 (Scrafton)

4.23 Yet the sluggish speed at which these statements and video made their way to relevant people in Canberra is of concern. Mr Scafton says he followed up the sworn witness statements and video with Air Vice Marshal Titheridge on around 14 or 15 October, to be told that:

...they were moving slowly towards Canberra and I should not ask any more about what was happening to them.³⁷

4.24 Mr Scafton says Air Vice Marshal Titheridge also told him that 'things were not moving as quickly as they might normally'.³⁸

4.25 While the slow progress of the video may be understandable, the same cannot be said of the statements, which were available by email from as early as 11 October. On 11 October they were emailed to several senior Navy officers who concluded on seeing them that no children were thrown overboard from the SIEV 4.³⁹

4.26 The Committee invited Air Vice Marshal Titheridge to appear before it as it had hoped to ask him about the delay in getting the witness statements and video tapes to Canberra. In declining the invitation to appear, AVM Titheridge stated:

I have nothing to add to this issue. Requests received by me from Mr Scafton were passed to the chain of command for action, in this instance to HQ Australian Theatre and then, I presume, to Maritime HQ where the tape was held. You would have to seek information about those delays from those responsible for custody of the tape.

4.27 This means that this Committee can only speculate about the reasons for the delays in the statements and video reaching relevant people in Canberra. It notes with concern the failure of this material to reach the Defence Minister's office in a timely way.

People Smuggling Taskforce not alerted to doubts about 'children overboard' story

4.28 The CMI Committee noted AVM Titheridge's failure to relay doubts about the 'children overboard' incident to the People Smuggling Taskforce, on which he was the Defence representative.⁴⁰ AVM Titheridge told the CMI Committee that it was not until 25 November 2001 that he had had cause to doubt the 'children overboard' story.⁴¹ This was in direct conflict with several senior Navy officers, who believed they had told AVM Titheridge on 11 and 17 October that children had not been

37 *Transcript of Evidence*, 1 September 2004, p.12 (Scafton)

38 *Transcript of Evidence*, 1 September 2004, p.25 (Scafton)

39 CMI Report, p.65

40 CMI Report, p.142

41 CMI Report, p.139

thrown overboard.⁴² Mr Scafton's new evidence that his conversations with AVM Titheridge were one factor leading him to doubt the initial report lends weight to the CMI Committee's belief that AVM Titheridge was made aware of problems with the 'children overboard' story much earlier, even if he did not realise the import of that advice, and could not recall it later on.

4.29 Without further opportunity to obtain AVM Titheridge's version of events, this Committee can make no further comment on this matter, but notes the findings of the CMI report mentioned above.

Conclusion

4.30 Mr Scafton's new evidence has added to the public record on the handling of information relating to the 'children overboard' incident.

4.31 Of particular interest is his knowledge of the Defence Minister's failure to retract the 'children overboard' photos despite being told that they were of a different incident. This is in addition to the Defence Minister's reluctance to view the video, as previously established by the CMI inquiry⁴³ and noted in Chapter 2. Mr Scafton's evidence suggests that Mr Reith, his chief of staff and his media adviser all knew that the photos were being misrepresented, but decided not to correct the public record. His evidence also corroborates the CMI report's findings that the Prime Minister's office was alerted to the misrepresentation of the photographs before the Prime Minister's Press Club appearance on 8 November.

4.32 In a wider sense, Mr Scafton's evidence also highlights two further concerns.

4.33 First, Mr Scafton's account of how information was handled in the Defence Minister's office illustrates concerns about the ambiguity and potential confusion surrounding what constitutes 'formal advice' to ministers. This has become particularly problematic with the proliferation of lines and modes of communication between officials and ministers and their advisers.⁴⁴ Mr Scafton's evidence reinforces the impression that despite the minister's office receiving multiple reports about the misrepresentation of the photos, the minister was able to avoid publishing this unwelcome information on the ground that he had not been advised 'formally' in writing from an appropriately senior officer that the original children overboard report was wrong.⁴⁵ As another recent Senate report has observed, in cases involving tight time frames, political controversy and high operational activity like the children

42 CMI Report, p.139

43 CMI Report, pp.86-87

44 Senate Finance and Public Administration References Committee, *Staff employed under the Members of Parliament (Staff) Act 1984*, October 2003, pp.78-80

45 See also CMI Report, Chapter 6

overboard incident, problems are likely to arise if formal communication procedures are not in place.⁴⁶

4.34 Mr Scafton's evidence underlines the necessity for establishing proper communication protocols between departments and ministerial offices to ensure that both parties understand clearly when official communications have passed from one to the other. A formal system of communications may not overcome entirely the 'accountability gap' that the children overboard affair exposes, but it would provide a framework for, and help reduce the ambiguity with, the handling of sensitive information between public servants and ministers and their advisers.

4.35 An obvious point emerging from this inquiry is that verbal communications are uniquely vulnerable to confusion, misunderstanding, ambiguity and to simply being forgotten or ignored. It is recommended that public servants record the essence of key messages or concerns that pass between them and ministers' offices. A follow-up email or a diary note may help ensure that important features of a conversation are marked as such and may result in potentially significant dividends in terms of accuracy, accountability and public confidence.

4.36 The second area of concern, as discussed in Chapter 1, relates to the way in which strict centralisation of all public communications for Operation Relex in the minister's office meant that misinformation about the original incident and the photos remained uncorrected far longer than might have been the case if normal Defence communication protocols had operated. As the CMI report stated, with the minister's office acting as the gatekeeper between the Australian Defence Force and public,

...this substantially undermined both the CDF and the Secretary [of the Defence department] 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.⁴⁷

4.37 Such centralisation of communications in a minister's office not only risks misinformation remaining inadvertently uncorrected, but makes all information susceptible to manipulation according to political convenience. At the very least, by restricting public servants from publishing, in accordance with standard practice, accurate facts and advice about operations they have administrative responsibility for, this strategy reduces the chances that errors will be identified and corrected at the earliest opportunity. More seriously, it creates a perception of politicisation of the public service, as public servants are seen to be responsible for politically convenient

46 Senate Finance and Public Administration References Committee, *Staff employed under the Members of Parliament (Staff) Act 1984*, October 2003, p.79

47 CMI Report, p.152

misinformation going uncorrected. Ultimately, it undermines public confidence in the integrity of the information being published about a controversial matter. The 'children overboard' affair is a classic illustration of this point.

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Senator Jacinta Collins
Chair