

## 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’.<sup>1</sup>

#### 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’.<sup>2</sup>

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.<sup>3</sup>

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.

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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'.<sup>4</sup>

### ***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.<sup>5</sup>

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.<sup>6</sup> Between 6.13pm<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> They displayed, in CO (Commander) *Adelaide*'s [Commander Banks's] words, 'visible and oral aggression' and continued to make way steadily towards Christmas Island.<sup>10</sup> Commander Banks told the

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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’.<sup>11</sup>

3.12 By 2.30am on 7 October, SIEV 4 had entered Australia’s contiguous zone<sup>12</sup> 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’.<sup>13</sup>

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.<sup>14</sup>

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’.<sup>15</sup>

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,<sup>16</sup> and that they were ‘irate, aggressive and to some extent hysterical’.<sup>17</sup>

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

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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.<sup>18</sup> 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.<sup>19</sup>

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’.<sup>20</sup>

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’.<sup>21</sup> 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.<sup>22</sup>

3.22 ‘However’, he continued:

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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.<sup>23</sup>

3.23 SIEV 4 began heading north at slow speed.<sup>24</sup> Commander Banks signalled:

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

### ***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.<sup>26</sup> 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'.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup>

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'.<sup>30</sup> Accordingly, the SIEV was deemed to be a vessel in distress and CO

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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.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup>

3.29 However, some difficulties did arise during night, when the bilge levels in SIEV 4 began to rise.<sup>34</sup> The SIEV's generator had failed and could no longer power the bilge pumps.<sup>35</sup> 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.<sup>36</sup> 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'.<sup>37</sup>

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.<sup>38</sup> Commander Banks described the situation to the Committee as a 'controlled abandon ship' directed by the boarding party embarked on SIEV 4.<sup>39</sup> 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.<sup>40</sup>

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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.<sup>41</sup> 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.<sup>42</sup>

3.34 Commander Banks emphasised that his ‘instructions were clear that there was to be no loss of life or injury’.<sup>43</sup> 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’.<sup>44</sup>

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’.<sup>45</sup>

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.<sup>46</sup>

3.37 For example, he noted:

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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.<sup>47</sup>

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’.<sup>48</sup> 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

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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.<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup> The leaders of the group confirmed that there was no loss of life and that no-one was missing.<sup>52</sup> By 7.36pm, the two RHIBs had also been recovered and all the *Adelaide*’s personnel accounted for.<sup>53</sup>

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.<sup>54</sup>

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

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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’.<sup>56</sup>

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.<sup>57</sup> 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.

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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 minutes<sup>58</sup> 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.<sup>59</sup>

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'.<sup>60</sup> 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?

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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.<sup>61</sup>

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.<sup>62</sup>

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.<sup>63</sup> 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;<sup>64</sup>
- 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;<sup>65</sup>
- 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;<sup>66</sup>
- 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

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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'.<sup>67</sup>

- 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].<sup>68</sup>

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),<sup>69</sup> and Brigadier Silverstone noted that, at 4.50am, first light would have been '10 or 15 minutes away'.<sup>70</sup> Sunrise did not take place until 5.39am.<sup>71</sup> 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';<sup>72</sup>
- 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;<sup>73</sup>

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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;<sup>74</sup> 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’.<sup>75</sup>

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.<sup>76</sup>

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.<sup>77</sup>

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.

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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.<sup>78</sup>

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.<sup>79</sup>

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'.<sup>80</sup>

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'.<sup>81</sup>

### **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.

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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’.<sup>82</sup>

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.<sup>83</sup>

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.<sup>84</sup>

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.<sup>85</sup>

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

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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.<sup>86</sup>

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'.<sup>87</sup>

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.<sup>88</sup> 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.<sup>89</sup>

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'.<sup>90</sup>

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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.<sup>91</sup>

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.<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup>

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

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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'.<sup>96</sup> 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.<sup>97</sup>

## 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.<sup>98</sup> 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.<sup>99</sup>

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'.<sup>100</sup> 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.<sup>101</sup>

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.

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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.

