

Chapter 7

Accountability

Introduction

7.1 Many of the questions and concerns that animated the Select Committee's inquiry arose from considerations of accountability. These revealed forcefully what academic analysts have recently been asserting – that accountability is 'a notoriously imprecise term'¹, something that must be approached 'as a problem with multiple levels and more than one possible meaning'² and that balancing accountability with the need for flexibility of action is 'the ongoing challenge of public policy in Australia.'³

7.2 This chapter explores some of these major themes by drawing on particular examples relevant to the 'children overboard' controversy, and teasing out aspects which reveal how, in practice, people understand and exercise their accountability responsibilities. Consideration will be given to the actions and decisions of some key officials involved, up to and including ministerial staff. Attention will then turn to broader questions of how reporting arrangements, lines of authority, and administrative structures facilitate or impede accountability. Finally, consideration will be given to how accountability might be strengthened and what practical mechanisms might be put in place to promote and enhance it.

Accountability in the Public Sector

7.3 The Committee acknowledges the complexity of accountability in modern governance arrangements, and accepts the fact that there is a continuum of accountability relationships, both vertical and horizontal, between the public service, the government, the parliament and Australia's citizens. Nevertheless, there are some fundamental tenets and practices of accountability that are well established in public administration, even though these received notions of accountability are increasingly being stretched.

1 Richard Mulgan, 'Comparing Accountability in the Public and Private Sectors', *Australian Journal of Public Administration* 59(1) (2000), p.87.

2 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p21.

3 Alison McClelland, 'Partnerships and Collaboration: propositions from Experience', in *New Players, Partners and Processes: A public sector without boundaries*, edited by M Edwards and J Langford, (Canberra: 2002).

7.4 Legislative prescription for public service accountability is contained in several pieces of legislation, including the *Public Service Act 1999*, and the *Financial Management and Accountability Act 1997*. Various sets of supporting guidelines are also developed and distributed by the Public Service Commissioner. The Chief Executive's Instructions are explicit about accountability issues. Other material is also promulgated dealing with the accountability attaching to particular arenas of activity – for example, the *Commonwealth Procurement Guidelines* (Department of Finance and Administration) and the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* (Department of the Prime Minister and Cabinet).

7.5 Accountability within the context of the public service is usually described in terms of obligations arising from the relationships of responsibility or authority which pertain between the public service, ministers and the parliament. Departments and public servants must account for their performance, and accept sanctions or redirection;⁴ there are legal obligations to be responsive to the legitimate interests of affected parties; invariably a duty of care is involved; citizens and legislators have a right to information about the expenditure of public funds and how decisions are made.⁵

7.6 Correspondingly, government ministers have, under the constitutional doctrine of responsible government, both collective and individual responsibilities. A minister is accountable to the parliament for the policies and actions implemented by his or her department.⁶

7.7 There are both legal and conventional obligations attached to the performance of ministers - along with political requirements – and these contain their own version of sanction and redirection. The parliament expects ministers to tell the truth. At the heart of the debating and scrutiny process is the securing of sound information. Ministers must immediately correct any mistake they may have conveyed to parliament, and the making of a deliberately misleading statement is usually considered a contempt.

7.8 Against this background of quite unambiguous accountability requirements, at both departmental and ministerial level, key features of the management and distribution of information about the 'children overboard' incident and its aftermath stand out as inimical to the transparency, accuracy and timeliness requirements that are vital for proper accountability. As a consequence, fair dealing with both the public and the agencies involved was seriously prejudiced. That such circumstances should

4 Richard Mulgan, 'Comparing Accountability in the Public and Private Sectors', *Australian Journal of Public Administration* 59(1) (2000), p.87.

5 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p22.

6 Christopher Kam, 'Not Just Parliamentary 'Cowboys and Indians': Ministerial responsibility and bureaucratic drift' *Governance: An International Journal of Policy, Administration and Institutions*, 13 (3) (2000), p.365.

have prevailed in the politically significant context of an election campaign is a matter for grave concern.

7.9 Ministers, as the focus for the accountability of subordinates, and as the agents of accountability to parliament must in their turn promote transparency and ensure the integrity of information that is communicated to the public and the parliament. The Committee has serious concerns in this regard and these are explored in more detail later in this chapter.

Accountability and the Australian Defence Organisation (ADO)

7.10 Before embarking on a detailed account of the accountability and leadership structures in the ADO in the context of ‘children overboard’, it is important to set out briefly the traditional relationship between Australia’s defence forces, the government, and the Australian public. In the Committee’s view, key ministerial decisions about the way in which Defence’s role was communicated to the Australian public had a significant bearing upon the way the ‘children overboard’ fiasco unfolded. These decisions turned on their head some important conventions embedded in how the ADF usually related to the Australian public about its operations, and upset some subtle balances in that traditional relationship.

7.11 This traditional relationship may be characterised in the following terms:⁷

- Military force is exercised in the interests of the nation as a whole as determined by the government of the day. The government exercises a stewardship over the Defence Force on behalf of the nation.
- The Defence Force has a duty to stay out of party politics and the government has an obligation to avoid drawing the military into party political issues.
- Defence policy has been substantially bipartisan.
- Military personnel may speak about operational matters as they see fit, consistent with security and operational requirements, while matters of policy remain open for comment only by ministers.

7.12 In the Committee’s view, the actions of the former minister, Mr Reith, and of key members of his staff, undermined important aspects of the relationship between the ADF and the government. They did this by inserting themselves into both the military and civilian chains of command and by insisting that all public communications about Operation Relex be centralised in the minister’s office.

7.13 The Committee has commented elsewhere on Defence Instructions (General) No. 8 and on the extraordinarily restrictive Public Affairs Plan that the government

7 Account drawn from various sources including Hugh Smith ‘A Certain Maritime Incident and Political-Military Relations’ *Eureka Street* No.387, p.39, and *Transcript of Evidence*, CMI 1194-95, 1199-1201, 1228, 1242-44, 1254-55.

applied to Operation Relex. In the words of one Defence commentator: 'A form of censorship existed which prevented military personnel from providing information and correcting misinformation in the normal way.'⁸

7.14 By making the minister's office the interface between the ADF, the Defence Department and the public, the minister weakened the trust that needed to prevail between these groups. It also substantially undermined both the CDF and the Secretary in that they could not exercise their own discretion concerning information provided to the public. The result was that an important aspect of public accountability evaporated.

The diarchy and accountability

7.15 The dual leadership of the Australian Defence Organisation by the Secretary of the Department of Defence and the Chief of the Defence Force, and the mix of military and civilian regimes which comprise the ADO, has important implications for how accountability is rendered under such conditions.

7.16 For the ADF, the military arm of the organisation, accountability is effected primarily through the 'chain of command' to the Chief of Defence Force (CDF), who has command authority over the whole of the ADF and is the principal military adviser to the government. This is not to deny that those outside the chain of command also have important accountability obligations – and in any event the transiting of decisions and actions from within to without the ADF chain of command is not uncommon. But it has been repeatedly stressed by service personnel that the concept of a 'chain of command' – which entails a chain of iterative reporting and thus accountability - is fundamental to the way service personnel go about their business, whether that be routine or during a military operation.

7.17 Accountability requirements for the civilian arm of the ADO, the Department of Defence, are basically those applicable in any other public service agency. There are some special features of that accountability arising from the joint responsibilities of the Secretary and the CDF under Section 9A of the *Defence Act 1903* and the responsibilities and authority of the Secretary under the *Financial Management and Accountability Act 1997*. These are set out in a ministerial directive.⁹

7.18 The dual leadership of the Australian Defence Organisation is formally expressed by the term 'diarchy', a term regarded as 'useful ... for characterising what is an understandably rare organisational construct.'¹⁰ The Secretary has further elaborated the concept as follows:

8 Hugh Smith 'A Certain Maritime Incident and Political-Military Relations' *Eureka Street* No.387, p.41.

9 Tabled Paper, Ministerial Directive from Hon. Peter Reith, Minister for Defence, 9 April 2001.

10 Dr Allan Hawke, Paper based on *Address to the Royal United Services Institute*, Adelaide, 1 May 2000.

The diarchy is not about striking a balance between ‘opposing powers’. It is about bringing together the responsibilities and complementary abilities of public servants and military officials, to achieve the Defence outcome sought by the Government of the day. Those complementary abilities are about, on the one hand, giving the CDF unfettered focus on the command of the ADF and, on the other hand, allocating clear responsibility to the Secretary for the resource, policy and *accountability functions* [emphasis added] of the largest Department of the Commonwealth Government.¹¹

7.19 The diarchy may have served the Australian Defence Organisation well during the period where received notions of its purpose emphasised its fundamentally military functions. Until 2001, Defence’s mission was ‘The prevention or defeat of armed force against Australia or its interests’. During 2001-02 this outcome became ‘to defend Australia and its national interests’,¹² a considerable broadening of the scope of the ADO’s responsibilities.

7.20 Now that its mission has shifted to ‘defend Australia and its national interests’ there are new tasks and functions in the ADO landscape that may well demand a more nuanced articulation of the diarchy. In the Committee’s view, the way the diarchy impacted upon the ‘children overboard imbroglio’ highlights the need for such refinement.

7.21 In his evidence, Dr Hawke repeatedly asserted what he described as his ‘pure view’ of the demarcation in responsibilities between the Secretary and the CDF concerning ‘operational’ or ‘chain of command’ issues.¹³ In Dr Hawke’s view, the issue of claims about children being thrown overboard from SIEV 4 was ‘an operational matter affecting the chain of command’ which was being ‘run by CDF’ who was ‘in daily contact with the minister’.

So he was providing the advice and discussing these matters with the minister, not me. I do not think I have a role in it—and I suspect if I attempted to, the ADF would be up in arms about it.¹⁴

7.22 It does not seem, however, that the CDF and the Minister necessarily viewed the operational / bureaucratic demarcation of responsibilities in the way that Dr Hawke himself did. While the responsibilities and accountabilities of the ‘diarchy’ incumbents may appear jointly and severally clear - at least on paper – it seems to the Committee that the Secretary, CDF and Minister were not entirely at one when it came to how each interpreted what the diarchy required, and more importantly, how each acted within that arrangement.

11 Dr Allan Hawke, Paper based on *Address to the Royal United Services Institute*, Adelaide, 1 May 2000.

12 Defence Annual Report 2000-01, (Canberra), p.4.

13 *Transcript of Evidence*, CMI 8-11, 18-22.

14 *Transcript of Evidence*, CMI 9.

7.23 For example, Dr Hawke regarded his involvement in attempts to correct the record about falsely attributed photographs as a proper intervention, and consistent with his accountability obligations to the minister. However, when it came to the public release of the photographs, those decisions were made by the minister in consultation with the CDF, not Dr Hawke, suggesting that they did not observe operational / bureaucratic distinctions in the way they were articulated by Dr Hawke.

7.24 The CDF appears not to have sought to engage with Dr Hawke at all on the issue of the handling of photos within the administrative chain. The CDF was quite content to engage directly with Minister Reith about the photos, and approved their release via AVM Titheridge and without reference to Dr Hawke.

7.25 The Committee notes, however, that Dr Hawke was involved in facilitating the preparation and dissemination of Vice Admiral Shackleton's 'clarifying statement', even though it went to questions of advice to the minister that were ostensibly about 'operational' matters.¹⁵

7.26 While Dr Hawke has made clear his reluctance to insert himself into or comment on 'operational' matters, it seems that they are not beyond his ken. Evidence provided by Admiral Barrie to Senate Estimates suggests that Dr Hawke was probably reasonably well-informed about operational matters.

Senator FAULKNER—... Did you raise any of the matters raised with you by either Rear Admiral Richie or Rear Admiral Smith with the Secretary of Defence, Dr Hawke?

Adm. Barrie—I would have to say that I would be surprised if I had not because the secretary of the department and I have a very close relationship.

Senator FAULKNER—Sure. Could you outline for the benefit of the committee ... what the nature of those communications were?

Adm. Barrie—I would be pretty confident in saying that the communications would have been verbal. They would have been issues that we had discussed. We see each other pretty frequently, and almost every day when we are in the headquarters.

...

Senator FAULKNER—Are you able to help us about how well apprised the secretary was about these matters in the broad?

Adm. Barrie—Again, I would say that he would be well apprised. But you would have to ask him; I can only give my impression.

...

Senator FAULKNER—Yes, but, Admiral, you would be aware of briefing material going to Dr Hawke from the ADF.

Adm. Barrie—On operations?

Senator FAULKNER—No, formal briefing material if there were some.

Adm. Barrie—Yes, sometimes.

Senator FAULKNER—Was that taking place?

Adm. Barrie—Not to my certain knowledge. Again, you would have to ask Dr Hawke..... I am not aware of all the briefing material Dr Hawke gets from the ADF. I am also very conscious that Dr Hawke attends the Strategic Command Group, so he gets involved in a whole range of committee work and other things. As I said earlier, I would be very surprised if he was not in the picture.

7.27 The Committee considers that the boundaries around the ‘operational’ or ‘chain of command’ domain are not necessarily as clear, nor should they be as unbreachable, as Dr Hawke might claim. Given the joint responsibilities of the diarchy for Defence overall, and the involvement of both the military and civilian arms of Defence (navy and public affairs respectively) in the government’s handling of people smuggling, the Committee doubts the utility of a strict approach to ‘operational’ boundaries – particularly where the ‘operations’ are not conventional military ones. The Committee considers that a strict separation of the operational from the bureaucratic domain in these kinds of ventures is arguably not only unrealistic but counterproductive.

7.28 As well in this instance, the CDF was overseas for significant periods, with various Acting CDFs serving in his place. Important military operations were already in train in several locations, and further serious deployments were being planned. These required the full attention of the CDF. By comparison, the navy’s role in intercepting SIEVs was a non-military, border protection exercise essentially under civilian control.

7.29 The CDF made much of these factors in his evidence before the Committee, declaring the Australian Defence Force, in October 2001, to be ‘committed as never before’, and that this context was ‘highly pertinent to [the ADF’s] present priorities for action’.

In addition, we were supporting, as required, the government’s border protection policy. I emphasise ‘supporting’. Defence was not and is not running the government’s border protection policy. That is a function of other government departments. Defence’s role was as an agency directed to support a policy being formulated and implemented by other agencies, such

as the departments of Prime Minister and Cabinet, Immigration, Foreign Affairs and Transport.¹⁶

7.30 Under these circumstances, the Committee considers that the civilian half of the diarchy could properly assume a legitimate interest in undertaking a role more deliberately and visibly linked to ‘operational matters’ involving border protection. The diarchy leaders, when both were in town, typically had ‘daily discussions’.¹⁷ Opportunities for the exchange of information, views and proposals would therefore have been relatively abundant.

7.31 Such regular contact should have virtually eliminated any risk of one half of the diarchy cutting across the other in a manner that was adverse to their responsibilities. At the same time, it should have provided ample opportunity for the Secretary to draw anything problematic to the CDF’s attention, and vice versa.

7.32 In short, the realities of the diarchy’s personal interactions, their professional joint responsibilities and the requirements of a whole-of-government approach to border protection matters seem to fly in the face of a purist view of the operational / bureaucratic distinction.

7.33 The Committee has referred elsewhere to the views of Ms Halton and Professor Weller about what they believed would be appropriate action by a departmental secretary where a whole-of-government operation was in train. The implication of those views is that the diarchy, when applied in the manner promoted by the Defence leadership, is against the spirit of the accountability requirements for such operations.

7.34 Again, in the context of the broad responsibilities of departmental heads, the Committee notes the following advice from the Public Service Commissioner, Mr Podger, in re-issuing his predecessor’s guidance to secretaries about their performance assessment. That advice nominates five areas to focus on.

[These are] whole-of-government support, ministerial support, management, leadership and the promotion of the APS values.

7.35 The Committee is struck by the significance of the fact that whole-of-government support heads the list. Such a requirement has also been emphasised by the Auditor-General in his consideration of the auditing and accountability responsibilities around what is commonly termed ‘joined-up government.’¹⁸

16 *Transcript of Evidence*, CMI 741.

17 *Transcript of Evidence*, CMI 7.

18 Pat Barrett AM, Auditor-General, *Implementing Adequate Supervision – of what kind and how much*, Address to a Laboratory for Politicians and Top Managers from Different Public Institutions in Europe, Regione Lombardia, Italy, April 2002: accessed at <http://www.anao.gov.au/Web/wsPub.nsf/SpeechesByDate/>

7.36 The Auditor-General cited a Canadian-UK report which offered the following comment on the corporate role of permanent secretaries:

Permanent Secretaries have an individual and a collective responsibility. An individual responsibility to serve their respective ministers, to oversee the performance and ongoing improvement of their department. They also have a collective responsibility to serve the government as a whole by supporting and moving forward the government agenda. They have a collective responsibility ... to ensure that [the public service] is up to today's challenges.¹⁹

7.37 The Committee accepts that Dr Hawke held genuinely to his belief, based on the Ministerial Directive and his purist view of the diarchy, about not trespassing on what he regarded as the operational and advisory territory of the CDF. But it remains the case that Dr Hawke possessed knowledge in October 2001 about the misrepresentation of photographs, and in November about the absence of corroborative evidence in Defence intelligence material and reports concerning claims of children being thrown overboard. That several Defence officials knew these things, but for some reason failed, or were ignored, in their attempts to convey such advice to the minister is, in the Committee's view, alarming.

7.38 Dr Hawke has elsewhere observed: 'We're paid to call it as it is – not to provide tailored or filtered advice.'²⁰ In the case of the misrepresented photographs, explicit corrective advice was passed to the Minister's office by senior Defence officials. That this was to no avail in terms of the minister amending the public record is completely unacceptable.

7.39 In making the above points, the Committee does not assign to Dr Hawke the sole responsibility for ensuring Defence's accountability in general nor in the particular case of the 'children overboard' controversy. Several witnesses discussed the role and responsibilities of the CDF, Admiral Barrie, and his handling of the 'children overboard' controversy. The Committee has explored in the previous Chapter the CDF's acts and omissions, and the impact of these on effective accountability.

7.40 The diarchy should be an *enabling* mechanism – and in a conventional military/operational context it no doubt enables clarity of advice to the minister. However, the Committee is of the view that, whatever its strengths in other circumstances, the diarchy proved inimical to the effective handling of the 'children overboard' controversy, and more broadly to Defence's involvement in the whole-of-government approach to border protection.

19 Canadian Centre for Management Development, *Be the Change: Peer Review Report of the Cabinet Office Role in Modernising Government*, (2000) : accessed at www.cabinet-office.gov.uk/moderngov/peerreview

20 Dr Allan Hawke, *Public Service – A Secretary's View*. Paper based on the Telstra Address at the National Press Club, June 2002.

7.41 There may, perhaps, have been a robust exchange of views between the Secretary and CDF about the errors and doubts that, within days of the event, were seriously bothering their colleagues in both the operational and bureaucratic domains. Unfortunately, the diarchy privileged the CDF's position as adviser to the minister about Operation Relex matters and Dr Hawke used the diarchy to justify his decision not to provide separate advice. Thus the diarchy contributed to the failure by the Defence minister to correct the public record.

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

7.43 It must be stated clearly here, however, that the Committee's concerns about the diarchy are of relatively small moment compared to its grave concerns about the role of the minister's office in this whole affair. As has been made clear in Chapter 5, it is incontrovertible that sufficient advice was passed from the ADO to ministerial staff providing ample justification for a correction, by the minister, of the public record.

7.44 For the Committee, there are at least two key lessons to be learned from the consequences of how officials, agencies and ministerial staff interacted during this affair. One is that the role of ministerial staff in shaping the relationship between a department and a minister's office has a crucial impact on the robustness and transparency of the accountability that prevails. The second is that a whole-of-government approach to issues requires a substantial rethinking of concepts of accountability and how senior public servants might exercise their accountability function *horizontally* (across policy and operational alliances) as well as vertically through their own organisation to their minister.

7.45 The questions and tensions surrounding the horizontal and vertical responsibilities and accountabilities within the Defence diarchy are but a local version of broader accountability questions where multiple lines of authority, responsibility and agency are involved. For the Committee, such questions go to the heart of sound administrative practice.

Accountability in a Whole-of-Government Environment

7.46 The challenges to traditional standards and received notions of line authority posed within a modern public service are well expressed in the words of the University of Melbourne's Professor Mark Considine:

We expect public actors to account to the legislature, the courts and the citizenry and to other agencies with whom they coproduce public goods. Multidimensionality therefore begets complexity. ...

In the new world of enterprising government, the public official is expected to both honour his or her official mandate and to move freely outside the hierarchical constraints ... in search of collaborative relationships ...

This multidimensional agency power suggests that accountability cannot be defined primarily either as the following of rules or as honest communication with one's superiors. Rather, it now involves what might be thought of as the appropriate exercise of a navigational competence: that is, the proper use of authority to range freely across a multirelationship terrain in search of the most advantageous path to success.²¹

7.47 In the (increasingly frequent) whole-of-government approaches involving discrete agencies working collaboratively towards the same policy outcome, notions of 'navigational competence' and 'the proper use of authority across a multirelationship terrain' seem particularly apt. Professor Considine also proposes that instead of thinking about a 'line of accountability', one should think in terms of a 'culture of responsibility'.²²

7.48 It is worthwhile examining the implementation of the whole-of-government approach to people smuggling in the light of all these notions. The saga of 'children overboard' reveals quite starkly some of the vulnerabilities to which whole-of-government approaches are subject.

7.49 It is important to attend to these, because whole-of-government approaches are increasingly valuable strategies. As their value and frequency increases, more intense becomes the imperative that they be conducted in a robust and coherent way. The participating agencies must be effective collaborators without putting at risk their discrete responsibilities. This inevitably means adjustments to 'business as usual', and such adjustments must be understood, accommodated, and communicated within each agency.

7.50 The approach on this occasion was via an interdepartmental committee, the People Smuggling Taskforce (PST), chaired by a senior executive of PM&C. The preferred *modus operandi* of an IDC can be broadly expressed in the following terms.

7.51 Interdepartmental committees (IDCs):

- Are usually established to assist in the coordinated handling of major issues where the interests of a number of ministers and the agencies for which they are responsible are critically engaged.

21 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p22.

22 Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services', *Governance: An International Journal of Policy, Administration and Institutions*, 15(1) (2002), p23.

- They do not have executive or decision-making powers.
- They typically provide reports containing advice and recommendations to ministers and other decision-making authorities, including to Cabinet.
- While the work of IDCs may affect the policy advising roles of agencies to their ministers it does not displace it. Therefore, when an IDC report is provided to ministers, the representatives of agencies on the IDC should advise their ministers separately of their views on the report.²³

7.52 The Committee has assessed the functioning of the People Smuggling Taskforce (PST) against the preferred model outlined above. The evidence in this regard is somewhat contradictory. Importantly, several aspects of the PST's operations were not conducive to best practice.

The role and operations of the People Smuggling Taskforce IDC

7.53 The establishment of the PST in August 2001 seems to have been at the suggestion of Mr Bill Farmer (Secretary, DIMIA) conveyed to Mr Max Moore-Wilton (Secretary, PM&C)

That was partly in response to the *Tampa* range of issues—because that was developing, as you know, very quickly—but partly also because we had had a range of boats coming into Australia and we thought that you really needed a more concerted focus on what was happening and on government responses.

I certainly thought that in DIMIA, in order to bring together the whole-of-government effort, you needed a mechanism which would do that on an ongoing basis rather than on an ad hoc basis—that is, on the basis of working level contacts and then occasionally phone calls and so on at senior level.²⁴

7.54 There had been earlier, more ad hoc committees, but for the PST:

there were really two changes: firstly, the level of representation, at least from some organisations, and the range of representation; and, secondly, the fact that the committee met in a more intense and regular way.²⁵

7.55 The Secretary of DIMIA (Mr Farmer) was a key player in the People Smuggling Taskforce. He regarded PM&C as the lead agency in the matter,²⁶ and

23 Department of Defence, *Guidelines for Defence involvement in IDCs or like joint government agency groups*. May 2002, paras 2-5.

24 *Transcript of Evidence*, CMI 859-860.

25 *Transcript of Evidence*, CMI 863.

26 *Transcript of Evidence*, CMI 862.

confirmed to the Committee that the PST operated without any specific terms of reference.²⁷ He explained:

We had a job to do, which was to bring together all the government agencies involved to respond to this phenomenon of illegal boat arrivals...[T]he first time I remember meeting with this group was in relation to the *Tampa*.²⁸

7.56 The Taskforce was chaired by a senior PM&C executive, Ms Jane Halton. Ms Halton introduced her account of the PST's purpose and operations in the following way:

The PST was set up and run on the basis that it provided advice on policy and operational issues as they arose. One of the group's key jobs was information exchange to ensure that all agencies were kept aware of relevant and emerging facts. It is important to understand that the role of the PST was not to insert itself into the chain of command within departments or the military.

My habit as chair was to start every meeting with a roundtable update from every agency. I always asked those attending to update the group, to raise any issues that they wish discussed or considered and to ensure that all members were fully informed. The need to ensure we were kept fully informed was reinforced on many occasions. At all times the PST operated in a thorough and professional manner consistent with Australian Public Service practice and APS values. Where issues or concerns emerged, these were followed up and advice provided. With hindsight, it is clear that some information which was available elsewhere was not passed to the PST.²⁹

7.57 According to Ms Halton, the Taskforce reported to the PM&C Secretary (Mr Moore-Wilton) and to the Prime Minister's Office. While the Taskforce brought together 'the collected advice' of the participating agencies about an issue, and the Taskforce might 'come to a view about that particular issue', Ms Halton stated that this 'did not in any way fetter any members of that group from individually advising their minister as to their individual view.'³⁰

7.58 Ms Halton consistently denied that the PST actually took decisions, stating that she was:

struggling to come up with an example of where the IDC took a decision. It had no power to take decisions. Decisions were taken by ministers or where individual departments had delegated authority in respect of those delegations. ...

27 *Transcript of Evidence*, CMI 862.

28 *Transcript of Evidence*, CMI 863.

29 *Transcript of Evidence*, CMI 902.

30 *Transcript of Evidence*, CMI 913.

It discussed issues as they arose and it discussed the handling of those. It provided an opportunity ... for information exchange so all of the agencies that were working on this issue had the opportunity to hear from all of the others precisely what issues were currently emerging. So, ...it was important, for example, for Customs officers, for the Federal Police and for Immigration officers to all understand exactly what was intended in particular respects so that their officers on the ground could be similarly briefed and be working from the same basis. As you know, it is the classic conundrum of whole-of-government exercises that individual departments do not always get the information that other departments have, and this was a mechanism to ensure that those departments were all privy to the same information...

As you know, the group prepared briefing papers and option papers in particular areas, so you are already aware that there was one provided on the evening of 7 October. ... What the paper did...was reflect the views of all of the agencies in respect of a series of issues. In some cases it reflected an accord about issues and in some cases it reflected a difference of view, which again you would expect—agencies come from different perspectives. It was important that in this particular case the Prime Minister understand that the agencies sometimes had a slightly different perspective on those issues.³¹

7.59 Although Ms Halton was categorical in her claims that the PST did not take decisions, nor insert itself into other agencies' chain of command, certain witnesses indicated to the Committee that they had the distinct impression that the PST not only laid out the broad operational framework and rules of engagement, but had a key role in directing the course of events, and indeed made decisions which then simply had to be implemented by the relevant agency.

7.60 On the last point, for example, according to a senior DIMIA official (Deputy Secretary Ed Killesteyn) it was the PST that decided that, in the case of SIEV 4, the people on board should be given a prepared script which would give them certain details about how they were to be transported to 'another place' and processed by Australian officials, but which would not disclose full details of where they were going. The script – one of a series that had been developed - was unique in this respect.³² According to Ms Halton's, the PST 'saw' and 'discussed' such a series of scripts, but the PST 'did not make a particular decision that [asylum seekers] would be misled.'³³

7.61 It is not clear from this evidence whether the PST instigated the modified script for SIEV 4 and directed that it be implemented, or simply endorsed a settled DIMIA decision about how SIEV 4's occupants should be handled. A file note dated 10 October prepared by Deputy CEO, Customs (Mr John Drury), who was present at

31 *Transcript of Evidence*, CMI 910.

32 *Transcript of Evidence*, CMI 866-67.

33 *Transcript of Evidence*, CMI 906-8.

that meeting, listed what he noted as ‘issues [that] emerged today’ at the PST. It is worth quoting at some length for the insights it gives into how the PST went about its business.

- PM&C began the meeting by distributing a press release in the name of the Prime Minister announcing arrangements to transfer SUNCs now held on HMAS Adelaide, to PNG.
- The plan is to disembark from Adelaide tonight and to locate the 223 persons in the Christmas Island sports hall.
- Those on board are not to be told that their destination is PNG at this stage. This is to avoid reaction among the group who may then display resistance to being airlifted onwards to PNG.
- ... [ITEM BLANKED OUT]
- ...[ITEM BLANKED OUT]
- Minister Reith wants Christmas Island relieved of the latest SUNCs by Friday. PM&C and DIMIA say this is impossible until the new PNG facilities are brought up to standard which may take two weeks.
- Manus Island [**Please protect**] is one of the locations in PNG which is being considered.
- Bill Farmer stressed the need for a common Q&A document for AFP, Customs, ACM, and other Government officials on Christmas Island so that there is no mixed messages given to either media or the local representatives on Christmas Island about the handling of, or the intentions towards the latest SUNCs.
- PM&C agreed with Mr Farmer and requested that DIMA action.³⁴

7.62 It remains unclear to the Committee how ‘decisions’ and ‘advice’ were distinguished within the PST. The Committee notes that some Defence personnel clearly believed that the PST was calling the shots, and that it was PST decisions that determined how they were to respond as each situation unfolded. Brigadier Silverstone referred to the ‘micro-management’ from Canberra, which he attributed to ‘a very fluid policy environment’,³⁵ involving ‘a very high degree of interagency coordination.’³⁶

34 File Note of 10 October 2001 attached to Drury witness statement to Bryant Report.

35 *Transcript of Evidence*, CMI 350.

36 *Transcript of Evidence*, CMI 365.

7.63 Rear Admiral Smith told the Committee that he operated under the impression that government directives came from the PST. For example, in describing Operation Relex he stated:

...once the vessels were intercepted in the early stages of Operation Relex, every decision that was taken in terms of what to do with [a] particular vessel and the people in it was in fact directed from Canberra... out of the interdepartmental committee process, and therefore, from our perspective it was a government directive.... [As] these incidents unfolded that particular committee, as I understand it, met regularly and decisions were taken ... as to the next step in the particular operation, whatever the SIEV happened to be.³⁷

7.64 This apparent confusion about the PST's role within the Defence chain of command and elsewhere is puzzling. Were these Defence officials inadequately briefed on the relationship between Operation Relex and the PST, or did Defence as a whole have similar views? Or were there some inadequacies in the PST, either in the way its membership was structured or in the communication protocols that existed between the PST and its contributing agencies ?

7.65 When the Committee sought from DIMIA Secretary Bill Farmer an insider's view of the operations of the PST, Mr Farmer began by describing how PST decisions were made and progressed:

In terms of the decision making [in the PST] ... members of the high-level group were not always involved in the preparation of briefing or advice that went to the Prime Minister from the Department of the Prime Minister and Cabinet. It is quite normal for that sort of advice to be, in effect, jealously guarded by PM&C. In terms of advice to the Prime Minister, we were not involved in... the preparation of every bit of paper. We were on some occasions involved in looking at draft bits of paper prepared by PM&C and offering our comments on those. After those discussions, PM&C would finalise them and send them to the Prime Minister. We were never a party to the broader distribution of those pieces of paper by the Department of the Prime Minister and Cabinet. I think in one case ... one of the reports went to Minister Reith. That may have happened on other occasions, but we were not the master of that information. There was one form of product from the IDC prepared by Prime Minister and Cabinet for the information of, or decision making by, the Prime Minister and possibly other ministers.³⁸

7.66 Ms Halton described the preparation of advice going from the PST to the Prime Minister in somewhat different terms:

The essence of this whole operation was to have agreement amongst the agencies about the text and the advice. I think we have canvassed previously

37 *Transcript of Evidence*, CMI 456.

38 *Transcript of Evidence*, CMI 874.

that ... where there was combined advice required on something, that was always discussed and the material was always agreed.³⁹

7.67 The Committee has been unable to satisfactorily reconcile the discrepancies between these views of how the PST actually operated. Perhaps the difference lies in what Ms Halton is referring to when she says that ‘the material was always agreed’. By ‘material’ does Ms Halton mean the document that was actually signed off by her following the PST’s session, or does ‘material’ refer to the content of the discussion that went on in the PST meeting proper? If the former, there is a clear discrepancy between her account and Mr Farmer’s; if the latter their accounts are more easily reconciled.

7.68 The Committee notes that in the specific case of the options paper prepared on 7 October, Ms Halton consistently told the Committee that the PST worked through an iterative editing process – ‘line by line’ – with everyone present involved, and that the document ‘ultimately came back for one last read’.⁴⁰ As noted earlier, Ms Halton’s account is at variance with that of AVM Titheridge.⁴¹

7.69 If the line by line editing and final read-through process as described by Ms Halton did in fact occur on this occasion – an account which is corroborated by Ms Edwards in her written answers to Questions on Notice - it stands in contrast to how the advices from the PST were generally finalised – at least so far as Mr Farmer’s account is concerned. Mr Farmer’s account conveys a process whereby essentially the PST representatives contributed their perspectives, issues were discussed, and then Ms Halton and her PM&C associates assembled the final advice going to the Prime Minister, without further reference back to the participants.

7.70 Ms Halton also told the Committee that:

There was no point at which that final [October 7 options paper] document – and, indeed, any final document that we put through – was disputed.⁴²

7.71 The Committee received no evidence that would contradict Ms Halton on this point in relation to the October 7 paper. Whether her claim would validly apply to ‘any final document that we put through’ is another question. It seems that the PST as a group rarely had before it a ‘final document’ to consider, and so it is self-evidently the case that no final document was ever disputed. It was not there to be disputed.

7.72 In any event, copies of advices flowing from the PST were not subsequently provided to participating agencies for their information or review. The Committee regards this a serious flaw in the PST’s procedures. Ms Halton told the Committee:

39 *Transcript of Evidence*, CMI 2069.

40 *Transcript of Evidence*, CMI 2069.

41 *Transcript of Evidence*, CMI 2070.

42 *Transcript of Evidence*, CMI 2069.

[N]obody was given a copy of the document to take away – that was standard practice. These materials were considered sensitive, and agencies were not given copies of the document.⁴³

7.73 This strikes the Committee as particularly odd. The document was assembled from the combined inputs of the participating agencies. Any sensitive material would have emanated from the agencies themselves, and presumably their representatives were appropriately cleared to deal with such sensitivities. Why they were not then entitled to or trusted with the final advice, which they supposedly jointly ‘owned’, is a mystery. Such a refusal also impeded representatives from reporting back as fully as they might to their own agencies. The PST was meant to have been a whole-of-government operation, and yet it seems the agencies involved were deliberately deprived of the final whole-of-government view of the PST.

7.74 This rings true with Mr Farmer’s comment that PM&C ‘jealously guarded’ the formulation of the final advice from the PST to the Prime Minister. If whole-of-government processes are to be more frequently used, there will need to be something of a cultural change within PM&C towards a more inclusive ethos. Agencies working on whole-of-government projects are likely to become quickly disenchanted if the lead agency appears patronising, or conveys a lack of confidence in the discretion of the participants, or does not provide adequate feedback on outcomes.

7.75 The Committee also sought a description from Mr Farmer as to how the participating agencies carried out their own roles and how ministers’ decisions were fed back into the PST.

[The] high-level group would also receive back advice from PM&C about decisions that had been taken on a range of issues. ... The high-level group shared information as well as, in a sense, trying to give some strategic direction on the way that the whole particular bits of the strategy were being implemented.⁴⁴

7.76 As far as documentation of PST discussions was concerned, Ms Halton stated that, apart from her own handwritten notes in her ‘running day book’, the PST operated with a note-taker, the notes being converted into minutes, but that the minutes did not go back to the PST at subsequent meetings.⁴⁵

If what you are asking is, ‘Were the minutes reflected back at the next meeting?’ the answer is no. If what you are asking is, ‘Was there a record of key issues raised and/or decisions taken?’—‘decisions’ is probably the wrong way to describe this forum, to be quite frank. ... ‘Outcomes’ would be a better description. Sometimes there was a product of the meeting ... and often the outcome of the meeting would be a thing: a paper or whatever... [T]o be quite frank, we were running so fast and, as you know,

43 *Transcript of Evidence*, CMI 2071.

44 *Transcript of Evidence*, CMI 874-75.

45 *Transcript of Evidence*, CMI 905.

there were a series of issues being dealt with and the issues that came out of particular Taskforce meetings were often then themselves considered in the next meeting. It was the nature of the iterative process of the work. So, no, those minutes were not subsequently referred to me.⁴⁶

7.77 Given the PST's strong reliance on oral advice from those in attendance, and the minimal documentation attached to its operations, Mr Farmer was asked by the Committee whether he had any concerns about the lack of a paper trail.

For me, no. I am concerned with effectiveness and with outcomes. That means that I am concerned about paper trails where there is a quite appropriate requirement for a paper trail, in an audit or other sense, but successive governments have made it clear that they want a public service that is able to be flexible and get the job done. That, for me, does not mean producing huge mounds of paper; it means looking at what is the most appropriate and effective way of getting something done.⁴⁷

7.78 The Committee fully accepts that at times the PST was dealing with very fluid, sometimes volatile, situations, and would not expect the PST to produce 'huge mounds of paper' to explain or justify its actions on those occasions. Nevertheless, the Committee considers that some basic administrative and procedural elements were missing from the PST's operations. For example, it would have been at least prudent – and probably highly desirable – that PM&C circulated back to the participating agencies copies of the advice that PM&C compiled and forwarded to the government on the basis of deliberations at a PST meeting.

7.79 The Committee is not arguing here for red tape, but for a respectable reporting back of PST outcomes to those who contributed to their development. This would have enabled participating departments to routinely check what had gone to government as the PST's considered position, and thereby would have greatly increased the chances that any error, misleading statement or insufficiently caveated advice would have been picked up by the agency concerned and fed back into the PST.

7.80 Information into the PST flowed largely from agency sources via their representatives at the PST meetings. However, the management of that information seems to have lacked the degree of orderliness necessary to ensure thorough consideration and careful assessment of the multiple inputs.

7.81 With regard to these communication flows, DIMIA official Ms Philippa Godwin is recorded in the Bryant Report to have expressed serious concerns.

Ms Godwin...recalled that information flows had become erratic and disjointed... It had therefore been very difficult to check which information was the most up to date, or to check the accuracy of information.

46 *Transcript of Evidence*, CMI 905-6.

47 *Transcript of Evidence*, CMI 882.

Ms Godwin commented that it was clear that some people were getting information ahead of and outside normal channels of communication. ...

Ms Godwin perceived that there was a need to rebuild proper lines of communication. This goes back to the Prime Minister's Coastal Surveillance Taskforce, where a lot of work was put into establishing timely and effective information flows through an established network of contact officers.⁴⁸

7.82 There also seem to have been considerable differences between agencies' representatives in the way they reported back to their home departments or ministers. These ranged from limited oral reports to typed up file notes. The nature of the 'handovers' between different representatives from the one agency who attended various meetings also seem to have been quite variable.

7.83 The PST comprised high level officials who were presumably well placed both to advise the PST and ensure close liaison with their home departments and ministers. The Committee considers that this resulted in a ready acceptance of the veracity of information circulating in the PST which was to prove not fully justified, and for which insufficient feedback and quality control mechanisms had been put in place.

7.84 On the matter of the ready acceptance by the PST of the report that children had been thrown overboard from SIEV 4, Mr Farmer explained that the group always worked on the assumption that contributions from PST members were authoritative.

I have already said that that was a high-level group meeting, that anyone in that meeting who was told anything by me about an immigration matter had the right to assume that that was authoritative advice from the Department of Immigration and Multicultural Affairs. Similarly, I and other DIMA officers had a corresponding expectation that anything said to us by representatives in the high-level group was an authoritative statement from their organisation. If there were caveats about material, then we had a responsibility to reflect those caveats. If there were not—I have already said to you in relation to this particular matter that there were not—then we had the right to take the information given to us by, in this case, Defence.⁴⁹

...[I]f a representative in a high-level group passes on information without caveats, then the other representatives in the high-level group have an expectation that that information is well founded. You do not go into a high-level group and say, 'Well, the Attorney-General's Department says this about the law, but how do we know this? Perhaps the Attorney-General's Department had better check it,' and then go through every bit of advice and

48 Record of interview with Ms Godwin in the Bryant Report.

49 *Transcript of Evidence*, CMI 882.

send people away. You had senior officials there who were supposed to be participating in a high-level group and I think talking authoritatively...⁵⁰

7.85 With respect to the original report to the PST of ‘children overboard’ Mr Farmer observed:

I have certainly come to the awareness that the process that led to that information coming into the high-level group was flawed and that, of course, has been at the centre of much of the discussion in this committee and in other places. I think that is the lesson that others are drawing—that before that sort of statement is made in that sort of meeting, then things should be properly corroborated.⁵¹

7.86 The input of flawed information on the morning of 7 October cannot result in the PST’s being blamed for including ‘children thrown overboard’ in the advice that was sent to the Prime Minister that evening. It was the rapid verbal transmission of the flawed information out of the PST to the Minister for Immigration that resulted in its quick entry into the public arena, thereby triggering the controversy. The Committee notes that the communication with the Minister was not initiated from within the PST. It occurred because of a chance phone call from the Minister seeking an update from the Secretary of DIMA while the PST meeting was in progress.

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

7.88 The Select Committee contends that the political import of the ‘children overboard’ advice would not have been lost on the senior figures who comprised the PST. This was potentially headline-making information, and PST members would have been under no illusion about the level of public interest it would arouse.

7.89 The PST Chair, Ms Halton, had a different view:

I do not think that anyone in that meeting anticipated what was going to happen with that information. This might sound surprising to your very political ears, but I genuinely do not believe that anybody in that room thought it was a particular political issue. I think that people thought that it was regrettable, but I do not believe that it was thought of as being a political issue.⁵²

50 *Transcript of Evidence*, CMI 882-83.

51 *Transcript of Evidence*, CMI 882.

52 *Transcript of Evidence*, CMI 2052.

7.90 The Committee considers it surprising that such a view should be proffered by a very senior PM&C officer. Officials at this level are required to be, and indeed often pride themselves on being, very attuned to the political dimension of matters they are dealing with. The proof of the political significance of the issue was dramatically apparent shortly after the information had been passed outside the PST to Minister Ruddock, and reinforced by utterances of other ministers during that day. It seems unlikely that the seasoned professionals attending the PST on 7 October were uniformly ignorant of the political significance of a report of children being thrown overboard.

7.91 Given that the government was on an election footing, and that the issue of asylum seekers was politically very prominent, there was every good reason for the PST and its members to be particularly scrupulous about its handling of such information.

7.92 It is understandable that officials were anxious to keep ministers as up to date as possible about unfolding events. But there is also a strong requirement on senior public servants to be judicious in that upwards reporting.

7.93 A DIMIA official present at the PST meeting - which she characterised as 'shambolic' with 'mobile phones ringing constantly',⁵³ - was concerned about erratic information flows and the lack of its systematic handling. She added:

Ministers had also inadvertently contributed to the problems themselves. Understandably they wanted to get information as it happened and were reluctant to wait for confirmation. However, this had meant that as soon as anyone got information, they felt pressured to pass it on. Because things were moving very quickly, through mobiles, there was a lack of precision in language used and a 'Chinese whispers' effect.⁵⁴

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

7.95 Little, if any, thought seems to have gone into establishing basic processes for keeping the PST and the participating agencies systematically in touch with the activities and outcomes of the group. No minutes, not even the notes, were circulated. No copies were sent back to departments of the advices that went from the PST, courtesy of PM&C, to government. No guidelines existed as to how PST members

53 Record of interview with Ms Philippa Godwin in the Bryant Report.

54 Record of interview with Ms Philippa Godwin in the Bryant Report.

should report back to their departments, nor how different representatives from the same agency attending different meetings should brief each other by way of handover.

7.96 The Committee has examined the attendance records of the PST. No fewer than one hundred and two different names appeared as having attended the PST at various times between August and December 2001. Some attended only once or twice, others perhaps half a dozen times, with up to twenty appearing more or less regularly. It is difficult to imagine how such an array of participants, unless scrupulously managed, could be conducive to the effectiveness, let alone the accountability, of the PST. It is also difficult to imagine how these participants could be coordinated in such a way as to ensure coherent input from the various organisations they represented.

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

7.98 The Auditor-General has made some particularly pertinent remarks in the context of an ANAO report on the management of unauthorised arrivals.

In situations where there is joint responsibility for overseeing and implementing programs across a number of agencies, a clear governance framework, which clearly defines accountability and reporting arrangements, roles and responsibilities of the various participants, is necessary. Increasingly, relevant governance arrangements need to cross organisational boundaries to better align activities and reduce barriers to effective cooperation and coordination. This is the case in relation to the prevention of unauthorised arrivals, given the various agencies involved, all of which have been required to operate in the context of a rapidly changing and, at times, high-pressure environment.⁵⁵

7.99 The Committee finds that the People Smuggling Taskforce did not operate with 'a clear governance framework which clearly defines accountability and reporting arrangements'. Observations about PM&C's 'jealous guarding' of advice, the PST's 'erratic and disjointed communication flows', and agency participants being 'not masters of that information' suggest that the PST fell far short of what the Auditor-General would rate as a satisfactory mechanism for conducting a whole-of-government operation.

7.100 In making these criticisms, the Committee is assessing the PST from the perspective of best practice, not urging a counsel of perfection. The Committee is not questioning the integrity of the individual participants on the PST, but commenting on weaknesses in its operation, particularly in its control structures.

55 The Auditor-General, Audit Report No. 57, 2001-02 *Management Framework for Preventing Unlawful Entry into Australian Territory* (ANAO, Canberra), p.39.

7.101 By ‘control’ the Committee does not imply rigidity and hierarchy, but a notion that embraces the identification and treatment of risks in order to promote the efficient, effective and ethical achievement of objectives. Control is a process, a means to an end, not an end in itself. It is everyone’s responsibility; it is effected by people at all levels within the group; it encourages a focus on the big picture; and it provides reasonable, not absolute, assurance that outcomes will be achieved.⁵⁶

7.102 A ‘best practice’ control structure comprises five core, inter-related components:

- a. Control environment – sometimes called the ‘tone at the top’.
- b. Risk assessment – identify, analyse, assess, prioritise and treat risks.
- c. Control activities – risk mitigation, detection and correction of errors.
- d. Information and communication – timely and accurate information; communication flows up, down and across; regular internal and external reporting.
- e. Monitoring and review – self-assessment; identify breakdowns, duplication and gaps.

7.103 The Committee cannot make a detailed assessment of the PST against all of these components. However, the Committee encourages Inter-Departmental Committees (IDCs) to devote some attention to establishing reasonable and relevant control structures before making haste in the execution of their important and responsible duties.

7.104 Responsibility also lies with the individual representatives involved in IDCs to report back in at least a minimally adequate way to their own departments. In the case of the People Smuggling Taskforce, the Committee had little material upon which to make an assessment. But there appears to have been considerable variation in the reporting back practices, ranging from the written and detailed to the virtually non-existent.

7.105 In summary, the Committee regards the PST as having embarked upon its demanding task without establishing at the outset a set of procedural and administrative structures and protocols suitable for the undertaking. Basic record-keeping, monitoring and risk management procedures were effectively non-existent. Information channels were not systematically organised so as to provide the necessary checks and balances for a whole-of-government operation.

7.106 In response to the experiences associated with its involvement on the People Smuggling Taskforce, the Department of Defence has produced guidelines for the

56 This discussion of control is based on the ANAO Better Practice Guide *Controlling Performance and Outcomes* (Canberra) 1997.

future participation of Defence personnel in whole-of-government groups. The Committee commends the Department on its initiative. Some of the key guidelines include:

- The lead IDC agency to circulate records of meetings, and provide copies of all advice(s) to Ministers, to all IDC members.
- Copies of IDC records to be provided by the IDC representative to other relevant staff within Defence.
- Where an IDC does not provide records of meetings, Defence representatives to prepare key point summaries for distribution.
- Defence IDC representatives to keep Minister, Parliamentary Secretary, CDF and Secretary informed about major IDC events and milestones.
- If related actions are taken outside formal IDC meetings, other IDC members to be informed, and a report made to the next IDC meeting.
- In relation to important communications, including phone calls, brief notes for file to be prepared.
- IDC reports should be cleared by all IDC members before submission to ministers.
- If a report raises significant issues or disagreements between agencies they should be brought to the attention of senior officials.⁵⁷

Accountability and Ministerial Advisers

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

7.108 While ministers and public servants regularly account for their actions directly to parliament and by appearance before its committees, this is not the case for ministerial advisers. In the past, it has been generally accepted that advisers' accountabilities are rendered via ministers, it being understood that advisers act at the direction of ministers and/or with their knowledge and consent. This seems to be no longer a legitimate assumption.

57 These Guidelines were prepared by the CDF-Secretary Task Force within the Department of Defence. The Task Force, as part of its duties, had been charged with identifying shortcomings in Defence communications and liaison processes and recommending corrective action.

7.109 The situation is that there now exists a group of people on the public payroll – ministerial advisers – who seem willing and able, on their own initiative, to intervene in public administration, and to take decisions affecting the performance of agencies, without there being a corresponding requirement that they publicly account for those interventions, decisions and actions. It is to an exploration of this phenomenon that the Committee now turns.

The changing role and status of ministerial advisers

7.110 An excellent account of changes in the roles of ministerial staff over the past three decades, and of the debate about advisers' accountability, has been produced by Dr Ian Holland of the Parliamentary Research Service. The Committee has drawn extensively on Dr Holland's work in the following discussion.⁵⁸

The growth in numbers of ministerial staff

7.111 Ministers typically have three sorts of staff working for them:

- Personal staff – policy, special and media advisers - who support and assist them in performing their ministerial, parliamentary and party duties. They add a political dimension to the advice available to ministers and often act as spokespersons. They are employed under Part III of the *Members of Parliament (Staff) Act 1984 (MoPS Act)*.
- Departmental Liaison Officers (DLOs), seconded from ministers' departments, who facilitate liaison between the minister's office and portfolio agencies. They remain departmental employees under the *Australian Public Service Act 1999*.
- Electorate staff, who generally do not work in the ministerial office. Ministers' electorate staff are allocated on the same basis as for all other members of parliament.

7.112 The growth in staff providing support to the government has not had a clearly partisan character: the rise and fall in numbers has had more to do with parliamentary reforms, and Prime Ministerial preferences.⁵⁹ The Fraser Government maintained the same sorts of levels of staff as the early Hawke Governments. The current Howard Government is maintaining similar staffing levels as the last Keating Government. The available data suggest also that governments of all persuasions increase the numbers of staff as their period in office lengthens.

58 Ian Holland, *Accountability of Ministerial Staff?* Research Paper no. 19, Department of the Parliamentary Library, Canberra, 2001-02 <http://www.aph.gov.au/library/pubs/rp/2001-02/02rp19.pdf>

59 On Fraser see Pat Weller, *Malcolm Fraser PM*, Penguin Books, Ringwood Vic., 1989, pp.22-5; on Keating see John Halligan, 'Labor, The Keating Term and the Senior Public Service', in Gwynneth Singleton (ed.) *The Second Keating Government*, Centre for Research in Public Sector management, University of Canberra / Institute of Public Administration Australia, Canberra, 1997, p.54.

7.113 The number of staff working in ministers' offices has at least doubled in thirty years. Close examination of that growth reveals it primarily to be the consequence of decisions about the machinery of government, and attempts to make government more 'professional', rather than the desire of governments to secure partisan advantage or gain further dominance over parliament. For the Committee, the key issue is accountability, and the extent to which the numbers of ministerial staff might impede accountability is one, but certainly not the most important, consideration.

The rise in influence of ministerial staff

7.114 Government ministers have traditionally had access to advice and support from the departments that they administer and in particular from the departmental secretary. However, in recent decades ministers have increasingly sought advice from other sources.⁶⁰ In so doing, they have tended to recruit onto their personal staff a hand-picked group, most of whom share the minister's political outlook and have strong commitments to ensuring that their minister is effective in both the party room and the parliament. This is particularly the case with ministerial advisers.

7.115 Ministerial advisers are appointed under the *Members of Parliament Staff Act*, (*MoPS Act*) Under this Act, the Prime Minister establishes conditions of employment for all ministerial staff, on an individual basis. The Act does not require those conditions to take any particular form.

7.116 The main guidance given to ministerial staff lies in the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*. Section nine of the *Guide* concerns 'ministerial staff conduct'. Most of its content pertains to conflict of interest issues. The *Guide* indicates for example that staff :

must divest themselves, or relinquish control, of sensitive interests such as shares or similar interests in any company or business involved in the area of their minister's portfolio responsibilities...

should not contribute to the activities of interest groups or bodies involved in lobbying the government, if there is any possibility that a conflict of interests... may arise

[that] gifts, sponsored travel or hospitality should not be accepted if acceptance could give rise to a conflict of interests...⁶¹

7.117 The main point to note is that, to the extent that ministerial staff have been regulated at all, it has been almost entirely to deal with possible conflicts between their individual self interest and the interests of their minister. None of the guidance

60 Anne Tiernan, 'Problem or Solution? The Role of Ministerial Staff', in Jenny Fleming and Ian Holland (eds.), *Motivating Ministers to Morality*, Ashgate, Aldershot, 2001, p.92; Patrick Weller, *Australia's Mandarins: the Frank and the Fearless?* Allen & Unwin, St Leonards, 2001.

61 Prime Minister *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998.

has been directed at problems that might arise through the ministerial adviser's pursuit of what they perceive as the interests of their minister or their party.

7.118 The Committee is also concerned by the lack of congruence between the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* and what is contained in the *Members of Parliament Staff Act*. As one witness expressed it:

[There] is the need to evolve institutional arrangements that are appropriate to the contemporary reality of government. The Public Service has evolved and has had its arrangements changed to accommodate new realities and new directions. The *Members of Parliament Staff Act* was passed in 1984 in a particular set of circumstances. It no longer provides an appropriate institutional framework for how the system is working.⁶²

7.119 Ministerial advisers have become important participants in the policy process, playing a range of policy roles.⁶³ As their numbers and perceived influence have grown, so their role has become more controversial. Few commentators or senior officials reflecting on the public service over the last decade or so would fail to mention the major changes that have been wrought in pursuit of flexibility and responsiveness. One of these major changes has been in the relationship between departmental secretaries and their ministers, and ministerial advisers.

The pressure on ministers to respond to anything and everything immediately has increased dramatically over the last 25 years or so...It is only natural that ministers require additional resources to help manage all this pressure, and that the resources required are both political and professional. The interface between the politicians and their political advisers, and the Public Service, is accordingly more complex and more fluid.⁶⁴

7.120 Many departmental secretaries find that advisers 'act as a conduit between the secretary and the Minister, often injecting policy advice along the way'.⁶⁵ Opinions vary as to the benefits of such a situation.

If you want to say it's a contest it's increasingly an unequal contest, but we've just got to make it work... it is a very sensitive issue obviously and very easily abused.

62 *Transcript of Evidence*, CMI 1239.

63 James Walter, *The Ministers' Minders: Personal Advisers in National Government*, Oxford University Press, Melbourne, 1986, pp.129-176; Maria Maley, 'Conceptualising Advisers' Policy Work: The Distinctive Policy Roles of Ministerial Advisers in the Keating Government, 1991-96', *Australian Journal of Political Science*, vol. 35, no. 3, 2000, pp.449-70.

64 Andrew Podger (Public Service Commissioner), *Beyond Westminster: Defining an Australian Approach to the Roles and Values of the Public Service in the 21st Century*, Address to IPAA Seminar, May 2002.

65 John Halligan et al, *The Australian Public Service: The view from the top* (Coopers & Lybrand, University of Canberra, 1996), p.71.

You bite your tongue a lot to make sure you have reasonable relations with the senior adviser.⁶⁶

7.121 Not all departmental heads have misgivings about ministerial advisers.

I've always taken the view that there is a real role for ministerial advisers that the public service can't provide, and in many ways it's better not to have somebody from the department there who's a senior adviser...[Advisers have] got a big role that in many respects the public service can't play ... there's a lot of negotiating to be done...with the Senate...with outside bodies and so forth. So I think there's a definite role for ministerial advisers, which in many ways ensures that the public service isn't politicised, because you can get the political stuff done by the ministerial advisers.⁶⁷

7.122 The 'political stuff' referred to by the departmental secretary quoted above seems clearly directed to activity connected with the formulation of policy and the passage of legislation – 'negotiating with the Senate and with outside bodies'. But what has animated much of the debate around 'children overboard' has been the engagement of ministerial staff in 'political stuff' at the interface between ministers' offices, their departments, the media and the electorate.

7.123 In the Committee's view, rather than ministerial advisers serving as a political buffer limiting the risk of politically partisan activity on the part of the public service, they are increasingly interventionist in ways that embroil agencies improperly as means to advisers' politically partisan ends.

A case study in the accountability of ministerial advisers

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

7.125 Throughout its inquiry the Select Committee, as a result of a whole-of-government decision, has been denied access to the ministerial staff in question. The basis for this refusal includes the claim that to question ministerial staff is to undermine the special nature and necessary confidentiality of the relationship between a minister and his or her staff. The Clerk of the House of Representatives has also

66 Secretaries quoted in John Halligan et al, *The Australian Public Service: The view from the top* (Coopers & Lybrand, University of Canberra, 1996), p.71.

67 John Halligan et al, *The Australian Public Service: The view from the top* (Coopers & Lybrand, University of Canberra, 1996), p.72.

argued that a probable immunity of ministerial staff exists by extension of the immunity of members of the House of Representatives (and hence of ministers) from being called before a committee of the Senate – and vice versa.⁶⁸

7.126 The Minister for Defence (Senator Robert Hill) has also refused the appearance of certain officials even though, as public servants, they do not fall under the cabinet prohibition on the appearance of *MoPS* Act staff. Such bans and refusals are anathema to accountability.

7.127 The Committee has considerable sympathy for the view that ministerial advisers and public servants should have similar obligations with respect to public accountability. The Committee is not suggesting that a parliamentary committee would actually censure, penalise or reward ministerial staff according to the content of any information they might disclose under questioning. It is not proposed that they be on trial. The proposal is merely that they provide information.

7.128 Over 25 years ago this same debate took place over the appearance of departmental secretaries before parliamentary committees. Many of the same arguments being made then about public servants are now being made regarding ministerial staff. As Professor Weller pointed out in his evidence to the Committee, the additional transparency that came with making departmental secretaries available to parliamentary committees was ‘probably desirable’ and it had not damaged the machinery of government.⁶⁹ Indeed, the appearance of public servants before committees is now quite routine.

7.129 Professor Weller also highlighted the link between the growth in the role of ministerial staff and the issue of accountability.

[I]f secretaries of departments can be asked to appear before your committee and asked what they told ministers then equally ministerial staff should be able to be called before the committee and asked what they told ministers, because we can no longer assume that telling a minister’s staff is telling a minister.⁷⁰

7.130 Ironically – especially given his role as Defence minister in refusing the appearance of certain witnesses, including public servants, before the Committee – it was Senator Hill who was a strong advocate for accountability in earlier parliamentary debates on these issues. At that time, Senator Hill gave a very clear indication that the immunity of the executive might need to be tempered when it comes to ministerial staff, if executive accountability to parliament is to remain credible. Indeed, in 1994 he led the (then) Opposition’s unsuccessful push to have ministerial staff answer questions in relation to the Community Grants Scheme.

68 Correspondence from the Clerk of the House of Representatives to the Committee, April 2002.

69 *Transcript of Evidence*, CMI 1220.

70 *Transcript of Evidence*, CMI 1219.

7.131 On that occasion he argued it was necessary to seek evidence from staffers following the minister's resignation because 'we are determining the proper response of the Senate in what amounts to a prima facie case of political corruption'.⁷¹ He reasoned that this involved doing 'everything reasonably possible to bring the government to account for improper conduct in the administration of the public purse.'⁷²

7.132 Eight years later during a discussion regarding the 'children overboard' incident in Senate Estimates hearings, he was involved in the following exchange:

Senator Faulkner —What is going to be your approach—and Mr Scafton is just one example—if, perchance, Mr Scafton [as a former MoPS employee] were to be invited by the Senate select committee to provide evidence on this or any other matter?

Senator Hill —I would defer... to a whole of government position on that. To my mind it is treading on very dangerous ground. On the other hand, that must be weighed against the benefit of getting as much relevant information as possible on the public record. I have certainly not been party to a discussion yet on how we should weigh that balance. I will be doing that in due course if the committee gives an indication that it wishes to call *MOPS* staffers.

7.133 In both 1994 and again in 2002, the question was one of how to ensure that 'as much relevant information as possible' was presented to the parliament (and, in both cases, the mechanism was to be a Senate committee). In these cases, as Professor Weller also indicated, this would mean putting questions to ministerial staff.

7.134 The Committee has been struck by the extent to which the question of accountability of ministerial advisers quickly became a topic for public debate as a direct result of the 'children overboard' inquiry. Numerous press articles and editorials addressed the issue; academics and prominent public servants spoke in public forums; and at least two seminars were held under the auspices of universities.

7.135 The tone of this commentary was universally critical of the behaviour of certain ministerial advisers, and was invariably accompanied by calls for reform to ensure that advisers were more directly and properly accountable to the parliament. The following extracts from newspaper editorials and other published articles convey the substance of those critical views.

Minders ought to be accountable: ...There may once have been some justification for a screen... but most of the older reasons for a screen have disappeared, just as the older operating systems have disappeared. The ones which have taken their place are notionally completely unaccountable, and have created a major vacuum in doctrines of ministerial responsibility and in

71 Senator R. Hill, Senate, *Debates*, 3 March 1994, p.1418.

72 Senator R. Hill, Senate, *Debates*, 3 March 1994, p.1419.

the public's right to know about the workings of government... Increasingly, staffers are wielding executive power in their own right, and without reference to the minister... Staffers are taking it upon themselves to decide whether advice given is passed on to ministers, and ministers, from the Prime Minister down, flatly refuse to accept any responsibility for the office if they can claim not to have been told.⁷³

Unelected Rulers: More important in the long term, however, is what may emerge from the inquiry about the role played by ministerial advisers... and the way their employment has distorted the traditional values of the Westminster system of government.. and the notion of an independent public service... What is happening is that ministerial staff are being used to insulate ministers from... responsibilities... [and].. from facts they might not want to know. Ministerial advisers have become an extremely powerful and influential arm of government, but also a secret and irresponsible one.⁷⁴

What lies beneath: Increasingly, the ministerial office has been developing direct links into departments and agencies, managing the nature and quality of advice, and frequently giving directions about what is to be done, often completely away from the formal channels. Strictly, the minister and his private office are subject to the same public service ethical code as ordinary public servants. But the role of the ministerial office is poorly documented, with a strong focus on oral, rather than written, advice, and with the direct role of the minister often left deliberately vague, whether for deniability ... or so as to protect a minister's flexibility when things go awry.⁷⁵

The Select Committee's approach to ministerial advisers

7.136 Notwithstanding cabinet's decision to prevent Commonwealth departments from making submissions to the Inquiry into a Certain Maritime Incident, and to ban ministerial staffers from appearing before the Committee, the Committee made several requests to the relevant advisers for the provision of written submissions, as well as delivering invitations to appear at hearings. Similar invitations were extended to former Minister for Defence, Mr Peter Reith. In the event, none of these people appeared before the Committee, nor did they contribute submissions.

7.137 The Committee sought the views of both the Clerk of the Senate and the Clerk of the House of Representatives on the matter of whether any immunities attach to ministerial advisers with respect to appearing before parliamentary committees. The Clerk of the Senate has argued no immunity attaches to ministerial staff:

73 Editorial *Canberra Times* 11 March 2002, p.10.

74 David Solomon 'Unelected Rulers' *The Courier Mail* 16 March 2002.

75 Jack Waterford 'What lies beneath: Has government accountability become an oxymoron?' in *Eureka Street* 12(3) April 2002, p.21.

...the Senate and comparable houses of legislatures have not recognised any immunity attaching to this category of office-holders. There is also no basis for supposing that they possess any legal immunity...⁷⁶

7.138 Having argued this legal position, the Clerk of the Senate also suggested that calling ministerial staff was a good idea:

...there is a strong case for subjecting ministerial personal staff to compulsion in legislative inquiries, on the basis that their role is manifestly now not confined to advice and personal assistance... they act as de facto assistant ministers and participate in government activities as such... Moreover, ministers no longer necessarily accept full responsibility for the actions of their staff...⁷⁷

7.139 The Clerk of the House of Representatives argued for a probable immunity for advisers arising from their direct association with the minister:

[A] reasonable case could be made out for the immunity operating in respect of Ministers who are current Members of the Parliament also applying to their staff, based on a Minister's need for the assistance of staff to perform their roles and functions, especially in the modern complex world of government and administration.⁷⁸

7.140 The Committee had the benefit of a legal opinion provided to the Clerk of the Senate by Bret Walker SC. This opinion, grounded in an examination of the *Constitution*, the *Parliamentary Privileges Act 1987*, foundation texts in parliamentary practice and relevant High and Appeal Court decisions, concluded that 'former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee.'⁷⁹

7.141 One of the difficulties faced by the Houses of Parliament in attempting to enforce their powers to compel the appearance of witnesses is that they are limited in what they can do to compel appearance. In particular, there exists a difficult ethical question of how to treat public servants who indicate that they have been instructed by their Minister not to answer questions put by the Houses. In 1994, the Senate Committee of Privileges in its report on the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994* noted that it was:

76 Clerk of the Senate, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 22 March, p.2.

77 Clerk of the Senate, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 22 March, p.4.

78 Clerk of the House of Representatives, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 3 April 2002, p.12.

79 Bret Walker SC *Opinion* 'Australian Senate: Witnesses – former Ministers and Ministerial Staff'. Document published by the Select Committee.

well understood that any attempt by a House of the Parliament to impose the extreme penalties of either gaol or a fine upon a public servant who obeyed a ministerial instruction not to comply with an order of that House or a committee, while the minister concerned was immune from its contempt powers, was untenable.⁸⁰

7.142 Despite this remark, the Committee of Privileges included in its final remarks the consideration that:

if an order of a House or committee is not complied with by a public servant acting on the instructions of a minister, it is for the relevant House to take such action under its contempt powers as it considers appropriate in the circumstances.⁸¹

7.143 Thus the Committee of Privileges noted that, on the one hand it was 'well understood' that the exercise of parliament's powers in such cases was untenable, but at the same time endorsed the very exercising of those powers.

7.144 It is worth considering exactly why it is sometimes claimed that public servants should not be confronted by the powers of the chambers of parliament. Implicit in the statement that one should not penalise a public servant who is acting on the directions of a minister is a concession that the minister has the legal authority to issue directions to someone to defy the Senate or House of Representatives. It may be argued that in making this concession, those who claim to be seeking to assert the power of the Senate are in fact deferring to the power of the executive and are unwittingly encouraging the public servants (and probably ministerial staff) to do the same.

7.145 This seems to rest uneasily with the Parliament's declarations on powers and immunities, and the limited case law that exists in this area.⁸² As the Law Institute of Victoria once argued, if a public servant is asked to choose between complying with a Minister's instruction and complying with a House's demands, they should be deferring to the House, not the executive.⁸³

7.146 Faced with the continued refusal of these prospective witnesses to respond to invitations to appear, and with correspondence from ministers indicating that they would not appear, the Select Committee decided not to exercise its power to compel

80 Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (49th Report)*, September 1994 (Parliamentary Paper 171 of 1994), p. 5.

81 Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (49th Report)*, September 1994 (Parliamentary Paper 171 of 1994), p. 13.

82 Senate Privileges Committee, *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1966-1999, (76th Report)*, June 1999.

83 Submission of the Administrative Law Section of the Law Institute of Victoria, cited in the House of Representatives Committee of Privileges, *Report Concerning Proposal to Transfer to the Federal Court Certain Responsibilities in Relation to Disputed Claims for Public Interest Immunity*, November 1994.

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

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

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

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

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

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

7.149 The actions of the Committee in this case reflect the complexity surrounding the conventions that have thus far been observed with respect to ministerial advisers not being called before committees – on the grounds that their accountability is exercised via their minister. The Committee has serious doubts about the efficacy of these conventions in the light of the issues canvassed above, and particularly in the light of the behaviour of the ministerial staff involved in the 'children overboard' affair. The time has come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby to the public.

What is to be done about advisers' accountability

7.150 Every commentator and analyst seems to agree that ministerial staff have grown in importance in the policy process as they have grown in numbers. The more difficult question however is whether their raised profile warrants new rules to govern them. There is evidence that international practice is moving in this direction.

7.151 It is probably also true to say that ministerial staff in Australia have become targets for increasing public scrutiny over the last ten years. Some of the more significant occasions have been the federal travel rorts investigations in 1997 and, perhaps most prominent of all, the 'children overboard' affair.

7.152 Ministerial staff are not subject to any equivalent of the Australian Public Service Code of Conduct that govern public servants under the *Australian Public Service Act 1999*, or the Parliamentary Service Code of Conduct governing

parliamentary employees under the *Parliamentary Service Act 1999*. There is no direct equivalent for staffers of the Australian Public Service Values that establish norms to underpin the way staff approach their work.

7.153 The Public Service Commissioner has suggested that ‘there is a case for some articulation of the values and code of conduct of ministerial officers’.⁸⁴ Public sector analyst and academic Dr John Uhr put this in terms of needing:

to carry forward the spirit of reform so that the kind of pretence to accountability can be more properly enacted by making sure that the people who are holding power and exercising the capacities as public decision makers - ministerial advisers -... really own up when things don’t go as planned...⁸⁵

7.154 Certainly the practice in other countries is generally to regulate or guide ministerial staff more explicitly than in Australia. In the UK a *Code of Conduct for Special Advisers*, promulgated in July 2001, covers matters such as the tasks which special advisers can do, prevention of the use of resources for political party purposes, contact with the media, relations with the government party generally, and the holding by advisers of political party offices.⁸⁶

7.155 It also establishes a complaints structure, stating that:

Any civil servant who believes that the action of a special adviser goes beyond that adviser’s authority or breaches the Civil Service Code should raise the matter immediately with the Secretary of the Cabinet or the First Civil Service Commissioner, directly or through a senior civil servant.⁸⁷

7.156 The Committee is attracted to the idea of a code along the above lines. Dr John Uhr has taken a keen interest in the UK developments, and described the key ways in which such a code captures accountability.

I would suggest three elements: the first is the fact that it is a specified public document that articulates into the other specified public document, the Civil Service Code—the fact that it is out there. Public focus is one element of public accountability so that we know what to expect of these classes of public officials. The second is that, in relation to ministerial staffers, their accountability in terms of their employment relationships is something that is managed by the Cabinet Secretary as the chief adviser to the Prime Minister. It is something that goes right to the heart of government. You can imagine the parallels that there would be here. The third element is that, in terms of public servants feeling that somehow they

84 *Transcript of Evidence*, CMI 1203.

85 John Uhr quoted in *Background Briefing*, ABC Radio National, 24 March 2002.

86 UK Cabinet Office, *Code of Conduct for Special Advisers*, cited: <http://www.cabinet-office.gov.uk/central/2001/codcons pads.htm>

87 UK Cabinet Office, *Code of Conduct for Special Advisers*, Clause 22.

are getting an unfair deal and that the people with whom they are working, the ministerial staffers, are unaccountable and irresponsible in their conduct, they have a right of redress to the Public Service Commissioner—or the equivalent officer there as a central government agency that has a supervisory role. They are the three elements of accountability, none of which we have at all in relation to the workings of ministerial staff.⁸⁸

7.157 Even prior to the Code's introduction, ministerial staff in the UK were not entirely unregulated. In particular there already existed a *Ministerial Code* and a *Model Contract for Special Advisers*, which, together with other policies, covered issues now consolidated in the *Code of Conduct*. There are also proposals currently being considered in the UK for parliamentary regulation of the numbers of advisers: 'there should be a limit on the number of special advisers in each government, set by Parliament at the beginning of each new Parliament.'⁸⁹

7.158 In Canada, there is regulation of ministerial staff, but principally in relation to conflict of interest. This takes place under the *Conflict of Interest and Post-Employment Code for Public Office Holders*.⁹⁰ In some respects this is similar to the Australian arrangement. Unlike Australia, however, the Code is backed by the advice and reporting of the office of the Ethics Counsellor. Staff are thus subject to professional advice and scrutiny in a bid to ensure compliance with the Code.

7.159 All the above arrangements aim to regulate the staff. It might also be possible to approach some aspects of the problem through regulation of interactions with ministerial staff, rather than through the regulation of the staff themselves. The Public Service Commissioner recently outlined such a possibility, discussing the extent to which the Public Service Code of Conduct guides interaction between public servants and ministerial staff:

...we are looking at the guidelines on official conduct. The current guidelines are very brief on the relationship, and I think this is an area we need to expand upon to clarify for public servants their relationship with ministers... there will be a lot of relationships between the minister's office and the staff of an organisation... The relationships are between the staff and their secretary and between the secretary and the minister. Obviously, in making that relationship work, staff would normally expect that, when they are dealing with a minister's office, they will know what the minister is saying, that they will understand the requirements and that this approach will work very easily and properly. But I think there is a need within each agency to clarify the protocols of the relationship.⁹¹

88 *Transcript of Evidence*, CMI 1252.

89 UK Cabinet Office, *Portrait of a Profession Revisited*, Speech by Sir Richard Wilson, 26 March 2002, cited: <http://www.cabinet-office.gov.uk/2002/senior/speech.htm>, p. 20.

90 Canada. Office of the Ethics Counsellor, cited: <http://strategis.ic.gc.ca/pics/oe/coiencod.pdf>

91 *Transcript of Evidence*, CMI 1203.

7.160 The Committee notes the views of the Hon Tony Abbott MP, Minister Assisting the Prime Minister for the Public Service, concerning what he described as the inevitable outcome of controversies – namely, ‘calls for more rules’.

In government administration, problems typically arise from errors of judgment rather than breaches of the law or a total breakdown of ethical behaviour. I’m sceptical about new regulations which might turn out to be better at tripping conscientious people focused on doing their job than trapping villains who know how to cover their tracks.⁹²

7.161 This may be a reasonable view to put forward where the government administration is proceeding according to the norms of best practice, but it is a view which has turned the problem on its head. The view does not address the kinds of behaviour that have been manifest in the controversy at issue. The Committee’s inquiry has revealed behaviour by advisers in their interactions with departments which is inappropriate at best, and grossly improper at worst. Suitable regulations will help insulate ‘conscientious people focused on doing their job’ from the impediment of ‘villains’ seeking to ‘cover their tracks’.

7.162 The Public Service Commissioner, in his evidence to the Select Committee, argued for a clarification of the relationship between public servants and ministers’ offices.

The issue of trust is important until you get the relationship working and ...[it] has got to be professional and cooperative.

In this context, you need to have a close relationship, but the minister’s office is not there as a power to direct. The minister needs an office there to help in the process and to handle the scale of activity, and by nature there will be a lot of relationships between the minister’s office and the staff of an organisation. But I think we do need to clarify, in law, there is no power to direct.⁹³

7.163 The Committee understands the Commissioner to be saying here that ministerial staff have no power to direct in their own right as opposed to their legitimate role in conveying the directions of the minister. It seems that departmental staff can no longer be sure that an instruction or request from a ministerial adviser has the blessing of the minister, or is consistent with the minister’s view on how a matter is to be approached. For departmental secretaries in particular there seems to be a need for greater clarity in the roles and responsibilities of the advisers and secretary respectively.

7.164 The Committee believes that two courses of action are needed to satisfactorily resolve the issues around ministerial advisers that have been emerging for some years

92 Hon Tony Abbott MP, *Address to Institute of Public Administration Australia*, Canberra, May 2002; accessed at <http://www.psmpc.gov.au/minister/abbott220502.htm> p.3.

93 *Transcript of Evidence*, CMI 1203.

and have now been brought sharply into focus as a result of the ‘children overboard’ affair. The first requires the bringing of ministerial advisers properly within the scope of parliamentary committee scrutiny, in a manner similar to that which currently applies to public servants.

7.165 The second requires the articulation of a Code of Conduct and Set of Values for ministerial advisers within a legislative framework – possibly a modified *MoPS* Act. Such a code might include general guidelines as to how advisers might go about their business, and what limits might be placed on their power to direct public servants. It might also be desirable for the code to state what they *cannot* do.⁹⁴

7.166 With respect to the first course of action, the Committee believes that the appearance of ministerial staff before a parliamentary committee will quickly become standard practice. It will, like the appearance of public servants, be guided by a set of procedures that ensure the executive answers to the parliament on matters of policy. And it will, like the appearance of public servants, be likely to enhance rather than undermine ministerial accountability.

7.167 With respect to the second course of action, such a Code of Conduct will not only give clear guidance both to ministerial advisers and to ministers about what is proper practice, but by being enshrined in legislation will facilitate the establishment of mechanisms for redress should such a code be breached.

Ministerial accountability

7.168 The convention of ministerial responsibility is one of the centre-pieces of Westminster style parliamentary democracy. It enshrines the fundamental principle that the government is accountable to parliament through its ministers. It asserts the essential capacity of parliament to acquire accurate information, so that debate can be meaningful and scrutiny effective.

[S]ecuring information is at the heart of the debating or scrutiny process. Ill-informed debate cannot be effective ... the price of democracy is eternal scrutiny ... [and] the success of a democracy is to be judged by the extent to which it can ensure that government is publicly accountable.⁹⁵

7.169 A British observer, not alone in the literature, and in a journal article mischievously titled ‘The right to mislead Parliament?’, has noted that:

94 Such an approach has been recommended by former UK Cabinet Secretary Sir Richard Wilson: ‘This may sound a negative approach. But by defining the area of what was not acceptable it would free up Ministers to deploy their special advisers as they wished within the framework which had been created.’ *Speech Portrait of a Profession Revisited* March 2002; accessed at <http://www.cabinet-office.gov.uk/2002/senior/speech.htm>

95 J Griffith and M Ryle *Parliament: Functions, Practice and Procedure* (London, Sweet & Maxwell, 1989) pp15-16 and p.517.

Recent political practice would seem to indicate... that there is some distance between these grand statements of principle about the supposedly central importance of ministerial responsibility on the one hand and the crude reality of parliamentary practice on the other.⁹⁶

7.170 The Committee acknowledges those grains of truth that lie in such a statement, but reaffirms the fundamental importance of the principles which are its focus. The misleading of the parliament and the public by governments is a very serious business, and for many observers goes to the heart of a government's credibility.

[S]hould we care if a minister lies or fails to correct an untruth? Oh yes, very much. *Very much.*⁹⁷

7.171 There seems to be little point in adding to the voluminous academic discussions about ministers' responsibilities when it comes to rendering service and accountability to the parliament and the public. Rather the Committee will link its discussion to one key practical document - the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*.

7.172 To contextualise this discussion, and to place ministerial responsibility at the heart of it, the Committee draws attention to the following remarks given in evidence by Dr John Uhr:

There are two issues. One is the integrity of Defence intelligence. ... The other issue that the community is...more keenly interested in is the integrity of public information. That is an issue that ...goes to ministerial practices...

...[C]an we start to open this inquiry up as to how ministers themselves satisfy themselves that they have got intelligence of integrity that they can divulge to the community at the time of an election? I think there is a duty on ministers themselves not to mislead the community. In fact, it is part of Prime Minister Howard's commendable ministerial code that ministers are under a duty and obligation not to mislead the community....

I do not think we have had any evidence yet that ministers have been actively involved in testing advice that has come to them. We have lots of evidence before the committee... where ministerial staff acting on behalf of ministers have, in a way, been acting as testers of evidence. But it has been more like cherry picking rather than testing—not subjecting advice to scrutiny to see whether it is ready for public information, but just picking and choosing those parts that they think are of partisan advantage to them. ... I think it is that element... the integrity of public information—that the

96 Adam Tomkins 'The right to mislead Parliament?', *Legal Studies* 16, (1996) p.66.

97 Andrew Bolt 'We were betrayed' *Herald Sun* 18 February 2002.

committee might well start to explore, because it goes to the heart of ministerial and ministerial staffers' responsibilities...⁹⁸

7.173 The Prime Minister's *Guide on Key Elements of Ministerial Responsibility* was issued in December 1998. It covers a range of issues, from constitutional and legal frameworks to ministerial conduct, relations with departments and ministerial staff conduct.

7.174 The opening statement in that part of the *Guide* dealing with Ministerial Conduct states the following:

It is vital that ministers ... do not by their conduct undermine public confidence in them or the government.

- Ministers must be honest in their public dealings and should not intentionally mislead the Parliament or the public. Any misconception caused inadvertently should be corrected at the earliest opportunity.
- Ministers should ensure that their conduct is defensible, and should consult the Prime Minister when in doubt about the propriety of any course of action.⁹⁹

7.175 The Committee is of the view that former minister Reith misled the public in relation to the 'children overboard' affair during October and November 2001. As well, the evidence that emerged in the Bryant report, and the failure of Mr Reith and his staff to submit information to, or appear before, the Inquiry into a Certain Maritime Incident further eroded public confidence in the government.

7.176 It seems extremely unlikely that the former minister was not aware, even if he had not been categorically, unambiguously and directly advised, that the initial 'children overboard' reports were not true. Certainly he had been told that the photographs he had released were not evidence of the event. Mr Reith was therefore clearly in breach of the Prime Minister's guidelines. He did not deal honestly with the public, he did not seek to correct misconceptions, and it is hard to see how his conduct was anything other than indefensible.

7.177 To what extent Mr Reith consulted the Prime Minister, if at all, about the course of action he took, the Committee has been unable to properly determine. Certainly Mr Reith's staff were in touch with the Prime Minister's office about aspects of these matters. Mr Reith had held at least one conversation with the Prime Minister about the photographs. The Prime Minister has consistently asserted that he was never told the 'children overboard' story was untrue.

98 *Transcript of Evidence*, CMI p.1217.

99 Hon John Howard MP, *Prime Minister Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.10.

7.178 The Committee finds that Mr Reith stands condemned for his deliberate misleading of the public, his persistent failure to correct the record, and his refusal to cooperate with the Senate inquiry charged by the parliament to get to the bottom of the affair.

7.179 Previous chapters have dealt in some detail with the interactions between the minister or his staff and various Defence officials. It is clear to the Committee that the way those interactions were conducted failed to respect some important conventions of the relationship between a department and a minister's office.

7.180 On the question of a minister's role in relation to the conduct of ministerial advisers, the Prime Minister's *Guide* states:

Ministers' direct responsibility for actions of their personal staff is, of necessity, greater than it is for their departments.... Ministers therefore need to make careful judgements about the extent to which they authorise staff to act on their behalf in dealings with departments.¹⁰⁰

7.181 On this account, Mr Reith must bear responsibility for the haranguing interventions of his personal staff into the Department of Defence, the insertion of their politically-driven demands into both the operational and administrative chains of command, and their complete failure to adequately assess, and give proper weight to, the advice coming to them from the Department.

7.182 If his ministerial advisers were so dealing with the Department with their minister's authority, foreknowledge and approval – and the Committee has no evidence to suggest otherwise – Mr Reith failed to maintain the standards specified in the Prime Minister's *Guide*.

7.183 As well, the *Guide* highlights the fact that ministers must be scrupulous about not asking public servants to engage in activities 'which could call into question their political impartiality.'¹⁰¹ Such a meticulous requirement is compromised by actions such as the 'special arrangement' that was put in place to interrupt a commander in the middle of an operation in order to transmit information outside the chain of command about matters whose policy context was politically controversial, and with an election looming. It is also compromised by things like the special public affairs plan insisted upon by the minister that prevented Defence from communicating even factual information about Operation Relex to the public – a prohibition that was reinforced by the minister's office to Defence officials the day after Air Marshal Houston advised Mr Reith that no children had been thrown overboard.¹⁰²

100 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13-14.

101 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13.

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

7.184 The Prime Minister's *Guide*, noting the importance of trust between ministers and public servants, points out that both the minister and the public servant 'must contribute' to its establishment and maintenance.¹⁰³ In the Committee's view, the actions of the minister and his staff were on almost every occasion contrary to such an obligation.

7.185 For Defence officials to know, for example, that they have acted to correct the public record, and to discover that their minister repeatedly declines to do so, is profoundly undermining of trust – not only trust in one's minister, but trust in the leadership of the Department. Thus has the minister doubly damaged professional relationships, as well as sending the message to public servants that their 'frank and fearless' advice may be held in contempt.

7.186 Elsewhere, the Prime Minister has spoken of such relationships of trust, stating that, when advice has been given by a senior public servant it should be 'properly considered and not summarily dismissed'.¹⁰⁴ In the Committee's view, to 'properly consider' advice is not to recklessly prosecute it because of its immediate political advantage, nor in turn to 'summarily dismiss' it if it is politically inconvenient. Mr Reith failed on both these counts.

7.187 The Prime Minister's *Guide* also states that, while it is not for public servants to press their advice beyond the point where the minister has indicated it is not favoured, they:

... should feel free, however, to raise issues for reconsideration if they believe there are emerging problems or additional information that warrant fresh examination.¹⁰⁵

7.188 The Committee's assessment here is that the reluctance of Mr Reith to correct the public record, prefaced by the pursuit by his staff of corroborating evidence when there was none to be had, could easily have led Defence officials to conclude that any pressing by them for such a correction would not be 'favoured'.

7.189 Most of them were diligent in passing corrective advice up the chain of command. But from there, it seems, most were resigned to the fact that they could do no more, and that it was now in the hands of the CDF as the government's principal military adviser. The vertical accountability effort was clearly insufficient to produce the desired corrective outcome.

7.190 Here again, the Committee points to the flaw in the horizontal accountability arrangements which highlights forcefully the need for an improved 'culture of

103 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13.

104 Hon John Howard MP, Speech at the launch of paper 'Ethical standards and values in the Australian public Service', Canberra, May 1996.

105 Hon John Howard MP, Prime Minister, *Guide on Key Elements of Ministerial Responsibility* Canberra, 1998, p.13.

responsibility' and for a greater exercise of 'navigational competence' in whole-of-government operations, especially at the top level of the bureaucracy.

7.191 The Committee appreciates that there are tensions associated with the accountability requirements in contemporary public administration. The Committee's earlier discussion of the Defence 'diarchy' and the whole-of-government responsibilities of the Secretary of the Department of Defence explored these tensions in their 'real life' manifestation.

7.192 It is imperative that departmental secretaries pay special attention to their whole-of-government responsibilities, and that both senior public servants and ministers recognise the validity and desirability of horizontal accountability. This may require some adjustment in the attitudes and expectations of both parties.

7.193 The Committee is in no doubt that a diligent pursuit of broader accountability responsibilities at the senior levels of the public service, and a clear acceptance by ministers of the legitimacy of that pursuit, is the only way to effectively meet the challenges of contemporary governance.

Accountability of the executive

7.194 While much of the Committee's critique has been focussed on the former Minister for Defence, his office and department, there are broader aspects of the 'children overboard' affair which go to the question of the responsibility of the executive as a whole. After all, the response to people smuggling at both the policy and legislative levels, as well as in its implementation, was a whole-of-government activity.

7.195 The executive as a whole has been very keen to take the credit for what it regards as a successful whole-of-government operation on border protection and the handling of asylum seekers. In the Committee's view, the executive is therefore similarly obliged to take corporate responsibility for any shortcomings.

7.196 Within hours of the alleged incident having taken place, ministers were on the public record condemning the SIEV 4 occupants for their abhorrent attempts to confect a 'safety of life at sea' situation. During the days and weeks that followed questions continued to be asked of, and statements continued to be made by, senior government ministers, concerning the events. The public record remained uncorrected throughout – for some a deliberate deceit, for others an unwitting perpetuation of a falsehood because of inadequate advice.

7.197 The findings of the Routine Inquiry by Major General Powell (the Powell Report) formally repudiated the original report, and the Bryant Report, tabled in the parliament by the Prime Minister, also found that children had not been thrown overboard. A period of four months had elapsed. The CDF, Admiral Barrie, finally conceded in late February 2002 that children had not been thrown overboard from SIEV 4. The government's response – instead of being a forthright acknowledgment of the sustained error - was one of grudging acceptance of the CDF's advice, combined with a reiteration of its defence of ignorance due to faulty advice.

7.198 The Committee notes that none of the ministers closely involved in the ‘children overboard’ affair appear to have taken any action to reprimand or discipline advisers or officials who have performed either inadequately or inappropriately in their various roles. Dr Hawke offered his resignation on the grounds of his failure to properly advise the former minister, Mr Reith. But no other key figures in the affair have acknowledged any errors or omissions let alone confessed to any deliberate misleading of their ministers or the public.

7.199 Ministers have been quick to assert that they ‘were not told’ or were given ‘faulty advice’, but have been singularly reluctant to admonish those responsible for those failures or faults. The Committee contrasts this state of affairs with what has applied on other occasions. For example, in 1997 the Prime Minister terminated the services of two of his key staff for failing to tell him about a ministerial repayment associated with the ‘travel rorts’ imbroglio, and in 2001 Deputy Prime Minister John Anderson sacked his principal adviser and another staffer for failing to inform him about the politically damaging contents of an Audit Report on the national highways program.

7.200 In the Committee’s view, the examples cited seem to have involved lapses rather than the deliberate, possibly strategic, acts and omissions of advisers associated with Mr Reith. Yet it seems, in the case of ‘children overboard’, no action was taken to convey the government’s displeasure at having been poorly advised or misled. It is reasonable to infer, therefore, that the government was not displeased with the acts and omissions of Mr Reith’s advisers because the outcomes were politically advantageous to the government in an election period.

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

7.202 Even though the Prime Minister was explicit in telling the parliament that the ban affected only *MoPS* Act staff, and that public servants would be allowed to appear,¹⁰⁶ the Minister for Defence (Senator Hill) refused permission for certain public officials to appear.

7.203 In the Committee’s view, the government’s actions during the Inquiry into a Certain Maritime Incident do not promote transparency, and are inimical to accountability.

106 House of Representatives Official Hansard *Parliamentary Debates* 12 March 2002, pp.995 & 998.

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

7.205 In this context, the Committee endorses the views expressed on 2 July 2002 by Professor Richard Mulgan of the Graduate Program in Public Policy at the Australian National University.

The first step will be for the Government to admit the fact of failure... [E]ven if ministers were not personally to blame they should still be held accountable under the normal conventions of ministerial responsibility. The public were misled on a politically sensitive issue when the truth was readily discoverable by the government machine.

Ministers, including the Prime Minister, should ... express regret that such a failure occurred on their watch. ... Only when the failure is openly admitted will there be any chance of seeking to avoid its repetition.¹⁰⁷

107 Richard Mulgan 'APS fails to do its duty to the public' *Canberra Times* 2 July 2002.