



hc/let/13648

22 May 2002

Senator J. Collins
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Collins

**SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT
MR SCRAFTON — LETTER FROM MINISTER'S OFFICE**

You have asked for advice on the letter dated 17 May 2002 apparently signed by a member of the staff of the Minister for Defence, "per" the minister, and relating to the request by the Select Committee on a Certain Maritime Incident that Mr M. Scrafton give evidence before the committee.

The letter indicates that the minister (or the person who signed the letter) has decided what the significance of Mr Scrafton's evidence is to the committee, what interpretation should be placed on the evidence of another witness about a discussion with Mr Scrafton, and what is the "only contribution" Mr Scrafton's evidence could make to the committee's inquiry. The letter then indicates that the minister's office has contacted Mr Scrafton, and conveys a statement purportedly made by Mr Scrafton that the discussion took place.

Before commenting on these matters in the letter, I note that the letter makes the statement that there is a "longstanding convention that public servants employed under the Members of Parliament (Staff) Act not be called to appear before such committees". I again state that I know of no basis for the claim that there is any such "longstanding convention". Such conventions come into existence only by being applied in a long line of precedents which are widely recognised as authoritative. They are not created, even by ministers. The precedents of the Senate are all against the supposed convention.

It is for the committee to decide what the significance of Mr Scrafton's evidence is to its inquiry, what interpretation is to be placed on another witness' evidence about a discussion with Mr Scrafton and what evidence Mr Scrafton might be able to give in relation to the committee's terms of reference. The Senate has not empowered any other person to make these decisions on behalf of the committee. It is also for the committee to determine what questions should be put to Mr Scrafton about the discussion in question. The Senate has similarly not delegated to any person the power to put questions to Mr Scrafton on behalf of the committee.

It is also for the committee to decide whether the committee is satisfied with a purported confirmation by Mr Scafton that the discussion took place. This does not indicate whether Mr Scafton recalls the discussion in exactly the same terms as the other witness, or whether he is able to add anything to the terms of the discussion. It also does not indicate Mr Scafton's conclusions about the discussion or what, if any, action he took as a result of the discussion.

The statement that the minister's office contacted Mr Scafton and sought his confirmation that the discussion took place also raises the possibility that Mr Scafton's purported confirmation, even if it is accepted as evidence by him, was not given freely and without interference. The committee has already caused to be referred to the Privileges Committee a case in which an officer who could well be regarded as superior apparently called to a meeting an officer who could well be regarded as subordinate to ascertain the latter officer's recollection of matters relevant to the committee's inquiry. The mere occurrence of such a situation raises, as the chair of the committee pointed out, a strong suggestion that the subordinate officer was put under pressure to make his recollection accord with that of his superior. A person in the minister's office, in the practical, current mode of operation of ministers' offices and the public service, is superior, and a public servant in the minister's department is subordinate, raising the same possibility of corruption of evidence as in the other case. Even if the question was put to Mr Scafton in the form: "What is your recollection?", rather than: "This is your recollection, isn't it?", the strong possibility of pressure being applied is there. And, even if the superior/subordinate relationship is not present, the problem of a person with an interest in the witness' evidence "getting the story straight" is present.

Whatever the situation, it would be open to the Senate to treat it as improper interference with a witness. The placing of Mr Scafton's purported statement before the committee makes him a witness in the inquiry, and if it is shown that his statement has been fabricated or improperly influenced, the offence is proved.

I recall a senator many years ago putting to a senior public service witness the proposition that a Senate committee is entitled to at least the same respect as a magistrates' court. The witness felt constrained to agree with that proposition. Perhaps nowadays ministers and their staff would not agree with that proposition. You may imagine, however, the reaction of a magistrates' court to a letter being tendered, in place of the appearance of a material witness, stating: "I act on behalf of this witness' boss, who has decided that the witness is not permitted to appear, but I have decided what relevant evidence the witness could give, I have asked him about it, and this is what he says".

It would be a different matter if a letter were received from the minister, signed by the minister, indicating that the minister raised a claim of public interest immunity in relation to the officer's evidence, and, pursuant to that claim, had instructed the officer not to give evidence. Although such a letter would raise a familiar problem of the rights of the Senate and the claimed powers of the executive government, it would at least raise that problem in a regular and proper way. The manner in which the committee's request for Mr Scafton to give evidence has been answered, if not a contempt of the Senate, is at least contemptuous.

As indicated, it would be open to the committee to raise this transaction as a possible interference with a witness.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Harry Evans". The signature is fluid and cursive, with the first name "Harry" and the last name "Evans" clearly distinguishable.

(Harry Evans)