

MINISTRY OF
JUSTICE

LA 04 01 00 03

1 March 2000

Minister of Justice

OPTIONS FOR FURTHER INQUIRY INTO THE ELLIS CASE

You have asked for a report on the options for further inquiry into the Ellis case.

This first part of the report outlines the general issues surrounding a possible inquiry.

The second part of this report considers the scope for further inquiry into the Ellis case and the form such an inquiry might take.

PART 1

BACKGROUND

On 19 October 1999, a further application was submitted to the Governor-General seeking the exercise of the Royal prerogative of mercy on behalf of Mr Peter Ellis. The application seeks a pardon for Mr Ellis and a Royal Commission of Inquiry.

As you know this is the third such application. Following the two earlier applications the Governor-General referred the case to the Court of Appeal pursuant to section 406(a) of the Crimes Act 1961.

The Court released its judgment on 14 October 1999. In summary, the Court concluded that, whether taken individually or cumulatively, the grounds of the reference did not indicate that a miscarriage of justice had occurred in Mr Ellis's case. His appeal was dismissed accordingly. However, the Court commented in the course of its judgment that some of the matters placed before it might more appropriately be addressed by a Commission of Inquiry.

THE CURRENT APPLICATION

The current application is supported by twenty-eight volumes of material. Most of this material has been previously considered by the Executive in the context of the two earlier applications. The new material comprises the submissions, affidavits and documents which were presented to the Court of Appeal during the recent Court of Appeal hearing.

A copy of the application is attached as an Appendix. In summary, it is argued that the Court of Appeal adopted a conservative interpretation of its jurisdiction and function under section 406(a) of the Crimes Act 1961; and that, as a result, significant issues remain outstanding. It is claimed that these matters can only be addressed by the grant of a pardon and the appointment of a Royal Commission of Inquiry into the case.

Paragraph 83 of the application suggests possible Terms of Reference for an inquiry. They include requests for:

- A factual inquiry into the investigative processes used by the Police and Department of Social Welfare in relation to the events at the Christchurch Civic Crèche;
- Inquiries into various aspects of the criminal process leading to Mr Ellis's conviction including the non-disclosure by the Crown of certain documents and photographs relevant to the case, possible jury bias, and the conduct of Detective Eade, the officer in charge of the investigation;
- A general review of the legislation and administrative processes used for obtaining childrens' evidence in child sexual abuse cases.

POSSIBLE FORMS OF INQUIRY

(a) Royal Commission of Inquiry/Commission of Inquiry

There is little practical difference between a Royal Commission of Inquiry and a Commission of Inquiry. The principal distinction is in the instrument of appointment.

Royal Commissions of Inquiry are constituted under the powers conferred on the Governor-General by the Letters Patent. Commissions of Inquiry are established under the Commissions of Inquiry Act 1908.

Features of these types of inquiry include:

- Commissions have power to conduct and order their proceedings, summon witnesses, order the production of documents, and take evidence on oath;
- Any person who has an interest in the proceedings apart from an interest in common with the public is entitled to appear before a Commission and be heard;
- Legal Aid may be available to persons entitled to be heard;

- Commissions are generally supported by a secretary and by legal counsel appointed to assist;
- The proceedings are formal and are generally open to the public.

Commissions of Inquiry have statutory power to inquire into any of the following:

- a) the administration of Government;
- b) the working of any law;
- c) the necessity or expedience of any legislation of the Crown;
- d) the conduct of any officer in the service of the Crown;
- e) any disaster or accident involving injury or death of the victim or the risk of it;
- f) any matter of public importance.

Commissions of Inquiry are particularly well suited to the investigation of issues which involve disputed factual matters and/or matters in which information needs to be obtained from persons who may be reluctant to supply it. The main disadvantage of inquiries of this kind is that they tend to be slower, more expensive and more adversarial than other inquiries because of the manner in which they are constituted and the formality of their proceedings.

(b) **Ministerial Inquiry**

A Minister of the Crown may appoint one or more persons to inquire into a particular issue. The Minister may decide the procedure to be followed or may leave the procedure to be followed to the discretion of the person or persons appointed. Such an inquiry must comply with the requirements of natural justice. Ministerial inquiries are less formal and public than Commissions of Inquiry. They tend to deal with issues more quickly and at less cost. The main limitation of these inquiries is the absence of any power to compel evidence.

(c) **Officials Inquiries**

The third form of possible inquiry is an officials' inquiry. These take a variety of forms. In general, the procedural aspects of official inquiries are similar to Ministerial inquiries.

THE PURPOSE OF AN INQUIRY

It is important to focus on the objectives of any inquiry. There are two quite distinct areas of possible inquiry. The first would be an investigation into whether Mr Ellis was properly convicted (i.e. looking back to the events of 1992). The second would be an investigation into the desirable law and administrative practices governing the investigation and prosecution of child sexual abuse, particularly where mass allegations are involved (i.e. looking forward to future reform of the law).

There are difficulties with establishing a single inquiry with such different objectives. Such an inquiry would inevitably lack both structure and focus. The form of inquiry best suited to investigating possible past miscarriages of justice must inevitably deal with evidence and disputed facts. That is not necessarily the best environment for dealing with law and administrative reform which must take into account much broader issues.

There are also issues of timing. Any inquiry into the possibility of a miscarriage of justice in Mr Ellis's case must precede, and form the basis for, consideration of his further application for a pardon. An exercise aimed at reform of the law and practice in child sex abuse cases would be better dealt with after the pardon application has been resolved so that any lessons that arise through consideration of the pardon can be taken into account along with the broader considerations that influence law and administrative reform.

We suggest there are two broad options:

Option 1

Consider the application for a pardon and in the light of your decision consider whether to establish an inquiry into the need for reform of the law and administrative practice surrounding the investigation and prosecution of mass allegation child sexual abuse

We have examined Mr Ellis's further application for pardon. It is not supported by any factual material that has not already been put before the Court of Appeal. The Governor-General has wide powers under the Letters Patent to grant pardons. However, the exercise of the prerogative of mercy is not just an arbitrary monarchical right of grace and favour. Rather, as developed it has become an integral element in the criminal justice system, a constitutional safeguard against mistakes.¹ In practice, pardons are normally entertained only if there is new evidence which is sufficiently cogent and compelling to point to a likely miscarriage of justice. In light of the Court of Appeal's findings, we are not able to recommend an appropriate basis on which to found a pardon on the evidence presented.

As to whether there should be an inquiry into the need for reform of the law and administrative practice surrounding the investigation and prosecution of mass allegation child sexual abuse, quite apart from questions relating to the safety of Mr Ellis's convictions, the case has highlighted a concern about whether the law deals properly with child sexual abuse, particularly where mass allegations are involved.

An inquiry of this kind could certainly be considered consistent with established principles.

Option 2

Establish an inquiry into unresolved aspects of the Ellis case as a basis for considering his further application for a pardon

There is considerable public disquiet about certain aspects of the Ellis case. This alone does not justify a further inquiry. Public opinion is generally based on a limited knowledge of the trial. However, it is clear from the Court of Appeal judgment that there are aspects of the case which the Court of Appeal was unable to consider because of the way in which the evidence was presented and the nature of its appellate role. The Court of Appeal itself has acknowledged that "there may well be matters worthy of and which could properly be addressed by a Commission of Inquiry".

¹ *Burt v Governor-General* [1992] 3 NZLR 672.

A further inquiry into the substantive issues left open by the Court of Appeal could, depending on the outcome of the inquiry, help to resolve public doubts. It has to be acknowledged, however, that such an inquiry is unlikely to be able to arrive at the truth and, whatever its findings, may fail to satisfy current public doubts.

As a matter of principle, any inquiry by the Executive should focus on the aspects of the case which were not resolved by the Court of Appeal, and should not seek to re-run matters which have already been heard and determined by the Court. We examine the issues which might be considered for an inquiry of this kind, and the form such an inquiry might take, in the second part of this report.

PART 2

THE SCOPE FOR FURTHER INQUIRY

If it is decided that a further inquiry of the kind outlined under Option 2 is warranted, it will be necessary to consider the nature of the issues to be inquired into and the form such an inquiry might take.

This part of the report examines the issues which may warrant further inquiry and the form of inquiry best suited to their resolution.

The relevant factors

Mr Ellis's application seeks an inquiry into all aspects of the case including the investigation and processes used to obtain the childrens' evidence, the possibility of juror bias, the non-disclosure by the Crown of certain documents and photographs relevant to the defence, and the conduct of Detective Eade, one of the officers responsible for the investigation.

In our view, such an inquiry is neither necessary nor appropriate. There are four main factors which should influence the shape of any further inquiry.

- (1) The need for the inquiry, so far as possible, to focus on matters which the Court of Appeal was unable to resolve.

As a matter of principle, it is not appropriate for the Executive to inquire into matters which have been finally dealt with by the Court. Any further inquiry into the case must respect that principle so far as possible and apply only to those issues which have not been fully resolved by the Court.

We suggest that the claims of jury bias and non-disclosure of documents are not appropriate subjects for further inquiry. These issues have already been comprehensively considered and rejected by the Court of Appeal. The Court of Appeal is the appropriate body to consider issues of this kind. In addition, there is nothing in the Court's judgment which suggests that its ability to deal with these issues was affected by the nature of the material it was presented with. The issues relating to the reliability of the childrens' evidence are more complex. While the Court of Appeal has considered the issues in a limited way, there are aspects of this matter it was unable to resolve because of the form in which the evidence was presented and the nature of its appellate role. We discuss this matter more fully later.

- (2) The undesirability of an inquiry into matters that have been comprehensively considered and rejected by the Executive.

It would also be inappropriate, in the absence of new information, to inquire into matters which have been comprehensively considered and rejected by the Executive. Such a reinvestigation, where no new information is provided by the applicant, involves duplication and undermines confidence in the ability of the Executive to deal with allegations of miscarriage of justice.

Mr Ellis's two earlier applications contained allegations about the conduct of Detective Eade. The allegations were to the effect that there were concerns about his mental state at the time of the investigation and that he had formed inappropriate relationships with mothers of the crèche children. These allegations were comprehensively considered by both the Ministry of Justice and the Hon Sir Thomas Thorp. The matter did not form part of the Governor-General's reference to the Court of Appeal. The applicant has provided no new information which indicates that the matter should be reopened.

Mr Ellis's counsel urged upon you at the recent meeting that the conduct of Detective Eade warranted further inquiry because he was a source of potential contamination of the childrens' evidence. However, we note that the nature of the contact between the Detective and the children was canvassed at both the depositions and the trial and any further inquiry into his mental state at this late stage is unlikely to significantly advance the issue.

- (3) The lapse of time since the events at the crèche and the unlikelihood of a factual investigation achieving any further resolution into those events.

The events at the crèche took place in 1991/1992. Since then the case has been subject to intensive public scrutiny. The positions of those involved in the case, already polarised at the time of the trial, have long since become entrenched.

There is little real prospect of a further factual inquiry into the events at the crèche achieving any greater resolution of the issues than was achieved during the depositions and trial. The problem is particularly acute in the case of the children who attended the crèche. These children were only 3 or 4 years old at the time of the events. It is difficult to see how these children can shed further light on the matter almost ten years later, or how a further factual inquiry can proceed without the childrens' evidence. It follows that if there is to be an inquiry of the kind envisaged under Option 2, it should not seek to reopen these events. The evidence at depositions and trial is likely to provide the best account available of the circumstances which led to Mr Ellis's conviction.

- (4) The effect of a further inquiry on the children and their families

Any further inquiry into the case will inevitably put the children who attended the crèche and their families under the public spotlight with associated distress and trauma. This is not to say that there should not be a further inquiry if the interests of justice so require, but merely that any such inquiry should be structured in such a way as to minimise the harm to the children and their families.

The reliability of the childrens' evidence

Background

If there was to be an inquiry of the kind envisaged under Option 2, but structured to bear in mind the considerations set out above, it would need to focus on questions about the reliability of the childrens' evidence. The case for Peter Ellis at both depositions and trial was that the evidence of the children was unreliable because of contamination by parental questioning and the use of unacceptable interviewing techniques.

Among the grounds on which the case was referred back to the Court of Appeal were concerns about the reliability of the childrens' evidence. The reason for the reference was that material presented in the two petitions suggested a need to consider whether the techniques used to obtain the childrens' evidence and the risks of contamination might have given rise to a possible miscarriage of justice.

The Court of Appeal Hearing

It is necessary to examine briefly the way in which the Court of Appeal dealt with these issues to assess whether they can be said to have been finally resolved by the Court of Appeal.

At the Court of Appeal hearing, Mr Ellis's counsel relied on two types of material to support her submissions about the childrens' evidence. In the first category were various reports, articles, and memoranda on the problems associated with obtaining evidence of child abuse. These included reports from various inquiries held in other jurisdictions into the problems associated with investigating mass allegation child sexual abuse.

The Court considered the material "informative", and "a useful background", but considered itself unable to embark upon a comprehensive analysis to reach a conclusion on any particular aspect of relevance to the appeal. The Court observed that this sort of exercise was more properly the function of a Commission of Inquiry.

The second category was expert opinion in the form of affidavits from psychologists with expertise in child sexual abuse. The affidavits canvassed issues relating to the development of memory in children, interviewing children, contamination of childrens' evidence and the significance of children retracting evidence. The Court criticised the affidavits both because they were based partly on untested and inadmissible material and because the experts had based their opinions on selected material rather than the full trial transcripts. Inevitably, this affected the weight the Court could attach to the affidavits.

The Court approached the problem from the starting point that there had been no challenge to the conduct of Mr Ellis's trial. That being the case, as an appellate court, it could only interfere to the extent that the material relied upon could be shown to be new information about child interview techniques which had become available since the trial or to show that the risks of contamination were not properly understood at the time. Overall, the Court concluded that Mr Ellis had not demonstrated anything sufficiently new in the contamination and allied fields to justify the verdicts being set aside.

Unresolved Issues

The effect of this approach is that the Court of Appeal has not fully resolved certain questions relating to the reliability of the childrens' evidence. In particular, there has been no detailed consideration of the lessons learned in other jurisdictions, and how they might bear upon questions relating to the reliability of the childrens' evidence. In addition, there has not been a comprehensive analysis of the application to this case of current expert understanding of the problems associated with obtaining childrens' evidence.

The nature of an inquiry

Without seeking at this point draft precise terms of reference for an inquiry, the task would be threefold:

- (i) to consider the various articles, reports and memoranda on the problems associated with obtaining childrens' evidence which were put before the Court of Appeal and assess what relevance (if any) they have to questions relating to the reliability of the childrens' evidence;
- (ii) to consider expert opinion on whether there are features of the investigation and/or the interviews of children which may impact on the reliability of their evidence, having regard to the facts which emerged during depositions and the trial; and
- (iii) to report on whether having regard to the inquiries in (i) and (ii) above there are any matters which cast sufficient doubt on the reliability of the childrens' evidence to impact on the safety of Mr Ellis's convictions.

It needs to be noted that there are conflicting views amongst experts. However, the problem is not insurmountable. Judges are frequently called upon to assess conflicting expert opinion in the context of particular issues.

A more difficult question is how to ensure that the inquiry has access to an appropriate and representative body of expert opinion. One option is to leave the matter to the person or persons appointed to conduct the inquiry to settle upon the experts in consultation with both the Crown and Mr Ellis's advisers.

The second option is for us to seek expert advice on the issue before the inquiry is established. A useful starting point would be consultation with relevant government agencies in Australia, United Kingdom and the United States, all of which have held inquiries for one reason or another into child sexual abuse.

The form of a further inquiry

There are doubts about whether the law allows Royal Commissions of Inquiry to be established to inquire into whether a person has committed a crime. An officials inquiry may not be perceived to have the independence necessary for a subject of this importance. The real choice is between a Commission of Inquiry and a Ministerial inquiry.

A Ministerial inquiry would be less formal, less public and will achieve a quicker result. It would help ensure that the adverse impact of an inquiry on the crèche children and their families is kept to a minimum. There is precedent for a Ministerial inquiry in these circumstances, namely, the Arthur Allan Thomas case, where two inquiries were made by a Queen's Counsel into matters relevant to the application for pardon. A Ministerial inquiry is also less vulnerable to legal challenge. While, in our view, the issues raised by the Ellis case are matters of public importance and therefore within the jurisdiction of a Commission of Inquiry, there is a risk that this might be challenged.

The main limitation of a Ministerial inquiry is that the person appointed would lack power to compel evidence. This is, however, unlikely to impose a problem in the context of this kind of inquiry, which will depend upon the assessment of expert opinion rather than the resolution of disputed facts.

There is one further potential difficulty. The Evidence (Videotaping of Child Complainants) Regulations 1990 contain restrictions on the purposes for which videotaped evidence of children can be shown. These do not include purposes connected with investigations into possible miscarriages of justice. This is potentially problematic, not only in this case, but also in the context of other applications for exercise of the Royal prerogative of mercy, where the evidence of children is involved. We therefore recommend that the regulations be amended as soon as possible, whether or not an inquiry into this case is to proceed.

Costs

The costs of an inquiry will depend on decisions about who is to conduct the inquiry, whether this should be more than one person and the rate of payment to be agreed upon. The issue in the Ellis case is essentially a legal issue and the obvious candidate for appointment is a retired High Court Judge. However, consideration could also be given to the appointment of a second person with specialist medical expertise because of the focus on the assessment of expert psychological opinion. The rate of payment approved by Cabinet, for inquiries of this kind, is between \$600-\$800 per day per person, but recent experience suggests higher rates may need to be paid to attract candidates of suitable calibre.

Commissions of Inquiry are administered and funded by the Department of Internal Affairs. That department will prepare a detailed budget if the decision is made to have a Commission of Inquiry. We estimate that a Commission of Inquiry could take four or five months because of the large number of people who would be entitled to be heard. (These include Mr Ellis, other crèche workers employed at the crèche at the relevant time, the families of children at the crèche, the Police, the Department of Social Welfare and the specialist interviewers who interviewed the children). Having regard to the actual expenditure for the Incis Commission of Inquiry, this could mean costs up to two million dollars. This estimate does not take into account legal aid costs.

A Ministerial Inquiry is likely to be both faster and cheaper. We estimate that it might take three months and involve costs of up to \$800,000, depending upon who is to conduct the inquiry, the rate of payment and the number of expert opinions to be sought. We anticipate that about six expert opinions will be necessary at a cost of about \$40,000 per expert. It is likely that the person or persons who are appointed to conduct the inquiry will need to travel to the USA, the UK and Australia to test the expert opinions, once the initial reports for the experts have been considered. The alternative would be to bring experts to New Zealand. Either way the costs might be about the same. Any findings about the reliability of the children's evidence may also need to be referred for comment to those responsible for the conduct of the interview. We have taken these matters into account in our preliminary estimate.

Summary and Conclusion

There are two possible approaches to this application for a pardon and a Royal Commission of Inquiry into the Ellis case.

The first is to consider Mr Ellis's application for a pardon at the outset. Established principles would suggest that in these circumstances the application should be declined. This would not preclude the Government establishing an inquiry into the need for reform of the law and administrative practice surrounding the investigation and prosecution of mass allegation child sex abuse cases once the application for pardon is dealt with. An inquiry into these topics might go some way to allaying the public concerns about the way these cases are currently dealt with which have arisen in context of the Ellis case.

The second option is to inquire further into the reliability of the childrens' evidence. The Court of Appeal was unable to look at this issue comprehensively because of the form in which the evidence was presented and the constraints of its appellate role. Essentially, such an inquiry would involve an investigating into the problems associated with obtaining childrens' evidence and assessing in light of that investigation whether there are doubts about the reliability of the evidence of the children involved in Mr Ellis's trial which would impact on the safety of the convictions. An inquiry of this kind could be undertaken either by a Commission of Inquiry or by Ministerial appointment. On balance the latter may be preferable primarily because it is less formal and public and therefore will cause less distress and trauma for the crèche children and their families.

Recommendations

We seek your further directions on the approach you wish to take and the further work required of the Ministry. We recommend that you:

Either:

- | | | |
|-----|--|--------------------|
| (1) | Indicate whether you now wish to take formal recommendations to Cabinet. | Yes/ No |
| (2) | Confirm that the Ministry should, at least provisionally, include in its budget bids (due 8 March) provision for a possible inquiry. | Yes/ No |

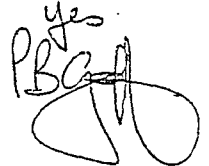
Oral item

- (3) Indicate whether you would like to put:
- option 1 alone to Cabinet Yes/No
 - option 2 alone to Cabinet Yes/No
 - both options to Cabinet Yes/No.
- (4) Agree that The Evidence (Videotaping of Child Complainants) Regulations 1990 be amended to allow the videotaped evidence of children to be shown by Police for purposes connected with investigations into possible miscarriages of justice.




Colin Keating
Secretary for Justice

yes
PBA

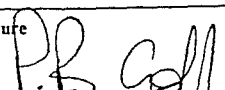


CONSULTATION ON CABINET AND CABINET COMMITTEE SUBMISSIONS

Certification by Department

<p>DEPARTMENTS CONSULTED: The attached submission has implications for the following departments whose views have been sought and are accurately reflected in the submission:</p> <p>_____</p> <p>_____</p>		
<p>DEPARTMENTS INFORMED: In addition the following departments have an interest in the submission and have been informed:</p> <p>_____</p> <p>_____</p>		
<p>OTHERS CONSULTED: Other interested groups have been consulted as follows:_____</p> <p>_____</p>		
<p>Signature</p> 	<p>Name, Title, Department</p> <p>Rajesh Chhara Private Secretary (Legal).</p>	<p>Date</p> <p>6.3.2000</p>

Certification by Minister

<p>Ministers should be prepared to update and amplify the advice below when the submission is discussed at Cabinet/Cabinet committee.</p>		
<p>Consultation at Ministerial level</p>	<p>The attached submission:</p> <p><input checked="" type="checkbox"/> does not need consultation with other Ministers</p> <p><input type="checkbox"/> has been the subject of consultation with relevant portfolio Ministers</p> <p><input type="checkbox"/> has been the subject of consultation with relevant coalition consultation Ministers</p>	
<p>Consultation with Government MPs</p>	<p><input checked="" type="checkbox"/> does not need consultation with the government caucuses</p> <p><input type="checkbox"/> has been/will be the subject of consultation with the government caucuses (detail if appropriate)</p> <p><input type="checkbox"/> Labour</p> <p><input type="checkbox"/> Alliance</p>	
<p>Other consultation at Parliamentary level</p>	<p><input checked="" type="checkbox"/> does not need consultation at parliamentary level</p> <p><input type="checkbox"/> has been/will be the subject of consultation with other parties represented in Parliament (detail if appropriate)</p>	
<p>Signature</p> 	<p>Portfolio</p> <p>Justice</p>	<p>Date</p> <p>1.2.2000</p>