OFFICE OF THE ATTORNEY-GENERAL
WELLINGTON

MEMORANDUM FOR CABINET

PETER ELLIS CONVICTIONS: A COMMISSION OF INQUIRY

Introduction

1. The possible or likely establishment by Cabinet of a Commission of Inquiry into or touching on the Peter Ellis convictions raises several issues I think it necessary for me to bring to the attention of the Cabinet. There are of course several options concerning the scope of such an Inquiry. The main concerns I have will arise directly if it is contemplated that the Commission would inquire into the correctness or safety of the actual convictions of Mr Ellis. However, if it is intended that a Commission would have a more limited focus, such for example as an inquiry into best practice in obtaining and use of children's evidence generally, then the issues will change.

2. To get the perceived need for any fresh Inquiry into context, I feel it is helpful to summarise the extensive history of the proceedings to date, including some analysis of the special nature of the most recent appeal hearing and judgment delivered in October 1999. This provides a useful base for consideration of what if anything should happen next.

History of the Proceedings

The Trial

3. Peter Ellis stood trial in 1993. There were initially 28 charges but the trial Judge removed three (involving two complainants) during the trial. Thus 25 charges relating to 11 children went to the jury. There were 16 convictions and nine acquittals. The breakdown of the verdict in relation to the 11 children was as follows:

Convicted on all counts involving that child	-	Four children
Acquitted on all counts involving that child	-	Four children
Mixed verdicts (ie convictions on some counts and acquittals on others)	-	Three Children

4. Mr Ellis was sentenced to 10 years imprisonment. On sentencing him Justice Williamson, the trial Judge, described the verdicts as "obviously correct". He observed:

> "The jury were in a unique position in this case. Unlike almost all of those who have publicly feasted off this case by expressing their opinions, the jury actually saw and heard each of the children. They also heard your own evidence and that of the other former Christchurch Civic Creche workers. They disbelieved you. They believed the children and I agree with that assessment."

5. The importance of this observation is that it emphasises that the ultimate issue at the trial was credibility. The jury heard and saw, for the prosecution, all the complainants and, for the defence, Mr Ellis, testify and be cross-examined. Generally they believed the children although, as is proper where there were doubts, acquittals were entered. This general assessment of credibility by the jury was one clearly shared by the very experienced trial Judge. Credibility was the central issue and the jury was indeed in the best position to judge it; no subsequent inquiry, be it by way of appeal or Commission, could ever enjoy the unique advantage and insight into the case that the jury had.

6. That having been said, our system of criminal justice provides safeguards against errors by juries or procedural irregularity that may make a conviction unsafe. The first of these is the right of appeal.

The First Appeal

7. The first appeal was heard in 1994. The Court of Appeal had the benefit of full submissions for Mr Ellis from senior counsel, initially Mr Hampton QC and when he became ill Mr Panckhurst QC (now Justice Panckhurst). The primary grounds of this appeal were that:

   7.1 the allegations of the children in all the circumstances were simply not credible, and the jury should not have believed them;

   7.2 the complaints of the children had been obtained by a flawed interviewing technique which meant the evidence of the complainants should not be relied on;

   7.3 various alleged trial procedure infirmities.

8. In dismissing the appeal the Court observed:

> "Our overall judgment of the case is that after this long trial the jury were fully justified in their conclusion that charges against the accused [Mr Ellis] had been established beyond reasonable doubt."

The Reference Hearing

9. Normally in New Zealand accused persons have only one appeal. There is an option to seek leave from the Privy Council for a second appeal. However, leave must be obtained from the Privy Council itself and it is necessary to demonstrate a major issue of legal principle arises. In any event that option was not taken here. There is however a procedure whereby a convicted person can ask the Governor-General in Council (in effect the Cabinet) to refer the matter back to the Court of Appeal for a second hearing focusing on particular aspects. Such requests are usually based on the discovery since the first appeal of new evidence which the government considers may cause the Court to reassess its earlier view. The availability of a reference back procedure (s 406 Crimes Act 1961) is a very important safeguard to deal with unusual events - it was the route successfully followed for example by Dean Wickliffe in 1986, and more recently David Dougherty (new DNA evidence).

10. New counsel for Mr Ellis, Mrs Judith Ablett-Kerr QC, sought and in 1999 obtained from the government such a reference. There were several grounds for the reference identified in the Order in Council. Summarised they concerned:

    10.1 The interview techniques, based it was said on new evidence providing fresher insights into children's memory and thinking;

    10.2 The alleged contamination of the children's evidence, based it was said on new research which showed the effect on reliability of evidence that exposure to outside information can have;

    10.3 Problems said to have been experienced during the trial with several of the jurors;

    10.4 Miscellaneous points relating to complainant recantation, the trial Judge's rulings, and alleged non-disclosure by the Crown of some photographs and documents.

11. As is known five judges of the Court of Appeal conducted a fresh hearing over four days and in October 1999 dismissed the reference appeal. The allegations about the jury were found on inquiry to be unfounded; the matters such as non-disclosure were found to relate to peripheral documents that could not have made any difference. The trial Judge's rulings were found to have been proper.

12. However, the primary focus at the second appeal was again the children's evidence. Although the terms of the Governor-General's reference, as settled by the Cabinet, focused primarily on the interview techniques, by the time of the Court of Appeal hearing counsel for Mr Ellis presented their argument in terms of what they alleged was new research surrounding "mass allegations in creche" settings. It was said that the Ellis case was one of a category of cases worldwide where initial allegations had led to hysteria, to increased

allegations which fed on themselves and which resulted in a situation where it was impossible to distinguish fact from fiction at the trial.

13. The Crown submitted to the Court at the second appeal that there was neither new nor reliable research put forward which showed that the submissions based on a mass allegation phenomenon raised any new issues in the case: what was still required in the view of current expert thinking, as in 1993, was that the jury should consider each child and each allegation and assess the credibility of the witness in the light of all pertinent factors and influences. Such would include the timing of the allegations, the nature of the disclosure, the way in which the interviews(s) progressed, the reason for and nature of further disclosures after the initial ones had been made, the exposure the children had to other children and the role of their parents in the disclosures. It is apparent from the record of the many pre-trial rulings made by the trial judge in 1992 and 1993 that the importance of these considerations was known at the outset and, more importantly, that they were examined exhaustively both pre-trial and at trial. To illustrate, the following introductory passage from just one of the numerous pre-trial rulings of Justice Williamson demonstrates that all involved in the trial process were aware from the outset of the relevant issues and concerns:

> **"Pre-Trial Ruling 4**
> In this case it is claimed that the videotaped evidence of a number of children is so defective that the charges against the accused, Peter Ellis, should not be permitted to proceed to trial. The defects contended for are inconsistencies within the children's evidence; contamination by parents or other children; faulty procedures; and a lack of supportive testimony."

14. When hearing the Governor-General's reference in the Ellis case the Court of Appeal was not operating in an area of exact or hard science which can establish new facts. That can be the case in other contexts. For example, scientific progress in the field of DNA since a trial can tell much that is new about the identity of an accused; likewise new developments in DNA and techniques of bullet rifling analysis can be applied to establish or eliminate possibilities. Armed with such new scientific facts it is then possible to go back into a past case and assess how that new fact might have impacted on the trial. By contrast, the research since the trial that was examined at the reference hearing in the Ellis case has as its focus the development of questioning techniques that maximise accuracy and reduce risks of inaccuracy. At best the research can show that certain techniques generally are riskier; but it can tell us very little or nothing about the accuracy of a particular answer. It remains the position that no questioning technique is guaranteed to, or will probably, produce a true disclosure just as no technique is guaranteed to, or will probably, produce a wrong answer. The primary utility of this important research is therefore to assist with the development of best practice models. Assessment of the truth or falsity of evidence remains however a question for the jury.

15. In the context of a criminal trial the limit of the research is that, at best, it identifies factors *to take into account* in assessing whether a child's allegations and answers to particular questions are to be believed. The important judicial task in the latest appeal, therefore, was to determine whether the developing research had uncovered insights that were sufficiently different from what was known at the trial that it might have made a real difference in the minds of the jury. However, as the brief extracts cited above show, the judge and counsel were very much aware at the time of the trial of the concerns and the issues involved. This is the reason why the Court of Appeal saw the issue as being whether the new evidence demonstrated such advanced thinking in this area to the extent that it can be said it would have affected the trial outcome. The Court concluded there was no such advancement.

16. It is important in this regard to note the standard test applied by the Court of Appeal in relation to submissions that there is significant new evidence. On each occasion, the Court asks whether the evidence is truly new, and if so, whether its availability at the trial might have made a difference such that there should be a new trial. This test goes to the heart of the safety of the conviction. Unless the Court concludes a verdict is unsafe the finality of a jury's unanimous verdict is to be respected. The unanimous conclusion of the Court of Appeal was that the new Ellis evidence did not meet this standard. If a Commission of Inquiry is established which has as its task inquiring into that assessment in this case, it will create doubts about the soundness of a long established appellate principle in the area of admissibility of new evidence on appeal.

17. Essentially for these reasons, in a unanimous judgment, the five Judges of the Court of Appeal found:

> "... we are not persuaded that any individual ground of appeal has been made out. Neither are we persuaded that their cumulative effect constitutes a miscarriage of justice."

18. Assessing the safety of convictions, assessing whether a miscarriage of justice has occurred and the possible impact of any new evidence is of course the essence of the Court of Appeal's role in its criminal jurisdiction, being both its core function and its central expertise. The success rate for applicants who have obtained a reference back is quite high. However, on this occasion our highest internal Court has found no miscarriage of justice occurred.

Proposal for Establishment of a New Inquiry: Issues

The Process has been Followed

19. Thus the present position is that in this case the formal processes of the criminal justice system are complete and a further review in light of developments and aspects of concern to the former government has resulted in the affirmation of that process. The concern of Ministers is, as I understand it, that the Court of Appeal's review of governmental concerns has not removed

public doubts concerning the Ellis case. The assertion by supporters of Mr Ellis and some media is that his case can be put into an international context, being part of a global pattern of such cases where hysteria amongst complainants and their families continues to have its adherents. Recognising the difficulty of the matter for the government, I look at options and their implications.

20. Commissions of Inquiry are a mechanism commonly used to address questions of public importance and concern. Independent person(s) conduct a public inquisitorial process at which those all potentially affected by the outcome will be heard. The report of the Inquiry desirably will give authoritative reassurance or criticism addressed to the matters stated in its terms of reference which can include the working of an existing law. When appropriate, there will be proposals for remedial action.

21. An important question for the government in deciding whether there should be an inquiry which focuses on the circumstances of the Ellis case is whether a useful purpose can be served. Some matters on which there is public concern are not amenable to an authoritative answer giving near absolute reassurance to the public that the truth has been found. In the present case, the Court of Appeal has found no miscarriage of justice has occurred. The question Ministers should ask, given the role and expertise of the Court of Appeal, is whether any inquiry can give a more authoritative answer to the questions of public concern.

Risks of an Inquiry

22. There are also some risks in relation to such an inquiry to be weighed against advantages Ministers identify. An inquiry which directly or indirectly addresses whether there has been a miscarriage of justice, in the context carries the implication that Ministers lack confidence in the soundness of the criminal justice process including its safeguard "reference" appeal element. This risk arises here because it is doubtful whether there is anything particularly different or special about the Ellis case distinguishing it from many other child abuse cases.

23. In my opinion, the issues in the Peter Ellis case are very familiar to the criminal justice system, albeit that they arise in that case on a very large scale. Invariably, the resolution of allegations of sexual offending turns on the respective credibility of the complainant and the accused. The Ellis case here is no different. As a society we have decided to rely on the unanimous opinion of the jury following a trial presided over by a judge to assess that credibility and to reach conclusions on whether guilt has been proved beyond reasonable doubt. We then rely on the Court of Appeal to ensure that the process which was followed at the trial in reaching an assessment that an accused was guilty was appropriate. This appellate review includes ensuring the jury had before it the information it should properly have, and did not have information it should not properly have. The outcome in this case is the Court of Appeal's now reaffirmed opinion that the jury was able to decide all issues raised by the case and there was no basis for interfering with the unanimous verdicts. In

particular, the nature of the "new" material did not warrant interference with the convictions. The reputation of New Zealand's Court of Appeal in its scrutiny of the operation of the criminal justice process is one of being meticulous and demanding of trial integrity. There is a risk that the government will be seen to be casting doubt on the system.

Protecting Victims and the Jury System

24. Regard needs also to be had to the impact a public inquiry focused on the Ellis case on the victims of abuse. The system must always guard against injustice. However, it must also respect the need to protect victims of crime. Giving evidence in the circumstances of sexual abuse allegations is traumatic. Much has been done to improve that over the years but a crucial component of the system is finality. Once the criminal justice process has run its course it is important that victims can feel they can put the matter behind them. If supporters of an accused continue to dispute the soundness of a conviction and seek public support, that is a right open to them. It is however a departure from the desirability of finality for the government to officially extend the process, especially if that raises issues concerning the truthfulness of the evidence of the victim(s). There must be a very cogent reason for doing that.

Protecting Jurors and the Jury System

25. Similarly, child abuse trials, especially in high profile cases, can be traumatic for members of juries. In this particular case members of this jury have been subjected to public attack. Three of them have had to be approached, officially, to provide responses to what have proved to be unfounded allegations. Jurors are brought together by compulsion to perform their public duty. It is always a responsible and in a trial such as that of Mr Ellis a very difficult task. They serve in the impression their privacy will be respected and their identity not disclosed. If potential jurors come to see protection of their privacy as being at risk especially in high profile cases they may be reluctant to serve. This has implications for the long term effectiveness of the system. This tells against an inquiry that looks into actions of jurors, in the absence of very good reason.

The Court of Appeal's View

26. There are passages in the most recent judgment of the Court of Appeal which some suggest support the setting up of a Commission of Inquiry. It is true that in its judgment the Court of Appeal contrasted its function with the more wide ranging role available to a Commission of Inquiry. The Court of Appeal, in my view, was doing no more than indicating that it is not its role to resolve conflicts in expert opinion as to the best techniques for interviewing children in the context of possible sexual abuse. A Commission of Inquiry, a more wide ranging mechanism, would by contrast be able to address that question. The Court's role was to decide whether the new evidence was sufficient to warrant interference with the convictions (which was not the case). It was not

calling for or endorsing the value of an inquiry into that general subject let alone one into whether the convictions themselves were safe.

Inquiry into Children's Evidence Generally

27. Of course it is always open to Parliament to lay down rules as to how children are to be interviewed in this context. To a considerable extent it has already legislated in the related area of how evidence is to be given in Court in cases involving child complainants. There could be a general inquiry into the area of the interviewing of child complainants and the working of present law on how they give evidence. One issue here is whether such an inquiry is necessary or desirable. But for a degree of public concern over the Ellis case there appears to be no particular indication of need for such an inquiry. In particular, there is certainly no reason to believe seven years after the trial of Ellis that New Zealand interviewers are not alive to the developments and increased understandings in this field that were discussed by the experts on both sides whose evidence was considered by the Court of Appeal.

28. Analysis conducted by one of Mr Ellis's own experts, Dr Lamb, showed quite clearly that the Ellis case complainant interviews were the equal in quality of any conducted around the world at that time. It was perhaps this conclusion that lay behind the shift in focus at the argument of the appeal away from analysis of the interviews towards issues of contamination and mass allegations. At the end of the day the interviews withstood scrutiny and criticism from both Mr Ellis's experts and, twice, by the Court of Appeal. There is little reason to suppose the New Zealand service has not continued to develop and adapt at a pace equal to the research.

29. A general inquiry will not address public doubts in any meaningful way unless it is permitted to traverse the Ellis case and the reliability of what was said at the child interviews. It would not address the concerns. Furthermore, however general the terms of reference there would be pressure for the process to examine the circumstances of the Ellis case.

Conclusion

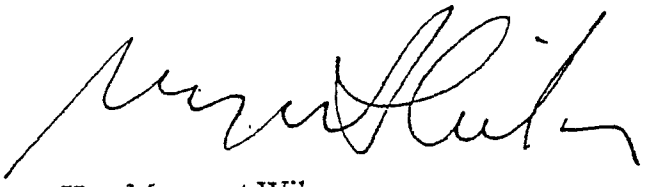
A Neutral Stance

30. I do acknowledge the presence of a degree of public concern over the verdicts in this case. Opinions can legitimately differ over the weight to be accorded such disquiet, particularly where it has been fueled by public releases of information by supporters of a convicted person. Nevertheless I suggest this is probably one of those cases where universal public satisfaction is not a realistic goal. Some will always have doubts either way. In a case that was very much about credibility, the question which now arises as to whether anything more than the usual processes can ever achieve a better outcome; whether any purpose can be achieved by a Commission of Inquiry. If not, then support for the adequacy of the processes might be seen by Ministers to be the neutral and preferable response. It would simply be a recognition that if an inquiry were established the very slim chance of an outcome offering any

better insights into the case or general question would be outweighed by the likelihood of detriment to individuals and the justice system.

Conclusion

31. Inquiries have proved useful in other jurisdictions where it is clear interviewing practices have failed, for example where because of the way in which children were interviewed the Court decided it would be unsafe to allow them to give evidence. But the Court of Appeal is satisfied that is not the case here. The processes for addressing convictions in cases of public doubt has operated and has affirmed them. There is a public interest in victims and jurors not having their truthfulness or views further looked into by official processes. In those circumstances the government should consider the neutral stance of support for the adequacy of our criminal justice process.



Hon Margaret Wilson
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