

FAX MESSAGE**FROM** Rt Hon Sir Thomas Eichelbaum**DATE** 12/9/2000**PAGES** (including this page) 1**TO** Ms Val Sim, Chief Legal Counsel, Ministry of Justice, Wellington**FAX** 04 494 9839**ELLIS INQUIRY****DRAFT ONLY****(10/9/00)****TERMS OF REFERENCE - INTERPRETATION**

I need to deal with two issues of interpretation. The Crown Law Office filed a Submission on behalf of the Solicitor-General, the New Zealand Police, and the Department of Child, Youth and Family Services. In that Submission Crown Counsel stated he understood the Inquiry was not concerned with a further examination of the interviews themselves, but rather, was to consider the interviews in the light of "new understandings" about interviewing children in a mass allegation context. The Submission argued there was no such new understanding, but nevertheless was prepared to go on and address "some of these general issues" which had already been canvassed at the appeals. In view of this last concession it may not be a significant matter, but my understanding of the Terms is not as limited as that proposed by the Crown. The Terms require me to assess whether the interviews were conducted in accordance with best practice "as now understood". This does not seem to preclude from consideration any deficiency I may find, merely because it was already recognised as not being best practice in 1992. I could understand a basis for the limitation the Crown has proposed: if the

deficiency was one already known in 1992, it was available to be dealt with by the trial and appeal procedures of the time. However, that is not how the Terms have been framed, and the introductory paragraph implies the contrary, in saying that I am to inquire into "matters which may be relevant to the reliability of evidence given by the children". I also note that at a later stage (55) the Crown Submission has framed the task of the Inquiry, in this respect, in different terms, which accord with my own view as just expressed.

The second matter relates to para (1)(c) of the Terms of Reference. It requires me to identify the nature and extent of any risks arising which might affect the assessment of the reliability of the children's evidence, in the event that I conclude that *the interviews* were not conducted in accordance with best practice. The italicised words, and their repetition in the next sentence, represent the only occasions in the Terms where the inquiry is limited to the interviews, as distinct from the investigation as a whole. The opening paragraph refers generally to "matters" relevant to the assessment of the reliability of the evidence of the children, and paras (1)(a)(i) and (b) both refer to both investigating and interviewing, as does para (2)(a), requiring the reference of issues to internationally recognised experts. I consider that the omission of "investigation" in para (1)(c) was accidental, a conclusion strengthened by the fact that otherwise, the Terms would direct me to inquire into the investigation, without giving any direction as to what advice is required, should I conclude the investigation fell short of best practice. As all the Submissions received have proceeded on the unspoken assumption that the investigation required to be addressed, no one will be prejudiced by my interpreting para (1)(c) in the manner suggested.

