

6 October 2000

Rt Honourable Sir Thomas Eichelbaum

Dear Sir Thomas

PETER HUGH MCGREGOR ELLIS

Thank you for your email dated 2 October 2000.

1. The standard set to justify intervention by the Criminal Cases Review Commission

As requested, please find enclosed:

- A copy of the report of the United Kingdom Royal Commission on Criminal Justice; and
- The Criminal Appeal Act 1995, including all subsequent amendments.

As you will see, chapter 11 of the report outlines the background to the Criminal Cases Review Commission in some detail. The Criminal Appeal Act 1995 provides the statutory framework within which the Commission operates. Sections 9 – 10 allow the Commission to refer cases dealt with on indictment in England, Wales, and Northern Ireland to the Court of Appeal, and sections 11 – 12 allows the Commission to refer cases dealt with summarily to the relevant Crown or County Court.

Section 13 of the Act sets out the statutory threshold under which the Commission may refer a conviction or sentence to the relevant appellate Court pursuant to sections 9 - 12. As you will see, the Commission shall not make a reference unless there is a real possibility that the conviction or sentence would not be upheld were the reference to be made. The Commission also retains a residual discretion under section 13(2) to make a reference in certain exceptional circumstances.

Te Manatū Ture

In the process of formulating his opinion for the Secretary for Justice on Mr Ellis's first two applications for exercise of the Royal prerogative of mercy, Sir Thomas Thorp requested that the Ministry provide an opinion on the threshold necessary to justify the grant of a free pardon. The opinion discusses relevant statutory authority and case law, and provides a useful complement to Sir Thomas's own opinion on the matter. We **enclose** it for your information, and are available to discuss the matters raised if you desire.

2. Interpretation of terms of reference

You have raised two issues of interpretation relating to the terms of reference to the inquiry, and have requested our advice. We deal with each of the issues in turn.

Firstly, in the context of submissions made by the Crown, you have raised the issue of whether the terms of reference to the inquiry require you to assess whether the Ellis interviews were conducted in accordance with best practice "as now understood", including any deficiencies that may have already been recognised at the time of trial.

We agree with your interpretation. In our opinion, paragraph 1(b) of the terms of reference is clear and unqualified; it requires, on the basis of evidence given at depositions at trial, an assessment of whether the investigation into the events at the Christchurch civic crèche case and child complainant interviews were conducted in accordance with current best practice for investigating child sexual abuse. In conjunction, paragraph 2 of the terms of reference provides a gloss; it requires attention to internationally recognised norms for the investigation of mass allegation cases. We see nothing in the terms of reference that limits consideration to matters which may have already been recognised at the time of trial.

We would note that, to a large extent, similar issues appear to have faced the Court of Appeal in the consideration of the reference of the question of Mr Ellis's conviction under section 406(a) of the Crimes Act 1961. The Court commented that, unlike other areas of scientific endeavour, expert psychological evidence is often characterised by changes of degree rather than in paradigmatic changes in approach. As a result, it was difficult for the Court to isolate components of the expert evidence relating to child suggestibility and interview contamination which contained an element of "newness", in accordance with the established rules for the admissibility of evidence on appeal. As a Ministerial inquiry, however, your inquiry is broader in jurisdiction and scope. Again, we would reiterate that we see nothing in the terms of reference that limits consideration to matters which may have already been recognised in 1992.

The second issue you have raised relates to paragraph 1(c) of the terms of reference, which requires you to identify the nature and extent of any risks which might affect the assessment of the children's evidence, in the event you conclude that the interviews were not conducted in accordance with best practice. You have queried whether "investigation" was accidentally omitted from paragraph 1(c).

Again, we agree with your interpretation. As you note, paragraphs 1(a)(i) and (b) both refer to investigating and interviewing, as does paragraph 2(a). In addition, the opening paragraph of the terms of reference is broad; appointing you to inquire into matters which may be relevant to the assessment of the children's evidence, and to report on matters which give rise to doubts in that regard. In this context, it would be overly restrictive if paragraph 1(c) were interpreted as relating to the interviews alone, without reference to the investigative context in which those interviews occurred.

We could seek the approval of the Minister to formally amend the terms of reference to correct the position if you thought this necessary although there would be obvious risks that the parties will seek to make further submissions if we were to do so.

3. Joint NZCYPFS and Police Guidelines

In your letter dated 12 September, you raised three issues around the Joint NZCYPFS and Police Operating Guidelines.

Firstly, you have requested clarification of the status of the two sets of Guidelines that have been referred to you.

The Police have informed us that the version of the Guidelines titled "Version 1.0, May 1996" is the authoritative version of the guidelines. It is currently used by both the Police and NZCYPS as the guide for conducting evidential interviews. The version of the Guidelines titled "Version 1.0, March 1997", in contrast, is a draft of the guidelines that was never approved by the Police Commissioner.

By way of clarification, at the time that the terms of reference to the inquiry were finalised, we were unaware that two versions of the guidelines were in existence. In this context, "Version 1.0, March 1997" was specified in the terms of reference because this version was presented by Mrs Ablett Kerr to the Court of Appeal. One justification for the inquiry was to address matters which were left open by the Court of Appeal, including the examination of a number of documents adduced before it which the Court noted were inadmissible according to the established rules of evidence.

Your second query is whether any further changes to the guidelines have been made. The Police have informed us that since "Version 1.0, May 1996" of the guidelines were developed, some further refinement in evidential interviewing best practice has occurred. A number of additional documents, referred to you in correspondence dated 23 March 2000, provides the current complete stock of material which is used to train Police and NZCYPS interviewers in conducting child evidential interviews. We draw your attention in particular to the following documents:

- Evidential Interviewing Structure for Child Complainants 2000; and
- Videotaping Interviews with Child Physical Abuse Complainants in New Zealand: Suggested Criteria and Interview Formats.

As you will see, the former of these documents is expected to be used in conjunction with the Joint New Zealand Children and Young Persons Service and Police Operating Guidelines (1996).

Finally, you have asked whether the Joint NZCYPFS and Police Operating Guidelines had any predecessor that was in force at the time of the Ellis interviews. In short, there was not. There were no guidelines for child sexual abuse interviewing in force at the time of the Christchurch Civic Creche inquiry.

4. Other matters

As you have requested, please find enclosed:

- Page 277 of the trial transcript; and
- A copy of *R v Horsfall* 51 SASR 490.

Finally, you have queried in your letter dated 12 September 2000 whether the copy of the Royal Commission into the NSW Police Force (the Wood report) supplied to you is a complete version. There are discrepancies between the page numbering used in Volume 4 and the numbering used in the table of contents.

The version of the Wood report that you were supplied was printed from a CD edition of the report. It is likely that the discrepancies in page numbering are a result of formatting that occurred through the printing process. The CD is currently held by Kristy McDonald QC, who is overseas until 9 October 2000. The most convenient method for resolving the numbering problems you have observed may be to supply you with the CD copy of the report immediately upon her return.

Please do not hesitate to contact me if you have any queries in relation to the matters raised in this letter.

Yours sincerely

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Encls.