

MINISTERIAL INQUIRY INTO THE PETER ELLIS CASE

Rt Hon Sir Thomas Eichelbaum

SUBMISSIONS ON BEHALF OF

MR PETER HUGH McGREGOR ELLIS

**IN RELATION TO PARAGRAPH (1) OF THE TERMS OF
REFERENCE**

24 July 2000

INTRODUCTION AND OVERVIEW

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Mr Peter Hugh McGregor Ellis, through his Counsel, Mrs Judith Ablett Kerr QC makes the following submissions to Rt Hon Sir Thomas Eichelbaum:

The Task At Hand

1. On 10 March 2000 the Minister of Justice, the Hon Mr Phil Goff advised that there would be a Ministerial Inquiry into the Peter Ellis case.
2. The Minister of Justice appointed the Rt Hon Sir Thomas Eichelbaum to inquire into the matters set out in the Terms of Reference.
3. The purpose of the Inquiry was to examine:

"matters which may be relevant to the assessment of the reliability of evidence given by the children who attended the Christchurch civic crèche against Peter Hugh McGregor Ellis and to report on whether there are any such matters which give rise to doubts about the assessment of the children's evidence to an extent which would render the convictions of Peter Hugh McGregor Ellis unsafe and warrant the grant of a pardon."

4. The ambit of the investigation charged by the Inquiry was determined as:
 - (a) Firstly, to review the reports and memoranda listed in the schedule and;
 - (i) identify the processes, practices and procedures currently accepted internationally as best practice for investigating mass allegation child sexual abuses and interviewing children in these cases; and
 - (ii) identify any risks associated with a failure to adhere to best practice (Task One).

The Schedule contained the following reports and memoranda:

1. Report of the Inquiry into Child Abuse in Cleveland 1987;
2. Report of the Inquiry into the Removal of Children from Orkney Isles in February 1991;
3. The 1992 Memorandum of Good Practice (England);
4. The Joint New Zealand Children and Young Persons Service and Police Operating Guidelines of March 1997;

5. The Final Report of the Royal Commissions into the New South Wales Police Service of May 1997;
 6. Law Commission. Total Recall? The Reliability of Witness Testimony. A Consultation Paper (July 1999); and
 7. Analysis of Child Molestation Issues Report No. 7, A Report by the 1993/4 San Diego County Grand Jury, June 1, 1994.
- (b) Secondly, on the basis of the evidence given at both the depositions and the trial, assess whether the investigation into the events at the Christchurch civic crèche case [sic] and the interviews of children were conducted in accordance with best practice as now understood (**Task Two**).
- (c) Thirdly, if you conclude that the interviews were not conducted in accordance with best practice, identify the nature and extent of any risks which arise, which might affect the assessment of the reliability of the children's evidence. In conducting this task you are not required to attribute or apportion blame to particular individuals who undertook the interviews. The focus of the task is on the evaluation of systems and techniques and their impact on the children (**Task Three**).

For the purpose of the assessment and conclusions of these tasks, you are to seek and evaluate opinions from at least two internationally recognised experts (if possible with experience in mass allegation child sexual abuse) on whether there are features of the investigation and/or interviews of the children (on the basis of the evidence at depositions and trial) which may have affected the reliability of the children's evidence, and if so, their likely impact.

5. Counsel respectfully submits that inquiry into and assessment of the best practice methods of investigating mass allegation cases, together with an examination of the methods adopted in the Ellis case, including how the children were interviewed (by parents, family members, police, social workers and Department of Social Welfare interviewers), will cause such grave concerns as to the reliability of the evidence upon which the convictions against Mr Ellis are based that the convictions should be set aside.

OVERVIEW OF SUBMISSIONS

6. The Referral effectively sets the Inquiry three tasks, namely:

Task One : (1) Identification of a Best Practice Protocol by reference to Schedule A;
(2) Identification of risks associated with failure to adhere to best practice.

Task Two : Using evidence given at depositions and trial, to assess whether investigation and interviews of the children met best practice protocol;

Task Three : Identifying nature and extent of risks which arise in relation to reliability of children's evidence.

7. The Inquiry is required to focus on the systems and techniques adopted then and their impact on the children rather than focusing on the attribution of blame to particular individuals who undertook the interviews.

8. The submissions on behalf of Mr Ellis are set out in three parts in line with the three tasks with which the Inquiry is charged.

TASK ONE : A. Identification of a Best Practice Protocol and
(VOLUME 2) B. Identification of risks associated with failure to adhere to such practice.

Paras 1-12 **Introduction**

Paras 13-44 **Overview of the Reports and Memoranda in Schedule A of the Referral**

- (a) The Report of the Inquiry into Child Abuse in Cleveland 1987
- (b) The Report of the Inquiry into the Removal of Children from Orkney in February 1991
- (c) The Memorandum of Good Practice (UK) 1992

- (d) NZ Guidelines (1997)
- (e) The Royal Commission into the NSW Police Service (The Wood Report)
- (f) Law Commission Paper
Total Recall? The Reliability of Witness
Testimony : A Consultation Paper July 1999
- (g) Analysis of Child Molestation Issues Report No. 7 A Report by the 1993/4 San Diego County Grand Jury June 1, 1994.

Identification of a Best Practice Protocol and Risks of Non-Compliance

Paras 44

Fundamental premises underpinning a Best Practice Protocol

Premise 1 - with appropriate care taken in investigating/interviewing. Children, even young children, are capable of accurately reporting events and memories -

Premise 2 - The investigator and interviewers must bear in mind that young children can have difficulty distinguishing fact from fantasy.

Premise 3 - The interviewer must have regard to the capabilities and limitations of the memory systems.

Premise 4 - The interviewer must consider the language capabilities of children.

Premise 5 - Accounts by children of past events can be contaminated producing inaccurate reports.

Premise 6 - Delay is detrimental to reliability.

Para 45

Appropriate Procedure for the Investigation and Interviews of Children in Child Sexual Abuse Cases in a Mass Allegation Context

1. Interviewer bias unacceptable;
2. Interviewer should not selectively reinforce;
3. Alternative hypothesis must be put;
4. Children do lie;
5. "No information" from child acceptable proposition;
6. Interviews should not be confirmatory;
7. Duty to clarify responses;
8. Social Influence: - the effect of;
9. Interviewing cues:- the dangers;
10. Social Rules: - the effects of;
11. Authority figures:- the dangers;
12. Demonising the suspect:- the dangers;
13. Child's reactions to be monitored;
14. Non-verbal cues:- need for awareness;
15. Interviewers assisted by relying on protocol scripts;
16. Interviewers need to be trained;
17. Parents are powerful interviewers;
18. Parents are bad reporters;

Questioning Techniques

19. Interview techniques should be based on:
 - (i) Open ended and supporting free recall;
 - (ii) Closed questions not acceptable;
 - (iii) Free recall account that contains detail requires considerable scrutiny;
 - (iv) Repeat questions need reason explained for repetition;
 - (v) Suggestive questions to be avoided;
 - (vi) Child to be instructed re misinformation they may have received;
 - (vii) No invitation to speculate;
 - (viii) One interview only;
 - (ix) Interviews must be recorded;

- (x) Therapy and evidence gathering not to be in tandem;
- (xi) Interviews must be planned;
- (xii) Interview no longer than 1 hour;
- (xiii) Children should not be interviewed or questioned prior to specialist interview;
- (xiv) Delay compromises reliability;
- (xv) Children should be instructed in "don't know";
- (xvi) Children given right to question and correct;
- (xvii) Children to be trained in interview procedure;
- (xviii) Props are undesirable;
- (xix) Anatomical dolls are undesirable;
- (xx) Child not to be questioned after interview;

Contamination & Consequences

- 20. Combination of suggestive interviewing techniques more damage than a single factor - the cumulative effect;
- 21. Contamination cannot be undone;
- 22. Detail does not validate an account - even experts cannot distinguish between accurate and non accurate tainted accounts;

Lessons from Other Studies on Mass Allegation

- 23. The methodology of investigation in mass allegation cases has to be correct.
- 24. The effect of the publicity surrounding such allegations is not to be underestimated.
- 25. Children's accounts of events naturally contain an element of fantasy and fiction.
- 26. Fantasy and fiction elements may become incorporated into accounts of actual events.

27. A reconstituted false memory can be believed by a child and a child can seem persuasive in the genuineness of the memory.
28. Children have limited cognitive capacity.
29. Children do not begin to understand abstract concepts such as truth until they are aged about 10 or 11 years.
30. Free Recall is the best method of obtaining accurate information from a child.
31. Children are capable of telling stories about topics of child abuse and do conform to adult's interests.
32. To minimise the possibility of a child's account being contaminated the family of the child should not question, or speak in front of, the child about the allegation.
33. Children should only be interviewed in specialist interviewing and examination centres;
34. The interviewer should have a very general outline of the allegation and should not be provided with all the details of the allegation.
35. The child should not be subjected to repeated interviewing.
36. The interview needs to be even handed and fully recorded.
37. Interviews should be conducted by specialist trained interviewers.
38. The interviewing process should commence as soon as there is a serious concern about the child and before the child is affected by talk and stress within the family.
39. An adults preconception of events, if transmitted to the children, can impact on the reliability of the accounts given by children.
40. The objectivity and impartiality of the investigator is critical.
41. Children are curious about sexual matters and their normal play and humour can include sexual content.

42. Children are most open to suggestion and are very conforming to parental suggestion.
43. Well meaning but inappropriate involvement of parents in passing on information can compromise an investigation.
44. Children should not be interviewed or questioned, either by police or parents, in the company of one another.
45. Critical attention should be given to significant discrepancies in various versions given by children in mass allegation cases.
46. Counsellors ought not to be involved in the investigation process, and where increasingly bizarre behaviour is alleged the source of the information must be questioned.
47. The police and prosecutors must be sufficiently objective to appreciate if the evidence of the young children is compromised.
48. Sensational publicity can increase parental anxiety and compromise the investigation of mass allegations of abuse.
49. The prosecution must provide the defence with full and complete disclosure of all relevant matters, including materials which indicate discrepancies or weaknesses in the prosecution case and which reveal bizarre elements to the allegations made.
50. Investigations of mass allegations of abuse quickly escalate out of control, it is imperative that the investigation of these cases is strictly planned and controlled.
51. Investigators of mass allegation cases need be aware of the experiences of other jurisdictions with mass allegation cases, to be aware that this is not a new phenomena and to objectively consider all possible reasons for the allegations.
52. The reference to "lists" of indicators of "signs" or "symptoms" of abuse is risky. Such "lists" are

capable of being misused in the hands of inexperienced persons.

53. In mass allegation cases a prosecution should only be initiated if the prosecution can exclude the possibility of contamination of the children's accounts of past events.
54. The investigator in a mass allegation case must be aware that the actual incidence of mass abuse cases is minimal, and that the main contamination is the main source of such abuse allegations being made.
55. It must not be assumed that a clinician trained in best practice interviewing technique actually complied with the best practice guidelines in their interactions with children.
56. Questioning that contains the social influence elements present in the McMartin case produce more false allegations than suggestive interviewing alone.

Paras 46-50 **Conclusion to TASK ONE**

TASK TWO : Using evidence given at depositions and trial, to assess
PART 1 whether investigation and interviews of the children
(VOLUME 3) met best practice protocol

Paras 1-3 **Introductory Remarks**

Paras 4-28 **Overview of failures of the investigation to meet the best practice protocol:**

- (i) Christchurch 1991 - the atmosphere investigators should have been aware of;
- (ii) Time Line of the Investigation;

Paras 29-44 **The Role of Detective Eade**

Paras 45-72 **The Role of the Specialist Services Unit (D.S.W.)**

- (i) Investigative Not Therapeutic;
- (ii) Providers of Behaviour Characteristics at:
 - (a) 2nd December 1991 meeting;
 - (b) Paul Holmes Show 23 March 1992;
 - (c) Knox Hall Meeting 31 March 1992;

- (d) Creche Investigation Form;
- (e) Discussions Prior to Interviews;
- (f) Support Groups;
- (g) Spreading of Allegations;
- (h) Sharing of Allegations Between S.S.U. and Police;

Paras 73-83	The Role of the Mothers
Paras 84-90	Knowledge of Risks of Contamination by Investigators
Paras 91-92	The Role of the Monitor
Paras 93-95	Use of Contaminated Material
Paras 96-98	Use of Children's Allegations
Paras 99-102	Counsel's Attempts at Trial to Elicit Contamination;
Paras 103-124	The Failure to Make Full Disclosure:

- (i) The Non-Disclosure of Detective Eade's Sexual Approaches to a Mother;
- (ii) The Non-Disclosure of Documentation:
 - (a) 19 March 1992 NZ Police Report Form;
 - (b) 12 August 1992 Notes of Creche Enquiry Meeting;
- (iii) The Non-Disclosure of Photographs (the "Weallean Photographs")
- (iv) The Non Disclosure of Photographs (the "SRA Photographs")

Paras 125-130	Overview of the Interviews and Their Failure to Meet Best Practice:
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- (i) Introductory Remarks
- (ii) The Failures (a) to (w) identified;

TASK TWO : **The Analysis of the Interviews of the Six Conviction Children**

PART 2

(VOLUME 4)

TASK THREE: **Identifying nature and extent of risks which arise in relation to reliability of children's evidence.**

(VOLUME 5)

Paras 1-3	Introductory Remarks
Para 4	The nature of the contamination
Paras 5-10	The Expert Opinion as to Risk
Paras 11-17	Conclusion