Corrected transcript

JUSTICE AND ELECTORAL COMMITTEE

PETITION OF LYNLEY JANE HOOD AND DR DON BRASH AND 807 OTHERS

10 December 2003

Members
Tim Barnett (Chairperson)
Judith Collins
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Stephen Franks
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Dail Jones
Moana Mackey
Mita Ririnui
Murray Smith
Nandor Tanczos
Richard Worth

Louise Sparrer, Clerk of the Committee
Will Murray, Parliamentary Officer (select committees)

Witnesses
Val Sim, Chief Legal Counsel, Office of Legal Counsel
Melanie Gudsell, Principal Legal Advisor, Office of Legal Counsel

Barnett — Now I'd like to call the Ministry of Justice's Val Sim and Melanie Gudsell. Welcome to select committee. I think you were probably here when we introduced everyone.

Sim — Yes, thank you.

Barnett — I'm sure members will be happy if we could just get you on one, but again let's go about the same format, so if you'd like to speak for about 20 minutes, then we'll start with Murray and we'll work around the table and then try to do that again. We'll try and get through twice if we can, which is why I went slightly over last time.

Sim — Thank you very much, Mr Chairman. First, I would like to just introduce ourselves briefly and also what we do. I am Val Sim, the Chief Legal Counsel in the Ministry of Justice. I head the ministry's Office of Legal

Counsel. Melanie Gudsell is a principal legal adviser in that office. As you'll know, one of the ministry's responsibilities is to provide legal advice and support to the Minister of Justice when a person applies for the exercise of the royal prerogative of mercy. As Chief Legal Counsel, I have responsibility for the ministry's advice in that area.

The ministry is pleased to be able to assist the committee in its consideration of this petition. As our initial submission outlines, the ministry has engaged with the Christchurch Civic creche case at different points over a period of about 10 years. Concerning this petition, we see the primary role of the ministry as being to provide the committee with information and background, firstly about the case and its consideration by the courts and other authorities, and secondly about the procedures and principles which are commonly applied when questions arise about possible miscarriages of justice. These matters are, of course, covered in some detail in the ministry's submission of 29 August 2003, and also in our comment of 17 October on the petitioners' submissions. Against the factual background, we've tried to highlight briefly some of the factors that the committee might want to weigh up when considering this petition.

As a final introductory matter, some media reports may have given the impression that the ministry is here to, as it were, appear for the other side, to contest or oppose the petition. It would be unfortunate if such an impression lingered. I want to assure the committee at the start that the ministry does not hold a brief for the interests of any party—prosecution or defence—in this matter, and we don't appear today as an advocate. We're here to help the committee, and I hope that the information that we've provided will help the committee with its deliberations on the petition.

Turning then to the material that we've supplied to the committee, the ministry's submission of 29 August is numbered PET0055/2 for the committee's reference. We've also provided a timeline or chronology of the Ellis case to the committee, and that's numbered PET0055/2A. And what we've tried to do in that submission is set out the background to the prosecution of Peter Ellis, and to provide an outline of how the case was dealt with initially through the courts, and then through the subsequent processes to have the safety of Mr Ellis' convictions reviewed. While this includes issues relating to the charges against the other creche workers, the closure of the creche, and the Employment Court case, the submission mainly focuses on the processes through which the case against Mr Ellis progressed. There is detail of the depositions and the trial, the two Court of Appeal hearings, the three applications for the exercise of the Royal prerogative of mercy, and the ministerial inquiry, which was carried out by the Rt Hon Sir Thomas Eichelbaum. We've also provided in an appendix to that submission some information about the Royal prerogative of mercy and the basis on which it is exercised in New Zealand. The committee also asked us to provide some comments on the petitioners' submission. Those comments were sent to the committee on 17 October, and are numbered PET0055/2C for the committee's reference.

There are three main parts to the ministry's comment. The first part outlines the ministry's role in the royal prerogative process as an independent adviser. I've touched on that role already briefly. What we stress in the submission is that in appraising an application and providing advice to the Minister of Justice, the ministry acts entirely independently of the parties. Our fundamental concern in every case is to assess where the interests of justice lie. The second part of our comment addresses that part of the petitioners' submission listing the matters that the petitioners submit warrant further inquiry. We've provided some brief comments on each of those matters, with the emphasis really being on the extent to which each issue has already been considered by one of the judicial or other processes arising out of the case.

Against the background of those matters listed in the petition, we were somewhat surprised at the suggestion in the petitioners' response to our submission that the focus of the inquiry proposed should be on the conduct of official agencies, rather than on the facts of the case itself and the credibility of the parties involved. We consider, really, the key question that is raised is whether there needs to be a further inquiry into the possibility that there has been a miscarriage of justice. Of course, if an inquiry did find there'd been a miscarriage of justice, then it would be appropriate to look further into how and why that occurred.

It is the issue of whether there needs to be a further inquiry into a miscarriage of justice that we've addressed in the third part of our comment on the petitioners' submission, and the first thing we note in that part of our comment is that the usual process for addressing miscarriages of justice is through the Royal prerogative of mercy. Normally, there is a requirement for fresh evidence before a case will be reopened, although that rule is flexibly applied. The Royal prerogative process has, of course, already seen Mr Ellis' convictions questioned and re-examined by both the executive and by the courts on several occasions. However, there is still a level of public disquiet about the case, borne out by the petition itself, and also by some of the debate that's taken place in the media.

So the question for this committee is, what weight should be given to strong public opinion about a matter like the Ellis case, where it has already been the subject of extensive consideration and where the petition does not contain any new information. That is the central issue for this committee to consider. What we've tried to do in our response of 17 October is to set out some of the important considerations that we suggest the committee weigh up in thinking about what should happen next, and I'll run briefly through some of those matters.

I think the first and important point is that the public has a legitimate interest in a system of justice that not only corrects miscarriages of justice, but also upholds soundly based convictions. Finality is an important value, but should not prevail at the expense of justice. There is clearly a section of the public that remains concerned about what happened in the Ellis case, and fears that there has been a miscarriage of

justice. However, it's also clear that there isn't a consensus amongst the public or professionals. There are other strongly held opinions that justice was done and has been thoroughly tested.

We point out also in our submission that members of the public on all sides have not been able to examine the issues to the same extent as the courts and the other authorities that have inquired into the case. Indeed, the only ones who have had the opportunity to assess the credibility of all of the witnesses are the members of the jury that considered the case.

We think there are a number of other relevant questions that the committee could pose—for example, are there material matters that have not been adequately resolved that can now be resolved by further inquiry? Are there other suitable mechanisms available to address particular issues of concern? For example, if as has been suggested, material evidence was withheld in the Employment Court case, there is a right to seek a rehearing. There are certain rights of appeal to the Privy Council, which still exist, notwithstanding the passage of the Supreme Court Act earlier this year. There are remedies in the courts for civil wrongs or breaches of the Bill of Rights Act and, of course, there's the Royal prerogative process, which I've already mentioned.

Another important consideration, which has already been touched upon this morning, is the interests of all the people who would be affected by the establishment of an inquiry. As well as the creche workers and their families, they include the professionals caught up in the case and the complainant children and their families, whose views have not been given much public attention to date.

The committee might also need to consider whether an inquiry in, say, 2004 could be expected to reach a better view of the facts than it could in 1993, given the length of time that has elapsed. A related and really difficult question is the question about whether the children would be required to give evidence again, or whether a factual inquiry without their input could be said to be fair or comprehensive. Also relevant to consider is whether there's any reasonable prospect that an inquiry would result in a genuine resolution of public views, given the polarised views about the case that now appear to have developed.

Those are some of the matters that the committee may wish to consider further. We're happy to answer any questions the committee might have about our submission, or to provide any further information.

Smith Lynley Hood says that Phil Goff has "left you to defend the indefensible". How sure are you personally, in percentage terms that the justice process has delivered a fair and just result in this case, and if you have any misgivings at all, in what areas are they?

Sim The nature of my role has been to provide advice on the application for the exercise of the Royal prerogative. The ministry's advice in relation to that was that there appeared to be matters particularly around whether or not there had been a sea change in professional opinion on child sex

abuse that should be looked at again by the court, and that is indeed what happened.

Smith That's the only one. That's the only area where you have concerns?

Sim Oh, that's the area in which we recommended that the matter be referred back to the courts at the time of the Royal prerogative application.

Tanczos I'm interested in your response to the answers given by previous submitters around the question of the contamination of the children's evidence and the argument that because of section 23 G, the court did not have scientific expertise available to assist it, and that, as a result, a particular view of those matters held sway in the court. I was just interested in your response to those answers.

Sim I think there are a number of issues, really, raised by that question. One is about section 23G itself, and that's a matter that, of course, will be looked at again in the context of evidence law reform and implementation of the Law Commission's report on evidence. The matters under section 23G on which an expert is permitted to give evidence are fairly limited and are really around whether the behaviours exhibited by a child are consistent with behaviours exhibited with sexually abused children. I think one of the criticisms of the section has been that there are so many other explanations for the kind of behaviours that might be exhibited that there's very little value to that evidence. Certainly, in the Ellis case, it came through very clearly in the cross-examination that while the experts had given particular evidence about particular kinds of behaviour, upon cross-examination it was clearly established that there were many other possible explanations for the behaviour that was exhibited than sexual abuse. I hope that answers your question.

Mackey What would you say to the criticisms that the parameters of the Eichelbaum inquiry were too narrow?

Sim I think it's important to recognise both the stage in the process and what it was that the Eichelbaum inquiry was intended to look at, and we've set out the history of the matter fairly fully in our submission. The matter had been referred back to the Court of Appeal—indeed, with extended terms of reference—after Sir Thomas Thorp had looked at the matter. The Court of Appeal had considered the argument and concluded there was no miscarriage of justice. The court did have some concerns, I think, about the way in which the case had been run and about the nature of some of the evidence that was being put before the court, which hadn't been subject to an application for admission and some of it which wasn't really in a form which was admissible. In the context of that discussion, the court made comments that it wasn't a commission of inquiry, and it couldn't look at the matters that had been put before it. We advised the Minister that that could leave an impression that there were relevant matters that ought to be looked at, and we thought it was important that they were looked at.

So Sir Thomas Eichelbaum was appointed specifically to look into those matters, which were primarily around the issue of what is best practice for interviewing children and avoiding risks of contamination, what are the risks from failure to adhere to best practice as we now understand it, and whether there were any features in the case which might give rise to any concerns about the safety of the convictions. One of the things that we were concerned about was that this shouldn't be a broad-ranging factual inquiry, because of some of those issues surrounding stress to the children and so forth, and because really what we were trying to achieve was to look at that particular small set of issues. So that was the basis for the Eichelbaum inquiry being established the way it was. And I should say, I think its terms of reference achieved what it was set up to do, and it was set up on the basis that those were the matters that hadn't been fully considered by the Court of Appeal.

Jones I'm interested in paragraphs 107 and 108 of your submission to us, which discusses the point of view of the children concerned, looking particularly at page 108, second to last line, "in a case that was very much about credibility". If the case was very much about credibility, could any commission of inquiry consider the matter without re-examining, or having the children who are now young adults back at the commission of inquiry?

Sim If the focus of any inquiry were on the facts of the case and whether there had been a miscarriage of justice, it's quite difficult to see how that could occur, because the questions of whether or not children's evidence was contaminated depended on findings about which parents talked to who, when, and to what extent, and to what kind of questioning there had been by parents of their children. And it depended on making assessments of the children themselves, both when they gave their evidential interviews, but they were also, of course, cross-examined from outside the courtroom by means of cross-circuit TV. So that, in terms of getting a complete picture of the case, there are a number of aspects and a number of witnesses whose credibility would need to be assessed.

Fairbrother What do you say to the assertion, which I think I heard this morning, that the defence were denied use of the transcripts which contained some of the more bizarre allegations by the children?

Sim I don't think that's strictly accurate. The trial judge made a ruling—and I think we've set this out in our submission—which was really designed to prevent what was a very large trial getting bogged down and enmeshed in collateral detail. So, the effect of the ruling was that the Crown could play the tapes which related to the charges before the court, and that the defence could ask to have played any other parts of the tapes that they wanted or considered necessary for the purposes of advancing the defence. That ruling, of course, was looked at by the Court of Appeal, who found it unexceptional.

Fairbrother And that was unrestricted use of those parts of the tapes?

Sim — Yes. My recollection is that it was argued at the appeal that defence counsel might have felt some constraint by that ruling, but it was unrestricted access and, indeed, there was no example of any defence request at the trial being denied.

Collins — Thanks for coming along. There's some concern about the impact of any inquiry on what were then child complainants and their families. If, however, Lynley Hood is correct in her book and the petitioners are correct that Peter Ellis was not the person who inflicted child abuse on these children, surely the greatest crime for these children would be, in fact, believing that they were the victims of child abuse, when they were really the victims of incredible, gross negligence on behalf of a whole lot of professionals who should have been there to protect them. Is that an issue or concern that you have in relation to this petition?

Sim — Obviously, if that were the case that would be a concern. I guess we come to this petition in a context where these matters have been quite carefully looked at through an extensive depositions hearing, a trial, two appeals—so, a very extensive process. One of the things that we've tried to emphasise in our comment is that that's one of those issues that we think this committee will need to give very careful thought and consideration to.

Hughes — Mr Tanczos asked you about section 23G of the Evidence Act. I'd like to ask about 23I, because when I asked Lynley Hood and the other petitioners what new information they would like to have considered that would lead to a royal commission of inquiry, they pointed to page 12 of their supplementary submission, in which they highlighted their concern that no regulations had been issued under section 23I. I just wondered if you had a comment on that or could give us some background on that?

Sim — My understanding of that provision is that it empowered the making of regulations defining who was and who wasn't the experts, but it didn't require the making of the regulations. It was a provision that would have been there if there had been concerns, for example, about what was happening in the courts. Those kinds of regulations could have been made. But there doesn't appear to have been seen to be any need to make those regulations, leaving it to the court to make its assessment of who are or who are not experts.

Worth — In the petitioners' response, in paragraph 27—but you probably don't need to look at it—there's reference made to all these changes which were enacted in 1989 relating to evidence in the sexual cases involving children, and they identified in that paragraph all the changes that were made then. Is the Law Commission looking, in the context of the work it's doing on evidence, at those changes specifically?

Sim — The Law Commission report does contain some reference to those matters and the Ministry of Justice also has been looking at and reconsidering those particular matters.

Worth Sorry, you're talking about a published report of the Law Commission, not active work being done at the moment?

Sim No, no—the published report on the Evidence Code.

Franks What comfort is there for us in the community that the review of the Evidence Act—and in particular Sir Geoffrey Palmer's 1989 changes, which I understand had the assistance of Karen Zelas, who is obviously a protagonist in this—what comfort is there that the review won't be warped by a desire to minimise changes in case changes look like an admission of aberration in the State? In other words, one of the advantages of an external Royal commission is, presumably, the reassurance that this evidence review is not conducted in a back-covering way?

Sim Well, I think the evidence law reform will eventually become a bill, and like any other bill will be open to public submissions, and I'd certainly imagine that these kind of provisions will attract public submissions, which the committee will, of course, be asked to look at and weigh up in due course.

Franks That's not very comforting.

Barnett Do you accept the assertion in the Thorp report of this being a sea change in professional thinking about contaminated evidence since 1993, and if so, how do you then apply the concept of interests of justice to the way in which such evidence was handled back then?

Sim I think that was the particular conclusion, in fact, in the Ministry of Justice report, which was that when we came to look at the material with which we'd been presented, we concluded that there may have been, and that was a matter that warranted further consideration by the Court of Appeal. So, on that basis, we recommended to the Minister of Justice that he advise the Governor-General to refer the case back to the court.

Smith I'm going to ask you my first question again, because I don't think you answered it. You've lived with this case for a long time. You know it better than most people. The question I want to know from you is your gut feeling as to whether you have any doubts at all that there was a fair and just result in the Ellis case, and to what extent have you had misgivings? How strong are they?

Sim I feel some limitations on my ability to answer that, because I haven't, unlike the authorities that have considered the case, seen, for example, the evidential interviews of children. So I haven't had the same opportunity to make the assessment that the courts and authorities have had, in relation to this case.

Mackey I would just like to get your comments: both in the book and in the submissions there's been a lot of criticism about the officials' role in terms of application for the Royal prerogative of mercy, or any other inquiries. I'd like to get your comments on that, because I felt very

strongly that coming out in various things that I've read has been an implication that officials have had some kind of vested interest in not seeing this case pursued. I think that probably needs to be addressed.

Sim Yes, and certainly we tried to emphasise in our opening that our role is not to act as an advocate for either party—prosecution or defence—nor is our role to uphold decisions of the courts. Our role is to make an independent assessment of where we consider the interests of justice lie, and we endeavour to do that in every case. We have now two cases being reviewed where people have had concerns that we have got it wrong, and we certainly have no hesitation in recommending to the Minister that he get second opinions in those sorts of cases. Nobody is immune from getting it wrong. So I think I can say quite categorically and strongly that I don't think we do have a vested interest in any outcome.

Tanczos I think I heard you say before that you agreed that there was some questions around the interviewing technique, and that was one of the reasons why there's a recommendation that the Governor-General refer back to the Court of Appeal. It seems to be that one of the crucial points of the submitters is that not just was there concerns, but that in a sense there is a prevailing scientific opinion that those interviewing techniques are deeply flawed. In the petitioners' second submission, they refer to your role in recommending to Sir Thomas Eichelbaum that he talk to Thomas Lyon at the University of Southern California, who they say is well-known for his attacks on [ ] researchers, and I assume people who have that opinion. Is that correct the statement there?

Sim Yes. If I could perhaps talk generally. I think there are some quite highly polarised views about who is an expert, and quite divided opinion on children's evidence. Sir Thomas Eichelbaum as part of his inquiry was asked to consult at least two internationally recognised experts. He was also required to consult parties as to who those experts could be. That wasn't an easy task, bearing in mind that there are quite divided opinions and views. He was quite concerned to get experts who weren't at the extreme ends of professional opinion.

The Ministry's role in the whole process was really simply to provide administrative support to Sir Thomas Eichelbaum, and as part of that exercise we, for example, obtained CVs and published writings of experts, and matters of that ilk. We suggested the names of three that we'd identified that we thought looked not at the extreme ends of professional opinion. Professor Thomas Lyon was nominated as an expert by both the Crown Law Office and the Commissioner for Children. Sir Thomas was certainly attracted to Professor Lyon as an expert, partly because he had legal qualifications as well as expertise in children's evidence issues. However, he was not available. I made a suggestion then to Professor Thomas that he might find it helpful to have a discussion with Sir Thomas Lyon to get a lie of the land, if you like, and to find out about the professional names and reputations of others who were being proposed, and matters of that ilk. My understanding is that Sir Thomas did so.

Tanczos So who finally advised him?

Sim Who were the experts? Professor Davies and Dr Louise Sas.

Jones Just thinking about this sea change of opinion, and there has been a sea change of opinion on how these cases should be conducted—I can say that as a lawyer I have been involved in one or two—if there was any agreement to a change, obviously from a constitutional point of view it couldn't be retrospective, because otherwise you would get everyone else saying: "I also was in this situation, and my evidence was also contaminated by this type of behaviour", and we'd have a whole raft of cases coming before the courts if the law was changed retrospectively. So from the point of view of the sea change, surely it could only be done for the future, it could not be done for the past.

Sim I think the sea change was really a question that we referred the case back to the Court of Appeal to consider whether there had been a change in expert opinion which might suggest that the evidence was unreliable. But of course, ultimately each case needs to be looked at on its own facts and, indeed, in relation to this particular case one might say the evidence as it relates to each child needs to be looked at separately and independently.

Fairbrother My question relates to the comment you made earlier about the Privy Council options. There are two decisions which could go to the Privy Council, in theory. The first is the decision of September 1994 from the Court of Appeal, and the second one is the decision of October 1990 from the Court of Appeal. The latter one couldn't go to the Privy Council because, in fact, the Court of Appeal is so critical of the way the case was argued that that really puts the end to the matter, doesn't it? Critical of the counsel of that appeal, the way the case was argued.

Sim I think they were —

Fairbrother Mr Ellis seems not to have taken any issue with that, does he, as far as you know? Criticised his counsel, or —

Sim Not as far as I know, but I would think that the issues that were raised by that appeal could still be the subject of an appeal to the Privy Council. That is, I don't think the manner in which the appeal was conducted would necessarily restrict the issues that were being raised from being reconsidered.

Fairbrother But the issues dealt with in the 1994 appeal could still be taken by way of conventional petition to the Privy Council, couldn't they?

Sim Yes, I think so.

Collins Could you tell us, please, have you read Lynley Hood's book, and, if so, did you go through it and look at some of the disturbing information in it and verify it or get information to show it wasn't true, or anything like that, because it's just that your submission is primarily concerned with

the actual conduct of the cases and the outcomes of the case system themselves—the trials—rather than that a lot of the emphasis of the book is in fact about how the evidence came to be there, collected, and what wasn't disclosed.

Sim Yes, I did read the book and, indeed, I was asked by the Minister of Justice to do a report on the book outlining whether there was any new information in the book that hadn't been looked in the context of the various legal processes that had gone before. Ultimately, the conclusion I came to was that there wasn't new information in the book.

Collins Right. Do we have that information available to us?

Sim No, you don't, but—

Collins Is that something we can get?

Sim I could make that available if the committee would find that useful.

Hughes My question is on the two overseas experts that Sir Thomas Eichelbaum used, particularly Professor Davies. This morning we heard that Davies had doubts about the manner in which the evidence from the children had been collected and used. In your report at paragraph 95—in your first submission to us, page 20—it says "In Professor Davies opinion, it was of high quality for its time. It was considered that it was of good overall quality, even by the standards of the time at the ministerial inquiry in 2001." So there's a conflict there about what Professor Davies' view of the child evidence was. Can you comment on that?

Sim Professor Davies, I think, expressed concern about the evidence of one of the children, which was, I think, the child that was referred to by Ms Hood in her submission this morning, but in looking at the standard of the interviews, he made the finding which you've just read. He also came to the conclusion that the similarity of what the children were saying about what happened in the creche toilets couldn't be explained on its own by contamination.

Hughes But as far as you're aware, he hasn't backed away from the comments that you've made in your submission.

Sim No. That was certainly a comment that came directly from his opinion. The other thing he said, which has been referred to by Lynley Hood this morning, was that Sir Thomas ought to carry out reality checks, and it's probably useful to mention that, because what Sir Thomas was asked to do was assess the evidence against the backdrop of the evidence which was given at the depositions hearing and at the trial. His task specifically included the depositions hearing, where there was more extensive cross-examination of some parents about who they'd talked to and matters of that ilk. So Sir Thomas had the evidence about the layout of the creche and where the toilets were situated and so forth, and was aware that the jury had had a view of the creche toilets and matters of that ilk. So I think

it's not entirely accurate to suggest that those kinds of reality checks weren't carried out.

Franks In your response to my last question, you said it was the interests of justice that you were pursuing.

Sim Yes.

Franks If I were to accept the statement or the question that whether or not Peter Ellis did or didn't do it may be much less important now than the corrosive effect on a community of substantial body of opinion that thinks that it's never been properly examined, or thinks that their assumptions underlying law reform processes that mean it's not objective. I just wonder what weight you've given in your consideration of justice, not to another form of trial for Peter Ellis, but to getting a way of reassuring the community that the 1989 evidence changes and all those derogations from long-standing protections will be looked at properly by people who don't have baggage. You mentioned to me that people have a chance to give submissions, but you well know that by the time the Government comes out with its amendments, there's egg on face for the Government to change that much. Select committees can only work around the edges, and the establishment has swung in behind the work that you've done. What I'm saying is, why wouldn't you see a Royal commission as helpful in the current environment, to say something external's now looking into this issue—not whether he was guilty or innocent, but were the rules that were made just before his trial perhaps conducive to miscarriages?

Sim I guess you're really asking me a question which is about whether a law reform process is better undertaken by a commission of inquiry—

Franks In this particular one, not normally. Just because it is clear there's now a high degree of suspicion on both sides of the debate, and throughout the community. When you get Senior Counsel, judges, former judges, and others saying "I'm anxious", no amount of Law Commission report is going to resolve that.

Sim Your question is really saying should there be an inquiry into what the evidence rules should be?

Franks Should there be an external or independent process around it, to reassure people that justice is not covering its tracks, supporting the establishment, refusing to acknowledge mistakes, all these things that underlie the submissions.

Sim I would have thought that the Law Commission itself, being the law reform body which, if you like, has produced the evidence code, brings with it a degree of independence—

Franks They've been a PC mob for years. You know that that's not going to reassure a lot of people.

Sim I guess you're asking me the question that is a question probably for this committee, not for me.

Barnett Quoting from your introductory comment, who believes that in the Christchurch Civic creche case justice was in done and thoroughly tested?

Sim I can't give you name and address and phone number, but the Minister of Justice receives this, as well as correspondence from people who are concerned about the case. He also receives correspondence from people who are concerned about the possibility of another inquiry into the case.

Smith There's been some recent criticism about Dr Sas and whether she effectively had the expertise necessary to provide the opinions that she did. What's your response to that?

Sim I think it's kind of symptomatic of quite a lot of what I've seen about the division in expert opinion, and there appears to be a spectrum from, at one extreme, experts who consider children extremely suggestible, and at the other, experts who don't find them suggestible at all. Ultimately, of course, we rely on juries rather than experts to make the assessment of children's evidence, and we rely on their common sense to do so.

Collins The allegation in Lynley Hood's book about the climate relating to allegations of sexual abuse, particularly as it relates to any questioning that child abuse might not have taken place, once it's been alleged—do you give any weight to that at all? Do you think that that's a valid concern that we might have?

Sim Things like climate in that sense are of course quite difficult to measure, and there were lots of different developments at that time, but I think they were also matters which certainly Justice Williamson appeared to take into account when he looked at the question of whether publicity surrounding the case had meant that Mr Ellis got less than a fair trial. He looked at some of the factors that were prevailing at the time, including the fact that the public had quite widespread knowledge of the overseas cases where hysteria had led to false allegations of sexual abuse.

Collins So that's hysteria. I'm thinking not so much of the hysteria, I'm thinking more of the reality that a man who says, a judge who says, a juror who says that sexual abuse alleged against a female child or a male child by a male just could not have happened, that that particular judge or that particular juror who says that could feel very strongly that they are then in fact going to be themselves the victim of a huge amount of people saying "How can you possibly, possibly stand up for a paedophile or a sex abuser?" Do you have any concern that judges and jurors—that men, in general—feel so totally disempowered because of a climate that men are sex abusers? You don't have any concern about that?

Sim I'm not entirely sure I understand the question.

Collins Right. It's just it's all the way through the book, and I note that you've read the book, so —

Sim Yes, yes I have. It was just the question I didn't quite understand, but I was wondering whether it was about the question of whether people believe that children never lie or something of that ilk, and that was certainly not of the —

Collins No, it's about the accusations of sexual abuse, rape, the fact that, according to Lynley Hood, so few men feel able to ever stand up to those sorts of accusations on behalf of another man, or to even give any credibility to a possibility that they didn't occur.

Sim Sorry, I'm still not entirely sure that I understand the question —

Collins Don't worry, I think I've tried enough on that.

Franks If I was forced to summarise your position in a couple of sentences, I would say that you've said that what occurred was in accordance with the rules. Our rules need to be applied for certain or we would be in chaos, with everyone wanting to overturn things through the formal processes. Many worthy people have affirmed that the rules were complied with. What I'm not sure about is the ministry's view on the parts of the submissions that say there need to be some occasions when you go outside, for example, the rule that you don't overturn a jury's finding unless there's new evidence. In other words, you say the rules themselves might be at fault, and therefore go outside them.

Sim I think in fact if I were to read a passage of our response to these petitioners' submission, it might summarise it.

Franks Which page is it?

Sim Page 11, and indeed, I think Lynley Hood herself read the same passage, which is: "The ministry acknowledges that the petitioners are in a sense challenging this orthodoxy. They seem to be saying the case has gone wrong from beginning to end, and the conclusions reached by the courts and other inquiries are all part of the overall problem. Only by stepping back from the whole case and its history and having a fresh look can a balanced appraisal be achieved. The petitioners' case is that there is strong support for this viewpoint from the public generally, and from the reputable public figures who have signed the petition. Therefore, a central issue facing the select committee and, ultimately, the Government, is this: what weight should be given to evidence of strong public concern about a matter like the Ellis case, that has already been the subject of extensive consideration and where the petition does not contain any new information? The ministry has found it very difficult to address this aspect of the petition. Is it enough that people are concerned? Is something else required to justify further inquiry? If the conclusions of courts and other authorities that have already scrutinised the case are to be discounted, what is the satisfactory basis for doing so? Where do the interests of justice lie?" And then we have pointed to a number of matters

that we think the committee will need to weigh up in reaching that conclusion. Those were the matters I outlined in opening today.

Franks I acknowledge that, but mine was more focused. I don't accept that things went wrong everywhere. I think that the processes that you would follow, say, in most cases, were done in accordance with the rules. It's more the evidence rules that I was concerned about, that Justice Eichelbaum, for example, wasn't asked to go outside and say, were those misguided changes in 1989? The question was, other than saying you need new evidence before you disturb a properly functioning jury, would you have a set of tests or recommendations for when one might go back and say, hey, the law wasn't very good then?

Sim I think any matter of concern can obviously be inquired into, and indeed, the Eichelbaum inquiry, which was established outside the ordinary processes, was established because there was particular concern about children's evidence and the kind of factors that might make children's evidence unreliable—contamination, poor interview techniques, and matters of that ilk.

Barnett Thank you very much indeed for the last hour and a bit. I think, to both parties we've heard, we are meeting again next week, and I think we're going to consider where we go next. We may then put some further questions to you. In the meantime, we've asked for some further information, and maybe that could be forwarded. I guess at that stage, really, next year, we'll make some further statements about where we go.

end of evidence