Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others

Petition 2002/70 of Gaye Davidson and 3346 others

Report of the Justice and Electoral Committee

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Recommendations

The Justice and Electoral Committee has considered Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others, and Petition 2002/70 of Gaye Davidson and 3346 others, requesting that the House of Representatives urge the Government to establish a Royal Commission of Inquiry, presided over by a judge or judges from outside the New Zealand jurisdiction, to inquire into all aspects of the investigation and legal processes relating to the Christchurch Civic Crèche case.

In relation to matters raised by the committee, we recommend to the Government that:

- section 340 of the Crimes Act 1961 be amended so that, in an adversarial environment, multiple allegations of sexual crimes substantially based on the evidence of more than one complainant should not be included in an indictment without very close consideration of the risk of the jury drawing a conclusion from the totality of the charges rather than the necessary detailed examination of each allegation
- regulations directing the process of taking evidential videos of children are promulgated
- the Attorney-General not oppose, or opposes only in principle, a proposed application by Mr Ellis for leave to appeal to the Privy Council; and that the Legal Services Agency use their discretion to provide legal aid for this process
- there be reform of the Royal Prerogative of Mercy system by the establishment of a body similar to the United Kingdom's Criminal Cases Review Authority

In relation to matters raised by the committee, we recommend to the Justice and Electoral Committee of the next Parliament that it:

- in its consideration of the Legal Services Amendment Bill (No. 2), ensure that selection of trial counsel reflects the preferences of the accused if the accused's preferred lawyer is reasonably available
- examine the operation from 1990 of the 1989 amendments to the Evidence Act 1908 relating to rules in sexual abuse cases involving child complainants, and the role of experts in the consideration of the evidence from such children, bearing in mind the risk that professional thinking can be affected by evolving theories, and make appropriate recommendations in its consideration of the Evidence Bill

- inquire as to whether the evolution of the trial process in the Family Court into an inquisitorial-type hearing may not be a pointer to a better way of determining criminal guilt in allegations of sex abuse by vulnerable children.

After due consideration, taking into account the above matters, the Justice and Electoral Committee does not support the petitioners' request.

Petitioners' request

The petitioners have described the Christchurch Civic Crèche case as "one of the most extensive, expensive and controversial criminal investigations in New Zealand history." Although their request for a Royal Commission of Inquiry appears to be primarily centred on matters related to the police investigation, criminal trial processes, and appeals of former Civic Childcare Centre worker Peter Ellis, the case also encompasses charges against four other workers at the crèche, the closure of the crèche, and the making of laws and regulations relating to children's evidence.

The petitioners believe that there is a widespread public and professional consensus "that in the Christchurch Civic Crèche case the justice system failed, and failed catastrophically at many levels, and has been unable to self-correct." They claim that "the proper constitutional mechanism by which the crèche case may be fully examined and public confidence in the justice system restored, is a Royal Commission of Inquiry."

The lead petitioner also referred us to a book she had written on the matter. A summary of the book, prepared by Parliamentary Library and agreed to by Lynley Hood, is appended at Appendix B.

The role and approach of the committee in respect of such petitions

The committee considered whether or not a full committee examination of the issues raised by the petition was appropriate. We were aware that the usual approach is that petitions only receive full consideration if all legal avenues have been exhausted (see "Remaining legal options" below). We understand that there was significant and enduring public interest in the matter, evidenced by overt academic and media interest and some opinion-poll evidence. We noted that the case had already been the subject of three legal petitions, two Court of Appeal hearings and one Ministerial inquiry. We also recognised that the case to which the petition related raised some important matters concerning the operation of the law which had been examined in comparable situations in overseas jurisdictions.

The committee has tackled this matter by:

- limiting submissions to two (including supplementary submissions), one from Lynley Hood (petitioner) and the other from the Ministry of Justice;
- avoiding the danger of relitigating the case itself; and
- focusing on the conduct of the case and the legal environment surrounding it, the lessons which have been learned from it, and which remain to be learned.

Petition 2002/55 was referred to the committee on 24 June 2003 and Petition 2002/70 was referred on 7 October 2003. This is an unusually lengthy period, but was due to the complexity of the matter (as evidenced by its complex and lengthy route through the legal system); the intense pressure on the committee of other, legislative, business; and latterly, a lengthy wait for a response to two letters to Mr Ellis' lawyer (see "Issues arising from the case and raised by petitioners", "Remaining legal options", and "Miscarriages of Justice" below).

Counsel for Peter Ellis has indicated to us that there has been a comparatively recent legal development that may open up the possibility of further legal action. The possibility that further action may be taken in respect of a matter that is under consideration by a committee does not prevent a committee considering the matter or reporting on it.

In this context, the question of whether legal remedies have been exhausted, as required under Standing Order 355(a), was also raised. The petition requests that a Royal Commission of Inquiry be established to inquire into the case. In terms of the petitioners' direct request there are no legal remedies.

Standing Order 355(a) sets out that a petition is not in order if the petition relates to a matter for which legal remedies have not been exhausted. In essence this requires a petitioner to have taken up any direct appeal rights available to him or her. Petitioners are not expected to embark upon litigation of a speculative nature. While the opportunity for further legal action may have arisen in relation to Peter Ellis' case, it does not make the petition out of order on the grounds that legal remedies have not been exhausted.

Trial, appeals, petitions of Peter Ellis

Pre-trial and trial

Peter Ellis commenced employment at the Civic Childcare Centre in Christchurch in September 1986 as a reliever. He was given a permanent position in February 1987 and completed a 3-year child-care certificate in 1990. Following a complaint to the principal of the crèche on 20 November 1991, Mr Ellis was placed on temporary leave and suspended shortly afterwards. A complaint was made to the police, and the Specialist Services Unit of the Department of Social Welfare began interviewing crèche children.

Table 1: Arrest, trial, sentencing, and release of Mr Ellis

30 March 1992	Mr Ellis was arrested and charged with indecently assaulting a child.
26 April 1993	The jury trial of Mr Ellis in the High Court, on 28 charges alleging indecency with 13 young children, commenced and lasted for 6 weeks.
5 June 1993	Mr Ellis was convicted on 16 charges in relation to seven complainants. Mr Ellis was acquitted on nine charges. (During the trial the judge discharged Mr Ellis on three charges under section 347 of the Crimes Act 1961.)
22 June 1993	Mr Ellis was sentenced to 10 years' imprisonment.
February 1999	Mr Ellis was released from prison.

First appeal

In 1994 Mr Ellis appealed against his convictions on the grounds that the verdicts were unreasonable because the evidence of the children was not credible and the nature of the interview process was unsatisfactory. He also claimed that there had been a miscarriage of justice and that there were a number of inconsistencies involving his conviction on charges based on earlier disclosures but acquitted of those based on later, more bizarre, allegations. During the appeal one of the child complainants retracted her allegations.

On 8 September 1994 the Court of Appeal delivered its judgment. The three convictions relating to the child who retracted her allegations were quashed. In relation to the remaining 13 convictions, the Court of three judges found that a miscarriage of justice had not been established, the appeal was dismissed and no change was made to the total length of Mr Ellis' sentence.

First petition and reference to Court of Appeal

Following a petition to the Governor-General on 2 December 1997, seeking a free pardon or reference of his 13 remaining convictions back to the Court of Appeal for further consideration, Mr Ellis' remaining convictions were referred back to the Court of Appeal on 4 May 1998. The Court of Appeal heard argument from counsel for Mr Ellis that the court was not limited by the terms of the reference from the Governor-General, but could treat the proceedings as a general appeal.

In an interlocutory judgment dated 9 June 1998 the Court held that the hearing and determination of references under section 406(a) of the Criminal Appeal Act 1945 should be confined to the matters in the reference.

Second petition and reference to Court of Appeal

Mr Ellis presented a second petition to the Governor-General on 16 November 1998 seeking a free pardon and a Royal Commission of Inquiry into his case or, alternatively, a Royal Commission; and for the whole case to be referred back to the Court of Appeal. On 12 May 1999 the Governor-General referred the question of Mr Ellis' 13 convictions to the Court of Appeal.

In a judgment dated 14 October 1999 five Court of Appeal judges considered whether there was sufficient new evidence to require appellate intervention. The court was unable to conclude that a miscarriage of justice had occurred and dismissed the appeal.

Third petition and Ministerial inquiry

On 18 October 1999 Mr Ellis presented a third petition to the Governor-General seeking a free pardon and a Royal Commission of Inquiry into his convictions. On 10 March 2000 the Right Honourable Sir Thomas Eichelbaum was appointed to undertake a Ministerial inquiry into the reliability of the evidence given by the complainant children, in order to assist in the resolution of the third Royal prerogative application (see Appendix C).

Sir Thomas was asked to seek and evaluate opinions from two international experts. Professor Graham Davies of the University of Leicester, England and Dr Louise Sas, Adjunct Professor of the University of Western Ontario, Canada performed this function.

Professor Davies and Dr Sas both concluded that contamination was an insufficient explanation for the body of broadly similar allegations, particularly of events at the crèche.

Sir Thomas concluded that there were no doubts about the reliability of the children's evidence which would render the convictions unsafe or warrant the grant of a pardon in Mr Ellis' favour.

The Governor-General declined the third application for a pardon.

Charges against other crèche workers

The investigation

Following a meeting between the owners of the crèche (the Christchurch City Council), the police and officials from the Ministry of Education and the Department of Social Welfare on 2 September 1992, the Ministry of Education cancelled the crèche's licence and the crèche was closed.

On the day it was closed, the manager gave notice to the staff that the crèche would be closed with immediate effect and that staff were to be made redundant. The next day, following representations from the union, these notices were replaced by notices that, pending consultation with the union, all staff were suspended on pay for 2 weeks. That period was later extended until the union was notified that the workers' employment would terminate on 22 October 1992.

On 28 September 1992, the union submitted a personal grievance claim alleging that the council had committed an unjustified action in failing to follow the complaints procedure in the staff members' employment contracts and in failing to give the workers the opportunity to answer the allegations from the police.

Pre-trial and trial

On 10 October 1992 four other workers at the Christchurch Civic Crèche (Deborah Gillespie, Janice Buckingham, Gaye Davidson and Marie Keys) were arrested. Two charges were laid jointly against Deborah Gillespie and Mr Ellis, and four charges were laid jointly against Janice Buckingham, Gaye Davidson, Marie Keys and Mr Ellis.

On 5 March 1993 the charges against Deborah Gillespie were discharged under section 347 of the Crimes Act 1961 because the complainant was unavailable to give evidence at the trial.

On 6 April 1993 following a pre-trial application, the charges against Gaye Davidson, Janice Buckingham, and Marie Keys were discharged under section 347 of the Crimes Act 1961. In an oral judgment, Justice Williamson gave three reasons for his decision to discharge the charges against the women:

- The evidence was of insufficient weight to justify their trial.
- The potential for prejudice against the accused was so strong that they might have been convicted for the wrong reasons.

- The unavoidable delay in their trial might have resulted in hardship to the then 7-year-old child complainant who would have had to wait until the other trial of Mr Ellis was completed.

Justice Williamson did not consider that any one of these reasons would on its own have been sufficient to justify a discharge. It was the combination of the three factors which gave rise to the decision to discharge the women.

Costs hearing

The four women crèche workers were each granted legal aid subject to the following contributions: Janice Buckingham $12,500, Gaye Davidson $7,500, Marie Keys $4,000, and Deborah Gillespie $1,250. The District Legal Services Committee fixed the total remuneration for the applicants' counsel up to the end of depositions at a sum of $43,220.

Subsequently, the committee gave approval to the applicants' counsel to charge the women directly (as permitted by section 11(3) of the Legal Aid Services Act 1991) a further sum of $43,469.79. The reason advanced by defence counsel for seeking this approval was that the women crèche workers were likely to be awarded substantial costs. His concern was that the level of such an award should not be limited by the restrictions imposed on such awards where people are legally aided. The four women agreed to this further liability being incurred.

As a result of these arrangements, the applicants incurred liabilities which were not covered by the grant of legal aid (Janice Buckingham $25,048.21, Gaye Davidson $21,548.21, Marie Keys $19,548.21 and Deborah Gillespie $12,435.35).

Justice Williamson declined to award costs to the four women. In reaching his decision, he did not consider it necessary to reach any conclusion on the propriety of the arrangements made with the Legal Services Committee. There is no right of appeal against orders as to costs.

Employment Court and Court of Appeal decisions

The Employment Court concluded that the crèche workers were entitled to compensation for unjustifiable dismissal, firstly because the dismissals were not for redundancy but were due to the council acting on a suspicion that the staff were sexually abusing children, and secondly because of process failure in that the City Council did not give 2 weeks' notice to the union of termination of employment for redundancy.

The Court of Appeal overturned these decisions and concluded that there was no basis for any finding other than that the closure of the crèche led the council to see it as a genuine redundancy situation. The Court of Appeal considered that it was unrealistic to suggest that the council could have embarked on its own inquiry into possible wrongdoing, and that the council was justified in accepting the categorical statements of the police and the Ministry of Education.

The Court of Appeal agreed that there had been a process failure because the redundancy notices issued did not comply with the provisions of the employment contracts. This was found to be a short-duration procedural breach from which no loss of income flowed and

the remedy was therefore confined to compensation for humiliation, loss of dignity, injury to workers' feelings and any loss of benefit, totalling $83,500.

Issues arising from the case and raised by petitioners

This report identifies each issue raised by the petitioners, includes the response from the Ministry of Justice, and then sets out the committee's conclusion in relation to each issue.

Arrests

The petitioners have questioned whether there was any rational or legal justification for arresting the crèche workers.

This never appears to have been an issue at trial so there is no material on which to base any conclusions.

However the Ministry of Justice told us that at the conclusion of the depositions hearing, the presiding judge was required to consider whether there was sufficient evidence to commit each defendant for trial. In the case of the four women crèche workers, this question was relevant to the court's consideration of whether costs should be awarded following their discharge. It would have been open to the judge to award costs if he considered that the charging of the women crèche workers had been unreasonable. Clearly at the end of the deposition hearing there was sufficient evidence to commit Mr Ellis for trial.

The only safe conclusion available to the committee is that the police had one or more credible narratives from complainants sufficient to justify an arrest.

Charges

The petitioners are concerned about the reshaping of the indictment, which reduced the number of charges faced by Mr Ellis and amended others to lesser charges.

The Ministry told us that it is standard practice following a depositions hearing for the Crown Solicitor to review the charges initially laid in the light of the evidence that emerges at the depositions. In some cases this results in differences in the number and nature of the charges laid in the indictment. In this case, the question of the reshaping of the indictment was considered during the second Court of Appeal hearing.

The committee noted that it is a growing practice in cases to include representative charges and a multiplicity of allegations, generating an omnibus trial. Administrative convenience seems to be a significant reason for this. On that basis the committee expressed concern about:

- the number of people involved as complainants in some cases
- the number of different charges handled in some cases
- the application of similar fact rules
- the removal of the requirement for corroboration.

Recommendation

We recommend to the Government that section 340 of the Crimes Act 1961 be amended so that, in an adversarial environment, multiple allegations of sexual crimes substantially based on the evidence of more than one complainant should not be included in an indictment without very close consideration of the risk of the jury drawing a conclusion from the totality of the charges rather than the necessary detailed examination of each allegation.

Access to legal aid

The petitioners questioned the decision by the Registrar to decline legal aid for Queen's Counsel to defend Mr Ellis at the trial.

The ministry told us that under the legal aid regime that applied at the time, decisions by Registrars on questions of legal aid were reviewable by a judge (section 16 of the Legal Services Act 1991). Counsel competence is also an established ground of appeal. In the Ellis case the issue of counsel competence has never been raised either during the appeals or in the context of applications for the exercise of the Royal prerogative of mercy.

The committee notes that the right to defend allegations is an important constitutional right and believes that the selection of trial counsel is an issue that should not be ignored. There is nothing to suggest counsel incompetence in this case, but a more experienced counsel could have addressed issues differently at trial. The selection of counsel should never be the responsibility of anyone other than the accused and the selection should be made from the ranks of experienced counsel.

Confidence in trial counsel may well be a factor in accepting an adverse jury verdict. Compromises in this important decision may have no assessable effect on the trial, other than to undermine confidence in the process. This petition is essentially about a loss of confidence in the process leading to Mr Ellis' conviction. There should be no compromises in the matters which contribute to confidence in process.

The Legal Services Agency told us that it has now established criteria for each area of law that requires the demonstration of experience and competence by the practitioner before listing can be approved. Criminal legal aid is divided into four proceedings categories to ensure that assignments are allocated to suitably experienced practitioners according to the complexity of the proceedings and the severity of the possible outcome for the aided person.

The agency told us that its clients can choose their own legal aid lawyer or the agency can choose one for them. In the 12 months prior to March 2005 the agency made 40,261 criminal assignments, of which 62.7 percent (25,755) were made to preferred lawyers of the legally aided clients.

We consider that any public perception that Mr Ellis may not have had a fair go is incalculably corrosive of overall confidence in our criminal justice system.

Recommendation

We recommend to the Justice and Electoral Committee of the next Parliament, in its consideration of the Legal Services Amendment Bill (No. 2), that it ensure that selection of trial counsel reflects the preferences of the accused if the accused's preferred lawyer is reasonably available.

Overall trial standards

The petitioners questioned whether Mr Ellis' trial and appeals met minimum standards of fairness and due process.

The Ministry told us that the Ellis trial followed ordinary criminal trial appeal processes and no evidence has been adduced at any stage to indicate that Mr Ellis was not accorded proper due process. If it could be shown that due process was not followed, this would constitute a ground for appeal. A civil action could also be taken for a breach of the New Zealand Bill of Rights Act 1990.

The committee wrote to Judith Ablett-Kerr QC on 22 March 2005, with a follow-up letter on 12 May 2005, to ask whether this option had been considered by Mr Ellis. No reply on this matter was received.

Children's evidence

In 1988 a package of reforms relating to children's evidence in criminal cases was introduced as part of the Law Reform (Miscellaneous Provisions) Bill. This was an omnibus bill, affecting more than 50 different Acts. It was introduced into Parliament under urgency before Christmas 1988 and passed into law in November 1989.

Under this bill, sections 23C to 23I, relating to rules in cases involving child complainants, were inserted into the Evidence Act 1908 by section 3 of the Evidence Amendment Act 1989 on 1 January 1990 (see Appendix D). These sections were later amended by the Summary Proceedings Amendment Act 1993, the Crimes Amendment Act 1995, the Medical Practitioners Act 1995, and the Health Practitioners Competence Assurance Act 2003.

The petitioners are critical of the 1989 package of reforms relating to children's evidence in criminal trials. They consider that it was irregular to use an omnibus bill as the legislative vehicle for these reforms and that this resulted in inadequate parliamentary scrutiny.

The Ministry of Justice told us that, although at the time some members of Parliament were critical of the 1989 reforms being dealt with through a Law Reform (Miscellaneous Provisions) Bill because of their significance, the legislative procedure was consistent with Standing Orders.

The Law Commission has considered issues surrounding children's evidence in the context of its work on the proposed Evidence Code, but has not identified any significant concerns about the way in which the law regarding children's evidence is operating. The Associate Minister of Justice told us that the Evidence Bill, which was referred to this committee on 10 May 2005, generally follows the recommendations of the Law Commission and the provisions of the Evidence Code. However, the bill will repeal section 23G so that the

admissibility of expert evidence in child sexual abuse cases will be dealt with in the same way as expert evidence in any other case.

The committee sought information on overseas cases of alleged child sexual abuse. A summary of this information is appended at Appendix E.

Clause 103 of the Evidence Bill reflects the current law which requires the prosecution to apply to the court in which the case will be tried for directions about the way in which a child complainant in criminal proceedings is to give evidence-in-chief and be cross-examined (see Appendix F).

Clause 121 also reflects the current law which deals with the giving of judicial directions in relation to children's evidence. In general, evidence given by children is to be treated in the same way as evidence by adults, in the absence of expert evidence to the contrary. However, in a case tried before a jury, there is provision for a special direction to be given in respect of evidence by children under the age of 6 years (see Appendix F).

In relation to this case, the petitioners have asked whether the children's evidence was credible or contaminated by interactions between police, interviewers, counsellors and parents, parental questioning of children, and leading and oppressive specialist interviewing.

The Ministry told us that reliability of the children's evidence was the central issue in the Christchurch Civic Crèche case and was the subject of extensive scrutiny in the course of the criminal trial processes. While the assessment of the credibility of complainants and witnesses is essentially a matter for the jury, the law does provide a mechanism so that if a verdict can be shown to be unreasonable or cannot be supported having regard to the weight of the evidence, the evidence can be set aside (section 385(1)(a) of the Crimes Act 1961). This argument was made by Mr Ellis in the Court of Appeal in relation to the credibility of the children and was rejected.

Bruce Squire QC told us that in determining the facts of the case the jury is obliged to confine itself to the evidence given at trial, but otherwise what evidence it accepts as truthful and reliable and what it does not, and the judgements it makes in that context about the credibility of witnesses who have given the evidence, is exclusively the jury's responsibility.

In appeals under section 385(1)(a) of the Crimes Act the Court of Appeal has consistently held that issues of credibility, and the weight to be given to evidence at trial, is exclusively the responsibility of the jury. In practice, this provision, except in the rarest of cases, does not enable an appeal to be brought on the ground that a verdict is against the weight of evidence nor is it enough that the Court of Appeal itself might disagree with the verdict.

The committee considered, in recognising that children's evidence had to satisfy certain prerequisites before it could be given, that the outcome of the Christchurch Civic Crèche case primarily revolved around a combination of three distinct factors, namely:

- the permissibility and protected status of "expert" evidence in cases of sexual offending against young people, defined in section 23G(2)(c) of the Evidence Act 1908 and central to the case in situations where there is no objective evidence, would be handled in a distinctly different way by courts today
- the use of interview practices which in terms of number and style of interviews would not be used nowadays when such young complainants were involved. Some very young complainants were interviewed on a number of occasions and were asked potentially leading questions, a combination of practices which although found in the Eichelbaum inquiry to be commensurate with best practice at the time are not commensurate with current practices. The prevailing view of how young children should be questioned has changed significantly between 1991 and now
- the condition of the law of evidence, especially section 23G of the Evidence Act, inhibiting effective examination of the credibility of the accusations made by the young children, combined with the impact of the relaxation of corroboration rules.

We recognised that these factors had the potential to cause a significant concern. When, as in this case, these factors feed a widespread public sense of justice not done, then some risk to the legal system results.

The Ellis case revolved primarily around findings of fact based on the credibility of the children's evidence. However, the committee accepts that it is both impossible and undesirable to rehear the evidence in the Ellis case due to the lapse of time. The committee therefore considers that the best that can now be achieved is to look to the future in respect of these matters.

In this regard the committee noted that it had recently had referred to it the Evidence Bill, a significant rewrite of current evidence law following a comprehensive law reform process. Matters of future law could be addressed in the course of that select committee process.

Recommendations

We recommend to the Justice and Electoral Committee of the next Parliament that it:

- examine the operation from 1990 of the 1989 amendments to the Evidence Act 1908 relating to rules in sexual abuse cases involving child complainants, and the role of experts in the consideration of the evidence from such children, bearing in mind the risk that professional thinking can be affected by evolving theories, and make appropriate recommendations in its consideration of the Evidence Bill.
- inquire as to whether the evolution of the trial process in the Family Court into an inquisitorial-type hearing may not be a pointer to a better way of determining criminal guilt in allegations of sex abuse by vulnerable children.

Regulations relating to children's evidence

The petitioners are concerned that no regulations have been made under section 23I of the Evidence Amendment Act 1989 to provide for the approval of interviewers where children are giving evidence by videotape. They claim that the absence of any such regulations raises

serious questions about the legal status of specialist sexual abuse interviewers and the videotaped interviews they record.

The Ministry told us that section 23I of the Evidence Amendment Act 1989 is an empowering provision – it authorises but does not require the making of regulations. The Ministry submitted that it would be open to Mr Ellis, or any other person convicted on the basis of videotaped evidence, to challenge the admissibility of the videotaped evidence on the basis that regulations governing the qualification of interviewers and the obtaining of the children's consent have not been made. There has not been any legal challenge on this basis to date.

The committee wrote to Judith Ablett-Kerr QC on 22 March 2005, with a follow-up letter on 12 May 2005, to ask whether this option had been considered by Mr Ellis. No reply on this matter was received.

The committee believes that, because of the conclusions made by the Ministerial inquiry by the Rt Hon Sir Thomas Eichelbaum, future concerns may be allayed if regulations directing the process of taking evidential videos from children were promulgated. These would then be subject to Parliamentary scrutiny and more easily subject to review.

Recommendation

We recommend to the Government that regulations directing the process of taking evidential videos of children are promulgated.

Withholding of evidence

The petitioners claim that key evidence was withheld from the Employment Court, in particular a brief of evidence that would have been presented by a Ministry of Education manager if counsel for the City Council had decided to call him as a witness. The petitioners claim that this evidence supported Judge Goddard's finding in the Employment Court that the Christchurch City Manager's evidence was unreliable and that the crèche staff had been unjustifiably dismissed.

The ministry told us it was not aware of any evidence that was withheld by the Christchurch City Council during the Employment Court case. The law provides for a right of rehearing where it is established that relevant and significant evidence has been withheld.

The committee can make no further comment on this matter.

Police practice

The petitioners are concerned about the manner in which the police conducted their investigation into the case. For example the petitioner has raised questions about the behaviour of the detective in charge of the investigation and what they saw as a vendetta-like approach to Mr Ellis. If true, such conduct would be a cause for concern. An early decision by police investigators on the guilt of a principal suspect may lead to a misreading of evidence and such an approach has been criticised in other circumstances.

The committee notes, however, that the Ministerial inquiry by the Rt Hon Sir Thomas Eichelbaum did not consider that it extended to police conduct.

The Ministry of Justice told us that questions relating to the adequacy of the investigation and the way in which the interview process was conducted were raised as arguments in support of:

- a discharge at the depositions hearing
- pre-trial consideration of the evidence on application by the defence
- an acquittal at trial
- for a new trial at the Court of Appeal.

They were also at the heart of the terms of reference for the Eichelbaum inquiry.

The committee does not consider the Police Complaints Authority, which was a route apparently not taken by anyone involved in the case, has the potential to satisfy those with concerns about policing practice in this case, since the proper way to dispute, assess and direct on evidence is contained in the various stages of trial noted in the preceding paragraph.

The issue of the investigation process is secondary and now remote in time and we do not recommend any action in relation to this.

Civil rights

The petitioners are also concerned that the basic civil rights of the crèche workers may have been violated.

No evidence was provided regarding any violation of the civil rights of the crèche workers. The law at that time provided remedies for those whose rights had been violated, including: taking a civil action for a breach of the New Zealand Bill of Rights Act 1990 or making a complaint to the Police Complaints Authority. But the extent of those remedies and their nature were not entirely clear at that time.

The committee can make no further comment on this matter.

Crèche closure and compensation

The petitioners have questioned whether there was any rational or legal justification for closing the crèche and whether all the crèche staff should have been compensated.

The Ministry of Justice told us that the issue of the closure of the crèche and the question of compensation for loss of employment was considered by both the Employment Court and the Court of Appeal.

The committee can make no further comment on this matter.

Ministerial inquiry by the Rt Hon Sir Thomas Eichelbaum

The petitioners have asked whether a Ministerial inquiry was the appropriate forum for an issue as complex and controversial as the crèche case; whether the terms of reference for the Ministerial inquiry were too narrow; whether the Ministerial inquiry was conducted

according to the rules of natural justice; and whether the conclusions of the Ministerial inquiry were supported by the evidence.

The ministry told us that the Ministerial inquiry was not set up to be a general review of the case – it was intended to address specific areas of concern that might not have been seen to have been fully resolved by the Court of Appeal. The terms of reference focused on issues associated with best practice in interviewing children and any risks with failing to adhere to that best practice. As the terms of reference required Sir Thomas Eichelbaum to take the evidence given at both the depositions and the trial as the factual basis on which his inquiry proceeded, Sir Thomas was not authorised to interview Mr Ellis, the parents of the children, the children, or the crèche workers. However, these people were given the opportunity to comment on the interpretation of the terms of reference, the appointment of experts, the experts' reports and the substantive issues that Sir Thomas was asked to consider. Throughout the inquiry Mr Ellis was represented by Queen's Counsel and although it was open to any party to the inquiry to seek a judicial review on grounds of breach of natural justice, none did so.

Sir Thomas Eichelbaum is almost universally held in the highest regard as an experienced, perceptive, fair and judicially wise Judge on criminal law issues. Given that Mr Ellis' counsel cooperated in the inquiry, the committee accepts that concerns now expressed about the parameters of the inquiry are based on the concerns at the failure of any process to overturn the convictions rather than a substantive criticism of this Ministerial inquiry.

Remaining legal options

Select committees usually tackle matters such as this petition when all legal avenues have been exhausted. While recognising the extensive legal journey already taken by Peter Ellis, we identified the following avenues which at least potentially remain open to him:

- an appeal to the Privy Council or Supreme Court
- a civil action under the New Zealand Bill of Rights Act 1990 to show that due process had not been followed in his trial and appeals
- an action to challenge the admissibility of the videotaped evidence on the basis that regulations governing the qualification of interviewers and the obtaining of the children's consent had not been made

and, as identified at various places in "Issues arising from the case and raised by petitioners" above and "Miscarriages of justice" below, the committee wrote to Judith Ablett-Kerr QC on 22 March 2005, with a follow-up letter on 12 May 2005, to ask whether these options had been considered by Mr Ellis. No reply on these matters was received. We regret this.

During the latter stage of this inquiry the committee received a letter from Judith Ablett-Kerr QC, reading in part as follows:

> Both *R v A* (CA 123/04, 16 December 2004) and another recent case authority give cause to believe that it would be appropriate to pursue an application for leave to appeal to the Privy Council.
>
> Without limiting the scope of an intended application for special leave to appeal, three questions arise in light of these later authorities:

1. Should the evidence which was before the Court under the guise of section 23G of the Evidence Act 1908 have been admitted as evidence;

2. If such evidence was properly admitted were the Jury properly directed as to the use they could make of such evidence; and

3. Was a miscarriage of Justice occasioned by the failure to properly apply the law relating to similar fact evidence.

You will be aware of course that the Privy Council will be concerned with the ultimate issue of whether Mr Ellis received a fair trial and whether there may have been a miscarriage of Justice.

In the past Mr Ellis and his mother have been adamant that his case should be resolved in New Zealand by the New Zealand Criminal Justice system where the problem arose. Mr Ellis has now been driven to the view that in order to resolve the issues that have so heavily burdened his life for the last 14 years he may need to place the matter in the hands of the Privy Council.

Given the length of time since Mr Ellis' unsuccessful second Appeal and the change of legislation which has terminated the rights of post 2003 intended applicants to pursue an appeal at the Privy Council it is unlikely that such an application would be well received other than in special circumstances.

The committee considered whether meeting this request would involve it in a "legal process", and was minded of the usual rules of comity between the courts and Parliament. However, the committee does not regard a recommendation to the Attorney-General in this regard as being part of the legal process. Indeed, neither is the Attorney-General's instruction to the Solicitor-General a part of the legal process. Instead it is in effect the relationship between client and lawyer. The committee recommends that the Attorney-General does not oppose the application to the Privy Council; and that the Legal Services Agency provide legal aid for this process. It does so mindful of the cumulative effect of the following:

- the failure of Mr Ellis to have counsel of choice, even though no complaint is made as to the way trial counsel conducted this trial
- the practice of including essentially unrelated allegations involving separate complainants in one indictment based on administrative convenience
- current developments in the interviewing of child complainants by police and the taking of evidential videos; modern practice being substantially refined from that in Mr Ellis' situation
- the apparently contradictory decision to exclude the charges against co-workers who were charged as parties to some of Mr Ellis' offending
- the continuing debate on the reliability of children's memory, and of children in giving evidence
- the considerable sense of public disquiet in this case extending across the whole spectrum of New Zealand society.

Recommendation

We recommend to the Government that the Attorney-General not oppose, or opposes only in principle, a proposed application by Mr Ellis for leave to appeal to the Privy Council; and that the Legal Services Agency use their discretion to provide legal aid for this process.

Miscarriages of justice

Enduring public disquiet about the Christchurch Civic Crèche case can not be adequately addressed by an examination for procedural fairness. The preoccupation with formal fairness – the consistent application of formal rules of trial and the law – which is at the heart of the appeals process, coupled with the view that matters of credibility are for the jury alone, ensures that some matters of valid public concern are only addressed with great difficulty. In particular the picture painted by the petitioner of a society in the midst of a mass hysteria, leading to in her view an unjust conviction, is not susceptible to normal inquiry by the appellate process.

The committee cannot resolve the matter and we do not think that it can be resolved today, even by Royal Commission. We have to rely on the judicial process, but we do consider that it may be useful to consider whether an extraordinary process to address concerns not susceptible to normal appellate scrutiny.

Bruce Squire QC advised us that counsel for Mr Ellis could have applied for a change of venue on the basis of a prejudicial climate in Christchurch, but this was not made. The committee was unclear as to whether this option had been considered by Mr Ellis. The committee noted that there is not a transparent process in New Zealand for the examination of miscarriages of justice, in spite of debate from time-to-time and in spite of developments in that direction in the United Kingdom and other countries. While not stating that in its view a miscarriage of justice occurred in this case, the committee is of the view that the operation of the legal system in respect of this case did not inspire adequate public confidence in the operation of the legal system. A justice system should lead to certainty. In this case it seemed to increase the sense of uncertainty.

Currently claims of miscarriage of justice are dealt with by way of application to the Governor-General for the exercise of the Royal Prerogative of Mercy. That Prerogative is an important safeguard in our criminal justice system which provides an avenue for convicted persons to petition the Crown for relief in cases where an injustice may have occurred. However the system is very lengthy and lacks adequate transparency. There has been an increase in the number and complexity of applications for the Royal Prerogative of Mercy over the last decade, with more than 60 applications since 1996.

The committee recommends reform of this system to include the establishment of a Criminal Cases Review Authority or equivalent body to independently examine allegations of miscarriage of justice. Such a move would:

- reinforce the constitutional separation between the power of the Executive and the courts
- reduce pressure on the resources of the Ministry of Justice

- enable the development of a centre of expertise on examination of miscarriages of justice
- be an appropriate response to the increasing complexity of claims of miscarriage of justice.

Recommendation

We recommend to the Government that there be reform of the Royal Prerogative of Mercy system by the establishment of a body similar to the United Kingdom's Criminal Cases Review Authority.

Should a Commission of Inquiry be established?

The petitioners have requested the establishment of a Royal Commission of Inquiry to inquire into the investigation and legal processes relating to the Christchurch Civic Crèche case.

A Royal Commission of Inquiry may be appointed to inquire into any matter of major public importance of concern to the government of the day and is constituted under powers conferred on the Governor-General by Letters Patent and is governed by the Commissions of Inquiry Act 1908. Under section 2 of the Commissions of Inquiry Act a Royal Commission of Inquiry may be appointed to inquire into and report on any question arising out of or concerning:

- the administration of the Government
- the working of any law
- the necessity or expediency of any legislation
- the conduct of any officer in the service of the Crown
- any disaster or accident involving injury or death of members of the public, or the risk of it
- any other matter of public importance.

A Commission of Inquiry cannot exercise judicial functions, although it may have limited judicial powers. A Commission of Inquiry cannot be convened to determine the guilt or innocence of an individual as its primary purpose. Commissions may look into offences, but only as part of a wider investigation into matters of conduct relevant to the purpose for which the Commission has been established.

The appointment of a Royal Commission of Inquiry is a serious step. It may, however, be appropriate where an event or situation is so unusual or serious that no other approach will do. Reasons for establishing a Commission of Inquiry would include the following:[1]

- considerable public anxiety about a matter
- a major lapse in government performance

1 *Setting Up and Running Commissions of Inquiry*, Department of Internal Affairs, February 2001.

- circumstances that are unique, with few or no precedents
- an issue that cannot be dealt with through the normal machinery of government, or the criminal or civil courts
- an issue that is in an area too new, complex or controversial for mature policy decisions to be taken.

The committee considered each of these criteria in turn in relation to this case.

Considerable public anxiety about a matter

There is clearly public anxiety about the handling and outcome of this case. However, in isolation this is exceeded by levels of public anxiety about many other matters. This factor alone cannot justify a Royal Commission.

A major lapse in government performance

This matter is not Government-related.

Circumstances that are unique, with few or no precedents

Although the combination of circumstances in this case was remarkable, it did not involve unique circumstances and there are precedents for all of its specific elements.

An issue that cannot be dealt with through the normal machinery of government, or the criminal or civil courts

Aspects of this criterion are potentially present, but in essence the matters under dispute are capable of being handled by the existing legal system, or legislative reforms of that system.

An issue that is in an area too new, complex or controversial for mature policy decisions to be taken

This criterion does not apply.

Since the request for an inquiry does not seem to adequately meet these criteria, the committee has instead taken a more targeted and effective approach to the issues raised by the case. These are itemised in "Issues arising from the case and raised by petitioners", "Remaining legal options", and "Miscarriages of Justice" above, and comprise:

- recommended improvements in the legal process
- recommendations to the Justice and Electoral Committee of the next Parliament, which will be considering both the Evidence Bill and the Legal Services Amendment Bill (No. 2)
- a proposed new system for consideration of miscarriages of justice
- a positive response to Judith Ablett-Kerr QC's proposal for committee comment in relation to a possible future appeal by Mr Ellis.

We do not believe that a Commission of Inquiry is relevant to many of these matters, and do believe that the recommendations of our committee are, if accepted, likely to do much more to improve standards of justice in our nation.

Most of us also believe that it is unlikely that a Royal Commission of Inquiry conducted in 2005 could be expected to reach a better view of the facts than was achieved in 1993, given the effect of the lapse of time on the availability and quality of the evidence. We are also concerned about the potential impact on the child complainants and their families who may be required to re-live their experiences in giving evidence to an inquiry. We consider that they are entitled to expect that if the formal legal process has found no miscarriage of justice then that is the end of the matter.

While we note the petitioners' concerns, most of us do not recommend that the Government should establish a Royal Commission of Inquiry into the Christchurch Civic Crèche case.

National minority view

There are two National Party members on the committee. The Honourable Clem Simich has taken no part in the consideration of the petition as he was one of the signatories to the petition.

I do not wish to associate myself with the report and recommendations of the majority. I believe the committee has followed a process inconsistent with the expectations of the petitioners and the recommendations are inappropriate.

The petitioners made it clear in their request that they did not seek a recommendation from the committee that Peter Ellis should be pardoned or the convictions entered against him on 5 June 1993 otherwise vacated. Instead they sought that the Government establish a Royal Commission of Inquiry presided over by a judge or judges from outside the New Zealand jurisdiction, to inquire into all aspects of the investigation and legal processes relating to the Christchurch Civic Crèche case.

The report of the majority contains a detailed history of events to date including the release of Mr Ellis from prison in February 1999. The events have included:

- a petition to the Governor-General on 2 December 1997 and reference to the Court of Appeal
- a second petition to the Governor-General on 16 November 1998 and reference to the Court of Appeal
- a third petition to the Governor-General on 18 October 1999 and a Ministerial inquiry.

As if by a side wind the petitioners have effectively secured much of the relief which they have sought in the present petition. That has occurred substantially by dint of the passage of time with two events:

- The introduction on 3 May 2005 of the Evidence Bill and the detailed provisions of that bill (which are currently open for public submission) relating to statements of opinion, expert evidence and evidence by children. Those issues will be able to be considered by the Justice and Electoral Committee to which the bill has been referred in the next Parliament.
- The introduction on 10 May 2005 of the Legal Services Amendment Bill (No. 2). It is clear that a ground on which the petitioners base their claim relates to the decision by the Registrar to decline legal aid for Queens Counsel to defend Mr Ellis at the trial. That issue of principle will be able to be considered by the Justice and Electoral Committee to which the bill has been referred in the next Parliament.

The petitioners are, and always were, entitled to an early decision on their petition. They have not been well served in the present case.

Appendix A

Committee procedure

Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others was referred to the committee on 24 June 2003. Petition 2002/70 of Gaye Davidson and 3346 others was referred to the committee on 7 October 2003. The petitioners requested that both petitions be heard together.

On 10 December 2003 the committee heard evidence from: Lynley Hood, Dr George Barton QC, Bernard Robertson, and Dr Maryanne Garry on behalf of the petitioners and the Chief Legal Counsel and Principal Legal Adviser on behalf of the Ministry of Justice.

The committee appointed Bruce Squire QC as an independent adviser to the committee in October 2003.

Committee members

Tim Barnett (Chairperson) (Labour)
Stephen Franks (Deputy Chairperson) (ACT)
Lianne Dalziel (Labour)
Russell Fairbrother (Labour)
Dave Hereora (Labour)
Dail Jones (New Zealand First)
Moana Mackey (Labour)
Hon Clem Simich (National)
Murray Smith (United Future)
Nandor Tanzcos (Green)
Dr Richard Worth (National)

Lianne Dalziel and Hon Clem Simich absented themselves from these proceedings and took no part in the committee's consideration or deliberation.

Appendix B

Summary of *A City Possessed: The Christchurch Civic Creche Case*

Parliamentary Library

To: , **Parliamentary Officer (Clerk of Committee), Office of the Clerk**

Subject: Summary of *A City Possessed: The Christchurch Civic Creche Case*

Date: 3 October 2003

Dear ,

In accordance with your request of 16 September 2003, please find following a synopsis of Lynley Hood's work *A City Possessed: The Christchurch Civic Creche Case* (Longacre, Dunedin, 2001).

This summary has not been approached as a critical review and the book's statements have not been verified against external reports, court files, trial transcripts or otherwise. The work provides considerable detail in transcripted materials and analysis of the interview and trial procedures, none of which is reproduced in the summary. To facilitate more detailed reference the synopsis is structured according to the sections and chapters of the book itself.

A case-chronology and table of contents from the book have been included to aid reading. A shorter summary outlining identifying key themes may be useful and we would be happy to prepare this if required.

Research Analyst
ext.

A City Possessed: The Christchurch Civic Crèche Case

SYNOPSIS

Prologue

The author states her reservations regarding child sexual abuse cases, noting that fantasy and reality can be easily confused. A comparison is made with the witch-hunts of the 16th and 17th centuries that are described as epidemics of mass psychogenic illness, moral panic and scapegoating at all levels of society and state.

1. What's the Problem?

Child abuse is a common theme of the folk tales of the Middle Ages, including those involving witches. The author makes reference to the stories of Minnie Dean and Lindy Chamberlain, to a more recent US case where a woman convicted of mass abuse was later pardoned, and to various modern urban legends that demonstrate superstition, ignorance and gullibility as a continuing reality of everyday contemporary life.

The author outlines basic facts of the Peter Ellis case, stating that it began with the suspicion of one mother and expanded into more than one hundred children being interviewed by the Department of Social Welfare, with charges laid for 20 children and guilty verdicts involving seven of them. The author emphasises that there were no eye-witnesses and no physical evidence of abuse. She acknowledges a central issue to be addressed, asking why children and their parents would make these allegations if no abuse had taken place.

The author recounts her first meetings with Peter Ellis and with the initial police investigator. Her impression of the latter is reserved – she found his comments unbalanced and indicative of unprofessional bias. She presents a sample of public opinion on the case, reproduces a strongly opinionated letter sent to her from the initial police officer, and comments on some of the attempts to discourage her from proceeding with the book.

She queries the motivations of child abuse experts, making the comparison with scientific experts who may have underlying funding, research and publication interests guiding the direction of their work.

The author states that she began the research with an open mind, but soon became convinced of a miscarriage of justice. She asserts that she tried, but failed, to persuade parents of complainant children to speak with her during her research and she states that she deliberately chose not to interview any children.

2. Sex, Sexism and the New Demonology

The social movements of the 1970s and 1980s are introduced, with the author outlining a tendency for the general public to be relatively undiscriminating in any details of a cause they espouse, following and trusting in a relatively small group of committed leaders.

I. The Strands of the Seventies

The author discusses the growth of feminism in the 1970s and the slogan 'all men are rapists'. She makes reference to the child protection movement in the Victorian era, when women were often the ones to be blamed for abuse by conservative religious leaders. The author describes the protection movement gaining momentum in the 1960s USA, with support continuing from conservative groups as well as radical lesbian-feminists who began to blame men for abuse. The first International Congress on Child Abuse and Neglect, associated with the World Health Organisation, was held in 1976.

The author raises concerns over the problems that can arise when one focus group generates dogmatic and outright hostility to other groups. She discusses the increasing use of rape statistics in rhetoric, which she finds exaggerated and magnified without basis.

II. The Knotted Web of the Eighties

Freud is cited retracting an earlier claim of his that child abuse is a cause of adult disorder. He concluded that in most of his patients repressed memory was in fact fantasy, in some cases forced by himself. The author raises concern at current sexual abuse therapy and 'disclosure' techniques, pointing to ongoing debate surrounding the fragility of memory. She tables common disclosure techniques of the time, including play with anatomically correct dolls, re-enactment and guidelines for types of appropriate leading and questioning.

The author describes the growing credibility during the 1980s in sexual abuse theories. She lists the increasing number of national bodies and state-sponsored literature in the field. She remarks on international conferences in child abuse that were attended by persons crucial to the Peter Ellis case – in particular the Crown expert psychiatrist and the chairperson of the National Advisory Committee on the Prevention of Child Abuse - and discusses a work on child abuse that was endorsed by several government departments in the 1980s, but which she feels was biased, inaccurate and lacking in intellectual rigour.

The author describes the media-fed mass hysteria surrounding child abuse and discusses the Telethon of 1988 that was based on the claim that '1 in 4' adults have been molested at some point, and claiming that few could be safe in trusting fathers. The 1 in 4 claim was later discredited and the sweeping denigration of fathers and the fear it instilled was widely criticised.

She expresses concern at the growing belief that many men are molesters and at the public resources poured into publicising, detecting and treating the problem of abuse among children, which she felt led to inflated estimates and over reporting of the extent of abuse.

3. Crimen exceptum

The author describes historic law changes that eroded the rights of suspected witches in Europe, and likens this to the modern erosion of suspects' rights in sexual abuse cases. Both are seen as a 'crimen exceptum', set apart from the normal procedural safeguards.

I. The Rise of the Sexual Abuse Specialist

The author discusses the legislative changes of the 1980s related to the Family Court, commenting on the inquisitorial – as opposed to adversarial – approach. She warns that the advantages of a gain in privacy can be offset by a reduction in public accountability and levels of proof. The author expresses concern at the legislative provision allowing for the use of untrained and unsupervised counsellors, who unlike most court experts, are less subject to the checks of a standardised professional body. She comments that counselling can appeal to those seeking part-time and flexible work, and to those with an authoritarian personality who gain power over an emotionally vulnerable client.

The author describes the rise of an over-zealous child protection ethos within the DSW, and relates a case from 1988-9 where a child was eventually found by a Court to have been wrongfully taken from parents accused of abusing her. She describes those involved as operating under a 'collective delusion'.

Note is made of the large proportion of overall ACC funding that is available for sexual abuse cases – both in compensation payouts and in fees to external therapists, and of the procedural changes during the late 1980s and early 1990s that lowered the checks and controls on this area of ACC work. She cites the concerns of a former ACC Managing Director over the use of untrained counsellors, and notes that the vast majority of sex-abuse claims to ACC were accepted, given the sensitivities associated with ACC officers trying to determine evidence.

II. Crimen Exceptum

The author states that the Select Committee considering the 1986 Children and Young Persons Bill received public complaints of a heavily interventionist approach and sweeping powers of regional Child Protection Teams recommended by the National Advisory Committee on the Prevention of Child Abuse. The Chairperson of this latter committee was involved in disagreement with the Minister of Social Welfare (Michael Cullen), the bill was substantially revised to reflect these public concerns, and was passed as the 1989 Children, Young Persons and Their Families Act. Nonetheless the Advisory Committee report (the Geddis report) was used to provide working guidelines for national police, DSW and other sexual abuse workers.

A second Advisory Committee was formed, on the Investigation, Detection and Prosecution of Offences Against Children. The expert psychiatrist for the Crown was a member and the author argues that this committee was essentially a regrouping of the first. She argues that the committee was heavily influential in legislative reform led by the Minister of Justice, Geoffrey Palmer. The author discusses the professionals involved in associated reviews, who included several counsellors and psychologists, but no lawyers. The Law Reform Bill was introduced under urgency and, it is maintained, rushed through Parliament with little real opportunity for public comment. The author cites Geddis-promoted amendments to the Crimes Act, Evidence Act and Summary Proceedings Act, and discusses critics' concerns.

The author advances that the amendments abandon the human-rights inspired uniform procedure as provided for in the Crimes Act and have eroded the right to a fair trial. She highlights changes

regarding restrictions on public access and media scrutiny in all 'cases of a sexual nature', the fact that child complainants no longer have to appear in person at depositions, that the defendant does not have access to videotaped disclosures in advance of the court hearing, that the standards of cross-examination are reduced by the judges being able to allow ;intimidating' and 'overbearing' questioning (in addition to the already existing restrictions on irrelevant and oppressive questioning), that child-abuse experts could give evidence on matters of their opinion and not only established scientific fact, that the judge may not instruct a jury to treat child-evidence with caution, nor make special warning in child cases to a jury regarding absence of corroboration of evidence.

She objects that a child's past may not be discussed in court, maintaining that it may be directly relevant. She gives the example of a child whose prior abuse may have led to sexual precocity, but which latter is interpreted by a jury as evidence of the guilt of the defendant.

She questions an overriding mentality to 'believe the victim', in that it disadvantages the defendant more so than in other court cases where the burden of proof is clearly on the prosecution to substantiate any claims, and warned that many judgments in 'minimising stress on the complainant' following the amendments were weighing in favour of the complainant She also questions the assumption that cross-examination does indeed further adversely affect a child who has already become involved in a case.

The author cites a 1990 appeal following the amendment acts, that overturned an earlier judgment that had dismissed children's video-taped evidence as inadmissible on grounds that the interviewer had engaged in prolonged probing, had sought confirmation from mothers and that it would be virtually impossible to cross-examine a child on statements made in a 'play' atmosphere eight months earlier.,

The author reiterates that by the time of the crèche case in 1991, child-evidence was no longer tested by unhampered cross-examination, and that many of the traditional safeguards protecting the reliability of evidence in criminal cases no longer applied in child sexual abuse cases.

4. Christchurch Possessed

I. The Place

Christchurch is described as class-conscious and conservative, an atmosphere that the author maintains can give rise to reactionary groups and movements. The author recounts some unusual crimes that have taken place there. She also describes a popular US book, later proven to be a hoax, which alleged memory repression of satanic abuse, was taken seriously by therapy and counselling groups, and was accompanied by a rise in the reported number of abuse cases across Western nations.

II. The Fever

The chief psychiatrist for the Crown is introduced. The author is critical of her expertise, pointing out that she was in some sense a self-manufactured public guru subject to little critical external analysis. The author introduces several other persons working with child abuse in Christchurch, and describes the make-up of the hospital child abuse centre - 'Ward 24' - and the Canterbury health camp (Genelg), all of which were caught up in scandals of improper child-abuse diagnoses. The author questions the professionalism of methods adopted by many of these people, commenting on the nature of conferences and international movements to which they subscribed – conferences whose key speakers were often later discredited.

III. The Epidemic

Christchurch saw a sharp rise in the reporting rates of sexual abuse cases during the 1980s. Male workers were dismissed from the health camp and a large number of fathers were accused of abuse. Children were examined without parental consent and by untrained personnel using practices discredited in later reviews.

The author describes the "Great Christchurch Pornography Ring" of the late 1980s, that involved a long-lasting police case that eventually closed as being without supporting evidence. The investigation did however allow the police to create a profile list of 'young homosexual men' in

Christchurch at the time. It is noted that fear of homosexuals was prevalent at this time, including amongst police, and that male homosexuality was still illegal until the passing of the Homosexual Law Reform Act in 1986.

The author discusses several cases of families who lodged complaints at the removal of their children by Ward 24 and DSW associates following unsubstantiated allegations of child abuse. A television programme criticising the actions of the authorities in these cases was aired on national television.

IV. The Ongoing Malaise

The author states that the child abuse workers involved in the case were not malicious, but rather she explains their behaviour in a discussion of obedience to authority and the ability of most people to compartmentalise and suppress qualms and issues of conscience.

Following television publicity, the Social Welfare Minister (Michael Cullen) requested a review into cases of families affected by accusations of child abuse. The author describes the internal investigation into Ward 24 as essentially only damage control, noting that whilst the report was at times critical, it stopped short of any condemnation of the interviewing techniques themselves. The author saw the report as vindicating the child protection movement, and discrediting critics of child-abuse techniques.

5. And a Little Child Shall Mislead Them

I. Enter the Devil

The author describes the mother who laid the first complaint, commenting that she was a sexual abuse worker with a history of mental instability.

The author describes a prevailing atmosphere of sensationalist claims and exaggerated stories. She describes the Ritual Action Group that was founded just before the Ellis case to counter the incidence of satanic mass abuse; a television programme investigating mass abuse and the later comments of its chief reporter admitting that it was based entirely on hearsay; the case of a primary teacher aide in Christchurch who pleased guilty to sexual abuse, but who maintained that some of the children's claims were exaggerated; cases of fraud within ACC and a DSW unit dealing with abuse and comments that the sexual abuse field was to some extent a 'haven for the incompetent'. She notes that many other children of child protection workers were attending the crèche, many of the complainant children came from these families and that many of the parents would have been caught up in the sexual abuse panic and fervour.

II. A Model for Early Childhood Education

Two US cases are discussed, in which childhood centres were found to have been wrongfully accused of mass abuse.

The author describes the socio-economic make-up of parents using the crèche, commenting on the relatively high-proportion of radical, politically active and informed parents. The author cites former staff and parents who felt that these 'liberal' radical parents were too ready to blame problems in their children on the latest politically correct trend. The final guilty verdicts against Ellis involved seven children, five of whose parents worked in the sexual abuse field.

The author cites a parent who states that she was encouraged by a counsellor to make a lump-sum ACC claim, despite her child not having disclosed abuse.

The author details the physical layout of the crèche and staff supervisory routines, and comments on the fact that none of the several trainee teachers visiting the crèche irregularly were ever interviewed by the police.

III. Peter Ellis

Peter Ellis originally joined the crèche as an option for working out an 80 hour community service penalty (relating to benefit overpayments). He was invited to join the paid team.

His performance assessments expressed some reservation at his boisterous style, and he was on occasion reprimanded for games and teasing that were seen as exceeding the boundaries of safe play. He was however widely praised for his commitment and popularity with the children and parents and seen as a favourite among them. He followed the NZ professional childcare qualification on the job, received positive assessments and his tutors later spoke in court in support of the defence.

His colleagues sometimes complained that he disliked cleaning children and avoided toilet assistant duties – which becomes of relevance to later charges that centred around alleged indecencies in the toilets. With adults he was often risqué, enjoyed sexual innuendo, was overtly camp, drank at lunchtimes and was a smoker. Some colleagues liked this whilst others found it inappropriate.

IV. The First Allegation

The author characterises some of the parents as serial accusers. She comments that the original complainant parent made a subsequent accusation of child-abuse at a second crèche about a year later, that was dismissed. This same person's evidence was also criticised by a judge in a third and unrelated case some years later.

The original alleged comment of the child - that he did not 'like Peter's black penis' is discussed. The child never repeated this to any official and in fact no charges were laid relating to this child. The author comments that this parent and several others who were involved with claims continued to send their children to the crèche, instead of removing them from the alleged danger, and outlines several instances of the crèche supervisor acting spontaneously to rectify other issues involving children's well-being and safety, including occasions involving Peter Ellis.

The author cites other parents who admitted to fraudulent ACC abuse claims, having been persuaded by therapists.

6. A Complaint has been Made

I. The Scapegoat

The author wonders whether the black penis comment related to a black puppy that Peter Ellis had given the boy. At the time the puppy's penis had been specifically pointed out to the boy to demonstrate its sex.

The author cites colleagues who remained convinced of Peter Ellis's innocence.

She cites police notes on Ellis early on in the case that expressly comment on his homosexuality.

She describes the way in which rumours escalated following the first complaint. The crèche management committee (made up of parents) were advised of the allegations against Peter Ellis, but in suspending him the Council kept details confidential from staff for some days. A parents meeting was organised by the management committee but staff were instructed by the Council not to attend. Many did, but without information to share and in the absence of the crèche supervisor. The author argues that this secrecy served to escalate rumours.

II. The Meeting was Somewhat Volatile

At the meeting, a strong police presence was seen to lend authority and credibility to the claims from the outset. Even so, several parents walked out, openly distancing themselves from any 'witch hunt' and many of these parents no longer had any dealings with the case – neither for the prosecution nor for the defence. One set of parents describes the parents meeting as hysterical and pervaded by 'group hugging'. For the few weeks immediately following the meeting no further claims of abuse were reported and the Peter Ellis case was initially closed.

The author states that children regularly played outside naked at the crèche, and describes an occasion when Peter Ellis painted on children's naked bodies which was at the time criticised by the supervisor, but only later re-visited in the context of abuse.

The first complainant parent moved her child to another crèche and later that year accused another homosexual male worker there of abuse. The claim was dropped.

III. Reinstatement is not an Option

Despite the lack of a case at this stage against Peter Ellis, the Council nonetheless determined to dismiss him, and he was offered $10,000 to resign, which he refused. His suspension remained in force.

Two more sets of parents claimed disclosures of abuse by their children, which the author argues were heavily prompted by leading questions of parents. It is noted that one of these children was not a crèche attendee herself, visiting with a parent for 5-10 minutes each day. The author provides interview transcripts from DSW, illustrating evidently fantastical statements.

Another parent comments that children felt let down that Peter Ellis was suddenly no longer at the crèche, and argues this could have caused them to describe him as 'mean', which then escalated to a willingness to agree with abuse stories.

IV. The Police Investigation has been Reactivated

The author expresses renewed misgivings over the police officer in charge of the case, feeling that he relished an opportunity to take control. The author outlines what she sees as a web of secrecy and hysteria developing among parents, exacerbated by the absence of clear and official information.

The author reproduces a checklist of symptoms to be looked for in abused children, particularly in ritualistic settings, that was widely available in Christchurch at the time. She describes how parents began to network with one another and each other's children, and that many used the technique of asking a child to name other children who might have been abused with them. The author queries the policy of parents to reward their children upon disclosing abuse, commenting that some children may have disclosed to please their parents.

The appeal counsel for defence alleged that these procedures led to the interviewing process being seriously flawed. The author reproduces transcripts from later DSW interviews that demonstrate leading questions and non-committal answers interpreted as a clear disclosure of abuse.

Some crèche staff are quoted as regretting their lack of support to Ellis at the time, stating that they felt vulnerable themselves, and faced with the assertive police allegations in relation to Peter Ellis, had initially presumed these allegations to be substantiated and true.

7. Parents in Terror of Abuse Discovery

I. 'There seemed to be no logic to it'

Ellis was advised of the reactivated investigation only through his colleagues, and his lawyer made several unsuccessful requests to the Police for fuller information.

The author objects that the children were interviewed too frequently and in too leading a manner. One child is recorded at DSW as replying that she knew of the abuse 'because her mother told her'. The author asserts that several aspects of the children's claims are evidently inaccurate and incompatible with crèche procedures. She records several letters of support sent to the crèche from non-complainant parents.

The author notes that the Crown expert psychiatrist was involved with the case throughout – supervising DSW interviewers and that she had some professional links with the police.

The author criticises a medical manual that encourages the use of the phrase 'findings are consistent with abuse' in cases that are inconclusive either way.

National media coverage is seen as inflammatory and suggestive, prejudicing the later court case.

II. 'Peter was as good as hung'

The child psychiatrist appeared on the *Holmes* programme, arguably inciting further panic in parents. In court she later declared that she did not recall this interview. The police officer in charge was becoming more closely involved with parents and it eventuated that he engaged in several affairs with complainant parents. It is argued that he was under no close supervision; his performance evaluation found him to be 'at times not totally objective'. The author reports police notes instructing that the arrest of Peter Ellis was to be 'without delay', and the author advances that the arrest was orchestrated to coincide with a second parents' meeting.

The regional manager of DSW Children and Young Persons Service is quoted as saying that the case was handled badly and with excessive attention.

More interview transcripts are reproduced, demonstrating inconsistent interview statements by children.

8. The Whole Crèche Thing has Blown Up

I. 'Anyone who has concerns should get in touch'

The author cites parents expressing reservations about the counsellors and describing a heightened sense of excitement and lack of impartiality at DSW. The ACC claims increased and at times the same therapist was interviewing several children. The author provides transcript evidence of prompting by interviewers, including several clearly extravagant claims - such as that Peter Ellis killed children.

The author cites a transcript where the interviewer falsely tells a child she has claimed something in the past and prompts her to agree to that claim. She also cites from the transcript of the girl who formally retracted her statements after the first conviction, leading to the dismissal of those charges. The transcript indicates that the girl was led, and even so denying wrongdoing by Peter Ellis when asked by the interviewer.

The author recounts a 1994 San Diego case in which the evidence was found to be contaminated by children who were feeding stories to each other.

The author cites the CYPS General Manager also later admitting to doubts over the running of the crèche case.

II. A Sustained Campaign of State-Funded Contamination of the Evidence

The author interviews a psychologist who claims she was frightened by officials within the Ministry of Justice into not taking the defence case. This psychologist also comments that to express a dissenting opinion in children's evidence in sex abuse cases was tantamount to professional suicide.. A former council officer and parent state that the specialist psychologists brought in for the second stage of the investigation were not impartial and were biased against Ellis. They distributed children's books about abuse that were later declared to be a cause of contamination in other similar cases. The author adds that they were operating under unclear lines of supervision and accountability.

Another mother whose child made a disclosure states that as parents they felt pressured and manoeuvred by the Police, DSW, and other complainant parents. She describes the chain of events that led to the disclosure by her child, which was later withdrawn. Of the disclosures that these particular counsellors elicited later in the investigation none led to an eventual guilty verdict.

The Council had previously commissioned a review of the crèche management, which took place at the time Peter Ellis had just been suspended. Crèche staff are cited expressing concern at the way they felt duped into trusting the reviewer with their fears, which were reported in a way that reflected badly upon Peter Ellis, whom the reviewer did not meet. A draft report was issued and the Council requested amendments to remove criticisms of Peter Ellis. However the author suggests that it is not clear who saw the draft version, nor the effects it may have had in adding to the reaction against Peter Ellis.

Police continued to drip-feed information on the allegations to Peter Ellis's lawyer. He was at one stage accused of breaking bail, which was not substantiated and the accusation was dropped. Peter Ellis's landlord, another male homosexual, is critical of the police investigation into alleged indecencies on his property. He claims that the police were heavy-handed, amended allegations, and refused to believe any of his declarations in favour of Peter Ellis, their commenting that he was not 'making their job any easier'. The landlord advances that the police were strongly biased towards the parents.

The police met again with parents to discuss and distribute check-lists that had been drawn up by one of the parents and that would form the basis for further questioning of children.

III. 'Concerns of abuse by other crèche staff (totally confidential)'

The author sets out the conflicting versions of what led to the closure of the crèche. The crèche was formally closed by the Council, following a suspension order from the Ministry of Education. No reasons were given, and at this stage no other staff were charged with abuse. The crèche staff and their union argue that the Council were not obliged to close the crèche and did so willingly based on confidential information from the Police. The Council CEO claimed he had no information from the police, and was acting blindly under the orders of the Ministry of Education. Some participants at key meetings – from both the Council and Ministry - disagree.

The Union was given no warning of a redundancy, only two staff were offered redeployment within the council, staff redundancy notices that were not in conformity with procedures had to be amended, and the staff eventually took the issue to the Employment Court. They won their case in this court, with the amount of compensation significantly reduced by the court of appeal.

9. They Were All Under Suspicion

I. 'It was like a Police State Thing Closing in'

The author cites a parent stating that police would only speak with those parents who would allow disclosure interviews for their children, refusing to give time to speak with other parents. Crèche workers state that they felt terrified by the police investigation closing in, and its secrecy. Some explain that it was this atmosphere of fear that led them not to have done more in the critical early stages to support Peter Ellis. A crèche worker who was seen as cooperative with police describes how she was approached one night at 10pm to go to the station, but the request was withdrawn once she insisted on bringing a lawyer. A family who were supporting Ellis claim that they were harassed by police, treated impolitely and then released without charge.

The crèche staff felt their reputations had been destroyed by the police involvement in closing down the crèche without notifying reasons.

II. Four Child Care Workers Arrested

The four staff were arrested from their homes one morning. The parents of one describe that they rushed to the police station, were told she was not there, and so went home. They express regret at having believed, then, in the good faith of the police involved. A staff member who was not charged describes the police questions about her sexuality and alleged irregular sex-life, finding them inappropriate. Another comments that she deliberately tried to appear 'housewifely' in order to allay police suspicion.

The crèche worker who testified for the Crown later said she felt targeted, manipulated and lied to by the police.

Peter Ellis's lawyer describes how the women's counsel deliberately avoided having their cases heard together with Ellis's. The argument was that as women, and mothers, they were more likely to be discharged if not associated with Peter Ellis.

10. Depositions

The author maintains that a number of wild allegations 'fed the mill' during the inquiry and directly contributed to the building up of a sense of mass panic and fear. She comments however that because of their improbable nature these allegations were raised, but never held up to court

scrutiny in the form of a refutable charge. Similarly, she cites directly the Crown prosecutor's opening address indicating elements of ritual abuse – including allegations of circles of adults colluding in rape- and notes the prosecutor's later denial that this formed any part of the case.

The author outlines nine key points established by the defence in their cross-examination of parents acting as witnesses for the Crown. The defence maintained that despite frequent and unscheduled parental visiting of the crèche, nothing unusual was ever seen and no children came home with evidence of abuse, including for example stains of urine and faeces – although some charges referred to defecation and urination on children. The defence also established that it was only in the wake of the abuse claims that parents began to re-examine earlier events and childhood problems with a more sinister interpretation, and that the children's behaviour had worsened in the wake of the investigation. The author comments that during the playing of a large number of tapes at the depositions, the atmosphere in the court became more and mote sceptical of the charges, as many disclosures were also accompanied by highly improbable, often impossible allegations.

Note is made that those crèche workers who acted as crown witnesses, were in fact at the crèche for only a short period of Peter Ellis's more than five years there. A colleague working in one of the offices adjoining the crèche comments that she found the police theories regarding the illicit use of that building by Peter Ellis to be practically very difficult, and absurd.

11. Pre-Trial Manoeuvres

The author notes another Court of Appeal ruling that an indictment of more than 20 charges is prejudicial to the defence. Peter Ellis was charged on 28 counts.

The author remarks that there had initially been several allegations of crimes of a non-sexual nature, but that none of these was brought in a charge. She argues that this is because these charges would have been quickly dismissed, as the level of proof would have been higher given the absence of sensitivity and overriding conviction to believe the victim.

The defence applied to have the children's videotaped interviews declared inadmissible for the trial, on the grounds that they constituted contaminated evidence. The judge ruled that this issue should be decided at the end of the trial, following viewing and cross-examination. The author advances that this ruling failed to address the essential point of the request, that as contaminated evidence they would unfairly prejudice the trial – by the time they had been viewed and the children examined, the damage would have been done.

The author notes that legal aid limitations prevented the defence from choosing a more experienced barrister.

The author notes that in discharging the women the judge provided several reasons, which the author feels mitigated against Peter Ellis. She argues that one of the grounds - insufficient evidence - would have sufficed, and argues that had the judge ruled in this way, by the same argument the largely similar evidence relating to Peter Ellis might more easily have been ruled insufficient for his conviction.

The author finds the oral judgments issued during the hearing to be inconsistent. She gives the example of one that states that admissibility of evidence can not be ruled upon without it first being viewed, and compares this with another oral judgment nonetheless ruling the evidence admissible.

The author also proposes that some of judge's preliminary advice to the jury was improper, insofar as he reminded the jury that it was not a trial of the police, parents or interviewers. The essential basis of the defence in fact rested around the claim that the entire case resulted from wrongful actions and interference by these three groups.

The defence disagreed with the judge's ruling that reported conversations concerning Peter Ellis's sexual activities were relevant to the trial, as the defence saw these as gratuitous character assassination.

The author discusses one of the main issues of ongoing concern to the defence – the restrictions on which parts of the video tapes it could play to the court. The Crown had submitted excerpts for its case that were accompanied with full transcripts and were replayed in cross-examination of the children. The defence was limited as to what it could play in addition to the Crown excerpts, was unable to play these additional selections in cross-examination of the children, and the jury was not provided with transcripts for these sections. The defence maintained that it was strongly disadvantaged, being prevented from building up a picture of inconsistency and unreliability of evidence.

12. The Trial

I. The Beginning

The author describes the alterations to charges between depositions and the trial. She notes for example charges that had involved multiple-offender scenarios with Peter Ellis as the principal perpetrator were changed to portray him as one of 'persons unknown'. She sees this as demonstrating an increasing lack of clarity in central detail and adding an additional barrier for defence to refute vague charges involving unnamed individuals. She comments that charges that had initially accused Peter Ellis jointly with the now discharged women, were amended to replace Peter Ellis as the principal subject, again with persons unknown. Charges involving sexual penetration were reduced to genital touching, which the author maintains allowed the prosecution to maintain the charge in the absence of physical evidence.

The author also notes that some charges related to dates before Peter Ellis joined the crèche.

The author provides transcripts of the Crown examination of children whose court statements did not agree with earlier allegations. One child persistently denied the alleged offences and was dismissed from the case. Another assured the Crown counsel that his 'disclosure' information had come from his mother, but his case was not dismissed. A third child demonstrated implanted memory by telling the court that she recalled the time of her birth, then admitting that her mother had told her about it. She was not dismissed. A fourth child was dismissed as she assured the court that she had been coached in her allegations by a DSW interviewer.

This last child had also stated in the videotaped interview at DSW that her uncle had abused her, but the transcript records the DSW interviewer persisting in returning the subject of questioning to Peter Ellis. The child repeated in court that it was her uncle who had abused her, but the author notes that the judge made no observations on the quality of this interviewer in his decision.

The author notes that trial questioning for the crown – and hence the video-tape selections - focussed only on the least bizarre and credible accusations, which prevented the defence from demonstrating an overall lack of credibility or inconsistency. She also transcribes statements from parents in which they admit to having given incorrect detail, but which were seen by the court as symptomatic of stress and nothing further. She feels that cross-examination by the defence of parents was severely restricted by public opinion - that to do so would be unkind.

The author questions the judge's impartiality, noting that at one point he ruled that a reported conversation, raised by the defence, between parent and child was inadmissible on grounds of hearsay. The author contrasts this with the many other reported conversations involving accusations of Peter that were accepted as admissible. The author also details occasions on which the judge interjected with additional questions to witnesses, finding these questions to have been too much in reinforcement of Crown viewpoints.

Police evidence provided extensive photographs of the interiors of several venues, including the crèche, but none among these included the toilet area. The author argues that such photographs would have clearly demonstrated the difficulty of anyone committing indecencies there undetected.

The crèche worker who testified for the Crown states later that the police told her they were 'disappointed' in her lack of convincing prosecution details in court.

The author describes a flow-chart introduced by the police witness at the end of his testimony, after the defence had cross-examined him. The flowchart purported to chart crèche children's behavioural patterns consistent with abuse. The defence strongly objected to the introduction of the flowchart, finding it inaccurate and misleading, The judge ruled the chart admissible.

II. The End

At one point in the trial Peter Ellis was questioned by the Crown about whether or not he normally used the bus to get to work. He replied that he did not, and then on closer questioning admitted that he did in fact use it if it was raining, and apologised. The prosecution strongly declared this to be an example of Peter Ellis lying, and the defence maintains that this equivocal interpretation of 'normally' was seized upon by the prosecution to prejudice the jury against Peter Ellis.

The author raises concerns over three of the jurors – one who was overheard during the trial commenting that the jury would find Peter Ellis guilty, another who it transpired later was associated with a prosecution witness, and another who had presided at the wedding of the Crown prosecutor.

Staff again testified to the difficulty of hiding in a crèche toilet. The author quotes an estranged parent of a crèche child saying that speaking for the defence would have risked his never being allowed access to his child by the mother.

The defence strongly refuted the Crown's claim that it had established consistent central detail to make their case. The author transcribes passages demonstrating that these alleged details comprised often monosyllabic responses by children to leading questions, and on other occasions clearly inconsistent responses.

With regard to the DSW interviewers, the defence argued that their professional role had not been to discover or prove truth, but to believe the d\children. He furthermore objected to the multiple roles played by the Crown psychiatrist during the investigation, suggesting a conflict of interest.

The author notes that in his summing up the judge suggested the defence had accused the children of lying. The defence disputes this interpretation as they had argued that the children were confused and manipulated, and not that they were liars. The defence also maintains that the judge had devoted more attention to the prosecution's arguments in his summing up, and was dismissive of defence claims. The judge again reminded the jury that the case was not an investigation into police, parents or interviewers.

The author notes that the sentence handed down was in fact relatively light given the scale of the alleged crimes. She advances that this leniency reflected the judge's view that the trial had not been entirely conclusive or fair, and she notes a later judgment by this same judge in a similar case in which he rejects expert evidence as inadmissible, warning that such evidence has the potential to be a 'cleverly packaged' instrument in favour of the prosecution.

13. The Aftermath

I. The Tide Turns

One parent had withdrawn her child from the trial after the depositions, and later lent active support to Peter Ellis.

Public concern grew at motivations underlying the investigation, following a television interview with a police officer heavily involved in the investigation who commented that there is 'a God who will not be mocked', in support of his stance against Peter Ellis.

II. The Women's Costs Application

The women applied for costs for the defence which was denied. No reasoning was given.

III. The Nigel Hampton QC Appeal

The author notes that at the appeal stage the burden of proof moves to the accused, who is now presumed guilty. The defence counsel is quoted in a later interview, that 'the fundamental injustice

of the case was that the jury did not see the full picture'. The defence also argued that bias and publicity in the community prevented a fair trial. The QC fell ill on the first day and so the appeal was adjourned.

IV. The Graham Pankhurst QC Appeal

The appeal continued and the new defence counsel maintained that the children's statements in the interviews were inconsistent, did not corroborate one another, and demonstrated parent-child and child-child contamination. The defence counsel outlined his concerns with regard to the contextual evidence: he asserted that the seven children whose allegations led to guilty verdicts had named 21 other children as also having been abused, none of whom confirmed the allegations. He re-emphasised that no adult had witnessed any event, despite the unpredictable visiting of parents to the crèche, and despite the open layout and high staff to child rations. No evidence of soiled clothing was found to corroborate the allegations of urinations and defecation. No staff had witnessed children returning from walks – during which abuse was alleged - in a distressed state. Only one child attended the crèche while Peter Ellis was living a house alleged to be a site of abuse. Four children claimed Ellis drove them to place of abuse, however it was noted that Peter Ellis was unlicensed and could not drive.

The defence counsel argued that the mix of guilty and non-guilty verdicts for the same children was inconsistent, that the defence was further disadvantaged by the jury retaining Crown transcripts of the vide interviews – since the transcripts did not always reflect doubtful body language – and that the children's evidence had been unfairly obtained, and he gained permission to play the tapes that had been excluded from the first trial.

The oldest child in the prosecution case and whose evidence was placed first in the trial, retracted her statements during the appeal and maintained that she had lied about Ellis molesting her. Her charges were dismissed. Nonetheless, the court appointed a barrister to interview her, who reported back that he did not believe her change of story, and that she was upset and confused.

Peter Ellis's guilty verdicts now related to six of the 118 children interviewed for 'disclosures' by DSW.

The appeal was rejected.

V. Graham Pankhurst QC Considers His Options

The defence counsel made an application for legal aid to take the case to the Privy Council, on the grounds that the issue of 'centrality' of evidence had not been considered by the Court of Appeal and that only a part of the tapes was viewed. The Solicitor-General considering the request reported that he had sought the opinion of an 'independent barrister'. The author records a statement from this barrister, that he 'happened to be in Christchurch' and so discussed the file with the Crown prosecution. The request was declined.

VI. Davidson and Others v The Christchurch City Council

The 13 crèche workers (11 childcare and 2 cleaners) who lost their jobs as a result of its closure took the Christchurch Council to court, maintaining that contrary to his denials the CEO had decided to close the crèche based on the police allegations of abuse. The CEO continued to maintain that he was unaware of the police allegations. The author discusses two draft memoranda from the Ministry of Education, that she acquired after the trial. The memoranda reflect a rewording of the proposed Ministry court evidence, that inn its first form implicat3eed the Council and would have lent support of the women's case. The author maintains that these documents were deliberately withheld form the court, and notes that the witness scheduled to deliver that part of the evidence for the Crown was never called. She cites a Ministry official who believed this to have been a deliberate manoeuvre.

The dismissal was found to have been unjustifiable and the workers were awarded a large sum of compensation. The judge commented that the police might have been more circumspect in their treatment of the staff, had the council not abandoned its employees. In his supplementary

judgment the judge added that he did not have confidence in the reliability of evidence provided by the council. The council voted to appeal.

VII. More Calls for an Inquiry

Following the rejection of legal aid for a Privy Council case, the defence Counsel again requested the Attorney-General for an inquiry, expressing concern that even following the discharge of the accused women, still no internal inquiry had been made into police conduct. The request was refused and the report stated that an inquiry into police procedures could result in renewed focus on Peter Ellis, and noted that the costs involved might be better spent towards administrative and legislative reform in the field of sexual abuse.

The author notes that this report made only brief reference to another famous case in NZ history, concerning Arthur Allan Thomas who was pardoned by the Governor-General following several inquiries and dismissed appeals. The author argues that there might have been better analysis of the issues surrounding the Thomas case, as the latter demonstrated a repeated miscarriage of justice.

VIII. The Christchurch City Council appeal the Employment Court decision

The author expresses her concern that the Appeal Court was dominated by conservative judges and that there already existed tensions with the Employment Court. She notes that the head judge had already issued a minor judgment in another case whose precedent would not favour the crèche staff, and comments that the Council lawyer made repeated 'flattering' reference to this judgment during the appeal.

The Ministry of Education document referred to earlier, which would have supported the staff case, was again withheld by the Council lawyer. The Appeal Court disputed the ruling of the Employment Court, stating an error of law. The author notes that when considering such employment issues, the Court of Appeal is restricted to considering questions of law, and not questions of fact. She argues that the Appeal Court ruling was flawed, and that they had in fact ruled on reliability of evidence – which she maintains is a question of fact and not of law.

14. The Royal Prerogative of Mercy

I. The Safety Net

The author argues that the procedures for obtaining a royal pardon are informal and opaque and rely on commissioning ad hoc reports. She also argues that the New Zealand justice system is not infallible, and by way of example discusses an unrelated Court of Appeal judgment from a few years earlier, rejecting a request for pardon. This judgement cites a particular case as evidence of the reliability of the New Zealand justice system. The author argues that by the time of Ellis's request, evidence had emerged of police and prosecution misconduct in this case.

II. Testing the Safety Net

National television aired another documentary, this time discrediting the policeman in charge of the initial investigation and detailing several cases of sexual liaisons with parents and a DSW counsellor involved in the case.

Peter Ellis's counsel was appointed to the High Court bench. The new defence counsel raised five main areas of concern in the first petition to the Governor-General, requesting an extension of the scope of reference to include questions that: the investigation was not objective; the methods of obtaining children's evidence were flawed and with unacceptably high risks of contamination; the retraction by the eldest child was of higher significance than recognised by the Court of Appeal; the jury was not impartial and the trial process was flawed. The counsel added that the photographs of the crèche toilets were not disclosed to the defence at the time of the trial.

The Ministry of Justice officials reviewing the petition recommended that the case be referred back to the Court of Appeal, on the grounds of new psychological opinion regarding evidence of children, evidence of an association between a Crown witness and juror, and photographs that were not disclosed to the defence.

At the court, Peter Ellis's counsel applied to have the scope of reference widened to a reconsideration by the Court of the entire case. This was declined and declared incompatible with legislative precedent. The author discusses the history of a Governor-General referral, arguing that its restrictions are interpreted in a unnecessarily narrow manner.

The second appeal therefore was restricted to examining only evidence that was new, and could not re-examine issues already raised in the first appeal.

15. Doing Justice

I. New Evidence

A second petition to the Governor-General was made requesting a royal commission of inquiry, and either a pardon or a referral of the entire case back to the Court of Appeal. The counsel argued that it was inappropriate for the appeal court to be the sole body to determine the claims of miscarriage of justice. The Ministry of Justice reviewed the petition and issued its report - the Thorp report. This report recommended that the reference to the Court of Appeal be extended to included those points concerning the claims of defective interviewing techniques and contamination of evidence, and the restriction on the playing of the tapes.

The expanded terms of reference covered: children's evidence; retraction; trial procedure; jury; and non-disclosure of material.

II. The Judith Ablett Kerr QC appeal

The author raises concerns over the defence counsel's handling of this second appeal, noting that the presiding judges were forced to intervene on several occasions to rectify matters of timetabling, conciseness, relevance and admissibility of evidence. Regarding this latter, the Counsel had unsuccessfully tried to have the court re-examine issues raised at the earlier appeal, which was refused as being outside the terms of reference. At one stage the judges requested of the counsel a summary of knowledge about interviewing techniques and risk of contamination that had not been available at the earlier appeal. The author feels that the counsel's response was unconvincing, leading to the judgment that the issue had been sufficiently covered at the earlier trial.

In dismissing the appeal, the judges nonetheless noted that expert opinion on the reliability of children's evidence was sharply divided and suggested that a commission of inquiry might better evaluate the competing claims.

Peter Ellis completed his prison sentence three months after this judgment.

16. 'It is a case that simply will not go away'

The defence counsel then lodged a new application to the Governor-General, asking for a free pardon and Royal Commission of Inquiry. The Justice Minister (Phil Goff) announced the Eichelbaum Ministerial Inquiry to investigate matters relevant to the assessment and reliability of children's evidence. The inquiry terms covered: currently accepted best practice for the investigation of mass child abuse allegations; risks associated with failure to adhere to best practice; whether the investigation of events and the interviews of children in the case were conducted in accordance with best practice; whether any breaches of interviewing best practice affected the reliability of the children's evidence; whether there are any matters giving rise to doubts about the assessment of the children's' evidence to an extent that Peter Ellis's conviction would be rendered unsafe.

The author raises several concerns with the Eichelbaum inquiry and final report.

The Eichelbaum terms of reference were limited to evidence given at depositions and trial, with no authorisation to make other investigations to test reliability of evidence. The author comments that many matters of public concern were therefore not addressed, including: the decision to prosecute the five crèche staff; the admission of and exclusion of evidence in court; the fairness of the trial; credibility of children's evidence; and the physical possibility of the abuse happening, given the layout and functioning of the crèche.

The author also comments that only aspects of the police investigation relating to the obtaining of evidence from the children and parents was covered, meaning that the possibility of wider police misconduct was not addressed.

She notes that whilst the complainant families and Crown (on behalf of the police, DSW and specialist interviewers) were invited to make submissions, the crèche staff were not.

The author also comments that both the Thorp report and second appeal judgment had advised that some matters would be suited to a Commission of Inquiry; yet this was not done. She also maintains that the terms of reference of the Eichelbaum inquiry reflected only matters identified by the appeal court, and not those in the Thorp report.

Two particular points raised are the 'sanitising' of charges. For example, brutal penetration claimed at depositions was rewritten as a charge of indecent touching for the trial, and Thorp's observation that the chief psychiatrist's comments 'can hardly have appeared to the jury as otherwise than supportive of the children's credibility'. Thorp had criticised the psychiatrist's failure to come up with any characteristics that were inconsistent with child abuse. He also noted a 'sea change' in professional thinking about contamination of children's evidence since 1993, observing that it might be appropriate to review the legislative provision requiring judges not to instruct a jury on the suggestibility of children and their tendency to invent and distort.

The author raises concern at the two experts selected by the Eichelbaum investigation, noting that the credentials of one related to her involvement in two separate mass allegation cases abroad, cases whose validity the author claims are now disputed in the respective countries. The author maintains that the experts were supplied with only a limited number of the videotapes. There is no record of them having reviewed the evidence relating to the older child who retracted her allegations following Peter Ellis's conviction, nor of them having seen the evidence from crèche staff, Peter Ellis's former tutors, associates and landlord – all of which were crucial to the defence case.

The author notes that the second expert proposed that 'reality checks' be done to determine whether the alleged events could in fact have happened, commenting that these sorts of issues were beyond his remit, but 'which the wider inquiry will wish to consider'. There is no record in the report of any such checks being made. The same expert also recommended that children be told that 'don't know' and 'can't remember' are acceptable answers to leading questions. This suggestion is rejected in the final report, with the comment that such a technique might not be helpful in inducing reticent children to speak.

The report states that the concerns surrounding the assessment of children's evidence had been repeatedly raised and rejected in the courts. The author advances that whilst the statement is true, it avoids crucial questions of whether these rejections were based on adequate analysis; and whether the fact that they had already been rejected was a valid justification for rejecting them again.

The author concludes the work reiterating her concerns that the Eichelbaum investigation failed to carry out reality checks on the children's evidence; failed to take seriously evidence showing that the children's statements had been obtained by pressure and manipulation; failed to consider the role of the police; failed to consider the effect on the jury of controversial evidence given by the Crown's expert witness; failed to consider the effect of the controversial laws (the amended Evidence Act) relating to children's evidence; failed to mention or give regard to the evidence of the child who retracted her allegations; and failed to acknowledge the reservations of one of its experts.

This information has been prepared by the Parliamentary Library
for the Justice and Electoral Select Committee

CHRISTCHURCH CIVIC CRECHE CASE CHRONOLOGY

1991	20 November	• First complaint in crèche case.
	21 November	• Ellis suspended.
	25–29 November	• Education Review Office inspection of crèche.
	2 December	• First mass meeting for crèche parents.
	20 December	• Crèche investigation closed.
1992	23 January	• Ellis dismissed.
	30 January	• First formal disclosure.
	19 February	• Crèche investigation reopened.
	27 February	• First formal disclosure resulting in a conviction. Formal interviews continue all year.
	20 March	• News of investigation breaks in media.
	30 March	• Ellis arrested.
	31 March	• Ellis first court appearance. • Second mass meeting for crèche parents.
	6 August	• Formal disclosure of 'circle incident'.
	12 August	• 'Phase II' police inquiry established.
	3 September	• Crèche closed.
	1 October	• Four women crèche workers arrested (Davidson, Keys, Buckingham, Gillespie).
	2 November	• Depositions hearing begins.
1993	11 February	• Depositions hearing ends.
	5 March	• Gillespie discharged.
	6 April	• Davidson, Keys and Buckingham discharged.
	26 April	• Ellis trial begins.
	5 June	• Ellis trial ends.
	22 June	• Ellis sentenced.
	July	• Government rejects calls for commission of inquiry.
	15 December	• Women crèche workers' application for costs declined.

1994	14 February	• First Ellis appeal aborted (N. Hampton QC).
	25–28 July	• First Ellis appeal begins (G. Panckhurst QC).
	5 August	• Ellis appeal ends.
	8 September	• Appeal judgment delivered.
1995	22 February	• Ellis applies for legal aid to Privy Council.
	27 Feb.–8 March	• Crèche staff Employment Court case.
	15 March	• Ellis Privy Council legal aid application declined.
	16 March	• Crèche staff Employment Court interim judgment.
	7 April	• Crèche staff Employment Court supplementary judgment.
	8 June	• Government rejects calls for commission of inquiry.
1996	21–22 August	• Crèche staff Employment Court appeal.
	26 September	• Crèche staff Employment Court appeal verdict.
1997	2 December	• First Ellis petition for prerogative of mercy (Ablett Kerr QC).
1998	February	• Ellis refuses, and is refused, parole.
	4 May	• Ellis case referred to Court of Appeal.
	18 November	• Second Ellis petition for prerogative of mercy.
1999	January	• Second Ellis petition referred to Sir Thomas Thorp.
	February	• Ellis refuses, and is refused, parole.
	13 May	• Ellis case referred to Court of Appeal.
	5–9 July	• Second Ellis appeal.
	14 October	• Second appeal judgment delivered.
	18 October	• Third Ellis petition for prerogative of mercy.
2000	2 February	• Ellis completes sentence.
	10 March	• Eichelbaum Inquiry established.
2001	13 March	• Eichelbaum Report released. Government rejects calls for pardon and commission of inquiry.

CONTENTS

Appendix C

Summary of the Ministerial Inquiry Report by Sir Thomas Eichelbaum

Sir Thomas Eichelbaum was appointed by the Minister of Justice in March 2000 to assess the reliability of evidence against Peter Ellis given by children who attended the Christchurch civic crèche and to report on whether there were matters which gave rise to doubts about the assessment of the children's evidence which would render the convictions against Mr Ellis unsafe and warrant the grant of a pardon.

Sir Thomas presented his report in February 2001.

Introduction

The inquiry was not a general review of the Ellis case. There was no direction to carry out further inquiries into the facts. The focus of the inquiry was on the obtaining of evidence from the children including the part played by their parents and the parents of other crèche children. Sir Thomas notes his inquiry did not extend to police conduct or alleged non-disclosure of information (particularly photographs of the interior of the crèche and apparent crèche activities), both of which were raised by Mr Ellis' counsel. He took the view these issues were outside the ambit of the inquiry.

Two overseas experts were appointed to assist in the inquiry. They were Professor Graham Davies of the University of Leicester in the United Kingdom and Dr Louise Sas of London, Ontario, Canada. Neither had any previous connection with the case. The experts worked independently and were unaware of the other's identity until after they had delivered their reports. Crown counsel and counsel for Mr Ellis were given the opportunity to comment on these reports and both made substantial responses. As a result the experts made some amendments in matters of detail.

Review of overseas reports and memoranda

Sir Thomas was asked to consider the following reports:

- The Cleveland Inquiry (1987)
- The Orkney Inquiry (1992)
- The San Diego County Grand Jury Report (1994)
- NSW Royal Commission (1997)
- Law Commission Discussion paper (NZ, 1999)
- Memorandum of Good Practice (UK, 1992)
- Joint NZCYPS and Police Operating Guidelines

The first four reports dealt with cases of suspected child abuse and covered the investigatory and interviewing processes used. In Mr Ellis' 1999 appeal to the Court of Appeal, his counsel had suggested the court evaluate the various reports of overseas

inquiries and the operating guidelines developed since Mr Ellis' trial. The court declined to do so on the basis that this was not its function "as distinct from the more wide-ranging inquiry possible with a commission of inquiry".

In the course of his survey on this term of reference, Sir Thomas considered materials from the United States, Scotland, England and Australia. He found that: The New Zealand methodology of 1991 for interviewing children in suspected abuse cases was well up with and, in many respects, in advance of the corresponding arrangements discussed in the overseas materials.

Whether the investigations and interviews were conducted in accordance with best practice

Sir Thomas was directed to invite submissions from the participants. The submission on behalf of Mr Ellis alleged:

- There was a complete failure of the investigators, meaning the police team, to prevent parental interviewing, or to identify the effects of the contamination that occurred in this way.
- The detective in charge lost his objectivity.
- The Specialist Services Unit failed to act with fairness and impartiality.
- There was no attempt to seek alternative sources of the children's information about abuse.
- The interviewing procedures were unacceptable and the convictions owed much to parental involvement.
- There was no recognition of the special risks occasioned by mass allegation situations.
- There existed a climate of fear and hysteria in Christchurch at the time.

As noted above, a number of matters allegedly not disclosed by the police raised by Mr Ellis' counsel in this submission were determined by Sir Thomas to be outside the ambit of the inquiry.

The Crown submitted that:

- The interviewing was conducted properly and by professionals. The issue of parental questioning was exhaustively explored in the depositions and at trial.
- The interviewers did test the children's accounts for contamination.
- The defence had the right to use material the Crown chose not to.
- The jury had all the relevant information about "mass hysteria" and mass allegations and made its own assessment.
- The risk of contamination does not equate with actual contamination.
- Guidelines for interviewing in these situations represent the ideal and as such are not absolute – a leading question will not automatically invalidate an interview although it may have that consequence.

- Although the children were subject to more interviews than "seen as generally desirable" the impetus came not from the authorities but were the product of fresh disclosures by the children.
- The interviewing in the Ellis case was essentially sound.

Sir Thomas also received a submission from the Commissioner of Children and one submitted on behalf of a group of parents.

Sir Thomas considered that it was his task to identify the relevant standards of international practice relating to interviewing in mass abuse allegation cases. He did not see his role as requiring him to "include the formulation of a 'best practice' protocol". Instead he provided a list of elements he had identified from his reading and this included work undertaken by Dr Louise Sas on an appropriate model for the investigative stage of a mass abuse allegation case.

Sir Thomas noted that in relation to both questioning by parents and formal interviewing by agencies "there is a considerable catalogue of techniques having the potential to detract from the accuracy of the child's reporting". He went on to state "understandably, no means have been found for measuring the extent to which accuracy may have been impaired in a particular case". It is generally left to the tribunal of fact to make an assessment of reliability subject to the discretion of the trial judge to exclude evidence regarded as wholly unreliable.

Sir Thomas went on to consider the videotaped interviews of the six "conviction" children. Against each he set out salient points of evidence relevant to contamination. In this context "contamination" is confined to an examination of the conduct of the parents. Inappropriate interviewing as a form of contamination is dealt with as a separate topic. He summarised his review of the interviews against the list of elements noted above. The more pertinent sections are summarised as follows:

Structure: Under this heading Sir Thomas noted that submissions on behalf of Mr Ellis did not maintain that structural deficiencies contributed to the outcome. The criticism was directed almost exclusively to the interviewing itself and conduct immediately connected with it, and the contamination said to have been caused by parents.

Use of same interviewers: Sir Thomas noted the potential downside of many children being interviewed by the same person. While the ideal is to have many interviewers, the reality is that few agencies have the resources for this. However, this situation raises valid concerns of interview bias. Sir Thomas concluded that neither he nor the experts saw any evidence of this.

Number of interviews: Sir Thomas concluded the criticism here was valid; not only the number of times some children were interviewed but the length of time over which the process continued. Had significant evidence been obtained at the later interviews, this would have been a concern; however, this was not the case and most of the later interviews were not played to the jury.

Testing the children's accounts: Sir Thomas thought there could have been more probing of the children's accounts in some of the interviews.

Contamination: By the standards of best practice, Sir Thomas noted the following shortcomings that had been raised by Dr Sas:

- There should have been a written handout for parents advising how to handle disclosures made by their children and cautioning against sharing such information (December 1991). Sir Thomas noted his scepticism as to whether written cautions would have been any more effective than the verbal cautions that were given.
- The content of the written handout circulated in March 1992 could have been improved; the content may have increased concern rather then reduced it. Sir Thomas again doubted whether a better-worded document would have allayed concerns.
- The reference to "support for parents" was problematical. While noting that parents would support each other, Sir Thomas held the view stronger steps could have been taken to try to limit the exchange of information between parents.
- The dissemination of information about behavioural symptoms could have been better handled.

Sir Thomas stated that despite these concerns, he did not consider their absence had made any difference. He said "the problem was not the absence of the right messages; by and large they were given, and those parents who were able to control their anxiety and maintain objectivity took them on board. Others, despite hearing the same advice, were unable to follow it, and in some instances, deliberately declined to do so." He suggested that a stronger message would not have met a different response.

Sir Thomas then went on to address the issue of interaction between parents, the contact between children, and the conduct of some parents. He noted it was to be expected that, given the nature of the case, many parents would be in frequent contact with each other; that this was unavoidable particularly if these parents had connections with each other that pre-dated the case. He noted the support group meetings where some parents met regularly and where, he felt it safe to infer, information was exchanged. Professor Davies suggested that it would be useful to assess the contamination argument by a timeline but Sir Thomas concluded there were too many imponderables to enable a reliable assessment to be made; there was not enough precision as to the dates when parents or children were in contact with one another, what information was exchanged, or when sites were visited.

A further feature which he considered was established was that some of the parents questioned their children in a manner contrary to the advice given. To a greater or lesser degree he concluded this happened with most of the "conviction" children. Sir Thomas noted the parents were extensively cross-examined about these interviews at depositions and at trial.

In an ideal situation, where abuse is suspected, no one would talk to the child before a formal interview. However, in reality, the formal interview usually takes place after a conversation between the child and its parents or other caregivers. Sir Thomas concluded the possibility of contamination through this source is generally present: "The issue becomes one of degree." He went on to state "Published research shows however that children's accounts can be contaminated by discussion with others and it is uncontroversial to say that the risk of such contamination should be minimised. In the present case, by any

standards there was excessive questioning and other potentially contaminating conduct (site visits) by parents."

The overseas experts who were appointed to assist the review concluded the interviewing was of an appropriate standard although it did not meet best practice standards in every respect. However, if that degree of perfection were the test, few if any of this kind of interview would pass the test. Sir Thomas concluded "aspects of the systems set in place for the investigation could have been improved. However, that made no significant difference to the outcome." He also noted "questioning and investigations by some parents exceeded what was desirable and had the potential for contaminating children's accounts."

The nature and extent of risk to which any breaches of best practice give rise

Sir Thomas then moved on to discuss the interviewing processes that, in his opinion, had imperfections. He broke these down into causative and non-causative shortcomings. For example, if a particular allegation was brought out by a "blatantly leading" question, but the tape was not played to the jury, the event could not have caused Mr Ellis any prejudice. The nature of the videotaped interviews is transparent – what is happening, whether it is fair or appropriate and the effect on the child are all matters readily apparent to a lay person. All in all, Sir Thomas' view is that the jury exercised considerable discrimination.

Despite the imperfections noted, Sir Thomas found that the evidence emerged in a credible way. There were isolated lapses where leading questions were used and it would have been preferable to cut some of the interviews short and the number of them down, but having regard to the outcomes, Sir Thomas concluded Mr Ellis did not suffer any prejudice as a result.

In reaching this conclusion Sir Thomas took into account the opinions expressed by the two experts. Professor Davies stated the mistakes that occurred were insufficient to explain the content of the allegations regarding events at the crèche. The reservations he expressed affect only one of the 13 convictions. Professor Davies was careful to stress the interviews had to be considered in the wider context of the whole of the available evidence. He would not say that of itself the content of the interviews proved the charges against Mr Ellis (and he was not required to express a view on that). Sir Thomas took from Professor Davies' report that the tapes provided credible evidence of the offences on which convictions were entered.

Dr Sas criticised some of the interviews but mainly those that were not played to the jury. She considered the children's evidence on which the convictions were based was reliable.

On the issue of interviewing imperfections Sir Thomas took the view

> the guilty verdicts … can be regarded as resulting from well-tested evidence, deserving high weight. In general, there was a lack of connection between the shortcomings and the allegations on which convictions were founded. I consider that the shortcomings did not give rise to a significant risk that the convictions were founded on suspect evidence.

On the issue of contamination, Sir Thomas noted this was the stronger aspect of Mr Ellis' submissions. In brief, some parents questioned their children inappropriately and the

existence of a risk that these processes contaminated the children's accounts cannot be denied. However, Sir Thomas concluded this is a question of degree. Professor Davies indicated that some of the more improbable incidents may have had their origins in cross-talk between families and he considered the visits to locations may have coloured accusations made in the later interviews. However, he did not believe that cross-talk alone was sufficient to explain the similar accusations made particularly in relation to events in the crèche toilets. Dr Sas examined the possibility of contamination carefully and in detail. While recognising the presence of contamination (the over-involvement of one mother in the investigation and the intrusive questioning of another), she did not feel the evidence on which the convictions were based was seriously affected. Dr Sas considered that the evidence was reliable.

Sir Thomas stated the experts' conclusions strongly reinforced his own opinion. He said "the prime opportunities for contamination occurred after the particular child had made the disclosure leading to a conviction".

Sir Thomas remained unconvinced that cross-talk between parents and excessive questioning by them could account for the detailed, similar accounts given by so many children in separate interviews stretching over many months. This view was supported by one of the overseas experts; the other expert concluded the evidence of the six remaining "conviction" children had not been seriously affected by possible contamination.

Whether any matters give rise to doubts about the children's evidence to an extent which would render convictions unsafe and warrant grant of a pardon

Sir Thomas considered there was a need to establish a threshold "test" for the exercise of a pardon given that full pardons are rare and, in this case, a re-trial is not a viable option. He determined the appropriate approach was to require Mr Ellis to satisfy the inquiry that the convictions were unsafe; or that on the information now available, the case against him was not proved beyond reasonable doubt.

On this basis, Sir Thomas concluded he had no doubts that would render the convictions unsafe. He concluded the case advanced on behalf of Mr Ellis failed by a distinct margin and that he did not find this to be a borderline judgment. He was satisfied as to the reliability of the children's evidence. The salient points in this regard were:

- In the course of the proceedings doubtful allegations and charges were weeded out. The jury was astute in identifying those where the supporting evidence or the method by which it emerged was open to valid criticism.
- Where the number of interviews was excessive generally allegations arising out of the later interviews did not form the subject of charges, the tapes were not played, although available to the defence.
- Such shortcomings as occurred in the interviewing process did not lead to convictions.
- Both experts considered that contamination was an insufficient explanation for the body of broadly similar allegations particularly of events at the crèche.
- The experts and Sir Thomas independently reached the view that the children's evidence in the conviction cases was reliable.

Sir Thomas concluded the case advanced on behalf of Mr Ellis had failed, by a distinct margin, to satisfy the inquiry that the convictions are unsafe or that a particular conviction was unsafe. He stated "on the matters referred to me in this inquiry, I do not consider the grant of a pardon is warranted".

Appendix D

Evidence Act 1908 – sections 23C to 23I

23C Application of sections 23D to 23I—

Sections 23D to 23I of this Act apply to every case where—

(a) A person is charged with—

(i) Any offence against any of the provisions of sections 128 to 142A of the Crimes Act 1961; or

(ia) Any offence against section 144A of the Crimes Act 1961; or

(ii) Any other offence against the person of a sexual nature; or

(iii) Being a party to the commission of any offence referred to in subparagraph (i) or subparagraph (ia) or subparagraph (ii) of this paragraph; or

(iv) Conspiring with any person to commit any such offence; and

(b) Either—

(i) The complainant has not, at the commencement of the proceedings, attained the age of 17 years; or

(ii) The complainant is of or over the age of 17 years and is mentally handicapped.

23D Directions as to mode by which complainant's evidence is to be given—

(1) Where, in any case to which this section applies, the accused is committed for trial, the prosecutor shall, before the trial, apply to a Judge of the Court by or before which the indictment is to be tried for directions under section 23E of this Act as to the mode by which the complainant's evidence is to be given at the trial.

(2) The Judge shall hear and determine the application in chambers, and shall give each party an opportunity to be heard in respect of the application.

(3) The Judge may call for and receive any reports from any persons whom the Judge considers to be qualified to advise on the effect on the complainant of giving evidence in person in the ordinary way or in any particular mode described in section 23E of this Act.

(4) In considering what directions (if any) to give under section 23E of this Act, the Judge shall have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused.]

23E Modes in which complainant's evidence may be given—

(1) On an application under section 23D of this Act, the Judge may give any of the following directions in respect of the mode in which the complainant's evidence is to be given at the trial:

(a) Where a videotape of the complainant's evidence was shown at the preliminary hearing, a direction that the complainant's evidence be admitted in the form of that videotape, with such excisions (if any) as the Judge may order under subsection (2) of this section:

(b) Where the Judge is satisfied that the necessary facilities and equipment are available, a direction that the complainant shall give his or her evidence outside the courtroom but within the Court precincts, the evidence being transmitted to the courtroom by means of closed circuit television:

(c) A direction that, while the complainant is giving evidence or is being examined in respect of his or her evidence, a screen, or one-way glass, be so placed in relation to the complainant that—

(i) The complainant cannot see the accused; but

(ii) The Judge, the jury, and counsel for the accused can see the complainant:

(d) Where the Judge is satisfied that the necessary facilities and equipment are available, a direction that, while the complainant is giving evidence or is being examined in respect of his or her evidence, the complainant be placed behind a wall or partition, constructed in such a manner and of such materials as to enable those in the courtroom to see the complainant while preventing the complainant from seeing them, the evidence of the complainant being given through an appropriate audio link:

(e) Where the Judge is satisfied that the necessary facilities and equipment are available, a direction that—

(i) The complainant give his or her evidence at a location outside the Court precincts; and

(ii) That those present while the complainant is giving evidence include the Judge, the accused, counsel, and such other persons as the Judge thinks fit; and

(iii) That the giving of evidence by the complainant be recorded on videotape, and that the complainant's evidence be admitted in the form of that videotape, with such excisions (if any) as the Judge may order under subsection (2) of this section.

(2) Where a videotape of the complainant's evidence is to be shown at the trial, the Judge shall view the videotape before it is shown, and may order excised from the

videotape any matters that, if the complainant's evidence were to be given in person in the ordinary way, would be excluded either—

(a) In accordance with any rule of law relating to the admissibility of evidence; or

(b) Pursuant to any discretion of a Judge to order the exclusion of any evidence.

(3) Where a videotape of the complainant's evidence is to be shown at the trial, the Judge shall give such directions under this section as the Judge may think fit relating to the manner in which any cross-examination or re-examination of the complainant is to be conducted.

(4) Where the complainant is to give his or her evidence in the mode described in paragraph (b) or paragraph (d) of subsection (1) of this section, the Judge may direct that any questions to be put to the complainant shall be given through an appropriate audio link to a person, approved by the Judge, placed next to the complainant, who shall repeat the question to the complainant.

(5) Where the complainant is to give his or her evidence at a location outside the Court precincts, the Judge may also give any directions under paragraph (c) or paragraph (d) of subsection (1) of this section that the Judge thinks fit.

(6) Where a direction is given under this section, the evidence of the complainant shall be given substantially in accordance with the terms of the direction; but no such evidence shall be challenged in any proceedings on the ground of any failure to observe strictly all the terms of the direction.

23F Cross-examination and questioning of accused—

(1) Notwithstanding section 354 of the Crimes Act 1961, but subject to the succeeding provisions of this section, the accused shall not be entitled in any case to which this section applies to cross-examine the complainant.

(2) Nothing in subsection (1) of this section nor any direction given under section 23E of this Act shall affect the right of counsel for the accused to cross-examine the complainant.

(3) Where the accused is not represented by counsel, the accused may put questions to the complainant (whether by means of an appropriate audio link or otherwise as the Judge may direct) by stating the questions to a person, approved by the Judge, who shall repeat the questions to the complainant.

(4) No direction given under section 23E of this Act shall affect the right of the Judge to question the complainant.

(5) Where the complainant is being cross-examined by counsel for the accused, or any questions are being put to the complainant by the accused, the Judge may disallow

any question put to the complainant that the Judge considers is, having regard to the age of the complainant, intimidating or overbearing.

23G Expert witnesses—

(1) For the purposes of this section, a person is an expert witness if that person is—

(a) a medical practitioner whose scope of practice includes psychiatry, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or

(b) a psychologist practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.

(2) In any case to which this section applies, an expert witness may give evidence on the following matters:

(a) The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on—

(i) Examination of the complainant before the complainant gives evidence; or

(ii) Observation of the complainant giving evidence, whether directly or on a videotape:

(b) The general development level of children of the same age group as the complainant:

(c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

23H Directions to jury—

Where a case to which this section applies is tried before a jury, the following provisions shall apply in respect of the Judge's directions to the jury:

(a) Where the evidence of the complainant is given in any particular mode described in section 23E of this Act, the Judge shall advise the jury that the law makes special provision for the giving of evidence by child complainants in such cases, and that the jury is not to draw any adverse inference against the accused from the mode in which the complainant's evidence is given:

(b) The Judge shall not give any warning to the jury relating to the absence of corroboration of the evidence of the complainant if the Judge would not have given such a warning had the complainant been of full age:

(c) The Judge shall not instruct the jury on the need to scrutinise the evidence of young children generally with special care nor suggest to the jury that young children generally have tendencies to invention or distortion:

(d) Nothing in paragraph (b) or paragraph (c) of this section shall limit the discretion of the Judge to comment on—

(i) Specific matters raised in any evidence during the trial; or

(ii) Matters, whether of a general or specific nature, included in the evidence of any expert witness to whom section 23G of this Act applies.

23I Regulations—

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

(a) Prescribing the procedure to be followed, the type of equipment to be used, and the arrangements to be made, where the evidence of a complainant is to be given by videotape:

(b) Providing for the approval of interviewers or classes of interviewers in such cases, providing for the proof of any such approval to be by production of a certificate and prescribing the form of that certificate, and prescribing the form of certificate by which the interviewer is to formally identify the videotape:

(c) Providing for the consent of the complainant to being videotaped, and specifying who may give consent on behalf of the complainant:

(d) Prescribing the uses to which any such videotapes may be put, and prohibiting their use for any other purposes:

(e) Providing for the safe custody of any such videotapes:

(f) Providing for such other matters as are contemplated by any of sections 23D to 23H of this Act or as may be necessary for the due administration of those provisions.

Appendix E

Public inquiries into cases of alleged child sexual abuse

Cleveland, United Kingdom

From January to July 1987 there was a massive increase in allegations of child sexual abuse in Cleveland, with 505 referrals to Cleveland Social Services compared with 288 in the same period of the previous year. Two consultant paediatricians at Middlesbrough Hospital had made an increasing number of allegations based on an unproven medical diagnosis termed "the anal dilatation test". Following these allegations, a large number of children were removed from their families by social workers.

A public inquiry, led by Justice Butler-Sloss, examined 121 cases where sexual abuse was alleged to have been identified using the test and the actions of the paediatricians and social workers involved. Of these cases, the courts subsequently dismissed the proceedings involving 96 of the children.

Manchester, United Kingdom

Over six months in 1990 in Manchester, 20 children from six families were taken into care by social workers who were convinced that some of the children had been given hallucinogenic drugs and subjected to organised ritual abuse. A judicial inquiry was commissioned to investigate the charges and the practices of the social workers. In March 1991 the judge severely criticised the practices of the local police and social workers and ordered that those children still in care be returned to their parents. An official government investigation was then held into the case.

Orkney, United Kingdom

In November 1990, following allegations of sexual abuse by a child in Orkney, seven younger siblings of that child were removed to the mainland of Scotland. During the months after their removal, the younger children were interviewed and three of them made allegations of what was understood to be organised sexual abuse involving the children and parents of other families and a local minister. On 27 February 1991 the Orkney Social Work Department removed nine children from the four other families whom they believed were involved.

The children were the subject of a reference to the Children's Hearing. The parents denied the grounds for referral and a proof to establish the grounds was arranged before the Sheriff. On 4 April 1991 the Sheriff held the proceedings incompetent and the evidence was never heard. After the Sheriff's decision the children were returned to Orkney. The Acting Reporter appealed successfully to the Court of Session against the Sheriff's decision, but abandoned further pursuit of the proof on the grounds of evidence.

Saskatoon, Canada

In July 1991 16 people in Saskatoon, including two people who were prosecuted as young offenders, were arrested and charged with over 70 counts of sexual assault against eight

foster children. The children's allegations included group and ritualistic sex with satanic overtones, and other perverted acts.

One of the people arrested pleaded guilty to four charges. Three others were convicted of several offences, but their convictions were overturned by the Supreme Court of Canada. Charges against the remaining 12 accused were all eventually stayed by the Crown. In 1994 the 12 accused commenced a civil malicious prosecution action against the two prosecutors, the investigating police officer, and a therapist in 1994. Their case was successful in 2003.

Newcastle, United Kingdom

In April 1993, following a publicised incident of indecent assault at a Newcastle nursery by a male employee, allegations were made of similar assaults by another male employee at a different Newcastle nursery. Over the course of a year, further allegations were obtained from approximately 30 other children of sexual and physical abuse, by both this employee and a second female employee. Counts relating to six children were selected to form the basis of criminal proceedings.

At the criminal trial in July 1994 the judge reviewed the evidence against the two former employees who had both been dismissed for "gross misconduct" in the interim. The judge concluded that the evidence was too weak to put before a jury and acquitted the two former employees. Newcastle City Council commissioned an independent report, published in 1998, which concluded that the two former employees had been guilty of abuse. In 2002 the former employees sued the Council and the authors of the report for libel and won.

Appendix F

Evidence Bill – clauses 103 and 121

103 Directions about way child complainants are to give evidence

(1) In a criminal proceeding in which there is a child complainant, the prosecution must apply to the court in which the case will be tried for directions about the way in which the complainant is to give evidence in chief and be cross-examined.

(2) An application for directions under subsection (1) must be made to the court as early as practicable before the case is to be tried, or at any later time permitted by regulations made under section 194.

(3) If an application is made for directions under subsection (1), before giving any directions about the way in which the complainant is to give evidence in chief and be cross-examined, the Judge-

(a) must give each party an opportunity to be heard in chambers; and

(b) may call for and receive a report, from any persons considered by the Judge to be qualified to advise, on the effect on the complainant of giving evidence in the ordinary way or any alternative way.

(4) When considering an application under subsection (1), the Judge must have regard to-

(a) the need to ensure-

(i) the fairness of the proceeding; and

(ii) that there is a fair trial; and

(b) the wishes of the complainant and-

(i) the need to minimise the stress on the complainant; and

(ii) the need to promote the recovery of the complainant from the alleged offence; and

(c) any other factor that is relevant to the just determination of the proceeding.

121 Judicial directions about children's evidence

(1) In a criminal proceeding tried with a jury in which the complainant is a child at the time when the proceeding commences, the Judge must not give any warning to the jury about the absence of corroboration of the evidence of the complainant if the

Judge would not have given that kind of a warning had the complainant been an adult.

(2) In a proceeding tried with a jury in which a witness is a child, the Judge must not, unless expert evidence is given in that proceeding supporting the giving of the following direction or the making of the following comment:

(a) instruct the jury that there is a need to scrutinise the evidence of children generally with special care; or

(b) suggest to the jury that children generally have tendencies to invent or distort.

(3) Despite subsection (2), if, in a proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:

(a) even very young children can accurately remember and report things that have happened to them in the past, but, because of development differences, children may not report their memories in the same manner or to the same extent as an adult would:

(b) this does not mean that a child witness is any more or less reliable than an adult witness:

(c) one difference is that very young children typically say very little without some help to focus on the events in question:

(d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than older children or adults:

(e) thus the reliability of the evidence of very young children depends crucially on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish open questions aimed at obtaining information from leading questions that put words into their mouths.

(4) This section does not affect any other power of the Judge to warn or inform the jury.