Submission to Law Commission Re Public Inquiries

1. I, Ross Francis, am an independent researcher. I have recently published, in the *New Zealand Law Journal*, a two-part paper entitled "New evidence in the Peter Ellis case". I have attached a copy for your convenience.

My submission in regards to a proposed Public Inquiries Act is based largely on my research into the Peter Ellis case. There are a number of issues pertaining to the ministerial inquiry into the Ellis case which I will discuss briefly. I will then briefly explain how these issues relate to the proposed Act.

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2. Part One of my research into the Ellis case (NZLJ [2007] 393) explores the expert opinion evidence. The Court of Appeal was unable to pass judgment on that evidence, which was, the Court argued, within the scope of, and worthy of consideration by, a commission of inquiry.

3. As explained in Part Two (NZLJ [2007] 439), Cabinet decided to establish a ministerial inquiry in preference to a wide-ranging inquiry. This inquiry did not come out of a vacuum. Leading experts such as Michael Lamb and Stephen Ceci had expressed concerns about the validity of the complainants' evidence. Leading suggestibility researcher Maggie Bruck supported Lamb's opinion. In 1997, Barry Parsonson carried out a thorough review of the complainants' evidence. His conclusion, according to the Justice Ministry, was "capable of raising serious doubt about the reliability of the complainant's (sic) evidence". Retired High Court Judge Sir Thomas Thorp reviewed the case for the Justice Ministry prior to Ellis' second appeal hearing. In his report of March 1999, he expressed concerns with some of the evidence which was used to convict Ellis.

In the circumstances, the ministerial inquiry, which was established in March 2000, should have laid the above concerns to rest. It failed to do so. Sir Thomas Thorp has recently noted that my research "must add to concerns expressed previously that [the Ellis] case may have gone awry" (NZ Herald, January 12, 2008).

4. *Why didn't the ministerial inquiry lay the case to rest?*
First, the then Minister of Justice, Phil Goff, appointed Sir Thomas Eichelbaum to head the inquiry. Sir Thomas had had a close working relationship with Justice Neil Williamson, who died in 1996. Sir Thomas said, in 1997, that he had had the "greatest admiration" for Williamson J, who Sir Thomas described as a "model judge". In addition, Williamson J (according to Sir Thomas) "conducted many of the most difficult trials of his time, and did so impeccably". Williamson J presided at Peter Ellis' trial and declared that he agreed with the jury's (guilty) verdicts.

Officials recommended to Goff that Sir Thomas head the ministerial inquiry. They have confirmed, in private correspondence, that they did not consider anyone other than Sir Thomas for that position.

5. Second, Justice Ministry officials Val Sim and Michael Petherick proffered advice to Sir Thomas on all aspects of his inquiry. Sim and Petherick were familiar with the Peter Ellis case. Sim, for example, had:

- asserted that the prosecution's case had been "rigorously tested"
- twice recommended that Ellis not be pardoned
- recommended that a commission of inquiry not be held into the case
- expressed concern for the "personal reputations" of the children's interviewers, the complainants and their families but not the creche workers or their families.

It is difficult to understand, given the circumstances, why Val Sim did not recuse herself from taking any part in Sir Thomas' inquiry. It is also difficult to understand why the Justice Ministry did not advise the minister that in the interests of justice, the ministry should not be involved in Sir Thomas' inquiry.

6. Third, the then Attorney-General, Margaret Wilson, supplied Cabinet with advice prior to its decision as to what, if any, inquiry should be established. Much of Wilson's advice was factually incorrect. Wilson argued that there should be no inquiry into the case. This advice possibly dissuaded Cabinet from opting for a commission of inquiry. Her advice was improper and, in this writer's opinion, went well beyond the scope of her position (not to mention her expertise). She failed to clearly articulate why an inquiry should not be established. Her main objections were that finality was an overriding principle, and an inquiry would raise doubts about the criminal justice system. Neither reason was compelling or cogent.

7. There were other problems with Sir Thomas' inquiry. Sir Thomas was aware that Cabinet, when deciding whether to establish an inquiry, had been advised that about six experts would probably be hired to advise on the complainants' evidence. Though there was nothing to prevent him from selecting six (or more) experts, he chose only two. One of his selections, Louise Sas, was highly controversial. None of the parties to the inquiry nominated Sas. In addition, she had published no research into child suggestibility, investigative interviewing of child victims, or memory. Each of these areas is crucial to fully understanding the case. Despite Sas' less than impressive credentials, Sir Thomas was led to believe that Sas had "high standing".

8. Before selecting the experts, Sir Thomas wanted to know where they stood "in the debate". He rejected Stephen Ceci, one of the world's leading experts on children's testimony, because of Ceci's "research direction" and "high profile". Ceci's expertise, it seems, counted against him. His non-selection had Val Sim's support. Indeed, she advised Eichelbaum to "discount" Ceci. However, in 1999, Sim advised the Secretary for Justice that she probably would have sought Ceci's formal opinion of the children's evidence – a recommendation made by Sir Thomas Thorp in his March 1999 review of the case – if the Court of Appeal had not been seized of the case. In retrospect, and given Sim's later support for Eichelbaum's non-selection of Ceci, that advice seems to have been less than honest. More recently, the Justice Ministry's chief legal counsel has confirmed that the ministry has no intention of

obtaining Ceci's formal opinion.

9. Surprisingly, Sir Thomas watched the evidential interviews and read testimony from the trial and depositions *before* he chose the experts. That possibly explains why he asked officials where each candidate stood in the debate. Once he learnt where the candidates stood, he must have had a good idea what the experts were likely to say when they evaluated the complainants' evidence. After talking with Val Sim and Thomas Lyon, Sir Thomas possibly expected Louise Sas to side with the complainants. Thus, it seems likely that Sir Thomas selected Sas because he wanted support for his view that the complainants should be believed.

10. The Justice Ministry appears to have lost crucial documents pertaining to the ministerial inquiry. How these documents could possibly go missing is a mystery that the ministry has been unable to explain.

11. Sir Thomas appeared to know little about child suggestibility and its potential effects. Although he observed that the specialist interviewers asked the complainants suggestive and leading questions – he also observed that the children were exposed to parental contamination – he clearly believed that such questions had no effect on the children's reliability. His opinion is in stark contrast to that of leading experts who have reported that such questions may have adversely affected the reliability of the evidence.

12. Sir Thomas made a number of errors of fact. For example, he claimed that the experts "reached the view that the children's evidence in the conviction cases was reliable". Both experts did not say that the children's evidence was reliable. One expert was unable to determine whether the children could be relied on. Graham Davies argued that their age and the historic nature of their claims meant that they were unable to provide:

> detailed and spontaneous accounts which are so useful from the point of view of making judgements on reliability…we cannot and should not expect a vivid and detailed account in these circumstances and nor in general do we get one from any of the children.

Sir Thomas argued that any allegations arising out of the complainants' later interviews generally did not result in charges. The fact is that later interviews did lead to charges and convictions. Nine of the sixteen counts on which Ellis was convicted came from allegations elicited in later interviews.

It is difficult to understand how someone of Sir Thomas' experience – he is a former Chief Justice – could make such fundamental errors. The possibility exists that Sir Thomas was not sufficiently competent to undertake an inquiry of such complexity, or that he believed the case against Ellis was so weak that he needed to bolster his findings, even if that meant distorting the facts.

Following the publication of my research, I contacted Sir Thomas in the belief that he would be happy to resolve some key issues. For example:

- Why did he select only two expert advisors?

- Why did he assess the children's evidence before, and not after, choosing the experts?
- Did Phil Goff know that he had the "greatest admiration" for Justice Williamson?
- Why did he say both experts reached the view that the children's evidence was reliable?
- Why did he say that most allegations arising out of the complainants' later interviews generally did not result in charges?
- How did Louise Sas' name come to his attention?
- What did he learn about Louise Sas during the course of his inquiry?

Sir Thomas refuses to respond to these questions.

13. The nomination and appointment of Sir Thomas was a big mistake. What motivated his nomination, and whether officials advised Phil Goff of Sir Thomas' relationship with Justice Williamson, is less important than its effect. At worst, the perception is that Sir Thomas' findings were unduly influenced by his relationship with the Ellis trial Judge. Sir Thomas' appointment clearly created an actual or perceived conflict of interest. I have seen no evidence that Sir Thomas declared this conflict.

14. Permitting Messrs Sim and Petherick to advise Sir Thomas was another serious misstep. Their involvement created a perceived or actual conflict of interest. Again, I have found no evidence to indicate that either Sim or Petherick declared this conflict.

15. The ministerial inquiry into the Peter Ellis case is a case study of how **not** to conduct a public inquiry.

NEW PUBLIC INQUIRIES ACT

16. I agree with the thrust of the Law Commission's proposals, especially its position that inquiries "should conduct themselves according to a presumption of public access..." (para 21). The ministerial inquiry into the Ellis case was closed to the public (remarkably, Peter Ellis was not permitted to appear before the inquiry). This meant that the inquiry lacked transparency.

17. One would hope and expect that if the proposed Public Inquiries Act becomes a reality, perceived or actual conflicts of interest (as described above) will become a thing of the past. Under the new Act, the Department of Internal Affairs will administer public inquiries (unless that department is the focus of any such inquiry). Parliamentary legal counsel will devise the terms of reference for inquiries. I support both of these proposals.

18. These measures are likely to lessen the probability that conflicts of interest will remain a problem. However, they don't remove the possibility. There should be serious consequences if those involved with the administration or handling of public inquiries do not declare potential, perceived or actual conflicts of interest. Someone who fails to declare a conflict should, in my opinion, be disbarred from ever taking part in a public inquiry and should face a substantial fine.

19. I support the recommendation that a new Public Inquiries Act should give inquiries the power to regulate their own procedures, subject to the rules of natural justice. However, it should be made clear to inquirers, and to officials involved with inquiries, what is appropriate behaviour and what is not.

20. Financial considerations should not be permitted to determine the breadth and depth of any inquiry. The ministerial inquiry into the Ellis case was cheap – less than a third of its half-million-dollar budget was expended – and its terms of reference narrow. Unsurprisingly, the concerns that caused its establishment remain unresolved.

21. Public inquiries should be as thorough as possible. Among some of the questions to be considered when the terms of reference for a fact-finding inquiry are being decided upon are:

- Is this inquiry likely to resolve the outstanding issues/concerns?
- What is required to bring resolution?
- Could the appointment of a lay person be of use to the inquiry?
- What does the inquiry need to do, and what resources does it require, to be able to arrive at the truth?

22. I support the Law Commission's recommendation that more than one inquirer be appointed to a complex or long-running inquiry. The commission acknowledges that "an inquiry's report may be less compelling without the agreement of more than one competent mind" (p181). I would go further and say that at least three inquirers (including one from overseas) should be appointed to an inquiry into a possible miscarriage of justice.

23. All documents relevant to a public inquiry should be retained and stored. They should be publicly available unless good reason exists to withhold the documents from public examination. If documents are requested but cannot be located, the department responsible for storing the documents should be held accountable.

24. Inquiries into possible miscarriages of justice should provide a specific power for an inquirer, or inquirers, to recommend a pardon. Ultimately, it will be up to Cabinet, or the Attorney-General or Prime Minister, to decide whether a pardon should be granted.

As quoted in your draft report, Hardie-Boys J has commented that commissions of inquiry are "not prevented" from inquirying into guilt and innocence if that is covered by their terms of reference. Of relevance here is the fact that the Court of Appeal appears to be incapable of accommodating some cases. At Peter Ellis' second appeal hearing, for example, the appellate court stated on no fewer than four occasions that it was unable to assess the weight that it should give to some of the evidence proffered by Ellis' legal counsel. The court said there were matters that were worthy of consideration by a commission of inquiry.

25. In the ministerial inquiry into the Ellis case, Val Sim advised Sir Thomas Eichelbaum:

- to discount Sir Thomas Thorp's report into the case
- to discard three of the world's leading experts on children's testimony
- to ignore any expert that had a "close publishing assocation" with these experts

Official documents show that Sir Thomas Eichelbaum believed, after talking with Sim, that Louise Sas, a little known psychologist and child advocate from Canada, had "high standing". Sim expressed concern for the "personal reputations" of the interviewers, the complainants and their families, but not the Civic Creche workers or their families. Also, Sim advised Sir Thomas Eichebaum to consult with US law professor Thomas Lyon. (Lyon was nominated by the Children's Commissioner and Crown Law Office, but could not take on the role of expert advisor.) Sim would, or should, have known that Lyon's advice was unlikely to be impartial. Lyon's views sit squarely outside the scientific mainstream and have been the subject of much criticism. According to Debra Poole, who created and oversaw the implementation of Michigan's forensic interviewing protocol for children:

> I have issues with Lyon's reading of the literature, how he slants it, and what he is willing to cite to make his points. I doubt you'll find him talking to people on both sides of the debate.

These facts, and others, suggest that Sim's advice to Eichelbaum was one-sided and prejudiced his inquiry. There seems little doubt that Sim acted in bad faith.

CONCLUSION

I support the thrust of the Law Commission's recommendations. The implementation of these recommendations should prevent a recurrence of the problems that bedevilled the ministerial inquiry into the Peter Ellis case. That inquiry is a case study of how not to conduct a public inquiry.

Signed by

Ross Francis

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