8 April 2008

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Dear Belinda Clark,

Official Information Request – February 28

I refer to Jeff Orr's reply of March 31 to my request of February 28.

I had asked Mr Orr if Michael Petherick had declared a potential or actual conflict of interest before participating in the ministerial inquiry into the Peter Ellis case. I also asked if Mr Petherick encouraged Val Sim to declare a potential or actual conflict of interest before she participated in that inquiry.

Mr Orr makes a number of statements which indicate he has not read various documents held by his own department. For example, he says that the ministry did not "participate" in the ministerial inquiry. He asserts that the ministry "is not an advocate for any 'side' … the Ministry's concern in every instance is to assess where the interests of justice lie." He believes there was no need for Ms Sim or Mr Petherick to declare a potential or actual conflict.

Mr Orr asserts that the ministry recommended, on two occasions, that Mr Ellis' case be referred to the Court of Appeal. What he forgot to say was that the ministry could have recommended that Mr Ellis be pardoned, but did not do so. He also forgot to say that following Mr Ellis' second appeal hearing, the ministry expressed disappointment with the Court of Appeal's position in respect of the arguments advanced on Mr Ellis' behalf. The ministry referred to the appellate's position as "very narrow and conservative". Consequently, it might have been expected that the ministry would agitate for a wide-ranging, well-funded and independent inquiry. Instead, officials recommended a quick and inexpensive inquiry, whose terms of reference could be (and were) influenced by the same officials. The same officials recommended the appointment of Sir Thomas Eichelbaum, a former friend and colleague of the late Justice Williamson. In 1997, Sir Thomas claimed that Neil Williamson – the presiding judge at Mr Ellis' trial – had been a "model judge". He had possessed:

> exceptional gifts of judgment, integrity and humanity. He conducted many of the most difficult trials of his time, and he did so impeccably. Neil was much more than an outstanding Judge … [he was] an exceptional human being.

Whether Justice Williamson was a “model judge” and handled Mr Ellis’ trial “impeccably” is surely a matter of debate. More importantly, it is difficult to see how the appointment of Sir Thomas furthered the interests of justice.

At the time of the ministerial inquiry, Val Sim and Michael Petherick were very familiar with the Ellis case. In March 1998, when rejecting Mr Ellis’ first application for a pardon, Ms Sim asserted:

> Our [justice] system has many safeguards to protect against miscarriages of justice…the actions and evidence of those involved in the prosecution case have been rigorously tested at depositions, at trial and on appeal.

We know that neither Ms Sim nor Mr Petherick advised Sir Thomas that the credibility of his findings could be harmed by the appointment of Dr Louise Sas, a little-known child advocate from Canada. We know that Ms Sim believed Sir Thomas was “required to seek opinions from two experts”. In fact, he was required to seek opinions from “at least” two experts. (Ultimately, he chose only two despite knowing that Cabinet had been advised “about” six experts were likely to be chosen.) We know that one of the Justice Ministry’s nominations, Dr Poole, though eminently qualified, was unlikely to have been a serious contender. This is because she had a close publishing association with Dr Michael Lamb, one of the three experts whose selection Ms Sim opposed. If Dr Poole was not a serious contender, why did the ministry nominate her? What was Sir Thomas’ opinion of her?

We know that Ms Sim did not want Sir Thomas to appoint Professor Stephen Ceci, one of the world’s leading experts on children’s testimony, or Dr Barry Parsonson. In March 1998, Ms Sim said that Dr Parsonson’s 1997 report into the case “casts considerable doubt on the reliability of the evidence given by the complainants…”. At the time of Sir Thomas’ inquiry, Dr Parsonson’s analysis had not been tested; it remains untested. It is not clear why the ministry has not sought to test Dr Parsonson’s review given the comments of the ministry’s previous chief legal counsel.

Ms Sim was aware that Prof. Ceci had, in 1995, raised concerns about the reliability of the complainants’ evidence. In April 1999, she indicated, in response to advice from Sir Thomas Thorp, that she probably would have sought Prof. Stephen Ceci’s formal opinion regarding the children’s evidence if the Court of Appeal not been seized of the case. She made it clear to Sir Thomas Eichelbaum, however, that it would not be appropriate for him to appoint Prof. Ceci. Did she mislead the Secretary for Justice (and the Minister) when she declared she had given Thorp’s advice “serious consideration”? Why did she think Prof. Ceci was unworthy of selection by Sir Thomas Eichelbaum when, a year earlier, she apparently believed that his opinion could be helpful? Did she ignore Thorp’s advice – as seems likely – because she was afraid of what Prof. Ceci might say? If so, did Ms Sim act in the best interests of justice, or did she behave improperly?

Eichelbaum asked Ms Sim whether Thorp’s 1999 report was covered by his terms of reference. She was uncertain. She considered that because the

report was not publicly available, the “safest course” was to discount it. Eichelbaum agreed. Ms Sim, who refused to publicly release Thorp’s report until Eichelbaum’s inquiry had concluded, would have been aware that the terms of reference for Mr Ellis’ second appeal hearing were widened because of Thorp’s review. It is difficult to understand how Ms Sim’s advice to Eichelbaum was in the best interests of justice.

What we know is that Ms Sim advised Sir Thomas to:

- overlook three of the world’s leading experts on children’s testimony and any experts with a “close publishing association” with these experts;

- talk to Thomas Lyon, an American law professor whose views on the suggestibility of children are well outside the scientific mainstream. He is, according to Dr Debra Poole, unlikely to be found “talking to people on both sides of the debate”.

Ms Sim was concerned about the effect an inquiry might have on the “personal reputations” of the children’s interviewers, the complainants and their families. She shared her concerns with Sir Thomas. It is not clear if she was equally concerned with the personal reputations of eleven childcare workers, each of whom was judged to have been unfairly dismissed when the Civic Creche closed down (due to the police investigation). It is not clear if she was equally concerned for the four childcare workers whose personal reputations undoubtely suffered after being charged with sexual offences against young children. Ms Sim doesn’t appear to have shown any concern for Peter Ellis or his mother, whose flat was raided by police on the suspicion that she, too, had molested children.

Cabinet took advice from the Secretary for Justice before it opted for a ministerial inquiry. The Secretary for Justice, presumably acting on the advice of Ms Sim, advised then-Justice Minister Phil Goff that a commission of inquiry was “unlikely to satisfy public doubts” about the case. How a much cheaper and narrower ministerial inquiry would satisfy public doubts was not explained. Nevertheless, the ministry preferred such an inquiry because it was likely to cause “less distress and trauma for the creche children and their familiies”. The distress and trauma caused to eleven workers and their families by the police investigation into the Civic Creche was not mentioned. The interests of these individuals are as important as the interests of the creche children (who, of course, are now adults).

In 2003, Ms Sim advised the Justice and Electoral Select Committee that regard must be had to the “impact that a further inquiry focused on the Ellis case would have on the child complainants”. In her oral submission to the select committee she expressed concern with the effect an inquiry might have on the professionals involved:

> [An] important consideration…is the interests of all the people who would be affected by the establishment of an inquiry…they include the professionals caught up in the case…

She again failed to mention the interests of eleven former creche workers or their families. The "professionals caught up in the case" include Colin Eade, Sue Sidey, Cathy Crawford, Lynda Morgan, and Karen Zelas. Ms Sim, however, did not explain why or how any of these individuals would be affected by the establishment of a commission of inquiry. When I spoke with Lynda Morgan (who now goes by the name Morgan Libeau) in 2006, she was adamant that she and other professionals had performed their job to the required standard. If she is correct, a broad inquiry might be expected to reach the same conclusion. Instead of being concerned for the professionals' reputations, ministry officials should regard such an inquiry as an opportunity for those professionals to demonsatrate just how well they performed throughout the investigation into the Civic Creche.

During her oral submission to MPs, Ms Sim was less than forthcoming with her own views about the Ellis case. She refused to be drawn on whether a miscarriage of justice may have occurred, explaining that she had not been privy to all of the evidence. But she told MPs:

> There is clearly a section of the public that remains concerned about what happened in the Ellis case, and fears that there has been a miscarriage of justice. … There are other strongly held opinions that justice was done and has been thoroughly tested.

One of those "other strongly held opinions" was her own, as evidenced by her (1998) comment that "the actions and evidence of those involved in the prosecution case have been rigorously tested". She didn't repeat this comment to MPs. Despite Mr Orr's claim that the ministry is not an advocate for any side, it is apparent that the ministry's previous chief legal counsel did advocate for one side re the Ellis case.

Mr Orr says that officials did not "participate" in the ministerial inquiry. The usual definition of participate is "to take part". In August 2000, Ms Sim wrote to a colleague: "I have been working with Sir Thomas Eichelbaum on engaging overseas experts for the Ellis inquiry". If Ms Sim had not participated in the inquiry, presumably she would have said that only Sir Thomas was working on engaging overseas experts. More recently, Mr Petherick advised me that he could not explain why Dr Louise Sas' name was given to Sir Thomas when the names of more highly qualified experts were not. "We went through a process to choose the experts and she was selected as part of that process", he said (italics added). If the process had been Sir Thomas' and his alone, Mr Petherick might have been expected to say that "Sir Thomas went through a process to choose the experts…".

Ministry records show that Sir Thomas worked very closely with Ms Sim and Mr Petherick. On 24 June 2000, Sir Thomas emailed Mr Petherick and advised him that Prof. Thomas Lyon had shown "some interest" in taking on the role of expert advisor. He asked Mr Petherick: "if he [Prof. Lyon] offered,

what would your and Val's reaction be?" Why did Sir Thomas need to know Mr Petherick's and Ms Sim's reaction to the posible appointment of Prof Lyon? After all, the experts' selection was, according to Jeff Orr, a matter for Sir Thomas and "not the Ministry of Justice".

lt's apparent that Ms Sim and Mr Petherick participated in, and made significant contributions to, the ministerial inquiry. Whether their contributions were in the interests of justice is open to debate. If the ministry had recommended the appointment of Sir Thomas Thorp as inquiry head, and if he had appointed the best experts in their field, it seems reasonable to believe that his conclusions could (and probably would) have been vastly different from those of Sir Thomas Eichelbaum. Does that fact concern you?

The case for the Crown has been put to Mr Ellis' peers only once, at trial. However, key witnesses did not appear at Ellis' trial; the defence was prevented from cross-examining or leading evidence on matters going to the heart of the complainants' credibility (and reliability); the expert's prosecution witness was permitted to say, among other misleading and irrelevant testimony, that a fear of spiders and insects "may be consistent with child sexual abuse"; the same witness withheld crucial evidence from the Court and apparently perjured herself; jurors were not told that mass allegation creche cases are sepcial cases that require particular care by investigators; Mr Ellis was denied his choice of legal counsel while the prosecution was led by an experienced QC; and there were irregularities wth the make-up of the jury. All of these facts would suggest that Mr Ellis did not receive a fair trial. Indeed, Judith Ablett Kerr QC, representing Mr Ellis, recently advised the Minister that jurors were "never in a position to make any real assessment of the reliability and credibility of the complainant children". It is thus difficult to understand what motivated Val Sim to say that the prosecution case had been "rigorously tested", unless she allowed any personal feelings about the case to interfere with her professional judgment.

On 14 November 2007, I wrote to Ms Sim. I asked her several questions pertaining to the ministerial inquiry. I had put some of these questions to her in an email dated 16 October 2007 to which she did not respond. She failed to respond to my later request for information. I have attached a copy of my 14 November letter for your convenience. You will note that one of the questions asked of Ms Sim was: Is it fair to say that at the time of the ministerial inquiry you believed that Peter Ellis' convictions were safe? I suspect that most reasonable people would come to the conclusion that Ms Sim believed Mr Ellis' convictions were safe at the time that inquiry was established.

I note that the proposed Public Inquiries Act should ensure, according to Law Commissioner Helen Aikman, that public inquiries "overcome any perceptions of a conflict of interest". That is because the Department of Internal Affairs will be administering all such inquiries and parliamentary legal counsel will be drafting their terms of reference. One can only speculate how the ministerial inquiry into the Ellis case might have unfolded under the new Public Inquiries Act.

I would appreciate it if you supplied me with answers to the following questions:

- Are staff at the Justice Ministry obliged to declare potential or actual conflicts of interest? If not, why not?

- Do you believe that Val Sim should have declared a potential or actual conflict of interest before taking part in the ministerial inquiry into the Ellis case? If not, why not?

- Do you believe that Val Sim should have recused herself from the inquiry? If not, why not?

- If Val Sim were still employed by the Justice Ministry and could participate in another inquiry into the Ellis case, would you encourage her to declare a potential or conflict of interest? If not, why not?

Please advise me if you have any queries regarding this letter, or if you require further information.

Yours sincerely,

Ross Francis