MINISTRY OF JUSTICE
Tāhū o te Ture

Hon Simon Power, Minister of Justice

Christchurch Civic Crèche (Peter Ellis) case: letter from Dr Brash, Ms Rich and Dr Hood

Date:	12 March 2009	**File Number:**	CON-34-05-02

Action Sought	**Timeframe**
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Contacts for telephone discussion (if required)

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Minister's office to complete

☐ Noted ☒ Seen	☐ Approved ☐ Withdrawn	☐ Overtaken events ☐ Not seen by Minister	by ☐ Referred to: _____

Minister's office comments

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Purpose

1. Attached is a detailed report responding to your request for advice on a request by Dr Don Brash, Katherine Rich and Dr Lynley Hood for a Commission of Inquiry into the Christchurch Civic Crèche (Peter Ellis) case.

Letter from Dr Brash, Ms Rich and Dr Hood

2. Dr Brash, Ms Rich and Dr Hood ("the writers") wrote to you on 25 November 2008 requesting a Commission of Inquiry into all aspects of the investigation and legal processes relating to the Christchurch Civic Crèche (Peter Ellis) case. They argue that the justice system has failed repeatedly in the Christchurch Civic Crèche case, has been unable to self-correct, and that a Commission of Inquiry is the only appropriate avenue for addressing concerns about the case. They ask that a Commission of Inquiry be chaired by an overseas judge with the power to recommend a pardon for Peter Ellis.

Attached report

3. The attached report provides a chronology of the case and its various stages of consideration within the criminal justice system and by the Executive branch of Government. The report also addresses:
   - the arguments presented over the years in support of a Commission of Inquiry into the case;
   - the Executive branch of government's role in correcting miscarriages of justice, both generally and in Mr Ellis' case; and
   - the option of establishing a Commission of Inquiry to resolve concerns about the Christchurch Civic Crèche case and relevant considerations.

4. The report does not make recommendations but outlines three options for responding to the writers' request:
   - recommend that the Governor-General pardon Mr Ellis immediately without further inquiry;
   - agree to establish a Commission of Inquiry; or
   - decide that a Commission of Inquiry is not justified and refer the writers to existing processes that remain available to Mr Ellis.

5. One or more of the options could be taken to Cabinet for decision.

Recommendations

6. It is recommended that you:

   1. **Note** the contents of this briefing; and

   2. **Note** that officials are available to meet with you to discuss the contents of this briefing.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

APPROVED / SEEN / NOT AGREED

Hon Simon Power
Minister of Justice
Date: 31/3/09.

MINISTRY OF JUSTICE
Tāhū o te Ture

BRIEFING FOR HON SIMON POWER, MINISTER OF JUSTICE

ON THE PETER ELLIS CASE

12 March 2009

Contents

The Christchurch Civic Crèche case: the investigation, trial, appeals and petitions

Peter Ellis' employment

1. Mr Peter Ellis commenced employment at the Christchurch Civic Childcare Centre in September 1986 as a reliever. He was given a permanent position in February 1987 and commenced a 3 year course towards a child-care certificate which he completed and passed in 1990.

2. There were an estimated 70-75 families using the crèche from 1989 onwards, with a daily average of about 40 children. Staff numbers were aimed to maintain a ratio of 1:4 for the nursery and 1:8 for the larger pre-school room.

Complaints and interviews

3. On 20 November 1991, a crèche mother reported to the principal of the crèche that her son had said he did not "like Peter's black penis". 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 commenced interviewing crèche children.

4. The management committee of the crèche called a meeting of parents at the crèche on 2 December 1991 which was attended by police and Social Welfare representatives. There had been some media publicity and the object of the meeting was to advise parents that there were concerns, but no specific allegations. They were asked to look for any noticeable changes in their children's behaviour and any events which might explain them.

5. Ms Sidey, a psychologist with the Specialist Services Unit of the Department of Social Welfare, talked to the parents about the interviewing process and what was involved and said that, if parents did have concerns about their children, they could be discussed with her and a decision could be made on whether to interview them. In the initial interviews, the children concerned did not make any allegations of sexual offending, and at one stage the police told the management of the crèche that the inquiry had been completed. However, on 30 January 1992, the first allegation of sexual abuse was made and after that, there were a number more.

6. Interviews continued with those children whose parents had concerns. Ms Sidey had the assistance of two other specialists. They were conducted in accordance with the Evidence (Videotaping of Child Complainants) Regulations 1990. Generally, before an interview commenced there would be a short discussion between the interviewer and the parents covering any disclosure the child had made and their responses to it, and any behaviour they had noted, with possible explanations for it, and the child's background and friends and contacts with other crèche children.

7. These interviews were conducted under the overall supervision of Dr Karen Zelas, a specialist child psychiatrist with international experience in the field of child abuse. It was a massive exercise and overall there were interviews of 118 children, most of them disclosing no abuse and serving to reassure parents. In

some cases, there was mention of abuse but the parents did not want to put the child through the court process. The interviews continued throughout 1992 with most of the eventual complainants being interviewed a number of times.

8. Mr Ellis was arrested on 30 March 1992 and was charged with indecently assaulting a child. He had been interviewed by Detective Eade of the Christchurch Child Abuse Unit and had consistently denied any misconduct.

9. On 31 March 1992, there was a meeting of crèche parents at Knox Hall, Christchurch, addressed by Ms Sidey, Dr Zelas and police representatives. It appears they spoke again in general terms about what had been happening and warned parents about questioning the children or other conduct which might interfere with the interview process. A support group of parents had been set up to assist the mother who had made the first complaint. A document prepared by the mother setting out complaints about Mr Ellis made by various children was circulated. This document was the subject of discussion at trial as a possible source of contamination of the children's evidence.

10. On 10 October 1992, as a result of the interviewing process, four female crèche workers were also arrested.

Depositions

11. On 2 November 1992, the deposition hearing commenced, concluding on 4 February 1993 when Mr Ellis and the four other crèche workers were committed for trial on a total of 42 charges involving 20 children.

Charges against other crèche workers

12. As stated, as well as Mr Ellis, charges were also brought against four of the women crèche workers at the Christchurch Civic Crèche – Marie Keys, Janice Buckingham, Gaye Davidson and Deborah Gillespie.

Charges against Marie Keys, Janice Buckingham and Gaye Davidson

13. Three of the women each faced one charge of being a party to an indecent act committed by Peter Ellis. The allegation was that the three women were present at (and encouraged) an incident at which a child (Child X) was taken to an address in Christchurch. At the address, a circle was drawn on the floor and the children placed in the middle with adults standing on the outside. Some of the adults were dressed in either black or white clothes; the children in the circle were naked. The children were told to and encouraged to kick each other in the course of which Child X was kicked in the genitals. The three women were said to have watched this event and laughed. It was also said that, after the incident, an adult named Andrew inserted a needle into the penis of the child.

14. The only evidence which was adduced at depositions hearing in support of this allegation was an evidential videotaped interview with Child X. There was no supporting evidence from any of the other persons named by Child X, no evidence of any reasonably contemporaneous complaint by any child who was said to be

present at the incident and no evidence of physical injury to Child X at that time or later.

15. Following a defended deposition hearing on 11 February 1993, the three women were discharged under section 347 of the Crimes Act 1961. In an oral judgment, Williamson J gave three reasons for his decision to discharge:

    - 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. In this regard, Williamson J noted that "it must be a real fear that a jury may judge the three accused on the basis that they should have been alerted by Peter Ellis' sexual statements or activities, or by what the children had been saying to them or by the need to protect very young children who were in the case;" and

    - that the unavoidable delay in their trial on this charge may have resulted in hardship to the then seven year old Child X who would have had to wait until the other trial of Mr Ellis was completed.

16. Williamson J 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.

Charges against Deborah Gillespie

17. Deborah Gillespie faced one charge of doing an indecent act in a public place and one of carrying out an indecent assault on a child.

18. The charge of doing an indecent act in a public place was based on an allegation that Deborah Gillespie had engaged in sexual intercourse with Peter Ellis in front of children at the crèche. The only evidence in support of the allegation was a videotaped evidential interview with a child in which dolls were used to simulate the particular act and the evidence of the interviewers. At the deposition hearing on 11 February 1993, Judge Anderson noted that the evidence of the interviewers was "at best equivocal; Ms Crawford [the interviewer] saying she really had no expertise in the matter whatsoever". On that basis, Judge Anderson considered that the evidence was not sufficient to place the defendant on trial and she was discharged.

19. The charge of indecent assault related to an allegation that Deborah Gillespie, jointly with Peter Ellis, indecently assaulted a child at the crèche by touching her vagina with their fingers. This charge was based primarily on the evidential interview with the child concerned. At depositions, Judge Anderson held there was a case to answer and committed the defendant for trial. Subsequently, the Crown was advised that the child was not available to give evidence at the trial. The Crown accepted that, without the evidence of the child, it was unlikely that any jury properly directed would convict on the charge. On that basis, the accused was discharged pursuant to section 347 of the Crimes Act 1961.

Crèche closure

20. On 1 September 1992, (approximately five months after the arrest of Peter Ellis), the Christchurch City Council was asked at short notice to receive a deputation from the Ministry of Education, the Department of Social Welfare, and the Police. This meeting took place on 2 September. At that meeting, a Police inspector revealed to the Council that there were ongoing Police investigations into the crèche but refused to disclose any information about the nature of those investigations. Police stressed that the discussion at the meeting was to be kept in the strictest confidence even from the Mayor. After receiving undertakings of confidentiality from Council officers present at the meeting, the Police explained that they considered children at the crèche to be in serious danger and, as a result, wanted the crèche closed that very day not later than 1.00pm.

21. The Council was reminded that the crèche could only operate by virtue of a licence issued by the Ministry of Education. Police indicated that their preferred course of action was for the Ministry of Education to withdraw the crèche licence and to do so that day. If that did not occur, the alternative course was to lay a complaint against the Council. The result of this meeting was that, after securing a day's grace, the Council entered into an arrangement whereby the Ministry of Education gave the Council a letter of suspension of the crèche licence and the Council in turn handed over a letter saying the Council had no representations to make about the matter. Thereupon, the Ministry of Education cancelled the crèche licence and the crèche was closed.

Personal grievances

22. On the same day the crèche was closed, the manager gave notices to the crèche staff that the crèche would be closed with immediate effect and that staff were to be made redundant. The locks were changed and a press statement was released. The next day, following representations from the union, the notices were substituted with notices that, pending consultation with the union, all staff were suspended on pay for two weeks. That period was later extended until the union was notified that the workers' employment would terminate on 22 October 1992.

23. Meanwhile, 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's employment contracts and in failing to give the workers the opportunity to answer the allegations from the police.

24. The Employment Court[1] concluded that the crèche workers were entitled to compensation for unjustifiable dismissal, firstly as the dismissals were not for redundancy but because the Council acted on suspicion that the staff were sexually abusing children, and secondly, because of process failure in that the Council did not give two weeks' notice to the union of termination of employment for redundancy.

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[1] *Davidson* v *Christchurch City Council*, Employment Court, Christchurch (CEC7/95, 7A/95) and *Davidson* v *Christchurch City Council*, Employment Court, Wellington (CEC7B/95) and *Davidson* v *Christchurch City Council*, Employment Court, Christchurch (CEC7C/95); (C48/94)

25. On appeal, the Court of Appeal[2] 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.

26. The Court of Appeal agreed that there had been a process failure in that the redundancy notices issued did not comply with the provisions of the employment contracts. However, 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.

Peter Ellis' trial

27. The trial of Mr Ellis on 28 charges alleging indecency with 13 young children commenced on 26 April 1993 and lasted for six weeks.

Sections 23D to 23I of the Evidence Act 1908

28. Sections 23D to 23I of the Evidence Act 1908, now replaced by the Evidence Act 2006, applied to Mr Ellis' trial. Amongst other things, these sections:

    - allowed the use of screens, closed circuit televisions and videotaped evidence for child complainants (section 23E);
    - permitted expert evidence about the intellectual attainment, mental capability and emotional maturity of a child complainant and whether a complainant's behaviour was consistent with behaviour of sexually abused children of a similar age (section 23G). Section 23G did not allow the expert to comment directly or indirectly on the credibility of the child complainant's evidence or express an opinion on whether sexual abuse had occurred; and
    - provided that judges should not issue a general instruction to juries on the need to exercise special care in scrutinising the evidence of young children or suggest to juries that young children as a class of witnesses have a tendency to invent or distort (section 23H). Section 23H did, however, allow judges to comment on specific matters relating to a child complainant's evidence during a trial.

Evidence at trial

29. Pursuant to an order made under section 23E of the Evidence Act 1908, the trial evidence of the child complainants was given by way of the videotape interviews. Additional oral evidence, including cross-examination, was given by way of closed circuit television. The Crown case included evidence from a parent or parents of each complainant, and from Ms Morgan and Ms Sidey, who had conducted the evidential interviews in question. In addition, Dr Zelas gave expert evidence in terms of section 23G of the Evidence Act, and also on the topic of contamination

[2] *Christchurch City Council* v *Davidson* [1997] 1 NZLR 275

generally, including children's memory and recall capabilities. The Crown also called medical evidence, and other crèche workers who had been employed over the relevant times, including one of the women who had been arrested but discharged. Police evidence included that of Detective Eade, the officer in charge of the investigation.

30. Evidence for the defence was given by Mr Ellis, other parents who had children attending the crèche at relevant times, and a number of other crèche workers including the remaining two who had been earlier arrested but discharged. The defence expert was Dr Le Page, who gave evidence as to children's recall ability, suggestibility and in relation to the matters set out in section 23G of the Evidence Act.

Convictions and sentence

31. Mr Ellis was convicted on 16 counts in relation to 7 children. Three were the subject of a discharge by the judge during trial, and 9 verdicts of acquittal were entered. Appendix A provides further details of the counts on which Mr Ellis was convicted. On 22 September 1993, Mr Ellis was sentenced to 10 years of imprisonment. Addressing his sentencing remarks to Mr Ellis, Justice Williamson observed:

> "The jury were in a unique position in this case. Unlike almost all of those who have publicly feasted off this case by expressing their opinions, the jury actually saw and heard each of the children. They also heard your evidence and that of the other former Christchurch Civic Crèche workers. They disbelieved you. They believed the children and I agree with that assessment."

The First Appeal

32. The first appeal was heard in 1994. On appeal against conviction and sentence, Mr Ellis alleged that the verdicts were unreasonable in that the evidence of the complainant children was not credible and the nature of the interview process was unsatisfactory. He also claimed that there was a general miscarriage of justice arising from several specified grounds and that there were a number of inconsistencies where he had been convicted of charges based on earlier disclosures but acquitted of those based on later, more bizarre allegations.

33. One of the child complainants retracted her allegations against Mr Ellis during the course of the appeal hearing, claiming that she had lied during the interviews.

Evidence of complainant children not credible

34. In alleging that the children's evidence was unreliable, Mr Ellis' counsel took the Court of Appeal through extracts from transcripts of videos played to the jury to demonstrate the improbability of what the children were saying when viewed against independent evidence of place and circumstances in which the conduct was supposed to have occurred.

35. The Court of Appeal was not persuaded that anything in the material placed before the Court by Mr Ellis made the complainants' evidence unworthy of belief. The

Court of Appeal rejected all criticisms made in respect of each complainant's evidence, or the interview process used to obtain that evidence. The Court of Appeal was not persuaded that any of the matters raised regarding the design and operation of the crèche meant that the abuse described by the children could not have happened, or that their evidence of it could not be relied on. They were similarly unconvinced about the alleged lack of opportunity for abuse away from the crèche. The Court of Appeal concluded that, although the matter called for careful consideration by the jury, nothing placed before them rendered the accounts given by the various complainants inherently improbable or unworthy of belief.

The interview process

36. In considering claims that the interview process was unsatisfactory, the Court of Appeal concluded that the professionalism of the three women who conducted the interviews was obvious from the transcripts and the evidence they gave about their training and extensive experience. Although there was criticism about some of the questions the interviewers asked and the way some of the evidence was elicited, the Court was satisfied that this was "of no real moment." The Court commented that:

> "The interviewers in this case were well aware of the need for a neutral approach and knew the dangers of asking leading questions (ie. questions which suggest the appropriate answer). The jury had the advantage of listening to and observing them and the children throughout the many hours the tapes were played in Court and they were able to assess the spontaneity and genuineness of the child's reactions and disclosures, and the effect of the interviewer's attitude and questioning. From the extracts of the transcripts to which we have been referred, the interviewer can be seen in some cases to be following up information received from a parent, but without inappropriate persistence or leading, and we do not accept the submission that they were working under an agenda with the object of obtaining disclosure of abuse in the belief that it had occurred."

Playing of the tapes

37. One of the features relied on by Mr Ellis' counsel to demonstrate the allegedly unsatisfactory nature of the interview process and the lack of credibility of the child complainants was the increasingly bizarre nature of the conduct that they described in successive interviews, some of which was not shown by the Crown to the jury. It was claimed that the defence was handicapped by the Judge's pre-trial ruling limiting the playing of those tapes and cross-examination of the complainants on them.

38. The Judge had ruled that the Crown did not need to produce as evidence the tapes which did not make allegations on which the Crown relied. Rather, the Crown had to supply that evidence to the defence. If the defence wished to cross-examine on any matters in a taped interview not played by the Crown, it could ask for that tape to be played, but only so far as it was relevant to the charges being considered by the jury.

39. The Court of Appeal noted that the Judge's ruling was made to prevent the trial becoming enmeshed in all the collateral and peripheral matters covered in the tapes not relied on by the Crown, and to avoid exposing the jury to the playing of many hours of irrelevant material, thereby distracting them from consideration of the real issues.

40. Mr Ellis' counsel conceded that the defence was not denied an opportunity to play whatever tapes they had requested. It was argued, however, that the defence had felt constrained by the Judge's insistence on relevancy from seeking more extensive playing to demonstrate the way the interview process had led the children into making these extreme allegations.

41. The Court of Appeal did not accept this as a valid criticism. The Court noted that, even without the tapes being played, some of the complainants readily admitted in cross-examination to making the more bizarre allegations described in the tapes not shown to the jury. In the Court's assessment, the jury had ample opportunity to judge the process from the extensive material played to them and concluded that "the ruling about the tapes was one which the Judge was entitled to make in the circumstances of this trial and that it caused no prejudice to the defence."

General miscarriage of justice arising from specified grounds

42. Counsel for Mr Ellis also made arguments that there was a general miscarriage of justice arising from any one or more of six specified grounds. Several of those grounds were dealt with by the Court of Appeal under the first ground relating to the unreasonableness of the verdict. Those remaining are set out below.

Retention of transcripts by jury

43. Mr Ellis' counsel criticised the fact that the jury were allowed to retain and use transcripts of the complainants' video recordings of evidence-in-chief, and contended that it was unfair for the jury to have transcripts of only the tapes played by the Crown and not those defence tapes which were played. The Court of Appeal noted that it is now commonplace to provide transcripts to assist a jury and that this was not inappropriate in a trial of this length, containing many hours of screening. The Court said that, in the overall context of the case, the fact that the jury did not also have transcripts of the defence tapes did not effectively prejudice Mr Ellis, particularly because in instances where the defence was able to make real in-roads in cross-examination there were verdicts of not guilty.

Evidence from Dr Zelas

44. The next ground was a complaint that the extent of the evidence permitted from Dr Zelas in terms of section 23G of the Evidence Act occasioned a miscarriage of justice. Mr Ellis' counsel suggested that Dr Zelas was in an "uneasy" position because she acted in a supervisory role in the interview process and then appeared as an expert expressing the sorts of opinions authorised by section 23G. These opinions were about the consistency of the complainants' behaviour with that of sexually abused children of the same age group; the intellectual attainment, mental capability, and emotional maturity of complainants, and the general development level of children of the same age group. Counsel did not suggest

that Dr Zelas was disqualified from giving such evidence, but that she was in a difficult position from which to draw the fine line between evidence allowed under the section and the expression of an opinion on the credibility of particular complainants.

45. The Court of Appeal was unequivocal in its conclusion that, in the extensive evidence given by Dr Zelas, they detected nothing to substantiate the suggestion that she overstepped the limitations imposed by section 23G and started expressing views on the credibility of individual complainants.

Judge's summing up

46. Finally, the Court of Appeal considered the suggestion that, in summing up, the trial Judge failed to put the defence case adequately and adopted a prejudicial treatment of its approach. The Court of Appeal concluded that there was nothing of substance in this ground to give them any concern over the guilty verdicts and noted that if the judge had got the defence case so badly wrong, it was strange that there was no request at the close of the summing-up for him to rectify this.

Inconsistent verdicts

47. Mr Ellis' counsel argued that the verdicts on some counts were unreasonable or resulted from a miscarriage of justice because they were inconsistent. The Court of Appeal addressed allegations of inconsistency in respect of three children where Mr Ellis had been convicted of charges based on earlier disclosures but acquitted of those based on later, more bizarre allegations. The Court was not persuaded by these submissions. It found in each instance that, having regard to the circumstances and content of the disclosures, the jury was entitled to accept the children's earlier accounts and reject the later ones.

48. In dismissing the appeal, the Court of Appeal observed:

> "Our overall judgement of the case is that after this long trial the jury were fully justified in their conclusion that charges against the accused had been established beyond reasonable doubt."

Retraction of allegations by Child A

49. During the appeal, one of the complainants (referred to as Child A in the Court of Appeal judgment) retracted her allegations against Mr Ellis, saying that she had lied during the interviews. The hearing was adjourned for a report to the Court to be prepared by an agreed independent barrister. The report indicated that, while Child A had withdrawn her allegations, the barrister did not find her explanation that she had made up the details convincing. In the end, he concluded that he was in a position of some doubt on the issue.

50. The Court shared the doubts of the counsel who saw the child and concluded that they were by no means satisfied that she did lie at the interviews, although she might genuinely believe that she did. With such doubts, it quashed the convictions arising out of the complainant's evidence.

51. The Court clearly concluded, however, that giving Mr Ellis the benefit of the doubt did not affect its view of the correctness of the other convictions.

Application for Royal prerogative of mercy and reference back to the Court of Appeal

52. Following conviction and sentence, a person can apply to the Governor-General for an exercise of the Royal prerogative of mercy to either grant a free pardon or to refer the convictions or sentence back to the courts for further consideration. Such a referral normally only occurs once a person's rights of appeal have been exhausted.

53. On 2 December 1997, following the Court of Appeal's decision on his case, Mr Ellis filed a petition seeking a free pardon in respect of his remaining 13 convictions, or, alternatively, that the convictions be returned to the Court of Appeal for further consideration. The essence of Mr Ellis' contention was that the criminal justice system had failed to protect him and to safeguard his rights. He also contended that a gross miscarriage of justice had been allowed to occur which was not able to be rectified because the very structure of the appellate system precluded a revisiting of the whole issue de novo. Mr Ellis alleged that the failure in the system comprised 5 multiple components:

The Investigation
Mr Ellis contended that the investigation was not an investigation by an objective agency but "rather as the consequence of a subjective validation process initiated by individuals predisposed to concluding that sexual abuse had occurred regardless of any supporting evidence of substance." Criticism was made of the way in which the prosecution came into being (including the atmosphere in Christchurch at the time), the role of the Specialist Services Unit, the method in which the interviews were conducted and the role of the parents. The petition also questioned the character, fitness and competence of the police detective in charge of the investigations, Detective Eade. Mr Ellis submitted that the Detective's conduct contributed to a miscarriage of justice.

Children's Evidence
Mr Ellis contended that "since the Court of Appeal hearing it had become clear that the techniques used in obtaining evidence from the child complainants carried an unnecessarily high risk of contamination." This was supported by an opinion from a psychologist, Dr Parsonson;

The Retraction
Mr Ellis submitted that the Court of Appeal was overly sceptical about the validity of the retraction of Child A, even though the Court decided to quash the convictions relating to that child. He submitted that in light of the current state of scientific evidence, the retraction raised serious concerns as to the allegations of all the complainants, especially as Child A's testimony was the most credible, coherent and cogent;

The Trial Process
Mr Ellis outlined a range of concerns about the unfairness of the trial process itself including the "sanitised" version of various allegations presented by the indictments, the alleged curtailment of the defence's cross-examination by the trial Judge, and the trial Judge's failure to require all disclosure interview tapes to be played; and

The Jury
The petition alleged that some members of the jury had associations or connections with the prosecution case that made it inappropriate for them to sit in judgement of Mr Ellis. One relationship concerned a juror who was the partner of a work colleague of Child A's mother. A second issue related to an allegation that another juror, at an early stage in the trial expressed a view in a public place that Mr Ellis was guilty. The third issue was a connection between a member of the jury who, as an Anglican Minister, conducted the marriage ceremony of the lead prosecuting counsel.

54. A further ground arose following the discovery of photographs relevant to Mr Ellis' application for the Royal prerogative of mercy. Mr Ellis argued that the photographs had not been previously disclosed by the Crown and that they were important to his defence.

55. The Ministry of Justice advised against the grant of a full pardon because such a course of action would be inappropriate in principle while the matter was capable of resolution by the judicial process. In this respect, the Ministry noted that Mr Ellis had not provided any real explanation for his contention that the appellate process could not deal satisfactorily with his case. The Ministry also concluded that the material advanced, much of which had already been considered by the Court of Appeal, was insufficient to justify a pardon.

56. The Ministry did, however, consider that some of the matters which Mr Ellis had raised warranted further consideration by the Court of Appeal. Material produced in support of the petition, in particular an affidavit from psychologist Dr Parsonson, indicated that there might have been something of a "sea change" in professional thinking about children's evidence since the 1993 Court of Appeal hearing. The material in his report suggested that the risks of contamination of children's evidence could have been more significant than was the generally accepted view in 1993.

57. The Ministry also considered that two other issues warranted further consideration. These related to the issue of possible jury bias (involving the juror who was the partner of a woman who worked with one of the children's mothers) and allegations of non-disclosure of photographs said to be relevant to the defence.

58. In light of the Ministry's advice, the then Minister of Justice advised the Governor-General to refer these specific aspects of the case to the Court of Appeal pursuant to section 406(a) of the Crimes Act 1961. This was done by Order in Council dated 4 May 1998.

Directions hearing in Court of Appeal

59. On 4 June 1998, the Court of Appeal heard argument from Mr Ellis' counsel that the reference back to the Court of Appeal gave Mr Ellis the same rights as a general appeal, that he was entitled to full discovery, to engage experts, to file points on appeal and to have the material relevant to those points from the trial and appeal record put before the Court at the hearing of the reference.

60. In a judgment dated 9 June 1998, the Court rejected that contention, concluding that the hearing and determination of references under section 406(a) of the Crimes Act 1961 should be confined to the particular matters raised in the Order in Council.

Second application for Royal prerogative of mercy

61. On 16 November 1998, before the substantive hearing on the first reference had commenced, Mr Ellis filed another petition seeking "a free pardon and a Royal Commission of Inquiry" into his case, or, in the alternative, "a Royal Commission of Inquiry into his case and for his whole case to be referred back to the Court of Appeal." The petition asked that, in the event of a reference to the Court of Appeal, "the Court should assume an investigative role itself."

62. In effect, this second petition sought to widen the reference to the Court of Appeal. It also restated more forcefully the contention previously advanced by Mr Ellis that the Court of Appeal was not an appropriate body to consider his claims of miscarriage of justice. The petition argued that the Court had already limited the scope of the reference and had itself recognised that it was "not the appropriate body to carry out an investigation or really to inquire into the merits of a conviction where an inquiry would be necessary to obtain justice."

63. The application was supported by the material previously advanced, together with some additional material. This included letters from overseas psychologists Professor Bull and Dr Lamb and extracts of the 1997 Report of the Wood Commission. There were also further allegations about one of the jury members and about non-disclosure by the prosecution of relevant material.

Legal opinion from Sir Thomas Thorp

64. Following receipt of the second application, the Secretary for Justice obtained advice from the Hon Sir Thomas Thorp, a former High Court Judge, on whether the terms of the reference ought to be enlarged. Sir Thomas was also invited to comment on Mr Ellis' application for pardon.

65. Sir Thomas noted that the role of the pardon in the criminal justice system is as a unique constitutional safeguard against the failure of that system. As such, he considered it should only precede the exercise of other available remedies if there were clear and cogent reasons for doing so. Particularly cogent reasons would be necessary to justify pre-empting the decision of the Court of Appeal after a conviction had been referred to it. He did not consider the material supplied by Mr Ellis justified that step.

66. Sir Thomas also considered the need for further inquiry into the case and concluded that the disadvantages of a commission of inquiry probably outweighed the advantages. Overall, while he did not see the matter as free from difficulty, he concluded that the issues raised by Mr Ellis were capable of resolution by the Court of Appeal.

67. However, Sir Thomas recommended that the terms of reference to the Court of Appeal be enlarged in a number of respects. Namely,

- to make it more explicit that the issues relating to reliability of the children's evidence included possible contamination of the evidence;
- to enable the Court to reconsider certain pre-trial rulings relating to the evidence of non-complainant children in light of the new expert evidence;
- to enable all three of the jury matters which had been raised in Mr Ellis' submission to be considered by the Court; and
- to enable the further allegations of non-disclosure of relevant material to be considered.

68. This led to a further Order in Council, dated 12 May 1999, that was much broader than the first Order and referred 5 groups of grounds to the Court of Appeal: those involving children's evidence, those involving retractions by complainants, those relating to procedure at trial, those involving members of the jury and those relating to non-disclosure of material by the prosecution.

Second reference back to the Court of Appeal

69. Five judges of the Court of Appeal conducted a hearing over four days and, in October 1999, the reference was dismissed.

70. In its judgment, the Court emphasised that its function was to treat the reference as an appeal brought under the Crimes Act 1961. Thus, the normal rules relating to a criminal appeal, including the requirements relating to fresh evidence, applied. For this reason, the Court noted that its primary role was to analyse material placed before it to see whether the matters covered were unknown, or not adequately appreciated, at the time of trial.

71. In respect of many aspects raised in support of the appeal, for example the mode of questioning by the interviewers, the Court was satisfied that the issues were well known in 1992, and were canvassed at the time. Some issues, for example the effect of the interviewers exercising "social influence" during interviews, were described as better understood than previously. In respect of others again, such as the use of anatomically correct dolls, the Court considered that the weight of opinion had changed since the time of the trial. However, the Court concluded that the various concerns of substance had all been identified and addressed in the course of the original proceedings.

72. The Court considered that there might have been changes in emphasis, or current knowledge might "have led to a more acceptable process", but this was

speculative and could not justify allowing an appeal. Referring back to the legal tests applied by an appellate court when faced with "fresh" evidence, the Court said:

> "... there is in our view an absence of significant 'newness' in the additional evidence to show there were serious flaws or problems which were unknown or unappreciated."

73. In reaching its conclusion, the Court of Appeal emphasised that its ultimate function was to decide the case on its true merits. That is, it was clear that they saw themselves as the ultimate decision-makers as to whether there had been a miscarriage of justice requiring one or more of the convictions to be set aside. In the context of this discussion, however, the Court made some further comments about its role.

74. The Court of Appeal had concerns about the way in which Mr Ellis had presented his case to it. A particular concern was that the expert witnesses relied on by Mr Ellis had based their opinions on a selective range of material, some of which was untested. The Court was also concerned that Mr Ellis had relied on material which had questionable admissibility, such as out of court statements by witnesses and from other people who did not testify at trial. There had been no application for leave to adduce this evidence. The Court was also asked to consider a number of articles, reports and commentaries on the problems associated with obtaining evidence from child complainants of their sexual abuse.

75. The Court of Appeal emphasised that it was not a forum for reviewing or evaluating the conclusions reached by various authors, some of which, in such a difficult and constantly developing area, are conflicting. It noted that such an exercise was more the function of a formal commission and stated that:

> "There may be matters which are worthy of, and could properly be addressed by, a commission of inquiry, but the Court cannot undertake that kind of function under the guise of an appeal under the Crimes Act 1961".

Third application for Royal prerogative of mercy

76. On 18 October 1999, four days after the delivery of the Court of Appeal judgment, Mr Ellis presented his third petition, seeking a free pardon and the establishment of a Royal Commission of Inquiry into his convictions.

Ministerial Inquiry – Sir Thomas Eichelbaum

Appointment of Ministerial Inquiry

77. The Court of Appeal was unanimous that there had not been a miscarriage of justice in Mr Ellis' case. Against that, however, was a concern that the comments of the Court of Appeal about the fact that it was not a Commission of Inquiry could have left an impression that there were relevant matters relating to the children's evidence which had not been considered. Recognising the difficult issues surrounding children's evidence, and the public disquiet about the case, the Government considered it desirable to inquire further into those matters left open by the Court of Appeal.

78. On 10 March 2000, the Minister of Justice appointed the retired Chief Justice Right Honourable Sir Thomas Eichelbaum to inquire into the reliability of the evidence given by the complainant children and to report on whether there were any matters which would give rise to doubts about the children's evidence to an extent with would render the convictions of Mr Ellis unsafe and warrant the grant of a pardon. The Ministerial Inquiry was to assist the resolution of the third Royal prerogative application.

Terms of Reference for the Ministerial Inquiry

79. The Ministerial Inquiry was not a general review of the case. Rather, the terms of reference set boundaries on the ambit of the inquiry based on the matters the Court of Appeal had said it could not properly consider. After consideration of the scheduled reports and memoranda, Sir Thomas was to identify the currently accepted best practice for investigating mass allegation child sexual abuse cases, and the risks associated with a failure to adhere to best practice. Having done so, he was asked to assess whether the investigation in the case was conducted in accordance with best practice. This was to be carried out on the basis of the evidence at depositions and the trial; Sir Thomas was not asked to carry out further inquiries into the facts. Sir Thomas was to then report on whether there were any matters which rendered Mr Ellis' convictions unsafe and which would warrant the grant of a pardon.

80. Sir Thomas was also required to seek the opinions of at least two overseas experts on whether there were features of the investigation or children's interviews that may have affected the reliability of the children's evidence, and if so, the likely impact. He appointed Professor Graham Davies, of the University of Leicester, UK and Dr Louise Sas, of Ontario, Canada to provide him with reports on whether there were features of the investigation and/or interviews of the children which might have affected the reliability of the children's evidence, and if so, their likely impact. Neither expert had any previous connection with the case. The experts were given (i) videotaped records of interviews with all children who were interviewed as part of the original investigation and who gave evidence at trial or depositions (ii) transcripts of those interviews and (iii) transcripts of the evidence and cross examination of the interviewers, parents and children at depositions and trial. The experts worked independently and were unaware of each other's identity until 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.

Submissions

81. In accordance with the Terms of Reference, Sir Thomas sought and considered submissions from the Crown Law Office, Mr Ellis, a group of parents of children who gave evidence at the trial, and the Commissioner for Children.

82. The submission on behalf of Mr Ellis included that:

    - there existed a climate of fear and hysteria in Christchurch at the time;

- the Police failed to prevent parental interviewing of their children, or to identify the effects of the contamination that occurred as a result;
- the Specialist Services Unit of the Department of Social Welfare failed to act with fairness and impartiality or investigate the issue of parental contamination;
- the interviewing procedures were unacceptable and the convictions owed much to parental involvement;
- attempts by Mr Ellis' trial counsel to elicit evidence of contamination were disallowed; and
- there was no recognition of the special risks occasioned by mass allegation situations.

83. The Crown submissions included 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 "generally seen as desirable" the impetus came not from the authorities but were the product of fresh disclosures by the children;
- the interviewing in the case was essentially sound.

Conclusions of the Ministerial Inquiry

84. Both of the international experts considered that the interviewing was of an appropriate standard. In Professor Davies' opinion, it was of high quality for its time. Sir Eichelbaum found the interviewing was considered of good overall quality even by the standards of the time of the Ministerial Inquiry. The experts did not consider that the interviews met best practice standards in every respect, and Sir Eichelbaum noted that, if that degree of perfection were the test, few if any interviews of this kind would pass.

85. Sir Thomas concluded that questioning and investigations by some parents exceeded what was desirable and had the potential for contaminating the

children's accounts. However, Dr Sas considered that the evidence of the six remaining "conviction" children had not been seriously affected and that their evidence was reliable. Professor Davies did not express a final view on the issue of contamination but did not believe that cross-talk alone was sufficient to explain the similar accusations made, particularly in relation to occurrences in the crèche toilets. Sir Thomas himself was also 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".

86. Sir Thomas spent over 400 hours studying the tapes, trial transcripts, Court of Appeal decisions, the experts' opinions and other material relevant to Mr Ellis' convictions. His overall conclusion was that the case advanced on behalf of Mr Ellis failed to satisfy him that the convictions were unsafe, or that a particular conviction was unsafe. He noted that "it fail[ed] by a distinct margin; I have not found this anything like a borderline judgment". In his report, Sir Thomas characterised the salient points as:

- 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 the 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; and

- the experts and Sir Thomas independently reached the view that the children's evidence in the conviction cases was reliable.

87. In reaching his conclusion, Sir Thomas observed:

> "... After the investigations and the interviewing there was an unusually exhaustive depositions hearing, the record extending to more than 1000 pages. Before being submitted to the jury the tapes and transcripts were subjected to close scrutiny in contested pre-trial applications. In scope and number, the pre-trial applications were exceptional (Judgment No.1 recorded that in preparation for that hearing alone, in addition to reading the depositions the Judge had viewed about 39 hours of tapes). The points which this Inquiry has considered about the quality of the interviewing, and the possibilities of contamination, were all traversed in detail, and were the subject of a series of careful judgments in the High Court. As a result of rulings before and during the trial, some charges were dismissed. There was a long and thorough trial, at the conclusion of which the jury had a lengthy retirement considering the charges. After trial the pre trial rulings, as well as all other aspects of the investigation, the interviewing, and the trial process, were open for challenge in the Court of Appeal. The Court of Appeal considered the case twice, once as a court of three judges in 1994, then as a court of five in 1999. Only one judge sat on both appeals, so seven different Court of Appeal

judges were involved. In the appeals, the merits of the investigation and the interviewing were canvassed on broadly the same grounds which have been urged before this Inquiry. None of the judges was prepared to uphold the challenges. Appropriately, this background has not prevented a further Inquiry into the same subjects. Full legal processes notwithstanding, the occasional miscarriage of justice can occur, and the procedure of petitioning the Governor-General, together with any resulting Inquiry, is available as a further protection. What must be clear is that Mr Ellis' case has had the most thorough examination possible. It should now be allowed to rest".

88. Following the outcome of the Ministerial Inquiry, the Governor-General declined Mr Ellis' third application for a pardon.

Petition to Parliament requesting a Royal Commission of Inquiry

The petition

89. In June 2003, Dr Lynley Hood, Dr Brash and 807 others presented a petition to Parliament. A second petition was presented in October 2003 by Gaye Davidson and 3346 others. The petitions requested that Parliament 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.

90. Both petitions were referred to the Justice and Electoral Select Committee for consideration. The Select Committee heard submissions from the petitioners and asked the Ministry of Justice to provide background information about the case and to comment on the submissions made by the petitioners in favour of a Royal Commission of Inquiry.

Report of the Justice and Electoral Select Committee

91. The Justice and Electoral Select Committee tabled its report on the petition in 2005. The Select Committee made several recommendations, including recommendations for legislative change, but did not recommend that the Government establish a Royal Commission of Inquiry into the case. The Select Committee considered the case did not meet the criteria for a Commission of Inquiry, and that an inquiry in 2005 would be unlikely to reach a better view of the facts than was achieved at the original trial, given the effect of the lapse of time on the availability and quality of evidence.

> "...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".

92. The Committee was also concerned about the potential impact on the child complainants and their families who may be required to re-live their experiences by giving evidence to an inquiry. The Committee considered that the children and their families were entitled to expect that if the formal legal process found no miscarriage of justice, then that was the end of the matter.

93. The National Party member (Hon Richard Worth) included a minority view in the Select Committee's report. In Mr Worth's view, the Committee had followed a process inconsistent with the expectations of the petitioners and its recommendations were inappropriate. For this reason, Mr Worth did not stand by the Committee's report and recommendations. He noted his view that the introduction in 2005 of the Evidence Bill and Legal Services Amendment Bill (No.2) addressed some of the petitioners' concerns. He did not express a view on whether the Government should establish a Royal Commission of Inquiry into the case.

Ongoing public and professional concern

94. The Christchurch Civic Crèche case has been the subject of ongoing public and professional disquiet. Calls for an inquiry into the case were first made prior to Mr Ellis' first appeal. In 1995, the Government rejected a request from the Civic Childcare Inquiry Organisation[3] for an inquiry focusing on the police investigation (and in particular the process of interviewing and counselling the child complainants) on the basis that there was no evidence of injustice or a failure of the legal system that would justify a public inquiry. Subsequent requests for a Commission of Inquiry have been declined on the basis that the concerns raised either had already been considered by the courts or, where new concerns were raised, that existing legal processes were available for the airing of those concerns.

95. Successive Ministers and the Ministry continue to receive correspondence and Official Information Act requests relating to the case. Articles or material are regularly published criticising aspects of the case, including the refusal of successive Ministers of Justice to establish a Commission of Inquiry into the case. Some commentators consider the Ministry of Justice has a vested interest in preventing a Commission of Inquiry into the case and have accused the Ministry of giving biased advice. In 2007 the New Zealand Law Journal published a two part article by Mr Ross Francis criticising Sir Thomas Eichelbaum's Ministerial Inquiry. The articles argued, amongst other things, that the Ministerial Inquiry was flawed because of its limited scope, the Ministry of Justice demonstrated bias when assisting Sir Thomas in his selection of experts and Sir Thomas' appointment of Dr Sas as an expert to the Inquiry could be open to criticism.

Request for a Commission of Inquiry

The request

96. In their letter to you of 25 November 2008, Dr Brash, Ms Rich and Dr Hood seek an inquiry into "all aspects of the investigation and legal processes relating to the case". The writers ask that an inquiry have the power to recommend a pardon for Mr Ellis. The request essentially repeats the Parliamentary petition considered by the Justice and Electoral Select Committee. While the current request does not detail the expected scope of an inquiry, the petitioners' submission to the Select

[3] An organisation including the four crèche women whose charges were dismissed, other staff and parents of children at the crèche and counsel for the four crèche women and Mr Ellis.

Committee in 2003 (drafted by Dr Lynley Hood) anticipated that an inquiry would "focus on the conduct of the organisations and officials involved in the investigations and legal processes, rather than on the facts of the case or the credibility of the parties". More recently, in a radio interview on 16 December 2008, Dr Hood suggested that an inquiry could focus on documentation rather than on revisiting the memories of the people involved.

97. Ultimately one of the main purposes of such an inquiry would be to determine whether a miscarriage of justice has occurred and Mr Ellis should be granted a pardon.

Arguments in support of an inquiry

98. The following points summarise themes or concerns presented over the years in support of a Commission of Inquiry into the Christchurch Civic Crèche case, including those concerns expressed by the writers in their letter to you and in the petition to the Justice and Electoral Select Committee. The points are a mix of: reasons put forward to support requests for an inquiry; matters an inquiry could focus on; and outcomes sought as a result of an inquiry. The belief that Mr Ellis is innocent is implicit.

    1. The criminal justice system has failed in the Christchurch Civic Crèche case; this failure being illustrated by:

        - allegations of police misconduct during the crèche investigation (including concerns that the detective in charge was not fit for the job and lost perspective or objectivity when investigating the case);
        - the decision to prosecute the four female crèche staff;
        - the trial judge's rulings on admissibility of evidence, which allegedly restricted the ability of Mr Ellis' defence to test the child complainants' evidence;
        - the Crown Solicitor's reshaping of the indictment after depositions and prior to trial, allegedly "sanitising" the Crown's case against Mr Ellis to make it more palatable to the jury by reducing the number of charges and amending others to lesser charges;
        - a belief that there was a climate of hysteria amongst parents of crèche children, and that the over-involvement of parents in the investigation and their influence over their children led to contamination of the children's evidence;
        - concerns that the methods employed by the Department of Social of Welfare psychologists in interviewing the children at the crèche were seriously flawed;
        - concerns about the impartiality of the Crown's expert witness at trial, Dr Zelas; and
        - the enactment and operation of sections 23C to 23I of the Evidence Act 1908, and concerns that the sections inhibited effective examination of the credibility of child complainants' evidence.

2. The inability of the appellate system and the Royal prerogative of mercy process to deal adequately with the case and correct the injustice, in particular concerns that:

   - the issues that have given rise to Mr Ellis' convictions, for example the writers' picture of a society in the midst of mass hysteria, are not susceptible to normal inquiry by the appellate process. An investigative role is required. The Court of Appeal is therefore an inappropriate body to determine Mr Ellis' claims of miscarriage of justice because it cannot (or refuses to) perform this role;
   - the Ministry of Justice's advice on the Royal prerogative of mercy applications and related processes is not impartial because the Ministry has a vested interest in the outcome of the case;
   - the Ministerial Inquiry's limited terms of reference prevented the Inquiry from addressing many matters of public concern, and the selection of experts to assist the Inquiry meant the Inquiry was flawed.

3. The strength and scale of public and professional concern about the Crèche case is such that the case should be opened up to further, extensive inquiry. This concern is evidenced by the petition to Parliament, which was signed by many well-known and reputable public figures, including lawyers, academics and MPs.

4. The level of public concern about the case undermines general confidence in New Zealand's justice system.

5. Officials and government organisations involved in the crèche investigation or subsequent legal processes should be held accountable for the part they played in the injustice.

6. The desire for objective scrutiny and for finality, both in terms of legal finality (determining whether Mr Ellis is or is not guilty) and factual finality (determining the truth about what happened at the crèche).

7. The exoneration of Peter Ellis, and compensation or restitution for Peter Ellis and other crèche workers.

8. A reappraisal of wider social and historical issues raised by the Christchurch Civic Crèche case, including the international spread of child abuse hysteria in the 1990s, the suggestibility and imaginativeness of children, and changes in professional thinking about contamination of children's evidence.

9. An inquiry could result in improvements to procedures and laws applicable to allegations of sexual offences against children[4].

10. Mr Ellis' second petition for the Royal prerogative of mercy argued that financial and resource constraints prevented him from doing more than raise

[4] Following the Law Commission's review of evidence law, sections 23C to 23I of the Evidence Act 1908 have been replaced by the Evidence Act 2006.

issues for further consideration, and that the work needed to take those issues further can only be done by a Commission of Inquiry with wide terms of reference.

Particular matters raised in Dr Brash, Ms Rich and Dr Hood's letter

99. Alongside these arguments in support of an inquiry, the writers have also raised some specific matters in their letter that warrant detailed comment.

Retraction of allegations

100. The writers have referred to retractions by some of the accusing children but provide no further information about the retractions.

Ministry comment

101. The Ministry is not aware of any recent retractions by complainant children whose evidence resulted in convictions. If there were recent retractions, Mr Ellis could make a further application for the exercise of the Royal prerogative of mercy.

102. The writers may be referring to Child A's retractions during the first appeal and retractions by other child complainants during the crèche investigation. As noted above, Child A's retraction led to the convictions arising out of Child A's evidence being quashed by the Court of Appeal. The Court found that the quashing of those convictions did not affect the correctness of convictions relating to the other complainants.

103. The significance of the child complainants' retractions was again considered by the Court of Appeal in 1999. It was argued on behalf of Mr Ellis that the retractions by Child A and other complainants raised questions about the other children's allegations or lent weight to claims that the children's evidence was contaminated. Material relating to the retractions, including new expert opinion evidence, was placed before the Court of Appeal. The Court of Appeal found that the arguments on behalf of Mr Ellis failed to establish that a miscarriage of justice may have occurred.

New research highlighting unreliability of the children's testimony

104. The writers have also referred to new academic research highlighting the unreliability of the children's testimony. Again, the writers provide no further information about this research.

Ministry comment

105. News reports indicate that Professor Harlene Hayne (Head of the Department of Psychology at University of Otago) presented unpublished research on the adequacy of the children's interviews at the Innocence Project New Zealand conference in December 2007. From commentary on the conference, we understand:

- the research analyses transcripts of interviews with 37 Civic Crèche children and compares them with interviews conducted in the *Kelly Michaels* case, a case involving mass abuse allegations in a day-care centre in New Jersey, US. Michaels' convictions were quashed on appeal as the Court found there was a substantial likelihood that the children's evidence was unreliable because of coercive and unduly suggestive interviewing procedures;
- the research found that on average each of the Crèche children were asked 400 questions per interview compared to 200 in the *Michaels* case and 20 suggestive questions compared to eight in the *Michaels* case. Long interviews and suggestive questions are generally accepted to increase the risk of eliciting unreliable information from young children;
- Professor Hayne's conclusion is there was a "strong risk" that the evidence of children who told of sexual abuse by Mr Ellis was contaminated by the way the interviews were carried out; and
- Professor Hayne is continuing her research.

106. We are unclear whether the interviews examined by Professor Hayne include those that led to Mr Ellis' convictions. It is also unclear what other contextual information, if any, she may have referred to for her conclusion (for example, evidence and cross-examination of the children, parents or interviewers at depositions and trial).

107. Ms Ablett-Kerr QC, Mr Ellis's lawyer, was reported in March 2008 as saying that she was preparing a petition to the Privy Council for leave to appeal, which would include evidence from Professor Hayne.

108. Because we have not seen Professor Hayne's research, we are unable to assess its relevance. The content and conduct of the children's interviews have received very detailed examination at depositions, the trial, two appeal hearings and the Ministerial Inquiry. Notably, the Ministerial Inquiry (supported by two independent experts) found weakness and mistakes in the interviewing but concluded they were of good overall quality and that the children's evidence in the conviction cases was reliable. Having said that, the relevance and cogency of the research can be fully assessed if made available by Mr Ellis or his supporters (for example, as part of an application for the Royal prerogative of mercy).

The Executive's approach to an alleged miscarriage of justice

109. At the heart of the request for an inquiry is the submission that a miscarriage of justice has occurred and it should be corrected by way of a Commission of Inquiry and a pardon.

110. This raises two fundamental issues.

- When the question of a possible miscarriage of justice has been extensively examined, on what basis should further inquiry or examination be contemplated?
- If further inquiry or examination is warranted, what form could that take?

Role of the Executive

111. The starting point is that determinations of criminal responsibility are made by the courts. They operate according to established rules of procedure and evidence, on the fundamental premise that the prosecution must prove its case beyond reasonable doubt. Judges preside over criminal trials and determine the law. Juries decide the facts. There is an appeal process supervised by the country's most senior judges.

112. This system is meant to minimise the prospect of miscarriages of justice. However, miscarriages of justice can still occur and in those relatively rare cases the Royal prerogative of mercy enables the Executive branch of government to act as a constitutional safeguard against mistakes.

113. In exercising this residual power, the Executive takes account of the role of the Judiciary and the functions of the Courts in two ways.

    - If a matter has been properly determined by the court system, with the opportunity for the parties to produce and test all relevant evidence, and to exercise appeal rights, the Executive will usually be very reluctant to interfere. To do so would require the Executive to substitute its own judgment about matters which it is much less well placed to determine. This would tend to compromise the finality of jury and judicial decisions and undermine the credibility of the criminal justice process.
    - If a new matter (usually new evidence) arises that for some reason was not able to be determined by the court process, and the Executive considers that it points to a possible miscarriage of justice, the Executive will usually refer the case back to the Court for further consideration rather than make a final decision itself. Again this is because the Courts are best equipped to decide questions of criminal responsibility. It is undesirable, in general, for the Executive branch of government to consider the grant of a free pardon where the issues are still capable of being considered and determined by the Courts.

Scrutiny of Ellis case already undertaken

114. There is a public interest in a justice system that not only corrects miscarriages of justice but also upholds soundly based convictions. Arguments against establishing a further inquiry into the case are usually based on the extensive scrutiny the case has already received within the criminal justice system and by the Executive, including two referrals to the Court of Appeal and the Ministerial inquiry.

115. The criminal justice system is premised on the unanimous opinion of a jury following a trial presided over by a judge to assess the cogency and credibility of evidence and reach conclusions on whether guilt has been proved beyond reasonable doubt. Following this, the role of appellate courts is to ensure that the process that was followed at the trial was fair, that evidence was properly admitted or excluded, and that the verdict is not unreasonable.

116. The resolution of allegations of sexual offending often turns on the respective credibility of the complainant, the accused and other relevant witnesses. The key question in the Ellis case has always been how the alleged irregularities, impropriety or misconduct may have affected the reliability and credibility of the children's evidence. This aspect has received more scrutiny than any other aspect of the case. The issues of the quality of the interviewing, undue influence on the part of the parents and consequent contamination of evidence were all traversed in detail and were the subject of a series of pre-trial judgments and cross-examination at trial. The quality of the interviewing and the possibilities of contamination were also examined by the Court of Appeal and were the focus of the Ministerial Inquiry. The only people who have had the opportunity to fully assess the credibility of all of the witnesses were the members of the jury.

The importance of new evidence?

117. No new evidence bearing on Mr Ellis' convictions has been submitted to the Minister of Justice or the Governor-General since the select committee inquiry. While reference has been made in the media to the research conducted by Professor Harlene Hayne, that research (and the necessary supporting submissions about its significance) has not been submitted for consideration.

118. The outcome of the Ellis case is that the Court of Appeal has on two occasions accepted that the jury was properly able to decide all issues raised by the case and there was no basis for interfering with the unanimous verdicts. Normally this would be the end of the matter unless something of substance subsequently came to light that cast a real doubt over the conclusions reached by the courts or other properly constituted authorities.

119. Supporters of an inquiry into the Ellis case challenge this orthodoxy, as indicated in the preceding section of this briefing. They cite strong support from a section of the public for the belief that the case has gone wrong from beginning to end.

Opportunities for further consideration

120. There are essentially three available options should Mr Ellis or the Government consider that further inquiry is justified into whether a miscarriage of justice has occurred.

Appeal to the Privy Council

121. The first option is for Mr Ellis to pursue an appeal to the Privy Council. This would enable a direct challenge to the Court of Appeal's decision to dismiss his second appeal.

122. This avenue remains open to Mr Ellis. His counsel, Judith Ablett-Kerr QC, indicated to the select committee inquiry in 2005 that an appeal would be considered. In March 2008, Mrs Ablett Kerr was quoted in the New Zealand Herald as saying that she hoped to get a petition to the Privy Council by May that year, and a hearing by the end of the year. To the Ministry's knowledge, no application for leave to appeal has yet been made.

Royal prerogative of mercy

123. Mr Ellis could consider a further application for the exercise of the Royal prerogative of mercy if he had new evidence that had not been previously considered and could raise a real doubt about his convictions. An individual may make multiple applications for the exercise of mercy. However, the onus is on the applicant to show that new evidence is available and is sufficiently cogent that it could have made a material difference to the outcome of the case.

A Government inquiry

124. The Government could initiate its own inquiry into whether a miscarriage of justice has occurred.

125. The Government would need to determine the focus of the inquiry and its form. It could focus on one or more aspects of the case, or on the case as a whole. It could take the form of a Ministerial inquiry or an inquiry established under the Commissions of Inquiry Act 1908. An inquiry could not itself set aside Mr Ellis' conviction but could conceivably recommend a pardon or a further referral to the courts if that was warranted. Consideration of this option should take account of the extensive scrutiny of the case and the apparent absence of new evidence.

126. The next section of this briefing discusses in more detail the option of a Commission of Inquiry into "all aspects" of the Christchurch Civic Crèche case.

A possible Commission of Inquiry into the Ellis case

Law governing Commissions of Inquiry

127. The Commissions of Inquiry Act 1908 governs Commissions of Inquiry. Under section 2 of the Act, a Commission of Inquiry may be appointed to inquire into any of the following:

    a) the administration of Government;

    b) the working of any law;

    c) the necessity or expedience of any legislation of the Crown;

    d) the conduct of any officer in the service of the Crown;

    e) any disaster or accident involving injury or death of the victim or the risk of it; or

    f) any matter of public importance.

128. The general principle is that Commissions of Inquiry cannot be established for the sole purpose of determining the guilt or innocence of particular persons. Inquiries may look into guilt or innocence, but only as part of a wider investigation into matters of conduct relevant to the purpose for which the Inquiry was established. Inquiries cannot determine civil or criminal liability in the same way as a court but could potentially look at whether a person suffered a miscarriage of justice without making findings of guilt or innocence.

129. As noted above, the Justice and Electoral Select Committee did not believe the case met the criteria for a Commission of Inquiry. There is, however, no legal bar to establishing a Commission of Inquiry in this case. Arguably, the case fits under section 2(f) of the Act because of the public importance in maintaining confidence in New Zealand's justice system.

130. The main features of Commissions of Inquiry include:

- Commissions have power to require the production of evidence, to compel witnesses, and to take evidence on oath;
- witnesses and counsel are protected by the same immunities and privileges that they would have before the courts;
- Commission proceedings are formal and are generally open to the public; and
- Commission recommendations are not binding.

Are there precedents for using Inquiries to investigate alleged miscarriages of justice?

Arthur Allan Thomas

131. In arguing that a Commission of Inquiry is appropriate in the Ellis case, the writers draw an analogy with Arthur Allan Thomas, stating that in Mr Thomas' case a Commission of Inquiry was established. However, no previous Commission of Inquiry has looked into the safety of a criminal conviction with the power to recommend a pardon. In the Thomas case, the question of his conviction had already been determined by a pardon before the Commission of Inquiry was established. A Commission of Inquiry into the Ellis case would be the first of its kind in New Zealand.

132. Arthur Allan Thomas was convicted in 1971 of the murders of David and Jeanette Crewe. His subsequent appeal was dismissed by the Court of Appeal. In June 1972, Mr Thomas applied for the Royal prerogative of mercy, which resulted in his case being referred back to the Court of Appeal. The Court of Appeal quashed his convictions and ordered a retrial. In April 1973, Mr Thomas was convicted again of both murders. The Court of Appeal dismissed his appeal against the new convictions.

133. In 1979, following two reports from Mr Adam-Smith QC (appointed by the Prime Minister to look into the case), Mr Thomas was granted a pardon. There was subsequently a Royal Commission of Inquiry to look into what had gone wrong and issues of compensation. The Commission was expressly excluded from inquiring into the actual conduct of the trials.

134. In contrast, the request for a Commission of Inquiry into the Ellis case would require legal consideration of whether there has been a miscarriage of justice and whether doubts as to the safety of Mr Ellis' conviction warrant a pardon.

Australia

135. The writers state that there are Australian precedents for using Commissions of Inquiry in criminal cases. They provide six cases as examples: Michael and Lindy Chamberlain; Frederick McDermott; Edward Splatt; Johann (Ziggy) Pohl; Douglas Rendell; and the Ananda Marga Trio. Five of the Australian cases involved convictions for murder. The sixth case (the Ananda Marga Trio) involved conspiracy to murder and attempted murder.

136. Our research into these cases is summarised in Appendix B. In essence:

- from the information we have gathered, most of the cases appear to have involved circumstantial cases against the defendants (in the Ellis case there was direct evidence of the offences alleged and the jury had to decide whether they believed the accused's or complainant children's version of events);
- in most of the cases, it is clear the Commissions of Inquiry were established in the face of new evidence, including new scientific evidence and, in Pohl's case, another man confessing to the murder;
- the cases show that an inquiry investigating a possible miscarriage of justice must inevitably deal with evidence and disputed facts. The Inquiries in these cases heard evidence from central witnesses from the original trial and new witnesses;
- three of the inquiries were established under New South Wales legislation that specifically permits inquiries to be appointed to look into doubts or questions about convictions. In the Chamberlain case, two inquiries were conducted simultaneously: the first by the Northern Territory Parliament, which passed an Act to establish a Commission of Inquiry into the case; and a Royal Commission of Inquiry appointed under the Royal Commissions Act 1902. The remaining two cases appear to have been appointed under general powers to appoint Royal Commissions of Inquiry.

137. It is unclear from the information we have gathered why the Executive in each case chose to establish a Commission of Inquiry as opposed to referring the matter back to the courts.

What could a Commission of Inquiry achieve?

Finality

138. One of the main motivations for an inquiry may well be to achieve finality, in the sense that an inquiry might satisfy public and professional concern about the Ellis case in a way that the processes to date have been unable to. Supporters hope that an inquiry would allow all concerns about the case to be aired and considered in a way not done previously. However, the level of disquiet surrounding the case is based on concerns at the failure of any process to overturn Mr Ellis' convictions. Only one outcome will satisfy these concerns – the exoneration of Mr Ellis. An inquiry that confirms the findings of the Court of Appeal and Ministerial Inquiry will not achieve finality in the eyes of those who believe Mr Ellis is innocent.

139. There is also not a consensus amongst the public or professionals. There are other strongly held opinions that justice has been done and thoroughly tested. The Ministerial correspondence you received prior to Christmas illustrates how polarised the strongly held views are. Given the polarised and entrenched views that have developed, an inquiry might be unable to achieve a genuine resolution of public differences of opinion about the case.

Determining whether a miscarriage of justice has occurred

140. The writers ask for a wide ranging inquiry with the power to recommend a pardon for Mr Ellis if it finds that a miscarriage of justice occurred.

141. Perhaps the most difficult practical question about a possible Commission of Inquiry is what evidence it would need to hear in order to conduct a fair process and reach sound conclusions about whether a miscarriage of justice had occurred.

142. Mr Ellis' convictions were based on direct evidence. At trial, oral evidence about what happened at the crèche was given on both sides and witnesses were cross-examined. The reliability of the central evidence has subsequently been examined by both the Court of Appeal and the Ministerial Inquiry. Dr Hood has suggested that an inquiry could focus on documentation rather than revisiting people's memories. However, it is not that straightforward.

143. On the one hand, it is difficult to envisage that a comprehensive inquiry could be conducted successfully without taking evidence from key witnesses, as the Australian inquiries did. This is particularly so when it is the evidence of the complainant children themselves on which the convictions rest. Could an inquiry be satisfied that it had reached a reliable conclusion without hearing from the central witnesses? There would in addition be natural justice issues in denying people the opportunity to be heard or give evidence if they might be affected by a Commission's findings. Section 4A of the Commissions of Inquiry Act gives "parties" or certain interested persons a right to appear or be heard.

144. On the other hand, even if oral evidence was to be heard from the original witnesses, the lapse of time is bound to affect the availability and quality of their evidence. Memories will inevitably have faded to some extent since 1993. The complainant children will now be in their early twenties. Some witnesses may be unavailable. Some may be unwilling. Though Commissions of Inquiry have power to compel witnesses to appear, with a penalty for refusal, a Commission is unlikely to think it just to require any of the original complainants to give evidence against their wishes. As the Justice and Electoral Committee acknowledged, the practical limitations may render it unlikely that an inquiry conducted in 2009 could reach a better view of the facts than was achieved at the time of the trial.

145. These considerations are not a bar to the establishment of an inquiry. They may, however, affect the prospects of an inquiry achieving its desired outcome.

146. There is likely to be further implications for an inquiry that may affect its ability to make clear authoritative findings. These would need to be identified, in consultation with the Attorney-General, if the proposal for an inquiry is pursued.

147. Finally, the Evidence Regulations 2007 restrict the viewing and copying of video taped evidence. Amendment of these regulations would be required to allow a Commission of Inquiry to view the children's video taped evidence.

Impact on child complainants

148. The impact that a further inquiry would have on the child complainants and their families needs to be considered. The children's and families' views have been given much less public attention.

149. Whilst the system must always guard against miscarriages of justice, it must also respect the need to protect victims of crime. Giving evidence in the circumstances of sexual abuse allegations is traumatic. Much has been done to improve that process over the years, but a crucial component of the system is finality. Once the criminal justice process has run its course, it is important that victims of crime can feel that they can put the matter behind them. The interests of justice will, however, prevail where there are good grounds for re-opening a case for further inquiry. This has already occurred several times in Mr Ellis' case. In the absence of new information, there should be very cogent reasons for officially extending the process.

150. The petitioners' submission to the Justice and Electoral Select Committee addressed concerns about the potential impact on the child complainants and their families. In their view, "if an inquiry establishes that no crime was committed, the children and their families will benefit twice over: first, they will have the assurance that their children were never sexually abused; and second, the public agitation will dissipate." The petitioners argued that the distress to the children and their families caused by public disquiet about the case will continue unless an inquiry is established. This position is unlikely to reflect the views of the complainant children and their families.

Options for responding to the writers' requests

151. The Government's options for responding to the writers' request are to:

(i) recommend that the Governor-General pardon Mr Ellis immediately without further inquiry;

(ii) agree to establish a Commission of Inquiry;

(iii) decide that a Commission of Inquiry is not justified and refer the writers to existing processes within the criminal justice system that remain available to Mr Ellis.

Option (i) Recommend that the Governor- General pardon Mr Ellis immediately

152. A convicted person who is granted a free pardon is deemed never to have committed the offence. Free pardons are extremely rare in New Zealand.

153. The Governor-General has wide powers to grant pardons. The Minister of Justice could, in theory, recommend a pardon at this stage of the case in the absence of new evidence. However, in practice, pardons are normally entertained only if

there is compelling evidence that a person could not properly have been convicted. This practice reflects the respective roles of the Executive and the Judiciary in the administration of justice.

Option (ii) Agree to establish a Commission of Inquiry

154. Significant considerations relating to this option have been outlined in the preceding sections of this briefing.

155. The cost of an Inquiry will depend on the Inquiry's scope. Costs include Commissioners' fees, legal or technical advice/support, witness' travel and expenses, administrative and office expenses, producing and distributing reports, and potentially legal representation for interested parties (for example, the complainant children and their families and Mr Ellis).

156. Recent Commissions include the Royal Commission on Genetic Modification (with reasonably broad Terms of Reference and a requirement for public consultation) costing approximately $4.3million, and the Commission of Inquiry into Police Conduct (with narrower Terms of Reference and hearing evidence from approximately 46 witnesses) costing about $4.89million. The Ministerial Inquiry into the Ellis case conducted by Sir Thomas Eichelbaum, which addressed specific areas of concern rather than being a general review of the case, cost $148,879.71.

157. Overseas judges may be appointed as Commissioners, with additional cost implications (for example, the judges' fees, international flights, accommodation and extra specialist support to provide advice on New Zealand's legal system).

158. In terms of process, Cabinet must approve the establishment, Terms of Reference and budget of Commissions of Inquiries. If you wish to pursue this option, further work will need to be done on the estimated costings and scope of an Inquiry (in consultation with the Department of Internal Affairs, the Crown Law Office, Treasury and Ministry of Social Development). The Cabinet Manual requires Ministers to consult the Prime Minister and the Attorney-General when assessing whether to establish a Commission of Inquiry, prior to submitting any proposal to Cabinet.

Option (iii) Decide that a Commission of Inquiry is not justified and refer writers to existing processes

159. The Government could decline to establish a Commission of Inquiry.

160. The response to the writers could, if you agreed:

- refer to the level of scrutiny that the case has received to date;
- acknowledge the limitations that a Commission of Inquiry would face in attempting to resolve whether or not a miscarriage of justice had occurred;
- indicate that further consideration by the Government of Mr Ellis' convictions remains open but is dependent on there being new, cogent evidence pointing

to a likely miscarriage of justice that has not already been properly examined or reviewed;

- refer to existing processes that remain open to Mr Ellis in respect of his convictions:

  - seek leave to appeal to the Privy Council (Mrs Ablett-Kerr QC, Mr Ellis' lawyer, has indicated that she is currently preparing a petition to the Privy Council);

  - if new evidence does comes to light, submit that evidence to the Government for consideration either by way of an application for the Royal prerogative of mercy or a request for some other form of inquiry into the significance of the evidence.

161. If the preferred option is to decline to establish a Commission of Inquiry, it is open for you to do this without Cabinet approval.

162. Alternatively you could seek Cabinet agreement on the preferred option. This would require Ministerial and departmental consultation as outlined above.

Next steps

163. Officials are available to meet with you to discuss these issues further as required.

Appendix A

Counts on which Peter Ellis was convicted at trial

The 16 counts upon which the petitioner was found guilty related to the following children:

Child A

Count 1. Indecent assault alleging petitioner placed his hand on her vagina.

Count 2. Inducing her to put her hand on his penis.

Count 3. Indecent Assault alleging his hand touched her vagina/anus.

These offences were alleged to have occurred between 15 December 1986 (count 1) and between 1 May 1986 and 1 May 1988 (counts 2, 3). Mr Ellis' convictions on these counts were later quashed by the Court of Appeal following Child A's retraction of allegations.

Child B

Count 4. Indecent Assault alleging the placing of the petitioner's hand on her vagina.

This offence was alleged to have occurred between 1 February 1988 and 30 July 1989.

Child D

Count 6. Indecent Assault alleging the petitioner urinated on his face.

This offence was alleged to have occurred between 1 March 1989 and 30 October 1991.

The petitioner was found not guilty of Count 7; namely, doing an Indecent Act by touching Child D's anal area with a stick.

Child F

Count 9. Doing an Indecent Act by urinating on her face.

Count 10. Inducing her to have a bath with him.

These offences were alleged to have occurred between 3 June 1988 and 1 December 1990.

The petitioner was found not guilty upon two counts relating to this child; namely:

Count 11: Attempting to have sexual intercourse with her, and

Count 12: Touching her bottom with a needle.

Child G

Count 16: Inducing an indecent act by having a bath and fondling his penis.

Count 17: Indecent Assault by placing his penis against his anus.

Count 18: Unlawful sexual connection by putting his mouth over his penis.

These offences were alleged to have occurred between 1 February 1989 and 1 March 1991.

The petitioner was acquitted upon Count 19; indecent act by hitting his genital area and putting a needle on his penis.

Child H

Count 20: Unlawful sexual connection by putting his penis in her mouth.

Count 21: Indecent act by putting his penis against her vaginal area.

Count 22: Indecent act by putting his penis against her anal area.

Count 23: Indecent assault by being a party to the act of an unknown man putting his penis against her vagina.

These offences were alleged to have occurred between 1 May 1989 and 30 July 1991.

Child K

Count 27: Unlawful sexual connection by putting his penis in her mouth.

Count 28: Indecent act by putting his hand on her vagina and anus.

These offences were alleged to have occurred between 1 January 1989 and 31 January 1991.

Appendix B

AUSTRALIAN USE OF COMMISSIONS OF INQUIRY INTO CRIMINAL CONVICTIONS

Michael and Lindy Chamberlain (Northern Territory)

On 29 October 1982, in the Supreme Court of the Northern Territory, Alice Lynne Chamberlain was convicted of murdering her daughter Azaria at Ayers Rock on 17 August 1980. Her husband, Michael Chamberlain was convicted of being an accessory after the fact to the murder. The Chamberlains appealed their convictions. Their appeals were dismissed.

Establishment of Commission of Inquiry

Following the discovery of Azaria's matinee jacket in 1986, the Parliament of the Northern Territory enacted the Commission of Inquiry (Chamberlain Convictions) Act 1986, which established a Commission of Inquiry into the convictions. Justice T R Morling was appointed as Commissioner. Morling was also appointed by the Governor-General of the Commonwealth of Australia under the Royal Commissions Act 1902 as a Commissioner to inquire into the same matters. The two Commissions were conducted simultaneously, and are generally referred to as "the Commission".

Evidence before Commission

All the witnesses who gave significant evidence in the earlier proceedings also gave oral evidence before the Commissioner, including Mr and Mrs Chamberlain. The Commission heard evidence from 145 witnesses over 92 days.

Commission's finding

The Commissioner concluded that there were serious doubts as to the Chamberlains' guilt and the evidence in the trial leading to their conviction. New scientific evidence cast serious doubt on the reliability of Crown evidence at trial. The Commissioner's view was that had the evidence before him been given at the trial, the trial judge would have been obliged to direct the jury to acquit the Chamberlains on the ground that the evidence could not justify their conviction.

Reference to the Supreme Court

Section 433A of the Northern Territory Criminal Code was enacted to allow the Chamberlain's convictions to be referred to the Supreme Court. The section provides for a post-conviction post-pardon referral of a case to the Supreme Court to enable the court to consider whether the conviction should be quashed and a verdict of acquittal entered. The Court is not bound by the rules of evidence "but may inform itself in such a manner as it thinks fit" (s433A(5)) and "adopt, as it thinks fit, the findings... of a Commission of Inquiry relevant to the Court's consideration" (s433A(6)(b)). The Supreme Court approached the reference in a way "not greatly different" from a normal

appeal; "that is, to determine on fresh evidence, if that evidence is allowed on the appeal, whether it would in the circumstances be unsafe to permit a verdict to stand".

The Supreme Court of the Northern Territory of Australia quashed the Chamberlains' convictions on 15 September 1988. The Court was satisfied that the convictions, by reason of the new material examined by the Commissioner, were unsafe.

Frederick Lincoln McDermott (New South Wales)

On 4 September 1936, William Lavers disappeared, suspected dead. McDermott was convicted in February 1947 of the murder of William Lavers. Condemned to death in February 1947, McDermott had his sentence commuted to life imprisonment.

Establishment of Royal Commission

In August 1951, the Premier of New South Wales appointed Justice Kinsella as a Royal Commissioner to inquire into and report upon the circumstances surrounding McDermott's conviction and sentence, in particular "whether as a result of such further enquiries the prisoner should serve the sentence or be released from imprisonment".

Role of Royal Commission

The Commissioner saw his role as accepting the jury's verdict as correct and conclusive of McDermott's guilt, unless the additional evidence presented at the Commission seriously challenged it.

Evidence before Royal Commission

The Royal Commission heard from 99 witnesses. Nearly all the witnesses from the original trial appeared again, as well as a large number of additional witnesses. Two issues were of central importance: the identification of a car; and McDermott's movements on 4 September 1936.

Commission's findings

On 9 January 1952 the Royal Commission presented its report. The Commissioner found that evidence at trial relating to the identification of a car had been shown by fresh evidence to have been completely mistaken. The Commissioner concluded that there was a strong probability that the jury had been misled and recommended that McDermott be released from further imprisonment. McDermott was released and given $500 compensation after serving more than 5 years' imprisonment. He was never officially exonerated. His conviction still stands on his record.

Edward Charles Splatt (South Australia)

On 24 November 1978 Edward Charles Splatt was convicted of murdering Rosa Simper on 3 December 1977. Mr Splatt appealed his conviction and sentence to the South Australia Court of Criminal Appeal which, on 28 February 1979, dismissed his appeal.

Establishment of Royal Commission

The prosecution's case against Mr Splatt depended on expert scientific evidence on trace materials found at the scene of the murder. The conviction of Mr Splatt depended entirely upon the jury's acceptance of the Crown evidence as to the trace materials. Because of doubts as to the scientific evidence, on 23 December 1982, the Governor-General of South Australia appointed a Royal Commission to inquire into Mr Splatt's conviction.

Role of the Royal Commission

The Commissioner saw his role as to consider fresh or additional scientific evidence presented on behalf of Mr Splatt or the Crown, and determine whether the additional scientific evidence created a reasonable doubt as to whether the jury's verdict was based on acceptable scientific evidence.

Evidence before Royal Commission

All the scientific and technical witnesses who were called by the Crown to give evidence in the trial gave evidence and were cross-examined again before the Commission. Principal witnesses appearing for the Crown and Mr Splatt were scientists or experts in various fields including biology, geology and metallurgy.

Commission's findings

The Commissioner found that the additional scientific evidence presented cast doubt upon the validity of the jury's verdict and that the guilty verdict should not stand.

Johann Ernst Siegfried Pohl (New South Wales)

On 2 November 1972, Pohl was convicted of murdering his wife on 9 March 1973. Pohl's appeal against his conviction was dismissed by the Court of Criminal Appeal on 2 August 1974. Pohl was imprisoned until 25 February 1983 when he was "released on licence". He was discharged from licence on 24 February 1988.

Establishment of Inquiry under section 475 of the NSW Crimes Act

On 8 September 1990, Roger Bawden confessed to the murder of Pohl's wife. Peter McInerney was appointed under section 475 of the NSW Crimes Act 1990 to inquire into doubts or questions as to Pohl's guilt and to summon and examine on oath any person likely to give material information on the matter

Role of Inquiry

An inquiry under section 475 is not an appeal against conviction. Its object is to determine the effect and significance of the evidence given at trial against the evidence given before the inquiry. The inquiry was to determine whether the questions or doubts as to guilt as a result of Bawden's confession had been resolved or remain. The central issue to be determined was the authenticity of the confession.

Evidence before the Commission

Key witnesses from the trial (excepting those who had since died) were recalled to give evidence (including a neighbour and Pohl's sister). Bawden and Pohl also gave evidence. In all 28 witnesses gave evidence.

Commission's findings

The Commission found that Bawden's confession was probably genuine and that therefore there was substantial doubt as to Pohl's conviction. McInerney recommended that Pohl be granted a pardon.

Douglas Harry Rendell (New South Wales)

Yvonne Kendall (Douglas Rendell's partner) was killed during an argument with Douglas Rendell by a rifle shot on 30 July 1979. The Crown's case at trial was that Rendell had fired the rifle with the intention of killing Kendall. Rendell argued that the rifle did not discharge as the result of any act of his or, at most, that it discharged accidentally. On 4 March 1980, Rendell was found guilty of murdering Kendall. His appeal was dismissed by the NSW Court of Criminal Appeal on 4 July 1980.

Establishment of Inquiry under section 475 NSW Crimes Act

The Crown's case was a circumstantial one, and included evidence that the rifle was not prone to accidental discharge. New ballistics evidence (on the possibility of accidental discharge of the rifle) was raised following dismissal of Rendell's appeal. A NSW Supreme Court Judge (Justice David Hunt) reviewed new material put forward in support of an inquiry under section 475 of the NSW Crimes Act 1990. Justice Hunt concluded that the result of the new evidence "is sufficient in itself to cause unease in a case based solely on circumstantial evidence" and "the doubt which I have in the present case is of sufficient gravity to warrant a further inquiry". This inquiry was conducted by Magistrate Arthur Riedel.

Evidence before Inquiry

The material before Riedel was: new ballistic evidence showing the rifle could have been accidentally discharged; new forensic evidence about blood in the washbasin; new evidence as to the lack of fingerprints on the rifle; retraction of evidence on placement of rifle; and new pathologist evidence. Riedel heard from original expert witnesses and new ones.

Inquiry's findings

Riedel reported to Justice Hunt on 9 June 1989 his conclusion that there now existed real doubt as to Rendell's guilt, despite that considerable suspicion still attached to him. Justice Hunt agreed with Riedel's findings. On 23 June 1989, he reported to the Governor of NSW that he was satisfied that if the additional evidence had been given at trial, the jury ought to have had a reasonable doubt as to Rendell's guilt. Justice Hunt recommended Rendell be granted a pardon.

On 26 July 1989, Rendell was given an unconditional pardon.

The Ananda Marga Trio (New South Wales)

Timothy Edward Anderson, Paul Shaun Alister and Ross Anthony Dunn were convicted in the Supreme Court of New South Wales on 1 August 1979 on a charge of conspiracy to murder Robert John Cameron. Paul Alister and Ross Dunn where also convicted of attempted murder. The three men were members of an international group called the Ananda Marga. The police acquired advance knowledge of the alleged plot through Richard Seary (an undercover agent who had infiltrated the Ananda Marga). Seary was the central Crown witnesses at trial. His evidence directly implicated Anderson, Alister and Dunn. The Crown presented other evidence, including forensic evidence and evidence of the men's alleged admissions to police. The defence case was that Seary had fabricated and planted evidence.

An appeal to the Court of Criminal Appeal and a subsequent application for special leave to appeal to the High Court were unsuccessful.

Establishment of Inquiry under section 475 NSW Crimes Act

On 20 June 1984, Justice Wood was directed to inquire into doubts or questions as to the three men's guilt under section 475 of the NSW Crimes Act 1900. The doubts or questions were not specified by the instrument establishing the Inquiry. Justice Wood identified the central questions as being:

(a) whether non-disclosure of certain information affected the men's ability to conduct their defence at trial;

(b) the cogency of new evidence or evidence excluded at trial relating to the credibility and reliability of Seary;

(c) whether the Crown's cross-examination of the three men at trial included irrelevant or prejudicial questions, resulting in a miscarriage of justice; and

(d) whether new evidence raised doubt about the trial evidence from witnesses other than Seary.

Evidence before Inquiry

Justice Wood decided not to recall trial witnesses unless they were required for further examination or cross-examination. The Inquiry heard from 48 witnesses, including Mr Seary and many of the police officers who gave evidence at trial. The Inquiry received further evidence by way of signed statements from another 44 persons. Anderson, Alister and Dunn elected not to give evidence.

Inquiry's findings

Justice Wood found the further evidence before the Inquiry in relation to issues (a) and (b) suggested a real doubt about the credibility and reliability of Seary's evidence. Despite a strong circumstantial case against each of the men, Seary's evidence was so central to the men's convictions that the circumstantial evidence could not be considered in isolation from Seary's evidence. Justice Wood therefore concluded that

while strong suspicion still attached to the three men, there was a doubt about their guilt.

Following the outcome of the inquiry, the three men were released from jail.