MINISTRY OF JUSTICE
Tāhū o te Ture

Hon Simon Power, Minister of Justice

Commission of Inquiry – Mr Peter Ellis

Date	11 May 2009	File reference	CON 34 05 20

Action Sought	Timeframe/Deadline
This briefing provides detailed advice on a commission of inquiry into Mr Peter Ellis's case.	Consider for meeting with officials on 19 May 2009

Contacts for telephone discussion (if required)

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☐ Seen ☐ Withdrawn ☐ Not seen by Minister

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11 May 2009

Hon Simon Power, Minister of Justice

Commission of Inquiry – Mr Peter Ellis

Purpose

1. You have requested detailed advice on a commission of inquiry into Mr Ellis's case.

2. This briefing contains confidential legal advice and is subject to legal professional privilege.

Executive summary and contents

3. The key question for a commission that will require resolution is whether there are any matters that raise doubts about Mr Ellis's convictions to such an extent as to render his convictions unsafe.

4. The inquiry would need to examine the safety of Mr Ellis's convictions comprehensively if it is to promote finality. A key feature will be to empower it to consider any evidence that, in its opinion, is relevant to the safety of Mr Ellis's convictions – whether or not it would be admissible in a court.

5. Crown Law have briefed the Attorney-General. This briefing is attached as appendix A.

6. Officials have subsequently met with Crown Law. Their advice is that an inquiry ordered by the executive into the safety of Mr Ellis's convictions is unconstitutional and ultra vires the Commission of Inquiries Act 1908.

7. The Ministry has consulted with the Department of Internal Affairs, who are responsible for establishing commissions of inquiry and providing administrative support.

8. The Department considers that the risks associated with establishing a commission of inquiry are high given that there is still a possibility of an appeal to the Privy Council. The Commission of Inquiry into Police Conduct was adjourned from 27 August 2004 to 7 February 2005, and had its terms of reference significantly amended, to avoid prejudicing any criminal trial.

9. The Department also supports Crown Law's assessment of the constitutional implications of establishing a commission of inquiry that would go beyond the constitutionally recognised function of the executive, and encroach directly on the authority and function of the courts.

Other limitations of the Commissions of Inquiry Act 1908 *Page 6*

10. Leaving aside the question of whether such an inquiry is legally possible under the Commissions of Inquiry Act 1908, the Ministry has identified other limitations in the Act in terms of the form of the inquiry and the powers a commission would be able to exercise.

11. In large part, these limitations arise because the Act is over 100 years old and overdue for reform. The Act is rigid and does not provide flexible, uniform powers for all commissions.

12. The following matters have been identified:

- the Act gives a range of individuals the right to appear and be heard, either in person or through representation. This means that it will not be possible to establish a commission that is conducted "on the papers" with a limited role from complainants, their families, or other interested parties;
- the Act will give the commission broad powers to require witnesses to appear at oral hearings, where they could potentially be cross-examined. A decision about exercise of these powers would ultimately lie with the commission itself;
- the Act will only grant limited powers to the commission (those of a District Court acting in its civil jurisdiction) if a judge or retired judge of the High Court is not a member;
- the commission will not have any power to suppress the identity of some of the children who are likely to form part of the inquiry.

13. Some of these limitations might be remedied through legislation, and the options are identified at *page 9*. Such legislation would not, however, be able to remedy the constitutional concerns that Crown Law have identified about the encroachment that such an inquiry would make on the authority and function of the courts.

Precedent *Page 10*

14. A commission empowered to inquire into the safety of Mr Ellis's convictions will be unique in New Zealand's legal history. A second exceptional feature is that the inquiry would occur while Mr Ellis signalled his intention to exercise further rights of appeal on a number of occasions in 2007 and 2008.

15. There have been commissions of inquiry in Australia that have had the primary task of examining the safety of criminal convictions. There are some parallels and also some distinguishing features, and these are summarised in this briefing.

16. The precedent effect is important because, if the unusual step of establishing a commission of inquiry to review a judicial process is taken in one case, it is likely there will be requests for similar treatment in other cases which would be difficult to reject on a principled basis, particularly given the absence of fresh evidence in the Ellis case.

17. The fact that Mr Ellis has clearly signalled an intention to exercise further rights of appeal compounds the problem. The risk here is that a commission into the safety of Mr Ellis's convictions may in turn undermine the established conventions relating to the exercise of the Royal prerogative of mercy.

A response that is consistent with constitutional principle *Page 13*

18. In the Ministry's previous briefing, an option for responding to the request for a commission of inquiry was outlined that is consistent with constitutional principle.

19. This is to say that Mr Ellis has clearly signalled he wishes to exercise further rights of appeal, and this option remains open to him.

20. Alongside this, the government remains open to the possibility that Mr Ellis's convictions might be re-opened. Such a course of action, however, would depend on new, cogent evidence being presented that has not already been properly examined or reviewed. This is a requirement that all criminal cases must normally fulfil before the executive will consider taking the unusual step of intervening in the judicial process.

21. The current request for a commission of inquiry does not present any new evidence that has not previously been considered. For this reason, alongside the fact that Mr Ellis has clearly signalled his intention to appeal, there is therefore no proper constitutional basis for the government to re-open Mr Ellis's case at this stage.

Form and conduct of inquiry *Page 13*

22. This section outlines options for the composition of an inquiry, and some factors that may impact on the inquiry's conduct, such as judicial review.

Detailed matters for the inquiry *Page 14*

23. This section identifies the matters that a commission would need to consider in order to conduct a comprehensive inquiry into the case.

24. It is not clear whether the videotaped evidence of children and associated transcripts of the children who were interviewed still exist, as the Evidence Regulations provide for the destruction of at least some of them after a period of time. This would significantly hamper an inquiry. The Ministry has therefore initiated inquiries with the Police and Christchurch High Court.

What evidence might a commission consider? *Page 15*

25. The Commissions of Inquiry Act 1908 effectively sets up three classes of people who are entitled to appear before the commission, either in person or by counsel. The commission would also have powers to require individuals to attend. We have identified the following individuals who might choose or be required to participate in an inquiry:

- *children and parents* - these individuals fall into two groups. There are the complainants whose disclosures led to charges being laid against Mr Ellis and his co-workers, and their parents. There is also a much larger group of children and parents who were interviewed as part of the inquiry, but whose disclosures did not lead to charges;
- *Mr Peter Ellis* – while Mr Ellis would have the right to participate in the inquiry, there is an open question about whether he would appear in person. While he would have the right to do so, the privilege against self-incrimination may mean that he cannot be compelled to;

- *crèche workers* - the four crèche workers who were initially charged with sexual offending alongside Mr Ellis might participate in the inquiry, as might other crèche workers (such as, for example, those who gave evidence at trial);
- *Police* - there is likely to be a focus on the actions of the Police - in particular, Detective Colin Eade, who was the officer in charge of the case. Detective Eade would have the right to legal representation and to appear in person to respond to allegations that adversely affected his interests, as would other officers;
- *Department of Social Welfare interviewers* – an important focus of the inquiry is likely to be the actions of the Department of Social Welfare interviewers who conducted the child evidential interviews, alongside their supervisor, Dr Karen Zelas;
- *crèche management* - there may be allegations about the crèche management, including employees of the Christchurch City Council;
- *Crown Solicitors or Crown Counsel* – allegations may be raised about the conduct of Crown Solicitors and Crown Counsel involved in Mr Ellis's trial and appeals;
- *other interested parties* - there are likely to be other interested parties, such as witnesses who gave evidence at trial. One of the challenges that the commission is likely to face is whether individuals who have conducted research into the case (such as Ms Lynley Hood) will have the right to appear before the commission.

Legal representation *Page 18*

26. This section outlines how legal representation is funded for commissions of inquiry. This will be a significant cost driver for the inquiry.

Cost of inquiry *Page 19*

27. This section identifies key factors that will drive the cost of the inquiry.

Timing *Page 20*

28. The timing for the inquiry will depend on a number of factors, including its scope and when it is established. At this stage, the expected timeframe of a commission could be between 18 to 24 months.

Procedure for establishing a commission of inquiry *Page 20*

29. As requested, this section (along with appendix B) contains a detailed procedural guide for establishing a commission of inquiry.

Scope of the inquiry

30. The first question that warrants discussion is the scope of the inquiry, and its focus.

31. If you wish to recommend a commission of inquiry into this case, the key question that will require resolution is whether there are any matters that raise doubts about Mr Ellis's convictions to such an extent as to render his convictions unsafe. The allegation of a miscarriage of justice is at the heart of the request for a commission of inquiry, and has underpinned all previous requests by Mr Ellis for intervention by the executive.

32. If the commission is to promote finality, the inquiry would need to examine the safety of Mr Ellis's convictions comprehensively. A key feature will be to empower it to consider

any evidence that, in its opinion, is relevant to the safety of Mr Ellis's convictions – whether or not it would be admissible in a court.

33. This would enable the commission to examine the events surrounding the Christchurch Civic Creche case in their totality, alongside any new evidence that may come to light during the inquiry.

Constitutional and vires considerations

34. The Crown Law Office has briefed the Attorney-General on the possibility of an inquiry, and it is attached as appendix A.

35. Officials have subsequently met with Crown Law. Their advice is that an inquiry ordered by the executive into the safety of Mr Ellis's convictions is unconstitutional and ultra vires under the Commission of Inquiries Act 1908.

Constitutional objection

36. The constitutional objection is that a commission of inquiry into Mr Ellis's case would breach the proper division or separation between the judicial and executive branches of government.

37. Both in law and in practice, the executive branch may intervene in a criminal case. However, Crown Law's view is that the appropriate (and arguably only lawful) basis for doing so is via the Royal prerogative of mercy preserved by the Letters Patent, and augmented by section 406 of the Crimes Act 1961.

38. This is a long standing and constitutionally recognised process that does not involve any separation of powers issue. The established convention is that "fresh" evidence is normally required to justify re-opening a case and, where that occurs, the appropriate course will nearly always be to refer the case back to the courts for consideration.

39. The main difficulty identified by Crown Law with the proposed commission is that it would entail, in substance, a "retrial" of Mr Ellis's case conducted by the executive entirely outside the courts, with the power to determine the safety of Mr Ellis's convictions.

40. The inquiry could result in a finding that the convictions are unsafe, based on evidence that could not be admitted before a court. As a result, there is the potential for a situation where the court system has found that Mr Ellis was rightly convicted according to law, but an executive inquiry finds him to be wrongly convicted based on evidence that could not be considered at a criminal trial.

41. According to the advice, this would go beyond the constitutionally recognised function of the executive, and encroach directly on the authority and function of the courts.

Ultra vires

42. The *vires* concern effectively flows from this constitutional objection. According to the advice, it is questionable whether the Commissions of Inquiry Act 1908, which will provide the legal framework for the inquiry, will authorise the proposed inquiry.

43. The argument here is that the Act empowers the Governor-General to pursue executive functions – that is, to enable the detailed examination of public policy or official conduct. This is reflected in section 2 of the Act which provides as follows:

> **2 Appointment of Commissions of Inquiry**
>
> The Governor-General may, by Order in Council, appoint any person or persons to be a Commission to inquire into and report on any question arising out of or concerning –
>
> (a) The administration of the Government; or
>
> (b) The working of any existing law; or
>
> (c) The necessity or expediency of any legislation; or
>
> (d) The conduct of any officer in the service of the Crown; or
>
> (e) Any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury; or
>
> (f) Any other matter of public importance.

44. A commission of inquiry into the safety of Mr Ellis's convictions could only be ordered under paragraph (f), which is the catch-all to section 2. However, Crown Law questions whether the catch-all could authorise an inquiry that is inconsistent with both the remainder of section 2 and the broader objectives of the Act, and which moreover encroaches in a fundamental way on the core function of the judiciary.

Department of Internal Affairs

45. The Ministry has consulted with the Department of Internal Affairs, who are responsible for establishing commissions of inquiry and providing administrative support.

46. The Department considers that the risks associated with establishing a commission of inquiry are high given that there is still a possibility of an appeal to the Privy Council. The Commission of Inquiry into Police Conduct was adjourned from 27 August 2004 to 7 February 2005, and had to have its terms of reference significantly amended, to avoid prejudicing any criminal trial.

47. The Department also supports Crown Law's assessment of the constitutional implications of establishing a commission of inquiry that would go beyond the constitutionally recognised function of the executive, and encroach directly on the authority and function of the courts.

Other limitations of the Commissions of Inquiry Act 1908

48. Leaving aside the question of whether it is possible to order a broad-based commission of inquiry into the safety of Mr Ellis's convictions under the Commissions of Inquiry Act 1908, the Ministry has identified other limitations of the Act in terms of the form of an inquiry, and the powers it would be able to exercise.

49. In large part, these limitations arise because the Act is 100 years old and overdue for reform. The Act was recently reviewed by the Law Commission. One of the key findings was that the Act is rigid and does not provide flexible, uniform powers for all commissions. The Act has only been amended 5 times since its enactment, and on occasions these have been piecemeal, and designed to remedy specific limitations that the Act would place on a forthcoming inquiry.

50. A key finding was that commissions, notwithstanding their discretion under the Act, tend to adopt a formal legalistic procedure that is akin to a court hearing, often characterised by an adversarial environment with examination and cross-examination of witnesses. This approach also tends to lead to costly, longer inquiries.

51. We have identified four important aspects of the Act that, if an inquiry proceeds under the current framework, will require consideration. This supports the view that the framework of the Act does not accommodate an inquiry into a serious criminal case, where the role of the commission is likely to be tested on a number of fronts. Other issues may be identified as the project progresses.

(i) Inquiry with limited role from complainants not legally possible

52. Firstly, the structure of the Act means that it will not be possible to establish a commission that has terms of reference that, on the one hand, require an exhaustive inquiry into the safety of Mr Ellis's convictions, and on the other must be conducted "on the papers" with a limited role from complainants and their families.

53. This is essentially because section 4A of the Act envisages that there will be oral hearings before a commission, and gives particular individuals a right to appear and be heard, either in person or through representation by counsel or agent. These individuals are:

- any person who is a party before the inquiry;
- any person who satisfies the commission that he or she has an interest in the inquiry apart from any interest in common with the public;
- any person who satisfies the commission that evidence given before it may adversely affect his or her interests.

54. Because of the formulation of this provision, a broad-based inquiry into the safety of Mr Ellis's convictions will necessarily incorporate a right for complainants and their parents to appear and be heard in person. There will also be similar rights for the New Zealand Police, Social Welfare interviewers and possibly the Crown prosecutor, if there are adverse allegations made about these individuals.

55. The terms of reference could not override the rights provided for by section 4A.[1] Moreover, it will be for the commission to determine who has the right under section 4A to appear before it, and how the proceedings should run within its terms.

56. It may be possible for the terms of reference for the inquiry to direct the commission to consider the written and videotaped evidence of complainants and their parents as a primary source of evidence. Alongside this, the terms of reference could also direct that any oral hearings involving complainants or their parents, if they occur, are to be conducted in private.

(ii) Commission would have powers to require witnesses to appear

57. A second important feature of the Act is that it will give the commission broad powers to require witnesses to appear before it and produce any relevant document. These powers are contained at section 4D.

58. A decision about exercise of these powers would ultimately lie with the commission itself, including whether witnesses that appear can be cross-examined.

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[1] See Re Erebus Royal Commission [1981] 1 NZLR 618; section 27 of the NZ Bill of Rights Act 1990.

59. Because the Christchurch Civic Crèche inquiry was particularly broad, these powers could conceivably be exercised in relation to a wide range of individuals.

(iii) Limited powers available to overseas judge

60. Thirdly, a commission that does not have a New Zealand High Court judge or former High Court as a member will have limited powers to conduct and maintain order at the inquiry.

61. The Commissions of Inquiry Act effectively provides for two classes of commission. Where a commissioner is a New Zealand High Court judge or former High Court judge, section 13 of the Act grants the commission the greater powers of the High Court in the exercise of its civil jurisdiction, including the Court's inherent jurisdiction. These powers were specifically extended in 1995 to former High Court judges, to enable the retired Chief Justice Sir Ronald Davison to have the powers of the High Court as part of the Wine Box Inquiry.

62. In other cases, section 4 of the Act grants the commission the lesser powers of a District Court acting in the exercise of its civil jurisdiction.

63. There is no exhaustive list of the differences between the powers of the District and High Court. One significant distinction that may be relevant to an inquiry into the Ellis case are the lesser powers of the District Court to punish for contempt. The High Court has the power to try and to punish for contempt of any kind relating to itself or to its proceedings, including contempt that occurs outside of the proceedings. District Courts' powers of contempt are limited to dealing with events or behaviour in the Court itself. Section 112 of the District Courts Act 1947 provides District Courts with the power to commit a person to imprisonment or impose a fine for contempt in three specific circumstances. These circumstances are:

- wilfully insulting a Judge, witness or court officer during his sitting or attendance in court, or in going to or returning from the court;
- wilfully interrupting court proceedings or misbehaving in court; and
- wilfully and without lawful excuse disobeying an order or direction of the court in the course of a hearing.

64. It is an open question whether this might become significant in the course of the inquiry. One possibility is that the commission, if it only has the powers of the District Court, will become unable to control actions occurring outside of the inquiry's proceedings in the way that the High Court could be expected to when considering serious criminal charges. The Law Commission indicated that this had been a problem for previous commissions of inquiry, and gave the example where a person breaches a suppression order issued by a commission which comprises a High Court judge. In such a case the commission would be able to charge the person with contempt.

(iv) Suppression powers for children

65. This leads to the question about whether the commission would have the power to suppress the identity of children who were not complainants, but who were interviewed as part of the broader Christchurch Civic Crèche case and whose evidence forms part of the inquiry.

66. Under section 139 and 139A of the Criminal Justice Act 1985, there is an automatic prohibition against publishing the names (or other identifying particulars) of the children whose disclosures led to charges being laid as part of the Christchurch Civic Crèche

inquiry. The prohibition will continue to apply during and after any commission of inquiry into the case.

67. This prohibition does not extend to other children that were interviewed as part of the broader Christchurch Civic Crèche case, but whose evidence never formed the basis of charges.

68. There do not appear to be any other powers under the District Courts Act that would enable the commission to ensure the privacy of all of the children outside of its proceedings. A District Court acting in its criminal jurisdiction would have comprehensive powers to suppress the identity of individuals, pursuant to section 140 of the Criminal Justice Act. However, these powers would not be available to a commission acting with the powers of a District Court in its civil jurisdiction.

69. It may be adequate for the commission's terms of reference to direct that the commission should hear evidence from the children and their parents in private, and not publish their names or identifying details. This approach was successful in the Royal Commission into Police Conduct. The approach will, however, rely on others who are present at the hearing from agreeing to maintain privacy.

Options for resolving legal constraints imposed by Act

70. One possibility for overcoming these legal constraints (alongside others that may be identified) could be to address them through legislation. Such legislation would not, however, be able to remedy the constitutional concerns that Crown Law have identified about the encroachment that such an inquiry would make on the authority and function of the courts.

71. There would be three options here:

- progress the Inquiries Bill, which has been introduced and is currently awaiting first reading. The Bill may however require further amendment to allow the government to order inquiries into criminal cases;
- enact legislation that is specifically designed to allow an inquiry into Mr Ellis's case, in similar terms to the Chamberlain Inquiry where the Northern Territory enacted the Commission of Inquiry (Chamberlain Convictions) Act 1986;
- amend the Commissions of Inquiry Act 1908 to remedy particular problems that have been identified. However, the Law Commission's report was critical of piecemeal amendments that had been made over time to remedy limitations in the Act. Consideration would also have to be given to the desirability of further piecemeal amendments to the Act while a bill proposing comprehensive reform was before the House.

Amendment of Evidence Regulations

72. Finally, the Evidence Regulations 2007 would also require amendment to enable the commission of inquiry to consider videotapes and transcripts of children's evidence. A similar amendment to the regulations was required for the Ministerial Inquiry by Sir Thomas Eichelbaum into the Ellis case.

73. The Evidence Regulations 2007 impose a prescriptive regime on who can have access to videotaped evidence and the associated transcripts. It limits the agencies to which the Police or court registrars can supply video tapes and transcripts, and also limits the

ability to copy, view or show the tapes or transcripts. The Regulations do not permit the video tapes and transcripts to be supplied to a commission of inquiry.

74. The Commissions of Inquiry Act 1908 provides commissions with broad powers of investigation. Under section 4C of the Commissions of Inquiry Act 1908, a commission of inquiry may inspect, examine and require persons to produce "any papers, documents, records or things". However, this power would have to be exercised in a way that was consistent with the Evidence Regulations. There is nothing to indicate that the power could be used to override them.

75. An amendment to the Regulations to expressly allow a commission of inquiry to view the children's videotaped evidence and associated transcripts would therefore be advisable to put the matter beyond question. This is especially given the sensitivities surrounding the evidence and the interests in avoiding any possible delay to an inquiry for the purpose of resolving questions about the commission's powers.

Precedent

New Zealand precedents

76. A commission empowered to inquire into the safety of Mr Ellis's convictions will be unique in New Zealand's legal history. There has not been a commission of inquiry in New Zealand that has been charged with making recommendations to government on whether a person's convictions are unsafe.

77. Since the inception of the Commissions of Inquiry Act 1908, commissions of inquiry have been used as an instrument of executive government, primarily to examine complex questions of public policy or official conduct in a forum that has statutory independence from a Minister or department. Commissions have not been used to review or "retry" criminal cases, as in constitutional terms this is considered the function of the appellate courts.

(i) Thomas case

78. The Royal Commission of Inquiry into the Thomas case, which is sometimes cited in support of a similar inquiry into Mr Ellis's case, is not a precedent for the current situation.

79. This is because the Royal Commission *followed* the pardon of Mr Arthur Allan Thomas, based on a report by Mr Adams Smith QC that indicated the conviction was unsafe. It was a "what happened" inquiry that followed a conventional exercise of the Royal prerogative of mercy. It was not an inquiry into whether Mr Thomas was properly convicted.

(ii) Atenai Saifiti

80. There are also limited parallels that can be drawn with the pardon of Mr Atenai Saifiti. This was a case where, during the course of a wider prison inquiry into unrest at Paremoremo by the then Chief Ombudsman (Sir Guy Powles) and a retired magistrate (Mr Sinclair) in 1971-72, a piece of fresh evidence emerged that demonstrated Mr Saifiti was likely to be innocent of the charges he was convicted of. Sir Guy Powles and Mr Sinclair said that a satisfactory resolution to this problem was one of the keys to better relations in the prison.

81. The records show that consideration was given to whether the best course of action would be to refer Mr Saifiti's case back to the Court of Appeal under section 406(a) of

the Crimes Act 1961, so that it could be dealt with by the judicial arm of government in accordance with constitutional principle. However, there were difficulties associated with a new trial because of the lapse of time and because the inquiry found that an acquittal would almost certainly result if the case returned to trial. A pardon was therefore recommended and subsequently granted.

Exhaustion of rights of appeal

82. A second exceptional feature will be that the inquiry would occur notwithstanding that Mr Ellis has clearly signalled he wishes to exercise further rights of appeal. Mr Ellis's counsel lodged notice of intention to seek special leave to appeal to the Privy Council in July 2007.

83. Ms Judith Ablett Kerr wrote to the Minister of Justice on behalf of Mr Ellis on 25 January 2008, indicating that an application seeking leave to appeal to the Judicial Committee of the Privy Council was currently being drafted. The letter said it would have been filed sooner but for financial constraints. Her oral advice to Crown Law later that year confirmed the continuing preparation of submissions to the Privy Council.

84. Mr Ellis's counsel made an informal inquiry about the availability of legal aid following the Justice and Electoral Committee inquiry into his case. However, he has not yet applied for legal aid for leave to appeal. Before it is granted, the Attorney-General must certify that the application involves a question of law of exceptional public importance and that the grant of criminal legal aid is desirable in the public interest.

85. The fact that Mr Ellis will have a final right of appeal following completion of the inquiry does not preclude a commission altogether, as the Governor-General's power to pardon or otherwise exercise the Royal prerogative may be exercised at any point in criminal proceedings. However, it is relevant to the question of finality. Moreover, because Mr Ellis's counsel has clearly signalled an intention to appeal, the question of interference by the executive in judicial proceedings is thrown into sharp relief.

(i) Saifiti case

86. You have asked whether the inquiry that led to a pardon in the Saifiti case occurred after Mr Saifiti had exhausted his rights of appeal.

87. Mr Saifiti did appeal to the Court of Appeal, where it was dismissed. It is unlikely that Mr Saifiti would have applied for special leave to appeal to the Privy Council given the low success rate in 1971. Moreover, it appears legal aid was not available for criminal appeals to the Privy Council prior to 1991 when the Legal Services Act 1991 came into force.

88. The context in which the inquiry occurred is also important to understand. As is outlined above, the inquiry that led to Mr Safiti's pardon was not ordered specifically to consider his case. Rather, the fresh evidence emerged during the course of a wider prison inquiry, and the Chief Ombudsman and retired magistrate recommended to the Minister of Justice that it would be necessary to address the safety of his convictions to deal effectively with the broader unrest at the prison.

Australian precedents

89. There have been commissions of inquiry in Australia that have had the primary task of examining the safety of criminal convictions. The Ministry has therefore examined a range of Australian precedents, which provide a much closer parallel to the existing

situation and are therefore helpful. Details of these inquiries were summarised in an appendix to our previous briefing.

90. Some states in Australia have a statutory power that allows a Governor to order an inquiry into criminal cases when considering applications for exercise of the Royal prerogative of mercy. In these cases, the task for the commission has been to inquire into a criminal case and make recommendations to Government on whether the convictions are safe. There has also been a broader willingness in Australian states to order commissions of inquiry to examine the safety of criminal convictions under general powers similar to the Commissions of Inquiry Act 1908.

91. The form of these inquiries, and their terms of reference, might potentially have some precedent value for Mr Ellis's case. However, there are some important points of difference worth emphasising.

92. Firstly, the reports of the Australian inquiries that we have been able to obtain in the time available demonstrate that the inquiries revolved around fresh evidence that was not available at trial, emerged later, and threw the convictions into doubt. Again, this is unlike Mr Ellis's situation, where there is no fresh evidence and the main reason for reopening the case will be because of ongoing public doubt.

93. Secondly, the reports we have obtained in the time available indicate that the Australian inquiries proceeded once the convicted person first had exhausted all of his or her rights of appeal. This meant there was no judicial avenue open to the individuals concerned to examine the fresh evidence that had been discovered.

Precedent implications

94. We must highlight the precedent implications of establishing a Commission of Inquiry into the safety of Mr Ellis's convictions.

95. If the unusual step of establishing a Commission of Inquiry to review a judicial process is taken in one case, it is likely there will be requests for similar treatment in other cases. It would be difficult for the executive to reject such requests on a principled basis, particularly given the absence of fresh evidence in the Ellis case. This may in turn undermine the established conventions relating to the exercise of the Royal prerogative of mercy.

96. The fact that Mr Ellis has clearly signalled an intention to exercise further rights of appeal compounds the problem. If a Commission of Inquiry proceeds, others may well expect intervention in their case by the executive before they have taken reasonable steps to exhaust their rights of appeal.

Option for responding that is consistent with constitutional principle

97. In the Ministry's previous briefing, an option for responding to the request for a commission of inquiry was outlined that is consistent with constitutional principle.

98. This is to say that Mr Ellis has clearly signalled he wishes to exercise further rights of appeal, and this option remains open to him.

99. Alongside this, the government remains open to the possibility that Mr Ellis's convictions might be re-opened. Such a course of action, however, would depend on new, cogent evidence being presented that has not already been properly examined or reviewed. This is a requirement that all criminal cases must normally fulfil before the executive will consider taking the unusual step of intervening in the judicial process.

100. The current request for a commission of inquiry does not present any new evidence that has not previously been considered. For this reason, alongside the fact that Mr Ellis has clearly signalled his intention to appeal, there is therefore no proper constitutional basis for the government to re-open Mr Ellis's case at this stage.

Form and conduct of the inquiry

Composition of Commission

101. If an inquiry into Mr Ellis's case proceeds, it will be necessary to make decisions about the form of the inquiry.

(i) Proposal for senior overseas judge to head inquiry

102. One option that has been suggested is for the commission to be comprised of a single senior Judge or retired Judge, possibly from Australia.

103. Another possibility that may be worth considering is for the appointment to be made from the Canadian judiciary, given the similarity of that jurisdiction.

(ii) Three person commission

104. A further option might be for the commission to comprise three individuals, with the remaining members being respected New Zealanders who are not necessarily legally qualified. At least one member of the commission (and preferably its chair) will need to be a senior Judge or retired Judge if the primary task for the commission is to examine the safety of Mr Ellis's convictions.

Requests for executive intervention

105. If a commission is established, there may be requests for executive intervention to modify the terms of reference or deal with legislative issues that arise while the inquiry is underway. Such requests could potentially come from the Crown, from a person with an interest in the inquiry like Mr Ellis, or from the commission itself.

106. Such requests have been a feature of the case to date. In the first application for the exercise of the Royal prerogative of mercy, Ms Ablett Kerr QC petitioned the Governor-General to broaden the reference to the Court of Appeal. As a result, the reference was significantly broadened to include a number of additional matters. In the third application for the Royal prerogative of mercy, Ms Ablett Kerr unsuccessfully sought to widen the terms of reference for the Ministerial Inquiry.

107. Whatever the statutory framework for the inquiry, there is also a possibility that the commission itself might be presented with matters that require amendment of the terms of reference or legislative intervention. As examples:

- significant amendment of the terms of reference of the Royal Commission of Inquiry into Police Conduct were required to ensure that the task of the inquiry remained clear;
- the Wine Box Inquiry required amendment of the Commissions of Inquiry Act 1908 to ensure that the commission had the proper powers;
- in the Ministerial Inquiry into the Ellis case, the need for amendment of the Evidence (Videotaping of Child Complainant) Regulations 1990 to give Sir Thomas Eichelbaum access the videotapes of children's evidence and associated transcripts only became apparent once the inquiry was underway.

Judicial review

108. Decisions made by a commission of inquiry are susceptible to judicial review. If a commission is established, it is possible that the Crown or a person interested in the proceedings might seek to challenge decisions made by the commission while it is underway – for example, about the exercise of its statutory powers, or decisions made pursuant to its terms of reference – or after the commission's report is released. A challenge to the lawfulness of the commission of inquiry, along the lines indicated by Crown Law, cannot be ruled out.

109. Judicial review of commissions of inquiry is not uncommon, and can be initiated by a range of interested parties. The New Zealand Police, for example, sought judicial review of the Royal Commission of Inquiry into the Thomas case. The Wine Box Inquiry was conducted in a litigious environment, and was subject to judicial review from several parties on a number of occasions. Air New Zealand successfully challenged certain findings of the Erebus Royal Commission by way of judicial review.

Detailed matters for the inquiry

110. As is outlined above, if the commission is to promote finality in the eyes of Mr Ellis and his supporters, it would need to examine the safety of Mr Ellis's convictions comprehensively.

111. The Ministry holds extensive files relating to Mr Ellis's case, and has conducted a stock take of the issues raised over its course. A broad commission of this type would need to be directed, at a minimum, to the following matters in order to conduct a comprehensive inquiry into the case:

- the events connected with the Christchurch Civic Crèche that gave rise to charges of indecency being laid against Peter Ellis and 4 other persons who worked at the crèche;
- the actions taken by crèche management, Police, and the Department of Social Welfare following the initial complaint by one of the children about Peter Ellis;
- the actions, following that complaint, of parents and family members of children who attended the crèche;
- the interviews by the Department of Social Welfare of children who attended the crèche;
- the overall reliability of the evidence given by children at Peter Ellis's trial;
- the investigation by Police of possible offences and the laying of charges against Mr Ellis and the other crèche workers;
- the conduct of the depositions hearing and other pre-trial hearings in relation to these charges;
- the conduct of Peter Ellis's trial and his appeals against conviction in 1994 and 1999;
- the Ministerial Inquiry into the Peter Ellis case conducted by Sir Thomas Eichelbaum.

What materials and evidence will the commission consider?

112. This section outlines in greater detail the material that a commission is likely to consider if one is established, and the witnesses who are likely to want to give evidence or have legal representation.

Commission will need to consider matters relevant to inquiry

113. Commissions of inquiry are empowered to determine their own procedure, and will consider any evidence that they consider necessary to discharge the terms of reference.

114. A broad commission of the type sought by Mr Ellis and his supporters would need to consider the following evidence, and should probably be directed to do so in its terms of reference:

- the video recordings and transcripts of interviews of children by the Department of Social Welfare, whether or not those video recordings were the basis of charges against Mr Ellis or his co-workers;
- all statements made to Police in connection with the investigation by Police of possible offences committed in respect of children who attended the crèche;
- the transcript of all submissions made and evidence given at the depositions hearing, pre-trial hearings and trial arising from the charges laid against Peter Ellis and 4 of his colleagues who worked at the Christchurch Civic Crèche;
- all rulings, instructions, directions and judgments given or made by a court at or in connection with the hearings and trial;
- the transcript of all submissions made and evidence given at the appeals against conviction by Peter Ellis in 1994 and 1998-1999;
- all rulings, instructions, directions and judgments given or made by the Court of Appeal at or in connection with the hearing of those appeals;
- the Ministerial Inquiry into the Peter Ellis case conducted by Sir Thomas Eichelbaum.

Who will commission hear from?

115. One of the first tasks for any inquiry is to determine who it needs to hear from. The Commissions of Inquiry Act 1908 effectively sets up three classes of people who may appear and be heard orally before the inquiry, and are entitled to legal representation:

- the parties to the inquiry;
- any person who satisfies the commission that they have an interest in the inquiry apart from any interest in common with the public good; and
- any person who satisfies the commission that any evidence given before it may adversely affect his or her interests. Such individuals have a limited right to appear and be heard in respect of this evidence.

116. The next section of this report outlines some of the people that are likely to have standing before the commission, alongside the nature of their interest in the inquiry.

Children

117. A primary focus for the inquiry will be the written and videotaped evidence of the children that were interviewed as part of the Christchurch Civic Crèche inquiry.

118. These individuals fall into two groups.

119. Firstly, there are the complainants whose disclosures led to charges being laid against Mr Ellis and his co-workers. There is also a much larger group of children and parents who were interviewed as part of the inquiry, but whose disclosures did not lead to charges being laid.

120. As is outlined above, it is likely that the complainants would be entitled to give oral evidence before the commission by virtue of section 4A of the Commissions of Inquiry Act. The commission would also have powers to summon these individuals to give evidence if it felt this was necessary to discharge its terms of reference.

121. Mr Ellis has previously sought access to interviews with children that did not result in convictions. It is therefore likely that some of these children's interviews would form part of the inquiry. If so, they would similarly be entitled to give oral evidence before the commission, and might potentially be summoned to give evidence if the commission decided they had knowledge or information that was relevant to the subject of the inquiry.

Parents

122. The actions of the parents of children who had been interviewed would also be a significant focus for the inquiry. The question here (which has been argued by Mr Ellis's counsel and explored thoroughly at trial, on appeal, and before the Ministerial Inquiry) is whether parents contaminated the children's interviews, through "cross-talk", sharing of information amongst themselves and questioning their children.

123. Again, the parents fall into two groups – the parents of complainants whose disclosures led to charges being laid against Mr Ellis and his co-workers, and the parents of children who were interviewed as part of the inquiry, but whose disclosures did not lead to charges being laid.

124. Because of the nature of the allegations about the parents, it is likely that both would potentially participate in the inquiry.

Mr Peter Ellis

125. A significant focus for the inquiry will also be Mr Ellis and his actions.

126. The inquiry would need to examine Mr Ellis's evidence at trial and, in similar terms to the complainants, Mr Ellis would be entitled to give evidence in person if he chose and have legal representation (section 4A of the Commissions of Inquiry Act 1908).

127. However, it is not clear whether Mr Ellis could be required to give evidence by the commission if he chose not to.

128. This is because there could be an argument that the privilege against self-incrimination, which is set out in section 60 of the Evidence Act 2006, applies to Mr Ellis. The application of section 60 is, however, not clear and could potentially be the subject of significant legal argument, either before the Commission itself or on judicial review.

Creche workers

129. The breadth of the inquiry would mean that the four crèche workers who were initially charged with sexual offending alongside Mr Ellis may also have the right to participate in the inquiry. These individuals would be likely to have an interest in the inquiry other than one in common with the public good. Alongside this, they would also potentially need to have the ability to respond to allegations that adversely affected their interests.

130. Other crèche workers also gave evidence at trial and, depending on how the commission proceeds, these individuals might have the right to appear before the commission in person or through counsel, or might be called by the commission to give evidence.

Police

131. There is likely to be a focus on the actions of the Police - in particular, about Detective Colin Eade, who was the officer in charge of the case. There have been submissions about Detective Eade's personal conduct in successive applications for exercise of the Royal prerogative of mercy.

132. Because of this, it is likely that Detective Eade would have the right to appear in person before the commission to respond to allegations that adversely affected his interests. A similar right would also apply to other police officers if allegations were made about their conduct.

Department of Social Welfare interviewers

133. Another important focus of the inquiry is likely to be the actions of the Department of Social Welfare interviewers who conducted the child evidential interviews. These interviewers, and their supervisor, Dr Karen Zelas, are likely to be entitled to give evidence in person and have legal representation (section 4A of the Commissions of Inquiry Act 1908).

134. The key thrust of the submissions made by Mr Ellis's counsel at trial, on appeal, and before the Ministerial Inquiry has been that the evidential interviews were not conducted in accordance with best professional practice. Alongside this, there has been an argument that a "sea change" in expert psychological opinion has occurred since the time of Mr Ellis's trial, and the broad consensus of experts now is that aspects of the interviewing process might have rendered the interviews unreliable.

135. Examination of these submissions was one of the central areas for examination by the Ministerial Inquiry conducted by Sir Thomas Eichelbaum, where two independent experts of international standing advised on whether the interviews were conducted in accordance with best practice, both at the time and by present day standards.

136. There have also been submissions that Dr Karen Zelas, who supervised the evidential interviews and also gave expert evidence for the Crown at Mr Ellis's trial, had a conflict of interest in these two roles. This question has been considered by the Court of Appeal and rejected.

Creche management

137. There may also be allegations about crèche management, including employees of the Christchurch City Council. These could extend to:

- the decision to close the crèche following the laying of charges against Mr Ellis and other workers and their subsequent dismissal;
- allegations about the personal conduct of particular city council officials when liaising with parents.

138. If the commission determines that these matters fall within the ambit of its inquiry, then the affected individuals might also participate in the inquiry.

Crown solicitors and counsel

139. The Crown Solicitors and Crown Counsel involved in Mr Ellis's trial and appeals might need to participate if allegations are raised about their conduct in the proceedings.

Other interested parties

140. There may be other interested parties, such as witnesses who gave evidence at trial. Alongside this, the breadth of the inquiry means that the pool of persons with an interest in the inquiry is likely to be correspondingly broad.

141. One of the challenges that the commission is likely to face is whether individuals who have conducted research into the case (such as Ms Lynley Hood) will have the right to appear before the commission, notwithstanding that their contribution will be limited to their opinion about the case. Here, the commission will not be bound by sections 24-26 of the Evidence Act 2006, which places restrictions on the admissibility of opinion evidence.

Legal representation

142. While the Commissions of Inquiry Act 1908 entitles a range of interested persons to have counsel appear on their behalf before a commission, legal aid is not available for representation under the Legal Services Act 2000.

143. This means that the Crown will have to decide whether to meet the legal costs of particular individuals, and how. Decisions about legal representation may need to be revisited once the commission has determined who it needs to hear from, and how it will conduct its proceedings.

144. The Ministry is working alongside the Department of Internal Affairs on this topic.

Individuals who have a significant interest in the inquiry

145. The legal representation of individuals who have a significant interest in the inquiry (such as Mr Peter Ellis, the children who were interviewed, and their parents) would normally be included in the commission's budget.

146. In the case of the children and parents, there would need to be consideration about whether one or more lawyers could represent their collective interest. For the Ministerial Inquiry into the Ellis case, one lawyer was appointed to represent the complainants and their families. However, an inquiry that involved oral evidence from these individuals might raise different issues. This is something that would need to be explored directly with the individuals concerned.

147. For all individuals, there would need to be decisions about whether legal representation would be subject to a cap, and how grants would be managed.

Legal representation of state employees

148. The legal representation for state employees (including Police, Department of Social Welfare interviewers and possibly Crown Solicitors) would not form part of the commission's overall budget and would need to be met within the relevant department's baseline. These costs could be substantial.

Individuals who have to meet their own legal costs

149. Finally, there will be individuals entitled to legal representation who the Crown decides have to meet their own legal costs.

150. Again, decisions on individuals falling within this category may need to be revisited during the course of the inquiry.

Cost

151. We are working with the Department of Internal Affairs on the estimated costs of a commission of inquiry into Mr Ellis's case.

152. We are not currently in a position to provide detailed costs but have identified the following areas which will drive the cost:

- an overseas retired judge as chair of the commission and two prominent New Zealanders as commissioners → a judge's daily fee as a commissioner is usually outside the Cabinet Fees Framework as the fee is set in line with what the judge would receive on the bench. An overseas judge could expect higher fees, return flights for home visits during the commission's term, and accommodation and expenses while in New Zealand;

- a commission based in Christchurch or Wellington, with an office and hearing premises → specific accommodation requirements (including the security of persons and information) may mean appropriate premises are hard to find and increase costs. One possibility is that the commission could utilise existing court facilities, but this would impact on normal court work and would not therefore be cost-free;

- legal representation → the costs for legal representation are outlined in the previous section and are likely to be significant cost driver for the commission;

- counsel assisting, and possibly experts on children's evidence, would be appointed to advise the commission;

- professional services, such as media advisers, would be appointed to assist the commission; and

- a publicly available report of commission → a number of print copies of the report could be published to meet anticipated public interest, and electronic versions could be accessed from an official website.

153. In practical terms, the Department of Internal Affairs works alongside each commission to help it to manage its budget. Where a budget is clearly not sufficient, it is necessary for extra funds to be allocated by Cabinet – this can happen on multiple occasions.

154. The Royal Commission on Genetic Modification (which examined a pure question of policy with reasonably broad terms of reference and a requirement for public consultation) cost approximately $4.3 million. The Commission of Inquiry into Police Conduct (which was a commission into official conduct, with narrower terms of reference and hearing evidence from approximately 46 witnesses) cost about $4.89 million.

Timeframe

155. We are working with the Department of Internal Affairs on the estimated timeframe.

156. At this stage, the expected timeframe of a commission could be between 18 to 24 months taking into account:

- the number of interested persons;
- the likely adversarial nature of the inquiry;
- the difficult legal and practical environment that the commission will operate in; and
- the possibility of judicial review.

157. The Law Commission's paper *A New Inquiries Act* contains information on the proposed and actual duration of all commissions since 1976. While circumstances vary for every commission, extensions are not uncommon. It is often difficult to estimate the length of time an inquiry will take. Providing a more generous timeframe upfront may lessen the chance of an extension, and any further funding as a result of the extension, being sought.

Procedure for establishing a commission of inquiry

158. As requested, a detailed procedural guide for establishing a commission of inquiry into the Peter Ellis case is set out in Appendix B.

159. Cabinet approves the establishment of a commission of inquiry, the appointment of commissioners, the warrant (including the terms of reference), and budget. On Cabinet's recommendation the Governor-General then appoints a commission of inquiry by order in council. If establishing a Royal commission of inquiry, the only real difference in process is that the Governor-General appoints the commission under the Letters Patent.

160. The Department of Internal Affairs recommends Cabinet decisions are sought in two stages: a first Cabinet paper seeks agreement to establish a commission of inquiry and provisional budgets; the second paper seeks detailed agreement on the appointment and remuneration of commissioners, the warrant and terms of reference for the commission, and a detailed budget.

161. Responsibility for establishing a commission of inquiry is often shared between the Minister who initiates the inquiry and the Minister of Internal Affairs. For reasons of independence, the Minister of Internal Affairs is usually responsible for taking the second paper to Cabinet.

Conclusion

162. Officials are available to discuss the issues raised in this briefing with you, alongside the next steps.

163. **Please note that:**

(a) Crown Law have advised that an inquiry ordered by the executive into the safety of Mr Ellis's convictions is unconstitutional and ultra vires under the Commission of Inquiries Act 1908;

(b) The Department of Internal Affairs, who are responsible for establishing commissions of inquiry and providing administrative support, considers that the risks associated with establishing a commission of inquiry are high given that there is still a possibility of an appeal to the Privy Council;

(c) In terms of precedent, the establishment of a commission of inquiry to review a criminal conviction would be unique in New Zealand, and may undermine the division between the executive and the judiciary, alongside the established conventions relating to the exercise of the Royal prerogative of mercy;

(d) the Ministry of Justice has identified limitations imposed by the Commissions of Inquiry Act which may require legislative intervention.

Jeff Orr
Chief Legal Counsel

APPROVED / SEEN / NOT AGREED

Hon Simon Power
Minister of Justice
Date: 27/5/09

APPENDIX A

Pub 29/4
1/5

Te Tari Ture o te Karauna
Crown Law

29 April 2009

Attorney General

Proposed Commission of Inquiry: The Christchurch Crèche Conviction
Our Ref: JUS043/784

1. The Ministry of Justice has sought advice from the Crown Law Office in respect of a possible Commission of Inquiry into the Christchurch Civic Crèche (Peter Ellis) case.

2. Crown Law will of course work with the Ministry of Justice. The purpose of this memorandum is to draw to your attention matters that we see as raising constitutional issues, arising from the proposed Commission.

3. In a nutshell, our concerns are centred on the proper division or separation of the judicial and executive branches of government under our constitutional arrangements.

4. Both in law and practice the executive branch may intervene in a criminal case. The appropriate (and arguably only lawful basis) for so doing is via the Royal prerogative of mercy preserved by the Letters Patent, and augmented by s 406 of the Crimes Act 1961.

5. This has become an increasingly active area of decision-making, *Barlow* being a recent example and earlier, of course, *Bain*. Pursuant to the Letters Patent the Governor General in Council may pardon any person convicted of a crime. Usually, however, Petitioners seek a reference for their case to the Court of Appeal under s 406(a) or (b) of the Crimes Act.

6. In these cases the Governor General, as is usual, acts on the appropriate advice from the Minister of Justice, and there has been a long practice of inquiry by the Minister's advisers into the circumstances of the conviction. Plainly this does not involve any separation of powers issue because a long standing and constitutionally recognised process is being put in train. The appropriate power is recognised and protected by s 406 of the Crimes Act.

7. The difficulty with the proposed Ellis Commission is that there is no evident application for the exercise of the Royal Prerogative. The relevant history is that there was a petition to the House in 2003 requesting that a Commission be established (it does not appear that P. Ellis was a petitioner) which was refused. It is that petition that has apparently been renewed.

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by the exercise of the prerogative of mercy in its accepted and understood form because of the underpinning from the Letters Patent and the Crimes Act. But this is not otherwise the case. Whether the Commissions of Inquiry Act 1908 read in the necessary light of fundamentals in constitutional law authorises the proposed inquiry is far from obvious.

15. While time has allowed only a quick sampling of overseas inquiries into convictions (e.g. in Canada, the well known "three Ms" – *Moran, Marshall* and *Milguard*, in New Zealand, *Thomas*, in the UK, the *Confait* case and the IRA bombings) all have acted after the judicial or a lawful executive process of quashing the convictions.

16. We will discuss with the Ministry of Justice a proposed terms of reference in the event that a Commission were to proceed and keep you informed of that process.

17. Finally, we note that Judith Ablett-Kerr QC, counsel for Peter Ellis, in 2007 filed and served a Notice of Intended Application (copy **attached**), signalling an intention by Mr Ellis to exercise his right of appeal to the Privy Council. To date no further steps have been taken."

Recommendation

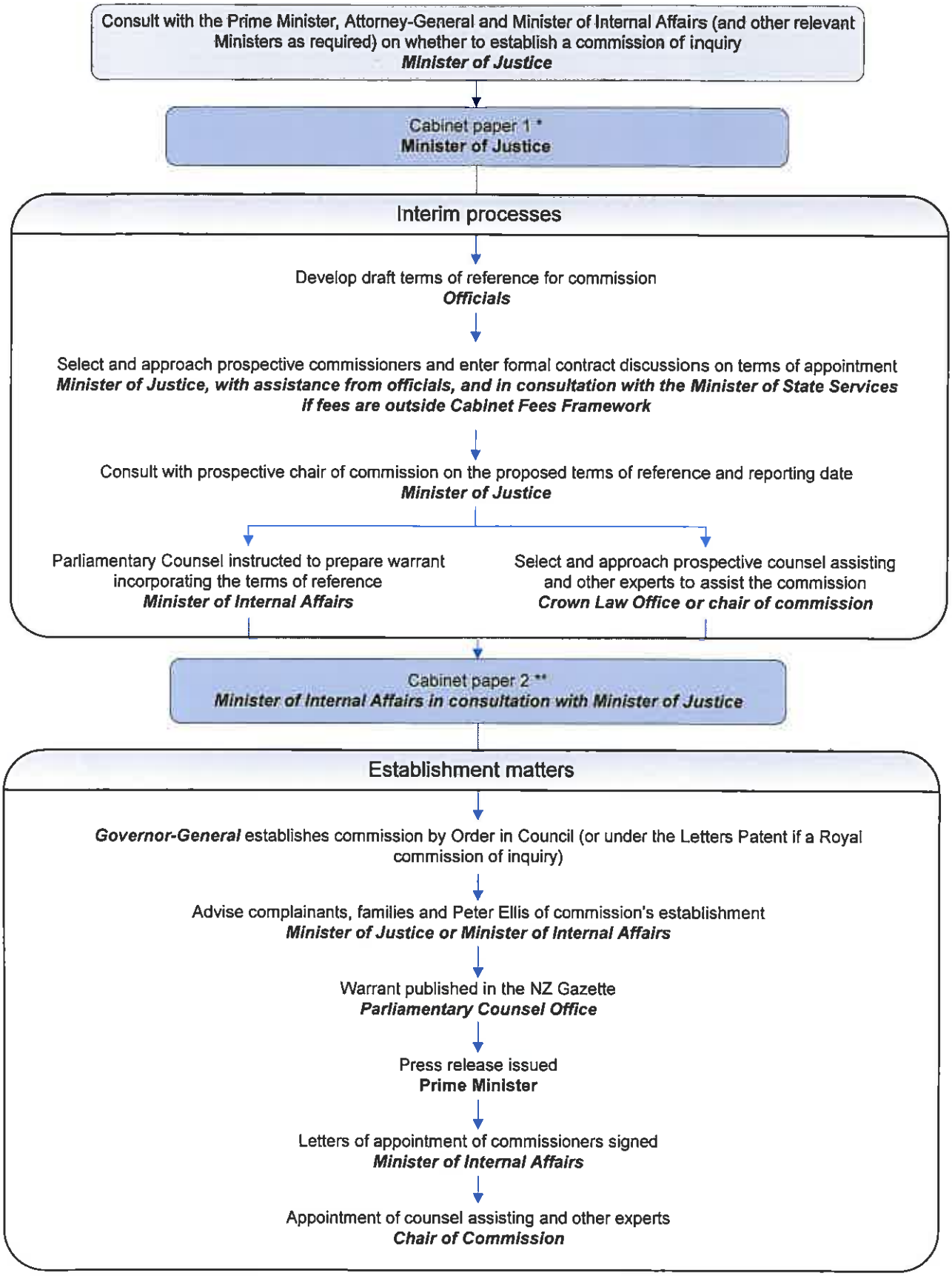
18. We recommend that you note this report that the proposal to establish a Commission of Inquiry into the Peter Ellis case raises significant constitutional and *vires* issues.

Noted

Cheryl Gwyn/John Pike
Deputy Solicitor-General/General Counsel

C. J. Finlayson
.....
Hon Christopher Finlayson
Attorney-General
29/4/09

Appendix B Procedure for establishing a commission of inquiry



*** Cabinet paper 1 (Minister of Justice)**

Covering:

- situation giving rise to the need for a commission of inquiry and why one is necessary
- objectives for the commission of inquiry
- proposed makeup of commission
- any issues for departments (potential conflict of interest with commission, legal representation for individuals, allocation of responsibilities)
- provisional budget sufficient to cover set up costs of commission
- an indication of budget requirements for operation of commission
- administrative requirements of Department of Internal Affairs

and seeking agreement to:

- establish commission of inquiry
- Department of Internal Affairs being responsible for establishing the commission of inquiry, and for ongoing administration and budgetary support
- invite the Minister of Internal Affairs to report to Cabinet recommending proposed Commissioners, terms of reference and seeking appropriations for the commission's budget

**** Cabinet paper 2 (Minister of Internal Affairs in consultation with Minister of Justice)**

Covering:

- appointment and remuneration of commissioners
- full wording of warrant including final terms of reference and reporting date
- any specific legal powers of the commission
- revised and final budget

and seeking agreement to:

- remuneration of commissioners if outside of Cabinet Fees Framework
- wording of warrant for assent by Governor-General (including terms of reference)
- revised detailed budget
