

From: Renay Duncalfe
To: janice.calvert@dia.govt.nz
Date: Monday, 16 February 2009 4:35 p.m.
Subject: Advice on commissions of inquiry

Hi Janice

I have been given your name as a first contact in the Department of Internal Affairs for advice on commissions of inquiry.

The Minister of Justice has been approached by members of the public seeking a commission of inquiry into the Peter Ellis (Christchurch Civic Creche) case. The request is for an inquiry into all aspects of the investigation and legal processes relating to the case, with the inquiry having the power to recommend a pardon for Mr Ellis. The Minister has sought written advice from the Ministry of Justice on the request. We are currently drafting advice to help the Minister decide whether to pursue the option of establishing an inquiry.

The reason for contacting you is to see whether DIA is able to assist with some particular queries we have and to discuss generally the suitability of Mr Ellis' case for inquiry.

We have DIA's publication "Setting up and running commissions of inquiry" and the relevant parts of the Cabinet Manual.

Our particular queries in relation to this request include:

(i) suitability for inquiry

Ultimately one of the main purposes of a commission of inquiry would be to determine whether a miscarriage of justice has occurred and Mr Ellis should be granted a pardon. Such an inquiry might hear evidence from the Crown and Ellis and then decide whether the facts as determined by the inquiry lead to doubts about Mr Ellis' convictions.

We are interested in DIA's view on the suitability of an inquiry into the case or whether there are any examples of commissions of inquiries being used for similar purposes in the past.

(ii) cost

At this stage, we are not intending to provide an estimated cost of an inquiry. However, if possible, we would like to provide examples of the cost of recent commissions of inquiry. We would also like discuss generally the types of matters that impact on the cost of commissions (e.g. structure and procedure).

(iii) other

Are there any obstacles to appointing an overseas judge as a commissioner of an inquiry?

We are interested in meeting to discuss these issues and look forward to hearing from you. Please contact me on 494 9789 or renay.duncalfe@justice.govt.nz.

Kind regards,

Renay Duncalfe

Renay Duncalfe
Senior Solicitor | Office of Legal Counsel

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From: .. Jeff Orr
To: peter.andrews@egs.govt.nz
Date: 27/04/2009 11:18 a.m.
Subject: Commission of Inquiry - Ellis

Dear Peter

As you are aware the Minister of Justice is currently considering a request from Don Brash, Katherine Rich and Lynley Hood for a Commission of Inquiry into the Christchurch Civic Crèche (Peter Ellis) case. The Minister requested advice from the Ministry, and in March we provided him with a detailed report on the history of the case. Our advice also addressed the arguments presented over the years in support of an Inquiry into the case and some principles for considering the current request when no new evidence has been presented and Mr Ellis has a remaining avenue of appeal.

The Minister has asked us for further advice on the focus, scope, structure and cost of a possible Inquiry. He has also asked for detailed advice on the steps to establish an Inquiry, and particularly his role in the establishment.

We are currently putting together a briefing that covers these issues. I would like to get DIA involved at this stage. In particular, I would appreciate a discussion and advice from DIA on the possible structure and cost of an Inquiry, and other matters around establishing and running an Inquiry (including the process for seeking Cabinet approval and appointing Commissioners).

Withheld s 9(2)(g)(i)

You will see that, at this stage our working proposal is for an Inquiry focused on whether there are any matters that raise doubts about Mr Ellis' convictions to such an extent as to render his convictions unsafe.

Withheld s 9(2)(g)(i)

The Inquiry would be charged with making recommendations on whether the exercise of the Royal prerogative of mercy is warranted in Mr Ellis' case – either in the form of a pardon or some other remedy.

In our upcoming briefing we want to explore the options of an Inquiry with one commissioner (an overseas judge) or an Inquiry with 3 commissioners (an overseas judge as chair, and two respected lay people from New Zealand). We anticipate that an Inquiry may receive written and oral evidence from original and new witnesses, and allow cross-examination of witnesses. Possible features Withheld s 9(2)(g)(i) are: a broad statement of matters that may be considered in relation to the Inquiry; core records that must be taken into account by the Inquiry; a definition of when a conviction is to be considered unsafe; that hearings of evidence by Crèche children (if any occur) would be in private and that legal restrictions on identifying the children would be maintained.

Our briefing to the Minister is due early May. For this reason I would be grateful if we could meet this week to discuss the matters I have outlined and any other matters DIA would like to raise.

Regards,

Jeff Orr
Chief Legal Counsel

From: Renay Duncalfe
To: "Julie Wall (MIN)" <Julie.Wall@parliament.govt.nz>; joanna.gould@dia.govt.nz
CC: Hammington, Jeremy; Orr, Jeff; Petherick, Michael; Webb, Melanie
Date: Tuesday, 5 May 2009 2:54 p.m.
Subject: Draft briefing to Minister of Justice on inquiry
Attachments: MJ - Commission of Inquiry - Peter Ellis 23-4-09_1.doc

Hi Julie and Jo

Please find attached a draft briefing to the Minister of Justice on a possible inquiry into the Peter Ellis case. It is our first draft and is still to be reviewed within the Ministry. However, given our time restraints we thought it would be best to get it to you in its early state. The briefing incorporates many of the issues we discussed at our meeting last week.

As discussed with Julie, we would be very grateful if you could review the draft briefing and provide comments on the areas of particular interest to DIA. These areas are likely to be:

- restrictions imposed by the Commissions of Inquiry Act 1908 (page 5)
- form of the inquiry (page 11)
- legal representation (page 16)
- cost (page 17)
- timeframe (page 18)
- procedure for establishing an inquiry (page 18 and Appendix A) - this section is focussed on actions at Ministerial level.

The briefing is due with our Minister on Friday. To meet this deadline we need to receive comments by the end of Thursday if possible. We are happy to meet to discuss your comments or receive comments by email - whichever suits you best. Thank you for your help, and apologies for the timeframe.

Kind regards, Renay

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Hon Simon Power, Minister of Justice

Commission of Inquiry – Mr Peter Ellis

Date	<<date May 2009>>	File reference	CON 34 05 20
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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 12 May 2009

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	(a/h)	1st contact
Jeff Orr	Chief Legal Counsel	494 9755		✓
Melanie Webb	Manager, Ministerial Advice	494 9839		

Minister's office to complete

- Noted Approved Overtaken by events
 Referred to
 Seen Withdrawn Not seen by Minister

Minister's office comments

<<date 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 professional legal privilege.

Executive summary and contents

Scope of inquiry

Page 3

3. If you wish to order 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.
4. The inquiry would need to examine the safety of Mr Ellis's convictions comprehensively if it is to promote finality in the eyes of Mr Ellis and his supporters. 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.

Crown Law advice

Page 4

5. Crown Law have briefed the Attorney-General and raised concerns about the constitutional appropriateness of a inquiry ordered by the executive into the safety of Mr Ellis's convictions.
6. There are also said to be significant *vires* issues about whether the Commissions of Inquiry Act 1908 could be used to authorise an inquiry into the safety of Mr Ellis's convictions.
7. This Crown Law advice is summarised in this briefing, and it is attached as an appendix.

Other restrictions imposed by Commissions of Inquiry Act 1908

Page 5

8. Leaving 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 restrictions on the form of an inquiry imposed by Act, and the powers it would be able to exercise.
9. In large part, these restrictions arise because the Act is designed to pursue Executive functions – that is, to enable the detailed examination of public policy or official conduct. The framework of the Act does not easily accommodate the exercise of judicial functions, particularly for such a serious criminal case where the role of the commission is likely to be tested on a number of fronts.

10. 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, on the one hand, is required to exhaustively inquire into the safety of Mr Ellis's convictions, but on the other is conducted "on the papers" with a limited role from complainants, their families, or other interested parties;
- the Act gives the commission broad powers under the Act 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 if a judge or retired Judge of the High Court is not a member (those of a District Court acting in its civil jurisdiction). One of the effects is that the commission will only have limited contempt powers, and could mean that it will be unable to control publicity about the case outside of its proceedings in the way that a court would be expected to;
- the existing suppression of the identity of complainants is guaranteed by sections 139 of the Criminal Justice Act 1985. It is not clear that the commission would have any power to suppress the identity of children who were not complainants, but whose evidence formed part of the inquiry.

11. Some of these legal shortcomings might be remedied through legislation, and the options are identified at page 7.

Precedents

Page 8

12. A commission empowered to inquire into the safety of Mr Ellis's convictions will be unique in New Zealand's legal history. Since the inception of the Commissions of Inquiry Act 1908, commissions have been used as an instrument of Executive government to examine public policy or official conduct. There has not been a commission of inquiry in New Zealand that has been charged with determining whether a person's convictions are unsafe, and making recommendations to Government.

13. A second exceptional feature is that the inquiry would occur while Mr Ellis has signalled he wishes to exercise further rights of appeal. Mr Ellis's counsel lodged notice of intention to appeal to the Privy Council in July 2007; and 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 Privy Council is currently being drafted.

14. 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.

Detailed matters for the inquiry

Page 10

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

Form of inquiry

Page 11

16. This section outlines options for the form of the inquiry.

What evidence might a commission consider?

Page 12

17. The Commissions of Inquiry Act 1908 effectively sets up three classes of people who are entitled to appear before the inquiry, and are entitled to legal representation. 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 convictions against Mr Ellis, and their parents. There is also a much larger group of children and parents who were interviewed as part of the inquiry, but were not the subject of 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 appear in person before the commission 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;
- *other interested parties* - there are likely to be other interest 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 16

Cost of inquiry

Page 17

Timing

Page 18

Procedure for establishing a commission of inquiry

Page 18

Scope of the inquiry

18. The first question that warrants discussion is the scope of the inquiry, and its focus.
19. If you wish to order 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.
20. If the commission is to promote finality in the eyes of Mr Ellis and his supporters, 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.
21. This would enable the commission to examine the events surrounding the Christchurch Civic creche case in their totality, alongside any new evidence that has come to light.

Constitutional and vires considerations

22. The Crown Law Office has briefed the Attorney-General on the possibility of an inquiry, and it is attached.
23. Crown Law have raised a concern about the constitutional appropriateness of an broad inquiry ordered by the executive into the safety of Mr Ellis's convictions. There are also said to be significant *vires* issues under the Commissions of Inquiry Act.
24. Officials have met with the Crown Law Office to discuss these concerns, and they are summarised below.
Constitutional objection
25. 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.
26. 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. This is a long standing and constitutionally recognised process that, because of the protections imposed by section 406, does not involve any separation of powers issue.
27. The difficulty with the proposed commission is that it will amount to executive intervention in a criminal case where, unlike the process that applies for applications for exercise of the Royal prerogative of mercy, there is no "fresh" evidence or new argument that throws new light on the case. Rather, it will involve a wholesale review of decisions made by the courts, with the power to determine the safety of Mr Ellis's convictions.
28. According to the advice, this will go beyond the constitutionally recognised function of the executive, and encroach on the authority and function of the courts.

Ultra vires

29. 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.
30. The argument here is that the Act empowers the Governor-General to pursue Executive functions – that is, to enable the detailed examination of examine 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
31. Under the terms of the section a commission of inquiry could only be ordered under paragraph (f), which is the catch-all to section 2. The question is, however, whether this provision could authorise an inquiry to be held which encroaches in a fundamental way on the function of the judiciary.

Other restrictions imposed by the Commissions of Inquiry Act 1908

32. Leaving 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 restrictions on the form of an inquiry imposed by Act, and the powers it would be able to exercise.
33. 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. This is primarily because of its age and the piecemeal amendments that have been made over time - the Act has since only been amended 5 times since its enactment, and on occasions these have been to remedy specific limitations that the Act would place on a forthcoming inquiry.
34. Another key finding was that the overall framework in the Act tends to result in an "all or nothing" approach – 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.
35. We have identified three important aspects of the Act that, if an inquiry proceeds under the current framework, are worth highlighting. Other issues may be identified as the project progresses.
- (i) *Inquiry with limited role from complainants not legally possible*

36. 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, is required to exhaustively inquire into the safety of Mr Ellis's convictions, but on the other is conducted "on the papers" with a limited role from complainants and their families.
37. 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, or 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.
38. 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. It would be difficult for the terms of reference of the inquiry to restrict the involvement of complainants and their parents without potentially being *ultra vires* of section 4A.
39. The best result that may be possible here is for the terms of reference from the inquiry to direct the commission to consider the written and videotaped evidence of complainants and their parents. Alongside this, the terms of reference could also require any oral hearings involving complainants or their parents, if they occur, to be conducted in private.
- (ii) *Commission would have powers to require witnesses to appear*
40. A second important feature of the Act is that it will give the commission broad powers under the Act to require witnesses to appear at oral hearings.
41. These powers are contained at section 4D. They would effectively enable the commission to require any person that has knowledge or information that is relevant to the subject of the inquiry to attend and give oral evidence.
42. A decision about exercise of these powers would ultimately lie with the commission itself. Because the Christchurch Civic crèche inquiry was particularly broad,
- (iii) *Limited powers only available to overseas judge*
43. Thirdly, the provisions in the Act will only grant limited powers to the commission to conduct and maintain order at the inquiry if a New Zealand High Court judge or former High Court judge does not sit with the commission.
44. The Commissions of Inquiry Act effectively provides for two classes of commission. Where a commissioner is a 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. These powers were specifically extended in 1995, to enable the retired Chief Justice Sir Ronald Davison to have the powers of the High Court as part of the Wine Box Inquiry.

45. 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.
46. There is no exhaustive list of the differences between the powers of the District and High Court. However, one significant distinction that may be relevant to an inquiry into the Ellis case are the lesser powers of the District Court to make orders for contempt. The High Court has broad inherent powers of contempt and these effectively enable the court to control issues both before and outside of proceedings – they may (for example) be used to make orders or directions on matters that form part of the inquiry, and these must be adhered to both within and outside of the inquiry.
47. Breach of the High Court's inherent powers of contempt carry a penalty of imprisonment for a period not exceeding 3 months, or a fine not exceeding \$1,000.
48. The District Court, in contrast, has limited powers of contempt, which are outlined comprehensively in statute law. The powers are restricted to matters that essentially form part of the hearings themselves, such as wilfully interruption or misbehaviour during the course of a proceeding. The penalty for breach is also lower – on summary conviction, a fine not exceeding \$1,000.
49. It is not clear 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 issues that form part of the inquiry, or their broader reporting outside of the inquiry. The Law Commission indicated that this had been a problem for previous commissions of inquiry.

(iv) Suppression powers for children

50. There is also a 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.
51. Under section 139 of the Criminal Justice Act 1985, there is an automatic prohibition against publishing the names (or other identifying particulars) of the children who were complainants at Mr Ellis' trial. The prohibition will continue to apply during and after any commission of inquiry into the case.
52. This prohibition will 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.
53. Inquiries have the power to control whether proceedings are held in public or in private, and the commission's terms of reference could direct that hearings of certain evidence be conducted in private, and that the commission not publish certain classes of persons' names or identifying details. However, it does not appear that a commission with the same powers as a District Court would have comprehensive powers to ensure the privacy of this group of children outside of its proceedings.

Options for resolving legal constraints imposed by Act

54. 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.

55. 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' 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 the problems that have been identified. However, this is likely to be the least preferable option in light of the Law Commission's recent report that was critical of piecemeal amendments that had been made over time to remedy specific limitations in the Act.

Amendment of Evidence Regulations

56. Finally, the Evidence Regulations 2007 may also require amendment to enable the commission of inquiry to consider videotapes and transcripts of the complainants' evidence to be considered by a commission of inquiry. A similar amendment to the regulations was required for the Ministerial Inquiry into the Ellis case.
57. 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.
58. 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, it is not clear whether or not this power would override the regulations.
59. An amendment to the Regulations to expressly allow a commission of inquiry to view the children's video taped evidence might 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.

Precedents

New Zealand precedents

60. 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.
61. 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*

62. The Royal Commission of Inquiry into the Thomas case, which is sometimes used as an argument in support of a similar inquiry into Mr Ellis's case, is not a precedent for the current situation.
63. 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. The inquiry was subsequent to the pardon, and focussed on examination of Crown and Police conduct that led to his wrongful conviction alongside the appropriate compensation that should be paid.

(ii) *Atenai Saifiti*

64. 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 Chief Ombudsman and a magistrate 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. This is unlike Mr Ellis' situation, there is no fresh evidence currently available that has not been considered previously by the judicial system.
65. 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

66. 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 appeal to the Privy Council in July 2007.
67. 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 Privy Council is currently being drafted. The letter says it would have been filed sooner but for financial constraints.
68. Mr Ellis 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.
69. 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 the judicial proceedings is thrown into sharp relief.

(i) *Saifiti case*

70. You have asked whether the inquiry that led to pardon in the Saifiti case occurred after Mr Saifiti had exhausted his rights of appeal.
71. 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.
72. The context in which the inquiry occurred is also important to understand. As is outlined above, the inquiry that led to Mr Saifiti'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 a 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

73. 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.
74. 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 inquiry 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 under general powers similar to the Commissions of Inquiry Act 1908.
75. 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.
76. Firstly, in each case the Australian inquiries that we have identified all revolved around fresh evidence that emerged, which was not available at trial and threw the convictions into doubt. Again, this is unlike Mr Ellis' situation, where there is no fresh evidence and the main reason for reopening the case will be because of ongoing public doubt.
77. Secondly, from our research in each case Australian inquiries that we have identified appear to have proceeded once the convicted person first had exhausted all of their rights of appeal. This meant there was no judicial avenue open to the individuals concerned to examine the fresh evidence that had been discovered.

Detailed matters for the inquiry

78. As is outlined above, if the commission is to promote finality in the eyes of Mr Ellis and his supporters, its inquiry would need to examine the safety of Mr Ellis's convictions comprehensively.
79. The Ministry holds extensive files relating to Mr Ellis's case, and has conducted a stocktake of the issues raised over the course of the case. A broad commission of this type would need to be directed 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 reactions, 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' trial;
 - the investigation by Police of possible offences and the laying of charges 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' trial and his appeals against conviction in 1994 and 1999;
 - the Ministerial Inquiry into the Peter Ellis case conducted by Sir Thomas Eichelbaum.

Form of the inquiry

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

Composition of Commission

(i) Proposal for of senior overseas judge to head inquiry

81. One option that has been suggested is for the commission to be comprised of a single senior Judge or retired Judge, possibly from Australia.
82. Another possibility that may be worth considering is for the appointment to be made from the Canadian judiciary, given the similarity of that jurisdiction and the need for independence from the New Zealand legal system.

(ii) Three person commission

83. A further option might be for the commission to comprise three individuals, with the remaining members being respected New Zealanders who are not 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' convictions.

84. The advantage of a three person commission would be that the inquiry may be seen to have broader legitimacy and reflect the community's views, rather than a purely "legal" focus.
85. It may also help to address the ongoing concern that has been articulated by Mr Ellis's counsel that, because of the nature of the issues raised in Mr Ellis's case, the courts have not been able to determine his claims of a miscarriage of justice.

Requests for Executive intervention

86. 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, a person with an interest in the inquiry like Mr Ellis, or from the commission itself.
87. Such requests have been a feature of the case to date – in the first and third applications for exercise of the Royal prerogative of mercy, Ms Ablett Kerr QC petitioned the Governor-General to have the terms of reference for the case broadened. This approach was successful for the first application – the reference to the Court of Appeal for reconsideration of the case was significantly broadened to include a number of additional matters.
88. Whatever the statutory framework for the inquiry, there is also a risk that the commission itself might be presented with matters that require amendment of the terms of reference or legislative intervention:
 - 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;
 - there is a risk, depending on the statutory framework, that the need for legislative amendment might become apparent during the course of the inquiry. The Wine Box Inquiry, for example, required significant 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, amendment of the Evidence (Videotaping of Child Complainant) Regulations 1990 only became apparent once the inquiry was underway.

Judicial review

89. 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 – for example, about the exercise of its statutory powers, or decisions made pursuant to its terms of reference - while it is underway.
90. Judicial review of commissions of inquiry are not uncommon. 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 a number of parties on a number of occasions.

What will the commission consider?

91. 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

92. 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.
93. 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 admitted as evidence at the trial of Peter Ellis;
- 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 others;
- all rulings, instructions, directions and judgments given or made by a court at or in connection with the hearings and trial referred to in paragraph (c) above;
- 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 report "Ministerial Inquiry into the Peter Ellis Case" by Sir Thomas Eichelbaum.

Who will commission hear from?

94. 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;
- the individuals 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.

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

Children

96. 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.
97. These individuals fall into two groups. Firstly, there are the complainants whose disclosures led to convictions against Mr Ellis. At minimum, the commission would need to consider the interviews with the complainants whose disclosures led to convictions against Mr Ellis.
98. 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.
99. Mr Ellis has previously sought access to interviews with children that did not result in convictions. It is therefore likely that some children who were not part of the trial would form part of the inquiry.
100. Those individuals would similarly be entitled to give oral evidence before the commission, and might potentially be summoned to give evidence if the commission decided that particular people had knowledge or information that was relevant to the subject of the inquiry.

Parents

101. A second important focus would be the role that parents of children who were interviewed as part of the Christchurch civic crèche inquiry.
102. 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" and sharing of information amongst themselves.
103. Again, the parents of the complainants would be likely to be entitled to give oral evidence before the commission, and the commission would also have powers to summon these individuals. Other parents whose children did not form part of the trial would also potentially form part of the inquiry.

Mr Peter Ellis

104. A significant focus for the inquiry would also be Mr Ellis and his actions.
105. The inquiry would need to examine Mr Ellis's evidence at trial. There is, however, an open question about whether Mr Ellis would appear and give evidence in person before the commission itself.
106. 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). However, it is not clear whether Mr Ellis could be required to give evidence by the commission, if he chose not to.
107. This is because there could be argument about whether the privilege against self-incrimination, which is set out in section 60 of the Evidence Act 2006, would apply 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

108. The breadth of the inquiry would mean that the four crèche workers who were initially charged with sexual offending alongside Mr Ellis would have the right to appear in person before the commission and receive legal representation under section 4A. 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 interest.
109. Other crèche workers also gave evidence at trial and these individuals might also have the right to appear in person before the commission and receive legal representation under section 4A.

Police

110. 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.
111. 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

112. 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).
113. 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 professional practice. Alongside this, there has been an argument that there has been a "sea change" in expert psychological opinion since the time of Mr Ellis's trial, and the broad consensus of experts now is that aspects of the evidential interviews are now unsafe.
114. Examination of these submissions was one of the central areas for examination by the Ministerial Inquiry, 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.
115. There have also been submissions about Dr Karen Zelas, who supervised the evidential interviews and also gave expert evidence for the Crown at Mr Ellis's trial.

Creche management

116. 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 played when liaising with parents.
117. If the commission determines that these matters fall within the ambit of its inquiry, then the affected individuals could be entitled to give evidence in person and have legal representation.

Other interested parties

118. There are likely to be other interest parties, such as witnesses who gave evidence at trial. Alongside this, the breadth of the inquiry will mean that others will potentially be identified as having an interest in the inquiry, and therefore be entitled to appear. The pool will be broader than those who gave evidence at trial.
119. 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.
120. There are arguments on both sides here, and a ruling on this matter could be the subject of subsequent litigation.

Legal representation

121. While the Commissions of Inquiry Act 1908 entitles a range of interested persons to legal representation, legal aid is not available for representation under the Legal Services Act 2000.
122. This means that Crown has to make choices about whether to meet the legal costs of particular individuals, and how. Decisions on this 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.
123. The Ministry is working alongside the Department of Internal Affairs on this topic.

Individuals who have a significant interest in the inquiry

124. 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 be included in the commission's budget.

125. In the case of the children and parents, there would need to be consideration about whether one lawyer could represent their collective interest. This is the approach that was taken for the Ministerial Inquiry into the Ellis case. 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.
126. For all individuals, there would need to be a decision about whether legal representation would be subject to a cap, and how grants would be managed.

Legal representation of state employees

127. The legal representation for state employees would be met within the relevant department's baseline, and thus would not form part of the commission's overall budget.

Individuals who have to meet their own legal costs

128. There would also be individuals who were entitled to legal representation but were required to meet their own costs.
129. Again, decisions on this subject may need to be revisited during the course of proceedings. It may be that a legitimate claim for state assistance emerges during the course of the inquiry, and

Cost

130. We are working with the Department of Internal Affairs on the estimated costs of a commission of inquiry into Mr Ellis' case.
131. 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 → 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 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 drivers here are outlined in the previous section;
 - one counsel assisting, and possibly experts on children's evidence, would be appointed to advise the commission;
 - one dedicated media adviser would be appointed to assist the commission; and
 - a publicly available report of commission → a large 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.

132. 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.
133. Recent Commissions include 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) which cost approximately \$4.3million. 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) which cost about \$4.89million.

Timeframe

134. We are working with the Department of Internal Affairs on the estimated timeframe.
135. 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 or practical environment that will face the commission
 - the possibility of judicial review.
136. The Law Commission's paper *A New Inquiries Act* contains information on proposed and actual duration of all commissions since 1976. While the circumstances vary for each commission, extensions are the norm (the Royal Commission of Inquiry into Police Conduct, which is at the outer end of the examples, required six).

Procedure for establishing a commission of inquiry

137. As requested, a detailed procedural guide for establishing a commission of inquiry into the Peter Ellis case is set out in further detail in Appendix A.
138. 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 Patents.
139. 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 more detailed agreement on the appointment and remuneration of commissioners, the warrant and terms of reference for the commission, and a detailed budget.
140. Responsibility for establishing a commission of inquiry is often shared with a 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

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

Jeff Orr
Chief Legal Counsel

APPROVED / SEEN / NOT AGREED

Hon Simon Power
Minister of Justice
Date:

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Appendix A Procedure for establishing a commission of inquiry

[items listed below are in a proposed chronological order. The information will be converted into a flow chart for the next version of the briefing]

Early matters (Minister of Justice)

Consult with the Prime Minister, Attorney-General and Minister of Internal Affairs on the establishment of a commission of inquiry (Minister of Justice).

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 incurring expenses to meet interim set-up costs
- appropriation for Vote Internal Affairs to fund the inquiry
- payment of legal expenses for State Sector employees
- interim budget amount

Interim processes

Develop draft terms of reference for commission (officials)

Select and approach prospective commissioners and formal contract discussions on terms of appointment (Minister of Justice, with assistance from officials, and in consultation with the Minister of State Services if fees are outside Cabinet Framework)

Consult with prospective chair of commission on the proposed terms of reference and reporting date (Minister of Justice).

Parliamentary Counsel instructed to prepare warrant incorporating the terms of reference (Minister of Internal Affairs).

Select and approach prospective counsel assisting and other experts to assist the commission (Crown Law Office or chair of commission)

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

Establishment processes

Governor-General establishes commission by Order in Council (or under the Letters Patent if a Royal commission of inquiry)

Advise complainants, families and Peter Ellis of commission's establishment (Minister of Justice or Minister of Internal Affairs)

Warrant published in the NZ Gazette (Parliamentary Counsel Office)

Press release issued (Minister of Internal Affairs)

Letters of appointment of commissioners signed (Minister of Internal Affairs)

Appointment of counsel assisting and other experts (Chair of Commission)

From: Renay Duncalfe
To: Hammington, Jeremy; Orr, Jeff; Petherick, Michael; Webb, Melanie
Date: Wednesday, 6 May 2009 5:01 p.m.
Subject: Comments from DIA on Ellis inquiry briefing

>>> Greg Stephens <Greg.Stephens@dia.govt.nz> Wednesday, 6 May 2009 4:48 p.m. >>>

Hi Renay

Many thanks for the chance to comment on your briefing. I have collated the responses of the Department, although Jo is away this week.

As an opening remark, we would recommend having a clear conclusion and recommendation for the Minister. We also thought that the executive summary went into too much detail and should instead be about two paragraphs long (summary of issues and summary of recommendations) followed by a table of contents for your Minister.

Paragraph 42. The final sentence needs to be completed.

Paragraph 53. You could note that the Commission of Inquiry into Police Conduct had similar issues (Dame Margaret Bazley is not a judge and many of the women involved were not publicly known) and there was, as far as we know, no leaks of the details of the women involved.

Paragraph 55. It is possible that, by the time the briefing goes up, the Inquiries Bill will have passed its first reading in the House and been sent to the Government Administration Committee to consideration. However, you should check on the Daily Progress in the House (<http://www.parliament.nz/en-NZ/PB/Debates/Progress/>) first.

Paragraphs 73-77. You could mention in this section that Australia has had significantly more inquiries than New Zealand as each state can appoint inquiries.

Paragraph 89. Judicial reviews can also occur after the report has been released.

Paragraph 125. It is possible that one lawyer would be insufficient to represent the collective interest of a large number of people and it may be better to broaden this out to "several lawyers". The Commission of Inquiry into Police Conduct provided numerous lawyers for the entire group of women, although the Cave Creek Inquiry paid for one legal representative for the families of people killed or inquired. Finally, the Winebox Inquiry paid for Hon Winston Peters' legal costs which totalled \$1.46 million and, given this, I suspect involved more than one lawyer.

Paragraph 131, first bullet point. You could add that the usual practice for judges is to set a daily fee in line with the daily fee that that judge would receive on the bench and that this means going outside of the Fees Framework.

Paragraph 131, third bullet point. Legal costs are likely to be a significant cost driver for this commission and it may be wise to reinforce that message here.

Paragraph 131, fourth bullet point. Can you please delete "one" as several counsel assisting may be needed. There may also be other legal support required for the Commission.

Paragraph 131, fifth bullet point. We suggest amending this to "Professional services, such as media advisors, would be appointed to support the commission" as there may be a number of different services needed.

Paragraph 131, sixth bullet point. We suggest deleting "large".

Paragraph 136. You could add that providing a longer initial timeframe may lessen the chance of any extension being sought, and that may lessen the chance of any further funding being sought. Further, can you change "norm" to "not uncommon". It may also be wise to mention that it is difficult to estimate the length of time an inquiry will take.

Appendix A. Early matters. Your Minister may wish to consult with other relevant Ministers as he sees fit.

Appendix A. Cabinet paper 1, "and seeking agreement to:". While there is no hard-and-fast rule, I would suggest deleting the final four bullets. Cabinet should also agree that DIA is responsible for establishing and for ongoing administration and budgetary support. Cabinet should also invite the Minister of Internal Affairs to report to Cabinet with a recommendation for proposed Commissioners, terms of reference and to seek appropriations for the budget. Just for your information at this point, noting recommendations should be used for the interim budget and other matters.

Appendix A. Establishment processes. Given the high profile nature of Commissions of Inquiry, the usual

process is for the Prime Minister to announce the decision to establish at the post-Cabinet press conference.

Finally, and most importantly, the Department considers that the risks associated with establishing a commission of inquiry are high given that legal processes are not finalised (i.e. there is still the possibility of an appeal to the Privy Council). We note that 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 subsequently amended, to avoid prejudicing any criminal trial (the amendment to the terms of reference significantly altered the work the CIPC undertook). We also support Crown Law Office's assessment of the constitutional issues of establishing a commission of inquiry into the workings of the judiciary.

Many thanks. Please feel free to ring or email me for any further clarification or information.

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From: Renay Duncalfe [mailto:]
Sent: Tuesday, 5 May 2009 2:54 pm
To: Julie Wall (MIN)
Cc: Jeff Orr; Jeremy Hammington; Melanie Webb; Michael Petherick
Subject: Draft briefing to Minister of Justice on inquiry

Hi Julie and Jo

Please find attached a draft briefing to the Minister of Justice on a possible inquiry into the Peter Ellis case. It is our first draft and is still to be reviewed within the Ministry. However, given our time restraints we thought it would be best to get it to you in its early state. The briefing incorporates many of the issues we discussed at our meeting last week.

As discussed with Julie, we would be very grateful if you could review the draft briefing and provide comments on the areas of particular interest to DIA. These areas are likely to be:

- restrictions imposed by the Commissions of Inquiry Act 1908 (page 5)
- form of the inquiry (page 11)
- legal representation (page 16)
- cost (page 17)
- timeframe (page 18)
- procedure for establishing an inquiry (page 18 and Appendix A) - this section is focussed on actions at

Ministerial level.

The briefing is due with our Minister on Friday. To meet this deadline we need to receive comments by the end of Thursday if possible. We are happy to meet to discuss your comments or receive comments by email - whichever suits you best. Thank you for your help, and apologies for the timeframe.

Kind regards, Renay

Renay Duncalfe

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