

New evidence in the *Peter Ellis* case

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analyses recently released documents in the first of two articles

This two-part paper is the result of the author's research into the *Peter Ellis* case. Part 1 examines the expert opinion evidence proffered at Ellis' second appeal hearing. The opinion of Michael Lamb is discussed in detail. The allegations of one of Ellis' accusers are evaluated in the context of the relevant research findings. In addition, Cabinet's decision to hold a ministerial inquiry is briefly explored. Part 2 examines the outcome of that inquiry, the conduct of officials and the subsequent inquiry by Parliament's justice and electoral select committee. Options that could provide long-awaited finality are discussed.

This paper cites official documents, affidavits, Cabinet papers and the latest research on child sexual abuse. Many documents have been made available, some with the Ombudsman's assistance, only within the last year. The new evidence raises questions about the efficacy of the criminal justice system. In particular, it raises questions as to whether Peter Ellis' convictions are safe.

BACKGROUND

In 1992, Ellis was charged with sexually abusing 20 children who attended the Christchurch Civic Crèche. Four female crèche workers were also charged with sexual offences, but their charges were later dropped. In 1993, Ellis was convicted on 16 counts involving seven children. After twice refusing parole, he was released from prison in 2000.

At Ellis's 1994 appeal, *R v Ellis* (1994) 1 NZCrimC 592 (CA), the oldest child recanted her allegations. However, the appellate Judges were unconvinced that her retraction was genuine. Casey J contended that it was not uncommon for young victims of sexual abuse to withdraw their allegations. Nevertheless, convictions relating to the child who recanted were quashed, but the appeal was otherwise dismissed.

In 1999, a reference by the Governor-General was heard by the Court of Appeal, *R v Ellis* [2000] 1 NZLR 513. The Court's position was that certain matters had already been heard and disposed of. New evidence was provided in the form of expert opinions. Affidavits were proffered by Michael Lamb, Barry Parsonson, Maggie Bruck – all supporting Ellis – and Constance Dalenberg.

EXPERT REVIEW OF EVIDENCE

Michael Lamb is possibly the leading authority on the interviewing of child abuse victims. The Cambridge University professor has published numerous articles in scientific peer-reviewed journals. In 1998, he co-authored *Investigative interviews of children: A guide for helping professionals*. The book's intended readers were police, social workers and forensic interviewers, whom Lamb has advised and trained. Its guidelines have been cited by experts testifying in Court and have become the standard in several countries, including our own. In 2004, the American Psychological Society pre-

sented Lamb with a lifetime contribution award. The society said that his work had "fundamentally advanced the interests of young children and their families"; it called him a scientist and scholar of "the highest integrity".

Lamb argued that young children could be competent witnesses but could also be susceptible to errors when interviewed because they: (1) infer that the interviewer wants a particular response; (2) want to help but do not understand the questions; (3) retrieve information recently acquired about the event in question; and (4) become confused as to the source of their memory about the event.

When evaluating forensic interviews of children, Lamb's preference is to focus on the interviewer rather than the child. This is because an interviewer's behaviour, particularly vocabulary, complexity of their questions and their ability to elicit useful information from children, "profoundly influences the course and outcome of their interviews". Lamb cited research by Gail Goodman showing that a significant minority of young children were error-prone when asked specific abuse-related questions. When questioned in a laboratory setting, between 20–35 per cent of three- to four-year-olds falsely assented to questions such as "Did he try to kiss you?", "Did he keep his clothes on?" and "He took your clothes off, didn't he?". Studies have found that false and potentially troublesome claims can also be elicited from pre-school and school-age children, even when asked non-leading questions.

Lamb noted that only 6 per cent of the questions in the *Ellis* interviews were suggestive (he classified a further 36 per cent as leading). He said that the use of suggestive questions was "not remarkable". However, the *Ellis* interviews were conducted weeks and months after informal interviewing of the children began. Children were exposed to interviews and conversations "that are known to contaminate children's accounts of either experienced or imagined events". Furthermore, the average delay between formal interviewing of the conviction children and the alleged events was 18 months. Lamb wrote that given such a delay, the children were likely to have adopted recently acquired information about the events in question.

Free recall, non-leading and open-ended questions elicit the most accurate and detailed responses from children. Children should explain in their own words what has happened to them (eg "Tell me what you did today."). This, according to Lamb, seldom occurred in respect of the children's formal interviews. In the early 1990s, UK and US interviewers obtained more than twice as much information from open-ended questions as did interviewers in the *Ellis* case. By the mid-to-late 1990s, the gap had increased: when employing open-ended questions the *Ellis* interviewers elicited only 14 per cent of what UK and US interviewers elicited. The *Ellis* interviewers eschewed the most desirable types of questions in favour of riskier alternatives.

Children should be questioned as soon as possible after the target event. The longer the delay, the greater the potential for children's memories to be contaminated by misinformation. Lamb argued that once contamination had occurred, it was "often impossible" for young children to distinguish between real and suggested events. This was especially true if details were reinforced over time by repeated suggestive questioning.

Unintentionally false reports can be elicited from children even when the event in question is recent. Lamb cited research by Garven et al, "More than suggestion: The effect of interviewing techniques from the McMartin Preschool case" (1998) 83 J of Appl Psych 347, which found that 58 per cent of four- to six-year-olds accepted false or misleading information about a week-old event. Moreover, 44 per cent of children falsely assented to questions about touching after just five minutes of improper questioning. This raised concerns about the accuracy of the allegations in the *Ellis* case, given that children had been informally questioned over a period of weeks and months about events that had allegedly occurred months or years earlier.

According to Lamb, there was no serious effort to test the complainants' claims. Those involved with the investigation were "singularly focused" on any evidence consistent with the hypothesis that abuse had occurred. However, psychiatrist Karen Zelas, who reviewed the children's evidence for police, knew that some parents were questioning their children improperly. In a letter to Detective John Ell, she explained that two children, including Tommy Bander, had been exposed to "highly leading questioning" by their parents. Further, Zelas wrote, Tommy's parents had:

subjected him to intensive interrogation pertaining to 'ritual' abuse ... [i]t is an extremely difficult inquiry with such young children and it is most important that their statements are neither dismissed as fanciful nor accorded unwarranted weight primarily because of parental anxieties.

Collecting physical evidence consistent with the abuse-hypothesis proved troublesome. In October 1992, Detective Ken Legat handed Lesley Ellis (Peter's mother) a search warrant, giving police access to her Buffon St flat. They expected to find "instruments or sexual aids used in sexual offending". None were found. Legat claimed, in an affidavit supporting the search warrant, that overseas studies and investigations showed that "this type of abuse on children have (sic) occurred in various crèches and play schools". Michael Lamb agreed that the *Ellis* case shared "startling similarities" with daycare cases overseas. Social scientists generally believe that such cases were the product of a moral panic; doubt remains as to whether any children were actually abused.

Legat's belief that crèches and play schools were havens for paedophiles was influenced by Rosemary Smart's report into the Civic Crèche. The Christchurch City Council hired Smart, a qualified social worker, to review the performance of senior crèche staff. Smart, who began her review just days before Ellis's arrest, repeatedly cited the findings of American sociologist David Finkelhor, a self-proclaimed expert on (and believer in) satanic ritual abuse. Smart accepted Finkelhor's claims that child sexual abuse was more prevalent in childcare centres than elsewhere and that 40 per cent of abusers in childcare centres were women (a large New Zealand study recently found that women committed only 1 per cent of alleged child sex offences). Smart was apparently unaware

that Finkelhor's claims were based on unsubstantiated cases of sexual abuse. She asserted that children attending the Civic Crèche had been sexually abused by a male staff member qualified in early childhood education. It was obvious who she was referring to. She questioned how the abuse had remained undetected for several years and why it did not "arouse serious concern on the part of staff". Four experienced female childcare workers were subsequently charged with sexually abusing children in their care.

Lamb noted that children in the *Ellis* case made similar allegations at or near the same time. This suggested contamination, "not validation". Although delayed disclosure did not imply deceptive disclosure, the fact that children were no longer in contact with Ellis reduced the likelihood that they would remain silent (about abuse). No child, said Lamb, alleged abuse when first questioned by their parents. The vast majority did not make allegations when formally interviewed.

Social influence probably affected the disclosure process. An evidential interviewer or police officer would talk to a suspected victim shortly before the child was formally interviewed. Such conversations were not recorded. Colin Eade, who led the police investigation, monitored many of the formal interviews. He spent up to thirty minutes with children prior to their interviews and had, according to Lamb, "ample and unchecked opportunities" to shape their claims. He also made unscheduled visits to the children's homes "to try and [help them] overcome [their fear] prior to evidential interviews". (Police Report Form, 19 March 1992)

INTERVIEWS WITH YOUNG CHILDREN

It was not very long ago that many social workers and clinicians believed that children were incapable of making false allegations of sexual abuse. But in the late 1980s and early 1990s a series of mass allegation daycare cases raised the possibility that children's "memories" of sexual abuse could be distorted by mere suggestion. Experimental research has since confirmed this conclusion; moreover, researchers have found that a single interview can have powerful and lasting effects, producing false reports in later non-suggestive interviews.

Lamb's affidavit listed nine conditions under which suggested information was likely to be adopted by a young child. Among the conditions were:

- details are suggested repeatedly;
- an air of accusation is established;
- the questioner responds positively to some statements and ignores others;
- the child is told that others have reported the details in question;
- some details are rehearsed;
- conversations with sources of contaminating information – including parents, peers, counsellors, and police – proceed unchecked;
- any real memories are weak.

All nine conditions were present in the *Ellis* case, said Lamb, making it highly likely that the children's reports were (unintentionally) tainted. The risk of contamination was so high:

and the failure [by investigators] to explore alternative hypotheses so obvious that it is almost impossible for either an expert or a tribunal of fact to determine which if

any of the complainants' accounts were valid. (Michael E Lamb, *R v Ellis* (CA 120/98))

In May 1992, evidential interviewer Lynda Morgan formally questioned child complainant Tommy Bander, aged six years and two months. Below is an excerpt from that interview:

- A: He smacked my bum.
 Q: And he smacked your bum, yeah?
 A: Real hard.
 Q: Real hard. I wonder why he smacked your bum.
 A: I can't remember. I don't. I remember he smacked it.
 Q: Right, so where, did you have clothes on?
 A: He pulled down my pants because I had to get changed.
 Q: Oh, why did you have to get changed?
 A: Because I done poos in my bum, that was when I was really, really very little.
 ...
 Q: Well, do you think there's anything else ... that that you need to tell me about crèche and about Peter?
 A: No.
 Q: So that's the things that you told ... too, aye?
 A: Yep.
 Q: Mmm, okay, so you think that's absolutely everything about the things you told Colin [Eade] and Mum about Peter and the crèche. Can you remember any other things happening that you didn't like?
 A: There was no other things anyway.
 Q: There was no other things?
 A: Nope.

During the same interview Tommy claimed that while he was being changed, Ellis "wobbled my dick". He was later asked the following leading question: "He [Peter] didn't pull his pants down, so you didn't see any of his rude bits?" "No", Tommy replied, before adding that "he might have done it to other children ... but not to me". Despite Tommy's denials, Lynda Morgan told Zelas that she believed Tommy had been indecently assaulted.

Tommy's mother, Joy Bander, testified that she spoke with Lynda Morgan after her son's first formal interview. She said Morgan did not tell her that Tommy had apparently soiled his pants, which was why Ellis had had to pull them down. When cross-examined as to whether she believed, after talking with Morgan, that Tommy had more to disclose, she replied: "Absolutely".

Prior to Ellis' trial, Karen Zelas advised Brent Stanaway that Tommy's evidence was consistent with "a cleaning up procedure". Furthermore, she asserted that "the investigation of Tommy's circumstances were (sic) considered complete after his first interview". (She failed to inform jurors of this fact.) Lynda Morgan's opinion of Tommy's abuse status was not shared by investigators. So why was he interviewed again, months later? According to Zelas, it was all down to his parents. It was "hard to believe", she said, that they would have "accepted an opinion that Tommy had not been abused". (Affidavit presented to Brent Stanaway, 22 March 1993)

Denial of child sexual abuse

Contrary to popular belief, abused children are unlikely to deny abuse when asked. (However, retrospective studies show that most adults did not disclose their childhood

abuse at the time, presumably because they were never asked.) In possibly the largest study of its kind, 26,325 Israeli children were formally interviewed between 1998 and 2002. (Hershkowitz, Horowitz and Lamb, "Individual and family variables associated with disclosure and non-disclosure of child abuse in Israel" in Pipe, Lamb et al (eds) *Child Sexual Abuse: Disclosure, Delay, and Denial* (Lawrence Erlbaum Associates, 2007)) They were suspected victims of physical or sexual abuse. The disclosure rate for sexual offences was 71 per cent. Older children were more likely to allege sexual abuse than were younger children. In comparison, 77 per cent of suspected victims alleged sexual abuse in a recent American study. Among the youngest children, 63 per cent of four- to five-year-olds and 77 per cent of six- to eight-year-olds made allegations. (Pipe, Lamb et al "Factors associated with nondisclosure of suspected abuse during forensic interviews" in the same book.) A disclosure rate of 68 per cent was observed in a recent New Zealand study. Some of the 4060 suspected child victims were interviewed though they had made no prior allegation of sexual abuse. The disclosure rate for children who had made a prior allegation was 88 per cent. (Wilson, "Forensic interviewing in New Zealand", *ibid*)

Also contrary to popular belief, children generally do not need to be prodded to disclose abuse. In the Hershkowitz et al and Pipe, Lamb et al studies referred to above, experienced interviewers trained in state of the art interviewing methods were employed. Suggestive and leading questions were generally avoided. Free recall and open-ended questions predominated and few children were interviewed more than once. Neither anatomical dolls nor body diagrams were used.

Tommy Bander

Tommy Bander denied having been abused when (repeatedly) questioned by his parents and oldest brother. He did not make a clear disclosure during his first formal interview. However, although most sexually abused children do not deny the abuse, younger children do not appear to be as forthcoming as older children. On the other hand, false allegations can be elicited from young children within five minutes of improper questioning (Garven et al). On one occasion Tommy was questioned by his parents for two and half hours. See Joy Bander, *A Mother's Story*. (Howling at the Moon Productions, 1997)

Tommy's memory of the alleged events was weak. During his fourth formal interview, he said that three female crèche workers had stuck needles into his penis. When asked "so what stopped you from telling me [about that] yesterday?", he replied: "Oh, I just remembered today".

Tommy had at least four therapy sessions prior to his second formal interview. Gayle Taukiri, his therapist, confirmed that she showed him satanic signs and asked him to identify them. She claimed, however, that she did not talk to him about Peter Ellis or the Civic Crèche, unless he raised these matters of "his own volition". Tommy's allegations of ritual abuse appear to have occurred only after talking with Taukiri (who took no notes during their sessions). Taukiri subsequently advised Joy Bander that American ritual abuse "expert" Pamela Hudson should be brought to New Zealand to assist police.

Pipe, Lamb et al found that among children aged six to eight years, 70 per cent made allegations of sexual abuse when the alleged offender was an immediate family member

(eg biological father). When the alleged offender was familiar but unrelated, 81 per cent of this age-group disclosed. Tommy had had no contact with Peter Ellis or other crèche staff for more than a year when his parents and eldest brother began questioning him. According to Lamb:

abused children are most likely to keep secrets when still in contact with (and presumably fearful of) the alleged abuser and when their parents are skeptical or unsupportive.

Neither was true in Tommy's case. In fact, Tommy's mother was skeptical of his denials and encouraged him to disclose.

During the police inquiry, parents were instructed not to ask their children direct questions about Peter Ellis. Joy Bander admitted at the depositions hearing that she found this advice "rather odd". She said she asked Tommy direct questions because she always dealt with him in this manner. She did not tell the Court that when the police investigation began she was supporting five children on a sickness benefit of \$289 a week. Nor did she say if Tommy's claims of abuse had caused her to apply for lump sum compensation from ACC.

If Tommy was not abused, why has he not recanted? The obvious answer is that he believes he was abused. To quote leading child sexual abuse expert Debra Poole:

Studies have shown that children will vehemently defend the veracity of implanted memories. They recall reporting them, and those reports produce mental images of the events that these individuals cannot distinguish from their real experiences. But the kids are not responsible for that. The interviews are. (Quoted in the *Boston Herald*, 8 July 2001)

In 2003, Tommy, then 17, reportedly told journalist Linley Boniface that "all my parents ever said to me was that I should tell the truth". He added:

I stand by everything I said when I was little. I didn't make anything up. But back then I believed everything I was told. ... when you're a little kid, you think adults are always telling you the truth. ("I am sick of being called a liar", *Dominion Post*, 16 August 2003)

It is believed that between 1995 and 2003, Tommy was able to watch his videotaped evidential interviews. His mother told the High Court, when requesting copies of the tapes, that Tommy could not heal unless he saw the interviews. The Court agreed.

In 1992, the then six-year-old reportedly said that: four female crèche workers had watched as sharp sticks and burning paper were inserted into his anus; Ellis' mother had hung five cages, in which there were children, from cables attached to the ceiling of the crèche; three female crèche workers had inserted needles into his penis; he had been forced to kill a boy. He revealed the first names of 11 women who he claimed had physically or sexually abused him. He made similar accusations against several men and five teenagers.

It is worth noting that in Wilson's (2007) study, 96 per cent of suspected abuse victims were formally interviewed only once. Tommy, however, was questioned five times over five-and-a-half months. He did not make any unambiguous disclosures during his first interview. Investigators, however, seemed to be under the impression that abused

children were reluctant to talk about their abuse. Suspected victims needed to be encouraged to disclose. Ellis was convicted on the basis of allegations made in Tommy's later interviews.

Constance Dalenberg

At Ellis' second appeal, the only expert employed by the Crown was Constance Dalenberg. Her brief was to review the research literature and to evaluate Lamb's and Parsonson's affidavits. Dalenberg referred to her involvement in a number of research projects concerning alleged child abuse victims. She referred to conferences at which her research had evidently been given top billing. But references to her published research were sparse. She did not provide the Court with a conventional curriculum vitae. She claimed her research on the relationship between fantasy and abuse had been published as a chapter in the *Handbook of Interviewing* (1999). Her chapter was about adult Holocaust survivors and did not cite her research on fantasy. Dalenberg claimed to have treated more than 1000 victims of child sexual abuse. The Judges learnt, from Lamb, that she had published no scientific peer-reviewed research on the interviewing of child sexual abuse victims.

Dalenberg claimed that the children's demeanour in the *Ellis* case was not "inconsistent with true allegations of child abuse". It is difficult to see how such a comment would be admissible under s 23 of the Evidence Act 2006, which requires expert opinion evidence to be of "substantial help". The comment invited comparison with the testimony of psychiatrist Karen Zelas, who at Ellis' trial said that the complainants' behaviour was consistent with sexual abuse. When asked what behaviour was inconsistent with sexual abuse, Zelas replied: "I haven't thought about that". There are no childhood behaviours specific to sexual abuse. (see, on this, Robertson and Vignaux "Authorising irrelevance, or just irrelevant?" [2005] NZLJ 37)

When children are questioned in ways designed to maximise the accuracy of their responses, recantation appears to be rare. (London et al "Disclosure of child sexual abuse: What does the research tell us about the ways that children tell?" (2005) 11 *Psychology, Public Policy, and the Law* 194) Dalenberg, however, claimed that recantation was not uncommon. She cited a 1991 study with a recantation rate of 22 per cent. Only 11 per cent of the children, each of whom was in therapy at the time, made unambiguous allegations when first interviewed (possibly the lowest disclosure rate in the research literature). After an unspecified number of interviews, the disclosure rate rose to 96 per cent. In their initial statements some children had, wrote the study's authors, "adamantly denied" being abused. Some had said that their parents or therapist coerced them into disclosing. When the children denied or recanted, they were possibly telling the truth.

A feature of the *Ellis* case was the number of children who, according to Colin Eade, recanted their abuse allegations. Another feature was the bizarre nature of many of the allegations. There were references to underground tunnels, cages and trapdoors, children being defecated and urinated on, naked children being forced to hurt one another inside a circle of adults, children being forced into a steaming hot oven or buried in coffins; one boy had his belly-button removed with pliers.

Fantasy and multiple complaints

Dalenberg claimed that fantasy was “to be expected” when a child had been traumatised. Therefore the presence of fantastic elements should not cause investigators to disbelieve or doubt an abuse allegation. Her own research, which she cited, contradicted her claim that fantasy should be expected. When hundreds of suspected abuse victims were formally interviewed, fantasy was rarely present. Only 2 per cent of abuse claims featured fantasy. (Dalenberg, “Fantastic elements in child disclosures of abuse” (1996) 9 *APSAC Advisor* (online))

Maggie Bruck advised the appellate Court that Dalenberg’s research on fantasy and abuse would not be accepted by a scientific peer-reviewed journal. She confirmed that it had been published in a professional newsletter. She referred to research showing that bizarre claims were more prevalent in false than in true reports, indicating that bizarre claims were related to questioning techniques. In a study of children who were exposed to highly suggestive questioning and were given positive reinforcement, half made fantastic allegations. (Garven et al “Allegations of wrongdoing: The Effects of Reinforcement on Children’s Mundane and Fantastic Claims” (2000) 85 *J of Appl Psych* 38)

Bruck argued that when fantastic or implausible claims feature prominently, as they did in the *Ellis* case, “this should begin to raise some concern about the authenticity of the allegations in general”. She concluded that Dalenberg’s review was not an accurate reflection of the scientific literature. Barry Parsonson went further:

all of her [Dalenberg’s] assumptions and conclusions in relation to detail of the *Ellis* case itself appear to be based on hearsay and to be founded upon presumption. If so, they have to be viewed with some caution. ... Dr Dalenberg chooses to ignore these significant cases [the Kelly Michaels and the McMartin preschool cases] which cast doubt on the generality of her research findings.. (Affidavit of Barry Parsonson, *R v Ellis* (CA 120/98))

When writing her affidavit Dalenberg was in the process of writing a paper about multi-victim, multi-offender (MVMO) cases. The paper, entitled *Overcoming Obstacles to the Just Evaluation and Successful Prosecution of Multivictim Cases*, listed 11 complications with such cases. These included: parental contamination of children’s evidence, the increased likelihood of bizarre detail, the likelihood of problems created by therapists and advocacy groups, and the possibility of contamination by the media and other children involved with the case. Where children’s evidence is tainted, the timeline of contamination of children’s testimony is “typically hopelessly confused”. The possibility that children’s testimony is not based on personal experience becomes a “plausible” argument.

Dalenberg knew, from reading Lamb’s and Parsonson’s reports, that several young children were involved in the *Ellis* case. However, she did not cite her then unpublished research into MVMO cases. Why she did not do so is unclear. Crown Law Office, which hired Dalenberg, has refused to disclose the terms of her brief.

The Court of Appeal affirmed *Ellis*’ guilt. The Judges argued that the issue of suggestive and leading questions had been identified and traversed at depositions and at trial. They accepted, however, that “rather more is now known of the effect of suggestive questions on reliability”.

The appellate Judges contended that “the very matters which are now raised as relevant to the issue of mass allegations were recognised and traversed” at depositions. That was possibly so, but those matters had not been addressed at trial. Sir Thomas Thorp, who reviewed the case on behalf of the Justice Ministry, argued that at “no stage” was the jury told of the special characteristics of mass allegation *crèche* cases. Thorp was privy to expert opinion stating that such cases should be subject to special care and examination. He could find no evidence that investigators had taken special care.

The judgment of the Court of Appeal included the comment: “So long as the evidence is assessed with awareness of the relevant risks, it is for the jury to decide whether it can be relied upon”. The presumption was obvious: jurors were cognisant of the various risks and weighed each of them up before reaching their verdicts. There is of course another possibility. That is, jurors asked themselves – and each other – how likely it was that so much smoke could exist without any sign of a fire.

The Court noted that there were among the experts “differing views on many of the aspects of evidential interviews of children alleging sexual abuse”. That was not strictly true. The fact that Constance Dalenberg was hired to counter the views of Lamb, Bruck and Parsonson meant that differences of opinion were inevitable. It did not mean that her opinion should be afforded any weight. Given her less than impressive credentials, the appellate Judges might have been expected to treat her opinion with a healthy dose of scepticism. Surprisingly, they ignored the fact that she could not respond to specific criticisms of the children’s evidential interviews because, unlike Lamb and Parsonson, she had not seen them. (Dalenberg and Bruck were supplied with no case-specific material.)

More importantly, Lamb made it clear that there was consensus among experts on several important issues. In particular, “every relevant professional group” had endorsed the recommendation that forensic interviews rely primarily on open-ended questions. (*italics in original*) This recommendation was not, however, endorsed by Dalenberg. She indicated that children should be asked direct questions if open-ended questions produced no allegations of abuse. She stated, without any hint of concern, that such a strategy could lead to false allegations of abuse. Her methods of questioning children have come in for strong criticism. (See Ceci, Kulkofsky, Klemfuss, Sweeney, and Bruck, “Unwarranted Assumptions about Children’s Testimonial Accuracy”, (2007) 3 *Annual Review of Clinical Psychology* 307 (online))

Ultimately, the Court did not express an opinion on the expert opinion evidence. It was not:

[t]he function of the Court as distinct from the more wide-ranging inquiry possible with a Commission of Inquiry, to determine whether the admissible evidence proffered by the appellant’s present experts is to be accepted, nor even to make a final evaluation of its weight and effect on the trial evidence.

A NEW INQUIRY

In March 2000, the then Minister of Justice, the Hon Phil Goff, announced that a ministerial inquiry would be held into the case. In reaching this decision, Goff took advice from other ministers and officials. Three options had been considered: an officials’ inquiry, a ministerial inquiry, and a commission of inquiry.

Ministry of Justice officials could have investigated the unresolved issues. But Colin Keating, then Secretary of Justice, did not favour an officials' inquiry. He advised Goff that an officials' inquiry might not be seen to have the "independence necessary for a subject of this importance ... an inquiry must comply with the requirements of natural justice". He noted that the "procedural aspects" of an officials' inquiry were similar to those of a ministerial inquiry.

The Hon Margaret Wilson, then Associate Minister of Justice and Attorney-General, believed that the Court of Appeal had not recommended a commission of inquiry. Instead, the Court:

was doing no more than indicating that it is not its role to resolve conflicts in expert opinion as to the best techniques for interviewing children in the context of possible sexual abuse. (Letter to Cabinet, 1 March 2000)

Wilson's interpretation of the appellate Court's decision was unsympathetic to the possibility of a miscarriage of justice. Furthermore, her comment belittled the contributions of three experts, two of whom had seen the complainants being formally interviewed. Their contributions went well beyond discussing how child abuse victims should be interviewed. Indeed, their focus was on whether it was likely that any abuse had occurred.

Wilson told Cabinet that the case was not unique. She claimed that "it was doubtful whether there is anything particularly different or special about the Ellis case distinguishing it from many other child abuse cases". She noted that the only difference was the large number of child witnesses. Her claim that the case was not special was troublesome. Michael Lamb and other experts had made it clear that mass allegation crèche cases were special.

Cases involving multiple young complainants within the same child care setting involve higher risks of contamination and thus require precautionary and preventive steps by investigators ... [s]uch steps were not taken in the case of Peter Ellis. (Michael E Lamb, *R v Ellis* (CA 120/98))

Wilson argued that finality was an overriding principle. "Once the criminal justice system has run its course, it is important that victims can feel they can put the matter behind them." Wilson also claimed that the central issue was the children's credibility. The jury, she argued, was in the best position to judge their credibility; no inquiry "could ever enjoy the unique advantage and insight into the case that the jury had".

She was mistaken. It was the children's reliability that was the central issue. Whilst some of the complainants may have appeared credible, the question was whether their evidence was accurate. This did not mean that they had lied. Indeed, young children typically have an undeveloped understanding of deception and lies. It is for this reason that they can pose difficulties as witnesses: they can be both sincere and incorrect. That Wilson, a barrister and former law professor, could confuse credibility with reliability was troublesome. The implication was that 12 lay people could, and possibly did, make the same mistake.

In a letter to Cabinet, Wilson argued that experts' criticisms of the children's formal interviews were irrelevant. That is:

It remains the position that no questioning technique is guaranteed to, or will probably, produce a true disclosure just as no technique is guaranteed to, or will probably, produce a wrong answer.

It is unclear whether Wilson had opposed the introduction of s 23G of the Evidence Act 1908, permitting experts to testify as to whether a child's behaviour was consistent or inconsistent with sexual abuse. The probative value of such testimony was probably close to zero. Sexually abused children can display the same behaviours as non-abused children. The new Evidence Act 2006, which came into effect earlier this year, has omitted s 23G and replaced it with more general provisions. These provisions permit expert opinion evidence where such opinion provides the Court with "substantial help" in understanding other evidence.

Scientific research has demonstrated that suggestive questioning increases the probability that a child will allege abuse (whether or not abuse occurred). The jury in *R v Ellis* might have found this evidence helpful considering that the complainants' formal interviews featured suggestive questions.

Wilson informed Cabinet that Michael Lamb had shown "quite clearly" that the children's interviews were "the equal in quality of any conducted around the world at that time". This comment is inexplicable. One of Lamb's central findings was that the crèche interviewers asked few open-ended questions compared with their overseas counterparts at the time. The interviews of the seven conviction children included 232 details which the children later contradicted. All contradictions emerged in response to leading or suggestive questions (thus, open-ended questions produced no contradictions). The interviewers failed to explore alternative hypotheses and appeared knowledgeable about the alleged events.

Wilson's claim that the interviews were good by the standards of the time was not only wrong but also irrelevant. First, the biggest problem was arguably contamination of the children's evidence. Contamination occurred before the formal interviews were conducted. It also occurred between interviews and continued up to the depositions hearing and trial.

Second, any inquiry would need to assess the quality of the interviews in terms of current standards. By 2000, it was apparent that forensic interviewers in the UK and US were asking far more open-ended questions than were asked by the *Ellis* interviewers. Thus, UK and US interviewers were eliciting more information and more accurate information than was elicited by the *Ellis* interviewers. Lamb was blunt:

The interviewers in the Ellis case did not perform well relative to current recommendations and best practice guidelines. (Michael E Lamb, *R v Ellis* (CA 120/98))

Wilson advised her Cabinet colleagues that an inquiry should not be held, on the grounds that it might raise doubts about the effectiveness of the justice system. "There is a risk that the government will be seen to be casting doubt on the [criminal justice] system," she said. This ignored the fact that over the years, governments had set up various inquiries into matters of public importance. Ultimately, Cabinet rejected Wilson's advice and decided that an inquiry was needed. But it begged the question: why was a ministerial inquiry, and not a commission of inquiry, the preferred option? □

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New evidence in the *Ellis* case – II

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examines the process followed by Sir Thomas Eichelbaum

This is the second of a two-part paper into the Peter Ellis case. Part 1 examined the expert opinions proffered at Ellis' second appeal hearing. Part 2 reviews the ministerial inquiry and the subsequent inquiry by Parliament's justice and electoral select committee. It concludes with a discussion of future inquiry options.

MINISTERIAL INQUIRY

Why was a ministerial inquiry, and not a commission of inquiry, the preferred option? Cabinet was advised that the latter would be costly and lengthy. Such an inquiry might cost upwards of \$2m, an estimate that excluded legal aid, and take five months to complete. In comparison, it was estimated that a ministerial inquiry might cost \$800,000 and be completed in three months.

On 1 March 2000 Secretary of Justice, Colin Keating, supplied the Hon Phil Goff with a report outlining inquiry options. A ministerial inquiry was the ministry's preference. It would, officials said, be "faster and cheaper" than a commission of inquiry. But any inquiry was "unlikely to be able to arrive at the truth ...". (This was surely beside the point: as with Arthur Allan Thomas, the question was the safety of Ellis' convictions, not the "truth".) Officials expected that "about six" experts would be chosen to evaluate the complainants' evidence. Once the expert opinions had been submitted, they probably would be reviewed by relevant experts. Goff learnt that ministerial inquiries, unlike commissions of inquiry, are unable to compel evidence.

On 10 March 2000, Cabinet chose the option favoured by officials and stipulated that the inquiry should cost no more than \$500,000. It is unclear whether members discussed the terms of reference. Goff told his colleagues that he would discuss them with the inquiry head. When he announced the terms of reference, Goff said that at least two internationally recognised experts had to be appointed. There was no requirement for more than two to be chosen, nor was there any requirement for the expert opinions to be peer-reviewed.

On the advice of officials Goff named retired Chief Justice Sir Thomas Eichelbaum to conduct the inquiry. Sir Thomas had had a close working relationship with Williamson J, the presiding Judge at Ellis' trial. According to Sir Thomas, Williamson – who died in 1996 – had been a "model Judge". He had possessed:

exceptional gifts of judgment, integrity and humanity. He conducted many of the most difficult trials of his time, and he did so impeccably. Neil was much more than an outstanding Judge ... [he was] an exceptional human being ("Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited", 6 Cant LR 421)

OFFICIAL ADVICE

The Justice Ministry had asked Sir Thomas Thorp to review a second application by Ellis for a pardon. He reported in March 1999. He argued that the Crown Prosecutor, Brent Stanaway, had put forward several charges on a "very conservative basis". The motive for "sanitising" the charges, Thorp argued, was "less important than its effect". He concluded that the evidence he had seen, which was extensive, did not establish Ellis' innocence. But neither, he implied, did it establish Ellis' guilt. He advised officials that Ellis should not be pardoned, but hinted that this might need revisiting once Ellis' legal options had been exhausted. He recommended to the Justice Ministry that it seek the opinion of Stephen Ceci, an eminent psychologist and adviser to the recently formed New Zealand Innocence Project. Ceci had previously reviewed the complainants' evidence for a television documentary. Val Sim, the ministry's then chief legal counsel, and her assistant Michael Petherick decided not to request Ceci's opinion, because the ministry was not a party to Ellis' impending Court of Appeal hearing. However, both officials advised Colin Keating that they had given Thorp's advice "serious consideration".

Sim and Petherick assisted Eichelbaum in all aspects of his inquiry. Both officials were familiar with the case. In March 1998, when rejecting Ellis' first application for a pardon, Sim asserted:

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

Sim had argued, however, that Barry Parsonson's 1997 report, prepared on behalf of Ellis, was "capable of raising serious doubt about the reliability of the complainant's (sic) evidence". Sim advised the Justice Minister that the Court of Appeal was "well placed" to make an assessment of Parsonson's report. As discussed in Part 1 of this paper, the Court ruled that the expert opinion evidence was beyond its scope.

Sir Thomas Eichelbaum asked Sim whether Thorp's report into the *Ellis* case was covered by his terms of reference. Sim was uncertain. She considered that because the report was not publicly available, the "safest course" was to discount it. Eichelbaum agreed. Sim, who refused to publicly release Thorp's report until Eichelbaum's inquiry had concluded, would have been aware that the terms of reference for Ellis' second appeal hearing were widened because of Thorp's review. In the context of a potential miscarriage of justice, Thorp's report should have been required reading for Eichelbaum and his appointed experts.

When he advised Phil Goff of the merits of setting up a ministerial inquiry, Colin Keating said that there were two options to determine the choice of experts. The experts could

be chosen by the inquiry head after consultation with all the parties to the inquiry, or officials could seek expert advice from overseas before the inquiry was set up. A variation on the first option was chosen. All parties, including the Justice Ministry, provided Eichelbaum with the names of potential candidates.

Experts nominated by Ellis' legal counsel were Stephen Ceci, Maggie Bruck and Michael Lamb. Though arguably the three leading experts on children's testimony, they were not nominated by the other parties. In a letter dated 2 June 2000, Val Sim advised Eichelbaum that he should reject Ceci, Bruck and Lamb. Sim proffered the same advice in relation to Barry Parsonson. On 13 June, Eichelbaum met with Sim and Michael Petherick. He told them he had decided to discard Ceci due to his "high profile" and "research direction". What he knew of Ceci's profile and research is unclear.

Sim's advice to Eichelbaum was inconsistent with her earlier advice to Keating. When, in 1999, she recommended that Ellis not be pardoned, Sim indicated that she probably would have obtained Ceci's formal opinion had the Court of Appeal not been seized of the case. In the course of this research the writer asked Sim to explain her turnaround. She declined to comment.

Sim also wanted Eichelbaum to discount any expert who had a "close publishing association" with the likes of Ceci, Bruck and Lamb. Sim did however nominate developmental psychologist Debra Poole who had a close publishing association with Lamb (whom Eichelbaum discarded). She also had (and has) a high profile. Furthermore, her research interests were (and are) similar to Ceci's. She has stated that once children are contaminated, their testimonies become almost, though not completely, useless. "That is why," she explains, "we train people that the child's testimony is usually not the most important part of the case ... [we] look at the testimony in the context of a time line of the case." (private communication, 28 July 2005)

By early June 2000, Eichelbaum had not contacted any experts. In May or June, he was supplied with the name of Canadian psychologist Louise Sas. Although none of the parties to the inquiry had nominated Sas, Eichelbaum was led to believe – after speaking with Sim – that she had "high standing". However, work commitments meant that she could not meet the inquiry deadline. At least one expert had already been discarded for that reason.

Sim thought that American law professor Thomas Lyon could assist Eichelbaum. (Lyon was nominated by the Children's Commissioner and Crown Law Office, but could not take on the role of expert adviser.) Sim was aware that Lyon had, in 1999, written a lengthy article criticising the "new wave" of suggestibility researchers, who included Stephen Ceci and Maggie Bruck. Sim gave Eichelbaum a copy of the article, in which Lyon claimed that the new wave exaggerated children's suggestibility and interviewers' use of suggestive questions. In 2000, Ceci and his colleague Richard Friedman responded, accusing him of distorting the research findings on children's suggestibility. The authors implied that Lyon was biased. In 2001, forensic psychologist David Martindale declared that there were "significant fallacies" in Lyon's claims. The professional recognition heaped upon Bruck and Ceci indicated that their work was "widely appreciated". Lyon later conceded that the "recent research on children's suggestibility has done a lot of good".

Lyon has expressed the belief that many abused children "accommodate" abuse. He has stated, for example, that rates of denial among abuse victims are "surprisingly high" and that abused children "have difficulty in discussing abuse". These views, which sit squarely outside the professional mainstream, are not endorsed by Debra Poole:

I have issues with Lyon's reading of the literature, how he slants it, and what he is willing to cite to make his points. I doubt you'll find him talking to people on both sides of the debate. (private communication, 4 May 2005)

Eichelbaum had a long conversation with Lyon, who was familiar with the work of Louise Sas. Lyon recommended two well-regarded experts, James Wood and Amye Warren. Eichelbaum subsequently asked an official where both experts "stand in the debate". He presumably learnt that Warren was one of 45 social scientists, including Poole, Ceci and Bruck, to sign an amicus brief in support of Kelly Michaels, who in 1988 was convicted on multiple counts of child sexual abuse. Her convictions were subsequently overturned.

Between 1991 and 2000, Warren authored nine peer-reviewed journal articles and five chapters on child suggestibility, investigative interviewing of child victims, and memory. James Wood had written 11 peer-reviewed journal articles on the same topics. (Louise Sas had not written a peer-reviewed journal article on any of those topics; she had, however, written four papers on how child victims' experience of the Courts could be improved.)

Official documents show that Eichelbaum believed Warren was "possibly less well-known" than Sas. He requested Val Sim's opinion of both experts before confirming Sas as his choice. Eichelbaum could, of course, have appointed Sas and Warren (and Wood). In a letter to the writer dated 24 December 2003, Val Sim wrote that "Sir Thomas was required to seek opinions from two experts". In fact, he was required to seek opinions from "at least" two experts. Why he did not appoint more than two has never been explained.

Louise Sas

In 1995, Louise Sas received a grant of C\$60,000 to research Project Guardian. She claimed that Project Guardian was a multi-victim, multi-offender case which involved 60 young boys aged between 8 and 17 and 80 adult male offenders. She stated that "there was not one spontaneous disclosure!" Were it not for child pornography videos, which police allegedly found, "I doubt that there would have been an investigation at all". (Sas, 2001)

What Sas didn't mention was that many Canadians regarded Project Guardian as an anti-gay witch-hunt. Police raided houses and seized hundreds of videotapes as part of their investigation into an alleged child pornography ring. There were dozens of arrests. Two men received long sentences for videotaping youths (14 and older) engaged in sexual acts. These were the only convictions regarding the so-called child pornography ring, which:

turned out to be a group of teenage boys who introduced one another to men. Very few of the men even knew each other. The most common charge ... involved primarily gay men who were alleged to have had sex for money or gifts with teenage hustlers. (Bell and Couture, cited by Douglas Victor Janoff, *Pink blood: homophobic violence in Canada*, University of Toronto Press (2005))

Two eight-year-old boys who were allegedly abused later recanted. One of the boys claimed he had told police that

nothing had happened. Police believed a teenage brother of one of the boys was also a victim. In a radio interview, he described police interviewing methods:

the interview was supposed to be about me, but the first thing they [the two officers] said to me was, "We know what happened with your little brother, and we really want to get these guys. And we want you to help us out." Sort of making it seem like I would be helping my brother out if I said anything happened to me. But nothing had happened to me ... I know that if I was [my brother's] age I know that I would have just went along with them.

Sas wrote to Sir Thomas Eichelbaum on 15 August 2000, declaring her interest in the role of expert adviser to the ministerial inquiry. In the letter she admitted that there had been problems with Project Guardian:

In that case, due to the reluctance of the boys to disclose, the police were forced to interview the boys many times (developing a relationship) and this caused problems for the case later on.

In her report into the *Ellis* case, she claimed that Project Guardian had been carried out "very cautiously". She did not mention that police interviewing of alleged victims had caused any problems. She did, however, mention that she had worked closely with the police and had studied the "victimization of the boys involved with the adult paedophiles".

In 2001, another Canadian sexual abuse case received widespread publicity. A nanny was accused of forcing two four-year-old twin boys to perform oral sex on her. On the eve of her trial, a 12-year-old boy who lived near the twins alleged that she had also abused him. The trial was cancelled to allow the new witness to be interviewed. The boy reportedly said in his third and final interview that he had been lying all along. The boy's father claimed that he had seen his son sexually abuse the twin boys.

At the nanny's second trial, Louise Sas, testifying for the prosecution, claimed that the older boy's recantation was a "clear example of his difficulty sharing the information". She also claimed that the twin boys' delayed allegations were "consistent with the abuser being known to the child".

The trial ended abruptly. The Judge dismissed the charges, ruling that the Crown's evidence was unreliable and inadmissible. "The [twin] boys were highly impressionable", he said, before adding that the older boy "could easily have influenced them into ... a blur of reality and imagination". The nanny's lawyer was highly critical of Louise Sas: "Dr Sas can interpret every fact and every behaviour as evidence of abuse".

SELECTION OF EXPERTS

The Justice Ministry's chief legal counsel, Jeff Orr, has claimed that Louise Sas was appointed after consideration of "a number of factors, but, in particular, her expertise, experience, lack of previous involvement with the case, availability and cost". (private communication, 16 January 2006) This explanation is not supported by the facts.

With the selection of only two experts, the inquiry was never in danger of exceeding its budget. (But when, in October 2000, Michael Petherick sent Louise Sas an employment contract to sign, he asked her to keep a record of her hours worked "in light of the Ministry's limited budget for the inquiry".) Nor was the availability of experts a convinc-

ing reason for selection. Sas could not have been selected had the inquiry's deadline not been extended. Graham Davies, the other appointed expert, also could not meet the original deadline.

A lack of previous involvement was an interesting, if dubious, justification. The prior involvement of Val Sim and Michael Petherick did not prevent them from advising Eichelbaum on all aspects of his inquiry, including who he should and should not appoint. In 1999, both officials advised the Justice Minister to decline Ellis' application for a pardon. At the same time, they recommended that a commission of inquiry not be held into the case. In 1998, Sim argued that the prosecution's case had been "rigorously tested".

Sas' credentials have been described above. Her nomination and selection raise questions about the appointment process. For example, why was Sas nominated when officials did not contact more highly qualified experts? How did Eichelbaum come to believe that Sas had high standing and was better known than Amye Warren? Did officials warn Eichelbaum that Sas' selection could harm the credibility of his inquiry?

Amye Warren was surprised to learn of Sas' selection. "Clearly", she remarked, "Maggie Bruck would have been a better choice". (private communication, 21 May 2005) Stephen Ceci, she said, "would also fall into Bruck's category". Debra Poole, who drafted the forensic interviewing protocol for Michigan and served on committees that revised the first and second editions of the protocol, said she had not heard of Sas. (private communication, 28 April 2005)

Michael Petherick, who is still employed by the Justice Ministry, was recently asked if he had known where Sas stood in the debate. He responded:

Information was provided [to Eichelbaum] regarding "where people stood" in the debate but I can't recall where she stood ... Sir Thomas was concerned that experts be chosen who were seen to be relatively neutral ... [he] was conscious of the need to select experts who did not have a particular viewpoint. (private communication, 29 July 2007)

Petherick could not explain why Sas' name was given to Eichelbaum when the names of more highly qualified experts were not. "We went through a process to choose the experts and she was selected as part of that process," he said.

Jeff Orr has advised the writer that ministry files "do not indicate where the name Louise Sas originated from". Asked to explain why the reporting deadline was extended six months to accommodate Sas' work commitments, Orr declined to comment. He added that the process for selecting the experts was a matter for Eichelbaum and "not the Ministry of Justice".

In 1997, Wendy Ball, then senior law lecturer at Waikato University and spokesperson for the complainant families, and Louise Sas attended a conference on family violence in London, Ontario. They both spoke at the same workshop. Ball supplied participants with a paper which praised changes to the Evidence Act 1908, ie s 23G and the related provisions which have been dropped from the Evidence Act 2006. These changes, enacted in 1989, "covered a wide sweep of needs for child witnesses". Ball argued that assessment of child competency had been passed to evidential interviewers, who were, in effect, "put into the shoes of the Judge".

Ball highlighted the *Ellis* case as an example of the success of the legislative changes. She claimed that at the depositions

hearing of Ellis and his four co-accused, a case was established against “all five offenders”. She said that following Ellis’ conviction, the public saw him as a “disgusting paedophile”. The media’s subsequent treatment of the case as a potential miscarriage of justice angered Ball:

The effects of this [media coverage] on the children abused by Ellis is (sic) far reaching and devastating ... (Paper presented to The 2nd International Conference on Children Exposed to Family Violence. London, Ontario, June 1997)

She concluded that the case had tested the changes to the Evidence Act but, as a result of Ellis’ failed 1994 appeal, “the amendments has (sic) stood their ground”.

This writer recently asked Wendy Ball if she had any idea how Louise Sas came to be nominated to the ministerial inquiry. She has not responded.

OUTCOME OF INQUIRY

On 13 March 2001, Phil Goff announced the outcome of the ministerial inquiry. He told National Radio listeners that justice had to be seen to be done. “We went the extra mile,” he exclaimed. He added that the expert advisers – “two of the best people in the world” – had both concluded that the children’s evidence was reliable. Both experts, Goff said, had “an impressive list of publications to their name”. He had “no reluctance at all” in spending half a million dollars. Listeners would have assumed that that was how much the inquiry had cost. In fact, it cost less than \$150,000. Goff asserted that the “overwhelming majority” of people could feel “confident that the convictions that were entered can be relied upon”.

The Eichelbaum Report

The case advanced on behalf of Ellis, Eichelbaum concluded, failed “by a distinct margin”. None of his convictions were unsafe. Eichelbaum opined that the case “has had the most thorough examination possible. It should now be allowed to rest”.

Whilst it may appear that the case has been examined thoroughly, the facts show otherwise. The Court of Appeal did not review all the available evidence and, at the second hearing, failed to give any weight to the expert opinions. The Court acknowledged that it was not a commission of inquiry and so could not assess the weight that should be given to the expert opinion evidence. Officials didn’t believe that the opinions of Lamb, Bruck, Parsonson or Dalenberg should be included in the terms of reference of the ministerial inquiry.

During the course of his inquiry, Eichelbaum was required to read reports into other mass allegation abuse cases. Among the reports was the San Diego County Grand Jury Report (1994). This report grew out of the *Dale Akiki* case. Akiki, a child care worker, was accused of sexually abusing nine young children. The similarities with Ellis’ case were striking. Akiki was one of several adults suspected of abusing children. Some of the children made fantastical claims, including that Akiki had made children drink the blood of animals which he had killed. When initially interviewed, many children denied they had been abused. But after weeks of therapy, parental questioning and numerous formal interviews, the children’s denials ceased. During the police investigation, a meeting of concerned parents was held. One parent gave other parents information about ritual abuse. There was no

physical evidence of abuse. Prosecutors, however, believed that abuse had occurred because the children displayed alleged symptoms of abuse such as bed-wetting and tantrums. Eichelbaum did not mention the similarities between the *Akiki* and *Ellis* cases. He did not mention that Akiki was acquitted on each of the 35 charges.

Eichelbaum agreed that children should be formally interviewed only once. Though six of the seven conviction children had been interviewed on multiple occasions, he claimed that any allegations arising out of the later interviews generally did not result in charges. There were three problems with this claim. First, it ignored the fact that the evidential interviewers often used leading or suggestive questions to elicit allegations and that children had been questioned by their parents before being formally interviewed. Children did not generally allege abuse during free recall or in response to open-ended questions. Second, children were exposed to suggestive influences before being formally interviewed. Their evidence, claimed Michael Lamb, was likely to have been contaminated. Third, later interviews did lead to charges and convictions. Nine of the sixteen counts on which Ellis was convicted came from allegations elicited in later interviews.

Eichelbaum noted that interviewers “should keep in mind that proved instances of mass abuse are rare”. Tribunals of fact should also keep this in mind when faced with cases of alleged mass abuse. Many relevant experts believe that when dealing with such cases, it is important to corroborate the allegations. Karen Zelas, who supervised the evidential interviewers, advised police that they should investigate the children’s claims with a view to finding supporting evidence. None was found. Eichelbaum did not comment on the lack of supporting evidence. Sir Thomas Thorp, however, observed that “where one child claimed to have seen serious abuse being committed on another, the second child denied any such happening”.

The jury’s verdicts had Eichelbaum’s support. “The jury was astute in identifying those [charges] where the supporting evidence or the method by which it emerged was open to valid criticism”. In the notorious *Kelly Michaels* case, the accused was convicted but also acquitted on many charges. The New Jersey Appeals Court argued that the way the children’s allegations had been elicited was such that it would be unsafe to allow Michaels’ convictions to stand. Jurors may have been swayed by the plausibility of many of the charges. Jurors acquitted Ellis in relation to the so-called “circle” incident, suggesting that plausibility was a determining factor in their verdicts.

Eichelbaum concluded that he and the two experts “independently reached the view that the children’s evidence in the conviction cases was reliable”. But he had watched the evidential interviews and read testimony from the trial and depositions before he chose the experts. That possibly explains why he asked officials where each candidate stood in the debate. Once he learnt where the candidates stood, he must have had a good idea what the experts would say when they evaluated the complainants’ evidence. He presumably knew, after speaking to Thomas Lyon and Val Sim, that Louise Sas was unlikely to disagree with his findings.

Contrary to Eichelbaum’s assertion, one of the experts was unable to determine whether the children could be relied on. Graham Davies argued that their age and the historic nature of their claims meant that they were unable to provide:

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

There also were questions pertaining to corroboration which Davies was unable to answer. These questions, he wrote, would need to be addressed by "the wider inquiry". Jeff Orr is not sure what inquiry Davies was referring to. Orr claims that it was possibly the ministerial inquiry. That seems unlikely – Eichelbaum's inquiry had narrow terms of reference. If Davies had been given a copy of Sir Thomas Thorp's review, he would have realised that the children's claims could not be corroborated.

On 3 August 2000, Eichelbaum emailed Sas, apparently inviting her to participate in the ministerial inquiry. The exact contents of the email are unknown because it appears to have been lost or destroyed (the same fate has befallen a similar email from Eichelbaum to Davies, dated 24 July 2000). However, Sas seemed to be under the impression that she had to supply the inquiry with an unequivocal opinion. She did just that ("the children's evidence is reliable"). Her role contrasted sharply with that of Davies ("I perceive my role to be to provide independent advice and relevant information for others to draw their own conclusions, based on the wider evidence and circumstances of the case"). Sas' opinion went well beyond what would be admissible in Court. In New Zealand, experts are not permitted to comment on the credibility or reliability of child witnesses.

PETITION TO PARLIAMENT

In 2003, petitions organised by Lynley Hood, author of *A City Possessed: the Christchurch Civic Crèche Case*, and Gaye Davidson, supervisor of the crèche at the time of the police investigation, were presented to Parliament's justice and electoral select committee. The petitioners requested a Royal Commission of Inquiry into the case.

The petitions attracted thousands of signatures, including those of two former Prime Ministers, four former Cabinet ministers, 26 MPs, a retired High Court Judge, a retired District Court Judge, 12 law professors, 12 Queen's Counsel, psychology professors, professors from other disciplines, lawyers, child protection workers, psychologists, social workers, therapists and counsellors.

Hood told the committee that the criminal justice system had failed "catastrophically at many levels". It was incapable of self-correction. The failure of successive governments to set up a wide-ranging inquiry into the case had served only to amplify calls for such an inquiry. New evidence, as demanded by the Justice Minister, was not needed. "All you need is moral courage and political will," said Hood.

The committee questioned several of the petitioners, including memory expert and Innocence Project co-founder Maryanne Garry. Garry explained that memory was a reconstructive process.

As adults, our memories are extremely fragile and open to corruption and distortion, and children have these tendencies exaggerated for a number of social and developmental reasons that adults themselves don't have.

Although the complainants might wish to appear before a commission of inquiry, Garry believed that their participation could be problematic. She argued that their memories

were likely to have been distorted at the time of the police investigation. The former children would be unlikely to see their evidence "in a new light ... they would still be reporting what they believed ... [but] it doesn't mean it's accurate," she said.

Val Sim was also questioned by the committee. She denied that the Justice Ministry had a vested interest in the outcome of the case. She stressed that she was not an advocate for either side of the debate. She appeared, however, to have serious reservations about a commission of inquiry:

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

Sim's concern for the professionals involved was troubling. During the ministerial inquiry, she told Eichelbaum that the experts' reports might cause harm to the "personal reputations" of the interviewers, the complainants and their families. She expressed no concern for the personal reputations of the eleven crèche workers, who were judged to have been unfairly dismissed when the crèche closed down (as a result of the police investigation). She expressed no concern for the four female crèche workers who were arrested and charged with (but not convicted of) sexual offences. She expressed no concern for Ellis' mother, whose flat was raided by police on the suspicion that she, too, had molested children.

There were other problems with Sim's oral submission. She advised committee members that her role during the ministerial inquiry had been restricted to providing "administrative support". She didn't mention that she had apparently encouraged Eichelbaum to appoint Louise Sas at the expense of the world's leading experts. She didn't mention that she had helped to shape the inquiry's terms of reference, which were narrow and flawed. She didn't mention that she had advised Eichelbaum to overlook Sir Thomas Thorp's report.

On occasions, Sim avoided the committee's questions altogether. For instance, when asked whether Louise Sas "had the expertise necessary" to evaluate the children's evidence, she replied:

There appears to be a spectrum from, at one extreme, experts who consider children extremely suggestible, and at the other, experts who don't find them suggestible at all.

MPs were left none the wiser. They were also misinformed; very few, if any, experts believe children are extremely suggestible. However, some experts (eg Sas, Dalenberg, Lyon) minimise or ignore the potentially deleterious effects of suggestive questions, apparently in the belief that abused children need to be prodded in order to disclose.

Murray Smith asked Sim whether she had any misgivings about the outcome in the *Ellis* case. She said that, unlike the authorities, she had not seen the children's evidential interviews. Smith, possibly motivated by this response, asked the committee's legal counsel whether any of the appellate Judges had viewed the children's interviews. Seven Judges had rejected Ellis' appeals. How many of them had viewed the children's interviews? Bruce Squire QC advised the committee that there was no clear evidence that any Judge had watched any interviews.

Select Committee recommendations

In September 2005, the justice and electoral select committee, chaired by Labour MP Tim Barnett, recommended a

number of changes to the way mass abuse cases are handled. It recommended that an independent body, similar to the UK's Criminal Cases Review Commission, be established to investigate miscarriages of justice. It also recommended that changes be made to the Evidence Act 1908, in order to reduce the probability of another mass allegation crèche case. But it stopped short of endorsing petitioners' calls for a commission of inquiry into the *Ellis* case. MPs concluded that such an inquiry was unlikely to improve upon the established facts and could cause distress to the complainants.

Barnett says that his committee could have recommended a pardon, but that "such a recommendation coming from a Select Committee dealing with many other matters and only meeting for three hours a week would not have been regarded as too relevant". (private communication, 26 March 2007) Whilst that is possibly true, it is beside the point; the petitioners did not request that *Ellis* be pardoned. Barnett's comment – that the committee spent three hours a week on all matters – calls into question whether members devoted sufficient time to such an important decision.

When the committee rejected the petitioners' request, it did so on the basis of incomplete information. The Parliamentary Library has on file the documents seen by the committee in the course of its deliberations. Many relevant documents are missing, including the reviews of Lamb, Bruck, Ceci and Parsonson. The committee read Sir Thomas Eichelbaum's report but did not read Sir Thomas Thorp's report. It is difficult to resist the conclusion that the committee, which questioned petitioners for little more than an hour, failed to take its responsibilities seriously enough.

One committee member, National MP Clem Simich, disagreed with the committee's decision not to hold a commission of inquiry. Simich, who had signed one of the petitions, wrote:

I do not wish to associate myself with the report and recommendations of the majority. I believe the committee has followed a process inconsistent with the expectations of the petitioners and the recommendations are inappropriate.

LEGAL AND OTHER OPTIONS

The legal options available to *Ellis* are limited. In May, his lawyer, Judith Ablett-Kerr QC, indicated an intention to seek special leave to appeal to the Privy Council. Another option would be an appeal to the Supreme Court if both parties agreed in writing. This option seems to be unfavoured. Any appeal would be heard by a panel of New Zealand Judges. Given that seven appellate Judges and a retired Chief Justice – all from New Zealand – have ruled against *Ellis*, it could be argued that the case is incapable of being accommodated by the criminal justice system. In addition, the Supreme Court typically confines itself to addressing points of law. This means that the expert opinion evidence, for example, might not receive the attention it deserves.

Ablett-Kerr could lodge another application for the royal prerogative of mercy. However, in the absence of a significant shift in attitude from the Ministry of Justice, it is difficult to see how a pardon could be granted.

In 2006, National MP Richard Worth submitted to Parliament the Criminal Cases Review Tribunal Bill. This member's Bill seeks to establish a tribunal (comprising lawyers and lay people) to investigate possible miscarriages of justice. The establishment of an independent authority has the support of many legal experts. One of its strongest supporters is

Sir Thomas Thorp, who believes that the Justice Ministry possesses neither the expertise nor the resources to properly investigate miscarriages of justice. He also believes that the incidence of miscarriages has been underestimated. An independent tribunal may be expected to address most but not all aspects of the *Ellis* case.

A second ministerial inquiry is an option. Careful consideration would have to be given to the terms of reference of such an inquiry. For obvious reasons the Justice Ministry's role would need to be severely constrained. Appointing an overseas Judge would be central to the credibility of the inquiry, as would the appointment of reputable experts. Another ministerial inquiry is likely to have its detractors. There possibly would be a sense of *déjà vu*. The inquiry would be unable to compel evidence or witnesses. Its findings could be subject to legal challenge. However, if measures were put in place to ensure a truly independent and impartial inquiry, another ministerial inquiry could bring finality and, more importantly, justice.

Some believe that a commission of inquiry is essential. According to Lynley Hood:

until the issues raised by the crèche case are fully and independently addressed New Zealanders will be as much at risk of having their lives, their families and their communities thrown into turmoil by sex abuse hysteria as the people of Christchurch were in 1992. (Submission to Parliament's Justice and Electoral Select Committee, August 2003)

Despite two appeal hearings, three applications for a pardon, a ministerial inquiry, and a parliamentary inquiry, questions remain. On what grounds were five childcare workers charged with sexually abusing 20 young children? Why were four of those workers paid compensation for wrongful dismissal while the other was convicted of sex offences? On what grounds were 118 children interviewed? Did the children's interviewers perform poorly, as suggested by one eminent expert? Did changes to the Evidence Amendment Act in 1989, especially the passing of s 23G, make the *Ellis* case a disaster waiting to happen? What lessons, if any, have been learnt by those involved?

A NEW PUBLIC INQUIRIES ACT?

The Law Commission has indicated that it proposes the introduction of a new Public Inquiries Act. Commissioners want to see ministerial inquiries given more powers. It is expected that all such inquiries will be administered by the Department of Internal Affairs. It is also expected that all terms of reference will be drafted by parliamentary legal counsel. These proposals, says Law Commissioner Helen Aikman, "should overcome any perceptions of a conflict of interest". (personal communication, 5 October 2007)

CONCLUSION

The recently established Innocence Project offers hope to the wrongly convicted. But it has come too late for Peter *Ellis*. Resolving his case will go a long way to restoring confidence in the justice system. Doing nothing will be to admit failure. That cannot be allowed to happen. □

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