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1. EXECUTIVE SUMMARY

Terms of Reference (1)(a)(i)
(review of overseas reports & memoranda)

The review has shown that the New Zealand methodology of 1991 for interviewing children in suspected abuse cases was well up with and, in many respects, in advance of the corresponding arrangements discussed in the overseas materials.

Terms of Reference (1)(b)
(whether the investigations and interviews conducted in accordance with best practice)

Both the International Experts (Professor Davies and Dr Sas) considered that the interviewing was of an appropriate standard. In Professor Davies' opinion it was of a high quality for its time. Even by present day standards it was of a good overall quality. The interviews did not meet best practice standards in every respect, and if that degree of perfection were the test, few if any interviews of this kind would pass.

Aspects of the systems set in place for the investigation could have been improved. However, that made no significant difference to the outcome.

Questioning and investigations by some parents exceeded what
was desirable and had the potential for contaminating children's accounts.

Terms of Reference (1)(c)
(the nature & extent of risk to which any breaches of best practice give rise)

Regarding possible contamination, Dr Sas considered that the evidence of the six remaining "conviction" children had not been seriously affected. Their evidence was reliable, and Dr Sas expressed the view that there would

probably have been more convictions, had the contamination issue not been given such prominence.

Professor Davies did not express a final view about the effects of contamination. However, he did not believe that cross-talk alone was sufficient to explain the similar accusations made, particularly in relation to occurrences in the creche toilets.

I am unconvinced that cross-talk between parents, and excessive questioning by them, could account for the detailed, similar accounts given by so many children, in separate interviews stretching over many months.

Terms of Reference (3)
(whether any matters which give rise to doubts about assessment of children's evidence to an extent which would render convictions unsafe and warrant grant of pardon)

The case advanced on behalf of Mr Ellis has failed, by a distinct margin, to satisfy the Inquiry that the convictions were unsafe, or that a particular conviction was unsafe. On the matters referred to me in this Inquiry, I do not consider the grant of a pardon is warranted.

2. INTRODUCTION

(an overview of the Peter Ellis case)

2.1 Children's names

Publication of the names of the complainants is prohibited by statute. In this Report the children and their parents are referred to by a code.

2.2 Background

The following account is taken largely from the second judgment of the Court of Appeal, as confirmed by my own reading. Originally the Christchurch Civic Childcare Centre (the creche) carried on business in the Arts Centre in Montreal Street, Christchurch. Mr Ellis started to work there as a staff member in 1986, when he was 28. Initially he was a reliever, then he was given a permanent position. He completed a three year course for a Childcare certificate.

In 1989 the creche moved to premises in Armagh Street. Some 70 to 75 families had children there, the daily average attendance being about 40 children. Of these, 12 were in the nursery part, where the ages ranged from 12 months to two and a half years, and the rest in the pre-school area, where the age was up to 5 years. When the investigation started, Mr Ellis was the only male teacher. In his pre-sentence report he was described as an outgoing, uninhibited, unconventional person, given to putting plenty of enthusiasm and energy into his work and social activities, sometimes to the point of being risqué and outrageous. Mr Ellis was well regarded by many of the children and their parents, although according to what children said in their interviews, his boisterous games, tricks and teasing were not universally appreciated.

2.3 The Investigation

Following a complaint by a mother, arising from something her son said about Mr Ellis, he was suspended from his employment. Some children were interviewed by the Specialist Services Unit (SSU) of the Department of Social Welfare, the interviews being videotaped in accordance with the Evidence (Videotaping of Child Complainants) Regulations 1990. The creche Management Committee called a meeting of parents held on 2 December 1991, where a psychologist from the SSU addressed parents. In the initial interviews, the children concerned did not make any allegations of sexual offending, and at one stage the Police informed the Management that the Inquiry had been completed. However, in an interview conducted at the end of January 1992, the first such allegation was made, and after that, there were a number more. Interviewing continued through 1992, with at least 118 children

being interviewed altogether, in most cases without any allegations of abuse emerging.

2.4 The charges

There were 36 informations against Mr Ellis alone, four charges against him laid jointly with other creche workers, Ms Davidson, Ms Buckingham, and Ms Keys, and two charges laid jointly against Mr Ellis and another creche employee, Ms Gillespie. These informations involved 19 or 20 separate complainants. The numbers just set out are exclusive of one or more other charges against Mr Ellis which were dismissed at the conclusion of the Depositions hearing, or at an earlier stage; it is not possible to be more precise on the details supplied to me.

2.5 Depositions

There was a lengthy Depositions hearing, the transcript of oral evidence and cross-examination running to more than 1000 pages. With two possible exceptions, on the 42 information detailed above, Mr Ellis was committed for trial. The four other creche workers were also committed.

2.6 In the High Court

The Crown elected not to proceed with some of the charges, mainly ones involving younger complainants. The High Court (Justice Williamson) decided a number of pre-trial applications. An application for dismissal of a charge of indecent assault, laid jointly against Mr Ellis and Ms Gillespie, was granted on 5 March 1993, the Crown having confirmed that it was the strong wish of the complainant's mother that the complainant should not give evidence. The High Court directed that the joint charge arising out of the so-called "circle" incident (in which Mr Ellis was charged jointly with Ms Davidson, Ms Buckingham, and Ms Keys) be tried separately, and on 6 April 1992 the Court ordered that this charge be dismissed.

On another application, the defence asked the Court to exclude the evidence of the 13 principal witnesses, former pupils of the creche, on the grounds that the evidence had been unfairly obtained, or that its prejudicial effect would outweigh any probative value it may have. The Judge described the main thrust of the argument as a contention that the procedures followed by the Police, the parents and those who interviewed the children were so wrong and oppressive that the resulting videotaped interviews and the children's oral evidence should be excluded on the grounds of unfairness. One point of criticism raised on behalf of the accused was the extent of the questioning by parents of children involved, the Judge noting that a feature of the case was the amount of written material, such as notes and diaries, kept by the parents of relevant matters including the questions they had asked of their children, and information obtained from other parents. As the Judge said, the ideal position would be if the evidence of the complainants in such cases arose clearly and precisely, without any previous questioning, but it would be unreal to have any such expectation. In the nature of things there would first be some allegation about which parents would question their child. The Judge said:

"It is when more extensive questioning has taken place that decisions have to be made about whether a Judge should exercise the discretion to exclude evidence having regard to the extent of any risk that evidence is untrue. There was extensive questioning of some of the children in this case and that is a factor which I must have particular regard to in considering this application." (12)

As a separate matter the judgment dealt with submissions on behalf of the accused to the effect that investigations had been affected by the public meeting called in December 1991, when allegations about events at the creche first surfaced. However, on examination of the circumstances in which the meeting had been called the Judge was not satisfied that they supported counsel's argument.

The Judge also considered submissions based on the sharing of information between parents. While the Judge accepted that following the initial meeting of parents, this had taken place, the issue was whether the children's evidence had been affected. In turn this raised the necessity to exercise a judgment about the reliability and truthfulness of the children's evidence. The Judge was not satisfied that the sharing of information between the parents had had a deleterious effect.

As to the manner in which the formal interviews were conducted, the Judge referred to the views expressed by the Court of Appeal in a case in 1990 (*R v Lewis* [1991] 1 NZLR 409) where the Court had noted that the evidence of the complainant children had been elicited by a process of "patient probing", with many questions asked of "a somewhat leading or coaxing" character. The Court had taken a benign attitude towards such techniques. The Judge said that courts traditionally tolerated "special questioning techniques" where the person questioned was under some disability regarding the provision of evidence, such as immaturity. From the terms of the judgment it is apparent that counsel for the (then) four accused had presented arguments based on a variety of criticisms of the interviewing of the children, including the use of direct and suggestive questions, multi choice questioning, repeated questioning, repeated interviews, the use of dolls, the continuing of the interviews after the child involved in a particular count had commenced therapy, and when he was unwell, the failure of the interviewers to explore the child's background adequately before the interview, and the alleged contamination of his evidence by information obtained from his parents or other children. The Judge however did not find it necessary to respond to the arguments in a detailed way. He referred to other evidence, particularly the tapes of the interviews, which he had viewed, and the expert evidence given by Dr Karen Zelas. The Judge stated he was satisfied that the interviewers were qualified, mature and trained persons under the regular supervision of a psychiatrist with specialist qualifications in child sexual abuse cases. He concluded:

> "While there may be some legitimate criticism about some aspects of these interviews, I am not satisfied that there has been improper conduct which should be the subject of discipline or that there are circumstances of unfairness raised by the conduct of these evidential interviews." (14)

While the Judge did not elaborate on the reference to "discipline", in the context undoubtedly it referred to the Court's power to exclude evidence on the basis that it had been obtained in such an improper manner as to lead the Court to disallow it as a disciplinary measure against the Police or prosecution agencies. In the result, the application made by the accused for dismissal of the charges failed.

A further extensive pre-trial hearing was again concerned with the videotaped evidence of the children. This time, Mr Ellis argued that because of the defective quality of that evidence, the charges ought to be dismissed under s 347 of the Crimes Act. The alleged defects were inconsistencies within the children's evidence, contamination by parents or other children, faulty procedures, and a lack of supportive testimony. In his judgment (No. 4, 20 April 1993) which declined the application, the Judge first discussed the counts where child S was the complainant. (In the event, Mr Ellis was convicted on 2 of these charges.) It was argued that the disclosures were brought about by direct or suggestive questioning, and that her evidence had been contaminated by contact with child Z and by contact between S's and Z's parents. In respect of one count, the Crown accepted that the evidence was elicited by a "blatantly leading" question, and agreed not to proceed on this charge. One matter to which particular attention was drawn was that during the interviews, the child had with her, and was able to refer to, two booklets which the child and her mother had prepared, containing pictures drawn by the child, with words written by the child and her mother. The Judge regarded them as in the nature of notes to which a witness could legitimately refer to refresh memory, rather than as a brief of evidence, as counsel for the accused maintained.

The Judge also had to consider submissions relating to child P. At his first interview he did not disclose any allegations of sexual abuse, and did not do so until 3 months later, when his sister (Q) had made disclosures. Neither child made any disclosures until they had had read to them a book "A Very Touching Book" dealing with sexual abuse, and then only after specific allegations had been put to them by their parents. In turn, it was claimed that the parents had been affected by contact with the parent of Z. After considering material submitted to him the Judge held that the questions, doubts and criticisms of the evidence ought to be dealt with by the jury.

The next group of counts related to child X, the boy involved in the dismissed charges against the three female creche staff. The Judge pointed out that most of the allegations against Mr Ellis emerged at the second interview, whereas in the case of the other accused, the disclosure was at a much later stage. In the Judge's view, the position regarding the allegations against Mr Ellis was

distinguishable from that of the three other accused. The Judge said he was not persuaded that the complaints were false, or that it would be unsafe or dangerous to allow the trial to proceed in relation to them.

Turning to the charges involving Z, the main complaint was contamination by the child's mother, and by another person, Mrs D. It was argued that the most serious allegation, that the accused put his penis in the child's mouth (a charge on which he was ultimately found guilty) emerged from a suggestion made by the mother, and given at the interview only because of direct and persistent questioning by the interviewer. While the Judge accepted that the interviewer had been persistent, he considered that on a view of the tapes, there was room for more than one possible conclusion. He concluded that the allegations in this group of counts were properly a matter for the jury.

The next counts related to U, but since these charges were dismissed at a later stage, it is unnecessary to say anything more about them.

Dealing finally with count 27 (child T) the particular allegation did not emerge until a third interview. The Judge held however that there was evidence justifying the charge remaining. In the same judgment the Judge also considered, and dismissed, a contention that primarily because of the publicity the case had received, the accused could not receive a fair trial.

A further Judgment (No 5, 21 April 1993) was concerned with procedural aspects of the trial, then about to commence. One matter pertinent to this Inquiry related to videotaped interviews not containing allegations forming charges in the indictment. The Crown wished to present only those tapes where relevant allegations were made, whereas the defence wanted all the interviews of the particular child witness to be played to the jury, as the foundation for arguments based on inconsistencies, and contamination. The defence also wanted the child's memory to be refreshed by watching all the taped interviews in which the child had participated. The Judge ruled that initially, only the tapes containing relevant allegations would be played. If the defence wished to cross-examine on other tapes, they would be played to the jury too, but the children need not view them unless they wanted to do so.

The last issue was revisited in Judgment No 6, 23 April 1993. The Crown argued that the playing of tapes should proceed on the basis that tapes not containing allegations relevant to the charges should be treated as if they were

contradictory or inconsistent statements. Their playing should be restricted to situations where the witness, upon being cross-examined, either denied the previous statement, or did not distinctly admit the fact of the prior statement. Counsel for Mr Ellis on the other hand contended that the jury ought to have the whole picture, the defence being based on the proposition that it was the process undergone by young susceptible children which had led them to make the allegations forming the basis of the charges. The jury ought to be able to observe the process and the sequence of events from which the allegations arose. The Judge ruled that the Crown was not obliged to produce, as evidence in Court, the tapes which did not make allegations on which the Crown relied. Rather, the Crown was obliged to make that material available to the defence, which could then decide whether or not to use that material, or portions of it, in cross-examination of the Crown witnesses. The procedure which the Judge ruled was to be adopted was that if the defence wished to cross-examine on any matters in a particular interview which had not been produced by the Crown, that interview would be played, with cross-examination to follow. Particular matters within specified tapes could be the subject of further consideration. Subject to that last qualification it will be seen that the defence was not prevented in bringing before the jury the tapes in which some of the more seemingly bizarre allegations were made. On this subject the 1994 Court of Appeal judgment stated:

> …appellant's counsel accepted that in general the defence was not denied the opportunity of playing whatever tapes they requested…. (8)

The Court did not accept the contention, that the Judge's insistence on relevancy constrained the defence from seeking more extensive playing. The 1999 Court of Appeal judgment said:

> It was undoubtedly open to the defence to cross examine all complainants on all allegations which they had disclosed whether or not they were the subject of specific charges. The contention that the defence was constrained in this regard is not supported by the ruling. (40)

In the event some (though not all) the tapes in question were played to the jury. This merits emphasis, since there seems to be a common misconception that the jury was unaware of the bizarre allegations.

2.7 The Trial

In the Indictment that proceeded to trial a number of the charges were laid in a changed or reduced form, compared with the original Informations; for example the charge involving child Z of anal penetration was reduced, as was that of rape concerning child S, and that of anal penetration involving complainant X. The Indictment contained 28 counts involving 13 complainants.

The trial opened on 26 April 1993. The prosecution called 45 witnesses, and the defence 13, including the accused. On 5 May 1992 the Judge dismissed one count under s 347 of the Crimes Act, this being the only count involving the particular complainant. Two further counts were dismissed on 6 May, these being the only ones involving that complainant. Thus, 25 counts relating to 11 complainants went to the jury. On 5 June 1993, after deliberations spread over 3 days, the jury returned verdicts as follows:

	Guilty	Not Guilty
Complainant N	3*	0
Complainant O	1	0
Complainant V	0	1
Complainant R	1	1
Complainant Y	0	1
Complainant S	2	2
Complainant X	3	1
Complainant Z	4	0

Complainant T	0	2
Complainant P	0	1
Complainant Q	2	0

- = convictions quashed on Appeal when the complainant retracted her allegations after trial.

On 22 June 1993 the Court sentenced Mr Ellis to a total of 10 years imprisonment. With the statutory remission, Mr Ellis completed his sentence before the present Inquiry commenced.

2.8 The 1994 Appeal

Mr Ellis appealed against his conviction on grounds that the verdicts were unreasonable in that the evidence of the children was not credible, and that there had been a miscarriage of justice. Under the first heading, counsel for Mr Ellis argued that the circumstances in which the children stated the offending had taken place was improbable, in that much of it was alleged to have happened at the creche over a five year period, yet had never been seen by nor, according to the evidence of the other creche workers, reported to any adult. Offending was said to have taken place in the toilets yet the door between the pre-school room and the toilet was generally open. The Court said it was not persuaded the offending at the creche could not have happened, and likewise considered that there was opportunity for offending on the walks on which Mr Ellis took children, sometimes unaccompanied by other adults. Another submission concerned the fact that some children said that other children were involved as victims, but some of the latter children were not called as witnesses, while others did not refer to the episodes where they allegedly were abused. The Court said however that while these aspects required careful consideration by the jury, there was nothing in them that rendered the accounts given by the children inherently improbable, or unworthy of belief.

The Court next considered criticism of the manner in which the children's evidence was obtained. The judgment said the professionalism of the interviewers was obvious. It noted the Court of Appeal's remarks in *Lewis* where the interviewing had shown "a certain degree of patient coaxing", but had said that whether the process might have led to any untrue statements was essentially a matter which a jury should be well capable of evaluating. The Court referred to the changes made by the Evidence Amendment Act 1989 as reflecting a desire to get at the truth and doing so by effective machinery enabling children to give evidence without undue stress, while at the same time preserving an accused's right to a fair trial. The judgment continued that the interviewers in the present case were well aware of the need for a neutral approach and the dangers of leading questions. It stated:

> "…the interviewer can be seen in some cases following up information received from a parent, but without inappropriate persistence or leading, and we do not accept the submission that they were working under an agenda with the object of obtaining disclosure of abuse in the belief that it had occurred." (7)

The Court canvassed the subject of the tapes not played by the Crown (referred to as the defence tapes), an issue to which I have already referred in dealing with the High Court rulings (section 2.5, above). It noted that Mr Ellis's counsel accepted that in general the defence was not denied the opportunity of playing whatever tapes they requested, but had contended that trial counsel had felt constrained by the Judge's ruling from seeking more extensive playing of the tapes. The Court rejected the criticism, saying that the jury had ample opportunity to judge the process from the extensive material played to them. The Court said it was satisfied the ruling about playing the tapes was one the Judge was entitled to make, and caused no prejudice to the defence. The judgment then proceeded with an examination of the evidence of each of the complainants where convictions had resulted. After a full analysis of the evidence, and the surrounding circumstances such as the conduct of and questioning of children by their parents, the Court concluded that the arguments under this heading did not give any grounds for interfering with the verdicts, except in the single instance of the complainant who retracted her accusations after the trial.

Finally the Court considered, and rejected, some residual grounds relating to trial processes which are not relevant to the present Inquiry. In the result the convictions relating to the child who retracted were quashed, but otherwise the Appeal was dismissed.

In this country, one permissible ground of appeal is that trial counsel made radical mistakes in the conduct of the defence: *R v Pointon* [1985] 1 NZLR 109. At no stage have the proceedings or Petitions on Mr Ellis's behalf raised any such allegation against trial counsel.

2.9 The 1999 Appeal

On 2 December 1997 Mr Ellis presented a Petition to his Excellency the Governor-General, seeking a free pardon in respect of the 13 remaining convictions, or in the alternative, reference of the convictions to the Court of Appeal for further consideration. By Order in Council dated 4 May 1998 ("the Reference") the convictions were referred to the Court of Appeal. In an interlocutory judgment dated 9 June 1998, the Court ruled that the hearing should be confined to matters raised in the Reference, rather than be conducted in the manner of a general appeal, as counsel for Mr Ellis had contended.

With the object of widening the terms of the Reference to the Court of Appeal, Mr Ellis presented a second Petition, dated 16 November 1998, seeking a free pardon and a Royal Commission of Inquiry into his case, or alternatively a Royal Commission and for the whole case to be referred back to the Court of Appeal. The Secretary for Justice obtained advice from the Hon. Sir Thomas Thorp, a former Judge of the High Court, whether the terms of the Reference ought to be enlarged. In his Opinion Sir Thomas advised that they should be; in particular, he recommended that they should cover not only the allegations relating to defective interviewing techniques, but also, and separately, the failure to recognise the problems of contamination of complainants' evidence by inappropriate questioning and suggestions. This led to a further Order in

Council, dated 12 May 1999, covering 5 grounds, or groups of grounds: those involving children's evidence; those involving retraction (by complainants); those relating to procedure at the trial; those involving members of the jury, and those relating to non-disclosure of material by the prosecution.

The appeal came before the Court of Appeal in July 1999. In its 48 page judgment the Court emphasised that the function of the Court was to treat the Reference as an appeal brought under the Crimes Act 1961. Thus the practice of the Court regarding the reception of fresh evidence applied. For this reason the Court had to analyse material placed before it to see whether the matters covered were unknown, or not adequately appreciated, at the time of trial. In respect of many aspects raised in argument of the appeal, for example the mode of questioning adopted by the Interviewers, the Court was satisfied that the issues were well known in 1992, and (as the record of the depositions, and of the trial, show) were canvassed at the time. Some issues, for example the effect of the Interviewers exercising "social influence" during interviews, were described as now better understood than previously, while in respect of others again, such as the use of anatomically correct dolls, the Court considered that the weight of opinion had changed since the time of the trial. However, the Court recorded that the various concerns of substance , which formed the subject of submissions to the Court, had all been identified and addressed in the course of the original proceedings. Referring back to the legal tests applied by an appellate court when faced with "fresh" evidence the Court said:

> …there is in our view an absence of significant "newness" in the additional evidence to show there were serious flaws or problems which were unknown or unappreciated. (36)

The Court continued that there might have been changes of emphasis, or current knowldge might have led to a more acceptable process, but this was speculative and in any event could not justify allowing the appeal.

In the course of its judgment the Court pointed out that the new expert evidence relied on by Mr Ellis was untested, and it was not the function of the Court (as distinct "from the more wide-ranging inquiry possible with a Commission of Inquiry") to determine whether such evidence was to be accepted. Likewise, it was not the Court's function to evaluate the various

Reports of Inquiries overseas, and the operating guidelines developed since the date of the trial. After reviewing at length all the grounds advanced, the Court concluded that the appeal failed.

The Court of Appeal judgment having been delivered on 14 October 1999, on 18 October Mr Ellis presented his third Petition, seeking a free pardon, and the establishment of a Royal Commission of Inquiry into his convictions. In March 2000 the Minister of Justice requested me to undertake the present Ministerial Inquiry.

3. THE MINISTERIAL INQUIRY

3.1 The Terms of Reference

Dated 10 March 2000, these were as follows:

MINISTERIAL INQUIRY INTO THE PETER ELLIS CASE

The Minister of Justice appoints you [Sir Thomas Eichelbaum] to inquire in the manner set out below into matters which may be relevant to the assessment of the reliability of evidence given by the children who attended the Christchurch civic crèche against Peter Hugh McGregor Ellis and to report on whether there are any such matters which give rise to doubts about the assessment of the children's evidence to an extent which would render the convictions of Peter Hugh McGregor Ellis unsafe and warrant the grant of a pardon.
You are to:

(1) (a) Review the reports and memoranda listed in the schedule and

(i) identify the processes, practices and procedures currently accepted internationally as best practice for investigating mass allegation child sexual abuses and interviewing children in these cases; and

(ii) identify any risks associated with a failure to adhere to best practice.

(b) On the basis of the evidence given at both the depositions and the trial, assess whether the investigation into the events at the Christchurch civic crèche case and interviews of children were conducted in accordance with best practice as now understood.

(c) If you conclude that the interviews were not conducted in accordance with best practice, identify the nature and extent of any risks which arise, which might affect the assessment of the reliability of the children's evidence. In conducting this task you are not required to attribute or apportion blame to particular individuals who undertook

the interviews. The focus of the task is on the evaluation of systems and techniques and their impact on the children.

In undertaking the tasks referred in (1) above, you are to invite, and consider, written submissions from the Crown Law Office (on behalf of the Police, Department of Social Welfare and Specialist Interviewers), Peter Ellis, the families of children who gave evidence at the Ellis trial, and the Commissioner for Children.

(2) For the purpose of the assessment and the conclusions under (1) above, you are to:

(a) Seek and evaluate opinions from at least two internationally recognised experts (if possible with experience in mass allegation child sexual abuse) on whether there are features of the investigation and/or interviews of the children (on the basis of the evidence at depositions and trial) which may have affected the reliability of the children's evidence, and if so, their likely impact.

(b) In selecting the experts from whom opinions are to be sought you are to:

(i) invite and consider submissions from the Crown Law Office, Mr Peter Ellis, the families of children who gave evidence at Mr Ellis's trial and the Commissioner for Children; and

(ii) make such further inquiries as you consider necessary to ensure that the experts from whom opinions are sought reasonably reflect the range of professional views.

(3) In light of your assessment and conclusions in (1) and (2) above, you are to report by 31 August 2000 on whether there are any matters which give rise to doubts about the assessment of the children's evidence to an extent which would render the convictions of Peter Hugh McGregor Ellis unsafe and warrant the grant of a pardon.

SCHEDULE

Report of the Inquiry into Child Abuse in Cleveland 1987;

Report of the Inquiry into the Removal of Children from Orkney Isles in February 1991;

The 1992 Memorandum of Good Practice (England);

The Joint New Zealand Children and Young Persons Service and Police Operating Guidelines of March 1997;

The Final Report of the Royal Commission into the New South Wales Police Service of May 1997;

Law Commission. Total Recall? The Reliability of Witness Testimony. A Consultation Paper (July 1999); and
Analysis of Child Molestation Issues Report No.7, a Report by the 1993/4 San Diego County Grand Jury, June 1, 1994.

My CV is attached as an Appendix to this Report.

3.2 Interpretation

This Inquiry is not a general review of the Ellis case; as seen the Terms of Reference set boundaries on the ambit of the Inquiry. After the consideration of the scheduled reports and memoranda, and identification of processes and risks directed by para 1(a), I was to assess whether the "investigations" into the relevant events, and the interviews of the children, were conducted in accordance with best practice as now understood. This was to be carried out on the basis of the evidence at depositions and the trial, so I was not requested or authorised to carry out further enquiries into the facts. Finally, after covering the obtaining of opinions from overseas experts, the Terms requested me to report, in light of my previous assessment and conclusions, whether there were any matters which gave rise to doubts about the assessment of the children's evidence to an extent which would render Mr Ellis's convictions unsafe, and warrant the grant of a pardon.

The Terms of Reference did not define "Investigations". By itself the expression could be taken as referring to any and all aspects of the Police investigation, but in their submissions, none of the participants addressed the term in such a wide sense (for one isolated exception, see para 6.4 below, at reference **13**). This may have been because they interpreted the term as referring to the obtaining of evidence from the children, or they did not consider that there was anything in the wider "investigation" that needed to be addressed. Mr Ellis's counsel directed some submissions to Police conduct at later stages, for example alleged non-disclosure of information; but on any

view such matters were outside the ambit of the Inquiry. In my Inquiry I have therefore focussed on the obtaining of evidence from the children, including the part played by their parents and the parents of other creche children.

As already mentioned, my Inquiry was directed to be on the basis of the evidence at depositions and trial. One of the grounds of the 1999 Appeal was the alleged non-disclosure of photographs of the interior of the creche, and (apparently) of creche activities. Having regard to the wording of theTerms of Reference to which I have just drawn attention, neither the international experts, nor I, have been shown those photographs. I mention this because the subject was referred to in submissions on behalf of Mr Ellis.

I need to deal in greater detail with two specific issues of interpretation. The Crown Law Office filed a Submission on behalf of the Solicitor-General, the New Zealand Police, and the Department of Child, Youth and Family Services. In that Submission Crown Counsel stated that he understood the Inquiry was not concerned with a further examination of the interviews themselves, but rather, was to consider the interviews in the light of "new understandings" about interviewing children in a mass allegation context. The Submission stated there was no such new understanding, but nevertheless was prepared to go on and address "some of these general issues" which had already been canvassed at the appeals. In view of this last concession it may not be a significant matter, but my perception of the Terms is not as limited as that proposed by the Crown. Paragraph 1(b) is clear and unqualified: it requires me to assess whether the interviews were conducted in accordance with best practice "as now understood". This does not seem to preclude from consideration any deficiency I may find, merely because it was already recognised as not being best practice in 1992. I can see a basis for the limitation the Crown has proposed: if the deficiency was one already known in 1992, it was available to be dealt with by the trial and appeal procedures of the time. However, that is not how the Terms have been framed, and the introductory paragraph implies the contrary, in saying that I am to inquire into "matters which may be relevant to the reliability of evidence given by the children". I also note that at a later stage (55) the Crown Submission framed

the task of the Inquiry, in this respect, in different terms, which accord with my own view as just expressed.

The second matter relates to para (1)(c) of the Terms of Reference. It requires me to identify the nature and extent of any risks arising which might affect the assessment of the reliability of the children's evidence, in the event that I conclude that *the interviews* were not conducted in accordance with best practice. Later, the paragraph states that I am not required to attribute or apportion blame to particular individuals who undertook *the interviews*. Para 1(c) is the only point where the Terms seemingly limit the Inquiry to the interviews, as distinct from the investigation and interviews together. The opening paragraph refers generally to "matters" relevant to the assessment of the reliability of the evidence of the children; and sub-paragraphs (a)(i) and (b) of paragraph (1) each refer to both investigating and interviewing, as does para (2)(a), requiring reference of issues to internationally recognised experts. I consider that the omission of reference to "investigation" in para (1)(c) was accidental, a conclusion strengthened by the fact that if the contrary were the case, the effect of the Terms would be to direct me to inquire into the investigation, but without giving any direction as to what advice was required, should I conclude that the investigation fell short of best practice. I have therefore proceeded on the basis that para (1)(c) should be approached as if, in both places, the reference to "interviews" was to "investigations and interviews".

As all the Submissions received were framed in accordance with the unspoken assumption that this was how para (1)(c) required to be addressed, no one will be prejudiced by my proceeding in the manner suggested. Further, the participants in the Inquiry were given an opportunity of commenting on the Interpretation issues.

4. PROCESS

4.1 Representation of the parents

At the time of my appointment the Ministry of Justice was trying to make arrangements with the parents of the complainants for their representation, to enable them to make submissions to the Inquiry. Although it was understood that the arrangements were on the verge of completion, in the event the Ministry found it a difficult and drawn out exercise, which was not finalised until 10 May 2000. Two sets of parents, those of child X and of child Z, did not wish to join in the group represented by appointed counsel, and when communicating with participants, I wrote to those sets of parents individually. On 10 May I wrote to counsel now appointed to act for the parents, and to all other participants, requesting their nomination of names for appointment as international experts to assist the Inquiry, as envisaged by the Terms of Reference. The closing date given was 2 June; and the responses all came to hand on or about that date.

4.2 Appointment of Experts

The nominations caused some difficulty. I requested the assistance of Legal Counsel within the Ministry of Justice both in assessing the suitability of the nominees, and in identifying other possible candidates. Mainly, those nominated by the parties were persons whose views about the general acceptability or otherwise of the evidence of child witnesses were well documented. The Ministry was most helpful and with its assistance, I also had a long discussion with an USA Law professor who knew or was familiar with the work and reputation of many of those under consideration. Inevitably, this process took time. By early July however I was in a position to approach the experts.

I decided I would if possible appoint experts who had not had a previous connection with the case. Two of those nominated on behalf of Mr Ellis had

already been engaged by his counsel to provide evidence for his second appeal while a third had provided input for a television programme on the case. All three had expressed decided views on at least some of the very matters in issue. While their expertise was not in doubt, I considered that if, based on their opinions, my ultimate Report made recommendations favourable to Mr Ellis, the Report would lack credibility in the eyes of the parents, the Interviewers and the other participants concerned. My approach would have been the same had the latter group of participants nominated any experts who had previously been engaged in the case. In the event, the appointments were not drawn from the nominations made by the participants. The process of obtaining appropriate experts of the required standing and independence necessarily took time, and together with the delay in completing the arrangements for representation of the parents, necessitated an extension of the time allowed for the Inquiry. While I would have liked to avoid this, both aspects were important, and for the integrity of the final Report, needed proper attention.

It has to be appreciated that the task the experts were asked to undertake in reviewing the numerous tapes and voluminous records was considerable. Advance estimates were that about 100 hours work would be required. The persons approached all had full-time jobs and busy careers. It would have been hopeful to expect to find overseas experts of the required standing, who were immediately free to undertake the task. Given that background the completion dates offered by those approached were reasonable.

4.3 The Regulations

Regulations had to be enacted to allow me, and the international experts, to view the videotapes of the children's evidence. The *Evidence (Videotaping of Child Complainants) Amendment Regulations 2000* were enacted by Order in Council dated 15 May 2000.

4.4 The Experts

Professor Graham Davies, of the University of Leicester, UK was engaged on 4 August 2000. Owing to previous arrangements he was unable to start work before mid-September. His CV is attached as Appendix A.

Dr Louise Sas, of London, Ontario, Canada was engaged on 29 August. Owing to previous arrangements she was unable to start work before the beginning of October. Her CV is attached as Appendix C.

The experts worked independently. They were unaware of the other expert's identity until after they had delivered their reports.

Both the reports were delivered in early January 2001. The Reports were made available to the participants so that they had the opportunity to correct any factual errors, or respond to any comments or conclusions reflecting unfairly or incorrectly on any person. Crown Counsel, and counsel for Mr Ellis, made substantial responses. The experts made some amendments in matters of detail, as a result. Copies of the final reports are attached, as Appendices B and D respectively.

4.5 Access to Court Records

The *Criminal Proceedings (Search of Court Records) Rules 1974* restrict public access to the court records of criminal proceedings. I obtained permission from the High Court to copy the depositions, and the relevant parts of the trial record, and release the copies to the experts for the purposes of the Inquiry.

4.6 Extension of time

For the reasons noted in para 4.2 the Minister extended the time for my Report to 28 February 2001.

5. REPORTS & MEMORANDA

Paragraph (1)(a) of the Terms of Reference first requires that I review the reports and memoranda listed in the Schedule to the Terms of Reference.

5.1 The Cleveland Inquiry

In 1987 the Secretary for State for Social Services ordered a statutory inquiry to look into arrangements for dealing with suspected cases of child abuse in Cleveland in the United Kingdom. The Report, of 320 pages, prepared by the Chair of the Inquiry, the Right Honourable Lord Justice Elizabeth Butler-Sloss with the assistance of three Assessors, was delivered in 1988. The essence of the events giving rise to the Inquiry was a dramatic rise in the reported cases of sexual abuse in the County of Cleveland, principally at one hospital. The situation arose from the diagnosis reached on examination of children in hospital, following their admission with unrelated conditions, and in the absence of any complaint of sexual abuse. The Report was critical of two doctors for the "certainty and over-confidence" with which they pursued the detection of sexual abuse, but noted that the doctors were not solely or even principally responsible for the subsequent management of the children concerned. The Report made a number of findings and criticisms in relation to the agencies involved, but these are of no direct relevance to the present Inquiry.

It will be apparent that the background to the Cleveland Inquiry was totally removed from that of the present Inquiry. Sections of the Report regarding the interviewing of children are helpful, but not surprisingly, 13 years on the conclusions do not bring any novelty to bear on the task set for me. The following points, selected from a list of findings at 207–8, and from the Report's recommendations commencing at 245, may be recorded:

1. Parents should be informed and where appropriate, consulted at each stage of the investigation by the professional dealing with the child, whether medical, Police or Social worker. Parents are entitled to know what is going on, and to be helped to understand the steps that are being taken.

2. Social Services should always seek to provide support to the family during the investigation. Parents should not be left isolated and bewildered at this difficult time.
3. Professionals ought to recognise the need for adults to explain to children what is going on. Children are entitled to a proper explanation appropriate for their age.
4. Children should not be subjected to repeated interviews, nor to the probing and confrontational type of "disclosure" interview, which in itself can be harmful. (The Report endorsed the view that use of the expression "disclosure interview" was undesirable.)
5. The interview must be approached with an open mind. It must be accepted that at the end of the interview the child may not have given any information to support the suspicion of abuse.
6. At interview, a major consideration should be the creation of a sympathetic environment for the child
7. The style of the interview should be open-ended questions, to support and encourage the child in free recall.
8. There should where possible be only one and not more than two interviews. They should not be "too long".
9. It must be recognised that the use of "facilitative techniques" may create difficulties in subsequent court proceedings.

These, I repeat, are only a selection of the many points made in the Report in regard to the investigation of abuse allegations, and interviewing techniques. It may be noted that all these points would have equal relevance whether the inquiry related to a single complaint, or to "mass allegations".

5.2 The Orkney Inquiry (1992)

Following allegations of sexual abuse by one of the children of the W family, the seven younger siblings of that family were removed from Orkney to the mainland of Scotland, pursuant to Place of Safety Orders.

After their removal, the children were interviewed, and some made allegations of what appeared to be organised sexual abuse, involving the parents and

children of other families, and a local Minister. After this, nine children from four other families were also taken from their homes and removed to the mainland.

Proceedings relating to the care and protection of the children were commenced, involving what is known in Scotland as a Children's Hearing; but ultimately the proceedings were dismissed on jurisdictional grounds. The children were then returned to their parents. Although there was a successful appeal against the dismissal of the proceedings, they were not revived. However, the Secretary of State for Scotland ordered an Inquiry into the circumstances of the removal of the nine children. As at the date of the Report, no person had been prosecuted in connection with the children's allegations. The Inquiry was not charged with investigating the truth of the allegations as such.

The Report was made by the Rt Hon Lord Clyde, a senior Judge, assisted by two Assessors. I have extracted the following points of relevance to the present Inquiry from the 363-page Report.

The Report referred to the anxiety that evidence which the children might be able to offer in court should not be open to attack as having been prompted, influenced or otherwise affected by the actions of others, so that its reliability could be challenged. The Inquiry considered that the fear of contamination was exaggerated and that there ought to be recognition that training and experience provided sufficient counter to any such risk. Having endorsed a submission that the doctrine of contamination was illogical in theory, inappropriate in practice and baseless in fact the Report continued:

> The fear of contamination prompted the prohibition on the Social workers employed in the removal from engaging in discussion with the children about the alleged abuse and lay behind the RSSPCC's attempt to confine all disclosure to the privacy of the interview sessions conducted by their staff along with the Police. Such a restriction however is artificial and unnatural. It cannot be predicted when an abused child will tell of the abuse nor to whom he or she may confide. While it may well be that a relationship of trust will make a disclosure more likely the relationship cannot be fostered with one or two individuals to the exclusion of all others so as to secure that disclosure will only be made to those trusted persons. The reception of children's confidences should not necessarily be seen as an activity which for all purposes can only be conducted within such special premises (220).

Further points noted include:

In the approach to the interviewing of children, cases of alleged multiple sexual abuse should be dealt with in the same way as any other case of sexual abuse (269).

There is a vital distinction between taking an allegation seriously, and believing it (272).

Recommendation of a joint meeting of the affected agencies at the earliest time, to decide on further action, coordination, information sharing etc (276).

The Report emphasises the need for an understanding of the difficulty and sensitivity of the task of interviewing children about sexual abuse allegations, and the need for adequate training , supervision, management and support (309). In multiple abuse cases a case manager should be appointed at an early stage.

Planning to identify the purpose of the interviews is required.

Consideration should be given to an overall assessment of the child, to enable management of the interview to be prepared. Techniques to be used should be discussed and determined.

The duration of the interview should be decided.

A review process should be in place, so as to consider whether a change of purpose may be adopted.

The term “disclosure” is to be avoided; “investigative” seems the preferred option.

A lot of detailed advance planning is recommended (para 17.50).

Interviewers who had received accounts of abuse from one group of children were involved in interviews with other children named by the first group. This is undesirable, since the interviewers will no longer be seen as impartial. This is seen as a form of contamination, see para 17.54.

There is undoubtedly a risk that the validity of information given in interviews may be open to attack if interviewers are seen to hold very extensive background information about the allegations which have been made.

The interviewer should have relevant background information about the child and his or her emotional, physical, & mental development. It is the job of the case manager to see this is supplied (311).

The importance of interviewers remaining open-minded, and not developing an emotional investment in the case.

Strict control of the workload of interviewers. Not more than 2 investigative interviews per day.

Emphasis on the need for the interviewers to have a proper support structure, providing regular and systematic supervision (314).

As a general rule the Report recommended a maximum of 2 interviews per child per week. The Report distanced itself from the Cleveland recommendation, of a total limit of two investigative interviews per child. One interview conducted so as to pressure the child, could be more harmful than several conducted impeccably. But it was recommended that the number of interviews should be set in advance, with provision for a formal review of the number in case of need. An "initial number" of 4 was recommended, and that these would be short. Additional ones would be held only after a planning meeting so agreed, on the basis that they were necessary *in the interests of the child.* Although the Report does not set out to go into investigative interview techniques fully, it offers a number of suggestions (316):

- Interviewers must be ready to deal with denials and retractions.
- There must be a plan, in advance, as to what interviewers will tell the child about their personal knowledge of allegations, and the source.
- Sometimes interviewers will need to introduce "an agenda" to the child. This needs to be done on a structured, planned basis.
- Interviewers must understand that use of leading questions will detract from the value of the responses. However, there is no absolute rule about the use of such questions, if done in a planned way.
- The introduction of "personal material" (i.e. personal to the interviewer) is ill-advised. Investigative interviews are not conversations.

The Report went on to discuss deficiencies in the interviewing of the nine children, with emphasis placed on the failure to plan and prepare for the interviews. As to the actual interviewing techniques, criticisms included (pages 351 -2):

- dealing with a child's denial
- being unduly concerned with the interviewer's own agenda
- inappropriate introduction of explicit material at commencement of interviews
- over-stressing interviewers' own belief in allegations
- inappropriate reintroduction of earlier drawings, use of leading questions, and personal material
- excessive number of interviews
- not fully explaining the purpose of the interviewing

The Report made a considerable number of recommendations regarding interviewing, including (359):

- emphasis on planning and preparation
- interviewers who have dealt extensively with children making allegations about other children, should not interview those other children
- interviewers should have background information about the child, in particular the child's emotional, physical and mental development, and an assessment of the child's wider family
- interviewers must keep an open mind
- the workloads of interviewers should be limited and controlled
- interviews involving complex or multiple sexual abuse allegations need to be subject to careful supervision and management
- in general there should be a maximum of 2 interviews per child a week

- the timescale for investigative interviews should be planned in advance
- an initial series of investigative interviews should not usually exceed 4, to be increased only after a full review.

The descriptions and criticisms of the interviewing techniques make it clear that the processes normally used in New Zealand in 1992 were considerably in advance of those in issue in the Orkney Inquiry.

5.3 The San Diego County Grand Jury Report (1994)

The Grand Jury's investigation arose out of an (evidently unsatisfactory) child molestation prosecution, the *Dale Akiki* case. The paper was described as a report on child molestation prosecutions within the criminal justice system of San Diego County. It dealt with two main elements, the handling of child sexual abuse cases from complaint to the filing of charges, and the management system of the District Attorney's Office with regard to the prosecution of such cases.

A section on contamination defines it as the act of introducing outside influences into a person's subjective experience so that either their memory or their description of an event is altered. Interested parties, including family members and investigators, can create "intervenor contagion" (14). Contamination may occur as a result of well meaning intervenors giving bribes and rewards, subtle or overt, for furnishing details. Alternatively, intervenors may make assumptions or misinterpretations of what the victims are saying, and by repeating, and possibility embellishing, these assumptions and misinterpretations, cause the victims to accept their version of what happened.

In the *Akiki* case parents' meetings were regarded as one form of contamination. Therapists were another; therapy being described as by its very nature as a form of contamination, since it does not work unless the client is susceptible to some degree of suggestibility. Further, therapists can

contaminate one another, and then pass the contamination on to the clients. The possibility becomes the greater if the therapists have a common basis, such as accepting ritual abuse allegations as an established fact. One of the perceived flaws in the A*kiki* case was that at the request of the prosecutor, the therapists were also attempting to be investigators. Parents were also urging children to provide more allegations. It was pointed out that clients' need for acceptance was a powerful factor leading them to conform with therapists' expectations. The Report includes the following comments on children's responses (21 – 24):

- when children try to answer complex yes/no questions, questioners should ask them to elaborate before judging the credibility of the reply.
- accuracy and credibility deteriorate, not necessarily because of fabrication or fantasising but because of adult insensitivity to the norms of development.
- pre-schoolers reason on the basis of what they see. Requests for other types of reasoning, such as hypothetical, may lead to children trying to answer questions they are incapable of answering.
- children may end up contradicting themselves, not because they are lying, but because they are stretching to explain something they do not understand.
- where children do not understand complex questions, they are likely to try to answer anyway, and are equally likely to respond inaccurately as accurately to difficult questions.
- a child's response may sound like fantasy because of the vocabulary used by children.
- there are differing views about the utility of leading questions regarding sexual conduct.

The report deals with a "Kids in Court" programme, designed to familiarise potential child witnesses with court procedure. There is discussion of the risk of contamination as between the children attending, and a recommendation

that children involved in the same case ought not to attend the same programme (32).

At 28 the Report discusses the increase in reportage of sexual abuse since the enactment of the Child Abuse Prevention and Treatment Act (the "Mondale Act") in 1974. The legislation, since expanded, created a number of incentives to report child abuse. The majority of the reported cases have been regarded as unsubstantiated. Many arise from custody disputes, others from venues such as daycare or church centres. The Report concluded that the Child Sexual Abuse Syndrome (CSAS), the Child Sexual Abuse Accommodation Syndrome (CSAAS) and Post-Traumatic Stress Disorder (PTSD), or other theories utilising behavior as a basis of proof of child sexual abuse, were discredited. Relevant recommendations include:

- evaluators working on the same case should not confer with one another, or with more than one alleged victim, until an independent written report has been submitted;
- therapists in multi victim/multi perpetrator cases should not deal with more than one victim, nor share disclosure information with other therapists;
- the number of videotaped interview sessions should be reduced to a minimum.

A revealing comment on the state of the art in San Diego County in 1994 is the recommendation for consideration of the establishment of a new position of "Evidentiary Interviewer" whose background would include investigation skills, and training in working with child victims.

5.4 NSW Royal Commission (1997)

The *Royal Commission into the New South Wales Police Service* (the Wood Commission) was primarily an Inquiry into Police corruption in the State. Among its Terms of Reference, para (d) required the Commission to investigate and report on :

> The impartiality of the Police Service and other agencies in investigating and/or pursuing prosecutions including, but not limited to, paedophile activity

Subsequently, the Terms of Reference were widened by including pederasty, and to remove any doubt concerning the authority of the Commission to

enquire into the existing laws and of the investigatory and trial processes to deal with crimes involving pederasty and paedophilia, and into the sufficiency of the monitoring and screening processes of government departments and agencies to protect children in their care or under their supervision from sexual abuse. In the result, the Commission conducted a wide-ranging inquiry into these matters, and the "Paedophile Terms" were the subject of separate volumes of the Royal Commission's Final Report, Volumes IV, V and VI; the Report as a whole occupying some 1300 pages plus appendices. The particular item in the Terms of Reference of direct relevance to the present matter read:

> (J) whether Police Service investigatory processes and procedures and the criminal trial process are sufficient to effectively deal with allegations of paedophilia and pederasty

In its examination of the investigation process the Commission noted:

- the number of interviews commonly carried out in the investigation process can risk the immediacy, spontaneity and reliability of the victim's account, especially when he or she feels a need to embellish or improve on the story, or becomes frustrated and unco-operative – this can also open up the possibility of inconsistency, which is then used to advantage by the defence (54);
- in some cases the therapeutic intervention of a counsellor, even though well-intentioned, can contaminate the child's evidence; especially when there is resort to leading questions, or dubious techniques designed to assist memory recall, or when the counsellors are unqualified and impart their own beliefs, preconceptions and prejudices to the child.

A section at page 99 dealt with Satanic Ritual Abuse (SRA). Among the four scenarios mentioned as typical in USA (each of which is said to have arisen in Australia also) was the following:

> Day care cases involving children of both sexes who reveal victimisation by staff wearing costumes and engaging them in strange games , which are often allegedly accompanied by photographing or filming of the activities. (101)

The Report noted that rarely, if ever, was any objective evidence found to confirm the allegations of SRA. In the case of children, disclosure often emerged where there had been contamination through leading questions, or close contact between the families of the "victims". There was "an enormous

polarisation of opinion" on the subject among health professionals. In the discussion of possible alternative explanations (102 – 3) one theory was the introduction of elements of Satanism into sexual exploitation, to confound or intimidate the victims, or ensure rejection of their stories as nonsense, should they report the events. Contamination by overzealous parents, by the use of leading questions, was mentioned as another theory, among many.

The Report referred to an investigation into SRA in NSW in 1990, called "Task Force Disk". In its details there were curious similarities with allegations in the Ellis case; for example the children were made to eat excrement and urine, an ankle bone was cracked open and its insides eaten out, and the elderly mother of the principal perpetrator was alleged to have been involved. More than 100 children were interviewed. Other alleged victims uniformly denied the accounts of the two who made "disclosures". No prosecutions resulted, the evidence of the children concerned being regarded as too contaminated to use. The concluding part of the discussion contained a helpful analysis of the proposition that "children do not lie", to the effect that while this may be correct, it does not necessarily follow that they are telling the truth. The Report pointed out that it was equally important to bear in mind that the discrediting of part of a child's account did not necessarily discredit the whole. There was a "note of caution" with reference to the USA tendency to suppress details of ritual or Satanic conduct for fear that it might discredit the prosecution: "Fairness dictates the need for full disclosure of any SRA elements…"

Dealing with a particular investigation, the Seabeach kindergarten case, the Report referred to evidence given by Dr Underwager (USA) and Associate Professor Walker (Sydney) about the need for the methodology of investigations involving young children to be correct, otherwise false accusations could be produced; and evidence relating to the inability of young children to understand abstract concepts. After these and other experts had testified the Magistrate presiding at the committal proceedings held that the child witnesses lacked the capacity to give evidence, and the charges were dismissed. The Royal Commission was critical of the investigatory processes.

The Report referred to 1991 guidelines on the investigation and management of child assault cases issued by the NSW Attorney-General's Department

(272). In relation to interviewing, the guidelines stressed that while it was important to support the child, the interviewer should maintain objectivity and neutrality. Under no circumstances should children be informed of other children's complaints or involvement.

In dealing with the approach to child abuse investigations, the Report endorsed the New Zealand model, both in structure and training (149). It noted that the NZ model involved social workers and Police working together from custombuilt premises. The NZ system of training its Police and Social Welfare officers in CYPS was described as "an enlightening example" (280). The Commission recommended (at 281) that the equivalent NSW Service staff should be trained in a multi-disciplinary setting, along the lines of the NZ model.

A section *Deficiencies in current procedures which may adversely affect an investigation or prosecution* referred to the potential for contamination through the health workers with whom the child may come into contact, such as doctors, nurses, social workers, and psychologists. (322). The Commission endorsed the practice of these workers not taking a history from the child, but to rely on the history already obtained by the investigating agency, although accepting that for the purposes of therapeutic help this may not always be sufficient. The advice given was that therapeutic workers should refrain from canvassing the facts any more than was absolutely necessary, unless the child raised the incident, and even then, with considerable care. If the facts were opened up, a careful record should be made. Where it was alleged there were multiple victims, health workers needed to recognise the particular dangers of contamination: "unnecessary exploration of the facts, and the release of information to parents concerning the experience of other children, can prove fatal." All concerned must assume that anxious parents would discuss "the case" and needed to tailor their approach to accommodate that inevitability. Health workers should refrain from positive statements that abuse had occurred.

In Volume 5 of the Report, Chapter 15 was devoted to the Justice system. It is apparent that in certain respects developments in the New Zealand system had proceeded somewhat ahead of NSW; for example the Report recommended legislative amendments to enable the evidence in chief of child witnesses to be

given by videotape, and for their court appearance to be by way of closed circuit television, methods which had been in common use in this country for some years. In matters of evidence, the effects of the liberalising provisions of the Evidence Act 1995 (NSW) had not been fully observed as at the date of the NSW Report, whereas in NZ, expert evidence regarding the behaviour of child complainants had been allowed throughout the 1990s and had become a common feature of trials relating to sexual offending on children (page 1092). The Royal Commission recommended that similar provisions should be enacted in NSW (1093). In one respect the Report recommended a more restrictive approach than in this country, namely that any Crown expert called should be independent, in the sense of not having been involved in the investigation.

As in New Zealand, in NSW there had been legislative reform in cases charging sexual offending, abolishing the rule of practice requiring a warning that it was dangerous to convict on the uncorroborated evidence of a complainant. Other amendments, in 1985, had done away with the requirement for a warning about convicting on the uncorroborated evidence of a child witness. However, further legislative changes in 1995 required a Judge, on application, to caution a jury that certain evidence may be unreliable. One of the types of evidence which the legislation provided may be "unreliable" was evidence "the reliability of which may be affected by age". The Commission drew attention to the possibility that this amendment could see the reintroduction of the former warnings where the complainant was a young child.

Chapter 17 of the Report, *Protection and Support for the Victim* contained various aims including (1124) that the goal should be to gather the facts in a way that was skilled, fair and not affected by contamination through leading questions, undue pressure on the child or the like. The point was made that in the entire field of child sexual abuse, there was little in the way of expert consensus. Recent awareness of, and concerns about, child sexual abuse had led to a flurry of activity, some very emotive responses and a polarisation of opinions and approaches. At 1157 the Report recorded that in the 5 - 12 age group, experts suggested to the Commission that, among other things, children

- had a greater awareness that they were being violated by the abuser

- may exhibit general anxiety symptoms including sexual and aggressive thoughts and behavior, sleep problems and nightmares, flashbacks, fears and phobias, eating disorders, nervousness and irritability, temper tantrums, mood swings and confusion about sex.

Among the appendices in Volume VI were the NSW Child Protection Council's *Interagency Guidelines for Child Protection Intervention* (second edition, 1977). The guidelines stressed (at 60) that an interagency approach was essential to effective assessment and investigation. In situations involving allegations of multiple child victims a planning meeting should be convened by either the Department of Community Services or the Police and attended by both agencies, when decisions would be made how to pursue the joint investigation. Numerous issues were set out for consideration in planning assessments and investigations. As to guidance regarding how the interview with the child should be conducted, the safety and well-being of the child ought to be the guiding principle. The Guidelines encouraged interviewers to maintain a supportive approach, while not rewarding or punishing the child for giving details (68). Key issues included how best to engage the child, whether the presence of a support person would be helpful, and the most suitable time and venue.

5.5 Law Commission Discussion Paper (NZ, 1999)

This paper, titled *Evidence – total recall? The reliability of witness testimony* records views from numerous scientific papers on these subjects. In the section (commencing at 37) relating to children, there is reference (at 39) to the view that children may need more help than adults to recall all they know. The methods used must however be carefully monitored. The controversy about the use of anatomically correct dolls in sexual offending cases is discussed at 41 onwards. The paper concluded (at 42) that the use of such props remained controversial. With very young children, who are unable to treat the dolls as a representation, their use may impede rather than assist their ability to provide accurate testimony.

Under the heading "Susceptibility" (at 44) the paper stated that young children were more suggestible than older children or adults. (The cited research

suggests this may persist until age 8, or even 10 or 11.) This may be because young children wish to comply with the suggestions of an adult in authority, or because they interpret an adult's repeated questioning as an indication that their first response was adjudged "wrong". A consistent research finding (see 46) was that younger children acquiesced more than older ones to questions based on inaccurate information. Among the interview techniques which might reduce the suggestibility effect for young children were

* emphasising that the child may not know all the answers, and is allowed to say "I don't know"
* repeated use of open questions
- explaining why questions may be repeated
- explicit statements that the child may have received misleading information, and not to base recollections on it
- interviewing the child in a warm rather than an intimidating manner

The paper states (at 47) that an area of research still relatively unexplored was whether young children had difficulties in distinguishing between real and imagined events.

In the "Conclusion" sector (at 71) the Paper noted the catch 22 situation that typically a very young child will not provide much information in free recall, while the process of drawing out further information may influence what the child says. It is significant that in 1999, six years after the Ellis trial, this Paper should note that psychologists had *started* to examine non-suggestive ways of encouraging young children to relate their memories: "*This research should inform the procedures for managing child witnesses both prior to and during the trial"* (71 – 2).

The remaining documents listed in the Schedule to the Terms of Reference are Good Practice guidelines, one issued before the Ellis trial, the other more recently.

5.6 Memorandum of Good Practice (UK, 1992)

The main purpose of the Memorandum was to help those making a video recording of an interview with a child witness for use in Criminal proceedings. The Home Office, in conjunction with the Department of Health, was responsible for the document. (Professor Davies, one of the International

Experts assisting the present Inquiry, served on the Working Party which developed the Memorandum. He is also leading the writing team drafting the new 'Guidance' which will supersede the Memorandum next year.) Its genesis appears to have been recommendations in the Cleveland Report, and in its development, the Memorandum drew on a number of sources acknowledged in the document. The Memorandum is necessarily lengthy and detailed, and I will note only points relevant to the present Inquiry.

A major feature of the Memorandum's approach is joint interviewing by Police and social workers. The Memorandum stressed (at 3) that interviews should only be undertaken by trained personnel. Another point underlined (also at 3) was that interviews of this kind should never be referred to as therapeutic interviews, or as "disclosure" interviews.

At 6 the Memorandum gave advice on the approach where there is some initial questioning before the Police are involved:

1. Listen to the child, rather than question
2. Never stop a child who is freely recalling significant events
3. Make a note of the discussion
4. Record all subsequent events up to the time of the substantive interview.

The substantive interview should be preceded by proper inter-agency consultation and planning but subject to this, it should be held as soon as practicable, once it has become clear that an offence may have been committed. Once the video recording has been made, in general no further questioning ought to take place.

Planning before the interview (see 9) may include a check-list of questions designed to cover the elements of particular offences. The child's apparent development stage should be noted. Knowledge of the child's linguistic development will enable the team to plan how best to communicate with the child. The interviewer may have to adjust his or her language. Other points to note (10) are the child's social and sexual understanding, concept of time (children find it easier to relate events to specific anniversaries or occasions, rather than dates), the child's present state of mind, cultural background, and any disabilities.

At 12 the guidelines stressed the importance of planning the expected length of the interview with the child in advance. As a rule of thumb the interview

should last for less than an hour, excluding any breaks, but there may be exceptions, especially where the evidence has to cover a lengthy time period. The interview should go at the pace of the child, not that of the adult. There may need to be breaks for toilet purposes, or for refreshments, but the latter ought not to be offered as a reward for co-operation. It was strongly recommended that any interview be concluded within the same day, rather than spread over more than one day.

The interviewer should be a person who has or is likely to be able to establish a rapport with the child (13). Careful notes should be made while events are fresh in the interviewer's mind, to assist in giving evidence later. It is helpful if a second person can be present, to provide support, and take notes. Normally, no-one else should be present. Only the interviewer should speak to the child.

In introducing the approach to the conduct of the interview, the Memorandum stressed that the course recommended was not rigid, and the advice did not imply that other techniques were necessarily unacceptable. The interview is dealt with in phases, the main aim of the first phase being to build up a rapport with the child. It is an opportunity to supplement the interviewer's knowledge of the child's social, emotional and cognitive development, his or her communication skills, and degree of understanding. The reason for the interview should be explained but without referring to the alleged offence. It is permissible to refer to the fact that the child has told something to someone else but the interviewer should not mention the substance of the previous disclosure. During this phase the child should be alerted to the need to speak fully and truthfully.

In the second phase, the heart of the interview, the child is encouraged to provide in his or her own words, and at the child's own pace, an account of the relevant events (17). "Only the most general, open-ended questions should be asked in this phase." The prompts used at this stage should not include information known to the interviewer concerning events which have not yet been mentioned by the child. Younger children are usually able to provide less information, but their accounts are probably the most susceptible to inappropriate questioning. The interviewer should be tolerant of irrelevancies, pauses and silences. An approach of "active listening" is advocated, for

example by repeating the child's words, but without conveying disapproval or approval.

The third phase (18) involves questioning. First, open-ended questions should be used asking the child to provide more information. It should however always be clear to the child that it is acceptable to say can't remember or don't know. One question should be asked at a time, in simple language. It is important to avoid leading questions. Children may take questions beginning with "why" as attributing blame; likewise, the interviewer should avoid repeating a question soon after a child has answered since the child may take this as a criticism of the previous response. It is also important to avoid interrupting the child.

As a second part of this phase, the interviewer may ask specific, although non-leading, questions. The interviewer should consider whether it is in the interests of the child to proceed in this way. During this stage questions requiring a yes or no answer, or others which allow only one of two possible responses, should not be asked.

If repeated abuse has been mentioned without detailing separate incidents, this may be the time to clarify the point. Calendar dates or days of the week may be inappropriate; it may be more productive to refer to events meaningful to the child. Any inconsistencies can be probed gently during this stage. Similarly, if the child has displayed knowledge or surprising language apparently beyond his or her years, the source could be established. If the child has described acts of abuse the interviewer could tactfully ask if the child has seen explicit films etc, and if so, try to establish whether the child has merely described these.

Should specific (but non-leading) questions be unproductive, questions might be attempted which give the child a limited number of alternative responses. However, questions allowing only one of two responses may not elicit a reliable reply.

If at the end of this stage the interviewer considers that further questioning is appropriate, leading questions may be tried. However, the Memorandum strongly emphasised that answers to such question may be unreliable, and in any event may be excluded for legal reasons. If such questioning produces

relevant information, the interviewer should be careful not to continue in a leading style.

The fourth phase is the "closing". This is in the interests of the child, the aim being that the interview should end with the child in a positive rather than a distressed state of mind.

The Memorandum stated (23) that a key aim of video recording early investigative interviews was to reduce the number of times a child was asked to tell the account. If however after full consideration and consultation a further interview was regarded as necessary this was permissible. More than one supplementary interview was unlikely to be appropriate.

The Memorandum describes "props" as useful communication aids, particularly with young children, referring to things such as dolls, dolls' houses, drawings and small figures (24). However, the Memorandum recommends caution, and the avoidance of leading questions. With reference to anatomically correct dolls the Memorandum urged special care, saying that a combination of the use of such props and a leading questioning style could be particularly error prone. The recommendation is made that such dolls should only be used as an adjunct, to explain terms used by the child once the child has finished the free narrative account, and the general substance of the evidence is clear. Advice is also given as to dealing with reticent children, involving asking the child about nice/nasty things, or good/bad peope.

Finally, there is nothing in the Memorandum dealing specifically with "mass allegation" cases.

<u>"Interviewing Child Witnesses under the Memorandum of Good Practice: A research review"</u>

This paper, a Home Office publication, forms a useful adjunct to the Memorandum. Issued in 1999, its authors were Professor Davies and Helen L. Westcott, a lecturer in Psychology. As stated in the foreword, since the Memorandum was issued in 1992 there has been much literature and research generated around the Memorandum and in relation to child witnesses generally. The paper reviews this literature, drawing out the implications this has for interviews conducted under the Memorandum guidelines. It is also

intended as a means of informing revision of the Memorandum. Pertinent points drawn from the research include:

- While, exceptionally, young children introduce fantastical elements into their reports, this does not necessarily invalidate other parts of the child's statement (9)
- Open-ended questions are answered more accurately than specific questions, and specific questions more accurately than leading ones (9)
- Notwithstanding the above, examination of a sample of Memorandum interviews showed that more than a quarter lacked any free narrative phase; securing free narrative is not always easy (21)
- Reviews of actual interviews showed a premature use of closed questions, and over-use of specific (but non-leading) questions (22)
- Many children will not spontaneously disclose information about sensitive issues without direct prompts (22)
- Where an interviewer inappropriately rephrases what a child has said, one study found that children corrected less than 30% of such errors
- Research suggested that multiple interviews do not necessarily distort or invalidate an account, provided open-ended questions are consistently employed (24)
- However, repeat interviews driven by adult priorities and assumptions can lead to distorted testimony (24)
- Inconsistency need not imply unreliability (24)
- Physical props may be more effective than verbal prompts (24)
- However, the use of toys may prompt errors among three to four year old children (25)
- There is continued controversy about the use of anatomically-correct dolls (25)

Based on the research reviewed in the paper, the authors offer a number of broad conclusions. Those presently relevant include:

- No reliable method yet exists of judging the truth or otherwise of children's allegations, either from their demeanour at interview, or from features of their accounts (32)
- Children at different stages of development may require different styles of interview. Young children require more support and encouragement to produce free narrative prior to any specific questions (33)
- The ideal endorsed by the Memorandum, of a simple progression from open through ever more specific questions, is rarely achieved in practice (35)
- Recurrent questioning, as one incident is explored and then another, should not be seen as compromising the integrity of an interview, as long as questioning on each incident begins with open-ended questions and the initiative remains with the child (35)
- If the recommended maximum of one hour is retained, it needs to be acknowledged there will be exceptions, e.g. where multiple incidents of abuse are being investigated (35 – 6)
- Given the range of children involved (in terms of age, culture, disability and emotional state) there is a strong case for emphasising the principles underlying sound interviewing, rather than being over-prescriptive about one particular model (35; see also 38).

5.7 Joint NZCYPS & Police Operating Guidelines

The Schedule refers to Guidelines dated March 1997. Enquiries to ascertain whether this was the current version uncovered a misunderstanding. The document officially issued is described as Version 1.0, May 1996. There is another in existence, dated March 1997, but this was a draft which, when I was informed had not been approved. The following summary relates to the official version.

The document describes itself as covering policy and guidelines for videotaping evidential and diagnostic interviews under the Evidence (Videotaping of child complainants) Regulations 1990. Its stated purpose is as a handbook for trained evidential and diagnostic interviewers.

The Guidelines draw a distinction between diagnostic and evidential interviews, and envisage that an interview commenced as in the one category may turn into being in the other. The nature of the evidential interview is described as gathering evidence after the child has disclosed alleged abuse, whereas the diagnostic is checking the possibility of sexual and other abuse as well as other explanations for behaviour (Appendix 5). A number of "interviewing principles" are set out. It is essential (see 21) that there is an interview plan. Detailed information should be obtained from the child's caregiver, in an interview at which the child is not present. At this interview, the allegation and its context should be elicited, as well as information relevant to the child's vocabulary and conceptual level.

Depending on the child's age and maturity, the interviewer must speak to the child about the purpose of the interview, and the use of the recording. The interviewer must not ask about any alleged abuse before recording starts. The interviewer should be honest with the child, and not make promises which cannot be kept, for example a promise of absolute confidentiality (25).

The structure of the interview is in three stages (25) namely introduction (which includes building rapport, and the necessary formalities), content, and closure. Most of the interviewing principles set out are in terms of common sense and the obvious. The interviewer is advised to ask open-ended, non-

leading questions "whenever possible". The interview should be kept to a reasonable length, 45 – 60 minutes (18), unless there is good reason to continue although later it is stated (see 19) that except in special circumstances an interview should not last longer than 90 minutes. In a table of do's and don'ts the use of and dolls, such as used in kindergarten or pre-schools, is supported, but not anatomically detailed dolls. Body diagrams should be used only after disclosure, if the child cannot verbalise what happened. Anatomically detailed dolls should only be used if the child cannot clarify what happened with the use of diagrams or ordinary dolls. Play dough, body diagrams, and dolls' furniture are all in the "use" list.

Ordinarily there should only be one evidential interview, although special circumstances may require more. For example (20) a second interview may be appropriate where "serious information" comes to notice, such as a more serious offence. However, the number should be kept to a minimum. Nothing in the Memorandum deals specifically with "mass allegation" cases.

In the course of the survey in this section of the Report I have considered materials from the USA, Scotland, England, and Australia. In closing, I can say that the study has shown that the New Zealand methodology of 1991 - 1992 for interviewing children in suspected abuse cases was well up with and, in many respects, in advance of the corresponding arrangements discussed in those materials.

6. SUBMISSIONS

By letter dated 10 May 2000, I invited all participants to make written submissions relating to para (1) of the Terms of Reference, with a time limit of 23 June 2000. Because of other commitments, counsel for the group of parents requested an extension of time and as a result, I extended the time for all participants to 24 July. Submissions were made on behalf of Mr Ellis (by his counsel, Mrs J Ablett-Kerr QC), the represented group of parents (by their counsel, Ms K McDonald QC and Mr J H M Eaton), the Solicitor-General, the New Zealand Police, and the Department of Child, Youth and Family Services (by Mr S France, Crown Counsel) and the Commissioner for Children. All the

submissions made were received close to or on 24 July 2000. I will summarise the submissions received, adding some comments in italics.

6.1 On behalf of Mr Ellis

Pp 1 – 7 In November 1991 Christchurch was a "smouldering volcano awaiting sufficient pressure to trigger an explosion", on account of publicity regarding sexual abuse, and satanic sexual abuse in particular. This assertion is based on a number of newspaper articles, including The Press (the leading Christchurch paper) on 27 August 1991, and the Sunday Times (a national weekly) on 1 September 1991. According to the Submissions, on 19 and 20 November 1991 Dr Heger, described as an American Sexual abuse expert, was in Christchurch to lead a training session in sexual abuse diagnosis.

Page 7 On 20 November 1991 Mrs D complained to Mrs Davidson, the creche Supervisor, that her son, aged 3 and a half, had said he "hated Peter's black penis". The child had first made this remark a month previously. On 21 November Mr Ellis was suspended.

Page 6 Mrs D was aware of a publication about Ritual Child Abuse by Pamela Hudson. This contained a list of symptoms and allegations, many of which surfaced during the creche investigation.

Pages 8 - 9 Prior to the meeting of creche parents on 2 December, Mrs D had commenced to discuss the allegations with other parents, in particular Mrs Z. Around this time Mrs D, who had worked in the sexual abuse area for some years, set up a support group of parents. The fact that a creche worker had been suspended on account of sexual abuse allegations received media publicity.

Pp 10 – 11 Several children, most or all members of the Support Group, were interviewed but no allegations emerged. On 20 December 1991 the

Police closed the investigation. However, the Support Group continued to meet.

Page 13 On 30 January 1992 the first allegation of abuse emerged. This was by B, whose mother was a member of the Support Group. She was never a creche pupil, but went to the creche with her mother, a member of the creche Management Committee, from time to time.

Page 14 In February, Mrs D told Mrs Z that H, the daughter of a member of the Support Group, had said Mr Ellis had taken herself, Z and another girl into the toilets and showed them his penis. When Mrs Z put this directly to her daughter, she agreed. Mrs Z knew, from what parents had been told at the 2 December meeting, that this was the wrong way to go about questioning children.

Page 14 Z implicated Q. Her mother was either a member of the Support Group, or at least Mrs D had been in touch with her previously. In response to direct questioning Q agreed Peter Ellis had put his penis in her mouth.

Page 16 On 14 March 1992, in response to direct questioning by his mother, R made a disclosure. His mother had been prompted by information from another mother whose child had implicated R.

Page 17 On 23 March 1992 the Holmes Show (a nation wide TV infotainment programme) presented an item on the creche. On 31 March, the Knox Hall meeting was held, leading to reactions from other parents. The Submission contends that disclosures by S, O, K, E, A, F, C, Y and X resulted.

Page 21 Mrs D distributed information about what children were saying. She supplied a list which other parents saw. She deliberately ignored the advice given at the Knox Hall meeting about how parents should approach the issues with their children.

Page 23 The Submission contends there was a complete failure of the Investigators, meaning the Police team, to prevent parental interviewing, or to identify the effects of the contamination that occurred this way.

Pages 23 - Detective Eade was in charge of the Inquiry. He liaised with the Specialist Services Unit (SSU) and monitored most of the initial interviews. He maintained liaison with parents. The Submission contends that he lost his objectivity. Note: *The particular point of criticism here is that in deciding whether to recommend a prosecution, or particular prosecutions, Det. Eade failed to take into account "the atmosphere that existed around Christchurch at the time"(page 26).*

Page 27 - The Submission develops the contention that the SSU failed to act with fairness and impartiality. They ought not to have attended the Knox Hall meeting. They failed to investigate the issue of parental contamination.

Page 29 - The Submission contends that parents were told what behavioural characteristics were associated with child abuse allegations *before* parents were interviewed by Police as to such characteristics. A list of concerns ("Creche Information Form") is referred to. In other words the sequence of events, according to the Submission, was that the parents had a list of possible symptoms of child abuse; a child made a disclosure to the parent, resulting in an interview; then the Police interviewed the parent and ascertained what symptoms the child had, at a stage when the parents believed the child had been abused.

Page 35 - The Submission states that after the child's interview, contrary to the UK guidelines the Interviewer would tell the parents what the child had disclosed. It is clear that Ms Morgan, at any rate, did that.

Page 38 - The Submission contends that Det Eade passed on information about allegations to parents of other children. No evidence is provided in support of this allegation.

Page 39 - The Submission is made that certain of the mothers played a vital role in the distribution of information, and hence, the formation of allegations. Particular mention is made of Mrs D, Mrs Z, Mrs Q, Mrs B, Mrs R, Mrs S , Mrs X and Mrs Y. It is pointed out that Mrs D had formed a dislike of Mr Ellis, and had made complaints about him, centered on his drinking, before the sexual abuse allegations arose. She was "at the heart of the spider's web" of networking yet the jury did not hear from her. There are a number of links connecting the other women; several came from a background of social worker occupations or similar, and they included creche Management Committee members, or others with involvement in organising meetings or participating in groups. Some kept notes of their "investigations". In Mrs X's case, she was aware of, but chose to ignore, the advice given at the Knox Hall meeting about how parents ought to approach their children. The Submission says she was committed to the belief that Satanic Ritual Abuse had been taking place, and was pro-active in visiting sites where she believed this had happened. Eventually her son made allegations of bizarre activities that might be equated to ritualistic abuse.

Page 45 - The Submission contends that the Interviewers knew the parents were discussing abuse allegations with their children, but failed to discourage them. *(Comment– that there had been some discussion between parent and child could hardly surprise, normally the reason the child had been brought for interview would be a disclosure by child to parent. The thrust of the submission must be that the parents were questioning their children inappropriately, and the Interviewers failed to discourage that. One has to ask what the Interviewers could have done? They had made the position plain to parents but some parents ignored the advice. However, the question is not one of blame, but of inappropriate conduct and of the risk, or the extent of the risk, that this could have produced contaminated accounts.)*

Page 47 - The role of Det. Eade as monitor of the early interviews is criticised as putting pressure on the children.

Page 48 - The Submission criticises the process used by the Interviewers, i.e.the parents having provided them with disclosures made by the child, the Interviewer then attempted to extract a repetition of the disclosure.

Page 49 - When, on interview, a child made disclosures involving other children, Interviewers or Social workers or Police told the parents of those other children..

Page 50 - The Submission maintains that attempts by trial counsel to elicit contamination were disallowed (*I have not found anything in the record to support the view that legally admissible questioning was disallowed).* The point is also made that when the Interviewers were asked, in cross-examination, why (in interviews) they had failed to follow up possible alternative sources of the child's information about abuse, the Interviewers tended to say they "forgot".

Page 52 - The Submission points to a number of matters allegedly not disclosed by the Police: a Detective's alleged approach to the mother of a complainant child and a series of matters relevant to contamination by parents, namely a Police Report, a report of a Police meeting, and certain photographs (*The Submission accepts this subject may not be within the Terms of Reference, and I consider it is not.)* The document quoted at 55 shows that by 19 March 1992 Det. Eade recognised that parents were questioning children inappropriately. Another undisclosed document showed that Det. Eade recorded similar concerns to a meeting attended by "high ranking" Police officers, Interviewers, social workers and prosecution counsel held on 12 August 1992. Other concerns brought up were that parents were taking children to sites that might have been involved, the extent of parents' questioning of a particular child, and that one parent had a book on ritual abuse containing descriptions of events similar to disclosures made.

Page 57 - Reference to a box of miscellaneous photographs, found by accident 3 years after trial, which the Police ought to have disclosed, relevant to what was visible in relation to the toilet area. According to the Submission,

the site visit at trial "when all evidence of the creche" had been removed would not have captured the scene as well. (*this matter too is outside the scope of my Inquiry)*

Page 63 A new section of Submissions commences with an "Overview of the Interviews and their failure to meet best practice". It is pointed out that Det. Eade was the monitor in 10 of 21 video interviews where convictions resulted, including 5 out of 6 with complainant Z. The Submissions refer to unacceptable procedures and performance, and maintain that the convictions owed much to parental involvement. In summary these criticisms are made:

(1) Repeated interviewing – children whose allegations resulted in convictions were interviewed between 3 and 6 times;
(2) Interviewers failed to explore how the first disclosure came to be made to a parent, which was often elicited by leading questions;
(3) The interviewers presumed the children could disclose what the Interviewers had been told;
(4) Interviewers were not neutral and objective;
(5) Interviewers failed to prevent the monitor from talking to the children before the interviews
(6) The interviewers did not discourage parents from questioning their children;
(7) The interviewers contributing to escalating the parents' concerns by participating in meetings;
(8) The interviewers repeated details of the children's disclosures to their parents;
(9) The interviewers allowed children to bring materials into the interviews which parents had helped to create by repeated suggestive questioning;
(10) During interviews, interviewers failed to carry out "source monitoring";
(11) Interviewers used direct, suggestive, leading, and multiple choice questions;
(12) Detail provided by children was rarely challenged;
(13) Interviewers used "social pressure" to elicit disclosures;
(14) Interviewers permitted free play while disclosures were being elicited, challenging the children's ability to distinguish fact from fiction;
(15) Rather than challenge bizarre or fanciful accounts, the interviewers reaffirmed them;
(16) Interviewers used anatomical dolls, dolls, toys, freehand drawings, and body parts diagrams regardless whether they were needed;
(17) Interviewers failed to ascertain the previous sexual knowledge of the children;
(18) Interviews exceeded one hour in length;
(19) Interviewers ignored children's tiredness, and their wish to stop; particularly in the case of Z's first 2 interviews;
(20) Interviewers did not explore potential contamination;
(21) Interviewers failed to explore alternative hypotheses;
(22) Interviewers "perpetuated the demonising" of Mr Ellis;

(23) Interviewers failed to explore inconsistencies in the children's account between different interviews.

In **Volume 4** Counsel for Mr Ellis develops arguments relating to individual cases.

Page 2 – Complainant Z

Under the heading "Parental Involvement" the Submission points out that Mrs Z, a librarian, who was a friend of Mrs D, was one of the first parents to become aware of the allegations originating from D. From an early stage Mrs Z was also in touch with Mrs B.

Mrs Z questioned her daughter 2 or 3 times over a period of 3 months prior to the first disclosure. In February 1992 she became concerned about T, having observed sexualised behavior on T's part towards Mrs Z's baby son. She conducted an "experiment" in Z's presence which confirmed her concerns.

Mrs Z accepted that she asked her daughter leading questions about Mr Ellis's conduct. This was after Mrs D had told her that H (not a complainant herself) had stated that Mr Ellis had taken her, Z and another girl into the toilets and shown them his penis. This questioning elicited allegations that she sucked Mr Ellis's penis and he ejaculated, that she had to drink his urine, and that he touched her vagina. Mrs Z accepted that the questioning was contrary to advice given by Sue Sidey. Mrs Z continued to question her daughter after her initial videotaped interviews.

Page 10 Despite advice to the contrary from Detective Eade, Mrs Z shared with other parents, information about what children had disclosed. In particular, when Z said that Mr Ellis had committed offences on P and Q, Mrs Z passed this on to their mother. Likewise with Mrs S, Mrs D passed on, in writing, the information that according to Z, S had been present when Mr Ellis committed an offence on Z.

Page 13 From July 1992 Mrs Z was also in touch with the parents of X. According to Mrs Z's notes, on 5 August 1992 she questioned Z about X saying that she had been tied up. (*Comment: the last of Z's interviews that was played to the jury was made in March 1992)*

Page 14 Mrs Z continued to be in touch with Mrs D, and passed on to her information obtained from Z. Mrs D made notes. On perusing these notes during the depositions hearing, Mrs Z said she recognised quite a lot of information she had provided.

Page 17 The Submission notes that at her first interview, Z came primed to make allegations.

Page 18 The Submission notes that early in the interview, the interviewer introduces a doll, which is undressed and bathed, and contends that this leads to an allegation that Mr Ellis had seen her vagina.

Page 19 The Submission contends that Z's allegation that Mr Ellis put his penis in her mouth was elicited by an inappropriate reference to Z's allegation that he had done this to P and Q. The Interviewer also elicited, by a leading question, that he did this to Z more than once.

Page 20 The Submission draws attention to the fact that although Z, on a number of occasions, wanted the interview to stop, the Interviewer forged on

Page 21 It is contended that the allegation that Mr Ellis touched her vagina with his penis is brought out by suggestive questioning, and pressure.

Page 22 Turning to the second interview (which was the next day) the Submission contends this inappropriately reinforced the disclosure made on the first occasion.

Page 25 Turning to the third interview, in addition to generalised criticisms relating to repeat interviewing, particular criticism is made of the Interviewer's refusal to accept "don't know" as an answer, the use of repeat questioning, forced choice questions, and the use of dolls.

Page 29 In regard to the fourth interview, there is criticism of the use of props. Also criticism is made of "external contamination", constructing a pretend jail for Mr Ellis, although in response to a question the Interviewer accepts that the decision whether Peter goes to jail or not has yet to be made. (*Comments*: *The Submission draws attention to the question "whose penis did you see at Peter's house" overlooking however that this followed up an answer to an open ended question on the previous page of the transcript. Likewise, criticism of the question "did Joseph's penis touch you or not" seems unjustified given the apparent ambiguity of what the child was demonstrating.)*

Page 35 Complainant Q

Q and her brother P, were both complainants. Mrs Q, their mother, a Social worker, knew Mrs D professionally. She was aware "from an early stage" of Mrs D's concern about her son. Mrs Q attended the 2 December meeting, and was a member of the informal "support group" of parents, which included Mrs D and Mrs B. She had begun to question her children in about November 1991.

Page 37 Mrs Q said that the Support Group was clear that at meetings, members would not talk about what their children had disclosed. They talked mainly about behavioural symptoms or problems. However, Mrs Q agreed that outside the meetings, it was over to the individual parents, whether they passed on information about their children's disclosures or not. Thus Mrs Q learned that her children were said to have been present when Mr Ellis put his penis in another child's mouth. Mrs Z told her that Ellis had put his penis in her children's mouths. This accords with Mrs Z's account.

Page 38 According to the Submission, Mrs Q may have given conflicting accounts on the subject, but in her first Police statement, she said that she told the children what she had been told. After some hesitation Q agreed that this had happened.

Page 39 The Submission says that Mrs Q continued to question Q throughout 1992. (*Comment: the only tape played to the jury was the first, made on 9/3/92. However (**40**) it seems she asked her daughter about Ellis touching her private parts, before the first interview).*

Page 46 The Submission turns to the interviews. Criticism made are: although it is plain the child came prepared to talk about Peter, the Interviewer does not follow up how Q knew this; Q's account of Mr Ellis putting his penis in her mouth resulted from suggestive questioning; the details of the event were extracted by suggestive questioning; the Interviewer did not follow up Q's allegation that she immediately told another teacher, Marie (*Comment: I would have thought it was the Police's job to do that, not the Interviewer's);* other details were obtained by suggestive multiple choice questions, rather than open-ended ones*;* the account of indecent touching, and the accompanying detail, were obtained by direct, suggestive questions.

Page 53 The Submission argues that the interviews which were *not* played to the jury were important. Points made: Q equated secret touching to tickling; she said it was Gaye, rather than Marie, who had seen what Mr Ellis was doing; Q provided further evidence of parental contamination; in a number of instances Q changed her evidence when challenged by the Interviewer; she widened the circle of people involved, thus (according to the Submission) turning a semi-credible account into an outrageous one.

Page 59 – Complainant R Dealing first with parent contamination, the Submission notes that when his mother questioned him initially (after the December meeting) R made no disclosure and said the Peter was "really nice". Mrs R questioned him again when she returned from an overseas trip in early March 1992, saying that some children were saying that Mr Ellis had pulled their pants down and touched their bottoms. This elicited an allegation that Ellis had done "wees and poos" in children's faces. Eventually he said that Mr Ellis had, on one occasion, urinated in his face. Both R and his mother accepted that she questioned him repeatedly – according to the references at page 61, the account of urinating on R's face emerged during the third questioning on the same day. In cross-examination at the Depositions hearing, Mrs R accepted that in questioning R, she had acted contrary to Susan Sidey's advice. It appears (page 62) that R believed his mother already knew about Mr Ellis urinating in his face, from other parents.

Page 63 In June or July 1992 Mrs D showed Mrs R a list of things which children alleged had been done to them. (*Comments: note however that R disclosed the urinating in the face – the only charge relating to R on which there was a conviction – at his first interview on 3/4/92. But the other charge – on which there was an acquittal – involved placing sticks up his bottom; this was on Mrs D's list although Mrs R denied telling R about it* ***(64))***.

Page 65 The Submission contends that R's evidence may have been contaminated by other sources, including a visit by Detective Eade (*Comment: but this was after R's first disclosure).*

Page 66 Criticisms of the interviewing include: Interviewer focussed on negative aspects relating to Mr Ellis; the use of dolls and props before the details of the alleged offending were established; misstating answers; repeated questions; pressure (e.g, asking "what did it taste like?" at a stage when R had

not stated that it had happened to him); continuing to say that the Interviewer had heard that Mr Ellis had done something mean to him as well *(until finally at page 32 R accepts that it happened to him too).* The Submission maintains that the allegation that Mr Ellis put his penis into R's mouth was obtained by a leading question (*Comment: but the transcript (**35**) does not bear that out.)*

Page 72 At his second interview, 3 weeks after the first, R at first stated that Mr Ellis didn't "do it" to him. *(Comment: This interview was not played to the jury, but in terms of the Judge's ruling, it was open to the defence to do so.)*

Page 74 Complainant S Dealing first with parent contamination, the Submission notes that in February 1992 Mrs S, after a call from Mrs Q, formed the opinion that it was highly likely that S had been abused, either in the toilets, or at Mr Ellis's house. Mrs S then asked S directly whether Ellis had done anything to her. S denied it.

Page 76 Shortly after the Knox Hall meeting, Mrs S learned that S had been named by another child. Mrs S contacted Police, and a SSU interview was arranged. She continued questioning S, who stated she had had to drink urine, and (while in the bath with her mother) seemed to indicate "riding a horse" involving Ellis, and exhibited sexualised conduct (which Mrs S mentioned for the first time at the trial).

Page 77 Before the first SSU interview, Mrs S & her daughter prepared 2 booklets, "The way to Peter's house", and "What did Peter do". The second contained reference to S and Peter in a bath. The Submission states that these books indicate there must have been a number of discussions between S and her mother about Mr Ellis.

Page 79 According to Mrs Z, she passed on to Mrs S, allegations her daughter Z had made which concerned S. This started in April (*S's first interview was 1 May 1992*).

Page 80 Mrs S agreed she received "pages" of notes recording conversations between Z and S relating to allegations. It was only after talking with Z that S remembered about the needles, and that Mr Ellis had put his penis against her vagina. (*However, on the counts relating to these events, the verdicts were not guilty)*

Page 82 Criticisms of the interviewing include: that S came to the first interview prepared with a story book; there were suggestive multiple-choice questions; the use of props (making a model of the toilet). Under the heading "suggestive questioning" it is submitted that the Interviewer induced S to say Mr Ellis was standing up when at first she maintained he was sitting down (*Comment: although the view is open that the child changed her mind spontaneously,* ***page 18****).* At **85** the Interviewer is criticised for "challenging" the child's assertion that Peter's pants were on (*but what is an Interviewer to do in this situation? Had she not asked the question, she would have been criticised for not probing, as indeed the Submission does in the next paragraph).*

Page 86 In summary, the Submission maintains that the allegation of being made to drink urine is obtained by suggestive questioning, that the child changes her account in response, that there is little free recall, and that the child's assertions are confused and contradictory.

Turning to the charge of inducing an indecent act (the bath incident) the Submission points out that the Interviewer places social pressure on S by referring a chat she has had with her mother, and mentioning "some stuff about a bath". When S says this was at the creche, the Interviewer asks a leading question, obtaining agreement that it was at Peter's house. Other leading or suggestive question elicit replies to the effect that she washed Peter's bottom and penis, and that he washed her vagina.

Page 88 The Submission contends that the allegation about being pricked with a needle is brought out by direct questioning (*the jury acquitted Mr Ellis on the resulting charge)*

Page 89 In closing, the main contention is that by inappropriate processes, mainly leading or suggestive questioning, the Interviewer succeeded in having S repeat allegations that were first made as a result of "less than ideal" questioning by S's mother.

Page 90 **Complainant O** On the subject of parent contamination, it seems to be accepted that O's parents had minimal contact with other parents.

However, after attending the Knox Hall meeting, they told O that Police believed that Mr Ellis had been doing bad touching in private places and asked her if she would like to speak to the Police about it, to which she agreed. (*It does not seem that she made any disclosure to her parents, before the evidential interview.)*

Page 97 A criticism of O's account is that when the offence (poking her in the crutch) took place, the other teachers were at the other end of the creche looking after deaf children. There were no deaf children at creche, but there were, at a school O later attended.

Page 99 Among criticisms of the interview are: failing to enquire what information O had been given about the interview; lack of neutrality by Interviewer (saying "right" repeatedly; using social pressure - interviewer's seeming knowledge of what she had told her parents); failing (until page 27) to advise O she could answer "don't know"; failing to clear up ambiguity over what O meant by "crutch", and how she could have got a cut on the vagina when the touching was on the outside of her clothing.

Page 105 Complainant X Dealing first with parent contamination, Mrs X accepted that she ignored the advice given at the Knox Hall meeting about questioning children, and asked X whether Mr Ellis had ever touched his bottom or his penis. She said that she probably asked him once a week whether he had anything to tell her about the creche. On 1 April 1992 X was referred for interview although he had not made any disclosure, because the parents felt their child had been at risk; but they were told the appointment would be some time ahead.

Page 108 X's first disclosure came after direct questioning by his elder brother M. X told M that Peter had rubbed his penis. Mrs X was not satisfied that he had made a complete disclosure, and continued to question him, on her own admission, once or twice a week throughout May, June and July 1992. The Submission draws on a book written by Mrs X (under a pseudonym) published in 1997.

On 3 August 1992, according to the book, the parents had a long discussion with X. At trial, Mrs X did not accept that this was necessarily on 3 August.

(X *was interviewed by SSU on 4, 5 & 6 August. It seems likely that the 4 August interview was arranged as a result of the disclosures.)* Mrs X agreed she had detailed discussions with X on each of these days. On 4 August X was questioned by his 2 elder brothers. An interview scheduled for 11 August was cancelled because of the Interviewer's concerns about prior questioning. *(Comment: following Ruling No. 9 the defence was not allowed to cross-examine about the reasons for the cancellation of the interview.)*

Page 115 Mrs X constructed a list of 24 people by whom X alleged he had been abused. She took him to several sites where she believed he had been abused.

Page 117 With reference to sharing of information, Mrs X said her contact was with 2 parents in particular, Mrs Y and Mrs Z. She specifically declined to comply with the Police request not to speak to other parents.

Page 119 The Submission notes that X spoke freely about his abuse to his brothers, and also to adults in addition to his own parents. It also notes the pre-occupation of Mrs X with Satanic Ritual Abuse (*but some of the evidence relied on is outside the scope of the Inquiry).*

Page 122 The Submission states that an unmistakable feature of the interviews is the growth in the bizarreness of the allegations. The contention is that this marks X out as a suggestible child. The other outstanding feature is that the formal interviews followed contaminating interviewing by X family but the Interviewer failed to check on this.

Page 123 Criticisms made of the interviewing include: the large number of interviews, spread over 5 months; suggestive questioning; absence of probing; use of dolls, drawings and other props; failure to pick up on inconsistencies. In addition, mention is made of contamination, as covered above, and the unusual features of X's allegations, situations, and participants.

Page 125 In regard to the allegation of touching Mr Ellis's penis, the Submission states that the Interviewer lost objectivity and neutrality. It is

claimed that she misstated X's answers, and elicited details through direct questions and use of props. (*Comment: the contention in the Submission, regarding misstating answers, is rather strained)*

Page 126 The Submission points out, correctly, that there is an ambiguity in the answers about whether Ellis's penis was erect. (*I agree with Dr Parsonson, quoted in the Submission, that X's knowledge of the subject is limited. The Interviewer's attempts to clarify this having been unsuccessful, I doubt that she is to be criticised for not persisting – had she done so, she surely would have been criticised too. It is a matter that affects the credibility of the evidence, rather than a legitimate dissatisfaction with the interview process.)*

Page 127 In regard to the allegation that Mr Ellis placed his penis on X's bottom, the Submission, quoting Dr Parsonson, maintains there was inappropriate questioning and use of props.

Page 130 In summarising, the Submission points out that all the convictions arose out of the one interview, that of 4 August 1992. The Submission accepts that some of the allegations were volunteered, but maintains that many of the details were obtained by inappropriate questions. The Submission continues that in following interviews (5 & 6 August) X made many allegations, bringing in a widening circle of people, some never identified, and including increasingly bizarre allegations. (*However, the 6 August tape – although not the 5th August one – was played to the jury, which acquitted on a charge brought arising out of that interview. Thus the jury must have considered this account was not sufficiently reliable while the earlier ones were.).*

Nature & extent of risks

The final volume of Submission deals with identifying the nature and extent of risks arising in relation to the reliability of the children's evidence.

Page 2 The risk dealt with earlier are summarised as parent contamination, failure of the investigative process to safeguard the integrity of

the children's evidence, failure to conduct the interviews in accord with best practice, and special risks occasioned by mass allegation situations.

Page 3 Matters which ought to be taken into account include: where a child's account is tainted, it is not possible (contrary to Dr Zelas's account at trial) to distinguish between accurate and inaccurate accounts; that (also contrary to Dr Zelas) provision of detail is not supportive of accuracy; that it is not possible to reverse the effects of contamination; and that in a mass allegation situation, all the cases have to be viewed as a whole.

Page 4 Professor Ceci is quoted to the effect that there were characteristics with which he was familiar: a single, somewhat ambiguous complaint started the ball rolling, there was a tendency by Interviewers to try to confirm suspicions that abuse occurred, rather than to disconfirm, and an atmosphere of innuendo, fear and suspicion imbued the case, seen in numerous negative statements transmitted to the children by various sources.

Page 5 Professor Ceci referred to the strong network between parents, and the exchange of information between them, an understandable human impulse but sowing the seeds for children to assent to things that may not have happened. He said it was impossible to tease out fact from fiction in the accounts.

Page 6 Dr Lamb is quoted to the effect, interestingly, that only 6 % of Interviewers' utterances were suggestive, a figure said to be in line with overseas experience in the same era. What was different in the Ellis case, Dr Lamb said, was that the formal interviews followed "many months" of informal interviewing (*an unjustifiable generalisation).* Dr Lamb also points to the long delay between the relevant conduct, and the commencement of questioning. This would weaken memories, and make the children more likely to incorporate adult suggestions. The intensity and suggestiveness of the conversations with parents inflated the likelihood of false material becoming incorporated into the children's memories.

Page 7 Dr Lamb also noted that the children did not report abuse when first interviewed (*but the question arises how this may be reconciled with what is regarded as a truism in New Zealand – even incorporated into statute law – that there may be good reasons why children delay reporting abuse? At page 9, #66 Dr Lamb said this would be unexpected, where the abuser was a non-family member with whom the children had no further contact. But if the evidence is believed, the threats Mr Ellis made need to be taken into account).* Dr Lamb regarded it as particularly alarming that several children whose parents were in close communication made similar allegations at the same time. – see also para 66, page 9.

Dr Lamb is quoted as saying that on a statistical analysis the Ellis Interviewers conducted interviews in a manner quite similar, at that time, to counterparts overseas. But Dr Lamb continues that compared with their counterparts, the Ellis Interviewers relied much less on "invitations", and more on "focussed prompts".

Page 8 In the result, a "remarkably small" proportion of information was elicited using the widely-recommended and less risky open ended questions. Specifically, the Ellis Interviewers obtained less than half as much information this way as their contemporaries in the early 1990s, and about 4 % of the amount obtained by highly trained interviewers in the mid to late 1990s. Further, children frequently contradicted earlier information – this happened 232 times, and *every* contradiction was in response to a closed question.

Page 9 Dr Lamb considered there was an unusually high probability that the Interviewers unwittingly elicited erroneous information.

Page 10 Dr Lamb drew together a number of factors:

(a) The young age of the complainants at the time of their last encounter with Mr Ellis, so that memory encoding was less complete or strong.
(b) The time lapse between the last contact, and the formal interviews – ranging from 5 to 49 months, with an average of 18.
(c) Opportunities for contamination by conversations with and repetitive questioning by anxious parents.
(d) None of the initial interviews yielded allegations of abuse (*meaning I think, the questioning by parents. Not correct, so far as formal interviews are concerned).*

(e) Failure by Interviewers to pursue alternative hypotheses
(f) The extent to which Interviewers appeared knowledgeable about alleged events
(g) "The likelihood of contamination is so high, and the failure 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".

Page 14 Dr Lamb draws together 9 factors, all present in the Ellis case, which led to a risk of incorporating outside information into children's memories.

Page 15 Professor Bruck, in a 1999 affidavit, is quoted as referring to the presence of "a whole constellation" of suggestive factors that defined the Ellis case.

6.2 <u>On behalf of the Solicitor-General, the New Zealand Police, and Department of Child, Youth and Family Services</u>

For convenience I refer to this as the Crown Submission.

Page 20 – as to the defence right to use material the Crown did not use. This was established in the appeals.

Page 27 – the Crown submits that in principle, there is nothing special about mass allegation cases. (*My comment: the outstanding feature is the increased potential for contamination, in several distinct ways – child to child, parent to parent, Police to parent to other parents, interviewer to parent to child to other parents & children etc. Public meetings, parents' meetings & support groups are additional sources of contamination. There is also the additional element of interviewer bias, conscious or otherwise. Even the most neutral Interviewer may be subconsciousLy biased through becoming so much more knowledgeable about the allegations, with the risk that the extra knowledge will result in leading questions*) The Crown accepts (30) that a mass allegations situation leads to "recognised risks" being raised to a greater level.

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The Crown says that the formal interviews were properly carried out by professionals. Questioning by parents, as Williamson J pointed out in a ruling,

is a natural event that cannot be prevented (**31**). That issue was exhaustively explored in the depositions and at trial (**32**).

The Crown defends the role of the Interviewers in not exploring (much) the possibility of contamination: "cross-examination comes later". *(My comment: but there is a contradiction here, in that Dr Lamb is quoted about "testing alternative hypotheses"* (**33**))

The Crown then argues that the Interviewers *did* test the children's accounts for contamination; although the examples assembled in support are not extensive; 11 pages of extracts suffice to cover the 23 interviews conducted with the 6 conviction children.

The Submission (at **34**) also points to the extensive material available for an examination of the contamination issue, some of which resulted from advice from the agencies, including the Interviewers; (*but this does not seem to help solve the issue whether, in fact, contamination occurred. A valid point is that to decide the contamination issue, it is not sufficient to consider the interviews alone; but I do not think anyone would argue with that.)*

At **35** the Crown expresses difficulty in understanding the proposition that once contamination occurs, it is not possible to distinguish fact from fiction. It says that little research is ever cited in support.

(Comment: research has shown that children's accounts <u>can</u> be contaminated, that is, that leading or suggestive questioning can plant ideas into children's mind. Once it is clear that this has happened, is it possible to separate fact from fiction in the children's accounts? Is it sufficient to say, as the Judge did in one of the Ellis rulings, that it is a question of degree?)

The Crown submission sets out a series of steps which it says were followed in *Ellis,* essentially, the presentation of the case to the jury, having first tested it by depositions and pre-trial rulings, and the review of the case on Appeal. (*Comment: it could be said that is the best that can be done in any case, whether involving children or adults. After all, there are risks that the evidence of many adult witnesses may be mistaken, or worse.)*

At **36** the Crown defends and supports the calling of the public meetings.

At **37** the Submission examines whether, on present-day knowledge about "mass allegations", the trial would have gone ahead. The answer given is yes, for 2 reasons:

1. The issues were well known and tested, even if the label "mass allegation" was not used;
2. There is no new research into mass allegation cases that advances matters significantly.

In regard to (1), the Submission cites from pre-trial judgment No. 2 to show that the contentions now made on behalf of Mr Ellis were advanced (and rejected) in 1992. A point made at page 40 is that most of the recent publicity had been disparaging of the children's evidence. The Judge was aware of the Cleveland and Orkney Inquiries, and referred to "widespread public knowledge" of similar events overseas resulting from "hysteria or the actions of hyper-vigilant parents*". (Comment: these are points which need to be placed alongside the submissions on behalf of Mr Ellis, that there was a climate of fear and hysteria.)*

At **40** the question is asked whether it might have made a difference, had the jury been told about the "alleged mass allegation phenomenon". The Crown questions whether details of the *Kelly Michaels* case, for example, could have been put before the jury – how would that have been presented?

At **42** the Crown makes the valid point that *risk of contamination* does not equate actual contamination. The fact that parents have information does not mean it was passed on to the children. This depends on evidence, and the fact-finder's assessment of the available evidence. (*My comments: undoubtedly that is so in the context of a trial, but that is not determinative of the issue before this Inquiry – although it raises a question whether there is anything new before this Inquiry not covered by the exhaustive examination that has taken place before the Courts.)* The Submission points out that Williamson J considered that the defence contention about the extent of information dissemination was exaggerated (Judgment No 2, page 13). The Crown says that the jury had all the relevant information about "mass hysteria", and mass allegation risks and made their assessment, and there is nothing new which casts doubt on the outcome.

In the section commencing at **44** the Crown considers other Reports relevant to interviewing practice. The Submission also deals with "general issues" surrounding the interviewing itself, but understands the Inquiry is not concerned with a further examination of the interviews themselves, but rather, is to consider the interviews in the light of "new understandings" about interviewing children in a mass allegation context. The Crown says there is no such new understanding, but nevertheless is prepared to go on and address "some of these general issues" which have been canvassed at the Appeals. (*My comment: see "Interpretation", para 3.2 above)*

At 46, in discussing the recent Law Commission paper on the reliability of witness testimony, the Submission makes the point that when considering the reliability of children's evidence, it is necessary to categorise the child in question. Whatever the particular literature may mean by "pre-school" children, *all* the Ellis children (i.e. all the "conviction" children) were outside "pre-school" age. (*My comment: this doesn't entirely meet the point however, if the events in question occurred while the child was pre-school.)* The Submission continues that the research literature regards pre-school/school as an important division, in terms of memory and susceptibility. A further point made **at 46**, noted elsewhere, is that in the end it was accepted that anatomically correct dolls were not a feature of *Ellis* interviews. *(My comment: they were used on occasions, however.)* At **47** the Submission discusses the UK "Memorandum of Good Practice" (1992). At **48** reference is made to the recent Home Office paper "Interviewing Child Witnesses under the Memorandum of Good Practice" (1999), a summary of lesson learned from the application of the Memorandum (dealt with under Section 5, above). The Submission notes **(at 49)** that the Memorandum, and the paper, are silent on mass allegation issues. Finally the point is made that guidelines like the 1992 version make recommendations designed to maximise the safety and admissibility of an interview. They represent the ideal, and as such, are not absolute. For example they do not mean that a leading question will automatically invalidate an interview, although it may have that consequence, as illustrated with one original count in *Ellis.* In the context of a real case, the Court has to assess whether any departures require excision of evidence, or total rejection of the case based on evidence which includes such departures.

At **50** the Crown Submission addresses the (NZ) Joint CYPS/Police Guidelines (1996), pointing out that these cover both diagnostic and evidential interviewing. One matter arising, addressed in the Submission (at **54**), is the general policy that there should be only one evidential interview. The Crown acknowledges that with some complainants, there were more interviews than "generally seen as desirable". A distinction is drawn with other cases however (e.g. *Orkney*) where the impetus for interviews came from the authorities. Here, it is submitted, they were the product of fresh disclosures, and therefore "sourced in the child".

The Crown Submission addresses the *Ellis* interviews at **55**. It states that "the governing provision" is the identification of currently accepted best practice for interviewing children in mass allegation cases. It professes that the difficulty for the Inquiry is that there is no such best practice, and maintains that to a large extent this is determinative of the Inquiry's task. *(My comment: I deal with this under para 3.2 "Interpretation". The Crown Submission also proceeds on an alternative basis. Cf. the parents' Submission at para 13.)*

At **56** the Submission makes an examination of the *Kelly Michaels* case. As is confirmed by my own reading of the judgment of the New Jersey Supreme Court, the Submission points out the many dissimilarities between the interviewing in that case, and the present. The breaches of recognised standards were gross, and the interviewing was characterised by a noticeable lack of impartiality. There was cajoling, bribing, and mild threatening, together with vilification of the accused.

At **57** the Submission refers to the *McMartin* pre-school case, where no persons were convicted, and most charges were dropped before trial. Again, examples are quoted of grossly inappropriate questioning, of a kind not finding any parallel in *Ellis*. At **59** the Submission deals with Dr Lamb's research. The Crown says that this establishes a starting point, that overall, the *Ellis* interviews were essentially sound interviews. Any consideration of improvements in understanding since then ought to be seen in that light. Dr Lamb analysed actual interviews from various parts of the world, which he incorporated in a comparative table. This indicated that by the standards of the time, the *Ellis* interviews did not contain an excessive proportion of suggestive or leading questions. *(Comment: this is true as far as it goes, but does not*

address Dr Lamb's point that the Ellis Interviewers asked a smaller proportion of open-ended questions than their counterparts. No less than 80% of the NZ questions were directive, leading or suggestive, but this is in fact a smaller proportion than transacted by their colleagues in USA or the United Kingdom. On the other hand, under the Lamb "semi-scripted" model the proportion of directive, leading or suggestive questions dropped to 62 - 70%. The semi-scripted model is a technique developed by Dr Lamb where the questions are according to a pre-set formula, varied for the individual case. It is explained in the 1999 Home Office paper, see para 5.6 above, where it is regarded as promising, but subject to significant reservations, e.g. inflexibility.) The submission is made that whether compared with their early 1990's contemporaries, or with the latest "semi-scripted" concept, the *Ellis* interviewers stand up to the comparison. Further (at **61)** as the cross-examination of Ms Sidey at the depositions hearing shows (pp 26 – 33) the relevant propositions were appreciated in 1992.

At **63** the Crown refers to recent research relating to the implanting of false memories, conducted with groups of children between 5 and 7 years old. Where false memories were implanted by a "simple" processes, that is without reinforcement, children when pressed by the interviewer agreed in "virtually all" cases that their allegations were not based on personal observation. In the case of another group, the false memory had been reinforced, that is, the Interviewer gave praise, approval, agreement, or the like, or stated that a co-witness had given a similar account. In these instances there was more than a 50% probability that the child would later claim the allegation was based on personal observation, rather than second-hand information.

At 63 the Crown submission points out there is much in a real life situation that cannot be replicated, including the fact that in research, the incidents are generally trivial. There is no general acceptance that non-trauma research is directly applicable to traumatised children and trauma memories. Further, in real life an assessment has to be made of the particular child's reliability and suggestibility. No-one can claim that because a technique has had a particular effect on one child, it will have the same on another. Research cannot be equated to advances in, for example, DNA techniques, where new discoveries will enable a previously inculpated person to be positively excluded.

In conclusion, at **65** the Crown submission states that (unless the view is taken that no mass allegation conviction is ever safe) there is no basis in the conduct of the investigation, in the Court process or in the subsequent research, for doubts about Mr Ellis's convictions.

6.3 On behalf of the group of parents represented by Ms McDonald QC & Mr Eaton

(Note: the parents in question include some, whose children are not "conviction" children - see para 9.1, below. The group did not include *all* the "conviction" children – two sets did not wish to join the group. These qualifications however make no practical difference, regarding the weight to be accorded to the Submissions).

The Submission commences by stressing the parents' desire for continued confidentiality. At **3**, the Parents' Submission points out that the Ellis criticisms relating to the interviews were all known in 1992 – delay, parental or other contamination, focussed questions – and were directly addressed, especially at the Depositions hearing, as the Court of Appeal pointed out in its 1999 judgment at page 19.

It is pointed out that these were not disclosure interviews in the sense of seeking disclosure for the first time. Rather, they were the children's "statements", and this may have significance in regard to the children's demeanour.

The realities of a mass allegation situation must be recognised, namely that families must be free to speak to their children, and to seek information and support from friends and agencies. There would be no point in proposing unrealistic standards.

Mass allegation cases should be treated as with any other child sexual abuse allegations, but with particular awareness and recognition of the special issues arising, particulary contamination.

Another special factor, at least potentially, is media contribution to hysteria. However, the Submission contends that in the *Ellis* case, the media tended towards disbelief of the children.

At 5 the Parents' Submission turns to the "constant theme" advanced on behalf of Mr Ellis, of parent contamination. **At 7** the point is made that the parents did not want their children to make disclosures, as contended on behalf of Mr Ellis; the opposite was the case. (*Comment: But the reality is that some of the parents did not take no for an answer; they kept returning to the subject; one of then "knew" the child was lying. The submission that "the parents were careful to follow the advice that was given" is correct in some instances but in others, parents accepted under cross-examination that they acted contrary to the advice given – "I just had to know" – "I have always been upfront with my daughter" etc)*

At 8 the Submission turns to the topic of the "official" meetings. The Submission rejects that there was any "mass hysteria" as alleged. *(Comment: there is little if any evidence to support the assertion of "mass hysteria". Understandably, some parents became heavily affected with concerns and fears.)* The Submission repeatedly stresses the need for a "realistic" outlook that would not impose unreal expectations on parents in regard to their normal contacts with children and friends.

Turning (at **10**) to individual cases, the Submission starts with O. In this case there was no suggestion of the allegation being elicited by *repetitive* questioning on the part of parents, or of information sharing with other parents. However, the Submission appears to accept that it followed suggestive questions, reinforced by reference to disclosures by other children.

The mother of child S attended support group meetings, but the first meeting she attended was *after* the interview at which disclosures were made leading to the only convictions relating to this child. It is accepted that Mrs S had contact with parents of children P, Q and Z (there were convictions relating to the latter two.) She also attended a meeting at the home of complainant Y, where Mrs D's "information sheet" was available. However, this meeting, too, was after the disclosure interview.

However, it is accepted that after obtaining information from the mother of Q and Z, the mother proceeded to question S by way of direct questions. Then there was an incident in the bath.

Asked how information came out, the mother said "most of the time" it was volunteered. The Submission argues that if, as she said, the mother did not

have any knowledge of the allegations of urinating, bathing, or touching with needles, she could not have put these specific allegations into her child's mind. The Submission also deals with the criticism about the child relying on the books prepared with her mother, as prompts.

The mother of child R had contact with Mrs D, and received a list of materials from her in June or July 1992, this being after R's first interview at which he disclosed the offending which formed the subject of the only guilty verdict. There were 3 parents in particular known to the mother, one being the mother of P and Q. She said she did not know about the allegation of urinating until her son told her about it.

It is accepted that R had contact with P and Q. However, he denied talking to them about things that had happened.

With reference to children P and Q, the Submission accepts the mother questioned the children, sometimes in a direct way. (*Comment: The evidence at trial, p 228, showed there was "social pressure" in that the mother told her daughter what other children had said Mr Ellis had done. This contradicts the submission that the mother did not know what other children had disclosed.)*

This parent carefully recorded her conversations with her children. As already noted, these children had contact with R.

The Submission also deals with contamination issues relating to children whose evidence did not result in any convictions.

6.4 The Commissioner for Children

The Commissioner's Submissions commence with references to Articles 19 and 39 of the United Nations Convention on the Rights of the Child, to which NZ is a signatory. The Submission points out that these tenets entitle abused children to appropriate treatment within the criminal justice system, as well as requiring action against abusers. The Submission states:

> Processes for investigating child abuse need to ensure that child witnesses are able to give reliable evidence, that the status of children as witnesses is recognised and given appropriate weight, and the stresses placed on child witnesses are minimised and managed in a way that promotes their wellbeing and recovery.

The Submission contends that in the present case, Mr Ellis and his supporters have captured the media platform and have waged an effective campaign to

sway public opinion. Society ought to be protecting these children from ongoing violations of their right to privacy. The Submission states that the conduct and outcome of this case has the potential for a disastrous effect for children in our society, and that it is important for the credibility of our system to be maintained. Other convicted persons will be waiting for the outcome. Later (**at 12**) the Submission states that holding this Inquiry, ten years after the events, is unjust to the children. *(Comment: While I understand the Commissioner's concern, parents and the Commissioner will appreciate that this is not something on which I can properly comment.)*

At **10** the Submission points out that findings based on research into interviewing in analogue settings cannot be applied in a generalised way to real life situations. No conclusive research into mass allegations has been found.

If a child makes an allegation of abuse, in a mass setting or otherwise, caring parents will talk to the child about it, and offer support. The criminal justice system should not detract from this protective behavior. (*Comment: I accept the first sentence as a statement of fact, but point out the tension between encouraging a supportive parental role, and preserving the civil rights of those suspected or accused of offences. In our community, both are important.)* The solution offered by the Submission is that the issue of contamination should be put before the jury. (*Comment: One may add, there is the additional safeguard that where there are sufficiently serious breaches, the case will be dismissed at the depositions stage, or taken away from the jury before or at trial.)* At **12** the Submission states that the most positive outcome would be recommendations providing a greater degree of protection for children and an improvement of the systems put in place to safeguard them. The solution offered is to enhance the professionalism of the persons involved, meaning presumably all the agencies. At **13** the Submission refers to the absence of a systematically organised infrastructure within the New Zealand Police for dealing with child abuse work. *(Comment: I am unaware of the factual background for this contention, but in any case the matter is outside the scope of this Inquiry.)* Reference is also made to the apparent absence of any system for ensuring standardisation of interviewing practice throughout the country. The Submission suggests there is need for a quality assurance

process. Since these matters are not within my Terms of Reference, the agencies have not been given the opportunity of addressing these propositions. If there is substance in the contention that no such systems or processes are in place, the agencies should however give these matters consideration. Regardless of the outcome of this Inquiry, if there is reasonable scope for improvement in the monitoring of the systems presently in place, which in turn would be likely to enhance the standard of interviewing, they merit consideration. These remarks apply equally to a number of further suggestions made in the Submission: the provision of "Multi-agency Centres" (one stop shops), the provision of child advocates to assist child complainants, and increased public education. A more controversial suggestion is that there should be restrictions "on the media's freedom to incessantly promulgate the views of the accused." (*A contrary viewpoint is that while occasionally this right may be abused, it is an invaluable means of exposing potential miscarriages of justice.)*

7. TERMS OF REFERENCE (1)(a)(i)

(international best practice for mass child abuse allegations)

7.1 Investigations

7.1.1 *Structure for investigations.* The reports and memoranda listed in the schedule to the Terms of Reference make some reference, although not much, to the appropriate structure for the investigation of mass abuse cases. Among the salient points are the need for a joint inter-agency approach, the desirability of co-operation among agencies from an early stage, and the requirement of good planning. For interviewing, there must be adequate facilities and equipment, proper records should be kept, and early input from the Crown solicitor's office is desirable. Communication with parents needs careful attention.

7.1.2 *Processes incidental to the interviewing*. Dr Sas in her report has given careful attention to the appropriate model for the investigation stage. The following is a summary of the main points made.

7.1.3 The structure and identity of the investigative team should be established quickly, including the appointment of a lead case manager, and identification of the experts to be involved. Flexibility is required, in anticipation of possible expansion of the scope of the inquiry.

7.1.4 There should be clear communication lines between the professionals involved, achieved through regular team meetings.

7.1.5 Clinical supervision should be available to the specialist interviewers for (a) diagnostic interpretation of disclosures, and (b) general quality of the interviewing.

7.1.6 A detective should be involved in the interviews, and act as monitor (this I perceive may be controversial).

7.1.7 Police assistance should be available as required, particularly to follow up references to places and events made in the interviews, with a view to checking any evidence that may corroborate accounts (or – I add - contradict them as the case may be).

7.1.8 Specific measures should be taken to minimise the risk of contamination, especially on the part of parents.

7.1.9 If an agency arranges a meeting of parents, Police should attend to ensure that correct information is disseminated. They should warn parents not to question their children at length.

7.1.10 There should be a hand out sheet –

- giving the parents advice on how to talk with their children about sexual abuse, and what to do if they disclosed abuse
- telling parents not to question their children repetitively
- warning witnesses, and especially parents, of the dangers of sharing detailed information about children's allegations with other parents
- advising parents not to share information with their children about what other children may have said
- giving contact details for the Police unit, and the case manager

7.1.11 The handout *should not* –

- give a list of symptoms of sexual abuse – it would be preferable to give the name of a qualified person on the team with whom parents could discuss any behavioural concerns
- create an expectation in parents that their children will experience difficulties – the preferable course is to provide the name of a person on the team who can answer enquiries if problems arose
- make suggestions about the need for medical examination or treatment
- offer counselling

7.1.12 In regard to support for parents, it is preferable to offer parents access to a social worker, rather than encourage parents to support one another (although it is recognised that parents will do that anyway)

7.1.13 It should be made clear to parents that they should not act as investigators

7.1.14 Steps need to be taken to contain the spreading of information among parents

7.1.15 The agencies should not provide information to parents about disclosures by other children

7.1.16 Until the investigation has been completed, it is preferable that parents and others receive only a general awareness of the allegations, rather than specific details

7.1.17 Contact between complainants should be discouraged, until their interviews have been completed

7.1.18 The team should share information with other agencies only on a "need to know" basis

7.1.19 A strategy should be in place to deal with information leaks

7.1.20 In consultation with parents, the agencies should make referrals for treatment of complainants where necessary. The role of the therapist should be confined to treatment and support.

7.2 Interviewing

Although this will be familiar territory for New Zealand readers, at the outset I should record that in this country, the videotaping of interviews with child complainants is governed by and conducted under the provisions of the Evidence Amendment Act 1989 and the regulations made pursuant to that Act which have been mentioned earlier, the Evidence (Videotaping of Child Complainants) Regulations 1990 (the Regulations). The Act authorises the use of videotapes complying with the statutory requirements to be played as the evidence in chief of the child witness. The Regulations deal with process matters, such as the persons who may be present during videotaping, the recording of date and time, the procedure for determining that the complainant understands the necessity to tell the truth, the obtaining of a promise to tell the truth where appropriate, the custody of the tapes, the purposes for which the tapes may be viewed, the making of transcripts, the custody and ultimate destruction of tapes, and incidental matters. However, except as noted, neither the Act nor the Regulations deal with the conduct of the interview itself. In that regard a set of Guidelines has been developed by the agencies involved, as detailed in para 5.7 above.

The particular Term of Reference requires that after I have reviewed the scheduled reports and memoranda (see Section 5, above) I am to *identify the processes, practices and procedures currently accepted internationally as best practice for investigating mass allegation child sexual abuses, and interviewing children in such cases.* Crown Counsel submitted that

> …the difficulty for the Inquiry is that no such best practice exists. ….(T)here has been no consideration of mass allegation interviews as a separate phenomenon. (55)

On the information before me, factually that is correct, in the sense that no internationally-accepted protocol has been written. But I am unable to accept the corollary advanced, that "to a large extent that is determinative of the Inquiry's task". The absence of such a protocol must have been known when the Terms of Reference were drafted. By implication, at least, I am required to identify the relevant best standards of international practice relating to interviewing in mass allegation cases, resorting to analogy or extrapolation

from "international best practice" in interviewing of children generally. I accept the submission on behalf of the parents' group (at 4), that it is appropriate to treat mass allegation cases in the same way as other cases of child sexual abuse, but with particular awareness and recognition of additional issues, for example contamination.

However, I do not understand my function to include the formulation of a "best practice" *protocol*. That would require multi-disciplinary input, and one would expect the agencies concerned with interviewing processes to maintain initiative in this field, as evidently was the case when the Guidelines were produced in 1996. Sir Thomas Thorp's Opinion drew the same distinction, at page 26. Rather, I will list the elements I have identified from the reading to which I was directed by the Terms of Reference, and the submissions made to me. I compiled my list before receiving the experts' reports, but have added some of their suggestions.

I stress that I will concentrate on those matters which are or may be relevant to the issues before this Inquiry. A "best practice" protocol would go into many areas not in issue, for example the qualifications and training of the interviewers, the nature of the premises where interviews are conducted, the arrangements for videotaping the interviews, and how best to achieve compliance with the formalities required by the Regulations, designed to ensure that the child tells the truth. Proceeding in the way indicated has the disadvantage of not recording the many facets where the techniques adopted and the facilities used in the Ellis case were not criticised, and were beyond any criticism. Instead, the focus will be on those aspects which have been the subject of scrutiny and dissatisfaction, inevitably giving an unbalanced impression of the interviewing process, unless the approach adopted by this Report is appreciated. The alternative would be to embark on an assignment not entrusted to me, a task unsuited to an Inquiry conducted by one person from a background of a single discipline, and an exercise which would extend the scope of this Report unreasonably, without advancing the resolution of the central issues.

A second aspect should be noted. One distinction between an investigation into a conventional abuse complaint, and a mass allegation case, is that the former will be supported by the normal resources and processes of Police and

other agencies involved, while mass allegation cases will require special planning and the establishment of a particular, one-off support structure, although ideally the theoretical framework for such a structure should be in place in advance. Dr Sas's report (see pages 13 – 15) gives valuable insights to this aspect. On the information before me, such organisational questions do not intrude on the matters still at issue in the Ellis case, and it is unnecessary for me to refer to them further.

Returning to the interviewing process, it would be desirable to start by defining certain terms.

Leading questions The concept of a "leading" question is universally understood as a question which suggests or implies the answer, e.g. "Did he touch you?" or "Did he touch you in the crotch?"; or which assumes facts in dispute, e.g. "when he touched your behind, what were you wearing?". (In each example, it is assumed that the child has not previously mentioned being touched, or being touched in the particular way.) Some writers use the term "suggestive", generally as including "leading" but sometimes in a context seemingly having a wider connotation.

Direct Like "suggestive", the term "direct" question may be open to more than one interpretation. I use it as meaning a question which *directs* the child to a particular topic, for example if a child has said the offender was wearing a coat, a later question may be "What colour was that coat"? Such a form of questioning is neither leading, nor otherwise objectionable. Some writers describe these as "specific" questions.

Open, closed Open questions leave the child with an open choice to answer in his or her own words, e.g. what happened then? Open questions often start with what, when, where, or how. Some open questions may also be described as direct questions, e.g . what were you wearing at the time?; or, tell me about that? Closed questions on the other hand seek a yes or no answer, without elaboration; e.g. did he threaten to do something to you if you told? Such a question may be leading as well.

Multiple choice e.g. (the child having said E touched her on the bottom) "when he touched you, was he standing up, or sitting down or what?". Such questions provide the child with a possible answer, and may be regarded as a form of closed question, and also as a form of leading question, although depending on the context they will not invariable be objectionable on either ground (for example, "did this happen on a school day or on the weekend?" is a multiple choice question, but would generally be unobjectionable).

I turn to the substance.

Planning Interviews should be thoroughly planned in advance**.** Those involving complex or multiple sexual abuse allegations, in particular, need careful supervision and management.

Information The interviewer needs to obtain advance information from the caregiver about the child's emotional, physical and mental development. The child must not be present at this meeting.

Neutrality A number of precepts can be grouped under this heading:

* the interviewer should keep an open mind, and not develop an emotional investment in the case.
* interviewers need to remind themselves that some children will make false allegations, and others may have nothing to disclose
* the recorded interview should not be regarded as a confirmatory exercise in respect of whatever the interviewer may have been told about previous informal allegations
* any bias on the part of the interviewer may be apparent to the child even though not articulated directly.
* the interviewer should not selectively reinforce particular answers, e.g. by acknowledging some but ignoring others
* the interviewer should not introduce personal material.

Preliminary The interviewer must not ask the child about any alleged abuse before recording starts.

Rapport stage The first stage of the interview should focus on building a rapport with the child. The interviewer should establish the child's understanding of the purpose of the interview. The interviewer should also ascertain to whom the child has already spoken about the matter.

Content stage In this, the most critical phase of the interview –

- the interviewer should use simple, open-ended questions
- leading questions, yes/no questions, or other forms of questioning giving only two choices, are to be avoided
- the interviewer should make it clear to the child that it is acceptable to answer "I don't know"
- at this stage of the interview, the interviewer should not prompt the child with information about the allegations obtained from other sources (this is exerting "social influence" on the child)
- the interviewer should avoid anything the child could interpret as rewards for allegations, or punishments for their absence
- the interview should be conducted in terms appropriate to the child's verbal abilities and comprehension level, and at the child's pace
- body diagrams should be used only after the child has made allegations, if the child cannot verbalise what happened
- Anatomically correct dolls should not be used with children too young to be able to treat the dolls as representations. There is controversy about their use in other circumstances: the international experts in this Inquiry did not comment adversely on their use as an adjunct in the present case. In the present state of knowledge, anatomical dolls should be used with caution, and only if the child cannot clarify what happened with the use of diagrams or ordinary dolls
- Anatomically correct dolls aside, some writers maintain that the use of props (e.g drawings, puppets, dolls, dolls' furniture, toys) may be helpful (see e.g. the Joint NZCYPS & Police

Operating Guidelines, para 5.7 above, at page 19); but there are contrary views e.g. those of Dr Parsonson and Dr Lamb in the present case

- interviewers must be alert to the child's lack of understanding, and the tendency of children to supply an answer whether or not they understood the question

- interviewers should be ready to test the child's allegations gently for possible alternative explanations. This may include exploring whether the child's knowledge of events is first hand

- if despite reports of earlier allegations, open-ended questioning does not yield results, the interviewer may proceed cautiously to more direct questions, but with an awareness that any resulting evidence may be suspect and open to challenge. Any such questions should be put in the least leading way, e.g. your mother told me something is worrying you. If such questioning produces relevant information, the interviewer should be careful not to continue in a leading style

Length Opinions vary, and in any event a fixed limit could not be appropriate for all children, or all situations; but there seems to be a consensus that generally, an interview should not exceed one hour.

Number of sessions Again, views differ; some say the aim should be a single interview only, while others would allow up to four. (The NZ 1996 Guidelines recommend one only). Repeated interviewing can put the reliability of the account at risk.

Contamination Although in this area too, there are differences of viewpoint, the weight of opinion is that contamination from sources outside the interview is a distinct risk.

<u>Additional points raised by "mass abuse" situations:</u>

- the outstanding feature is the increased potential for contamination, in several distinct ways – child to child, parent to parent, Police to parent to other parents, interviewer to parent to child to other parents & children etc

- Public meetings, parents' meetings & support groups are additional sources of contamination

- Interviewers should keep in mind that proved instances of mass abuse are rare

- In cases of multiple abuse allegations, the same interviewers interviewing a succession of children may compromise neutrality. Even the most neutral interviewer may be subconsciously biased through becoming so much more knowledgeable about the allegations, with the risk that the extra knowledge will result in leading questions

- The cautions already noted, against interviewers referring to information obtained from other complainants, are especially applicable.

8. TERMS OF REFERENCE (1)(a)(ii)
(risks associated with failure to adhere to best practice)

The judgment of the Supreme Court of New Jersey in the *Kelly Michaels* case stated:

> There is an enormous amount of literature on children's memory, suggestibility, ability to distinguish fact from fantasy……..Bulkley [an author] comments that the research is so overwhelming that even researchers cannot keep up with it….Moreover, the views and conclusions of the researchers and writers vary greatly (20)

My reading of the literature has confirmed the last comment. Thus there may be limited value in setting out views and counter-views about the harm or otherwise of (for example) repetitive questioning. Although it involves some repetition I will however rehearse some views expressed in the 1999 Home Office Paper (see under para 5.6), as a recent, authoritative study:

- Free recall is generally very accurate
- The amount and accuracy of recall deteriorates over time
- Younger (three to six year old) children appear to forget more rapidly than older children or adults
- Although, typically, free recall of younger children is more incomplete and brief compared to older children, it is no less accurate

- While isolated examples may be found of young children introducing fantastical elements into their reports, this is exceptional and does not necessarily invalidate other parts of the child's statement
- While questioning increases the amount of free information provided, prompted recall is less accurate than free recall
- Open-ended questions are answered more accurately than specific questions
- Specific questions are answered more accurately than leading questions
- Loss of accuracy is greater in younger than in older children
- The idea that children are infinitely suggestible and can be encouraged to make plausible allegations of abuse against an adult on the basis of a few leading questions has been refuted by research
- Nevertheless children can be vulnerable to suggestion, e.g. the interrogation process may distort their memory, or they may acquiesce to the views of the more powerful interviewer
- Children below six, in particular, may be prone to incorrect responding in some circumstances, e.g. an accusatory context, repeated suggestive interviewing, post-event misinformation, and memories implanted by others
- Younger children may have particular problems in answering yes/no questions accurately
- Concepts such as date and time, duration, frequency, measurement and location cause difficulty for younger children.

A further citation from the *Michaels* case - Professor Ceci (writing in 1987) is quoted as follows:

Relative to adults, children are more suggestible because they find themselves in more situations in which they are unfamiliar. As a consequence, children are likely to pay attention to anyone (especially an adult) who they believe knows how to behave in that situation…Younger children can be expected to be particularly sensitive to contextual cues in a verbal situation where the child is supposed to listen and respond

> to questions and instructions from an interviewer……Thus, the child will be susceptible to leading questions and may make an erroneous choice…or may invent answers to questions (22)

Thus (in relation both to questioning by parents, and formal interviewing by agencies) there is a considerable catalogue of techniques having the potential to detract from the accuracy of the child's reporting.

Understandably, no means have been found for measuring the extent to which accuracy may have been impaired in a particular case. As the Court of Appeal said in its 1999 judgment (see 35 – 36), at issue is what is essentially a subjective exercise of evaluating the weight to be given to a variety of matters, none of which is capable of measurement. Indeed, there are no means by which it can be determined whether accuracy has been impaired at all. Where, in prosecutions, these aspects are called into question, it is left to the fact-finding tribunal (the judge, in judge-alone cases, or the jury, in jury trials) to make that assessment. This is subject to the discretion of the trial Judge to exclude wholly unreliable evidence, see the 1999 Court of Appeal judgment at 35. In addressing that assessment, the tribunal may have the assistance of expert evidence (as happened in the Ellis trial) or may be left to its own background knowledge, instincts and common sense. The following remarks by an experienced trial Judge in the South Australian case of *R v Horsfall* (1989) 51 SASR 489 are pertinent:

> There was much evidence about the possible effects of multiple questioning and it will always be open to the defence in a sex abuse trial to show, if it can, that it would be dangerous to rely upon the evidence of the Crown's child witness because repeated questioning and discussion and attention have influenced the child's memory and reliability. No doubt it would be best if a child who makes allegations of sexual abuse were seen by a skilled interviewer straight away, before there can be any contaminating influence from family and friends and untrained interrogators. That did not happen here and, in the nature of things, it would be practically impossible to ensure that it always did happen. It is also possible to be too critical about the discussions within the family and pre-trial therapy in this case. Child witnesses have to live and there may be a long delay between allegation and trial (493).

Similar considerations apply regarding contamination. One can hypothesise a situation where seemingly the sequence of events shows a clear pathway of contamination, e.g. parent A tells Parent B of abuse to child A, Parent B questions child B, child B (who has been interviewed previously) now "discloses" similar abuse for the first time. Nevertheless child B's allegation

may be true; she may not have been able to bring herself to speak about it previously. Neither New Zealand courts, nor so far as I am aware those of other comparable jurisdictions, have taken the stance that such evidence should be excluded automatically. Again, it is left to the tribunal of fact to make an assessment of reliability, subject to the discretion of the trial Judge to exclude evidence regarded as wholly unreliable.

To summarise, in cases where either the interviewing practices or the investigations have fallen below the standards of best international practices, there is a risk the evidence so obtained may be unreliable. Whether that risk affected particular convictions requires an examination of the circumstances surrounding those convictions: for example shortcomings may have been confined to areas that did not affect any convictions, or particular convictions, or their nature may be such that the risk may be disregarded. On the other hand the shortcomings may be seen as sufficiently causative to create serious misgivings about the safety of the convictions or particular convictions. These considerations, here stated as a matter of theory, will be considered later against the facts of the case.

9. TERMS OF REFERENCE (1)(b) (whether the investigations & interviews conducted in accordance with best practice)

9.1 *The "Conviction" children*

Excluding the three quashed following the 1994 Appeal, thirteen convictions remain, relating to six children. In this next section of the Report, I summarise the videotaped interviews of these 6 children. I note here that I have viewed the tapes of many other interviews as well, but without obtaining any insights beyond those apparent from studying the interviews of the remaining six children. Of the tapes made by the "conviction" children, not all were played to the jury.

In each case, I then set out salient points of evidence relevant to contamination. Mainly, I have taken this from the depositions, as they generally contain a fuller account than the corresponding trial evidence. Inappropriate interviewing can be regarded as a form of contamination, but I deal with the interviewing as a separate topic, and confine the term "contamination" to the examination of the conduct of the parents.

9.1.1 **Complainant Z.** This girl, aged 5 at the date of the first interview, attended the creche from April 1988 to July 1991.

First interview – 27 February 1992

Z was anxious to talk about Peter, introducing the subject before the interviewer had finished the formalities. Asked what she had come to talk about, she immediately said Peter, and that he used to show her his penis in the toilets. She asked whether P and Q had been interviewed, as "they had some very nasty things happen to them". She saw Peter getting them to touch and suck his penis.

Asked directly whether Peter's penis had gone in anyone else's mouth, she said it went in hers, lots of times. Z demonstrates with dolls. When the interviewer tried to elicit further details, Z asked if she could leave. (Some of the dolls used are small dolls, not of the anatomically correct kind. Other, larger dolls may have been anatomically correct, but they are not used undressed.)

My comments: There was a lot of direct questioning, and I thought more could have been done to try to establish how Mr Ellis and the child were positioned when the oral sex occurred.

Second interview – 28 February 1992

After a long preliminary period, when Z was allowed to play, anatomically correct dolls were introduced**.** By direct questioning the interviewer elicited an account of an erect penis touching Z through and underneath her clothing. Z stated she was standing on the toilet.

My comments: A patient, skilful interview. A number of multiple-choice type questions. A new allegation emerged.

Third interview – 18 March 1992

Z said, immediately, that she knew lots of things about Peter. She described visits to Mr Ellis's house. She disclosed that he had touched her anal area with his penis, a new allegation. This happened when she was kneeling and he was standing. Z tried to demonstrate with anatomically-correct dolls, but perhaps missed the point that the interviewer was trying to establish the relative positions of the two persons. It happened in the toilet, and eventually Z said Peter was lying down. At page 21 Z indicated she wanted a break, and then that she wanted to go home. The interviewer persisted but without obtaining any further information of consequence.

My comment: the interviewer's attempts to have Z explain how the conduct happened in the toilet were unsuccessful. The interviewer continued when the child wanted to stop.

Fourth interview: 27 March 1992

Z spoke about Peter going to jail. She referred to Peter's "bad friends" at his house, where one man touched her with his penis. About 5 other children were present, but she was able to recall only one by name (not a complainant).

My comment: The allegation of conduct at Mr Ellis's house emerged for the first time. In fact the allegations on which the four charges relating to Z were founded emerged successively at the 4 interviews.

*Further interviews***:** There were 2 further interviews in October 1992, when Z made allegations of being touched with a knife, by a male, and also by a female teacher. No charges relating to these allegations were laid, and the tapes of the 5th and 6th interviews were not played to the jury.

Contamination Z's friends at creche included S (a particularly close friend), O, I, L, and T and others who were not complainants. In November 1991 Mrs D, with whom Mrs Z had been friendly for many years, told her that Mr Ellis had abused her son. After attending the first meeting Mrs Z questioned Z but she did not make any disclosure. Early in 1992, Mrs Z noticed some sexualised behavior between Z and T. She knew that Ellis was baby sitting T. Mrs Z discussed this with Mrs D and also with Mrs B. On 20 February 1992 Mrs D passed on to her a disclosure made by H, to the effect that Ellis had shown his penis to H and Z. Although realising this was contrary to the advice

that had been given, Mrs Z questioned Z. An appointment for interview was then made.

After the Knox Hall meeting Mrs Z contacted Mrs S and Mrs Q, passing on things that Z had said, involving their children.

Later, Mrs Z drove Z past a number of addresses, identifying places where Ellis had taken her.

The interviews in which the evidence leading to convictions emerged took place on 27 and 28 February and 18 and 27 March 1992, all before the Knox Hall meeting. There is no evidence that prior to the first of these disclosures, Mrs Z had been in direct touch with the parents of children who were making similar allegations (although as noted, she had been in touch with Mrs D and Mrs B). Her first contact with P and Q's parents was at a support group meeting which took place after the 27 February interview (Depositions 552). There does not appear to be any evidence of contact with other parents prior to the end of the series of interviews. For example her contact with Mrs S commenced after the Knox Hall meeting (Depositions 548).

9.1.2 **Complainant Q.** This girl, aged 6 at the date of the first interview, attended the creche from June 1987 to January 1991.

First interview – 9 March 1992

Q said that Peter made children put his penis in their mouths, and that he did this to her. It happened in the toilets. She saw him doing it to P, and another child. He also touched their bottom, and their clitoris. Q demonstrated on a doll how he touched her.

My comment: No criticisms of the interview.

Second interview –6 March 1992

Asked what she has come to talk about, Q speaks about Peter making them get out of the sandpit. He did face painting, which she didn't want, that day. He did mean things, made children put his penis in their mouths, in the toilets. On one occasion Gaye saw him making kids put his penis in their mouth.

Coming back to the secret touching by the gate, Q says it was tickling, not secret touching.

Peter took us to a big room with escalators, and did secret touching. This was at a place where lots of people were working at desks. He touched her on the bottom and the vagina.

My comment: Q seems a well informed child with good recall for names of people. A criticism of the interview is that no attempt is made to explore the extent that her knowledge is based on things she has been told. It seems obvious that this has happened.

The allegation was not the subject of a charge, and the tape was not played to the jury.

Third interview – 9 December 1992

Q elaborated on the visit to the room with desks. Allegations of oral sex. Also of offending by three men, at a place to which children walked. Again, these allegations were not the subject of charges, and the tape was not played to the jury.

Contamination Mrs Q had heard about complaints against Ellis before the December meeting, which she attended. Had a discussion with the children before then, but without any outcome. In March 1992 she learned that another child had stated her children had been abused. She then had a serious discussion with her children. Difficulty in getting Q to talk, eventually put a leading question to her to the effect that another child saw Ellis put his penis in her mouth, to which Q assented. The interview in which the evidence leading to convictions emerged took place on 9 March 1992, before the Knox Hall meeting.

As a regular attender at support group meetings, Mrs Q had contact with the parents of a number of other complainants, including all the conviction children.

9.1.3 **Complainant R** This boy, aged 5 at the date of the first interview, attended the creche from September 1988 to October 1991.

First interview – 3 April 1992

The interviewer encouraged R to build a model of the creche, with dolls representing the teachers. R said Peter was mean to the children, but reluctant to say how. You weren't allowed to tell, or you would die. He said that Peter urinated in people's faces. There were 5 or 6 children but R is reluctant to state

names. At 29 the interviewer said she had heard Peter had done bad things to him. At 32, she said she had heard R had told his mother, Peter had done mean things to him as well. R responds that Peter had urinated in his mouth, once. He demonstrated how in happened: R was sitting on the toilet, and Peter was standing, with his pants down.

My comment: R was reluctant to disclose any personal involvement, which eventually was elicited by leading questions. A patient, well conducted interview.

Second interview – 27 April 92

The interviewer brought R back to the subject of Peter urinating in children's faces. In response to direct questions R names one child (not a witness at the trial). R at first denied that it happened to him, then said it did. Interviewer probed him about the inconsistency. R said it happened to lots of girls, but would not give more names.

My comment: This interview contained criticisable techniques – direct and leading questions early in the interview, where (although three weeks had elapsed) the interviewer appeared to try to carry on where the previous interview had ended. However, this tape was not played to the jury.

Third interview – 28 October 1992

R commenced by saying he had lots of things to tell. He described a building other than the creche, and Peter having a ladder, and creeping into a room to do mean things, poking sticks up children's bottoms. Other men with odd haircuts were present: names he recalled were Spike, Boulderhead, Yuckhead and Stupidhead. Women were involved as well.

My comments: the description of the building *might* be to features of the Cranmer Centre, and some of the events have a certain similarity to the "circle" incident described by Complainant X. R and X were at the creche at roughly the same time. X was interviewed by the same interviewer on the same day, but his account of a "circle" incident was given many weeks earlier.

<u>Contamination</u> The R family lived in the same street as P and Q. Mrs R was in touch with their parents, and L's parents, before the investigation started, because of behavioural concerns. Mrs R attended the December meeting, and

understood the advice about care in speaking to children. She did not think R was involved.

In February 1992, after returning from an overseas trip, she heard of disclosures by Q. On 12 or 13 March she told R that some children had said that Ellis had pulled down their pants and touched their bottoms. After R had made disclosures, an interview was arranged.

The interview in which the evidence leading to a conviction emerged took place on 3 April 1992, immediately after the Knox Hall meeting. Mrs R had previously learned that Mrs Q's son had made an allegation against Mr Ellis (Depositions 581). She had had little contact with any other parent prior to the first interview.

During the period while R was interviewed (April – October) Mrs R attended parents' support group meetings, and had contact with Q's and L's parents.

9.1.4 **Complainant S** This girl, aged 6 at the date of the first interview, attended the creche from November 1987 to November 1990.

First interview – 1 May 1992

S brought a picture book with her, prepared with her mother's help. Peter said you had to drink his urine if you went in the middle toilet. Peter urinated on her face. She saw this happen to Z, and another girl.

S said she, Z and another walked to Peter's house. Although the interviewers stated (at 41) that she knows there were things S told her mother about Peter's house, S does not refer to any offending there.

S described an incident where Peter put excrement into Z's mouth.

At 48 S said she had related everything she had told her mother. The interviewer said that S had told her mother "some stuff about a bath". S then described being in a bath with Mr Ellis, and washing each other's private parts.

My comments: An interview including direct and leading questions, and some social pressure. Although it was a long interview, the tape indicates that S remained bright and cheerful throughout.

Second interview – 28 May 1992

Reference to Mr Ellis putting his finger in a puppy's bottom. Mainly however the interview focussed on the bath incident. By a leading question (what the interviewer had heard) she elicited that Mr Ellis put his finger in her bottom.

My comments: In a pre-trial application (judgment No. 4, 20 April 1993) the Crown accepted that the charge that Mr Ellis put his finger in S's bottom ought not to proceed, because of the way the allegation was elicited. The tape was not played to the jury.

Third interview – 3 August 1992

Asked what she has come back to tell today, S said "all that bath stuff." She came to what she called "the scary part", Mr Ellis put his penis in her vagina. She said she was kind of sitting on him, and made a drawing of them in the bath, describing it as "a sexing". She said that they went to Peter's house in a car driven by Peter, whereas other evidence is that he never drove.

S demonstrated what happened in the bath with small dolls, and showed Mr Ellis as lying face down. At page 40 the interviewer led into a new topic, and elicited that Mr Ellis put needles up her bottom. Z had told S that he had done the same to her.

In summarising what S has said (49 – 50) the interviewer stated that Mr Ellis had put his finger in, rather than on, her bottom.

My comments: Leading questions were asked about the needles incident, and the attempts to have S explain how the bath incident happened seem inept. Note however that the jury brought in a not guilty verdict in respect of the needles, and did not accept the allegation of penetration in the bath.

<u>Contamination</u> Mrs S did not attend the December meeting. Mrs Z told her that according to Z, S had been present at some events, but S denied it. Mrs S had also had a conversation with Mrs Q. Mrs S attended the Knox Hall meeting. After that, she had a conversation with S while having a bath together. At this stage S started volunteering information about Ellis, including the incident in the bath. Together they prepared a book, describing among other things places she had been with Peter.

The interview in which the evidence leading to convictions emerged took place on 1 May 1992; the bath incident was also discussed in the 3 August

interview. Mrs S attended support group meetings where she met other parents, but this was after 1 July 1992. S was friendly with I and Z.

9.1.5 **Complainant O** This girl, aged 8 at the date of the interview, attended the creche from January 1987 to July 1989.

Interview – 15 May 1992

O spoke of Mr Ellis doing "mean" things, but nothing sinister emerged. At page 26, and again at 29, the interviewer led with reference to things O had told her parents. Eventually (but not in response to a question leading on this point) O stated that Mr Ellis had "poked" her in the crutch – the foundation of the only charge relating to this child.

My comments: a patient interview with an articulate 8 year old who gave a catalogue of "mean" things by Mr Ellis before finally making a disclosure. No objection that I can see.

Contamination Parents did not attend first meeting. After Mrs O had been to the Knox Hall meeting they spoke to O, saying Police believed Ellis had done bad touching. They followed the guidelines from the meeting. O said she would like to talk to Police, interview arranged. It does not seem O's parents had significant contact with other parents, nor that O had any with other children.

9.1.6 **Complainant X** This boy, aged 6 at the date of the first interview, attended the creche from February 1989 to February 1991.

First interview – 14 May 1992

X stated that Mr Ellis "fiddled with his rude parts" when he was very small. Charge dismissed at depositions.

Second interview – 4 August 1992

X came back because he had more things to tell about Peter. A number of things happened at Mr Ellis's house (they went there in a car driven by Mr Ellis). He made X have a bath with him. During this, he made him eat excrement. Mr Ellis dressed up in costumes. He made X touch his penis for a long time, until white stuff came out. Mr Ellis put his penis up his bottom. There were other men present who put their penis on X's bottom, Robert and three others. Peter took photos of the nasty things they did. At 35, in answer to

a question "where else could a penis go", X answered "he put it in my mouth as well".

My comments: this interview resulted in 3 charges – inducing indecent act, indecent assault (placing penis against anus) and sexual violation (connection of mouth with penis), findings of guilty being returned on all. The allegation of sexual violation was elicited by leading, although the experts did not comment adversely. This apart I saw nothing objectionable in the way the interview was conducted.

Third interview – 5 August 1992

Mr Ellis took X to a three storey building, with a library on top, where there was a trapdoor. Mr Ellis drove; his mother was there. Four other named boys, including Y. Others present were Spike and Boulderhead, and two women. Peter stuck a sharp stick up his bottom, and made it bleed. Peter and his mother took photos. There were 19 friends present, and they all put their penis in his bottom. Peter's mother made him take pills and drugs, and drink beer. Peter tried to put a ladder up his behind (but adds that this didn't really happen).

My comments: the way the account was elicited seemed unobjectionable. The tape was not played to the jury.

Fourth interview – 6 August 1992

X and 3 other children (one, a complainant) at 2 storey house in Hereford Street. The "circle incident" – a circle drawn on the floor, various adults and some female creche workers, the children in the middle naked, told to kick each other. Then the children were tied up and put in ovens. Needles put up my penis. Children had to put penises in each other's mouths. Two females pretending to have sex on floor.

My comments: the allegation of putting a needle in the penis led to a charge, on which the jury acquitted. There is some direct questioning.

Fifth interview - 28 October 1992

An account relating to Room "20" – the interviewer elicits that X had been back to the building with his mother. Four other children present, including two complainants. Mr Ellis's mother hung the children from the ceiling in

cages. Female teachers present. Various persons hurt them - burning paper, sticks put up their bottoms. Secret stairs, trapdoors, ladders.

My comments: there was questioning of a checking kind, as X came out with more allegations involving a widening circle of creche workers. This tape was not played to the jury. There was another, cancelled, appointment for an interview, where X was expected to tell of an experience at a graveyard, where teachers put X and other children into coffins.

Contamination Mrs X did not hear about the investigations until the Knox Hall meeting. Ignoring the advice not to ask the child directly, she questioned X who would not discuss the subject, so the first interview was arranged. After that, Mrs X questioned him regularly whether Ellis had hurt him in some way, and whether he had touched him on his penis or bottom.

The interview in which the evidence leading to convictions emerged was the second interview, which took place on 4 August 1992. Although Mrs X had been in contact with other parents before this date (having attended the first meeting of the support group on 1 July) she maintained that before 4 August she had no knowledge of allegations being made by other children. In particular, she denied having any knowledge of disclosures involving Mr Ellis having a bath with any child, which was one of the allegations X made in his 4 August interview. According to Mrs X, her extensive contact with other parents was mainly after the August interviews.

The night before X's second interview, Mrs X and her partner had a serious talk with X, who made a number of disclosures. Although at the trial Mrs X did not accept the visit was on that particular day, it is likely that on the morning of the interview she drove X to have a look at 404 Hereford Street. It follows that someone had spoken to her about some event involving that address before the second interview (Mrs X thought the information came from Mr Y). That evening X made disclosures to his brothers, while his parents were at a meeting at the home of Mrs Y, the mother of another complainant, which was also attended by Mrs D. The parents also questioned him before each of the succeeding two interviews. After this series of interviews Mrs X took him to the Masonic Lodge and the Cranmer Centre. Mrs X saw Mrs D's notes in August 1992. She was in regular contact with Mrs Z.

9.2 Professor Davies' opinion

Professor Davies' and Dr Sas's views appear in full from their reports, which are attached. At this stage I summarise their assessments of the interviews of the six "conviction" complainants. I have added some explanatory comments of my own, in italics.

Dealing with Z, Professor Davies commented that he found it difficult to see how the clear allegations contained in the first three interviews could have arisen as a result of defective interviewing practice. There was some leading, but anatomically correct dolls were appropriately used. Referring to the crucial question, whether Z was speaking of personal experiences, or relating a coached story, Professor Davies stated it was hard to see how such a plausible and reasonably detailed account could be attributable to coaching alone. (*These interviews gave rise to three charges, on all of which the jury returned a verdict of guilty.)*

In relation to the fourth interview, Professor Davies commented there was nothing in this interview which convinced him that Z visited Peter's house, or was assaulted by a person called Joseph. (*This allegation was the foundation for the fourth charge involving Z, which also resulted in a guilty verdict.)* The fifth and sixth interviews, Professor Davies said, subtracted from, rather than added to, Z's credibility, although not through any deficiencies in the interviewing. (*In fact, as Professor Davies noted, these tapes were not played at the trial.)* He did not consider that these interviews should be regarded as diminishing the strength of the earlier allegations, made some months previously.

In relation to Q, Professor Davies had no criticisms of the interviews. In the first interview he considered that the allegations were clear and could not be attributed to any obvious prompting or leading. The main issue, in his view, was whether the allegations could have been prompted by discussions with others. (*The jury convicted on the charges arising out of this interview).* With

regard to the second and third interviews, without being critical of the interviewing itself Professor Davies thought they were of limited evidential value. (*No charges arose out of these, and in the event they were not played to the jury.)*

Regarding the interviews of R, Professor Davies stated that the first interview was conducted in an orthodox manner, and departed from the ideal only in the interviewer's use of prompts concerning what R had told his parents. From this interview, there emerged the only charge involving R on which Mr Ellis was found guilty. In relation to the second interview, Professor Davies commented on the repetitious questioning, but this tape was not played to the jury. Turning to the third interview, and the late allegations made in its course, Professor Davies commented on the parallels with the fifth interview of X. (*Curiously, they were on the same day. On the other hand, X referred to Spike and Boulderhead in his third interview, on 5 August 1992, whereas R, although mentioning these names – and some others – did not do so until many weeks later, in his third interview on 28 October 1992.)* Apart from commenting on the number of specific questions, Professor Davies did not criticise the interviewing technique, but doubted the reliability of the allegations involving the group of adults, and that sticks were put in the complainant's anus. Professor Davies referred to the real risk that large elements of the account of this incident could be unreliable, driven by repetitive questioning, negative stereotyping, the conflating of unrelated events, and the sharing of information between families. *(The only charge arising out of the third interview resulted in a not guilty verdict.)*

In the case of S, Professor Davies was of the opinion that the interviews were too long, and contained too many specific questions. He considered that the greatest evidential weight was in the toilet cubicle incident *(on which the jury convicted)* and the least, in the needle incident *(where there was an acquittal).* He considered that the first version of the bath incident was the least prompted *(the jury convicted)* and that the latter versions could have been influenced by

other events *(the jury did not accept the subsequent version, in which S alleged a degree of penile penetration occurred).*

In relation to O, Professor Davies did not express any reservations about the interviewing. Nor, from the interviewing, could he find any evidence suggestive of the influence of an adult.

Coming to X, Professor Davies was "generally impressed" with the quality of the first interview. In regard to the second, he found few leading questions, although there were a lot of direct, focussed ones which however elicited a good deal of relevant detail. There was little indication of a rehearsed account. *(The three charges on which there were guilty verdicts were all founded on this interview.)* In Professor Davies' words the later tapes showed a gradual spiral into more elaborate allegations embracing a widening circle of helpers and teachers at the crèche. He considered that in the absence of any corroboration, other explanations must be sought. Secret passageways, he said, were the stuff of children's fictions. (*I comment first, that the only charge based on these later interviews was dismissed, while undoubtedly, the evidence established the presence of what could be described as "secret passageways" at 404 Hereford St, to which, it could be inferred, X was taken.)*

Professor Davies' overview. Although the interviews were conducted before the introduction of national standards, Professor Davies considered that *by today's standards* the quality of the interviewing stood up "surprisingly well". While there was room for some criticism, there were few of the gross violations seen in the *Kelly Michaels* case. If there was one "major weakness" it lay in the number of interviews. (*In this respect it may be noted that many of the later interviews were not played to the jury; in other words the prosecution did not rely on them and the defence chose not to request to have them shown. In fact only 1 of the last 16 tapes was played. Those <u>not</u> shown included 5 third interviews, 3 fourth interviews, 4 fifth interviews, and 2 sixth interviews.)* In sum, Professor Davies reported, the standard of interviewing was good, and exceptional for the time the interviews were made. Mistakes were made, but

these were insufficient to explain the content of the allegations of events at the creche.

In regard to allegations of events outside the creche, Professor Davies was of the view that the repeated use of specific questions may have contributed to confabulations by some witnesses; but he repeated that X and S provided plausible accounts of outside events, which could not be attributed readily to undue prompting or inappropriate questioning. (*Five of the remaining 13 convictions related to events outside the creche; but four of those 5 were based on the evidence of X and S.)*

9.3 Dr Sas's opinion

Dealing first with Z, overall the evidence in the first four interviews obtained from this child complainant was reliable and not the result of suggestibility factors in the interview process, or poor source monitoring. Her disclosures were very convincing given her age and level of maturity. The interview style produced good evidentiary interviews.

Dr Sas did not consider that Z's testimony had been contaminated by her contact with other children. She found assessment of the mother's part more difficult, but was not convinced that the mother had contaminated the evidence, although she may have influenced the order in which events were disclosed.

In summary, with respect to Z, in Dr Sas's opinion the evidence upon which the four guilty charges were based was reliable and emerged within the context of well conducted investigative interviews. Although the mother did not follow the Police directives, Dr Sas did not believe she contaminated her child's evidence to the degree that it was unreliable.

With regard to Q, Dr Sas considered the first interview was soundly conducted *(in the event, it was the only one played to the jury.)* She had concerns about the effect of the mother's questioning after that. In summarising, Dr Sas stated that while agreeing that the mother's questioning of her child was too intrusive prior to her interviews in November and December of 1992, this was not the

case prior to the child's first interview. Given the quality of the first investigative interview, the child's clarity and demeanor, and the contextual details provided by her, as well as her performance on the stand, it was her opinion that the evidence upon which the convictions were made was reliable.

Turning to R, while Dr Sas had criticisms of the second interview (which was not played to the jury) she considered that appropriate techniques were used in the first and third.
In her summary, she said the evidence R provided to the interviewer and the court, upon which a finding of guilt was obtained, was reliable and not tainted by the investigative process or by parental contamination.

In regard to the first interview of S, Dr Sas was critical of the pressure used to bring out more about the bath incident. However, she stated that despite some leading questions, the information the child gave appeared credible, in that she offered many details and insights which were not in response to direct questions. In respect of the second interview, Dr Sas said that overall the interview was adequate, except for the blatant leading question (which resulted in the interview not being played). Dr Sas commented adversely on the way the allegation regarding the needle was elicited in the third interview, and on the unclear demonstration with the dolls; but she considered that the evidence about penetration was credible (*in the event, the jury brought in not guilty verdicts on the charges arising out of this interview).*

In reaching an overall conclusion Dr Sas took into account the evidence that the child's mother was responsible for asking leading questions and putting together a 'book' with S about her experiences, and the fact that there were some leading questions in her investigative interviews. Nevertheless Dr Sas was of the opinion that the child's evidence upon which the convictions were based was reliable.

Coming to O, Dr Sas's view was that her evidence of inappropriate touching was reliable, and not contaminated in any way by her parents' questioning of her, or by the nature of the evidentiary interview.

Dealing finally with X, Dr Sas made some critical comments regarding the first interview, which did not result in any count. In regard to the second, she stated it was well conducted, with a combination of open ended and direct questions. Although there were a few leading questions, the child offered a lot of detail on his own initiative. The rapport was better than in the first interview, and the child seemed more comfortable with the interviewer. Dr Sas said that overall the interviewing style was balanced with minimal suggestion. The interviewer checked with the child if he had disclosed the information to anyone else, and also where he had obtained his information. The child was attentive to the questions, and responded more willingly than in his first interview.

In respect of the third and fourth interviews, Dr Sas considered that the interviewer did not sufficiently challenge the child's account. She thought that the allegation (in the second interview) that Mr Ellis placed his penis against the boy's bottom was a reliable disclosure but when repeated in the third, was imbedded in the context of a larger, bizarre account. However, there were consistencies across both interviews. Dr Sas noted that the fifth interview revealed some inconsistencies.

In summarising her views regarding the interviews of X, Dr Sas describes these as the most contentious of those involving bizarre allegations. She considered that a possible explanation was that the child was abused in many of the ways described (including the "circle incident") but the disclosures brought forth a strong post traumatic stress reaction, exaggerated fears and an over worked imagination, in the course of which he became increasingly suspicious of an increasing number of people, and had difficulty differentiating threats or tricks from events that really happened, for example being hung in cages. Dr Sas considered that fears of the threats made by the offender likely increased as he disclosed the abuse.

Regarding the effect the mother's conduct may have had, Dr Sas agreed that X's mother was over involved in questioning him and taking him to sites, that she was aware of allegations by other children, and was convinced that he had

been a victim of ritual abuse. However, this still did not account for the amount of detail the child provided and the disclosures made. The descriptions he gave of the abuse with the offender contained contextual details which Dr Sas considered were credible.

Dr Sas's overview. Overall the investigative interviews as a whole were reasonably conducted, and in accordance with standard practice. Regarding possible contamination, Dr Sas did not feel that the evidence of the six remaining "conviction" children had been seriously affected by contamination. Their evidence was reliable, and Dr Sas expressed the view that there would probably have been more convictions, had the contamination issue not been given such prominence.

9.4 My comments

9.4.1 Some opening remarks to give context. The Terms of Reference do not require me to attribute or apportion blame to any individuals, so my comments should be understood in that light. It should also be borne in mind that since the interviews, more than eight years have elapsed during which period there has been much research and writing on the topic of interviewing child complainants. The Terms of Reference require the performance to be measured against present day standards; but at the time, no such standards had been published. The English Memorandum of Good Practice does not appear to have been printed until December 1992, while the New Zealand Guidelines were not issued until 1996. These relate to interviews, not investigations. Indeed even today there are no universally acknowledged standards but the Terms of Reference recognise that standards have been published in particular jurisdictions, including New Zealand, and that from these, and other sources, it should be possible to say at least in a broad sense, what is standard practice according to international practice. There will not be agreement on every detail. Finally, all standards and guidelines try to set out the ideal, which is unlikely to be achieved uniformly, and certainly not in all of a huge series of interviews. Failure to achieve the ideal does not automatically mean the evidence resulting from the interview is suspect.

9.4.2 I first deal with some general aspects, relevant to the interviews.

Structure. Under section 3.2 above I referred to the issue of the interpretation of the term "investigations" and the way the participants and the Inquiry have addressed it. The submissions on behalf of Mr Ellis did not maintain that structural deficiencies contributed to the outcome. The Crown submissions rehearsed the structural arrangements, referring to the special units in Police and Social Welfare which had been established before the events happened. They noted that three well qualified interviewers, of appropriate practical experience, were assigned to carry out the interviewing, with the assistance of access to an outside psychiatrist. Three specialist Social worker positions were created especially to assist with the project. The unit manager was himself an experienced psychologist. The facilities and equipment were appropriate, the technical quality of the tapes was excellent, proper records were kept and there was early input from the Crown. As these matters were not the subject of any adverse comment I need say no more about them. The criticism was directed almost exclusively to the interviewing itself and conduct immediately connected with it, and the contamination said to have been caused by parents.

Use of the same interviewers. I have referred to the potential downside of many children being interviewed by the same person. The ideal, of many different interviewers, has to be balanced against the reality that few if any agencies, anywhere, would have the necessary resources, where over one hundred children had to be interviewed. However, the fact that the same person conducted the majority of the interviews is a valid reason for scrutinising the records carefully for interviewer bias. Here the New Zealand practice of meticulously videotaping the interviews is a significant aspect. Neither the experts nor I saw evidence of bias.

Number of interviews. Criticism under this head is valid, not only because of the number of times some of the children were interviewed, but the length of time over which the process continued. One must have some sympathy for the interviewers, faced with parents' requests for further interviews, in the

expectation of disclosures which did not always eventuate. Had significant evidence been obtained at the later interviews, this would have been a concern. However, this was not the case, and as pointed out elsewhere, most of the late interviews were not played to the jury.

Monitoring. The experts did not regard Detective Eade's position as monitor objectionable and Dr Sas in fact commended it. Where, as here, interviews have been competently videotaped, any bias or improper practice resulting from a monitor's intervention is readily apparent.

Length of interviews. A few were open to criticism, not just because of their length but because the interviewer ignored the child's wishes to stop. Again, the problems confronting interviewers in circumstances such as these are appreciated. Some of the children's narratives covered much ground and multiple, complex events – compare the case of O, who in essence disclosed one happening, resulting in a single interview completed in reasonable time. As with the issue of repeat interviews, had significant evidence emerged at a late stage of the particular interviews, this would have been a concern but generally this did not occur.

"Don't know". Theory would have it that it would be preferable if interviewers consistently explained, early in the interview, that the child was entitled to answer I don't know, or can't remember. One can understand that this would not be helpful in inducing reticent children to speak, but at least one would expect that to be regular practice with those not reluctant to make disclosures.

Testing accounts. Again, no doubt the theory is easier than the practice. Children will usually detect when they are being doubted, and may select answers thought more likely to please the interviewer, or become reluctant to continue with an account which they perceive is not being believed. Nevertheless, in some of the interviews I thought there could have been more probing.

9.4.3 *Contamination*

First, I address the systemic aspects discussed by Dr Sas, which are summarised in section 7 above. By the standards of best practice, there were the following shortcomings:

* Although the subjects were dealt with orally, at the December 1991 meeting there should have been a written hand-out advising parents how to handle disclosures made by their children. The document ought to have cautioned them against sharing such information, and advised them not to tell their children of disclosures made by others. It would also have discouraged the direct exchange of information between children until interviewing finished. I am sceptical however whether written cautions would have been any more effective than those given orally.

* The content of the written hand-out provided at the March meeting could have been improved. Some of the information may have tended to increase concern rather than lessen it. Again, given the scope of the investigation, and the high public profile it obtained, I doubt whether any better worded document would have allayed the parents' concerns.

* The reference to "support for parents" was problematical. As Dr Sas recognised, the parents would have supported each other anyway. However, stronger steps could have been taken to try to limit the exchange of information, as noted under the first bullet point above.

* The dissemination of information about behavioural symptoms could have been handled better.

I readily accept Dr Sas's expert opinion that in these respects, it would have been desirable to take stronger steps in the hope of reducing contamination. They certainly should be kept in mind in any similar investigation in the future. However, given the understandable fears of any parent in this situation, and in particular, the level of concern generated by individual parents, I do not consider the absence of these steps made any difference. The problem was not the absence of the right messages; by and large they were given, and those parents who were able to control their anxiety and maintain objectivity took them on board. Others, despite hearing the same advice, were unable to follow

it, and in some instances, deliberately declined to do so. I doubt that a stronger message would have met any different response.

Second, I address the interaction between parents, the contact between children, and the conduct of some parents. Some broad facts are not in doubt. As would be expected in any mass allegation case, many parents were in frequent contact with one another. This is unavoidable; regardless of advice, parents would not sever connections with other parents which had been in existence (sometimes for years) before the events occurred. As will often be the case some parents lived in the same neighbouhood. It is both understandable and unavoidable that in such situations parents will turn to one another for reassurance and support.

Specifically, the parents of some of the conviction children met regularly at support group meetings and, it is safe to infer, exchanged information. Some of the conviction children had contact with one another and again, that would be expected in any such situation. While ideally one would one like to go further and assess contamination by a timeline, as suggested by Professor Davies, there are too many imponderables to enable any reliable assessment to be made. There is no sufficient precision as to the dates when parents or children were in contact with one another, or as to what information was exchanged, or when sites were visited, and so on. In section 9.1 above, under the *Contamination* subheadings, I summarised the main points arising from the evidence in relation to each of the conviction children.

A further feature which can be taken as established is that some of the parents questioned their children in a manner contrary to the advice given at the meetings. To a greater or lesser extent this happened with most of the conviction children. A lot of notes were made but since, with an isolated exception, these conversations were not tape recorded, there is no certainty regarding how these interviews were conducted. The parents of course were extensively cross examined about them at depositions and, more selectively, at trial.

Where abuse is suspected, *ideally* no one would talk to the child before a formal interview. But as noted judicially, in extracts cited earlier in this Report, such is not the real world. Usually, the formal interview will be

preceded by a conversation between the child and parents or other caregivers. Thus, the possibility of contamination through this source is generally present. The issue becomes one of degree.

It is over formalistic to describe the non attainment of the ideal as being not in accordance with the processes "accepted internationally as best practice", to use the language of the Terms of Reference. As explained there has been no attempt to formalise best practice. Published research shows however that children's accounts can be contaminated by discussion with others, and it is uncontroversial to say that the risk of such contamination should be minimised. In the present case, by any standards there was excessive questioning and other potentially contaminating conduct (site visits) by parents.

9.4.4 *Summary*

* The formal interviewing was of a high standard for its time. Even by present day standards it was of a good overall quality. The interviews did not meet best practice standards in every respect, and if that degree of perfection were the test, few if any interviews of this kind would pass.
* Aspects of the systems set in place for the investigation could have been improved. However, that made no significant difference to the outcome.
* Questioning and investigations by some parents exceeded what was desirable and had the potential for contaminating children's accounts.

10. TERMS OF REFERENCE (1)(c) (the nature & extent of risks to which any breaches of best practice give rise)

10.1. *Interviews.* From the remarks I have made above, both in dealing with the particular interviews (para 9.1) and in my general comments (9.4.2) it will be apparent that in my opinion, the interviewing process had imperfections. In assessing the risks arising from those features where the interviews did not meet best practice standards, it is appropriate to distinguish between causative and non-causative shortcomings. If a particular allegation was brought out by

a "blatantly leading" question, but the tape was not played to the jury, the event cannot have caused Mr Ellis any prejudice. Or, if the tape was played, but the jury saw for itself that the allegation was elicited unfairly, and brought in a not guilty verdict, again there has been no prejudice.

Because of the videotaping procedure, in a case such as this the nature of the interviewing is transparent. Further, to repeat a comment made by the Court of Appeal, although the interviewing requires high professional skills, in its application it is not an arcane process. What is happening, whether it is fair or appropriate and the effect on the child are all matters readily apparent to a lay person. In the Ellis case, the jury not only viewed the tapes, the whole process was elaborately dissected and commented upon by experts on both sides, in the course of the trial.

When individual outcomes are examined, it becomes apparent that the Ellis jury exercised considerable discrimination. I draw attention to a number of examples.

* In S's third interview, for the first time she described an incident where Mr Ellis put needles up her bottom, brought out by leading questioning. Also, the interviewer tried to have S describe how, in the "bath" incident, Mr Ellis attempted to put his penis in S's vagina. However, she did not achieve clarity. During the trial (HCT, 102:24) S agreed it was only after she had spoken to X, that she remembered about the needles, and the attempted intercourse. In respect of both the charges grounded on these allegations, the jury brought in verdicts of not guilty, although finding Mr Ellis guilty on 2 other charges based on this complainant's evidence.

* Mrs D showed Mrs R a list of things which children alleged had been done to them. Prior to that, R had disclosed the urinating in the face, at his first interview on 3 April 1992; the jury convicted in a charge including this allegation. However, the other charge involved placing sticks up his bottom; this was on Mrs D's list and although Mrs R denied telling R about it, the jury acquitted.

* X's fourth interview included the "circle" incident and other events, some of which the jury may have thought were fantasy. Although there were verdicts of guilty on three charges based on an earlier interview, in the case of the charge arising out of the fourth, the jury acquitted.

* It was apparent that Y's mother had spoken extensively to him, and taken him to sites; also that she had assured him she believed even his more bizarre accounts. The jury acquitted Ellis on the charge based on Y's evidence.

Notwithstanding the imperfections which have been noted, in considering the passages leading to charges on which convictions were based, generally I found that the evidence emerged in a credible way. Subject to isolated lapses the interviewers resorted to leading questions, usually mild, only when conventional methods had not elicited information. They were rarely coercive, and remained neutral throughout. The inquiry must have generated considerable pressures on the team, and some of the interviews were extremely trying, yet the interviewers never lost patience with any child, and successfully eased the multitude of complainants through successive difficult experiences with a minimum amount of additional stress. It would have been better to cut some of the interviews short, and to keep the number of interviews down, but having regard to the outcomes, Mr Ellis did not suffer any prejudice as a result.

In reaching a conclusion I take into account the opinions expressed by the two international experts. Professor Davies stated that the mistakes which occurred were insufficient to explain the content of the allegations regarding events at the creche. The reservations he expressed affect only one of the 13 convictions.

Professor Davies has been careful to point out that the interviews have to be considered in the wider context of the whole of the available evidence. He would not say that of itself, the content of the interviews proved the charges against Mr Ellis (of course, as he noted earlier, the experts were not required

to express an opinion on that) but the gist of his concluding comments, as I understood them, was that the tapes provided credible evidence of the offences on which convictions were entered.

Dr Sas criticised some of the interviews, but mainly those which were not played to the jury. She criticised an interview (with S) which was played, but it did not result in a conviction. Dr Sas regarded the interviews with X as the most contentious, but concluded that overall, they had been conducted in a reasonable way. She considered that the children's evidence on which the convictions were based was reliable.

I am conscious that, as noted elsewhere in this Report, other well-qualified experts have expressed contrary views. The structure of the Terms of Reference made a prominent feature of the involvement of at least two experts of international standing. The expertise and experience of Professor Davies and Dr Sas is clear from their CVs. Professor Davies has had a particular involvement with the formulation of guidelines for on-camera interviewing of child complainants. Neither expert had any previous connection with the Ellis case. They had available to them all the material relevant to the Terms of Reference, and worked independently of one another. In regard to the standard of interviewing they expressed similar opinions. Against this background, I give a good deal of weight to their conclusions.

The interviews were subjected to intense scrutiny at depositions, during the extensive pre trial applications, and at the trial itself. A number of tapes which were the subject of valid criticism were not played. Some of the charges fell by the wayside, and the jury rejected others. The guilty verdicts on the remainder can be regarded as resulting from well-tested evidence, deserving high weight. In general, there was a lack of connection between the shortcomings and the allegations on which convictions were founded. I consider that the shortcomings did not give rise to a significant risk that the convictions were founded on suspect evidence.

10.2 *Contamination* This was the stronger aspect of Mr Ellis's submissions. In brief, some parents questioned their children inappropriately. They did so against a background of interaction between parents, and the dissemination of knowledge among them, of what other children had disclosed, or were rumoured to have disclosed. Some parents took their children to or past sites where it was thought abuse could have taken place. The existence of a risk that these processes contaminated the children's accounts cannot be denied.

This however is a question of degree. As Professor Davies said, in itself consultation between caregiver and child does not invalidate evidence; if every witness, whether adult or child, who had discussed the content of their evidence with a loved one were excluded from testifying, there would be precious few trials.

Professor Davies indicated that some of the more improbable incidents reported by two or more children may have had their origins in cross-talk between families. He also considered that the visits to locations may have coloured accusations made in the later interviews. However, he did not believe that cross-talk alone was sufficient to explain the similar accusations made, particularly in relation to events in the creche toilets.

In relation to each conviction child, Dr Sas examined the possibility of contamination carefully and in detail. She considered that Z's testimony had not been contaminated by contact with other children. The mother's role was more contentious, but Dr Sas was not convinced she had significantly influenced the content of the disclosures at the first four interviews (the fifth and sixth tapes were not played to the jury). Dr Sas was of the opinion that Z's evidence on which the charges were based was reliable. Likewise, with R and O she considered that the evidence provided for the charges which resulted in guilty verdicts, was reliable, and not tainted by parental contamination. Regarding Q, while Dr Sas thought the mother's questioning before the second and third interviews was too intrusive, this did not apply to the first, on which the convictions were based (the second and third were not played to the jury). Dr Sas considered that the evidence given in the first interview was

reliable. In the case of S, Dr Sas stated that despite some leading by the mother, the evidence was reliable. With X, although recognising that the mother became over involved in investigations, Dr Sas was satisfied with the reliability of the evidence on which the convictions were based.

In summary, Dr Sas recognised the presence of some contamination. However, she did not feel that the evidence of the allegations on which the convictions were based was seriously affected. In all instances she considered that that evidence was reliable.

Again, I give weight to the opinions of Professor Davies and Dr Sas, for the reasons given earlier. The experts' conclusions strongly reinforce my own opinion. I have accepted that questioning and investigations by some parents exceeded what was desirable and had the potential for contaminating children's accounts. Also, there was much cross-talk between families. However, I am wholly unconvinced by the proposition that these events produced the detailed, similar accounts given by so many children, in separate interviews stretching over many months. In some instances (for more detailed comment, see section 9.1 above, under *Contamination*) the prime opportunities for contamination occurred after the particular child had made the disclosure leading to a conviction. This applies strongly to the cases of Z and O, and to a lesser degree to S and X.

11. TERMS OF REFERENCE (3)

(whether any matters which give rise to doubts about the assessment of the children's evidence to an extent which would render the convictions unsafe and warrant the grant of a pardon)

11.1 The nature of this Inquiry

It is desirable to commence with a note about the scope of this Inquiry, and the investigations already dealt with by the courts.

My assessment takes into account material the courts could not consider; namely, the writings set out in the Schedule to the Terms of Reference, and information not previously available, namely the opinions of the international

experts. Nevertheless, although I thus have the benefit of much additional data, it needs to be understood that all the arguments addressed to me were, in essence, advanced at each step of the Court processes, meaning the pre trial hearings, the trial, the 1994 Appeal, and the 1999 Appeal. This is confirmed by reference to passages from the 1999 Court of Appeal judgment:

> At trial, and at the 1994 appeal, credibility of the children was under strong attack. The issue of contamination (including in that description interviewing technique failings) had been at the forefront of the defence contentions at depositions, at two pre-trial applications as well as at the trial itself. In pre-trial Ruling No. 2 the Judge rejected an application to exclude the evidence of the complainants. Specifically it was submitted in support: there had been direct and suggestive questioning by parents despite being cautioned against doing so, the collating and sharing of information between parents through support groups had fuelled a climate of fear, the disclosure interviewers incorporated direct and suggestive questioning, multi choice questioning, repeated questioning, repeated interviews and inappropriately used anatomically correct dolls. (13)….
>
> While it is accepted that psychiatric and psychological knowledge of interviewing techniques has improved, what is important for present purposes is that Dr Lamb did not express the view that the best practice techniques referred to were not known and appreciated in 1992, nor did he suggest that any of the criticisms now levelled at the interviews could not have been mounted with equal force in 1993. The adverse factors of delay, possible parental or other outside contamination, and the use of focussed questions (not open-ended) were all known and appreciated at the time trial, and importantly were directly addressed, extensively so at depositions. (18 – 19)
>
> It is apparent from the transcript that the very matters which are now raised as relevant to the issue of mass allegations were recognised and traversed. The origin of the enquiry, the meeting of the parents, the interchanges among parents, the exchange of information, the fear of parents that a child may have been caught up in a ritual abuse situation, the resulting parental questioning and its extent were all matters under the spotlight. The new material may strengthen the need for care in such situations but the underlying factors giving rise to that need were explored…. (30 – 31)
>
> Our overall assessment is that the various matters of concern of substance now identified and emphasised were all identified in 1992 and covered at trial. The real thrust of the appellant's case we think is contained in the general submission that contamination risks were underestimated and not adequately investigated. (36)

Thus this Inquiry, while having before it additional material, has been asked to consider issues which, in principle, have already been ventilated extensively in the Courts, both at first instance and at two Court of Appeal hearings.

A second preliminary point worth underlining is that the available legal processes have been exhausted. The Governor-General referred Mr Ellis's

earlier Petition to the Court of Appeal which, in theory, could have directed a new trial. However, given the lapse of time since the events, and the impossibility, from any point of view, of asking the children to testify again, a new trial has never been a potential outcome.

11.2 The test to be applied

Term of Reference (3) requires me to report whether there are matters which would give rise to doubts about the assessment of the children's evidence *to an extent which would render the convictions unsafe and warrant the grant of a pardon.* In deciding on my recommendation under this heading it is necessary to give consideration to the principle to be applied in deciding whether the convictions are unsafe and warrant the grant of a pardon. In *Burt v Governor-General* [1992] 3 NZLR 762, 681 the Court of Appeal described the prerogative of mercy, as currently developed, as an integral element in the criminal justice system, a constitutional safeguard against mistakes. Later in the judgment the Court said:

> Granted that after the failure of an appeal some new ground for suggesting a miscarriage of justice may emerge, the Royal prerogative is indeed a safety net…..(682)

Given that role, it may be urged that it would not be appropriate to impose inflexible limits on its exercise. However, for fairness and consistency there ought to be some articulation of the threshold standard required for the exercise of the pardon, while not excluding the possibility that paticular cases may demand a different approach.

I make the point later that full pardons are rare. I am aware of only a few cases that can be drawn on for any precedent. In *Meikle* (1908) two Supreme Court Judges, acting as Commissioners, stated that the evidence before the Commissioners was so far from conclusive that had it been a retrial, it would have been proper for a jury to acquit. In *Saifiti* (1972) a Ministerial Inquiry found "substantial grounds for believing that Saifiti was innocent". In the *Thomas* case (1979), where a pardon was granted, the Queen's Counsel who conducted an inquiry acted on the view that he had "real doubt whether ….the case …was proved beyond all reasonable doubt".

In searching for a standard, it may be helpful to consider the application of s406 of the Crimes Act, which provides that on any application for the exercise of the prerogative of mercy, the Governor-General may refer the question of the conviction to the Court of Appeal. Mr Ellis's 1999 appeal arose from such a reference. The section requires the Court to deal with the case as if it were an ordinary appeal; in doing so, the Court will take into account, to the extent that its rules permit, the new evidence which was the basis of the application to the Governor-General. If the Court decides to allow the appeal, the normal outcome is a new trial, although there may be circumstances where a retrial is not possible.

In advising the Governor-General whether to refer the case to the Court of Appeal, I understand the Ministry of Justice normally applies a test that the fresh evidence must be so compelling as to be capable of pointing to a likely miscarriage of justice; "compelling" generally requiring that the material must be of sufficient weight and cogency to justify re-opening the applicant's case by means of a referral to the Court of Appeal. In the United Kingdom the equivalent process is now a reference to the Criminal Cases Review Commission. The statutory test is "a real possibility that the conviction might not be upheld": Criminal Appeal Act 1995, section 13.

In this country, s406 references occur quite regularly. If the Court allows the appeal, the usual result is a re-trial, meaning that the new evidence on which the Petition was founded will be subjected the scrutiny of a hearing. A full pardon, on the other hand, is an exceptional (and, of course, final) remedy, granted sparingly. I understand that in the last 60 years there have been only five instances. It would be appropriate if the applicant were required to satisfy a higher test for the grant of a pardon, than is sufficient to justify a reference under s406.

Another source from which guidance might be found is to consider how the Court of Appeal deals with appeals based on the discovery of fresh evidence

having a sufficiently significant bearing on the case. The tests the Court adopts were set out in *R v Barr* [1973] 2 NZLR 95*:*

- If the new evidence is regarded as true, and conclusive, the conviction is quashed
- If the new evidence is regarded as true, but inconclusive, the Court orders a new trial
- If the Court is not satisfied the new evidence is true, but it might be believed by a jury, the Court orders a new trial
- If satisfied the new evidence is untrue, the Court deals with the appeal ignoring the new evidence.

On examination this analogy is not helpful. The first and fourth propositions are inapplicable. The second and third possibilities are more analogous, but involve a new trial. Here, there is no possibility of a new trial.

In deciding the standard I draw on the material considered above, and on the differing approaches taken in the *Meikle*, *Saifiti*, and *Thomas* cases. I consider the appropriate approach is to require the Petitioner, Mr Ellis, to satisfy the Inquiry that the convictions were unsafe; or that a particular conviction was unsafe. Expressed another way, this means the Inquiry must be brought to the point of being satisfied that on the information now available, the case against Mr Ellis was not proved beyond reasonable doubt. This is for the purpose of the recommendation I have to make to the Minister; the ultimate decision of course is that of the Governor-General.

11.3 Whether the doubts render the convictions unsafe, and warrant the grant of a pardon

My answer is no, largely for reasons already discussed in section 10. On the grounds set out in that section, I am satisfied as to the reliability of the children's evidence on which the convictions now remaining were based. In brief, these are the salient points:

- in the course of the proceedings, doubtful allegations and charges were weeded out. Some charges were dismissed at a preliminary stage, and others during the pre trial process. The jury was astute in identifying those where the supporting evidence or the method by which it emerged was open to valid criticism;
- where the number of interviews was excessive, generally allegations arising out of the later interviews did not form the subject of charges, and the tapes were not played, although available to the defence;
- such shortcomings as occurred in the interviewing process did not lead to convictions;
- both experts considered that contamination was an insufficient explanation for the body of broadly similar allegations, particularly of events at the creche;
- the experts and I independently reached the view that the children's evidence in the conviction cases was reliable.

I refer separately to the one instance where Professor Davies had reservations, namely count 23, indecent assault, where Mr Ellis was alleged to have taken Z to an unknown address where an unknown person committed an offence on her. I was impressed with the strength of the evidence that Mr Ellis took children on visits to places away from the creche. In particular, I thought that the body of evidence from which it could be inferred that he took children to the house at 404 Hereford Street, which contained various secret cavities, was convincing. Like Dr Sas, I did not see any reason to differentiate in respect of the reliability of the evidence supporting this count.

The case advanced on behalf of Mr Ellis fails to meet the test identified earlier, to satisfy the Inquiry that the convictions were unsafe, or that a particular conviction was unsafe. It fails by a distinct margin; I have not found this anything like a borderline judgment.

12. Concluding remarks

I express my appreciation for the submissions presented by the participants. In particular, those prepared by counsel for Mr Ellis were exhaustively thorough.

The Ellis case has been in the public eye for almost a decade. It was New Zealand's first experience of mass abuse allegations on this scale. With the advantage of hindsight, and of the overseas experience and writings which have since become available, no doubt there would be improvements in the handling of any future similar investigation and interviewing. Valuable lessons will have been learned from the experience, and the subsequent evaluations by the Courts and, I hope, by this Inquiry, especially the insights gained from the in-depth examinations made by Professor Davies and Dr Sas. I express my gratitude to them also.

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

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

Appendices

A. Professor Davies – Report
B. Professor Davies – CV
C. Dr Sas – Report
D. Dr Sas – CV
E. Sir Thomas Eichelbaum - CV

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26 February 2001