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From:
To:
Date: 13/12/2012 11:48 a.m.
Subject: Fwd: CONFIDENTIAL

>>> < .> 13/12/2012 9:29 a.m. >>>

From: Margaret Malcolm
Sent: Thursday, December 13, 2012 7:40 AM
To:
Subject: FW: FISHER DRAFT REPORT

Margaret Malcolm | Senior Adviser
Office of Hon Judith Collins | Minister of Justice | Minister for ACC | Minister for Ethnic Affairs | MP for Papakura
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From: Ian Binnie [mailto:
Sent: Thursday, December 13, 2012 6:12 AM
To: Margaret Malcolm
Subject: FISHER DRAFT REPORT

I received the Fisher document and have read it -- I certainly have comments -- obviously I don't have a copy of my own Report here in Geneva but it is probably not necessary to have it considering the generality of Mr Fisher's observations --

1 . much of the document consists of generalities about evidence and a history of the "extraordinary circumstances" discretion which require no response from me except where he purports to apply some of the principles to my Report. As the Minister knows, the language of "recommendation" etc was removed from my Report as a result of her comment at our meeting of September 13. All of that discussion, it seems to me, has no pertinence.

2. It is of interest that according to the document (a) Mr Fisher was retained on 26 September -- the "Dear Robert" letter --(b) he met the Minister the same day (c) and without having performed the "first stage" analysis he reports that " as we discussed , a second and final report will be required for the purpose of reviewing the evidence afresh and arriving at its own conclusions on the merits". This seems a very results oriented retainer. Normally one would expect him to make his analysis of

my Report , and to have his analysis considered by the Minister, BEFORE a decision to have Mr Fisher do an entirely new Report "on the merits". It seems clear the Minister had already made up her mind on Septermber 26 regarding the outcome. The only function of Mr Fisher's "first stage" report was, according to his own recitation, to provide a rationale for a Ministerial decision already taken.

3. The document makes it clear that Mr Fisher has not read any of the evidence since his meeting with the Minister last September -- this task (which I would have thought essential to an assessment of my Report) he reserves for "the second and final report" -- an exercise apparently predetermined at the September 26 meeting -- to be delivered who knows when -- much of what he says about my analysis seems to arise from his lack of familiarity with the material I was asked to review, as will be discussed. The other leg to his analysis is that he might have weighed up the evidence differently than I did (although, presumably with an eye to what he expects to be the second stage of his inquiry) he says he might reach the same ultimate conclusion -- or he might not.

4. Mr Fisher passes over the fact the structure of the argument of the parties to my inquiry was largely derived from the decision of the Judicial Committee of the Privy Council in 2007. That decision laid out in great detail the important FACTUAL issues which the Crown Law Office and the Bain team continued to consider critical to the outcome. They invited me to make findings of fact on each of these issues and I did so. As to the luminol footprints, for example, the Privy Council asked the Solicotor General in the course of the hearing whether the Crown's case could survive a finding that Robin made them. This was because on the Crown's theory Robin would never have been in those parts of the house on the morning of June 20. The Solicitor General agreed in Court that whoever made the footprints was the killer (the actual quote from the Solicitor General in the Privy Council hearing is included in my Report -- it was taken from a contemporaneous handwritten note and Mr Pike, for the Crown , who was present at the hearing, did not dispute its accuracy). Yet Mr Fisher thinks this issue should just be bundled up with everything else as if the Crown's admission had never been made.

5. Mr Fisher dismisses the luminol foot evidence as just a "single strand" of evidence followed by me by "a serial testing of that conclusion against some, but not all, of the other items of evidence" (para 95) This just shows Mr Fisher's lack of familiarity with the evidentiary record. When an admission is made in proceedings between the same parties on the same subject matter before New Zealand's then highest appellate Court it's importance is not to be diminished, in my opinion, on the basis of academic articles talking generally about the onus of proof.

6 Mr Fisher's main point is that "in a circumstantial case" bits of evidence are to be examined individually but the ultimate decision should only be reached looking at all the relevant evidence cumulatively. At the "second stage" , he says, "it is necessary to assess the cumulative effect of combining the probative force of all the items" (p 23). His analysis is based on criminal cases (see eg para 44 where he quotes a bunch of criminal precedents and, amongst other things, a paper he delivered to a Criminal Law Conference in Auckland in 2003). This is not a criminal case. It is not even a law suit.It is an informal inquiry to be conducted (as he notes elsewhere) with a great deal of flexibility and discretion. Nevertheless, Mr Fisher then quotes me at para 71 as doing exactly what he said I should have done i.e. I say:

> ...the cumulative effect of the items of physical evidence, considered item by item both individually and collectively
> , and considered in light of my interview with David Bain... persuade me that David Bain is factually innocent"

Mr Fisher says at para 72 that my "formulations are clearly beyond reproach", His allegation is that I didn't do what I said I did. This is just wrong. I did what I said I did. Otherwise I wouldn't have claimed to have done it. Moreover he concedes that in this "weighing up" exercise some factors will

be given more weight than others. That is precisely the path I followed. I found the physical evidence compelling. The psychological and propensity evidence of no help. Mr Fisher suggests at para 94 that I should have included in the weighing up the psychological and propensity evidence even though I considered it of no value. This shows the impracticality of his academic model .

6. Mr Fisher states that the "luminol footprint" evidence was "the foundation for my conclusion of factual innocence" .That comment was based, as stated, on my analysis of the evidence in light of the perfectly logical admission of the Solicitor General before the Privy Council , but nowhere did I suggest that the luminol footprint evidence stood alone. As explained in my Summary at the outset of the Report, the most persuasive evidence was the physical evidence including not only the luminol prints, but the absence of any blood on the inside of David Bain's running shoes, and the lack of a "window of opportunity" to accomodate the Crown's case. At para 91 Mr Fisher refers to other factors to which I assigned little weight. This too is part of the weighing up. At the end of the day Mr Fisher's complaint is that I did not neatly divide my analysis into two neat little"stages". He is advocating a complete triumph of form over substance. I disagree. What is important here is the substance.

7. It is true that I commented on the individual pieces of evidence as I went along , In the circumstances of a compensation inquiry (as opposed to a criminal trial which Mr Fisher takes as his model) it would have failed the parties to have done otherwise. They were entitled to know, for example, how I viewed the "gun fingerprint evidence" and I told them.

8. Then there is a lengthy explanation by Mr Fisher of the onus of proof starting with the statement that "Mr Binnie has misunderstood the law in New Zealand on multiple onuses of proof". This is demonstrably incorrect. I made a distinction between the legal or persuasive onus -- which rested throughout on Mr Bain -- and the evidentiary onus. The evidentiary onus is simply what Mr Fisher calls the need for "evidence" or "further evidence". Mr Fisher just uses a different vocabulary. On the Crown's speculation that the evidence of the witness who saw David Bain at his garden gate at 6:45am on June 20 should be given little weight because perhaps David Bain had just "popped in and out", I said the Crown was making the assertion and had the evidentiary burden to back up its assertion.. Mr Fisher, on the same example, says that "the Crown carried the risk that unless it adduced further evidence to support any alternative explanation (such as that he had returned earlier and popped back out again) Binnie J would be justified etc etc ... but Mr Fisher adds) "that has nothing to do with the onus of proof".(para 100). I beg to differ. The words "the Crown carried the risk" is the classic language of onus -- in the absence of "further evidence" -- or in my terms meeting an evidentiary onus -- the Crown risks losing the point. Once again Mr Fisher's analysis raises distinctions without a difference to discredit a report based on evidence he hasn't read.

9 At para 111 and following MR Fisher complains that I "relied heavily upon information sourced from David" . This is true, So did the police and the Crown Law Office. He was the only source of much of the information relied upon by both sides, eg paras 112 to 114 -- I therefore had to decide whether, on the whole, I believed him or not. That was part of my mandate. In my opening summary of the Report I pointed out that I had completed my examination of the record and the analysis of the other evidence BEFORE I interviewed David Bain. Mr Fisher explains at para 117 that the "modern approach" is to "place greater weight on other considerations such as the inherent likelihood of the witness's story, consistency with his or her contemporaneous and subsequent behaviour, and independent sourcesof evidence." This is exactly the approach I took. David Bain's version of what he did on the morning of June 20 was inherently likely because it conformed to a long standing paper route routine to which there were independent witnesses. The Crown's alternative theory that he left the house unattended for over an hour with Robin due to walk in anytime was not. The fact he didn't change his bloody clothes was inherently unlikely "subsequent behaviour" if he was guilty. As to "independent sources of evidence", I found that in large part his credibility rested on its consistency with the physical evidence , not the other way around.

10. At para 120 and following Mr Fisher complains about my use of what he calls "innocent openness" evidence, i,e, "that if clients had been guilty they would not have been so silly as to make the admissions or oversights in the first place". What Mr Fisher fails to note (although it is explained in my Report) is that the use of "innocent openness" evidence in this case did not originate with me but with the Judicial Committee -- as mentioned earlier, I do not have a copy of my Report with me in Geneva but Lord Bingham is quoted as puzzling over why David Bain, if he was guilty, would have made some of the statements he did. Accordingly, if I am guilty of sinning I do so in the good company of the five judges of the Privy Council. Once again, Mr Fisher's complaints are academic and theoretical and indicate little familiarity with reality of the case.

11. Mr Fisher finds it suprising that I quoted David Bain's claims of innocence at "the beginning and the end of the Executive Summary". I would have found it extraordinary NOT to quote his claims of innocence, Mr Fisher fails to point out that the statement was inserted at the end of the summary because, as I explain in the text, the decision rested in the hands of others and I felt (and still feel) that he should be given a chance to explain himself in his own words.

12 At para 128 and following Mr Fisher finds suprising my references to the 2009 jury acquittal.AQt para 131 he calls these references "an inappropriate distraction". Given that the acquittal is the starting point of the claim for compensation, and that it is a fundamental part of the narrrative, this complaint is off the mark as well. I made it perfectly clear at several points that the jury was dealing with a different set of issues that I was and that its conclusion was not probative for compensation purposes. If Mr Fisher felt "inappropriately distracted" it was not for want of explanation on my part.

13 At pages 42 to 50 Mr Fisher offers an exposition of his view of the scope of the "extraordinary circumstances" discretion . for the most part there is nothing much that divides us here. I laid out a series of alternate approaches Cabinet may wish to consider. I expressly stated that if deliberate misconduct is envisaged that there was none, in my opinion. I put the issue on the basis of ineptitude that departed to a marked degree from the CIB's own Manual which according to the police witnesses they were required to follow unless for good reason. Mr Fisher does not accept the Cabinet reference to "failure to investigate the possibility of innocence" . He wants to add the words (which appear nowhere in any official document that I know of) "and elected not to investigate in case innocence emerged". That is not the directive I was given and if it is to be amended in this fashion it should be amended by Cabinet not Mr Fisher.

14 As to Mr Fisher's insistence on "causal connection with imprisonment" it is surely the case that an incompetent and one sided investigation by the police will lead forseeably and consequentially to a heightened risk of conviction and conviction on charges of 5 murders will carry a prison term. In my view this is what happened here. This was not a matter of "consequences viewed in hindsight" as ssuggested atpara 202.

15. I should also say that for someone who insists that Cabinet should not be burdened with conclusions and recommendations Mr Fisher's draft report contains plenty -- e.g, at para 195 he writes "I previously concluded that if the case were to fall within that example, three elements would have to be satisfied "....including the new element that "the official knew of lines of inquiry that would be likely to demonstrate innocence and elected no to to investigate further in case innocence emerged". This "conclusion" has nothing to do with the Cabinet text.

16. At pèara 197 Mr Fisher thinks I should have said more about the lack of an "official admission or judicial finding of serious misconduct" . Having fopund there were no such admissions or findings there was nothing more to say. David BAIN CLEARLY HAD NO CLAIM ON THAT BASIS.

17. Mr Fisher says the discretionary payment is not for the purpose of condemning official

misconduct (para 218). In my view Cabinet could take the view, as in some other common law jurisdictions, that to pay compensation simply announces that the state is willing to shoulder its proper share of responsibility of a miscarriage of justice that resulted in someone spending 13 years in prison. Cabinet need not do so.

18 What is particularly galling in Mr Fisher's commentary is referenceto "ther well publiciyed recommendation that compensation be paid." At the time this "publicity" appeared in the New Zealand press the only people who had my report were the Ministry and myself. If the leak occurred it had nothing to do with me.

19. at para 221 and following Mr Fisher goes into what he sees at criticisms of certain individuals. All of the criticisms he mentions were made public at the 2009 trial and the people involved had every chance to explain themselves and they did so. The only exception is Mr Fisher's comment with respect to the contaminated DNA sample , He says AT PARA 227 "Although Dr Harbison is not specifically named it is obvious from the earlier discussion in the Report that she was the ESR scientist involved." I have never heard such a thing suggested before. If Mr Fisher were to read the evidence he would find that there were a number of other people in Dr Harbison's lab working on the case and I had always assumed, and I think others did as well, that it was one of the technicians who mixed up the samples

20. As to para 235, the Crown Law Office was not there solely "to protect the interest of the state". Before I went to Dunedin to interview the police officers there was a considerable discussion whether the police shouldbe separately represented and it was determined between the Crown and the police witnesses that there was no need to do so. There was no division of interest between the Crown and the police and the Crown could (and did) represent evrybody in the state employment.

21 I regard the idea that parts of my Report shouzld not be published because some people are criticized to be contrived. Of course in an inquiry such as this people are going to be criticized. I specifically denied there was any wiful misconduct on anyone^s part. The idea that special notices ahould go to everyone criticised has no foundation in law or common sense.