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NAME : RADIO NEW ZEALAND
FAX : 6444741458
TEL : 6444741422
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16 June 2004



Ms Hilary Jones
Complaints Executive
Broadcasting Standards Authority
P O Box 9213
WELLINGTON

Dear Ms Jones

CF2 / 979 3 June 2004 NINE TO NOON 25 AUGUST 2003

Further to your correspondence of 9 June 2004, please find enclosed Radio New Zealand's submissions being first a response to Ms Ablett Kerr's submission received on 3 June and second our response to the Authority's inquiry of that date.

Yours sincerely

A handwritten signature in black ink, appearing to read 'George Bignell', is written over a light blue horizontal line.

George Bignell
Complaints Coordinator

RADIO NEW ZEALAND SUBMISSION

REPLY TO: UNDATED SUBMISSION BY JUDITH ABLETT-KERR; AND THE
AUTHORITY'S 3 JUNE 2004 INQUIRY

CF2/979 - NINE TO NOON BROADCAST ON 25 AUGUST 2003 - PETER ELLIS
COMPLAINT

1. This submission responds to:
 - 1.1 Ms Ablett-Kerr QC's detailed submission, headed "Response to submissions of Radio New Zealand dated 24 May 2004" ("Ms Ablett-Kerr's Response"); and
 - 1.2 The 3 June 2004 request from the Authority for RNZ to provide details of inquiries made by RNZ to substantiate the allegations made by "Nathan" and his mother.

Ms Ablett-Kerr's Response

2. *Paragraph 1:* In relation to Ms Ablett-Kerr's summary at paragraph 1, RNZ's position is already clear, but (for the avoidance of doubt), it is not accepted that:
 - (a) RNZ failed – miserably or otherwise – in relation to Principle 4;
 - (b) RNZ failed to distinguish fact from opinion; and
 - (c) the Code should be interpreted in the manner Ms Ablett-Kerr suggests so as to stifle and suppress a legitimate broadcast.
3. *Paragraph 2:* We leave it to the Authority to form its own views – with reference to the transcript, the audio tape of the programme, and the submissions filed - as to whether reasonable efforts were made to present significant points of view in the programme itself.
4. *Paragraph 3:* With respect, Ms Ablett-Kerr is splitting hairs regarding any distinction between "significant issues" and "significant points of view". No doubt, where appropriate, the Authority will decide the matter with reference to the latter standard. Further, and with all due respect, "upping the ante" by referring to the "magnitude of the allegation" sheds no light on whether or not there was a breach of the Code.
5. *Paragraph 4:* We do not accept that the first three matters referred to are irrelevant. RNZ presented other relevant significant points of view by putting to "Nathan": Mr Ellis' denials; his

co-worker's denials on his behalf; and the substance of Ms Hood's book (the false/manipulated memory claims).

6. It is not accepted that the chronology/doubt as to Mr Ellis's identity issues were put in such a way as to reinforce the claims. A blunt instrument is not always necessary or an appropriate way in which to put matters to an interviewee. This aspect of Ms Ablett-Kerr's submission relates to matters of editorial style and not to any allegation of breach of the relevant standard(s).
7. *Paragraph 5:* It not accepted that other significant points of view were ignored. They were presented in the programme itself, in other programmes, and in other media during the period of current interest. Mr Ellis was offered – not once but twice - an opportunity to present his point of view on the programme but declined; see below at paragraphs 8, 12 – 16 and 27.
8. *Paragraph 6 to 9:* RNZ maintains that the period of current interest in relation to the Peter Ellis controversy is ongoing, and certainly extended for long enough for Mr Ellis to have availed himself of one of the two separate offers to present his point view. The fact that Mr Ellis, who was represented by lawyers throughout, chose not to do present his point of view on the programme is a matter for him and his lawyers.
9. Contrary to Ms Ablett-Kerr's assertion, it is not submitted, nor has it ever been submitted, that RNZ broadcast an unfair/unbalanced programme in the hope that later programmes would remedy the position; we refer the Authority to our earlier submission.
10. *Paragraphs 9-10:* The Authority is invited to determine the question of balance in the context of: the points presented in the programme itself, in other programmes, and in other media during the period of current interest; and in the context of the reasonable opportunity afforded to Mr Ellis to present his point of view. A selective formulaic approach is not appropriate.
11. *Paragraph 11-13:* It is not accepted that, as Ms Ablett-Kerr seems to be suggesting, a person can by refusing to provide their point of view effectively stifle the media or a particular media organisation. As Ms Ablett-Kerr concedes, Mr Ellis was simply not prepared to appear on the programme and would not have done so under any circumstances; he didn't like Ms Clark's style. That is a matter for him.
12. The Act, and the relevant part of the Code, only obliges the broadcaster to ensure that: "... *reasonable efforts are made or reasonable opportunities are given, to present significant points of view...*"

- (our emphasis). Reasonable opportunities were given. Mr Ellis was offered two opportunities to appear, the first directly to him before the programme and the second through his solicitors shortly afterwards.
13. Mr Ellis declined to appear on the programme but chose to seek to present his point of view on the TV3 20/20 programme. Had Mr Ellis wished to present a different point of view on the *Nine to Noon* programme, he could have.
 14. Mr Ellis's media preferences (*20/20* but not *Nine to Noon*) do not render the offers to him "unreasonable". If he or his lawyers genuinely wished to put his point view, even if Mr Ellis preferred not to do so live on *Nine to Noon*, they could have taken steps to do so. Ms Ablett-Kerr and her instructing solicitors will be well aware that, for example, they could have provided RNZ with a statement of Mr Ellis' position in response to RNZ's earlier invitations; RNZ would have been happy to broadcast the substance of such a statement.
 15. The fact is that, in conjunction with their threats of defamation proceedings, Mr Ellis/his lawyers chose not to provide anything further to RNZ/*Nine to Noon* for broadcast. It is respectfully suggested that strategic (and selective) silence should not advance the complaint to the Authority.
 16. The Authority is obliged to consider *both* RNZ's reasonable efforts to present significant points of view *and* the reasonable opportunities given to Mr Ellis to present his point of view.
 17. *Paragraph 14:* With respect, we maintain that Ms Ablett-Kerr overstates the significance of paragraph 69 of the *Mitchell and Morrison v TVNZ* 2004-03; 2004-37 decision. It is not accepted that paragraph 79 of this decision gives rise to a *heightened obligation* on a broadcaster in relation to any and all potentially inflammatory material. It is submitted that in paragraph 79: (i) the Authority is simply recording that where there are inflammatory statements the broadcaster must be careful to comply with its obligations; *and* (ii) the reference to "impartiality, objectivity and responsibility" simply reflects but does not re-define or heighten the broadcaster's obligations under (in that case) the Free-To-Air TV Code. In short, *Morrison and Mitchell* does not define RNZ's obligations; the Act and the relevant Code do.
 18. *Paragraph 15:* We repeat, the facts portrayed were what "Nathan" and his mother said. Those facts were accurate because the broadcast relayed exactly what they said. Nathan's mother confirmed that Mr Ellis wasn't working at the time and that Police had said to her that he was associated and hanging around with people at the crèche at the time; as noted below, RNZ took

reasonable steps to seek to verify these statements. Further, to the limited extent that “Nathan” expressed his opinion (eg. in the first paragraph on page 19 of the transcript) the New Zealand public is quite capable of distinguishing his opinion (“I believe...”) and Principle 6 will not apply.

19. *Paragraph 16:* Ms Ablett-Kerr does not suggest that the broadcast breached the *sub judice* rule, or that Mr Ellis’s right to remain silent has been compromised. As Ms Ablett-Kerr points out, no charges have been laid and there is no imminent prosecution. Mr Ellis’s rights remain intact. Any suggestion that he has been defamed is a civil matter and is not a matter for the Authority.
20. Ms Ablett-Kerr seeks to elevate her client’s right to silence, notwithstanding that no charges have been laid, to a right to stifle *Nine to Noon*/RNZ (but not, for example, TV3) and prevent a story in which the public have a legitimate interest going to air. The argument seeks to use the shield the law affords to a defendant (or likely defendant) in a criminal proceeding as, in effect, a sword in relation to a broadcasting complaint. Such an interpretation is neither necessitated by the Bill of Rights Act nor desirable in a free and democratic society.

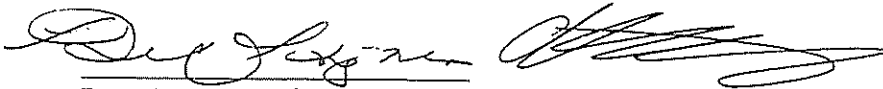
The Authority’s Inquiry

21. The Authority has asked RNZ: “What inquiries, if any, were made – and with whom – to substantiate the allegations of “Nathan” and his mother?” Both RNZ and counsel are surprised at this enquiry. The context in which the question arises and the precise issues/concerns that it seeks to address are not clear.
22. The Authority will be aware, from the correspondence, that defamation proceedings have been threatened. A complainant ought not to be allowed to use a complaint to the Authority as a dry run for subsequent civil proceedings or as an information gathering exercise. Similarly, it is respectfully submitted that it is inappropriate for a broadcaster to be required to respond to questions from the Authority that might - inadvertently - serve that purpose.
23. Counsel are aware of the protection afforded by section 19A of the Act. But section 19A will not preclude any information disclosed to the Authority and the complainant from being used by the complainant/their lawyers in terms of assessing (or re-assessing) the merits of any defamation proceeding and/or their strategy in relation to any such proceeding.
24. As the Authority members will appreciate, the effect of the long-standing “newspaper rule” is that media organisations will not be compelled to disclose sources until trial in respect of defamation

proceedings, particularly in respect of defamation proceedings. In part, the rationale for the newspaper rule is that it is unfair to allow plaintiff to delve around to see whom else he or she may sue. But in *Broadcasting Corporation of New Zealand v Alex Harvey Industries Limited* [1980] 1 NZLR 163, the Court held that the real rationale for the protection is the public interest in protecting the media's sources of information so as to encourage the free flow of information to them.

25. It is respectfully submitted that the Commissions of Inquiry Act powers afforded to the Authority pursuant section 12 of the Broadcasting Act should not be interpreted to circumvent the impact of the newspaper rule. Section 4C (4) of the Commissions of Inquiry Act 1908 provides that: *'Every person shall have the same privileges in relation to the giving of information to the Commission, the answering of questions put by the Commission, and the production of papers, documents, records, and things to the Commission as witnesses have in Courts of Law.'*
26. Against that background, without conceding any obligation to respond or waiving any right(s) to decline to respond further, RNZ's response is that:
 - 26.1 Before the program went to air RNZ *Nine to Noon* staff discussed these matters with "Nathan"'s mother on three occasions prior to recording the interview;
 - 26.2 RNZ *Nine to Noon* staff met with and interviewed "Nathan" face to face to record the interview;
 - 26.3 "Nathan"'s mother was interviewed by telephone;
 - 26.4 The RNZ staff involved were already familiar with the range of issues arising in the ongoing Peter Ellis controversy;
 - 26.5 RNZ staff made inquiries of Winston Wealleans (whom RNZ understood to be sympathetic to Mr Ellis's position) to corroborate the dates mentioned in the interview as to when Mr Ellis was actually working at the crèche;
 - 26.6 RNZ staff attempted to corroborate with Police whether they had a reliable witness who said that Mr Ellis was associated with and hanging around the crèche at the time when "Nathan" was attending. Police declined to comment;

- 26.7 RNZ considered "Nathan"'s account of events carefully in order to assess whether it was credible;
- 26.8 RNZ considered "Nathan"'s mother's account of events carefully in order to assess whether it was credible; and
- 26.9 RNZ staff consulted its own in-house library to corroborate details mentioned in the interview.
27. The only other person who could have commented directly on the core issues was Mr Ellis himself. As noted above, he was offered two opportunities to do so on the *Nine to Noon* programme but he declined. His refusal to have anything to do with *Nine to Noon* was absolute and unequivocal; see paragraph 12 of Ms Ablett-Kerr's submission as to his comments to the *Nine to Noon* "manager".
28. In counsel's respectful submission, Principle 5 of the Code does not specifically oblige a broadcaster to make inquiries to substantiate allegations that are made in a broadcast. It requires the broadcaster to deal justly and fairly with any person taking part or – in this case - referred to. It is submitted that RNZ did more than enough to satisfy the requirements of principle 5.
29. If and to the extent that the Authority considers that it is implicit in Principle 5 that a broadcaster is obliged to make inquiries to substantiate any allegations made in a broadcast, it is submitted that the inquiries made by RNZ *Nine to Noon* staff were more than sufficient.



Peter McKnight/Tony Stevens
Counsel for RNZ

16 June 2004



2nd Floor 54 – 56 Cambridge Terrace
PO Box 9213 Wellington
New Zealand

Telephone 64 4 382 9508
Fax 64 4 382 9543
Email info@bsa.govt.nz
Web www.bsa.govt.nz
Infoline 0800 366 996

Fax

To: George Bignell, Radio New Zealand

Fax: 474 1459

Cc:

Date: 9 June 2004

From: Hilary Jones

Pages: 2 (including cover)

Re: CF 2/979

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2nd Floor 54-56 Cambridge Terrace
PO Box 9213 Wellington
New Zealand

Telephone 04 382 9508
Fax 04 382 9543
Email info@bsa.govt.nz
Web www.bsa.govt.nz
Infoline 0800 366 996

9 June 2004

CF 2/979

George Bignell
Complaints Coordinator
Radio New Zealand Ltd
P O Box 123
WELLINGTON

Dear Mr Bignell

Thank you for your letter dated 8 June 2004.

In relation to your comment about the Authority beginning the process of "determining the complaint" before Radio New Zealand has seen Mrs Ablett-Kerr's latest submission (received by the Authority on 3 June and forwarded to you that day), the Authority has begun the process of examining the information currently before it. As is its usual practice, and in accordance with the principles of natural justice, the Authority will not be determining the complaint until it has received all relevant information from both parties.

In relation to your concerns about the Authority's question, the Authority considers that RNZ's response to the question could be relevant to its determination of whether RNZ treated Mr Ellis justly and fairly as required by Principle 5.

Please provide RNZ's response to the Authority's question, along with any further comment RNZ may wish to make on Mrs Ablett-Kerr's submission dated 3 June, by next Wednesday 16 June.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hilary Jones', is written over a faint, illegible typed name.

Hilary Jones
Complaints Executive

8 June 2004



Ms Hilary Jones
Complaints Executive
Broadcasting Standards Authority
P O Box 9213
WELLINGTON

Dear Ms Jones

CF2 / 979 3 June 2004 NINE TO NOON 25 AUGUST 2003

Thank you for the above correspondence and enclosure of Ms Ablett Kerr's final submission to the Authority.

Radio New Zealand appreciates that the Authority wishes to proceed to determine this complaint without delay, nonetheless we are surprised that the Authority has begun that process without first having forwarded Ms Ablett Kerr's submission, some of the content of which is contentious to say the least.

Radio New Zealand notes also that the Authority seeks our response to the question:

What enquiries, if any, were made – and with whom – to substantiate the allegations of "Nathan" and his mother?

To enable Radio New Zealand to better assess the Authority's question could you please provide further detail as to the basis upon which the Authority asks this question and how has the question arisen. As you may appreciate, without knowing the context in which this question has been framed it is somewhat difficult to anticipate the issue(s) or concern(s) that the question is addressing.

In any event, Radio New Zealand wishes to fully consider all the circumstances and take further legal advice, Radio New Zealand being of the opinion the asking of such a question raises quite significant issues in itself, as does Ms Ablett Kerr's submission.

Yours sincerely

George Bignell
Complaints Coordinator



Radio New Zealand Limited
155 The Terrace
P O Box 123 Wellington
Telephone 64 4 474 1999
Facsimile 64 4 474 1459
Email rnz@radionz.co.nz

sent by fax 3/6/04



2nd Floor 54-56 Cambridge Terrace
PO Box 9213 Wellington
New Zealand

Telephone 04 382 9508
Fax 04 382 9543
Email info@bsa.govt.nz
Web www.bsa.govt.nz
Infoline 0800 366 996

3 June 2004

CF 2/979

George Bignell
Complaints Coordinator
Radio New Zealand Ltd
P O Box 123
WELLINGTON

Dear Mr Bignell

Attached for your information is a copy of Mrs Ablett-Kerr's final submission on the complaint about the broadcast of an interview on *Nine to Noon* on National Radio on 25 August 2003, received today.

The Authority has begun its consideration of the complaint. In relation to the aspect of the complaint that the broadcast was unfair to Mr Ellis and therefore breached Principle 5 of the Radio Code of Broadcasting Practice, the Authority would like Radio New Zealand's response to the following question:

- What enquiries, if any, were made – and with whom – to substantiate the allegations of “Nathan” and his mother?

I would be grateful for your response by Friday 11 June at the latest.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hilary Jones', written over a faint, illegible typed name.

Hilary Jones
Complaints Executive

Judith Ablett Kerr ONZM QC

DUNBAR HOUSE CHAMBERS, 21 DUNBAR STREET, P.O. BOX 46, DUNEDIN, NEW ZEALAND
TELEPHONE (03) 477 3390, FACSIMILE (03) 477 3391
E-MAIL: ablettkerrQC@xtra.co.nz

Also at: LEVEL 7, AURORA CHAMBERS, 66 THE TERRACE, P.O. BOX 1353, WELLINGTON, NEW
ZEALAND
TELEPHONE (04) 499 1588, FACSIMILE (04) 499 1587
E-MAIL: ablettkerrQC@xtra.co.nz

FACSIMILE MESSAGE

From: Judith Ablett-Kerr QC
To: Broadcasting Standards Authority
Attention: Hilary Jones
Fax No.: 04 382 9543
Date: 3 June 2004
Number of Pages (including cover sheet): 5

RE: Ellis Response to RNZ Submissions Dated 24 May 2004 to follow

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JUDITH ABLETT KERR ONZM QC

DUNBAR HOUSE CHAMBERS, 21 DUNBAR STREET, P.O. BOX 46, DUNEDIN, NEW ZEALAND
TELEPHONE (03) 477-3390; FACSIMILE (03) 477-3391
E-MAIL: ablettkerrQC@xtra.co.nz

Also at: LEVEL 7, AURORA CHAMBERS, 66 THE TERRACE, P.O. BOX 1353, WELLINGTON, NEW ZEALAND
TELEPHONE (04) 499-1588; FACSIMILE (04) 499-1587
E-MAIL: ablettkerrQC@xtra.co.nz

Response to submissions of Radio New Zealand dated 24 May 2004

The submissions made on behalf of RNZ dated 24th of May 2004 are largely a repetition of submissions already made by RNZ. However, given that Mr Ellis has been invited to respond, the following is tendered on his behalf:

1. The summary contained in paragraph 2 is rejected. It is submitted that:
 - (a) Principle 4 of the Radio Code of Broadcasting Practice (the Code) requires that when controversial issues of public importance are discussed, reasonable efforts are made or reasonable opportunities are given to present significant points of view either in the same programme or in other programmes within the period of current interest. In this regard the broadcaster failed miserably and chose to present only one point of view.
 - (b) Principle 6 was breached by a failure of the broadcaster to distinguish between fact on the one hand and opinion, analysis and comment on the other. In particular the broadcaster clearly demonstrated an acceptance of statements of opinion as though they were facts. The interviewer failed to identify for the listener that this was but her opinion or the opinion of "Nathan's" mother rather than an established fact.
 - (c) The New Zealand Bill of Rights Act 1990 does not provide authority to breach the Code in question and in itself provides significant protections for a person in Mr Ellis' position
2. In paragraphs 5 to 12 the broadcaster attempts to argue that reasonable efforts were made to present significant points of view in the programme itself. It is submitted however that one has only to listen to the tape itself to see the futility of this argument.
3. At paragraph 5 the broadcaster suggests that the presenter put the significant issues to "Nathan". It is interesting to note that it is not suggested that 'significant points of view' were put to the interviewee. The difference is, if you will excuse the pun, itself significant. A balanced and fair programme would have ensured that the opposite view was put. It is impossible to ignore the magnitude of the allegation that was to be knowingly aired by the broadcaster and the corresponding obligation to ensure to the best of its ability that the Code was respected and Mr Ellis treated fairly.

4. The broadcaster sites five occasions when it claims the presenter put significant issues to "Nathan" and his mother. The first three matters referred to are irrelevant to the issue in question. The latter two matters when examined in context were put in such a way as to actually reinforce "Nathan's" claims and explain away any perceived problems relating to his complaint. The suggestion that the interviewer acted as "devil's advocate" is farcical.
5. At paragraph 10 it is suggested that *Smith v TV3* (re: "the Goons"/Christchurch Prison) 2003-006 is authority for the proposition that a programme may have a negative slant because of its inherently negative nature but may still be balanced. Whilst that indeed may be so in certain circumstances the present case is not such a circumstance. The allegation made by an unidentified young man (not a child) was of a serious criminal offence which the law enforcement agencies had declined to prosecute despite the fact that it had been considered by the highest level. Other significant points of view which were clearly available, even putting Mr Ellis himself to one side, were ignored by the broadcaster. It is hard to avoid the conclusion that there was no commitment to even attempt to provide a balanced programme.
6. In paragraphs 13 to 23 the broadcaster attempts to argue that reasonable efforts were made to present significant points of view in other programmes within the period of current interest. Fundamental to their argument is the proposition that the "Nathan" complaint is merely part of the ongoing Ellis controversy. This perpetuates the misconception the broadcaster's representatives have of the issues relating to the so-called Ellis controversy.
7. At the risk of sounding boringly repetitive it needs to be clearly stated that the concerns espoused by so many people, including as referred to at paragraph 15, many individuals of substance, relate to Mr Ellis' convictions and their safety. The concern of Mrs Hood, who does not and has never spoken on behalf of Mr Ellis, relates to the investigation of the Crèche cases. The Petition before the Select Committee does not relate to Mr Ellis as an individual but to the processes of investigation and prosecution. "Nathan's" allegation is totally separate to the cases involved in the controversy and relates to a time when Mr Ellis was not even employed at the Crèche and would therefore have had no opportunity to carry out abuse such as that upon which his convictions are founded. Such a distinction is far from being artificial, rather, it is fundamental.
8. The BSA are invited to conclude in paragraph 19 that it is legitimate for a broadcaster to air an unfair and/or unbalanced programme in the hope that some other broadcaster might remedy the unfairness at some other time within the period of current interest. Whilst the cases cited suggest that in some circumstances a later broadcast can indeed remedy a breach, it must be inherently objectionable to deliberately embark on such a course when the "story" involves an allegation of serious criminal misconduct and is almost inevitably an invitation to sue in defamation.

9. In this particular instance there has been no other programme that has remedied the breach. To suggest that a prior interview with Gaye Davidson on the 21st of August which makes no mention whatsoever of the "Nathan" allegation could somehow remedy the breach is unsupportable. Likewise the suggestion that Mr Ellis "sees his lawyer" over the interview could amount to a remedial publication borders on the fantastic.
10. The 20/20 programme referred to at paragraph 22 likewise falls into the same category. The documentary was 26.03 minutes long and relates to issues other than the "Nathan" complaint for 24.01 minutes of its length. The "Nathan" complaint is covered in 1.58 minutes and of that time only 48.05 seconds deals with other significant points of view which amount to Ms Davidson saying that Mr Ellis did not work at the Crèche at the time and Mr Ellis being quoted as not wishing to comment because of legal advice.
11. As to the claim that Mr Ellis was offered the opportunity to present his point of view the broadcaster fails to acknowledge that even a refusal to appear on a programme will not relieve the broadcaster of its obligations under the Code, see *The Prime Minister (Rt Hon. Helen Clarke) and Ors v TV3* 2003-055 - 061.
12. It is important in any event to have regard to the circumstances of any offer made to Mr Ellis to put forward his point of view. Mr Ellis instructs that he was contacted prior to the broadcast by a woman whom he thought was the "manager" of the Nine to Noon programme. The call came in the evening and the woman was clearly distracted by children causing a disturbance in the background. Mr Ellis assumed she was at home. She invited him to do a "live" interview with Ms Clarke. There was no mention of the "Nathan" allegation. He declined the interview and stated that he would not do an interview with Ms Clarke because he did not like her style in that she did not give people an opportunity to answer questions and he believed that she had her own agenda on Peter Ellis and would not be objective. He also advised the woman that he did not in any event do live interviews.
13. The circumstances described above could never be regarded as providing a reasonable opportunity to Mr Ellis to give his point of view and was no more than an invitation to an ambush.
14. As to the comments on the effect of the decision in *Mitchell and Morrison v TVNZ* 2004-03; 2004-37, the suggestion that our submissions overstate the findings are rejected. The decision properly reflects the higher standard required of a broadcaster when the content of the broadcast is of an inflammatory nature (see para 79). The requirement for impartiality, objectivity and responsibility is consistent with societal values and the privileged position a broadcaster enjoys.
15. As to Principle 6 it is submitted that the broadcaster has misunderstood the obligation and that even if it could be said that the allegation made by "Nathan" could be classified as fact (albeit disputed fact) that does not relieve

the broadcaster of the obligation to identify Ms Clarke's contribution and the mother's as opinion. Similarly the requirement to be truthful and accurate on points of fact is not discharged merely by broadcasting the allegations directly from the complainant. The submission of the broadcaster amounts to a proposition that as long as an allegation is spoken by the person making the complaint then no matter how outrageous or fanciful the claim may be there would be no fault with the broadcaster who makes no effort to test veracity and reliability. In this situation "Nathan" and his mother attributed comments adverse to Mr Ellis to other people. Ms Clarke did not indicate whether this was indeed fact.

16. As to the New Zealand Bill of Rights Act it is accepted that the Code should be interpreted in a manner that is consistent with the Act. However the Act contemplates limits upon rights that are reasonable and demonstrably justifiable in a free and democratic society. The Act recognises competing rights and recognises the importance of the fundamental common law rights of people accused of criminal offences. These rights are paramount as can be seen in the balance the Courts draw between the right to freedom of speech and the laws of sub judice and the right to silence, this latter right being entrenched in New Zealand Law since the 19th Century. There is nothing in the Act that would invite an interpretation of the Code which could justify the broadcast that is the subject of this complaint.

JUDITH ABLETT-KERR ONZM QC

RADIO NEW ZEALAND SUBMISSION
REPLY TO SUBMISSION BY JUDITH ABLETT-KERR
CF2/979 - NINE TO NOON BROADCAST ON 25 AUGUST 2003 - PETER ELLIS
COMPLAINT

1. Ms Ablett-Kerr's detailed submission raises a number of further issues. This necessitates that Radio New Zealand ("RNZ") revisits the factual issues, the statutory context, the relevant codes, and some previous decisions of the Authority in some detail.

2. To summarise:

Standard 4: The programme was balanced, in the sense required by the Principle 4 of the Code, in the following respects: the presenter put the key issues to "Nathan" and his mother; other programmes and publications in the ongoing period of current interest provided, and continue to provide, further balance; and Mr Ellis was specifically offered various opportunities to put his point of view, either in the programme itself or subsequently, and in all cases within the ongoing period of current interest. There was no breach of Standard 4.

Standard 6: The facts were what "Nathan" and his mother said. Given that the broadcast was, in essence, a verbatim recording of an interview with "Nathan" and his mother, there can be no real issue as to whether this was truthfully and accurately reported. Even if they offered opinions (if that is what is asserted), there was no breach of Standard 6.

New Zealand Bill of Rights Act 1990: The Authority is obliged to seek to interpret the Broadcasting Act 1989, and thus any relevant Code, in a manner consistent with the New Zealand Bill of Rights Act 1990. It is submitted that, in this case, this is a factor that favours a finding that there has been no breach of the relevant Codes.

3. We elaborate below, addressing Ms Ablett-Kerr's submissions, essentially in order, in relation to Standard 4 and then Standard 6 of the relevant Code.

Standard 4

4. It is accepted that the Broadcast discussed controversial issues of public importance. Standard 4 relates broadly to "balance". The issue is whether: (a) reasonable efforts were made; or (b)

reasonable opportunities were given; (c) to prevent significant points of view either: (i) in the same programme; or (ii) in other programmes within the period of current interest.

Reasonable efforts were made to present significant points of view in the programme itself:

5. The presenter put the significant issues to "Nathan" and his mother:
 - Mr Ellis always denied and continues to deny touching any of the children inappropriately at the crèche (p 7-8 transcript);
 - women who worked with Mr Ellis say that it could never have happened (p 8 transcript);
 - Lynley Hood's book, "A City Possessed", suggests that the children who say that they were abused by Mr Ellis had false memories and/or been manipulated by parents/counsellors/psychologists (p 8-9 transcript);
 - there were problems, in terms of chronology, with "Nathan's" account (p 13-14 transcript); and
 - seeking to determine whether there was any doubt that the man "Nathan's" mother saw with "Nathan" was Peter Ellis (p 14 transcript).
6. The Authority will, of course, consider the relevant parts of the audio tape of the broadcast too.
7. Thus, the presenter herself directly raised key issues that provided balance to the Broadcast. She acted as devil's advocate.
8. Guideline 4b to Standard 4 of the Free-to-Air TV Code, which has consistently been followed by the Authority, specifically provides that:

"No set formula can be advanced for the allocation of time to interested parties on controversial public issues. Broadcasters should aim to present all significant sides in as fair a way as possible, it being acknowledged that this can be done only by judging each case on its merits."
9. It is respectfully submitted that the Authority should follow that same principle in relation to Radio broadcasts. There is no principled reason why the approach of the Authority should differ as to the basis upon which balance will be assessed in relation to TV and radio broadcasts.

10. In addition, the Authority has recognised that in relation to the presentation of detailed matters of public interest, in some cases the inherently negative nature of the matters being reported/broadcast may result in what might be perceived as amounting to a “negative slant” without there being a lack of balance; see para 83 of *Smith v TV3* (re “the Goons”/Christchurch Prison) 2003-006.
11. How questions are put is a matter of editorial style at the discretion of the broadcaster and the presenter. A confrontational style will not necessarily best elicit information; this is a matter of judgment. But it is submitted that editorial style will not, save in the most extreme cases, raise broadcasting standards issues.
12. In short, in this case, balancing views were expressed in the broadcast itself. The fact that they were not expressed with the vehemence that the complainant might have preferred is not, in itself, the basis for a finding that there was a lack of balance. This is particularly so when the broadcast is considered in the broader context; see below.

Reasonable efforts were made to present significant points of view in other programmes within the period of current interest:

13. Ms Ablett-Kerr seeks to treat the interview with “Nathan” as a separate matter from the ongoing Peter Ellis controversy and then to suggest that the “period of current interest” which applies in relation to this story is very narrow. With respect to Ms Ablett-Kerr, the analysis is rather artificial.
14. The Peter Ellis controversy has captivated the New Zealand public in a way that very few other issues have. The Arthur Allan Thomas case was similar. These are open-ended issues; see below.
15. The Peter Ellis controversy has drawn comment from members of the judiciary, the legal profession, politicians, journalists and a range of other high profile figures. Much of that attention was sympathetic to Mr Ellis. But that sympathy was challenged following the publication of the stories of two witnesses in *The Dominion Post*. The controversy continues to ebb and flow.
16. This broadcast must, it is submitted, be considered in the context of the ongoing media attention in relation to the various allegations against Peter Ellis. The possibility of a commission of

inquiry is but one aspect of those issues. The specific issues raised in Lynley Hood's book are another, as are the merits of his conviction.

17. At the time of the broadcast, one of the issues on the Peter Ellis controversy was the suggestion that the alleged victims of abuse had false memories of the abuse as a result of their dealings with parents, counsellors and psychologists. The comments from "Nathan" and his mother were relevant generally in the context of the Peter Ellis controversy and, specifically, in the context of the "false memories" allegations. Any suggestion that it could be somehow "carved out" as a separate issue, with a limited shelf life, is artificial. This is still very much a live issue in the context of the Peter Ellis controversy as a whole.
18. Contrary to Ms Ablett-Kerr's submission at paragraph 8.b., Principle 4 of the Radio Code specifically provides that other programmes can provide balance within the period of current interest. The relevant part of Principle 4 mirrors section 4(1)(d) of the Act.
19. Furthermore, various decisions of the Authority have confirmed that:
 - The period of current interest can, in some cases be: "ongoing" (see: *Anderson & Orr v TVNZ* (re the "DNZ World Extra: Palestine Is Still The Issue" documentary) 2003-028, paragraph 57; and *Trussell v RNZ* (re the National Radio's "Eureka" Programme) 2002-024); or open for a substantial period (see *Giles v TVNZ*, re "60 Minutes" "Double Lives" documentary, 2002-073, paragraph).
 - "Breaches" can be remedied by prior programmes (see: *Giles*, supra, para 110).
 - "Breaches" can be remedied by subsequent programmes (see *Ministry of Health v TVNZ* (re broadcasts on One Network News and Holmes regarding Lyprinol extracts from Greenlipped Mussels) 2000-030 and 2000-031, fourth paragraph following the heading "Conclusion").
 - "Breaches" can be remedied in other media (*Trussell v RNZ*, supra, paragraph 48)
20. The view expressed by the Authority in *Trussell v RNZ*, supra, at paragraphs 47 and 48 are apposite:

"[47] ... The "period of current interest" has been running for some time, and is likely to continue well into the future. Therefore, the Authority considers there is an

ongoing requirement on broadcasters to present significant points of view regarding the debate.

[48] In the Authority's view, RNZ is currently fulfilling that requirement. While the programme complained about presented Lord Winston's particular views on various matters including Dr Pusztai's research, the Authority notes that RNZ has been covering and continues to cover a range of other views. In particular, Dr Pusztai has been interviewed on *Nine to Noon*. The Authority also notes that under Guideline 4(b) to Principle 4, broadcasters are entitled to take into account views expressed by other broadcasters or another media on controversial issues, of which listeners can reasonably be expected to be aware. In the Authority's view, a range of issues has been and is being covered both by RNZ and by other media. Accordingly, the Authority declines to uphold the aspect of the complaint that the broadcast breached Principle 4."

21. In addition, it is reiterated that the obligation to provide balance should not necessitate any application of a mathematical formula.
22. In that context, in addition to the points highlighted by the presenter, other points of view would have emerged during the period of current interest from:
 - the extensive ongoing media coverage of the Peter Ellis case generally;
 - the interview with Gaye Davidson on *Nine to Noon* on 21 August 2003;
 - extensive print media coverage in the Dominion Post, The [Christchurch] Press, The Otago Daily Times, The New Zealand Herald and the Sunday Star Times, including:
 - "*Creche boy's claims disputed*" (Dominion Post, 26 August 2003) – which followed up the presenter's queries as to whether Mr Ellis was at the crèche when "Nathan" was there;
 - "*Ellis sees lawyer over fresh claims*" (The Press – City Edition, 26 August 2003);
 - "*Memory of a Sucker for Fabrication*", (The New Zealand Herald, 17 September 2003); and

- the subsequent TV3 20/20 broadcast on 31 August 2003, in which Mr Ellis chose to put his point of view.

23. A variety of perspectives on these issues emerge, and continue to emerge to the present date, all of which arise within the “period of current interest”.

Reasonable opportunities were given to present significant points of view either in the same programme or in other programmes within the period of current interest.

24. Significantly, RNZ offered Mr Ellis various opportunities to present his point of view. In each case he declined.

25. An offer to present his point of view is sufficient, for the purposes of the provisions of the Act (section 4(1)(d) of the Broadcasting Act 1989) and for the purposes of Standard 4 of the Code.

26. Mr Ellis was offered an opportunity to appear on the *Nine to Noon programme* a few days prior to the “Nathan” interview. The producer of *Nine to Noon* for RNZ, contacted Mr Ellis by telephone. He declined the offer, making it clear that he was not prepared to appear on a programme with Linda Clark, the presenter of the *Nine to Noon* programme. His position has not changed.

27. Furthermore, in a letter dated 8 September 2003 (two weeks after the initial broadcast) the offer of an interview was repeated in a letter from this firm to Mr Ellis’ solicitors. Alternatively, that letter also offered an opportunity to make a statement in reply to be broadcast.

28. Each of the offers put to Mr Ellis comprised a real opportunity for Mr Ellis to put forward his point of view and (save for the general offer prior to the “Nathan” broadcast) to comment on what “Nathan” and his mother said.

29. Mr Ellis’ solicitors did not respond to the written offer to provide his point of view until 30 September 2003, at which time they indicated that the offer of an interview was under consideration. Copies of the written offer and the response are attached, with the relevant passages highlighted. Since then there has been no substantive response to the offer of an interview or an opportunity to broadcast a statement. That is no fault of RNZ’s.

30. Mr Ellis and/or his legal representatives have not offered Mr Ellis’s point of view in relation to the broadcast to RNZ, save indirectly in the TV3 broadcast, other than in the context of threatened defamation proceedings and the complaints procedure under the Act.

31. It is accepted that Mr Ellis was under no obligation to appear on the RNZ programme. However, he was given various opportunities to present his point of view in the programme itself and subsequently well within the period of current interest. The fact that he declined to do so, whilst he was receiving competent legal advice, is a matter for Mr Ellis.
32. The Principles of the Code, and the relevant sub-section of the Act, clearly provide that a broadcaster may satisfy its obligation to provide balance by providing a reasonable opportunity for contrary points of view to be put.
33. In this case, given the sensitivities of a live interview with a complainant of sexual harassment, it suggested that this was not a programme in which "Nathan" and/or his mother should have been asked to appear live and take live telephone calls.
34. In any event, any substantive response - other than the general points put to them by the presenter - would have to come from Mr Ellis himself. The opportunity to respond was provided to him and that, it is submitted, was in itself sufficient for the purposes of Standard 4.

The period of current interest and the *Mitchell and Morrison v TVNZ 2004-03; 2004-37* decision:

35. With respect, Ms Ablett-Kerr's submission overstates the findings of the BSA in this decision. Ms Ablett-Kerr's submission implies, at paragraph 8(d), that this decision comprised a statement of principle to the effect that contentious issues raised in a programme require either presentation of an opposing point of view, or critical examination by the reporter themselves - in the programme itself - in order to satisfy Principle 4 of the Code.
36. But the relevant part of the decision simply notes that the Mayor's contentious (that successful claims would lead to deteriorating race relations/race riots) were *not* balanced by the presentation of an opposing view nor by critical examination by the reporter. This does not comprise a broad statement of principle - signaling a sea change in the approach of the Authority to this issue such that the opposing point of view and/or critical examination must be comprised in the broadcast itself in every case.
37. Further, to the extent that the *Mitchell & Morris v TVNZ* decision reflects the proposition that there must be balance in respect of the *impact* of a broadcast, that proposition - if it is relevant here (notwithstanding that it is not mentioned in the Act of the Code) - must be considered here

in the context of: the ebbing and flowing media coverage during the ongoing period of current interest; the presentation of the key balancing points of view by the presenter; and Mr Ellis's declining to express his point of view.

38. Whereas *Mitchell & Morris v TVNZ* raised factual issues about which many parties and/or entities could have presented a contrary point of view, in the present case, any further substantive response to "Nathan" and his mother (other than the points the presenter herself addressed) would have had to come from Mr Ellis (at least in the first instance).
39. Mr Ellis chose not to provide that point of view – at least not to RNZ. But the relevant standard expressly provides that the obligation to provide balance may be achieved either by *reasonable efforts to present significant points of view* "or" by *the provision of reasonable opportunities to present significant points of view*. It is submitted that, in this case, the broadcaster succeeded on both counts.
40. We reiterate that, as noted in paragraphs 16 to 18 above, the relevant statutory provisions (section 4(1)(d) of the Act), the relevant Code (Principle 4) and a variety of decisions of the Authority clearly demonstrate that balance can be provided is a programme itself, in other programmes (in the same media or other media) within the period of current interest, *or* by the provision of an opportunity to express a point of view (either in the same programme or other programmes).

Principle 6:

Failure to clearly distinguish between fact and opinion:

41. The nub of Ms Ablett-Kerr's submission is that, throughout the interview with "Nathan" and his mother, fact and opinion were not clearly distinguished.
42. If the Authority considers that Principle 6 applies, care must be taken in applying Principle 6 to this broadcast.
43. The obligation on broadcasters is to be truthful and accurate *on points of fact*. This interview comprised a verbatim interview with Nathan and his mother.
44. No real issue arises as to whether the facts were truthfully and accurately reported, as the facts – Nathan's comments and his mother's comments – were simply broadcast first hand. The "facts" comprised their subjective recollection of various events.

45. Any suggestion, in the introduction to the broadcast, that “Nathan” was not interviewed by Police or psychologists and therefore was not part of the alleged brainwashing campaign, was clarified by the first hand detailed accounts provided by “Nathan” and his mother during the course of the interview.
46. It is respectfully submitted that the issue as to whether there was an adequate distinction between “fact” or “opinion, analysis and comment” is a non sequitur in the context of a verbatim interview.
47. In that context, if the Authority is minded to determine that any of the matters raised by “Nathan” and/or his mother comprise, in themselves, disputes facts, it is submitted that it would be a significant departure from past practice for the Authority to make any factual findings re disputed facts.
48. Finally, some consideration needs to be given to the practicalities of the proposition advanced by Ms Ablett-Kerr. It seems to be suggested that, during the course of an interview, a broadcaster has an obligation clearly to dissect and distinguish factual comments by the interviewee from opinion/comment. In counsels’ submission that would be unrealistic and impractical. The Authority will of course be aware of the very real difficulties associated with distinguishing whether a particular proposition is factual or an opinion/comment - even when time permits careful consideration of the issues. To require a broadcaster to intercede, during the course of an interview or otherwise, to make that distinction would simply be unworkable.
49. Further, as the Authority has noted on many occasions, one should not underestimate the ability of the New Zealand public to distinguish facts from opinions.

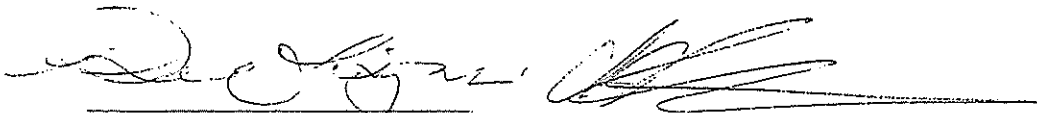
The Gaye Davidson Tape

50. The Gaye Davidson interview was identified to the Authority as comprising one of a series of publications/broadcasts in the period of current interest which provide balance (one way or the other) in the context of the broadcast in issue. For the avoidance of doubt, there is no complaint before the Authority re the Gaye Davidson interview.
51. The suggestion that the interviewer might have taken a firmer line in interview with Ms Davidson as opposed to the interview with “Nathan” and his mother, even if established, would not amount to a breach of broadcasting standards.

52. It bears mentioning that it is hardly surprising that the interviewer exercised an element of restraint in the interview with "Nathan" and his mother. This was the first occasion on which "Nathan" the alleged victim of sexual abuse, and his mother, had spoken out in public. Had the interviewer adopted a more tenacious approach, no doubt a deluge of complaints about that would have followed.
53. In any event, as noted in paragraph 5 above, the presenter did put the key issues to "Nathan" and his mother.

Conclusion

54. It is accepted that serious allegations were made in the broadcast. Mr Ellis' accuser and his mother put the allegations fairly and squarely. The key points were put to "Nathan" and his mother, albeit perhaps without the vigour Mr Ellis might have preferred. Other media coverage in the ongoing period of current interest added further balance to the broadcast. And Mr Ellis was offered an opportunity to express his particular point of view in the programme, or in a further programme, or in a statement that the broadcaster indicated would broadcast as he might wish; both of the latter opportunities were offered during the ongoing period of public interest.
55. Here, in line with the Act and the Code, the broadcaster has done all that it reasonably could. Accordingly, it is respectfully submitted that to uphold that this broadcast comprised a breach of broadcasting standards would be to apply the Broadcasting Act 1989 in such a way as to limit freedom of expression in a manner which is not reasonably or demonstrably justifiable in a free and democratic society (s.5 of the New Zealand Bill of Rights Act 1990). Section 6 of the New Zealand Bill of Rights Act requires the Authority to adopt an interpretation of the relevant standards which it considers is consistent with and gives full weight to the provisions of the New Zealand Bill of Rights Act. (See, for example, paragraph 53 of *Armstrong and Schaab v TVNZ* 2003-062 to 2003-065).



Peter McKnight/Tony Stevens
Counsel for RNZ

24 May 2004

**SUBMISSIONS OF COUNSEL FOR PETER HUGH MCGREGOR ELLIS IN
REPLY TO THE RESPONSE OF RADIO NEW ZEALAND CONCERNING
THEIR FAILURE TO UPHOLD THE COMPLAINT MADE REGARDING
THE BROADCAST OF AN ITEM ON "NINE TO NOON" ON NATIONAL
RADIO**

Breach of Principle 4

1. The complaint made to Radio NZ was that it had breached Principle 4 of the Radio Code of Broadcasting Practise ("the Code"), which requires that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest.
2. Perusal of the transcript or the recording of the interview clearly reveals that only one point of view is presented, the interviewer neglecting to question or challenge the allegations in any substantial way. Indeed any comment by the interviewer clearly serves to reinforce the allegations against Mr Ellis, by an unidentified accuser.

The "Period of Current Interest"

3. In its response Radio New Zealand has denied that it had breached Principle 4 of the Code. It rejects the complainant's contention that the Nathan interview is a separate issue. As it did in its January 26 2004 response it asserts that the Nathan interview is not a separate issue from but is inextricably linked to Mr Ellis' supporters call for a commission of inquiry.
4. This unfortunately demonstrates a misunderstanding of the "request for a Commission of Inquiry" (Royal or otherwise). The request in 2003 was part of a petition to Parliament by the author, Ms Lynley Hood and the politician, Dr Don Brash. The petition, which was not at the behest of nor signed by Mr Ellis or his Counsel, was very tightly focussed on the investigation and prosecution of the Crèche cases. It is about due process and the effectiveness of the Criminal Justice system. Whilst Mr Ellis might realistically expect to benefit from a Royal Commission he was not the Petitioner and has even now not been invited to make submissions to the Select Committee.
5. The "Nathan" interview concerns an allegation about Mr Ellis said to have occurred the year before he commenced employment at the Civic Crèche. Neither Nathan nor his mother sought to have their case be part of any potential Inquiry and said very little about the topic even after prompting by the interviewer.
6. Radio New Zealand also relies on a later TV3 documentary which included a very brief comment from Mr Ellis rejecting the allegations

made in the "Nine to Noon" interview. In doing so, Radio NZ referred to Guideline 4b (ii) of the Radio Code of Broadcasting Practice which states:

Broadcasters may have regard, when ensuring that programmes comply with principle 4, to the following matters:

(i)...

(ii) Any reasonable on-air opportunity for listeners to ask questions or present rebuttal within the period of current interest. Broadcasters may have regard to the views expressed by other broadcasters or in the media which listeners could reasonably be expected to be aware of.

7. In an earlier response dated 22nd of October 2003 Radio New Zealand had stated that *"the "Peter Ellis" topic has assumed the status of a controversial issue in New Zealand Society. Radio New Zealand noted that there had been extensive coverage in other programmes and news bulletins on National Radio and in other print and electronic media. It is further arguable that the period of current interest for this topic is open ended at this stage"*.
8. This view is mistaken for the following reasons:
 - a. The allegations aired on the "Nine To Noon" programme constituted a new and quite separate allegation, which had not been previously, addressed in general public debate, and to which Mr Ellis had not had a proper opportunity to respond. "Nathan" was not part of the original police investigation, nor was he attending the Crèche at the time that Mr Ellis was employed there. Consequently, the broadcaster cannot claim that this item fell within the general discussion concerning Mr Ellis's earlier convictions.
 - b. A broadcaster should not be entitled to rely on possible future broadcasts to present the "balance" that its own broadcast lacks. This is especially so in regards to Radio New Zealand's reliance on the TV3 documentary referred to as this in no way presented, or purported to present Mr Ellis's "response" to the allegations made by "Nathan", as Radio New Zealand seems to suggest. This would effectively endorse a situation where any programme could take a "side" in a debate, anticipating that another programme can take the other side, and pass this off as balanced broadcasting in accordance with Principle 4 of the code.
 - c. The interview was pre-recorded, and consequently the broadcaster knew exactly what the substance of the accusations would be. The presenter also appeared to be aware of the fact that Mr Ellis was not even working at the crèche at the time that "Nathan" claims he was abused by him, and thus that there were clearly difficulties with the boy's allegations, which required challenging. This is not a situation where Radio New Zealand was unprepared for the allegations, and so

could not be adequately prepared to provide some form of response to them.

- d. Where the issue dealt with is of an inflammatory nature, the broadcaster has a greater responsibility to ensure that there is balance in the presentation, which must be achieved in more than just a simplistic manner. In a recent decision of the Authority, *Mitchell and Morris v TVNZ* 2004-036; 2004-037, the Authority upheld complaints that a programme on the current foreshore and seabed issue lacked any real balance and fairness. At paragraph 79 of its judgement, the Authority stated that contentious issues raised in a programme require either presentation of an opposing view, or critical examination by the reporter themselves, in order to satisfy Principle 4 of the Code.
9. At paragraph 80 of the above decision, the Authority further states: "*The social objective of regulating broadcasting standards is to guard against broadcasters behaving unfairly, offensively, or otherwise excessively. It is the clear intention of the Broadcasting Act to limit freedom of expression. Section 5 of the New Zealand Bill of Rights Act provides that the right to freedom of expression may be limited by "such reasonable limits which are prescribed by law as can be demonstrably justified in a free and democratic society". The Limits prescribed in the Broadcasting Act, given effect in the Codes of Broadcasting Practice, are of such a nature*".
10. It is interesting to note that Radio New Zealand at no time has maintained that the presentation of the "Nineteen Noon" item in itself was balanced, or Attempted in any substantial way to put both sides of the matter. While purporting at times to give an 'overview' of the issue, the allegations were not challenged at all by the interviewer and in fact were endorsed by her.

Breach of Principle 6

11. Principle 6 of the Code requires that In preparation and presentation of news and current affairs programmes, broadcasters are required to be truthful and accurate on points of fact.

Failure to clearly distinguish between fact and opinion.

12. Guideline 6c of Principle 6 requires that factual reports should be clearly distinguished from expressions of opinion, analysis and comment. Throughout the entire "Nineteen Noon" interview of "Nathan" and his mother, fact and opinion were not clearly distinguished at any stage. In what was an extremely emotive interview, the interviewer failed in her obligation to ensure that the facts were not lost amongst the sensationalism of the matter. An example of this is where, in her introduction, the presenter states that "Nathan" "*was never interviewed as a small child by police or by psychologists. He was never part of the process Peter Ellis's supporters claim brainwashed the other children.*" This is not entirely true, as Nathan during the interview reveals that he and his family had some years ago spoken to both police and psychologists. However,

in introducing the matter thus, the presenter appears to be implying what "Nathan" is about to reveal *must* be the truth, because he has not been subjected to this "process".

13. Radio New Zealand has not fully responded to this complaint, as it argues in its 28th January 2004 correspondence, that "*Radio New Zealand does not consider the "Nineteen Noon" programme to fall within the ambit of the strict standards imposed on news and current affairs programmes by Principle 6, otherwise it would be impossible for a broadcaster to conduct any interview of an extended length*".
14. It is extremely difficult to apprehend how Radio New Zealand can come to this conclusion. It is clearly a news and current affairs programme, and in relation to this particular interview, where new criminal allegations were made, it was presenting what could only sensibly be described as a news item

The Gaye Davidson Tape

15. This interview is of no assistance to Radio New Zealand. Rather it suggests that the biased approach the interviewer had to Mr Ellis maybe more generalised than the one interview. A comparison of the attitude the interviewer adopted to Ms Davison as opposed to Nathan and his mother reveals a marked contrast. In the Nathan interview Ms Clark at no time challenges the young man or his mother. The allegations are accepted without question. The glaringly obvious flaws such as Mr Ellis not being a crèche worker until 1986, the fact that the mother's call to Inspector Pearce in 1991 or 1992 resulted in no interview of her son even though the police and child welfare agencies arranged for well over 100 children to be interviewed (even those who positively protested that they had not been abused), were either brushed over or not addressed at all.
16. In contrast Ms Davidson is vigorously challenged on all matters concerning Mr Ellis. There was no suggestion of support from the interviewer for the possibility of innocence
17. Further, it is difficult to see how Radio New Zealand could adopt the interview as supportive of its position on "period of current interest" given that the interviewer only addressed with Ms Davidson issues relating to the progress of the Petition before the select committee and Mr Ellis' convictions. She did not address the 'Nathan' allegation even though she no doubt would have been able to answer any question as to when Crèche staff first met Mr Ellis.

Concluding comments

The allegations made in the complained of broadcast were of the most serious kind. Any allegation of criminal wrong doing is serious and it is obvious that allegations of sexual abuse of children are amongst the more serious. Not only is Mr Ellis entitled to be dealt with in a fair and just way, but the New Zealand public are entitled to expect that news and current affairs

programmes, particularly from state broadcasters present information to the public that is of a reasonable standard and respects the needs and rights of individuals. This information must be of such a nature that it informs debate and does not merely promote the view point of the broadcaster, interviewer or a particular group in society. In the broadcast which is the subject of this complaint only one view was expressed. The broadcast was pre-recorded and therefore any failure to address the questions of fairness and balance must be seen as being intentional and therefore the more offensive.

JUDITH ABLETT-KERR ONZM QC

25 March 2004

Lt Copy

~~Dr Michael Stace
Complaints Manager
Broadcasting Standards Authority
P O Box 9213
WELLINGTON~~

Dear Dr Stace

**CF 2/979 09.03.04 BROADCASTING STANDARDS AUTHORITY REQUEST
FOR FURTHER INFORMATION AND RADIO NEW ZEALAND'S FURTHER
SUBMISSION**

Thank you for the above correspondence and opportunity to comment on the complainant's submissions dated 23 February 2004.

Contrary to the assertion in paragraph 1. of the complainant's above letter, Radio New Zealand has not misconstrued the meaning of "period of current interest". The interview with "Nathan" is not a completely separate issue and is inextricably linked with Mr Ellis's supporter's request for a Commission of Inquiry. The Authority may wish to note coverage given by other media in the period of current interest particularly the interview given in the *DominionPost* by two of those originally abused.

The "period of current interest" now centres on the call for a Commission of Inquiry and inevitably all matters related to that call. The "Nathan" interview clearly falls within the boundaries of the current controversy and by its timing is within the period of interest for that controversy.

Turning to the requests contained in the above correspondence, please find enclosed a tape of the Gaye Davidson interview on NinetoNoon on 21 August 2003 as requested. With respect your request for a copy of TV3's 20/20 item, a copy of the programme is presently being arranged and will be forwarded to the Authority as soon as it is available.

Yours sincerely



**George Bignell
Complaints Coordinator**



2nd Floor 54-56 Cambridge Terrace
PO Box 9213 Wellington
New Zealand

Telephone 04 382 9508
Fax 04 382 9543
Email info@bsa.govt.nz
Web www.bsa.govt.nz
Infoline 0800 366 996

9 March 2004

2/979

George Bignell
Complaints Co-ordinator
Radio New Zealand
PO Box 123
WELLINGTON

Dear Mr Bignell

The Authority in its consideration of the complaint from Mr Peter Ellis would appreciate the following material referred to in the letter from IZARD WESTON to MEDLICOTTS dated 8 September 2003.

In paragraph 3, there is reference to an interview of Gaye Davidson on *Nine to Noon* "a matter of days preceding" the broadcast complained about. Would you please let the Authority have a tape of the interview with Ms Davidson.

The same paragraph advises that Mr Ellis agreed to be interviewed on TV3's *20/20* programme. That interview is referred to again in your letter to the Authority dated 26 January 2004. The Authority would appreciate a copy of that item.

You refer to RNZ's intention to make submissions in response to Medlicotts' letter of 23 February. Please let the Authority have those submissions as soon as possible.

Yours sincerely

Michael Stace
Complaints Manager



21979

23 February 2004

COPY FOR YOUR INFORMATION

Broadcasting Standards Authority
P.O. Box 9213
Wellington

Fax 04 382 9543

For Dr Michael Stace

Dear Complaints Manager,

Peter Ellis - Radio New Zealand

Further to your letter enclosing Radio New Zealand's response and request for Mr Ellis' response by 16 February Mr Ellis responds to the submission by Radio New Zealand with the following short points:

1. "Period of current interest"
The respondent has misconceived the meaning of "period of current interest" in relation to this complaint. Whilst Mr Ellis and his convictions in relation to the abuse of six children who were under his care at the Christchurch Civic Creche is a matter of ongoing public interest the allegations published and seemingly endorsed by the Nine to Noon programme was an entirely separate issue. The complaint clearly had to be determined.
2. Principle 4(b)
Firstly, this guideline cannot have been intended to refer to some possible future broadcast but can only refer to what is in existence at the time. Any other interpretation necessarily invites speculation on a possible future contingency.
Secondly, Mr Ellis demonstrated in the short clip of the TV 3 Documentary that he did not want to be involved with an interview over a matter that he instructs amounts to defamation.
3. Principle 6
It is just not possible for the Respondent to claim that the Nine to Noon Programme is not a news and current affairs programme. It clearly promotes itself as such and its content establishes itself as such.

As to separation of fact and opinion the complainant says that this interview was extraordinary in that not only did it allege an unsubstantiated claim of serious criminal offending but the interviewer apparently adopted the claim as truthful. The transcript and tape shows that the questioning by the interviewer of the young man was largely leading and never challenging despite the fact that the interview was pre-recorded. The interview

PARTNERS Judith Medlicott CNZM MA LLB Hon LLD
Christopher Medlicott LLB
ASSOCIATE Vivian Jones LLB

Queens Gardens Court 3 Crawford Street
PO Box 1179 Dunedin New Zealand
NZDX YP 80017

Members of The Family Law Section
New Zealand Law Society

Telephone 64 3 477.7401
Facsimile 64 3 477.7406
Email medlicott@clear.net.nz

contained none of the usual caution in dealing with such serious allegations where the police have declined to prosecute.

In conclusion Radio New Zealand appears to have taken the line that because the safety of Mr Ellis' convictions is a matter of current public interest, he is not entitled to the normal protections given under the Broadcasting Act and it is in order for Radio New Zealand to broadcast uncritically this young man's unsubstantiated allegations as fact. That position is unsupportable.

Yours faithfully,
Medlicotts



Christopher Medlicott

Fic: 71540001
 Ref: PMCK3603-129189

Direct Dial: (04) 471 3463
 peter.mcknight@izardweston.co.nz

8 September 2003

BY FAX: (03) 477 7406

Medlicotts
 Solicitors
 P O Box 1179
 DUNEDIN

For: Judith Medlicott

**9 TO NOON, MONDAY 25 AUGUST:
 LINDA CLARK'S INTERVIEW WITH "NATHAN" AND HIS MOTHER**

1. We refer to our letter of 2 September 2003.
2. Your letter of 28 August 2003 alleges that the format and content of the interview lacks balance and was unfair; that the interviewer in effect "led" the interview. Such allegations are denied.
3. An apology and retraction are sought. Radio New Zealand declines that request.
4. Our client is quite willing to provide an opportunity to Mr Ellis to be interviewed on the *9 to Noon* programme as had been the offer to him prior to the broadcast about which he complains. We are sure you will be aware that Gaye Davidson was interviewed by Linda Clark a matter of days preceding the broadcast. Further it is noted that Mr Ellis agreed to be interviewed on the TV3 *20/20* programme in relation to the same topic. Alternatively, Mr Ellis may wish to make a statement in reply which, subject to usual editorial discretion, could be broadcast as he may wish.
5. You have sought the names of "Nathan" and his mother. In your letter you have indicated that consideration is being given to the issuing of proceedings with the interviewees being named as parties. You will have also heard in the interview that "Nathan" has been giving consideration to a private prosecution.
6. It will be appreciated, in such circumstances, the difficulties our client faces if it was to disclose the names of the two interviewees. Quite obviously, the identity of "Nathan", and his mother, may well be the subject of suppression orders should proceedings in one way or another ensue.
7. Grant Cameron of Christchurch is acting for the interviewees.
8. We enquire as to whether or not your client would be willing to provide an undertaking to not publicly disclose such names if they were disclosed.
9. We wait to hear from you in that regard and also in relation to the proposal as to the interview and/or broadcasting of a statement.

Level 15, Novell House
 89 The Terrace, Wellington, New Zealand
 P.O. Box 5348, Wellington 6149
 (Invoicing) Telephone: DN SP27002, Railway Station
 Phone: +64 (4) 473 0017, Fax: +64 (4) 473 0057
 Website: www.izardweston.co.nz
 93 Station Street, Napier
 Phone: +64 (6) 833 6686, Fax: +64 (6) 833 7086

Partners: Dan Stevenson, M.A. (Cantab) Grays Inn
 Richard Kemp, LL.B.
 Andrew Morrison, LL.B.
 Peter McKnight, LL.B.
 John Huron, LL.B.
 Paul Radich, LL.B. (Hons)
 Robert Stewart, LL.B., B.Com.
 Sarah Bacon, LL.B.
 Consultants: John Stevenson, M.A. (Cantab) Grays Inn, Notary Public

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10. Finally, your letter records that the letter is to constitute a formal complaint in terms of section 6(1) of the Broadcasting Act 1989. We suggest that the answer to this complaint be delayed until a decision is made in relation to the issuing of proceedings as mentioned in your letter. Having said that it is most sincerely hoped that the unpleasantness and expense of such proceedings can be avoided.
11. Your response is awaited.

Yours sincerely
IZARD WESTON



Peter McKnight
Partner

TRANSMISSION VERIFICATION REPORT

TIME : 26/02/2004 16:42
NAME : RADIO NEW ZEALAND
FAX : 6444741458
TEL : 6444741422
SER.# : G01234567890

DATE, TIME	26/02 15:42
FAX NO./NAME	BSA
DURATION	00:00:13
PAGE(S)	01
RESULT	OK
MODE	STANDARD ECM

26 February 2004



Dr Michael Stace
Complaints Manager
Broadcasting Standards Authority
P O Box 9213
WELLINGTON

Dear Dr Stace

CF 2/979 23.02.04 COPY OF COMPLAINANT'S CORRESPONDENCE

Thank you for forwarding a copy of the latest correspondence from the complainant.

Please note that the correspondence raises new matters not previously addressed and upon which Radio New Zealand will want to make submissions. We therefore request that the matter not be placed before the Authority until we have had an opportunity to address the matters raised.

Should the Authority wish to determine the complaint without receiving our further submissions, can you please advise us accordingly.

Yours sincerely

George Bignall



21979

23 February 2004

COPY FOR YOUR INFORMATION

Broadcasting Standards Authority
P.O. Box 9213
Wellington

Fax 04 382 9543

For Dr Michael Stace

Dear Complaints Manager,

Peter Ellis - Radio New Zealand

Further to your letter enclosing Radio New Zealand's response and request for Mr Ellis' response by 16 February Mr Ellis responds to the submission by Radio New Zealand with the following short points:

1. "Period of current interest"

The respondent has misconceived the meaning of "period of current interest" in relation to this complaint. Whilst Mr Ellis and his convictions in relation to the abuse of six children who were under his care at the Christchurch Civic Creche is a matter of ongoing public interest the allegations published and seemingly endorsed by the Nine to Noon programme was an entirely separate issue. The complaint clearly had to be determined.

2. Principle 4(b)

Firstly, this guideline cannot have been intended to refer to some possible future broadcast but can only refer to what is in existence at the time. Any other interpretation necessarily invites speculation on a possible future contingency.

Secondly, Mr Ellis demonstrated in the short clip of the TV 3 Documentary that he did not want to be involved with an interview over a matter that he instructs amounts to defamation.

3. Principle 6

It is just not possible for the Respondent to claim that the Nine to Noon Programme is not a news and current affairs programme. It clearly promotes itself as such and its content establishes itself as such.

As to separation of fact and opinion the complainant says that this interview was extraordinary in that not only did it allege an unsubstantiated claim of serious criminal offending but the interviewer apparently adopted the claim as truthful. The transcript and tape shows that the questioning by the interviewer of the young man was largely leading and never challenging despite the fact that the interview was pre-recorded. The interview

ARTNERS Judith Medlicott CNZM MA LLB Hon LLD
Christopher Medlicott LLB
ASSOCIATE Vivien Jones LLB

Queens Gardens Court 3 Crawford Street
PO Box 1179 Dunedin New Zealand
NZDX YP 80017

Members of The Family Law Section
New Zealand Law Society

Telephone 64 3 477.7401
Facsimile 64 3 477.7406
Email medlicotts@clear.net.nz

contained none of the usual caution in dealing with such serious allegations where the police have declined to prosecute.

In conclusion Radio New Zealand appears to have taken the line that because the safety of Mr Ellis' convictions is a matter of current public interest, he is not entitled to the normal protections given under the Broadcasting Act and it is in order for Radio New Zealand to broadcast uncritically this young man's unsubstantiated allegations as fact. That position is unsupportable.

Yours faithfully,
Medlicotts



Christopher Medlicott