

File Copy

15 October, 2004

~~Ms S Bacon
Partner
Izard Weston Lawyers
P O Box 5348
WELLINGTON~~

Dear Sarah

Please find enclosed a cheque in payment for the third of the Broadcasting Standards Authority's Orders in respect of the Peter Ellis decision. As discussed, can you please arrange for the amount tot be forwarded to Mr Ellis's solicitors.

I have today also sent under cover of the attached letter a payment of \$5000 to the Authority in respect of the fourth Order.

Thank you for your assistance.

Yours sincerely



George Bignell
Complaints Coordinator

Radio New Zealand Limited
PO Box 123 Wellington
Telephone 64 4 474 1999
Facsimile 64 4 474 1459
Email rnz@radionz.co.nz
Website www.radionz.co.nz



IZARD WESTON
PO BOX 5348
WELLINGTON

Page: 1
Date: 15th October 2004
Account: CI108
Cheque No: 039138

Date	Your Ref	Details	Amount
15/10/04	P ELLIS	0000071020	5,300.00

TOTAL 5,300.00

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Page: 1
Date: 15th October 2004
Account: CI108
Cheque No: 039138

Date	Your Ref	Details	Amount
15/10/04	P ELLIS	0000071020	5,300.00

TOTAL 5,300.00

WestpacTrust

North End
140 Lambton Quay, Wellington, NZ
Westpac Banking Corporation (New Zealand division)



Pay IZARD WESTON

the sum of FIVE THOUSAND THREE HUNDRED AND 00/100 DOLLARS

Date: 15th October 2004

\$ ****5,300.00

NOT TRANSFERABLE

For RADIO NZ LTD

S. Glasgow
Authorised Signature

[Signature]
Authorised Signature

CHEQUE DUTY PAID LIC 17

⑈039138 ⑈030539⑈ 0193256⑈00 ⑈

File Copy

9 September 2004

Mr John Sneyd
Complaints Manager
Broadcasting Standards Authority
P O Box 9213
WELLINGTON

Dear Mr Sneyd

CF2 / 979 3.9.04, BSA Decision 2004-115: Orders

Without prejudice to our appeal of parts of the above decision, please find enclosed payment in relation to the fourth of the Orders made by the Authority.

On the same basis, a cheque for \$5300 has been sent to our solicitors, IazardWeston with instructions to forward that amount to Mr Ellis's solicitors in respect of the third of the Orders made.

Yours sincerely



George Bignell
Complaints Coordinator

Radio New Zealand Limited
PO Box 123 Wellington
Telephone 64 4 474 1999
Facsimile 64 4 474 1459
Email rnz@radionz.co.nz
Website www.radionz.co.nz



MINISTRY FOR CULTURE & HERITAG
P O BOX 5364
WELLINGTON

Page: 1
Date: 15th October 2004
Account: CM435
Cheque No: 039139

Date	Your Ref	Details	Amount
15/10/04	CROWN COST	0000071019	5,000.00

TOTAL 5,000.00

Radio New Zealand Limited
PO Box 123 Wellington
Telephone 64 4 474 1999
Facsimile 64 4 474 1459
Email rnz@radionz.co.nz
Website www.radionz.co.nz



MINISTRY FOR CULTURE & HERITAG
P O BOX 5364
WELLINGTON

Page: 1
Date: 15th October 2004
Account: CM435
Cheque No: 039139

Date	Your Ref	Details	Amount
15/10/04	CROWN COST	0000071019	5,000.00

TOTAL 5,000.00

WestpacTrust

North End
140 Lambton Quay, Wellington, NZ
Westpac Banking Corporation (New Zealand division)



Pay MINISTRY FOR CULTURE & HERITAG
the sum of FIVE THOUSAND AND 00/100 DOLLARS

Date: 15th October 2004

\$ ****5,000.00

NOT TRANSFERABLE

For RADIO NZ LTD

Scilargow
Authorised Signature

[Signature]
Authorised Signature

CHEQUE DUTY PAID LIC 17

⑈039139 ⑈030539⑈ 0193256⑈00 ⑈

DUPLICATE

CIV - 2004 - 485 - 2035

In the High Court of New Zealand
Wellington Registry

CIV

Under the Broadcasting Act 1989

In the matter of a determination of the Broadcasting Standards Authority in
decision No. 2004-115 dated 3 September 2004

Between RADIO NEW ZEALAND a Crown entity established under the
Radio New Zealand Act 1995

Appellant

And PETER ELLIS of Christchurch

Respondent

NOTICE OF APPEAL BY APPELLANT AGAINST A DECISION OF THE
BROADCASTING STANDARDS AUTHORITY

Dated this 29th day of September 2004

IZARDWESTON
LAWYERS

Solicitors
Level 13
89 The Terrace
WELLINGTON
PO Box 5348
DX: SP27002, Railway Station
Phone: +64 (4) 473 9447
Fax: +64 (4) 473 4457
Contact Solicitor: Sarah Bacon
sarah.bacon@izardweston.co.nz

SLB4004-155253
71540001

**NOTICE OF APPEAL BY APPELLANT AGAINST A DECISION OF THE
BROADCASTING STANDARDS AUTHORITY**

TAKE NOTICE that on the first sitting of this Honourable Court after the expiration of 14 days from the filing and service of this notice or as soon thereafter as counsel may be heard the appellant will move this Honourable Court by way of appeal against Orders 1 and 2 of the determination of the Broadcasting Standards Authority in Decision No. 2004-115 in which the Broadcasting Standards Authority made the following orders from which the appellant appeals:

- “1. Pursuant to s.13(1)(a) of the Act, the Authority orders Radio New Zealand to broadcast a statement approved by the Authority. That statement shall:
 - be broadcast within one month of the date of this decision, at a time and date to be approved by the Authority;
 - explain that Radio New Zealand has been ordered to make the statement as a result of the Broadcasting Standards Authority’s decision to uphold the complaint about the interview on *Nine to Noon* on 25 August 2003;
 - contain a comprehensive summary of the Authority’s decision;
 - make an apology to Mr Ellis.

2. Pursuant to s.13(1)(a) of the Act, the Authority orders Radio New Zealand to publish a statement in a display advertisement, approved by the Authority, in each of the following newspapers within one month of the date of this decision on a date approved by the Authority: *The Otago Daily Times*, *The Christchurch Press*, *The Dominion Post*, and *the New Zealand Herald*. The statement shall not be in the Classified Advertising section and shall contain the following:
 - an explanation that Radio New Zealand has been ordered to publish the statement as a result of the Broadcasting Standards Authority’s decision to uphold the complaint about the interview on *Nine to Noon* on 25 August 2003;
 - a comprehensive summary of the Authority’s decision;
 - an apology to Mr Ellis.”

(the Orders)

AND UPON THE GROUNDS that the Orders made were wrong in fact and law, in the following particulars that:

1. The Broadcasting Standards Authority failed to adhere to the requirements of natural justice in accordance with section 10(1) of the Broadcasting Act 1989 and in accordance with the common law in that it did not inform the appellant that it intended implementing the Orders so far as those Orders related to a requirement to make an apology, and to a requirement to publish a statement and make an apology in the Otago Daily Times, the Christchurch Press, the Dominion Post and the New Zealand Herald, thereby failing to give the appellant a reasonable opportunity to make submissions on those Orders to the Broadcasting Standards Authority.
2. The Broadcasting Standards Authority has no jurisdiction to order the appellant to publish an apology and that such an order is ultra vires.
3. The Broadcasting Standards Authority knew or ought to have known, given the nature of the allegations made in the broadcast complained about, that the complainant may be considering issuing proceedings in defamation against the appellant and, as such, the making of an order requiring the appellant to apologise to the complainant would have a detrimental effect on the appellant's defence to any claim in defamation issued by the complainant.
4. The Broadcasting Standards Authority has wrongly concluded that it is appropriate to require a publicly funded organisation such as the appellant to publish a statement and apology in privately-owned media.

DATED this 29th day of September 2004



P A McKnight
Solicitor for the appellant

TO: The Registrar of the High Court at Wellington
AND TO: The Respondent by his solicitor
AND TO: The Broadcasting Standards Authority

This address for service is filed by **PETER ANDREW McKNIGHT**, solicitor for the above-named appellant, of the firm Izard Weston.

The address for service of the plaintiff is at the offices of Izard Weston, Level 13, 89 The Terrace, Wellington.

Documents for service on the plaintiff may be left at that address or may be:

- (a) Posted to the solicitor at PO Box 5348, Wellington; or
- (b) Left for the solicitor at a document exchange for direction to DX SP27002, Wellington; or
- (c) Transmitted to the solicitor by facsimile to (04) 473 4457.

File Copy

10 September 2004

~~Mr John Sneyd
Complaints Manager
Broadcasting Standards Authority
P O Box 9213
WELLINGTON~~

Dear Mr Sneyd

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

Thank you for the above correspondence and enclosed copy of the Authority's decision 2004-115.

Radio New Zealand inquires of the Authority's decision with respect to the orders made pursuant to s.13(1)(a) of the Act, particularly the orders to

1. "...make an apology to Mr Ellis"
2. "...publish a statement in a display advertisement...in... *The Otago Daily Times, The Christchurch Press, The Dominion Post, and the New Zealand Herald.*"

Our queries are as follows please:

1. What authority is relied on to order an apology? Radio New Zealand notes that s.13(1)(a) provides for the publication of a "statement" only.
2. Similarly, what authority is relied on to make an order with respect to publishing a statement in daily newspapers? At the very least this would seem to be a departure from the Authority's previous conventions and was not a possible penalty raised by the complainant nor one which Radio New Zealand could have contemplated and has therefore not had the opportunity to furnish a submission. Radio New Zealand further notes that the order redirects public money to the profits of privately owned media outlets through purchasing display advertising. We observe that privately owned broadcasters have never to our knowledge been directed to seek time either by purchase or by order to publish statements in publicly owned media outlets.

Your advice in these matters would be appreciated please.

Yours sincerely



George Bignell
Complaints Coordinator



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New Zealand

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Web www.bsa.govt.nz
Infoline 0800 366 996

3 September 2004

CF 2/979

George Bignell
Complaints Coordinator
Radio New Zealand Ltd
PO Box 123
WELLINGTON

Dear Mr Bignell

I have been asked to advise you that the Broadcasting Standards Authority has upheld Peter Ellis's complaint about the broadcast of *Nine to Noon* on National Radio on 25 August 2003.

The Authority makes the following orders pursuant to sections 13 and 16 of the Broadcasting Act 1989:

ORDERS

1. Pursuant to s.13(1)(a) of the Act, the Authority orders Radio New Zealand to broadcast a statement approved by the Authority. That statement shall:
 - be broadcast within one month of the date of this decision, at a time and date to be approved by the Authority;
 - explain that Radio New Zealand has been ordered to make the statement as a result of the Broadcasting Standards Authority's decision to uphold the complaint about the interview on *Nine to Noon* on 25 August 2003;
 - contain a comprehensive summary of the Authority's decision;
 - make an apology to Mr Ellis.
2. Pursuant to s.13(1)(a) of the Act, the Authority orders Radio New Zealand to publish a statement in a display advertisement, approved by the Authority, in each of the following newspapers within one month of the date of this decision on a date approved by the Authority: *The Otago Daily Times*, *The Christchurch Press*, *The Dominion Post*, and *The New Zealand Herald*. The statement shall not be in the Classified Advertising section and shall contain the following:

- an explanation that Radio New Zealand has been ordered to publish the statement as a result of the Broadcasting Standards Authority's decision to uphold the complaint about the interview on *Nine to Noon* on 25 August 2003;
 - a comprehensive summary of the Authority's decision;
 - an apology to Mr Ellis
3. Pursuant to s.16(1) of the Act, the Authority orders Radio New Zealand to pay to the complainant costs in the amount of \$5,300, within one month of the date of this decision.
 4. Pursuant to s.16(4) of the Act, the Authority orders Radio New Zealand to pay to the Crown costs in the amount of \$5,000, within one month of the date of this decision.

These orders shall be enforceable in the Wellington District Court.

A copy of Decision No: 2004-115 is enclosed. The Decision will be released to the media and subscribers on Tuesday 7 September 2004.

Payment of the costs to the Crown may be paid by cheque made out to the Ministry for Culture and Heritage. The payment may be directed to the Ministry via this Office.

We would also be grateful if you could advise this Office once you have paid Mr Ellis's costs.

Your attention is drawn to section 18 of the Broadcasting Act 1989 which provides that a complainant or a broadcaster may appeal a decision of the Authority to the High Court. Any appeal must be lodged within one month of the date on which you were notified of the Decision.

Yours sincerely



John Sneyd
Complaints Manager

File: 71540001
Ref: IMS3504-152661

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

24 August 2004

Tony Stevens
Direct Dial: (04) 471 5855
tony.stevens@izardweston.co.nz

Broadcasting Standards Authority
Lotteries Building
Level 2
54-56 Cambridge Terrace
WELLINGTON

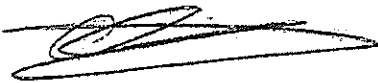
BY FAX: 382 9543
AND BY COURIER

For: John Sneyd/Hilary Jones

DECISION IN PART - ELLIS/RADIO NEW ZEALAND

1. Thank you for your letter of 24 August 2004 inviting RNZ's further comments on one issue.
2. We confirm that, in the event that the Authority decides to limit any costs award to the level of legal aid granted, RNZ's position is that:
 - 2.1 It will not object to Mr Ellis's solicitors' request to reserve the issue of costs pending a determination by the Legal Services Agency as to whether the grant of legal aid is to be increased from \$3,950 to \$5,250;
 - 2.2 It is matter for the Authority whether costs should be reserved as requested; and
 - 2.3 Its submissions in relation to the appropriate level of costs remain unchanged, save that if the grant is increased to \$5,250 that figure may be substituted for \$3,950 where the context requires.

Yours faithfully
IZARD WESTON



Tony Stevens
Senior Solicitor

trns

Received Time 24 Aug. 13:46



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New Zealand

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Infoline 0800 366 996

Fax

To: Tony Stevens

Fax: 473 9447

Cc:

Date: 24 August 2004

From: John Sneyd

Pages: 4 5

Re: CF 2/797

The information contained in this facsimile message is confidential to the Authority. If you have received this message in error please notify us immediately and return the original message to us. Thank you.

Dear Tony

Further to our recent discussion, please find attached a copy of the final comment from Mr Ellis relating to submissions on order in respect of the above matter.

We seek RNZ's further comment on one issue only; that of the request by Mr Ellis, in the event that the Authority decides to limit a cost award to the level of aid granted, to reserve the issue of costs pending the determination by the Legal Services Agency as to the increased grant of legal aid.

We would be grateful if you were able to have a response by close of business today. However we appreciate that that is a tight turnaround, and if you are unable to do so, then we seek your submissions by 4pm tomorrow.

If you have any queries in relation to this matter, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Sneyd', is written over a horizontal line.

John Sneyd

Complaints Manager

04 3829543



24 August 2004

Fax 06 382 9563

Broadcasting Standards Authority
P.O. Box 9213
WELLINGTON

For Hilary Jones

Dear Complaints Coordinator

Ellis - Radio NZ - Submissions in reply to submissions by Radio NZ as to penalty

1. Costs

An amendment of grant from the Legal Services Agency to cover costs of submissions on penalty is being sought to add 10 hours (i.e. \$1300) to the grant of aid to a total of \$5250. Please note that we had not sought an extension of the grant in view of the likelihood of a costs order and the effort required to obtain increases from the Agency.

If the Authority does not accept our submission that reasonable costs will fairly exceed the limited grant of aid then costs ought to be reserved pending the delivery of the Legal Services Agency's decision on the application for Amendment of the grant.

2. Conduct of the complaint by radio New Zealand

Radio NZ in its correspondence sought information and assurances from Mr Ellis that had nothing to do with the Broadcasting complaint. It chose to sit on its hands while corresponding rather than start the complaints procedure in the time required. The correspondence from Izard Weston reveals that RNZ made no differentiation between its role as broadcaster and its complaints committee's role. Having started the process with a denial of breach of broadcasting standards by the solicitors acting for its complaints committee it is impossible to see how Radio NZ could have approached the complaint with the necessary open mind.

In seeking information as to whether Mr Ellis would engage in an interview and whether he would bring defamation proceedings while doing nothing to progress the complaint under the Broadcasting Act 1989, Radio NZ failed in its clear obligation under the Act to carry out its statutory duty. The purported notice of extension of time was not accepted as legitimate at the time. See our letter dated 3 October 2003.

In respect of the brevity and generality of the letter setting out Mr Ellis' complaint it is perfectly in accord with the policy of the Broadcasting Act 1989, that in

PARTNERS
Judith Medlicott CNZM MA LL(B) LL(M) LL.D.
Christopher Medlicott LL.D.

Members of The Family Law Section
New Zealand Law Society

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Email medlicotts@clear.net.nz
NZDX YP 80017
Queens Gardens Court 3 Crawford Street
PO Box 1179 Dunedin New Zealand

complaints need not be set out in exhaustive detail (see section 5 of the Act), and it is only when a complaint is rejected by the broadcaster's complaints body and the complaint is litigated before the Authority that the full ambit of the case becomes apparent. The letter of complaint sets out the substance of the complaint: i.e. that it was unbalanced and unfair. The submission that in some way the form Mr Ellis' complaint led to the plethora of new issues raised by Radio New Zealand is therefore rejected.

The authority is referred to the following repetitions by RNZ and new submissions lodged by it after Mr Ellis' replies:

25 March 2004 Response for RNZ

- (a) Redefines the parameters of the 'period of current interest' from the "Peter Ellis" topic" of RNZ's response of 22 October 2003, to being centred on *"the call for a Commission of Inquiry and inevitably all matters related to that call"*;
- (b) Refers the Authority to further *"coverage given by other media"* and in particular news articles in the Dominion Post, in submitting that the interview with "Nathan" was within the period of current interest.

16 June 2004 Response of Izard Weston for RNZ

- (a) *paragraph 2* - submits that Mrs Ablett Kerr QC is suggesting that the Code should be interpreted *"so as to stifle and suppress a legitimate broadcast"*;
- (b) *paragraph 5* - raises the contention that *"RNZ presented other relevant 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)"*;
- (c) *paragraph 6* - raises the matter of *"editorial style"* as a defence of the broadcaster's approach;
- (d) *paragraphs 10, 13 and 14* - repeats its reliance on the broadcast of the 20/20 programme as representing Mr Ellis's point of view;
- (e) *paragraph 24* - raises the *"Newspaper Rule"* as a defence for non disclosure of RNZ's sources, and an avoidance of responding fully to the Authority's Inquiry;
- (f) *paragraph 26* - RNZ for the first time outlines in any detail the actual measures taken by its staff before broadcasting the Nine to Noon programme complained of;
- (g) *paragraph 27* - raises the contention that *"the only other person who could have commented directly on the core issues was Mr Ellis himself"*;

3. Statement

While it is undoubtedly the role of the Authority to determine the contents of a statement the effective submission by RNZ that it and the authority are the only parties involved in the preparation of a statement of the reasons for the decision is plainly wrong as to do so necessarily involves a denial of the principles of natural justice. Mr Ellis is as entitled to be heard upon this aspect of penalty as any other.

4. Changes in wording

Radio NZ is asking the authority to revisit some of the language used in its findings. In our submission there is no basis on which the authority may do so. The decision in part has been reached and that part contains the substantive findings of the BSA. The balance relates solely to penalty and costs. The forum for addressing those findings is not submissions on penalty but rather Radio New Zealand's remedy if it does not like the language in the decision is to appeal to the High Court.

In any case even if the authority has jurisdiction to revisit the decision it is submitted that the language used is fair. The evidence is plainly that Radio NZ was either blind (at best) to its obligations to treat Mr Ellis fairly and broadcast in a balanced way or deliberately ignored those obligations. Given Mr Ellis' uncontroverted evidence that he was invited to participate in a "sympathetic interview" where in reality he was invited to an ambush the Authority's wording is fair and reasonable.

Radio NZ has sought to replace the authority's damning findings of "*ignored obligations*" with far weaker findings of "*not sufficient to fulfil aspects of its obligations*". It is submitted that to do so would remove the whole thrust of the decision and replace the Authority's robust findings of serious breach with words that indicate that Radio NZ failed by a small margin to meet its responsibilities. That is not the case and to do so would be to allow Radio NZ to disguise its serious breaches of its fundamental obligations as a broadcaster as a *de minimis* failure to achieve the required standard in a few limited aspects.

The findings that it is impossible to achieve fairness or balance when broadcasting that an identified individual has committed unspecified crimes against an unnamed individual encapsulates this case. This appalling situation is then aggravated by pre-recording the interview containing the allegations and inviting Mr Ellis – the victim – to participate in a "sympathetic interview" in which these allegations would be publicly aired without prior notice to him. It is hard to imagine anything worse that a state broadcaster could do. It abrogates the rule of law and imposes trial by media for the purpose of creating a sensation. It is a technique used by totalitarian states to discredit those they find inconvenient. The vernacular for this conduct is "a hatchet job".

In this instance the breaches are so flagrant that there is a clear need for strong wording to underline the condemnation conduct of this kind by Radio NZ deserves. The wording and findings are appropriate and ought not to be disturbed.

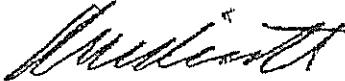
5. NZ Bill of Rights Act

The role played by the NZ Bill of Rights Act has been extensively dealt with in the Authority's decision. It is abundantly plain the right of free speech and expression do not include the right of a broadcaster to act as Radio NZ has in this instance.

6. Refrain from Broadcasting the Nine to Noon Program

The submission that the Nine to Noon programme not be broadcast for a day and that it be replaced for that day with other programming is maintained. While the public interest is served by Radio NZ continuing to be "on air" it is submitted that the public interest requires a very strong message indeed to be sent to Radio NZ and that the public has a strong interest in seeing Radio NZ punished by having that particular programme shut down for a day. It will deliver a forceful message to those involved in the programme whose conduct has been so forcefully damned by the authority, and reassure the public that, notwithstanding the right of free expression, that right must not be abused by the media in treating individuals unfairly.

Yours faithfully,
Medlicotts



Christopher Medlicott



COPY FOR YOUR INFORMATION

Send by fax 17/8/04
H. Jones.

FACSIMILE TRANSMISSION COVER SHEET

TO FAX NO:	04 382 9543	FROM:	Christopher Medlicott
ATTENTION:	Hillary Jones	DATE /TIME sent:	17/8/04
FIRM NAME:	Broadcasting Standards Authority	PLACE:	Wellington
RE:	Ellis - RNZ	NO. OF PAGES:	6

Please advise if any part of this transmission was not received

Dear Co-ordinator,

As discussed Mr Ellis' submissions as to penalty follow.

Yours faithfully,
Medlicotts

Christopher Medlicott

CONFIDENTIAL

This facsimile message contains information which is confidential and may be subject to legal privilege. If you are not the intended recipient, you are hereby notified that you must not use, review, disseminate or copy this facsimile message. If you have received this message in error, please notify us by facsimile or telephone (call collect) and destroy the facsimile message.

PARTNERS

Judith Medlicott CNZM MA LLB Hon LLD
Christopher Medlicott LLB

Members of The Family Law Section
New Zealand Law Society

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



16 August 2004

Broadcasting Standards Authority
P.O. Box 9213
Wellington

Attention: Hilary Jones

Dear Complaints Executive

Re Decision in Part - Ellis/Radio New Zealand

Mr Ellis makes the following submissions in respect of the decision in part and for orders pursuant to Sections 13 and 16 of The Broadcasting Act 1989.

1. An order for costs pursuant to section 16(1) of the Broadcasting Act

The case of *Owen v TV3 Network Services Ltd* (Decision No. 2004-064 27 May 2004), which was cited in Mr Ellis's earlier submissions, has similarities to the present case, and here, a significant level of costs were awarded. In *Owen v TV3* the Authority determined that the broadcaster had not made reasonable efforts, or given reasonable opportunities to present significant points of view so as to provide the necessary balance required when a controversial issue of public importance was discussed. The Authority in *Owen v TV3* made an order for costs of \$11,000 towards legal costs incurred by the Prime Minister and the Chief Press Secretary, and \$3,500 to the Crown in relation to complaints made by the Prime Minister and the Chief Press Secretary, the Life Sciences Network Inc, and the other complainants (Decision No. 2004-064 27 May 2004 pp 5-6). It is submitted that the present case involves a more severe breach of Principle 4 (the requirement to achieve balance), as it involved an allegation of serious crime against an already vulnerable individual with no reasonable efforts made to present other significant points of view nor to elicit any facts which might properly inform the public. Consequently, this should be reflected in a significant award of costs.

Mr Ellis's legal expenses in bringing his complaint to a resolution

Mr Ellis is legally aided. He has a grant of aid of \$3,950.

The Legal Services Agency approved a grant that has allowed payment for 30 hours of legal time at \$130 per hour plus \$50 for office disbursements. The actual time spent on the case in respect of the complaint to the Broadcasting Standards Authority on behalf of Mr Ellis of course far exceeds this. The time spent by this firm was 20 hours and Mrs Ablett-Kerr, in excess of but limited to 35 hours (including 10 hours by Junior Counsel).

PARTNERS
Judith Medlicott CNZM MA LLB Hon LLJ
Christopher Medlicott LLB

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

This firm normally charges \$240 per hour plus G.S.T. and Mrs Ablett-Kerr QC \$365 per hour plus G.S.T. Mrs Ablett-Kerr's Clerk (who is an admitted Barrister) \$120 per hour plus G.S.T. On the basis that reasonable costs are properly determined on a solicitor/client basis (and that legal aid rates could not be considered 'reasonable' in any event and in particular in this case) the appropriate measure to be taken for a reasonable costs award would be what we would properly charge but for aid. Such a figure would be for this firm's work 20 hours @ \$240 per hour and for the work done by Mrs Ablett-Kerr QC 25 hours @ \$365 per hour and work done by Junior Counsel 10 hours @ \$120 per hour plus G.S.T. i.e. \$15,125.00

Leave of the Legal Services Agency is being sought to enable us to charge more than the amount of legal aid should the Authority determine a reasonable award in excess of the grant of aid.

The Broadcaster's Response

In reaching a decision as to quantum, the Authority may take into account the manner in which the broadcaster has responded to the complaint (see *The Diocese of Dunedin and Others v TV3 Network Services Limited* Decision No.s 1999 – 125 to 137, 9 September 1999 at paragraph 4 of the Authority's decision as to orders). In the *Diocese of Dunedin and Others v TV3* decision, costs of \$45,000.00, \$17,500.00, and \$12,500.00 were awarded to separate complainants based on information supplied by them as to the actual legal costs involved, and the fact that the broadcaster had contributed to such costs by the manner in which it responded to the complaints. We consider that the conduct of Radio New Zealand in response to this complaint has exacerbated Mr Ellis' costs significantly beyond the grant of aid. Radio New Zealand has taken an adversarial approach right from the outset. This included an adversarial denial by Radio New Zealand by its solicitors following the complaint to its Complaints body - see letter dated 8 September 2003 from Izard Weston - this before the complaint had even been considered. See our reply of 30 September 2003. They sought an assurance that if the identity of Nathan was revealed that Mr Ellis would not disclose it and they sought an extension of time having failed to consider the complaint. See their solicitors' letter of 2 October and our reply of 3 October 2003.

Given the letter denying the breaches before Radio New Zealand considered the complaint (ie pre-determination), rejection of the complaint out of hand and the extreme disparity between the decision of the RNZ Complaints Committee and the decision of the Authority, it is submitted that Radio New Zealand has not given bona fide consideration to Mr Ellis' complaint. This should be reflected in a substantial award of costs.

Radio New Zealand's subsequent protracted and repetitious submissions in response to supposedly final replies from Mr Ellis (who has the right to the last word) have also increased the amount of work and time and cost well in excess of the limited grant of aid and this also ought to be recognised in the costs decision.

We request that any order made for costs require such costs to be paid within one month of the decision of the Authority.

2. Penalty

The Authority's decision in *Associate Minister of Health (Hon. Jim Anderton) v Radio New Zealand* (Decision No: 2004-081 15 July 2004) (at paragraph 29) referred to the "circumstances of the breach" as a matter to be taken into account in making its decision as to orders. At paragraph 125 of the present decision, the Authority sets out how RNZ failed to treat Mr Ellis fairly and justly. It is submitted that the Authority should consider the very serious circumstances of the breach in the present case in assessing appropriate orders. The matters referred to by the Authority included:

- The invitation to participate in a "sympathetic" interview did not disclose to Mr Ellis the nature of the allegations that were to be broadcast against him. As a matter of fairness, RNZ should have informed Mr Ellis of the reason for his participation, and the role expected of him.
- The interviewer did not attempt to discover the exact nature of the alleged criminal acts. It would have therefore been impossible for Mr Ellis to defend the allegations.
- The invitation of a "sympathetic" interview was not a reasonable one. It would have taken Mr Ellis by surprise when the allegations were put to him, and he would not have been able to defend them for the reasons already given.
- The interviewer did not seriously challenge Nathan or his mother about the fact that Mr Ellis did not work at the Crèche during the time that Nathan alleged that he had been abused.
- Nine to Noon was unable to corroborate evidence that Mr Ellis was "associated and hanging out" with people at the Crèche at the time Nathan was there. In order to be fair to Mr Ellis, further investigation was necessary.
- RNZ broadcast the interview without making any further efforts to corroborate or substantiate the allegations.

It is submitted that given such serious breaches of the code were found to have occurred in the present case, and the Authority's finding at paragraph 139 that "[g]iven the magnitude, impact, and gravity of the allegations, and their inherent unfairness as a result of their vagueness and the accuser's anonymity, these broadcasts and newspaper reports manifestly did not provide balance," orders should be imposed which properly reflect the seriousness of the breaches, and the wrong done to Mr Ellis.

(a) Broadcast Statement

A requirement that Radio New Zealand broadcast a statement pursuant to section 13 (1)(a) of the Broadcasting Act as to the Authority's findings is essential. An order for the broadcast of such a statement was made in *Owen v TV3* (Decision No. 2004-064 27 May 2004) mentioned above, and it would seem even more necessary and appropriate that one be made in Mr Ellis's case given the seriousness of the allegations. As required by the Authority in *Owen v TV3*, it is submitted that the broadcast of the statement should take place at the same time during the week as the original programme was made. It should summarise comprehensively the Authority's Decision on the complaint (see *Owen v TV3* at page 5), including reference to the inherent unfairness and impossibility of achieving balance where an unidentified accuser identifies an individual and accuses them of unspecified serious criminal acts.

It should record the finding that RNZ breached the requirement in Principle 5 to treat Mr Ellis, as a person referred to in the programme, justly and fairly and that "*radio New Zealand ignored its responsibility under the Broadcasting Act 1989 to maintain standards consistent with the principles in the Radio Code of Broadcasting Practice.*"

Reference should also be included of the Authority's findings at paragraphs 122, 123, 124, 125, 135, 136, 139, 152 and 153 of the decision.

Further, as required in *Owen v TV3*, the statement should explain that Radio New Zealand has been ordered to make the statement as a result of the Broadcasting Standards Authority's decision to uphold the complaint about its broadcast on the Nine to Noon programme on 25 August 2003.

(b) No advertising for up to 24 hours

This is a very serious matter involving what must be described as blatant breaches of the Broadcasting Principles at the expense of an individual. It is a gross abuse of the power of the media. But for Radio New Zealand being a public service broadcaster, which does not advertise, a penalty of a period of up to 24 hours without advertising pursuant to its power under section 13 (1) (b) of the Broadcasting Act would be appropriate.

The seriousness of the case compares directly with cases such as the broadcasts "*In the Public Good*" and "*Sex, Lies and Video Tape*" (Decision No's: 1999-125 to 137 9 September 1999), and the decisions of the Authority which required the television broadcasters involved to broadcast an evening without advertising.

Were Radio New Zealand a commercial station, a prohibition of advertising for a period of up to 24 hours would have been sought by way of penalty. This clearly is not available. Given that Radio New Zealand is a public service state funded broadcaster and is therefore immune from this provision it is submitted that greater weight must be given to the other options for penalty.

(c) No broadcasting for up to 24 hours

Mr Ellis recognises that Radio New Zealand is a public service and as such the public benefit in continued broadcast far exceeds his private interest in the broadcaster being punished by a requirement to go off air for a period of up to 24 hours.

That said there is little public interest by comparison in requiring the Nine to Noon programme to be shelved for a day and it is submitted that this would be an appropriate penalty.

Therefore a requirement, pursuant to the Authority's power under section 13(1)(b)(i) of the Broadcasting Act that the Nine to Noon programme hosted by Linda Clarke not be aired for a day would appear to be an appropriate penalty in this case, not only to the broadcaster but also to the individuals within Radio New Zealand responsible for the offending broadcast. It is submitted that this would go some way to reflect the Authority's finding as to the magnitude of the breach by Radio New Zealand.

(d) Costs to the Crown

As this is a serious matter and has occupied a great amount of time and work by the Authority resulting in serious findings against Radio New Zealand an order that \$5,000 be paid to the Crown, pursuant to section 16 (4) of the Broadcasting Act is also appropriate.

Yours faithfully
MEDLICOTTS



Christopher Medicott



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5 August 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 4 August 2004.

The Authority agrees to RNZ's request to defer making submissions on orders/costs until RNZ has had the opportunity to consider the complainant's submissions in that regard. Accordingly, the Authority sets out the following timeline:

- Monday 16 August – final date for receipt of complainant's submissions, which will then be copied to RNZ
- Friday 20 August – final date for receipt of RNZ's submissions, which will then be copied to complainant
- Tuesday 24 August – final date for receipt of complainant's response, if any, to RNZ's submissions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hilary Jones'.

Hilary Jones
Complaints Executive

cc: Christopher Medicott



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Fax

To: George Bignell

Fax: 474 1459

Cc:

Date: 5 August 2004

From: Hilary Jones

Pages: 2 (including cover)

Re: CF 2/979

The information contained in this facsimile message is confidential to the Authority. If you have received this message in error please notify us immediately and return the original message to us. Thank you.



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P O Box 123
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Yours sincerely

Hilary Jones
Complaints Executive

cc: Christopher Medlicott

4 August 2004



Ms Hilary Jones
Complaints Executive
Broadcasting Standards Authority
PO Box 9213
WELLINGTON

Dear Ms Jones

CF2/979 29.07.04, DECISION IN PART

1. Thank you for forwarding a copy of the above Decision in Part and for your invitation to make submissions in respect of orders/costs. Radio New Zealand (RNZ) notes the Authority's "Decision in Part" and, as requested, does not now propose to re-litigate the complaint in correspondence.
2. RNZ wishes to be informed as to what orders the complainant seeks in relation to penalty/costs before formulating its response. We respectfully suggested that the principles of natural justice apply.
3. Accordingly, RNZ respectfully requests that the Authority deals with these issues sequentially, with the complainant first stating his position, RNZ responding as it sees fit, and (if so advised) the complainant responding to the reply.
4. Of course, such an approach is (in principle) no different from the process that is followed in relation to the imposition of any penalty or costs in the civil/criminal jurisdictions of our courts. RNZ sees no reason why a similar process should not apply here.
5. RNZ notes that the complainant's solicitors have indicated that Mrs Ablett-Kerr QC has been instructed "to prepare [defamation] proceedings against RNZ and your interviewees" (per the complainant's solicitors' letter of 28 August 2003). RNZ wishes to ensure that, if and to the extent that the complainant's submissions in relation to penalty and/or any penalty itself might impact upon the threatened defamation proceedings, it has an opportunity adequately to respond.

6. Please be assured that RNZ does not wish to delay this process. To the contrary, we have responded at the earliest opportunity as there is an ongoing concern that, while the "Decision in Part" is marked "Not for Publication", there has been at least one occasion in

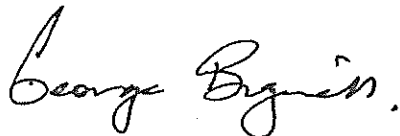


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the past where such a decision against RNZ obtained publicity in the face of the embargo imposed. In those circumstances, and in fairness to all of those affected by the decision, RNZ wishes to see this matter progressed to a final determination as expeditiously as possible.

7. Accordingly, we respectfully request that the Authority considers as a matter of priority our request for a sequential exchange of submissions in relation to penalty and costs. It remains RNZ's view that, provided that orders regarding the order for submissions can be made relatively shortly, and subject of course to counsel for the complainant being in a position to provide submissions within a short timeframe, the Authority's 16 August 2004 deadline should still be realistic. Indeed, RNZ remains optimistic that the Authority will be in a position to reach its final determination in advance of 16 August.

Yours sincerely



George Bignell
Complaints Coordinator



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29 July 2004

CF 2/979

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

Dear Mr Bignell

The Authority has now determined the complaint from Peter Ellis about the broadcast of an item on *Nine to Noon* on National Radio on 25 August 2003.

The Authority has issued a Decision in Part relating to the complaint. A copy of the Decision in Part is attached. The Authority draws your attention to the fact that each page of the Decision in Part is stamped "Not for Publication".

In accordance with the final paragraph of the Authority's Decision in Part, Radio New Zealand is now invited to make submissions on whether an order should be imposed. In that regard, the Authority draws your attention to the provisions of sections 13 and 16 of the Broadcasting Act 1989 which relate to orders when a complaint is upheld.

The Decision in Part which the Authority has issued is not the Authority's formal decision to which section 18 of the Broadcasting Act 1989 applies. The Authority's formal decision will be issued when matters relating to orders have been determined.

Please note that submissions on order(s) should be restricted to issues relevant to the question of orders. The invitation to make these submissions should not be regarded as an opportunity to re-litigate the complaint.

Radio New Zealand's submissions should be received by the Authority no later than Monday 16 August 2004.

Yours sincerely

Hilary Jones
Complaints Executive

Encl: Authority's Decision in Part

JUDITH ABLETT KERR ONZM QC

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29 June 2004

Hilary Jones
Complaints Executive
Broadcasting Standards Authority
PO Box 9213
WELLINGTON

Dear Ms Jones

Re: CF 2/979 Complaint by Mr Peter Ellis Against Nine to Noon Programme.

This letter provides a brief response to the reply of Radio New Zealand dated 25 June 2004.

1. We do not accept that the 20/20 Programme could legitimately be used to create a picture of balance. Please refer to our earlier submissions.
2. An offer to appear on Nine to Noon cannot be classed as a genuine offer when the invited person is not informed of the purpose of the interview. Radio New Zealand did not advise Mr Ellis of the nature of the programme and thus denied him the opportunity to review his decision. It also denied him the opportunity to seek legal advice, and a potential injunction being sought.
3. The fact is that Radio New Zealand chose not to advise the New Zealand public that they had asked the Police for confirmation of an important fact. The no-comment situation may not be unusual in cases that are proceeding to trial in the Criminal Courts, but I suggest are more unusual in circumstances where the Police have declined to prosecute. I also note that Radio New Zealand did not pursue their request through higher authority, nor the Crown Solicitor's office, nor the Crown Law office. These were all avenues open to them.

I trust this response now completes this stage of the process. However, if I can assist you further, please do not hesitate to contact me.

JUDITH ABLETT KERR ONZM QC

25 June 2004



Ms Hilary Jones
Complaint Executive
Broadcasting Standards Authority
PO Box 9213
WELLINGTON

Dear Ms Jones

CF2/979: COMPLAINT RE NINE TO NOON PROGRAMME

I write further to my letter of 24 June 2004.

Thank you for the opportunity to respond to Ms Ablett-Kerr's 23 June 2004 submissions. I note the Authority's desire to determine this complaint without delay. In light of this, Radio New Zealand has sought to respond both expeditiously and in brief. To the extent that Radio New Zealand's position in relation to the points raised in Ms Ablett-Kerr's submission should already be sufficiently clear from previous correspondence/submissions, those points are not repeated here. But three points merit brief comment.

First, Radio New Zealand invites the BSA to review the videotape of the 20/20 programme (see my 25 March 2004 letter and paragraph 22 of our counsel's submissions dated 24 May 2004), particularly those parts of that broadcast which relate to the "Nathan" story (i.e. commencing 20.30 minutes into the tape). The presenter's voice over indicates that:

"Ellis wouldn't comment on the latest allegations because his legal counsel is preparing defamation proceedings against Radio New Zealand. But he did say at the time the alleged abuse was supposed to have taken place he didn't even know where the crèche was let alone anyone who worked there."

In other words Mr Ellis did offer a point of view. The employment records shown on screen before the voice over, and the brief comment from Gaye Davidson that follows, reiterate that point of view. Of course, the gist of these issues was addressed in the Radio New Zealand interview with "Nathan" and his mother.

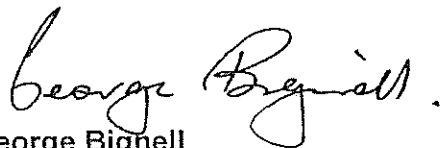
Secondly, there is no basis for the suggestion that the opportunities for Mr Ellis to present his point of view "lacked bona fides". In fact, it is clear that Mr Ellis was not prepared to express a view on the "Nathan" allegations (save for the suggestion that he is was involved at the crèche at the time - which was put to "Nathan" in the Radio New Zealand broadcast), even in the context of what was obviously a fairly sympathetic 20/20 programme. It is not accepted that the fact that Mr Ellis might be contemplating defamation proceedings is any reason for him not to publicly deny the allegations if that is his position. But that is Mr Ellis' decision. It does not detract from the reasonableness of the opportunities which have been given to him by Radio New Zealand to present his point of view.

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Thirdly, the Police's "no comment" is not (as Ms Ablett-Kerr suggests) significant; Radio New Zealand was told that this was a standard response to any media inquiries regarding the Peter Ellis matter. No inference could or should be drawn from the Police's "no comment" - it neither confirms nor denies the truth of "Nathan"'s mother's comments. In those circumstances, there is no obligation on Radio New Zealand to include what is of course a pretty standard Police response in a broadcast, nor does it comprise a breach of any aspect of the Code.

Yours faithfully

A handwritten signature in black ink that reads "George Bignell". The signature is written in a cursive style with a large initial 'G' and a long, sweeping tail.

George Bignell
Complaints Coordinator

True Copy

25 June 2004

Ms Hilary Jones
Complaint Executive
Broadcasting Standards Authority
PO Box 9213
WELLINGTON

Dear Ms Jones

CF2/979: COMPLAINT RE *NINE TO NOON* PROGRAMME

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Secondly, there is no basis for the suggestion that the opportunities for Mr Ellis to present his point of view "lacked bona fides". In fact, it is clear that Mr Ellis was not prepared to express a view on the "Nathan" allegations (save for the suggestion that he is was involved at the crèche at the time – which was put to "Nathan" in the Radio New Zealand broadcast), even in the context of what was obviously a fairly sympathetic *20/20* programme. It is not accepted that the fact that Mr Ellis might be contemplating defamation proceedings is any reason for him not to publicly deny the allegations if that is his position. But that is Mr Ellis' decision. It does not detract from the reasonableness of the opportunities which have been given to him by Radio New Zealand to present his point of view.

Thirdly, the Police's "no comment" is not (as Ms Ablett-Kerr suggests) significant; Radio New Zealand was told that this was a standard response to any media inquiries regarding the Peter Ellis matter. No inference could or should be drawn from the Police's "no comment" - it neither confirms nor denies the truth of "Nathan"'s mother's comments. In those circumstances, there is no obligation on Radio New Zealand to include what is of course a pretty standard Police response in a broadcast, nor does it comprise a breach of any aspect of the Code.

Yours faithfully

A handwritten signature in black ink, appearing to be 'G. Bignell', written in a cursive style.

George Bignell
Complaints Coordinator

sent by fax 24/6/04

HJ



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24 June 2004

CF 2/979

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

Dear Mr Bignell

Please find attached a copy of Mrs Ablett Kerr's submissions dated 23 June 2004 in response to RNZ's submissions sent under cover of letter dated 16 June 2004.

The Authority wishes to proceed to determine this complaint without delay. If there are any matters in the attached submissions to which RNZ wishes to respond, please do so by 5pm tomorrow, Friday 25 June.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hilary Jones'. The signature is fluid and cursive.

Hilary Jones
Complaints Executive

Judith Ablett Kerr ONZM QC

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FACSIMILE MESSAGE

From: Judith ABLETT KERR ONZM QC
To: Broadcasting Standards Authority
Attention: Hilary JONES
Fax No.: 04 382 9543
Date: 23 June 2004
Number of Pages (including cover sheet): 4

RE : ELLIS - BSA SUBMISSIONS

Submissions follow. This copy replaces the copies earlier emailed and faxed to you. Unfortunately, the previous version contained a typographical error.

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RESPONSE TO RADIO NEW ZEALAND SUBMISSION DATED 16 JUNE
2004

1. The submissions of RNZ dated the 16th of June 2004, are largely repetitive of earlier submissions made on behalf of the broadcaster. Mr Ellis' position has been made clear in the earlier submissions presented on his behalf. It is not the intention to now revisit those submissions in detail but the Authority is advised that they remain our position and are relied upon. It is intended however to briefly respond to certain limited matters referred to in the broadcaster's 16 June response.
2. *Paragraph 2 (c)*: It is quite incorrect to say that I suggest that the Radio Code of Broadcasting Practice ("the Code") should be interpreted in a manner "so as to stifle and suppress a legitimate broadcast". What I do say however is that a legitimate broadcast is one that complies with the Code. The Code is intended to deter broadcasts that are in breach of its principles.
3. *Paragraph 4*: RNZ have misunderstood my submission, and indeed its obligations under the Code. Where a controversial issue of public importance is the subject of a programme, RNZ is under an obligation to present significant points of view on that issue. The issue in the complained of broadcast being, the 'Nathan' allegation, and in this, they failed.
4. The distinction is important and it is unfortunate that the broadcaster chooses to see it as "splitting hairs". This misconception may well explain the seeming inability of the broadcaster to appreciate the unfairness of what has occurred here.
5. Similarly the broadcaster chooses to water down the decision in *Mitchell and Morrison v TVNZ* 2004-03; 2004-37 and the guidance it provides in cases where inflammatory allegations are made.
6. *Paragraph 5*: The broadcaster did not put significant points of view to "Nathan" in relation to his allegation. The suggestion that Mr Ellis' denials, his co-workers' denials, or Ms Hood's book amounted to denials of "Nathan's" allegations is quite incorrect.
7. *Paragraph 6*: My submission did not suggest that putting an alternative view or presenting a challenge to an allegation needs to be done in an aggressive

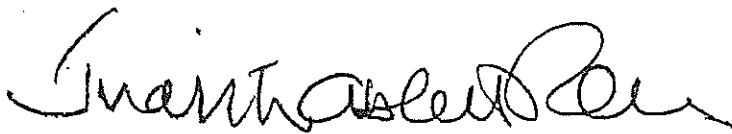
manner. What my submission does say is that you do actually have to put the alternative view and you do have to challenge. What the interviewer did in this broadcast was to provide no other point of view and failed completely to challenge the allegation. Where there was a clear opportunity to deal with areas of potential difficulty for the complainant Ms Clark adopted an approach that effectively reinforced the allegation.

8. In this broadcast, which was clearly planned in advance, the manner of interview/the editorial style of the programme has prevented the presentation of significant points of view and contributed to the failure of the broadcaster to meet the obligations of the Code.
9. *Paragraphs 7 and 8:* The "offers" afforded to Mr Ellis to present his point of view lacked bona fides. Our earlier submissions have detailed the context of these "offers."
10. *Paragraph 9:* If RNZ was not looking to later programmes to provide balance then it is difficult to understand why they have repeatedly referred to the proposition that later programmes could provide such a balance.
11. *Paragraphs 11 and 12:* We reject the idea that the obligation to present balance is somehow negated by Mr Ellis' refusal to be interviewed. The Authority is reminded of our earlier submissions relating to the circumstances of the "offer". It is clear that the obligation that the broadcaster has under the Code continues to exist even if a bona fide offer is extended and declined. In any event, the idea that only Mr Ellis himself could provide the balance or had an obligation through his Counsel to provide the balance is patently incorrect.
12. *Paragraph 13:* Mr Ellis did not choose to put his point of view on "20/20". In fact he declined to comment on the new allegation.
13. *Paragraph 14:* RNZ suggest that Mr Ellis could have taken steps to ensure that his point of view was presented. In fact the obligation is on RNZ, not Mr Ellis, to ensure that significant points of view are presented.
14. *Paragraph 17:* See paragraph 5 of these submissions. Inevitably, RNZ must reject the principles enunciated in *Mitchell and Morrison v TVNZ* 2004-03; 2004-37 if it is to maintain its stand. However the Authority is invited to give due weight to the import of that decision. A heightened obligation is entirely consistent with the spirit and intention of the Code and with duties in the civil arena. The making of a serious criminal allegation must carry with it a heightened obligation.
15. *Paragraph 18:* It is disturbing to see that RNZ continues to assert that the presentation of "Nathan's" view without any disclaimer are "the facts". Equally disturbing is the submission that second-hand hearsay by "Nathan's" mother could amount to fact. Her account cannot but in large part amount to opinion.

16. *Paragraph 20:* Mr Ellis does not seek to stifle legitimate broadcasts or prevent legitimate public interest. He does however wish to be accorded the same rights that other individuals have in New Zealand.

The Authority's Inquiry

17. It seems that RNZ wish to directly challenge the rights and powers of the Authority. The Broadcasting Act 1989 provides the Authority with "...all such powers as are reasonably necessary or expedient to enable it to carry out its functions." (See s. 24). It also provides all the necessary protections for a Defendant by virtue of s. 19A. Given those protections and the clear intention of Parliament that the Authority should be free to investigate a complaint and be empowered in a way that the individual is not, it is difficult to see how RNZ can hide behind the "newspaper rule" or indeed why they feel the need to. To allow them to do so in these circumstances would potentially place them above public interest and societal values.
18. *Paragraph 26:* The cursory detail provided of their investigations into the accuracy and reliability of Nathan's allegations reveals that RNZ in fact did little by way of investigation and were prepared to proceed with this pre-planned broadcast relying almost exclusively on the stories of "Nathan" and his mother. They failed to obtain corroboration of a key fact of the allegation, namely that Mr Ellis was supposedly "hanging around" the crèche even before he was employed there, but still went ahead with broadcasting the allegations. It is astonishing that they even failed to advise listeners that they had enquired of the Police if this fact were true and could not get confirmation that it was.
19. That RNZ had an obligation to do more than they did is implicit not only by virtue of the obligations imposed on a broadcaster by Principle 5 but also by virtue of the obligation imposed under Principle 6, which imposes a duty to present matters accurately. It is a matter of common sense that the withholding of the information that the Police had not corroborated a key fact relating to "Nathan's" allegations, is neither treating Mr Ellis fairly nor presenting an accurate account. As stated in an earlier submission, the broadcaster failed "miserably" in its obligations.



JUDITH ABLETT-KERR ONZM QC

23 JUNE 2004



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To: George Bignell, Radio New Zealand

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Cc:

Date: 24 June 2004

From: Hilary Jones

Pages: 6 (including cover)

Re: CF 2/979

The information contained in this facsimile message is confidential to the Authority. If you have received this message in error please notify us immediately and return the original message to us. Thank you.



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24 June 2004

CF 2/979

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

Dear Mr Bignell

Please find attached a copy of Mrs Ablett Kerr's submissions dated 23 June 2004 in response to RNZ's submissions sent under cover of letter dated 16 June 2004.

The Authority wishes to proceed to determine this complaint without delay. If there are any matters in the attached submissions to which RNZ wishes to respond, please do so by 5pm tomorrow, Friday 25 June.

Yours sincerely

Hilary Jones
Complaints Executive

Judith Ablett Kerr ONZM QC

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FACSIMILE MESSAGE

From: Judith ABLETT KERR ONZM QC
To: Broadcasting Standards Authority
Attention: Hilary JONES
Fax No.: 04 382 9543
Date: 23 June 2004
Number of Pages (including cover sheet): 4

RE : ELLIS - BSA SUBMISSIONS

Submissions follow. This copy replaces the copies earlier emailed and faxed to you. Unfortunately, the previous version contained a typographical error.

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JUDITH ABLETT KERR ONZM QC

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RESPONSE TO RADIO NEW ZEALAND SUBMISSION DATED 16 JUNE 2004

1. The submissions of RNZ dated the 16th of June 2004, are largely repetitive of earlier submissions made on behalf of the broadcaster. Mr Ellis' position has been made clear in the earlier submissions presented on his behalf. It is not the intention to now revisit those submissions in detail but the Authority is advised that they remain our position and are relied upon. It is intended however to briefly respond to certain limited matters referred to in the broadcaster's 16 June response.
2. *Paragraph 2 (c)*: It is quite incorrect to say that I suggest that the Radio Code of Broadcasting Practice ('the Code') should be interpreted in a manner "so as to stifle and suppress a legitimate broadcast". What I do say however is that a legitimate broadcast is one that complies with the Code. The Code is intended to deter broadcasts that are in breach of its principles.
3. *Paragraph 4*: RNZ have misunderstood my submission, and indeed its obligations under the Code. Where a controversial issue of public importance is the subject of a programme, RNZ is under an obligation to present significant points of view on that issue. The issue in the complained of broadcast being, the 'Nathan' allegation, and in this, they failed.
4. The distinction is important and it is unfortunate that the broadcaster chooses to see it as "splitting hairs". This misconception may well explain the seeming inability of the broadcaster to appreciate the unfairness of what has occurred here.
5. Similarly the broadcaster chooses to water down the decision in *Mitchell and Morrison v TVNZ* 2004-03; 2004-37 and the guidance it provides in cases where inflammatory allegations are made.
6. *Paragraph 5*: The broadcaster did not put significant points of view to "Nathan" in relation to his allegation. The suggestion that Mr Ellis' denials, his co-workers' denials, or Ms Hood's book amounted to denials of "Nathan's" allegations is quite incorrect.
7. *Paragraph 6*: My submission did not suggest that putting an alternative view or presenting a challenge to an allegation needs to be done in an aggressive

manner. What my submission does say is that you do actually have to put the alternative view and you do have to challenge. What the interviewer did in this broadcast was to provide no other point of view and failed completely to challenge the allegation. Where there was a clear opportunity to deal with areas of potential difficulty for the complainant Ms Clark adopted an approach that effectively reinforced the allegation.

8. In this broadcast, which was clearly planned in advance, the manner of interview/the editorial style of the programme has prevented the presentation of significant points of view and contributed to the failure of the broadcaster to meet the obligations of the Code.
9. *Paragraphs 7 and 8:* The "offers" afforded to Mr Ellis to present his point of view lacked bona fides. Our earlier submissions have detailed the context of these "offers."
10. *Paragraph 9:* If RNZ was not looking to later programmes to provide balance then it is difficult to understand why they have repeatedly referred to the proposition that later programmes could provide such a balance.
11. *Paragraphs 11 and 12:* We reject the idea that the obligation to present balance is somehow negated by Mr Ellis' refusal to be interviewed. The Authority is reminded of our earlier submissions relating to the circumstances of the "offer". It is clear that the obligation that the broadcaster has under the Code continues to exist even if a bona fide offer is extended and declined. In any event, the idea that only Mr Ellis himself could provide the balance or had an obligation through his Counsel to provide the balance is patently incorrect.
12. *Paragraph 13:* Mr Ellis did not choose to put his point of view on "20/20". In fact he declined to comment on the new allegation.
13. *Paragraph 14:* RNZ suggest that Mr Ellis could have taken steps to ensure that his point of view was presented. In fact the obligation is on RNZ, not Mr Ellis, to ensure that significant points of view are presented.
14. *Paragraph 17:* See paragraph 5 of these submissions. Inevitably, RNZ must reject the principles enunciated in *Mitchell and Morrison v TVNZ* 2004-03; 2004-37 if it is to maintain its stand. However the Authority is invited to give due weight to the import of that decision. A heightened obligation is entirely consistent with the spirit and intention of the Code and with duties in the civil arena. The making of a serious criminal allegation must carry with it a heightened obligation.
15. *Paragraph 18:* It is disturbing to see that RNZ continues to assert that the presentation of "Nathan's" view without any disclaimer are "the facts". Equally disturbing is the submission that second-hand hearsay by "Nathan's" mother could amount to fact. Her account cannot but in large part amount to opinion.

16. *Paragraph 20*: Mr Ellis does not seek to stifle legitimate broadcasts or prevent legitimate public interest. He does however wish to be accorded the same rights that other individuals have in New Zealand.

The Authority's Inquiry

17. It seems that RNZ wish to directly challenge the rights and powers of the Authority. The Broadcasting Act 1989 provides the Authority with "...all such powers as are reasonably necessary or expedient to enable it to carry out its functions." (See s. 24). It also provides all the necessary protections for a Defendant by virtue of s. 19A. Given those protections and the clear intention of Parliament that the Authority should be free to investigate a complaint and be empowered in a way that the individual is not, it is difficult to see how RNZ can hide behind the "newspaper rule" or indeed why they feel the need to. To allow them to do so in these circumstances would potentially place them above public interest and societal values.
18. *Paragraph 26*: The cursory detail provided of their investigations into the accuracy and reliability of Nathan's allegations reveals that RNZ in fact did little by way of investigation and were prepared to proceed with this pre-planned broadcast relying almost exclusively on the stories of "Nathan" and his mother. They failed to obtain corroboration of a key fact of the allegation, namely that Mr Ellis was supposedly "hanging around" the crèche even before he was employed there, but still went ahead with broadcasting the allegations. It is astonishing that they even failed to advise listeners that they had enquired of the Police if this fact were true and could not get confirmation that it was.
19. That RNZ had an obligation to do more than they did is implicit not only by virtue of the obligations imposed on a broadcaster by Principle 5 but also by virtue of the obligation imposed under Principle 6, which imposes a duty to present matters accurately. It is a matter of common sense that the withholding of the information that the Police had not corroborated a key fact relating to "Nathan's" allegations, is neither treating Mr Ellis fairly nor presenting an accurate account. As stated in an earlier submission, the broadcaster failed "miserably" in its obligations.



JUDITH ABLETT-KERR ONZM QC

23 JUNE 2004

24 June 2004



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

Dear Ms Jones

CF2 / 979 3 June 24th 2004: Your fax re NINE TO NOON 25 AUGUST 2003

Thank you for the above correspondence and the invitation to respond to Ms Ablett Kerr's submission.

I must protest the deadline set of 5pm 25th June for response. At this stage I am not sure that I can obtain legal advice from counsel who have been retained in this matter within that timeframe. It would not be reasonable to expect Radio New Zealand to instruct other counsel in the time available.

I therefore request that a more reasonable deadline of 5pm Wednesday 30th of June be imposed please. Obviously if we are in a position to respond earlier than that, Radio New Zealand will do so.

I look forward to your early response.

Yours sincerely

George Bignell
Complaints Coordinator



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