IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 24**

	Reference No. HRRT 043/2009
UNDER	**THE HUMAN RIGHTS ACT 1993**
IN THE MATTER OF	**AN APPLICATION FOR AN INTERIM ORDER UNDER S 95 OF THE HUMAN RIGHTS ACT 1993**
BETWEEN	**IDEA SERVICES LIMITED**
	PLAINTIFF
AND	**ATTORNEY-GENERAL**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson

REPRESENTATION:
Dr AS Butler, Mr OC Gascoigne and Mr P Barnett for Plaintiff
Ms M Coleman and Ms A Graham for Defendant

DATE OF HEARING: 28 and 29 May 2013

DATE OF LAST SUBMISSIONS: 5 and 6 June 2013

DATE OF DECISION: 10 June 2013

DECISION OF CHAIRPERSON ON INTERIM ORDER APPLICATION

BACKGROUND

The application

[1] In this application under s 95 of the Human Rights Act 1993 (**HRA**), IDEA Services Ltd seeks orders that the Ministry of Health (**MOH**):

[1.1] Immediately reverse the direction it gave to needs assessment and service coordination organisations (**NASCs**) that it would decline any new referrals for Ministry-funded day services for IDEA Services' service users aged 65 and above; and

[1.2] Confirm that IDEA Services' service users who turn 65 are eligible for needs-based referral for Ministry-funded day services

until further order of the Tribunal or pending the final determination of this proceeding.

[2] The application has been heard by the Chairperson sitting alone, as permitted by s 95 of the HRA. It is to be noted that this is the first occasion on which the Chairperson has heard any matter relating to these proceedings. In addition the urgency with which the application has been brought has not allowed each and every submission made by the parties to be addressed in this decision.

The application – grounds

[3] The grounds on which the orders are sought are stated in the following terms in the application dated 13 May 2013:

(a) Day services are important for the health, safety and wellbeing of people with intellectual disabilities assessed as needing them.

(b) The Tribunal made a declaration that the decision of the senior management team of the Ministry on 21 March 2005 that no new referrals by NASCs for day services for IDEA Services' service users aged 65 and above would be accepted ("**SMT Decision**") was made in breach of Part 1A of the Human Rights Act 1993.

(c) The direction to NASCs (the reversal of which is sought by this order) was made pursuant to, and put into effect, the unlawful SMT Decision.

(d) The Tribunal has earlier found that the SMT Decision was made "in order to change the position that had applied" (ie the position that would be preserved by the order sought) and that all the Ministry needs to do to give effect to the Tribunal's declaration is "to go back to what it was doing under the relevant contract and without any difficulty before it made the impugned decision".

(e) The Ministry's earlier stated position was that it would abide the declaration (if it were not stayed) without the need for mandatory relief. It has failed to do so. The stay of the declaration that was ultimately granted by consent expired on its terms on 3 December 2012 when the Ministry's appeal was dismissed. Since then, the Ministry has not (to IDEA Services' knowledge) reversed the discriminatory direction to NASCs the subject of the order sought.

(f) IDEA Services' repeated and sustained attempts over the past five months to initiate constructive engagement with the Ministry have been unsuccessful. IDEA Services' solicitors have not even had the courtesy of a response to a letter sent on 21 December 2012, nor the eight subsequent attempts at contact (including two letters addressed to the Director-General of Health) over the five months since.

(g) IDEA Services has therefore been left with little option but to apply for an interim order to preserve the position of the parties prior to the Ministry's unlawful SMT Decision. The Ministry has been aware of IDEA Services' intention to apply for an interim order if the Ministry failed to reverse its discriminatory direction to NASCs since 27 March 2013.

(h) This application is urgent. As at 1 July 2013 a further 35 people with intellectual disabilities will have turned 65 and (if the order sought is not made) become as at that date ineligible

to access government-funded day services. The needs assessment and service coordination process needs to be completed for those 35 people before 30 June 2013. That cannot occur until and unless the Ministry's direction to NASCs is reversed.

(i) IDEA Services therefore reluctantly applies for an interim order on an urgent basis to preserve the status quo ante pending the final determination of this proceeding.

(j) It is in the interests of justice that the order sought be made.

[4] The chronology of the plaintiff's post-High Court judgment dealings with the MOH as established by the supporting affidavit evidence has been accurately summarised in the chronology provided by Dr Butler. It is in the following terms:

Events following the High Court judgment	
Date	**Event**
5 December 2012	IDEA Services issues a press release commenting on the High Court decisions and stating its desire to move forward constructively with the Ministry. The release states: > IHC acknowledges the support the Government and the Ministry provides to IHC and to the disability sector more generally, and we look forward to working with the Ministry to correct what occurred here, to reimburse IHC for unfunded services provided during the period of the dispute and to strengthen our relationship, she [IHC Director of Advocacy Trish Grant] said.
20 December 2012	Counsel for the Ministry advises Russell McVeagh that it will not appeal the High Court's decision.
21 December 2012	Russell McVeagh writes to Phil Knipe (Chief Legal Advisor for the Ministry) seeking to address the implications of the High Court judgment.
25 January 2013	Mr Knipe advises that Russell McVeagh could expect a response to its letter by 1 February 2013.
13 February 2013	Russell McVeagh emails Mr Knipe requesting an update as to when it could expect a response to its letter.
19 February 2013	Russell McVeagh emails Mr Knipe requesting an update as to when it could expect a response to its letter.
25 February 2013	Russell McVeagh leaves a voicemail message with Mr Knipe requesting an update as to when it could expect a response to its letter.
27 February 2013	Mr Knipe advises that Russell McVeagh could expect a response no later than 6 March 2013.
8 March 2013	Russell McVeagh leaves a voicemail message with Mr Knipe requesting an update as to when it could expect a response to its letter.
15 March 2013	Russell McVeagh emails Mr Knipe requesting an update as to when it could expect a response to its letter.
27 March 2013	Russell McVeagh writes to the Director General of Health, Kevin Woods, noting its frustration at the Ministry's lack of response to date: > You will appreciate IDEA Services' deep frustration at the lack of engagement by the Ministry and the need to elevate its concerns. By any standards, the Ministry's lack of engagement to date is entirely unacceptable. The letter also notes that IDEA Services reserves its rights to apply for an interim order to preserve the position of the parties prior to the unlawful direction to NASCs.
15 April 2013	Russell McVeagh writes again to Mr Woods requesting a response and again noting that IDEA may apply for interim relief:

	IDEA Services otherwise reserves its rights, including to apply for an interim order preserving the position of the parties prior to the Ministry's unlawful direction to NASCs and to put this and our earlier letter before the Tribunal or Court in support of the same.
13 May 2013	IDEA Services files an application in the tribunal for an interim order preserving the parties' position prior to the SMT's discriminatory direction.

[5] When on the second day of the hearing I enquired why the MOH did not reply in a substantive way to the repeated enquiries made by the solicitors for the plaintiff over a period of five months, Ms Coleman advised that a part-drafted MOH letter had awaited completion but the author had been overwhelmed by other commitments. She characterised as "extraordinary" the filing of the interim order application as a "reaction" to the Ministry's silence.

[6] I cannot agree with this characterisation. It is the Ministry's silence which is extraordinary given that all the plaintiff wished to do was to engage constructively with the MOH over the implications of the High Court judgment. The service users represented by the plaintiff are a particularly vulnerable class of individuals. The Ministry's failure to communicate in a timely fashion with the plaintiff was at best deplorable.

The grounds of opposition

[7] The MOH by notice of opposition dated 17 May 2013 opposed the application on the following grounds:

3.1 The Tribunal does not have jurisdiction to make the orders sought as all questions relating to the granting of remedies have been referred to the High Court.

3.2 There is no power to make interim orders against the Crown under s 95 of the Human Rights Act 1993.

3.3 Granting the interim orders would improve rather than simply preserve the position of the applicant:

3.3.1 The respondent is already in compliance with the decision of the High Court in *Attorney-General on behalf of the Ministry of Health v IDEA Services Limited* [2012] NZHC 3229 (the High Court decision);

3.3.2 Payment by the respondent to the applicant for day services exceeds the remedial obligations necessary to comply with the High Court decision.

3.4 Interim relief is not "necessary" to preserve the applicant's position:

3.4.1 The SMT decision declared discriminatory was taken in 2005;

3.4.2 No steps have been taken by the applicant to have the remedies issues heard since the High Court decision of 3 December 2012;

3.4.3 The applicant has refused the offer of a day activities contribution for service users whose current eligibility for Ministry of Social Development funded day services ceases at age 65. This is the situation of most, if not all, the 35 people the applicant claims will shortly be ineligible to access government funded day services.

[8] To contextualise the competing contentions advanced by the parties it is necessary to refer to the litigation history.

Previous decisions – Tribunal

[9] The Tribunal's substantive decision is found in *IDEA Services Ltd v Attorney-General (No. 1)* [2011] NZHRRT 11 (11 April 2011, RDC Hindle, Chairperson, M Sinclair and Dr AD Trlin). For present purposes it is sufficient to note that the Tribunal made two findings. First, that the Ministry was the default funder of day services for service users after their retirement from MSD funding programmes and that the SMT decision was a breach of the contract between the Ministry and Idea Services. See [106]. Second, that there had been a discriminatory exclusion of those over 65 from Ministry funded day services. It found that a decision made by a Senior Management Team (the **SMT decision**) to stop funding for intellectually disabled people requiring access to day services after their retirement from the Ministry of Social Development (**MSD**) amounted to prima facie discrimination and further, that the SMT decision was not justified under s 5 of the New Zealand Bill of Rights Act 1990 (**NZBORA**). The Tribunal concluded at [196] that the SMT decision was a breach of Part 1A of the HRA. The Tribunal stated at [197] that all questions of remedy should be left to be determined at a later stage. It therefore made no final orders, not even a declaration. This, however, led to difficulty as the Ministry wished to challenge the decision in the High Court by way of appeal but required a remedy of some kind to be granted to enliven the right of appeal.

[10] In *IDEA Services Ltd v Attorney-General (No. 2)* [2011] NZHRRT 17 (13 July 2011, RDC Hindle, Chairperson, M Sinclair and Dr AD Trlin) the Tribunal:

> **[10.1]** Made a declaration under s 92I(3)(a) that the MOH had committed a breach of Part 1A of the Act;
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> **[10.2]** Referred to the High Court pursuant to s 92R of the Act all questions relating to the grant of remedies.

[11] In *Idea Services Ltd v Attorney-General (No. 3)* [2011] NZHRRT 21 (28 September 2011, RDC Hindle, Chairperson, M Sinclair and Dr AD Trlin) the Tribunal declined an application by the MOH to defer giving effect to the declaration made in the second decision; and further declined an application to maintain the status quo for two years after all rights of appeal had been exhausted.

[12] The MOH appealed against the first decision given on 11 April 2011.

Two separate High Court processes set in motion

[13] It is important to note that by this stage two separate processes had been set in motion in the High Court:

> **[13.1]** First, the appeal by the MOH against the Tribunal's substantive decision (No. 1) given on 11 April 2011.
>
> **[13.2]** Second, the referral under s 92R for all remedies to be determined under ss 92R, 92S, 92T and 92U of the HRA.

Previous decisions – High Court

[14] A question arose as to whether the appeal had been brought in time, the Ministry relying on the second decision (issued on 13 July 2011) as giving rise to an appeal right

by virtue of the declaration made on that date by the Tribunal. In *Attorney-General v IDEA Services Ltd* CIV-2011-485-1562, 16 December 2011, Mallon J held that the MOH appeal had indeed been brought in time.

[15] In *Attorney-General v IDEA Services Ltd (In Statutory Management)* [2012] NZHC 3229 (3 December 2012) (Mallon J, Ms J Grant and Ms S Ineson) the appeal by the Attorney-General was dismissed, the High Court agreeing that the SMT decision made in March 2005 breached Part 1A of the HRA. The High Court did, however, overturn the Tribunal finding of breach of contract. The High Court at [55] determined that the contract did not commit the MOH to provide continuing funding for day services to those not funded by the MSD or ACC.

[16] On 20 December 2012 counsel for the Ministry advised Russell McVeagh that the MOH would not appeal the High Court decision.

Outcome of the litigation – current position

[17] At the present time the position appears to be that:

> **[17.1]** There is a final determination (by way of declaration by the Tribunal which has been upheld by the High Court) that the SMT decision to stop funding for intellectually disabled people requiring access to day services after their retirement from the MSD was a breach of Part 1A of the HRA.
>
> **[17.2]** The grant of any other remedy is yet to be determined pursuant to the reference under s 92R from the Tribunal to the High Court.

[18] It has been submitted by the MOH that a "reference" having been made to the High Court, the Chairperson (and indeed the Tribunal) has no further jurisdiction, or at least, there is no jurisdiction for interim orders to be made under s 95. In view of this submission it is necessary to examine the reference provisions of the HRA.

THE REFERENCE FROM TRIBUNAL TO HIGH COURT

The statutory provisions

[19] Section 92R of the HRA provides that if the Tribunal is satisfied on the balance of probabilities that a defendant has committed a breach of Part 1A or Part 2, it must refer the granting of a remedy to the High Court where the amount of damages claimed exceeds the jurisdictional limit (presently $200,000) or if the Tribunal is of the view that the grant of a remedy "would be better dealt with" by the High Court:

> **92R Tribunal to refer granting of remedies to High Court**
>
> The Human Rights Review Tribunal must refer the granting of a remedy in any proceedings under section 92B or section 92E to the High Court if the Tribunal is satisfied on the balance of probabilities that a defendant in the proceedings has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint, but that—
>
> (a) the granting of the appropriate remedy under section 92I would be outside the limits imposed by section 92Q; or
>
> (b) that the granting of a remedy in those proceedings would be better dealt with by the High Court.

[20] In the present case the amended statement of claim dated 11 May 2010 seeks a variety of declarations including a declaration that the Ministry pay to IDEA Services $2,604,097, being the amount said to be due under the contract as at 28 March 2010 together with such further amount as may be due at the time of judgment. Also sought

is an order restraining the Ministry from continuing or repeating the alleged breach of Part 1A.

The referral

[21] In the No. 2 decision given on 13 July 2011 the Tribunal at [4] to [6] noted that the issue of damages had to be referred to the High Court since the sums claimed exceeded the monetary limit of the Tribunal's jurisdiction. The Tribunal further determined that the granting of all other remedies would be better dealt with by the High Court:

> [5] That does leave a question over other aspects of the remedies sought in the claim, such as the claims for restraining orders and the possibility of other more detailed declarations. For the defendant, Ms Coleman submits that these should be dealt with by the Tribunal before being referred to the High Court. But given the situation that has developed, we do not agree. We have no doubt that, once the High Court has heard and determined questions of damages it will be in a good position to go on to deal with all remaining remedy questions. And, although we do not mean to diminish the importance of the other remedies that have been sought in the claim, the reality is that to a large extent they are matters that either depend on, or will at least be informed by, the determination of the primary questions and the assessment of damages. In any event, if there are any questions of remedy that the High Court is not willing to deal with at first instance, it will be able to remit any such questions back to the Tribunal.
>
> [6] To use the language of s.92R(b) of the Act, we are satisfied that in the circumstances that have developed here the granting of any other relief in these proceedings will now be better dealt with in the High Court.

[22] At [7] the Tribunal stated:

> Pursuant to s 92R of the Act we refer all questions relating to the granting of remedies in this case to the High Court.

The statutory provisions – post-referral

[23] Section 92T(5) requires the High Court to now determine which remedies to grant, that determination being based on the Tribunal's finding that the defendant has committed a breach of Part 1A or Part 2. See s 92T(5):

> The High Court must decide, on the basis of the Tribunal's finding that the defendant has committed a breach of Part 1A or Part 2, whether 1 or more of the remedies set out in section 92I or the remedy set out in section 92J is to be granted.

[24] The decision of the High Court under s 92T(5) will then be remitted to the Tribunal "for inclusion in its determination" with regard to the proceedings. See s 92U(1):

> (1) Every decision of the High Court under section 92T(5)—
> (a) must be remitted to the Tribunal for inclusion in its determination with regard to the proceedings; and
> (b) has effect as part of that determination despite the limits imposed by section 92Q.

The significance of this provision is that it stipulates that the end point of the reference is not the decision of the High Court on remedies, but the Tribunal's "determination" in which the High Court decision is included. Any submission that the Chairperson is *functus vis-à-vis* s 95 HRA during the period of the reference must be seen in this light. Before turning to this argument another aspect of the provisions needs to be noted.

[25] It is not possible on a reference under s 92R for any party to challenge the finding of the Tribunal that the defendant has committed a breach of Part 1A or Part 2 of the Act. See s 92T(4). This is to prevent the reference from being turned into an appeal. Any challenge to the Tribunal's finding must await the appeal itself. At that point the decision appealed against will be the Tribunal's "determination" which by then will include the remedies decision made by the High Court under s 92T(5). In other words, the

reference does not limit the appeal right in s 123 of the Act. See s 92U(2) and *Attorney-General v IDEA Services Limited* CIV-2011-485-1562, 16 December 2011, Mallon J at [59].

[26] While the statutory provisions governing the determination of remedies by the High Court on a reference from the Tribunal appear to predicate that the High Court decision on remedies will precede any appeal, the statute does in fact allow an appeal prior to the High Court decision on the reference. Such occurred in the present case.

[27] Ms Coleman pointed out that this potentially leads to difficulty where (as here) the decision of the Tribunal is upheld in part and reversed in part on appeal prior to the hearing of the reference. However, the difficulty may be more imagined than real. If on appeal a finding by the Tribunal that the defendant has committed a breach of Part 1A or Part 2 is overturned, that finding would not be protected by the statutory bar in s 92T(4).

Whether power to make an interim order under s 95 affected by reference

[28] It was submitted by the Ministry that the Tribunal having made a reference to the High Court under both limbs of s 92R (remedy outside jurisdiction limits and grant of remedy would be better dealt with by the High Court), the Tribunal was *functus* and the Chairperson's power to make interim orders under s 95 did not survive the reference.

[29] As to this:

> **[29.1]** The submission conflates interim relief with remedies. This is fundamentally mistaken. Interim relief is not a remedy. Rather, it is granted to preserve the position of a party pending the determination of the substantive rights of the parties and the remedies which are to follow. By their very nature interim orders are not final.
>
> **[29.2]** A reference under s 92R is not a ceding or transfer of jurisdiction by the Tribunal. It remains seized of the matter and indeed, the Tribunal determination in which the High Court decision is ultimately included is the operative determination which can then be appealed. See s 92U and the decision of Mallon J at [59].
>
> **[29.3]** In none of the Part 3 provisions addressing remedies is it provided that the s 95 power to make an interim order falls away upon the making of a reference. To the contrary, the effect of ss 92R to s 92U is that the Tribunal remains seized of the matter from beginning to end and that the purpose of the reference is for the determination of remedy only. This is underlined by the fact that the decision of the High Court must be remitted to the Tribunal "for inclusion in its determination with regard to the proceedings". See s 92U(1)(a).
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> **[29.4]** On the making of a reference, the Tribunal (as distinct from the Chairperson) has power under High Court Rules, r 20.10 to grant interim relief. This is because s 92S(3) of the HRA provides:
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> > … the procedure for a reference under section 92R is the same as the procedure prescribed by rules of court in respect of appeals, and those rules apply with all necessary modifications.
>
> In turn, High Court Rules, r 20.10 provides that the decision-maker or the court may grant any interim relief:

20.10 Stay of proceedings

(1) An appeal does not operate as a stay—
(a) of the proceedings appealed against; or
(b) of enforcement of any judgment or order appealed against.
(2) Despite subclause (1), the decision-maker or the court may, on application, do any 1 or more of the following pending determination of an appeal:
(a) order a stay of proceedings in relation to the decision appealed against:
(b) order a stay of enforcement of any judgment or order appealed against:
(c) grant any interim relief.
(3) An order made or relief granted under subclause (2) may—
(a) relate to enforcement of the whole of a judgment or order or to a particular form of enforcement:
(b) be subject to any conditions for the giving of security the decision-maker or the court thinks just.

Section 92S(3) would require the term "appeal" to be modified to "reference". The term "decision-maker", as defined in High Court Rules, r 20.2 means the Tribunal, not the Chairperson sitting alone.

[29.5] These provisions show that notwithstanding the reference, the Tribunal may grant interim relief. While in the present case the application under s 95 HRA is to the Chairperson sitting alone, an interpretation which sees s 95 as conferring a continuing jurisdiction is consistent with r 20.10 and the reference provisions of the HRA.

[29.6] Otherwise there would be a lacuna in that an interim order under s 95 could only be made prior to the reference. Yet the case for an interim order is likely to be strongest at the point the Tribunal has decided, on the balance of probabilities, that there has been a breach of Part 1A or Part 2. In addition the determination of remedies by the High Court could be many months, if not years away, as illustrated by the present case. There is also the point made earlier that s 95 is couched in terms of making an "interim order" to preserve the position of the parties, it is not a remedy as such.

[29.7] An interpretation of the Act which avoids reading down the jurisdiction of the Chairperson under s 95 to make an interim order is also consistent with the stated object of Part 3 namely, to establish a procedure that recognises that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.

Conclusion

[30] For these reasons I conclude that the Chairperson of the Tribunal continues to have jurisdiction under s 95 of the HRA to make an interim order notwithstanding that the question of remedies has been referred to the High Court under s 92R.

[31] A second jurisdictional objection raised by the Ministry is that s 95 HRA does not empower the Chairperson to grant interim orders against the Crown.

JURISDICTION – INTERIM ORDERS AGAINST THE CROWN

The submissions

[32] Observing that IDEA Services was seeking interim mandatory orders against the Crown, Ms Coleman submitted for the MOH that s 95 confers no such jurisdiction:

[32.1] As a creature of statute, the Tribunal (and its Chairperson) has no inherent jurisdiction; its jurisdiction is that conferred by statute.

[32.2] Section 95 HRA bears a close resemblance to s 8 of the Judicature Amendment Act 1972 (**JAA 72**) prior to it being amended in 1977 to provide for interim relief against the Crown. Therefore s 95 of the HRA similarly confers no power to grant such relief. Reliance was placed on obiter comments made by the Tribunal in *Deliu v New Zealand Law Society* [2012] NZHRRT 1 at [42] – [45].

[33] For IDEA Services Dr Butler, in broad outline, submitted that the remedial jurisdiction of the Tribunal is wide-ranging. Importantly (and significantly), the remedies provisions in Part 3 of the HRA explicitly empower the Tribunal to make mandatory orders against the Crown in Part 1A cases. There can be no question but that this constitutional safeguard displaces any Crown immunity from mandatory orders that might otherwise apply. The scope of the s 95 interim order power is expressly coterminous. It empowers the Chairperson to make an interim order "in respect of any matter in which the Tribunal has jurisdiction under [the] Act to make any final determination". Consistent with the objective of Part 1A of the HRA and the principle that freedom of government action should not be indiscriminately allowed to prevail over the public and private interest in restraining an allegedly unlawful interference with a plaintiff's rights, s 95 empowers the Chairperson to make an interim order against the Crown in an appropriate case.

Discussion – a purposive interpretation

[34] Surprisingly, there is a dearth of authority on the scope and application of s 95 of the HRA, particularly in the context of Part 1A. The provision has not received detailed consideration and is most routinely used to make non-publication orders. In *Deliu v New Zealand Law Society* the Tribunal made an attempt to signal a number of unexplored issues but it must be remembered that in that case the question whether mandatory orders can be made against the Crown was not in issue. The Crown was not a party to the proceedings, the point was not argued and the Tribunal at [50] explicitly declined to determine the scope of the s 95 power. In these circumstances the question whether s 95 empowers the Chairperson to make mandatory orders against the Crown falls for consideration in the present case.

[35] Having now heard detailed argument on the issue I am of the view that in Part 1A cases mandatory orders and interim declarations can be made against the Crown under s 95 of the HRA.

[36] The submission for IDEA Services is compelling, namely, Part 1A of the HRA subjects the New Zealand Government to the anti-discrimination standard prescribed by the New Zealand Bill of Rights Act 1990, s 19. This is encapsulated in s 20I and s 20J(1):

> **20I Purpose of this Part**
> The purpose of this Part is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990 is in breach of this Part if the act or omission is that of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990.
>
> **20J Acts or omissions in relation to which this Part applies**
> (1) This Part applies only in relation to an act or omission of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990, namely—
> (a) the legislative, executive, or judicial branch of the Government of New Zealand; or
> (b) a person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[37] These provisions are at the heart of Government commitment "to the development of a robust human rights culture in New Zealand" and to the prescription of an "anti-discrimination standard for Government". See the Explanatory Note to the Human Rights Amendment Bill 2001 (152-1):

> The Government is committed to the development of a robust human rights culture in New Zealand. Two important features of a robust human rights culture are –
>
> - human rights institutions that are able to effectively perform the dual functions of promoting and protecting human rights:
> - an anti-discrimination standard for Government that is backed up by an accessible complaints process and effective remedies.
>
> The Government has given careful consideration to how best to achieve these aims, and in particular has taken cognisance of the recommendations of, and the public submissions received on, the independent report on the *Re-Evaluation of Human Rights Protections in New Zealand,* which was commissioned by the Associate Minister of Justice, Hon Margaret Wilson, in 2000.
>
> The Bill makes amendments relating to the anti-discrimination standard for Government activities and the associated publicly funded complaints process. Specifically, the Bill addresses the expiry of section 151 of the Human Rights Act 1993 by providing that complaints may be made under the Human Rights Act 1993 in respect of all Government activities, with the anti-discrimination standard of the New Zealand Bill of Rights Act 1990 being the standard for all Government activities (except employment and the related areas of racial disharmony, and racial and sexual harassment). To give effect to this, the Bill incorporates the anti-discrimination standard of the New Zealand Bill of Rights Act 1990 and to the Human Rights Act 1993.

[38] If **statutes or regulations** are found to breach the anti-discrimination standard for Government, the only remedy that can be granted by the Tribunal is a declaration of inconsistency. See s 92J. However, if **Government policies or practices** are found to contain unjustified discrimination, the full range of remedies in the HRA are available against the Crown as substantive relief. See particularly s 92I. There is nothing in the Remedies provisions of Part 3 which suggest otherwise. Indeed the elaborate remedies in ss 92O and 92P stipulate mandatory considerations and interests which, in the words of Cabinet Paper "Anti-Discrimination Standard for Government Activities" (17 May 2001) POL (01) 99 at [7] – [9], "reasonably limit the fiscal risk to government especially in respect of substantial social assistance programmes". See also the associated paper from the Office of the Associate Minister of Justice, Hon Margaret Wilson addressed to the Cabinet Policy Committee "The Anti-Discrimination Standard for Government Activities" at [39].

[39] The specific reference in s 92I(2) to proceedings brought under s 92B(1) or (4) makes it clear that in proceedings for a breach of Part 1A (other than a breach of Part 1A that is an enactment) the plaintiff may seek any of the remedies described in s 92I(3). Those remedies include (inter alia):

[39.1] A declaration that the defendant has committed a breach of Part 1A or Part 2.

[39.2] A restraining order.

[39.3] Damages.

[39.4] Specific performance.

[39.5] The undertaking of specified training or implementing a specified policy or programme to enable the defendant to comply with the provisions of the Act.

[39.6] Any other relief the Tribunal thinks fit.

[40] These remedial powers in Part 3 must be interpreted and applied so as to further, rather than stultify, the purpose of Part 1A.

Mandatory interim orders against the Crown

[41] The same principle must apply to the power to make an interim order under s 95(1). If in its "final determination of the proceedings" under Part 1A the Tribunal is expressly empowered to grant remedies against the Crown in the form of mandatory orders, there can be no principled basis for limiting the Chairperson's powers under s 95 to forms of interim relief falling short of such orders. Such an interpretation would largely emasculate s 95 in the context of Part 1A cases.

[42] For the MOH it was submitted that mandatory orders against the Crown are permitted as forms of final relief under Part 3 only because there is power to suspend such orders. If the point has been correctly understood, it is difficult to see the objection to mandatory interim relief being granted against the Crown under s 95:

> **[42.1]** A final remedy in the form of a mandatory order against the Crown made upon the final determination of the proceedings is no less a mandatory order simply because the Tribunal has a discretion, which it is not required to exercise in favour of the Crown, to defer or suspend that remedy.
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> **[42.2]** In the context of an interim order under s 95, the defendant has, in addition to a right of appeal, the ability (with leave) to apply to the High Court under s 96 HRA for the interim order to be varied or rescinded. The Crown is not unprotected.
>
> **[42.3]** Judicial review under the JAA 72 would also be available.

[43] Put more succinctly, because the Tribunal has jurisdiction to make mandatory orders against the Crown under s 92I in respect of Government policies and practices, it must follow that the Chairperson similarly has jurisdiction to make mandatory interim orders against the Crown under s 95. As the submissions for IDEA Services correctly emphasise, this reading is supported by s 95(2) which expressly provides that an application for an interim order may be made in proceedings under s 92B(1), thereby including proceedings for a breach of Part 1A via Government policy or practice (s 92B(1)(a)) or for a breach of Part 1A that is an enactment (s 92B(1)(b)).

[44] As the submissions for the plaintiff stress, the contrary position would be manifestly unfair. If no interim relief were available against the Crown, then in the words of BV Harris "Interim Relief Against the Crown" (1981) 5 Otago LR 92 at 103-104:

> … the public interest in the freedom of governmental action is indiscriminately allowed to prevail over the public and private interest in restraining an allegedly unlawful interference with the plaintiff's rights.

Section 17 of the Crown Proceedings Act 1950

[45] The foregoing analysis is not altered by s 17 of the Crown Proceedings Act 1950 (**CPA**) which relevantly provides:

> **17 Nature of relief**
>
> (1) In any civil proceedings under this Act by or against the Crown or to which the Crown is a party or third party the court shall, subject to the provisions of this Act and any other Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

provided that—

(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may instead make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Crown for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may instead make an order declaring that any person is entitled as against the Crown to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

[46] There are several reasons why this provision does not apply in the present context:

[46.1] Proceedings before the Tribunal are not "civil proceedings" as defined in s 2(1) of the CPA with the result that the restraint on granting an injunction or making an order for specific performance in the proviso to s 17(1) has no application.

[46.2] Further, s 17 explicitly provides that the section is "subject to" the provisions of "any other Act" indicating that its provisions are qualified by (here) the HRA. The HRA ranks first should the two Acts be inconsistent. For the reasons given, the remedies available to the Tribunal under Part 3 of the Act where complaints about discriminatory Government policies and practices are upheld include (inter alia) not only declarations, but also damages and specific performance. Section 17 of the Crown Proceedings Act is explicitly displaced.

[46.3] This interpretation is consistent with s 27(3) of NZBORA which provides that that there is a right to bring civil proceedings against the Crown and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals:

27 Right to justice

(1) …
(2) …
(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[46.4] Furthermore, s 6 of NZBORA requires an interpretation consistent with the Bill of Rights:

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[46.5] Section 8(2) of the JAA 72 is of little interpretive assistance in the present context given that it, along with s 17 of the CPA, has no application to the Tribunal. In addition the Tribunal's jurisdiction under Part 1A and Part 2 of the HRA does not have an analogue to s 14 of the JAA 72 which gives precedence to the CPA.

[46.6] Finally, Crown immunity can be seen as an anachronism which is on the wane, particularly given the advent of the HRA and of the NZBORA. See Law

Commission *Mandatory Orders Against the Crown and Tidying Judicial Review* and Terence Arnold QC "The Changes, The Trends and Challenges" (paper presented to New Zealand Law Society Litigating Against the Crown Seminar, July 2002).

Conclusion

[47] For the foregoing reasons I conclude that mandatory orders and interim declarations can be made against the Crown under s 95 of the HRA in Part 1A cases.

SECTION 95 – WHETHER INTERIM ORDER TO BE MADE

[48] Having found that there is jurisdiction to make the orders sought by the plaintiff it is possible to turn to the question whether I am satisfied that it is necessary in the interests of justice to make the orders to preserve the position of the plaintiff pending a final determination of these proceedings. Before addressing the facts a brief summary is provided of the principles to be applied.

Section 95 – principles

[49] At the risk of repetition s 95(1) provides:

> **95 Power to make interim order**
>
> (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[50] As discussed in *Deliu v New Zealand Law Society* [2012] NZHRRT 1 (8 February 2012) there are similarities as well as differences between s 95 of the HRA and s 8 of the JAA 72. As the differences are significant, s 95 is to be interpreted in its own terms although the established case law under the JAA 72 is a useful point of reference:

[50.1] Being "satisfied" in this context simply means that the Chairperson has made up his or her mind that the interim order is necessary in the interests of justice to preserve the position of one of the parties pending a final determination of the proceedings. The term "satisfied" does not require that the Chairperson should reach his or her judgment having been satisfied that the underlying facts have been proved to any particular standard. See by analogy *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26] (Elias CJ) and [96] (Blanchard, Tipping and McGrath JJ).

[50.2] The term "necessary" means reasonably necessary. See by analogy *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.

[50.3] As to "the interests of justice" it was held in *X v Police* HC Auckland AP 253/91, 9 October 1991 by Barker J that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.

[50.4] There is a clear distinction between preserving the position of a party on the one hand and improving it on the other. It is clear from s 95(1) of the HRA and from s 8(1) JAA 72 that the position of a plaintiff cannot be improved: *Movick v Attorney-General* [1978] 2 NZLR 545 (CA) at 551 line 35; *Nair v Minister of Immigration* [1982] 2 NZLR 571 at 575-576 (Davison CJ) and more recently

Squid Fishery Management Co Ltd v Minister of Fisheries (2004) 17 PRNZ 97 at [29] (Ellen France J).]

[50.5] The phrase "the position of the parties" must in this context be read as including the singular "party". See Interpretation Act 1999, s 33 and Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 428. Were the position otherwise, an interim order could seldom, if ever be made, as it is difficult to envisage circumstances in which an interim order could be couched in terms which preserved, simultaneously, the position of both parties to the proceedings.

[50.6] The phrase "pending a final determination of the proceedings" in the context of a case where a reference has been made from the Tribunal to the High Court under s 92R HRA means pending the final determination of the Tribunal under s 92U ie after the decision of the High Court on remedies has been remitted to the Tribunal; or alternatively, upon the reference coming to an end for some other reason and the Tribunal then making its final determination.

[51] The power in s 95(1) HRA is to be applied flexibly. Here s 8 JAA 72 assists by analogy:

[51.1] In *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) Cooke J at 430 said that the s 8 power should not be restricted by any formulation such as that found in the cases on interim injunctions, for example *American Cyanamid*. Specifically there is no general rule that a prima facie case must be established by the applicant for the order. The Court has a wide discretion to consider all the circumstances of the case:

> Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[51.2] The broad language of this section was also emphasised by Richardson J at 430-431 and by Somers J at 433. In the interests of brevity only the passage from the judgment of Richardson J is reproduced here:

> Section 8 of the Judicature Amendment Act 1972 does not mandate any particular approach to the statutory test of whether an interim order is necessary for the purpose of preserving the position of the applicant. The legal answer must depend on an assessment by the Judge of all the circumstances of the particular case. Clearly the nature of the review proceedings will be material. So will the character, scheme and purpose of the legislation under which the impugned decision was made. And appropriate weight must of course be given to all the factual circumstances including the nature and prima facie strength of the applicant's challenge and the expected duration of an interim order. Nor should the residual discretion under s 8 be circumscribed by reading qualifications into the broad language of the section.

The *Carlton & United Breweries* approach was recently described by the Supreme Court in *Easton v Wellington City Council* [2010] NZSC 10 at [5] as settled principle. See also *Minister of Fisheries v Antons Trawling Company Ltd* (2007) 18 PRNZ 754 (SC) at [3] and [8].

[52] Also relevant in the context of exercising the power to make an interim order under s 95 are the provisions of s 105 of the HRA which provide:

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

[53] The primary issue in the present case is whether the interim orders sought by the plaintiff are necessary to preserve the plaintiff's position pending a final determination of the proceedings.

WHETHER ORDER NECESSARY TO PRESERVE POSITION OF THE PLAINTIFF

The position IDEA Services wishes to preserve

[54] The position sought to be preserved by IDEA Services is articulated in the written submissions at para [5.12] in the following terms:

> 5.12 The position sought to be preserved is the non-discriminatory status quo ante, prior to the Ministry's breach of Part 1A (ie prior to its discriminatory directive to NASCs in March 2005). The critical feature of the position sought to be preserved is that people with intellectual disabilities aged 65 and above were eligible for referral for needs-based access to Ministry-funded day services.
>
> 5.13 IDEA Services notes that it is no obstacle to the interim relief sought that its application technically seeks to preserve the status quo *ante* rather than preserve the status quo. It is recognised that the analogous power under section 8 of the JAA extends to such a situation (as, indeed, is expressly anticipated by section 8(1)(c) under which the Court may declare a licence that has been revoked to continue and be deemed to have continued in force).

The evidence for the Ministry

[55] The case for the Ministry is that the status quo ante is now of historical interest only as the circumstances have changed. More particularly, the defects which surrounded the 2005 SMT decision which led to the finding by both the Tribunal and the High Court that it was neither minimally impairing nor proportionate have been overtaken by events. Particularly, in the period 2012 to 2013 Cabinet, the Minister of Health and the MOH have addressed anew the funding of day services for those 65 and over and who were being funded by MSD. Possibly the most important change from the status quo ante was the February 2013 implementation of a residential funding initiative called the Day Activities Contribution (**DAC**) which provides an extra $30 per day to community residential service providers to assist with the provision of meaningful day time activities for those **residential clients** that are ineligible to be funded to attend either a MSD or a MOH funded day service. It is not practical to summarise the contents of the affidavits filed by the Ministry. Hopefully most of the main points made by Ms TK Atkinson, Group Manager Disability Support Services in the National Health Board are captured here:

> **[55.1]** At present neither the MOH nor the MSD have been assigned responsibility to fund day services for those 65 and over who were being funded by MSD. While the MOH continues to fund day services to those for whom it is responsible [ie those who have been deinstitutionalised under a formal deinstitutionalisation plan, those with an intellectual disability who are either care

recipients under the Intellectual Disability Compulsory Care and Rehabilitation Act 2003, or those whose high and complex needs are provided for under the National Intellectual Disability Care Agency], it does not acquire funding obligations for those who exit from MSD funded community participation services at 65. Ministers are aware of this funding gap.

[55.2] Since being served with the present application for interim orders, the MOH has again raised the funding gap issue with the Minister of Health. The Minister has confirmed the Ministry should not fund those who exit MSD funded community participation services at age 65, even if it means that some people over the age of 65 are unable to access day services.

[55.3] In February 2013 the Disability Support Services (**DSS**) at the National Health Board implemented a residential funding initiative called the Day Activities Contribution. This resulted from a proposal for DSS to provide supplementary support funding for 65 and over community residential clients who were ineligible to be funded to attend a day service.

[55.4] The DAC provides an extra $30 per day to community residential service providers to assist with the provision of meaningful day time activities for those residential clients ineligible to be funded to attend either a MSD or a MOH funded day service.

[55.5] The DAC funding initiative is not a replacement for day services.

[55.6] Nearly all of the 137 providers of community residential care have signed variations of their contracts with the Ministry to take into account the DAC. Apart from IDEA Services, only five small providers have not signed variations for the DAC.

[55.7] In February 2013, the MOH estimated there were 359 disabled people over the age of 65 who would be eligible to be funded for the DAC. This represents a potential cost to the Ministry of $2,638,650 depending on uptake.

[55.8] DSS is currently considering how day services can deliver better outcomes for eligible disabled people through collaborative day services funding between both the MOH and the MSD. It is intended the day service funding boundary issue will be resolved through an initiative known as the Enabling Good Lives initiative.

[55.9] Since the delivery of the High Court decision in December 2012 the Ministry has been considering how to best implement that decision.

The evidence for IDEA Services

[56] In a reply affidavit filed for IDEA Services, Ms WL Rhodes, General Manager, Quality, at IDEA Services Ltd has responded at length. Again, it is impractical to provide a full summary of the evidence. Hopefully the main points follow:

[56.1] IDEA Services has still not received a substantive response to the letters and communications referred to in the chronology set out earlier in this decision.

[56.2] Ms Rhodes is surprised that Ms Atkinson raises the DAC. In the opinion of Ms Rhodes, the decisions given by the Tribunal and by the High Court confirmed that the denial of eligibility for day services to over 65s was in breach of the HRA.

IDEA Services expected the MOH to honour those decisions and confirm that over 65s are eligible for needs-based referral to access Ministry-funded day services. Because the DAC only applies to those who are *ineligible* for government funded day services, the need for it to apply to the 35 service users exiting MSD funded day services as at 1 July 2013 should fall away in light of the Tribunal's and High Court's decisions.

[56.3] From IDEA Services' perspective, the findings of the High Court meant that the need for the DAC fell away. Over 65s could undergo needs assessment and service coordination in relation to day services as they had done prior to the Ministry's discriminatory direction in May 2005.

[56.4] IDEA Services has not been able to take an informed position on the DAC until it has received a substantive response from the MOH to the enquiries which have remained unaddressed by the MOH from December 2012 to May 2013.

[57] It is appropriate to pause at this stage to observe that the present application for interim orders has been heard and determined in circumstances of urgency. The application was filed on 13 May 2013, the first teleconference convened on 15 May 2013 and the timetable required the affidavits by the Ministry in opposition to be filed and served by 4pm on Wednesday 22 May 2013. The reply affidavits by IDEA Services were required to be filed and served by 5pm on Friday 24 May 2013. The hearing commenced at Wellington on Tuesday 28 May 2013 and lasted two days. The parties and those advising them are to be commended for the enormous effort that has been made to ensure that I am properly informed. Nevertheless I am conscious that the time constraints mean that both parties remain at a disadvantage. The Ministry because it has had but a few days to articulate the factual basis of its opposition to the application and IDEA Services because prior to receipt of Ms Atkinson's affidavit they had no warning of what stance the Ministry would take vis-à-vis the High Court judgment. After all, for five months the Ministry had remained silent.

[58] Nonetheless, as the hearing of the interim order application developed it became clear that the jurisdictional objections by the Ministry to the interim order application were largely subsidiary to the main "defence" namely, that the introduction of the DAC initiative had created a new situation and that it was not possible for the interim order application to be determined on the basis of the now superseded status quo prior to the 2005 SMT decision.

[59] For IDEA Services it was submitted (inter alia) that the DAC was introduced prior to the High Court decision (and therefore could not be a response to it), that the DAC was itself discriminatory and that the MOH evidence had not offered a justification which would satisfy the terms of s 5 NZBORA and finally, that the SMT decision had not been formally revoked.

[60] These points may not do justice to the submissions made for IDEA Services and are certainly incomplete. The point being made, however, is that the argument on the interim order application began to take on the appearance of a Part 1A challenge to the DAC initiative.

Whether new circumstances

[61] The submission for the Ministry was that:

[61.1] Any challenge to the DAC initiative based on an allegation that it was discriminatory needed to take place within the context of standalone substantive proceedings in which the DAC was challenged under Part 1A. It was impermissible for such challenge to occur in the context of the current proceedings by way of an interim order application under s 95.

[61.2] If the introduction of the DAC initiative has brought about a new circumstance it will have a direct impact on identifying "the position of the parties" and whether an interim order is necessary in the interests of justice to preserve the position of IDEA Services.

[61.3] For the purpose of the interim order application the issue was whether the MOH had made a reasonable argument that with the introduction of DAC the Ministry is now compliant with the non-discrimination standard as interpreted and applied by the High Court.

[62] To contextualise this argument reference was made to to the New Zealand Public Health and Disability Act 2000, s 3 for the proposition that the provision of personal health services, public health services and disability support services must be achieved within the funding provided by Government:

> **3 Purpose**
>
> (1) The purpose of this Act is to provide for the public funding and provision of personal health services, public health services, and disability support services, and to establish new publicly-owned health and disability organisations, in order to pursue the following objectives:
>
> (a) to achieve for New Zealanders—
>
> (i) the improvement, promotion, and protection of their health:
>
> (ii) the promotion of the inclusion and participation in society and independence of people with disabilities:
>
> (iii) the best care or support for those in need of services:
>
> (2) The objectives stated in subsection (1) are to be pursued to the extent that they are reasonably achievable within the funding provided.

[63] The argument, as then developed, included the following points:

[63.1] The High Court decision falls far short of finding that the same decision made by the SMT, properly considered, could not be reached. It was for "process" reasons that the Court found that the 2005 decision was, in terms of s 5 NZBORA, neither minimally impairing nor proportionate.

[63.2] The flaws identified were the lack of evidence that the SMT had considered whether the Government intended day services to the over 65 group to be funded; the disconnect between the SMT decision and the Government's vision for an inclusive society; the scope of the service specification under the residential care contracts to determine the extent to which there would still be funding for any activities outside of the home; the financial impact of continuing to fund day services to this group; the impact of the SMT decision on human rights; whether non-discriminatory options were available.

[63.3] The High Court considered that reasonable alternatives were available, including:

[63.3.1] For the Ministry to defer a decision pending a review of the financial impact and to seek a supplementary appropriation if necessary; and

[63.3.2] The reduction of the funding of day services for disabled people over the age of 65 on a pro rata basis either by reducing the number of available hours or prioritising on the basis of need.

[63.4] The Ministry had failed to establish that the SMT decision was proportionate at the time it was made, in the absence of any consideration of other alternatives.

[63.5] The holding by the High Court that the prima facie breach of the non-discrimination principle was not justified was based on what the SMT did, or more importantly what it did not, consider at the time. The Court did not hold that failing to fund the affected group of disabled people who were all aged over 65 was necessarily discriminatory.

[63.6] It was therefore open to the Ministry to reach the same decision, this time after proper consideration of the human rights implications and the availability of other alternatives.

[64] The Ministry accordingly submitted that its current position in relation to day services funding to the affected group of those over 65 exiting from MSD community participation services is consistent with the High Court judgment. While the Ministry's formal direction to NASCs remains the same, each of the issues identified as flaws in relation to the 2005 decision have been taken into account in reaching the current position:

[64.1] First, in preparation for the hearing of the interim order application, evidence of the cost of funding day services going forward was prepared and has informed decision-making subsequently.

[64.2] Second, following the decisions of the Tribunal and High Court, the Ministry is aware of the human rights considerations arising in this context and these have been taken into account in its decision to provide a DAC to residential care providers.

[64.3] Third, it is now clear Cabinet and Ministers do not intend that the MOH should commence funding the affected group once they turn 65.

[64.4] Fourth, while the Court felt constrained by inadequate information regarding the purpose of MSD services, there was now the affidavit of Mr Gordon Pryde, National Manager, Contracts at the MSD which makes it plain those services are intended to provide a pathway into work, a purpose no longer generally relevant for the affected group. Different purposes and different funding responsibilities are relevant considerations both to the issue of discrimination and justification.

[64.5] Fifth, the MOH has taken the Government's strategy for an inclusive society into account. Services are available for this group, including the DAC, to support community access and inclusion. In making the DAC available the Ministry has expressly had regard to the need for additional funding for meaningful day activities including those outside the home.

[65] For the Ministry it was further submitted that in considering whether the DAC is a "reasonable alternative" it is important to note that the Court held that a pro rata reduction in the funding of day services for the over 65s would have been an alternative. That is, it would have been permissible to eliminate discrimination by levelling down

entitlements and to do this solely within the context of the affected group. In the light of this, the Ministry could have taken its existing funding of day services for those over 65 and simply spread it more thinly. The High Court decision did not require it to fully fund day services for the affected group to comply with the Court's decision. What has in fact happened is that the Ministry has put in place a more favourable alternative for both disabled people and residential care providers. The introduction of the DAC increases available funding for the over 65 group for day activities by up to $2.64 million a year. A significant reason why the DAC option was chosen by the Ministry was that it met the objective of providing additional support to the affected group of disabled people over the age of 65 but did so within the formal funding mandate directed by Cabinet. The Ministry's choice of an option that aligned with its funding responsibility is an important factor in assessing whether the option chosen fell within the range of alternatives recently open to it.

[66] In reply Dr Butler took issue with the argument advanced by the Ministry. In particular he submitted that any comparison between DAC and day services should not be accepted. The DAC is a different and more limited service and indeed is described as a contribution. Those over 65 exiting MSD funding remain ineligible for day services. There is still age related discrimination in that the DAC still results in some categories of persons under 65 not having access to day services. It was also pointed out that the defence now being advanced by the Ministry had never been communicated to IDEA Services notwithstanding repeated attempts to communicate with the Ministry over the past five months.

Discussion

[67] In assessing the competing considerations urged by the parties, the factors which have carried most weight with me are:

> **[67.1]** If, by virtue of the DAC, the Ministry (and beyond that the Government) has lawfully brought about a situation in which no funding is provided for those who exit MSD funded community participation services at 65, the interim orders sought will not preserve the position of IDEA Services. Its position would be improved and jurisdiction to make the order in such circumstances would be absent. On the limited information before me, I am of the view that the Ministry's case is both genuine and tenable. Grant of the interim order application would create a substantial risk of "improvement" rather than "preservation".
>
> **[67.2]** There is also considerable force to the point made by the Ministry that the present application appears to be predicated on the assumption that following the High Court decision the only option open to the Ministry was to start funding day services under its existing contractual obligations with providers such as IDEA Services. The application is therefore misguided, but understandably so given that the Ministry did not reveal its hand until, in effect, the eve of the hearing of the interim order application.
>
> **[67.3]** The claim by the Ministry that it is no longer in breach of Part 1A of the HRA cannot be dismissed as fanciful. Frustrating as it must be for IDEA Services, an interim order application is not the appropriate setting in which the Ministry's position is to be tested. It may well be that the Ministry is correct in submitting that new proceedings will have to be brought.

[68] In these circumstances I am not satisfied that the making of the orders sought are reasonably necessary in the interests of justice to preserve the position of IDEA Services.

[69] In arriving at this decision it has not been necessary to address the submission for the Ministry that any interim order would require the Ministry to fund services outside the funding responsibility assigned to it by its Minister and Cabinet. Cited in support were (inter alia) *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 112 along with *Taylor v Department of Corrections (No. 2)* HC Auckland, CIV-2011-404-3227, 5 August 2011, Allan J.

[70] One can understand the "immense frustration" expressed by Ms Rhodes in her reply affidavit of 27 May 2013. After protracted litigation and success both before the Tribunal and the High Court, IDEA Services has encountered a seemingly unresponsive Ministry which, after a silence of five months revealed only at the door of the Tribunal that it claimed to have a lawful, High Court-compliant justification for withholding funding. Pressure of work within the MOH notwithstanding, such an approach to a responsible plaintiff representing a vulnerable class of individuals, apart from being bad administration, is unacceptable. By any standard, the conduct of the Ministry since delivery of the High Court judgment in December 2012 has been deplorable. It has also caused IDEA Services to incur yet further legal expense.

DECISION

[71] The final result is that the application for interim orders under s 95 of the HRA is dismissed.

[72] Costs are reserved. IDEA Services is to file a memorandum within 14 days of this decision. The submissions for the Ministry are to be filed within a further 14 days with a right of reply by IDEA Services within 7 days after that.

.....
Mr RPG Haines QC
Chairperson
Human Rights Review Tribunal