IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 1**

	Reference No. HRRT 014/11
IN THE MATTER OF	**A CLAIM UNDER THE HUMAN RIGHTS ACT 1993**
BETWEEN	**FRANK DELIU**
	PLANTIFF
AND	**NEW ZEALAND LAW SOCIETY**
	DEFENDANT
	Reference No. HRRT 045/11
BETWEEN	**FRANK DELIU**
	PLANTIFF
AND	**LAWYERS NATIONAL STANDARDS COMMITTEE**
	DEFENDANT

AT AUCKLAND

Before:
RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Ms PJ Davies, Member

Mr Deliu in person
Mr WC Pyke for the defendants

Date of hearing: 5, 6 & 21 December 2011
Date of decision: 8 February 2012

DECISION ON INTERIM ORDER APPLICATION

The application

[1] This is an application under s 95 of the Human Rights Act 1993 (HRA) in which Mr Deliu seeks an order preventing the Lawyers National Standards Committee (NSC) from laying before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (LCDT) disciplinary charges which relate to "own motion" investigation numbers 2606 and 2983.

Background

[2] Some of the background to the application is set out in the *Minute* of 3 August 2011, in the *Decision on Recusal Application* (11 October 2011) and in the *Minute* of 6 December 2011 with the result that there may be an element of repetition in what follows.

[3] As this is an interim order application it is not intended that the evidence presently before the Tribunal and the competing submissions be referred to in detail except to the degree necessary to determine the interim order application. It is also recognised that it is not appropriate for a final determination to be made of the substantive merits of the two proceedings filed in HRRT 014/2011 and HRRT 045/2011.

[4] Mr Deliu is a barrister in practice in Auckland. He is currently engaged in various proceedings arising out of his conflict with two members of the judiciary, namely Harrison J and Randerson J. Charges have not yet been laid before the LCDT and so the narrative which follows has been taken from the two bundles of documents tendered by Mr Pyke without opposition and described as "Harrison J complaint by F Deliu" and "Randerson J complaint by F Deliu" respectively.

The allegations made against Harrison J

[5] By letter dated 5 August 2008 to Randerson J, then Chief Judge of the High Court, Mr Deliu made request that no existing or future case in which he was instructed be heard by Harrison J. Among the allegations made in the letter were that Harrison J:

> **[5.1]** Was "attacking me for my imputed political opinions" (paras [53] & [56]);
>
> **[5.2]** Used "intemperate language unbecoming of a sitting judge" showing "a level of vitriol on his part against me" (para [65]).
>
> **[5.3]** "has proven himself to be a judge lawyers and the public should be very scared of dealing with" (para [66]).
>
> **[5.4]** "acted well outside the law" (para [67]).
>
> **[5.5]** Would not allow certain arguments or political opinions in his court rooms (para [68]).
>
> **[5.6]** Breached Mr Deliu's right to political freedom and right to free speech (paras [68] & [69]).
>
> **[5.7]** Acted outside his judicial capacity to injure Mr Deliu (paras [71] & [72]).
>
> **[5.8]** Engaged in conduct "very similar, if not identical, to that which the South African apartheid, Stalinist and other abhorrent regimes of the past did" (para [76]).

[5.9] "is prepared to violate directly the international conventions ratified by New Zealand in terms of access to justice, ie, independent and unafraid counsel, for the purpose of following his own agenda" (para [78]).

[6] In an application for special leave to appeal dated 14 October 2008 and filed in *Ley v Chief Executive of the Ministry of Social Development* (SC77/2008) the first three grounds of appeal were framed in the following terms:

> 1. Justice Harrison was actually or apparently biased;
> 2. Justice Harrison discriminated against the Appellants/Applicants lawyers on the basis of their foreign nationality, imputed political beliefs and/or status as human rights advocates;
> 3. Justice Harrison acting without jurisdiction, ultra vires, mala fides, maliciously, vexatiously, vindictively, spitefully, oppressively, unduly punitive and/or with an ulterior motive to harm Messrs Orlov and Deliu personally and thus the Court abused its own process.

Later the Notice asserts:

> e This appeal relates to the persecution of lawyers by a New Zealand Court ...
>
> f Justice Harrison is a danger to the public

Among the orders sought are:

> VI a declaration that Justice Harrison has acted outside the capacity and function of his judicial office and thus has no judicial immunity for his conduct in the lower court proceeding;
>
> V that costs for this appeal be paid by Justice Harrison personally and that they be paid on a solicitor/client basis.

[7] In an originating application dated 5 September 2008 filed in the High Court at Auckland in *Orlov & Deliu v High Court at Auckland* (CIV-2008-404-00) it is alleged:

> 4 Justice Harrison has filed *de facto* and *de jure* law society complaints against one or both Applicants based on untenable and/or non particularized grounds and also which were frivolous, malicious, vexatious, vindictive, oppressive, and/or punitive in nature and the original and only complaint(s) finally and fully determined was not upheld.
>
> ...
>
> 8 Justice Harrison has oppressed one Applicant's right to free speech, political opinions and freedom of association.

[8] An apparently undated complaint by Mr Deliu to the Judicial Conduct Commission began:

> I write to make a complaint against Justice Rhys Harrison of the High Court on the grounds that he is a racist, or de minimis discriminates against foreigners.

[9] In a letter to the Judicial Conduct Commissioner dated 13 August 2008 Mr Deliu provided a three page "non-exhaustive" list of his allegations against Harrison J (including that he should be the first judge in New Zealand to be removed from the Bench because "his actions bring the administration of justice into great disrepute, if not outright mockery") and at para [20] continued:

> 20 In my further submission, Justice Harrison, by refusing to further correspond with this office, is therefore making himself immune to accountability which is anathema to even the most primitive of democratic notions.

The allegations made against Randerson J

[10] In the separate "Bundle of Documents – Randerson J complaint by F Deliu" there is a letter dated 27 May 2010 from Mr Deliu to the Judicial Conduct Commissioner. It opens:

> I write to lodge a formal complaint against Justice Randerson.
>
> The essential grounds of my complaint are that his Honour has:
>
> 1. Defamed me to the President of the New Zealand Law Society;
> 2. Refused to apologize to a fellow court officer as a duty of respect would warrant;
> 3. Failed to act as a reasonably prudent judge would be expected to;
> 4. Conducted a secretive and unlawful investigation;
> 5. Been using his judicial office in a gross abuse of taxpayer money;
> 6. Been doing so for an improper motive, ie, to protect a fellow judge from legitimate complaints; and
> 7. Attempted to obstruct the course of justice by interfering with sub judice matters.

[11] In the same letter Mr Deliu asserts at p 10:

> Fifthly, there remain the unanswered questions as to what end Justice Randerson was seeking to achieve by lodging this purported complaint and also whether his approach is impermissible in a Western democratic country ... Again, only out of my duty of respect to Justice Randerson do I not go so far as to make an analogy to la cosa nostra ... If my story were to get out into the media, New Zealanders I am sure would think this is something that would more likely happen in coup-riddled Fiji, but surely not in New Zealand. There are very serious issues involving the right to free speech and to freely work as a lawyer which I feel have been breached and that warrant your attention. The judiciary is free from attack, but also must not engage in attacks on counsel.

[12] In an earlier email dated 25 May 2010 to Mr Graeme Pitt (copied to Ms Olivier) Mr Deliu asserts:

> What Justice Randerson has done is in my submission far more egregious than the worst judicial scandal in New Zealand history ... In my view, this brings seriously into question his abilities as a judicial officer....

The determinations made by the National Standards Committee

[13] In relation to Mr Deliu's allegations against Harrison J and Randerson J the NSC, after hearing Mr Deliu, made the following determinations on 12 November 2010:

[13.1] Own motion investigation 2606 (Harrison J):

> The conduct which occurred prior to 1 August 2008 was considered by the Committee to be of sufficient gravity that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.
>
> The Committee determined that the intemperate and persistent manner in which Mr Deliu has made complaints against Harrison J was capable of meeting (if proven) the standard of professional misconduct under the Law Practitioners Act 1982 and (if proven) sufficient to meet a threshold test of misconduct as defined by s 7(1)(b)(ii) of the LCA, and pursuant to s 152(2)(a) of the LCA determined that the matter be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[13.2] Own motion investigation 2983 (Randerson J):

> The Committee determined that the intemperate manner in which the allegations were made against Randerson J and the making of the allegations seemingly without a substantial basis by Mr Deliu was capable of meeting, and (if proven) sufficient to meet, a threshold test of misconduct, as defined by s 7(1)(b)(ii) of the LCA, and pursuant to s

152(2)(a) of the LCA determined that the matter be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[14] It will be seen that in each case the NSC determinations relate not to the fact of the making of the complaints against the two judges but to their "intemperate and persistent manner" (Harrison J) and to their "intemperate manner ... seemingly without a substantial basis" (Randerson J).

The review by the Legal Complaints Review Officer

[15] Mr Deliu sought a review by the Legal Complaints Review Officer (LCRO) under ss 193 and 194 of the Lawyers and Conveyancers Act 2006 (LCA).

[16] In decisions given on 21 October 2011 in LCRO 259/2010 (Harrison J) and 260/2010 (Randerson J) the decisions made by the NSC in both matters were confirmed. The LCRO rejected the submissions made by Mr Deliu that he was to be the subject of charges of misconduct merely because he had exercised his right to lodge a complaint against a Judge. The LCRO was of the view that this misrepresented the NSC determinations which were based on the intemperate and persistent manner in which the allegations had been made against Harrison J and the intemperate manner in which the allegations had been made against Randerson J, and also because the allegations against him were seemingly without a substantial basis.

[17] Mr Deliu advised that he was considering challenging the decisions of the LCRO by way of judicial review proceedings but in mid-December 2011 had filed a recall application on the costs award made against him.

The High Court challenge to the determinations made by the National Standards Committee

[18] In his submissions to the Tribunal Mr Deliu mentioned that in or about September 2010 he had commenced proceedings in the High Court at Auckland against the New Zealand Law Society (NZLS) in *Deliu v New Zealand Law Society* (High Court Auckland, CIV-2010-404-6182) challenging (inter alia) the determinations made by the NSC on 12 November 2010. At the request of the Tribunal a copy of the Third Amended Statement of Claim (14 December 2011) was made available. That document alleges at para [31] that both determinations made on 12 November 2010 are unlawful in that they:

> (A) were a form of selective prosecution or discrimination;
> (K) breached the New Zealand Bill of Rights Act 1990 and the plaintiff's human rights under both international and domestic law.

The relief sought includes judicial review of the determinations, an order quashing the decisions of the NSC and "a permanent injunction enjoining the NZLS or NSC from taking any further steps in relation to the matters pled".

[19] It will be seen that as presently pleaded, this aspect of the proceedings in the High Court bears similarities with the proceedings before the Tribunal. More particularly the relief sought in both sets of proceedings includes an order restraining the laying of disciplinary charges before the LCDT.

[20] The relevance of the High Court proceedings to the interim order application before this Tribunal is that on a judicial review application the High Court has powers under s 8 of the Judicature Amendment Act 1972 (JAA 72) to issue an interim order if it is necessary to do so for the purpose of preserving the position of the applicant. It follows that caution must be exercised by a tribunal which is asked to make an interim order in

circumstances where the High Court has before it proceedings in relation to the same or nearly the same subject matter and in those proceedings the High Court has jurisdiction to issue an interim order. It is an issue addressed below. First, however, it is necessary to provide a brief outline of the proceedings presently before the Tribunal.

The proceedings before the Human Rights Review Tribunal

[21] In the first of the proceedings (HRRT 014/2011) filed in this Tribunal under the HRA on 14 June 2011 the NZLS is cited as the defendant. Mr Deliu at para [12] of the Statement of Claim asserts that "a prima facie basis" for the intended prosecutions is the fact that he has "expressed political opinions about one or two Judges of New Zealand Courts who are public government officials". It is alleged at para [13] that the decisions to investigate and prosecute are a form of prohibited discrimination on the basis of Mr Deliu's political opinion. The relief sought includes a declaration that the NZLS has breached s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA) by discriminating against him on the basis of his political opinions, an apology and damages of $200,000.

[22] For the NZLS Mr Pyke has pointed out that no or no meaningful particulars are given in the statement of claim of the political opinion relied on by Mr Deliu, a potentially important point given the need for the alleged discriminatory act (ie the laying of charges) to be causally linked to a "political opinion" held by Mr Deliu.

[23] The statement of reply filed by the NZLS asserts (inter alia) that the proceedings in HRRT 014/2011 are misconceived because the relevant decision-maker was the National Standards Committee, not the NZLS. This point ultimately led to the filing of the second set of proceedings (HRRT 045/2011) in the middle of the hearing on 5 December 2011. In those proceedings the defendant is the Lawyers National Standards Committee. The circumstances are more particularly set out in the *Minute* issued on 6 December 2011, the relevant passages of which are reproduced below for convenience:

> **The joinder issue**
>
> **[3]** In the NZLS statement of reply dated 12 July 2011 the NZLS says, in effect, that in HRRT 014/2011 Dr Deliu has complained against the wrong person:
>
> > 1. It denies that any provision of the Human Rights Act 1993 has been contravened by it and says further that the decision to refer the plaintiff's conduct to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal ("the NZLCDT") was not made by it but was made by the National Standards Committee (No. 1) ("the NSC"), an independent Lawyers Standards Committee established by reg. 12 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.
>
> **[4]** The submissions by Mr Pyke in support of the application to dismiss and which are dated 19 July 2011 at para [1.4] reiterate the point that the NZLS was not the decision-maker at issue and indeed has no power to intervene in proceedings or determinations of a Standards Committee.
>
> **[5]** Against this background Dr Deliu and Mr Pyke submitted a joint memorandum dated 29 November 2011 advising that by consent, the parties requested an order adding the National Standards Committee as a defendant in the HRRT 014/2011 proceedings.
>
> **[6]** At the commencement of the hearing on Monday 5 December 2011 the Tribunal sought assistance on the question whether it had jurisdiction to make the order sought given that the NSC was not a party to the complaint lodged by Dr Deliu with the Human Rights Commission with the result that none of the Part 3 procedures had been followed in respect of the NSC. Furthermore, while ss 92G and 92H confer on the Attorney-General and the Commission the right to appear in proceedings before the Tribunal, neither the Act nor the Human Rights Review Tribunal Regulations 2002 appear to confer power to join parties to a proceeding. Rather, s 108 envisages the hearing of any person who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally. Such person may appear and may call

evidence and while Regulations 14, 17, 18 and 19(2) address the situation of persons who have a right to appear, or who are allowed to appear, before the Tribunal, the legislation does not recognise such persons as "parties" nor are such persons "joined" to the proceedings.

[7] These issues, however, fell to one side when, over the luncheon adjournment on 5 December 2011, Dr Deliu filed a fresh complaint with the Commission, this complaint identifying the NSC as the person or body complained against. Simultaneously, Dr Deliu completed a new statement of claim under Regulation 5 of the Human Rights Review Tribunal Regulations 2002 citing the NSC as the defendant in the new proceedings. When the Tribunal resumed at 2.15pm he handed up the "receipt" of complaint from the Human Rights Commission which is automatically generated when an online complaint is lodged with the Commission. He also handed up a copy of the statement of claim in relation to his intended new proceedings before the Tribunal. He undertook to file the statement of claim with the Tribunal. In the interim it was treated as filed and given the filing number of HRRT 045/2011.

[8] The balance of the hearing was conducted on the basis that the new proceedings in HRRT 045/2011 had been filed in the office of the Tribunals Division of the Ministry of Justice in Wellington and on the further basis that the two proceedings would be heard together with the documents filed in one treated as filed in the other. The Tribunal has of course not heard from the Commission as to the somewhat unorthodox procedure which Dr Deliu has followed in respect of his new proceedings.

[24] The statement of claim in HRRT 045/2011 presently contains no meaningful information. Given the circumstances in which it was filed it is a perfunctory document and does not assist in addressing Mr Pyke's point about the difficulties caused by the absence of a particularised articulation of the political opinion relied on. A direction was made in the *Minute* of 6 December 2011 that a full and particularised amended statement of claim be filed and served by Mr Deliu by 5 pm on Tuesday 7 February 2012.

THE INTERIM ORDER APPLICATION

The Chairperson point

[25] Section 95 of the HRA confers on the Chairperson 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 final determination of the proceedings:

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.

(2) An application for an interim order may be made,—

(a) in the case of proceedings under section 92B(1), (2), (3), or (4), by the person or body bringing the proceedings; and

(b) in the case of proceedings under section 92E, by the Commission.

(3) A copy of the application shall be served on the defendant who shall be entitled to be heard before a decision on the application is made.

[26] The power is conferred on the Chairperson but it can be seen that the hearing was conducted before the full Tribunal as the interim order application was one of three matters which came on for hearing on 5 December 2011. See the *Minute* of 6 December 2011. No objection was raised by Mr Deliu or by Mr Pyke to the Tribunal hearing the interim order application.

[27] In any event the conferral of the section 95 power on the Chairperson was to enable the parties to obtain interim relief on an urgent basis and this has occurred most commonly in the context of applications for identity suppression. A requirement that only the full Tribunal grant such relief would work considerable inconvenience given the necessity to first convene a panel of three (HRA s 98) who may not necessarily live and work in the same geographical region or be available at short notice. In other circumstances, as here, the interim order application may be but one of several matters argued before the full Tribunal. In such circumstances it would be artificial for the Chairperson to convene separately from the Tribunal to hear the interim order application, particularly given that the general background and context of the case may be relevant to all of the applications then being heard. The fact that the Tribunal, not the Chairperson, must give leave for the defendant to apply to the High Court to vary or rescind the order (HRA s 96) is further indication that a Chairperson, sitting with two panel members, may hear and determine an interim order application. But if necessary, the decision can be treated as the decision of the Chairperson and if the Chairperson is the dissentient, clearly the decision of the Chairperson would prevail given the explicit terms of HRA s 95.

The grounds for making an interim order

[28] Section 95 of the HRA requires the decision-maker to be "satisfied" that it is "necessary" in the "interests of justice" to preserve the position of the parties. Before these terms are addressed it is helpful to place HRA s 95 in the broader context of private and public law.

The power to make an interim order – comparisons

[29] Both Private Law and Public Law recognise interim orders and injunctions.

[30] In civil proceedings High Court Rules, r 7.53 allows application to be made for an interlocutory injunction and the principles governing the grant of such injunction are well established – is there a serious question to be tried and where does the balance of convenience lie? See *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL). The final question is where the overall justice lies: *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142. An applicant for an interlocutory injunction under HCR 7.53 must file a signed undertaking as to damages. See HCR 7.54.

[31] In Public Law proceedings the power to make an interim order is generally regulated by the JAA 72 s 8. In its originally enacted form this section provided:

> On an application for review, the Court may make such interim order as it thinks proper pending the final determination of the application.

[32] This provision, which bears some similarity to HRA s 95, was found to be too narrow. The Public and Administrative Law Reform Committee in its *Eighth Report* (September 1975) at para [29] observed:

> We believe that s 8 of the Act, which enables the Court to make interim orders, needs to be expanded so as to enable the Court to prohibit the respondent to an application for review from taking action in consequence of a decision, and in other ways to preserve the status quo until a final determination is made. Clause 4 of the attached bill is intended to give the Court these powers.

[33] The "clause 4" referred to was subsequently enacted with no material alteration as the now s 8(1) and (3) by the Judicature Amendment Act 1977. Although not addressed

by the Committee, subsection (2) of the current version was inserted to authorise, for the first time, the grant of interim relief against the Crown notwithstanding s 17(1) of the Crown Proceedings Act 1950. See Smillie "The Judicature Amendment Act 1977" [1978] NZLJ 232 at 238. Part 30 of the High Court Rules, particularly HCR 30.3 and HCR 30.4 complement the Judicature Amendment Act 1972 in that they address interim orders under the 1972 Act and also allow an undertaking as to damages to be required by the Court.

[34] Section 8 of the Judicature Amendment Act 1972 now provides:

> **8 Interim orders**
>
> (1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:
>
> > (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:
> >
> > (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:
> >
> > (c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.
>
> (2) Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order,—
>
> > (a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:
> >
> > (b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.
>
> (3) Any order under subsection (1) or subsection (2) of this section may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

[35] 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.

[36] The broad language of this section was also emphasised by Richardson J at 430-431 and by Somers J at 433. 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.

[37] It does not appear that the power of the Tribunal to make an interim order under HRA s 95 has received detailed consideration and as mentioned, is most routinely used in the context of orders suppressing identity. The most notable exception is *Hosking v Wellington City Transport Ltd* (1995) 1 HRNZ 542 in which the then Complaints Review Tribunal at 554 appears to have combined the public and private law tests and there is little analysis of HRA s 95 itself.

The scope of s 95 – discussion

[38] There are striking similarities as well as striking differences between HRA s 95 and s 8 of the Judicature Amendment Act 1972.

[39] First, as to similarities, both provisions operate in a quintessentially Public Law environment. Specifically the jurisdiction of the Tribunal under the HRA is to consider and adjudicate on a complaint that there has been a breach of the non-discrimination provisions of Part 1A or Part 2 of the HRA or both. See HRA s 94(a).

[40] Married as the prohibited grounds of discrimination are to the right to freedom from discrimination in NZBORA s 19 the jurisdiction of the Tribunal is unmistakably "public law" in nature. This is reinforced by the remedies available in HRA ss 92I and 92J which include a declaration of inconsistency, a restraining order, damages, the performance of specified acts and the undertaking of training.

[41] The language in which the interim order power is conferred is in some respects also similar:

HRA **necessary** in the interests of justice to **preserve the position** of the parties ...

JAA 72 **necessary** to do so for the purpose of **preserving the position** of the applicant

[42] Second, as to the differences, the brevity of HRA s 95 is more closely aligned with the pre-1977 form of the JAA 72 s 8 and this in turn brings into focus the fact that the very extensive powers now possessed by the High Court (a court of inherent jurisdiction) under JAA 72 s 8 were conferred in express terms by the 1977 Amendment Act. If the intent of the HRA was to confer on the Human Rights Review Tribunal much the same jurisdiction as is to be found in the JAA 72 s 8, such jurisdiction would have to be inferred in the absence of explicit terms as found in JAA 72 s 8. Given that the jurisdiction of the High Court to issue interim orders under the JAA 72 flows not from its inherent jurisdiction but from specific statutory provisions, there must be real doubt whether HRA s 95 confers powers broadly similar to JAA 72 s 8.

[43] In particular, as a statutory body the Tribunal (and its Chairperson) has no inherent jurisdiction though inherent powers may exist. See generally *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 (CA) at [16]; *Transport Accident Commission v Wellington District Court* [2008] NZAR 595 at [16] (Dobson J) and *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 at 701 (Wylie J).

[44] Next is the point that the power in the JAA 72 s 8 to preserve the position of the **applicant** is conceivably broader in terms than the power to preserve the position of the **parties**. In the former the position of the defendant is not necessarily factored into the assessment. The position under HRA s 95 is arguably different.

[45] Then there is the point that HRA s 95 does not confer express power to make interim orders binding on the Crown. This is particularly significant in the context of claims under HRA Part 1A.

[46] But perhaps the overarching point is the one already referred to. That is, if it was considered that a court of inherent jurisdiction (the High Court) required express statutory power to make interim orders of the kind now listed in JAA 72 s 8, the less likely it can be inferred that the brief and general language of HRA s 95 was intended to confer on an inferior tribunal much the same jurisdiction.

[47] The differences between the two interim order regimes is highlighted by the nature of the order sought in the present case – an order preventing the NSC from exercising its statutory duty under LCA s 140 to enquire into a complaint "as soon as practicable", to determine that complaint and where appropriate to frame a charge and lay it before the Disciplinary Tribunal (LCA ss 152 & 154). The power to make an interim order of this kind is clearly envisaged by the JAA 72 s 8 but under HRA s 95 everything is left to implication.

[48] Compounding these difficulties is the fact that this Tribunal (or its Chairperson) is being asked to prevent another statutory body from discharging its mandated duty to proceed with expedition. If the order is made it will impact on the stated purposes of Part 7 of the LCA (s 120(2)(b) & (3)) which include the expeditious processing and resolution of complaints as well as the expeditious hearing and determination of disciplinary charges.

[49] Beyond these factors is the marked reluctance of courts to interfere with the exercise of the discretion to prosecute: *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (Randerson J) at [61] to [68].

[50] It follows that there must be substantial doubt whether HRA s 95 is to be treated as co-extensive (or nearly so) with JAA 72 s 8, particularly given the absence of any enumeration in HRA s 95 of the circumstances explicitly addressed in JAA 72 s 8, including the position of the Crown. The claim by Mr Deliu that the power in HRA s 95 is broader than that in JAA 72 s 8 is untenable. We are of the view that it is of more limited scope, the precise bounds of which are not necessary to determine in the present case given that, as will be seen, we have determined that even if there is jurisdiction under HRA s 95 to make the order sought, no order should be made.

"Necessary"

[51] In interpreting the term "necessary" in HRA s 95 we see no reason to depart from the analogous determination in *Carlton & United Breweries* that "necessary" means reasonably necessary.

"Interests of justice"

[52] In *X v Police* (High Court Auckland, AP253/91, 9 October 1991, Barker J) it was said that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.

THE DISCRETION

[53] Section 95 of the HRA confers a discretion. In exercising that discretion it is permissible to have regard to all the circumstances of the case including the apparent strength or weaknesses of the complaint and all the repercussions, public or private of

granting interim relief. See by analogy *Carlton & United Breweries*. It is also settled law that discretionary relief can be refused if an alternative remedy exists. See by way of example *Skelton v Family Court at Hamilton* [2007] 3 NZLR 368 at [116].

Whether evidence of discrimination

[54] For convenience we examine first the strength of the claim that there has been unlawful discrimination on the grounds of "political opinion".

[55] Both parties addressed submissions to the meaning of "political opinion" in the context of HRA s 21. Authority can be found for both wide and narrow readings of this provision. It is not necessary for the purpose of determining the present application for a view to be taken because the difficulty faced by Mr Deliu is not the definitional challenge but rather the absence of evidence that the reason for the NSC decision was Mr Deliu's political opinion (however defined). The evidence presently before the Tribunal unequivocally establishes that the decisions by the NSC were based not on the allegations made by Mr Deliu and such political opinion as might be inferred from those allegations. Rather it was the intemperate manner in which the allegations were made. The express language of the determinations makes this abundantly clear:

Investigation 2606 ... the intemperate and persistent manner in which Mr Deliu has made complaints against Harrison J....

Investigation 2983 ... the intemperate manner in which the allegations were made against Randerson J and the making of the allegations seemingly without a substantial basis.

[56] There is presently no evidence to establish, even to the slightest degree, that the investigation by the NSC and its decision to lay charges is for reason of any political opinion held by Mr Deliu. In short, there is no evidence of discrimination. It follows that we do not consider that the making of the interim order is necessary in the interests of justice to preserve his position.

Whether order necessary

[57] Nor has it been established that an order under HRA s 95 is necessary to preserve the position of Mr Deliu. On the laying of the misconduct charges before the Disciplinary Tribunal that Tribunal will have to be satisfied that "misconduct" as defined in LCA s 7(1)(b)(ii) has been established. This would require the Disciplinary Tribunal to engage (inter alia) with NZBORA s 14 and the justified limitations provision in NZBORA s 5. This is not a matter into which the Chairperson or this Tribunal can embark upon in the context of the present proceedings. It is a responsibility which the LCA imposes on the Disciplinary Tribunal. It should be pointed out that it was not disputed by Mr Pyke that in determining the misconduct charges NZBORA ss 5 and 14 would have to be addressed by the Tribunal.

Interests of justice – jurisdiction and the High Court

[58] In September 2010 Mr Deliu issued proceedings in the High Court at Auckland against the NZLS. In those proceedings (as currently pleaded in the third amended statement of claim) Mr Deliu challenges the decision of the NSC to lay charges in relation to the matters which Justice Randerson has laid before the NSC. As earlier mentioned in this decision, Mr Deliu is seeking a permanent injunction preventing the NSC from laying charges before the Disciplinary Tribunal.

[59] Asked why he had not sought from the High Court an interim order under JAA 72 s 8 to prevent the laying of disciplinary charges, the Tribunal was told by Mr Deliu that he preferred to seek the aid of the Tribunal instead and referred to claimed procedural disadvantages in the High Court such as the absence of a right to cross-examination and to discovery. In addition, the High Court could look only at the process, not the merits. We are of the view that these difficulties are more imagined than real. They are certainly not difficulties which inhibited Mr Deliu from taking the proceedings in the first place.

[60] Reference has been made to the reasons why there is real doubt whether HRA s 95 confers power to make the order sought here. We are of the view that where the jurisdiction of an inferior tribunal to make the order sought is in doubt and at the same time the High Court indubitably has such jurisdiction in proceedings currently before it in relation to the same or nearly the same matter, the inferior tribunal should defer to the High Court. It follows that it is neither in the interests of justice nor necessary for the purpose of preserving the position of the parties that this Tribunal make an interim order of the kind sought.

Interests of justice – interfering with statutory duty of other statutory bodies

[61] Part 7 of the LCA explicitly states that the framework in relation to complaints against lawyers is to ensure that such complaints be "processed and resolved expeditiously" (s 120(2)(b)) and that disciplinary charges "be heard and determined expeditiously" (s 120(3)).

[62] We are of the view that a strong if not compelling case would have to be established before this Tribunal could justifiably interfere with the workings of a statutory body charged with such responsibilities, the more so given the marked reluctance of courts to interfere with the exercise of the discretion to prosecute: *Polynesian Spa Ltd*.

[63] We note also that the NSC decisions to prosecute were made on 12 November 2010 and the review sought by Mr Deliu via the LCRO delayed matters until 21 October 2011.

[64] On the facts presently before us we do not consider that any case at all has been made out to question the decision of the NSC, let alone a strong or compelling case. These factors, taken together with the delay which will flow from the making of an interim order lead us to the clear view that it will not be in the interests of justice to make an interim order. To the contrary, it is in the interests of the public that matters relating to the discipline of the legal profession are dealt with expeditiously rather than be drawn out. See *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [128] and *Dorbu v New Zealand Law Society* [2011] NZAR 174 at [24].

Interests of justice – the jurisdiction bar in HRA ss 79(3) & 92B(7)

[65] The effect of HRA ss 79(3) and 92B(7) is to bar certain proceedings before this Tribunal. Section 79(3) of the HRA provides:

> ... if the complaint or parts of it concerns a judgment or other order of a court, or an act or omission of a court affecting the conduct of any proceedings, the [Tribunal] must take no further action in relation to the complaint or relevant part of it.

[66] In the present case it is submitted by the NZLS that the complaints made by Mr Deliu against Harrison J are clearly complaints which concern a judgment or other order of a court, or an act or omission of a court affecting the conduct of any proceedings.

See Mr Deliu's letter to Randerson J dated 5 August 2008. This twenty-eight page letter addresses three proceedings presided over by Harrison J and the orders and directions given by him and about which complaint is now made. It is not practical to repeat or summarise the multitude of allegations made in this letter against Harrison J. The submission made by Mr Pyke is that a fair reading shows that the complaints fall squarely within the prohibition in ss 79(3) & 92B(7). He also relies on the related decision of this Tribunal in *Orlov v Ministry of Justice and Attorney-General* [2009] NZHRTT 19 (21 July 2009).

[67] For the NZLS it is also submitted that the complaints made against Randerson J arise out of an application by Mr Deliu to Randerson J that he (Randerson J) direct that Harrison J be recused from all matters in which Mr Deliu was appearing as counsel and were accordingly "derivatively" related to an act or omission of Harrison J either in the context of a judgment or other order of the Court or an act or omission of a court affecting the conduct of any proceedings. There is also the point that the application made by Mr Deliu to Randerson J was an application for recusal and addressed to Randerson J in his capacity as Chief High Court Judge. See the letter from Mr Deliu dated 5 August 2008 at paras [85] to [95].

[68] As to these submissions it must be remembered that the strike out application filed by the NZLS (yet to be heard and determined) rests partly on these points and no definitive ruling can be given in the context of this interim order application. All that need be said at this point is that there does appear to be a real question whether these proceedings are jurisdiction barred.

[69] For this additional reason we are disinclined to make the interim order sought.

CONCLUSION

[70] For all of the foregoing reasons we have decided that the interim order application is declined.

DIRECTIONS AS TO FUTURE CONDUCT OF CASE

[71] In terms of HRA s 108A the Attorney-General has been given notice of both proceedings in HRRT 014/2011 and HRRT 045/2011. By Memorandum dated 10 January 2012 counsel for the Attorney-General has advised:

> 2. Pursuant to s 92G of the Human Rights Act, the Attorney-General advises that he wishes to be heard solely on the issue of whether the proceedings are properly brought under Part 1A of the Human Rights Act.
>
> 3. Should the scope of Part 1A jurisdiction be a live issue in these proceedings, the Attorney-General requests that he be advised so that he may file submissions and be heard.

[72] It is not realistically possible for the Tribunal itself to advise the Attorney-General in advance if and when either point arises. The better course is for counsel for the Attorney-General to appear at each hearing from this point on so that she can better assess for herself whether the Attorney-General wishes to make submissions on any specific issue.

[73] The *Minute* issued on 6 December 2011 required Mr Deliu to file a full and particularised amended statement of claim in HRRT 014/2011 and a full and particularised statement of claim in HRRT 045/2011 by 5pm on Tuesday 7 February 2012. At the conclusion of the hearing on 21 December 2011 it was recognised that it

will be necessary for the defendants in each case to file an amended statement of reply and statement of reply (as the case may be) within one month of service.

[74] It was also noted that if either of the NZLS or NSC is to pursue the current application to dismiss, that application will be heard on 23 and 24 February 2012. As noted in Direction [21.5] of the *Minute* issued on 6 December 2011, Mr Pyke is to file his submissions in support by 5pm on Friday 17 February 2012 and Mr Deliu is to file and serve his submissions by 5pm on Tuesday 21 February 2012. Any further application by the parties can also be addressed at the resumed hearing.

Directions

[75] The following additional directions are made:

> **[75.1]** In HRRT 014/2011 an amended statement of reply is to be filed and served by the NZLS within one month of receipt of the plaintiff's full and particularised amended statement of claim.
>
> **[75.2]** In HRRT 045/2011 a statement of reply is to be filed and served by the NSC within one month of receipt of the plaintiff's full and particularised statement of claim.
>
> **[75.3]** In terms of the memorandum dated 10 January 2012 filed by counsel for the Attorney-General, it is recommended that the Attorney-General be represented at all future hearings in these two proceedings.
>
> **[75.4]** Any further application to be made by the parties (including the Attorney-General) is to be filed and served by 5pm on Friday 17 February 2012.

.....	.....	.....
RPG Haines QC	**Mr G Cook JP**	**Ms PJ Davies**
Chairperson	**Member**	**Member**