

Psychologist, Mr C

**A Report by the
Health and Disability Commissioner**

(Case 02HDC11760)



Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

Parties involved

Dr A	Complainant / Gynaecologist
Ms B	Consumer
Mr C	Provider / Psychologist

Complaint

On 20 August 2002 the Commissioner received a complaint from gynaecologist Dr A about services provided to Ms B by her psychologist, Mr C. The complaint was summarised as follows:

- *Mr C did not provide services in accordance with appropriate professional and ethical standards to Ms B between approximately January 2000 and August 2001. Specifically, Mr C had a sexual relationship with Ms B (including moving into Ms B's home) while she was a current patient.*

An investigation was commenced on 12 December 2002. Mr C provided a written response and a copy of Ms B's clinical records after several months of delay while his lawyer challenged the legal basis of the Commissioner's request for the production of the clinical records.

Information reviewed

- Information provided by Mr C
- Information provided by Ms B
- Information provided by Dr A
- Information provided by the consumer's colleague

Independent expert advice was obtained from Dr Fred Seymour, a psychologist.

Information gathered during investigation

On 24 May 2002 Ms B (aged 60) attended a routine consultation with her gynaecologist, Dr A. During the consultation Ms B disclosed that she had been involved in a sexual relationship with her counsellor.

Dr A made a note of Ms B's disclosure in her medical record and recorded that she was extremely distressed, and an urgent counselling appointment was arranged for her. He alerted her general practitioner, advising that "it would appear that [Ms B] has been abused both mentally, physically and emotionally" by the counsellor.

Dr A wanted Ms B to make a formal complaint. Ms B was reluctant to do so and was also initially reluctant to identify the counsellor, as he was under the care of a private psychiatrist and she feared that he would not be able to continue his therapy if her complaint affected his capacity to earn a living. However, on 23 June 2002 she wrote to Dr A revealing further information about her relationship, and the identity of the counsellor, psychologist Mr C (aged 65 at the time of the alleged relationship). Mr C practised from a clinic.

Ms B

In her letter to Dr A Ms B described the circumstances that led her to consult Mr C. Ms B had suffered a number of "traumatic events". Her father had died seven years earlier, her partner had died shortly afterwards from a brain tumour, one of her adult sons had separated from his wife and had been accused of molesting their children, and another adult son had changed his gender. Ms B's elderly mother had also come to live with her.

Ms B referred herself to Mr C on the recommendation of someone who had previously consulted him. She advised me that the counselling sessions commenced in November 1999 and continued until December 2000. She consulted Mr C weekly, for an hour, at a cost of \$45, which she paid in cash. Ms B advised me that she was aware of Mr C's interest in her "early on" in the counselling relationship and that she had responded to the "signals" that Mr C gave her (which she described as flirtatious).

Ms B advised me that she entered into a sexual relationship with Mr C on 28 December 2000 and did not have any further counselling sessions thereafter. In May 2001 Mr C moved into her house, as her partner, but left approximately two months later. Ms B was devastated following her sexual relationship with Mr C. She stated:

"In innocence and trust I opened my psyche to him. He invaded my mind, my body and my home. I had no resources with which to deal with this act of vampirism and the process of extricating him from my psyche has damaged me very badly indeed and will leave permanent scars. ... I have flashbacks, panic attacks, insomnia. I am in a constant state of anxiety. I feel used and I feel ugly. I doubt I will ever trust a relationship again. [Mr C] betrayed me as a professional and then, when he moved in with me, he abused me as a man ..."

Mr C

Mr C confirmed that he had engaged in a sexual relationship with Ms B and advised that she was "a former patient" at the time of the commencement of the sexual relationship. Mr C denied that his sexual relationship with Ms B commenced while she was a current patient.

Mr C advised that he counselled Ms B from 17 November 1999 until 31 May 2000 and that Ms B initiated the development of their relationship when, on 14 August 2000, she invited him to the theatre. A sexual relationship developed "in December 2000/January 2001"

(again at Ms B's initiation). He moved into Ms B's home and lived with her from approximately April 2001 to July 2001.

Mr C advised me, via his lawyer, that he was "coerced" into having a relationship with Ms B. Mr C further explained:

"I must admit I felt uncomfortable with the pressure that [Ms B] exerted on me to enter this relationship. I told her I was not comfortable with having a sexual relationship with her and her reply was 'Time is short, we are old, and we are not going to have another chance if we don't take each other this time.' Albeit that I had previously been [Ms B's] counsellor it was in fact [Ms B] who assumed the dominant role in our relationship.

I have tried to understand how it was that (a) the relationship occurred at all and (b) how it was that [Ms B] became the dominant partner in this relationship and believe that my own poor state of health both physically and psychologically at that time significantly contributed to matters."

Mr C submitted that at the time of the sexual relationship developing, he was suffering from the effects of childhood polio, depression and anxiety, which at times affected his walking, breathing and talking. He sought treatment from a psychotherapist for his depression and anxiety and was prescribed Aropax. It was during this time that he briefly became a tenant in a flat owned by Ms B and "thereafter for a short period of approximately two months lived in her home as her partner as she assisted in caring for me as I was most unwell".

In July/August 2001 the relationship ended. Mr C said that the decision was mutual "as we both agreed it could not work". However, since ending the relationship, Mr C has "continued to be the subject of her unsolicited and unwanted attentions from time to time [and felt] fearful and distressed by her behaviour".

Mr C advised me that he "bitterly regret[s]" entering into a relationship with Ms B and if he had "hurt or damaged her in anyway it was not [his] intention to do so".

Counselling sessions

Mr C advised me that his last counselling appointment with Ms B was on 31 May 2000. The personal relationship developed some months later in August.

Mr C provided me with handwritten notes for the counselling session that took place on 17 November 1999. He advised me that this was his only written record of any of the counselling sessions that he had with Ms B, as he only made notes according to patient "need". However, Ms B disputed this and advised me that she observed Mr C making handwritten notes during their sessions.

Mr C advised that Ms B presented with a variety of problems, including the following:

- The inadequacy [of] [Ms B's] elderly mother's living arrangements with [Ms B], and how [Ms B] felt she could not run a personal life of her own

- [Ms B's] former partner's death from a brain tumour at their home in ... and how he had 'died in her arms'
- A child of [Ms B's] from a previous marriage who had a sex change operation
- Discussion of [Ms B's] second husband who was principal of an art school where she was a student
- Discussion of farming near ... and an affair with a neighbour that was not long term
- Recollections of [Ms B's] difficult relationship with her deceased father."

Mr C advised me that, in his view, it would be best for Ms B to first deal with these matters before commencing therapy. Accordingly, he counselled her to place her mother in rest home care, have her mother's elderly pets put down, dispose of her late partner's ashes, and to sell the property that she and her late partner had lived on together.

Mr C explained that although he was a registered psychologist at the time he treated Ms B, he saw her in his capacity as a "psychotherapist".

Mr C stated:

"However, it is also my belief that the advice could have been given by her lawyer or by a very good reliable friend. In my opinion, the actual advice I gave has little to do with psychology or psychotherapy. [Ms B] did not commence therapy with me in relation to her family issues."

Mr C provided me with a copy of his personal diary, in which he kept a "dual purpose record" of both his professional and personal appointments. He explained that he placed a tick next to the patient's name if he or she attended and noted whether the fee had been paid, or whether there was no charge.

The diary shows that the first contact Ms B had with Mr C was on 3 November (for which he did not charge). She had a further appointment with him on 10 November and then 17 November (for which a written record was provided). Thereafter, until 31 May 2000, Ms B attended weekly consultations with Mr C.

On 31 May Ms B's name has been crossed out of the diary and "no further appts [appointments]" is recorded next to her name (the reason for this entry is not recorded). Mr C advised me that, in his view, the "treatment relationship" ended as of 31 May. However, on 14 August at 10.30am there is a further appointment recorded for Ms B, with "N/C" (no charge) written next to it. Mr C advised me that Ms B "arrived at my clinic and invited me to go to the theatre with her".

Following the theatre date (on 26 August) Mr C visited Ms B twice in September, at her home. On the 4 September visit he lent Ms B some books, and on 27 September, he visited again but wrote "Last Visit" next to Ms B's name in his diary. Mr C advised me that this

was because he had decided that he did not want to become involved in a relationship with Ms B at that time. Mr C did not charge Ms B for any of these visits and advised me that “this affirms my belief that we no longer had a professional relationship”.

Mr C had no further contact with Ms B until she made an appointment to see him at the clinic on 18 December. However, Mr C stated that this was not a “professional consultation” as he did not charge her. He visited Ms B at home on 22 December. Ms B advised me that the sexual relationship started on 28 December.

Ms B made an appointment to see Mr C at the clinic on 22 January 2001; however, this is crossed out in the diary. Mr C stated that this “tells me that the appointment did not take place. This is entirely consistent with my memory of a sexual relationship commencing in the Christmas/New Year holiday.”

Mr C recalled that Ms B commenced therapy with other therapists at about that time as it was “perfectly clear between us that I could not be her therapist”. Mr C continued to see Ms B during 2001. There are three appointments for Ms B listed in the diary for February, two notes to telephone Ms B and one appointment to see her in March, nothing for April and May, and in June Ms B’s name appears twice. There is a record of a final appointment for Ms B to see Mr C on 25 September 2001.

Independent advice to Commissioner

The following expert advice was obtained from Dr Fred Seymour, an independent registered psychologist:

“Introduction

I am asked to provide an opinion for the Commissioner relating to the complaint by [Ms B] about the conduct of [Mr C]. This matter was referred to me on 10 October 2003. Specifically the complaint is that ‘[Mr C] did not provide services in accordance with appropriate professional and ethical standards to [Ms B] between approximately January 2000 and August 2001. Specifically, [Mr C] had a sexual relationship with [Ms B] (including moving into [Ms B’s] home) while she was a current patient’.

I confirm that I have read and agree to follow the ‘Guidelines for Independent Advisors’.

I am a Registered Psychologist holding the degrees BAHons (Well.), MA (W. Aust.) and PhD (Auck.). I am an Associate Professor in the Department of Psychology, The University of Auckland, where I am also Director of the Professional Psychology Unit. I also maintain a small private practice. I have a particular interest in professional ethics. I teach that topic to clinical psychology trainees, and recently convened the national

working party that produced a new code of ethics for psychologists working in NZ. I have researched the issue of therapist-client relationships as part of this work.

Specifically I am asked 'To advise the Commissioner whether, in your professional opinion, [Mr C] provided services to [Ms B] that met professional and ethical standards'. In addition I am asked to address the following specific questions:

- What are the relevant professional and ethical standards that apply in this case?
- Please comment on [Mr C's] explanation of the circumstances resulting in him entering into a relationship with [Ms B]. Were [Mr C's] actions reasonable in the circumstances?
- Is it appropriate to have a sexual relationship with a former patient? If not, why not? Is there any interval after the termination of a professional relationship when it would be appropriate to commence a sexual relationship with a former patient?
- Was [Mr C's] counselling method, and advice, appropriate in the circumstances?
- [Mr C] advised that during his sessions with [Ms B] he was acting in the capacity of a psychotherapist rather than a psychologist. Does this alter his professional obligations (given he was a registered psychologist at the time)?
- Please describe the process of maintaining professional boundaries in counselling relationships. Were these processes observed by [Mr C]?
- Please comment on [Mr C's] explanation for his limited record keeping. Is his record keeping (and explanation for this) reasonable in the circumstances?
- Are there any other matters relating to professional and ethical standards which you believe are relevant to this complaint?

In preparing this report I read the following material that was provided to me with the referral:

- Letter to the Commissioner from [Dr A], dated 20 August 2002 including attachments (pages 1-6) marked 'A'
- Action note of conversation between [Dr A] and [Commissioner's] Senior Legal Advisor, dated 22 October 2002 (pages 7-8) marked 'B'
- Correspondence and counselling record from [Mr C] via his lawyer (pages 9-18) marked 'C'
- Action note of conversation between [Mr C] and HDC Investigator dated 13 January 2001 (page 19) marked 'D'
- Two action notes of conversations between [Ms B] and HDC staff concerning her complaint (pages 20-22) and letter from [Ms B] to [HDC Senior Legal Advisor] dated 12 November 2003 (page 23) marked 'E'
- Letter to the Commissioner from [the consumer's colleague] dated 30 September 2003 and letter to [the consumer's colleague] requesting information (pages 24-27) marked 'F'

I have also consulted the relevant codes of ethics, specifically the Code of Ethics of the NZ Psychological Society (1986), the Code of Ethics for Psychologists Working in Aotearoa/New Zealand (2002 – which replaces the earlier code), the Code of Ethics of

the NZ Association of Psychotherapists, and the Code of Health and Disability Services Consumers' Rights. I have also considered some articles written on psychologist-client sexual contact.

Relevant Background

The following factual summary was provided by the Commissioner:

'On 17 November 1999, [Ms B] consulted Psychologist, [Mr C], for assistance with a variety of issues. [Mr C] advised that he counselled [Ms B] until 31 May 2000. However, there is only one record of a session conducted in November 1999. In his response to the Commissioner [Mr C] explained that he had notes for only one session because it was his practice to take notes according to the client's 'need' only. [Mr C] also advised that he saw [Ms B] as a psychotherapist, not as a psychologist, although he was a registered psychologist at the time.

In August 2000, [Mr C] and [Ms B] became friends. The friendship developed into a sexual relationship sometime in December 2000/January 2001. Some months after that, (approximately May 2001) [Mr C] moved into [Ms B's] home. The relationship ended approximately two months later and [Mr C] moved out of [Ms B's] home.

[Mr C] has advised that he is a childhood polio victim and suffers ongoing physical consequences of this disease. Furthermore, he has required counselling treatment and medication for depression and anxiety. [Mr C] advised, via his lawyer, that it was during the time he was receiving treatment and unwell he was 'coerced into a physical relationship with [Ms B]'.

[Mr C] accepts that he had a sexual relationship with a former patient. He denies having sex with a current patient.

[Ms B] was deeply disturbed by the relationship that she formed with [Mr C] and confided in her gynaecologist, Dr A, who subsequently complained to the Commissioner on behalf of [Ms B]. [Ms B] has declined to have any further involvement with the Commissioner's investigation process.

What are the relevant professional and ethical standards that apply in this case?

[Mr C] was a Registered Psychologist at the time [Ms B] was his client. [Ms B] would probably have assumed she was seeing a 'psychologist', but we do not know that for sure. It is possible that he 'contracted out' of a role as a Registered Psychologist with this client, but there is no information to indicate that this occurred. Thus, it is my opinion that the relevant professional and ethical standards are those that apply to Registered Psychologists.

Nevertheless, in view of [Mr C's] contention that he was working with her as a 'psychotherapist' I have also accessed the code of ethics of the NZ Association of Psychotherapists (NZAP). We do not know if [Mr C] is or was a member of that body,

but this code can be referenced in any case as an indication of the expectations of those who practise in this model of therapy. Members of the NZAP may also be Registered Psychologists, psychiatrists, or therapists from another discipline since membership is by commitment to a particular model of therapy rather than professional discipline.

Please comment on [Mr C's] explanation of the circumstances resulting in him entering into a relationship with [Ms B]. Were [Mr C's] actions reasonable in the circumstances?

[Mr C] appears to 'have several explanations and/or justifications for entering into a sexual relationship with [Ms B]: (1) She was no longer his client (2) the sexual relationship was 'at the instigation of [Ms B]' and 'that she was dominant in the relationship', and (3) that he was 'particularly vulnerable' at the time due to his physical and mental state.

The issue of [Ms B] no longer being a client is discussed in response to the next question below. It is my opinion that while she may no longer have been a client, the former (and recent) therapeutic relationship would have been likely to have significantly influenced [Ms B's] decision making.

The issue of whether [Ms B] 'initiated', 'instigated', or 'coerced' [Mr C] (all words used by [Mr C] or his lawyer) into the relationship is, in my opinion, irrelevant. The presence of attraction of a client to a therapist is a well understood phenomenon within the practice of psychotherapy (and understood as 'transference'). [Mr C] cannot claim to be unaware of this when he also says that *psychotherapy* was what his model of work with this client. The claim that she became 'dominant' in the relationship can be understood as an abdication of the role he should have played, both within the period of active therapy and in the aftermath. It is the psychologist/psychotherapist's responsibility to provide structure and safety within their professional relationships, and to not exploit or take any gain from their client even when there may be invitations to do so.

It must also be noted in this context that [Ms B] in any case perceived [Mr C's] behaviour within therapy as 'flirtatious', and that 'she responded to signals that he gave her and (she) came on to as well in the counseling sessions'. This suggests that her subsequent approaches to him (if indeed she did initiate the dating and sexual relationship) may have been a response to a context set by him in which such initiation may have appeared as appropriate. Of course, we cannot know for sure whether flirtatious behaviour did occur on his part, or for that matter, that she was the initiator in subsequent contact. However, the client clearly perceives the situation as being a two-way interaction that developed within therapy. This leaves significant doubt about his assertion that he was passive, and only under 'pressure' gave way to her approaches.

The third issue is that of [Mr C's] vulnerability at the time due to his health. His concession that this was in part the reason the relationship occurred reveals that he knew/knows that it was inappropriate. It is the responsibility of the psychologist to maintain a fit state to practise, and to be aware when they are not fit and withdraw from practice at these times. This is noted in the 2002 code as follows:

2.2.7 *Psychologists have responsibility to monitor their ability to work effectively in order to avoid conditions that could result in impaired judgement and interfere with their ability to practise safely. They seek appropriate help and/or discontinue scientific or professional activity for an appropriate period of time if a physical or psychological condition reduces their ability to work effectively and maintain safe practice.*

While it is noted that [Mr C] sought professional help for himself at the time, he did not apparently protect his client from his vulnerability. While one may have sympathy for [Mr C] in relation to his condition and state at the time, it was his duty to protect his client. In this context it is relevant to note that the Psychologists Act 1981 recognises this responsibility to protect client from practitioners who have a disability by providing powers of suspension and discipline in such circumstances.

Is it appropriate to have a sexual relationship with a former patient? If not, why not? Is there any interval after the termination of a professional relationship when it would be appropriate to commence a sexual relationship with a former patient?

It should be noted that there is a disparity in accounts about the date the professional relationship ended. [Ms B] asserts that she had been attending weekly hour-long sessions up until the Xmas period. [Mr C] asserts that his last session with her was May 31 of that year. In the absence of client notes we cannot be sure which account is correct. However, even accepting his account, the commencement of a dating then sexual relationship with his client is contrary to standards accepted by the profession.

The Code of Ethics of NZPsS (1986) was the code that applied to Registered Psychologists at the time [Ms B] was a client (Nov. 1999 to sometime in 2000) and also at the time of commencement of their dating (Aug. 2000) and sexual relationship (Dec. 2000/Jan. 2001). This code has the following to say relevant to this matter:

- 1.3 *While taking account of their obligations under the law, psychologists who are practitioners hold the interests and welfare of their clients to be of primary importance.*
- 1.4 *The welfare of research subjects, students and clients, takes precedence over the self-interests of psychologists and over the interests of colleagues, employers and other agencies.*
- 5. *Psychologists do not exploit their professional relationships with clients*
 - 5.1 *Psychologists do not condone or engage in sexual harassment, which is defined as deliberate or repeated comments, gestures, or physical contacts of a sexual nature that are unwanted by the recipient. Sexual relations with clients are unethical.*

These clauses make it clear I think that sexual relationships with a client are unethical. What is not spelt out here is the appropriateness of sexual relationships with an ex-client

(or when a client can be considered to be an ex-client). In the 2002 Code this matter is explicitly addressed as shown in the following statement:

2.1.10 Sexual relationships with clients, supervisees and/or students are unethical. Psychologists do not encourage or engage in sexual intimacy, either during the time of that professional relationship, or for that period of time following during which the power relationship could be expected to influence personal decision making.

An attached 'Comment' says:

It is not appropriate to terminate a professional relationship in order to facilitate an intimate relationship.

The Code of Ethics of NZAP says:

1.14 Practice non-exploitatively. Psychotherapists shall recognize the power 'imbalance in the psychotherapeutic relationship and shall not abuse power, nor exploit the relationship for personal gain or satisfaction.

1.15. Abstain from sexual relations with clients. The establishment of a sexual relationship between psychotherapist and client is unethical.

And on the matter of 'ex-clients':

1.17 Avoid sexual relations with former clients. Sexual relationships between psychotherapists and their former psychotherapy clients are unethical when the dynamics of psychotherapy can reasonably be expected to influence the relationship in an ongoing manner.

1.19 Terminate therapy with care. Psychotherapists shall terminate their services to clients in a suitably professional manner.

There is nothing in the material supplied to me that indicates there was a proper termination of the professional relationship. Thus, we cannot be sure that the last session of therapy was understood by the client to be a termination of therapy, or that this was done in a 'suitably professional manner'. Indeed, [Ms B] thought that therapy was ongoing until Xmas. Even accepting [Mr C's] account that the termination of therapy was on 31 May 2000, it was only a matter of 10-11 weeks until 'he accepted her invitation to the theatre' and 6 months until the commencement of a sexual relationship. These periods are well within the range that a client may be expected to re-engage in therapy, and/or be contacted by a psychologist conducting a follow up. Therapists who have affairs with clients cut off opportunities for them to return for tune-ups or other problems that emerge as they move on with their life.

There is no specific designation in NZ codes as to how soon after therapy ends a therapist can have sex with a client. In USA the American Psychiatric Association unequivocally says never. The American Psychological Society says that there must be a

delay of at least two years after therapy ends, but that it is also the therapist's responsibility to prove that boundary blurring has not caused any harm. In the new NZ psychologists' code and the psychotherapists' code reference is made to sexual contact being unacceptable while there is still the presence of a power relationship, or dynamics that influence decision-making. Within such a short period of time as in this case, it is my opinion that this client's decision making would still be strongly influenced in her experience of the therapeutic relationship. The fact that she might have initiated the dating contact and sexual contact is irrelevant as argued above.

Was [Mr C's] counselling method, and advice, appropriate in the circumstances?

His advice regarding [Ms B's] circumstances at the commencement of therapy – as described in his letter – seem to be appropriate. It is impossible to comment beyond that because of the lack of information available.

[Mr C] advised that during his sessions with [Ms B] he was acting in the capacity of a psychotherapist rather than a psychologist. Does this alter his professional obligations (given he was a registered psychologist at the time)?

No – as discussed above.

Please describe the process of maintaining professional boundaries in counselling relationships. Were these processes observed by [Mr C]?

The 2002 code states the following:

3.3.2 *Psychologists maintain appropriate boundaries with whom they work and carefully consider their action in order to maintain their role.*

The psychotherapists' code also refers to the maintenance of appropriate sexual boundaries, and makes the following general statement:

2.12 *Maintain appropriate boundaries. Psychotherapists shall be responsible for setting, monitoring and maintaining clear boundaries between psychotherapeutic, supervisory, training and other relationships.*

This matter has been discussed above. The maintenance of appropriate structure and boundaries to preserve the professional psychologist-client relationship is absolutely the responsibility of the professional. It is my opinion that [Mr C] had a duty to provide appropriate structure and boundaries in this case.

Please comment on [Mr C's] explanation for his limited record keeping. Is his record keeping (and explanation for this) reasonable in the circumstances?

The 1986 NZPsS code says:

2.3 *Psychologists keep sufficient records of their professional activities:*

- a) *for their own reference*
- b) *to ensure that at some future date the client, or other psychologists who become responsible for that client, can be informed of the action taken*
- c) *to allow the information to be presented clearly if necessary.*

Clearly [Mr C] has ignored the accepted practice in this case. It is of added concern that he did not – at the very least – provide a summary at the termination of therapy and evidence of an appropriate termination of therapy.

It is also puzzling that [Ms B] asserts in her telephone interview that she observed him taking notes.

Are there any other matters relating to professional and ethical standards which you believe are relevant to this complaint?

There is an issue as to whether or not [Mr C] was receiving supervision for his clinical work generally, and in particular, in relation to [Ms B]. Had he been receiving adequate supervision the events that have transpired may not have occurred at all.

Whether, in your professional opinion, [Mr C] provided services to [Ms B] that met professional and ethical standards?

This is the general issue: It is my opinion that [Mr C] did not provide services that met professional and ethical standards, for the reasons set out above. While it appears that [Mr C] himself acknowledges deficiencies in his practice his explanations for why they occurred appear to me to amount to an abdication of his professional responsibility.”

Response to Provisional Opinion

Ms B

Ms B made the following comments in response to my provisional opinion:

- Mr C was not coerced or pressured into the relationship. She never made the statement “... if we don’t take each other this time”.
- Mr C was never a tenant in her flat; he stored his furniture there but lived in the house with her. He asked her to not tell anyone about their living arrangements aside from being in “crisis counselling”.
- Ms B denies Mr C has been the subject of her “unsolicited and unwanted attentions” and alleges that he wrote to her.

- Her affair with a neighbour occurred nearly 40 years ago and was not a subject of therapy; nor was her ex-husband. However, her mother (and family issues in general relating to loss) was discussed in therapy.
- Her mother did not, as stated by Mr C, have any pets. Ms B did.
- Ms B never sought Mr C's advice about her late partner's ashes or sale of her property.
- Ms B did not go to Mr C's clinic and invite him to the theatre. She telephoned him. The appointment on 14 August may have been a "real one".
- Mr C visited Ms B several times at her home and invited her to his holiday home, where the sexual relationship commenced on 28 December.
- Mr C "has a huge and virulent anger against women one of whom, he says, gave him polio".

Mr C

Mr C's lawyer made the following submission on his behalf, in response to my provisional opinion:

- Mr C regrets entering into a personal relationship with Ms B and regrets any harm that has been a consequence for both of them.
- The report's description of Mr C's diary entries as "appointments" fails to acknowledge the true nature of the document – a record of Mr C's personal and professional commitments. It is not suggested that Ms B had a professional relationship with Mr C in March 2001, so the references to appointments are "incorrect, misleading and unnecessary".
- The expert advisor incorrectly states that Mr C had several explanations and/or justifications for entering into a sexual relationship with Ms B. Mr C has offered only a factual account of what occurred and has never attempted to justify his actions. It is unfair to equate Mr C's explanation with an excuse.
- At no time has Mr C claimed to have entered into a sexual relationship with Ms B because she was a former client.
- The report has failed to take into account Mr C's poor health and its impact on his judgement and understanding.
- Ms B herself advised the Commissioner that she had almost become Mr C's counsellor by the time the sexual relationship commenced. This is an acknowledgment, by Ms B, that she believed that the balance of power in the relationship was not as one would have assumed to be the norm between a former

therapist and client. Rather, in this case the former client (Ms B) held the balance of power because of Mr C's poor health.

- “Whilst the optimum standards espoused in the report should undoubtedly be the norm it is appropriate for any system of regulation and discipline to acknowledge that theory and reality do not always coincide and that there must always be provision to take account of the exceptional circumstance.”
- The use of the terms “exploitive” and “unprofessional” in the report wrongly attribute an improper motive to Mr C, namely an intention to take advantage of Ms B. There is no evidence that Mr C's actions were other than those of a debilitated practitioner (of advancing years) who failed to recognise and act swiftly to protect himself and Ms B.
- It is inappropriate to use the 2002 Code of Ethics for New Zealand psychologists to judge ethical standards, and is contrary to rules of natural justice and the New Zealand Bill of Rights. The appropriate Code of Ethics to refer to is the 1986 version, which does not preclude sexual relations with former clients. Section 5.1 of the 1986 Code of Ethics envisages that a relationship with a client that is short of actual sexual intimacy is not precluded, provided it is not “unwanted by the recipient”.
- Mr C's standard of documentation is in keeping with fellow practitioners who belong (as he does) to the “Analytical Group in ...”. Furthermore, in 40 years of practice Mr C has never been asked by another practitioner for his notes on a client and he considers it is good practice for any new therapist to take their own history from a client.

Code of Health and Disability Services Consumers' Rights

The following Rights in the Code of Health and Disability Services Consumers' Rights are applicable to this complaint:

RIGHT 2

Right to Freedom from Discrimination, Coercion, Harassment, and Exploitation

RIGHT 4

Right to Services of an Appropriate Standard

- (2) *Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.*

Other relevant standards

The New Zealand Registered Psychologists *Code of Ethics* (1986)

- 1.3 *While taking account of their obligations under the law, psychologists who are practitioners hold the interests and welfare of their clients to be of primary importance.*
- 1.4 *The welfare of research subjects, students and clients, takes precedence over the self-interests of psychologists and over the interests of colleagues, employers and other agencies.*
- ...
5. *Psychologists do not exploit their professional relationships with clients*
- 5.1 *Psychologists do not condone or engage in sexual harassment, which is defined as deliberate or repeated comments, gestures, or physical contacts of a sexual nature that are unwanted by the recipient. Sexual relations with clients are unethical.*
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Opinion: Breach – Mr C

Inappropriate relationship with a current client

There is dispute about when the therapeutic relationship ended. Mr C states that his counselling of Ms B and his treatment of her as a client ended on 31 May 2000. Ms B states that counselling continued until December 2000. What is not disputed is that a sexual relationship commenced sometime in December 2000, culminating in Mr C living with Ms B as her partner.

If a sexual relationship commenced while Ms B was a current client, the New Zealand Registered Psychologists *Code of Ethics* (1980) applied. Standard 5.1 states: “Sexual relations with client are unethical.”

It appears on the evidence that the sexual relationship did not commence until after the treatment ended. However, Mr C’s behaviour still raises significant professional issues. My advisor commented on the time lapse between Ms B’s therapy allegedly finishing and the relationship starting:

“These periods are well within the range that a client may be expected to re-engage in therapy, and/or be contacted by a psychologist conducting a follow up. ... Within such a short period of time as in this case, it is my opinion that this client’s decision making would still be strongly influenced in her experience of the therapeutic relationship.”

The number of contacts Ms B had with Mr C are listed in Appendix 1. I note that Ms B made further appointments with Mr C after 31 May, which indicates to me that she was not clear about the boundaries of their relationship. The fact that Mr C did not charge Ms B for her two appointments after 31 May, or for the home visits he made, does not affect whether a professional relationship existed.

Mr C has submitted as a mitigating factor that he was “coerced” into a sexual relationship by Ms B, who was the “dominant partner” and that he was in poor physical and emotional health at the time of these events as a result of childhood polio and anxiety/depression. In my advisor’s view, the fact that Ms B might have initiated the dating contact and sexual contact is irrelevant:

“The presence of attraction of a client to a therapist is a well understood phenomenon within the practice of psychotherapy (and understood as ‘transference’). [Mr C] cannot claim to be unaware of this when he also says that *psychotherapy* was what his model of work with this client. The claim that she became ‘dominant’ in the relationship can be understood as an abdication of the role he should have played, both within the period of active therapy and in the aftermath. It is the psychologist/psychotherapist’s responsibility to provide structure and safety within their professional relationships, and to not exploit or take any gain from their client even when there may be invitations to do so.”

In my view, if Ms B did initiate a personal relationship in August, she did so believing that this was appropriate, given the context set by Mr C in the counselling sessions. Mr C has provided no evidence that he had maintained appropriate therapeutic boundaries while counselling Ms B. During Ms B’s consultation at his clinic on 14 August Mr C agreed to go to the theatre with her, and he made home visits in the following weeks.

My advisor does not regard Mr C’s “vulnerability” at the time of commencement of a sexual relationship with Ms B to be an adequate excuse for his actions: “It is the responsibility of the psychologist to maintain a fit state to practise, and to be aware when they are not fit and withdraw from practice at these times.”

I am not persuaded by Mr C’s assertion that the treatment he provided Ms B was no different to what a “lawyer or a very good and reliable friend” would do, and that although he was a registered psychologist at the time, he treated her in his capacity as a “psychotherapist”. This is irrelevant. There is no doubt in my mind that Ms B consulted Mr C for personal counselling, rather than for legal advice or paid friendship. I do not consider that a meaningful distinction can be made between the professional responsibilities of a psychotherapist compared with those of a psychologist.

My advisor concluded that Mr C did not provide services to Ms B that met professional and ethical standards: “While it appears that [Mr C] himself acknowledges deficiencies in his practice his explanations for why they occurred appear to me to amount to an abdication of his professional responsibility.”

I concur with my advisor’s comments. Mr C should have known that having a sexual relationship with a recent former client was unethical and had the potential to cause Ms B

harm. Health professionals have a duty not to cause clients harm, especially in counselling relationships where a client's emotional vulnerability is most exposed and there is a risk of transference. Given Ms B's vulnerable state arising from the grief and loss that she initially consulted Mr C about, her subsequent suffering as a result of her sexual relationship with Mr C was both predictable and preventable.

In the words of my advisor, "even accepting his account, the commencement of a dating then sexual relationship with his client is contrary to standards accepted by the profession". In my view, in commencing a sexual relationship with Ms B so soon after the end of treatment, Mr C placed his own interests and welfare above hers. Mr C's actions were exploitative and unprofessional, and cannot be excused by his ill-health and attempts at self-justification. In my opinion, Mr C breached Rights 2 and 4(2) of the Code.

Record-keeping

Mr C's standard practice of making notes according to individual patient "need" is unsatisfactory and unprofessional. The notes he provided in relation to Ms B's counselling are inadequate. Comprehensive record-keeping is an essential component of health professional practice, irrespective of the particular discipline and style of practice. It is particularly concerning that there is no record of the outcome of Ms B's therapy or the reasons for the termination of his counselling relationship with Ms B.

Adequate record-keeping is a requirement of the Code of Ethics for psychologists and psychotherapists. I am not persuaded by Mr C's argument that his lack of record-keeping was in keeping with Ms B's "needs". Good documentation guides treatment and facilitates continuity of care. Mr C failed to record all but one session. Accordingly, in my opinion Mr C did not comply with relevant professional standards and breached Right 4(2) of the Code.

Actions taken

In response to my provisional opinion Mr C provided a written apology to Ms B for his breaches of the Code.

Follow-up actions

- A copy of my opinion will be forwarded to the New Zealand Psychologists Board and the New Zealand Association of Psychotherapists.
 - This matter will be referred to the Director of Proceedings in accordance with section 45(f) of the Health and Disability Commissioner Act 1994 for the purpose of deciding whether any proceedings should be taken.
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- A copy of this report, with identifying features removed, will be placed on the Health and Disability Commissioner's website, www.hdc.org.nz, for educational purposes, upon completion of the Director of Proceedings' processes.
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Addendum

The Director of Proceedings considered this matter and decided not to issue proceedings before the Psychologists Board or the Human Rights Review Tribunal.

Appendix 1

3 Nov 99	Appointment
10 Nov 99	Appointment
24 Nov 99	Appointment
1 Dec 99	Appointment
8 Dec 99	Appointment
15 Dec 99	Appointment
22 Dec 99	Appointment
5 Jan 00	Appointment
12 Jan 00	Appointment (Line through it)
19 Jan 00	Appointment
26 Jan 00	Appointment
2 Feb 00	Appointment
9 Feb 00	Appointment
16 Feb 00	Appointment
22 Feb 00	Appointment (Line through it)
23 Feb 00	Appointment
1 March 00	Appointment
7 March 00	Notation made re flat and phone
8 March 00	Appointment
10 March 00	Appointment
15 March 00	Appointment
22 March 00	Appointment
29 March 00	Appointment
5 April 00	Appointment
12 April 00	Appointment
19 April 00	Appointment
26 April 00	Appointment
3 May 00	Appointment
10 May 00	Appointment
17 May 00	Appointment
24 May 00	Appointment
31 May 00	Appointment – note saying “cancelled no more apts”
14 Aug 00	Appointment N/C (no charge)
26 Aug 00	Date
4 Sept 00	Home visit
19 Sept 00	Home visit
27 Sept 00	Home visit (“Last Visit” noted)
18 Dec 00	Appointment (price is crossed out)
21 Dec 00	Home visit
22 Jan 01	Appointment (\$45 crossed out)
8 Feb 01	Home visit
13 Feb 01	Note stating “5.15 to [Ms B’s] for [illegible]”

16 Feb 01	7.00pm Appointment
20 Feb 01	1.00 “[Ms B] is [illegible]”
7 March 01	Note to phone Ms B
17 March 01	Noon appointment to see Ms B
31 March 01	“Ph [Ms B]”
1 June 01	“Shift – [Ms B’s] Mother”
30 June 01	Ms B
16 Aug 01	2.30pm Ms B
24 Aug 01	6.00pm Ms B
25 Sept 01	2 – 4.00 Ms B