General Practitioner, Dr B

A Report by the

Health and Disability Commissioner

(Case 11HDC00237)

Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

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Executive summary

Background

1. Mrs A received primary care services regularly from a medical centre from May 2007 to November 2010, and once in April 2011. Mrs A's usual doctor was Dr B, and she consulted him on more than 20 occasions between May 2007 and 3 November 2010. Some of Mrs A's consultations with Dr B throughout this period were for issues of a sensitive nature.

2. Between October and December 2010, Dr B persistently texted Mrs A on two different cell phone numbers. The content of some of these text messages was sexually explicit.

3. On 24 October 2009 Mrs A experienced an anaphylactic reaction to codeine. Despite the severity of Mrs A's reaction, advice from the public hospital, and Mrs A's request, Dr B did not arrange a medical alert bracelet for Mrs A. Dr B also prescribed codeine to Mrs A in July 2010 over the telephone for the treatment of a respiratory infection, eight months after she had suffered the anaphylactic reaction to codeine.

Decision summary

4. Professional and ethical standards are clear: doctors must not engage in relationships of a sexual nature with their patients. This is a non-negotiable professional and ethical standard. The Medical Council of New Zealand has a zero-tolerance position on doctors who breach sexual boundaries. A doctor breaches sexual boundaries not only through physical behaviour, but also through any behaviour, including discussions, that has as its purpose some form of sexual gratification, or that might reasonably be interpreted as having that purpose.

5. The Commissioner found that the sexual content of the text messages Dr B sent to Mrs A could reasonably be interpreted as having, as their purpose, some form of sexual gratification. In addition, the text messages supported Mrs A's accounts of the sexual relationship she had with Dr B. Concern was also expressed about the frequency with which Dr B was contacting Mrs A.

6. It was Dr B's responsibility as a registered medical practitioner to maintain professional boundaries and ethical standards. Dr B did not do so, and therefore breached Right 4(2) of the Code of Health and Disability Services Consumers' Rights (the Code). It was also held that Dr B sexually exploited Mrs A, and breached Right 2 of the Code.

7. The Commissioner found that Dr B failed to exercise reasonable care in prescribing codeine and antibiotics to Mrs A on 10 July 2010, and his failure do so was a breach of Right 4(1) of the Code.

8. Dr B also failed to comply with his professional and legal responsibilities to keep clear and accurate patient records. He did not document clinical findings during numerous consultations with Mrs A, did not fully document the care he provided on 10 July when he prescribed her codeine, and he made a misleading entry in Mrs A's records on 15 July 2010. Dr B's record-keeping failures were a breach of Right 4(2) of the Code.

9. Dr B will be referred to the Director of Proceedings for the purpose of deciding whether any proceedings should be taken.

Complaint and investigation

10. On 4 March 2011, the Commissioner received a complaint from Mrs A about the services provided to her by Dr B. The following issues were identified for investigation:

- *The appropriateness of the relationship between Dr B and Mrs A both during and after their therapeutic relationship.*
- *The appropriateness of the services provided by Dr B to Mrs A.*

11. An investigation was commenced on 14 April 2011. The parties directly involved in the investigation were:

Mrs A	Consumer/Complainant
Dr B	Provider/General Practitioner

Also mentioned in this report

Mr A	Mrs A's husband
Mrs B	Dr B's wife
Ms C	Mrs A's friend

Information was reviewed from:

Mrs A
Dr B
Medical centre receptionist
Telephone companies
Public hospital
The Police

12. Independent expert advice was obtained from general practitioner Dr David Maplesden (attached as Appendix A).

Information gathered during investigation

Therapeutic relationship

13. Dr B is a general practitioner practising at the medical centre. The medical centre is owned and operated by a company of which Dr B is the sole Director.

14. Mrs A, in her mid-30s, attended the medical centre for primary care services 11 times in 1998, and then regularly from May 2007 to November 2010. Mrs A's usual doctor was Dr B. Mrs A consulted Dr B in person on more than 20 occasions from May 2007 to 3 November 2010, and at least 10 of these consultations took place in 2010.[1]

[1] This total does not include a missed appointment on 11 June 2010, or appointments that indicate an action only (for example, a repeat prescription or an order for full blood count), as opposed to an actual presentation.

15. Mrs A's last in-person appointment with Dr B appears to have been on 20 October 2010. However, the medical records indicate that Mrs A continued to be Dr B's patient until at least April 2011, when it is noted in her records (on 20 April 2011) that she was referred to secondary services at the public hospital, and that on 21 April 2011 a letter "to whom it may concern" was written for her (apparently by Dr B).[2]

16. Mrs A advised HDC that her parents and her husband were also enrolled as patients with Dr B.

Consultations for sensitive issues

17. The medical records indicate that some of Mrs A's consultations with Dr B were for issues of a sensitive nature.

Codeine allergy

18. Mrs A advised HDC that on a Saturday in October 2009 she had back pain and took some codeine that she had at home. She said that after 10 or 15 minutes she could not breathe, and her face became swollen. Mrs A's father drove her to the medical centre where she saw Dr B.

19. The records show that on Saturday 24 October 2009, Mrs A presented to Dr B for "Anaphylactic ?reaction to codeine? 60mg". It was noted that Mrs A had taken a dose of codeine at 9am, and presented at 9.30am with "difficulty with [blood pressure]/swollen arms unable to palpate pulse — radial cubital[3]". Dr B referred Mrs A to the Emergency Department at the public hospital.

20. The discharge record from the public hospital notes:

> "This patient presented to ED via Ambulance after having an anaphylaxis reaction to codeine phosphate. She woke this morning feeling unwell and developed [left] chest pain. She then decided to take codeine phosphate tabs for analgesia at home. Shortly after she developed an urticarial rash and started feeling dizzy as well as [shortness of breath]. She was rushed to an ED clinic and was given 1mg of adrenaline IM, 200mg hydrocortisone as well as IV phenergan. She was then transferred to hospital."

21. At the public hospital Mrs A was treated with an antihistamine and a corticosteroid, and was observed for eight hours before being discharged back into the care of Dr B. Mrs A was advised not to take codeine phosphate or codeine-based drugs, and to return to hospital if she experienced any shortness of breath and breathing problems. The discharge summary advised Dr B to organise "a bracelet" for Mrs A.

22. Dr B told HDC that, at that time, a patient alert that Mrs A was allergic to codeine was entered on the patient management system. Mrs A advised HDC that she requested a medical alert bracelet but did not receive one.

23. Mrs A's clinical records from the medical centre show that she consulted Dr B on 10 July 2010 for an upper respiratory tract infection. Among other things, Dr B prescribed Mrs A

[2] It is not clear to whom this letter was addressed or what it was about. However, the entry in the medical records regarding the letter states: "21/04/2011 Action: Let: To Whom it may Concern ([Dr B's initials]) …"
[3] The cubital fossa, or elbow pit, is the triangular area on the anterior view of the elbow.

antibiotics and "Codalgin Tab paracetamol 500mg with codeine phosphate 8 mg 2 TDS/PRN 100 tablets".

24. Mrs A advised HDC that she collected the codeine from the pharmacist and recalled that it was a paracetamol and codeine mix. Mrs A advised HDC that she remembered that she has an allergy to codeine only after she took the medication. Mrs A believes that she texted Dr B, who called her back. She recalled that Dr B advised her that if she had any of the symptoms that she had previously experienced, then she should go to the public hospital. Mrs A advised HDC that she started having mild symptoms, so she went to the public hospital.

25. Mrs A's medical records from the public hospital confirm that she presented to the emergency department on 11 July 2010. The clinical management summary records:

> "Patient was prescribed codeine for fever when she is allergic to it. Patient developed itching of the neck and tight chest upon taking it. No rash. She was treated by GP with antihistamine before coming to hospital."

26. Mrs A was treated with prednisone and observed in hospital until her symptoms improved. She was then discharged back to the care of Dr B.

27. Dr B advised HDC that the script for codeine phosphate given on 10 July was a telephone script following a telephone consultation with Mrs A on a Saturday when he was not at the clinic. Dr B advised: "When I arrived [at] the clinic some time later to attend to the script I realised that she was allergic to codeine. I telephoned and advised her not to take Codalgin." There is no record in the clinical records that Dr B contacted Mrs A following the prescription of codeine on 10 July, or of any advice he gave to Mrs A, or of any treatment he provided after giving her the prescription.

28. There is a further entry in Mrs A's medical centre records on 15 July 2010 which states:

> "Action: [prescribed]: Codeine Phosphate Tab 15 mg Tablets
> Scripts: [prescribed] Codeine Phosphate Tab 15mg Tablets
> Letters: LET: To Whom it may Concern."

29. Dr B advised HDC that no script for codeine was given to Mrs A on 15 July 2010. He stated: "The explanation for this entry is that I was reviewing her notes. I wrote a letter '*to whom it may concern*' regarding her allergy to codeine and this was given to her for future reference and information."

30. There are several entries in the clinical record for which there is no record of a clinical assessment being undertaken, including 16 December 2009, 12 February 2010, 10 May 2010, 10 July 2010, and 13 September 2010. There is also an entry in the clinical record on 14 October 2010 with no accompanying information regarding history, clinical examination, or diagnosis.

Personal relationship

Allegation of sexual relationship

31. Mrs A originally alleged to HDC that she had a sexual relationship with Dr B, and that Dr B "sexual [sic] abused [her] many times".

32. Mrs A alleged that sexual relations with Dr B began in early 2010, when she went to his clinic one evening to collect a prescription for her husband.[4] Mrs A advised that she had more than 30 sexual encounters with Dr B until the relationship ended in late November or early December 2010. She said she had sexual intercourse with Dr B in his clinic, and that the encounters would usually take place either early in the morning (before 7am) or after 6pm (or after 8pm on Fridays). Mrs A also said that on one occasion, another person was involved. Mrs A said that Dr B threatened to tell her husband if she stopped coming, or did not do what he wanted.

33. Mrs A also advised HDC that Dr B would text her, and "it got so regular that he started calling me to his surgery every second, third day". Mrs A advised HDC that she kept going back because she felt threatened by Dr B. She said: "He's got such a higher post. I'm just an ordinary person"; and "He's such a powerful man and I'm just an ordinary person." Mrs A also stated that she trusted Dr B because he was her family general practitioner.

34. Mrs A advised HDC that she could not save all the texts that Dr B sent to her, so she made a folder on her phone and she kept his "recent ones". She advised HDC that she had over 700 text messages from Dr B, some of which contained sexual references. Mrs A provided HDC with a cell phone, which she said was attached to the number 'Cell Phone No 1'. Mrs A represented to HDC that the cell phone belonged to her, and that the text messages saved on that phone were sent to her by Dr B.

Dr B's response

35. Dr B denies having a sexual relationship with Mrs A. He stated: "[Mrs A's] allegation that I have sexually abused her or otherwise had sexual relations with her is quite untrue"; and "The complaint made alleging that I have had a sexual relationship with [Mrs A] is not correct." Dr B also denied sending sexually explicit text messages to Mrs A. In response to the second provisional opinion, Dr B's lawyer stated: "The texts which your opinion places reliance upon are not texts between [Dr B] and [Mrs A] but were intended for a friend of hers."

36. Dr B advised HDC that he has concerns about Mrs A's credibility. He stated to HDC: "[Mrs A] has acted with an ulterior motive in trying to extract money from me." Mrs A stated that her motive was never money.

37. Dr B did not provide any further response to the allegation or HDC's investigation into the appropriateness of his relationship with Mrs A, despite being given numerous opportunities to do so.

Retraction of original statement and further investigation

38. Mrs A alleged that after she made the complaint to HDC, Dr B visited her house and spoke to her parents, with the intention of getting Mrs A to withdraw her complaint. Mrs A withdrew her complaint to HDC on 26 May 2011; however, she reinstated her complaint on 14 June 2011. Mrs A again withdrew her complaint to HDC on 18 July 2011; however, she reinstated her complaint on 11 January 2012.

[4] Mrs A's medical records confirm that Mrs A consulted Dr B on 26 February 2010 to "discuss husband's [condition]".

39. On 5 June 2012, in response to the first provisional opinion, Mrs A retracted her original statement that she had had a sexual relationship with Dr B. Mrs A advised: "I wish to state that [Dr B] and myself never had any sexual relationship …" Mrs A also advised in her response to the first provisional opinion that 'Cell Phone No 1' was not her cell phone number. Mrs A advised that the phone number belongs to a friend, but she would not disclose the name of the friend to whom she alleges the phone number belongs.

40. Cell Phone Provider X confirmed to HDC that 'Cell Phone No 1' is a pre-paid cell phone number, and is not registered to a particular user.

41. In the course of the investigation, HDC became aware that Mrs A had also made a complaint to the Police about Dr B. Mrs A provided the Police with a cell phone, and advised the Police that the messages saved on that phone were sent to her from Dr B. The Police downloaded text messages from that phone, attributed to 'Cell Phone No 2'. The downloaded text messages included texts of a sexual nature sent to that phone number from Dr B's cell phone number.

42. Mrs A did not advise the reason why she retracted her original statement about the nature of her relationship with Dr B, and her advice that 'Cell Phone No 1' was her cell phone number. However, given the seriousness of the allegations originally made, and the nature of the available evidence, HDC continued with the investigation, and obtained further information about 'Cell Phone No 2'. The information HDC obtained about 'Cell Phone No 2' is set out below, as well as the other evidence HDC obtained about contact between Dr B and Mrs A.

43. On 18 February 2013, Mrs A advised HDC: "During this course of investigation I have to go through a very stress full moments [sic]", and said that she has "suffered a lot". Mrs A indicated her support for continuing the HDC investigation, and stated: "It would be good to know the outcome of this case."

Text messages sent from Dr B's cell phone to cell phone number 'Cell Phone No 2'

44. Mrs A originally told the Police and HDC that in 2010 she was using two cell phones, with the numbers 'Cell Phone No 1' and 'Cell Phone No 2'.

45. Cell Phone Provider Y confirmed to HDC that 'Cell Phone No 2' is billed to Mrs A and has been active under her name since 10 July 2006.

46. 'Cell Phone No 2' is the cell phone number Mrs A provided to HDC as her cell phone number on her complaint form, dated 4 March 2011. In addition, Mrs A wrote a letter to HDC, received on 26 May 2011, which stated: "If you have any [queries] pls do call me on 'Cell Phone No 2'." Furthermore, throughout the course of the investigation into Mrs A's complaint to HDC, HDC staff contacted and spoke to Mrs A on 'Cell Phone No 2'.

47. The Police obtained a Device Report for the 'Cell Phone No 2' cell phone Mrs A provided to the Police, which included details of saved contacts and text messages. In her interview with the Police, which was recorded on DVD, Mrs A advised the Police that the text messages on the phone she showed to the Police were "from the doctor". Pursuant to section 162 of the Summary Proceedings Act 1957, Mrs A made a formal written statement to the Police that the DVD interview is a true and accurate record of her evidence. One of the downloaded text

messages is a message to Mrs A from a Detective Constable on 6 July 2011, asking Mrs A to call him.

48. There are also text messages to Mrs A on 'Cell Phone No 2' from a hospital clinic, which were received on 'Cell Phone No 2' on 13 May 2011 and 23 June 2011. The clinic confirmed that the contact details on its records for Mrs A include 'Cell Phone No 2'. The clinic also confirmed to HDC that it recorded contacting Mrs A on those dates either by phone or text.[5] The clinic advised:

> "The message on 13/05/2011 was sent by […] & intended for [Mrs A]. It is presumed that it was sent to [Cell Phone No 2]. As we have no other mobile number for her and this is the mobile number recorded on our Triage sheet.
>
> The Message on 23/06/2011 was documented in our system as a telephone contact — text not specified but this is not always recorded. Contact was by [a nurse] & intended for [Mrs A] also presumably on [Cell Phone No 2]."

49. There are also incoming and outgoing text messages downloaded from that phone to and from a lawyer. The text messages from the lawyer use Mrs A's known name, and were received in June and July 2011.

50. The saved contacts that were downloaded by the Police include the direct dial and email of the HDC Investigator who was Mrs A's contact person for her complaint to HDC.

51. A large number of the downloaded text messages were sent from 'Cell Phone No 3'. The messages were loaded under the name "Paul".

52. Cell Phone Provider Y confirmed that 'Cell Phone No 3' was billed to Dr B, and was active under his name from 22 December 2008 to 7 December 2010. The billing address for the account was Dr B the medical centre.[6]

53. When asked by HDC why the messages were loaded under the name "Paul", Mrs A advised that it was because her brother used to go through her phone and she didn't want to save them under the doctor's name.

54. The text messages sent from Dr B's cell phone number to 'Cell Phone No 2' that were downloaded by the Police were sent between 17 October and 12 November 2010 and refer to Mrs A by name on at least four occasions, and refer to Mrs A's husband on at least one occasion.

55. The messages to 'Cell Phone No 2' from Dr B's cell phone number between 17 October and 12 November 2010 indicate a pattern of persistent texting, asking the recipient to call the sender, stating that the sender will call the recipient, asking where the recipient is and what the recipient is doing, asking why the recipient does not reply to text messages, and using the

[5] The Clinic advised that due to the limited storage space in the DHB email systems the sent messages are usually deleted regularly so it has no record of the exact message or what the actual phone number was that the message was sent to.

[6] On 18 February 2009 Dr B provided the Police with 'Cell Phone No 3' as his contact number, after lodging an incident claim with the Police.

terms "babe", "baby", "dear", "darling", and "sweetie". There is also a message from Dr B's cell phone number referring to a patient who died from a heart attack.

56. Between 12.34am and 12.42am on 12 November 2010, 'Cell Phone No 2' received nine messages from Dr B's cell phone number, many of which were sexually explicit.

Record of calls and text messages from Dr B's cell phone number to 'Cell Phone No 2' and 'Cell Phone No 1'

57. Cell Phone Provider Y was unable to provide text content or any inbound call/text activity for 2010 from Dr B's cell phone number, as that activity is no longer saved on its system. However, Cell Phone Provider Y was able to provide copies of the invoices for Dr B's cell phone number from February to December 2010. The invoices detail outbound activity from Dr B's cell phone number, which includes the dates and times of telephone calls and text messages sent from Dr B's cell phone number to 'Cell Phone No 2' and 'Cell Phone No 1'.

58. The invoices indicate a pattern of persistent texting from Dr B's cell phone number to 'Cell Phone No 2' and 'Cell Phone No 1' throughout 2010.

59. Cell Phone Provider Y advised HDC that, because of issues with their text content server, texts on the outgoing account may not precisely match the times recorded for texts on the receiving phone. Cell Phone Provider Y advised HDC in December 2011 that the cause of that problem was yet to be established.

Record of calls made from Dr B's work phone to 'Cell Phone No 2' and 'Cell Phone No 1' and Mrs A's home numbers

60. Phone Company Z confirmed that the landline telephone number for the medical centre where Dr B works, is one of their numbers, and that the contacts under "subscriber details" are Dr B and Mrs B.

61. Phone Company Z provided HDC with the call records for the landline number from the period 1 October 2010 to the end of December 2010. The call records indicate a pattern of regular calling from the medical centre to 'Cell Phone No 2' and 'Cell Phone No 1' and Mrs A's home phone numbers.

Text messages from Dr B's cell phone to cell phone number 'Cell Phone No 1'

62. As noted above, Mrs A originally advised HDC that in 2010 she used two cell phones, with the numbers 'Cell Phone No 2' and 'Cell Phone No 1'. She further advised that 'Cell Phone No 1' was a Cell Phone Provider X phone that she was using in 2010, but that she subsequently stopped using. On 13 January 2012 Mrs A provided HDC with a Nokia cell phone which she represented as her cell phone associated with 'Cell Phone No 1'. As noted above, Mrs A subsequently denied that 'Cell Phone No 1' is hers.

63. As recorded in the "Officer's Evidential Statement" pertaining to Mrs A's complaint to the Police about Dr B, dated 10 March 2011, Mrs A also advised the Police that she "has around 1200 text messages from the Doctor on her two phones" and "[t]hese numbers are 'Cell Phone No 2' and 'Cell Phone No 1'".

64. In January 2012, HDC used Nokia PC Suite to download text messages from the Nokia cell phone with the number 'Cell Phone No 1'.[7] The phone had 662 messages saved in a "Saved messages" folder on the phone. Of those messages, 660 were attributed to "Doc" (from cell phone number 'Cell Phone No 3'), and two messages were attributed to "Docs wife" (from 'Cell Phone No 4'). The saved messages date from 6.51pm on 3 October 2010 to 4.55pm on 6 December 2010.[8]

65. As noted above, Cell Phone Provider Y confirmed that 'Cell Phone No 3' was billed to Dr B, and was active under his name from 22 December 2008 to 7 December 2010. The billing address for the account was Dr B at the medical centre.

66. Cell Phone Provider Y also confirmed that 'Cell Phone No 4' is billed to Dr B's wife, and has been active under her name since 7 December 2007.

67. Although Mrs A subsequently denied that 'Cell Phone No 1' is hers, I note that text messages downloaded from 'Cell Phone No 1' sent from Dr B's 'Cell Phone No 3' between 3 October and 6 December 2010 refer to Mrs A by her known name on at least 20 occasions. In addition, text messages downloaded from 'Cell Phone No 1' sent from Dr B's 'Cell Phone No 3' between 3 October and 6 December 2010 refer to Mrs A's husband on three occasions.

68. In addition, as noted above, the Police obtained a Device Report for 'Cell Phone No 2'. The Device Report included details of saved contacts. The number 'Cell Phone No 1' is saved in that phone as "Mrs A".

69. There are multiple messages to 'Cell Phone No 1' from Dr B's cell phone number between 3 October and 6 December 2010 (see Appendix B). The messages indicate a pattern of persistent texting, asking the recipient to call the message sender, asking if it is okay to call, asking Mrs A why she does not reply to text messages and if she is upset or angry with the message sender, and using the terms "sweetie", "darling" and "babe".

70. There are text messages sent from Dr B's cell phone to 'Cell Phone No 1' between 3 October and 6 December 2010 referring to patients, and text messages referring to "doing surgery",[9] being "back in surgery",[10] and "in hospital".[11]

71. There is also a series of text messages with sexual references, as set out below.

72. Between 10.43pm and 11.47pm on 8 November 2010, 'Cell Phone No 1' received 29 messages from Dr B's cell phone number, many of which are sexually explicit.

[7] Cell Phone Provider X provided HDC with the IMEI number associated with 'Cell Phone No 1'. The IMEI number corresponded with the serial number extracted from the handset (except for the last digit which Cell Phone Provider X advised is not actually part of the number).
[8] The times recorded for incoming messages on Mrs A's cell phone, as documented by Nokia PC Suite, do not directly correspond to the specific times recorded on the cell phone itself for incoming messages. The reason for this is unclear. For the purposes of this opinion, the times and dates of messages received are as recorded by Nokia PC Suite.
[9] Received at 1.56pm on 15 November 2010.
[10] Received at 11.19am on 13 November 2010.
[11] Received at 8.56am on 13 November 2010.

73. On 9 November 2010, 'Cell Phone No 1' received text messages of a sexual nature from Dr B's cell phone number.

74. Between 10.54pm on 11 November and 12.33am on 12 November, 'Cell Phone No 1' received 84 text messages from Dr B's cell phone number, many of which were sexually explicit.

75. 'Cell Phone No 1' also received sexually explicit text messages from Dr B's cell phone number on 16, 17 and 23 November 2010.

76. 'Cell Phone No 1' also received text messages from Dr B's cell phone number between 3 October and 6 December 2010 that refer to physical contact and proposed or past meetings.

Police evidence

77. In 2011, the Police carried out an investigation into a complaint Mrs A made to the Police about Dr B. The Police provided HDC with information obtained in the course of the investigation.

78. The "Officer's Evidential Statement" pertaining to Mrs A's complaint to the Police about Dr B, dated 10 March 2011, records the details of Mrs A's complaint, and notes: "The complainant has around 1200 text messages from the Doctor on her two phones. These numbers are 'Cell Phone No 2' and 'Cell Phone No 1." The statement was made by a Police Detective and is signed by him.

79. The Police formally interviewed Mrs A on 24 March 2011. Mrs A "promised to tell the truth knowing that [the] interview may later be used as evidence". The interview was recorded on DVD. Mrs A was provided with an opportunity to view the DVD and made a Formal Written Statement pursuant to section 162 of the Summary Proceedings Act 1957 on 24 March 2011 that the DVD record is a true and accurate record of her evidence. In the course of the interview, Mrs A made the following statements:

(a) "It started with me from February 2010, I went to, my husband is [a patient] and I went into his surgery to get some medications that afternoon for the first time. I used to go with mum and dad but I never knew that what was gonna happen to me but that afternoon it was like after 5.30 and then I called the surgery and he was there, the doctor and then he said for me to just come and pick up the prescription and you can take the medications the next day. So I went in to get the prescription from the surgery … Once I got into the surgery there was no one in the surgery. At that time everybody was gone home. There's like, the doctor is sitting on the other table and I'm sitting on the corner. Like he's writing the prescription and then he asks me to wait while he goes and locks the door on the front and then he locks the door on the other side as well and then I question him that why is he closing the doors. And then he didn't answer me but then he started like talking to me like about sexual things and other stuff."

(b) "He would text me during the day time, so many times, where am I, what am I doing. I need to talk to you. He would call my house asking my mum where am I, what am I doing. Like every day there was like texts coming in from him, and I wouldn't even like sometimes when I really had … like really had enough of that, I wouldn't bother like

even replying to his texts and stuff and then he would keep on calling … And then he wouldn't stop. He would just keep on calling and texting."

(c) "He kept on going and going and then he was like texting me so many times and then I think the wife got hold of the phone bills that told who he had been texting … And then the wife started calling me, saying but I … I couldn't say anything. I couldn't tell the wife anything. She was a bit nice in the beginning, you know, she wanted to know what really has happened and things like that but I just didn't say anything."

(d) "… and then in November just last year, when um saying that the wife, the daughter was working in the surgery and she went through all the phone bills and stuff saying that there's a couple of numbers that he has been like texting and calling a lot and things like that. So she goes and tells the mother because she was … and then the wife started calling me and stuff and like telling me off and then she goes and tells my husband …"

(e) "Because I'd like, it would be like he would say, I wouldn't be replying to some of his texts because I would be studying and then he would say are you there, are you there, why are you not replying to my texts you know and things like that and then he would continue and then I'd just not reply to his texts."

(f) "Because um once he asked me one time that if I would be interested I think I have got that text in my phone, you can have a look. He said that he would like to do threesome."

(g) "So the wife finally got to [know] and then he started calling me at home and said for me to keep my mouth shut and not to say anything because it will spoil his family and things as well. So finally that's when he's, he's stopped when the wife got to [know]."

80. When the Police asked Mrs A whether she still had her phone with all the messages and texts on it that she had "from the doctor", Mrs A replied: "I have got text on my phone as I have shown it to the police officer that um I went to give in my statement. I showed him one of my phones and then he told me not to delete those texts or anything because I've got it in my folder and stuff so I've got all the texts and stuff. Like even you know he used to do phone sex in the middle of the night and stuff as well"; and "And then he would be like sending all these texts. You can go through my phone and you can see for yourself"; and "Like he would be like sending all these dirty texts you know…" Mrs A provided the Police with 'Cell Phone No 2' as evidence of the text messages she had received from Dr B.

81. The Police notes of an interview with Dr B on 31 August 2011 record that Dr B denied having had a sexual relationship with Mrs A. Dr B does not appear to have been asked about the text messages during the course of that interview.

82. Police interviewed Dr B's wife on 14 September 2011. Her Witness Statement records:

"Somewhere in the second half of november, I was going through my husband's telephone bill when I noticed a series of numbers that kept appearing.

I confronted my husband about these recurring numbers.

He said that there is something going on …

> He informed me that this female patient has informed him that someone was trying to blackmail them (the Doctor and the Patient). She informed him that someone had noticed that they were having an affair and that they wanted money in return for their silence.
>
> I told him that I didn't believe him so he gave me the numbers which he had been receiving the texts from for me to follow up on.
>
> I contacted [Mrs A] by phone and she confirmed the allegations of blackmail against them. She informed me that there was nothing going on between her and my husband and she did not make any allegations of … sexual contact …
>
> I was contacted first by [Mrs A] in November 2010 as I had called her number and she had obviously viewed my number and she called me to find out who I was. With our first conversation, I asked her what was going on with my husband and she corroborated what my husband had told me."

83. Police interviewed Mrs A's husband on 22 July 2011. Mr A's Evidential Statement records:

> "[In early 2011] I asked [Mrs A] if she was having an affair … She says, 'Yes' … I later learnt that the other person was [Dr B]. …
>
> I was shattered and broken when I found out [Dr B] and [Mrs A] were having an affair behind my back. It all started to make sense now. …
>
> I also remember receiving a phone call from a woman who identified herself as [Dr B's] wife. She asked me, 'Do you know that your wife was having an affair with [Dr B]?' ..."

84. Police interviewed Mrs A's friend, a fellow student, Ms C, on 13 July 2011. Her Witness Statement records:

> "I have known [Mrs A] for about three years now and I call her '[her known name]'. …
>
> Sometime into the course, I sensed that there was something was going on with [Mrs A] as she started to miss classes and not turning up for her lessons. …
>
> Around April 2011 … She came over to my house … [Mrs A] told me that she had been having a relationship with her doctor since last year, 2010.
>
> Her husband didn't know about it for a start. The doctor's clinic was in [suburb] …
>
> [Mrs A] showed me her phone and some of the text messages that the doctor had been sending to her. I read one message … and other rude messages that I can not remember the exact words of …
>
> When I was speaking to her she was crying …"

Termination of relationship

85. Mrs A advised HDC that she stopped consulting Dr B in 2010, in November or the first week of December; however, she did not formally transfer her care at that time.

86. Mrs A told HDC that she started getting texts from Dr B's wife, and that Dr B and his wife also contacted Mrs A's husband. A message was received on 'Cell Phone No 1' on 10 December 2010 from 'Cell Phone No 4' which, in part, states in reference to "[Dr B]", "he … is sory 4 hs mstk…" (sic).

87. As noted above, Cell Phone Provider Y confirmed that 'Cell Phone No 4' is billed to Mrs B, and has been active under her name since 7 December 2007. The billing address for the account is the address registered to Mrs B and Dr B on the New Zealand Companies Register,[12] and an address HDC has used successfully to correspond with Dr B about Mrs A's complaint.

88. In April 2011 Mrs A attended a health clinic. The consultation notes refer to sexual relations with her GP, Dr B.

89. Mrs A accessed services at the District Health Board in 2011. The records for those consultations refer to her allegations of sexual relations with her general practitioner.

Response to provisional opinion

90. In response to the first provisional opinion, Dr B advised that he has taken the following steps "to ensure that no mistakes or errors in prescribing in the future":

(a) Audited patient files at random and found that alerts have been entered;

(b) Contacted patients with known allergies to ensure they apply for bracelets, and the necessary forms have been completed;

(c) Sent an alert to staff to ensure that all alerts and any allergic reactions patients have are entered promptly. The alert states: "An extra step is to be taken, to ensure that the patient has been made aware and a brief note should be given to the patient"; and

(d) Sent an alert to staff, which stated: "In future no telephone prescription is to be written without checking the clinical notes for allergies or alerts. Routine repeats are to be given by doctor or nurse after reviewing the patient's notes and provided the patient has been seen recently ie within last 3 months."

Opinion: Breach — Dr B

Personal relationship

Professional standards

91. Under Right 4(2) of the Code, Mrs A had the right to have services provided that complied with legal, professional and ethical standards. Pursuant to Right 2 of the Code, Mrs A also

[12] A search of the Companies Register on 14 May 2012 showed that Dr B and Mrs B are shareholders of a company.

had the right to be free from discrimination, coercion, harassment, and sexual, financial, or other exploitation.

92. Professional and ethical standards are clear: doctors must not engage in relationships of a sexual nature with their patients. This is a non-negotiable professional and ethical standard. The standard is reflected in the New Zealand Medical Council's publication *Sexual Boundaries in the doctor–patient relationship* (October 2009), which states that the Council has a zero-tolerance position on doctors who breach sexual boundaries with a current patient.

93. The strict position in respect of doctors who breach sexual boundaries with their patients exists for the following reasons:

"• a breach of sexual boundaries in the doctor–patient relationship has proven to be harmful to patients and may cause emotional and/or physical harm to both the patient and the doctor

- trust in the doctor–patient relationship is the basis of the professional relationship and a breach of boundaries is a breach of trust

- the doctor–patient relationship is not equal. Doctors can influence and possibly manipulate some patients, so even if a patient has consented to a sexual relationship this is not a sufficient excuse and it is still considered a breach of sexual boundaries

- sexual involvement with a patient impairs clinical judgement".[13]

94. The Medical Council publication prescribes:

> "A breach of sexual boundaries comprises any words, behaviour or actions designed or intended to arouse or gratify sexual desires. It is not limited to genital or physical behaviour. It incorporates any words, actions or behaviour that could reasonably be interpreted as sexually inappropriate or unprofessional."

95. Accordingly, a doctor breaches sexual boundaries not only through physical behaviour, but also through any behaviour, including discussions, that has as its purpose some form of sexual gratification, or that might reasonably be interpreted as having that purpose.

96. In determining whether Dr B breached sexual boundaries in this case, I must determine the following questions of fact:

1. Whether Mrs A was a patient of Dr B; and

2. if so, whether Dr B had a relationship with Mrs A that breached sexual boundaries during that period.

Mrs A was Dr B's patient

97. The clinical records confirm that Mrs A had more than 20 in-person consultations with Dr B from May 2007 to 3 November 2010. At least 10 of those in-person consultations took place

[13] See the New Zealand Medical Council's publication *Sexual Boundaries in the doctor–patient relationship* (October 2009).

in 2010. Some of Mrs A's consultations with Dr B throughout this period were for issues of a sensitive nature.

98. Mrs A's last in-person appointment with Dr B appears to have been on 20 October 2010. However, it appears from the medical records that Mrs A continued to be Dr B's patient until at least April 2011, when it is noted in her records (on 20 April 2011) that she was referred to secondary services at the public hospital, and that on 21 April 2011 a letter "to whom it may concern" was written for her (apparently by Dr B).

99. On the evidence, I am satisfied that Mrs A was a patient of Dr B's until at least April 2011.

Relationship that breached sexual boundaries

100. The next question is whether Dr B had a relationship with Mrs A that breached sexual boundaries during the period in which Mrs A was Dr B's patient.

Contact between Dr B and 'Cell Phone No 2'

101. I have obtained evidence that, in October and November 2010, sexually explicit text messages were sent from 'Cell Phone No 3' to 'Cell Phone No 2'.

102. Records from Cell Phone Provider Y confirm that 'Cell Phone No 3' was billed to Dr B, and was active under his name from 22 December 2008 to 7 December 2010. Given that the cell phone number was registered to Dr B, and given the references to patients within the content of the messages sent from that cell phone number, I am satisfied that, on the balance of probabilities, those messages were sent by Dr B.

103. In response to the second provisional opinion, Dr B's lawyer stated: "The texts which your opinion places reliance upon are not texts between Dr B and Mrs A but were intended for a friend of hers." However, I remain of the view that, on the balance of probabilities, 'Cell Phone No 2' was Mrs A's cell phone number, and that Mrs A was the intended recipient of the sexually explicit text messages that Dr B sent to that cell phone number, for the following reasons:

(a) Mrs A originally advised both HDC and the Police that she was using two cell phone numbers in 2010. She advised both HDC and the Police that 'Cell Phone No 2' was one of those numbers.

(b) Cell Phone Provider Y confirmed that 'Cell Phone No 2' is billed to Mrs A and has been active under her name since 10 July 2006.

(c) Mrs A provided the Police with a cell phone during the course of the Police investigation, and represented to the Police that the phone belonged to her and that the number 'Cell Phone No 2' was her cell phone number. The Police obtained a device report for that cell phone. Mrs A made a formal written statement to the Police that the text messages on the cell phone she showed to the Police were "from the doctor".

(d) 'Cell Phone No 2' is the number Mrs A provided to HDC as her cell phone number on her complaint form, dated 4 March 2011, and in a letter to HDC received on 26 May 2011. Throughout the course of my investigation into Mrs A's complaint, HDC staff contacted and spoke to Mrs A on 'Cell Phone No 2'. In addition, the saved contacts

on the phone include the direct dial and email of the HDC Investigator who was Mrs A's contact person for her complaint to HDC.

(e) The clinic at the hospital confirmed that the contact details on its records for Mrs A include 'Cell Phone No 2', and two text messages saved on the phone were messages sent from the Clinic to Mrs A as the intended recipient.

(f) There are text messages sent to 'Cell Phone No 2' from Dr B's cell phone number that refer to Mrs A, by two of her known names.

(g) There are incoming and outgoing text messages to that cell phone number to and from a lawyer. The text messages from the lawyer use Mrs A's known name, and were received in June and July 2011.

(h) Mrs A made a formal written statement to the Police that "[Dr B] would text me during the day time, so many times, where am I, what am I doing. I need to talk to you … like everyday there was like texts coming in from him …" and "… I wouldn't be replying to some of his texts because I would be studying and then he would say are you there, are you there, why are you not replying to my texts you know …" This evidence is consistent with the content and the persistent nature of the messages Dr B sent to 'Cell Phone No 2'.

(i) Mrs A made a formal written statement to the Police that Dr B "… would be sending all these dirty texts you know." Mrs A's description to the Police of the content of those messages is consistent with the content of the messages Dr B sent to 'Cell Phone No 2'.

(j) Mrs A's friend, Ms C, made a Witness Statement to the Police that "[Mrs A] showed me her phone and some of the text messages that the doctor had been sending to her. I read one message … and other rude messages that I can not remember the exact words of …" Ms C's description of the content of the message she read is consistent with the content of the messages Dr B sent to 'Cell Phone No 2'.[14]

104. The text messages Dr B sent to Mrs A on 'Cell Phone No 2' include content of a sexual nature that can reasonably be interpreted as having, as their purpose, some form of sexual gratification. In my view, the text messages Dr B sent to Mrs A on 'Cell Phone No 2' amount to a breach of sexual boundaries, as defined by the Medical Council of New Zealand.

105. I find that by sending persistent and sexually explicit text messages to Mrs A on 'Cell Phone No 2' while she was his patient, Dr B breached professional and ethical boundaries and breached Right 4(2) of the Code. I also find that Dr B sexually exploited Mrs A, and breached Right 2 of the Code.

[14] Ms C did not specify which phone she was shown by Mrs A.

Contact between Dr B and 'Cell Phone No 1'

106. I have obtained evidence that, between October and December 2010, sexually explicit text messages were sent from 'Cell Phone No 3' to 'Cell Phone No 1'.

107. As noted above, I find that 'Cell Phone No 3' was Dr B's cell phone number. Accordingly, I find that Dr B sent the sexually explicit text messages to 'Cell Phone No 1'.

108. Mrs A originally advised HDC that 'Cell Phone No 1' was her cell phone number, and that the text messages saved under the name "doc" were text messages that she received from Dr B. However, in response to my first provisional opinion, Mrs A retracted that statement, and instead advised that 'Cell Phone No 1' did not belong to her, but belonged to a friend whom she would not name. In addition, as noted above, in response to the second provisional opinion, Dr B's lawyer said that the texts were intended for Mrs A's friend.

109. However, I am satisfied that, on the balance of probabilities, 'Cell Phone No 1' was Mrs A's cell phone number and/or Mrs A was the intended recipient of the sexually explicit text messages that Dr B sent to 'Cell Phone No 1' for the following reasons:

(a) Mrs A originally advised both HDC and the Police that she was using two cell phone numbers in 2010. She advised both HDC and the Police that 'Cell Phone No 1' was one of those numbers.

(b) The Police obtained a Device Report for the cell phone Mrs A provided to the Police. The Device Report included details of the saved contacts. The number 'Cell Phone No 1' is saved as "[Mrs A]".

(c) A significant number of the text messages downloaded from 'Cell Phone No 1' sent from Dr B's cell phone number between 3 October and 6 December 2010 refer to Mrs A by her known names. There are multiple messages to 'Cell Phone No 1' from Dr B's cell phone number between 3 October and 6 December 2010 asking Mrs A why she does not reply to text messages and if she is upset or angry with the message sender.

(d) There are text messages on 'Cell Phone No 1' that refer to Mrs A's husband by name.

(e) Mrs A made a formal written statement to the Police that "[Dr B] would text me during the day time, so many times, where am I, what am I doing. I need to talk to you … like everyday there was like texts coming in from him …" and "… I wouldn't be replying to some of his texts because I would be studying and then he would say are you there, are you there, why are you not replying to my texts you know …" This evidence is consistent with the content and the persistent nature of the messages Dr B sent to 'Cell Phone No 1', often using Mrs A's known names in such messages.

(f) Mrs A made a formal written statement to the Police that Dr B texted her and asked her to participate in a threesome. This is consistent with the content of messages Dr B sent to 'Cell Phone No 1' regarding a threesome.

(g) Mrs A made a formal written statement to the Police that Dr B "used to do phone sex in the middle of the night and stuff as well" and "[y]ou can go through my phone and you can see for yourself" and "[l]ike he would be sending all these dirty texts you

know …". Mrs A's description to the Police of the content of the text messages is consistent with the content and timing of the messages Dr B sent to 'Cell Phone No 1'.

(h) Mrs A's friend, Ms C, made a Witness Statement to the Police that "[Mrs A] showed me her phone and some of the text messages that the doctor had been sending to her. I read one message … and other rude messages that I can not remember the exact words of …"[15] Ms C's description of the content of the message she read is consistent with the content of the messages Dr B sent to 'Cell Phone No 1'.

110. The text messages Dr B sent to Mrs A on 'Cell Phone No 1' include content of a sexual nature that can reasonably be interpreted as having, as its purpose, some form of sexual gratification. The text messages Dr B sent to Mrs A on 'Cell Phone No 1' amount to a breach of sexual boundaries, as defined by the Medical Council of New Zealand.

111. I find that by sending persistent and sexually explicit text messages to Mrs A on 'Cell Phone No 1' while she was his patient, Dr B breached professional and ethical boundaries and breached Right 4(2) of the Code. I also find that Dr B sexually exploited Mrs A, and breached Right 2 of the Code.

Other contact between Dr B and Mrs A

112. I have obtained evidence that Dr B regularly and persistently contacted 'Cell Phone No 1' and 'Cell Phone No 2' and Mrs A's home phone numbers between October and December 2010. Dr B contacted Mrs A from his cell phone number and from the medical centre number where he worked.

113. I am concerned with the frequency with which Dr B was contacting Mrs A. The evidence indicates that Dr B texted Mrs A on 'Cell Phone No 1' 660 times between 3 October 2010 and 6 December 2010 (see Appendix B). Dr B's cell phone invoices and Phone Company Z's call report for the medical centre also clearly indicate that Dr B was persistent in his contact with 'Cell Phone No 2' and Mrs A's home phone numbers. This evidence is consistent with Mrs A's formal written statement to the Police about the frequency of Dr B's contact with her.

[15] Ms C did not specify which phone she was shown by Mrs A.

Sexual relationship between Dr B and Mrs A

114. In the recent decision of *Health Practitioners Competence Assurance Act 2003 v Disciplinary Proceedings against Dr M of X, Medical Practitioner*,[16] the Health Practitioners Disciplinary Tribunal found that, on the balance of probabilities, Dr M had a sexual relationship with her patient.[17] Dr M and the patient denied the sexual relationship, and therefore the Tribunal considered the totality of the evidence of the relationship, including hearsay statements of the patient suggestive of a sexual relationship, the observations of witnesses, and communications (including text messages) between Dr M and her patient. The Tribunal found that by having a sexual relationship with her patient, Dr M was guilty of professional misconduct. The Tribunal noted that "[e]ven if it were wrong about the sexual activity between the two, the texts are so sexualised (and inappropriate) that the Tribunal considers that they would fit within the definition of sexual — both the dictionary definition and the definition of sexual impropriety/violation in 'Sexual Boundaries in the Doctor–Patient Relationship'".

115. Considering the totality of the evidence in this case, including Mrs A's original statements, the statements of witnesses, and the nature of the text messages that Dr B sent to Mrs A, I am satisfied, on the balance of probabilities, that Dr B and Mrs A had a sexual relationship in 2010 that included, amongst other things, sexual intercourse. The specific evidence I have relied on in making this finding includes:

(a) Dr B sent text messages to Mrs A on 'Cell Phone No 1' referring to previous physical contact with her, and arranging times to meet her.

(b) The sexual content of the messages Dr B sent to Mrs A on 'Cell Phone No 1' and 'Cell Phone No 2'.

(c) The persistent nature of Dr B's contact with Mrs A on 'Cell Phone No 1' and 'Cell Phone No 2' and her home phone numbers, from both his cell phone number and his work phone.

(d) Mrs A originally told HDC staff that she had had sexual intercourse with Dr B.

(e) Mrs A made a formal written statement to the Police pursuant to section 162 of the Summary Proceedings Act 1957 that she had had sexual relations with Dr B.

(f) Mrs A's husband made an Evidential Statement to the Police that his wife, Mrs A, had had an affair with Dr B.

(g) Mrs A's friend, Ms C, made a Witness Statement to the Police that Mrs A admitted to her that she had been having a relationship with her doctor.

(h) Mrs A's clinical records record that Mrs A sought medical assistance in 2011 following sexual contact with her GP.

[16] Decision No: 487/Med12/215P, dated 5 November 2010 and available at: www.hpdt.org.nz.

[17] Although the Tribunal found that there was a sexual relationship, it noted that the conclusion that there was sexual activity is not necessary for it to conclude that the relationship was sexual, as set out in the charge. This is because of the broad definition of what consititutes "sexual".

116. I find that by having sexual intercourse with Mrs A while she was his patient, Dr B breached professional and ethical boundaries, and sexually exploited Mrs A, and that he therefore breached Rights 2 and 4(2) of the Code.

Conclusion

117. Mrs A was a vulnerable patient. Dr B was aware of Mrs A's vulnerability because he was aware of her history of consulting him for issues of a sensitive nature. It is irrelevant whether Mrs A engaged in texting of a sexual nature with Dr B. It was Dr B's responsibility as a registered medical practitioner to maintain professional boundaries and ethical standards. Dr B did not do this, and seriously abused the trust that Mrs A placed in him as her and her family's general practitioner.

118. In his response to HDC, Dr B denied having sexual relations with Mrs A. Dr B also denied sending sexually explicit text messages to Mrs A, stating that the text messages sent from his cell phone number to 'Cell Phone No 1' and 'Cell Phone No 2' were intended for Mrs A's friend. Given that the messages sent to 'Cell Phone No 1' and 'Cell Phone No 2' from Dr B's cell phone number were sent over a prolonged period of time, at all times of the day, and at a time when the cell phone was being billed to Dr B, I find that it is more likely than not that Dr B was sending the messages. Given that the text messages refer to Mrs A by her known names, I also find that it is more likely than not that Mrs A was the intended recipient of those messages. Dr B's actions, as well as his response to the complaint, show a serious disregard of his professional and ethical responsibilities as a registered medical practitioner in New Zealand.

Codeine prescriptions

119. On 24 October 2009, Mrs A had an anaphylactic reaction to codeine, and Dr B referred her to the Emergency Department at the public hospital. Mrs A was treated and discharged back into the care of Dr B, with the recommendation not to take codeine phosphate or codeine based drugs, and for Dr B to arrange a "bracelet" for Mrs A. Dr B advised that, at that time, a patient alert was entered on the patient management system that Mrs A was allergic to codeine; however, it does not appear that a bracelet was arranged for Mrs A.

120. I accept my expert's advice that Dr B's clinical management of Mrs A's acute anaphylaxis on this occasion was competent and of a good standard. However, there is no evidence that Dr B arranged a medical alert bracelet for Mrs A, despite the severity of her allergy, the advice from the public hospital, and Mrs A's request for a bracelet. In the absence of any evidence that Dr B did arrange a medical alert bracelet for Mrs A, it is my view that, on the balance of probabilities, he did not, in fact, do so. My expert was moderately critical of Dr B's failure in this regard.

121. Dr B prescribed antibiotics and codeine to Mrs A on 10 July 2010. It was highly inappropriate for Dr B to prescribe codeine to Mrs A at that time, given her previous reaction to codeine.

122. There is uncertainty as to what happened after Mrs A collected the prescription and took the medication. Dr B's medical records do not provide any clarity.

123. Mrs A advised HDC that she realised after she had taken the medication that she had experienced a previous reaction to codeine, and that she contacted Dr B, who advised her to

go to hospital if she had any symptoms. Dr B's recollection was that he realised his mistake when he went to the clinic to "attend to the script", and that he contacted Mrs A to advise her not to take the medication. The public hospital notes record that Dr B treated Mrs A with antihistamine before she presented at the hospital on 11 July 2010.

124. Although it is accepted that Dr B and Mrs A spoke on the telephone after Mrs A obtained the codeine prescription, it is unclear on whose initiative that conversation took place. There is no entry in the clinical records to support Dr B's account. HDC has made numerous comments in previous reports stressing the importance of the accuracy of the medical record.[18] In *Patient A v Nelson-Marlborough District Health Board*,[19] Judge Baragwanath noted that it is through the medical record that doctors have the power to produce definitive proof of a particular matter. As previously noted by this Office, doctors whose evidence is based solely on their subsequent recollections (in the absence of written records offering definitive proof) may find their evidence discounted.[20]

125. In relation to the prescribing of codeine and antibiotics to Mrs A on 10 July 2010, my expert advisor made the following comments:

- It is a severe departure from expected practice for a doctor to prescribe a medication to a patient, knowing that patient has suffered a previous anaphylactic reaction to that medication.

- In general, the prescribing of antibiotics over the telephone without undertaking a clinical review of the patient would be met with mild to moderate disapproval, and antibiotics are not generally recommended for uncomplicated upper respiratory infections.

- The failure by Dr B to establish whether Mrs A had any medication allergies when prescribing over the phone was likely a mild departure from expected standards.

- If Dr B had been advised by Mrs A that she had taken the codeine, and Dr B had provided management advice, those details should have been recorded in the medical record.

126. I accept this advice. I am concerned about the overall appropriateness of Dr B's actions in prescribing medications for Mrs A on 10 July 2010, including: Dr B's failure to establish, when prescribing over the telephone, whether Mrs A had any medication allergies; that Dr B prescribed codeine to Mrs A when she had previously suffered a reaction to codeine; Dr B's decision to prescribe antibiotics over the telephone without undertaking a clinical review of Mrs A; and the inadequate documentation of Dr B's management of Mrs A when he became aware of the fact that he had prescribed her a medication to which she is allergic.

127. As noted by my expert advisor, Dr B's management of this event illustrates the potential risks of managing a patient without access to relevant clinical data. In my view, Dr B breached

[18] For example: 10HDC00610, 09HDC01765, 08HDC10236, 06HDC12164, 04HDC17230, 03HDC11066 and 01HDC04847.
[19] (HC BLE CIV-2003-204-14, 15 March 2005).
[20] See opinion 05HDC07699.

Right 4(1) of the Code[21] for failing to exercise reasonable care in prescribing codeine and antibiotics to Mrs A on 10 July 2010.

Record-keeping

128. I note that there are several entries in the clinical record for which there is no record of a clinical assessment being undertaken, including 16 December 2009, 12 February 2010, 10 May 2010, 10 July 2010, and 13 September 2010. There is an entry in the clinical records on 14 October 2010 with no accompanying information regarding history, clinical examination, or diagnosis.

129. There is also an entry in Mrs A's medical records, dated 15 July 2010, which states that Mrs A was prescribed and given a script for "Codeine Phosphate Tab 15 mg Tablets". While Dr B has advised HDC that no script for codeine was given to Mrs A at that time, I note that this is less than clear from the entry in the clinical record. The record suggests that Dr B prescribed codeine to Mrs A on 15 July 2010, which would have been highly inappropriate given her previous reactions to codeine.

130. Dr B had a professional and legal responsibility to keep "clear and accurate patient records that report relevant clinical findings, decisions made, information given to patients, any drugs or other treatment prescribed".[22]

131. Records are an essential tool for patient management, for communicating with other doctors and health professionals, and for ensuring continuity of care. A patient's clinical records must comprehensively document all relevant aspects of a patient's signs, symptoms, diagnosis and treatment, and must be accurate.[23] Dr B failed to ensure that his records of care provided to Mrs A met his professional and legal obligations in that he did not document clinical findings during numerous consultations with Mrs A, did not fully document the care he provided to Mrs A on 10 July 2010, and made a misleading entry in Mrs A's notes alluding to a prescription of codeine on 15 July 2010. In my view, Dr B failed in his professional duty to maintain appropriate professional medical records and, accordingly, he breached Right 4(2) of the Code.

Protection of the public

132. As noted above, Dr B's actions, as well as his response to the complaint, show a serious disregard of his professional and ethical responsibilities as a registered medical practitioner in New Zealand, and a lack of insight as to his behaviour. Dr B's breach of professional and ethical standards was severe and showed a flagrant disregard for Mrs A's rights.

133. Because of my concerns about Dr B, I intend to refer him to the Medical Council of New Zealand to consider whether a review of his practice is warranted, and I intend to refer him to the Director of Proceedings, to consider whether proceedings should be taken.

[21] Right 4(1) of the Code states: "Every consumer has the right to have services provided with reasonable care and skill."
[22] Medical Council of New Zealand, *The Maintenance and Retention of Patient Records* (August 2008). Available from: www.mcnz.org.nz.
[23] See Opinion 10HDC00610.

134. At the conclusion of proceedings taken by the Director of Proceedings, if any, and consistent with the HDC Naming Policy (see: www.hdc.org.nz), I will also name Dr B in the abridged copy of this report on the Health and Disability Commissioner website.

135. I note, as a separate matter, that in the course of my investigation I referred Dr B to the Medical Council of New Zealand pursuant to section 39(3) of the Health and Disability Commissioner Act 1994, because of my concerns about his conduct.

Recommendations

142. Dr B has apologised to Mrs A for prescribing codeine to her by telephone on 10 July 2010, and has advised that he has reviewed his practice in terms of undertaking telephone conversations and prescribing new medications to patients over the telephone.

143. I further recommend that Dr B:

- apologise to Mrs A for all his breaches of the Code. The apology is to be forwarded to HDC by **15 April 2013**, and HDC will forward it to Mrs A;
- review the standard of his record-keeping to ensure it complies with relevant professional and legal standards and advise HDC by **15 April 2013** of the actions he has taken to improve his record-keeping; and
- provide a full copy of his reviewed internal protocols for telephone consultations and prescribing of medications over the telephone by **15 April 2013**.

Follow-up actions

- Dr B will be referred to the Director of Proceedings in accordance with section 45(2)(f) of the Health and Disability Commissioner Act 1994 for the purpose of deciding whether any proceedings should be taken.
- Dr B will be referred to the Medical Council of New Zealand pursuant to section 59(4) of the Health and Disability Commissioner Act 1994, with the recommendation that the Medical Council conduct a review of Dr B's competence to practise.
- A copy of this report with details identifying the parties removed, except the expert who advised on this case, will be sent to the Medical Council of New Zealand, the Royal New Zealand College of General Practitioners, and the District Health Board. They will be advised of Dr B's name.
- An abridged copy of this report, with details identifying the parties removed, except the expert who advised on this case, will be placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes. At the conclusion of

proceedings taken by the Director of Proceedings, if any, Dr B will be named in the abridged copy of this report on the Health and Disability Commissioner website.

Addendum

The Director of Proceedings laid a charge before the Health Practitioners Disciplinary Tribunal. Professional misconduct was made out and the provider's registration was cancelled and name suppression was not granted. This was appealed in the High Court where the finding of professional misconduct and the decision not to grant name suppression were upheld but the order for cancellation was quashed and substituted with an order for a two-year suspension from practice.

Appendix A — Independent general practitioner advice to the Commissioner

The following expert advice was obtained from Dr David Maplesden:

"My name is David Maplesden. I am a vocationally registered general practitioner practising in Hamilton, New Zealand. My qualifications are MB ChB (Auckland University 1983), Dip Obst (1984), FRNZCGP (2003).

1. Thank you for the request that I provide clinical advice in relation to the care provided to [Mrs A] by [Dr B]. In preparing the advice on this case to the best of my knowledge I have no personal or professional conflict of interest. I have examined the information on file: response from [Dr B]; response from [Mrs A]; GP notes; [hospital] notes. Preliminary advice was provided on 1 March 2012 and identified possible issues related to prescribing of codeine phosphate for [Mrs A] on 10 July and 15 July 2010 (as indicated by the medical records) after she had been diagnosed with an anaphylactic reaction to codeine phosphate on 24 October 2009.

2. GP notes for 24 October 2009 indicate [Mrs A] had presented with a possible anaphylactic reaction after taking codeine at 0900hrs that morning. Immediate care was provided by [Dr B] with subcutaneous adrenaline x 2, IV hydrocortisone and phenergan and oxygen. An ambulance was called and transported [Mrs A] to [the hospital] ED where she was observed for eight hours, given further IV fluids, oral steroids and antihistamines, and discharged home. Primary diagnosis was *anaphylactic shock* and secondary diagnosis *anaphylaxis reaction to codeine.* Advice to GP was *Thank you for your follow-up care. Could you please organise a* [medical alert] *bracelet for her.* In his response dated 7 May 2012, [Dr B] asserts he added a patient alert to the PMS following the consultation of 24 October 2009. I cannot see from the clinical record or responses that a [medical alert] bracelet was organised.

Comment: The clinical management of [Mrs A] by [Dr B] on this occasion was of a good standard, with him showing a competent approach to management of acute anaphylaxis. Documentation was of a reasonable standard. A formal patient alert (medication allergy) is not apparent on the notes received but presumably is present in the PMS. I would be moderately critical if this had not been entered immediately following confirmation of the allergy. I would also be moderately critical if [Dr B] did not facilitate a [medical alert] bracelet for [Mrs A], unless she declined his assistance, given the severe nature of the allergy and the advice from [the public hospital].

3. [Mrs A] evidently contacted [Dr B] after-hours on Saturday 10 July 2010. The consultation on 24 October 2009 was also a Saturday so I assume [Dr B] provides a personal after-hours service for all his patients rather than deputising this service, although this has not been confirmed in writing. Clinical record for 10 July 2010 consists of *URTI Rx Amoxil 500mg TDSx21, Zetop 10mg ODx30, Codalgin Tab paracetamol 500mg with codeine phosphate 8mg 2 TDS/PRN 100 tablets.* In his response, [Dr B] clarifies this was a telephone consultation as he was not at his clinic. *When I arrived* [at] *the clinic some time later to attend to the script I realised that she was allergic to codeine. I telephoned and advised her not to take Codalgin.* [Mrs A] advises that she collected the medication from the pharmacy and took a dose of Codalgin before realising it contained codeine. She recalls notifying [Dr B] of this by text, and him calling her back and advising her to go to hospital immediately if she developed any

symptoms she had had with the previous reaction. [Public hospital] records state [Mrs A] attended ED at 1942hrs on 11 July 2010. Notes include *Patient was prescribed codeine for fever when she is allergic to it. Patient developed itching of the neck and tight chest upon taking it. No rash. She was treated by her GP with antihistamine before coming to hospital.* She was treated with oral prednisone, observed for a few hours and discharged.

Comment: It is a severe departure from expected practice for a doctor to prescribe a medication to a patient, knowing that patient has had a previous anaphylactic reaction to the medication. However, on this occasion [Dr B] was prescribing without access to his PMS (which might have prompted him regarding the allergy) and did not recall [Mrs A's] previous reaction. The drug prescribed (Codalgin) contained codeine but [Mrs A] quite reasonably did not recognise this. It is not entirely clear from [Dr B's] response whether he was aware [Mrs A] had actually taken the medication, and the [public hospital] notes indicate either the medication was not taken, or at least there was no reaction to it, until the day after it had been prescribed. However, the notes seem to indicate [Mrs A] had contacted [Dr B] and he advised her to take an antihistamine. The lack of clarity around the issues of when the medication was taken and when/if [Dr B] was aware [Mrs A] had reacted to the medication precludes definitive comment on his actions in this regard. In terms of general comments relating to this incident:

a. In general, the prescribing of antibiotics over the telephone without undertaking a clinical review of the patient would be met with mild to moderate disapproval by my peers. Mitigating circumstances on this occasion were that it was after hours and it appears [Dr B] was considering both his and the patient's convenience. However, antibiotics are not generally recommended for uncomplicated upper respiratory infections[24]. On some occasions, prescribing of antibiotics without examining the patient may be more acceptable eg renewal of prescription for patients on long-term antibiotic treatment, extension of a partially completed course of antibiotics, change of antibiotic based on microbiology results, provision of 'standby' antibiotics to patients with enhanced self-management skills who have chronic disorders such as COPD. I cannot see that any of these situations applied in this case.

b. This incident illustrates one of the potential risks of managing a patient without access to relevant clinical data, in this case the adverse drug reaction history. Risk in this regard can be reduced by asking patients if they have any drug allergies before prescribing for them, particularly if the patient is not known to the clinician or the clinical record is not available. The failure by [Dr B] to establish whether [Mrs A] had any medication allergies, when prescribing over the phone, was probably a mild departure from expected standards given his general familiarity with her history, although the consequences of this omission had the potential to be severe.

c. The advice [Dr B] claims he gave [Mrs A] (assuming he was not aware she had taken the medication) ie not to take the Codalgin (and presumably to discard it) was reasonable.

d. The advice [Mrs A] claims to have received from [Dr B], on notifying him she had taken the medication, was probably not unreasonable if she was asymptomatic at the time of telephone contact, and depending on how much time had elapsed since she took the

[24] BPAC. Rational Use of Antibiotics in Respiratory Tract Infections. August 2006. Available at: http://www.bpac.org.nz/resources/campaign/respiratory/bpac_respiratory_infections_poem_wv.pdf

medication. She was apparently advised to attend [the public hospital] should she develop any symptoms, and, according to [public hospital] notes, was also advised to take an antihistamine. Given the severity of the previous reaction, and risk of increasingly severe reactions, some of my colleagues might have been more explicit in their advice eg call an ambulance if any symptoms develop, if the medication had been very recently ingested.

e. If [Dr B] had been advised by [Mrs A] she had taken Codalgin, and been given management advice by him, these details should have been recorded in the notes when [Dr B] attended his surgery later that day.

4. Clinical notes for 15 July 2010 include *Action: Rx: Codeine Phosphate tab 15mg tablets ([Dr B's initials]). Scripts: Rx Codeine phosphate 15mg tablets. Letters: LET: To Whom It may Concern.* [Dr B] has noted in his response that no prescription for codeine was issued on this occasion, and [Mrs A] does not recall receiving a prescription for codeine phosphate tablets. The consultation notes refer to a letter [Dr B] wrote regarding [Mrs A's] allergy which was given to her for future reference. On file is a letter generated on that day which contains [Mrs A's] details and the narrative *ALLERGY TO COEDENE* (sic). [Mrs A] does not recall receiving the letter referred to above.

Comment: I am satisfied that [Dr B] did not prescribe codeine for [Mrs A] on this occasion although the clinical notes are certainly ambiguous. Although there was apparently some attempt at equipping [Mrs A] with documentation relating to her allergy, I remain moderately critical if access to a [medical alert] bracelet was not facilitated given this second significant reaction to codeine.

5. As noted in my original advice, there was some variability in the standard of [Dr B's] clinical documentation with some notes containing only a diagnosis and prescription list (13 September 2010, 10 July 2010, 12 February 2010). Overall, the standard of documentation probably departs from expected standards to a mild to moderate degree. I recommend [Dr B] consider reviewing the MPS recommendations on what constitutes good clinical records[25], and audits his current performance against RNZCGP standards using the relevant tools contained in the RNZCGP publication *Aiming for Excellence (2011)* (available at rnzcgp.org.nz).

6. I recommend [Dr B] reflect on the potential risks involved in undertaking telephone consultations and prescribing medications new to the patient over the telephone, without access to the patient's medical history. He should seek to minimize such risks in the future by ascertaining whether the patient has any allergies or takes regular medications, and ensuring the prescribing he undertakes is appropriate for a telephone consultation and consistent, as far as possible, with best practice recommendations."

[25] Medical Records — an MPS Guide (2011) — section on 'What makes good clinical records'. Available at: http://www.medicalprotection.org/Default.aspx?DN=b0e8f239-3b4d-451b-83b8-48d339df1d81

Appendix B

Incoming messages to cell phone number 'Cell Phone No 1' from Dr B's cell phone number 'Cell Phone No 3'

Date	Number of texts received
6.12.10	6
5.12.10	2
4.12.10	4
3.12.10	10
2.12.10	5
1.12.10	8
30.11.10	6
29.11.10	11
28.11.10	5
27.11.10	23
26.11.10	10
25.11.10	18
24.11.10	23
23.11.10	30
22.11.10	14
21.11.10	13
20.11.10	19
19.11.10	14
18.11.10	22
17.11.10	34
16.11.10	28
15.11.10	10
14.11.10	11
13.11.10	6
Date	**Number of texts received**
12.11.10	53
11.11.10	65
10.11.10	10
9.11.10	26
8.11.10	42
7.11.10	6
6.11.10	11
5.11.10	14
4.11.10	20
3.11.10	11
2.11.10	6
1.11.10	5
31.10.10	6
30.10.10	11
29.10.10	6
28.10.10	1
27.10.10	4
26.10.10	1
17.10.10	2
15.10.10	2
13.10.10	2
4.10.10	14

3.10.10	9