

Counsellor, Mr A

Medical Centre 1

Medical Centre 2

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

(Case 14HDC00525)



Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

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Executive summary

1. This decision concerns the personal relationship between a counsellor, Mr A, and Ms B, a former patient. In 2004, Mr A was employed by a medical centre (Medical Centre 1). From 1 January 2006, Mr A was employed by another medical centre (Medical Centre 2).
2. In 2004, Ms B was referred to Mr A.
3. Ms B saw Mr A in his capacity as her counsellor on eight occasions in 2004 and 2005.
4. Approximately two weeks after their counselling relationship ended, Mr A and Ms B began a personal relationship. Both Ms B and Mr A confirm that their personal relationship was sexual.
5. Their personal relationship ended between March and June 2006.
6. On 3 March 2014, Ms B complained to Medical Centre 2 about Mr A's relationship with her. On 12 March 2014, following an internal investigation by Medical Centre 2, Mr A resigned from his employment. Medical Centre 2 was not aware of Mr A's relationship with Ms B, prior to receiving her complaint.
7. Medical Centre 1 was not aware of Mr A's relationship with Ms B while it was his employer.

Findings

Mr A

8. Mr A acted unprofessionally and unethically by failing to maintain appropriate boundaries and engaging in a personal relationship with Ms B. Mr A failed to comply with professional and ethical standards and, accordingly, he breached Right 4(2)¹ of the Code.

Medical Centre 1

9. Medical Centre 1 is not vicariously liable for Mr A's breach of the Code.

Medical Centre 2

10. Medical Centre 2 is not vicariously liable for Mr A's breach of the Code.
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Complaint and investigation

11. The Commissioner received a complaint from Ms B about the services provided by counsellor Mr A. The following issues were identified for investigation:
 - *Whether Mr A provided an appropriate standard of care to Ms B.*

¹ Right 4(2) of the Code states: "Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards."

- *The appropriateness of Mr A's relationship with Ms B.*
 - *Whether Medical Centre 1 provided an appropriate standard of care to Ms B.*
 - *Whether Medical Centre 2 provided an appropriate standard of care to Ms B.*
12. An investigation was commenced on 12 September 2014. This report is the opinion of Deputy Commissioner Ms Theo Baker, and is made in accordance with the power delegated to her by the Commissioner.
13. The parties directly involved in the investigation were:

Ms B	Consumer/Complainant
Mr A	Counsellor/Provider
Medical Centre 1	Provider
Medical Centre 2	Provider
Also mentioned in this report:	
Mr C	Counsellor
Ms D	Practice and nurse manager

Information gathered during investigation

Background

14. This decision concerns the personal relationship between a counsellor, Mr A, and Ms B, a former patient. Ms B saw Mr A in his capacity as her counsellor in 2004 and 2005. Mr A and Ms B began a personal relationship less than a month after the counselling relationship ended. The personal relationship ended in 2006.

Medical Centre 1

15. In 2004, Mr A was employed by Medical Centre 1. Medical Centre 1 held the contract to provide health and counselling services to students and staff at a tertiary institute.

Medical Centre 2

16. On 1 January 2006, Medical Centre 2 took over the contract to provide health and counselling services for students and staff at the tertiary institute. At that time, Medical Centre 2 became Mr A's employer.
17. Mr A's employment agreement with Medical Centre 2 included an expectation that he undergo monthly supervision with another counsellor, which was funded by Medical Centre 2. Mr A met with his supervisor counsellor, Mr C, on a monthly basis.
18. Mr A's employment agreement with Medical Centre 2 also stated that Mr A was required at all times to hold a valid New Zealand Association of Counsellors (NZAC) certificate.²

² Medical Centre 2 did not have any policies regarding relationships with clients. Medical Centre 2 told HDC that its staff handbook, which was provided to new employees, conveyed its expectations adequately, that counsellors comply with NZAC regulations. However, based on the information provided to HDC, Medical Centre 2 did not provide Mr A with a copy of the staff handbook until 2007.

Counselling relationship

19. In 2004, Ms B was seeing a general practitioner (GP) at Medical Centre 1. In November 2004, the GP referred Ms B to Mr A.
20. In 2004, Mr A was a member of the New Zealand Association of Counsellors (NZAC).
21. Following the referral in November 2004, Ms B saw Mr A in his capacity as a counsellor on eight occasions. According to Mr A, Ms B had her last appointment for counselling with him in August 2005, and the counselling relationship ended that day. However, Ms B told HDC that she had her final counselling session with Mr A in January or February 2005.³
22. According to Ms B, when the counselling relationship ended, Mr A suggested that they keep in touch, and she agreed.

Personal relationship

23. Both parties agree that within a month after their counselling relationship ended, they began a personal relationship. However, as with their recollections as to the date counselling ended, the parties' recollections of the date on which their personal relationship began also differ. Ms B told HDC that she recalls that their personal relationship began in March 2005. However, Mr A recalls that their personal relationship began in September 2005.
24. Mr A told HDC that, when their personal relationship began, he "did express some unease regarding the changing relationship to [Ms B]". Mr A told HDC:

"I entered this relationship as I felt there were many similar interests and opinions and the professional relationship had truly come to a (successful) end. The interest in each other appeared genuinely mutual and all elements of the relationship were initiated and pursued equally."

25. Ms B told HDC that her relationship with Mr A was "intimate" and sexual. Mr A confirmed to HDC that "intimate contact did become a part of the relationship between Ms B and [himself], although it was never central to it".
26. During their relationship, Ms B and Mr A saw each other three or four times a week and had dinner together. Ms B said that Mr A cooked her meals when she was feeling "down". Mr A confirmed that he and Ms B had dinner together regularly, but told HDC: "These meals were not connected with how either of us felt at the time."
27. Once a month, Ms B and Mr A attended dinner parties with his friends. During their personal relationship, Mr A met some of Ms B's family members and friends.
28. Mr A told HDC that the personal relationship with Ms B ended in March 2006. Ms B told HDC that Mr A ended the personal relationship with her in June 2006. A friend

³ Due to the time elapsed since these events, the clinical records regarding Ms B's counselling sessions with Mr A were not able to be provided to HDC.

of Ms B told HDC that she also recalls Ms B's relationship with Mr A ending in June 2006.

Complaint lodged

NZAC

29. Ms B told HDC that in late 2013 her GP suggested that she recommence counselling, and that it was this suggestion that caused her to consider making a complaint against Mr A.
30. In October 2013, Ms B lodged a complaint with the NZAC regarding Mr A's personal relationship with her. NZAC commenced an investigation into Ms B's complaint.
31. On 18 October 2013, following Ms B's complaint to the NZAC, Mr A informed his supervisor, Mr C, about the complaint made against him, and that he had had a personal relationship with Ms B. Mr C told HDC that this was the first that he became aware of Mr A's relationship with Ms B.⁴
32. In his response to Ms B's complaint to the NZAC, Mr A confirmed that he had had a personal relationship with Ms B. He stated:

“I regret my failure to adhere to the appropriate professional boundaries and would like to sincerely apologise to both [Ms B] and the Association for this to have happened.

...

[The relationship] occurred after the professional work had been concluded, and I had mentioned the ethical conflict to [Ms B]. However I do realise that this doesn't relieve me of my responsibility, not to enter into a romantic relationship with a former client; and in hindsight I can hardly understand how I could have made [this mistake].”

Medical Centre 2

33. On 3 March 2014, Ms B made a complaint to Medical Centre 2 about Mr A's relationship with her. Medical Centre 2 was not aware of a personal relationship between Mr A and Ms B prior to receiving this complaint.
34. On 4 March 2014, Medical Centre 2's practice and nurse manager, Ms D, met with Mr A regarding Ms B's complaint. Mr A confirmed that he had a personal relationship with Ms B after the professional relationship ended.
35. Mr A told Ms D that his personal relationship with Ms B began after her “case was closed”, and that he had never made a secret of it. He stated that, while he was prepared to face the consequences of having had a relationship with a former client, he hoped that this was not the way his career would end.

⁴ In the course of this investigation, HDC did not explore the content of Mr A's supervision sessions, except to establish that his supervisor was unaware of his relationship with Ms B.

36. Mr A acknowledged that, during his relationship with Ms B, she was vulnerable, but he stated that he, too, was vulnerable at that time.
37. Mr A told Ms D that he continued to attend monthly supervision sessions with Mr C as required under his employment agreement with Medical Centre 2, as well as attending additional counselling sessions that he was paying for himself.
38. On 10 March 2014, Ms D met with Mr A again and informed him that he was required to attend a disciplinary meeting with Medical Centre 2 on 12 March 2014.

Resignation from employment

39. At the disciplinary meeting on 12 March 2014, Mr A resigned from Medical Centre 2. Medical Centre 2 came to an arrangement with Mr A that he would continue to work for a further one month period, in order to ensure safe handover of his existing patients to a new counsellor. It is recorded in the minutes of the meeting that Mr A gave permission for his supervisor to “immediately report to [Medical Centre 2], any issues or risks that he becomes aware of that may compromise, or have the potential to compromise, patient safety and care” during the final month of his employment.
40. On 16 April 2014, Mr A ceased his employment with Medical Centre 2.

Withdrawal from NZAC

41. Shortly after he ceased employment with Medical Centre 2, Mr A withdrew his membership from NZAC. Mr A told HDC that he does not intend to recommence his career as a counsellor or pursue any work associated with the profession.
42. Following Mr A’s withdrawal from the NZAC, the NZAC suspended its investigation pending any future application for membership by Mr A,⁵ and subsequently referred Ms B’s complaint to HDC.

Subsequent events

Medical Centre 1

43. In response to the complaint to HDC, Medical Centre 1 stated that it knew “absolutely nothing” about Mr A’s relationship with Ms B while it was Mr A’s employer. Medical Centre 1 further stated that it had never been put on notice of any other allegations of a similar nature regarding Mr A, or had any reason to believe that such a situation would have occurred.

Medical Centre 2

44. Medical Centre 2 told HDC that, as a result of Mr A’s relationship with Ms B, it has reviewed the employment agreement it uses for clinical staff, and its staff handbook.

Employment agreements

45. Medical Centre 2 has now amended its employment agreement to include the following clauses:

⁵ Ms B supported the complaint being referred to HDC.

“1.2 I understand by accepting this agreement I abide by any codes of ethics, guidelines and scope of practice as set out, and amended from time to time, by the professional body (as covered under the Health Practitioners Competence Assurance Act 2003) or any institute that provides the framework for my professional area of practice e.g, the Medical Council of NZ, Nursing Council NZ or the NZ Association of Counsellors.

...

2.1 If you, as an Employee of the Company or any other Company or organisation for whom you work in a professional capacity:

2.1.1 receive or become aware of a patient complaint regarding your practice or conduct,

...

2.3 you must disclose to the company the substance of any such complaints, investigations and/or disciplinary action as soon as is practicable once you become aware of it, regardless of whether it relates to your practice or conduct while working for the company or not. Failure to do so may result in disciplinary action.”

46. Medical Centre 2 told HDC that it will ensure that performance reviews for the counsellor position are completed annually, and there will be specific focus on the management of appropriate counsellor–patient relationships.

Staff handbook

47. Medical Centre 2 advised that clause 1.2 of the employment agreement (above) relating to the employee’s relevant professional/regulatory authority will also be added to a staff handbook that is provided to all new employees. The staff handbook is currently being updated.

Mr A

48. With regard to the personal relationship with Ms B, Mr A stated: “I concede this was a breach of ethical standards which I do deeply regret.” Mr A further stated:

“I genuinely thought that discussing the possible conflict with ethical standards with [Ms B] and looking up the then current ‘Professional Ethics’ of the NZAC, which talked about ‘clients’ but not ‘past clients’ had taken care of this.

In hindsight I clearly see that this was a somewhat naïve view of mine.

...

I can clearly see the misjudgements that I have made ... I should have consulted my supervisor before even considering entering into a personal relationship with a former client and I should have considered the likely outcomes for all concerned.

For these mistakes I am truly sorry.”

Responses to provisional opinion

49. The parties were given an opportunity to comment on the relevant sections of the provisional opinion. These responses have been incorporated into the report where relevant.

Opinion: Mr A

Introduction

50. Under Right 4(2) of the Code of Health and Disability Services Consumers' Rights (the Code), Ms B had the right to have services provided that complied with professional and ethical standards. I consider that Mr A's conduct was unprofessional and unethical.

Professional relationship and personal relationship

51. Due to the passage of time since these events occurred, the specific dates on which events occurred are unclear. However, both parties agree that Mr A provided services to Ms B in his capacity as her counsellor between November 2004 and some time in 2005. Ms B told HDC that the counselling relationship ended as early as January or February 2005, while Mr A stated that the professional relationship ended on 15 August 2005. Because the parties are agreed on the length of time that lapsed between the ending of the therapeutic relationship and the commencement of the personal relationship, the actual date on which the therapeutic relationship ended is not material to my decision. This is discussed further below.
52. There is no dispute that Mr A and Ms B engaged in a relationship of a personal nature, and both Mr A and Ms B agree that this relationship commenced within one month of their professional relationship coming to an end. Ms B and Mr A confirmed that the relationship was sexual. It is not clear exactly when the personal relationship between Ms B and Mr A ended, and I do not consider it necessary to make a finding in this respect, for the purposes of this opinion. However, I am satisfied that it was some time between March and June 2006.

Professional and ethical standards — Breach

53. The NZAC Code of Ethics that applied at the time of these events⁶ states that counsellors should not engage in sexual or romantic activities with their patients, and that counsellors assume responsibility for setting and monitoring boundaries with their patients. Mr A stated that the NZAC Code of Ethics did not specifically refer to having relationships with previous patients. However, I note that while the NZAC

⁶ The NZAC Code of Ethics (2002). This Code was updated in 2012. The NZAC Code of Ethics (2002) states: "5.11 Multiple Relationships a) Counsellors assume full responsibility for setting and monitoring the boundaries between a counselling relationship with a client and any other kind of relationship with that client and for making such boundaries as clear as possible to the client. 5.13 Sexual and other Inappropriate Relationships with Clients a) Counsellors shall not engage in sexual or romantic activities with their clients. b) Counsellors shall not exploit the potential for intimacy made possible in the counselling relationship, even after the counselling has ended ..."

Code of Ethics did not specifically prohibit relationships with previous patients, it stated: “Counsellors shall not exploit the potential for intimacy made possible in the counselling relationship, even after the counselling has ended.”

54. Mr A was bound by the standards of his profession and the obligations set out in the Code. Right 4(2) of the Code provides that every consumer has the right to have services provided that comply with professional and ethical standards. I note that in *Director of Proceedings v Mogridge*,⁷ the Human Rights Review Tribunal (HRRT) stated:

“Clearly it is unethical for a provider of health services acting in that capacity to exploit those who consume their services for sexual advantage. Nor do we regard it as necessary to go beyond the Code to conclude that it is unethical ...”

55. In my view, Mr A acted unprofessionally and unethically when he commenced a personal relationship with Ms B within one month of their professional relationship coming to an end, and he failed to maintain appropriate boundaries with her. The importance of appropriate boundaries, particularly by counsellors, has been noted previously by this Office:⁸

“The maintenance of professional boundaries is an integral part of counselling, a process that involves an intense therapeutic relationship where the client confides fears, feelings, emotional responses and vulnerabilities. The importance of maintaining professional boundaries in the counsellor–client relationship cannot be overemphasised ...”

56. Mr A accepts that he breached ethical standards in having a personal relationship with Ms B.
57. Mr A stated that when their personal relationship began he “express[ed] some unease regarding the changing relationship to [Ms B]”. He stated:

“I had mentioned the ethical conflict to [Ms B]. However, I do realise that this doesn’t relieve me of my responsibility, not to enter into a romantic relationship with a former client ...”

58. In my view, it is always the responsibility of the professional to maintain appropriate boundaries in patient relationships.⁹ Despite Mr A’s own vulnerabilities, he had a responsibility to manage his own personal circumstances as well as maintaining professional boundaries with Ms B. I acknowledge Mr A’s statement to the NZAC:

“I regret my failure to adhere to the appropriate professional boundaries and would like to sincerely apologise to both [Ms B] and the Association for this to have happened.”

⁷ [2007] NZHRRT 27 (21 December 2007) at 102.

⁸ See Opinion 03HDC06499 (11 February 2004), p11.

⁹ This is also recognised in standards 5.11 and 5.13 of the NZAC Code of Ethics.

59. Mr A acted unprofessionally and unethically by failing to maintain appropriate boundaries and engaging in a personal relationship with Ms B. Mr A failed to comply with ethical standards and, accordingly, breached Right 4(2) of the Code.

Exploitation — No breach

60. A consumer's right not to be exploited, as set out in Right 2 of the Code,¹⁰ is fundamental to the counselling relationship. Right 2 provides protection to vulnerable consumers in circumstances where providers seek to take advantage of them, to their own ends. I have considered whether exploitation occurred in this case and, in my view, while I consider that Mr A had a fiduciary duty to Ms B, I do not consider that there is sufficient evidence to make a finding that he exploited her.
61. "Exploitation" is defined in clause 4 of the Code as including "any abuse of a position of trust, breach of fiduciary duty, or exercise of undue influence."
62. The counsellor–client relationship is fiduciary in nature, and Mr A therefore had a fiduciary duty in respect of Ms B, as her counsellor. As stated in a previous opinion of the Office:¹¹

"The relationship between a client and counsellor is often described in terms of there being a fiduciary relationship. It is framed in this manner, as the client puts his or her trust in the counsellor. This results in an inherent power imbalance between the counsellor and the client, as the client entrusts the counsellor with his or her fears, vulnerabilities and emotions."

63. I note that the NZAC Code of Ethics that applied at the time of these events states that counsellors "shall not exploit the potential for intimacy made possible in the counselling relationship, even after the counselling has ended".
64. One of the reasons that it is unethical for a counsellor to enter into a relationship with a former client (rather than existing clients), is because of the potential for exploitation of those vulnerabilities and the knowledge gained from a relationship of trust. There is a risk that a counsellor could "prey" on clients, ending a therapeutic relationship simply in order to pursue his or her own ends.
65. When Ms B saw Mr A in his capacity as a counsellor, she was emotionally vulnerable and requiring support. In my view, there was a power imbalance in the therapeutic relationship that had not ceased to exist at the time the personal relationship commenced.
66. I have had to consider whether Mr A exploited that power imbalance. I have considered each of the parties' descriptions of the relationship, and, while there is no doubt in my mind that the relationship was unethical and unprofessional, and there was a risk of exploitation, I have decided, on balance, that there is insufficient evidence to support a finding of exploitation.

¹⁰ Right 2 of the Code states: "Every consumer has the right to be free from discrimination, coercion, harassment, and sexual, financial or other exploitation."

¹¹ See Opinion 09HDC01937 (1 April 2011) available at: www.hdc.org.nz.

Referral to Director of Proceedings

67. This Office takes complaints of this nature very seriously. However, while Mr A's actions reflect a serious breach of trust in the client–counsellor relationship, I have decided not to refer Mr A to the Director of Proceedings. In making this decision I have considered the following:
- That the NZAC is aware of the complaint against Mr A and has undertaken its own process in this regard.
 - The amount of time that has passed since any professional or personal relationship between Mr A and Ms B.
 - That Mr A has now retired from counselling, having not practised since 2013, and has no intention to return to practice.
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Opinion: Medical Centre 1

Vicarious liability — No breach

68. Medical Centre 1 was Mr A's employer between 2002 and 31 December 2005. Mr A provided counselling to Ms B from November 2004 until some time in 2005. A personal relationship commenced within one month from when the counselling relationship started, and ended between March and June 2006.
69. Under section 72(2) of the Health and Disability Commissioner Act 1994 (the Act), employers are responsible for ensuring that their employees comply with the Code. Pursuant to section 72(5) of the Act, it is a defence for an employing authority to prove that it took such steps as were reasonably practicable to prevent acts or omissions leading to an employee's breach of the Code.
70. At the time of these events, Medical Centre 1 did not have any policies relating to relationships between counsellors and their patients or former patients. However, health professionals are bound to comply with professional and ethical standards. As a member of the NZAC, Mr A was bound to comply with the professional and ethical standards of that body (as set out above).
71. It was reasonable for Medical Centre 1 to expect Mr A to comply with his professional and ethical obligations with regard to professional boundaries. I also accept that Medical Centre 1 was not aware of the personal relationship between Mr A and Ms B.
72. For completeness, I note that I have not been provided with any evidence to suggest that Medical Centre 1 was on notice of Mr A having previously failed to adhere to appropriate professional boundaries. Therefore, I do not consider that Medical Centre 1 is vicariously liable for Mr A's actions in this respect, and I find that Medical Centre 1 did not breach the Code.
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Opinion: Medical Centre 2

Vicarious liability — No breach

73. Medical Centre 2 was Mr A's employer from 1 January 2006. Mr A's personal relationship with Ms B began in 2005, prior to Medical Centre 2 becoming his employer, and ended between March and June 2006. Mr A did not provide counselling services to Ms B while he was an employee of Medical Centre 2.
74. Under section 72(2) of the Health and Disability Commissioner Act 1994 employers are responsible for ensuring that their employees comply with the Code. Pursuant to section 72(5) of the Act, it is a defence for an employing authority to prove that it took such steps as were reasonably practicable to prevent acts or omissions leading to an employee's breach of the Code.
75. Medical Centre 2 did not have any policies regarding appropriate relationships with patients or former patients. However, Medical Centre 2 told HDC that while Mr A was its employee, he underwent monthly supervision sessions with his supervisor, Mr C.
76. However, health professionals are bound to comply with professional and ethical standards. As a member of the NZAC, Mr A was bound to comply with the professional and ethical standards of that body (as set out above). It was reasonable for Medical Centre 2 to expect Mr A to comply with his professional and ethical obligations with regard to professional boundaries.
77. I also accept that Medical Centre 2 was unaware of the personal relationship between Mr A and Ms B, as a previous client of his, when they became his employer in 2006.
78. For completeness, I note that I have not been provided with any evidence to suggest that Medical Centre 2 was on notice of Mr A having previously failed to adhere to appropriate professional boundaries. Therefore, Medical Centre 2 is not vicariously liable for Mr A's actions in this respect, and I find that Medical Centre 2 did not breach the Code.
79. I note that after being put on notice of Ms B's complaint against Mr A, Medical Centre 2 immediately undertook an internal investigation into the complaint, resulting in Mr A's resignation. Medical Centre 2 ensured that Mr A's clients were not left without care during Mr A's notice period, while ensuring that Mr A's supervisor was given the authority to disclose any concerns regarding Mr A's practice to Medical Centre 2 during that time. I consider the actions taken by Medical Centre 2 to have been appropriate in the circumstances.

Recommendation

80. I recommend that Mr A provide an undertaking to this Office that in the event that he recommences practice as a counsellor, he will immediately register with the New Zealand Association of Counsellors.
 81. I have not made a recommendation that Mr A provide an apology to Ms B for his breach of the Code. Ms B has advised HDC that she does not wish to receive an apology from Mr A.
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Follow-up actions

82.
 - A copy of this report with details identifying the parties removed will be sent to the New Zealand Association of Counsellors and the relevant district health board, and they will be advised of Mr A's name.
 - A copy of this report with details identifying the parties removed will be placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.