General Practitioner, Dr B

A Report by the

Health and Disability Commissioner

Case 12HDC00518

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Executive summary

Background

1. Dr B was contracted to provide locum services at a medical centre (Medical Centre 2). He had previously worked at another medical centre (Medical Centre 1).

2. On 10 March 2009, Ms A consulted Dr B at Medical Centre 2 following a depressive episode. Ms A had previously consulted Dr B at Medical Centre 1 for similar issues.

3. During the consultation, following a discussion about her depression, Ms A consented to a hug from Dr B. Following that hug, Dr B locked his door and closed the blinds in his office. Dr B asked Ms A to lean over a table and made inappropriate sexual gestures.

4. Dr B then stopped, opened his blinds and unlocked his door. He advised Ms A that because of what had happened, there had been a breach of the professional relationship and he would need to write that up in his notes.

5. Later that day, Dr B visited Ms A at her place of work. He shut her office door, and then undid his trousers and lay down. He asked Ms A to perform a sexual act on him, and offered to perform a sexual act on her.

6. Some time later, Ms A told Dr D, of Medical Centre 1, about these events. Ms A declined to take the matter further at that time; however, in 2012 she lodged a complaint with HDC.

Findings

7. The Medical Council of New Zealand has a zero-tolerance position on doctors who breach sexual boundaries with a current patient. A breach of sexual boundaries comprises any words, behaviour or actions designed to, or intended to, arouse or gratify sexual desires, and incorporates any words, actions or behaviour that could reasonably be interpreted as sexually inappropriate or unprofessional.

8. By making inappropriate sexual gestures during his consultation with Ms A on 10 March 2009, and then later visiting Ms A, undoing his trousers and asking her to perform sexual acts on him and offering to perform a sexual act on her, Dr B breached sexual boundaries and, accordingly, breached Right 4(2)[1] of the Code of Health and Disability Services Consumers' Rights (the Code). In addition, Dr B harassed and sexually exploited Ms A. Dr B also breached Right 2[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.

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

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

Complaint and investigation

10. Ms A complained to the Commissioner about the services provided by Dr B. An investigation was commenced on 16 July 2012. The following issue was identified for investigation:

Whether Dr B's interactions with his patient, Ms A, were in accordance with professional and ethical standards from 10 March 2009 to 30 November 2010.

11. This report is the opinion of the Health and Disability Commissioner.

12. The parties directly involved in the investigation were:

Ms A	Consumer
Dr B	Provider/medical practitioner
Dr C	GP, Medical Centre 2
Dr D	GP, Medical Centre 1

Information gathered during investigation

Medical centre 1

13. In 2008 Ms A was a patient at Medical Centre 1. Dr B was her doctor at that practice.[3] She initially consulted him regarding a depressive episode and a vestibular[4] complaint. In response to the provisional opinion, Ms A said that at her first consultation with Dr B she confided in him about a distressing incident she had been involved in some years earlier, which had involved legal proceedings, and he told her about a similar incident that he had been involved in.

14. In response to the provisional opinion, Dr B stated:

> "Although [Ms A] had shared a difficult experience with me I did not see it at as (sic) causing significant asymmetry between us. In retrospect I believe transference may have taken place, less because of asymmetry or difficult situations being dealt with but more because of our similarity and symmetry."

15. Ms A said that Dr B was understanding about her depression and referred her to a specialist for the vestibular complaint. She said Dr B telephoned her at home after the consultation to check that she was "OK" and asked her whether she "could talk" and, at the time, she thought he was being kind. In response to the provisional opinion, Dr B recalled returning a call from Ms A, and said that he believed she was at work at that time. He stated that the call related to her hearing issue, which he knew impacted on her work.

[3] Dr B is registered within a general scope of practice.
[4] The vestibular system includes the parts of the inner ear and brain that process the sensory information involved with controlling balance and eye movements.

16. Some months later, Ms A called Medical Centre 1 to make an appointment to see Dr B. She was told that Dr B was working at Medical Centre 2.[5]

Medical Centre 2

17. Dr B said that Ms A saw him a number of times at Medical Centre 2 during 2008, as a casual patient.

18. Ms A said she decided to continue with Dr B as her GP because she did not want to repeat her health complaints to another GP. In 2009 she called Medical Centre 2 to arrange an appointment with Dr B. Her main concerns were her depression and an ear complaint, which was later diagnosed as Ménière's disease.[6]

Consultation[7]

19. Ms A stated that at the consultation at 10am on 10 March 2009, she told Dr B that she was still on antidepressant medication and had additional "life stressors". In response to the provisional opinion, Ms A also said that she had told Dr B that she was under financial stress, and that she had recently separated from her partner. In response to the provisional opinion, Dr B said that he "learned of her relationship break up as a done deal, which she declined to explore". He stated that the reason for the consultation was a lost prescription and that there were no acute problems. Ms A agreed that she may have consulted Dr B to obtain a prescription.

20. Ms A said that Dr B asked whether he could hug her. She consented to a hug and said, as a health professional herself, she was comfortable with this.

21. Ms A said that Dr B then "went over to the door and locked the door and shut the two sets of blinds in his office". She said she "did not feel 'ok' or comfortable with this". She told HDC that Dr B "then asked me to bend over his table and I did, (I do not know why I did)." Dr B then made inappropriate sexual movements. Dr B has not denied these actions.

22. Dr B then stopped and told Ms A that there had been a breach of the professional relationship. He asked Ms A where she worked and whether he could come to see her at work. She said she agreed because her work place office was always busy, with people around.

23. On 26 September 2010, Dr C of Medical Centre 2 had a telephone conversation with Ms A about these events (see below). His notes of the telephone conversation record that Ms A told him that during the consultation on 10 March 2009, Dr B told her he was in love with her and wanted to have sex with her, and that he had "bent [her] over bed" and made inappropriate sexual gestures.

[5] Dr B was engaged as an independent contractor to provide locum services at Medical Centre 2 three days a week. He started in 2008 and finished in 2011.

[6] Ménière's disease is a disorder of the inner ear. It can cause severe dizziness, a roaring sound in the ears called tinnitus, hearing loss that comes and goes, and the feeling of ear pressure or pain (see: http://www.nlm.nih.gov/medlineplus/menieresdisease.html).

[7] Dr B indicated in his response that there were some aspects of the complaint he did not accept, but he did not provide any information as to whether he disputed any of the description of what had occurred on 10 March 2009 as told by Ms A to both Dr C and HDC.

Visit to office

24. Ms A said that later on 10 March 2009, Dr B arrived at her office and seemed "hot and nervous". She stated that he closed her office door, undid his trousers and asked her to perform a sex act on him. He lay down. He also offered to perform a sex act on her and told her that they could have a relationship. Ms A said she asked him to pull up his trousers and sit down. She said she told him that he would regret this and that he needed to tell his wife what had happened.

25. In response to the provisional opinion, Dr B did not deny visiting Ms A's office, but said that they had met up and driven to her office together. Dr B said that he was introduced to her colleagues, and that he and Ms A made coffee and then went to her office. He also stated that he "disagree[s] with the stereotypical description of the meeting" and "strongly [denies] harassing her". He stated that he was not there to have sex but to talk. Dr B agrees that he was "hot and bothered" because he felt guilty about being there. Dr B said he does not recall closing the door but may have done so, and said that no mention was made of regrets or of him telling his wife.

Consultation notes

26. Dr B made an entry in the clinical notes about his 10am consultation with Ms A on 10 March 2009, but made no mention of the incident during the consultation. At the time the original consultation notes were entered, there was nothing in the notes about transferring Ms A to another practitioner. However, an addition to the notes was made at 12.01pm on 10 March 2009, which read: "[D]iscussed t/r, will reg with Dr in town."

27. On 12 March 2009, at 9.43am, Dr B altered his consultation notes for a second time. The new addition read: "Discussed t/r, will see other Dr."

28. In response to the provisional opinion, Dr B said that he "disagree[s] with an insinuation that [he] dishonestly altered notes". He said that his 10 March 2009 notes were typed during the appointment and were saved some time later, and the alteration at 12.01pm added a discussion he had with Ms A at the end of the appointment. Dr B said that the correction he made on 12 March 2009 "was immaterial but correct".

Contact with Dr C

29. Dr C said that on 12 March 2009, Dr B asked him to take over Ms A's care. Dr C recorded this discussion in Ms A's notes on 12 March 2009 as: "Asked to see by [Dr B] — Ex [Medical Centre 1]." Dr C noted that his entry in Ms A's clinical notes was made at 12.27pm on 12 March 2009, three hours after Dr B's 9.43am entry in the notes regarding the transfer of care to "other Dr".

30. In response to the provisional opinion, Dr B said he disagrees with the suggestion that he did not fully end the professional relationship because he failed to forward, or delayed forwarding, Ms A's notes to another doctor. He said that he did not forward Ms A's notes because Ms A did not want him to do so, and "there were no new diagnoses or significant medication changes to hand over". He said that he asked Dr C to see Ms A "as feelings had developed", but it was not a formal transfer.

Events leading to Ms A's complaint

31. In August 2010, Ms A made an appointment to see Dr D at Medical Centre 1. Ms A disclosed to Dr D what had occurred with Dr B in 2009. Dr D asked Ms A whether she wanted to take the matter further. Ms A said that she did not.

32. During a subsequent telephone conversation with Dr C, Dr D disclosed to Dr C the discussion she had had with Ms A regarding the consultation with Dr B in 2009.

33. After receiving this information from Dr D, Dr C developed a new chaperoning policy for his medical practice.

34. On Sunday 26 September 2010, Dr C contacted Ms A and spoke to her about the events in March 2009. Ms A said that initially she was concerned about Dr D's apparent breach of her privacy, but no longer feels that way. Ms A provided Dr C with details of her interactions with Dr B, and gave her consent for Dr C to take the matter further.

35. On 4 October 2010, Dr C spoke to Dr B. Dr C told Dr B what Ms A had told him, and said that he was obliged to send the information to the Medical Council of New Zealand (MCNZ). Dr C reported that, on hearing this information, Dr B put his head in his hands, and his first words were, "Oh shit." Dr B told Dr C that he was not in a "good head space". Dr C said that Dr B then asked him not to tell MCNZ or the Health and Disability Commissioner what Ms A had told him. Dr C considered that Dr B directly asked him to withhold information.

36. Dr C said that, later that day, Dr B said that he was not trying to get Dr C to lie or withhold information on his behalf.

37. Following that discussion, Dr C made a complaint to the MCNZ. Ms A did not support the complaint at that time. However, in 2012 she lodged a complaint with HDC about Dr B.

Meeting

38. Ms A said that Dr B subsequently rang her and asked to meet her. At the meeting he explained that he thought she had feelings for him, and said that he had spoken to his wife and consulted a lawyer, who had advised him to meet Ms A.

39. Ms A said that she subsequently called Dr B as she was upset about the meeting. She told Dr B that it was definitely he who had initiated everything — not her.

40. Dr C said that on 6 October 2010, Dr B came into Dr C's consulting rooms and informed him that the feelings between himself (Dr B) and Ms A were "definitely mutual", and that this would be his "defence" if needed with both MCNZ and HDC. Dr B also said that he had had a meeting with a psychiatrist.

41. In September 2012 the MCNZ put in place conditions on Dr B's scope of practice. This included requiring him to have a chaperone when seeing any female patient; to inform patients and their support people of this fact; to advise any prospective

employer of the conditions on his scope of practice; and that any future employment must be approved by the MCNZ and a medical advisor.

Dr B's initial response

42. On 8 November 2012, Dr B responded to HDC regarding the complaint. He said that he did not accept some aspects of the complaint, but admitted that he had acted inappropriately and accepted that he had breached the Code.

43. Dr B said that his behaviour was the product of consensual behaviour on the part of Ms A. He rejected the suggestion that he had "preyed" on her. However, he acknowledged that the final responsibility for the breach of boundaries was his.

44. Dr B said that after the incidents he had three telephone conversations with Ms A, and "we [Ms A and Dr B] discussed and finally terminated our relationship".

45. Dr B said that he did not accept a good deal of what Dr C had recorded. However, as he accepted that he had acted inappropriately with Ms A, he thought it inappropriate to engage in a lengthy traverse of Dr C's beliefs and "at times speculative/third-hand observations".

46. Dr B outlined a number of stressors affecting him at the time of the incidents.

47. Dr B advised that he had met Ms A by chance at an event in May 2010. He stated that on 12 November 2010 he met with her again and apologised to her.

48. Dr B confirmed that he was under the care of a psychiatrist. He said that his psychiatrist had provided an opinion to the MCNZ that he had good insight and a good understanding of the Medical Council's guideline on sexual boundaries in a doctor–patient relationship. Dr B said that he had learnt a "salutary lesson" from these events and assured HDC that there would be no repeat of them.

Responses to the provisional opinion

49. Responses to the provisional opinion were received from Dr B, Ms A and Dr C, and have been incorporated into the "facts gathered" section where relevant.

Relevant standards

50. The MCNZ's *Sexual boundaries in the doctor–patient relationship: A resource for doctors* (October 2006), the standard in place at the time of these events, states:

> "Council has a zero-tolerance position on doctors who breach sexual boundaries with a current patient. In the Council's view it is also wrong for a doctor to enter into a relationship with a former patient or a close relative of a patient if this breaches the trust the patient placed in the doctor.
>
> …

> A breach of sexual boundaries comprises any words, behaviour or actions designed or intended to arise or gratify sexual desires … It incorporates any words, actions or behaviour that could reasonably be interpreted as sexually inappropriate or unprofessional.
>
> … It is difficult for any professional to objectively assess the appropriate action when he or she is attracted to a client. By recognising the danger signs you can consciously avoid any improper behaviour before any damage is done.
>
> … If you … feel attracted to a patient ask for help and advice from a respected peer who can help you decide the appropriate and ethical course of action.
>
> … A sexual relationship between you and a family member of a patient will always be regarded as unethical if it can be shown that you have used any power imbalance, knowledge or influence obtained as the patient's doctor.
>
> … Because each doctor–patient relationship is individual, and because everyone reacts differently to circumstances, it is difficult to have clear rules on when it is or is not acceptable for a doctor to have a relationship with a former patient."

51. The New Zealand Medical Association's Code of Ethics (2008) provides:

> "Doctors, like a number of other professionals, are involved in relationships in which there is a potential or actual imbalance of power. Sexual relationships between doctors and their patients or students fall within this category. The NZMA is mindful of Medical Council policy in relation to sexual relationships with present and former patients or their family members, and expects doctors to be familiar with this. The NZMA considers that a sexual relationship with a current patient is unethical and that, in most instances, sexual relations with a former patient would be regarded as unethical, particularly where exploitation of patient vulnerability occurs. It is acknowledged that in some cases the patient–doctor relationship may be brief, minor in nature, or in the distant past. In such circumstances and where the sexual relationship has developed from social contact away from the professional environment, impropriety would not necessarily be inferred. Any complaints about a sexual relationship with a former patient therefore need to be considered on an individual basis before being considered as unethical."

Opinion: Breach — Dr B

Professional standards

52. Under Right 4(2) of the Code, Ms A had the right to have services provided that complied with legal, professional and ethical standards. Pursuant to Right 2 of the Code, Ms A also had the right to be free from discrimination, coercion, harassment, and sexual, financial, or other exploitation.

53. Professional and ethical standards are clear: doctors must not breach sexual boundaries with their patients. This is reflected in the MCNZ publication *Sexual boundaries in the doctor–patient relationship: A resource for doctors* (October 2006), which states that the Council has a zero-tolerance position on doctors who breach sexual boundaries with a current patient.

54. The MCNZ publication prescribes that a breach of sexual boundaries "comprises any words, behaviour or actions designed or intended to arouse or gratify sexual desires", and it includes "any words, actions or behaviour that could reasonably be interpreted as sexually inappropriate or unprofessional".

55. Accordingly, a doctor breaches sexual boundaries not only through having sexual relations with a patient, but also through any behaviour that is designed to, or intended to, arouse or gratify sexual desires, or that could reasonably be interpreted as sexually inappropriate or unprofessional.

56. In determining whether Dr B breached sexual boundaries in this case, I must determine the following questions of fact: whether Ms A was his patient; and, if so, whether Dr B's behaviour towards Ms A breached sexual boundaries during that period.

Professional relationship

57. In 2008, Ms A was a patient of Dr B when he worked at Medical Centre 1. She was also Dr B's patient when she consulted him at Medical Centre 2 on 10 March 2009. In addition, I consider that Ms A remained Dr B's patient when, later that day, he presented at her office, despite his notes indicating that he intended to transfer her care, for the reasons set out below.

58. The MCNZ statement "Ending a professional relationship" requires a doctor to complete all of the following steps when terminating the doctor–patient relationship:

- Tell the patient that the professional relationship has ended.
- Note this termination in the patient's records.
- Refer the patient to another doctor of the patient's choice.
- Send a letter of referral (or reporting letter) and all relevant information about that patient to the new doctor or general practitioner.
- Only after all these steps have been completed does the Council consider the doctor–patient relationship to be properly terminated.

59. In the *Wiles* case, when referring to a situation similar to that faced by Dr B in March 2009, the District Court held that

> "… the transfer of Mrs Y's medical notes was a necessary step in ending her doctor/patient relationship with Dr Wiles. Dr Wiles knew that relationship was

being taken into dangerous waters and it was his professional duty to take clear and positive steps to end it."[8]

60. On appeal the decision was upheld by the High Court.[9]

61. Dr B did not take "clear and positive steps" to end the professional relationship with Ms A when intimacies began to develop in March 2009. He did not undertake all the steps required by the MCNZ. Accordingly, the professional relationship had not been properly terminated when he visited Ms A at her office on 10 March 2009 and, at that time, Ms A was still his patient.

Sexual boundaries

62. I am satisfied that Dr B breached sexual boundaries during the 10 March 2009 consultation and exacerbated the issue when he visited Ms A at her place of work later that day and made inappropriate sexual advances towards her.

63. I am also satisfied that Dr B's behaviour and actions were designed to gratify his sexual desires. In my view, Dr B's words, actions and behaviour could have reasonably been interpreted as a breach of sexual boundaries. In addition, they were sexually inappropriate and unprofessional.

64. MCNZ describes sexual behaviour in a professional context as "abusive", and notes that it "risks causing psychological damage to the patient".

65. It is irrelevant whether Ms A consented to Dr B's behaviour. As the medical professional, the onus was on Dr B to maintain professional boundaries and ethical standards. Furthermore, I do not accept Dr B's statement that the activity was consensual. Ms A's statement of her reaction to his actions in her office clearly shows that she was rejecting his advances. Dr B has stated that no mention was made of regrets or of telling his wife about the incident; however, I remain of the view that Ms A told Dr B that he would regret his actions, and that he needed to tell his wife about them. It is entirely inappropriate for Dr B to attempt to minimise his culpability by asserting that the events were consensual.

66. It is also no excuse that Dr B asserts that he had a number of "stressors" at the time. He was clearly aware that crossing those boundaries was a breach of his professional standards, given his reaction immediately after his consultation with Ms A on 10 March 2009. Ms A was in a vulnerable position, having discussed with Dr B her reasons for being on antidepressant medication. During the consultation with Dr B, Ms A discussed additional stressors in her life. I find that Dr B took advantage of Ms A's vulnerability.

67. Any crossing of sexual boundaries between a patient and his or her doctor involves a breach of trust. A doctor is required to have the patient's best interests at heart. That is

[8] *Director of Proceedings v Medical Practitioners Disciplinary Tribunal* (DC, Wellington 24 January 2002, Judge Lee, MA69/01) at [32].
[9] *Director of Proceedings v Medical Practitioners Disciplinary Tribunal* [2003] NZAR 250 (HC).

the fundamental contract that allows patients to trust the doctor with intimate physical and psychological matters.

Summary

68. I find that, at the time of these events, Ms A was a current patient of Dr B. It is apparent that Dr B was aware that his actions crossed professional boundaries, and that his behaviour was inappropriate, given the patient–doctor relationship. While he has admitted that he has breached the Code, he has attempted to mitigate this by alleging that the approaches he made to Ms A were consensual. Even if I accepted Dr B's account that his approaches were consensual, it would be no excuse for his behaviour.

69. I am satisfied that Dr B breached sexual boundaries and, accordingly, I find that Dr B breached Right 4(2) of the Code. In addition, Dr B harassed and sexually exploited Ms A. Accordingly, I find that Dr B also breached Right 2 of the Code.

Recommendations

70. Dr B has provided to HDC an apology to Ms A for his breaches of the Code.

71. I recommend that Dr B:

- remain in a mentoring relationship with two senior GPs (including at least three face-to-face meetings with each mentor each year) until 2015. Both mentors will provide written confirmation to the Medical Council of New Zealand that the mentoring has occurred and that Dr B appears to be continuing to maintain appropriate professional boundaries with patients. Dr B is to confirm in writing to HDC by **12 July 2013** that this arrangement is in place.

Follow-up actions

72.
- 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.
- A copy of this report with details identifying the parties removed will be sent to the Medical Council of New Zealand, and it will be advised of Dr B's name.
- A copy of this report with details identifying the parties removed will be sent to the District Health Board and the Royal New Zealand College of General Practitioners, and both will be advised of Dr B'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.

Addendum

The Director of Proceedings laid a charge before the Health Practitioners Disciplinary Tribunal. Professional misconduct was made out and conditions were placed on the provider's practicing certificate and name suppression was not granted to the provider. The issue of name suppression was successfully appealed to in the High Court.