

23 February 2011

New Zealand Association of Counsellors
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Discussion paper on self-regulation and registration under Health Practitioners Competence Assurance Act 2003 in the counselling profession

Thank you for the opportunity to provide comment on regulation of the counselling profession. You asked for feedback on whether counsellors should be self-regulated or regulated under the Health Practitioners Competence Assurance Act 2003 (HPCAA).

Under the Health and Disability Commissioner Act 1994 (the Act) my role is to promote and protect the rights of health and disability services consumers. Pursuant to section 14(1)(d) of the Act, one of my functions is to make public statements in relation to any matter affecting the rights of health and disability consumers.

Given my focus on consumer protection, I fully support the regulation of the counselling profession. I consider it advantageous for there to be authoritative systems in place to address competence, fitness to practice, and learning initiatives.

Will self-regulation protect the public in an equivalent manner as protection provided by HPCAA registration?

What is the risk to the public?

I commend the focus on public safety in ascertaining the most appropriate form of regulation. I note that counselling is a “health service” for the purposes of section 2 of the Act and this Office has received several complaints about counsellors. Several of these complaints resulted in a finding that there had been a breach of the Code of Health and Disability Services Consumers’ Rights (the Code).

The complaints raised a number of issues concerning the provision of counselling services, predominantly the repeated failure to maintain professional boundaries in the counsellor/client relationship by engaging in inappropriate and sexual relationships with their clients.¹ There is also a concern that counsellors give advice on areas outside their expertise. One counsellor told a former client (via text) not to take anti-psychotic medication prescribed by a mental health team. The man committed suicide two weeks later.²

Counsellors work with a highly vulnerable client group in a complex environment, dealing predominantly with emotional and mental health. Without regulation and clearly defined scopes of practice, the degree of harm to the consumer can be profound, as demonstrated by the complaints received at HDC. It is essential that counsellors do not breach the trust which clients

¹ See for instance Opinion 03HDC02071, Opinion 01HDC07830, Opinion 03HDC06499, Opinion 08HDC17394

² Opinion 09HDC01409

and society repose in them. Accordingly, I consider that the public is at risk of harm from counsellors who are not competent and fit to practise.

Protection of the public under the HPCAA

Protection of the public, and consequently consumers of health and disability services, is explicit in the HPCAA.³ The HPCAA provides a mechanism whereby the scope of practice and competencies of its practitioners, expected standards, and the education and skill requirements are carefully prescribed. Accordingly, regulation under the HPCAA enhances consumer safety and knowledge by providing the public with a reliable, current source of information regarding standards to be expected of the profession and by allowing identification of competent and qualified providers. Under the HPCAA, consumers can readily find out the services in which their chosen counsellor is competent and entitled to provide, and be assured that his or her competence and fitness to practise is regulated.

Protection of the public through self-regulation

There is clearly some overlap between self-regulation and the regulation enforced by the HPCAA, such as setting education and competency standards, maintaining a register or members and forming mechanisms for addressing fitness to practise concerns. I acknowledge that such measures will provide a degree of protection to consumers from incompetent counsellors.

However, the legal status of self-regulation is weaker than registration and regulation under the HPCAA. From the perspective of this Office, regulation of counsellors under the HPCAA would significantly improve the range of options available to protect consumers when faced with serious complaints about a counsellor's competence or fitness to practise.

Currently, if a counsellor seriously breaches the Code, the Commissioner can refer the matter to the Director of Proceedings. As counsellors are an unregulated profession, proceedings can only be brought against counsellors before the Human Rights Review Tribunal (HRRT). The remedies available in the HRRT are a declaration that there has been a breach of the Code, an order restraining the practitioner from continuing to engage in conduct that was the subject of the breach (i.e. in relation to that consumer), and damages.

The focus of the HRRT is the right of the individual, rather than issues of public safety. Unlike the Health Practitioners Disciplinary Tribunal (HPDT), the HRRT has no power to impose conditions on practice, to suspend from practice, or to ban the counsellor from continuing to provide services to the public.

If counsellors were registered health practitioners under the HPCAA, the Director of Proceedings would be able to initiate proceedings in the HPDT. This is advantageous as it means that, in appropriate circumstances, counsellors may be subject to disciplinary action and/or restrictions on their practice. If counselling was a health profession under the HPCAA, it would also be possible for this Office to refer counsellors to their responsible authority for competence reviews to be initiated where appropriate. In serious cases, the practitioner could be suspended from practice, pending the outcome of the investigation. These mechanisms would be positive measures to protect the health and safety of members of the public. I do not consider that the

³ The purpose of the HPCAA is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.

measures offered by self-regulation will protect the public in an equivalent manner if incompetent counsellors can continue to practice.

Additionally, registration under the HPCAA ensures that the scope of practice of counsellors is defined. Without registration, there is no benchmark in the counselling profession regarding qualifications, standards and competency. While self-regulation will enable some distinction to be made between members and non-members, the self-regulating profession will be unable to enforce membership. Accordingly, any person could call themselves a counsellor if they purport to provide counselling services, without any minimum standard of qualification. The self-regulated profession could only ensure the competency of its members, thus failing to ensure that incompetent non-members do not continue to practise and inevitably placing the public at risk of harm.

Would self-regulated counsellors have equivalent status to registered health professionals as defined under the HPCAA?

Under the HPCAA, consumers are assured that their health practitioner is suitably qualified and competent to practice in their specific area. Without regulation under the HPCAA, there is no such assurance. Because of this and for the reasons stated above, I do not consider that counsellors recognised under a self-regulation process would have equivalent status to registered health professionals under the HPCAA.

Summary

The HPCAA ensures the regulation of health services which pose a risk of harm to the public. I consider that counselling services poses such a risk, given the inherent vulnerability in the counsellor/client relationship and the complaints received by this Office where that vulnerability has been abused.

If counsellors were to be self-regulated, I consider that concerns for public safety would not be adequately addressed. Incompetent counsellors could continue to practice even if they seriously breached of the Code, and although the self-regulated body could set qualifications, standards and competencies for members, non-members would not be bound by the same rules.