# Counsellor, Mr C

## A Report by the

## Deputy Health and Disability Commissioner

## Case 09HDC01937

Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

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## Executive summary

1. Ms A first received counselling services from counsellor and former psychologist Mr C in 2000. Ms A alleges that she and Mr C entered into a concurrent professional and intimate relationship in 2003, which continued until 2006.

2. In contrast, while Mr C acknowledges that he did have a short-lived sexual relationship with Ms A, he denies that this was at the same time as he was providing her with counselling services. Mr C asserts that after ceasing to provide Ms A with counselling services in mid-2004, a close friendship continued to develop, but it was not until mid-2006 that an intimate or sexual encounter occurred on two occasions over a two-month period.

3. Mr C was aware of the complex issues surrounding Ms A's particular history of sexual abuse. She was extremely vulnerable, and trusted and relied heavily on Mr C. There was an obvious power imbalance. Mr C abused that power.

4. Mr C admitted promptly to HDC that he had had a sexual relationship with Ms A. He expressed shame and regret, and acknowledged his wrongdoing. He apologised to Ms A, and offered to reimburse the fees she had paid to him. He also acknowledged that his duty of care as a counsellor did not end just because the counsellor/client relationship, in his view, had ended.

5. By engaging in a sexual relationship with Ms A, Mr C did not maintain appropriate boundaries and therefore violated his fiduciary obligations. Consequently, his actions were inappropriate and unethical, and he exploited Ms A's vulnerability. Mr C breached Right 2 and Right 4(2) of the Code.

## Investigation process

6. On 19 October 2009 the Health and Disability Commissioner (HDC) received a third party complaint from a registered psychologist and academic, Ms B, on behalf of, and with the knowledge and consent of, Ms A, about the counselling services provided to Ms A by Mr C.

7. After a period of information gathering and preliminary assessment, a formal investigation was commenced on 2 March 2010. The following issues were identified for investigation:

*The appropriateness of the relationship between Mr C and Ms A both during and after their therapeutic relationship.*

*The appropriateness of services provided to Ms A by Mr C.*

8. This report is the opinion of Tania Thomas, Deputy Commissioner, and is made in accordance with the power delegated to her by the Commissioner.

9. Information was obtained from:



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Ms A Consumer/complainant
Ms B Complainant
Mr C Provider
Ms D Mr C's colleague/former partner

## Information gathered during investigation

*Background*

10. Ms A first met Mr C around 1993. At this time Ms A was a university student, and Mr C was an employee of the university. Ms A was enrolled in a course taken by Mr C. No additional contact occurred between Ms A and Mr C around this time.

*Professional relationship — Mr C*

11. Mr C started counselling in the 1990s. He retired from his position at the university but continued to provide some private counselling services. Much of this work was low cost or *pro bono*. His clients were usually a result of word of mouth, with the occasional letter of referral from other professionals he knew.

12. Mr C registered with the New Zealand Psychologists Board in 1983. To practise as a psychologist, he also required an annual practising certificate (APC). The Board advised HDC that Mr C last held an APC in March 1995. While Mr C's name still appeared on the register up until August 2006, he was not able to practise as a psychologist without a current APC.[1] I note that Mr C is not affiliated with any New Zealand counselling or psychotherapy association.

13. In 2000, Ms A (then aged 36) contacted Mr C (then aged 66) seeking counselling services.[2] Mr C operated out of his own home and worked with his then life partner, psychologist Ms D. Although living in another region, Ms A would travel for sessions with Mr C and/or Ms D. The sessions were usually between one and one-and-a-half hours long. Ms A recalled that Mr C's sessions could last up to two hours. Ms A was charged $60 for a session lasting one hour. She recalls that payment was in cash and she received no receipts.

14. Ms A primarily sought counselling services to address issues of past sexual and emotional abuse by her father. (Her history of extensive sexual abuse also included a former psychologist sexualising a therapeutic relationship with her when she was aged 18–19 years old and the man involved was in his early 30s.)

[1] The provider's name remains on the register even if he or she does not hold a current APC, and is removed from the register only if he or she either requests to be removed from it or is removed under Section 144 of the Health Practitioners Competence Assurance Act 2003.
[2] Ms A recalled that Mr C had often referred to himself as a "conversationalist", and she was aware that colleagues of his had used a similar title and practised in a similar way.



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*Professional relationship — Ms D*

15. It was Ms A's understanding that Mr C would work together with Ms D to counsel her. She stated:

> "My understanding was that [Mr C] and [Ms D] would work together, with [Mr C] offering his specialty in metaphorical work … I do not recall any discussion of issues [Mr C] was not prepared to treat me for. I know that [Mr C] and [Ms D] discussed openly their work with me."

16. However, Mr C responded to HDC that because many of Ms A's issues related to past sexual abuse, he felt it would be better and gender-appropriate for her to work on these issues with Ms D. He agreed to work with Ms A occasionally on other issues unrelated to sexual abuse, including relationship difficulties Ms A was having with her partner at the time. He stated:

> "When [Ms A] originally asked me to be her counsellor, some years prior to 2003, I insisted that she work on sexual abuse issues with a woman. It was my understanding that was why [Ms A] worked with my former partner, [Ms D]. I was never privy to any details of their work together."

17. Ms D recalled to HDC that Mr C referred Ms A to her. However, Ms A's recollection is that she was not referred. Ms D told HDC that she counselled Ms A on her relationship problems at the time, as well as abuse and family issues. As far as Ms D was aware, Mr C saw Ms A more for professional issues, career, and professional training discussions. Ms A's view is that she had no requirement for such discussions. Ms D recalls having informal discussions with Mr C about Ms A (but they did not supervise each other's work), and considers that he would have been aware of Ms A's abusive past and vulnerability. Ms D did not recall Mr C keeping any notes when he counselled.

*Documentation*

18. When interviewed by HDC investigation staff, Mr C explained that in terms of documentation of counselling sessions, he initially hand-wrote brief notes on paper. He usually had nothing to write, as many clients often reiterated their ongoing unhappiness and not knowing what to do to address it. Later, he began the practice of transferring notes on to a computer, with the handwritten notes being destroyed once transferred. He advised that when he obtained a new laptop he could not recover the client files off his desktop (it was very old) as they had become contaminated in some way. The system crashed and the records were lost. He was aware that he was obliged to keep records for a 10-year period.

19. Ms D's handwritten records show that Ms A saw her 10 times between May 2000 and July 2001. Initial discussions centred on her relationship difficulties, family issues, and general anxieties. On 29 May 2000, the session also included specific reference to Ms A's sexual abuse history. Ms A believes she saw Ms D beyond July 2001.



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*Knowledge of sexual abuse*

20. While Mr C acknowledges that early on he was aware that Ms A's history included past sexual abuse, he responded that he did not know the specifics and never counselled her in relation to those issues. He later outlined that some of Ms A's communication was oblique and he tried not to push her into clarification to "avoid her further obfuscating". He also stated:

> "Consequently, it wasn't until I read the complaint that I clearly learned the abuse by her father was sexual. I knew [Ms A] had sometimes confused me with her father and I remembered being uneasy about that. But she had insisted she wanted me to continue to counsel her on non-abuse issues."

21. He also commented that:

> "I agreed to work with [Ms A] occasionally as a counsellor on issues that had nothing to do with sexual abuse. Every now and then I had to steer her away from that area when she was working with me, but for the most part that arrangement seemed to work well."

22. In contrast, Ms A stated that there was no such agreement, and that she worked both with Ms D and Mr C in relation to her past sexual abuse. She never recalls Mr C trying to steer her away from discussing these issues. Rather, she recalls Mr C actively encouraging such discussion and that he asked her "intimate questions and emphasised sex as part of the road to psychological well-being a great deal of the time". She found it "ludicrous" to suggest that she could separate the discussion about the nature of abuse by her father between Mr C and Ms D. She also wrote:

> "I was very dependent on [Mr C] and both [Mr C] and [Ms D] prior to her leaving. I phoned them both frequently from home, in between appointments. I felt strongly connected to [Mr C] because of his depth of understanding for my art and poetry and the anguish I was experiencing through the behaviour of my partner and that of my own destructive family."

*Cardiac surgery*

23. Mr C underwent heart surgery in March 2003 and experienced severe postoperative delirium.[3] He provided HDC copies of hospital notes from 2003 confirming delirium post-surgery. While he was eventually medicated, Mr C's recovery was slow and he continued to experience bouts of severe agitation and confusion following his return home, and this continued intermittently for a few years.

24. Ms D recalled Mr C undergoing heart surgery and agrees that he experienced severe side-effects from the surgery. She advised that she stayed with Mr C for approximately six weeks after his return home, until he had recovered sufficiently. She ended her relationship with Mr C in early October 2003. Ms D advised that after

[3] Delirium is generally regarded as an acute confusional state characterised by an alteration of consciousness with reduced ability to focus, sustain, or shift attention. Postoperative delirium is a recognised complication in older patients following a major operation.



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this date she had limited contact with Mr C and did not know what his work arrangements were.

25. Mr C commented when interviewed that he discussed his experiences in hospital with his clients. While Ms A recalls that he had complications while he was in hospital, she does not recall Mr C ever experiencing any ongoing delirium symptoms. Ms A agreed that Mr C openly discussed his health with her and so she is sure that he would have advised her if he was experiencing any ongoing health problems.

*Post-surgery counselling*

26. Mr C advised HDC that he returned to counselling at the end of 2003/beginning of 2004. He counselled about four to six clients, including Ms A. However, due to his ongoing complications from surgery, and other personal reasons, he made the decision to shut down his practice.

27. He explained that it took some time to completely finish with all of his clients, and it was not until mid-2005 that he saw his last client. When interviewed, he explained that the process took 12 months as his clients all had different issues — some would reduce the number of visits very slowly, and others found it difficult to stop seeing him. He began to turn away clients and told people who referred clients to him that he was no longer in business. He did not formally refer clients on to another counsellor in writing, but rather would ring another provider or give the client the provider's contact number. He could not recall a name of anyone to whom he referred a client. He did not formally document cessation of services.

28. As he felt there was a risk of Ms A developing a dependency, coupled with his belief that she would be better off having a counsellor closer to where she lived, Mr C stated that he stopped counselling Ms A earlier than his other clients. He recalled that Ms A said she would find another counsellor in her own area. He did not know any counsellors in the area. Mr C does not believe that he provided Ms A with any counselling after mid-2004. He acknowledges that there is no documented evidence regarding his ending of the therapeutic relationship. He does clearly recall discussing his decision with Ms A in mid-2004. Ms A has no recollection of any such discussions about counselling cessation.

*Personal relationship development*

29. Mr C advised that while providing Ms A with counselling services (prior to mid-2004) they developed a good friendship through their similar interests. Ms A would show him her writing, painting, and drawings during their sessions. She would also send him pieces of her work by email. Mr C stated:

> "[Ms A] and I began a friendship which seemed to grow up quite naturally alongside some occasional counselling. The friendship was not an issue in relation to the counselling."

30. Further to this, Mr C stated:

> "While I was [Ms A's] counsellor my relationship with her was professional and friendly within strict boundaries of propriety. The friendliness was confined to



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> talking about art and writing, health of members of our families, travel plans, gardening and other innocuous and everyday subjects."

31. Mr C recalls discussing with Ms A his decision to stop counselling clients, advising her that he could no longer cope with providing professional counselling but wished to remain friends. He believes that he was clear with Ms A that he would no longer be providing her with counselling services. Furthermore, he felt confident that he meant a "friendship of equals with common interests, and certainly not a sexual relationship".

32. Mr C stated that he ceased providing Ms A with counselling services in mid-2004. He recalls Ms A continuing to visit him sporadically. He stated that they would discuss things they were both interested in, such as art and literature. While Mr C recalls that Ms A would occasionally raise various issues and problems in her life, he would respond to them as he would any other friend.

33. In a statement prepared by Mr C in February 2008 in support of Ms A's attempt to retain custody of her children, Mr C referred to the transition of his relationship with Ms A from counselling to friendship. He also referred to having stopped seeing clients a few years after he retired from the university. He stated:

> "Eventually, after [her de facto relationship] finally did break up, [Ms A] began to need less and less support. A time came when we agreed to terminate counselling because she was confident she could cope without it."

34. Ms A confirmed to HDC that her de facto relationship ended in September 2004. In relation to the statement Mr C provided to support her custody application, Ms A stated to HDC that it was "dishonest" and contained "gross inaccuracies". (Although I note an email from Ms A to Mr C on 15 February 2008 regarding the statement, saying "thank you so much — a great second draft", which Ms A told HDC she sent because it supported her custody case.)

35. Ms A does not recall Mr C ever advising her that he was no longer going to provide her with counselling services. As far as she was concerned, Mr C continued to counsel her, and this alternated between phone calls and occasional visits to him. She does not recall ever having a discussion with Mr C about ending their therapeutic relationship. Notably she commented:

> "I'm not sure when I ceased to be a client because that was never discussed. Sessions just blurred into dates, which were not normal dates, they were more like sessions, in the sense that they were always at his place, for a duration that suited him, and what we did was controlled by him."

36. Ms A advised that it was not until late 2006/early 2007 when she noticed that the relationship was changing and she felt that Mr C had suddenly begun acting differently towards her.

37. Mr C commented that his personal relationship with Ms A was initially quite restrained, but that this became much more relaxed and open over a period of about



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18 months, eventually becoming "excessively friendly" towards the end of 2005. He commented on the change in the way he began to communicate by email towards the end of 2005 and the way he began to sign off emails using endearments, for example, "xxx", "love" or "[Mr C], x". He explained that these were typical of emails he affectionately exchanged with a very diverse range of friends and that they have no sexual connotation.

38. He advised that "this [change in email communication] was part of no longer being counsellor and client" and was the "move from the more distant language of client and counsellor to the warm casual language of friends. The love it speaks of is not the erotic love of lovers." He felt it signified that she was a special friend who he cared about.

*Sexual relationship*

39. Ms A recalled that she and Mr C opened the subject of sexual boundaries in a client–counsellor relationship prior to his first sexual advance, the first occasion being prior to his surgery (ie, before March 2003). Ms A advised that this discussion made her feel "quite depressed because his comments were insensitive to the clear fact I was not interested in drawing his attention to me in that way".

40. Ms A stated that she remembered this session distinctly as she suffered a stomach upset (which she thought was Campylobacter)[4]. Ms A's GP records do not include reference to Campylobacter, and the DHB Public Health Service advised that its records do not include notification of this, although Ms A's son appears to have had a case reported in 2001.

41. According to Ms A, the second discussion about sexual boundaries included reference to her adolescent experience with her former psychologist. Ms A recalls Mr C focusing on discussing sexual issues during their therapy sessions, which she believes was a "precursor to breaking down [her] sexual boundaries". Contrary to Mr C's stance on this issue, Ms A recalled that he actively encouraged her to talk about sex.

42. Ms A considers that it was around the time Ms D left to go overseas (approximately May 2003) that Mr C first made sexual advances toward her. She recalls that the first sexual advance was following a counselling session, and consisted of Mr C initiating a very close goodbye hug. Ms A recalls feeling Mr C pressing his penis against her. He then reached down to her buttocks and said, "Can you feel my energy for you?" Ms A replied, "Yes," and recalled him responding with, "It's nice for us to know it's there."

43. Ms A advised that she never did anything to suggest to Mr C that she wanted to have sex with him, and his actions took her "completely by surprise". She recalls it being a normal counselling session with the exception of Mr C advising her that Ms D was leaving him. In no other sessions had he raised personal issues about his relationship.

[4] Campylobacter organisms cause the most commonly reported gastrointestinal disease in New Zealand. Infection is legally notifiable.



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44. Mr C denies ever embracing Ms A and moving his hands down to her buttocks at the end of any of their sessions. The only incident Mr C recalls was when Ms A pressed her abdomen suggestively into him on one occasion. Mr C advised that he simply ignored this. He does not recall when this occurred. He also submitted to HDC that he has low levels of testosterone and low libido so, in his view, the scenario outlined by Ms A could not have been possible.

45. Ms A believes that this was the last time she paid for any of her counselling sessions, a decision she made which she advised was not challenged by Mr C. Appointments continued to be made like counselling sessions.

46. Ms A recalls from then on having sexual intercourse with Mr C each time she saw him. She stated that each interaction was quite formal and structured. First, they would have their therapy session, then Mr C would begin to make sexual advances and invite her to lie with him or have sex. Ms A stated:

> "It was a dual relationship which I thought at the time would work for me. Besides, I was apt to dissociating from unpleasant sexual experiences so I didn't really recognise or want to believe in the harm. I often felt like I was receiving an experience that would heal me because I trusted [Mr C] knew what was best for me".

47. Ms A remembers that subsequent visits to Mr C continued to involve a time limit. At the end of the allocated time he would indicate that it was time to leave. She noted:

> "[It was inhospitality you would not expect] from a friend but it is consistent with my expectations of a therapist, so I believed I was in a half-and-half client/lover relationship."

48. She recalled that Mr C had already begun a sexual relationship with her in 2003, around the time a close relative died and Ms D had left him. Ms A considered that he was perhaps grieving the loss of his partner and his relative at that time. She recalled a specific sexual encounter in July 2003 as on that day she had travelled to visit her daughter in hospital. Ms A considers that their sexual relationship continued for an "absolute minimum" of three years.

49. Ms A noted that she never objected to having sex, and that her own background abuse issues explained her interest in going along with Mr C's desires. She described these as "co-operative responses" and a direct reflection of her sexual abuse history. Ms A stated that she "admired, respected and trusted" Mr C, and that he exploited this to satisfy his sexual desires. Ms A now feels sexually violated by him.

*2007 onward*

50. Ms A stated that a sexual relationship continued until late 2006. She felt she and Mr C had a "close friendship". She continued to seek counselling from Mr C by both telephone and email. However, she explained that the way Mr C interacted with her during this time was very confusing and upsetting. She explained that when his relationship developed with his new wife (he married in 2007) she sought clarification of her own relationship with him because she "didn't want to be abandoned by this



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person that [she] had become very emotionally dependent on and with whom [she] thought [she] had a valuable friendship". She started to feel "manipulated and deceived, blaming [herself] for the tensions and changes in [their] relationship". She advised that by April 2007 communications with Mr C had begun to fade.

51. Mr C advised that while the friendship continued during this time, they were no longer intimate after 2006. He maintained that he was not providing counselling services to her or anyone. He agreed that the friendship slowly began to fade, and that after the sexual relationship stopped they "parted awkwardly". In hindsight, after reviewing the old emails from the Christmas/New Year period 2006/2007, Mr C stated that he realised "to my chagrin how blind I was to what was happening … I kept responding as if all she was asking for was reassurance that she and I would remain good friends, as artists and writers, but really she was asking for our relationship to be redefined in the light of what was happening with [his new partner]. I am appalled at how I shied away from dealing with that properly."

52. Mr C commented that, despite the difficulties in the relationship, he continued to receive friendly emails and updates from Ms A over the next two years, including her intention to respond to his invitation to visit him and his new wife. It was in this period that he wrote his letter in support of Ms A's application for child custody. However, the last contact he had from her was an email on 27 March 2009.

53. Ms A first approached registered psychologist and academic Ms B in May 2007, because she wanted to discuss her experiences of psychologists, including Mr C. Ms A had learned of Ms B through the media. By 2009 Ms A independently decided to make a formal complaint, and Ms B complained to HDC on Ms A's behalf.

*Acknowledgement of sexual relationship*

54. Mr C acknowledges that he did have a sexual relationship with Ms A. He denies that this was while he was still providing her with counselling services. Although he cannot recall the exact dates, he does not believe that he had sex with Ms A until sometime in mid-2006, and that it occurred on only two occasions — probably months apart — and approximately two years after he stopped providing her with counselling services. He emphasised that he "certainly did not sustain a sexual relationship" with Ms A over a period of years.

55. Mr C responded to HDC that he was appalled with himself for having sex with Ms A, which he knew was wrong and for which he was very sorry. He also commented that he mistakenly believed that Ms A wanted him to have sex with her. He indicated that what he did was wrong but there was no malice in what he described as a "misguided act of genuine affection", greatly influenced by his mental state being impaired by his ongoing illness, which had begun after his 2003 surgery. He refutes any notion that his actions were deliberately exploitative.

56. Mr C considered that he did not fully take into account Ms A's sexual abuse history, and that she might seem to make sexual advances which did not represent her real wishes. He acknowledged that he still had a continuing duty of care after she ceased to be a client, and he failed in that duty. He fully regretted having added to the distress



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in Ms A's life. He was deeply ashamed and took full responsibility for his actions, indicating that he would never practise counselling again.

57. Mr C acknowledges that there is no documentary evidence stating when he ceased providing Ms A with counselling services, but says that he recalls it being mid-2004. (He also considers that an email dated 9 April 2006 from Ms A which states "… self-therapy worked well last week. I've become quite a good [self] counsellor …" supports his assertion that he was not counselling her at that time.)

58. Mr C considers that Ms A made sexual advances toward him on a number of occasions, and that around 2006 she seemed to be quite flirtatious at times. He advised that he does not believe that this makes Ms A responsible for what happened. He also added that he did not give adequate and proper thought to the possible reasons underlying what he now thinks was probably unconscious seductive behaviour on the part of Ms A.

59. In relation to the delirium he suffered affecting his clinical and personal judgement between 2003 and 2005, Mr C stated:

> "I am absolutely certain that if I had not been suffering from intermittent recurrences of delirium following cardiac surgery the events which are the subject of this complaint would never have occurred."

60. Mr C commented that he was hallucinating and deluded from time to time. His judgement was seriously impaired, and this "came and went intermittently with declining frequency over the next three or four years". He advised HDC in his responses that he intended to find a neurologist or psychiatrist to consult about this. No information has been provided by Mr C to show that he sought any medical assistance or follow-up regarding ongoing intermittent delirium symptoms in the period after 2003. Mr C advised HDC that he did not get a report from a specialist as he believed HDC would take his account seriously without one. He stated that he believed that if HDC thought it would be helpful to obtain a specialist report, he would have been informed accordingly.

61. Mr C also commented:

> "I realise that this material on delirium may cast doubt on the reliability of my memory of the events in the complaint. But it may also be an indication of how much or how little I understood what I was doing right up to the end of 2006 and beyond."

*Apology*

62. On 19 November 2009, three days after HDC sent a letter to Mr C requesting his initial response to the complaint; he attempted to contact Ms A via text and email. In an early response to HDC during preliminary assessment of the complaint, Mr C outlined that he then attempted to contact Ms A directly by email (in December 2009) to send her a half-page apology letter, but this was not successful in reaching her. He then forwarded the apology to HDC, who in turn passed this on to Ms A. She did not accept Mr C's apology. He also offered to pay back fees charged to Ms A, which he



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explained to HDC was a gesture, rather than an attempt to undo the work they had done in the time he had provided counselling to her. He considered this to be approximately $1680 (based on his estimating seven sessions a year for four years between 2000 and 2004).

63. Once a decision had been made to formally investigate this matter, Mr C emailed HDC a number of submissions. In one of his later emailed submissions to HDC, Mr C indicated that he had cancelled his registration as a psychologist a few years before he closed down his counselling practice (in mid-2004). However, as mentioned earlier (see paragraph 12) the Psychologist Board advised that while having not had an annual practising certificate since 1995, he remained on its active register up until August 2006.

64. In another email to HDC, Mr C concluded:

> "At the end of the day, no matter what reason says, I will always blame myself for what happened with [Ms A]. By having sex with an ex-client only about two years after counselling ceased, I did something which is quite wrong in my own private set of values. Within myself, I can't get past that. Then added to that is chagrin at having so badly misread her intentions, and shame for having failed to take adequate account of her vulnerability because of her earlier sexual history — to say nothing of my foolishness at being so easily misled into believing she actually cared for me."

*Key email records*

65. Both Ms A and Mr C submitted substantial material to HDC, which included comprehensive records of email correspondence they exchanged over a long period (particularly between 2005 and 2009). While this material is not a complete record of their exchanges, the emails kept and submitted by both parties (approximately 150 in total) are quite similar, suggesting that the records supplied are likely to be a very good proportion and representation of what was exchanged. These exchanges with Ms A, while referring to many other unrelated medical issues Mr C had, do not refer specifically to delirium problems or clarify exactly when he ceased providing counselling services. I have outlined below what I consider to be some of the key emails.

66. Emails between 2000 and early 2004 are sparse and centre on issues such as counselling appointment times, news, and some literary discussion. Ms A explained that these were sparse because they were sent from her partner's computer. Once she acquired her own computer, in 2005, the nature and frequency of the content changed owing to greater freedom and access.

67. On 17 August 2005, Mr C began signing off his emails to Ms A in an affectionate manner, such as "XXXLoveXXXX[Mr C]XXXX". Similar sign-offs continued to be exchanged from this point on until about mid-2007.

68. On 29 September 2005, Mr C mentioned that he was sometimes thinking of Ms A erotically. About a month later, he sent Ms A an email which contained a sexually



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explicit poem. Mr C explained in his responses to HDC that Ms A was very open about sex and it was not unusual for them to have this type of exchange with each other.

69. On 25 October 2005, Mr C wrote "I am startled by the sudden access of intimacy to a new level with you and relieved by it". Mr C denies that this email was an indication that a sexual relationship had begun, explaining that what they were emailing to each other and what was actually happening physically was quite different. It was not until some time after the emailing began that the relationship became physical. Ms A considers that the reference to a new level concerned the nature of their sexual activity rather than the beginning of intimacy.

70. On 23 February 2006, Mr C wrote regarding a visit that seems to have occurred on 17 February 2006 "that was a lovely visit ... [then a reference to enjoying her artistic work] … above all, it was very good to enjoy the pleasure we take in each other".

71. Mr C later commented to HDC that the 23 February 2006 email made him wonder if their relationship was "becoming erotic some months sooner than [he] had remembered" but that he was still fairly sure that the pleasure he referred to was in painting and drawing and the happiness of having someone who understands art. He also stated, "I wouldn't be surprised if [Ms A's] memory [is] better than mine."

72. The emails continued regularly over the next year. Generally the content of these emails is indicative of an exchange between close friends but with intermittent sexually suggestive and explicit comments particularly on 30 and 31 August 2006.

73. In an email on 3 January 2007, Mr C expressed to Ms A his feelings about his current partner (soon to be wife), stating how happy he was in his relationship. On 7 January 2007, in response to a question Ms A asked about their relationship, he emailed that:

> "[t]he short of it is I don't have plans for our friendship. To my knowledge it never has had plans — it has just been a normal muddly old meandering friendship, with some enjoyable sex, some confidences, some unexplained absences, some sharing about art and relationships, and some support in times of need; and I don't see any reason to suddenly start planning it now."

74. On 21 April 2007, Mr C emailed Ms A news that he had married the week before. On 30 May 2007, Ms A reacted to this by emailing Mr C the following:

> "I've said before how I've needed clarity over our friendship and that's what I was hoping to achieve when I phoned you. It suddenly felt like an uncomfortable friendship … I will say that I've been pretty confused and even more confused when I heard you got married … I thought friends shared significant life events with each other. I've been pretty confused and a bit shattered. Just think it got too awkward for you …"

*Response to provisional opinion*

75. In his response to my provisional opinion, Mr C outlined that the report showed him "very clearly the enormity of the wrong [he] did to [Ms A]". Mr C reiterated his



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assertion, as part of a plea in mitigation, that he was impaired and experiencing ongoing bouts of delirium (and a concurrent lack of insight and memory of certain events as a consequence) on the occasions when sexual activity occurred with Ms A.

*Recommendations met*

76. Mr C complied with the proposed recommendations outlined in my provisional report and supplied HDC with a further formal apology to Ms A, together with a cheque refunding fees paid ($1680) — both of which were forwarded to Ms A by HDC. Mr C undertook never to practise again.

## Opinion: Breach — Mr C

77. There is no dispute that Mr C and Ms A engaged in a sexual relationship. However, it is unclear when exactly this commenced. I have been provided with two very different and conflicting accounts. It would appear that both parties' recollection and account of exactly what occurred, and when, is not completely accurate, clear, or reliable — which is hardly surprising given the time that has elapsed since the events in question, the complex personal contexts in which the relationship developed, and the lack of formal documentation that exists. In the circumstances, it is extremely difficult to determine exactly when Mr C stopped providing counselling services to Ms A, when they began their sexual relationship, and when the relationship ended. However, Mr C has admitted that he did have a sexual relationship with Ms A.

78. I acknowledge that Mr C suffered complications from his heart surgery in 2003 and that these were quite marked in the period immediately after the surgery, affecting his behaviour and recall.

79. It was inappropriate for Mr C to have a sexual relationship with Ms A, regardless of whether he terminated the professional relationship before entering into a sexual relationship with her, or whether it was concurrent to their therapeutic relationship. The sexual relationship was inappropriate because Mr C knew of Ms A's particular vulnerability owing to her history of sexual abuse. Furthermore, he took advantage of her when he owed her a fiduciary duty.

*Vulnerable client*

80. Ms A was a particularly vulnerable client. Her primary reason for seeking counselling was to address her unresolved issues relating to her history of being sexually abused by her father. Ms A disputes Mr C's account that initially Ms D provided counselling relating to the sexual abuse, and Mr C counselled her for the emotional abuse she suffered. Regardless of this, it is clear that Ms D and Mr C discussed with each other the content of their sessions with Ms A. Ms D advised HDC that she did informally speak to Mr C about Ms A's history of sexual abuse. Mr C has also stated that he was aware of Ms A's previous relationship with her former psychologist. I note that when Ms D dissolved her counselling partnership with Mr C, he continued to counsel Ms A, and it is therefore highly likely that her history of sexual abuse was discussed in these sessions.



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81. Despite knowing that Ms A was a vulnerable client, Mr C did not maintain appropriate boundaries. The importance of boundaries, particularly in a counselling relationship, has been noted previously, in Opinion 03HDC06499:

> "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. Mr A as a counsellor aware of the relevant ethical codes, could reasonably be expected to have recognised the need to maintain professional boundaries, and to be alert to situations where they were under threat and becoming blurred."[5]

82. In my opinion, it was inappropriate and unwise for Mr C to enter into any form of close personal relationship with Ms A, particularly in light of his clear awareness of the complex issues surrounding her history of sexual abuse (one of the very reasons Ms A sought counselling in the first place).

*Fiduciary relationship and obligations*

83. 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.

84. Clearly, Ms A was extremely emotionally vulnerable, and she trusted and relied heavily on Mr C (who acknowledged a risk of dependence). A power imbalance resulted and existed throughout their counselling and personal relationship. Mr C abused this power, which was inappropriate and wrong, and had a detrimental effect on Ms A. Mr C's actions jeopardised the inherent relationship of trust that is formed between a counsellor and a client.

85. A previous Opinion (06HDC07873) stated:

> "A therapist who violates the boundaries of the therapist/client relationship thereby exploits the client.[6] The client is dependent on the therapist to honour his or her professional fiduciary obligations to meet the client's needs before his or her own."[7]

86. While Ms A was a willing participant, in that she "never objected to sex", Mr C should have honoured his fiduciary obligations to her by not engaging in a sexual relationship with her. I note the following:

> "Exploitation occurs when a person in a fiduciary relationship (such as a counsellor) takes advantage of another for his or her own ends. It is irrelevant to a

[5] See Opinion 03HDC06499 (11 February 2004), p 11.
[6] HPDT 27/OT05/14D, para 54, www.hpdt.org.nz.
[7] See Opinion 06HDC07873 (6 December 2006), p 3.



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> finding of exploitation whether the person to whom a fiduciary duty is owed is a willing participant."[8]

87. Here, there was a professional fiduciary relationship between Mr C and Ms A. By engaging in a sexual relationship with Ms A, Mr C did not maintain appropriate boundaries and therefore violated his fiduciary obligations.

*Exploitation*

88. In my opinion, Mr C breached Right 2 of the Code of Health and Disability Services Consumers' Rights (the Code)[9] as he exploited Ms A by engaging in a sexual relationship with her. It was Mr C's view that the sexual relationship began after he terminated the therapeutic relationship. Even so, in these circumstances his actions were still entirely inappropriate as he knew of Ms A's particular vulnerabilities and took advantage of the fiduciary relationship. Knowing this information, he should never have entered into a sexual relationship with her.

*Ethical obligations*

89. When Mr C retired from his senior academic position in 1993 and decided to provide occasional private counselling from home, he was not affiliated to the New Zealand Association of Counsellors (NZAC).

90. Despite not being a member of a relevant association, he was nonetheless bound by the standards in the Code. Right 4(2)[10] provides that every consumer has the right to have services provided that comply with ethical standards. I note that in *Director of Proceedings v Mogridge*[11] the Tribunal stated that:

> "[c]learly 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 …"

91. In my view, Mr C, a health provider, acted unethically when he had a sexual relationship with Ms A and, by doing so, he breached Right 4(2) of the Code.

*Director of Proceedings*

92. While Mr C's actions reflect a serious breach of trust in the client–counsellor relationship, I have not referred Mr C to the Director of Proceedings. In not doing so, I have taken into account of a number of factors, including: his insight and acknowledgement that he was wrong to enter into such an intimate relationship with Ms A; his apology and sincere expressions of shame and regret; this is the first complaint received by HDC concerning Mr C; and Mr C's reimbursement of Ms A's fees. Furthermore, in light of Mr C's age, the fact that he is now retired, having not practised for a number of years, and the fact that he has given an undertaking that he

[8] See Opinion 03HDC06499 (11 February 2004), p 9.
[9] Right 2 of the Code states: "Every consumer has the right to be free from discrimination, coercion, harassment, and sexual, financial or other exploitation."
[10] 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."
[11] [2007] NZHRRT 27 (21 December 2007) at [102].



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will never practise again, I will not, aside from the follow-up actions outlined, be pursuing the matter further.

## Follow-up actions

- An anonymised copy of this report (except for Mr C's name) will be sent to the New Zealand Association of Counsellors, the New Zealand Psychologists Board, and the New Zealand Association of Psychotherapists (as Mr C has provided these services throughout his career).

- An anonymised copy of this report (except for Mr C's name) will also be sent to the District Health Board..

- 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.



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