Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

A Decision by the Deputy Health and Disability Commissioner

(Case 21HDC02415)

Introduction

1. The Nursing Council of New Zealand received a notification from a primary health organisation (PHO) about the conduct of one of its former employees, a registered nurse (RN), RN A.

2. RN A provided mental health services to a prisoner, Mr B.

3. The PHO alleged that RN A had an intimate relationship with Mr B, and that a sexual encounter occurred between RN A and Mr B on 30 September 2021.

4. The Nursing Council of New Zealand referred the matter to the Health and Disability Commissioner (HDC). A Commissioner-initiated investigation was commenced pursuant to section 40(3) of the Health and Disability Commissioner Act 1994.

5. This is the opinion of Deputy Commissioner Dr Vanessa Caldwell and is made in accordance with the power delegated to her by the Commissioner.

6. The following issues were identified for investigation:

- *Whether the PHO provided Mr B with an appropriate standard of care in 2021.*
- *Whether RN A provided Mr B with an appropriate standard of care in 2021, and maintained professional boundaries.*

How matter arose

7. The PHO was contracted to provide mental health services to the prison and was responsible for providing clinical oversight and support to 'improving mental health clinicians' (IMHCs). IMHCs provide mental health services to prisoners who may have, or may be vulnerable to developing, a mental health need within the prison environment.

8. Up to 10 sessions are allocated to provide the prisoners with evidence-based psychological intervention and skills to help them overcome their identified psychological distress. In special circumstances, additional sessions are allocated when a prisoner is in crisis or needs more time to complete specific treatment or intervention.

9. On 9 September 2019, RN A was employed by the PHO as an IMHC. She was based at the prison.

10. RN A had been providing mental health services to Mr B, a prisoner, from 1 October 2019.

11. Between 1 October 2019 and 30 September 2021, RN A conducted a total of 105 sessions with Mr B, eight of which were conducted by telephone due to COVID-19 restrictions at that time.

12. In 2021, Mr B was found with contraband[1] and was suspected of introducing contraband to the prison. As a result, the prison's Site Emergency Response Team (SERT) began to monitor Mr B's telephone calls. Through this surveillance, it became apparent that there was a personal relationship between RN A and Mr B.

Opinion: RN A — breach

Introduction

13. As a healthcare provider, RN A was required to provide services to Mr B that complied with legal, professional, ethical, and other relevant standards. The applicable standards are those contained in the Nursing Council of New Zealand's Code of Conduct for Nurses (Code of Conduct for Nurses), and the Nursing Council of New Zealand's Guidelines on Professional Boundaries (Guidelines on Professional Boundaries).

14. For the reasons set out below, I find that professional boundaries were not maintained appropriately by RN A during and after her professional relationship with Mr B.

Alleged boundary violations

'Ms X'

15. Prisoners are allowed to make phone calls to phone numbers that have been approved by the prison service. On 5 July 2021, a phone number listed to 'Ms X' was approved by the prison service for Mr B.

[1] Items that, while not illegal, are prohibited as they may be used inappropriately by prisoners. This includes alcohol, communication devices, drugs, drug paraphernalia, tattoo equipment, weapons and other items.

16. From the outset, I address the issue as to the identity of 'Ms X'. I have concluded that 'Ms X' and RN A is one and the same person. In making this finding, I have relied on the following supporting information:

- Through social media searches carried out by the prison service, it was established that RN A used a Pinterest account with a user name '@[Ms X]'.

- The PTMS report stated that on 30 September 2021, during a phone call at 7.28am from Mr B to the phone number listed to 'Ms X', 'Ms X' said: '… I just got to work, I'm early today … It's just as well you called me before I went in …'

  The phone call was disconnected at 7.30am, and one minute later at 7.31am, video footage of the prison car park showed RN A exiting her car and walking towards the gatehouse.

- The PTMS report stated that on Sunday, 1 August 2021, during a phone call at 4.34pm from Mr B to the phone number listed as 'Ms X', 'Ms X' said: 'Hey I might be finishing work early like at half past three on Monday and Tuesday.'

  The 'Monday' and 'Tuesday' referred to in this phone call were Monday, 2 August and Tuesday, 3 August 2021.

  Records show that on Monday, 2 August and Tuesday, 3 August 2021, RN A signed out of work earlier than usual, at 3.19pm and 3.05pm respectively.

- The PTMS report stated that on 17 September 2021, during a phone call at 10.18am from Mr B to the phone number listed as 'Ms X', 'Ms X' said that she was 'working from home today'. Records show that RN A did not visit the prison on 17 September 2021, and that she had no on-site appointments scheduled on that day.

17. It follows that the phone conversations that occurred between 'Ms X' and Mr B (discussed further below) were in fact phone conversations between RN A and Mr B.

Phone calls between 18 July 2021 and 30 September 2021

18. HDC was provided with a copy of the Prisoner Telephone Monitoring System (PTMS) disclosure document (PTMS report) containing details of some of the phone calls made by Mr B to the number listed to 'Ms X'.

19. Between 18 July 2021 and 30 September 2021, the phone calls between Mr B and 'Ms X' were personal in nature. The PTMS report stated that 'throughout the calls it is apparent a sexual relationship is taking place between [Mr B] and [Ms X] … This is illustrated by various instances of covert conversations.'

20. During the phone calls, Mr B and 'Ms X' called each other by nicknames. They called each other 'my darling'. Mr B called 'Ms X' 'my baby', and 'Ms X' called Mr B 'beautiful' and 'gorgeous'.

21. Mr B and 'Ms X' had a number of phone calls of an intimate nature, including on 18 July,[2] 1 August,[3] 2 August,[4] 28 September,[5] and 30 September 2021.[6]

22. There were no discussions during any of the phone calls about inappropriate boundaries or attempts by RN A to terminate any of these phone calls with Mr B.

Video footage and incident on 30 September 2021

23. HDC was provided with, and has viewed, video footage from the prison showing inappropriate physical contact between RN A and Mr B.

24. On 30 September 2021, the video footage shows RN A and Mr B leaving the interview room to an area not completely visible to the camera (a 'black spot' area). HDC has viewed this footage, which shows, through a glass door panel, RN A lying on the ground, facing upward, and Mr B lying on top of her. They appear to be in this position for approximately one minute and 30 seconds before they both get up to their feet.

25. The video footage was also viewed by Ms C, Prison Director, Mr D, Security Manager, Mr E, Primary Health Manager of the PHO, and the Chief Executive Officer of the PHO. Their descriptions of what they see on the video footage are consistent with HDC's description set out above.

Email to Mr B on 4 October 2021

26. Friends and family of prisoners can communicate with them by using one-way email communication. The relevant prisoner's full name and prison record number must be included in the email subject line. Emails are sent to a central email address and are then passed on to the relevant prisoner by the prison service. Emails received are read and moderated by staff to ensure the security and good management of the prison.

27. On 4 October 2021, an email showing it was sent 'From: [RN A]' was sent to the prison's central email address containing details of Mr B's full name and prison record number in the subject line. The email stated:

[2] The PTMS report states that talk turned to Mr B and 'Ms X' 'reminiscing about previous sexual encounters, including a supermarket carpark where they were apparently witnessed by a trolley pusher'. Mr B also said, 'Can't wait to come home and have cooking,' to which 'Ms X' responded, 'If the food ever gets made.' Mr B discussed 'interrupting' 'Ms X' while cooking and said: 'It's all about the timing with the cooking and the love making.' 'Ms X' responded, 'Heaven.'

[3] Both Mr B and 'Ms X' said 'I love you' to each other. Mr B said: 'Please have a safe drive back, I love you, I miss you, I got you and I love us madly and badly to [expletive] pieces.' 'Ms X' responded: 'I love you and I miss you so much, I got you and I love us madly and badly to pieces.' The phone call ended with 'Ms X' saying: 'Goodnight my darling, always in my heart, always in my mind. I'm always there for you beautiful, I love you.'

[4] Sexually explicit comments were made by both Mr B and 'Ms X'. The PTMS report states: '[C]alls continue regularly from this point at an average of 3 times a day. Often extremely graphic and sexual in nature.'

[5] The PTMS report states that both Mr B and 'Ms X' tell each other 'how much they love each other', and that 'Ms X' said that she had been late to work that morning 'due to them having phone sex before work'.

[6] Mr B said, 'Take your knickers off,' to which 'Ms X' responded, 'I can't I have to go in, I'm sorry, I hate having to say no, you know that.' She then giggled. Mr B and 'Ms X' told each other that they love each other before the phone call was disconnected.

> 'Hi my darling, I don't even know if you will get this. I don't know what is going on for you there I just hope you are ok and that nothing bad has happened to you. I don't know what you know about what happened for me, hopefully someone has talked to you. Hell I don't even know if I will ever hear from you again. Train wreck eh! … Be safe my darling and I hope I hear from you one day. If I don't, well I still wouldn't change a thing. Ilywamh, imylsc, igyana, ilumabtmfp
>
> xx'

28. Mr D told HDC that on 5 October 2021, he was informed that Mr B had added contact details for 'RN A' to his list of approved contacts.

Allegations put to RN A and resignation

29. Ms C told HDC that on 30 September 2021, after she had been informed about the video footage by the security manager, she advised RN A that she had concerns for her safety, as she believed her to be in an inappropriate relationship with Mr B. Ms C advised RN A that she had viewed the video footage of her and Mr B engaging in physical contact, and that if RN A 'had been got[7]', they might be able 'to help her work through this'.

30. Ms C said that RN A did not engage in the conversation. Ms C stated that RN A did not wish to view the video footage and made no comment, other than saying that she felt that Ms C had already made up her mind and that nothing she could say would make any difference.

31. Similarly, Mr E told HDC that RN A 'did not respond to the allegations and offered nothing to refute these claims, when prompted'.

32. Ms C stated that she then asked RN A to accompany Mr E and Mr D to her office to collect her personal items and return her security equipment. RN A's access to all prisons was suspended with immediate effect, and she was escorted off site by Mr D.

33. On 1 October 2021, RN A resigned from the PHO. Her notice of resignation stated:

> 'Please acknowledge my resignation from the position of Improving Mental Health Clinician at [the prison]. As you are aware, I am unable to give the one month notice as per my contract. I sincerely apologise for the difficult situation I leave behind.'

34. On 5 October 2021, RN A met with the PHO to discuss her clinical cases that needed to be handed over to another IMHC. The PHO provided RN A with an additional funded supervision session (which occurred on 12 October 2021, as discussed further below), and Employee Assistance Programme[8] services, if required.

[7] A term used in a prison environment where a person is manipulated by a prisoner into doing something they do not wish to do, such as unprofessional or illegal acts that breach the Code of Conduct.
[8] A confidential service established to assist staff members to get help with health and personal problems that are affecting their work.

Relevant standards

35. The Nursing Council of New Zealand's Code of Conduct states that nurses must maintain professional boundaries between themselves and health consumers, and that nurses must not engage in sexual or intimate behaviour or relationships with health consumers in their care.

36. The Nursing Council of New Zealand's Guidelines on Professional Boundaries (see Appendix A) provides that nurses must be aware of their professional responsibility to maintain appropriate personal, sexual and financial boundaries in relationships with current or former health consumers. It states:

> 'The nurse has the responsibility of knowing what constitutes appropriate professional practice and to maintain his or her professional and personal boundaries.'

37. Similarly, the prison service's Code of Conduct states that appropriate professional boundaries and relationships must be maintained with offenders. The Code of Conduct lists some examples of inappropriate behaviour or relationships, including a personal or sexual relationship with a prisoner with whom an employer or contractor has had contact in the course of their duties.

Conclusion

38. It is clear from the evidence that RN A and Mr B had a personal and intimate relationship. Between 18 July and 30 September 2021, RN A and Mr B engaged in frequent phone contact, and a number of these phone calls contained sexually explicit conversations. RN A is also seen on camera footage engaged in close physical contact with Mr B, and on 4 October 2021, she sent him an email of a nature not appropriate between clinician and patient.

39. The above conduct is unacceptable and contravenes the Code of Conduct for Nurses, the Guidelines on Professional Boundaries, and the prison service's Code of Conduct.

40. In addition to the non-compliance with the above relevant standards, RN A's relationship with Mr B breaches fundamental ethical standards, given the power imbalance between clinician and patient. I do not consider that such a relationship being consensual alters this fact. This is supported by the Guidelines on Professional Boundaries, which state that however consensual the relationship appears to be, there is a power imbalance that will always mean that there is the potential for abuse of the nurse's professional position and harm to the health consumer.

41. For the above reasons, I find that RN A breached Right 4(2)[9] of the Code of Health and Disability Services Consumers' Rights (the Code).

[9] Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.

Opinion: PHO — no breach

42. I have undertaken a thorough assessment of the information gathered. For the reasons set out below, I consider that there were no broader systems or organisational issues at the PHO, and I find that the PHO did not breach the Code.

Supervision

43. RN A reported to an IMH Team Leader, who reported to Mr E, Primary Mental Health Manager of the PHO.

44. The PHO told HDC that it had 'no suspicion of any professional breach from [RN A]' up until the event that occurred on 30 September 2021. the PHO told HDC:

> '[The Team Leader] shared an office with [RN A] and had a supportive clinical relationship and would informally discuss cases. [The Team Leader] had high trust with [RN A] and did not suspect for one moment [any] breach of professional boundary.'

45. Pursuant to a Clinical/Professional Supervision Agreement (Supervision Agreement) dated 15 April 2020, RN A received clinical supervision from a Drug and Alcohol Practitioners Association Aotearoa[10] (dapaanz) Accredited Clinical Supervisor.

46. The Clinical Supervisor told HDC that between 15 April 2020 and 12 October 2021, she had a total of 13 supervision sessions with RN A, and stated:

> 'I was informed of the issue in case by [RN A] herself on [7 October 2021], when she told me that she was no longer in employment with [the PHO] and so supervision would cease. At this stage my understanding was that she had been accused of [some] sort of professional ethics breach and her manager, [the Nursing Council of New Zealand] and [the New Zealand Nurses Organisation] were all involved and an investigation of some sort was underway.
>
> As [RN A] was distressed and due to poor cell phone coverage to discuss this in any further detail (she was on the side of a road [in a rural area]) she agreed to a final termination session. This was arranged with permission from her manager for [12 October 2021], which was after it had been reported.'

47. The Supervision Agreement stated:

> 'Responsibility for the supervisee's practice remains with the supervisee. It is agreed that the line management supervision is the responsibility of the supervisee's manager and not the supervisor …
>
> It is accepted practice that supervision will occur at least monthly. Review of the supervision arrangements will be 3 monthly in the first instance, thereafter at regular

[10] The membership association representing the professional interests of the addiction workforce in New Zealand. Dapaanz advises that supervision should be provided a minimum of every four weeks, and more frequently for new or inexperienced practitioners, or if the work is complex.

intervals as part of the supervision relationship and to be re-signed on the anniversary of the agreement.'

Prison service Code of Conduct

48. The Code of Conduct stated that its purpose is to outline the high standard of behaviour that is expected of all people who work at the prison. The Code of Conduct also applies to contractors, consultants or volunteers who work on the premises.

49. The Code of Conduct stated:

> 'To be accountable, at [the prison service] you must … maintain appropriate professional boundaries and relationships with offenders …'

50. The Code of Conduct listed some examples of conduct that fall below its expectations:

> '**Inappropriate behaviour or relationships (internal or external).** Failing to maintain professional boundaries with prisoners or offenders … Examples include having financial, personal or sexual relationships with an offender, a prisoner, or an ex offender or prisoner with whom you have had contact in the course of your duties …'

PHO policies

51. The PHO told HDC that its policies, as well as the prison service's Code of Conduct, are provided to staff to review as part of their induction.

52. Staff are required to sign a form to acknowledge that they have received, read and understand the prison service's Code of Conduct, and that if at any time they are unclear about any of the content, or are at risk of breaching the Code of Conduct, they can discuss it with their manager, or any other Department representative.

53. On 11 October 2019, RN A signed a form acknowledging that she had received, read, and understood the prison service's Code of Conduct.

54. The PHO also told HDC that all IMH staff are required to attend a 'Getting Got' seminar as part of their induction. In addition, it said that potential boundary breaches are discussed regularly during team meetings.

55. The PHO's Service Provision Framework is used to help orientate new staff and to facilitate part of a wider quality improvement programme. The Service Provision Framework contains an audit tool that is used to monitor compliance with the documented agreed standards and procedures.

56. The Service Provision Framework stated:

> 'It is the responsibility of the organisation to provide supervision to their employee … Each IMH clinician is to participate in their own professional supervision on a regular basis.'

57. The PHO did not have a formal supervision policy in place at the time of events, and any requirements for supervision were contained in its Service Provision Framework.

58. The PHO told HDC that all IMHCs were engaged in funded supervision and were informally encouraged to engage in monthly supervision sessions.

My opinion

59. The PHO had an obligation to provide Mr B with appropriate and safe care. I consider that in this case, this meant that the PHO had a responsibility to ensure that RN A was aware of her obligations under the prison service's Code of Conduct and respond appropriately if and when it became aware of any cause for concern.

60. As evidenced by the signed Acknowledgement Form dated 11 October 2019, I am satisfied that RN A was aware of the prison service's Code of Conduct. I acknowledge that the PHO also requires staff to attend a 'Getting Got' seminar as part of their induction, and that potential boundary breaches are discussed regularly during team meetings. I consider this appropriate.

61. As a registered nurse, RN A was bound by her professional obligations under the Code of Conduct for Nurses and the Guidelines on Professional Boundaries. The PHO had a reasonable expectation that RN A would comply with her obligations to maintain professional boundaries with patients under her care.

62. In my view, RN A's actions were individual failings, and it is apparent that she took steps to keep the relationship secret (by allowing inaccurate or misleading information to be used ('Ms X') to engage in phone contact with Mr B, by not disclosing her relationship, and by not seeking support from her manager or external clinical supervisor).

63. I note that RN A did not receive monthly external clinical supervision sessions, as set out in the supervision agreement, but note that this responsibility rested with RN A. As set out in the PHO's Service Provision Framework, it is the responsibility of each IMHC to access and participate in their own professional external supervision.

64. Accordingly, I have no reason to believe that the PHO was, or should have been, aware of the relationship before 30 September 2021.

65. I commend the PHO for acting promptly and for taking immediate action once it became aware of events. I also commend the PHO for the support offered to RN A, including providing her with an additional supervision session and Employee Assistance Programme services at the organisation's expense. This was a compassionate response to a challenging situation. Further, I commend the PHO for reviewing its clinical processes, and for developing and implementing a formal Supervision Policy, which is discussed further below.

66. Having considered these factors, I find that the PHO did not breach the Code.

Responses to provisional opinion

RN A

67. RN A was given an opportunity to respond to the sections of the provisional opinion that relate to her.

68. RN A does not accept 'all the detailed findings within the report', but accepts the conclusion reached at paragraph 41 of this report.

69. RN A acknowledges that her relationship with Mr B breached nursing standards, and apologised for the harm that this has caused.

70. RN A accepts the breach finding and acknowledges the proposal to be referred to the Director of Proceedings.

PHO

71. The PHO was given an opportunity to respond to the provisional opinion and had no other comments to make.

Subsequent events and changes made since events

RN A

72. The Nursing Council of New Zealand told HDC that RN A requested that her name be removed from the register of nurses, and she has been suspended from practice.

PHO

Supervision Policy

73. Since the events, the PHO has developed and implemented a separate Supervision Policy (prior to the events, any requirements for supervision were contained in its Service Provision Framework). The purpose of the Supervision Policy is to ensure that staff of the PHO receive appropriate and effective external supervision to ensure ethical, quality service provision to clients.

74. The Supervision Policy states that external supervision is to occur at least monthly during one hour of protected time. It states that it is the role and responsibility of the supervisee to access regular professional external supervision that is appropriate and consistent with their practice, and to inform the supervisor of any ethical or safety issues that arise in practice.

75. The Supervision Policy also states that it is the role and responsibility of the managers to collaborate with external supervisors to ensure that organisational and professional goals are being achieved, and to initiate the external supervision process for all new staff members.

Review of clinical processes

76. The PHO told HDC that it has reviewed its clinical processes and has developed a 'ten-point plan' and guidelines with a focus on 'protecting the IMHC from risk to safety/forming unhealthy attachment/seeing paihere for no obvious or helpful therapeutic goal'.

77. As part of the plan, the guidelines for the team leader include reviewing cases coming up to eight to ten sessions and asking each IMHC to present these cases at a weekly team review meeting. If additional sessions are allocated, the team leader will need to ensure that this is reviewed so that cases 'are not seen long term or get missed'. These cases will need to be entered in a case review book at each weekly meeting. If not clinically indicated or required, discharge is to be advised, and the team leader must ensure that this has been done.

78. The team leader will carry out a three-monthly review of the individual IMHC caseload to ensure that cases are not being 'held onto'. In addition, there will be 'whiteboard detailing whereabouts' of clinicians at the prison so that the team leaders will be aware of what the IMHCs are doing and who they are seeing.

79. The PHO said that the above guidelines have become formalised and part of the IMH team's operation. The PHO stated that the guidelines for a three-monthly clinical case review by the team leader, and formalised team case presentation have been incorporated into the PHO's Service Protection Framework.

80. The PHO also said that it will be developing a single point of entry service model, which was forecast for early 2023.

Recommendations

81. Taking into account the changes made by the PHO since events, including the changes to enhance its supervision policy to prevent similar events from recurring, I do not consider that any recommendations are necessary.

82. As RN A is currently suspended from practice, she will be referred to the Nursing Council of New Zealand to decide whether further action is warranted. I recommend that the Nursing Council of New Zealand determine any necessary conditions on RN A's practice, such as supervision, monitoring, and training, and advise HDC accordingly.

Follow-up actions

83. Breaches of professional boundaries, particularly when sexual relationships are involved, are viewed very seriously by HDC. RN A 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.

84. A copy of this report with details identifying the parties removed will be sent to the Nursing Council of New Zealand, and it will be advised of RN A's name.

85. 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.

Appendix A: Nursing Council of New Zealand Guidelines: Professional Boundaries

'Professional relationships are therapeutic relationships that focus on meeting the health or care needs of the health consumer. Nurses must be aware that in all their relationships with health consumers they have greater power because of their authority and influence as a health professional, their specialised knowledge, access to privileged information about the health consumer and their role in supporting health consumers and those close to them when receiving care. The health consumer does not have access to the same degree of information about the nurse as the nurse does about the health consumer thereby increasing the power imbalance …

The power imbalance is increased when the health consumer has limited knowledge, is made vulnerable by their health circumstances or is part of a vulnerable or marginalised group. Some particularly vulnerable consumers are ... those with a mental illness …

Health consumers must be able to trust nurses to protect them from harm and to promote their interests. Nurses must take care to ensure that their own personal, sexual or financial needs are not influencing interactions between themselves and the health consumer. They must also recognise that health consumers may read more into a therapeutic relationship with the nurse and seek to have personal or sexual needs met. It is the nurse's responsibility when this occurs to maintain the appropriate professional boundary of the relationship.

The nurse has the responsibility of knowing what constitutes appropriate professional practice and to maintain his or her professional and personal boundaries. The health consumer is in an unfamiliar situation and may be unaware of the boundaries of a professional relationship. It is the responsibility of the nurse to assist health consumers to understand the appropriate professional relationship. There is a professional onus on nurses to maintain a relationship based on care plans and goals that are therapeutic in intent and outcome …

Sexual relationships with current health consumers are inappropriate. They are unacceptable because they can cause significant and enduring harm to health consumers, damage the health consumer's trust in the nurse and the public trust in nurses, impair professional judgment and influence decisions about care and treatment to the detriment of the health consumer's well being. However consensual the relationship appears to be, there is a power imbalance that will always mean that there is the potential for abuse of the nurse's professional position and harm to the health consumer.'