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And by e mail to policy@hpc-uk.org and consultation@hpc-uk.org

Dear Sir or Madam,

Statutory regulation of psychotherapists and counsellors consultation

1. We are instructed by representatives of the Association for Group and Individual Psychotherapy, the Association of Independent Psychotherapists, the Centre for Freudian Analysis and Research, the College of Psychoanalysts-UK, the Guild of Psychotherapists and the Philadelphia Association ('our clients').
2. As you will know, our clients have a number of concerns about the ongoing decision making process which is likely to lead to recommendations from the Health Professions Council ('HPC') to the Secretary of State and others about future regulation of psychotherapists and counsellors. The latest stage of this process is a consultation on the recommendations of the Psychotherapists and Counsellors Professional Liaison Group ('the PLG') on questions including the way the HPC's register would need to be structured to include psychotherapists and counsellors, which specific titles will be protected, and what transitional arrangements, proficiency standards and threshold entry level qualifications should be introduced. Those responding are also invited to comment on the "potential impact" of statutory regulation by the HPC and future regulation of "other groups delivering psychological therapies".
3. Our clients have submitted their consultation responses as have a number of individuals associated with them. We also enclose, by way of a supplement to those responses, the newly published 'Maresfield Report on the Regulation of Psychotherapy in the UK'. This sets out some of the objections which our clients and other like minded organisations have to HPC regulation.

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4. Our principal reason for writing, however, is to alert you to a further set of concerns - about the legality of the decision making process itself - and to ask whether the HPC plans to do anything to address them before making any recommendations to the Secretary of State. We have advised our clients that these are not matters that can be raised or addressed in the context of the current consultation process. If you consider that advice is wrong, we ask that you both notify us before the consultation closes today and take what follows into account in that process.
5. The focus of these concerns can be summarised as an ongoing, unlawful failure on the HPC's part to gather evidence relevant to, consult upon, consider and then properly determine certain questions which it is obliged to address as part of the recommendation making process envisaged by the Health Act 1999 and The Health Professions Order 2001. These questions are about whether regulation of psychotherapists and counsellors under the 1999 Act is required and, if it is, who should be the regulator. There are also related unlawful failures to consult and issue guidance upon the criteria used by the HPC to answer these questions and to take into account interests protected by the Human Rights Act 1998.
6. We have advised our clients that, if the HPC does not remedy these serious deficiencies in its decision making in response to this letter or otherwise, no lawful recommendations can be made on the regulation of psychotherapy and counselling. In those circumstances, both the ongoing failure and any recommendations that are ultimately made will be amenable to challenge by way of a claim for judicial review in the Administrative Court.
7. Our clients' decision on whether to pursue such a claim will depend on your reply to this letter and you may wish to consider taking legal advice before responding bearing in mind the Practice Direction of April 2009 on pre action conduct. If you are unwilling to give the undertakings sought (see 'Action you are requested to take in the light of this letter' below), our clients would nevertheless like to explore whether there is any means this dispute might be put to independent mediation. We refer you to the 2001 Government ADR pledge in this regard. We would be grateful for your comments on this suggestion.
8. In any event, it is important that the HPC does not react in a defensive way to this letter or further entrench its position. Our clients' primary reason for instructing us to write now is to enable the HPC to ensure that its unlawful failures to date are addressed and that it does not make unlawful decision in future. If it does so, it will avoid both the costs of litigation and further alienating those with whom, regardless of the substance of its recommendations, it should seek a constructive relationship.

Background

9. The present government first indicated their intention to regulate the field of psychotherapy almost a decade ago. The process was properly set in motion in 2007 with the publication of the White Paper ‘Trust, Assurance and Safety - The Regulation of Health Professionals in the 21st Century’ in February that year.
10. In her Foreword, the then Secretary of State for Health, Patricia Hewett, stated the “key principles” underpinning statutory regulation are:
 - (i) safety and quality of care for patients;
 - (ii) a sustained confidence of the public and professions, which would be achieved by ensuring the impartiality of the regulators from government, the professions themselves, employer, educators and all the other interest groups involved in health care;
 - (iii) a commitment to sustain, improve and assure professional standards of the majority of health professionals, as well as identifying and addressing poor practice or bad behaviour;
 - (iv) regulation proportionate to the risks it addresses and the benefits it brings; and
 - (v) that the system of regulation should ensure strength and integrity of health professionals but be sufficiently flexible to work effectively for the different health needs and healthcare approaches and also must be able to adapt to future changes.

(our emphases).
11. Chapter 7 of the White Paper concerns “new roles and emerging professions” which class, surprisingly perhaps, is said to include psychotherapy and counselling. It notes that statutory regulation of psychotherapists and counsellors, amongst others, is considered a “priority” given the widespread delivery of services in this field along with the perceived risks to the public in cases of poor practice.
12. There is no ambivalence in the White Paper on the question of whether there will be statutory regulation. On the identity of the regulator, however, paragraph 7.16 of the White Paper states that:

“The Government’s view is that most new professions should be regulated by the Health Professions Council

which was designed for this purpose and has the most expertise in bringing new professions into statutory regulation and also in regulating a wide range of professions within a common system.

Psychologists, psychotherapists and counsellors will be regulated by the HPC, following that Council's rigorous process of assessing their regulatory needs and ensuring that its system is capable of accommodating them." (our emphasis)

13. The White Paper's justification for proposing the HPC as regulator was threefold: to foster consistency across regulated professions; to meet the needs of professions within a common framework; and to promote multidisciplinary working. Yet the White Paper indicates it would not be a forgone conclusion (indeed, if it were that would, in itself, be unlawful because the HPC would be acting as a puppet of the Secretary of State and fettering its own discretion on the content of its recommendations).
14. The HPC, as you will know, regulates certain health professionals. It does so by designating their titles (as 'protected') and publishing a register of 'registrants' who meet its criteria for registration as users of those titles. It is also responsible for devising and promulgating the standards to which registrants are expected to practice, disciplining those who transgress them and prosecuting others who, e.g. use the protected titles when not registered.
15. Following the publication of the White Paper, the HPC began a process of consultation on the regulation of psychotherapists and counsellors. On 13 December 2007 a short but important document entitled 'Counsellors and Psychotherapists - road map to their statutory regulation' was published ('the road map'). It put forward the following justifications for regulation:
 - (i) anyone can presently use the titles counsellor or psychotherapist without demonstrating competence (the 'brass plate' argument);
 - (ii) there are no agreed and universally adopted national educational standards;
 - (iii) there is no process, backed up by legislation, to prevent incompetent or unethical individuals from treating patients (e.g. if expelled from their professional organisation);
 - (iv) the public cannot easily differentiate individuals working to appropriate standards from those who

are not (e.g. those that do not belong to a professional body); and

(v) the public is not protected.

16. We pause to note that this view was not reached following research or consultation. They were very much the starting point for the HPC.
17. In fact, the road map also all but evades two important questions which were raised but not answered by the White Paper's proposals. The first was whether statutory regulation under the Health Act 1999 was necessary at all ('the whether question'). The factors quoted above do not bear on this question. They would equally serve arguments for other forms of regulation such as those our clients have advanced.
18. On the 'whether' question, the road map simply says:

“Objective of statutory regulation of Counsellors and Psychotherapists

The only justification for statutory regulating Counsellors and Psychotherapists is that public protection will be enhanced. The benefits of statutory regulation will have to outweigh any potential down sides of statutory regulation and in particular the cost of regulation, which will have to be born by those regulated.

As many practitioners work outside the NHS, the cost of regulation will have to be paid for by the patients.”
19. The second question raised by the White Paper was who would do the regulating ('the who question').
20. On this the road map says nothing at all of significance. A reader might be forgiven for thinking that this question was not one the HPC had been asked to answer. But it had: if it were proposing to become the regulator, its recommendations would need to be based on a robust assessment that its system was capable of accommodating those who would be regulated. The option to recommend non-HPC regulation was also explicitly recognised by the Chief Executive of the HPC at a meeting on 13 October 2008 with Professor Darian Leader who was there on behalf of our clients.
21. The road map went on to recommend the establishment of the PLG which would make recommendations on the specifics of regulation. This was to be preceded by three months of unspecified “research” by your colleagues within the HPC Policy and Standards Department. We would like some information

about this research, as you will see from the questions raised below.

22. Next, the HPC launched a pre consultation 'call for ideas' in December 2008, which ran to May 2009. 'Stakeholders' were requested to comment on the following issues (which also formed the terms of reference of the PLG):
 - (i) the structure of the register;
 - (ii) protected titles;
 - (iii) voluntary register transfer and grandparenting (transitional) arrangements;
 - (iv) standards of education and training; and
 - (v) standards of proficiency.
23. Importantly then, the PLG had no brief to consider or advise on the 'whether' or 'who' questions.
24. In the call for ideas document the HPC stated that they would be writing to stakeholders to invite nominations for membership of the PLG. Privately and publicly, assurances were given that it would be a broadly representative group.
25. The HPC convened a group of 17 individuals, both professionals and lay members, as the PLG. Our clients were immediately concerned that, in breach of the assurances, its membership was dominated by those with strong views or even vested interests in favour of HPC regulation. For example, Peter Fonagy, of the UCL sub-department of clinical health psychology, is a member of the PLG and is widely known to be a proponent of regulation.
26. The PLG's report, which incorporated recommendations to the HPC Council, was published on 14 July 2009. It listed their recommendations, which in brief, were that there should be:
 - (i) protection of the professional titles psychotherapist and counsellor together with adjectival variations (e.g. 'psychoanalytic psychotherapist');
 - (ii) differentiation in the structure of the register between psychotherapists and counsellors;
 - (iii) no differentiation between modalities, however; and

-
- (iv) no differentiation between those specifically qualified to work with children/adolescents and those specifically qualified to work with adults.
27. Detailed draft standards of proficiency, including both generic and specific standards, and minimum qualification thresholds (which differed between counsellors and psychotherapists) were also set out or appended to the report.
28. In terms of the next steps in the process, the PLG report indicated that its members are due to reconvene in November to further consider the standards of proficiency and the threshold level of qualification for entry onto the Register.
29. On 14 July 2009, a further consultation was launched which focused on seeking views in respect of the recommendations of the PLG and which closes imminently, on 16 October 2009. Its scope is noted at the start of this letter. Importantly, it does not pose the ‘whether’ or ‘who’ questions. This, it seems, is the further consultation the PLG report envisaged. We know of no other plans to consult before recommendations are made. The likely nature of the recommendations is clear from the PLG’s report.

Legal framework

The Health Act 1999

30. Section 60 of the Health Act 1999 is concerned with “regulation of health care and associated professions”. It provides materially:
- “(1) Her Majesty may by Order in Council make provision—
- ...
- (b) regulating any profession which appears to Her to be concerned (wholly or partly) with the physical or mental health of individuals and to require regulation in pursuance of this section.”
31. There are therefore two pre-conditions in section 60(1)(b) which must be met before an Order in Council can be made to regulate a profession under the auspices of the HPC: first, the profession in question must be “concerned (wholly or partly) with the physical or mental health”; and, second, it must “require” regulation. Ultimately the decision on these issues will be a matter for the minister who sponsors any draft order put before Parliament for approval (section 69(2)). However, the HPC has a specific role to play in the statutory scheme in informing that decision (see below).

The Health Professions Order 2001 (“the Order”)

32. The HPC was created by Article 3(1) of the Order which also delimits its powers. Article 3(5) imposes the duties of regard and cooperation with external bodies concerned with regulation of other health professionals:

“In exercising its functions, the Council shall–

- (a) have proper regard for -
 - (i) the interests of persons using or needing the services of registrants in the United Kingdom, and
 - (ii) any different interests of different categories of registrants;
 - (b) co-operate, in so far as is appropriate and reasonably practicable, with public bodies or other persons concerned with -
 - (i) the employment (whether or not under a contract of service) of registrants,
 - (ii) the education or training of registrants or other health care professionals,
 - (iii) the regulation of, or the co-ordination of the regulation of, other health or social care professionals,
 - (iv) the regulation of health services, and
 - (v) the provision, supervision or management of health or education services.”
33. Although, historically, the HPC has awaited requests from professions for regulation to be imposed upon them, Article 3(17) of the Order allows for the HPC to recommend regulation where such a request is not forthcoming:

“The Council may–

- (a) make recommendations to the Secretary of State [and the Scottish ministers] concerning any profession which in its opinion should be regulated pursuant to section 60(1)(b) of the Health Act 1989; and
 - (b) give such guidance as it sees fit, to such persons as seem to it to have an interest in such regulation, on the criteria to be taken into account in determining whether a profession should be so regulated.”
34. It is clear that, when using its Article 3(17) in this way, the HPC will need to be especially careful to answer the ‘whether’ and ‘who’ questions on a properly informed basis.

35. Article 5(2) of the Order allows the HPC to set standards of proficiency and good character requirements:

“The Council shall from time to time—

- (a) establish the standards of proficiency necessary to be admitted to the different parts of the register being the standards it considers necessary for safe and effective practice under that part of the register; and
- (b) prescribe the requirements to be met as to the evidence of good health and good character in order to satisfy the Education and Training Committee that an applicant is capable of safe and effective practice under that part of the register.”

36. This is qualified by Article 3(14):

“Before establishing any standards or giving any guidance under this Order the Council shall consult representatives of any group of persons it considers appropriate including, as it sees fit, representatives of—

- (d) persons providing, assessing or funding education or training for registrants or prospective registrants.”

37. Article 5(3) requires a specific consultation in relation to the good character requirements:

“The council shall—

- (a) before prescribing the requirements mentioned in paragraph (2)(b), consult ... the persons referred to in Article 3(14); and
- (b) publish those requirements.”

38. The above provisions therefore set out a number of requirements relating to consultation, cooperation and fair regard, which must be met prior to any recommendation to the Secretary of State both on whether a profession is to be regulated by means of a section 60(1)(b) Order and, if the recommendation is positive, on the standards registrants will need to meet. Statutory requirements for consultation must be read alongside case law in this area. Any consultation (whether mandatory or not) must be conducted fairly. The decision maker must be open minded about what others have to say about the alternatives, it must take place at a time when proposals are in their formative stage, it must allow consultees sufficient notice and information about the proposals made to respond meaningfully and any responses of must be conscientiously taken into account: see *R v Brent LBC ex parte Gunning* [1985] 84 LGR 168.

39. Besides consulting adequately, a public body must pose and answer the right questions to enable the lawful exercise of any discretionary powers and gather adequate information to do so: see *Secretary of State v Tameside MBC* [1977] AC 1014 at 1065B per Lord Diplock.
40. Last but not least, public authorities exercising discretionary functions must do so in a way that avoids breach of the European Convention on Human Rights articles scheduled to the Human Rights Act 1998 unless a statutory requirement makes that impossible. Failure to do so is unlawful under section 6 of the 1998 Act. Failure to consider matters of proportionality when a qualified Convention right is engaged is likewise unlawful at common law. Section 3 requires Courts to interpret existing domestic legislation in a way that avoids such breaches.
41. Included in the Schedule is the entitlement under Article 1 of the Convention's First Protocol to the "peaceful enjoyment of possessions". Any deprivation of possessions must be in the public interest, lawful (such that the means used are accessible, precise and foreseeable in their application) and the means used must also be demonstrably proportionate to the aim.
42. "Possessions" is an autonomous Convention concept and includes the economic interests arising from practicing a recognised profession: see by analogy *Van Marle v Netherlands* (1986) 8 EHRR 483. The introduction of a regulatory scheme that has the effect of making future practice of a profession impossible will therefore amount to a deprivation calling for justification to the Convention standard on public interest grounds.

The required approach in summary

43. For present purposes we reserve our clients' position on whether a section 60 order can ever be made in respect of psychotherapists. We simply note that many schools of psychotherapy disassociate themselves from the general concept of mental health, its restoration to a state of 'normality', or its improvement. Their proponents would not necessarily accept that the therapy they offer is concerned, even partly, with mental health.
44. To the extent that psychotherapy can be regulated in this way, the HPC must follow these steps before recommendations on regulation are made:
 - (i) first of all, under Article 3(17)(b) it must decide whether to exercise its power to give such persons as seem to it to have an interest in regulation guidance on the criteria to be taken into account in determining whether any given profession should be so regulated with it as the regulator (indeed, to the

extent that guidance is needed to enable consultees to make an informed response to proposals, it will need to be given);

- (ii) if such guidance is to be given, there must first be fair consultation with the groups identified in Article 3(14) as to the content;
- (iii) next, it must gather the information needed to answer the 'whether' question that arises under Article 3(17)(a) and section 60(1)(b), by both research and fair consultation and, in doing so, must take into account the rights of those currently practicing the profession under Article 1 of the First Protocol (if regulation is not required, it will be irrational to go on determine who will be the regulator or indeed what standards will be imposed);
- (iv) then it must decide, following research and fair consultation, whether it should be the regulator (if it does not answer that question, it cannot make recommendations on whether regulation should be pursuant to section 60(1)(b) of the Health Act 1989, or by means of alternatives, such as bespoke regulation under schedule 3 or a new Act of Parliament);
- (v) if a lawful, positive view is reached on (iii) and (iv), the HPC is then empowered to use its Article 5(2) powers to set standards;
- (vi) however, their use is again predicated on there being fair consultation with the groups identified in Article 3(14).

HPC decision making to date

- 45. Returning to the 'Background' section of this letter, with this in mind, it becomes immediately apparent that the HPC has attempted to leap over several stages in the statutory process. This is not lawful.
- 46. To begin with, there is an unlawful failure to give guidance to such persons as seem to it to have an interest in such regulation (which on any sensible view, includes our clients), on the criteria to be taken into account in determining whether psychotherapy should be regulated and, if it is, whether the HPC should be the regulator. This in turn results in an unlawful failure to consult on such guidance.

47. We accept, of course, that the HPC is not always obliged to give such guidance under Article 3(17)(b). Yet the reason it retains a discretion is obvious: some professions (indeed all that have been HPC regulated to date) will positively seek HPC regulation. In that scenario, provided regulation is consistent with government policy, the criteria used by the HPC to decide whether or not to make a recommendation will be of limited relevance. The process is wholly consensual.
48. The present situation is very different as the HPC is well aware. Some psychotherapists are opposed to statutory regulation. Some, our clients included, are not opposed but consider the HPC model is inappropriate and have proposed others. Some are content with the HPC model. In those circumstances, it is impossible for the various interests to respond meaningfully to any consultation by the HPC, or even make unsolicited representations to it, without knowing the factors it will be taking into account on the critical 'whether' and 'who' questions. Here, it is inherently unfair, and thus unlawful not to publish guidance in the decision making criteria: see *R v Secretary of State for the Home Department ex parte Sittampalam Thirukumar* [1989] Imm AR 402 at 404.
49. The second fundamental flaw in the HPC's approach is that whatever research was done following the road map's publication, there has been no consultation with affected groups on the 'whether' or 'why' questions. The HPC has, instead, simply assumed the answers will be that there should be section 60(1)(b) regulation and it should be the regulator. Consideration of alternatives was also outwith the remit of the PLG.
50. It is also apparent that the HPC has, so far, not even turned its mind to Article 1 of the First Protocol in connection to the 'whether' question. It must do so. Fundamental rights of this kind are a mandatory relevant consideration: see *R (Richards) V Pembrokeshire District Council* [2004] EWCA Civ 1000 at [69]-[70].
51. In response to these points, it might be said that the 'whether' and 'who' questions can be answered later by the Minister who may or may not sponsor a section 60(1)(b) Order (this point seems to be implicit in some of the HPC's correspondence with our clients). Yet this is no real answer because the HPC is statutorily required to consider these things for itself when making a recommendation one way or the other. Even had this not been a statutory requirement, the assurances (of a "rigorous process of assessing ... regulatory needs and ensuring that its system is capable of accommodating" psychotherapists and counsellors) given in the White Paper, and direct to our client's representatives by the HPC, would engender a legitimate expectation that they would be addressed properly.
52. It might also be contended that both questions have been in the backdrop to the whole consultation process. Such an argument

would also be bad. The consultation undertaken did not pose the questions and nor did the recorded responses to them engage with what was said about statutory regulation generally and about the HPC as potential regulator in particular. In any event, if the question is posed 'did the decision maker consider this information open-mindedly, willing at least to be persuaded of a different course' the answer is plainly 'no'. The HPC did not have, and in reality never has had, an open mind on these questions.

53. Nor are the answers to the questions obvious or uncontentious. Many, our clients included, have proposed alternative regulatory models that could be imposed under schedule 3 of the 1999 Act or otherwise. The HPC should at least hear and engage with their views. Provided that they might have made a difference, fair consultation demand that they be taken into account. Further, on the face of things, the HPC has not gathered a body of evidence, and, less still a reliable one, supporting the case for regulation.
54. Last, we should mention that the HPC has indicated it is considering an advertising campaign to deter the public from using psychotherapists and counsellors who do not register with it and has also contacted insurance companies to discuss their willingness to withdraw cover from such practitioners. We are wholly unclear as to the legal basis for these initiatives and ask questions about them below in order to further advise our clients.

Action the HPC is requested to take in the light of this letter

55. Our clients ask that the HPC undertakes to:
 - (i) consult with them and other representative bodies about the criteria it will use to determine the 'whether' and 'who' questions;
 - (ii) disclose the evidence it has gathered to date that bear upon those questions;
 - (iii) consult fairly on the 'whether' question;
 - (iv) publish the results of that consultation and its view on that question and, if it concludes there should be regulation because it is 'required', then;
 - (v) consult fairly on the 'who' question; and
 - (vi) suspend the remainder of its decision making process on regulation of psychotherapists and counsellors in the meantime.

Information and documents sought

55. To further advise our clients on their legal position, we require the following information and documents. Please answer these requests in turn using the enumeration below. If you are unable or unwilling to address any particular request, please say so giving full reasons.
56. Please:
- (i) provide copies of the documents which set out the instruction or request to the HPC to embark on the decision making process of rigorous assessment of the regulatory needs of psychotherapists and counsellors and ensuring that its system is capable of accommodating them;
 - (ii) identify the documents which set out the HPC's plans for that process (save for those mentioned above) and, unless they appear on its website, provide copies;
 - (iii) confirm that the PLG had no brief to consider or advise on the 'whether' or 'who' questions;
 - (iv) summarise the nature of the research programme mentioned in the road map;
 - (v) provide any summary that exists of the research undertaken and the conclusions reached;
 - (vi) explain why no guidance has, to date, been issued under Article 3(17)(b);
 - (vii) indicate if, at any point to date, the HPC has determined whether psychotherapists and counsellors should be regulated and, if it has, when that decision was made and why it was not preceded by consultation;
 - (viii) indicate if, at any point to date, the HPC has determined that it should be the regulator of psychotherapists and counsellors, if it has, when that decision was made and why it was not preceded by consultation;
 - (ix) indicate whether the HPC accepts that Article 1 of the First Protocol is engaged by this decision making process and, if it does, what thought has been given to this to date and what conclusions reached;

- (x) explain the HPC's proposed advertising campaign to deter the public from using psychotherapists and counsellors that do not register with it if the proposals are implemented, and its legal basis;
- (xi) give details of contact to date between the HPC and companies that would insure psychotherapists and counsellors who were not to register with it (if the proposals are implemented), and the legal basis for this initiative;
- (xii) indicate whether the HPC has, to date, assessed or estimated how many psychotherapists and counsellors are likely to register if the proposals are implemented and, if it has, please provide the documentation generated;
- (xiii) explain what consideration has been given, to date, to alternatives to section 60 regulation including the Practitioner Full Disclosure systems used in Australia and Canada and, if alternatives have been considered, please supply the documentation generated by that process and that recording the conclusions reached; and
- (xiv) indicate if the HPC has, to date, undertaken any analysis of the question of whether the benefits of statutory regulation outweighs any potential down sides of statutory regulation, in particular the cost of regulation, and, if it has, please provide the documentation generated and recording the conclusions reached.

Concluding remarks

Subject to the point made at paragraph 4 above, we ask that you acknowledge this letter by return and then provide a comprehensive response within 14 days.

We look forward to hearing from you.

Yours faithfully

Bindmans LLP

Bindmans LLP