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Dear David and Sean

Interpretation of s 25 of the Social Workers Registration Act
Our Ref: SOC329/982

1. You jointly seek advice on the interpretation of s 25 of the Social Workers Registration Act 2003. In particular, you seek advice on the meaning of the phrase “employed or engaged as a social worker”, which determines who is required to hold a current practising certificate pursuant to that provision.
2. This advice has been provided in draft form, and we have met to discuss it. The advice is now provided in final form.

Summary

3. In short, we consider that a registered social worker is “employed or engaged as a social worker”, and hence is required to hold a current practising certificate pursuant to s 25, if he or she:
 - 3.1 is engaged with casework decisions at any level; and/or
 - 3.2 in the context of performing his or her role, expressly or implicitly holds himself or herself out as a registered social worker, or is held out in that way by his or her employer or colleagues.
4. Extrapolating on the second point, we consider that all people for whom being a registered social worker is an important aspect of their role, or of the way in which they perform their role, are required to hold practising certificates pursuant to s 25.
5. While, in most cases, whether a registered social worker falls within s 25 will be clear-cut, the more peripheral cases will need to be considered on a case by case basis, both in light of the nature of the role and the manner in which it is performed.

Background

6. The Social Workers Registration Act 2003 (“the Act”) provides for the voluntary registration of social workers, and for a regulatory regime in respect of registered social workers.
7. The Act establishes a number of institutions to implement the regime provided for in the Act:
 - 7.1 The Social Worker Registration Board (“the Board”) is established to (among other things) register social workers, promote a registration system and consider applications for practising certificates.¹
 - 7.2 The Social Workers Complaints and Disciplinary Tribunal (“the Tribunal”) is established to administer the complaints process and exercise disciplinary powers.²
 - 7.3 The position of Registrar of the Social Workers (“Registrar”) is established to carry out the Board’s decisions and to comply with the directions of the Board and Tribunal.³
8. The standard requirements for entitlement to registration are set out in s 6.⁴ A person who has a recognised New Zealand social work qualification is entitled to be registered if the Board is satisfied that he or she:⁵
 - 8.1 meets the competency requirements set out in Part 3 of the Act;
 - 8.2 is a fit and proper person to practise social work;
 - 8.3 is competent to practise social work with Maori and different ethnic and cultural groups in New Zealand; and
 - 8.4 has enough practical experience in practising social work.
9. It is not compulsory for social workers to be registered. However, a number of requirements and obligations apply to those social workers who are registered, including the complaints and disciplinary regime referred to above. The Act also provides for certain offences, including that it is an offence for any person to hold himself or herself out as a registered social worker when he or she is not, or to hold himself or herself out as holding a current practising certificate when he she does not.⁶

¹ Sections 97, 99.

² Sections 114-115.

³ Sections 137-138.

⁴ The entitlement to registration of overseas-qualified social workers is provided in s 7. Pursuant to s 13, the Board may recognise practical experience in lieu of a social work qualification in certain situations.

⁵ Pursuant to s 12, the Board must decide that an applicant should be registered fully if, and only if, he or she meets the criteria in ss 6 or 7.

⁶ Section 148.

10. Section 25 provides:

No registered social worker may be employed or engaged as a social worker unless he or she holds a current practising certificate.

11. As set out in the letter of instruction, the Board and the Ministry have differing views as to the proper interpretation of s 25:

- 11.1 The Board considers that, in order to determine whether a person is “employed or engaged as a social worker”, it is necessary to determine whether they are “practising social work”. As to the meaning of “practising social work”, the Board considers that:⁷

...practising social work does not only involve direct interaction with clients but includes managing and/or supervising other social workers, teaching social work practice or theory and generally roles that utilise an individual’s social work knowledge, skills, values and ethics.

- 11.2 The Ministry considers that there is a distinction between the concepts of being “employed or engaged as a social worker” and “practising social work”. Given the statutory framework in which social work is carried out in Child, Youth and Family, the wording of s 25, and the fact that the phrase “social worker” is not defined in the SWR Act, the Ministry’s view is that the only people in Child, Youth and Family who must hold a current practising certificate are those employees who are registered as social workers and who fall within the definition of “social worker” in the Children, Young Persons, and Their Families Act 1989 – that is:⁸

a person employed under Part 5 of the State Sector Act 1988 in the Department ... as a social worker

- 11.3 The Ministry’s view is therefore that the requirements of s 25 extend only to frontline staff who are actively working with families and children; that s 25 does not require registered social workers in roles such as manager, advisor and trainer to hold a practising certificate.

12. We consider the meaning of s 25 below.

Analysis

13. The phrase “social worker” is not defined in the Act. As the select committee report on the Social Workers Registration Bill explains, this omission was deliberate. In the context of discussing the policy decision for the Bill to provide for voluntary registration of social workers, the Committee states:⁹

...for registration to be made mandatory, the term ‘social worker’ would need to be defined. It is difficult to do this without creating unnecessary inflexibility, barriers to

⁷ Social Workers Registration Board, ‘Annual Practising Certificates Renewal, Policy Statement’, paragraph 1.

⁸ The same definition is provided in the Care of Children Act 2004: s 8. The definition of “social worker” in the Adoption Act includes this definition, and also makes special provision for members of the Maori community who are not employed as social workers pursuant to Part 5 of the State Sector Act to be nominated to perform the role of social worker.

⁹ At p 3.

entry and the creation of exclusive and elite sub-groups within the social work occupation.

14. For present purposes, the decision not to define “social worker” renders the proper interpretation and application of s 25 unclear. This situation is unfortunate given that, while it is not mandatory for social workers to be registered, the terms of s 25 are binding on those social workers who choose to be registered.
15. The meaning of s 25 must be ascertained from its text and in light of its purpose and context.¹⁰ Our analysis of these factors is set out below. We note, however, that the legislature’s decision not to define “social worker”, or to elaborate on the application of s 25, means that the section is somewhat opaque. It is not possible to state with any certainty the approach that a court would take in interpreting it.

Being “employed or engaged as a social worker” extends beyond those with the position title “social worker”

16. As the passage from the Select Committee report just considered reflects, “social worker” is not a standardised position title. For the purpose of interpreting and applying the Act, however, the concept of being “employed or engaged as a social worker” must have a consistent meaning.
17. For this reason, we do not consider that it is tenable for s 25 to be interpreted to apply only to those people with the position title of “social worker”, or to adopt the definition of “social worker” in the Children, Young Persons, and Their Families Act (that is, “a person employed under Part 5 of the State Sector Act 1988 in the Department ... as a social worker”) for the purposes of the Social Workers Registration Act. Such an approach would potentially lead to the inconsistent application of the Act throughout the profession.
18. In this context, we have considered the argument advanced by the Ministry that a distinction must be drawn between the concept of being “employed or engaged as a social worker” (as it appears in s 25), and the concept of “practising social work” (the phrase that appears predominantly throughout the Act). While we agree that an argument could potentially be made out of the use of these different phrases, we consider that the better view is that no distinction exists between them. Significantly, the heading to s 25 is: “*Practising* registered social workers to hold practising certificates” (emphasis added). In our view, the use of the phrase “employed or engaged as a social worker” in s 25 is intended to *describe* the concept of practising as a social worker, rather than to demarcate a subset of it.
19. It is thus necessary to turn to the object and scheme of the Act to discern the meaning of being “employed or engaged as a social worker” for the purposes of s 25.

Being “employed or engaged as a social worker” extends beyond those in ‘front-line’ positions

20. We consider that the purpose of the Act and the role that practising certificates perform in the scheme for the registration of social workers indicates strongly that the phrase “employed or engaged as a social worker” must be interpreted to extend beyond those in ‘front-line’ positions.

¹⁰ Interpretation Act 1999, s 5.

- 20.1 The primary purpose of the Act is “to protect the safety of members of the public” by providing mechanisms to ensure social workers are “competent to practise” and “accountable for the way in which they practise”.¹¹
- 20.2 The requirement for a practising certificate for those employed or engaged as social workers is not the only mechanism for monitoring registered social workers. Social workers who are registered under the Act are subject to a number of accountability mechanisms. The complaints and disciplinary process applies to all registered social workers, regardless of whether they have a practising certificate.¹² Further, the Board may at any time review any registered social worker’s competence to practise social work.¹³
- 20.3 These mechanisms, however, are reactive in nature, responding to potential issues in a registered social worker’s competence or performance once they have been perceived to raise problems. By contrast, the requirement for registered social workers who are employed or engaged as social workers to hold a practising certificate provides a mechanism for registered social workers’ competence to be monitored on a regular, on-going basis.
- 20.4 Practising certificates must be renewed regularly; the longest period of time for which a practising certificate can be in force is 1 year.¹⁴ Significant monitoring mechanisms are linked to the issuing of practising certificates:
- 20.4.1 A practising certificate can only be issued if the applicant has completed a competence assessment within the previous 5 years.¹⁵
- 20.4.2 The Registrar must refer an application for a practising certificate to the Board in a number of situations, including where the results of a competence assessment seem unsatisfactory, where the applicant has previously held a practising certificate but has not held a practising certificate within the 3 years before the date of the application, and where the Registrar suspects that an applicant is not fit or competent to practise, or has not been practising social work as a profession at any time within the 3 years before the date of the application.¹⁶ The Registrar also has a discretion to refer the applications of social workers who were first registered within the past 3 years to the Board.¹⁷
- 20.4.3 Where the Registrar refers an application for a practising certificate to the Board, the Board must consider whether to issue a practising certificate either with or without conditions, to refuse to issue a practising certificate until the applicant has met certain conditions, or to refuse to issue a practising certificate at all.¹⁸ If

¹¹ Section 3(a).

¹² Sections 59 to 96.

¹³ Section 39(1).

¹⁴ Section 34.

¹⁵ Sections 30(4), 44(1).

¹⁶ Section 30(1).

¹⁷ Section 30(2).

¹⁸ Sections 31, 33.

the Board decides to consider directing the Registrar to issue a practising certificate subject to conditions, or to refuse to issue a practising certificate, it must give the applicant a reasonable opportunity to make written submissions and be heard on the matter.¹⁹

- 20.5 In this way, the required regular renewal of the practising certificate is the primary mechanism by which the Board can monitor registered social workers' competence on an on-going, preventative basis.
21. The purpose of protecting the safety of members of the public would be undermined if *only* those registered social workers who work in 'front line' positions are required to have practising certificates, and hence are subject to the on-going monitoring that the requirement to renew practising certificates entails. Other roles performed by registered social workers also have the potential to directly affect individuals' safety.
22. This potential is demonstrated by some of the position descriptions provided by the Ministry. For instance, the position description for the role of "Social Work Supervisor" provides that the people performing this role are responsible for "effective and efficient delivery of service in accordance with relevant legislation, policies and business plan priorities", and for "identify[ing] and manag[ing] risks, including casework risks, and escalat[ing] where appropriate". Similarly, the accountabilities of the position of "Practice Leader" include "lead[ing], influenc[ing], and support[ing] Social Work Supervisors and Social Workers to exercise professional expertise, decision making and judgement". The purpose of the Act would be undermined if registered social workers in these positions were not required to have practising certificates.

Where should the line be drawn?

23. Just as the purpose of the Act in protecting the safety of members of the public points against a narrow or position title-focussed interpretation, the potentially serious consequences for registered social workers of breaching s 25 indicates that care must be taken not to give the phrase "employed or engaged as a social worker" an unmanageably wide meaning.
24. Pursuant to s 82(2)(b), a registered social worker is guilty of professional misconduct if he or she, "while employed or engaged as a social worker, claims or holds himself or herself out to be registered while not holding a current practising certificate". Care must be taken to ensure that the phrase "employed or engaged as a social worker" is not interpreted in such a way as to be unpredictable or unexpected, thus potentially catching people unawares.
25. It is also important to keep in mind that registered social workers who are not "employed or engaged as ... social worker[s]" are not *prevented* from applying for a practising certificate if they wish to do so (albeit that greater scrutiny may be given to their applications pursuant to s 30). It is open to the Board to encourage registered

¹⁹ Section 32.

social workers to maintain their practising certificates, regardless of whether they strictly fall within the terms of s 25, as one of the incidents of registration.²⁰

26. How, then, should the concept of being “employed or engaged as a social worker” (which, as noted above, we consider to be not materially different from the concept of “practising social work”) be interpreted?
27. In our view, the core meaning of the phrase concerns positions and roles in which registered social workers are *engaged with casework decisions in some way*. That is not to say that a registered social worker needs to be the primary casework decision-maker to be “employed or engaged as a social worker”. Nor does it suggest that direct contact with clients is required. In order to fall within this core meaning, some engagement with casework decisions made about individual clients is necessary, be that engagement in the context of a ‘front-line’ role, or in a supervisory, mentoring or managerial capacity. Interpreting the concept in this way ensures that it has a direct nexus with the Act’s purpose of protecting the safety of members of the public.
28. We acknowledge that the competence and fitness of people not involved in casework decisions can affect individuals’ safety. For instance, those people in training or policy positions can make decisions, or adopt positions, that affect or influence casework decisions down the line. However, we consider that the concept of being “employed or engaged as a social worker” will become too nebulous if it is extended as a matter of definition to all people with any involvement in matters relating to social work practice.
29. That said, we consider that registered social workers who are not actively engaged with casework decisions are nevertheless required to hold practising certificates pursuant to s 25 *if they are either expressly or implicitly ‘holding themselves out’ as registered social workers, or if they are being held out in this way by their employer or colleagues*. This requirement is consistent with the role that practising certificates perform in monitoring registered social workers on an on-going, preventative basis (as set out above). Also significant in this regard is s 148(4), which provides that every person commits an offence who (our emphasis):
- ...holds an employee or professional associate out *as a registered social worker*, knowing that the employee or associate ...
- (b) is a registered social worker—
- ...
- (ii) who does not hold a current practising certificate; or
- (iii) who holds a current practising certificate that is suspended.
30. This provision equates being held out as a registered social worker as being held out as a registered social worker *who holds a current, valid practising certificate*. It follows that all people who are being ‘held out’ as being registered social workers are required to hold practising certificates pursuant to s 25. Extrapolating on that, we consider that all people for whom being a registered social worker is an important aspect of their

²⁰ See the functions of the Board specified in s 99(1)(j) and (n).

role, or of the way in which they perform their role, are required to hold practising certificates pursuant to s 25.

31. While, in most cases, whether a registered social worker falls within s 25 (as interpreted above) will be clear-cut, the more peripheral cases will need to be considered on a case by case basis. Moreover, this case by case analysis will not be able to be performed on the basis of position description alone, as the way in which a position is performed will sometimes depend on the person who fills it (including whether that person holds him or herself out to be a registered social worker). In the peripheral cases, the full circumstances of the position at issue and the manner in which it is performed will need to be considered.

Conclusion

32. Our conclusions are set out above and summarised at [3]-[5]. Rebecca Garden, Assistant Crown Counsel, has assisted with the preparation of this advice.

Yours sincerely

Crown Law



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