



Health and Community Services
Complaints Commissioner

Investigation Report pursuant to section 55(6) of the *Health and Community Services Complaints Act 2004 (SA)*

**Section 55(6) report relating to
Birthline Pregnancy Support
Incorporated**

December 2021

Introduction

This public summary has been prepared by the Office of the Health and Community Services Complaints Commissioner (HCSCC) to outline key components of the investigation into Birthline Pregnancy Support Incorporated.

The Complainant and the Complaint

On 2 December 2019, my Office received a complaint from a consumer about the service. The complaint was received via our online complaint form.

It is important to note that the italicized text below is the consumer's wording.

The Complainant sought an apology, a change of policy or procedure and training and education for counsellors.

The Complaint was in two parts, but I determined to only investigate the first, which was:

The service is pro-life (the counsellor later said pro-woman but I argue advising against termination isn't pro-woman). I don't think there's a place for this in our society, it's really damaging. If it is to exist it must be advertised clearly as an anti-termination service. For a caller to receive such advice is damaging, particularly when they think this advice is personalised (ie not knowing every caller will be told the same).

Jurisdiction

I am empowered by the *Health and Community Services Complaints Act 2004* (SA) (the Act), to investigate complaints relating to "health services" and "community services" as defined by subsection 4(1) the Act. Further, I am empowered by subsection 43(1)(b) of the Act to investigate such complaints as I determine.

"Community service"

On receipt of the complaint, I considered whether the Service was within either of the definitions of "health service" or "community service". The term "community service" is defined to mean:

- (a) *service for the relief of poverty, social disadvantage, social distress or hardship; or*
- (b) *a service for the provision of emergency relief or support; or*
- (c) *not relevant; or*
- (d) *a service for the social advancement of disadvantaged groups; or*
- (e) *a service of a class included within the ambit of this definition by the regulations; or*
- (f) *an administration service directly related to a service referred to in a preceding paragraph, but does not include-*
- (g) *a service that provides employment search or placement services, or that provides employment related training or retraining; or*

- (h) *a service of a class excluded from the ambit of this definition by the regulations.*

Subsection 4(1) of the Act further provides examples of community services, as follows:

- *a service that provides community support or care;*
- *a service for the provision of emergency accommodation or relief (including by the provision of emergency financial support), or for the provision of accommodation or support to the socially disadvantaged;*
- *a counselling, advice or community information or awareness service;*
- *a community advocacy, self-help or mutual aid service.*

The examples form part of the Act and they broaden, rather than narrow, paragraphs (a) to (h) of subsection 4(1) of the Act.

I obtained a copy of the Service's Constitution. It outlines the Service's purposes which includes:

- 2.1 counselling for expectant mothers to enable them to make informed decision about their futures and the futures of their children;*
- 2.2 encouragement for pregnancies and practical support to expectant mothers before and after births;*
- 2.3 information and advice about other services and facilities for expectant mothers;*
- 2.4 counselling for other affected by the pregnancy;*
- 2.5 specialist advice in the event of a miscarriage, an abortion, or the early loss of a baby; and*
- 2.6 support for all other activities deemed incidental to the above.*

Information on the Service's website states:

1. Pregnancy testing

Birthline offers no-cost pregnancy tests to women who think they might be unexpectedly pregnant. These tests are offered completely free of charge so that you can get the answers you need, no matter what your financial circumstances may be.

2. Material assistance

Birthline receives donations of pre-loved and new baby items from the community. These items include cots, prams, car seats, change tables, baby clothing and much more. We have volunteers who sort through these items and pass them along, completely free of charge, to those who need them. This program exists to lift some of the financial burdens of a having a newborn.

3. Information and resources

Birthline is committed to providing women with services to help them through unexpected pregnancy on a case by case basis. When something you need is outside of our scope, we will be able to provide you with quality community resources and information to get you the further assistance you need such as connecting you with another agency to assist you with crisis accommodation, education programs, pregnancy mentoring, ante-natal care, home and hospital visits, access to support programs or general support.

4. Telephone counselling

Wherever you are in Australia, you can call our 24 hour hotline and you will always speak to someone who is ready to listen. You don't even have to give us your name if you choose not to. We're simply here to listen to your fears and concerns and talk you through the many choices you may not have realised were available to you. No matter what's going on or how you're feeling, you are not alone and there are people who care deeply for your wellbeing.

5. Face to face counselling

Face to face counselling is a resource we offer to women who aren't sure what to do next. It helps build a personal, firm and trusting relationship in a judgement-free and compassionate setting. Face to face counselling is offered completely free of charge to anyone who needs to talk and would like to do so in a one-on-one setting.

6. Pregnancy counselling

Pregnancy counselling is a free and confidential service offered by Birthline for women who are unexpectedly pregnant. During a pregnancy counselling session, we'll discuss what you're considering for your pregnancy: keeping the child, offering the child for adoption, or having an abortion. We'll talk about how each of these scenarios could be possible for you and how they would look.

7. Post-abortion counselling

Birthline's post-abortion counselling service is free of charge and completely confidential. This program exists to help those suffering from the emotional side effects following an abortion. Whether you've had an abortion a few weeks or several years ago, it is possible for you to experience the following emotional effects:

- Guilt*
- Shame*
- Anger*
- Regret*
- Loneliness*
- Isolating yourself from others*
- Difficulty within relationships*
- Anxiety*
- Depression*
- Eating disorders*
- Suicidal thoughts or feelings.*

Based on the service's Constitution and website information, I was satisfied that the service is a "community service" within the Act.

The service's opinion

On 8 January 2020, I wrote to the service informing it of the complaint and that I was investigating. I asked certain questions and for "all policies, procedures or work directions regarding how your workers are to address the issue of termination when raised by consumers". On 20 February 2020, the service responded that it did not agree that it is a health service or community service but provided information in any event.

On 21 February 2020, I wrote again to the service confirming my view that it was a health service and proceeded with my investigation. On 5 March 2020, the service responded that it was not within my jurisdiction but continued to co-operate. It advised it had one document that might be a “written policy, procedure or work direction” and a note that might record the call between the complainant and the counsellor, i.e. the Counselling Note referred to above. Due to its own confidentiality obligations, the service was initially unable to provide these documents unless I agreed not to distribute them outside my office, but I could discuss their content with the complainant. I did not agree to that.

On 20 April 2020, I wrote again to the service. I reserved my position as to whether it is a health service but was firm in my view that it was a community service and continued my investigation. I asked for a copy of the document that might be a “written policy, procedure or work direction” and the Counselling Note. I also asked for information about specialist advice in the event of a miscarriage (referred to in the service’s Constitution) and any other material the service might have that could be relevant. On 18 May 2020, the service responded again denying my jurisdiction but cooperating while reserving its rights.

“Consumer”

The Service submitted that my jurisdiction was only enlivened if the complainant was a “consumer of a community service” under section 24 of the Act. Relevant to this matter, “a health or community service consumer” may make a complaint. The Act does not define “consumer” and therefore it must be given its ordinary meaning subject to the text, context and purpose of the Act.¹ The *Online Macquarie Dictionary* defines consumer as “someone or something that consumes, someone who uses a commodity or service”. Taking the above into account, I consider that a consumer is a person who has used a community service, including a free service.

The question then was whether the complainant had used the telephone service offered by the service. As I understand it, the service does not make audio recordings of phone calls and its counsellors have a discretion as to whether they make a counselling note of a particular call. The service identified a counselling note of a call made around the time that the complainant said they made their call (the Counselling Note). The service gave me a copy. It showed the caller’s name. The service was unable to say whether that the caller is the complainant. This means that the service was largely unable to confirm or deny that it provided a service to them.

The complainant provided me with copies of email correspondence between them and the service. In that correspondence, the complainant used their maiden name. In that email correspondence, the service did not deny that it had provided a service to them. I am satisfied from that correspondence that the complainant was a “consumer” of the telephone service offered by the service.

¹ *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2.

Investigation

Investigation scope

I confirm that the I did not seek to investigate what was actually said in the telephone call because the issue is that the complainant felt the Service was anti-termination and did not clearly advertise that position.

I conducted my investigation by comparing the service's documents i.e. its Constitution and Philosophy and Ethos document, with what was contained on its website.

It provided a copy of the 'policy document' that is entitled "Birthline Pregnancy Support Inc Philosophy and Ethos". Due to its own privacy obligations, the service could not release the Counselling Note until it was established that it was about the complainant (and not another caller). This issue arose because the Counselling Note did not record the caller's name. The service confirmed that it does not give "specialist advice".

On 29 May 2020, I provided the service with a copy of my draft report (**the first draft**) of my investigation by way of procedural fairness and in compliance with section 73 of the Act. On 26 June 2020, the service responded, objecting to several aspects of the first draft. In summary terms, it submitted:

- a. I should verify that the complainant is the caller recorded in the Counselling Note as the service had no record of them making a call. (It had a record with the complainant's maiden name having called);
- b. I would commit an error of law if I did not consider the Counselling Note;
- c. I had accepted the complainant's version of events without regard to the service's submissions and I had been selective as to the parts of its correspondence I referred;
- d. I had given inadequate reasons for my findings and had made "an unexplained leap of reasoning, from determining that Birthline has a pro-life position as an organisation, to a conclusion that its pregnancy counselling service was conducted in a pro-life manner. You do so without any regard to whether, in fact, Birthline's pregnancy counselling service was conducted in a pro-life manner. This is a particularly important element here because your jurisdiction only extends to addressing issues relating to the provision of "services", not "organisations".

On 10 July 2020, the complainant's identity was verified with the service.

On 11 August 2020, the service provided the Counselling Note but did not concede that the complainant was the caller in the Counselling Note. The service noted that "there was no evidence of any coercion or intervention by the counsellor ... in a pro-life manner or otherwise".

There followed some email correspondence, including on 21 August 2020, I purported to finalise the report (the second draft report), providing a copy to the service. The service complained that I had denied it procedural fairness and I therefore agreed not to finalise the report. On 12 October 2020, I received a letter from the service containing several submissions about the second draft report. In particular, the service submitted that:

In the alternative, if [the] Complaint is properly only about the disclosure of Birthline's philosophy on its website, and you do not wish

to address the difference in their respective positions on the facts, then it is submitted that you should put Birthline's position on an equal footing with [the Complainant's] assertions and express the specific conclusion that you do not propose to make any findings about what actually occurred during the telephone calls.

On 20 October 2020, I provided a final report with an Erratum. I took the view that my report was final and I could not amend it. On reflection, my view on this point was an error. On 2 November 2020, the service wrote to me disagreeing with paragraphs 1(f) and 26(b) of the report. I agreed to place them in an Erratum and to include the Erratum in the report.

On 30 November 2020, I exercised the power in section 55 of the Act by requesting what steps the service would take to implement my recommendations. There followed correspondence between the service and me and I ultimately agreed to receiving the service's answer after Christmas 2020. The service duly responded by letter dated 29 January 2021. That letter raised a number of issues. On reflection, I noted my request had not complied with section 55 so I decided to withdraw my request. I treated the service's letter of 29 January 2021 as further procedural fairness. As a result, I re-drafted my purported final report taking into account comments made by the service in the earlier correspondence (the third draft report). On 26 February 2021, I wrote to the service, and enclosed the third draft report for its consideration.

On 13 April 2020, the service wrote to me claiming I was *functus officio* and could not 're-open' the investigation and re-write the report, noting that I was now doing that which I was previously not prepared to do. In a letter dated 15 June 2021, the service maintained that position. I disagree, as I made a jurisdictional error in my approach to the letter of 20 October 2020 and the Erratum. Note that matters complained of in the Erratum have not been repeated in the report. In other words, Birthline's complaints in the Erratum have been taken into account in the text of this report.

Procedural fairness submissions not implemented

Denied it is a community service: I informed the service that I reserved my position on whether it is a health service but provided detailed reasons as to why I was firmly of the view that it is a "community service". The service denied that it was either a health service or a community service.

The Counselling Note: The service initially declined to provide the Counselling Note based on its confidentiality obligations. It subsequently stated it would provide a copy to me if I could verify the complainant's identity and agreed to keep it confidential. I verified that complainant's identity and the service provided the Counselling Note. The service submitted that it would be an "error of law" not to consider the Counselling Note. I therefore considered it and concluded that on the balance of probabilities, it was not a record of the complainant's interaction with the service. As my investigation was not about what was actually said to the complainant, but was about the alleged lack of transparency, on the service's website, about its view on termination, there was no need for me to consider the Counselling Note further. The HCSCC deemed the Complainant's issue with Birthline had to do with communication and clarity about their ethos. Birthline insisted the counselling note was fundamental to the issue. I disagreed but nevertheless, in the interest of fairness, the HCSCC went through the process to obtain the note. Once received, the HCSCC was unable to confirm that the note was an official record between the Complainant and Birthline, and furthermore, added nothing to the primary issue raised.

Pro-life and anti-termination: The service objected to the use of the term ‘pro-life’ (even though it appears in its own Philosophy and Ethos – see below). As the service objected to ‘pro-life’ I changed the report to read “anti-termination” where possible. The service objected to that saying it was a distinction without a difference.

Functus officio: The service asserted that I was *functus officio* and could not withdraw my previous report and replace it with the present report.

Issue 1 — Does the Service have an anti-termination ethos?

The Evidence

I read the service’s Constitution and its Philosophy and Ethos document. The Philosophy and Ethos Document is set out in full, however.

I consider that clause 3.4 of the Constitution tends to suggest that the service is anti-termination.

To subscribe to an ethos which values human life from the moment of fertilization to the moment of natural death and must do nothing that is reasonably foreseeable would result in an abortion.

The service’s Philosophy and Ethos document is a two-page document, which reads:

1. Introduction

Birthline Pregnancy Support Inc (Birthline) was founded in September 1972 as a caring counselling agency for distressed pregnant women their families and other affected people. Birthline became incorporated in 1999 as a completely independent, corporate body with no political or religious agendas.

*It [the Service] has specific goals that are achieved within a prevailing spirit of mutual understanding and commitment to the **pro-life** cause and these together with the will to co-operate with each other constitute the image of care for both the counselees and those who serve at [the Service].*

Birthline’s counselling service covers the areas of pregnancy support, crisis counselling, pre- and post-natal caring, family assistance by provision of baby goods and equipment and education in life and human relationship issues.

The organizational structure of Birthline is simple:

The administrative responsibility is vested in a Board of Management whose members are appointed by a vote of the members at the Annual General Meeting of Birthline Pregnancy Support Inc. The Director is constitutionally a member of the Board and responsible for the day-to-day running of the agency. She is assisted by a number of volunteers who undertake set duties.

This service does not operate in a vacuum. It is based on a definitive philosophy and expressed in a particular ethos.

2. [The Service's] Philosophy

The word philosophy literally means love of wisdom. [The Service's] love of wisdom is guided by three basic principles, i.e.

- *the affirmation of the primary importance and unique value of human life from conception until death;*
- *the total commitment to the well-being of both mother and her unborn child; and*
- *[The Service] does not refer for abortion. It is willing to co-operate with other organisations and persons with a similar philosophy and who under no circumstances refer for abortion.*

All counsellors and workers in [the Service] are bound to these principles and cannot depart from those in their involvement in the counselling, support and educational activities of [the Service] (

3. [The service's] Ethos

In accordance with our Philosophy, Birthline Counsellors never refer for an abortion because abortion is never in the best interest of the child or of its mother.

However, while we can judge the act of abortion as wrong, we can never judge the woman who had had an abortion. We can offer non-judgmental Post-Abortion Grief Counselling....

The seven principles (individualisation, acceptance, non-judgemental attitudes, client self-determination, confidentiality, purposeful expression of feelings and controlled emotional involvement) of a counselling relationship assist the formation of a purposeful relationship between Counsellor and Counsellee.

The Telephone Counsellor is the first person (and often the only person) at Birthline who is contacted by the caller. This means that she or he gives the first impression of Birthline's work to the person calling. The counsellor as a responsible, caring person, needs an attentive ear, an understanding mind and a "still small voice" (the latter is an ancient and poetic way of conveying the supreme attitude of love).

Birthline people have an absolute belief that human life is sacred from conception until natural death and that abortion is therefore always wrong. Bioethics is an enormous subject and [the Service] does not attempt to have a specific view about many areas of Bioethics e.g. IVF and contraception.

Birthline does not give contraceptive advice but does discuss aspects of contraception. When family planning issues including contraception are raised by a counsellee, Birthline suggests consultation with a doctor or other health professional.

The Telephone Counsellor must be aware that Birthline is not a political pressure group. It is a service agency doing whatever it can to help girls and women who for various reasons do not want to continue their pregnancy or who face grave difficulties (personal and other) in coping with their pregnancy or ultimately with the birth of a child.

The Telephone Counsellor is able to put to the caller or counsellee a variety of possibilities concerning available help, assistance, care and responsible information. A Birthline counsellor never gives advice.

I acknowledge that I have read and agree to the above Philosophy and Ethos of Birthline.

Name

Signature

Date

The Philosophy and Ethos document indicates an anti-termination ethos and reveals that counsellors must agree to it and sign it.

The service's submissions

The service denied that it is anti-termination, submitting:

Birthline's pregnancy support service provides counselling on a neutral basis. its counsellors do not seek to influence a caller's decision regarding pregnancy outcomes, including any decision regarding termination of pregnancy.

When the issue of termination is raised by the caller, Birthline counsellors allow the caller to lead the discussion. Counsellors encourage callers to express their thoughts and feelings about the topic, which are then explored in conversation.

Birthline counsellors are non-directive and do not seek to persuade or dissuade a caller from taking any particular action. The issue of termination is never raised by the counsellor. Birthline counsellors are not medically qualified and do not provide medical advice or refer callers for medical procedures.

The service repeated the above submission but using different words when it submitted that it “maintains that its counselling service is neutral and person-centred, being led by the caller. Counsellors provide support which does not seek to impose ideology”.

I find both of these submissions to be inconsistent with the contents of the Philosophy and Ethos document, noting that counsellors are required to agree to those contents and sign the document. I am unable to accept that a person who has read and signed the Philosophy and Ethos document would be truly neutral. I was therefore not persuaded by these submissions.

Issue 2 — Does the service's website represent its anti-termination position transparently?

The Evidence

The service's website does not contain any direct statement about its ethos towards termination as contained in Constitution, clause 3.4 and Philosophy and Ethos document. These documents are not available on its website. It is not possible to reproduce the website in full. Much of the content of the website is reproduced under the heading “Jurisdiction” and will not set that out again here. It is sufficient to note that it gives the impression of ‘neutral’ ethos on termination. I consider the service's website does not transparently present its Philosophy and Ethos (of being anti-termination).

The service's submissions

15. The Service did not make any express submissions about this issue.
16. Having reviewed the Service's website, documentation, and written submissions, I find:

Issue 1 — The service has an anti-termination philosophy and ethos.

and

Issue 2 — The service does not present its anti-termination philosophy and ethos transparently on its website.

Recommendations

Recommendation 1: The service issue a written apology to the complainant for failing to present its anti-termination philosophy and ethos transparently on its website.

Recommendation 2: The service to immediately amend its website to transparently present its anti-termination philosophy and ethos, by either:

- a. Placing its Constitution and Philosophy and Ethos document on its website; or
- b. Placing the following sentence on its website:

"Birthline does not refer for abortion because it is contrary to its philosophy and it is a medical procedure (and Birthline does not give medical advice). However, Birthline never judges a woman for having an abortion and offers sincere and compassionate post-abortion grief counselling to any woman or couple that might need this support".

Recommendation 3: The service to amend all publicly available material to transparently represent its anti-termination position.

Recommendation 4: Birthline counsellors to advise each caller at the beginning of the conversation they have an anti-termination philosophy and ethos and do not refer for abortion.

Concluding remarks

Making a public statement about an investigation I have conducted is a significant exercise of my powers under the Act. I have not taken it lightly. In determining whether to do so, I considered Birthline's willingness to implement my recommendations and the public interest in being aware of Birthline's ethos and philosophy.

On balance, I consider it appropriate to issue a public statement and this public summary in order to inform consumers about these matters.

My decision to issue this summary and the public statement should not be viewed as commentary about pregnancy terminations. I make no observations on that issue. This is solely about service providers being transparent with consumers so they can make informed decisions about health or community services they receive.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line that tapers to the right.

Associate Professor Grant Davies
Health and Community Services Complaints Commissioner
17 December 2021