

**A Decision by the
Deputy Health and Disability Commissioner
(Case 21HDC01323)**

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|--|----|
| Introduction..... | 1 |
| Background..... | 2 |
| Opinion: Mr B — breach..... | 5 |
| Opinion: Clinic — adverse comment..... | 9 |
| Changes made since events | 10 |
| Recommendations..... | 10 |
| Follow-up actions | 11 |
| Appendix A: Independent advice to Deputy Commissioner | 11 |
| Appendix B: Independent clinical advice to Deputy Commissioner | 17 |

Introduction

1. This report is the opinion of Dr Vanessa Caldwell, Deputy Health and Disability Commissioner, and is made in accordance with the power delegated to her by the Commissioner.
2. The report discusses the care provided to Ms A by Mr B at a traditional Chinese massage clinic (the clinic).¹ The complaint concerns alleged inappropriate physical contact and unprofessional conduct during a massage appointment.²
3. The following issue was identified for investigation:
 - *Whether Mr B provided Ms A with an appropriate standard of care and/or maintained appropriate boundaries on 4 March 2021.*

¹ Mr B is a co-director of the company.

² This refers to the ‘relaxation massage’ provided by Mr B, as opposed to a ‘therapeutic massage’ or massage therapy provided as a traditional Chinese massage.

4. The parties directly involved in the investigation were:
- | | |
|-------------------|-------------------------------|
| Ms A | Complainant/consumer |
| Mr B ³ | Chinese medicine practitioner |
5. The massage clinic company is also mentioned in the report, as the group provider/owner of the clinic.
6. Independent advice was received from Mr Pengde (George) Cui⁴ (Appendix A) and Mr Barry Vautier⁵ (Appendix B).

Background

Introduction

7. On 4 March 2021 Ms A made a same-day appointment for a massage at a traditional Chinese massage clinic. Ms A submitted a complaint via the Nationwide Health and Disability Advocacy Service on 14 June 2021 regarding Mr B's alleged unprofessional behaviour during the massage, including potential boundary violations, and the unprofessional environment of the massage clinic.

Events surrounding massage appointment

Unprofessional conduct during massage

8. Mr B told HDC that when Ms A arrived at the clinic on 4 March 2021, he asked whether she wanted a full body massage or only the parts with the pain, and whether she would prefer the massage with or without oil. Mr B told HDC that Ms A responded that she wanted a full body massage with oil. Mr B told HDC that his clinic does not allow clients to be naked when receiving a massage.
9. Ms A told HDC that the appointment was 'unprofessional and inappropriate from the beginning', and that although [Mr B] left the room for her to undress, he returned without knocking first, and she 'barely had the chance' to cover herself and get settled on the massage table.
10. Mr B told HDC that he informed Ms A to take her clothes off but to keep on her bra and underwear and lie on her tummy with a towel over her, and he told her that he would wait outside the room. He then shut the door and waited outside the room. Mr B said that 'after

³ Registered at various times with the New Zealand Rheumatology Association, the New Zealand Acupuncture Standards Authority, and the Chinese Medicine Council.

⁴ Mr Cui is an acupuncturist who graduated with a Bachelor of Medicine in China in 1982, and a Bachelor of Acupuncture in New Zealand in 2008. He has practised Chinese medicine since 1995 and since 2001 has been working part time as a lecturer at the New Zealand School of Acupuncture and Traditional Chinese Medicine.

⁵ Mr Vautier is a massage therapist who obtained a Diploma of Therapeutic Massage in 1994 and graduated with a Bachelor of Health Studies in 2012. Currently, he is a member of Massage New Zealand and has been working in massage practice since 2002.

about 3 minutes' he asked Ms A, 'are you ready', and he heard her answer 'ready'.⁶ He stated that he opened the door without knocking and found her already lying on her tummy, but he does not recall (due to the passage of time) whether Ms A used the towel to cover herself.

11. Ms A told HDC that during the first 10 minutes of the massage, Mr B asked her personal questions about her family and living situation, which made her 'very uncomfortable'. Mr B told HDC that often he tries chatting with clients who are 'too nervous', to help clients and to 'relax the muscles', and that it seemed to work well from past experiences. He also told HDC that he would stop or change the topic if clients showed no interest in his chatting.
12. Regarding the massage itself, Ms A told HDC that Mr B massaged her neck 'way too hard', causing her 'whole body to shake', and that she had a lot of 'unusual' pain in that area for the next few days. Ms A also told HDC that as Mr B was massaging her back, his left fingers 'repeatedly touched' the side of her left breast.
13. Mr B told HDC that he undertook the massage 'as usual', splitting both hands from the central spine to the sides while Ms A was face down, and that Ms A may have felt that he touched the 'edge of the sides [of her breast]' when he was massaging her back. He also told HDC that he always asks clients to let him know if the massage is too strong, as 'different people have different feelings', and he 'regulate[s] the strength with their reaction[s]'. Mr B said that Ms A did not inform him of any pain or injury before she left the clinic, but he refunded the full price of the massage as she was not satisfied with the appointment.
14. Ms A told HDC that when the phone rang during her appointment, Mr B answered the call on speakerphone, and she could hear the details of the call, which seemed to concern another potential client booking an appointment. Mr B continued to massage her with his other hand as he took the call. Ms A believed this was unprofessional, and 'not ok'.
15. Mr B confirmed that he answered his phone during the appointment. He explained that he runs a small business and cannot afford a receptionist. He told HDC that during working hours he only answers calls regarding appointments, and this amounts to fewer than 10 calls a day.

Unprofessional environment

16. Ms A stated that she found the clinic online, and when making the appointment, she was asked by Mr B to bring \$90 in cash for her appointment. She told HDC that when she arrived at the clinic there was 'nothing to suggest' it was a massage clinic as the website stated. Mr B told HDC that this is incorrect, and he provided HDC with an image of a sign outside the clinic stating 'Therapeutic Massage'.⁷

⁶ Mr B accepts that he may have heard Ms A's response incorrectly, ie hearing only 'ready' instead of 'not ready'. In response to the provisional opinion, Mr B reiterated that he only entered the room because he had heard the response 'ready', in line with his usual practice.

⁷ This photograph was provided in 2023 in a response to HDC.

17. Ms A told HDC that the massage room itself was 'very messy, with hundreds' of acupuncture needles spilling out of a medical waste bucket on a table in the corner. Mr B explained that it may have been the time right before the medical disposable container needed to be emptied, but he assured HDC that the clinic holds the appropriate sharps container.
18. Ms A also told HDC that there seemed to be inaccurate, potentially misleading information on the clinic's website, where the clinic claims to be 'affiliated providers/partners' of certain organisations, but when contacted, these organisations claimed they had no knowledge of such a partnership. Mr B told HDC that this was a misunderstanding on his part, as he understood the term 'partner' as meaning any providers who referred clients to his clinic. He confirmed that these references have since been removed from the clinic's website.
19. No clinical records regarding the appointment were provided to HDC. Mr B told HDC that he does not keep records with relaxation massages, 'as [clients] have no injuries or pain to record', and therefore he regards these clients as casual clients. Mr B did provide HDC with a copy of the consent forms used by his clinic.

Complaints process

20. Ms A told HDC that she was unable to submit a complaint via the comments/complaints box on the clinic's website, and when she called the number provided on the website, she received a response from a staff member at another location, who provided an apology and offer of free acupuncture treatment, with no further explanations.
21. Ms A submitted the complaint to HDC as she felt uncomfortable during the 'whole experience', and 'does not want someone less confident and more vulnerable to experience the same thing'.

Responses to provisional opinion

Ms A

22. Ms A was provided with an opportunity to comment on the 'information gathered' section of the provisional report. Despite multiple attempts to obtain Ms A's view, this Office did not receive a response from Ms A.

Mr B

23. Mr B was provided with an opportunity to comment on the provisional report. Mr B accepted the provisional findings and confirmed that the recommendations will be completed. Further information provided by Mr B has been included in the report where relevant.

Massage clinic company

24. The company was provided with an opportunity to comment on the provisional report and confirmed that it had no further comments beyond that provided by Mr B.

Opinion: Mr B — breach

Introduction

25. On 4 March 2021 Ms A booked and attended a same-day appointment for a massage. The massage was performed by Mr B, whom Ms A believes was unprofessional during the treatment and made her feel uncomfortable with inappropriate touching, as well as causing further pain. Ms A also expressed her disappointment in the clinic's environment, and the difficulty in lodging a complaint directly with Mr B.
26. I acknowledge the difficulties in making a factual finding considering conflicting accounts, the passage of time, and a lack of contemporaneous records. However, I consider that both Mr B and Ms A agree on the following findings of fact:
- a) The massage booked by Ms A was a relaxation massage.
 - b) At the time of Ms A's massage, the sharps container within Mr B's treatment room was filled to an extent that seemed to be 'overflowing' with needles.
 - c) Mr B did ask Ms A questions of a personal nature during the massage.
 - d) Mr B did answer a phone call during the massage.
27. After reviewing the information gathered and obtaining advice from two independent advisors (Mr Pengde Cui, an acupuncturist and Chinese medicine practitioner, and Mr Barry Vautier, a massage therapist), I consider that aspects of Mr B's provision of care are clearly below the expected standard.

Clarification regarding relaxation vs Chinese therapeutic massage

28. Considering Mr B's qualifications as an acupuncturist and Chinese medicine practitioner, initially I obtained independent advice from Mr Cui. However, the massage appointment in question is understood to have been a relaxation massage, as indicated by the responses from both Mr B and Ms A, and Mr Cui makes a distinction between a therapeutic massage (which falls within the scope of a Chinese medicine practitioner) and a relaxation massage, which '[does] not belong' to the scope of a Chinese medicine practitioner. Although massage therapy is an unregulated service and there are no restrictions on offering such services, Mr B's qualifications as a Chinese medicine practitioner may leave room for clients to misunderstand or be unclear on the service Mr B provides, particularly considering that relaxation massages are not mentioned in his billboard.
29. Therefore, although Mr B should still be aware of, and hold himself to, the relevant standards of a Chinese medicine practitioner for his general conduct and environment, if he chooses to offer relaxation massage as part of his service, he must meet the required standard for this type of care. Accordingly, I have also obtained independent advice from Mr Vautier, to consider the massage appointment against appropriate relaxation massage standards (discussed further below).

Services of an appropriate standard — breach*Massage techniques*

30. Ms A told HDC that she felt that her massage with Mr B was ‘unprofessional and inappropriate’ from the beginning, noting that Mr B’s left fingers repeatedly touched the side of her left breast, and that he massaged her neck ‘way too hard’, causing her whole body to shake and leaving her in pain for the following couple of days.
31. Mr B told HDC that he performed the massage ‘as usual’, splitting both hands from the central spine to the sides while Ms A was face down, and that Ms A may have felt that he touched the ‘edge of the sides [of her breast]’ when he was massaging her back. He said that his usual practice with clients is to ask them to ‘let [him] know’ if the massage is too strong, and that he regulates his technique according to this. He told HDC that Ms A did not raise any concerns that the massage was painful or caused injury before she left the clinic.
32. As discussed above, it is understood that Mr B provided a relaxation massage to Ms A, and therefore I have relied on Mr Vautier’s advice for this section of the opinion.
33. Mr Vautier advised that if the massage provided was a relaxation massage, touching the breasts without consent or good reason is considered a departure from accepted standards of practice. As outlined above, Mr B accepts that Ms A may have felt that he touched the ‘edge of the sides [of her breast]’ when he was massaging her back, which is consistent with Ms A’s recall that the side of her left breast was touched. Ms A stated that this occurred repeatedly. However, due to the conflicting accounts and absence of any corroborating evidence, I am unable to make a finding as to the extent of the touching or how frequently it occurred during the massage. In any event, I accept Mr Vautier’s advice that touching the breast in this context was a departure from accepted standards of practice, and I am critical that the side of Ms A’s breast was touched without consent during the massage. It can cause a consumer significant discomfort and distress if a sensitive area of the body is touched, even accidentally or briefly. I encourage Mr B to exercise extra caution when massaging near sensitive areas, and to communicate with clients if the area is touched.
34. Regarding Ms A’s concern that the massage was ‘way too hard’, Mr Vautier advised that it is ‘not normal’ to apply such pressure in a relaxation massage to cause such excessive discomfort without close monitoring of pain levels and informed consent. It would be unreasonable if the massage caused Ms A’s whole body to shake and for the pain to last for days.
35. The force of the massage is disputed by the parties, and there is no contemporaneous clinical record on this issue or other corroborating evidence. I am therefore unable to accept as fact that Mr B’s massage caused Ms A’s whole body to shake and for her pain to last for days. However, I agree with Mr Vautier that it is more likely than not that Mr B did not check with Ms A often enough throughout the massage to determine her level of comfort and monitor her pain levels, which is considered a departure from accepted standards of care. Therefore, I am critical of Mr B’s failure to check in with Ms A regarding her pain levels and adjust his pressure accordingly, and I consider this to have been a departure from accepted standards.

Unprofessional conduct and environment

36. Ms A told HDC that the massage room itself was 'very messy' with 'hundreds' of acupuncture needles spilling out of a medical waste bucket. Ms A also told HDC that Mr B asked her personal questions that made her uncomfortable, and he answered a call during the massage while he continued to massage her.
37. As Mr B is a registered Chinese medicine practitioner, and his clinic is advertised as such, I have considered Mr Cui's advice regarding the clinic environment and general professional conduct. I accept Mr Cui's advice that the appropriate standard is for a clinic environment to be clean, tidy, and professional at all times, and, in my view, the described environment does not reach this standard. Standard 2.22 of the New Zealand Acupuncture Standards Authority (NZASA) Code of Safe Practice (Acupuncture) is also clear that sharps containers should not be overfilled.
38. I also accept Mr Cui's advice that the questions regarding Ms A's personal life were 'not necessary' during a massage and would be required only if Mr B needed to collect information to support a Chinese Medicine diagnosis. There are no indications from either Ms A or Mr B that Ms A was receiving a Chinese massage or that such a diagnosis was required, which indicates that this was purely a personal conversation, which Ms A said made her feel uncomfortable. I find Mr B's stated approach of sometimes asking personal questions to help people to relax unusual, and I note that it could be perceived as inappropriate in this context.
39. As set out in principles 1 and 4 of the Standards of Professional Conduct⁸ set by the Chinese Medicine Council, Chinese medicine practitioners should maintain high standards of professional and personal behaviour, including providing surroundings that protect the audio privacy of clients during consultation and treatment processes. I consider that answering a phone call on speakerphone regarding another client during a massage is against such standards of practice and does not provide the audio privacy of both Ms A and the client consulted on the phone. Therefore, I consider that this amounts to unprofessional behaviour that departs from the accepted standard of practice expected of Chinese medicine practitioners. Although I acknowledge Mr B's comment on the lack of a separate receptionist to manage costs, I consider that there are workarounds (such as ensuring an effective voice message system) to manage client calls during massage appointments.
40. In light of the above information, I accept Mr Cui's advice that Mr B's management of the premises, including pricing, the cleanliness of the environment, and his communication with Ms A, amount to a moderate departure from accepted practice.

Informed consent and documentation of consent

41. HDC was not provided with any clinical records or statements to show that Mr B obtained Ms A's informed consent for this procedure. I note that Ms A's call and her appearance at

⁸ Published 11 April 2023.

Mr B's clinic indicates initial consent for the massage, and there is agreement between the parties that Ms A attended for a relaxation massage.

42. NZASA standards clearly state that practitioners should ensure that accurate and legible records of fact are kept for each consultation or contact,⁹ without specifying or differentiating between a casual and a non-casual client. The NZASA standards also state that it is always the responsibility of the practitioner to ensure that interaction with each patient occurs in a context in which the patient is informed and consents.¹⁰
43. There is no evidence that Mr B obtained any verbal or formal written consent from Ms A before the appointment, or, if he did, he did not record or retain such consent. On balance, it is more likely than not that no written consent was obtained. I accept Mr Cui's advice that as a clinic that provides therapeutic massage, the clinic should keep records and ask patients to sign consent forms before providing a service. I also accept Mr Cui's advice that both examples of consent forms provided to HDC by Mr B miss 'basic information' such as gender information and further definition of 'private parts', and that the forms require improvements to be in line with NZASA and CMC requirements. I accept Mr Cui's advice that this is considered a moderate departure from accepted standards of practice.
44. Regarding the documentation of informed consent, the NZASA Guidelines for Informed Consent state:

'While it is not necessary to ask the patient to sign a consent form for every proposed treatment, it is important that the [practitioner] documents in the patient's health record, the fact that informed consent (verbal or written) has been given by the patient, together with a summary of the information that was provided to the patient in order to obtain that consent. All oral and written informed consent must be clearly documented and date[d] ... It is important that the communication process itself be documented in the patient's clinical notes.'

45. I accept Mr Vautier's advice that even with a relaxation massage it is standard practice to obtain screening information on a client to establish the safety of the massage and the stroke adaptations required, and that such information should be signed by the client. Therefore, not screening Ms A, not gaining written consent using a formal consent form, and not keeping notes on the massage supplied is considered a severe departure from the standard care.

Conclusion

46. Considering both Mr Cui's and Mr Vautier's advice regarding Mr B's care during Ms A's massage, I find that Mr B's incorrect massage techniques, including touching the left side of Ms A's breast, the failure to moderate pressure with consumer feedback, and his

⁹ Standard 2.1.2 of the Code of Ethics within the NZASA Standards and Code of Ethics.

¹⁰ Standard 9.1.2 of the Code of Ethics within the NZASA Standards and Code of Ethics.

unprofessional conduct and environment, amount to a breach of Right 4(2)¹¹ of the Code of Health and Disability Services Consumers' Rights (the Code).

47. Furthermore, considering both Mr Cui's and Mr Vautier's advice, I find that although Ms A consented to a relaxation massage, the incomplete screening and lack of consenting documentation further amount to a breach of Right 4(2) of the Code.

Opinion: Clinic — adverse comment

Complaints process — adverse comment

48. Ms A told HDC that the comments and complaints form on the clinic's website was not working, and that she had to speak to another practitioner at another clinic to make a complaint. Ms A did not find the response helpful, as there were no active efforts by the practitioner to resolve the complaint besides offering a free acupuncture treatment at the practitioner's clinic.
49. As a health services provider, the clinic must ensure that services are provided in line with the rights of the Code. Right 10(1) of the Code provides that every consumer has the right to complain about a provider in any form appropriate to the consumer. As part of fulfilling this right, under Right 10(3), every provider must facilitate the fair, simple, speedy, and efficient resolution of complaints.
50. In my view, it is appropriate that Ms A's complaint was redirected to another practitioner and clinic. Whilst I appreciate her concerns about being unable to complain to Mr B directly, given the nature of the concerns, I consider that it was reasonable that another practitioner within the clinic group initially received and reviewed the complaint independent of Mr B.
51. Notwithstanding this, I consider that the colleague in question did not manage the complaint appropriately. The colleague did not take active steps to resolve Ms A's concerns regarding Mr B besides offering a free acupuncture treatment, which does not support Ms A's right to complain about the care provided by Mr B. I would have expected Mr B to be advised of the complaint, and for the concerns to be investigated through discussions with relevant parties.
52. Further, I wish to highlight to the clinic the importance of having a transparent and functioning complaints system. It is evident that Ms A found the complaints process difficult, in large part due to the malfunctioning complaints form on the clinic's website. I ask that the clinic ensure that its complaints process is clear and functional for consumers.
53. Accordingly, whilst I do not consider that these actions amount to a breach of the Code, I am critical of the malfunctioning complaints form and inappropriate management of Ms A's complaint by another practitioner.

¹¹ Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.

Payment method — other comment

54. I also note Mr Cui's advice that Mr B is able to set a price for clients but should not set a requirement for payment methods (such as in cash). If it was the case that the clinic could process payments only by cash, Ms A should have been made aware of the accepted payment method prior to her appointment. Considering that there is no clear indication that Ms A was required to pay in cash only, I am unable to determine whether there were other options for payment available, and I leave this comment for the clinic and Mr B to consider. In response to the provisional opinion, Mr B confirmed that the clinic does have an EFTPOS machine but that perhaps there may have been issues with the EFTPOS machine, or he may have forgotten to bring it to the clinic that day.

Changes made since events

55. Mr B told HDC that he has made the following changes to his practice:
- a) He always answers calls using earphones.
 - b) He treats relaxation massage clients the same as other clients with regards to clinical documentation, ie, he makes records and ensures that they sign a consent form.
 - c) He removed the names of 'partner' organisations from the clinic's website.

Recommendations

56. I recommend that Mr B:
- a) Provide a written apology to Ms A regarding the deficiencies outlined in this report. The apology is to be sent to HDC, for forwarding to Ms A, within three weeks of receiving this report.
 - b) Reflect on the deficiencies in care identified in this case, particularly around informed consent, clinical documentation, and massage techniques, and provide a written report on the reflections and changes to practice instigated as a result, within three months of the date of this report.
 - c) Undertake further education/training with a registered massage professional and/or Chinese medicine practitioner on best practice around massage techniques, professional conduct, informed consent, and clinical documentation:
 - Arrange a mentor from a member practitioner of the Chinese Medicine Council of New Zealand for a period of 12 months from the date of this report, and provide details of the mentor within six months of the date of this report;
 - Arrange for the mentor to provide a report to HDC on the content and outcome from the mentoring within three months after completing the 12-month period of mentoring;
 - Arrange for the mentor to provide observational supervision and mentoring relating to informed consent prior to and during a traditional Chinese medicine acupuncture

treatment, with the consent of the client, and confirm that this has been done within three months of the date of this report.

d) Develop a policy and/or documented process regarding informed consent, clinical documentation, and draping techniques, and provide a copy of this to HDC within three months of the date of this report.

57. I recommend that the clinic implement a functioning complaint form on its website and ensure that brochures regarding the complaints process are displayed at its clinics, and provide evidence of such within three months of the date of this report.

Follow-up actions

58. A copy of this report with details identifying the parties removed, except the independent advisors on this case, will be sent to the Acupuncture Standards Authority and the Chinese Medicine Council, and they will be advised of Mr B's name.

59. A copy of this report with details identifying the parties removed, except the independent advisors on this case, will be placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.

Appendix A: Independent advice to Deputy Commissioner

The following independent advice was received from Mr Pengde (George) Cui:

'C21HDC01323

Mr Pengde (George) Cui

12 April 2024

I have been asked to provide clinical advice to HDC on case number C21HDC01323. I have read and agree to follow HDC's Guidelines for Independent Advisors.

I am not aware of any personal or professional conflicts of interest with any of the parties involved in this complaint.

I am aware that my report should use simple and clear language and explain complex or technical medical terms.

Qualifications, training and experience relevant to the area of expertise involved:

- *Bachelor of Medicine*
- *Bachelor of Health Science*
- *Chief Physician of Chinese Medicine*
- *Professor of Chinese Medicine*

- *Vice Chairperson of the Supervision Board of the World Federation of Chinese Medicine Societies*
- *Lecture of NZSATCM in Acupuncture, Tuinaology (Chinese Massage) over 20 years*
- *Chairman of NZRTCMP over 10 years*

Documents provided by HDC:

1. Letter of complaint dated 14 June 2021
2. [Mr B's] response dated 11 May 2023
3. Consent forms provided by [Mr B] on 29 November 2023

Referral instructions from HDC:

[Mr B]

1. Reasonableness of care provided by [Mr B] in his treatment/care of [Ms A] as described by [Mr B], in conjunction with the information provided to us by [Ms A], in particular:

a. Whether the method of massage described by [Mr B] is standard practice (“... massage splitting my both hands from central spine to sides. She might feel I touched the edge of the sides ... I only massaged her back while she kept facing down.”), and

b. Whether it is standard for massages to be of such pressure to cause clients to experience symptoms described by [Ms A] (“... way too hard and caused her whole body to shake ... feels this injured her neck ... a lot of unusual pain in that area the following couple of days.”)

2. Adequacy of relevant policies and procedures in place at [the clinic] as provided, particularly:

a. Adequacy of the consent forms provided.

b. Whether it is standard practice to not leave records for casual clients receiving a massage.

3. Any other matters in this case that you consider warrant comment.

Brief summary of clinical events:

[Ms A] complained that she accepted the massage provided by [Mr B] in an unprofessional and inappropriate way. According to [Ms A's] description, [Mr B] entered the room without notice after she undressed, she did not get enough time to cover herself and settle on the treatment bed. During the treatment, [Mr B] touched her left breast without permission, also [Mr B] continued to ask personal questions not related to the treatment. When [Mr B] answered the phone during the treatment, he still provided the treatment for one hand. [Ms A] also complained of neck pain that lasted a couple of days after the treatment. Lastly, [Ms A] complained about the messy treatment environment in that there were acupuncture needles spilling out of a medical

waste bucket, missing information on the signs and the wrong complaint information on the website.

[Mr B] confirmed that the treatment was a full body relax massage with oil, he chatted with [Ms A], but he did not provide further information about the specific topics they chatted about, he did answer the phone during the treatment. [Mr B] thought he might have heard the wrong reply when he prepared to enter the room, and he might have touched the edge of the body sides instead of the breast directly because he only applied the massage on her back. For the treatment environment, [Mr B] said it might have been right before the time prior to swapping the sharps container, and he confirmed they have professional sharps containers. There was no response according to the website link about the complaint, and [Mr B] confirmed that [Ms A] communicated with [a staff member at another location] only. Lastly, [Mr B] denied the missing information on the signs, 'therapeutic massage' can be found in the signs.

There was no clinical note because it was the relax massage service.

Question 1: Reasonableness of care provided by [Mr B] in his treatment/care of [Ms A] as described by [Mr B], in conjunction with the information provided to us by [Ms A], in particular:

- Whether the method of massage described by [Mr B] is standard practice; and
- Whether it is standard for massages to be of such pressure to cause clients to experience symptoms described by [Ms A]

Advisor's opinion:

1. It is standard practice as [Mr B] described, but his practice might not be professional hand techniques.
2. It is not standard for massages to be of such pressure to cause clients to experience symptoms described by [Ms A].

What was the standard of care/accepted practice at the time of events? Please refer to relevant standards/material.

1. 'splitting my both hands from central spine to sides' hands should be obliquely towards or upwards like shape '八' instead of transverse. Normally, the methods of back massage would not be over the mid-axillary line, which means it is not possible to touch repeat.
2. When applying massage, the pressure should be suitable, different areas should use different force. For example, hip and lower back might apply hard force but the same force cannot be used in the chest or abdomen.

If the patient feels pain after treatment, it may be caused by unskilful techniques or massage with over force or lasting a long time.

References:

1. Li Z. Tuinaology (推*学). Beijing:China Traditional Chinese Medicine Press; 2002
2. Xinwen Z. Practical Chinese Massage (实用推拿*学). Shanghai: Shanghai Scientific and Technical Publishers;2002
3. Guidelines: Professional Boundaries from the Nursing Council of NZ

Was there a departure from the standard of care or accepted practice?

Moderate departure.

How would the care provided be viewed by your peers? Please reference the views of any peers who were consulted.

No peer views for this complaint.

Please outline any factors that may limit your assessment of the events.

1. Did [Ms A] take off her bra, who did that? If it was [Mr B] and he did not get permission from [Ms A], then it did not meet the standard of practice.
2. Do not know how [Mr B] draped [Ms A]. For the standard of draping, the towel/blanket would cover the side of the body, which means only when [Mr B] draped the patient, he might touch the side of the body.

Recommendations for improvement that may help to prevent a similar occurrence in the future.

1. Need to improve the draping of patients.
2. Need to improve the massage skills and asking the patient's feeling properly during the treatment.
3. Must get permission when palpating the body or doing the examination.
4. Keep clear boundaries with patients.
5. If the patient is of the opposite gender, it is better to have a third party in the clinic.

Question 2: Adequacy of relevant policies and procedures in place at [the clinic] as provided, particularly:

- Adequacy of the consent forms provided.
- Whether it is standard practice to not leave records for casual clients receiving a massage.

Advisor's opinion

1. Both consent forms need to improve, there is some basic information missing.

2. As a clinic that provides therapeutic massage (shown in the signs), should keep a record and ask the patient to sign the consent form before providing service. If it was a relaxation massage centre, it does not belong to the health care providers.

What was the standard of care/accepted practice at the time of events? Please refer to relevant standards/material.

1. NZASA — Guidelines for Informed Consent
2. AcNZ — Acupuncture NZ Informed Consent

Was there a departure from the standard of care or accepted practice?

Moderate departure.

How would the care provided be viewed by your peers? Please reference the views of any peers who were consulted.

No peer views for this complaint.

Please outline any factors that may limit your assessment of the events.

No factors are limiting my assessment of the question.

Recommendations for improvement that may help to prevent a similar occurrence in the future.

1. Both consent forms should add the Gender.
2. For the massage consent form:

“except private parts, I will ...” please change to “except private parts and sensitive areas (i.e. chest, breast, buttocks, groin areas), I will ...”
3. Improve both consent forms according to NZASA, AcNZ and CMC requirements.
4. Keep good records of treatment including acupuncture, herbs and therapeutic massage.

Question 3: Any other matters in this case that you consider warrant comment.

Advisor’s opinion

1. [Mr B] may tell the price to [Ms A], but cannot require the payment way.
2. Asking the privacy question is not necessary based on the information provided by HDC. For example, visa, kids and living situation. If [Mr B] recorded the treatment, he may need to collect the information about history of pregnancy, occupation, life habits etc to support Chinese Medicine diagnosis.
3. The clinic environment should be clean, tidy and professional all the time.
4. Because the signs provided information that [Mr B] provides ACC treatment and therapeutic massage, thus he should regulate his behaviour as a professional healthcare provider instead of relaxation massage therapist.

What was the standard of care/accepted practice at the time of events? Please refer to relevant standards/material.

AcNZ — Code of professional Ethics

NZASA — Standards Ethics and Safe Practice

Was there a departure from the standard of care or accepted practice?

Moderate departure.

How would the care provided be viewed by your peers? Please reference the views of any peers who were consulted.

No peer views for this complaint.

Please outline any factors that may limit your assessment of the events.

No factors are limiting my assessment of the question.

Recommendations for improvement that may help to prevent a similar occurrence in the future.

1. Improve [the clinic's] environment and make it more professional and hygienic.
2. Give more payment choices to the patients.'

Appendix B: Independent clinical advice to Deputy Commissioner

The following independent advice was received from Mr Barry Vautier:

'I have been asked to provide clinical advice to HDC on case number C21HDC01323. I have read and agree to follow HDC's Guidelines for Independent Advisors.

I am not aware of any personal or professional conflicts of interest with any of the parties involved in this complaint.

I am aware that my report should use simple and clear language and explain complex or technical medical terms.

Qualifications, training and experience relevant to the area of expertise involved:

Barry Vautier

Bachelor of Health Studies (BHS) 2012. Neuromuscular and Sports therapy. New Zealand College of Massage, Auckland.

Adult Teaching & Education 2005. Assessment for Tutors & candidate performance. University of Auckland performance Improvement centre. 1995. Up Front Teaching module. Unitech, Auckland

Diploma Therapeutic Massage (Dip Ther. Mass.) 1994. New Zealand Association of Therapeutic Massage Practitioners.

Diploma of Herbal Medicine (DHM) 1996. Southern Cross Herbal School, Gosford, Australia.

Naturopath Diploma (ND) 1990. Specialising in Remedial Body Therapies South Pacific Association of Natural Therapies.

Professional Memberships

Life member of Massage New Zealand (MNZ — President 2006/7)

Continuous member of a massage association since 1989 (NZATMP, TMA & MNZ)

Board member; Bowen Therapy Federation of Australasia (BTFA)

Mr Vautier has over 35 years in private practice in the massage industry in New Zealand. He has held posts as education officer and president of massage associations. Barry has contributed to massage educational standards of practice in New Zealand and has been an educator of massage and health science for over 25 years. He is conversant with many styles of body therapy and massage techniques. Barry has been committed to ongoing professional development throughout his career.

Documents provided by HDC:

1. Letter of complaint dated 14 June 2021
2. [Mr B's] response dated 11 May 2023

3. Consent forms provided by [Mr B] on 29 November 2023

Referral instructions from HDC:

[Mr B]

1. Reasonableness of care provided by [Mr B] in his treatment/care of [Ms A] as described by [Mr B], in conjunction with the information provided to us by [Ms A], in particular:
 - a. Whether the method of massage described by [Mr B] is standard practice (“... massage splitting my both hands from central spine to sides. She might feel I touched the edge of the sides ... I only massaged her back while she kept facing down.”), and
 - b. Whether it is standard for massages to be of such pressure to cause clients to experience symptoms described by [Ms A] (“... way too hard and caused her whole body to shake ... feels this injured her neck ... a lot of unusual pain in that area the following couple of days.”)
2. Adequacy of relevant policies and procedures in place at [the clinic] as provided, particularly:
 - a. Adequacy of the consent forms provided.
 - b. Whether it is standard practice to not leave records for casual clients receiving a massage.
3. Whether the environment was appropriate for the circumstances of a massage.
 - a. Any other matters in this case that you consider warrant comment.

Brief summary of clinical events:

The complaint

On 4 March 2021 [Ms A] attended a massage with [Mr B]. She was asked to bring \$90 in cash which was later refunded. She felt the appointment she had with him was unprofessional and inappropriate. After he answered a phone call during the appointment she firmly told him to stop the massage which he did. She was unable to make a complaint on [the clinic’s] website, but was able to speak to someone at another clinic to make a complaint. She did not find the response to be helpful.

Key issues of [Ms A’s] complaint:

1. The room was very messy, with “hundreds” of acupuncture needles spilling out of a medical waste bucket on a table in the corner.
2. [Mr B] left the room before she undressed, but returned without knocking first and she barely had the chance to cover herself and get settled on the massage table.
3. As [Mr B] massaged her back, his left fingers repeatedly touched the side of her left breast.
4. During the first ten minutes of the massage [Mr B] continued to talk to her and ask personal questions which made her feel very uncomfortable.

5. [Mr B] massaged her neck in a way that was way too hard and caused her whole body to shake. She feels this injured her neck as she had a lot of unusual pain in that area the following couple of days.
6. During the massage [Mr B] answered a phone call on speakerphone while he continued to massage her with his other hand.
7. The day after making her complaint over the phone to a woman at another location for the practice, she received a text from a colleague of [Mr B] apologising for [Mr B's] treatment and offering free acupuncture instead. [Ms A] declined the offer.

The provider's response

The provider was asked the following 13 questions by HDC to provide details of the treatment given to [Ms A]:

1. Details of [Ms A's] massage treatment on 4 March 2021, including the techniques used and areas treated.

This question was not answered directly by [Mr B]. No details of the techniques or the areas treated have been given.

2. Details of communication with [Ms A], including discussion of the treatment being provided and what it would involve, consenting discussions, questions asked during the treatment, and any telephone calls made or received during the treatment.

No details have been supplied by [Mr B] of any discussion about the treatment, what it involved or any informed consent.

[Mr B] said he chats with clients to develop rapport and enable the client to relax. If they show no interest in his chatting, he stops or changes the topic (see complaint 4).

[Mr B] stated he did answer his phone for an appointment (see complaint 6).

3. [Ms A's] concern that she did not have the chance to cover herself before you entered the room prior to treatment, and was not made aware you were entering the room.

[Mr B] said he might have misheard [Ms A] say ready rather than not ready (see complaint 2).

4. [Ms A's] concern regarding the touching of her left breast during treatment.

[Mr B] stated, "She lied on the tummy and I did massage splitting my both hands from central spine to sides. She might feel I touched the edge of the sides. Actually, I only massaged her back while she kept facing down." (see complaint 3)

5. [Ms A's] concern about the pressure used whilst massaging her neck and the resulting pain and injury.

- [Mr B] claims he kept asking if the massage was too strong (see complaint 5). [Ms A's] experience was that it was too hard and injurious.
6. Any steps taken to address and manage any discomfort or pain [Ms A] experienced during the massage.
[Mr B] claims [Ms A] didn't tell him of the pain or injury caused by his massage before she left the clinic. He refunded the full price as she was not satisfied with his help (see intro to the complaint above).
 7. [Ms A's] observation that there were acupuncture needles spilling out of a medical waste bucket on a table.
[Mr B] apologised that the container hadn't been emptied (see complaint 1 above).
 8. Details of any actions taken to resolve [Ms A's] complaint. A complete copy of [Ms A's] clinical records from 4 March 2021 and any records or documents associated with the appointment on this date, including consent documentation.
[Mr B] stated they do not keep clinical records for relaxation massage, but plan to in the future (see intro to the complaint above).
 9. Any policies, procedures or guidelines in place at the time of these events relating to obtaining informed consent, and any changes you may have made since.
Due to this complaint [Mr B] stated they will now get clients to fill out a consent form. Evidence of this form is provided by [Mr B].
[Mr B] says they can't afford a receptionist and now answers calls by earphone. (See complaint 6 above.)
 10. Any policies, procedures, guidelines, or information sheets relating to the different types of massage techniques used at your clinic.
Very limited information has been provided here. [Mr B] stated "In our clinic, mostly we provide therapeutic massage, acupressure related to acupuncture. Even the clients who ask the relaxing massage with oil like her, we do not allow the client get the massage with the naked body."
 11. Any policies, procedures or guidelines relating to the safe handling and disposal of medical waste and sharps.
[Mr B] says they provide a professional sharp container and change it when it's full. (See complaint 1 above.)
 12. A copy of all communication with [Ms A] relating to her complaint.
No written communication has been provided by [Mr B]. Just that [Ms A] spoke to [a staff member] at another clinic.

13. When [Ms A] arrived, she noticed that the signs outside said acupuncture clinic and there was nothing to suggest it was a massage clinic as the website stated.

[Mr B] provided photographic evidence of the clinic sign stating therapeutic massage.

Question 1: Reasonableness of care provided by [Mr B] in his treatment/care of [Ms A] as described by [Mr B], in conjunction with the information provided to us by [Ms A], in particular:

- Whether the method of massage described by [Mr B] is standard practice; and
- Whether it is standard for massages to be of such pressure to cause clients to experience symptoms described by [Ms A]

List any sources of information reviewed other than the documents provided by HDC:

Massage New Zealand “Code of Ethics” and “Standards of practice”. Historical teaching notes on Massage from the New Zealand College of Massage.

Advisor’s opinion

[Mr B] has provided almost no detail on the style of massage he gave to [Ms A]. He stated he only massaged her back and that “she might feel I touched the edge of the sides” in reference to point 4 above to touching her left breast. It reads as if he was performing petrissage (kneading) strokes across her back and his hands may have gone too far laterally to touch the side of [Ms A’s] breast. Touching the breasts without consent or good reason is a breach of standard practice.

[Ms A] stated that when [Mr B] massaged her neck it was “way too hard and caused her whole body to shake”. The pain effects of this she claimed lasted a couple of days. This level of care provided by [Mr B] is unreasonable. He doesn’t seem to have engaged with [Ms A] often enough with the application of strokes by using a pain scale to determine client’s comfort. It’s not normal to apply excessive discomfort in a relaxation massage especially without very close monitoring of pain levels.

His massage seems to have lacked informed consent to apply deeper massage.

What was the standard of care/accepted practice at the time of events? Please refer to relevant standards/material.

The standard of care according to Massage New Zealand (MNZ) Standards of Practice is to apply:

1. Informed consent for the massage. Including style of strokes applied.
2. Informed consent and the moderation of the depth of strokes for client comfort.
3. No touching of sensitive areas such as the client’s breast.

Was there a departure from the standard of care or accepted practice? (No departure; Mild departure; Moderate departure; or Severe departure)

There was a severe departure of care about:

1. Lack of informed consent
2. Too much application of depth of strokes
3. Inappropriate touch to her breast

How would the care provided be viewed by your peers? Please reference the views of any peers who were consulted.

Given the standard of care outlined by MNZ my peers would consider the departure of care to be severe.

Please outline any factors that may limit your assessment of the events.

There is a serious lack of information about how this relaxation massage was performed. What body areas were covered. What type of strokes were applied. There was no consent for massage obtained by writing and it's unknown what information was gathered prior to the massage to cover any health concerns.

Recommendations for improvement that may help to prevent a similar occurrence in future.

[Mr B] and the clinic he runs needs to address best practice for a massage practice:

1. Always obtain a written consent for any massage with screening information.
2. Practise informed consent prior to and throughout the massage.
3. Apply a pain scale when changing strokes of depth to establish client comfort.
4. Keep case notes on the massage of what body areas were massaged, what strokes applied and the client's outcome from the massage.
5. Use professional language throughout the massage.

Question 2: Adequacy of relevant policies and procedures in place at [the clinic] as provided, particularly:

- Adequacy of the consent forms provided.
- Whether it is standard practice to not leave records for casual clients receiving a massage.

List any sources of information reviewed other than the documents provided by HDC:

MNZ "Code of Ethics" and "Standards of practice". Historical teaching notes on Massage from the New Zealand College of Massage.

Advisor's opinion

There were no consent forms supplied to [Ms A] to fill out prior to the massage. It is standard practice in a massage to always obtain screening information on a client to establish if this person is safe to massage. And if so, are there any massage stroke adaptations required. What sort of massage will be applied and to what body parts. What duration of the massage. The consent form should be signed by the client. After the massage notes should be recorded of what strokes or techniques were used and where on the body. What the outcome of the massage was. These records should be kept confidential and securely locked away.

What was the standard of care/accepted practice at the time of events? Please refer to relevant standards/material.

The standard of care as in the MNZ "Standards of practice" for relaxation massage is to have a client fill out a consent form prior to the massage and keep client notes of what massage was applied and the outcome of the massage including any post massage advice for care of the client.

Was there a departure from the standard of care or accepted practice? (No departure; Mild departure; Moderate departure; or Severe departure)

There was a severe departure of care by not having a screening and consent form and by not keeping notes on the massage supplied.

How would the care provided be viewed by your peers? Please reference the views of any peers who were consulted.

Given the standard of care outlined by MNZ my peers would consider the departure of care to be severe.

Please outline any factors that may limit your assessment of the events.

Because there are no clinical notes supplied by [Mr B] it's impossible to know just how he gave the massage and what the outcomes were.

Recommendations for improvement that may help to prevent a similar occurrence in future.

[Mr B] has supplied a sample of a consent form they are now using for relaxation massage at their clinic. This form has some limitations which should be addressed. [Mr B] needs to get advice on best record keeping practice.

Question 3: Whether the environment was appropriate for the circumstances of a massage.

List any sources of information reviewed other than the documents provided by HDC:

MNZ "Code of Ethics" and "Standards of practice". Historical teaching notes on massage from the New Zealand College of Massage.

Advisor's opinion

[Ms A] stated the room was “very messy with hundreds of acupuncture needles spilling out of a medical waste bucket”.

Having a messy environment for a massage clinic is unprofessional and, in this case, unhygienic with used acupuncture needles being present.

What was the standard of care/accepted practice at the time of events? Please refer to relevant standards/material.

The standard of care as in the MNZ “Standards of practice” for relaxation massage is to have a tidy, clean and hygienic environment.

Was there a departure from the standard of care or accepted practice? (No departure; Mild departure; Moderate departure; or Severe departure)

The messy room and having used acupuncture needles present are a moderate departure of standard of care for a massage environment.

How would the care provided be viewed by your peers? Please reference the views of any peers who were consulted.

MNZ peers would consider the departure of care of a clean and hygienic environment to be moderate.

Please outline any factors that may limit your assessment of the events.

It's unknown what the room looked like as there is no photographic or other evidence as to the degree of messiness of the room as reported by [Ms A].

Recommendations for improvement that may help to prevent a similar occurrence in future.

Remove used acupuncture needles from the room if practising massage. Always ensure there is a clean and tidy clinical environment.

Question 4: Any other matters in this case that you consider warrant comment.

List any sources of information reviewed other than the documents provided by HDC:

MNZ “Code of Ethics” and “Standards of practice”. Historical teaching notes on massage from the New Zealand College of Massage.

Advisor's opinion

1. [Mr B] answered his phone inappropriately during the massage. He continued to rub her with one hand while taking the call. This is unprofessional as the client is disrespected as attention is taken away from the client.
2. Having a clear complaints procedure published in the clinic visible to clients and online. [Ms A] was unable to fill out a complaint online and had to ring several associate clinics before giving verbal feedback on the massage. Her complaint was

inappropriately responded to by another practitioner “...” at another clinic who suggested she have acupuncture for free.

What was the standard of care/accepted practice at the time of events? Please refer to relevant standards/material.

1. It's standard practice to never answer a phone call or text messages during a massage. Any clients ringing can leave a message.
2. It's standard practice to have a complaints procedure visible in the clinic or waiting area.
3. It's normal practice to have the Health and Disability Code of Health and Disability Services Consumers' Rights poster or pamphlet visible or available to every new client.

Was there a departure from the standard of care or accepted practice? (No departure; Mild departure; Moderate departure; or Severe departure)

1. The departure of care by answering the phone call to book a client in is a moderate departure of standard of care.
2. The departure of standard of care of not having a complaints procedure and having it visible in the clinic is a severe departure of care and accepted practice.
3. The departure of standard of care of not having the HDC poster or pamphlet is severe.

How would the care provided be viewed by your peers? Please reference the views of any peers who were consulted.

1. MNZ peers would consider the departure of care by answering a phone call during a massage to be moderate.
2. MNZ peers would consider the departure of care by not having a complaints procedure and it not being visible to be a severe departure of accepted practice.
3. MNZ peers would consider not having the HDC Code of Health and Disability Services Consumers' Rights poster or pamphlet a severe departure of accepted practice.

Please outline any factors that may limit your assessment of the events.

It's unknown if [Mr B] and [the clinic] has a complaints procedure and it is visible to clients.

Recommendations for improvement that may help to prevent a similar occurrence in future.

1. Never answer [phone] call or text or email messages during a massage. The massage is the client's time. [Mr B] gives the excuse that he needs to answer calls as he is self-employed, however most practitioners in New Zealand don't have a receptionist and do not answer calls during a massage. A good phone message asking clients to leave a message is sufficient for a practitioner to ring them back between massages.

2. Have a complaints procedure in place and a poster advertising this in the clinic or waiting room. A brochure could be given to each client on the practice with a section on how to make a complaint. The HDC Code of Health and Disability Services Consumers' Rights poster or pamphlet should also be visible.
3. [Mr B] should get advice from a registered massage professional in New Zealand who can provide him with best practice advice. Ideally [Mr B] should have a New Zealand massage qualification at least in relaxation massage which will provide him with best practice in New Zealand. He should join a professional association which encourages best practice and professional development.'