

**A Decision by the
Deputy Health and Disability Commissioner
(Case 22HDC02896)**

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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.
1. The report discusses the services provided to Mrs A by Dr B, a traditional Chinese medicine (TCM)¹ therapist.
2. On 17 November 2022, the Health and Disability Commissioner (HDC) received a complaint from Mrs A, aged in her fifties at the time of the events, about the services provided to her by Dr B.
3. Mrs A raised concerns about Dr B’s conduct towards her during the course of acupuncture treatment provided at two appointments, on 22 and 29 June 2016. This report considers the appropriateness of the treatment provided to Mrs A, including whether informed consent was obtained. Mrs A stated that the treatments caused her significant distress and trauma, which has affected her day-to-day life.

¹ TCM is defined by the New Zealand Standard Classification of Occupations used by Statistics New Zealand as ‘the treatment of imbalances of energy flows through the body by assessing the whole person, and using techniques and methods such as acupuncture, Chinese herbal medicine, massage (tuina), diet, exercise and breathing therapy (qigong)’. See: <https://www.health.govt.nz/system/files/documents/publications/traditional-chinese-medicine-regulation-proposal.pdf> (page 9).

4. The following issue was identified for investigation:
 - *Whether Dr B provided Mrs A with an appropriate standard of care on 22 and 29 June 2016.*
5. The parties directly involved in the investigation were:

Mrs A	Consumer/complainant
Dr B	Provider
6. Further information was received from:

New Zealand Police
Mrs A's medical practice

Information gathered during investigation

New Zealand Police investigation

7. Mrs A made a complaint to the New Zealand Police (the Police) in July 2016, alleging that Dr B had indecently assaulted her during the appointments on 22 and 29 June 2016. The Police file was provided to HDC and is referred to in this report.
8. The Police interviewed Mrs A and Dr B but found that there was 'insufficient evidence to prosecute and suggest that [Dr B] ha[d] not intentionally indecently assaulted' Mrs A. However, the Police Report Form dated 18 October 2016 states:

'I have found there to be an issue with [Dr B's] communication in obtaining consent and explanation before he performs his professional treatment.

I recommend that [he] be warned about his practices when dealing with patients, in particular women, in obtaining explicit consent. It may be prudent [that] [he] provides all clients with a consent form explaining his treatment practices.'
9. The purpose of HDC's investigation is to determine whether Dr B provided services of an acceptable standard in accordance with the Code of Health and Disability Services Consumers' Rights (the Code), as distinct from the Police investigation.

Background

10. Dr B has been practising TCM therapy for approximately 17 years.
11. The services provided by Dr B, as advertised, are acupuncture, cupping,² energy healing, herbalists, men's health, natural fertility management, sports injury therapy, traditional Chinese medicine and women's health.

² Cupping is used in complementary and alternative medicine and is practised with round glass cups that are shaped like glass balls, which have an opening at one end. This treatment involves placing glass suction cups on painful body parts for vacuum creation, to restore the flow of 'Qi' or 'Energy'. See:

First acupuncture treatment — 22 June 2016

12. Mrs A sought acupuncture treatment from Dr B as she had been suffering from sciatica³ in her lower back, which caused pins and needles in her right leg, buttocks, and foot.
13. Mrs A's first appointment with Dr B was on 22 June 2016 at 3pm. Mrs A said that she had never had acupuncture before and chose Dr B after reading reviews on his website and receiving a recommendation from a work colleague.
14. Mrs A told HDC that Dr B was the sole person at the premises when she attended for the appointment.

Information provided prior to treatment

15. Mrs A completed a Treatment Record form provided by Dr B. The information provided by Mrs A included her contact details, weight, and medical history, including the signs and symptoms of her pain. Mrs A also confirmed the previous treatment she had tried.
16. The Treatment Record included a 'Patient Check List', which listed the following:
 - (i) Patient explained treatment in compliance with health and disability?
 - (ii) Patient signed consent form?
 - (iii) Patient supplied with written material?
 - (iv) Patient informed of treatment objectives and review date?
17. None of these boxes were ticked, and the 'Doctor's signature' area was not filled out. The Treatment Record made no provision for a patient's signature, and Mrs A did not complete or sign a consent form prior to Dr B providing treatment.
18. Dr B told HDC that he does not obtain signed consent and relies on 'implied' consent from the consumers he treats. Dr B confirmed that this was the case for Mrs A at both of her appointments. In this regard, Dr B stated that he used 'eye [contact]' rather than 'words'.
19. Dr B told HDC that his diagnosis of Mrs A's symptoms was a lot of tension in her body due to an accident when rolling off a couch. Dr B described how he considered that the shock from the accident was having a deep impact on Mrs A, physically and mentally. Dr B stated that based on his diagnosis, he proposed to approach her treatment in two ways — one being physical, the other being mental and emotional.
20. Mrs A said that Dr B made a lot of his own 'diagnosis and assumptions' around his treatment, and that it was his 'own personal assumption' that the shock from having rolled off the couch was having a deep impact on her, both physically and mentally. Mrs A said that she

[https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4488563/#:~:text=Cupping%20therapy%20is%20a%20part,Qi%20\(%E6%B0%A3q%C3%AC\)%E2%80%9D](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4488563/#:~:text=Cupping%20therapy%20is%20a%20part,Qi%20(%E6%B0%A3q%C3%AC)%E2%80%9D).

³ Sciatica refers to pain, weakness, numbness, or tingling in the leg. It is caused by injury to, or pressure on, the sciatic nerve. Sciatica is a symptom of a medical problem. It is not a medical condition in itself. See: <https://www.penmedicine.org/for-patients-and-visitors/patient-information/conditions-treated-a-to-z/sciatica#:~:text=Definition,a%20medical%20condition%20by%20itself>

went for the treatments only to have acupuncture to relieve sciatic pain, and Dr B should have made a diagnosis only in relation to that.

21. Mrs A told the Police that prior to the treatment commencing, Dr B explained how he was going to use the needles and cupping. Mrs A said that she understood this clearly and was comfortable with Dr B's explanation. However, Mrs A said that Dr B did not inform her that he was going to perform a procedure on her that Dr B subsequently described to the Police as a 'meridian massage'. Mrs A said that this involved Dr B 'stroking' her arms, legs, and hair.

Treatment

Account from Mrs A

22. Mrs A told the Police that Dr B asked her to remove her trousers and jacket, so that she was wearing only a singlet and bra on her top half. Dr B gave her a towel and asked her to lie on her stomach.
23. Mrs A stated that while she was lying on the treatment bed, Dr B did the following:
- a) He held up her trousers after she had taken them off and studied them for a while without explaining why he was doing this or asking her permission;
 - a) He unclipped her bra without asking or advising that he was going to do this;
 - b) He proceeded with the acupuncture treatment by placing needles in the back of her leg, and then he started to use the practice of 'cupping', without explaining that he was about to do this;
 - c) He stroked her hair, arms and legs, which made her feel uncomfortable; and
 - d) He patted her stomach and said, 'You need to lose this,' when she was getting up from her treatment, which upset her.
24. In response to the provisional decision, Mrs A explained that Dr B caused her direct harm by patting her bare stomach saying 'you need to lose this' and not explaining why he did this. She said that his comment left her 'feeling bad' about herself resulting in binge eating, which she has now been diagnosed with. She told HDC that since the treatments with Dr B, her weight has escalated from 80kg to over 101kg.
25. Mrs A told the Police that after the treatment had finished, she got dressed and Dr B did up her bra.
26. The Treatment Record included a 'Diagnosis & Treatment' page containing diagrams of the body. After the treatment had finished, Dr B highlighted on the diagram an area depicting Mrs A's back and the back of her right leg, where he noted a 'huge amount of very dark thick blood'. Mrs A told the Police that the process of needling and cupping had produced some 'very dark blood'.
27. Mrs A told HDC that 'despite not feeling comfortable with [Dr B], the treatment worked so [she] reluctantly went back for a second treatment'.

Account from Dr B

28. Dr B told HDC that after completing his diagnosis following a review of Mrs A's symptoms, medical history, and blood pressure, he proceeded with the 'Oriental Medical Theory'⁴. Dr B described this as requiring one hour and consisting of five treatments, namely:
1. '**Acupuncture:** ... to build up and open channel of bladder, kidney and stomach energy.'
 2. '**Needling in and out:** at right shoulder back where has stiffness. put needle in and out without staying to relax tension.'
 3. 'Needling and moxibustion at the Fuxi ... to relax tight muscles on her leg.'
 4. '**Need[le] Cupping** (cup, lancet needle. Lancet gun): NEEDLE and vacuum suction CUPPING treatment.'
 5. '**Massage (10 min)**' explaining that a whole body massage can open the energy channel, as Dr B considered that Mrs A's problem was not limited to her shoulder and lower back but related to her 'whole body tension', including mental and emotional anxiety and 'whole organ function'.
29. Dr B stated that the reason for holding up Mrs A's trousers was to check for 'any bluely colo[u]r, pain and muscle condition whether it has any stiffne[ss], knot, lump etc'.
30. In relation to the massage treatment that Mrs A described as Dr B 'stroking' her hair, arms and legs, Dr B told HDC that depending on the client, and if he considered they had 'low energy', to boost this he would give a 'soft touch skin massage'. Dr B said that he has given massages to clients previously to 'relax and refresh energy from the pain of acupuncture treatment as finalizing with good feeling' and that he had received no complaints regarding the massage he had provided in the 17 years he had been practising.
31. Dr B apologised for not providing Mrs A with a clear explanation of the massage treatment. He stated that when he was in the middle of the 'connective treatment that is needle, cupping' and Mrs A was lying on her stomach, he said the word 'massage' to her. However, Dr B acknowledged that Mrs A might not have heard him say this.
32. Dr B acknowledged to HDC that he had 'slightly' patted Mrs A's stomach and told her she needed 'to lose this'. He stated that he said this sincerely as 'tummy fat is one of the main factor[s] of pain on our groin, hip, lower back'.
33. Dr B also told HDC that in his opinion, if Mrs A was dissatisfied after the first treatment, she should not have come back for a second treatment. Further, he noted that she did not make a complaint during either treatment.

Second acupuncture treatment — 29 June 2016

34. Mrs A stated that at the second appointment on 29 June 2016 at 3pm, once again she was alone at the premises with Dr B, and this appointment lasted for 1 hour and 15 minutes.

⁴ See: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4572216/>

35. In response to the provisional decision, Mrs A also remains concerned about Dr B's assumption that consent was given because she did not complain, and she should not have come back for a second treatment if she was dissatisfied. She confirmed that despite having felt uncomfortable after the first treatment, she returned for treatment because the acupuncture had relieved her leg pain. Mrs A emphasised that she was alone in a cubicle at the back of the premises and knew there was no one available for help.

Information provided prior to treatment

36. Mrs A told HDC that she went to see Dr B for acupuncture treatment only. As was the case with the first treatment, Mrs A did not complete any consent form, and Dr B told HDC that he relied on 'implied' consent by using eye contact.

Treatment

Account from Mrs A

37. Mrs A told the Police that Dr B asked her to remove her trousers, so she was wearing only her underwear and a long-sleeved top. Dr B asked her to lie on her stomach and then placed needles in her legs as part of the acupuncture treatment.
38. Mrs A said that whilst the needles were still in her legs, Dr B used the practice of cupping on her again and stroked her hair. Mrs A stated that once he had removed the cups and needles, she heard a buzzing noise and turned her head to see Dr B using a handheld vibrating massager. Mrs A said that Dr B had not informed her at any point that he was intending to use this.⁵
39. Mrs A said that Dr B proceeded to use the massager on her head, moving down to her neck, shoulders, arms, spine, and left leg. She stated that Dr B then placed the vibrating massager between her buttocks, before holding it between her legs for a 'concerning' amount of time.
40. Mrs A said that Dr B asked her to roll over onto her back, and he used the vibrating massager on her stomach. She stated that she asked Dr B what this had to do with her back, but he carried on using the vibrating massager, saying she was stressed, and pulled her hand away.
41. Mrs A said that following this, Dr B placed the massager over her breasts and used it in circular motions. Mrs A stated that she covered her breasts with her hands and tried to push Dr B away, but he continued and said, 'No you need this.'
42. Mrs A said that Dr B then 'waved' the massager down to her stomach and rubbed it over her pubic bone, before holding it over her genital area. She said that after turning off the vibrating massager, Dr B placed both of his hands under her top and massaged her breasts for around 30 seconds, 'quite fast', then he rubbed her stomach and commented that she was 'very beautiful'.

⁵ Vibration massage involves the use of vibrations to stimulate blood flow, eliminate pain and reduce inflammation. Vibrations are defined as continuous rapid slight shaking or trembling movements.

43. In response to the provisional decision, Mrs A said that by telling her she was beautiful, Dr B added to her stress and fear during the treatment.
44. Mrs A stated that while she was getting dressed, Dr B said to her, 'Please next time, can we have a skin on skin,' and advised her that it would make her 'very happy'.
45. Mrs A told HDC that she was upset and left Dr B's practice very quickly. She said that she felt unable to say anything to Dr B at the time as there was no one else on the premises and she had been too frightened to move as she was in 'total and complete shock'. She explained that she could not just jump up during the treatment, as she had acupuncture needles in her legs for some of the time.
46. Mrs A told the Police that she felt 'humiliated' and 'disgusted' that she had not stopped Dr B. Mrs A also told HDC that she felt 'shame and guilt and disgust and trauma', especially due to the intimate areas of the body involved. She said she felt as though she had been 'violated', which led her to make a complaint of sexual assault to the Police.

Account from Dr B

47. In his response to HDC, Dr B confirmed that he used a vibrating massager on Mrs A. He said that he used it on her 'whole body (starting from head to the neck, shoulder, arm, leg, abdomen, chest, shoulder back, lower back etc)'. He said that he used it 'following [her] meridian [line]' and 'to open her energy channel like breast, pubic, tail bone area'.
48. Dr B acknowledged that he used the massager 'at some intimate parts', although he said he had placed it on Mrs A's tail bone and pubic bone, and not her genitals. His explanation to HDC for this was that it was 'needed for tonifying special energy under TCM meridian theory'. He described that this practice opened the front middle centre line to relieve the main centre channel, which he considered was blocked and causing Mrs A's lower back pain.
49. Dr B stated that he kept the vibrating massager around 0.5 centimetres distance from Mrs A's chest and 'waved it' over the area, without touching her breasts (with the massager or with his hands). Dr B said that this part of the treatment was for Mrs A to feel 'energy boosting' around her chest area, and that the strong stimulation used could provide an 'electric wave feeling by [Mrs A's] imagination'.
50. In response to the provisional decision, Dr B further described the use of the massager over Mrs A's breasts as being called 'air swing', and he continued to deny that it touched her body.
51. Dr B acknowledged to HDC that he kept massaging Mrs A's stomach even though she questioned why he was doing this.
52. Dr B told HDC that his reasoning behind suggesting a 'skin to skin' massage was because he considered that Mrs A's energy was 'very low' that day. Dr B explained that he has carried out a 'soft skin touch massage' for patients who 'feel very lonely' or have 'low energy with depression'.

Further Information*Mrs A*

53. Mrs A told HDC that she felt 'shame and guilt' for several years after the incidents with Dr B. She stated that this left her with depression, anxiety, insomnia, and an eating disorder, and she has become insular. She said that she had to give up work and has received victim support and counselling over the years. She stated that she was diagnosed with PTSD as a direct result of what happened during the treatments with Dr B, and she has had ongoing therapy for this.

Dr B

54. Dr B told HDC that he did not consider that he could solve Mrs A's problem with acupuncture only, as her problem was not only in her back area but 'related with her whole body system'. As such, he said that she needed multiple treatments including acupuncture, cupping, and massage.
55. Dr B stated that he did not use any untoward practices such as 'sexual abuse, indecent assault through the treatment like ... touching intimate parts with hands etc'. He explained that the purpose of the 'special soothing massage' he did on Mrs A was to focus on 'relaxing her tension of body only as a doctor'.
56. Dr B told HDC that he believes there is no need for words and speaking when he can communicate by 'curing'. He said that he did not have enough time to explain the theory and process of each treatment, and to fix Mrs A's problem, within the one-hour treatment session provided.
57. Dr B stated that the theory of TCM treatment is hard to explain and he recognises that there may be some cultural differences regarding the types of practice used 'between East and West'. He said that he could explain this well in English but did not provide an explanation to Mrs A because he considered that most 'western people' did not understand, and it confused them.
58. Dr B explained the theory of energy healing to HDC as the process of transferring energy to the patient who needs energy, and that this can be communicated from the 'universe sky, earth, or person to person'. Dr B described that energy can also be transferred by touch, and he gave an example of having a warm shower, where we feel warm because the energy is received from the warm water.
59. Dr B apologised to Mrs A and expressed regret at how his treatment has affected her. He acknowledged that he should have been clearer in his communication during the massage, especially when treating intimate areas. He said that in his practice generally, he assumed implied consent if a patient did not complain directly. Dr B acknowledged that this was 'wrong' and poor practice, and that he should have provided Mrs A with a full explanation and obtained her consent before proceeding.

Responses to provisional opinion

Mrs A

60. Mrs A was given an opportunity to respond to the 'Information gathered during investigation' and 'Changes made' sections of the provisional opinion. Mrs A's comments have been incorporated into this opinion where relevant and appropriate.
61. Mrs A advised that my provisional decision gave her some closure in knowing that Dr B has not denied that the events occurred. She said that she also feels 'validated and heard'.
62. Mrs A again explained to HDC that she went to Dr B's practice solely for the purpose of acupuncture, and she did not agree or consent to Dr B's treatment plan, which included a 'meridian massage' and 'oriental therapy'.
63. Mrs A stated that she had no pain from the acupuncture and so finds Dr B's reference to stroking her hair and arms to relax her from the pain of acupuncture difficult to believe. She also told HDC that she purposefully wore a long sleeve top to the second treatment so that Dr B was unable to stroke her arms. Mrs A confirmed that the stroking made her feel uncomfortable.

Dr B

64. Dr B was also given an opportunity to respond to the provisional opinion. He advised that he feels shame and guilt for the stress caused to Mrs A and that it has affected his own health.
65. Whilst Dr B confirmed that he has learnt a lot from this event, he told HDC that he still considers that the time frame for his treatments leaves little time to 'allow any description of long words'.
66. Dr B also told HDC that normally the receptionist at the practice is at the premises with him, but at the time of the treatments she was out of the country.
67. Dr B stated that he said the words 'needle', 'cupping' or 'massage' in the middle of the 'connective treatment at each treatment', although he acknowledged that Mrs A may not have heard him because it was in a low tone. Dr B advised that normally he would say: 'If you feel discomfort with treatment, please let me know.' He said he explained what organ each point was for by using single words such as 'for stomach, for gallbladder etc'.
68. Dr B told HDC that it was not 'stroking' of Mrs A's body he used but 'toktok' patting with fingers to check whether there was any pain or not. He stated that this was applied over the clothes without any touching of skin.
69. Dr B also confirmed to HDC that he did call Mrs A 'beautiful', but he advised that it was because he thought she did not have many wrinkles and had young-looking skin, and he explained that it was for cheering 'up her gloomy mood'.

70. However, Dr B confirmed that he was minded to ‘agree, accept and respect’ the provisional decision, which he considered was ‘accurately right and correct’, and he will follow up with the recommendations made.
71. Dr B also apologised again to Mrs A for the impact of his treatments on her.

Opinion: Dr B — breach

Introduction

72. First, I acknowledge the significant trauma and distress Mrs A experienced following the incidents in 2016. It is evident that they have had a deep impact on her, and it would have been difficult to revisit the events. I commend her reasons for bringing this complaint.
73. Currently there are no requirements for TCM practitioners to register with any professional association, and I have made comments regarding the Chinese Medicine Council of New Zealand below,⁶ which was established in September 2021.
74. Whilst Dr B is not a member of any regulatory organisation, as stated in an earlier HDC decision,⁷ he is nonetheless bound by the Code in relation to his practice. In *Director of Proceedings v Mogridge* [2007] NZHRRT 27 the Tribunal stated:

‘The obligations of the Code apply to those who provide health services, whether or not they belong to any professional association or similar body, and whether or not they are aware of the standards set out in the Code.’

75. Following an assessment of all the information gathered as part of this complaint, I find Dr B in breach of Rights 1(1),⁸ 6(1),⁹ and 7(1)¹⁰ of the Code. The reasons for my decision are set out below.

Communication and consent

76. On 22 and 29 June 2016, Mrs A visited Dr B at his clinic for acupuncture treatment to alleviate pain in her back. Dr B provided little to no information about his procedures prior to commencing them, and he obtained no verbal or written consent from Mrs A at either appointment.

22 June 2016

77. During Mrs A’s first appointment with Dr B on 22 June 2016, Dr B unclipped her bra and, after completing acupuncture and cupping, stroked her hair, legs, and arms. Dr B described this to the Police as a ‘meridian massage’. Prior to commencing the massage, Dr B did not inform Mrs A that he was intending to massage her, or of the intended sites and techniques.

⁶ See paragraphs 105 and 106.

⁷ In opinions 12HDC01512 and 20HDC01152/20HDC02080 (combined decision).

⁸ Right 1(1) states: ‘Every consumer has the right to be treated with respect ...’

⁹ Right 6(1) states: ‘Every consumer has the right to the information that a reasonable consumer, in that consumer’s circumstances, would expect to receive ...’

¹⁰ Right 7(1) states: ‘Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent ...’

Dr B stated that he may have said the word 'massage' to Mrs A when he was in the middle of the acupuncture and cupping treatment, but he acknowledged that she may not have heard this.

78. An explanation of the procedure that Dr B was going to perform, and the intended sites and techniques, was information that a reasonable consumer, in Mrs A's circumstances, would expect to receive, and I am critical that Dr B did not provide this information to Mrs A. I note that Dr B said that he did not have enough time to explain the 'theory and process' of each treatment during Mrs A's allocated one-hour appointment, and believed there was no need for verbal or written communication when he could communicate by 'curing'. I do not accept this as an adequate explanation of his conduct.
79. Mrs A said that because she had no information about the intended massage, she did not consent to this procedure. Dr B said that he used 'eye contact' rather than words to obtain 'implied consent' from Mrs A. Further, Dr B said that in his practice generally, he assumed implied consent if a patient did not complain directly. Dr B stated that he assumed that Mrs A consented as she did not object.
80. Again, I do not accept Dr B's position. As noted in earlier decisions from this office (20HDC01152 and 20HDC02080), a lack of protest cannot be relied on as consent. In another previous decision by this office (19HDC00788), it was also recognised that where a patient has removed clothing and is lying on a treatment table, as was the situation here, it may not be easy for them to speak up or remove themselves from the situation. That decision highlighted the power imbalance that exists in this context, and how patients who 'feel disempowered and vulnerable may find it difficult to give feedback or raise concerns at the time'.
81. As Dr B did not inform Mrs A that he was going to massage her, and of the intended sites and techniques, I am of the view that he breached Right 6(1) of the Code at the first appointment. It follows that Mrs A was not able to give informed consent to the massage, and, accordingly, that Dr B also breached Right 7(1) of the Code.

29 June 2016

82. Mrs A went to see Dr B again for acupuncture treatment on 29 June 2016. During this appointment, Dr B stroked Mrs A's hair and, after completing acupuncture and cupping, massaged various parts of her body with a handheld vibrating massager.
83. As with the first appointment, Dr B did not inform Mrs A that he was going to massage her, or of the intended sites and techniques. He also did not inform Mrs A that he would be using a vibrating massager. Mrs A said that she became aware of the massager only when she was lying on her front and heard a buzzing noise.
84. In his response to this investigation, Dr B acknowledged that he:
 - a) Used the massager on Mrs A's head, neck, shoulders, arms, spine, left leg, abdomen, lower back, tail bone, and pubic bone;

- b) Used the massager on Mrs A's stomach, and continued doing so even though she questioned why he was doing this (Dr B's response to this was that he did not 'have enough time to fix [Mrs A's] problem within 1 hour'; and
- c) Held the massager over Mrs A's chest area and breasts, at a distance of 0.5cm.

85. Mrs A said that in addition to the above areas, Dr B placed the vibrating massager between her buttocks, before holding it between her legs for a 'concerning' amount of time. Dr B did not refute these allegations in his response to HDC, and he acknowledged that he used the massager 'at some intimate parts'. On this basis, I am satisfied that Mrs A's version of events is what occurred.
86. Mrs A also said that Dr B placed the massager over her breasts and used it on them in circular motions. Further, Mrs A said that Dr B held the massager over her genital area, before turning it off and placing both of his hands under her top and massaging her breasts for around 30 seconds. Dr B acknowledged that he held the massager over Mrs A's chest area at a distance of 0.5cm but denied that he touched her breasts (with the massager or with his hands). Dr B also denied that he placed the massager over Mrs A's genital area.
87. Although it is difficult to determine exactly where the massager was applied and I am unable to determine whether Dr B massaged Mrs A's breasts directly, Dr B acknowledges that the massager was utilised on intimate areas of Mrs A's body, including her pubic and chest area. Further, this was done with the intent of stimulating energy, as advised by Dr B. As such, in my view, the treatment involved sensitive and intimate areas of Mrs A's body.
88. An explanation of the procedure that Dr B was going to perform, and the intended sites and techniques, was information that a reasonable consumer, in Mrs A's circumstances, would expect to receive. I am particularly critical of Dr B's failure to provide this information to Mrs A at this appointment, given the sensitivity of the areas involved.
89. As with the first appointment, I do not accept Dr B's comments that he did not have enough time to explain each treatment during Mrs A's allocated one-hour appointment, and believed there was no need for verbal or written communication when he could communicate by 'curing'.
90. Mrs A again complained that she did not consent to the massage that Dr B undertook during this appointment. Dr B's explanation was that he assumed that Mrs A had consented as she did not object, and that he obtained implied consent by eye contact. For the same reasons as stated above in relation to the first appointment,¹¹ I do not accept this. In addition, I note that Mrs A described being too frightened to move as she was in 'total and complete shock' and said that Dr B continued to massage her stomach despite her questioning this. I consider that irrespective of everything else, this should have been a clear indication to Dr B that Mrs A was not comfortable, and I am extremely critical that he continued with the massage despite this.

¹¹ In opinions 12HDC01512 and 20HDC01152/20HDC02080 (combined decision).

91. As Dr B did not inform Mrs A that he was going to massage her, and of the intended sites and techniques, I am of the view that he also breached Right 6(1) of the Code at this appointment. It follows that Mrs A was not able to give informed consent to the massage, and, accordingly, that Dr B also breached Right 7(1) of the Code.
92. I acknowledge that Dr B has apologised to Mrs A for not providing a clear explanation to her of the massage treatment and for failing to obtain her informed consent. He has also acknowledged that the practice of assuming 'implied consent' when a client does not complain was 'wrong' and poor practice.

Respect

93. I am concerned by some of Dr B's other conduct towards Mrs A. This includes the following during the appointment on 22 June 2016:
- a) Dr B held up Mrs A's trousers after she had removed them and studied them for some time without offering an explanation or asking her permission. Dr B told HDC that this was to check for any discolouration or stiffness.
 - b) Dr B touched Mrs A's stomach and commented that she needed to 'lose this'. Dr B acknowledged that he said this and 'slightly' patted Mrs A's stomach. However, he said that he said this sincerely, as fat on the stomach is associated with pain in the groin, hip, and lower back.
94. In addition, during the appointment on 29 June 2016, Dr B told Mrs A that she was 'very beautiful' and asked whether they could have 'skin on skin' during their next appointment. Dr B told Mrs A that this would make her 'very happy'. This happened while she was getting changed after the treatment. Dr B told HDC that the reason for suggesting a skin-to-skin massage was because he considered Mrs A's energy to be very low that day.
95. In my view, the explanations offered by Dr B for the above conduct do not explain or justify his behaviour, which I consider to be inappropriate. In particular, it was not necessary for Dr B to comment on Mrs A's body and appearance, which left Mrs A feeling upset and vulnerable, particularly as she was alone with Dr B at the premises. Every consumer has the right to be treated with respect, and I consider that Dr B's conduct towards Mrs A showed a disregard for this. As such, I find that Dr B breached Right 1(1) of the Code.

Further comments

96. As Dr B held the massager in very close proximity to Mrs A's chest and placed it on other sensitive areas of her body, I wish to draw attention to an earlier decision involving massage of an intimate area on a female consumer by a male provider (opinion 20HDC01152/20HDC02080). In that decision, HDC's independent advisor stated:

'Massaging the breasts across gender is particularly risky due to the possibility of it being considered a sexual assault. Non-consensual breast massage may be considered an invasion of personal privacy. It is rare for a male to massage female breasts for this reason. There is a high risk to a male practitioner being misinterpreted around their intention.'

97. It is not my role to determine whether a provider may have sexually assaulted a consumer. However, it is clear to me that Dr B, in undertaking a non-consented massage on sensitive areas of Mrs A's body, significantly invaded Mrs A's personal privacy. I note that the Police also found there to be an issue with Dr B's communication in explaining and obtaining consent prior to treatment and recommended that he be warned about his practices when dealing with patients (and particularly female patients) and the importance of obtaining explicit consent.

Conclusion

98. For the reasons set out above, I consider that Dr B breached the following Rights, as set out in the Code:
- a) Right 6(1), in failing to provide Mrs A with information that a reasonable consumer, in Mrs A's circumstances, would have expected to receive, at both appointments;
 - b) Right 7(1), in failing to obtain Mrs A's informed consent to the massages undertaken at both appointments; and
 - c) Right 1(1), in failing to treat Mrs A with respect, at both appointments.

Changes made since events

99. Dr B advised that since the Police warning, he has paid special attention to ensuring that his conduct during treatments does not give 'any indecent intimation'.
100. Dr B told HDC that now, prior to treating a patient, he spends more time explaining the theory of treatment and what kind of treatment a patient needs. However, Dr B advised that people do not appear to understand the theory and stated:
- '[T]hey feel more confused, and lost interests and do not trust my treatment. Most of them want me to go to treatment without wasting time of explanation. Just want to expect and show the good results only.'
101. In relation to information provided to patients, Dr B told HDC that he now shows patients the book map and model doll of acupuncture.
102. Dr B also told HDC that now, throughout the process of the treatment he provides an explanation showing the needles used for the acupuncture and how deep they will be placed. He then carries out the treatment based on the patient's decision after this, and so may just provide a massage only.
103. Dr B stated that he has learnt a lot from this complaint, especially that obtaining consent is important prior to providing treatment. Dr B told HDC that he now seeks permission from a patient if he needs to touch their body as part of the treatment, and, if a patient refuses, he will not proceed. He also advised that he tells patients to let him know if they feel discomfort at any point throughout the treatment. However, Dr B mentioned that he does not have any consent form but obtains clear verbal agreement in relation to the treatment provided.

Recommendations

104. I recommend that Dr B provide a formal written apology for the deficiencies outlined in this report. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Mrs A.
105. I also recommend that Dr B:
- a) Consider registration as a member practitioner with the Chinese Medicine Council of New Zealand and abide by the standards and guidelines set out by the Council, and provide HDC with the outcome of this consideration within six months of the date of this report;
 - b) 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;
 - c) Arrange for the mentor to provide a report to HDC on the content and outcome from the mentoring within three months after the 12-month period of mentoring has been completed;
 - d) 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;
 - e) Use this case as a basis for developing education/training on informed consent and appropriate communication and treatment methods for staff at the practice. Evidence of the education/training in the form of training material and staff attendance records is to be provided to HDC within six months of the date of this report;
 - f) Review his website as detailed on Natural Therapy Pages to update it to include in detail the types of TCM practices used, including massage (soft touch/soothing), stroking hair, and that a vibrating massager is used, and confirm that this has been done within three months of the date of this report;
 - g) Develop a leaflet/information page for patients providing an explanation of the types of practices used, a diagram to explain the areas of the body involved, and other information commonly referred to. A copy of the leaflet/information page is to be provided to HDC within six months of the date of this report;
 - h) Place a Health and Disability Commissioner Code of Rights poster and leaflets in visible areas of the practice and confirm that this has been done within three weeks of the date of this report; and
 - i) Use a written consent form for all patients to ensure that a full explanation is provided to them for every treatment, seeking guidance from the Chinese Medicine Council of New Zealand on the template to use. A copy of the consent form template document is to be provided to HDC within three months of the date of this report.

106. I recommend that the Chinese Medicine Council of New Zealand:
- a) Confirm to HDC that the mentoring referred to in paragraph 105 b), c) and d) above has occurred. The confirmation is to be provided to HDC by email or letter within three months of the date of this report; and
 - b) Consider whether a review of Dr B's competence is warranted in the circumstances that the practitioner registers with them.

Follow-up actions

107. The findings in this report are of a serious nature. The consumer was in a particularly vulnerable position during the sessions and was not informed of what would be done; nor were any efforts made to actively seek consent for undertaking the procedures, which were of an intimate nature. As such, Dr B will be referred to the Director of Proceedings in accordance with section 45(2)(f) of the Health and Disability Commissioner Act 1994 for the purpose of deciding whether any proceedings should be taken.
108. A copy of this report with details identifying the parties removed will be sent to the Chinese Medicine Council of New Zealand and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.