

Massage Therapist, Mr C

**A Report by the
Deputy Health and Disability Commissioner**

(Cases 20HDC01152 and 20HDC02080)

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Executive summary

1. This report concerns the actions of a massage therapist during his massage of two consumers. This case highlights the importance of massage therapists maintaining their code of ethics and standards of practice at all times so that consumers feel safe and empowered to raise concerns that may arise during their treatment. The experience of these two consumers also serves to emphasise the significance of the consenting process, particularly when treatment involves the massage of sensitive areas and the use of invasive techniques.

Findings

2. The massage therapist did not provide information about the intended sites and techniques to be used during the massage that a reasonable consumer in the circumstances would expect to receive, and, accordingly, breached Right 6(1) of the Code. It follows that the consumer was not able to give informed consent to those aspects of the massage, and, accordingly, the massage therapist also breached Right 7(1) of the Code.
3. The massages did not meet accepted standards, and the standard of draping of both consumers was inadequate to maintain their privacy, comfort and dignity. Accordingly, the massage therapist breached Right 1(2) of the Code. He also failed to meet Massage New Zealand's Code of Ethics and Standards of Practice, in breach of Right 4(2) of the Code.

Recommendations

4. In response to the Deputy Commissioner's provisional recommendations, the massage therapist provided an apology for his breaches of the Code, sought professional mentoring from an experienced massage therapist, and reviewed his informed consent process and social media information.
5. The Deputy Commissioner recommended that the massage therapist re-join Massage New Zealand, consider training to develop effective listening skills, and update his first aid certificate.
6. The Deputy Commissioner referred the massage therapist to the Director of Proceedings.

Complaint and investigation

7. The Health and Disability Commissioner (HDC) received complaints about the services provided by massage therapist Mr C to Ms A and Ms B. The following issues were identified for investigation:
 - *Whether Mr C provided Ms A with an appropriate standard of care on 6 June 2020.*
 - *Whether Mr C provided Ms B with an appropriate standard of care on 11 August 2020.*

8. This report is the opinion of Deputy Health and Disability Commissioner Rose Wall, and is made in accordance with the power delegated to her by the Commissioner.
 9. The parties directly involved in the investigation were:

Ms A	Consumer
Ms B	Consumer
Mr C	Provider/massage therapist
 10. Further information was received from the New Zealand Police.
 11. Independent advice was sought from a massage therapist, Barry Vautier, regarding the massage services provided to Ms A. The advice received is included as Appendix A.
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Information gathered during investigation

Introduction

12. Ms A and Ms B have raised separate complaints about massage services provided by Mr C at a massage therapy clinic (the clinic). This report considers the appropriateness of a massage provided to Ms A on 6 June 2020, and to Ms B on 11 August 2020, including whether informed consent was obtained and professional standards were met. The opinion sets out the background applicable to both complaints, and then considers each complaint separately.

Background

13. Mr C holds a Level 5 Diploma in Wellness and Relaxation Massage. He advertises his business as “Therapeutic Swedish Massage”. Mr C is the owner of the clinic.
14. Mr C is not a member of Massage New Zealand.¹ He told HDC that he has been a member in the past and abides by Massage New Zealand’s Code of Ethics, which contains standards regarding communication and consent (see Appendix B).
15. In December 2020, Mr C told HDC that the clinic’s policy is available on the business Facebook page and advised HDC that (among other things) the policy requires the clinic to:
 - Provide draping and explanation sufficient to meet the client’s needs for comfort and privacy;
 - Ensure informed client consent has been obtained prior to the massage;

¹ Massage New Zealand (MNZ) is the only massage therapy body in New Zealand for professional massage therapists. It is a self-regulated, voluntary membership association that promotes the massage profession by requiring members to achieve educational competency and clear standards of client care, practice, and ethics, and to meet ongoing requirements to maintain membership.

- Maintain open communication throughout the massage session ensuring ongoing informed client consent, explaining the rationale for the proposed massage.

Complaint by Ms A (20HDC01152)

Introduction

16. Ms A received a full body therapeutic massage from Mr C at the clinic on 6 June 2020. Ms A told HDC that she had received massages in the past with many different therapists, and “this one made [her] feel uncomfortable in a way [she had] not experienced before”. She is concerned that aspects of the massage were inappropriate and felt sexually motivated.
17. In particular, Ms A raised concerns that the massage covered areas of her body that had not been agreed prior to the massage, and Mr C used inappropriate massage techniques and draping. She said that the massage area included the inner thighs, inter-gluteal cleft, massage of both legs simultaneously, and massage of areas underneath her underwear.

Communication and consent

18. Ms A noted that she and Mr C agreed to a 90-minute “full body” massage. In response to the provisional opinion, Ms A stated that there was minimal discussion of what a full body massage entails. She said that her previous experience is that a massage usually starts with the client face down and gluteal muscles/legs are massaged one at a time. She stated that she expects to be screened by a drape while turning over, and that body parts outside the massage area remain covered for comfort and dignity. Ms A stated that massage of the upper inner thigh is not part of a “normal” massage, and she has not had that area massaged previously. She said that she was not asked if it was okay for Mr C to touch her inner thigh, and did not consent to that area being massaged.
19. Mr C told HDC that Ms A “mentioned a full body for the time of 90 minutes”. He said that regarding the areas to be massaged, he “assumed the fact that she had already received lots of massages and that she would know that full body meant: head, neck, shoulders, arms, hands, back, glutes, thighs, legs and feet”. In response to the provisional opinion, Ms A stated that that she did not discuss with Mr C that she had received massages previously.
20. Mr C noted that Ms A did not expressly state that she did not want her glutes and thighs to be massaged. Mr C said that he believed he had obtained “[Ms A’s] informed consent to carry out a full body massage including the thighs, glutes and sacrum”.
21. Ms A signed a consent form prior to the massage commencing. The form includes the following statements:

“It is my responsibility to inform of any discomfort I may feel during the massage session.”

“I understand that the massage therapist or I may terminate the session at any time.”

22. In Mr C’s account of the massage session, he stated that there was open communication with Ms A, and that at various stages of the massage he asked whether she was comfortable. Mr C’s view is that Ms A did not express discomfort, anxiety, or hesitation to him during or after the massage. In response to the provisional opinion, Mr C stated that although stomach massage is part of a full body massage, after Ms A changed position on the table he asked about her preference, and did not massage her stomach in response to this. He stated that this shows clear communication.
23. Mr C told HDC that in his opinion, if someone was uncomfortable with the initial touch of the first leg, they would not allow the other leg to receive the same treatment. Furthermore, as he had been given consent to massage the legs, he had not considered that consent to massage both legs simultaneously would be required. He stated that it was not his intention to be sensual, and that previously he had sought consent to undrape and massage Ms A’s legs.
24. Mr C noted that if a client is uncomfortable during a massage treatment, they will “generally tense up”. He considers that Ms A’s body was relaxed during the massage, and said that he was surprised and concerned to hear subsequently that Ms A had felt distressed during the massage.
25. Ms A told HDC that she felt uncomfortable and concerned that aspects of the massage were inappropriate. She reported that she felt “uncomfortable and quite tense [and] clamped the towel down over [her] chest with [her] arms”. She noted the vulnerability of clients, and said that she felt that her right to feel safe was disregarded.
26. Ms A told HDC that she did not raise concerns with Mr C during or immediately after the massage, and that at the end of the massage she paid and left, as she “couldn’t face having a conversation with him about it”. She said that she returned to her hotel room and cried. In response to the provisional opinion, Ms A stated that she accepts that while in principle she could have stopped the massage, in reality she was fearful about what might happen if she did. She said that she was in a dark room with a man she did not know, naked and lying on a table being touched inappropriately, which was an incredibly vulnerable position to be in. Ms A stated that she was in a state of “freeze” out of fear of escalation if she tried to stop Mr C.

Standard of massage

27. The massage commenced with Ms A’s back, and proceeded to her legs. Ms A stated that during the leg massage, both legs were undraped and massaged simultaneously, with Mr C standing at the foot of the massage table. She said that while lying face down on the table, the massage area included the inner thighs and gluteal area, and pressure was applied to the inter-gluteal cleft.
28. In response to the provisional opinion, Ms A stated that whilst lying face up, Mr C ran his hands up underneath her underwear, running his hands over her hip flexors. She said that

he then moved his hands around her waist (while still under the underwear) to massage her lower back. She also said that he massaged her glutes under her underwear while she was lying on her front.

29. Ms A reported that her legs were moved apart to massage her inner thigh very close to the “knicker line”. She said that she had not requested this area to be included in the massage, “so there was no reason to be so close”. Ms A stated that the gluteal area and upper thighs were massaged under her underwear, and that the pressure applied to the inter-gluteal cleft felt uncomfortable and inappropriate.
30. Ms A said that she then turned onto her back. She considers that the process of turning appeared to be done respectfully, although at this stage Mr C continued the massage, which included both legs and the inner thigh area.

Draping

31. In response to the provisional opinion, Ms A said that initially her legs were draped, but once Mr C finished massaging her back he moved onto her legs and left her undraped.
32. Mr C informed HDC that generally clients are draped except for the part of the body that is being worked on at any particular time. He said that draping is not removed from the client without their consent.
33. Mr C told HDC that his routine for massaging lower extremities is for the drape to remain positioned over the leg that is not being massaged, and that this occurred with Ms A’s massage. Mr C maintains that he asked Ms A whether she would be uncomfortable before removing draping and touching her inner thigh, and she said that she would not (be uncomfortable). However, Mr C also told HDC that after massaging Ms A’s left leg, he asked whether she would be comfortable without the drape on top in order to receive one continuous stroke from feet to hands, and she said that she was comfortable with that. Mr C said that the remaining linen was folded towards the middle of Ms A’s legs, and covered her genital area while both her legs were undraped simultaneously. In response to the provisional opinion, Ms A stated that she “fundamentally disputes” that Mr C asked if she would be okay without the drape on top.

Massage technique

34. Mr C told HDC that his usual process is to briefly touch the origin of the leg adductors located in the inner thigh once during the massage. He said that this is for the purpose of connection with the leg, and to check for a pain response. He stated that he asked Ms A whether that would make her uncomfortable, and she replied that it would not. In response to the provisional opinion, Ms A stated that Mr C stroked her hip flexors under her knickers and that she did not consent to him massaging her anywhere underneath her underwear.
35. Ms A told HDC that there was no communication during the massage from Mr C. In response to the provisional opinion, Mr C stated that his clinic is located in the heart of the city and there is noise from the street outside and music from speakers in the room.

36. Ms A told HDC that Mr C did not ask if he could remove the drapes to massage her legs or ask her if he could touch her inner thigh. She told HDC that if Mr C had asked to massage her inner thighs, her “natural response would be no”. Ms A said that the inner thigh is a very intimate area and she has never given consent for her inner thighs to be massaged.
37. Mr C acknowledged having touched the top of the crevice of Ms A’s “butt cheeks as if it were a pressure point”. He explained that as the coccyx is part of the spine, he applies brief and gentle pressure in order to get any pain responses, and he does this for every vertebra.
38. In response to the provisional opinion, Ms A stated:

“The only ‘vertebra’ he touched was my ‘intergluteal cleft’. He did not do this to any other vertebra. This was a single point of touch. I have never had a massage therapist put their finger in my butt crack before or since.”
39. Mr C said that when working on a part of the client’s body that is underneath their underwear, his personal view is that it “is more respectful and appropriate to massage a client under their underwear than it is to move their underwear to one side in order to massage that area”. Mr C stated that he does not massage any area under the underwear that would be inappropriate.
40. In response to the provisional opinion, Ms A stated that she was face down on the table, and believed from the hand positioning and movement that Mr C was at the foot of the table when he massaged both of her legs simultaneously. She said that she did not consent to having her legs moved apart, and noted that draping was placed between her legs to cover her gluteal cleft.
41. Mr C acknowledged that he massaged both Ms A’s legs at the same time. However, he denied that he moved Ms A’s legs apart during the massage and said that he massages a client’s legs and feet from the side of the table. He denies that he stood at the foot of the table to massage Ms A’s legs. He provided photos of his massage table and room, which show a radiant heater at the foot of the table, indicating that there would have been insufficient space for him to have been standing there.

Changes to practice

42. Following Ms A’s complaint, Mr C reviewed his consent form. He now asks clients whether they want specific body areas to be massaged, and records that in writing.
43. At the end of 2020, Mr C “reviewed his thigh massage work” and decided to avoid massage of the inner thigh on both males and females.
44. Mr C stated that following receipt of the independent clinical advice in this case, he became aware of the concerns relating to both legs being massaged simultaneously, and how this could be misunderstood by the client as sensual in nature. He said that as a result, he would specifically discuss this part of the massage and seek consent before proceeding. However, in response to the provisional opinion, Mr C stated that since December 2022 he has not used this technique with new clients.

Complaint by Ms B (20HDC02080)

45. Ms B received a full body therapeutic massage from Mr C at the clinic at 4pm on 11 August 2020. She said that she expected the massage to take one hour, and is concerned that she was at the clinic for 2.5 hours. She is further concerned that the massage inappropriately concentrated on the gluteal and breast areas, and that her underwear was removed during the massage.

New Zealand Police investigation

46. Ms B made a complaint to the New Zealand Police (NZ Police) on 14 August 2020 alleging sexual assault. She made a statement to NZ Police outlining her concerns about the massage she received from Mr C at the clinic on 11 August 2020.
47. NZ Police interviewed Mr C as part of investigating the complaint made by Ms B. NZ Police told HDC that they consider that Mr C's actions do not meet the threshold for bringing criminal charges. However, the purpose of HDC's investigation is to determine whether Mr C met professional standards and provided services of an acceptable standard in accordance with the Code of Health and Disability Services Consumers' Rights (the Code).

Communication and consent

48. Ms B completed a consent/health and history form, and ticked and initialled the option of a full body massage. The form lists the body areas covered by a full body massage, and includes the glutes, thighs, legs, chest, and stomach. The list does not explicitly mention the breasts.
49. Mr C told HDC that Ms B gave written consent to have her glutes massaged, and verbal consent to have her breasts massaged.
50. In her statement to NZ Police, Ms B noted that she signed a consent form agreeing to remove her bra for the massage. On the consent form provided to HDC, Ms B had ticked and initialled the option of being nude during the massage.

Standard of massage

Duration of massage

51. Ms B made an appointment for a one-hour massage.
52. Mr C told HDC that Ms B was offered an extra 30 minutes as standard for new clients who are having a one-hour full body massage, and Ms B accepted. Mr C said that after close to 90 minutes of massage, Ms B was asked whether she would like to continue, and she agreed. A further 15 minutes of massage was provided.
53. Mr C informed HDC that the duration of Ms B's massage was no longer than 100 minutes. He noted that the massage time refers to time on the table, and does not include time for preparation/changing/administration, etc. Mr C disputes that Ms B was at the clinic for 2.5 hours.

54. From the text records provided, it appears that Ms B's appointment was at 4pm, and that Mr C texted Ms B at 6.42pm when, according to Mr C, he had started to clean the room after a brief rest.

Draping

55. Ms B noted that while she was turning over on the table, her chest was not draped as "normally happen[ed] in previous massages [she had] had", and that the front of her body was exposed.
56. Mr C told HDC that prior to a client turning over, he prepares the linen to shield and provide privacy, and makes adjustments to the table. He said that Ms B turned before preparations were complete, and her body was exposed. Mr C stated that after untangling the linen, he asked, "[A]re you comfortable the way you are now?" while gesturing to her chest area, and Ms B agreed that she was. Mr C's understanding is that this "clearly indicated" that Ms B was comfortable having her breasts exposed at that stage of the massage, and therefore the drape was not positioned over her chest.

Areas massaged

57. The massage started with a back massage, and Ms B was then asked to turn over. Mr C stated that there was a discussion about which areas of her body Ms B would like to be massaged, and this was "double checked" by asking Ms B about massage of her "legs, tummy, chest and breast", to which he says she agreed.
58. In Ms B's statement to NZ Police, she noted that her front was massaged, "paying a lot of attention to the breasts and around that area", which made her feel uncomfortable. She further outlined having felt very uncomfortable when Mr C was touching her "bum", and said that he focussed on this area for "way longer than he should have".

Ms B's concerns about conduct

59. Ms B noted that at one point Mr C told her that she had a "beautiful body", and she did not like this comment. In Ms B's statement to NZ Police, she said that following this comment, Mr C asked to remove her underwear, and he started to take it off.
60. Mr C explained to HDC that massage strokes are longer when someone is naked, and the massage therapist's hands do not need to disconnect from the body by having to "jump" to the side of the underwear. Mr C stated that he discussed this with Ms B and noted that she had ticked a preference for nude massage but had left her underwear on. He said that following the discussion, Ms B agreed to be nude, and he attempted to assist her and placed the underwear on the chair with her clothing.
61. Mr C told HDC that his intention in assisting with the removal of Ms B's underwear was to be helpful, but, having reflected on the situation, he considers that the best approach would be to "leave the room and let them do it".
62. At the end of the massage, Ms B was lying face down on the table, with the drape only between her legs. Mr C remained in the room talking, drinking water, and washing his hands.

In response to the provisional opinion, Mr C stated that the drape was between Ms B's legs, covering her gluteal cleft area and secured.

63. Ms B said that she was uncomfortable getting up while Mr C remained in the room, and felt concerned that he was waiting for her to get up so that he could look at her. Ms B stated that when Mr C left the room, she got up to get dressed but could not find her underwear despite searching for it. She said that she dressed and paid before leaving.
64. Mr C said that he was unaware that Ms B was missing her underwear until he was cleaning the room and found it next to the chair. In response to the provisional opinion, Mr C provided a photograph of the chair which showed a large dark coloured upholstered chair with a potted fern beside it. Mr C told HDC that he found the underwear on the floor between the fern and the bottom of the chair, where they were not obvious.
65. Upon finding the underwear he contacted Ms B to inform her that she "forgot something here". Ms B is concerned that Mr C "asked [her] if [she] wanted to meet him to get [her underwear] back". In the messages provided to HDC, Mr C asked Ms B: "Shall I give it back to you next time you come?"
66. Mr C told HDC that the following day he sent a further text message to Ms B asking how she was feeling. Mr C did not provide HDC with an explanation of why he sent this text message to Ms B. Ms B noted that this had not happened for any of her friends who had received messages from Mr C.

Changes to practice

67. Following Ms B's complaint, Mr C reviewed his policies and removed the option of nude massage from the consent form. In his response to the provisional opinion, Mr C stated that the option of consumers being nude was added to the consent form only because previously he had experienced that some clients chose to remove all their clothing despite being asked to keep their underwear on.
68. As noted above, Mr C told HDC that he no longer works on a consumer's upper or middle inner thigh, even with communication or consent, in order to avoid misunderstandings.
69. In response to the provisional opinion, Mr C sought professional mentoring that would include review of the recommendations made by the clinical advisor in this case. He stated that he would consider attending a course to improve his listening skills, but that some of the proposed recommendations require a financial outlay (such as the first aid certificate), and will be considered when he is able. Mr C stated that he:
 - No longer massages under clothing;
 - Revised his informed consent forms to clearly delineate the areas to be massaged and the position of drapes, and included diagrams showing intended massage sites;
 - Updated the health and history form;
 - Developed a feedback form for consumers;

- Installed the Massage New Zealand Code of Ethics in the massage room and on the Bio section of his business Facebook page; and
- Displayed “Contraindication of Massage” and “Massage Aftercare Advice/Reactions” information and the Code of Health and Disability Services Consumers’ Rights poster in the clinic.

Responses to provisional opinion

Mr C

70. Mr C was given the opportunity to respond to the provisional opinion. Where appropriate, his comments have been incorporated into the report. Mr C stated that he accepts Mr Vautier’s advice and has made changes to his practice and processes.
71. In response to the provisional opinion Mr C noted that he believes the option of being nude during a massage is a “subjective choice as long as both parties are informed and in agreement with that”.
72. Mr C stated that he does not feel that any inappropriate touching occurred, and he is “sorry that this was misunderstood by the consumers leaving them feeling uncomfortable”. He reiterated his view that the consumers demonstrated their comfort during and after the massage through the content and tone of their conversation and body language, and noted that they did not voice concerns or show distress. He maintains that verbal consent was obtained, and that draping was repositioned with the consent of the consumers. He provided information that massage of the thigh included “effleurage upwards, including the inner thigh” and was a technique he learned on a course.

Ms A

73. Ms A was given an opportunity to respond to the “information gathered” section of the provisional opinion. Where appropriate, her comments have been incorporated into the report.

Ms B

74. Ms B was given an opportunity to respond to the “information gathered” section of the provisional opinion, and confirmed that she had no further comment.

Opinion: Mr C — breach

Introduction

75. The massage profession in New Zealand is not regulated under the Health Practitioners Competence Assurance Act 2003, and there are no requirements for massage therapists to register with any professional association. At the time of these events, Mr C was not a member of Massage NZ or any other professional association.

76. As this Office has stated previously,² despite not being a member of a relevant association, Mr C is nonetheless bound by the Code of Health and Disability Services Consumers' Rights (the Code). 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.”
77. Mr C told HDC that he has been a member of Massage New Zealand in the past and abides by Massage New Zealand's Code of Ethics, which contains standards regarding communication and consent (see Appendix B). I consider that by holding himself out to be a massage therapist, and by providing massage services for a fee, he is required to meet the standards of a professional massage therapist, and that the ethical principles set out in the Massage NZ Code of Ethics provide a credible reference point in establishing the ethical standards that should apply in these circumstances. Accordingly, I consider the Massage NZ Code of Ethics and Standards of Practice to be an appropriate benchmark for the assessment of Mr C's practice.
78. Both Ms A and Ms B separately alleged that Mr C touched them inappropriately and behaved inappropriately while performing therapeutic massage. The therapeutic massages in question occurred approximately two months apart. Both women had had massages previously, and felt that Mr C's practice was different, and not appropriate. Both women were distressed by the events that occurred.
79. Mr C believes that he obtained informed consent for the massages, and did not receive a negative response when he checked with Ms A and Ms B about their comfort during the massages. In response to the provisional opinion, Mr C stated that he did not feel that inappropriate touching occurred. On the other hand, Ms A and Ms B say that they felt vulnerable and distressed by their experiences, and felt unable to raise concerns at the time. They both felt that there was a sexual element to the massage, with Ms B going on to make a complaint of sexual assault to the Police.
80. There are disputed facts in these cases regarding the content of discussions between Mr C and the consumers, and the events that occurred during the massage sessions. It is unknown whether Mr C draped Ms A's buttocks diagonally, and the degree to which she was consulted is speculative. It is disputed whether Ms A's legs were moved apart, and whether Mr C was standing at the foot of the table to massage Ms A's legs. Furthermore, there is a disparity regarding the location of Ms B's underwear when she was dressing after the massage.
81. My independent advisor, massage therapist Barry Vautier, notes that “the outcome of a massage can be very different from the perspective of a client versus a practitioner”. It can be difficult to make a factual finding when the parties involved have conflicting perspectives of events and there is an absence of other evidence. However, I consider that there are sufficient agreed facts for me to make a decision on these cases without the need for

² In opinion 12HDC01512.

conjecture. Furthermore, there are alarming similarities in the concerns raised by the two women concerned, and their accounts of what happened during their therapeutic massages.

Consent and communication

Discussions prior to massage

82. I accept that both consumers signed a consent form prior to the massage commencing. However, in light of the highly personal and intimate nature of the proposed treatment involved, I consider that the signed forms in themselves are not sufficient to show that informed consent was obtained. Informed consent is more than a signature, and requires that consumers are fully informed of the intended treatment, so that they can make a choice about whether to accept it. Consumers must also have the capacity to process the information, and freely exercise their choice.
83. It appears that all parties had expectations about the massage process that were not clarified through the informed consent process.
84. Prior to making a choice or giving consent, consumers have the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive; this would include an explanation of the consumer's condition, the options available, including risks and benefits, and any information required by legal, professional, ethical, and other relevant standards. Both in this case, and in discussion about the initial assessment and history-taking for new clients in a previous case (20HDC01182), Mr Vautier identified that client preferences for style of massage and body parts to be massaged should be documented, and that practitioners should explain their scope of practice and clarify the expectations of the treatment and the client's goals.
85. The Massage New Zealand Code of Ethics requires practitioners to "[e]nsure informed client consent has been obtained prior to massage", and to "[m]aintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed massage". Further, in a previous case (19HDC00788), the independent advisor considered that the failure "to explain the rationale for massaging the breasts ... contravenes the [Massage New Zealand] code of ethics".
86. Once treatment has commenced, particularly if the consumer has removed clothing and is lying on a table, it may not be easy for the consumer to speak up or remove themselves from the clinical encounter. Providers must be mindful that the power imbalance in the relationship has changed, and consumers who feel disempowered and vulnerable may find it difficult to give feedback or raise concerns at the time. Hence, the importance of a full and informative discussion with the consumer prior to treatment beginning, and open communication during the massage, with clear consent obtained before any variation to the goals of treatment.
87. Mr C told HDC that Ms A did not indicate any areas of pain or discomfort on the form she completed. He said that at the time, he "**assumed** the fact that she had already received lots of massages and that she would know what full body meant: head, neck, shoulders, arms, hands, back glutes, thighs, legs and feet" (my emphasis). In response to the provisional

opinion, Mr C stated that massage of the thigh included effleurage upward, including the inner thigh, and was a technique he learned on a course. However, while both consumers had received massages from different therapists in the past, both women were clear that the massage from Mr C was outside their expectations.

88. Regarding Ms A's experience, Mr Vautier advised:

"[Mr C] seemed to assume that as she had consented to a full body relaxation massage, that it would include massage of her inner thighs and buttocks. The big departure from care is this assumption and lack of informed consent with his client by clarifying what body parts she wanted massaged or not even during the massage."

89. Mr Vautier said that the areas that are to be included in a full body massage must be discussed specifically, particularly sensitive areas, and, "due to the invasiveness of this location", very clear verbal consent would be required for a massage therapist to place his finger into the crease between a client's buttocks. He stated:

"The lack of informed consent about massaging [Ms A's] inner thighs and placing a finger in the crease between her buttocks would be regarded by peers as a breach of ethical standards and a severe lapse in good practice."

90. Consent to massage of sensitive areas such as breasts has been considered in a previous decision by this Office (19HDC00788), in which Mr Vautier stated:

"The standard of care in the [Massage New Zealand] code of ethics is not specific around massaging breasts as a part of a full body massage. Some clients may be comfortable with having their breasts massaged especially if there is some clear clinical reason such as breast tenderness or for lymphatic drainage. Men are usually comfortable with having their chests (breasts) exposed and massaged. Whatever the gender, specific informed consent should be obtained prior to massaging the breasts. It's important to confer with the client during a breast massage to ensure client comfort and dignity. The only other reason to massage the chest area is to address specific muscles underlying the breasts such as pectoralis major. This can be performed with good draping so as not to expose the breasts."

91. The signed consent form referred to massage of the chest. It did not refer to breast massage. While Mr C asserts that Ms B gave verbal consent for her breasts to be massaged, Ms B has stated that she was not comfortable with the massage of her breasts and buttocks, and I conclude that she was not expecting or agreeing to the nature and duration of the massage. In the absence of clear consent sought to massage these areas, I am concerned that the massage was interpreted by the consumer as sensual in nature. As Mr Vautier has advised previously:³

"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

³ 20HDC01182.

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.”

92. With regard to Ms A’s massage, Mr Vautier commented that massaging both legs simultaneously would be considered a mild departure of good practice, as it may be considered sensual, especially if the strokes are taken too high up the inner thigh.
93. In addition to the body areas to be massaged, there must also be a shared understanding of what the massage will involve. For example, massage of a person’s chest is of a very different nature to massage of a consumer’s breasts; and massaging a person’s leg while the other leg remains draped is of a different quality to exposing both legs to massage them simultaneously, or touching the consumer’s inner thigh. Furthermore, while a consumer may consent to being nude under draping during a massage, this does not mean they consent to having the draping removed and large parts of their body exposed.
94. In all circumstances, it is clear that specific informed consent is required for massage of the breasts and any sensitive areas, and it is insufficient that the consumers “didn’t mention not wanting” specific areas massaged. In the present cases, there was no full discussion of the meaning of “full body” prior to the massage commencing, no explicit mention of sensitive areas, and no specific agreement as to which body areas would be massaged and undraped.

Discussions during massage

95. Mr C told HDC that he asked the consumers about their comfort level during the massage, and received verbal responses from the consumers that they were not uncomfortable. In response to the provisional opinion, Mr C reiterated that “[t]one of voice, chat after the massage, body language demonstrated comfort” and “body language and communication during and after the massage did not show any signs of distress”.
96. I also note that Ms A told HDC that there was no communication with Mr C during the massage.
97. With regard to Ms B’s draping, Mr C informed HDC that he considers that the consumer “gave her consent that she was comfortable” with the treatment being delivered at that time. Mr C said that he considers that if the consumer was not comfortable, they would not allow the massage to continue. He stated that he relies on the signed consent form, which places responsibility on the consumer to inform of any discomfort.
98. I do not accept this submission. Asking whether a consumer is comfortable during a massage is a separate process to seeking informed consent. Questions about “comfort” are ambiguous — they may be misunderstood to be questions about physical comfort, or consumers may feel too vulnerable or intimidated to raise concerns at the time.
99. I acknowledge that in both these cases the consumers did not voice concerns even though they were feeling uncomfortable and distressed. However, consumers may not be able to voice objections freely and withdraw consent once a massage has commenced, as they are disempowered and in an extremely vulnerable position.

100. As Mr Vautier explains, “[o]ften a client feels vulnerable and powerless merely by virtue of lying on a table with a practitioner leaning over the top,” and disempowered consumers may have less capacity to voice concerns at the time of a distressing experience. Mr Vautier points out:
- “[I]t’s very common for someone who has been overwhelmed and subject to inappropriate touch to under-respond immediately after a massage. They may feel intimidated to speak the truth and awareness of how they feel may not dawn until much later.”
101. Consumers may not always speak up for many reasons, and I cannot accept that lack of protest in circumstances such as this can be relied on as continuing consent.
102. As noted above, very clear informed consent prior to the commencement of a massage is required for massage of sensitive areas, or invasive techniques. Furthermore, as discussed further below, practices such as inadequate draping or massaging under clothing are inappropriate and should be avoided, regardless of whether the consumer assents at the time.
103. I am concerned that Mr C is asserting that he was unaware that the consumers felt unsafe and uncomfortable when they were undraped and had their lower bodies massaged. I agree with my independent advisor that the consumers’ distress following the massage would suggest that there was inadequate informed consent.
104. The obligation is on the provider to ensure that they have obtained informed consent, rather than relying on the consumer to raise an objection or remaining compliant during the massage. Mr C failed to appreciate the power imbalance inherent in the consumer–provider relationship, particularly in cases such as these where the consumer is a partially naked young woman being massaged by a male therapist operating in a clinic on his own.

Standard of massage

105. Regardless of consent issues, providers must remain clear that the purpose of treatment is to benefit the consumer, and the obligation is on providers to provide safe and ethical care. Understanding the potential for consumers to feel vulnerable during a massage is fundamental to understanding the importance of maintaining therapeutic clinical boundaries and using appropriate massage techniques. Some massage practices are best avoided for reasons of maintaining safe boundaries and the consumer’s psychological wellbeing.
106. The Massage New Zealand Code of Practice states that respect for the consumer requires that their dignity and modesty is maintained, and the Massage New Zealand Code of Ethics states that practitioners will “[s]erve the best interests of their clients and provide best practice quality of service”. Practices that do not respect the consumer’s dignity and privacy, such as inadequate draping or inappropriate massage techniques, are unacceptable in the context of a therapeutic clinical encounter.

Draping

107. The Massage New Zealand Code of Ethics requires practitioners to provide draping and explanation sufficient to meet the client's needs for comfort and privacy. Correct use of draping is an essential element of massage that clearly delineates the scope of the massage, maintains some degree of privacy and gives a sense of security to the consumer.
108. Mr Vautier considers that if the draping technique had been more effective, Ms A may not have felt so threatened. He said that consumers should never be massaged under underwear or clothing because the massage area is not clearly defined, and this creates uncertainty in the consumer. Inadequate draping by not tucking it in to the client's clothing and keeping coverage of a body area not being massaged at the time, would be considered a moderate departure from accepted practice. Massage should never be applied underneath underwear or any other clothing for any reason at any time, and this would be considered a severe departure.
109. Mr C acknowledged having assisted Ms B to remove her underwear. I consider this to be extremely inappropriate and unethical. First, Ms B was capable of removing her underwear and could have done so had she wished. Secondly, as has been discussed in previous decisions of this Office,⁴ it is expected that consumers would be offered privacy when undressing, and this would also apply when consumers are getting dressed after the appointment.
110. Furthermore, with regard to accepted practice, Mr Vautier noted:
- “Usually for a full body massage a client would leave their underwear ON ('knickers' briefs, underpants, jock straps) and the rest of her clothing removed. The reason for this is to ensure a client's dignity, provide a foundation to tuck draping into, and to help protect the client and practitioner against possible allegations of inappropriate touch.”
111. The Massage New Zealand Code of Practice and Code of Ethics, to which Mr C said he adheres, and Mr C's business policy provided by Mr C, refer to the importance of informed consent and draping to preserve the client's dignity. I consider that these standards were not met by Mr C.

Conclusion

112. I consider that Mr C failed to communicate adequately with the consumers prior to their massages. A consumer cannot give informed consent without first being adequately informed as to the proposed massage sites. It is not sufficient to assume that a client has given informed consent because they do not object to specific actions at the time.
113. Furthermore, Mr Vautier advised that “explanations should be given to the client if there is a variation to the goals of the treatment and gaining consent to vary them, for example, massaging an area previously not in the agreed treatment plan”. This would include massage

⁴ 09HDC00788 and 12HDC01011.

of a consumer's sensitive areas such as breasts or inner thighs that were not specifically identified on the consent form and/or discussed prior to the massage commencing.

114. In addition, I consider that Mr C's massage of the consumers did not meet accepted standards. The assumptions and discussions prior to the massage commencing were insufficient for there to be a shared understanding of the sites to be massaged. Moreover, massage techniques such as massage of both legs simultaneously was inappropriate unless specific informed consent had been obtained, and the standard of draping of both consumers was inadequate to maintain their privacy, comfort and dignity.
115. I agree with Mr Vautier's view that "[i]f a client has had an unsatisfactory massage due to lack of informed consent or as in this case poor draping principles then peers in the industry would consider this a breach of ethical standards as the client's needs should come first".
116. In my opinion, Mr C's actions on both occasions transgressed Massage New Zealand's Code of Ethics and Standards of Practice.

Care of Ms A (20HDC01152)

117. I consider that Mr C did not sufficiently discuss with Ms A his intention to touch her inner thigh and inter-gluteal cleft prior to and during the massage. This was information that a consumer in Ms A's circumstances would need to receive to give informed consent, and therefore I consider that Mr C breached Right 6(1)⁵ of the Code. It follows that Ms A was not able to give informed consent to those aspects of the massage, and, accordingly, Mr C also breached Right 7(1)⁶ of the Code.
118. Mr C also failed to provide an adequate standard of massage, and failed to protect, maintain, or respect Ms A's privacy by providing an inappropriate standard of draping when he undraped both of Ms A's legs at once. Accordingly, Mr C breached Right 1(2)⁷ of the Code. He also failed to meet Massage New Zealand's Code of Ethics and Standards of Practice, in breach of Right 4(2)⁸ of the Code.

Care of Ms B (20HDC02080)

119. I consider that Mr C did not specifically discuss with Ms B the scope and duration of the breast massage prior to the massage occurring. This was information that a consumer in Ms B's circumstances would need to receive to give informed consent, and therefore I consider that Mr C breached Right 6(1) of the Code. It follows that Ms B was not able to give informed

⁵ 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, including ... any other information required by legal, professional, ethical, and other relevant standards."

⁶ Right 7(1) states: "Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise."

⁷ Right 1(2) states: "Every consumer has the right to have his or her privacy respected."

⁸ Right 4(2) states: "Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards."

consent to those aspects of the massage, and, accordingly, Mr C also breached Right 7(1) of the Code.

120. Mr C also failed to provide an appropriate standard of massage, and failed to protect, maintain, or respect Ms B's privacy by providing an inadequate standard of draping and by removing Ms B's underwear during the massage. Accordingly, Mr C breached Right 1(2) of the Code. He also failed to meet Massage New Zealand's Code of Ethics and Standards of Practice, which breached Right 4(2) of the Code.
121. In addition to the breach findings, I make the following comments about the massage of Ms B.
122. I am critical of the duration of the massage. Ms B agreed to a 90-minute full-body massage. I note that Ms B's appointment was scheduled to commence at 4pm, and the text from Mr C was sent at 6.42pm, after she left, and he took a short break before starting to clean the room. This time frame is consistent with Ms B spending 2.5 hours at the clinic. There is a significant difference in the duration of the appointment, particularly at the end of the day, and this may have contributed to the feelings of discomfort and vulnerability experienced by Ms B. The duration of the appointment should be established prior to the massage commencing, and should be adhered to as much as reasonably possible.
123. Mr C has not commented on whether he made a sensual remark about Ms B's body, and I cannot determine whether this took place. I consider such comments to be highly inappropriate, as they could be construed to suggest a sexual attraction, which has no place in a therapeutic encounter, where the focus is on the needs of the client.
124. The fact that Ms B was unable to locate her underwear at the completion of the massage is perplexing. It appears that immediately after he discovered Ms B's underwear Mr C messaged Ms B to advise that her property could be returned to her when she next visited the clinic. I accept that Mr C sent the message as he may have wanted to reassure Ms B that her underwear had been found.
125. However, I consider it inappropriate that Mr C contacted Ms B again on the day after the massage to check how she felt. There was no clinical need or reasonable explanation for him to make this contact. If Ms B had had concerns or wanted to provide feedback, she could have initiated this. I am concerned that the contact was not for a therapeutic purpose, which caused distress to Ms B and overstepped relevant boundaries.

Recommendations

126. In response to the recommendation in my provisional opinion, Mr C provided written apologies to Ms A and Ms B, and has taken steps to engage with a mentor and improve his informed consent process. I recommend that in addition, Mr C:
- a) Re-join Massage New Zealand;
 - b) Attend a counselling course to learn effective listening skills; and
 - c) Update his first aid certificate, within three months of the date of this report.
-

Follow-up actions

127. Mr C 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.
128. A copy of this report with details identifying the parties removed, except the advisor on this case, will be sent to Massage New Zealand and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.

Appendix A: Independent clinical advice to Commissioner

The following expert advice was obtained from Mr Barry Vautier regarding the standard of care provided to Ms A:

“Statement of qualification:

Barry Vautier has over 30 years’ private practice in the massage industry in New Zealand. He qualified as a naturopath in 1990 and as a massage therapist in 1994. He holds a bachelor’s degree in health studies in massage from the New Zealand College of Massage and is a life member of Massage New Zealand (MNZ). 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 having been committed to ongoing professional development throughout his career.

...

I have compiled the following advice on professional standards and/or accepted practices in relation to whether the care provided to [Ms A] by [Mr C] was within acceptable standards of massage practice in New Zealand.

I have drawn on the standards of the massage industry in New Zealand. These standards are set out in the New Zealand Qualifications Authority (NZQA) for certificate, diploma and degree levels of training, and in massage schools training documentation.

The massage scope of practice of the NZQA certificate/diploma level of training is the application of relaxation massage to healthy individuals. [Mr C’s] documents indicate he has a NZQA qualification with the NZ Diploma in Wellness and Relaxation massage, obtained at the NZ College of Chinese Medicine Ltd.

Background of the complaint.

[Ms A] received a 90-minute full body therapeutic massage from [Mr C] on 6th June 2020.

[Ms A] states that she was touched in ways that made her feel uncomfortable by [Mr C], and is concerned about whether his conduct was appropriate. [Ms A] is concerned about whether she was adequately draped, massaging of her inner thighs, the placing of a finger on the top crevice of her buttock (on the sacrum/coccyx), [Mr C’s] hands going underneath her underwear and the massaging of both legs simultaneously.

[Mr C] acknowledges he touched the top of the crevice of [Ms A’s] buttocks and massaged underneath her underwear.

[Mr C] is not currently a member of Massage New Zealand although he has been in the past and states he abides by the MNZ Code of Ethics.

I have given advice whether the care provided to [Ms A] by [Mr C] was reasonable in the circumstances and why.

Comments have been made on:

1. Whether the massage as described by [Ms A] was within acceptable standards.
2. Whether touching the buttocks is an acceptable part of full body massage. Whether it is usual practice to get specific consent in advance to touch a client's buttocks.
3. Whether massage of the body underneath underwear is an acceptable part of a full body massage. Whether it is usual practice to get specific consent in advance to massage underneath the underwear.
4. The adequacy of the steps [Mr C] states he undertook to maintain [Ms A's] modesty.
5. [Mr C's] stated practice of not offering a chaperone to adult female clients.
6. [Mr C's] statement that 'If a client is uncomfortable about the massage treatment they are receiving, they generally tense up and a good massage therapist will notice.'
7. Any other matters for consideration.

For each of the above questions, advice has been given on

- 1. What is the standard of care/accepted practice?**
- 2. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be? (mild moderate or severe).**
- 3. How would it be viewed by your peers?**
- 4. Recommendations for improvement that may help to prevent a similar occurrence in the future.**

I have drawn on the various massage educational sources of industry standards of practice along with the Massage New Zealand (MNZ) *code of ethics* and *standards of practice* documents.

(These public documents are attached separately.)

Comment:

- 1. Whether the massage as described by [Ms A] was within acceptable standards**
 - a. Standard of care/accepted practice.**

A massage practitioner needs to:

- Give clear instructions as to what clothing to remove as necessary for the treatment and get informed consent from the client about clothing removal.
- Usually for a full body massage a client would leave their underwear ON ('knickers' briefs, underpants, jock straps) and the rest of her clothing

removed. The reason for this is to ensure a client's dignity, provide a foundation to tuck draping into, and to help protect the client and practitioner against possible allegations of inappropriate touch.

- 'Bras' may be removed/unfastened with the client's consent.
- A client should be consulted during the treatment about pressure, changes of stroke, depth, speed or location on the body to ensure their safety and dignity and to ensure the treatment needs are met.
- The practitioner should establish a feedback system where the client is in control over the pressure, speed and type of treatment given. Regularly conferring with the client during the treatment around depth (pressure), speed, and comfort gives confidence and a sense of safety for the client.
- Explanations should be given to the client about what to expect next in the treatment, as the practitioner moves from one area of the body to another. The client should be made aware of what strokes are being performed and why.
- Explanations should be given to the client if there is a variation to the goals of the treatment and gaining consent to vary them. For example, massaging an area previously not in the agreed treatment plan.
- Professional presentation: Self hygiene principles. Appropriate and clean clothing. Clean and short fingernails. Unobtrusive body odours and breath.
- Be effective with communication and language skills: by applying language supportive to the client and the profession including:
 - Clear verbal instructions throughout the treatment.
 - Check that a client understands the instructions.
 - Check for client comfort throughout the treatment.
 - Respond to the client's verbal and non-verbal feedback — Considering changes of skin temperature, colour, body tension, relaxation, body movements, breathing patterns, facial responses, and general body language.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

Although there are some differences of opinion between [Mr C] and [Ms A] as to what actually happened in the massage, the massage as described by [Ms A] does not fit some of the standard of care and accepted practice of professional massage.

The main points of contention are:

- a. Whether [Mr C] draped [Ms A] adequately
- b. Whether [Mr C] obtained informed consent for massaging [Ms A's] inner thighs

- c. Whether [Mr C] obtained informed consent for placing his finger on top of her buttock crevice.
- d. Whether massaging both of her legs simultaneously is appropriate.

There may have been verbal consent and instructions given but these are not recorded. In this case [Ms A] seems to have removed her Bra. It's not clear from the evidence if [Mr C] tucked the draping into her underwear to provide a secure anchor for the draping to protect her dignity, protect her clothing from oil and define the area to be massaged.

It's not clear if [Mr C] asked [Ms A] for consent about body areas to be massaged. This is a contentious issue as there may be a difference of opinion as to whether adequate verbal consent was established for body areas that were not to be touched. [Mr C] seemed to assume that as she had consented to a full body relaxation massage, that it would include massage of her inner thighs and buttocks. The big departure from care is this assumption and lack of informed consent with his client by clarifying what body parts she wanted massaged or not even during the massage. It's unclear if [Mr C] used a pain scale in order to obtain accurate feedback from [Ms A] about the level of her comfort.

It's unclear if [Mr C] obtained informed consent to place his finger into the crease between her buttocks. There may be valid reasons for a procedure in this location but due to the invasiveness of this location, very clear verbal informed consent is required.

Massaging both legs simultaneously is not usual but is practised by some therapists at times. In this case it seems [Mr C] did not get informed consent to practise in this manner. Massaging bilateral legs simultaneously is usually considered sensual in nature and best avoided.

c. How would this be regarded by your peers?

Inadequate draping by not tucking in to the client's clothing and keeping coverage of a body area not being massaged at the time, would be considered a moderate departure from accepted practice.

The lack of informed consent about massaging [Ms A's] inner thighs and placing a finger in the crease between her buttocks would be regarded by peers as a breach of ethical standards and a severe lapse in good practice.

Massaging both legs simultaneously would be considered a mild departure of good practice as it may be considered sensual, especially if the strokes are taken too high up the inner thigh.

d. Recommendation.

That [Mr C] receives mentoring around the ethical, legal and standards of massage practice as applied by professionally trained relaxation massage therapists in New Zealand. This includes informed consent and draping principles.

2. Whether touching the buttocks is an acceptable part of full body massage. Whether it is usual practice to get specific consent in advance to touch a client's buttocks.

a. What is the standard of care/accepted practice?

The standards of practice do not define whether massaging specific buttock structures such as gluteus maximus and medius is acceptable or not. It's common for buttocks to be massaged given the gluteal muscles may be a source of muscle tension and structural imbalance. However, given the need for client dignity and safety it's usual practice and important to gain informed consent when approaching the buttocks. Draping needs to be secure and usually applied diagonally one buttock at a time in order to maintain client dignity. The gluteal crevice is not exposed.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be? (mild moderate or severe).

It's unknown if [Mr C] diagonally draped [Ms A's] buttocks and the degree to which she was consulted is conjectural. Given [Ms A's] distress would suggest there was inadequate informed consent and this would be a moderate departure of standard of care for a client.

c. How would it be viewed by your peers?

The lack of informed consent would be regarded by peers as a severe breach of ethical standards when massaging the buttocks.

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

I would recommend that [Mr C] always get clear informed consent to massage the buttocks prior to applying strokes in the buttock region. He would be advised to review his draping techniques with a peer.

3. Whether massage of the body underneath underwear is an acceptable part of a full body massage. Whether it is usual practice to get specific consent in advance to massage underneath the underwear.

a. What is the standard of care/accepted practice?

Massage should never be applied underneath underwear or any other clothing for any reason at any time. The reasoning for this is that people feel vulnerable when hands go under clothing. They don't know where the hands may end up going. For this reason, draping should always be tucked in to define the exposed area to be massaged. Thus, draping is done to provide dignity, define the areas to be massaged and provide warmth and comfort for the client. Non-massaged areas should be covered until such time strokes are to be applied to the area, and then that area should be re-covered when moving onto another area.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be? (mild moderate or severe).

Massaging under clothing at any time is considered a severe breach of good practice.

c. How would it be viewed by your peers?

Massage peers would consider massaging under clothing a serious breach of ethical and performance standards.

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

[Mr C] needs to seriously reconsider his belief system about performing massaging under clothing. Massage can be performed over clothing or draping if necessary. In a hard to get at area very clear informed consent is required. I would recommend [Mr C] get further instruction on professional standards of draping. He should NEVER massage under clothing.

4. The adequacy of the steps [Mr C] states he undertook to maintain [Ms A's] modesty.

a. What is the standard of care/accepted practice?

The standard of care is informed consent about all aspects of a massage. The client's dignity and modesty should be attended to at all times through questioning and listening to both verbal and non-verbal responses of the client's body.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be? (mild, moderate or severe).

This is a very difficult area to give an opinion on as without a video recording or having a third person present, just what was said or done is conjectural based on differing opinions of [Ms A] and [Mr C]. In what manner and how often [Mr C] gained informed consent is difficult to gauge. What's important is that [Ms A] had an experience leaving her distressed, vulnerable and overwhelmed. Often a client feels vulnerable and powerless merely by virtue of lying on a table with a practitioner leaning over the top.

c. How would it be viewed by your peers?

If a client has had an unsatisfactory massage due to lack of informed consent or as in this case poor draping principles then peers in the industry would consider this a breach of ethical standards as the client's needs should come first. The outcome of a massage can be very different from the perspective of a client versus a practitioner. It's very common for someone who has been overwhelmed and subject to inappropriate touch to under-respond immediately after a massage. They may feel intimidated to speak the truth and awareness of how they feel may not dawn until much later. The capacity for a client to give feedback immediately after a massage may be limited even if there are no confounding issues such as a client's touch history.

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

[Mr C] needs to consider the vulnerability of a client post massage and attempt to pick up any nuances of distress and lack of feedback during and after a treatment.

5. [Mr C's] stated practice of not offering a chaperone to adult female clients.

a. What is the standard of care/accepted practice?

As [Mr C] states, it would be unusual for a client to request or be offered a chaperone. In general, a chaperone is not typically offered unless there are presenting concerns.

Usually, a chaperone is not offered unless a client requiring massage is under the age of 16 years, in which case a parent or guardian should be present. Occasionally for cultural reasons a chaperone may be required when massage is performed on the opposite gender. For example, cross culturally there may be cultural norms requiring massage be normally applied with the same gender of the client and practitioner.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be? (mild, moderate or severe).

This would be considered in this case a mild departure of standard care. It could be considered severe if cultural taboos or other issues were in place such as a client history of abuse, but this is not clear from the evidence given.

c. How would it be viewed by your peers?

The use of a Chaperone may be very important in certain situations and it is unclear in this event if this was required.

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

[Mr C] may want to consider using a chaperone in certain circumstances. This will mean getting more information from a client when they first book to establish any touch concerns of a male on a female.

6. [Mr C's] statement that 'If a client is uncomfortable about the massage treatment they are receiving, they generally tense up and a good massage therapist will notice.'

a. What is the standard of care/accepted practice?

The standard of practice is for the practitioner to be very aware of subtle changes in the client's breathing and other body language feedback such as tensing up during a massage. Clients don't always speak up for many reasons. They may be embarrassed, especially if they are new to massage. The client may have a disconnect between body and mind especially if they have been a victim of abuse or trauma. The client may not be able to verbalise what sensations they are experiencing let alone how

they are feeling. They may be drowsy from the massage and only half awake. For these reasons it's especially important, unless otherwise clearly indicated, for a practitioner to constantly check-in with the client. This means developing a rapport and having adequate communication skills, particularly around listening.

Ideally a good therapist will notice changes in the client and respond accordingly to the client's needs.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be? (mild, moderate or severe).

It's hard to gauge given the evidence presented what exactly happened such that [Ms A] felt vulnerable and abused. Usually, it's due to a lack of rapport, lack of informed consent and the therapist not being present enough to respect the client's needs at the time. [Mr C] seemed to have failed to pick up the distress of [Ms A] and this would be considered a moderate departure of good practice.

c. How would it be viewed by your peers?

Peers would consider a practitioner's inability to be fully present to be a breach of good standards of practice. But then everyone has an 'off' day and it's hard to know if [Mr C's] inability to pick up [Ms A's] distress is a habit or a lack on the day.

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

[Mr C] may benefit from attending a basic counselling skills course to learn effective listening skills.

8. Any other matters for consideration. Any other matters in this case you consider warrant comment about departure of care of the expected standard of care or accepted practice.

[Mr C] massaged around [Ms A's] hips in supine and he stated his hands moved beneath her underwear and that this is a part of his 'style'. I would strongly urge [Mr C] to alter his style and NEVER massage underneath clothing and underwear.

There's a definite disparity between what [Ms A] experienced and what [Mr C] stated he was doing. For example, he stated he got informed consent to massage her leg adductors by asking if that would make her uncomfortable and he says she told him it would not. And yet her experience was that she felt assaulted and vulnerable from him massaging this area. I suspect if he had good rapport with the client the experience may have been different. If his draping technique had been more effective, she would not have felt so threatened.

Code of practice includes being polite and considerate with clients at all times. A client should feel safe throughout a massage. They should be listened to and respect given to their concerns and preferences. Their requests should be responded to immediately within professional boundaries.

Informed consent should be applied from start to finish of any massage to ensure client safety, dignity and respect.

Other considerations and recommendations.

[Mr C] may be applying some of these already.

- [Mr C] keep up with his 1st aid revalidation every 2 years as his was out of date at the time he massaged [Ms A].
- [Mr C] re-join Massage New Zealand and get support and enjoy the fellowship of his peers in New Zealand. This will also provide an incentive for ongoing professional development which Massage New Zealand requires for ongoing membership.
- [Mr C] consider client safety and professionalism and carry out his treatments with non-prejudicial client care including anti-discrimination.
- [Mr C] should display in a visible place and pointed out to clients, the Health and Disability Commissioner's Code of Health and Disability Services Consumers' Rights Poster.
- [Mr C] should have a complaints procedure displayed in a visible place and pointed out to clients.
- [Mr C] should display a Code of Ethics at his practice based on a professional association they should belong to. (A requirement of MNZ.)
- [Mr C] should have a referral network for sending clients on to another health professional if a client's condition is outside their scope of practice, or for any other reason by client request.

Yours sincerely

Barry Vautier
5th March 2021"

**Further comments from Mr Vautier following Mr C's response to HDC.
Received 15 June 2022**

"As per your request I have studied the attending documentation from [Mr C], reviewed all previous documentation of this case and given advice on the following statements in response to the provider [Mr C] in his correspondence of 25 May, 2021.

Whether the provider's comments change any aspects of your initial advice;

Whether there are any other matters in this case that you consider warrants comment;
and

Any recommendations that you could think of for future improvements to the provider's practice.

[Mr C] has given extensive justifications for what he believed to have happened with his client [Ms A] with his 90-minute massage on 6th June 2020. My initial advice was given based on the evidence presented to HDC and based on the experience of the complainant [Ms A] and related to standards of massage in New Zealand. As stated in my report of 5th March 2021 it's conjectural as to what really happened as the perceptions of the client and therapist don't concur in this instance. My advice remains the same despite [Mr C's] comments. [Ms A] felt dissatisfied with her treatment on the day, and possibly due to a lack of adequate conferring with her on the day, she lodged a formal complaint with HDC. Although [Mr C] describes his rationale for his treatment of [Ms A], and attempts to attribute blame to [Ms A] for her lack of feedback, there's no escaping the fact of her reported dissatisfaction.

[Mr C] has stated he has altered his practice as a result of the complaint which demonstrates a responsible attitude towards his professional development and adaptation to changing circumstances especially when a complaint is made. There seems to be a discrepancy between [Ms A's] version of informed consent with that of [Mr C]. This is not unusual as a client may not realise how they felt from a technique or procedure during a massage until much later due to the effects of feeling vulnerable on the massage table in a relatively powerless position and being partially undressed, even if draped adequately. Post massage a client may be in a drowsy state and also unable to articulate how vulnerable they felt.

Although [Mr C] has provided documentation with his confidential client form, massage reviews from satisfied customers plus his justifications for his beliefs and choice of techniques, my opinion stands based on the need for safe practice and professional standards. As stated in my first report, if a practitioner is to apply unusual techniques such as bilateral simultaneous whole leg massage and massaging under draping and clothing, then there needs to be extra concern as to whether the client has adequate informed consent — even though other clients may have been happy with these.

The most important recommendation is for [Mr C] to be ever vigilant about seeking informed consent for any procedure, both before and during a treatment. In mitigation for what happened with [Ms A] it's commendable [Mr C] has responded by stating he has made adjustments to his practice. I would suggest if he were to get any future complaints, he listens very closely to the feedback from his client and avoid justifying a position by taking a stand. It's the client's massage, not the therapist's. Every therapist offers their unique style and techniques and these need to be verbalised in the first interviewing instance and during a treatment as well. Thus, a client then has the choice to accept or reject any procedure applied. By understanding a client's needs and preferences as much as possible a practitioner can then adjust his practice to meet his client's needs. First understanding, then adjustment.

Yours sincerely

Barry Vautier
14th June 2022"

Appendix B: Relevant standards

Massage New Zealand Standards of Practice state:

“All registered MNZ therapists abide by these standards as well as the Code of Ethics which is required to be displayed at all clinic spaces where a registered therapist works.

...

Obtain clients’ informed consent before commencing treatment

...

use appropriate draping to preserve the dignity and modesty of the client

...

inform client during session on what treatment will be provided and continue to monitor and update where required.”

The Massage New Zealand Code of Ethics states:

“— Provide draping and explanations sufficient to meet the client’s needs for comfort and privacy.

...

— Ensure informed client consent has been obtained prior to massage.

...

— Maintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed Massage.

...

Practitioners will not:

— Engage in sexual conduct with a client.”