

**A Decision by the
Deputy Health and Disability Commissioner
(Case 22HDC01056, 22HDC01963, 22HDC02711)**

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|------------------------------|----|
| Introduction..... | 1 |
| Summary of events..... | 2 |
| Complaints..... | 2 |
| Opinion: Mr D — breach | 13 |
| Recommendations..... | 22 |
| Follow-up actions | 22 |

Introduction

1. This report is the opinion of Dr Vanessa Caldwell, Deputy Health and Disability Commissioner, and is made in accordance with the power delegated to her by the Commissioner.
2. The report discusses the care provided to Ms A, Ms B, and Ms C by Mr D at a massage clinic.
3. In 2022, HDC received three separate complaints about the care provided to three consumers by massage therapist Mr D at the clinic. The complaints all concern alleged inappropriate behaviour and communication by Mr D.
4. The following issues were identified for investigation:
 - *Whether Mr D provided Ms A with an appropriate standard of care in 2022.*
 - *Whether Mr D provided Ms B with an appropriate standard of care in 2022.*
 - *Whether Mr D provided Ms C with an appropriate standard of care in 2022.*
 - *Whether Mr D has engaged appropriately with the Health and Disability Commissioner’s process, as part of his obligation to facilitate resolution of complaints.*
5. The parties directly involved in the investigation were:

| | |
|------|------------|
| Ms A | Consumer 1 |
| Ms B | Consumer 2 |
| Ms C | Consumer 3 |

having a low pain tolerance and would not like a hard massage, Mr D 'joked' about getting carpets on the floor so that patients would not see their own blood.

13. In response to the provisional opinion, Mr D told HDC:

'This is not my style at all. Client comfort is paramount, and they are [all] advised that some discomfort may be involved but that they are completely in charge of this and ... the [client] is repeatedly asked regarding pressure ... To say that I refused here is pure imagination. The last line [in paragraph 11 above] is pure fiction. I will comment often that after the renovations, costing \$500,000 we were very careful not to get blood on the floor as now carpeted. This is always received in the spirit [of] which it is given [often] accompanied with a chuckle from the client.'

14. Mr D said that he remembers Ms C's session, as eventually she became 'intolerant of any pressure at all'. He told HDC:

'I am not an idiot, if I [had] of been requested to stop this would have taken place. We have a very high rate of return customers and a pressure complaint would have been met with a continuation of less pressure as this is what the client has asked for.'

15. Ms C said that she also mentioned on a form at the clinic that she struggles with low blood pressure. She stated that following the massage, she had very low blood pressure and felt as though she was going to vomit or pass out. She said that the whole massage was 'pure pain and discomfort' and that at the time of writing her complaint (4.30pm the following day) she was still experiencing pain in her back and neck, and she had been having reoccurring low blood pressure dips throughout the day. In response to the provisional opinion, Mr D said that he instructed Ms C about the possibility of nausea due to the release of lactic acid. He said: 'Every client is told to rest on the table for 5 mins or [listen to] one track on the CD and to sit in the atrium area to enjoy a glass of water and a hot towel for the face or neck.'
16. Ms C said that she did not complain directly to Mr D or the clinic as she did not feel comfortable doing so. Initially, Mr D provided a brief and vague response to HDC regarding Ms C's complaint on 20 June 2022, but the response did not address most of the questions asked by HDC. Mr D told HDC:

'We are not beauty therapists and may use pressure to change pain and discomfort levels that may be experienced by our clients. All [patients] are instructed to inform their therapists of this and that they are in complete charge of the pressure used and are encourage[d] to provide feedback if this is too much or not enough ... We are known to specialise in [m]assage therapy predominantly deep tissue and sports ... On exit all clients are asked how the therapy wen[t] for them and how they fe[e]l now. During this session I do not remember any comments to the negative from this client nor are [there] any contra indications in her session notes nor have we received any emails nor phone calls from her detailing any problems.'

17. On 22 September 2022, Mr D provided a further response to HDC in two brief emails. He advised that usually he engages in discussions with clients and will discuss a large range of topics, including a client's muscular-skeletal issues and general health. Mr D said that often he will discuss diet with clients, as he has 20 years' experience in this area. He recalled spending time discussing issues around pregnancy with Ms C, as her sister or sister-in-law was pregnant. He recalled discussing the role that insulin plays in pregnancy and said that the conversation went on for 'the full hour plus an extra 15 mins'. Mr D made several other general comments about how many clients the clinic has seen over the years it has been in operation, but he did not provide further information relevant to Ms C's complaint. As discussed below in more detail, Mr D did not provide HDC with any session notes from Ms C's appointment.
18. In response to the provisional opinion, Ms C said that she and Mr D did not speak for over an hour regarding pregnancy. She said that in 2022, she had no sister-in-law and had never spoken to or met her half-sister. Further, she said that neither of these women were pregnant. Ms C stated:
- 'As it has been 2 years, my memory is a little foggy on what we spoke about, but I do recall him mainly talking about his trips [overseas], the money he put into the clinic ... and how he was currently building or preparing to build some kind of massage resort. I recall the overwhelming theme being about money.'
19. In response to the provisional opinion, Mr D said that he 'interact[s] well with clients' and 'will typically have conversation throughout the session'. He said that the conversation is governed by clients' interests and 'occasionally a discussion on current events will occur'. He said that the 'notes' detail a 'full back neck and shoulder session' and that as Ms C was 'clearly happy with the session when asked' she would have been invited to book another session before leaving. Mr D did not provide a copy of his notes in response to the provisional opinion.

Ms B

20. Ms B told HDC that she was booked in for a 60-minute 'relaxation massage' with Mr D at the clinic on 26 July 2022. She said that Mr D talked for the entirety of the massage, and the nature of his conversation was 'racist and inappropriate'.
21. Ms B said that Mr D began by telling her that recently he had dismissed one of his female employees for incompetent practice, and he described the process to Ms B by saying that he had 'handed her her notice and said she was going on a "permanent holiday"'. Ms B said that Mr D then shared racist views, including the claim that Māori people 'do not exist because there are no 100%' Māori people left'. Ms B said that he then compared Māori to 'cross[bred]' cows and shared his disapproval of Māori having a voice in government, and many incorrect historical facts, including that Māori never lived in the South Island. Ms B said that Mr D also said that Māori women were 'willingly lining up outside colonist homes to have sex with sailors' and that Māori people were trying to 'take over government'.

22. In response to the provisional opinion, Mr D said that he ‘disagree[s]’ with Ms B’s recollection. He stated: ‘[Māori] people as an ethnic group do not exist as at best they may only be 50% [Māori] genes.’ Mr D told HDC:

‘[A]t the signing of the Treaty [of Waitangi] it was estimated that they numbered some 2,500 people, most of them being Ngai Tahu so to suggest that I stated that they didn’t exist there is not a statement that I would make. I [am] well versed in politics and the antagonism by many toward [the] [Māori] seats in Parliament. My views are always qualified as such.’

23. Ms B recalled that Mr D also said that he was against wearing a mask (in relation to the COVID-19 pandemic) and that the research that suggests that masks reduce infection rates is false.

24. In response to the provisional opinion, Mr D told HDC:

‘[S]urgical masks were never designed to filter air but to prevent saliva droplets [from entering] the surgical wound. Having said this all staff wore these both in the clinic and with clients as it was the general population[’s] view that these were very effective. Mask use was mandated then eventually dropped by the population. We continued to wear these for many months after [the mandate] was dropped simply to reassure clients.’

25. Ms B told HDC that Mr D then proceeded to speak about women and sex, and his religious beliefs. Ms B stated:

‘He gave detailed and specific explanations about female birthing hygiene, post-birth medical infections caused by cross-contamination of medical instruments, labia tearing and stitches, the risk of post-birth sex caused by the wounds from the placenta detaching from the uterus and the impact of male circumcision on said hygiene practices.’

26. In response to the provisional opinion, Mr D said:

‘She must have had an interest in this hence the discussion. The cross contamination statement is incorrect. This may have referred to the very beginning of handwashing in hospitals not instruments ... No idea how religious beliefs fit in here[.]’

27. Ms B said that Mr D then went on to describe the differences between men and women’s ‘crucifixion practices’ — that both were crucified naked, but women were offered the dignity of being crucified facing the cross. Mr D responded to the provisional opinion, stating: ‘This is correct.’

28. Ms B said that she felt uncomfortable and wanted to leave. However, she felt unable to do so as she was lying on the massage table with no clothing on. Ms B stated: ‘I felt intimidated by his conversation and unsafe as a result.’ Ms B told HDC that her massage ended up being

90 minutes long (when it was booked for 60 minutes), which she also found unsettling as she was not sure why it was going on for so long.

29. In response to the provisional opinion, Mr D stated:

‘[N]ot naked. Some females present with out a bra, but generally not new [clients], they are told they are welcome to leave the bra on but we will undo it at the back so oil is not on their clothing. All clients wear underwear.’

30. Ms B said that she did not raise her complaint directly with Mr D as she did not feel safe to do so. In response to the provisional opinion, Mr D reiterated that all clients are treated with the utmost respect and dignity.

Ms A

31. Ms A told HDC that on 30 October 2022 she attended her second massage with Mr D at around 7pm. Ms A told NZ Police² that she was in her bra and underwear and was covered by a towel during the massage.³ She said that the massage started with Mr D telling her that she needed to lose weight and that she could have her ‘body altered surgically to be taller’ as she is short.

32. In response to the provisional opinion, Mr D said:

‘This may well have been discussed but of course very politely and would never [have] been broached using the language suggested. No idea now re the lengthening of leg bones but this is of course very possible.’

33. Ms A said that the conversation then turned to ‘a very inappropriate one-sided conversation all about sex’. She stated that Mr D was speaking explicitly about erections, ejaculations, and about people having sex. She told HDC: ‘I was incredibly uncomfortable, but due to having [post-traumatic stress disorder] from sexual assault, I froze and was unable to speak out at the time.’ In response, Mr D said that he has no recollection of this conversation.

34. Ms A reported the event to the NZ Police on 2 November 2022. The NZ Police’s summary of the incident outlined that Ms A reported Mr D making comments along the lines of: ‘[Y]ou should check your boyfriend’s ballsack. If you follow the line down the ballsack, this is where the babies come from’ and ‘[I]n order for the man to cum, the female needs to be relaxed, so you need to stay relaxed and you’ll both enjoy it more.’

35. In response to the provisional opinion, Mr D stated:

‘[I have] no idea where this came from. [I] would not have called the [scrotum] a “ball sack” seems from her recollection that she had discussed problems that they as a couple were having.’

² As set out in paragraph 34, Ms A reported the incident to the NZ Police.

³ As per the NZ Police’s summary of the incident (see paragraph 34).

36. Ms A said that the massage was meant to finish at 8pm, but Mr D continued the massage and 'speaking about inappropriate sexual topics until 8.30pm'. She told HDC: 'I was very concerned for my safety, being the only person there with [Mr D]. I left feeling lucky to have got away.' Ms A said that she did not feel safe to raise her concerns directly with Mr D.
37. In response to the provisional opinion, Mr D said that sessions generally last for one hour, but 'with conversation in the atrium area this may have given the feeling of lasting longer'. He reiterated that all conversation is led by the client.
38. The NZ Police told HDC that police spoke to Mr D, and he was given a verbal warning.

Attempts to contact Mr D

Ms C's complaint

39. On 20 May 2022, HDC sent a letter via email to Mr D under section 14(1)(m) of the Health and Disability Commissioner Act 1994 (the Act)⁴ in relation to Ms C's complaint, after he had confirmed his email address the previous day. Mr D was provided with a copy of the complaint. The letter advised Mr D: '[Under the Health and Disability Commissioner Act 1994], we gather information to assess complaints. Please respond to the issues raised in the complaint.' The letter asked Mr D to respond to the following:
- An explanation of the care provided to Ms C during her massage;
 - The steps taken to assess Ms C's preferences for the massage and ascertain any relevant medical history;
 - An explanation of his usual practice in regard to massaging consumers who have low blood pressure (hypotension);
 - Ms C's concern that the massage was painful;
 - Any steps taken to respond to Ms C's requests to stop the massage and have a break; and
 - Ms C's concern about the comments made during the massage.
40. Mr D was also asked to provide a copy of any notes relating to Ms C's appointment on 29 April 2022, including (but not limited to) consent forms and pre-massage assessments, and a copy of any policies or guidelines that the clinic has relating to the complaint, including informed consent, and massaging consumers with hypotension. Mr D's response was due on 10 June 2022, but he did not respond. A follow-up email was sent to Mr D on 13 June 2022, and he was asked to provide his response by 20 June 2022.

⁴ Section 14(1)(m) of the Act stipulates that one of the functions of the Commissioner is to 'gather such information as in the Commissioner's opinion will assist the Commissioner in carrying out the Commissioner's functions⁴ under this Act'. HDC has several statutory functions, including acting as the initial recipient of complaints and ensuring that each complaint is dealt with appropriately (s14(1)(da)) and investigating any action that is, or appears to be, in breach of the Code of Health and Disability Services Consumers' Rights (s14(1)(e)).

41. In response to the provisional opinion (specifically, paragraph 39 above) Mr D said that he has no recollection of this letter. He also said that all new clients are asked to fill out a registration card, but this was not provided to HDC.
42. Mr D responded to HDC on 20 June 2022, advising that he could ‘not find [the] prior email so will reply from memory’. Part of Mr D’s response is stated in paragraphs 16–17 above. Mr D also advised that the clinic is 12 years old (in its current form) and had been running for 13 years prior to this (possibly under a different name or structure, although Mr D has not confirmed this). Mr D said that he trained as a massage therapist several years ago and has done many short courses on massage therapy since then. He stated that the clinic has 14,958 registered clients and has ‘completed 66,735 one hour sessions’. He said that he takes a full written record at a client’s first visit, which includes a health survey.
43. Because of Mr D’s lack of specific response to the questions asked of him under section 14 of the Health and Disability Commissioner Act 1994 and his comment that he did not have the original information request, on 20 June 2022 the section 14 letter was again sent to Mr D and he was given a new due date of 4 July 2022 to provide a response and information. Mr D confirmed receipt of the letter on the same day, but he did not provide a further response. A further follow-up email was sent to Mr D on 21 September 2022.
44. Mr D responded with two brief emails on 22 September 2022. Part of Mr D’s response is contained in paragraph 17 above. In addition, he told HDC:
- ‘There is nothing to assess. I can’t find you[r] original letter so I had assumed that this was [dealt] with as emails stay in my [inbox] [until] actioned. My apologies as this was not the case ...
- At no time was I asked to stop talking or was the conversation changed by the client. We would have covered a wide range of topics led by the client ... If you had asked for specifics I apolog[ise] if I have not answered these here as I can’t find your notes.’
45. That day, HDC sent the section 14 letter to Mr D again and wrote: ‘We require that you respond to the requested points in our letter.’ Mr D was asked to respond by 6 October 2022, but he did not provide a response.

Ms B’s complaint

46. On 6 September 2022, HDC sent a letter to Mr D under section 14(1)(m) of the Health and Disability Commissioner Act 1994 in relation to Ms B’s complaint, after Mr D had confirmed his email address the previous day. Mr D was provided with a copy of the complaint and advised:

‘[Under the Act], we gather information to assess complaints. [Ms B] has raised concerns that you discussed inappropriate topics with her during her massage session with you. Please respond to all the concerns she has raised in her complaint.’

47. Mr D was also asked to respond to the following:
- The topics discussed with Ms B as listed in her complaint; and
 - The length of the massage session.
48. HDC also requested a copy of Ms B's clinical notes, an outline of Mr D's standard services and massage length, and an outline of any actions taken to address the concerns raised. Mr D's response was due on 4 October 2022, but he did not provide a response.

Ms A's complaint

49. Mr D was first advised of Ms A's complaint on 17 April 2023, when he was advised that three complaints relating to him were being considered by HDC's Investigations Team (see paragraph 52 below). He was provided with a copy of the complaint and told that while a response was not necessary at that stage, he could provide a response and information if he wished to do so. Mr D did not respond to the email.

All complaints

Follow-up of section 14

50. On 4 November 2022, HDC emailed Mr D to follow up the information requests made regarding Ms C's and Ms B's complaints. HDC wrote that correspondence had not been received and asked that he make these requests a priority and action them immediately.
51. On 24 November 2022, a further letter was sent to Mr D, noting that HDC had not received the requested information regarding Ms C's and Ms B's complaints. The letter stated:
- 'I would like to remind you that every consumer has the right to complain and as a provider, you are expected to use your best endeavours to assist this Office in facilitating the fair, simple, speedy and efficient resolution of complaints by responding promptly to our requests for information. If I do not hear from you by the date below, I will be forced to accept the complainants' version of events as the established facts and proceed with our assessment. Hence, I would appreciate your cooperation in providing a response and the requisite records to the above-stated complaints by 7 December 2022.'
52. Mr D did not respond or provide the requisite information. On 17 April 2023, Mr D was advised that all three complaints had been sent to the Investigations Team for consideration. As Mr D failed to respond to this email, a further follow-up email was sent on 14 August 2023.
53. On 3 November 2023, HDC telephoned Mr D, who advised that he was not sure whether he had received HDC's emails and would 'have to check'. Following this call, HDC sent an email to Mr D and he confirmed receipt of that email but not the email of 17 April 2023. The emails from 17 April 2023 and 14 August 2023 were re-sent to Mr D and he was asked to confirm receipt again, which he did on the same day (3 November 2023). Shortly afterwards he was also re-sent the section 14 letters and the password for accessing them. However, Mr D did not provide a response.

Notification of investigation

54. On 16 January 2024 HDC commenced a formal investigation into all three complaints, and a letter was sent to Mr D requesting information under section 62(1) of the Health and Disability Commissioner Act 1994.⁵ Mr D was required to provide information, including the following, by 23 February 2024:
- A detailed description of the service provided to the complainants;
 - A response to the details of each complaint;
 - Copies of any records he made at the time of the appointments;
 - Whether he considered making any changes to his practice as a result of the complaints; and
 - Details of his membership of any College or professional association.
55. On 23 January 2024 Mr D asked HDC to re-send the notification letter and password and said: '[N]ot sure why all the secrecy around this we have nothing to hide and this business is now 14 [years old]. 70,000 completed sessions from a registered 15,500 clients.' The password was sent to Mr D that day, but he did not provide a response.
56. HDC telephoned Mr D on 6 March 2024 and he advised that he was overseas and would attempt to complete his response in 'the next few days'. A further telephone call was made to Mr D on 22 March 2024 and Mr D advised that he was still overseas without access to internet, but that he would be returning to the country on 3 April 2024 and would have the response to HDC within 10 days. HDC sent a further email to Mr D that day, advising that HDC would begin preparing its provisional report if it did not receive a response by 5 April 2024. Mr D did not provide a response.
57. On 6 April 2024, Mr D emailed HDC:
- 'I seem to remember you had sent an email [regarding alleged allegations] and the response [you] were seeking[.] I have searched[.] I am unable to find. Would you kindly resend this please and I will attend to this[.] I would also appreciate information on what your legal involvement is here and why and what my legal obligations are, if any.'
58. HDC responded to Mr D on 9 April 2024 and provided him with another copy of the notification letter and explained his legal obligations under the Act and the Code. He was given a final due date of 22 April 2024 to provide the requested information and his response to the questions put to him in the notification letter, but as at the date of the provisional

⁵ Section 62(1) of the Act stipulates: 'The Commissioner may from time to time, by notice in writing, require any person who in the Commissioner's opinion is able to give information relating to any matter under investigation by the Commissioner to furnish such information, and to produce such documents or things in the possession or under the control of that person, as in the opinion of the Commissioner are relevant to the subject matter of the investigation.'

report he had not done so. Mr D did, however, provide a statement in response to the provisional report.

Relevant standards

59. The Massage NZ Code of Ethics and Standards of Practice are the industry standards and what can be reasonably expected of massage therapists.
60. The Code of Ethics states under 'client relationships' that practitioners will:
- Acknowledge the inherent worth and individuality of each person by not discriminating or behaving in any prejudicial manner with clients.
 - Maintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed massage.
 - Serve the best interests of their clients and provide best practice quality of service.
61. The Code of Ethics states that practitioners will not:
- Endanger the physical, mental, or emotional health, wellbeing, or safety of a client.
 - Engage in sexual conduct⁶ with a client.
62. The Code of Ethics states under 'professionalism' that practitioners will:
- Respect the right of any client to refuse, modify or terminate massage services at any time before or during the massage, regardless of prior consent to the contrary.
63. The Code of Ethics states that practitioners will not:
- Speak or write disrespectfully of colleagues or Massage Aotearoa New Zealand either publicly or to clients.
64. The Standards of Practice includes the following statements:

Interpersonal skills

- Listen to clients and respect their concerns and preferences.

Client Health

- Inform client during session on what treatment will be provided and continue to monitor and update when required.
- Assess pressure, tissue tolerance and comfort levels during sessions and communicate with client on an ongoing basis.

⁶ The Code of Ethics does not define 'sexual conduct'.

Professionalism

- Ensure that beliefs and values do not prejudice client care.
- Comply with equality and anti-discrimination laws.
- Be open and honest when dealing with clients and colleagues and respond quickly to complaints.
- Uphold the reputation of the profession through good conduct.
- Abide by the MANZ Code of Ethics, abide by the Health and Disability Commissioner's Code of Rights.

Legal and cultural requirements

- Be aware of cultural appropriateness and respect in order to meet clients' needs.

Responses to provisional opinion

Mr D

65. Mr D was given the opportunity to respond to the provisional opinion, which was sent to him on 19 June 2024. Mr D advised that he was overseas without internet connection, which delayed his response to the provisional opinion. Mr D's response was eventually received on 16 August. Where relevant, his comments have been incorporated into this report. In addition, Mr D told HDC:

'Of primary concern to me apart from the allegations is several communications reportedly sent by you of which I either do not have and or have no recollection of receiving. I take my obligations seriously, very seriously and this is evidenced by 71, 000 sessions completed which includes multiple sessions to the same client and clients going back as much as 14 years[.] On top of this is the complaints themselves. In the past I have always been happy to express my views on a wide range of topics and as stated this will be led by the clients conversation. I love information and conversation so apart from disagreeing with these persons description of events I am concerned that the business has been brought into disrepute and am more than happy to tender an apology [if] this is what they are wanting ... Subsequent to these complaints I am now most [cautious] about what is discussed and will no longer be led by the clients conversation.'

66. Mr D also told HDC:

'With regard to missing information two years ago I suffered a serious ... injury ... My partner was in charge of the day to day running of all business systems and this is the only possible explanation I have for reported non compliance.'

Ms C

67. Ms C was given the opportunity to respond to relevant sections of the 'summary of events' section of the provisional report. Where relevant, her comments have been incorporated into this report. In addition, Ms C told HDC:

'I want to clarify that while hi[m] talking a lot was unpleasant, it was not any of my main concerns — apart from the comments about blood, my main issues were about the severe low blood pressure episode despite disclosing this on the paperwork, his intimidating demeanour whenever I tried to stop the massage, and lack of stopping when asked (which he seems to imply in one of his statements that I didn't as it's the clients responsibility — I did, I was intentionally ignored) ... From his responses to HDC email and phone calls, I cannot see any indication of remorse, or taking any responsibility. It was distressing to read his responses.'

Ms B

68. Ms B was given the opportunity to respond to relevant sections of the 'summary of events' section of the provisional report. Ms B told HDC:

'The lack of response from [Mr D] is disheartening, concerning and undermines the investigative process. His non-cooperation has impacted my ability to find closure from this distressing experience. The unresolved status of my complaint prolongs the discomfort I have endured. Furthermore, it is disrespectful to me and my experience that he has not responded. I am also deeply concerned for others who may experience services from [Mr D]. The lack of accountability and responsiveness raises questions about the quality and safety of the care provided to other individuals. Every massage I've received since this experience has reminded me of the discomfort I felt during the massage I received from [Mr D] ... The power dynamics in a massage room can prevent one from feeling safe, as the client is in a vulnerable position, often unclothed and relying on the professional conduct of the massage therapist. The nature of his conversation was not professional and led me to feel unsafe and vulnerable. I did not engage with [Mr D]'s inappropriate conversation, however, I worry for others who might feel pressured to respond to him or even feel pressured to agree with his racist ideas and sexual nature of conversation.'

Ms A

69. Ms A was given the opportunity to respond to relevant sections of the 'summary of events' section of the provisional report. She told HDC:

'[D]espite 2 years almost having passed I have decided to continue with the complaint in the case that [Mr D] has conducted himself in the same (or worse) way towards others and I would hate to think that he may scare or hurt someone else.'

Opinion: Mr D — breach

Introduction

70. The massage therapist profession in Aotearoa New Zealand is not regulated under the Health Practitioners Competence Assurance Act 2003, and there are no requirements for massage therapists to register with a professional association. Mr D was not associated with Massage NZ or any other professional body at the time of events and is not currently. However, Mr D clearly holds himself out as a qualified massage therapist, evidenced by his website.

71. As this Office has stated previously,⁷ despite not being a member of a relevant association, Mr D is nonetheless bound by the Code of Health and Disability Services Consumers' Rights (the Code). In *Director of Proceedings v Mogridge*,⁸ 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.'

72. Mr D is not associated with a professional body. However, 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 & Standards of Practice provide a credible reference point in establishing the ethical and practical 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 D's practice.

Engagement with HDC investigation

73. The role of HDC is to promote and protect the rights of consumers of health and disability services. The Rights are set out in the Code of Health and Disability Services Consumers' Rights (the Code), together with the obligations for providers. Right 10(3) of the Code requires providers to facilitate the fair, simple, speedy, and efficient resolution of complaints.
74. In their complaints to HDC, Ms A, Ms B, and Ms C outlined their concerns about the care provided to them by Mr D in 2022. HDC commenced an assessment of Ms C's and Ms B's complaints⁹ and sought further information from Mr D under section 14 of the Health and Disability Commissioner Act 1994. Mr D did not provide the requisite information, and provided only limited responses to Ms C's complaint that did not address her key concern adequately — that Mr D failed to stop the massage when she expressed discomfort.
75. Subsequently, an investigation was initiated on all three complaints on the basis that Mr D's actions appeared to be in breach of the Code. HDC sought information from Mr D under section 62 of the Act, including relevant clinical records/consultation notes, company policies, and a substantive response to each of the complaints. Section 62 of the Act allows the Commissioner to require information from parties that is relevant to an investigation. Mr D failed to provide this information and continued to state that he had not received the correspondence sent to him by HDC despite it being re-sent several times and despite him receiving other emails from HDC.
76. Mr D later advised that he was overseas and that he would provide a response on his return. I understand that this may have been a valid reason for a delay in providing a fulsome response at that time. However, despite several follow-ups and extensions to provide a

⁷ In opinion 12HDC01512 & 20HDC02080.

⁸ *Director of Proceedings v Mogridge* [2007] NZHRR 27.

⁹ Ms A's complaint was sent straight to Investigations as it was the third similar complaint we had received about Mr D after Ms B's and Ms C's complaints.

response subsequently, at the time of issuing the provisional opinion, Mr D had failed to respond to HDC's notification letter.

77. Given Mr D's failure to engage with HDC or provide the information HDC requested from him, including a meaningful response across all three complaints during the investigation process and prior to the issuing of the provisional report, I consider that Mr D has not made sufficient attempts to facilitate the efficient resolution of these complaints. I do not consider that any of the reasons provided by Mr D for not providing his response are reasonable explanations for failing to provide this information.
78. This investigation is an impartial and fair process. The correspondence sent to Mr D from HDC represented an opportunity for Mr D not only to clarify and resolve the issues raised by Ms C, Ms B, and Ms A, but to explain the care that he provided to each of the complainants. Mr D did not take this opportunity. In doing so, he unnecessarily delayed Ms C's, Ms B's, and Ms A's right to have their complaints handled in a speedy, efficient, and satisfactory manner. As a result of Mr D's failure to engage with HDC, the information available to me throughout the investigation has primarily been that provided by the complainants. Mr D has provided only limited correspondence.
79. I also note that Mr D said that he had not received written correspondence from HDC. However, as outlined above, Mr D had received at least some correspondence from HDC and had provided limited information to this Office. Therefore, he was aware that there were three open complaints before him, and that this Office was requesting information from him by way of telephone calls and email.
80. I acknowledge that Mr D provided responses to some of the issues raised in the complaints, and eventually he did respond to the provisional opinion. However, he failed to provide any clinical records or information previously requested from him and did not provide any other evidence to support his version of events. Accordingly, I do not accept Mr D's reason that he was not receiving any correspondence from HDC to be an adequate reason for his failure to respond to this Office for a period of almost two years.

Conclusion

81. Right 10(3) of the Code stipulates that every provider must facilitate the fair, simple, speedy, and efficient resolution of complaints. In this case, Mr D has not provided the information that was crucial to the fair and speedy investigation of the complaints, and, as a result, Mr D has not facilitated the speedy and efficient resolution of the complaints. Accordingly, I find that Mr D breached Right 10(3) of the Code in relation to each of the three complaints.

Professional conduct

Introduction

82. At the time of these events, Mr D was operating out of his clinic, and was engaged to provide services to Ms C, Ms B, and Ms A independently in 2022. As I have noted above at paragraphs 70–72, I consider that Mr D can be held to the standards set out in the Massage NZ Code of Ethics and Standards of Practice.

83. Both Ms B and Ms A separately alleged that Mr D discussed inappropriate and sexually explicit topics with them while performing therapeutic massage. The therapeutic massages in question appear to have occurred within the same year (2022). All three women were distressed by the events that occurred and did not feel comfortable raising their concerns directly with Mr D. Ms A reported Mr D's conduct to the NZ Police shortly after her appointment with him.
84. HDC has attempted to obtain information and responses from Mr D and has given him numerous opportunities to engage in the process via telephone calls and emails. Mr D's limited response to Ms C's complaint has been less than helpful, and until his response to the provisional opinion, he provided no response to Ms B's or Ms A's complaints. In my view, the accounts from the three complainants have been detailed, and all bear similarities to each other.

Ms B

85. With respect to Ms B's complaint, Mr D provided responses to some aspects of the complaint. In particular, he suggested that he would not have made racist remarks about Māori. He went on to say that Māori people as an 'ethnic group' do not exist, 'as at best they may only be 50% [Māori] genes'. Later, he said that saying that 'Māori do not exist' is not something that he would say. Clearly, this statement is contradictory. I therefore do not accept Mr D's version of events in relation to this matter and continue to prefer Ms B's version of events.
86. With respect to his discussion on the efficacy of masks, Mr D said that surgical masks were never designed to filter air, but that all staff at the clinic wore masks as 'it was the general population['s] view that these were very effective'. In my view, Mr D's response to this issue suggests to me that he did have personal views on the efficacy of masks and his response does not disagree that he made such comments to Ms B, so I continue to prefer Ms B's evidence.
87. In response to Ms B's concerns about Mr D discussing birthing practices and cross-contamination of hospital instruments, Mr D said that Ms B must have had an interest in this topic. Again, he did not disagree that he made such comments (aside from the comment about the cross-contamination of hospital instruments). This suggests to me that it is more likely than not that Mr D did engage in some discussion that made Ms B uncomfortable. In addition, Mr D has accepted that he made a comment about female and male crucifixion practices. As such, again I continue to prefer Ms B's version of events.

Ms A

88. With respect to Ms A's complaint, Mr D accepted that he may well have commented on Ms A's weight 'but of course very politely'. He stated that he is not sure whether he suggested leg lengthening surgery but said that 'this is of course very possible'. Regardless of the way in which Mr D approached a conversation about Ms A's height and weight, it is my view that making such comments is entirely inappropriate and outside the scope of Mr D's practice as a massage therapist. In relation to Ms A's concern that Mr D began speaking about inappropriate topics, including sex, Mr D said that he has no recollection of this

conversation. Mr D also told HDC that he cannot recall discussing the matters that Ms A reported to the NZ Police (paragraph 34) and said that he would not have called the scrotum a 'ball sack'. Mr D stated that it seems from Ms A's recollection that she was discussing problems that she and her partner were having.

89. Having considered all the evidence before me, including that Mr D said that he 'does not recall' having had an inappropriate conversation with Ms A and that she must have been discussing problems that she and her partner were having, and that Ms A reported her recollection of events to the NZ Police shortly after the session, and Mr D provided his recollection some two years after the events, I continue to prefer Ms A's version of events.
90. Accordingly, taking into account the above and owing to Mr D's failure to provide relevant consultation notes, policies, procedures, or a fulsome and timely response to all three complaints, I continue to accept the evidence that has been provided to me by the complainants.

Ms C

91. With respect to Ms C's complaint, Mr D has provided limited responses, which I discuss below.
92. Ms C saw Mr D for a massage on 29 April 2022. Ms C's key concern was that Mr D would not stop the massage when she expressed discomfort and asked him to stop on multiple occasions. Ms C also said that she had noted on a form at the clinic that she has low blood pressure, and that following the massage she felt as if she was going to vomit or pass out, and she experienced low blood pressure dips. Ms C said that when the session ended, she felt vulnerable and uncomfortable 'alone in a room with a man who would [not] stop touching/hurting [her] no matter how many times [she] asked him to stop'.
93. Ms C said that she asked Mr D about five to ten times to stop the massage or expressed her discomfort, but he did not listen to her even though she is sure that he heard her. The following day, Ms C was still experiencing pain in her back and neck.
94. As part of Mr D's limited and vague response to Ms C's concerns in June 2022 (which did not include answers to many of the questions asked by HDC), he said that he and his staff are 'not beauty therapists' and may use pressure to 'change pain and discomfort levels that may be experienced by [their] clients'. He said that all patients are instructed to inform their massage therapist of their pain/discomfort levels and that 'they are in complete charge of the pressure used and are encouraged to provide feedback if this is too much or not enough'. Mr D said that he does not recall any comments 'to the negative' from Ms C, 'nor are there any contra indications in her session notes nor [has he] received any emails nor phone calls from her detailing any problems'. However, I note that Ms C told HDC that she did not complain directly to the clinic or Mr D as she did not feel comfortable doing so, and I do not consider that Ms C not raising concerns at the time to be evidence that she was not concerned about the care provided.
95. In response to the provisional opinion, Mr D said that client comfort is paramount to him, and that all clients are advised that some discomfort may be involved but that they are in

charge of the session and are repeatedly asked about pressure. Mr D said that if he had been asked to stop, he would have done so, and that '[t]o say that [he] refused here is pure imagination'. However, he stated that he remembers Ms C's session as eventually she became 'intolerant of any pressure at all'. I find these statements somewhat contradictory. Mr D clearly acknowledges that he recalls that Ms C 'eventually became intolerant of any pressure', indicating that throughout the session she was becoming less tolerant of the pressure. However, he then says that if he had been asked to stop, he would have, and in his earlier response, he said that he does not recall any comments 'to the negative' from Ms C.

96. I acknowledge Mr D's comments. However, Ms C's evidence is clear — that on numerous occasions she asked Mr D to stop the massage due to pain or expressed discomfort, and that he did not acknowledge her or stop the massage. Ms C also said that she noted in the clinic form that she has low blood pressure, whereas Mr D said that Ms C's clinical notes did not contain any contraindications, which I assume to mean that the clinical notes did not contain reference to Ms C's low blood pressure, although he has not provided a copy of the form.
97. Ms C's and Mr D's evidence is conflicting. Establishing the facts is further complicated by the fact that Mr D has failed to provide clinical notes to HDC, and the responses that he did provide initially were non-specific and did not answer the questions posed by HDC in the section 14 request for information, nor did he respond to the section 62 request for information. Because of this, I acknowledge that I do have incomplete information regarding the events that took place during Ms C's appointment. However, I have taken into consideration Ms C's account of Mr D's conduct, and her reported ongoing pain and feeling unwell related to low blood pressure following her appointment. I find it difficult to believe that Mr D would not have heard at least one of Ms C's requests to reduce the pressure/stop the massage, and I note that Ms C recalled that Mr D made comments about the massage 'tickling' if he went lighter (which Mr D denies) and getting carpets in response to her discussion of low pain tolerance and not wanting a hard massage, which suggests to me that he ignored her requests deliberately.
98. I note that Mr D also denies making this statement, but then goes on to say:
- 'I will comment often that after the renovations, costing \$500,000 we were very careful not to get blood on the floor as [it is] now carpeted. This is always received in the spirit [of] which it is given [often] accompanied with a chuckle from the client.'
99. Clearly, Mr D had made such comments to clients previously.
100. I have also considered the fact that Mr D has failed to provide a fulsome and timely response to all three complaints. Accordingly, based on all the evidence before me, I remain of the view that it is more likely than not that at several points during the massage Mr D failed to stop the massage when Ms C asked him to, and failed to engage with Ms C or enquire further when she expressed pain. This is very concerning.

101. Accordingly, there are several areas within the Massage NZ Code of Ethics and Standards of Practice that I consider Mr D has not complied with in his care of Ms C, including the following:

Code of Ethics

- Practitioners will maintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed massage.
- Practitioners will serve the best interests of their clients and provide best practice quality of service.
- Practitioners will not endanger the physical, mental, or emotional health, wellbeing, or safety of a client.
- Practitioners will respect the right of any client to refuse, modify or terminate massage services at any time before or during the massage, regardless of prior consent to the contrary.

Standards of Practice

- Practitioners will listen to clients and respect their concerns and preferences.
- Practitioners will inform the client during the session on what treatment will be provided and continue to monitor and update when required.
- Practitioners will assess pressure, tissue tolerance and comfort levels during sessions and communicate with clients on an ongoing basis.

102. I am very critical of Mr D for failing to abide by the above standards under the Massage NZ Code of Ethics and Standards of Practice in his care of Ms C.

Inappropriate comments

Ms B

103. Ms B attended the clinic for a 60-minute 'relaxation massage' with Mr D. In her complaint, she raised several concerns, including that Mr D made several racist and other inappropriate remarks about reproduction during her appointment; that he shared his religious and 'anti-mask' views; and that he disclosed that recently he had dismissed a female employee for 'incompetent practice'.
104. Ms B said that she felt uncomfortable and wanted to leave, but felt unable to as she was lying on the table with no clothing on. Ms B said that her 60-minute massage went for 90 minutes, and she felt intimidated and unsafe as a result of Mr D's conversation. Ms B did not feel safe to raise her concerns directly with Mr D.
105. For the reasons outlined above, I have accepted Ms B's version of events as described in paragraphs 20–30. Accordingly, I find it more likely than not that Mr D communicated inappropriately with Ms B during her appointment, including making several racist comments and discussing inappropriate reproductive matters with Ms B, all of which had no relevance to the reason for which she had sought massage therapy.

106. The Massage NZ Code of Ethics stipulates that practitioners will ‘acknowledge the inherent worth and individuality of each person by not discriminating or behaving in any prejudicial manner with clients’. The Massage NZ Standards of Practice also states that practitioners will ensure that their beliefs and values do not prejudice client care, and that they will comply with equality and anti-discrimination laws and that they will be aware of cultural appropriateness and respect in order to meet clients’ needs.
107. In my view, by making inappropriate and racist remarks to Ms B about Māori (as described above), Mr D failed to comply with the Massage NZ Code of Ethics and Standards of Practice.
108. Mr D then spoke, unprompted, about his personal views on a number of topics, including women, religion, female birthing hygiene, male circumcision practices, crucifixion practices, and the effectiveness of masks as a measure against the spread of COVID-19. The Massage NZ Standards of Practice states that practitioners must ‘[u]phold the reputation of the profession through good conduct’. In my view, by inappropriately and unnecessarily sharing his personal beliefs about the above, particularly when all these topics were irrelevant to the services he was providing to Ms B, Mr D failed to act with integrity and uphold the reputation of the profession of massage therapists. In addition, by speaking about his dismissal of a female employee for ‘incompetent practice’, Mr D failed to abide by the Code of Ethics, which states that practitioners will not speak or write disrespectfully of colleagues.
109. Finally, I have also considered Ms B’s comments that she felt uncomfortable and intimidated during her appointment with Mr D, noting that the appointment went on for 30 minutes longer than scheduled. Mr D was in a position of power during his appointment with Ms B, with her being at least partially unclothed and lying down, and, in my view, it is clear that he made Ms B feel uncomfortable and unsafe during her massage owing to his entirely inappropriate conversation. In my view, this also highlights a failure by Mr D to comply with the Massage NZ Code of Ethics, which states that practitioners will not endanger the physical, mental, or emotional health, wellbeing, or safety of a client.

Ms A

110. On 30 October 2022, Ms A attended the clinic for a second massage appointment with Mr D. Ms A raised several concerns about Mr D’s conduct, including that he made inappropriate comments about her weight and height and that he spoke explicitly about erections, ejaculations, and sex. Ms A told the NZ Police that Mr D told her how to make sex more enjoyable between her and her boyfriend, and told her to check her boyfriend’s ‘ballsack’. Ms A said that the massage went on for an extra 30 minutes and that she felt ‘very lucky to have got away’.
111. For the reasons outlined above, I have accepted Ms A’s version of events as described in paragraphs 31–36. In addition, I have taken into account the clear impact that these events have had on Ms A, to the point that she made a report to the NZ Police shortly after her appointment with Mr D. Accordingly, I find it more likely than not that Mr D communicated inappropriately with Ms A during her appointment of 30 October 2022.

112. The Massage NZ Code of Ethics states that practitioners will not engage in sexual conduct with a client. As described above, Mr D made several sexually explicit comments to Ms A during her appointment. In my view, there is an inherent power imbalance between a practitioner and client during a therapeutic massage, particularly because often a client will be partially undressed and lying down with the practitioner standing over the client, as was Ms A. Ms A told HDC that she felt very unsafe. While sexual conduct is not defined in the Massage NZ Code of Ethics, I have no trouble considering that making sexualised comments in the course of treatment amounts to sexual conduct.
113. Taking this into account, I find that Mr D engaged in inappropriate sexual conduct with Ms A by facilitating an inappropriate and one-sided sexual conversation with Ms A to which clearly she did not consent (for the avoidance of doubt, even if a consumer consents to a sexual conversation with their massage therapist, in the context of the inherent power imbalance between practitioner and client, such conduct will almost always be inappropriate). This conduct was in direct contradiction to the Massage NZ Code of Ethics.
114. The Massage NZ Standards of Practice also states that practitioners will '[a]ct with integrity in the professional practice' and '[u]phold the reputation of the profession through good conduct'. In my view, by engaging in a sexually inappropriate conversation with a client, Mr D failed to act with integrity and failed to uphold the reputation of the profession of massage therapists.
115. Finally, the Massage NZ Code of Ethics states that practitioners will not '[e]ndanger the physical, mental or emotional health, well-being or safety of a client'. In my view, Mr D placed Ms A in a vulnerable position by making inappropriate sexual comments while she was only partially clothed and was lying down and unable to leave easily. Ms A said that she left her appointment with Mr D feeling lucky to have escaped safely, and that she was 'incredibly uncomfortable', but because she had PTSD from sexual assault, she had been unable to speak up at the time. I am extremely concerned that Mr D did not act in the best interests of Ms A, and it is my view that in creating this situation he endangered Ms A's mental and emotional wellbeing. Accordingly, I find that Mr D also failed to abide by the Massage NZ Code of Ethics in this regard.

Conclusion

116. Right 4(2) of the Code stipulates: 'Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.'
117. I have acknowledged that although Mr D was not a member of Massage NZ, I consider the Massage NZ Code of Ethics and Standards of Practice to reflect the ethical standards to be reasonably expected of a massage therapist in Mr D's circumstances.
118. As outlined above, in my view Mr D failed to abide by relevant standards, as reflected in the Massage NZ Code of Ethics and Standards of Practice, in all three complaints. There is a clear pattern of inappropriate behaviour by Mr D, and I am very concerned at the prevalence of his unethical behaviour.

119. Accordingly, by failing to comply with professional and other relevant standards in his care of Ms C, Ms B, and Ms A, I consider that Mr D breached Right 4(2) of the Code.

Recommendations

120. I recommend that Mr D:
- a) Provide separate written apologies to Ms A and Ms B, for the failings identified in this report. The apologies are to be sent to HDC, for forwarding to the complainants, within three weeks of the date of this report.¹⁰
 - b) Attend training on therapeutic communication, establishing rapport and trust with clients, and informed consent. Evidence of this training is to be provided to HDC within six months of the date of this report, and Mr D is to provide a summary of learnings from the training.
 - c) Attend training on ethics and professional boundaries. Evidence of this training is to be provided to HDC within six months of the date of this report, and Mr D is to provide a summary of his learnings from the training.
 - d) Review and reflect on his obligations as a healthcare provider under the Code, and provide HDC with a report on his learnings, within three months of the date of this report.
 - e) Complete the HDC online module on complaints management and submit the certificate of completion to HDC within three months of the date of this report.
 - f) Consider becoming a member of Massage NZ and, if he decides not to do so, provide HDC with the reasons for this, within three months of the date of this report.
 - g) Receive mentoring from a member of Massage NZ for a 12-month period, with particular focus on professional communication, professional boundaries, and listening skills.

Follow-up actions

121. Mr D 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. In making this decision, I have had regard to Mr D's failure to provide information to facilitate the speedy and efficient resolution of these three complaints. Mr D's overall failure to engage with this Office adequately to resolve these complaints has unnecessarily delayed those consumers' rights to have their complaints investigated efficiently. Mr D continues to work as a massage therapist out of his clinic, and I believe there is public interest in accountability for his failures. In addition, as Mr D is not associated with a professional body (as far as I am aware), there are no other mechanisms available to this Office to elevate the level of concern that I hold with his practice.

¹⁰ Ms C told HDC that she did not wish to receive an apology from Mr D.

122. A copy of this report with details identifying the parties removed will be sent to Massage NZ and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.