

Sports Therapist, Mr B

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

(Case 12HDC01011)



Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

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Executive summary

1. Mr B operates a sports clinic. He primarily prescribes exercises to assist with injury treatment and recovery. He has no professional body registration or affiliation. On 12 July and 19 July 2012, Ms A visited Mr B, seeking treatment for a sciatic¹ problem.
2. On 12 July 2012, Mr B discussed Ms A's occupation and workplace, and her sciatica. Ms A disclosed to him some information about her past history of sexual abuse. Prior to commencing treatment on Ms A, Mr B did not explain to her what it would entail. Mr B examined the musculature on either side of Ms A's spine, to ascertain the location of her pain. He worked on her left leg, which included some massage.
3. Ms A was happy with the 12 July treatment, as the pain eased immediately. Mr B also gave her dietary advice and showed her some exercises to help ease the pain. On 12 July 2012, Mr B made sparse notes.
4. On 19 July 2012, Ms A returned for a second appointment. Mr B did not discuss with Ms A what the treatment would entail. Ms A presumed that the treatment would be the same as previously.
5. Ms A removed her trackpants and lay face down. Mr B did not provide a screened off area in which Ms A could change. Mr B worked on her leg and lower back, then up to the back of her neck. Mr B asked Ms A to remove her vest jacket. She left on a skivvy. Ms A remained face down.
6. Mr B later asked Ms A to take off her skivvy. She did so, slipping her arms out and leaving the skivvy around her neck. Ms A was not wearing a bra. Mr B continued to work on her neck and shoulders with Ms A lying face down. Mr B asked Ms A to roll over on to her back.
7. Ms A turned over and was lying on her back with her breasts exposed for a few minutes while Mr B worked on her neck. Ms A was not draped at any stage, and felt distressed and upset.
8. During this appointment Mr B made inappropriate comments, including telling Ms A that she had lovely breasts and legs.
9. Mr B subsequently required Ms A to alter her orientation on the treatment table a few more times. Mr B worked on her gluteal muscles. Ms A said that Mr B was staring at her body and asking her in an odd way if it felt good. No notes were taken by Mr B for the 19 July appointment.
10. Ms A left the clinic feeling angry and confused. She did not go to a third appointment, and subsequently sought assistance from family and advocacy groups, made

¹ Sciatica refers to pain or discomfort associated with the sciatic nerve. This nerve runs from the lower part of the spinal cord, down the back of the leg, to the foot. Injury to or pressure on the sciatic nerve can cause the characteristic pain of sciatica: a sharp or burning pain that radiates from the lower back or hip, possibly following the path of the sciatic nerve to the foot.

contemporaneous records of events by text and diary entry, discussed her experience with a support worker, and registered a complaint with HDC.

Findings summary

11. All health service providers have a professional obligation to document the services provided to consumers. Mr B's failure to keep adequate records of his consultations with Ms A was a breach of Right 4(2) of the Code of Health and Disability Services Consumers' Rights (the Code).²
12. Mr B did not provide Ms A with information about what her treatment would involve, including that she might have to remove some clothing, which was information that she needed in order to give informed consent. Therefore, Mr B breached Right 6(2)³ of the Code. Ms A was consequently not in a position to make a fully informed choice about treatment and, therefore, Mr B breached Right 7(1) of the Code.⁴
13. By not draping Ms A and leaving her in an exposed and vulnerable position, Mr B caused Ms A significant distress. She felt violated. Mr B's behaviour toward Ms A failed to give due regard to her individual circumstances. By not offering Ms A a private place to change, and not offering to drape her, Mr B failed to take adequate steps to protect, maintain or respect Ms A's bodily privacy. Mr B therefore breached Right 1(2)⁵ of the Code.
14. Mr B was found to have made inappropriate comments to Ms A during the consultation on 19 July 2012. In doing so, he failed to treat her with respect and, therefore, breached Right 1(1) of the Code.⁶ Mr B was referred to the Director of Proceedings for the purpose of deciding whether any proceedings should be taken.

Complaint and investigation

15. HDC received a complaint from Ms A about the services provided to her by Mr B. The following issue was identified for investigation:

Whether Mr B provided an appropriate standard of care to Ms A on 12 July 2012 and 19 July 2012.

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

³ Right 6(2) states: "Before making a choice or giving consent, every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, needs to make an informed choice or give informed consent."

⁴ 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."

⁵ Right 1(2) states: "Every consumer has the right to have his or her privacy respected."

⁶ Right 1(1) states: "Every consumer has the right to be treated with respect."

16. An investigation was commenced on 30 November 2012. This report is the opinion of Ms Theo Baker, Deputy Commissioner, and is made in accordance with the power delegated to her by the Commissioner.
17. Information was received from:
- | | |
|------|---|
| Ms A | Consumer/complainant |
| Mr B | Sports therapist, provider |
| Ms C | Mr B's partner |
| Ms D | Service Coordinator, sexual abuse support service |
| Ms E | Support Worker, sexual abuse support service |

Information gathered during investigation

Background

18. On 12 and 19 July 2012, Ms A visited Mr B, seeking treatment for chronic sciatic nerve pain. Ms A was in a lot of pain from her left foot to her hip. She had been experiencing this problem for about two years. She was on medication, and had visited her doctor and tried many other types of treatment such as osteopathy, chiropractic, and acupuncture.
19. A work colleague recommended Mr B. Based on what she had been told, Ms A considered Mr B to be a sports therapist. Ms A told HDC that she was not quite sure what that entailed. Her complaint letter to HDC referred to Mr B as a physiotherapist.

Services offered

20. Mr B stated at interview that he has earned his living as an exercise physiologist prescribing exercises for sports injuries and back injuries for a number of years.
21. Mr B is not registered or affiliated with any professional body or organisation. He told HDC that he is not a physiotherapist. He also said that he does not call his treatments massage or perform massage for relaxation.
22. Mr B stated that his knowledge and qualifications have been gained from a lifetime as an athlete. Mr B told HDC that he played sport when he was young. He later became a physical education teacher. He has also competed in other sports and has done some coaching. Mr B said that his business is generated by word-of-mouth referrals, and he does not advertise. However, he has a Yellow and White Pages entry online and in his local telephone book, and a business card indicating that he operates as a sports clinic.
23. Mr B indicated that many top level sportspeople with whom he had previously worked often came to visit him at his clinic. These visits would be to treat injuries. Mr B said that if new clients telephone him to make an appointment they usually speak to him directly.

Ms A's first appointment — 12 July 2012

Appointment made

24. Ms A telephoned Mr B's clinic on 10 July 2012 to make an appointment. An appointment was made for 12 July 2012.
25. At 10.30am on 12 July 2012, Ms A arrived and was greeted by Mr B.

Initial discussion

26. Mr B told HDC that "an initial consultation with a client involves a physical examination and discussion of the client's work and training, previous injuries and treatment". He said that the treatment appointments last about 30–40 minutes but that appointments "don't always go completely to the clock".
27. Mr B also stated that on 12 July 2012 he questioned Ms A about her occupation and workplace, since work often impinges on an injury. Mr B told HDC that Ms A "disclosed [her employment], her financial difficulties, and she confided the sexual abuse she had suffered as a child". Mr B did not take any notes of this discussion. Ms A told HDC that she was open about her past and that she did volunteer some limited information about historical abuse to Mr B in response to a question about whether she had stress.
28. Ms A recalled that the initial discussion involved her explaining the effects of her sciatica. She said that Mr B did not explain beforehand exactly what he was going to do during the treatment.

Brief notes

29. Before the treatment, Mr B recorded in his appointment record book next to Ms A's name:

"[Ms A] [phone number]
NvS. L. Sciatic"

30. Mr B said that he recorded that Ms A was suffering from an inflamed sciatic nerve and was in a highly nervous state. He explained to HDC that "if a person I feel has great nerve problems, I put NVS in front". He also said that this was an indication to him that a problem is not always a physical injury.
31. No other information, assessment notes, or history were recorded by Mr B. He showed HDC staff his appointment record book containing similarly brief entries for other clients.

Treatment provided

32. Ms A was wearing trackpants, and Mr B asked her to take them off. Mr B said that he usually requires the client to remove some clothing, as his hands have to touch the client, and it is his hands that tell him what the problem is. Mr B did not leave the room. Ms A kept on her underwear, a skivvy, and a sleeveless vest jacket. There is no screened off or separate area in the room in which to change.
33. Mr B told HDC that he has treated sciatica many times. He stated that on 12 July 2012 the treatment that he provided was a full examination of Ms A's spine, using deep

pressure massage to ascertain the location of nerve pain and inflammation. He also said that he believes that problems with an inflamed sciatic nerve can start in the apex of the spine, nearer the skull.

34. When queried about use of the term “deep pressure massage”, Mr B responded that he does press hard, but he does not really like using the word “massage”, which is what he feels other people use more conventionally. He said that he does not provide relaxation massage, and that when he presses the tissue he is finding out physical reactions, and where the pain is located.
35. Mr B said that when he performed the examination of Ms A’s spine, he asked her to lie on the treatment table, face down (prone) so that he could “prod around and find out which side the inflamed sciatic nerve [was on]”, and he also felt around the sacroiliac joint of the lower back. Mr B demonstrated to HDC investigators that when Ms A was lying face down he pressed the musculature either side of the full length of the spine (the *erector spinae* muscle group).⁷ He did this with his thumbs and fingers, from the lower back up to the neck, to examine and check for pain and inflammation. He could not recall exactly, but thought that during the 12 July 2012 session Ms A may have had to turn over a couple of times.
36. Ms A’s recollection was that the 12 July 2012 appointment began with Mr B starting work on the back of her leg, all the way up the path of the sciatic nerve. Ms A could not recall Mr B doing any work on her neck at this first appointment. She said that Mr B may have worked on her lower back, but she remembered only the treatment of her leg. She said that she was face down for the whole session, and was extremely happy with the treatment as she could feel the pain easing straight away.
37. Ms A said that Mr B made some comments on 12 July 2012 along the lines of her being “a lovely girl”. She said she thought nothing of it at the time and that she thought he was being kind. Ms A told HDC that she thinks she then got back on the table, and Mr B worked on her leg once more. She remained face down. The session finished and she put her trackpants back on. Mr B remained in the room.

Dietary and exercise advice

38. Mr B advised Ms A to supplement her diet with brewer’s yeast powder, which he advised her was a good source of vitamin B₁₂ and helps sedate the nervous system. He also taught Ms A some exercises — a stretch, and alternate arm and leg raises, to alleviate pain.

Next appointment made

39. Mr B wrote on the back of a business card, in the space next to the heading “Your next appointment”, exercises he had shown Ms A.
40. Mr B told HDC that he offered to waive Ms A’s fee for the next treatment, owing to her personal and financial circumstances. Mr B said that he sometimes did this with

⁷ The *erector spinae* is a large muscle group that originates near the sacrum and extends vertically up the length of the back. It lies on each side of the vertebral column and extends alongside the lumbar, thoracic and cervical sections of the spine.

other clients as well. Another appointment was scheduled with Mr B for a week's time — 19 July.

41. Ms A told HDC that she felt that the first appointment was extremely helpful in relieving some of her pain. She was pain free for about three days. She left feeling fantastic and went to work. She told other people about her positive results.

Ms A's second appointment — 10.30am, 19 July 2012

42. Ms A went to her 19 July appointment.

Discussion

43. Ms A said that Mr B asked her how she had got on over the previous week. She said she had felt great, but was starting to get a little bit of soreness again. Ms A told HDC that she presumed the treatment would be the same as the previous week.
44. Mr B did not discuss with Ms A what the treatment would entail. He told HDC that he would have continued with the treatment he had done previously.

Treatment provided

45. Ms A removed her trackpants as she had done the previous week. She said that initially she was lying face down on her stomach on the treatment table. Mr B started working on the back of her leg. She recalls that he did so for only a short while. Mr B could not recall whether he worked on Ms A's leg, or whether or not she had taken off her trackpants at this point, but he said that she probably had.
46. Mr B stated that at the second treatment he again "examined the full length of [Ms A's] spine, including the neck — a necessary requirement for [a] sciatic problem". He explained that although pain was manifested in the sciatic area, some tension originated in the upper back and neck, and he had to "loosen" the neck muscles. He also stated that he continued some deep tissue massage of the lower back/sacroiliac area.
47. Ms A recalled Mr B moving up to work on the back of her neck. She said to HDC that she did not understand why he was working on her neck. She said that he rubbed her neck very gently — "like what you do with the cat". She could not see any benefit to it, and it felt different from the previous week. She said that Mr B then started making a tutting/sighing noise like he was annoyed.
48. Mr B asked Ms A to take off her vest jacket. Ms A unzipped her vest jacket but left on her skivvy. Ms A explained to HDC that she does not wear a bra, and so often wears two layers to hide this. Ms A remained face down, and Mr B resumed work on her neck and back. In response to the provisional opinion, Ms A recalled that Mr B asked her, when she was fully clothed, why she did not wear a bra.
49. Mr B stated to HDC that to work on the posterior part of her neck and upper back demanded that at some stage Ms A remove clothing from her upper body (but not her bra) and turn onto her back on the treatment table. Treatments would often involve the client changing orientation on the table a few times.

50. Mr B said that his treatment would not be very effective if the recipient was fully clothed, because he needed to feel the muscle. He also said that he never routinely tells a client to take off a bra, and it is not required in order to undertake the treatment.
51. Ms A said that Mr B tutted again and asked her to take off her skivvy. Ms A told HDC that it was at this point, while lying prone, that she took off her top, slipping her arms out and leaving the skivvy up around her neck. She told HDC that she thought that Mr B would have been aware then that she had no bra on, as he would have felt that to be the case when working on her back. Mr B continued to work on Ms A's neck and shoulders with her lying face down.

Changing orientation

52. Ms A recalls that Mr B asked her to roll over on to her back. She said she realised that she would be exposed if she did this, but she turned over nevertheless. Ms A believes she was compliant partly because of her abusive history. She was then lying face up (supine) on her back with her breasts exposed.
53. Ms A said that it reminded her of her past abuse and she felt re-traumatised. She told HDC that she was mad at herself for not voicing any opposition or standing up for herself at this point. She said she felt conflicted, as the first appointment had been so successful in alleviating her sciatic pain.
54. Mr B told HDC that it was only at this point he realised that Ms A, having turned over on to her back, had no bra on and was lying on her back exposed. He said that he was surprised.
55. Mr B recalls that Ms A would have been exposed for about a couple of minutes while he worked on her neck. Ms A said that she felt frozen and she said nothing to Mr B.

No draping

56. Mr B did not offer Ms A any draping towel or sheet, and said that he did not do so because it was "none of [his] business". Mr B stated that he "did not have any processes for draping clients in the event that they are exposed". He said that no client had ever suggested he drape them.
57. Mr B went on to state:

"It has never, in [my career], been an issue. I have always treated male and female clients with respect for their personal privacy and dignity. I believe my open communication is an important part of my healing relationship with every client."

58. Mr B advised HDC that he now realises that he should have offered to drape Ms A. He said that in future, he would ensure that he draped exposed flesh with a towel. He also said that he would consider requesting that Ms C be available to attend a session, although he said that this had never been requested by a female client.

Treatment while exposed

59. Mr B then cradled Ms A's head, stretched both sides of the neck musculature, and applied fingertip pressure along her posterior neck muscles up to the occiput of the skull. Ms A felt that Mr B was standing over her and watching her.

Alleged comments

60. Ms A said that during the 19 July consultation, Mr B asked her whether she had a boyfriend and whether she liked men. Ms A also said that Mr B told her that she had the body of an 18-year-old and that she had lovely breasts and lovely legs. Mr B denied making these comments.
61. Mr B said that he often spoke to clients while they were on the table, and that he only remembered telling Ms A, "You've got shoulders like a rower." Mr B said this was a compliment. He also stated that "it is unusual for my female clients to not wear a bra. She felt self-conscious and I attempted to reassure her verbally." He stated, "I thought it was a light but convivial sort of conversation but I can't remember what I was saying or what she was replying."
62. Mr B stated that Ms A's "claims of sexual overtures are completely without foundation".

Further treatment while prone

63. Ms A was then asked to roll back on to her stomach. Ms A said that she was relieved to do so. Ms A stated that Mr B then worked on her gluteal area, pushing her underwear "completely down" to a point where the gluteal fold meets the hamstring. She said that this included him working on a point at the base of her backside. She considered that this was very close to her private parts. She felt her genital area was exposed. Ms A said to HDC that there was little pressure on her buttocks, and she wondered what the point of this part of the treatment was.
64. Mr B denied moving Ms A's underwear down to that degree, or pulling the garment down. He said that he moved her underwear down slightly, a few inches only, to enable him to work on the gluteal muscle area.

Further changes in orientation

65. Ms A said that she then had to change orientation, pull up her underwear, and roll from her stomach on to her back, and then onto her stomach again, a few more times — possibly a further three times. She also said:

"I just wanted it to be over and I just wanted to get up and run away, but I felt like I could not stand up for myself ..."

66. Ms A recalled that, while she was lying on her stomach, Mr B said to her, "Does that feel good?" in what she considered to be an odd manner. Ms A recalled that Mr B asked her where she had to go after the appointment, and what time she had to leave to go to her work. Ms A told him that she was going to work the minute she left his clinic.

67. Ms A said that she did not make any further comments to Mr B as she was terrified. Ms A said that the 19 July appointment took about an hour.

Further appointment discussion

68. Mr B stated that at the end of the appointment, he said to Ms A, “I think I should see you once more,” and that Ms A said, “All right,” and made an appointment.
69. Ms A told HDC that she asked Mr B whether she should make another appointment, and that Mr B “looked shocked”. Another appointment was scheduled for a further week’s time. Ms A explained that she made another appointment because “I just wanted to get out and I thought if I played along with it then I can get out of the house ... I was just thinking of survival mode. I just wanted to get the hell out of there.”
70. Ms A stated that she then told Mr B that she may have been tense, as she was uncomfortable with her clothes off. Mr B told HDC that he could not recall Ms A saying that or making any mention of feeling uncomfortable at all.
71. Ms A said that she left the clinic and cried as she left. She proceeded to her workplace. She said that she cried the whole time she was there, feeling mad at herself and confused.
72. Ms A did not attend the scheduled third appointment.
73. Mr B’s written responses to HDC concluded that Ms A’s “distress and misconstruing of [his] professional sympathy for her are upsetting and regrettable”.
74. Mr B stated that he was “proud of his excellent reputation and credibility among hundreds of people he has successfully treated”, and that he wishes to carry on working as long as he is able.
75. No notes were taken by Mr B for the 19 July appointment.

Subsequent events

Texts

76. Ms A texted various members of her family and other support people between noon on 20 July 2012 and 4.36pm on 28 July 2012 regarding her appointments with Mr B. She forwarded to HDC mobile phones the content of 10 texts she had either sent or received on the matter. HDC investigators also sighted these on her mobile phone.
77. The texts include one on 20 July to her sister: “Something really awful happened to me yesterday. I don’t know how to deal with it ...” A message sent on 28 July to her cousin states: “Yea the 1st wk was fantastic. But the 2nd wk he violated me in a way that was a mess...” One text mentions Mr B’s name.
78. Ms A’s sister told HDC that, as far as she could recall, Ms A had said to her that Mr B had mentioned offering her free treatment because of her past. She recalled that Ms A did mention that there were comments made to her by Mr B. Her sister could not recall exactly what Ms A had told her but said it was something like Mr B saying she had “a beautiful body and things like that”.

Diary entries

79. Ms A provided HDC with copies of her diary entries from 9 July 2012 to 22 July 2012. The entry for 12 July states: “Apt [Mr B] amazing!!...”
80. The entry for 19 July 2012 states: “10.30am [Mr B] Dirty Prick!! ...”
81. The entry for 20 July states: “... upset went to [sexual abuse support service]. [Staff names] there, I told them about [Mr B]!!! ...”
82. Ms A told HDC that she had a breakdown, and the community mental health team came to see her on 20 July 2012 — staff giving her some tablets to calm her and help her sleep. The community mental health team telephoned her the next day to see how she was. The Unit Manager of the team confirmed to HDC that Ms A was assessed and given short-term support on 20 July 2012.

Sexual abuse support service visit — 23 July 2012

83. Ms A visited the sexual abuse support service on 23 July 2012 to see a support worker. Records supplied to HDC include an intake and assessment form entry stating that Ms A had

“[r]ecently seen [Mr B] ... for pain — seen him twice. 1st time she told him she had been sexually abused as a child — he didn’t charge her for session because of what she had been through. 2nd session [...] then he started saying inappropriate things to her wanting to take her top off ...”⁸

84. On 27 July 2012, Ms A presented to the sexual abuse support service with a three-page account of the incident, and discussed how it had been distressing her. HDC was provided with a copy of the document. The document is consistent with the direct evidence Ms A provided to HDC.

Responses to provisional report

85. A response to the provisional opinion was received from Ms A and has been incorporated into the “information gathered” section where relevant.
86. In response to the Deputy Commissioner’s provisional opinion and recommendations, Mr B stated that “[Ms A’s] allegations of sexual overtures I strongly deny”. He provided an apology letter for forwarding to Ms A, which included an apology for “...(b) making comments about your body which, though intended to help you to relax and feel good about yourself, I now realise had exactly the opposite effect”.
87. Mr B also stated:

“It is true that my services to hundreds of satisfied clients [...] may not conform to the usual environment of alternative health therapists. I operate from [a small clinic]. I do not provide separate changing facilities or parking spaces. I do not keep computerised records. But I know I have an excellent reputation in [the area] because I have helped so many to restore their good health.”

⁸ As noted above, Mr B did not charge Ms A for the second session.

88. Mr B went on to say: “[...] I wish to continue my services to people.”

Opinion: Breach — Mr B

Introduction

89. When Ms A visited Mr B for treatment, she was entitled, under the Code, to be treated with respect.⁹
90. Based on the information provided, including various records kept contemporaneously by Ms A and persons supporting her, it is evident that Ms A left the 19 July 2012 appointment feeling significantly distressed and upset by her experience.

Provision of health services

91. Section 3(k) of the Health and Disability Commissioner Act 1994 (the Act) states that the term “health care provider” means “any person who provides, or holds himself or herself or itself out as providing, health services to the public or to any section of the public, whether or not any charge is made for those services”.
92. It is evident that Mr B provides injury treatment (including the use of occasional sports massage techniques and stretching) and exercise prescription advice often, but not always, in a sporting context. Mr B is providing services in an unregistered capacity.
93. I find that Mr B is a provider of health services as defined by the Act.

Non-regulated providers and the Code

94. During my consideration of this matter, I have been mindful of the standards and accepted practices adopted by providers of similar treatment therapies.¹⁰
95. Despite Mr B not being a member of any relevant professional association or affiliation, and therefore not subject to any explicit professional standards, he is nonetheless bound by the Code.
96. As pointed out by the Human Rights Review Tribunal:

“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.”¹¹

⁹ Right 1 of the Code.

¹⁰ I have also reviewed, but not relied on, advice provided to me by a massage therapist regarding expected standards and accepted practices adopted by that profession.

¹¹ See *Director of Proceedings v Mogridge* [2007] NZHRRT 27 (21 December 2007) at 103.

97. It is my expectation that unregistered providers, such as Mr B, should make every effort to be familiar with the accepted practices and standards that apply to peers — particularly in relation to those therapies or treatments that inherently have an impact on a consumer’s personal space and physical privacy.

Documentation

98. Mr B has provided HDC with the records he made regarding Ms A. These constitute two lines, made after his initial meeting with Ms A on 12 July 2012, which recorded the fact that she had sciatica and, as he explained to HDC, an abbreviated note that she had issues with nerves. This was a very limited record of an initial assessment of a new client.
99. On completion of his treatment on 12 and 19 July, Mr B did not make any record of the services he had provided. This Office has frequently emphasised the importance of record-keeping, which applies to all healthcare providers.¹² As noted in a previous HDC opinion, “[a]ll health service providers ... have a professional obligation to document the services provided to consumers”.¹³ More recently, in a case concerning an unregistered natural therapist, a Deputy Commissioner found the provider in breach of Right 4(2) for breaching “the standard requiring health care providers to maintain and retain adequate records”.¹⁴
100. Mr B should have kept a written record of the care he provided to Ms A. Not only do such records allow a provider to verify what occurred but, more importantly, they underpin safe, effective and timely clinical practice. In failing to keep adequate records, Mr B breached Right 4(2) of the Code.

Information provided

101. At neither the first nor the second appointment did Mr B explain to Ms A what he would be doing during the sessions, or what the treatment would involve. Ms A was a new client, unfamiliar with Mr B’s treatment methods. She told HDC that she believed Mr B was a sports therapist, but was not really sure what that involved. That is not surprising, as Mr B’s background and his description of the services he offers are unclear.
102. As stated in a previous HDC opinion, concerning a natural therapies practitioner, “[p]roviders who do not adequately explain the services being provided run the risk of making the consumer feel confused and uncomfortable”.¹⁵ In a subsequent HDC opinion about a neuromuscular therapist, it was stated that making a consumer feel comfortable “is particularly important when treating sensitive areas of the body ...”.¹⁶
103. Every consumer has the right to the information that a reasonable consumer, in that consumer’s circumstances, would need to receive to give informed consent. Mr B should have clearly explained to Ms A that she might be required to remove some

¹² Stent, R, “For the record”. *New Zealand GP*, 12 December 1998.

¹³ Opinion 06HDC09882, page 11 (25 January 2007).

¹⁴ Opinion 10HDC00970, pages 17–18 (29 June 2012).

¹⁵ Opinion 06HDC09882, page 11 (25 January 2007).

¹⁶ Opinion 08HDC07644, page 10 (21 November 2008).

clothing, and how she would be touched. That is information that a reasonable consumer would need to receive to give informed consent.¹⁷ The absence of information given to Ms A meant that she was not in a position to make her own fully informed choice. Therefore, I find that Mr B breached Rights 6(2) and 7(1) of the Code.

Draping and privacy

104. Respect for consumers is at the heart of a consumer-centred approach, and a cornerstone of the Code.
105. Ms A was in a supine position with her breasts exposed for a few minutes during the second appointment on 19 July 2012. She was also required to change out of her clothes in front of Mr B, as he did not provide a screened off area in which clients could change if necessary.
106. As mentioned by HDC in a previous case, it is important to provide consumers with a level of dignity for their own comfort.¹⁸ The key purposes of draping are to provide warmth, define the area to be treated, and maintain the privacy and dignity of the client. The Human Rights Review Tribunal has previously commented on the covering of consumers to protect personal privacy.¹⁹
107. Mr B has acknowledged that he did not have any process in place to drape clients, and did not provide Ms A with any appropriate draping or coverings, such as a towel or sheet. However, he maintained that he always respects the personal privacy and dignity of his male and female clients, and that he also believes that his communication was open and is an important part of his healing relationship with every client. In my view, Mr B's actions did not live up to this assertion in the case of Ms A.
108. I am concerned that Mr B, aware of Ms A's history, knew that Ms A was exposed and uncomfortable, as evidenced by his written statement to HDC that "it is unusual for my female clients to not wear a bra. She felt self-conscious and I attempted to reassure her verbally." Despite this, he failed to rectify the situation and drape Ms A. In my view, there was a clear onus on him to do so promptly, and it was completely inappropriate for him not to cover Ms A while he was continuing to treat her neck. Mr B's explanation that Ms A's exposure was "none of [his] business" is unconvincing.
109. Providers have a responsibility to respect the privacy of consumers, particularly those aspects that consumers do not wish to be made public or have exposed. In this regard, the Code primarily protects bodily privacy. Mr B left Ms A in an exposed and vulnerable position, which caused her significant distress. She felt violated. Mr B failed to give due regard to her individual circumstances, feelings, and wishes. By failing to offer to provide Ms A with a private place to change, and failing to offer to

¹⁷ See *Director of Proceedings v Emms* [2013] NZHRRT 5.

¹⁸ Opinion 09HDC02122, page 8 (28 February 2011).

¹⁹ See *Director of Proceedings v Huang* [2003] NZHRRT (1 December 2003) and *Director of Proceedings v Fan* [2005] NZHRRT (25 February 2005).

drape her, Mr B did not take adequate steps to protect, maintain or respect her privacy. I find, therefore, that Mr B breached Right 1(2) of the Code.

Inappropriate comments

110. I have been provided with differing recollections about the content of discussion between Ms A and Mr B.
111. Ms A said that during the 19 July 2012 treatment Mr B made inappropriate and suggestive comments. She said that Mr B asked her whether she had a boyfriend, and whether she liked men. She also said that he told her that she had the body of an 18-year-old and that she had lovely breasts and lovely legs. Mr B denied making these comments.
112. Mr B said that he made a comment regarding Ms A having “shoulders like a rower”, which he intended as a compliment. It was ill-advised for him to make that comment. He told HDC that Ms A’s “claims of sexual overtures are completely without foundation”. In his apology letter, Mr B apologised to Ms A for:

“... making comments about your body which, though intended to help you to relax and feel good about yourself, I now realise had exactly the opposite effect”.
113. Ms A has been very specific in her recount of what Mr B said to her. The evidence she has provided to HDC throughout the course of the investigation has been consistent. Ms A’s sister recalled that Ms A had mentioned to her that Mr B had made comments about Ms A’s body. The sexual abuse support service records, made four days after the 19 July appointment, note that Ms A told the support worker that Mr B said “inappropriate things” to her, although what was said was not specified in the record made.
114. Based on the information gathered, I find that it is more likely than not that Mr B made inappropriate comments to Ms A. In doing so, he failed to treat her with respect and, therefore, breached Right 1(1) of the Code.

Recommendations

115. In my provisional report I recommended that Mr B provide a written apology to Ms A for his breaches of the Code. I requested that the apology be sent to HDC for forwarding. In response, Mr B provided an apology letter to Ms A, and this was forwarded to her.
116. I recommend that Mr B:
 - discuss and review, with a peer or colleague, his approach to treating clients and, based on that review and this report, provide HDC with a feedback document on the changes and improvements he will make to his practice. This should be sent to HDC within two months of the issue of this report.

117. As part of the above process, I recommend that Mr B:

- prepare information pamphlets on his treatment approach to give to new and existing clients, and ensure that this information includes an offer of a chaperone to all clients;
 - arrange a space or screened area for private disrobing;
 - provide draping to all clients; and
 - arrange an independent audit of his record-keeping.
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Follow-up actions

118. • Mr B will be referred to the Director of Proceedings in accordance with section 45(2)(f) of the Health and Disability Commissioner Act 1994 for the purpose of deciding whether any proceedings should be taken.
- A copy of this report, with details identifying the parties removed, will be sent to the DHB, and its designated recipient will be advised of Mr B's name in the cover letter. This is in recognition of the DHB's responsibilities for improving, promoting and protecting the health of people within its area.
 - A copy of this report, with details identifying the parties removed, will be placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.
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Addendum

The Director of Proceedings filed a claim at the Human Rights Review Tribunal which proceeded by agreement. The Human Rights Review Tribunal made a declaration that Mr B had breached Rights 1(1), 1(2), 4(2), 6(2) and 7(1) of the Code.