

Massage Therapist, Mr A

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

(Case 23HDC00529)



Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

Contents

Executive summary	1
Complaint and investigation	2
Information gathered during investigation	2
Opinion: Mr A — breach.....	19
Opinion: other comment.....	34
Changes made since events	34
Recommendations.....	34
Follow-up actions	35
Appendix A: Relevant standards	37

Executive summary

1. Between February 2020 and May 2022 a man was employed as a massage therapist. On 10 May 2022, Mr A was caught video recording one of his female clients on his phone. A subsequent Police investigation resulted in six charges and convictions of intentionally making an intimate visual recording of another person and one conviction of intentionally attempting to make an intimate visual recording. These related to four separate clients for the period between April and May 2022.
2. Subsequently, the massage therapist's clients raised additional concerns about his practices, including draping techniques, consent processes, communication, and documentation.

Findings

3. In addition to making non-consented video recordings, the massage therapist failed to communicate with his clients adequately prior to their massages to ensure a shared understanding of the sites to be massaged. During the massages, he did not communicate his intention to massage sensitive areas, such as breasts or inner thighs, when these specific areas had not been identified on the consent form and/or discussed prior to the massage commencing. The massage therapist failed to comply with accepted professional standards and boundaries regarding draping, and it was not in keeping with accepted standards for the massage therapist to suggest or imply to his clients that they should remove their underwear. It was also highly inappropriate and contrary to the best interests of the consumers for the massage therapist to discuss matters relating to sexual behaviour and attraction or orgasm. His record-keeping was not of an appropriate standard, including maintaining client records and his deletion of client appointments after being caught recording.
4. The Deputy Commissioner found the massage therapist in breach of Right 2, Right 4(2), Right 6(1), and Right 7(1) of the Code. He will be referred to the Director of Proceedings.

Recommendations

5. The Deputy Commissioner recommended that the massage therapist provide written apologies to those consumers who wish to receive one for the matters outlined in this report. The massage therapist has advised that he does not intend to practise massage again. However, the Deputy Commissioner recommended that should he return to practice, he provide HDC with evidence of completion of the following: membership with Massage New Zealand; mentoring from a Massage New Zealand member for a 12-month period, specifically in informed consent, draping, professional communication, and adequate documentation; completion of HDC's e-learning module on informed consent; attendance at courses on appropriate draping techniques, effective communication, and listening skills; and a plan to assist with client notes/documentation.

Complaint and investigation

6. The Health and Disability Commissioner (HDC) received a complaint from Ms G about the services provided to multiple consumers by a massage therapist, Mr A. The following issue was identified for investigation:
- *Whether Mr A provided an appropriate standard of care to multiple consumers from February 2020 until May 2022 (inclusive) in respect of massage therapy services provided, including but not limited to whether he maintained appropriate professional boundaries and standards.*
7. 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.
8. The parties directly involved in the investigation were:
- | | |
|------|------------------------------------|
| Mr A | Massage therapist/provider |
| Ms B | Consumer |
| Ms C | Consumer |
| Ms D | Consumer |
| Ms E | Consumer |
| Ms F | Consumer |
| Ms G | Complainant/massage business owner |
9. Further information was received from the New Zealand Police.

Information gathered during investigation

Introduction

10. This report concerns the standard of massage services provided by Mr A to multiple consumers. The consumers will be referred to as Ms B, Ms C, Ms D, Ms E, and Ms F.¹
11. Ms G's complaint included concerns that Mr A took non-consensual visual recordings of his clients, including of some of the consumers referred to in this report, as well as concerns about inappropriate informed consent processes, draping practices and communication, and inadequate documentation standards.
12. A number of the concerns raised in Ms G's complaint and the statements from the consumers were of a similar nature and illustrated a pattern of alleged inadequacies in the

¹ HDC is aware that other complaints have been made to Police about Mr A in similar circumstances; however, those accounts have not been considered by HDC in this investigation at the request of the complainant involved.

care provided. These are the matters I have prioritised as the key focus of my investigation. I acknowledge that some issues raised by Ms G and the consumers have not been addressed in this report.

Background

13. Mr A holds a diploma in therapeutic massage that was obtained overseas.
14. Mr A is not, and was not at the time of events, a member of Massage New Zealand (Massage NZ).²
15. The complainant, Ms G, operates a massage business (the Clinic). Between February 2020 and May 2022 Mr A provided massage services at the Clinic. Ms G said that the arrangement with Mr A was a ‘hand shake deal’ in which Mr A operated as an independent massage therapist and paid a commission to operate from the Clinic premises and use the business’s booking system and website.

New Zealand Police investigation and Court proceedings

16. In 2023, Mr A pleaded guilty to five charges of intentionally making an intimate visual recording of another person³ (including in relation to Ms B, Ms C, and Ms F) and one charge of intentionally attempting to make an intimate visual recording of another person⁴ (in relation to Ms B). The recordings and attempted recording were of four of Mr A’s massage clients and were all taken by Mr A in April–May 2022 without the client’s knowledge or consent, during those clients’ appointments with him for massage services.
17. Mr A was convicted and sentenced on the six abovementioned charges. As Mr A’s actions in this regard have been investigated thoroughly through the criminal justice system, the remainder of this section of the report will focus on the other concerns raised about Mr A’s standard of care. My decision on Mr A’s actions with respect to the non-consensual visual recordings is outlined at paragraphs 120–123 and 194–196.

Ms G

Complaints received

18. Ms G said that during Mr A’s two years of working at the Clinic she had ‘very few problems with him’ but ‘[she] was finding that small issues kept popping up’. These included complaints from Mr A’s clients about his pressure being too firm, failing to adjust his pressure when requested, and that he ‘talked the whole time’, as well as the complaint made by Ms D (discussed at paragraphs 64–65.)

² Massage New Zealand is the only massage therapy body in New Zealand for professional massage therapists. It is a self-regulated, voluntary membership association that promotes the massage profession by requiring members to achieve educational competency and clear standards of client care, practice, and ethics, and to meet ongoing requirements to maintain membership.

³ Section 216H of the Crimes Act 1961.

⁴ Sections 216H and 72 of the Crimes Act 1961.

19. Ms G said that she discussed these issues with Mr A. She described the issues that were discussed:

‘We discussed [that] women will want to wear underwear for obvious reasons, and [Mr A] saying “muscles don’t stop because underwear is there” ... makes them feel like that they have to take them off.

We discussed that as a male therapist [Mr A] needed to be very vigilant with [draping] and professional conversation.’

20. Ms G said that she raised these issues with Mr A on several occasions, and each time he became defensive.

Documentation

21. Ms G stated that when Mr A first began practising from the Clinic he was asked to complete a paper intake form for each new client. She said that the forms would then be loaded onto her laptop, but this laptop is no longer working, and the forms are no longer accessible.

22. Ms G provided HDC with an example copy of the intake form. The intake form asks the client to complete three sections:

- Personal information (including name, contact details, date of birth);
- Medical information (including current medications, pregnancy, injuries/conditions); and
- Massage information (including preferred pressure, allergies/sensitivities, treatment goals, areas the client does not want massaged, current areas of discomfort).

23. The intake form states: ‘I have completed this form to the best of my ability and acknowledge and agree to inform my therapist if any of the above information changes at any time.’

24. Ms G said that by early 2022 the Clinic had moved to an electronic client booking and note recording system, but Mr A never made notes on the electronic system. Ms G stated that she discussed with Mr A that he was to discuss with clients any referrals, medications, allergies, past medical injuries, the reason for the appointment, and ‘any other notes of interest such as observations to refer back on when [he] saw the client again’.

25. Ms G also said that on the day Ms B confronted Mr A about taking a recording of her on his mobile phone during a massage appointment (on 2 May 2023), Mr A deleted several client appointments from the electronic system ‘going back on the system a few weeks’. Mr A has acknowledged that he deleted client appointments.

26. Mr A has also acknowledged that he did not take written notes of his massage sessions. He said that he has been diagnosed with attention deficit hyperactivity disorder (ADHD) and dyslexia and that his dyslexia condition makes writing and reading painful for him. Mr A said that he avoids writing and reading as much as possible. Mr A stated: ‘[Ms G] always said I should [make written notes] for my own protection and since I was not required to do so I

chose not to.’ He said that if he had been required to take written client notes he ‘probably would not [have] work[ed] [at the Clinic]’. In providing comment on the provisional report, Mr A stated:

‘Nevertheless, in reflecting on this situation and the discussion by the HDC, I understand the benefits of better record keeping for client and provider protection and acknowledge I should have done more on this account.’

Standards

27. HDC asked Ms G whether Mr A was required to comply with any policies or procedures whilst operating from the Clinic. Ms G said that a copy of the Massage NZ Code of Ethics was on the door of the massage premises. The Massage NZ Code of Ethics contains standards regarding communication and consent, draping and privacy, and professionalism (see Appendix A).
28. Mr A told HDC that under the employment agreement (‘handshake deal’) he was only required to complete intake forms and ‘never ... required to comply with Massage NZ Code of Ethics or Standards of Practice’.

Ms B

29. Ms B received massage services from Mr A at the Clinic on a weekly basis between February and May 2022. Ms B was one of the women of whom Mr A took a non-consensual visual recording whilst providing massage services.

Communication and consent

30. Mr A told HDC that prior to beginning a massage he told all his massage clients:

‘I am classified as a medical massage therapist. I don’t know how to do spa massage and I don’t do full body. My style is more for people who have problems. I have a firmer pressure [than] most other therapists. I use this pressure to access some of your deeper muscles, ligament[s], and tendons. I listen to you[r] body about how much to use and look for warning signs but, I don’t know how you are feeling. I think I am doing okay but you may [feel] like I’m killing you. You need to tell me, I don’t know what is in your head. When you undress, undress to your level of comfort. [A lot] of people take off everything, some don’t. I can work th[r]ough any modesty concerns just understand it is a simple equation. More clothes crappier massage, also the oil might stain you[r] clothes. Lastly, you are in full control of this massage. You don’t like something I’m doing, tell me. If it feels good, tell me. I failed clairvoyance 101. So communication. Any questions?’

31. Mr A also referred to the client intake form discussed at paragraphs 21–23. Mr A did not have a copy of an intake form completed by Ms B and said that Ms G held copies of all client forms. Ms G said that Mr A did not complete an intake form for Ms B.

32. Mr A said that when he first saw Ms B she was complaining of hip and lower back pain. He said he considered that these issues could be related to Ms B's lumbar muscles,⁵ hip flexors,⁶ and hip abductor muscles.⁷ Mr A stated that he told Ms B that the massage would begin with her lying on her front, and he would massage her upper back and then her lower back. Mr A said he told Ms B that he would then 'check [her] glutes and hip' before having Ms B roll over on to her back so that he could 'check hip and abdominals' and finish with massage of the shoulders and neck. Mr A said that during the massage, he asked Ms B about her recent pregnancy and birth, as these events can cause the ligaments in the pelvis to loosen.

33. In a witness statement to the Police, Ms B said that Mr A frequently massaged her hips and pelvic area as these were her 'problem areas'. She stated that on one occasion she felt that Mr A had massaged 'very close to [her] vaginal area'. Ms B said that on this occasion she was lying on her back, and Mr A pulled her foot up so that it was touching the inside of her opposite knee. Ms B stated:

'So, my legs were kind of in a P-shape and [Mr A would] work on my groin area, with his hands down, like fingers, obviously not touching my vagina, but just very close, inside that area of my leg.

I guess I knew that what he was doing seemed to be helping with the pain that I was getting ... I guess I [kind of] just accepted it as part of the process.

I don't remember exactly where his fingers were at the exact time because it was massaging and rubbing and pushing. But it definitely was in an area where I would have had pubic hair, within that sort of area.'

34. Ms B also said:

'But I guess because of the nature of the massage, and where he was sort of trying to get into my pelvis, it wasn't, I wasn't worried about it. It was more like Jesus, like that was pretty close to my vagina.'

35. In response, Mr A said that during the massage, he could feel that Ms B's iliacus⁸ and psoas⁹ muscles were tight, along with the adductors¹⁰ of the hip. Mr A said that he performed some

⁵ A group of muscles in the lower back that support and stabilise the lumbar spine.

⁶ A group of muscles used in flexion of the hip joint (bringing the knee closer to the chest). The primary hip flexors are the iliacus and psoas muscles (together called the iliopsoas), located in the pelvis.

⁷ A group of muscles located on the outer thigh, which are used when lifting the leg away from the body.

⁸ The iliacus muscle is a triangular muscle on the inner surface of the pelvic bone, which is used in flexion of the hip joint and external rotation of the upper leg.

⁹ The psoas muscle is located in the lower lumbar region of the spine and extends through the pelvis to the femur. The psoas muscle is used in flexion of the hip joint and lifting the upper leg toward the body.

¹⁰ A group of muscles located on the inner thigh, which are used when bringing the leg toward the midline of the body and rotating the legs inward.

stretching along with a combination of effleurage¹¹ and petrissage¹² in these areas. Mr A said that the 'P-shape' described by Ms B was used to enable him to massage the gracilis¹³ and adductor muscles.

36. In her Police statement, Ms B said:

'During the massages I'd [ask Mr A] what part of my body he [was] trying to get to, and he'd sort of push down on that body part and I could feel obviously where he was trying to get to.'

37. Mr A said that he always asks for feedback during a massage as he knows it can be painful. He stated that he was unaware that Ms B was uncomfortable as she did not tell him this. Mr A said:

'[Ms B] did not inform me that it was making her uncomfortable. I can't stop something I don't know about. She was getting relief from the pain, that was the feedback I received. I never touched her anywhere I did not think she was okay with. Anytime I asked if she was okay I would get a "yup" from her.'

38. In a victim impact statement, intended for reading in the District Court, Ms B said:

'Even though you offputtingly spoke during our whole session about your strong views on the world, I was the one that would have to ask what you were touching on my body and why. I needed to make sense of ... some of the intimate places you were touching me.'

Draping and privacy

39. Ms B said that following a brief discussion at the start of the appointment, Mr A would leave the room while Ms B undressed, including removing her bra but leaving on her underpants. Ms B said she would then get on the massage table, face down, and drape a blanket over her. The blanket would cover her from her shoulders to her feet. Ms B would then call Mr A back into the room and he would begin the massage.

40. Ms B described Mr A's draping practice during her massage appointments. She said that when she rolled over during the massage Mr A would stand on one side of the table and hold the blanket up 'sort of with both hands above, out in front of him and above his head so I could then roll over on the table without him seeing me roll over'.

41. When asked about his draping of Ms B, Mr A said that the towels at the Clinic were too small to practise the diaper draping method that he would usually use for this type of massage

¹¹ Effleurage is a light friction technique commonly used to begin a massage treatment. Effleurage is made up of long, stroking movements that are performed using a flat hand or fingers.

¹² Petrissage is a massage technique in which deep pressure is applied to tissue and underlying muscle. Petrissage includes kneading, wringing, skin rolling and squeezing techniques.

¹³ The gracilis is a long, thin muscle located in the inner compartment of the thigh, which attaches to the coxal (hip) bone and the tibia (shin bone).

technique.¹⁴ Mr A said that he would therefore tuck the drape into Ms B's underwear, exposing the iliac crest.¹⁵ He stated that his normal practice would be to confirm that the consumer was comfortable 'with that much hip showing' and then pin the other side of the drape under the leg.

Professional boundaries

42. In her victim impact statement, Ms B also indicated that she had been asked by Mr A to remove her underwear. Ms B said:

'Never have I been asked to remove my underwear by any previous massage therapists and when I was unwilling to do this, have your hands go up under my underwear and touch me where we both [know] you shouldn't have.'

43. Ms B also said:

'[Mr A] did explain at the start that it is easier for him when you have less clothes on. He explained how [New Zealanders] tend to keep more of our clothes on than [people from his country] do during massage.'

44. In response, Mr A said that he would not tell a client to take off their underwear, as this would be contrary to his 'you are in charge' approach. Mr A states that he did not massage under Ms B's underwear at any time.

Ms C

45. Ms C received massage services from Mr A at the Clinic between March and May 2022. Ms C is a chiropractor. At the time of events, she worked at a chiropractic practice. The chiropractic practice and the Clinic operate from the same premises; the Clinic sub-leases the room from which it operates from the chiropractic practice. Although their businesses were separate, Mr A and Ms C worked alongside each other, referred clients to each other, and had mutual clients. On occasion, with permission from the client, Mr A and Ms C would discuss the clinical information of their mutual clients. Mr A was a chiropractic client of Ms C, and Ms C was a massage client of Mr A.

46. Ms C was one of the women of whom Mr A took a non-consensual visual recording whilst providing massage services.

Communication and consent

47. In a statement to the Police, Ms C said that when she first saw Mr A for massage services he asked her to complete a health questionnaire and sign a consent form. Neither Mr A nor Ms G had a copy of the health questionnaire or consent form mentioned by Ms C. Ms C said that Mr A did not ask her consent during the massage, including when he massaged in areas

¹⁴ A 'Diaper Drape' is a technique of draping used when massaging a person's hips or legs. It involves raising the drape and pulling it aside toward the midline of the body to expose the leg, then wrapping the drape underneath the same leg, back toward the edge of the table. The leg is then placed on top of the drape to keep it securely in place.

¹⁵ The curved upper border of the wing-shaped hip bone at the back of the body.

that were ‘perhaps a little bit private, such as massaging [her] chest and in the regions of [her] breasts’.

48. Ms C said that Mr A did ‘a lot of work’ around her shoulders and in the region of her pectoral muscles,¹⁶ but ‘he definitely was massaging [her] breasts’.

49. In a victim impact statement intended for reading in the District Court, Ms C referred to the massage of her chest/breast area and said that while she understands that massage in this area is sometimes needed, ‘in these cases appropriate consent is paramount’. Ms C stated:

‘[Mr A] failed to offer this to me on that evening, there was no explanation of what he was doing and why. I did feel concerned about this at the time but given the vulnerable position I was in I trusted he was acting with professional intent.’

50. In response, Mr A said that Ms C had been complaining of shoulder pain, and he considered that this could be related to her rotator cuff muscles¹⁷ and pectoral muscles. Mr A referred to the client intake form discussed at paragraphs 21–23. He said that Ms C did not indicate on the form any ‘no-go areas’. Mr A did not have a copy of an intake form completed by Ms C and said that Ms G held copies of all client forms. Ms G said that Mr A did not complete an intake form for Ms C.

51. Mr A said that he told all his clients the information outlined in paragraph 30. He also said that he explained to Ms C how the massage would proceed, as follows:

‘[I’m] going to start you face down. Work your upper back then lower back. Check you[r] glutes and hip. Flip you over and check hip and finish with some shoulder and chest.’

52. Mr A said that normally he massages until the fourth rib¹⁸ ‘without verifying’,¹⁹ and that if he considers it necessary to ‘work lower’, or to work on the serratus muscle,²⁰ he usually asks the client for consent. Mr A stated: ‘I was unaware that [Ms C] felt uncomfortable. She never informed me.’ Mr A told HDC that he ‘did not massage [Ms C’s] breasts at any time’.

Draping and privacy

53. Ms C said that typically Mr A would wait in the hallway while she entered the massage room and got undressed. She would remove all her clothing, including her bra, except for her underwear. Ms C said that she would then climb onto the massage table, lie on her stomach,

¹⁶ A group of four muscles that connect the front walls of the chest with the bones of the upper arm and shoulder (pectoralis major, pectoralis minor, serratus anterior and subclavius).

¹⁷ A group of four muscles in the shoulder.

¹⁸ The rib cage contains 12 pairs of ribs, which are counted from the top (one) to the bottom (twelve).

¹⁹ HDC understands that by this phrase Mr A means that normally he massages down to the fourth rib without confirming with the client that they are comfortable and consent to him massaging the chest area down to this point.

²⁰ The serratus muscle is a fan-shaped muscle at the side of the chest/rib cage. The serratus muscle sits along the surface of the first to eighth or ninth ribs, attaching to the scapula.

and ‘pull a small drape’ to cover her bottom. Ms C would then call out to Mr A to let him know she was ready, and he would re-enter the room to begin the massage.

54. Ms C also said that ‘[o]ften [Mr A] would have the drape pulled right down to expose [her] bottom when massaging the region of [her] lower back too’.
55. In response, Mr A stated that he drapes the lower back to expose the gluteal cleft,²¹ but he does not expose the buttocks in any way. Mr A said that any massage on the glutes is performed through the towel. He stated that he was unaware that Ms C was uncomfortable as she did not inform him of this.
56. Ms C described one occasion on which her breasts were exposed during the massage. She said that she was lying on her back when Mr A performed a stretch that involved stretching her arms over her head. The stretch caused the drape that had been covering her chest to slide below her breasts. Ms C recalled thinking that this stretch was exposing ‘a bit more than what [she] was comfortable with’. She stated that she resisted the stretch with the intention of trying to reach down to pull the drape back up over her breasts. Ms C said that she recalled Mr A saying: ‘Don’t worry, I’ve seen it all before.’ Ms C said that this was the end of the massage that day.
57. In response, Mr A said that the stretch Ms C described was manual traction therapy.²² He stated that before he performed this stretch, he would explain the technique and process and ask the client to let him know if they experienced any pain during the stretch. Regarding draping, Mr A said that he would first raise the client’s arms above the head, then pull the towel up to cover the chest and tuck the towel under the client’s back to secure it. Mr A said that during the stretch he would be in an ‘L shape’ looking toward the floor so that his view was of the floor or of his own feet. Mr A said that if Ms C’s breasts had become exposed, he would have apologised and readjusted the drape appropriately. He stated that he would not have said ‘Don’t worry I’ve seen it all before’.
58. Ms C said that during the massage when she would roll from her stomach on to her back, Mr A would stand to the side of the table and hold the drape ‘directly up’ to give her privacy to roll over. Ms C said that she would turn to her left-hand side, facing the opposite direction of Mr A. Ms C stated: ‘Knowing now where the camera was positioned[,] this rolling manoeuvre would have given [Mr A] full recording view of my breasts and [the] front of my body.’

Professional boundaries

59. Ms C also recalled that when she first began having massages with Mr A, she asked him how much clothing he wanted her to remove. Ms C said that Mr A replied: ‘Some people like to get completely naked. I don’t mind what you do. I’ve seen it all before.’ Ms C said that she

²¹ The groove between the buttocks that runs from just below the sacrum to the perineum.

²² Manual traction involves the application of a pull or force to body tissues to decompress an area of compression.

always chose to keep her underwear on but remove her bra completely, as she assumed that the drape would keep her breast region covered.

60. Ms C also said that there were times ‘on more than one occasion’ during the massages when Mr A’s conversation was not appropriate. Ms C recalled saying to Mr A: ‘I hope you don’t talk to all of your clients like this, and this is more because you’re comfortable around me as a colleague.’

61. Ms C said that the conversation she was referring to was about how Mr A would interact with his other clients and ‘what [Mr A had] seen [whilst] doing massage in the past’. Ms C said that Mr A also talked about his wife and the lack of physical contact in their relationship. Ms C stated that at times he described his previous wife as having a ‘slimmer figure’ and being ‘very different’ to his current wife. Ms C said that Mr A was alluding to sexual behaviour. Ms C said:

‘I knew exactly what he was talking about and what he was describing there and the point that he was trying to get across was[,] I believe[,] around body types and sexual attraction to different body types.’

62. Ms C said that she left the massage appointment that day feeling that ‘some lines had been crossed’ and that she ‘didn’t feel very good about some of the words that had been said’. She stated that when she got home, she told her partner about her concerns, but concluded that as Mr A was a professional, ‘It’ll all be okay’.

63. In response, Mr A noted that he was a chiropractic client of Ms C before she was his massage client and that he would ‘talk to [Ms C] about a lot of things’ as he saw her as a colleague and a friend. Mr A said that he talked with Ms C about his clients but that this was always on an anonymised basis and for the purpose of seeking her professional opinion. He said that when he talked with Ms C about his wife, they had already been talking about Ms C’s children and husband. Mr A stated:

‘I was confused and in a way asking for help. She was a wife and mother. She had a point of view that might help me. I wasn’t in a good place then. I was questioning everything. I felt my wife did not love me any more. That [I’m] alone in a country without any support but I was unaware that she felt uncomfortable. She never informed me.’

Ms D

64. Ms D began receiving massage services from Mr A at the Clinic in October 2020. On 25 November 2020, Ms D made a verbal complaint about Mr A to staff at the chiropractic practice²³ regarding a massage appointment she had had with Mr A on 23 November 2020. Ms D’s complaint was reported to Ms G, who completed a complaint form. Ms G provided

²³ Ms D explained that she raised her concerns with her chiropractor at the chiropractic practice, rather than with Mr A or the Clinic, because it had been her chiropractor who had recommended that Ms D see Mr A for massage services. Ms D noted that her chiropractor was present when she left Mr A’s massage room that day as her chiropractor worked on the same premises.

a copy of this complaint form to HDC. At the time of the complaint, Ms D did not want her name recorded against the complaint and did not want action taken.

65. HDC provided a copy of the complaint form dated 25 November 2020 to Ms D, and Ms D confirmed that she had made the complaint. The complaint form dated 25 November 2020 states:

‘[O]n Monday a patient came out of massage saying she won’t be coming back [and] that she felt a line was crossed ... [The] client felt that the [draping] was getting lower and that the therapist talked about another massage therapist who had a camera to see the faces of clients and that some people looked like [they] orgasmed. Client felt statement was inappropriate and felt weird.’

Communication and consent

66. When asked for comment on the complaint of 25 November 2020, Ms D said:

‘When massaging that day there’s an invisible line of comfortable where a therapist can put their hands and make you feel at ease or vulnerable. The line was crossed in my mind as I had gone to have my neck muscles worked on and he came around my collar bone and towards the center of my chest working so close to my nipples.’

67. Ms D also described that when Mr A was massaging her leg muscles that day ‘he was so close to touching [her] vagina it was horrible’. Ms D said that during this massage Mr A did not touch her nipples or her vagina, but he touched ‘the space just next to them [and] it was so close [she] felt violated’.

68. In response, Mr A said that Ms D had been complaining of neck, shoulder, and hip discomfort. He said that to treat Ms D’s shoulder discomfort he massaged the muscles of the pectoral region. Mr A said that to treat Ms D’s hip discomfort he massaged the hip adductors in Ms D’s inner thigh as well as the tensor fascia lata muscle.²⁴

69. Mr A stated that he told all his clients the information outlined in paragraph 30. He referred to the client intake form discussed at paragraphs 21–23 and said that Ms D did not advise him of any areas that she did not want to be massaged. Mr A said that he always asks for feedback during a massage as he knows it can be painful. He said that he was unaware that Ms D felt uncomfortable.

70. Mr A said: ‘I can’t say what “close” is but [Ms D] said I did not touch those parts and never said anything to me how uncomfortable she was. Not once.’

Draping and privacy

71. HDC asked Ms D to clarify what she had meant in her complaint by ‘the [draping] was getting lower’. Ms D said that when having a massage with Mr A it was usual practice for him to leave the room while she undressed and placed herself under a drape to maintain privacy. Ms D said that when Mr A re-entered the room, he would readjust the drape, pulling it lower

²⁴ A muscle of the gluteal region, located on the upper front section of the thigh.

than she was comfortable with. Ms D stated: 'So instead of having it say at my collar bone level [Mr A] move[d] it down so that if it slipped my breasts would be exposed. This made me on edge and nervous.'

72. In response, Mr A said that he uses bony landmarks when draping the chest, in particular the manubrium²⁵ and the body of the second and third ribs. Mr A stated that he was unaware that Ms D felt uncomfortable, and she did not inform him of this.

Professional boundaries

73. When asked for comment on the complaint of 25 November 2020, Ms D told HDC that Mr A had not talked about another therapist, but rather had stated that he himself had considered photographing people's faces when they had an orgasm.
74. Ms D told HDC that Mr A's communication made her very uncomfortable and left her in a state of shock. She said that the rest of the appointment was 'a horrible duration to get through' and that she felt trapped.
75. In response, Mr A denied making a comment to Ms D about orgasm. He said that the client he had seen in the appointment before Ms D's appointment had made a comment about recording people's faces and posting them online 'like the people who post recording[s] of popping pimples or lancing an abscess'. Mr A stated:

'The genesis of [the client's] statement start[ed] with him mak[ing] faces during his massage. He always asked me [for] full force and we would joke about the faces he would make at me. Nothing about orgasm or sex or anything like that. Even now I feel embarrassed about the situation.'

76. Mr A said that following Ms D's complaint, he apologised 'to everyone' and tried to be more mindful of what he said to people. Mr A indicated that he considered it regretful that Ms D made an anonymous complaint through employees of the chiropractic practice rather than telling him directly of her concerns, as this 'robbed [him]' of the opportunity to apologise or 'put [Ms D's] mind at ease'.

Ms E

77. Ms E began receiving massage services from Mr A at the Clinic in March 2022.
78. Following Mr A's criminal conviction in 2023, Ms E sent Ms G a message through Facebook Messenger about the care she received from Mr A. Ms G provided a copy of this message to HDC. Ms E confirmed to HDC that she wrote the message.
79. In her message, Ms E said that she had several massage appointments with Mr A. Ms E said that Mr A's massage and stretching at the first appointment were 'well within safe limits'.

²⁵ The uppermost part of the sternum.

Communication and consent

80. Ms E said that during the third massage appointment, Mr A massaged her feet, Achilles tendons and up her legs. Ms E stated:

‘Nothing was weird until he “massaged” my groin. His fingers would have been right at my undie line. I told him what he was doing hurt and he replied something like “those lumps should not be there”. I told him again [that] it really hurt and he stopped.’

81. Ms E said that this was the last appointment she made with Mr A.

82. In response, Mr A said that he told all his clients the information outlined in paragraph 30. He said that he would answer any questions the client might have, and he feels that an informed client is the best way for them to make choices in their treatment.

83. Mr A said that Ms E had come to him complaining of pain in her neck, lumbar region, and hips. He said that the primary goal was to find the cause of Ms E’s discomfort. Mr A referred to the client intake form discussed at paragraphs 21–23. He also said that during the massage he would ask clients questions about their history, and he always asked for feedback. Mr A stated that he was unaware that Ms E felt uncomfortable, and she did not inform him of this.

84. Mr A said that when Ms E informed him that she was in pain, he first shifted his stance and hand placement to use less pressure. He said that a range of pressure can be used in massage, and he was assessing whether ‘lighter [pressure] would get the job done’. He stated that when Ms E informed him that she was still experiencing pain, he stopped.

85. Ms E said that following this appointment, she saw her general practitioner (GP) to ask about the ‘lumps’ in her groin. Ms E’s GP told her that the ‘lumps’ were of normal size and that any pushing or poking at them would hurt and that this should not be done.

86. Mr A said that while he is not a doctor and cannot diagnose, he has ‘worked on hundreds of bodies and body types’ and he has come to know what may or may not be normal. Mr A said that he can advise a client to go and see their GP. Mr A stated:

‘[Ms E] did exactly what I want people to do. Her GP said that [the lumps] were normal and not to work on them. That[’s] all I needed to know because just in case it was a metastasized lymph nodes I can say her GP said it was “Normal”.’

Professional boundaries

87. Ms E said that during the second and third massage appointments with Mr A, he had been ‘whinging’ about his young child and complaining that his child took up too much of his time. Ms E recalled that Mr A said that as his wife was employed, he was ‘the house dad’ during the day, and he ‘felt he had no time for himself’. Ms E said that Mr A made ‘some comment about his wife’, and although Ms E does not recall the specific comment, she remembers thinking ‘that was something he should not be talking about’.

88. In response, Mr A said that at this time his child was a few months old and most of his clients would ask about him. Mr A said that due to his personal history, he worried about his ability to be a caring father, but he considered that anything he said about his child was never negative. Mr A stated that he did speak about sacrifices he had to make as a father, but he never minded this because it was for his child. Mr A said that he does not know how his comments may have been interpreted by others.
89. Ms E also said that Mr A made ‘moaning’ sounds during the third massage appointment (described above). In response, Mr A said that he has ‘no idea what [Ms E] is talking about’ and noted that massage is labour intensive so the sounds Ms E referred to ‘could just be [him] breathing’. Mr A said that some massage techniques require him to contract his chest wall and abdominals, and that can make breathing harder.

Ms F

90. Ms F began receiving massage services from Mr A at the Clinic around July–August 2020. Ms F was one of the women of whom Mr A took a non-consensual visual recording whilst providing massage services. Ms F did not respond to HDC’s invitation to participate in this investigation. The below statements from Ms F are taken from the witness statement she made to the Police as part of the Police investigation, and the victim impact statement she wrote for the Court’s consideration in Mr A’s sentencing.
91. Ms F said that she stopped seeing Mr A for massage after her initial appointments because she felt uncomfortable. However, she began seeing him again in April 2022, at Ms G’s recommendation, because Ms G considered that Mr A’s massage style was better suited to the care she required for a bulging disc in her neck and issues with her lower back and hips.

Communication and consent

92. Mr A said that he told all his clients the information outlined in paragraph 30. He said that he would answer any questions the client might have, and he feels that an informed client is the best way for them to make choices in their treatment. Mr A referred to the client intake form discussed at paragraphs 21–23. He also said that during the massage he would ask clients questions about their history, and he always asked for feedback.
93. Mr A said that Ms F came to him complaining of pain in her neck, shoulder, lumbar region, and hips. He stated that the primary goal was to find the primary cause of Ms F’s discomfort.
94. Ms F said that sometimes, when she was lying on her front, Mr A would massage the sides of her breasts. She said that on other occasions Mr A massaged her buttocks and in between the buttock cheeks. Ms F said that these massages were always over her underpants or the blanket.
95. Ms F said that she felt uncomfortable when Mr A massaged her breasts and buttocks, but she ‘never complained because [she] assumed there must be a medical reason’.
96. Ms F also said that she had an uneasy feeling about Mr A. She stated:

'[Mr A] talked constantly and often spoke about the massage he was performing, and it seemed like he was trying to reassure me, while at the same time trying to justify to himself that his actions were innocent.'

97. In response, Mr A said that he was unaware that Ms F felt uncomfortable. He said that Ms F never informed him of this. Mr A told HDC that he did not massage either the side of Ms F's breasts or in between her buttock cheeks.

Draping and privacy

98. Ms F said that Mr A would leave the room while she undressed. She said that she would remove all her clothing, including her bra, except for her underpants. Ms F stated that she would lie on the massage table, lying on her front, and cover herself with a blanket.
99. Ms F said that sometimes when Mr A massaged her lower back and buttocks he pulled down her underpants further than she was comfortable with, and she would then pull her underpants back up.
100. In response, Mr A said that when massaging the lower back, he lowers the drape to expose the gluteal cleft without exposing the buttocks. He said that any massage done on the glutes is done through a towel. With respect to draping of the chest, Mr A said that the drape is pinned under the client's rib at the fourth rib, with the breasts fully covered.

Further information and responses to information gathered

101. Ms G, Ms B, Ms C, Ms D and Ms E were provided with the opportunity to comment on the 'Information gathered during investigation' section of this report. Where relevant, the responses have been included in the report.
102. Mr A was given the opportunity to comment on the provisional report. His comments have been included where relevant.

Ms G

103. Ms G told HDC:

'[Mr A] has left a shell-shocked community behind dealing with the trust issues that come from a case like this ...

I have huge concerns that due to massage therapists in NZ not having a registration body than can strike him off or in fact do anything of influence (MNZ), [h]e can go to another small business ... elsewhere and do the same thing. He can work from home, or go to people[']s houses and no one will know of his previous conduct.

[Mr A] was well aware of the professional code of practice and he premeditated recording women and abused their privacy.'

Ms B

104. In her victim impact statement to the District Court, Ms B said:

'This whole ordeal has had more of an impact on me than I initially thought it would. I am a relatively emotionally stable person. However, since that moment I caught [Mr A], I started having uncontrollable panic attacks and have become extremely untrustworthy of people ...

Every room I enter now I scan for recording devices. I don't know how I will cope when the time comes for me to be alone in a room with a male health practitioner ...

[Mr A] took control away from me. [He] abused [his] power and belittled me to fulfil [his] own satisfaction ...

My main long-term concern is that unlike most other healthcare professionals in [New Zealand], massage therapists do not belong to or are associated with any governing body. I am worried that ... [Mr A] will be able to move on and set up somewhere else with no checks or repercussions for his actions.'

105. In response to the 'Information gathered' part of this report, Ms B provided further detail and context about her experiences and reiterated that Mr A massaged inside her underwear. Ms B also told HDC that her Police statement was mainly focused on the issue of Mr A recording her as 'the charges at the time were for digital crime and not indecent assault'. As a result, the Police statement at the time did not highlight in depth the worries she held about Mr A's massage techniques. Ms B restated these concerns and further outlined the impact these events have had on her:

'It makes me sick to my stomach knowing I returned to this man for treatment, and on reflection just think I was too embarrassed to complain or say anything to him ...

This man violated me, assaulted me, all while I was paying for him to do this ...

His actions have left me with ongoing issues that I am still to this day dealing with.'

Ms C

106. In her victim impact statement to the District Court, Ms C said:

'My personal experience with [Mr A] has left me feeling violated and uncomfortable seeking medical services from another male practitioner ...

I paid for [Mr A] to abuse me. Yes, I feel violated. Yes, I have had counselling help. Yes, this has and still does affect my quality of life. Yes, I feel [Mr A's] actions have, and continue to affect me on a regular basis ...

I can't help but feel that I have let this community that I call home down in some way. I let [Mr A] operate under my business reputation ... I feel responsibility to do what I can to ensure he doesn't leave this town and do the same thing somewhere else.'

Ms D

107. Ms D told HDC that she has tried very hard to move on from the events of this complaint and continues to find it difficult to discuss her experience with Mr A. In response to the 'Information gathered' part of this report Ms D highlighted her concern that Mr A 'appeared to have no sense of remorse towards his victims and limited insight into the grief and pain [caused by] his offending'.

Ms F

108. In her victim impact statement to the District Court, Ms F said: 'I have lost trust in male masseuses, and I wouldn't have massages again with a male. I am worried about [Mr A] continuing to massage women and young girls.'

Mr A

109. Mr A said that he considers that he provided an acceptable standard of care with respect to massage technique and draping. Regarding 'what happened before the massage',²⁶ Mr A said that this was the culmination of 'a mental break down' as a result of his own experience of abuse and trauma. Mr A stated:

'[Y]es I agree. I did something horrible [and] because of my action many people's [lives] have been changed for the [worse]. Not one of them deserved what has happened and the ongoing trials. I have tried to apologize and all I can do is do what I can to make sure it never happens again ... I am so sorry that my failures and weakness [have] caused [the victims] harm ... I am willing to do what I can to help [them] on [their] journey of healing.'

110. Mr A also said:

'What I did wrong wasn't during the treatments. If [any one] of [the consumers] informed [me] that they felt uncomfortable I could have done something about it but they didn't. If [any one] of them questioned why I am touching them here I could have explained why [I am] working where I am. Most never did and the ones who did were informed and made the choice to continue because they saw the benefit. So I talked [too] much, tell me to shut up but if you don't say anything how am I to know. I use [too] much pressure, tell me and if my style of massage isn't for you that is okay.'

111. Mr A is of the view that he provided an adequate standard of care regarding consent and communication both before and during the massages. He told HDC that the information set out in this report 'provides adequate basis for a finding that there was pre-massage and in massage communication about the massages'. Mr A told HDC that he disagrees with the concerns raised regarding consent, particularly regarding more sensitive areas. He stated:

'I will never agree with not providing appropriate consent but maybe be clearer on the meaning and definition. In the human body, the region of the thorax between the neck and diaphragm in the front of the body is called the chest. That is T1–T12. When I say

²⁶ HDC understands that this refers to the non-consensual intimate visual recordings that Mr A took of his clients.

I'm going to massage your chest and they agree they are agreeing to everything around the rib cage.'

112. Mr A further stated that his clients had the opportunity to raise any concerns without the presence of any potential power imbalance, before the massage and/or in the period of time after the massage and their next treatment. He stated:

'Pre-massage discussions would have taken place before there was any possibility of any power dynamic based on state of undress or supine state on the massage table. There was ample time for the client to ask any questions about the proposed treatment. Discussions during the massage would be based on the feedback from the client, from what was ascertained during the massage, and as a general practice ("[speaking] about the massage [I] was performing") ...

[and]

Clients B–F were repeat customers, with separate sessions over periods of weeks or months. Each had ample opportunity in between sessions, when there was no possibility of a power dynamic imbalance, to process the experience and decide ... whether there were questions they should raise to allay concerns (I don't understand why last session X happened) or to choose to opt for a different provider altogether.'

113. Mr A also said that he feels that the victims involved in the criminal trial 'wanted more' from the trial and are now, in hindsight, questioning other aspects of his care.

Opinion: Mr A — breach

Introduction

114. The massage profession in New Zealand is not regulated under the Health Practitioners Competence Assurance Act 2003, and there are no requirements for massage therapists to register with any professional association. At the time of these events, Mr A was not a member of Massage NZ or any other professional association.
115. As this Office has stated previously,²⁷ despite not being a member of a relevant association, Mr A is nonetheless bound by the Code of Health and Disability Services Consumers' Rights (the Code). In *Director of Proceedings v Mogridge* [2007] NZHRRT 27, the Human Rights Review Tribunal stated:

'[T]he 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.'

²⁷ In opinion 12HDC01512, and reiterated in combined opinion 20HDC02080/20HDC01152.

116. A previous decision by this Office (combined opinion 20HDC02080/20HDC01152) also concerned the care provided by a massage therapist who was not at the time of events a member of Massage NZ. In that decision, this Office stated:

‘I consider that by holding himself out to be a massage therapist, and by providing massage services for a fee, [the massage therapist] is required to meet the standards of a professional massage therapist, and that the ethical principles set out in the Massage NZ Code of Ethics provide a credible reference point in establishing the ethical standards that should apply in these circumstances. Accordingly, I consider the Massage NZ Code of Ethics and Standards of Practice to be an appropriate benchmark for the assessment of [the massage therapist’s] practice.’

117. I agree with this conclusion. In addition, the Massage NZ Code of Ethics was displayed on the door of the massage premises from which Mr A operated. Even though Mr A disputed that his ‘handshake deal’ with the Clinic required him to comply with the Massage NZ Code of Ethics or Standards of Practice, I remain of the view that his clients could therefore have expected that his care would be provided in accordance with that Code of Ethics. I have therefore assessed the care provided by Mr A against the standards set out in the Massage NZ Code of Ethics and Standards of Practice (see Appendix A).

118. From the outset, I note that there are marked similarities in the concerns raised by the six women concerned, and their accounts of what happened during their massages. These include that Mr A massaged the consumers in sensitive areas without first advising them of where and why he intended to massage in those areas, and that his draping practices and communication left them feeling uncomfortable and, at times, unsafe.

119. I acknowledge Mr A’s concern that some of the consumers’ accounts may have been coloured in retrospect, in light of his subsequent criminal conviction. I have borne this in mind while assessing the issues of this complaint.

Visual recordings

120. The Massage NZ Standards of Practice states that practitioners must ‘[e]nsure that the clinic space ... maintains the privacy of the client’.

121. Mr A was convicted on five charges of intentionally making an intimate visual recording of another person (including in relation to Ms B, Ms C, and Ms F) and one charge of intentionally attempting to make an intimate visual recording of another person (in relation to Ms B). On this basis, I accept that Mr A took non-consensual visual recordings of Ms B, Ms C, and Ms F during their appointments with him for massage services.

122. I am severely critical of Mr A’s actions in this regard. Making these recordings was a gross breach of trust and professional boundaries, and it is clear that this violation of privacy in the context of a consumer–provider relationship has had a significant and ongoing impact on these four women.

123. In my provisional report I outlined my concern that, while Mr A had expressed regret about his actions, he did not appear to have taken appropriate accountability for the harm he has

caused. I noted that nowhere in his communication with HDC had Mr A directly acknowledged that he took recordings of these clients, instead making vague references to 'what happened before the massage' and that he 'did something horrible'. Acknowledging the actions that have caused harm is one of the most basic elements of taking responsibility.

124. In response to my provisional report, Mr A disputed that he had not tried to take appropriate accountability. He stated that he has taken accountability for the video recordings by (in the context of the court proceedings) requesting participation in a restorative justice process (which ultimately was declined), pleading guilty, and withdrawing his application for name suppression in relation to the recordings. Mr A also provided HDC with a statement from his plea agreement as follows:

'I made unauthorized, or attempted to make unauthorized, videos of female clients (referred in the proposed report as Ms. B., Ms. C., and Ms. F.) while disrobing prior to receiving massage services ("Illegal Recordings"). There was no possible medical or therapeutic purpose or basis supporting the Illegal Recordings. They represented a fundamental breach of the personal privacy of those individuals and the professional ethics for massage therapists and healthcare providers. This fundamental breach caused, and continues to cause, significant emotional hurt and trauma to those women, as more fully described in the impact statements prepared for the court. My action also caused pain for my family and the community of [the town], which continues. It is not at all clear to me that there will ever be any way in which I can fully atone for the hurt my actions in making the Illegal Recordings has caused.'

125. It is not clear whether the consumers in this case have been provided with a copy of this statement.
126. I acknowledge Mr A's statement and reflection, recognising the harm caused by his actions in relation to recording the women. I note, however, that no written apologies appear to have been provided to his clients.

Massage of sensitive areas

127. Each of the consumers discussed in this investigation said that Mr A massaged them in sensitive areas, including that he massaged some of the consumers' breasts and close to some of the consumers' genitals.
128. Ms B said that during one appointment Mr A massaged in her groin area, on her inner thigh, and 'very close' to her genitals while her legs were in a 'P-shape'. Mr A said that he massaged the muscles of Ms B's inner thigh²⁸ and disputes Ms B's account.
129. Ms C said that Mr A massaged her breasts. In response, Mr A said that he massaged Ms C's chest, and disputes Ms C's account that he massaged her breasts.
130. Ms D said that Mr A massaged toward the center of her chest and close to her nipples. She said that when Mr A massaged her leg muscles he was close to touching her genitals. In

²⁸ Specifically, the gracilis and adductor muscles.

response, Mr A said that he massaged Ms D in the region of her pectoral muscles and inner thighs. He said that he could not comment on what Ms D considered to be 'close' and referred back to Ms D's account in which she said that he did not touch her nipples or genitals.

131. Ms E said that Mr A massaged her groin 'at [her] undie line'. In response, Mr A said that he massaged Ms E's groin and did not dispute Ms E's account that he massaged at the line of her underwear.
132. Ms F said that there were occasions when she was lying on her front during massage appointments with Mr A when he would massage the sides of her breasts. She said that on other occasions Mr A massaged her buttocks and between her buttock cheeks. Mr A has disputed Ms F's account in this regard.
133. I note that in response to my provisional report, Mr A has disputed the consumers' accounts. However, in light of the striking similarities in the concerns raised by each of the consumers, I consider it more likely than not that Mr A massaged each of the consumers in sensitive areas as they have described.

Communication and consent

Discussions prior to massage

134. In response to the concerns raised in this investigation, Mr A referred to the client intake form in which clients were asked about treatment goals, history of injuries/conditions, current areas of discomfort, and any areas they did not wish to be massaged. Mr A mentioned this form in his response to the concerns raised by Ms B, Ms C, Ms E, and Ms F. The example intake form provided by Ms F states: 'I have completed this form to the best of my ability and acknowledge and agree to inform my therapist if any of the above information changes at any time.'
135. It is not clear which of the consumers, if any, completed an intake/consent form. I note that Ms C is the only consumer who mentioned completing a health questionnaire and signing a consent form. On the other hand, Ms G said that initially Mr A did complete paper-based client intake forms, but that no form was completed for Ms B or Ms C. There are no records of an intake/consent form for any of the consumers.
136. In any case, in light of the sensitive areas in which Mr A massaged each of the consumers, I consider that even if consent forms were completed for each of the consumers this would not in itself be sufficient to show that informed consent was obtained for massage in those areas. As noted by this Office in opinion 20HDC02080/20HDC01152:

'Informed consent is more than a signature, and requires that consumers are fully informed of the intended treatment, so that they can make a choice about whether to accept it. Consumers must also have the capacity to process the information, and freely exercise their choice.'

137. Prior to making a choice or giving consent, consumers have the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive; this

would include an explanation of the consumer's condition, the options available, including risks and benefits, and any information required by legal, professional, ethical, and other relevant standards. In both opinion 20HDC02080/20HDC01152 and opinion 20HDC01182, the independent advisor identified that during the initial assessment, client preferences for style of massage and body parts to be massaged should be documented, and that practitioners should explain their scope of practice and clarify the expectations of the treatment and the client's goals.

138. In addition to the body areas to be massaged, there must be a shared understanding of what the massage will involve. For example, massage of a person's hips is not the same as massage of their groin, inner thigh, or close to their genital area, even though massage in those areas may be required to access the muscles of the hips. Likewise, massage of a person's chest is not the same as massage of a person's breasts, even if this is required for lymphatic drainage or to address the muscles underlying the breasts such as the pectoral muscles.
139. The Massage New Zealand Code of Ethics requires practitioners to '[e]nsure informed client consent has been obtained prior to massage', and to '[m]aintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed massage'.
140. The importance of a full and informative consent discussion prior to beginning treatment was discussed by this Office in opinion 20HDC02080/20HDC01152:
- 'Once treatment has commenced, particularly if the consumer has removed clothing and is lying on a table, it may not be easy for the consumer to speak up or remove themselves from the clinical encounter. Providers must be mindful that the power imbalance in the relationship has changed, and consumers who feel disempowered and vulnerable may find it difficult to give feedback or raise concerns at the time. Hence, the importance of a full and informative discussion with the consumer prior to treatment beginning, and open communication during the massage, with clear consent obtained before any variation to the goals of treatment.'
141. Mr A said that he informed all his clients prior to the massage: '[Y]ou are in full control of this massage. You don't like something I'm doing, tell me. If it feels good, tell me. I failed clairvoyance 101. So communication. Any questions?'
142. Mr A said that prior to the massage beginning, he informed Ms B that the massage would include 'check[ing] [her] glutes and hip' whilst Ms B lay on her front, and 'check[ing] hip and abdominals' whilst Ms B lay on her back. There is no mention of the massage involving Ms B's groin or upper inner thigh. While Ms B said that she understood that Mr A was massaging in her groin to reach the muscles in her pelvis, it is also clear from her statements that she had not expected the massage to come so close to her genital region.
143. Regarding the discussions with Ms C, Mr A referred to the client intake form and said that Ms C did not indicate on the form any 'no-go areas'. He said that Ms C had been complaining

of shoulder pain and he considered that this might be related to her rotator cuff muscles and pectoral muscles. Mr A said he told Ms C that the massage would include massage of her upper and lower back, glutes, and hip whilst Ms C lay on her back, and massage of her hip, shoulder, and chest whilst Ms C lay on her front. There is no mention that the massage would involve Ms C's breasts. Ms C said that there was no explanation of 'what [Mr A] was doing and why'.

144. Regarding the care of Ms D, Mr A referred to the client intake form and said that Ms D did not advise him of any areas that she did not want to be massaged. He said that Ms D had been complaining of neck, shoulder, and hip discomfort. Mr A did not provide further information about what was discussed prior to beginning the massage. There is no evidence that Mr A informed Ms D that the massage would involve massage toward the center of her chest, close to her nipples, and close to her genitals in her groin area, nor of any discussion about where on the body Mr A intended to massage Ms D.
145. Regarding the discussions with Ms E, Mr A referred to the client intake form. He did not provide further information about what was discussed prior to beginning the massage. There is no evidence that Mr A informed Ms E that the massage would involve massage of her groin area close to her underwear, nor of any discussion about where on the body Mr A intended to massage Ms E.
146. Regarding the discussions with Ms F, Mr A referred to the client intake form. He said that Ms F had been complaining of pain in her neck, shoulder, lumbar region, and hips. There is no evidence of a discussion about where on the body Mr A intended to massage. Mr A did not state the reason for massaging the side of Ms F's breasts or in between her buttock cheeks and has denied this happened.
147. In opinion 20HDC02080/20HDC01152, the independent advisor said that particularly sensitive areas must be specifically discussed prior to the massage. In particular, the advisor said that while there may be valid reasons for a procedure in the crevice of the buttocks, very clear verbal consent would be required 'due to the invasiveness of this location'. The advisor considered that not seeking appropriate informed consent to apply massage in the crease between a client's buttocks would be regarded as a breach of ethical standards and a severe lapse in good practice.
148. Consent to massage of sensitive areas such as breasts was also considered in opinion 19HDC00788, in which the independent advisor said:

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

the breasts such as pectoralis major. This can be performed with good draping so as not to expose the breasts.’

149. Further, in opinion 20HDC01182 the independent advisor said:

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

150. It is clear that specific informed consent is required for massage of breasts and other sensitive areas. I do not accept, as Mr A has suggested, that it was sufficient that the consumers did not specifically state that they did not want these areas to be massaged. The onus is on the massage therapist to inform the client of where on the body the massage will be performed, what this will involve, and the reasons for massaging in sensitive areas, and to obtain clear informed consent for this prior to beginning the massage. In addition, I note that according to Mr A’s own evidence, he tells all clients that he does not ‘do full body’. In Mr A’s response to HDC he said that this meant he would ‘... be applying specific techniques to specific areas based on their described symptoms’ rather than a ‘general massage of the entire body’. In my view, regardless of his intention, this statement could reasonably lead his clients to believe that certain more sensitive areas of the body (such as breasts and buttocks) would be excluded from the massage, unless specifically discussed and consented to beforehand. I further reject Mr A’s assertion that consent for a ‘chest’ massage includes consent for ‘everything around the rib cage’.

151. It is evident from the accounts of Ms B, Ms C, Ms D, Ms E, and Ms F that when Mr A massaged them in sensitive areas as described, each of these consumers found to this to be, to some extent, unexpected, uncomfortable, and without clear clinical rationale. I conclude that in each of these cases there was insufficient discussion about what areas of the body would be massaged, and in particular no explicit mention that this would involve the sensitive areas in which Mr A massaged each of the respective consumers. It follows that there was no specific agreement by each of the consumers as to massage of these sensitive areas.

Discussions during massage

152. In response to the concerns raised in each of these cases, Mr A said that he tells each client that they need to tell him if they ‘don’t like something [he is] doing’. He said that he was unaware that each of the consumers were uncomfortable, as none of them told him this.

153. I accept that with the exception of Ms E (who complained of pain when Mr A massaged her groin), the consumers in each of these cases appear not to have voiced their concerns to Mr A. However, I am very concerned about Mr A’s statements that he was unaware about the consumers’ discomfort because they did not tell him, and that ‘[he] can’t stop something [he does not] know about’. I consider that this indicates a concerningly casual approach and a worrying lack of accountability for patient consent and safety.

154. Further, I do not consider that it is acceptable to place the responsibility solely on the consumer to inform the massage therapist of any discomfort, and particularly whether they are uncomfortable with massage of sensitive areas. As explained by the independent advisor in opinion 20HDC02080/20HDC01152, '[o]ften a client feels vulnerable and powerless merely by virtue of lying on a table with a practitioner leaning over the top,' and disempowered consumers may have less capacity to voice concerns at the time of a distressing experience. Accordingly, I cannot accept that lack of protest can be relied on as consent.
155. The consumer–provider power imbalance is demonstrated in some of the consumers' statements, in which they say that they did not understand the reason for massage in intimate areas, but they did not speak up because they trusted Mr A's professional expertise.
156. I acknowledge that in Ms B's statement (referred to in paragraph 36 above), she referred to Mr A pushing down on parts of her body to demonstrate what areas of the body he was trying to 'get to'. I accept that this shows that there was some communication between them during the massage about what parts of Ms B's body Mr A was massaging. However, it appears that this communication was prompted by Ms B (noting her statement, quoted at paragraph 38, that she asked Mr A to explain what parts of her body he was touching and why).
157. Regarding the massage of her breasts, Ms C said that 'there was no explanation of what [Mr A] was doing and why', but that given her vulnerable position she trusted that he was acting with professional intent. Ms F said that although she was uncomfortable, she did not complain when Mr A massaged the side of her breasts, buttocks, and in between her buttock cheeks, because she 'assumed there must be a medical reason'. I acknowledge that Ms F also said that Mr A 'often spoke about the massage he was performing', which indicates that there were some discussions during the massage as to the massage sites. However, I do not consider that this evidence demonstrates that Mr A explicitly told Ms F that he intended to massage the side of her breasts, buttocks, and in between her buttock cheeks, noting also her comments that she felt 'uneasy' and 'uncomfortable'.
158. In a previous case (19HDC00788), the independent advisor considered that the failure 'to explain the rationale for massaging the breasts ... contravenes the [Massage New Zealand] code of ethics'.
159. Further, while Mr A has said that he always asks for feedback during a massage, it is not clear what type of feedback he asked for. Mr A said that he checked with Ms B if she was 'okay', to which she replied 'yup'. I do not consider that this amounts to obtaining appropriate ongoing informed consent. Questions about whether a client is 'okay' or 'comfortable' are ambiguous, as they may be misconstrued to be about physical comfort, and clients may not feel able to speak up about their psychological discomfort or distress.

160. As stated by the independent advisor in opinion 19HDC00788:

‘[I]t’s very common for someone who has been overwhelmed and subject to inappropriate touch to under-respond immediately after a massage. They may feel intimidated to speak the truth and awareness of how they feel may not dawn until much later.’

161. In his response to the provisional report, Mr A stated that his clients had the opportunity to raise any concerns without the presence of any potential power imbalance, before the massage and/or in the period of time after the massage and their next treatment. That his clients did not raise concern outside of an appointment, does not establish that his communication was adequate.

162. The obligation is on the provider to ensure that they have obtained informed consent, rather than relying on the consumer to raise an objection or remaining compliant during the massage, or after. I consider that Mr A failed to appreciate the power imbalance inherent in the consumer–provider relationship, particularly in cases such as these where the consumer is a partially naked woman being massaged by a male therapist operating in a clinic on his own.

Standard of massage

163. The Massage NZ Code of Practice states that respect for the consumer requires that their dignity and modesty is maintained. Further, the Massage NZ Code of Ethics states that practitioners will ‘[s]erve the best interests of their clients and provide best practice quality of service’. Practices that are not in the best interests of the consumer or do not respect the consumer’s dignity and privacy, such as inadequate draping or inappropriate communication, are unacceptable in the context of a therapeutic clinical encounter.

Draping

164. The Massage NZ Code of Ethics requires practitioners to provide draping and explanation sufficient to meet the client’s needs for comfort and privacy. Correct use of draping is an essential element of massage that clearly delineates the scope of the massage, maintains some degree of privacy, and gives a sense of security to the consumer.

165. I am concerned that on certain occasions Mr A’s draping techniques were inadequate to ensure the comfort and privacy of the consumer.

166. Ms C described one massage appointment during which the drape covering her breasts slid below her breasts as Mr A stretched her arms over her head. Mr A agreed that he performed this stretch and said that his usual practice would have been to cover the client’s chest with a drape, tucking the drape under the client’s back to secure it. Mr A did not dispute Ms C’s account of the drape slipping from her chest and said that his view was of the floor and his own feet. This implies that he would not have seen the drape slipping if it did occur, although I acknowledge Ms C’s account that Mr A knew the drape had slipped and said: ‘Don’t worry, I’ve seen it all before.’ While I am unable to determine whether Mr A saw that the drape

had slipped, or how he may have responded, on the evidence before me I have no reason to doubt Ms C's account that the drape did slip, leaving her breasts exposed.

167. Further, I note the similarity in Ms D's account that on one occasion Mr A pulled the drape covering her breasts lower than she was comfortable with, so that if the drape had slipped her breasts would have been exposed. Ms D said that this made her feel 'on edge and nervous'.
168. Further, Ms C and Ms F each raised concerns about Mr A's draping whilst he massaged the lower back. Ms C said that often when massaging her lower back Mr A would pull the drape 'right down to expose [her] bottom'. Ms F said that sometimes when Mr A massaged her lower back he would pull her underpants further down than she was comfortable with, and she would pull them back up. In response, Mr A said that when massaging the lower back, he lowers the drape to expose the gluteal cleft without exposing the buttocks. He did not respond to Ms F's comment that he pulled her underwear down.
169. In response to my provisional report, Mr A stated that there is no evidence that he deliberately exposed any consumer's breast, genitals, or buttocks. He also said:

'Nevertheless, in reflecting on this situation and the discussion by the HDC, I understand that more proactive engagement from me with clients on whether there were any accidental or incidental draping insufficiencies would be more likely to identify concerns with comfort and privacy, enable me to address these concerns with the clients, and more likely to result in a better overall experience for the clients.'

170. However, in contrast to this, Mr A also provided the following statement:

'I will never agree with the conclusion that I did not using proper draping techniques, but even when using stand[ard] draping method ... the client may feel uncomfortable by not fault of the draping but something else. Like a scar, bruise, or tattoo that they did think would be visible. Could have even come down to that I was a male and not a female.'

171. I am concerned that in this response, Mr A provides rationale for client discomfort that detracts from any role he may have played — first, suggesting that any client discomfort could be attributed to an individual's personal circumstances (rather than any draping technique attributed to him) and secondly, that discomfort was potentially the result of gender. I note that on previous occasions, Ms G had discussed with Mr A that as a male therapist, extra vigilance with draping was required, and it appears that this did not occur. Having reviewed the information available, and considering Mr A's reflections, I am of the view that the evidence from Ms C, Ms D, and Ms F illustrates that Mr A's draping practices left these three women feeling uncomfortable and insecure about their dignity and privacy being maintained. On this basis, I consider that Mr A's draping techniques were, on these occasions, insufficient to meet the consumers' needs for comfort and privacy.
172. I am also concerned about Mr A's draping of his clients when they turned from front to back on the massage table. Ms C said that when she would roll from her front to her back, Mr A

would stand at the side of the table and hold the drape ‘directly up’ as she rolled over. She said that owing to the position of Mr A’s iPhone in the room (on which he recorded several of the consumers), this practice would have given him ‘full recording view’ of her breasts and the front of her body. I note that Ms B also described Mr A standing on the side of the table and lifting the drape up above his head while she rolled over.

173. In opinion 19HDC00788, the independent advisor said that when repositioning (eg, from front to back), draping should be such that the client’s unclothed body parts are not exposed to the practitioner. I acknowledge that the consumers in this case have said that Mr A held the drape above his head so that he could not see them as they rolled over. However, I am very concerned that the reason for Mr A’s draping practice in this regard may have been related to his recording of the consumers as they rolled over.

Professional boundaries

Suggestion to remove underwear

174. Two of the consumers in this case said that Mr A had asked or encouraged them to remove their underwear. Ms B said that Mr A had asked her to remove her underwear and that he had explained that it was easier for him if the client wore less clothing. Ms C said that when she asked Mr A how much clothing she should remove, he replied: ‘Some people like to get completely naked. I don’t mind what you do.’
175. Both these women chose to keep their underwear on during the massage, as they did not feel comfortable removing it.
176. In response to Ms B, Mr A said that he would not tell a client to take off their underwear. Mr A said that he told all clients:

‘When you undress, undress to your level of comfort. [A lot] of people take off everything, some don’t. I can work th[r]ough any modesty concerns just understand it is a simple equation. More clothes crappier massage, also the oil might stain you[r] clothes.’

177. Massage NZ’s website²⁹ provides guidance for massage consumers about what to expect when ‘[v]isiting a massage therapist for the first time’. The guidance notes, among other things, that the massage therapist will explain what clothes the client should remove, and states: ‘[Y]ou will be expected to leave your underwear on.’
178. Further, regarding accepted practice, in opinion 20HDC02080/20HDC01152 the independent advisor said:

‘Usually for a full body massage a client would leave their underwear ON (“knickers” briefs, underpants, jock straps) and the rest of [the] clothing removed. The reason for

²⁹ <https://www.massagenewzealand.org.nz/Site/about-massage-therapy/visiting-a-massage-therapist-for-the-first-time.aspx>

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

179. I acknowledge that Mr A trained and previously worked as a massage therapist in his home country, and that there may be differences in accepted practice of how much clothing massage clients will wear during a massage. However, as the care provided occurred whilst practising in New Zealand, it is expected that Mr A would observe local accepted practice in this regard.
180. Based on the information on Massage NZ's website and the advice from the independent advisor in opinion 20HDC02080/20HDC01152, in my view it was not in keeping with accepted standards for Mr A to suggest or imply to his clients that they should remove their underwear. Mr A said that his intention was to allow consumers the choice of whether to do so. In response to the provisional opinion, Mr A disputed that he put inappropriate pressure on clients to remove their underwear. He emphasised that he gave his clients the opportunity to make an informed choice about their treatment. He stated: 'That a client could undress to his or her level of comfort is not the same as saying that the client must, ought, or should undress to any particular level.'
181. I accept that some consumers may choose and consent to be completely naked during massage. However, I remain of the view that by telling clients that the massage will be 'crappier' if they leave more clothes on and that many people take their underwear off, this places inappropriate pressure on the client to remove their underwear.

Other communication

182. Several consumers raised concerns about other aspects of Mr A's communication during the massage appointments. Both Ms C and Ms E said that Mr A spoke inappropriately about his wife and child, including that, on Ms C's account, he had alluded to the sexual behaviour of his current and his previous wife, and his sexual attraction toward them. Ms E also said that on occasion Mr A made 'moaning sounds'. With respect to the comments made by Ms C, Mr A said that he saw Ms C as a friend or colleague and that he 'wasn't in a good place' and was seeking her guidance. In response to Ms E, Mr A acknowledged that he spoke about his son but considered that this was not in a negative manner. He denied making moaning sounds and said that at times his breathing may have been laboured owing to the physical nature of the massage techniques he performs.
183. In light of the conflicting accounts, I am unable to determine the specific details of the conversations Mr A had with Ms C and Ms E. Nevertheless, Mr A acknowledges that he was, at the time, experiencing challenges in his personal life, and I am critical that this has permeated his professional life and his communication with these clients. With respect to Mr A's conversations with Ms C, it is clear that for Mr A the lines between friend, colleague, and client became blurred. I acknowledge that colleagues or practitioners and clients may develop close relationships. However, practitioners must remain clear that the purpose of treatment is to benefit the client, and it is their obligation and responsibility to ensure that their communication supports this purpose. As stated in the Massage NZ Code of Ethics, practitioners must 'serve the best interests of their clients and provide best practice quality

of service'. It is unfathomable how discussion about Mr A's wives' sexual behaviour or his sexual attraction to them would be in the best interests of Ms C or her treatment goals, and, in my view, this was not appropriate professional conversation in a therapeutic setting.

184. In addition, the complaint form dated 25 November 2020, completed in response to a complaint made by Ms D, states that Mr A spoke with her about another massage therapist recording their client's faces, and that some people 'looked like [they] orgasmed'. Ms D clarified to HDC that Mr A had not talked about another therapist, but rather had stated that he himself had considered photographing people's faces when they had an orgasm. She said that this 'left her in a state of shock'. In response, Mr A agreed that he spoke with Ms D about the idea of recording people's faces during massage, but he denied mentioning orgasm or sex in relation to this.
185. Given what was documented in the complaint form at the time, I consider it more likely than not that Mr A's conversation with Ms D did mention orgasm. It is also apparent from Ms D's account that she was, understandably, distressed by this conversation. Once again, it is self-evident that the nature of this conversation did not serve the best interests of Ms D or her treatment goals. The Massage NZ Code of Ethics states:

'Practitioners will not ... [be] affiliated with, or employed by, any therapeutic massage business that utilises any form of sexual suggestiveness or explicit sexuality in its advertising or promotion of services, or in the actual practice of its services.'

186. Regardless of whether Mr A had been speaking of taking recordings himself or of this being done by another practitioner, I consider the sexual nature of Mr A's conversation with Ms D to be highly inappropriate in a therapeutic setting.
187. For the reasons outlined above, I consider that Mr A's communication breached appropriate professional boundaries and standards with respect to the information he provided to clients about whether to remove their underwear, and the conversations he had with Ms C, Ms E, and Ms D.

Documentation

188. The Massage NZ Standards of Practice states that practitioners must 'ensure that client records are full, accurate and completed promptly'.
189. It appears that initially Mr A may have asked his clients to complete an intake/consent form. However, Mr A acknowledged that he did not make or update client records on an ongoing basis.
190. In opinion 19HDC00788, the independent advisor said that the care provided in that case departed from accepted standards as the provider had not documented the client body areas not to be touched/massaged nor any possible contraindications from a previous client injury. The independent advisor said that this was a breach of the Massage NZ Code of Ethics and Standards of Practice.

191. I acknowledge the difficulties faced by Mr A with respect to reading and writing, due to dyslexia. At the same time, I consider that keeping accurate and comprehensive client documentation is fundamental to providing an appropriate standard of care, including to ensure that there is mutual understanding of the areas of the body to be massaged, the identified treatment goals, and continuity of care. I consider this to be particularly relevant in this case, as Mr A was holding himself out to be a ‘medical massage therapist’, making documentation of treatment and contraindications related to injuries and other conditions essential. I also note that the lack of documentation has made it difficult to assess some aspects of this case.
192. While I appreciate that keeping client records via standard methods may have been difficult for Mr A, there are now technological options³⁰ available to assist with this. I am critical that Mr A does not appear to have considered or employed other options to assist him in keeping client records.
193. I also note Ms G’s concern that Mr A deleted client appointments after Ms B confronted him about taking a visual recording of her. Mr A has acknowledged that he did this. On this basis, I consider that Mr A deleted client appointments, and I am critical of his actions in this regard.

Conclusion

194. Mr A took non-consensual visual recordings of Ms B, Ms C, and Ms F when providing massage services. In light of the intimate nature of these recordings, I consider that Mr A sexually exploited Ms B, Ms C, and Ms F. In response to my provisional opinion, Mr A disputed that the recordings amounted to sexual exploitation. He stated:

‘Generally understood, sexual exploitation requires a financial or material benefit to be received (see for example Section 98AA(3) of the Crimes Act 1961) and there is no evidence in the record supporting a finding that I received any financial or material benefit in exchange for making the Illegal Recordings ...’

195. I accept that there is no evidence that Mr A received any financial benefit from making the recordings. However, I do not agree that sexual exploitation under Right 2 of the Code requires that the person doing the act receive a financial or similar benefit. The Code itself defines exploitation as including ‘any abuse of a position of trust’. In addition, interpreting Right 2 as requiring a financial or other material benefit to result from an action is inconsistent with previous decisions by this Office, in which providers were found in breach of Right 2 for sexually inappropriate actions in the absence of financial or material benefit.³¹ In this case, Mr A made nonconsensual intimate recordings of Ms B, Ms C, and Ms F. To be clear, I remain of the view that this constitutes sexual exploitation because it is clearly an abuse of a position of trust as a therapeutic provider and, in my opinion, it is more likely than not that the purpose of making those recordings was for Mr A’s sexual gratification.

³⁰ For example, dictation software.

³¹ For example, 09HDC02122 and 06HDC15374.

196. Accordingly, I find that Mr A breached Right 2 of the Code of Health and Disability Services Consumers' Rights (the Code).³² I note once more my severe criticism of Mr A's gross breach of trust and professional boundaries.
197. I consider that Mr A failed to communicate adequately with the consumers prior to their massages. Mr A's communication was inadequate for there to be a shared understanding of the sites to be massaged. A consumer cannot give informed consent without first being adequately informed as to the proposed massage sites.
198. Furthermore, I consider that Mr A failed to communicate adequately with the consumers during the massages, including regarding his intention to massage sensitive areas such as breasts or inner thighs that were not specifically identified on the consent form and/or discussed prior to the massage commencing. This was information that a reasonable consumer in the circumstances of Ms B, Ms C, Ms D, Ms E, and Ms F would need to receive to give informed consent. It is not sufficient to assume that a client has given informed consent because they do not object to specific actions at the time.
199. I therefore consider that Mr A breached Right 6(1)³³ of the Code with respect to the care provided to Ms B, Ms C, Ms D, Ms E, and Ms F. It follows that these consumers were not able to give informed consent to the aspects of the massages involving sensitive areas, and, accordingly, Mr A also breached Right 7(1)³⁴ of the Code.
200. In addition, I consider that Mr A's draping and communication during massage of the consumers failed to comply with accepted professional standards and boundaries. The draping of Ms C, Ms D, and Ms F was inadequate to meet the consumers' needs for comfort and privacy. Further, it was not in keeping with accepted standards for Mr A to suggest or imply to his clients that they should remove their underwear. I also consider that it was highly inappropriate and contrary to the best interests of the consumers for Mr A to discuss matters relating to sexual behaviour and attraction or orgasm with Ms C and Ms D, respectively.
201. In my opinion, Mr A's draping practices and communication as outlined above, in addition to his failure to keep written client records (via means appropriate to his needs and abilities) and his deletion of client appointments, transgressed Massage NZ's Code of Ethics and Standards of Practice. Accordingly, I find that Mr A breached Right 4(2)³⁵ of the Code.

³² Right 2 states: 'Every consumer has the right to be free from discrimination, coercion, harassment, and sexual, financial or other exploitation.'

³³ Right 6(1) states: 'Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive, including ... any other information required by legal, professional, ethical, and other relevant standards.'

³⁴ 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.'

³⁵ Right 4(2) states: 'Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.'

Opinion: other comment

202. At the time of events, Mr A provided massage services from the premises of Ms G's business.
203. I accept that the agreement between Mr A and the Clinic appears to have been an arm's length arrangement, in which Mr A operated independently rather than as an employee of the Clinic. Further, given Mr A's training and experience I consider it was reasonable for Ms G to assume that Mr A would provide services that complied with appropriate standards.
204. However, I note that Ms G has said that in the period in which Mr A practised at the Clinic, she was made aware of some concerns regarding his practice. These included concerns about Mr A's standards of communication, including failure to listen to clients' needs (regarding massage pressure), and standards of documentation and draping practices.
205. I acknowledge that Ms G said that she discussed these issues with Mr A on several occasions. I am not critical of Ms G's actions in this regard, and I commend her for bringing her concerns to the attention of HDC. Nevertheless, I consider that this case serves as a salient reminder of the importance of adequate supervision of employees and independent contractors to ensure that services provided are of an appropriate standard. I note that this is of particular importance in unregulated industries such as the massage industry where practitioners are not mandated to be registered, supervised, and monitored by a professional association.
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Changes made since events

206. Mr A said that he is no longer practising as a massage therapist and does not intend to practise as a massage therapist in future. He reports that he is receiving treatment for his mental health.
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Recommendations

207. I recommend that Mr A:
- a) Provide a written apology to Ms B for taking a non-consensual visual recording of her whilst providing massage services and for massaging of sensitive areas without obtaining appropriate informed consent. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms B.
 - b) Provide a written apology to Ms C for taking a non-consensual visual recording of her whilst providing massage services, for massaging of sensitive areas without obtaining appropriate informed consent, and for failing to meet accepted standards of draping and professional communication. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms C.

- c) Provide a written apology to Ms D for massaging of sensitive areas without obtaining appropriate informed consent, and for failing to meet accepted standards of draping and professional communication. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms D.
 - d) Provide a written apology to Ms E for massaging of sensitive areas without obtaining appropriate informed consent. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms E.
 - e) Provide a written apology to Ms F for taking a non-consensual visual recording of her whilst providing massage services, for massaging of sensitive areas without obtaining appropriate informed consent, and for failing to meet accepted standards of draping. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms F.
208. Mr A has indicated that he does not intend to return to massage practice, and I strongly encourage him to refrain from doing so. However, in the event that Mr A should return to massage practice, I also recommend that he:
- a) Join Massage New Zealand.
 - b) Receive mentoring from a member of Massage New Zealand for a 12-month period from the date of joining Massage New Zealand, with particular focus on informed consent, appropriate draping practices, professional communication, and adequate documentation.
 - c) Complete HDC's e-learning module 'What you need to know about informed consent' (Module 2).
 - d) Attend a training course in appropriate draping practices.
 - e) Attend a training course in effective communication and listening skills.
 - f) Develop a plan to assist with making client notes/documentation (for example, with the use of dictation software).
209. Should Mr A return to massage practice, evidence of recommendations (a)–(f) (paragraph 208) having been completed should be sent to HDC within two months of returning to practice.

Follow-up actions

210. Mr A 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. I acknowledge that Mr A has been criminally convicted of the charges of making intimate visual recordings of his clients. Nevertheless, in my view it is in the public interest to hold Mr A to account for the breach findings discussed in this report,

which were not the subject of the criminal proceedings. These include the failure to provide information that a reasonable consumer would expect to receive to enable them to give informed consent (Right 6(1)); provision of services, including massage of sensitive areas, without informed consent (Right 7(1)); and failure to provide services that complied with professional standards with respect to draping practices, communication standards, and documentation standards (Right 4(2)). In proposing this referral, I have considered the severity of the proposed breaches, the number of consumers affected, and the concern that Mr A has failed to demonstrate that he has accepted responsibility for the failings in his care.

211. A copy of this report with details identifying the parties removed will be sent to Massage New Zealand and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.
212. Following the completion of the Director of Proceedings' process, a copy of this report with details identifying the parties removed, except Mr A, will be sent to Massage New Zealand and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.

Appendix A: Relevant standards

The Massage New Zealand Standards of Practice state:

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

...

Obtain clients’ informed consent before commencing treatment.

...

Use appropriate draping to preserve the dignity and modesty of the client.

...

On first consultation get client to complete and sign a client history information sheet and update where required.

...

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

Assess pressure, tissue tolerance and comfort levels during sessions and communicate with client on an ongoing basis.

...

Ensure that your client records are full, accurate and completed promptly.

...

Respect clients’ rights to privacy and confidentiality.

...

Ensure any problem with one’s own health does not affect clients.’

The Massage New Zealand Code of Ethics states:

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

...

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

...

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

...

Practitioners will not:

— Endanger the physical, mental or emotional health, well-being or safety of a client.’