VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

Administrative division

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| Review and Regulation List | vcat reference No. Z932/2019 |
| CATCHWORDS |
| *Health Complaints Act 2016* (Vic) ss 95(1), 96, 100 and 101 and Sch 2 – *Health Practitioner Regulation National Law (Victoria) Act 2009* – Prohibition orders – Whether applicants engaged in conduct which was in breach of the applicable code of conduct. |

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| first APPLICANT | Cynthia Weinstein |
| second APPLICANT | CDC Clinics Pty Ltd |
| RESPONDENT | Health Complaints Commissioner |
| WHERE HELD | Melbourne |
| BEFORE | Deputy President H. Lambrick |
| HEARING TYPE | Videoconference Hearing |
| DATE OF HEARING | 7 October 2021 |
| DATE OF ORDER and reasons | 30 March 2022 |
| CITATION | Weinstein v Health Complaints Commissioner (Review and Regulation) [2022] VCAT 344 |

# Orders

1. Whilst noting that the prohibition order issued to CDC Clinics Pty Ltd on 28 October 2019 has already been revoked, it is for the purposes of this proceeding set aside.
2. The prohibition order issued to Cynthia Weinstein on 28 October 2019 is set aside.

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| H Lambrick**Deputy President** |  |  |

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| APPEARANCES: |  |
| For Applicants | Ms C Weinstein, in person |
| For Respondent | Mr B Jellis of Counsel |

# Reasons

### Background

1. This case concerns the circumstances surrounding the injection of a permanent ‘filler’ substance known as Oxane at CDC Clinics Pty Ltd (“CDC Clinics”), which is a clinic providing cosmetic services.
2. The treatments were provided to a person who I shall refer to as **KJ**, on 28 January 2017, 11 March 2017 and 22 April 2017.
3. Some months after receiving the treatments, KJ made a complaint to the Health Complaints Commissioner (“the Commissioner”) about the treatments. KJ was unhappy with the outcome of her treatment, alleging that her facial features became asymmetrical and that she had developed a hard unsightly lump below her lower lip.
4. The *Health Complaints Act 2016* (Vic) (“the HCA”) came into force on 1 February 2017 and provides a complaints mechanism in relation to the provision of general health services.
5. The Commissioner is an independent statutory body established under the HCA to receive and resolve complaints about health services in Victoria.
6. Schedule 2 of the HCA contains a General Code of Conduct in respect of General Health Services (“the Code”) which sets out minimum legal standards to ensure general health service providers in Victoria provide their services in a safe and ethical manner.
7. Under the HCA, the Commissioner has power to investigate general health service providers. General health service providers are those who are not required to be registered under the *Health Practitioner Regulation National Law (Victoria) Act 2009* (“the National Law”).
8. A general health service provider means a person who provides a general health service that is not a health profession service under the National Law. A health service is broadly defined under the HCA and includes the types of services alleged to have been provided at CDC Clinics to KJ.
9. It is not contentious that KJ did receive injections of Oxane into her lips and cheeks on 28 January 2017 and 11 March 2017, and into her lips on 22 April 2017. What is contentious is *who* injected KJ.
10. The injections were either given by Ms Cynthia Weinstein or Dr Angela (Hua) Xu.
11. Ms Weinstein was at all relevant times the practice manager of CDC Clinics. Ms Weinstein and CDC Clinics were each ‘general health service providers’ for the purposes of the HCA. Although formerly a dermatologist and cosmetic surgeon, Ms Weinstein surrendered her registration as a medical practitioner in 2010 with an undertaking that she would never apply for registration again. She denies ever giving KJ any injections. She contends that Dr Xu injected KJ.
12. Dr Xu was at all relevant times a medical practitioner contracted by CDC Clinics to perform cosmetic treatments. Dr Xu’s professional conduct is regulated under the National Law.
13. Dr Xu agrees with Ms Weinstein that she administered the Oxane injections to KJ on each occasion.
14. KJ, however, states that Ms Weinstein injected Oxane on 28 January 2017 and 11 March 2017 whilst Dr Xu observed. She states that although Dr Xu injected her lips on 22 April 2017, Dr Xu quickly sought assistance from Ms Weinstein when it appeared something had gone wrong.
15. Whilst Ms Weinstein and Dr Xu agree that Ms Weinstein *did* speak with KJ in her role as practice manager when an issue arose on 22 April 2017, each is otherwise adamant that Ms Weinstein was not directly involved in KJ’s treatment at any time.
16. When the Commissioner receives a complaint, the Commissioner considers whether it or another agency is best placed to deal with it and and/or whether a complaint is to be the subject of a complaint resolution process or a complaint investigation.
17. Section 19 of the HCA allows the Commissioner to divide or concurrently deal with a complaint which may also be the subject matter of a notification, complaint, investigation or referral under the National Law.
18. On 6 March 2018, the Commissioner referred the complaint made by KJ to the Australian Health Practitioner Regulation Agency (“AHPRA”) in accordance with section 26 of the HCA.
19. The complaint read:

Complainant states that she visited provider on 28/1/17 and was injected with cheek and lip fillings by Cynthia Weinstein. During this session she was training another doctor, Dr Xu (female), to perform injections as she has no experience. This resulted in lopsided cheeks and the Complainant returned to provider on 4/4/17 to have the cheeks corrected by Cynthia. She states that she was also persuaded into injecting more filler into her lips. She reports that Dr Xu injected additional Oxane filler into her lips and panicked, Dr Xu allegedly called Cynthia. She states that there is a large lump on lip which has since turned black. She was advised by Cynthia that this is a permanent filler (lasts 10 years) and it needs to be surgically removed. She states that Dr Xu had no experience in injecting fillers when she performed on her. The cheeks still remained lopsided. Complainant attended another clinic to correct cheeks but she was advised that they could only perform eye brow fillers to give the appear[ance] of symmetry. Complainant seeks refund and compensation.

1. The original complaint summary recorded by the Commissioner on 4 January 2018 only references two dates — 28 January 2017 and 4 April 2017. Twenty-eight January 2017 was a date preceding the commencement of the HCA and therefore preceding the jurisdiction of the Commissioner whilst the 4 April 2017 complaint primarily referenced the injections given by Dr Xu, a registered medical practitioner.
2. It was not therefore surprising that the Commissioner referred the complaint.
3. AHPRA accordingly commenced an investigation into the conduct of Dr Xu under the National Law, specifically in relation to Dr Xu’s conduct on 28 January 2017 and 4 April 2017.
4. AHPRA investigated whether Dr Xu improperly injected the fillers and, in doing so, failed to: recognise and work within the limits of her competence and scope of practice; ensure the patient was informed of the material risks associated with the treatment provided; and obtain the patient’s informed consent prior to providing the treatment.
5. Ultimately, on or around 26 November 2018, AHPRA determined to take no further action in relation to Dr Xu and made findings that Dr Xu had obtained proper, clear and informed consent from KJ prior to Dr Xu providing the relevant cosmetic procedures.
6. The reasons stated:

1. … The records suggest that you informed the patients of the nature of the procedures, the risks associated with same and that the use of oxane as a permanent filler was not TGA approved for that purpose. The patient provided written and signed consent for these procedures to occur.

2. According, on the balance of the evidence, it is considered that the patients provided informed consent for these procedures to occur.

3. It is also considered that you were appropriately qualified and experienced to be conducting the cosmetic procedures on the patients at the relevant times.

4. Accordingly, your performance in respect of performing procedures within your scope of practice and obtaining informed consent for such procedures (including informing patients of the material risks of procedures), are considered to be satisfactory in these matters.

1. Although the Commissioner had closed the complaint file, the Commissioner advised KJ that she would consider any request made by KJ to re-open it for concurrent handling.
2. On 22 March 2018, the Commissioner *was* requested by KJ to re-open the file, and accordingly did so.
3. This meant that there were concurrent investigations taking place — the AHPRA investigation described above in relation to the conduct of Dr Xu, and an investigation by the Commissioner into the conduct of Ms Weinstein and CDC Clinics.
4. The Commissioner followed and completed the various decision-making requirements under the HCA before determining to investigate the complaint under section 45(e) of the HCA in relation to Ms Weinstein and CDC Clinics.
5. On 31 January 2019, the Commissioner produced her final report recording her findings in the investigation. Those findings were adverse to Ms Weinstein and CDC Clinics.
6. On the same day, the Commissioner accordingly made prohibition orders under section 95(1) of the HCA in relation to both Ms Weinstein and CDC Clinics.
7. In due course, those prohibition orders were quashed by the Supreme Court.
8. The Commissioner then, on 28 October 2019, made the further prohibition orders the subject of this application.
9. In doing so, the Commissioner found no reason to change her original findings of fact, such that the orders were made based on the same factual matrix and investigation report findings as the 31 January 2019 orders. The Commissioner considered her findings placed Ms Weinstein and CDC Clinics in breach of the various provisions of the Code and justified the making of the prohibition orders.
10. The prohibition orders essentially prohibited Ms Weinstein from providing clinical treatment/advice or instructing or directing the provision of such clinical treatment. CDC Clinics was concurrently prohibited from facilitating or directing same.[[1]](#footnote-1)
11. The prohibition orders differed from the quashed orders by making express provision for Ms Weinstein to engage in non-clinical work as a practice manager.
12. The Commissioner found that it was *Ms Weinstein* who injected KJ with Oxane on 11 March 2017 and, further, that it was inappropriate for Ms Weinstein to have had any direct involvement in the provision of cosmetic treatments to KJ at CDC Clinics. The Commissioner found that Ms Weinstein did not have any reasonable explanation or excuse for injecting KJ with Oxane or being directly involved in the provision of Oxane. She further found that Ms Weinstein failed to advise KJ of the risks associated with Oxane and that it was inappropriate for *anyone* to have injected KJ with Oxane.
13. In making her findings, the Commissioner observed that she did not consider Ms Weinstein to be a credible witness. The Commissioner further observed that she did not consider that Dr Xu could be regarded as an independent witness as she was not satisfied that Dr Xu was independent of Ms Weinstein and CDC Clinics. The Commissioner referenced Dr Xu’s pecuniary interest in maintaining a financial relationship with CDC Clinics. The Commissioner further noted that she did not consider the clinical notes to be reliable. Ultimately, the Commissioner considered that Ms Weinstein’s role at CDC Clinics was considerably more involved than described by Ms Weinstein. She found that Ms Weinstein took an active part in the delivery of cosmetic services at CDC Clinics.
14. Although the Commissioner made further observations as to her view of the need for a permit when injecting Oxane under the skin for cosmetic purposes, the Commissioner did not however make her prohibition orders based on those observations. The Commissioner instead made it clear that she made the prohibition orders for *other* reasons; namely, her findings that Ms Weinstein administered of Oxane in circumstances where she is not a registered medical practitioner.
15. The decision of the Commissioner was the subject of judicial review in *CDC Clinics Pty Ltd & Anor v Health Complaints Commissioner* [2020] VSC 597, which was ultimately dismissed by her Honour Justice Forbes who:
	* + - 1. found that the Commissioner did not misapply her jurisdiction under s 27 of the HCA;
				2. found that the decision to make the prohibition orders was not legally unreasonable; and
				3. rejected the contention that the applicants were not afforded natural justice.
16. Her Honour observed in relation to the parallel findings of AHPRA in relation to Dr Xu that:

49 … AHPRA were considering her qualifications and experience, and the information she provided to the consent obtained from Complainant A [KJ]. Dr Xu herself advised AHPRA that she provided treatment on three occasions. Her response had the effect of conceding to the regulatory authority that her actions on those three dates were relevant to the investigation that it was conducting. In the absence of any contest by Dr Xu regarding the provision of treatment by her to Complainant A [KJ] there was no factual contest for AHPRA to resolve. It then simply investigated pursuant to s 160 of the National Law, whether or not the treatment that Dr Xu says she undertook was unsatisfactory.

1. Through this application Ms Weinstein and CDC Clinics seek review of the prohibition orders made by the Commissioner.

### Findings

1. As I have already mentioned, Ms Weinstein denies ever personally injecting KJ or being directly involved in the treatment of KJ. She contends that it was Dr Xu who administered the injections. Dr Xu agrees with her. KJ does not.
2. There is then a factual contest for this Tribunal to resolve, namely the role, if any, played by Ms Weinstein in KJ’s treatment.
3. On review, this Tribunal stands in the shoes of the Commissioner and makes its own decision.
4. I must therefore consider the material afresh and make what I consider to be the correct and preferable decision based on that material before me. In doing so, I must carefully scrutinise the evidence concerning the issues in dispute and make the correct and preferable decision on the level of proof enunciated by Sir Owen Dixon in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361:

The truth is that, when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality. … Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

1. I must not then make a prohibition order unless satisfied that the general health service provider has contravened the Code contained in Schedule 2 to the HCA; and I am satisfied that it is relevantly necessary to make the prohibition order to avoid a serious risk to:

(i) the life, health, safety or welfare of a person; or

(ii) the health, safety or welfare of the public.

1. The matter proceeded to hearing before me on 7 October 2021. No oral evidence was given by or on behalf of either party.
2. Ms Weinstein did not seek to cross-examine KJ.
3. The evidence before me was therefore the same as the evidence before the Commissioner.
4. Although the material before me was the same as the material before the Commissioner, I have determined the factual contest differently. I observe in doing so that it is often challenging, even when witnesses give evidence and are cross-examined, to determine who is giving the accurate account.
5. I nevertheless accept, for the reasons which follow, that it *was* Dr Xu who treated KJ at all relevant times and not Ms Weinstein. I accept that Ms Weinstein played an appropriate role in her role as practice manager attempting to diffuse a situation but was not involved in the treatment of KJ.
6. I have not been persuaded to the requisite standard that Ms Weinstein *was* involved in KJ’s treatment in any manner which would place her in breach of the Code.
7. I am not satisfied that either Ms Weinstein or CDC Clinics has contravened the Code. I have therefore not been satisfied of the necessity to make the prohibition orders and will set aside the orders of the Commissioner dated 28 October 2019.
8. I turn then to the reasoning behind my findings and, in doing so, set the scene through a brief chronology.

### Chronology

1. 28 January 2017: This marks the first attendance by KJ at CDC Clinics.
2. The Commissioner made it clear in her investigation report that she did not investigate the treatment relating to this date. Nor could she. The 28 January 2017 treatment precedes the commencement of the HCA and cannot form the basis of a prohibition order. It provides, at best, background material. The Commissioner did not have any jurisdiction until the HCA came into effect on 1 February 2017. This consultation was not and could not be included in the investigation by the Commissioner. It could not form any basis for the subsequent prohibition orders.
3. The facts surrounding what took place during the consultation are heavily in dispute. KJ says she was injected by Ms Weinstein on this occasion. Both Dr Xu and Ms Weinstein say that that was not the case and that it was Dr Xu who injected KJ. The dispute is unable to be resolved. Neither the Commissioner nor this Tribunal has jurisdiction to resolve that dispute.
4. For the same reason, any factual dispute surrounding who spoke with KJ on the telephone in the lead up to her first consultation is unable to be determined by this Tribunal.
5. I therefore make no observations about the treatment alleged to have taken place on that day other than to observe that there remains a live dispute which was not and could not be investigated about what took place on that occasion.
6. 1 February 2017: This is of course an important date being the date on which the HCA commenced operation.
7. 11 March 2017: This was the second attendance by KJ at CDC Clinics. KJ contends that Dr Xu was in the room observing whilst Ms Weinstein injected KJ.
8. The contemporaneous clinical notes purport to be made by Dr Xu. Dr Xu says they are her notes. They describe KJ as happy from a previous treatment.
9. Without meaning any disrespect to Dr Xu, I note that the notes are in broken English and contain spelling mistakes. In her dealings with both the Commissioner and AHPRA, Dr Xu had the assistance of a Mandarin interpreter.
10. I note that Ms Weinstein has studied law and was fluent in both of her interviews with the Commissioner and in her written submissions.
11. 22 April 2017: This is the final scheduled appointment — once again, the clinical notes purport to be those of Dr Xu and record ‘not happy with rhs cheek but loves lips’.
12. It is not in dispute that it was Dr Xu who injected KJ’s cheeks and lips on this occasion.
13. It is further not in dispute that Ms Weinstein was not present when the injection was given by Dr Xu to KJ. It is also not in dispute that, during the consultation, Ms Weinstein *was* asked by Dr Xu to come into the room.
14. In her statement, KJ describes Dr Xu becoming concerned and asking to speak with Ms Weinstein. Although she could not hear it, in her statement, KJ surmises about the content of that conversation.
15. 30 April 2017: In an email to the clinic, KJ complains about the treatment received at CDC Clinics. This is her first complaint email. It is a complaint primarily directed at the skill level of Dr Xu. It contains assumptions made by KJ about Dr Xu’s qualifications. The complaint commences with ‘*I really don’t think a beginner should be injecting a permanent product*’ and ends with ‘*[t]he lady injecting was concerned enough to call Cynthia in to show her*’.
16. Although there is a further brief reference to Cynthia (Ms Weinstein), it is ambiguous and takes the matter no further. I note however that if referable to alleged conduct on 28 January 2017, it would be referring to conduct which predates the jurisdiction of the Commissioner.
17. 1 May 2017 email: This email reiterates that Dr Xu called Ms Weinstein in to show her the alleged problem, presumably relating to the 22 April 2017 consultation.
18. Both Dr Xu and Ms Weinstein agree that Ms Weinstein *was* asked to enter the room by Dr Xu to discuss concerns raised by KJ.
19. Although, once again, the 1 May 2017 email makes brief reference to Ms Weinstein’s mistake, it is not at all clear when KJ says Ms Weinstein made the mistake, or what the detail of the mistake alleged to have been made was.
20. More time is however spent by KJ in the body of the email questioning the qualifications of Dr Xu to be injecting.
21. 2 May 2017: The clinical records record a telephone call taken by a member of staff who notes that KJ is upset about a small lump. KJ is encouraged to come into the clinic to see one of the doctors.
22. 11 May 2017: A further email from KJ once again refers to KJ’s view that the doctor who was previously learning (without specifying when) should not have been injecting.
23. The clinical records record a distressed telephone call taken from KJ once again complaining about the qualifications of Dr Xu.
24. 12 May 2017: An email from KJ shows that KJ is distressed about the lump on her lip.
25. Although reference is again made to work performed by Ms Weinstein, it is once again unclear what work or when such work was supposed to have occurred. Whilst once again an inference could arguably be drawn from the email that Ms Weinstein *had* previously injected KJ, it would be impossible to find that such an injection took place at a time over which the Commissioner had jurisdiction. It is clear from the email that a different doctor has, by this time, told KJ that Ms Weinstein is not permitted to inject her.
26. Once again, anger is expressed in the email by KJ about Dr Xu performing injections at all.
27. The clinical records record the unsuccessful attempts made by CDC Clinics staff to call KJ.
28. 16 May 2017: An email from KJ references Dr Xu asking Ms Weinstein (at the 22 April 2017 visit) to look at the lump.
29. 27 May 2017: On this date KJ attended CDC Clinics and video recorded her interactions with staff and Dr Xu.
30. Whilst arguably the video recording suggests that Ms Weinstein may have injected KJ at some time, it is ambiguous as to when and in what circumstances this is said to have occurred.
31. Although during KJ’s recording Ms Weinstein apparently enters and confirms that she has seen the spot complained of by KJ and makes comment about what it may be, it is Dr Xu who immediately engages in the conversation with KJ and advises KJ to take some photos. It is Dr Xu who asks KJ questions about the lump. It is Dr Xu who continues to engage with KJ after Ms Weinstein exits the room.
32. The clinical records which record this visit to the clinic by KJ are prepared by Dr Xu and record Dr Xu as being frightened by the behaviour of KJ on this occasion.
33. 4 January 2018: The complaint (already set out in full at [19]) to the Commissioner is made by KJ. The complaint is made more than nine months after KJ’s final treatment at CDC Clinics.
34. In due course it became clear, as already discussed, that treatment was actually provided to KJ at CDC Clinics on three, rather than two, separate dates.
35. The record of complaint recorded by the Commissioner on 4 January 2018 about the cosmetic services provided at CDC Clinics made no reference whatsoever to the 11 March 2017 consultation. It is unclear then whether KJ’s description to the Commissioner about that date was actually referable to her January, March and April 2017 attendance.
36. The record of complaint recorded by the Commissioner on 4 January 2018 contains:
37. a complaint pertaining to 28 January 2017 over which the Commissioner had no jurisdiction; and
	* + - 1. an allegation against Dr Angela (Hua) Xu, a registered medical practitioner who provides services as an independent contractor at CDC Clinics over whom the Commissioner had no jurisdiction.
38. Although clearly KJ was not pleased and had expressed her displeasure about the treatment received at CDC Clinics in advance of this date, it is clear that KJ’s recollection, as at 4 January 2018, was not a perfect one.
39. 6 March 2018: The Commissioner notified AHPRA of the complaint in relation to Dr Xu. Having done so, the Commissioner advised KJ that the Commissioner had closed the complaint file but would consider a request to re-open it.
40. 22 March 2018: The Commissioner was requested by KJ to re-open the file, which she did. The Commissioner thereafter followed and completed the various decision-making requirements under the HCA before determining to investigate the complaint under section 45(e) of the HCA.
41. April 2018: CDC Clinics provided the clinical records pertaining to KJ to the Commissioner and to AHPRA.
42. 28 June 2018: Dr Xu provided a written response to AHPRA. In the response, Dr Xu says it was she who treated KJ on 28 January 2017 and not Ms Weinstein. She proceeds to detail the treatment she administered in January, March and April 2017.
43. Dr Xu denies that she was trained by Ms Weinstein. She denies having no experience and discusses the treatments she has performed.
44. Dr Xu describes her account of what took place on 22 April 2017 in the following terms:

I asked the nurse to take photos of her. I honestly could not see any asymmetry. The nurse called the practice manager, Ms Weinstein to have a look at the photos. Ms Weinstein likewise could not see any asymmetry. [KJ] then marked the area that she wanted corrected with a white eyebrow pencil to indicate where she wanted the permanent filler placed. Photos were taken after her markings of the area. I agreed to provide extra filler, being Oxane to the areas of the cheeks that she had marked at no charge. I did not charge her, as she was unhappy with the previous injection to this area. She also requested more filler in her lips but paid for the lip filler.

Injecting the cheeks filler proceeded uneventfully. However when I injected the lower lip, I noticed a small area of blanching just below the lower lip. I was unsure what this represented. I then asked the practice manager to have a look, in case she had previously seen this phenomenon. The practice manager entered the treatment room at my request, had a look and then walked out. [KJ] asked the practice manager what was the blanched areas. Ms Weinstein did not answer her. I walked outside the room with Ms Weinstein and asked her what the blanched area represented and whether it was significant. Ms Weinstein said to me that she was not sure.

1. July 2018: The Commissioner provided Ms Weinstein and CDC Clinics with a copy of the formal complaint alleging that, on 28 January 2017 and 11 March 2017, Ms Weinstein injected KJ with Oxane whilst Dr Xu observed and that, on 22 April 2017, Dr Xu injected KJ’s lips but quickly sought assistance from Ms Weinstein when it appeared something had gone wrong.
2. 16 July 2018: Ms Weinstein and CDC Clinics each provide written submissions to the Commissioner. Ms Weinstein denies performing or assisting in the procedures and states that Dr Xu performed each of the procedures.
3. Ms Weinstein further denies that she ever injected KJ. She states that she considers Dr Xu to be very experienced.
4. She dismisses any suggestion of harm from the use of Oxane.
5. 3 September 2018: This is the date of the formal statement of KJ. It is taken some months after KJ’s initial complaint and many months after her final treatment at CDC Clinics. The room for error in these circumstances increase.
6. This is important because, as I have already indicated, anything that took place on 28 January 2017 did *not* fall within the jurisdiction of the Commissioner. On any version of events, it is clear that during each period over which the Commissioner did have jurisdiction, Dr Xu had at least some involvement with respect to the treatments involving KJ.
7. In her statement, KJ spends significant time discussing events which predate the commencement of the HCA. Her discussion includes the date of her first attendance at CDC Clinics on 28 January 2017.
8. Although KJ does discuss her appointment of 11 March 2017, she only devotes five paragraphs to the appointment. KJ says:

24. I returned to CDC on 11 March 2017. I wanted to correct the lopsided appearance of my cheeks and achieve the frontal contours I desired and which had been discussed at my previous appointment on 28 January 2017. … I showed Ms Weinstein the photographs of my desired look again during this appointment.

25. During this appointment Ms Weinstein once again injected what I believed was Oxane directly into both my cheeks. Again, I believe she did not take the time to measure or balance the filler correctly which resulted in my cheeks becoming worse and developing sideways protrusions instead of the desired frontal contours. I became very distressed. I told Ms Weinstein how I felt immediately, during the appointment, however Ms Weinstein once again reassured me that it was just swelling and over time would settle and develop the look I was after.

26. Along with the cheek injections I also received further Oxane injections into my lips from Ms Weinstein during this appointment. At this stage I was happy with the appearance of my lips.

27. I purchased a further 2mls of Oxane on this day at a total cost of $1200.

28. Just like the appointment on 28 January 2017, Dr Xu was in the room the entire time observing while these injections were being performed and Ms Weinstein was the person who was doing the injecting.

1. There are no follow-up contemporaneous texts or emails in relation to this appointment.
2. It is unclear how KJ verified or clarified her dates for the purpose of compiling her statement. Whilst the statement references the three treatment dates, it is very unclear, for example, how she became aware of the March 2017 attendance and recalled precisely what took place on that date or how she differentiated the March 2017 attendance from her January 2017 attendance. I note that the facts of the incorrectly cited 4 April 2017 appointment appear to broadly accord with the facts later attributed by KJ to her 22 April 2017 consultation.
3. In relation to the 22 April 2017 appointment, KJ says that she returned to the clinic because she was unhappy with how she looked. She said that Ms Weinstein agreed to fix the problem. She then describes her unhappiness at it being Dr Xu who performed the treatment.
4. KJ describes Dr Xu becoming concerned and Ms Weinstein attending the treatment room to discuss the concerns.
5. KJ describes thereafter returning to her usual cosmetic therapist for further treatments.
6. KJ documents the subsequent email and telephone contact outlined above with CDC Clinics and gives various explanations for why she could not make it back into the clinic for a doctor to review her complaints.
7. KJ in her emails to CDC Clinics and in her complaint to the Commissioner and in her statement repeatedly criticised and questioned the qualifications and capacity of Dr Xu to perform the procedures.
8. Whilst clearly the factual findings made by AHPRA cannot and do not resolve the factual issue as to whether Dr Xu or Ms Weinstein conducted the relevant procedures, they *do* answer questions as to whether, if she *did* perform the procedures, as she says she did, Dr Xu was sufficiently qualified to perform those procedures; whether she had breached or fallen short in her professional obligations; and whether she had obtained from KJ informed consent. They answer those questions favourably to Dr Xu.
9. In this respect, the findings of AHPRA arguably undercut any inference that Dr Xu was not qualified to perform the procedures and therefore Ms Weinstein needed to do so.
10. They further contradict any inference that Dr Xu did not have the requisite competency levels such that it was necessary for Ms Weinstein to do so.
11. 2 October 2018: In a recorded interview with Ms Weinstein on 2 October 2018, Ms Weinstein denies ever injecting KJ. She denies having had any direct personal contact with KJ before 22 April 2017. Ms Weinstein says that the first contact she remembers with KJ is on 22 April 2017.
12. Ms Weinstein agrees that she does enter consulting rooms. She speaks in general terms, not specifically referable to KJ, of sometimes being called in by doctors in her role as practice manager. She further describes sometimes being asked by doctors at the clinic and patients whether something looks good or not.
13. Ms Weinstein also spends time in the interview discussing her negative perception of KJ and describes saying to Dr Xu to ‘just do whatever it takes’.
14. She is asked to answer questions and enters a lengthy discussion about the use of Oxane within the clinic.
15. 4 October 2018: In a recorded interview with Dr Xu, Dr Xu states that she injected KJ on all three treatment occasions and did not delegate any of the treatments to Ms Weinstein.
16. Dr Xu describes her experience with cosmetic fillers and her training and education in cosmetic medicine.
17. Although Dr Xu agrees that Ms Weinstein may have been permitted to perform treatments under her supervision according to the AHPRA guidelines, she denies that this occurred in relation to KJ. She said that if it had occurred, she would have put it in her clinical notes.
18. Dr Xu said that when KJ attended with the video recorder, she was yelling and aggressive and Dr Xu did not even immediately recognise her.
19. 7 November 2018: Ms Weinstein prepared additional written submissions in which she continued to deny injecting KJ.
20. 26 November 2018: AHPRA determined to take no further action in relation to Dr Xu for the reasons set out above.
21. 18 January 2019: The applicants responded to the draft investigation report and continued to deny that Ms Weinstein provided the relevant treatment to KJ.
22. 31 January 2019: The Commissioner produced a finalised report of the investigation.
23. 28 October 2019: The Commissioner makes the prohibition orders the subject of these proceedings.

#### Observations and factual findings

1. KJ is clear in her statement dated 18 March 2018 that Ms Weinstein injected her on her first two attendances at CDC Clinics and that Dr Xu did so on the third occasion.
2. Ms Weinstein and Dr Xu are equally clear in stating that it was Dr Xu who treated KJ on each occasion.
3. The full truth of the matter will of course only ever be known by KJ, Dr Xu and Ms Weinstein.
4. I am ultimately not satisfied to the requisite degree that it was Ms Weinstein and not Dr Xu who performed the treatments as alleged by KJ.
5. In making this finding, I am mindful that KJ was not required for cross-examination purposes by Ms Weinstein. I am also mindful that her statement contains a declaration as to the truth of its contents. I accordingly have attached great weight to her statement.
6. I further observe that KJ’s statement does provide a somewhat compelling description of what KJ says happened and the dynamics said to be existing between Ms Weinstein and Dr Xu.
7. I am further mindful that, although her statement was not made until sometime after the relevant procedures, she arguably accused Ms Weinstein of having conducted some procedures in the emails sent earlier than this date as set out in the emails above.
8. Conversely, I note that although KJ arguably complained about her final treatment in contemporaneous emails to the clinic, she was uncooperative with the clinic in attempting to address those problems.
9. I further observe that the original complaint made by KJ was made a considerable time after the events complained of. It contains obvious omissions and mistakes. It is clear, for example, that KJ did *not* attend CDC Clinics on 4 April 2017. It is also clear that one of the two dates she specified in her original complaint did not come under the jurisdiction of the Commissioner. The clinical notes show that she did not attend the clinic on the specified 4 April 2017 date at all.
10. Ultimately, I cannot ignore the fact that both Dr Xu and Ms Weinstein have strenuously and repeatedly denied that Ms Weinstein injected KJ.
11. Each did so in written submissions to their respective regulators and in interviews conducted by the Commissioner.
12. Each was given a very significant warning before her interview was conducted, including the warning that it is an offence under the HCA to make a false statement.
13. There is support for the versions given by each of them in the contemporaneous clinical records. Those notes document Dr Xu as the practitioner conducting the relevant procedures on each of the dates referenced in the materials upon which I could find.
14. There is no evidence that the records were changed or falsified.
15. There is some material to suggest that the records could not be changed after the consultation date.
16. The patient records for this consultation were on their face created by Dr Xu. They note the patient attendances and discussions purported to have taken place between Dr Xu and KJ in relation to the use of Oxane. They describe advice given by Dr Xu about non-permanent fillers. It is unlikely that, months in advance of any formal complaint, Dr Xu and/or Ms Weinstein would have felt the need to falsify the records.
17. There is no reason on the face of those notes for me to find that they were written by anyone other than Dr Xu.
18. Dr Xu *says* that they were her notes.
19. Ms Weinstein *denies* they were her notes. There is no basis upon which I could find that they were.
20. Both Dr Xu and Ms Weinstein have always maintained that it was Dr Xu who injected KJ on each of the relevant dates and/or conducted the treatment.
21. Each has maintained her version of events over a lengthy period. Dr Xu has faced her regulator in relation to these matters.
22. Ms Weinstein remains adamant about her version and her desire to have the prohibition orders set aside, despite apparently no longer even wishing to work in the industry.
23. Significantly for my decision, in giving her responses to AHPRA, Dr Xu did so in the face of possible disciplinary proceedings in relation to her conduct as a medical practitioner. She was prepared to have her medical practice regulator examine her clinical notes and professional practice.
24. AHPRA found that (on the basis that it was Dr Xu who provided the treatment) Dr Xu *had* obtained informed consent from KJ and that she was appropriately qualified and experienced to conduct the cosmetic procedures. It found that performance of the procedures was within the scope of her practice.
25. The findings of AHPRA undercut the repeated contentions of KJ that Dr Xu was not qualified to perform the procedures. They further contradict any inference that, because Dr Xu did not have the requisite competency levels, it was necessary for Ms Weinstein to do so.
26. In her interview, Dr Xu gives every impression of being knowledgeable in relation to what is taking place in the practice and her use of Oxane.
27. I am not satisfied that both Dr Xu and Ms Weinstein repeatedly gave deliberately dishonest accounts of what took place involving KJ to their respective regulators.
28. In making my findings, I have not been blind to Ms Weinstein’s disciplinary history.
29. Nor have I been blind to some (minor) inconsistencies in the versions given by each.
30. I have also not been blind to the *possible* power imbalances that may have existed between Ms Weinstein and Dr Xu because of the employment relationship that existed between them and the potential, as contended by the Commissioner, for this to have impacted on what Dr Xu may have been prepared to say.
31. I consider it, however, to be a quantum leap to find that Dr Xu as a registered health practitioner, without any known disciplinary history, was prepared to repeatedly lie to each of the regulators involved in this matter in some alleged misguided endeavour to support Ms Weinstein or CDC Clinics. To do so would be to seriously risk her registration.
32. I consider it to be a further quantum leap to suggest that she would also potentially open herself up to the threatened compensation being sought by KJ if she had not herself been responsible for the treatments provided.
33. Whilst given her disciplinary history it is not surprising that the Commissioner took a more sceptical view of Ms Weinstein, once again I cannot make the quantum leaps asked of me.
34. Ms Weinstein’s is not a perfect background. Arguably relevant to the matters currently before me, in 2016 she was found guilty of recklessly holding herself out as a registered medical practitioner and CDC Clinics was found guilty of holding Ms Weinstein out as a registered medical practitioner.
35. This works two ways. One, as the Commissioner seemed to find, it could be said that she has a propensity to act how she likes in disregard of the regulatory regime. Conversely, as contended by Ms Weinstein, it could be said that Ms Weinstein was placed on high alert to act within the confines of what she is able to do as a health service provider (as opposed to a registered medical practitioner).
36. Hopefully her background would indeed have made her more cautious about again overstepping boundaries, particularly in light of her stated desire to become a legal practitioner. Because I am not satisfied that Ms Weinstein injected Oxane, I further do not propose to enter the debate about the use of Oxane and its ‘off-label use’, particularly where opinion remains divided and the Commissioner’s prohibition orders was not ultimately based on this.[[2]](#footnote-2) Its use appears to be very much an open book.
37. I finally observe that whilst an eyebrow may arguably be raised about the extent to which medical practitioners at CDC Clinics delegated or deferred to Ms Weinstein, the prohibition orders were not made in relation to her general conduct which did not form part of the investigation. They were made in relation to the specific factual matrix of this case.

### Conclusion

1. Whilst noting that the prohibition order issued to CDC Clinics on 28 October 2019 has already been revoked, it is for the purposes of this proceeding set aside.
2. The prohibition order issued to Ms Weinstein on 28 October 2019 is set aside.

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| H Lambrick**Deputy President** |  |  |

# Appendix A

### Prohibition Order: Cynthia Weinstein

**PROHIBITION ORDER**

***HEALTH COMPLAINTS ACT 2016***

**Section 95**

This Prohibition Order is made pursuant to section 95 of the *Health Complaints Act 2016* (**Act**).

The Health Complaints Commissioner (**Commissioner**) has made this Prohibition Order because the Commissioner has completed an investigation under Part 4 of the Act and is satisfied that:

* + - the general health service provider named below has contravened a code of conduct applying to the general health service, and
		- it is necessary to make this Prohibition Order to avoid a serious risk to the health, safety or welfare of the public.

|  |  |
| --- | --- |
| **Name of the general health service provider on whom the Prohibition****Order is imposed:** | Cynthia Lea Weinstein of Toorak in the State of Victoria |
| **Date this Prohibition Order is made:** | 28 October 2019 |
| **Date on which this****Prohibition Order expires:** | Until varied or revoked by order of the Commissioner. |
| **Effect of this Prohibition Order:** | Cynthia Weinstein must not:a) provide clinical treatment to any person;b) provide clinical advice to any person with respect to that person's clinical treatment;c) assist any person (regardless of whether that person is registered under the *Health Practitioner Regulation National Law (Victoria) Act 2009*) in providing clinical treatment to another person; ord) direct or instruct any person (regardless of whether that person is registered under the *Health Practitioner Regulation National Law (Victoria) Act 2009*) as to the clinical treatment provided, or to be provided, to another person.For the purpose of this Prohibition Order, clinical treatment includes, but is not limited to:a) medical procedures;b) surgical procedures; andc) the administration of cosmetic injections. |

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| --- | --- |
|  | For the purpose of this Prohibition Order, clinical treatment excludes the usual duties of a:a) practice manager - being the non-medical clerical and administrative aspects of managing a medical practice; andb) laser safety officer. |

This Prohibition Order takes effect on the service of the Prohibition Order on the general health service provider to whom it applies.

This Prohibition Order will be published in the Victoria Government Gazette and on the website of the Health Complaints Commissioner at [www.hcc.vic.gov.au](http://www.hcc.vic.gov.au).

**Karen Cusack**

**Health Complaints Commissioner**

### Prohibition Order: CDC Clinics Pty Ltd

**PROHIBITION ORDER**

***HEALTH COMPLAINTS ACT 2016***

**Section 95**

This Prohibition Order is made pursuant to section 95 of the *Health Complaints Act 2016* (**Act**).

The Health Complaints Commissioner (**Commissioner**) has made this Prohibition Order because the Commissioner has completed an investigation under Part 4 of the Act and is satisfied that:

* + - the general health service provider named below has contravened a code of conduct applying to the general health service, and
		- it is necessary to make this Prohibition Order to avoid a serious risk to the health, safety or welfare of the public.

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| **Name of the general health service provider on whom the Prohibition****Order is imposed:** | CDC Clinics Pty Ltd (ACN 109 209 921) of Level 1,1155 High Street, Armadale in the State of Victoria (**CDC**). |
| **Date this Prohibition Order is made:** | 28 October 2019 |
| **Date on which this****Prohibition Order expires:** | Until varied or revoked by order of the Commissioner. |
| **Effect of this Prohibition Order:** | CDC must not direct, instruct, or allow Cynthia Weinstein to:a) provide clinical treatment to any person;b) provide clinical advice to any person with respect to that person's clinical treatment;c) assist any person (regardless of whether that person is registered under the *Health Practitioner Regulation National Law (Victoria) Act 2009*) in providing clinical treatment to another person; ord) direct or instruct any person (regardless of whether that person is registered under the *Health Practitioner Regulation National Law (Victoria) Act 2009*) as to the clinical treatment provided, or to be provided, to another person.For the purpose of this Pro.hibition Order, clinical treatment includes, but is not limited to:a) medical procedures;b) surgical procedures; andc) the administration of cosmetic injections. |

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|  | For the purpose of this Prohibition Order, clinical treatment excludes the usual duties of a:a) practice manager - being the non-medical clerical and administrative aspects of managing a medical practice; andb) laser safety officer. |

This Prohibition Order takes effect on the service of the Prohibition Order on the general health service provider to whom it applies.

This Prohibition Order will be published in the Victoria Government Gazette and on the website of the Health Complaints Commissioner at [www.hcc.vic.gov.au](http://www.hcc.vic.gov.au).

**Karen Cusack**

**Health Complaints Commissioner**

1. The full details of the prohibition orders are contained in Appendix A to these reasons. [↑](#footnote-ref-1)
2. The investigation report discussed the *Guidelines for registered medical practitioners who perform cosmetic medical and surgical procedures* issued by the Medical Board of Australia on 1 October 2016. The guidelines talk to the best interests of the patient, the requirement for a medical practitioner to have the appropriate training expertise and experience and outline the requirements for patient consent. Thereafter the report considered a publication issued by the Department of Health and Human Services Victoria titled ‘Protecting patients from adverse health effects caused by injectable cosmetic procedures – Advice for health practitioners’ (26 July 2018). This of course post-dated the treatments the subject of these proceedings. The investigation report further made reference to the advice in a letter dated 13 September 2018 from the Australasian Society of Aesthetic Plastic Surgery to the Commissioner that injecting permanent fillers in silicon is ‘*inappropriate and unsafe*’ and ‘*off-label use of Oxane to the face in cosmetic procedures is inappropriate, unsafe and not indicated*’. The report went on to discuss appropriate alternatives.

 I note however that AHPRA, in correspondence to Dr Xu dated 30 August 2019, said:

[7] It is considered that the administration of Oxane for cosmetic filler purposes appears to be an unsettled area of law. Dr Xu provided a substantial amount of literature and research to support her position that Oxane is appropriate for permanent filler cosmetic injections, and appear to be compliant with AHPRA’s position on off label use of cosmetic products from May 2015 and there must be medical evidence in the relevant literature to support the off label use, and the off label use must be disclosed to the patient and consent obtained for the off label use.

[8] However, Dr Xu’s interpretation that she does not require a permit appears to be contrary to the DHHS’ position on the matter; however, this could be subject to interpretation. [↑](#footnote-ref-2)