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Free Speech Union

Attention: Jonathan Ayling – by email jonathan@fsu.nz

Dear Free Speech Union

**Genspect – Countering Hate Speech Aotearoa complaints to RNZCGP and others**

**Introduction and Summary**

You have sought my opinion on whether a doctor speaking at the Genspect online conference in New Zealand on 9 November 2023 would be in breach of the ethical responsibilities of a doctor, so that a complaint to that effect may be upheld by the Medical Council, and a finding made of professional misconduct likely to bring discredit to the profession (s 100(1)(b) of the Health Practitioners Competence Assurance Act 2003).

The issue arises because of recent communications by Paul Thistoll, of the newly formed Countering Hate Speech Aotearoa, to various medical professional bodies.

Mr Thistoll (a) urges the Royal New Zealand College of General Practitioners to advise their Fellows that an anonymous appearance to speak at the Genspect event would be unethical; and (b) asks a list of professional bodies with members trained in medicine, psychiatry, psychology, and counselling, to condemn the Genspect event and to tell their members that attendance at or speaking at the conference would be a violation of their professional ethics.

For the reasons below, my opinion is that a doctor speaking at the Genspect conference, intending to contribute to an evidence-based discussion on the issue of treatment of childhood gender dysphoria, would not be in breach of any ethical standard or guilty of professional misconduct likely to bring discredit to the profession. Likewise, my view is that any health professional attending the conference to listen or contribute on the same basis would not be in breach of any ethical standard.

I note that I have assisted you and other parties in respect of matters involving Speak Up for Women, and I have other instructions from people and organisations who would be described as gender-critical. However, my role in preparing this opinion is to assess the complaints made by Mr Thistoll, and the issues arising, from an objective and legal perspective, which I have done. My personal views, or the view of other clients, are not relevant to this issue.

**Discussion**

*The Countering Hate Speech Aotearoa position*

To the Royal New Zealand College of General Practitioners, Mr Thistoll's assertion is that Genspect is an organisation that promotes hate speech against transgender people. He says that their goal is ostensibly to promote gender exploratory therapy for gender dysphoria-presenting teens but in reality their leadership have all been caught talking about how their true goal is to prevent all transitioning. He says that while he can, he doesn't need to show that Genspect is a hate speech organisation to ask the College to proactively act. He complains that if a doctor speaks anonymously, he cannot identify them to complain about them, and that the purposes of anonymity can only be to make remarks that are highly prejudicial to trans people and their healthcare, and to avoid disciplinary action for breach of ethics.

To the list of professional bodies, he describes the Genspect event as a transphobic conference. He says that Genspect promotes gender-exploratory therapy – explained as a therapeutic practice with a very low evidence base that falls well outside the mainstream of gender-affirming practises, and is highly likely to be prohibited under the Conversion Practises Prohibition Legislation Act 2022. He is distressed that one speaker has a long history of making gender-critical and highly transphobic remarks, and recently ran as a list candidate for the Women's Rights Party, and that a Fellow of the RNZCGP was going to speak anonymously with a gender-critical Australian psychiatrist who recently lost her position because of her transphobic beliefs.

*The Genspect conference*

I have not consulted widely on the stated aims and practices of the various Genspect organisations that exist in various countries.

The New Zealand conference is promoted as discussing Gender Framework, analysis of affirmative guidelines, policy, and treatment, exposing myths about gender in early Māori society, how schools contribute to gender distress, how families and parents are impacted and responding, and the psychology behind widespread institutional capture. There is reference to a trans-Tasman discussion between Australian psychiatrist Dr Jillian Spencer and a New Zealand doctor on gender treatments for children.

Genspect New Zealand says it promotes respectful and open discussions regarding sexuality and gender in the light of current scientific and clinical evidence, and will address questions such as: How strong is the evidence base for gender transition in NZ? Do children have the capacity to consent to gender treatments? Do we do more harm by giving or withholding treatment? Are puberty blockers safe and reversible?

In correspondence with you, Jan Rivers of Genspect New Zealand has advised:

> Genspect's purpose is a healthy approach to sex and gender. It has members in 26 countries including professionals, trans people, detransitioners, and parent groups who work together to advocate for a non-medicalised approach to gender diversity. It was founded in

> 2021 and its rapid growth is testament to the international concern about medicalising gender non-conforming children. The object of the conference is to advocate a precautionary approach. Research shows that social transition of children and adolescents to the opposite sex is not a neutral act, and this often leads to a prescription for puberty blockers. Treatment with puberty blockers then invariably lead to cross sex hormones and surgical interventions. However strong evidence shows puberty resolves feelings of gender incongruence for the majority of young people. Social transition and puberty blockers – although considered safe and reversible in New Zealand (puberty blockers are currently undergoing a systematic review process by the Ministry of Health) - reinforce the likelihood of concretising the mistaken idea of 'being in the wrong body' in the children and adolescents who receive them.

*Other indicators of the Genspect conference speakers and content*

The Royal Australian and New Zealand College of Psychiatrists position statement on Gender Dysphoria (last updated August 2021) says:

> There are polarised views and mixed evidence regarding treatment options for people presenting with gender identity concerns, especially children and young people. It is important to understand the different factors, complexities, theories, and research relating to Gender Dysphoria.

A recent decision of the Media Council notes that:

> Coverage of the debate about the treatment of gender dysphoria in children is slightly different [to the more general topic of media coverage of transgender issues]. This is a sensitive, complicated and important topic, where there appears to be evolving scientific debate. The Council rejects Stuff's argument that it is analogous to climate change. In the case of climate change there is an overwhelming consensus of scientific opinion, whereas on the issue of childhood gender dysphoria there seems to be a variety of genuinely held and differing opinions internationally.[1]

The RANZCP position statement, and the decision by the Meia Council suggest that differing opinions about treatment of childhood gender dysphoria can be discussed in a responsible manner at a conference for that purpose, without there necessarily being "hate speech" or professional misconduct likely to bring discredit to the profession.

Mr Thistoll refers to speakers being gender-critical, in a way which implies that speech by such speakers will necessarily be hate speech, and listeners guilty by association.

In the United Kingdom an Employment Appeal Tribunal has held that gender-critical views are worthy of respect in a democratic society[2], and in New Zealand the High Court has said that a prominent gender-critical group, Speak Up for Women, could not rationally be called a hate group[3].

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[1] https://www.mediacouncil.org.nz/rulings/ruling-by-the-new-zealand-media-council-in-the-complaint-of-fern-hickson-against-the-nelson-mail/?fbclid=IwAR16yTzgp9gi47idKHthT-HyaJCRMrbc1Pf0pDSX_o63PgutEdznQY7XlXo

[2] *Forstater v CGD Europe and Ors* UKEAT/0105/20/JOJ 10 June 2021

[3] Whitmore v Palmerston North City Council [2021] NZHC 1551 (25 June 2021)

These decisions underpin my opinion that gender-critical views can be held and expressed by health practitioners attending a conference, without those practitioners necessarily being guilty of hate speech amounting to professional misconduct likely to bring discredit to the profession.

Mr Thistoll says that Dr Jillian Spencer, a speaker at the conference, recently lost her position because of her transphobic beliefs.

Some media sources on this issue reflect the Media Council observation above, that there are a variety of genuinely held and differing opinions internationally. Many reports indicate that Dr Spencer's views on treatment are outside those followed by her employer. I did not discover any further reason for Dr Spencer leaving her employment.

Mr Thistoll suggests that gender-exploratory therapy is highly likely to be prohibited under the Conversion Practises Prohibition Legislation Act 2022. In my opinion this is incorrect.

One of the stated purposes of this Act is to promote respectful and open discussions regarding sexuality and gender. Exploratory therapy was referred to by MP Ginny Anderson (in Committee) during the progress of the Bill. She said:

> [P]eople who are struggling with their sexuality or gender should be able to receive the support they need, including that ability to explore their identity or to reconcile their faith and sexuality. However, rather than being supportive or exploratory, conversion practices are external attempts to achieve a predetermined outcome of changing or suppressing a person's sexual orientation, gender identity, or gender expression.

This reference to exploratory treatment being outside the scope of the Bill is supported by the wording of the Act which provides that a conversion practice is any practice, sustained effort, or treatment that—

(a) is directed towards an individual because of the individual's sexual orientation, gender identity, or gender expression; AND

(b) is done with the intention of changing or suppressing the individual's sexual orientation, gender identity, or gender expression.

In my view this definition does not include a practice or treatment that has exploration as its main focus. Importantly, Mr Thistoll's preferred affirmative approach to gender dysphoria is not mandated by the Act. The Act places no obligation on a health professional or counsellor to affirm a child or young person asserting a transgender identity. In the absence of such an obligation, an exploratory approach would seem to be in keeping with the stated purpose of the Act, and not prohibited by it.

*Ethical standards for doctors*

The relevant ethical standard for conduct related to the practice of medicine but occurring outside a specific healthcare setting is in the Medical Council of New Zealand standard titled "Unprofessional behaviour" (attached). It states:

Unprofessional behaviour outside of the healthcare setting

12 Patients and the public generally have a high trust in and regard for doctors. Unprofessional behaviour, whether in a professional or personal setting, can damage the trust and confidence that patients have in their doctor, and how the public perceives the medical profession.

13 As a doctor, you should ensure that at all times you act in a way where your conduct does not adversely affect the public's trust and confidence in the medical profession.

The recent District Court decision of *Canaday v The Medical Council of New Zealand*[4] considered whether a doctor's public statements about the Covid-19 vaccine, unrelated to any existing clinical responsibilities, cast doubt on the appropriateness of his conduct in his professional capacity. I see some similarities between that scenario and a doctor attending the Genspect conference to discuss a different approach to gender dysphoria in children to that prevailing in medical practice in New Zealand. In each situation a doctor is associating themselves with a challenge to a status quo.

Another recent decision by the Health Practitioners Disciplinary Tribunal is also relevant. In *A Professional Conduct Committee appointed by the Nursing Council of New Zealand v Sarai Iva Tepou*[5] the Tribunal considered the conduct of a nurse of Tokelauan and Tuvaluan descent who was active on social media and gave a radio interview counselling strongly against the Covid-19 vaccine for a variety of reasons, including a lack of scientific evidence in support of the vaccine, and the suggestion that the vaccine would alter a person's DNA and so whether they were 100% human and still in the image of God. There was a strong theme in her messages of distrust for her nursing colleagues.

Both decisions referred to the right to freedom of expression, and the balancing of this against the purpose of the disciplinary powers, which is to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions.

In *Canaday* it was noted that the doctor was intending to contribute to a legitimate public debate on the vaccine issue. Nevertheless, the District Court said that good intentions could not determine the safety to the public issue which the one before the Court (on an appeal of an interim decision to suspend the doctor's practising certificate).

In *Tepou* it was relevant that the nurse made outlandish and unsubstantiated claims in her radio interview. Efforts to incorporate evidence-based reasoning on other occasions were in her favour.

The concerns about Dr Canady were that his views contradicted the best (then) available scientific evidence and may seek to actively undermine the (then ongoing) national immunisation campaign, with resulting risks to the health and safety of the wider public. It was said his experience and status as a doctor would incline people to give weight to his view. The Medical Council's assessment was that his views lacked balance, contradicted the best available scientific evidence and appeared to be calculated to undermine the national immunisation campaign. Dr Canady said he wasn't practising

[4] [2022] NZDC 4436
[5] HPDT NO 1331/Nur22/556P

medicine, the opinion that his views were wrong was up against the history of time bringing new evidence to medical issues, and that at least he should be allowed to discuss his concerns.

The District Court was satisfied that Dr Canady speaking publicly about the vaccine issue was conduct in his professional capacity, because he was speaking as a doctor. It noted the potential reach and effect of his public statements, including that people choosing not to have the vaccine were also having an effect on the health of other people in the community.

The Court said that there was a sufficient evidential foundation for the Medical Council to have concluded that Dr Canaday's conduct cast doubt on the appropriateness of his conduct in his professional capacity, which had given rise to a potentially significant risk of increased vaccine hesitancy and/or scepticism, which in turn has potentially far-reaching consequences for the health of the New Zealand public in the midst of a public health emergency. The issue was then whether interim suspension of Dr Canaday's practising certificate (until the full case could be heard) was a fair, reasonable and proportionate response to the identified risk.

In respect of the right to freedom of expression, the Court said that that right may sometimes have to yield in the context of professional responsibility, if that would be a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. Because the risk of harm to the public through widespread non-vaccination, Dr Canaday's freedom to speak was said to come with a very significant associated professional responsibility for accuracy and balance.

The result was that Dr Canaday was allowed to retain his status of a doctor with a practising certificate, pending a full hearing, because he was going to continue to speak on these issues, with or without it.

*Shelton v The Medical Council of New Zealand*[6] was heard at the same time as *Canaday*. As a GP Dr Shelton had advised his patients, and had publicly told others, that his view was contrary to that promoted by the government, and the Covid-19 vaccine should not be taken. His defence to suspension was that there was a genuine conversation to be had about the vaccine, and he should be able to continue to practice medicine while genuinely holding a minority view.

Dr Shelton was willing to advise patients that others had different views to him on this issue, and to give them the name of another doctor known to be able to provide conventional advice. He was not willing to refrain from public statements. He also retained his right to practice while the complaints against him were investigated.

In *Tepou* there was no defence from the nurse charged. In her absence she was suspended from practice for 12 months and ordered to undertake education prior to her return to practice.

Each of these three cases arose from the unique circumstances of the Covid-19 pandemic, and the concern for public health if the government vaccination plan was undermined. Notwithstanding the Medical Council's serious concern about significant harm to a large number and wide range of people, the two doctors wishing to challenge the government position in an evidence-based way were permitted to keep speaking, albeit with undertakings to acknowledge theirs were not the majority

[6] [2022] NZDC 4582

views when they spoke to patients or where their status as doctors would have an impact on the public hearing them.

Applying the principles in these cases to the current situation, it is my opinion that a doctor attending the Genspect conference to discuss treatment of childhood gender dysphoria, including by advocating on evidence-based grounds for caution in affirmative treatment, would not be in breach of any ethical standard or guilty of professional misconduct likely to bring discredit to the profession. The bringing of discredit to the profession is an objective test, not one dictated by complainants.

Where speech to the public on a particular topic carries a risk of harm, doctors have a significant professional responsibility for accuracy and balance.

Obviously, and in contrast to the speakers on the Covid vaccination issue, any potential for 'harm' in a gender dysphoria context is limited to the small part of the population with gender dysphoria. There is no risk to the physical health of the wider population if one or more listeners (professional or individual) is influenced by a speaker at a conference to prefer a treatment regime which may ultimately be found to be less effective than another. However, in my view, a doctor speaking about these issues to a public audience may be wise to acknowledge (if the audience cannot reasonably be expected to know) that there are different views about the best treatment for childhood gender dysphoria. Opinions should be advanced supported by evidence rather than, for example, religious or political beliefs.

I consider there is more scope for speculation and inquisitiveness at a conference such as the Genspect one, where an educated audience is alert to the present affirming position, and that the conference is to discuss alternatives. The professional responsibility for accuracy and balance that applies to public messages, drawing on the speaker's status as a doctor, would not be in play to the same extent in a closed environment. However, even in this environment, reference to matters such as religion, or discriminatory or derogatory comments, could adversely affect the public's trust and confidence in the medical profession.

Complaints about breaches of such responsibilities will be dealt with under the statutory scheme for professional discipline. Because this is a State-imposed scheme, the rights of individuals under the New Zealand Bill of Rights Act 1990 will prevail subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

I hope this opinion is useful. Please advise if further assistance is required.

Yours faithfully

**Nicolette Levy KC**