



Health and Disability Commissioner  
*Te Toihau Hauora, Hauātanga*

## **Rights versus responsibilities**

It is inevitable that from time to time tensions may arise for healthcare professionals about their moral duties as they relate to clinical practice. This article considers how such ethical dilemmas have been negotiated, first with regard to conscientious objection (CO) to providing a particular service and, secondly, with regard to doctors expressing views about COVID-19 and the COVID-19 vaccine that are not in accord with accepted, evidence-based medical practice.

In 2017, *New Zealand Doctor* (13 December 2017) published an article 'Conscientious objection in healthcare: for and against' in which Angela Ballantyne and Janine Penfield Winters provided opposing opinions on the issue of CO in health care.

Penfield Winters argued that doctors should have the option to invoke CO when they believe a treatment or referral to a service is not beneficial to the patient, even when that belief is based on personal values. However, she said invoking CO is not acceptable when the objection is based on a characteristic, or past action of the patient. She considered that CO is defensible in situations where healthcare professionals are asked to provide treatments or referrals they believe will not benefit the patient or will cause harm.

In contrast, Ballantyne argued that allowing CO introduces an element of randomness into medical practice as the care provided depends on the doctor the patient sees that day. She stated that the patient should have the right to predictable, consistent, and fair health services and noted that Aotearoa New Zealand has an explicit commitment to patient-centred care in the Code of Health and Disability Services Consumers' Rights (the Code). She noted that the debate about CO is about the competing values of diversity and medicine versus consistent standards of patient care. She said that doctors should not be allowed to refuse to pass on information, such as vaccination options.

Recent New Zealand legislation has resolved this quandary in part, by permitting health professionals in certain situations (namely assisted dying, and abortion/sterilisation and contraception) to refuse to provide services. Section 14 of the Abortion Legislation Act 2020 provides that with regard to contraception, sterilisation, abortion, and information or advisory services about whether to continue or terminate a pregnancy, the person requested to provide the service must tell the patient at the earliest opportunity of their CO and inform the patient how to access the contact details of the closest provider of the service requested. Employers providing abortion services are obligated to accommodate an employee's CO, unless doing so would unreasonably disrupt their provision of health services.

Similarly, in the End of Life Choice Act 2019, section 8 provides that a health practitioner is not under any obligation to assist any person who wishes to receive assisted dying services if

the health practitioner has a CO to providing that assistance. If the attending medical practitioner has a CO, they must tell the person that they have a CO and inform them of their right to ask the SCENZ group for the name and contact details of a replacement medical practitioner. The SCENZ Group maintains lists of medical and nurse practitioners and psychiatrists who are willing to deliver assisted dying services.

During the COVID-19 pandemic, several health professionals had views about COVID-19 and/or about the COVID-19 vaccine that were not in accord with accepted medical practice. Some made public statements about these views and advised patients against receiving the vaccine.

Section 14 of the New Zealand Bill of Rights Act provides: 'Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.' Section 5 provides that this freedom is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In *Canaday v Medical Council of New Zealand* [2022] NZDC 4436 with regard to the public statements made by Dr Canaday, Judge Harrop held that Dr Canaday was entitled to express his views, and those listening to him were entitled to seek out and receive them. However, Judge Harrop noted that Dr Canaday was a medically qualified speaker who expressly relied on his qualifications and experience to express and emphasise the validity of the points he made, as being based on 'the actual science' and that was, by inference, in contrast with the majority view about the COVID-19 vaccine response. The judge noted that the statements were made during a public health emergency, in circumstances where those who were uncertain about whether to get vaccinated would be likely to be especially vulnerable to being misled. He said that individual decisions not to get vaccinated created a serious risk of harm to the individual in question, and to those with whom they came into contact and the wider community, hospital, and healthcare systems. Judge Harrop stated: 'This means that with Dr Canaday's freedom to speak, comes a very significant associated professional responsibility for accuracy and balance. In terms of s5, significant limitation is justified.'

HDC received multiple complaints about a GP who advised patients that he could not support the COVID-19 vaccination (21HDC01972). He used the medical practice's patient list to send an unsolicited text message to around 600 patients and advised others in person against vaccination. The source of information to which he directed patients was the NZDSOS website.

The Commissioner found that the services the GP provided to the patients who received the text message did not comply with legal, professional, and ethical standards. The text messages were contrary to the 'unprofessional behaviour' and the 'use of the Internet and electronic communication' Medical Council standards. The GP's failure to provide balanced information to patients was contrary to the 'Doctors and complementary and alternative medicine (CAM)' standard, the guidance statement 'COVID-19 vaccine, and your professional responsibility', and the publication *Good Medical Practice*.

The Commissioner said that the text messages potentially had the effect of reducing the patient uptake of the COVID-19 vaccination and could have resulted in poorer health outcomes for the patients who received the message. The GP was found to have breached

Right 4(2) of the Code regarding nine complainants — namely, the GP did not provide services that complied with legal, professional, ethical, and other relevant standards. For face-to-face consultations, in one case adverse comment was made about the GP's failure to give the patient balanced and accurate information in order for her to make an informed choice about whether to be vaccinated. Regarding another patient, the Commissioner found that the patient was not provided with the information that a reasonable consumer, in his circumstances, would expect to receive, and so the GP breached Right 6(1) of the Code. The GP also did not provide that patient with services that complied with Right 4(2) of the Code.

The Commissioner stated that the GP should have made it clear that his views were not supported by most doctors and explained the basis for his disagreement with the generally accepted views, so that patients could understand his reasoning. In addition, he should have directed patients to other sources of information that outlined the likely effectiveness of the vaccine according to recognised peer-reviewed medical publications, notwithstanding his beliefs.

In conclusion, doctors are entitled to hold and express opinions, subject to maintaining legal, professional, ethical, and other relevant standards. Doctors should reflect on the influence their status as doctors may have on patients and ensure that advice provided is appropriately balanced and, where necessary, refer patients to other sources of information and/or to practitioners who are willing to provide the services sought.

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