

Guidance: Treating unvaccinated patients

MPS has received many recent queries from members about their obligations to treat patients who have not been vaccinated against COVID-19. Here we address some of these queries and summarise the key guidance.

This is a rapidly evolving area of law and medicine. This advice is current as at 3 December 2021 and subject to the disclaimer at the end.

Overview

If your practice is a “designated premises” under the COVID-19 Public Health Response (Protection Framework) Order 2021, the government has made rules to ensure that unvaccinated people continue to have access to healthcare.

If your practice is not a designated premises, then you are entitled to assess the risk presented by unvaccinated patients and take steps to mitigate that risk. How to approach this is discussed below.

Applicable guidelines

Whether or not your practice is a designated premises, applicable guidelines may be published over the coming days and weeks by the government, Medical Colleges or other sector bodies.

Medical Council

The Medical Council has published brief guidance on “Providing medical Care to patients not vaccinated against COVID-19” (18 November 2021) which includes:

- “The Medical Council has an expectation that doctors will not refuse to treat those who are unvaccinated”
- “As with every health care interaction, doctors should assess the risk to their own safety and implement appropriate evidence-based measures commensurate with the level of that risk”.

The most relevant Standards adopted by the Medical Council are:

- Good Medical Practice (December 2016) at paragraphs 12, 13, 19, 20, 21, 52 and 72
- A doctor’s duty to help in a medical emergency (June 2021)
- Ending a doctor-patient relationship (December 2020).

It is recommended that doctors familiarise themselves with these standards.

Ministry of Health

The Ministry of Health has published a “position statement on routine pre-consultation testing of unvaccinated individuals in healthcare settings” (25 November 2021). This discourages universal pre-consultation COVID-19 testing and includes:

- “The Ministry is of the view that in most cases, with vaccinated staff and other precautions in place, that the risks are unlikely to be high enough to provide sufficient justification to [discriminate against unvaccinated patients]. In other words, denying access to health care on the basis of vaccination status is unacceptable.”

Royal New Zealand College of General Practitioners

The RNZGP has published a statement titled “Principles of care: unvaccinated patients” (1 December 2021). This includes:

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- “The [RNZCGP] position on the management of unvaccinated patients (which includes all children under the age of 12) is that these patients should have access to face-to-face consultations when required.”

Traffic light system — “designated premises”

To implement its ‘traffic light system’, the New Zealand government has made a new Order under the COVID-19 Public Health Response Act 2020. The new Order is titled “COVID-19 Public Health Response (Protection Framework) Order 2021” and can be found on www.legislation.govt.nz.

The new Order creates a definition for “designated premises”. Designated premises include all premises of health services that are partly or wholly funded by:

- the Ministry of Health
- Oranga Tamariki—Ministry for Children
- the Ministry of Social Development
- the Department of Corrections
- a district health board
- Veterans’ Affairs New Zealand
- the Accident Compensation Corporation.

This means that all hospitals, secondary health services, urgent care services and GP practices will be designated premises. Many private health care providers will also be designated premises if they see patients funded by ACC.

The new Order limits the ability of designated premises to refuse access or service on “vaccination grounds”. Vaccination grounds is defined to mean:

- the consideration of whether or not a person—*
- (a) *holds a valid [My Vaccine Pass]; or*
 - (b) *holds a COVID-19 vaccination exemption or COVID-19 vaccination authorisation; or*
 - (c) *has been vaccinated (within the meaning of the Act) or otherwise vaccinated against COVID-19*

For healthcare providers that are designated premises then, under the new Order:

Entry

“A business or service in control of designated premises must not deny a person, other than a worker, entry to the premises on vaccination grounds” (clause 31). The term ‘worker’ is defined in the new Order.

MPS’s advice is that this does not prevent medical practitioners from asking patients to disclose their vaccination status nor taking steps to mitigate assessed risks. MPS considers it acceptable to (for example):

- Ask unvaccinated patients to phone ahead and/or offer a telehealth consultation if clinically appropriate.
- Require that unvaccinated patients enter premises only when ready to be seen, and not use waiting rooms.
- See and treat unvaccinated patients, vaccinated patients and symptomatic patients in different streams.
- Require a negative COVID-19 test prior to a non-acute face-to-face consultation with an unvaccinated patient who will not or cannot wear a mask.

Service

“A business or service in control of designated premises from which goods or services are provided must not deny a person, other than a worker, access to those goods or services (whether for that person or on behalf of others) on vaccination grounds” (clause 32).

MPS's advice is that this does not prevent medical practitioners from asking patients to disclose their vaccination status nor taking steps to mitigate assessed risks (see above). If a service cannot be provided safely for you and your staff at one point in time, it will be acceptable to ask an unvaccinated patient to return at a different time.

Practices that are accessed via another business

The 'front doors' of some healthcare premises are located within buildings that include other tenants. Clause 33 of the new Order requires those in control of spaces that people must enter to get to designated premises must allow entry to unvaccinated people for the purpose of accessing those designated premises.

Practices that are not designated premises

The new Order does not apply to completely private practices that do not see ACC funded patients. Private practices will however need to comply with:

- The Code of Health and Disability Services Consumers' Rights (**HDC Code**)
- The Human Rights Act 1993
- Professional standards regulated by the Medical Council under the Health Practitioners Competence Assurance Act 2003
- The Health and Safety at Work Act 2015.
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Under these laws:

- You must offer to help in an emergency, taking account of your own safety, scope of practice and the availability of other options for care.
- You must not refuse or delay treatment because you believe that a patient's actions have contributed to their condition. Nor should you unfairly discriminate against patients by allowing your personal views to affect your relationship with them. Your personal beliefs, including political, religious and moral beliefs, should not affect your advice or treatment.
- Any decision to decline consultations with unvaccinated patients should be motivated by risk management, not prejudice against unvaccinated patients' choices.
- You must ensure continuity of care – which may mean facilitating transfer to a different doctor with appropriate handover.

Subject to these baseline requirements, each workplace will need to assess the risk of COVID-19 transmission and make decisions about how to manage that risk. Such assessments may include the vulnerability of staff, the vulnerability of other patients and any increased risk presented by unvaccinated patients. You should also take into account the prevalence of COVID-19 in your community.

It is likely that a decision to mitigate risk by declining to provide care to any unvaccinated patients will be regarded by the HDC as a breach of the HDC Code and regarded by the Medical Council as inconsistent with professional standards.

Other policies such as requiring a negative COVID-19 test; charging more for the cost of using additional PPE; and only providing telehealth services to unvaccinated patients may however be justifiable on health and safety grounds. It is recommended that you seek specific advice from MPS before adopting such measures.

Risk and disclaimer

Healthcare practitioners declining to see unvaccinated patients or implementing policies that make it difficult for unvaccinated people to access care should proceed with their eyes open. They may face:

- HDC complaints
- Referrals to the Medical Council (or other relevant regulatory authorities such as the Psychologists Board, Nursing Council, Physiotherapy Board or Dental Council)
- Allegations of indirect discrimination under the Human Rights Act 1993.

This is a complex area in which to give advice, as the courts have not yet considered any cases of unvaccinated people being refused services. In general:

- The HDC may reach the opinion that declining services to unvaccinated patients is a breach of the HDC Code. The risk of such a finding can be minimised by treating unvaccinated patients with respect and otherwise in accordance with the HDC Code.
- Regulatory authorities such as the Medical Council may decide to enforce the position that it is unethical to decline services to unvaccinated patients. (It is likely however that doctors would be given time to change their policies and the issue is unlikely to be treated as a disciplinary matter.)
- A patient may complain to the Human Rights Commission and endeavour to have their feelings of discrimination litigated before the Human Rights Review Tribunal. While there are defences to a claim of indirect discrimination, it is impossible to completely exclude the possibility of an adverse finding.

This article is intended as general guidance. It is not specific legal advice, nor a guarantee that the recommended approach will avoid criticism or adverse findings.