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**GUIDANCE ON THE MANAGEMENT OF UNVACCINATED**

**ORTHOPAEDIC PATIENTS**

**October 2021**

1. **Introduction**

NZOA Members have requested guidance on how to respond to unvaccinated patients who have been referred to them. This guidance is not intended to be legal advice, it instead serves to highlight the relevant laws, standards and ethics.

1. **Human Rights Legislation**

There are two main New Zealand laws that specifically promote and protect human rights. One is the Human Rights Act 1993, and the other is the Bill of Rights Act 1990. The New Zealand Bill of Rights protects the right to life, the right to refuse medical treatment, and the right to manifest one’s religion. The Human Rights Act includes the right not to be discriminated against. Even during a pandemic, everyone has human rights and freedoms under the Bill of Rights Act and Human Rights Act. However, there are times when limiting these rights and freedoms can be justified under Section 5 of the New Zealand Bill of Rights Act.

A recent case in the Hight Court considered this and concluded that the benefits of the vaccine outweighed the potential discrimination against the complainant, and that the limitation of rights was proportionate and justified. The Judge decided the scientific support for the vaccine and the benefits of the COVID-19 Public Health Response (Vaccinations) Order 2021 to the wider community outweighed any potential discrimination against the employees. Whilst this decision does not directly apply to private businesses, it is illustrative.

1. **Health and Safety**

The Health and Safety at work Act applies to employees and contractors. The Act requires that workers and others are given the highest level of protection from workplace health and safety risks, so far as is reasonably practicable. This includes risks to both physical and mental health. A worker has the right to stop work, or refuse to carry out work, if they believe that doing the work would expose them, or anyone else, to a serious risk to health or safety from an immediate or imminent hazard.

This Act applies to you as employers, and there are significant fines for failure to comply.

1. **Guidance from Regulators**

As the COVID-19 pandemic is an unprecedented event, there is little guidance available.

**4.1 The Medical Council of New Zealand (MCNZ)**

We approached the Medical Council of New Zealand. They advised that they did not provide legal advice or guidance, that they waited until complaints were received and they judged the behaviour of the practitioner against their standards. The following excerpt from the Good Medical Practice Standard, Paragraphs 19-21 was forwarded to us for our consideration:

*Personal beliefs and the patient*

*19. 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.*

*20.     Your personal beliefs, including political, religious and moral beliefs, should not affect your advice or treatment. If you feel your beliefs might affect the advice or treatment you provide, you must explain this to patients and tell them about their right to see another doctor. You must be satisfied that the patient has sufficient information to enable them to exercise that right.*

*21.     Do not express your personal beliefs to your patients in ways that exploit their vulnerability or that are likely to cause them distress.*

In our opinion, this standard is not particularly relevant to the current situation. Unvaccinated persons have made a choice unless it is due to medical reasons (which are very rare). A decision not to have an in-person consultation with an unvaccinated person is about the health and safety of your practice and family, not a personal belief as such.

**4.2 The New Zealand Medical Association (NZMA)**

The New Zealand Medical Association (NZMA) Code of Ethics Position Statement, Clause 18 is possibly the most helpful we have found:

*Doctors have the right, except in an emergency, to refuse to care for a particular patient. In any situation which is not an emergency, doctors may withdraw from or decline to provide care as long as an alternative source of care is available and the appropriate avenue for securing this is known to the patient. Where a doctor does withdraw care from a patient, reasonable notice should be given and an orderly transfer of care facilitated.*

1. **Unvaccinated Patients in Public Facilities**

DHB’s are able to include the COVID vaccination status for all patients in their patient notes. If this is yet to occur at your DHB, we strongly urge you to insist upon this information.

In our view, doctors have a duty of care for acute and emergent presentations in the public health sector. As you are employees of the DHB, you will need to treat non-vaccinated public electives and outpatients, however we recommend consideration be given to a different pathway for these patient groups. Options include a negative COVID test within 72 hours prior to their appointment, and perhaps self-isolation prior to any surgery.

1. **Unvaccinated Patients in your Private Practice**

We suggest that rather than refuse to see a non-COVID vaccinated patient, that you make vaccination a requirement for an in-person consultation.

The following steps could be considered:

* Your receptionist/secretary asks a referred patient their vaccination status if unknown.
* If it is negative, ask whether it is a personal or medial reason.
* Ask the patient if they would like to speak to the surgeon about any concerns they have about vaccination.
* For non-vaccinated patients, the surgeon may offer a Telehealth consultation. The rational for this is that in-person attendance puts other patients, staff and the surgeon at increased risk because of the higher viral load that an unvaccinated person can potentially carry.
* If there is a very important clinical reason to see an unvaccinated patient face-to-face, then you can require a negative COVID test within 72 hours prior to their appointment.
* Refer to another provider or suggest they visit “Find a Surgeon” on the NZOA website [Find a Surgeon](https://www.nzoa.org.nz/find-a-surgeon).

1. **Concluding Remarks**

With the introduction of mandated vaccinations for front-line health workers and education workers, we consider this provides good support for the argument that unvaccinated patients create an unnecessary risk to your Orthopaedic practice. It is to be remembered that people make a choice not to be vaccinated.

We are aware that other organisations are also considering this very question, and our guidance may well evolve as other opinions are known.

In our opinion Orthopaedic surgeons in private should not be compelled to see an unvaccinated patient. Health practitioners can decline to accept referrals.

We urge you to exercise caution as to how you approach this sensitive and complex situation.

Peter Devane, President

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