

A Decision by the Health and Disability Commissioner (Case 22HDC00500)

Introduction

1. This report discusses the care provided to Mr A by ophthalmologist Dr B.
2. The Medical Council of New Zealand referred to HDC a notification made by Manatū Hauora | Ministry of Health (Manatū Hauora) concerning Dr B providing in-person health services whilst unvaccinated against COVID-19. On 19 January 2022 Manatū Hauora had received a report that Dr B was practising whilst unvaccinated, but at that time did not have sufficient evidence of in-person consultations. Therefore, Manatū Hauora wrote to Dr B advising of the requirement to be vaccinated if seeing patients in person and detailing the exemption process.
3. On 9 February 2022, Manatū Hauora received a complaint from Mr A, and following investigation it issued an infringement notice to Dr B for providing health services on 23 January 2022 as an unvaccinated health practitioner.¹ Dr B was issued two further infringement notices in March 2022.
4. The following issues were identified for investigation:
 - *Whether Dr B provided Mr A with services that complied with legal, professional, and other relevant standards on 23 January 2022.*
 - *Whether Dr B provided Mr A with information that a reasonable consumer, in that consumer's circumstances, would expect to receive on 23 January 2022.*
5. The parties directly involved in the investigation were:

Mr A	Consumer
Dr B	Provider/ophthalmologist
6. Further information was received from Manatū Hauora and the Medical Council of New Zealand.

¹ The infringement notice outlined that the alleged infringement offence was breaching clause 7 of the COVID-19 Public Health Response (Vaccination) Order 2021, which is an infringement offence under section 26(3) of the COVID-19 Public Health Response Act 2020. It was inferred from the infringement notice that the infringement offence was in respect to Dr B's appointment with Mr A, as the date, time and address recorded on the infringement notice were the same as Mr A's appointment confirmation letter dated 17 January 2022.

How the matter arose

7. On 23 January 2022, Mr A attended an in-person appointment with Dr B. Mr A had been referred to Dr B by his optometrist for a second opinion on a possible early-stage cataract. Mr A told HDC that this appointment went for a full hour, and, following examination, plans were made for a further appointment with Dr B and for cataract surgery in the coming months (which did not eventuate).
8. At the time of events, health practitioners in Aotearoa New Zealand were subject to a COVID-19 vaccine mandate, which required that health practitioners providing health services to patients in person must not do so unless they were vaccinated or were an exempt person.²
9. Dr B appears not to have been vaccinated for COVID-19 at the time of the appointment, as evidenced by the infringement notice that was issued to him by Manatū Hauora on 11 February 2022. Dr B has not provided information to the contrary, such as evidence of vaccination or being an exempt person. Dr B did not confirm his vaccination status with HDC despite multiple requests. Dr B's response to HDC did confirm that Mr A's appointment occurred in person.
10. Mr A told HDC that he is concerned that Dr B examined him whilst unvaccinated, and that Dr B did not tell him that he was unvaccinated for COVID-19 at any stage during the appointment. Mr A also noted:

'[C]ommon sense surely demands that if there were [an] exemption then the whole situation would be discussed with me to the point I would be able to make some informed decision. That advice did not occur.'
11. Dr B told HDC that he did not understand that he was required to provide his vaccination status to patients, as he considered it a personal health matter, with private health details protected under the Health Information Privacy Code.
12. Dr B voluntarily cancelled his registration with the Medical Council of New Zealand, and currently he resides overseas.

Responses to provisional opinion

Mr A

13. Mr A was provided with an opportunity to comment on the 'how the matter arose' section of the provisional opinion. Mr A reiterated that he believes that Dr B's actions were a 'serious breach of his profession[al] responsibility'.

² Under the COVID-19 Public Health Response (Vaccination) Order 2021, healthcare practitioners were to have received their first COVID-19 vaccine dose by 15 November 2021 and be fully vaccinated by 1 January 2022, with some exemptions available. The vaccine mandate for healthcare workers was in place until 11.59pm on 26 September 2022.

Dr B

14. Dr B was provided with an opportunity to provide comments on the provisional opinion, and his lawyers confirmed on his behalf that no further instructions or information was provided regarding the provisional opinion.

Opinion: Dr B — breach

15. As a healthcare provider, Dr B was required to provide services that complied with the legal and professional standards in place at the time of events.
16. There is no dispute that Dr B provided in-person health services to Mr A on 23 January 2022. While Dr B has failed to confirm his vaccination status with HDC, I infer from the infringement notice (see footnote 1) that he was not vaccinated at the time of his appointment with Mr A, and HDC has received no evidence that Dr B had been vaccinated or that he was an exempt person. I therefore consider it more likely than not that Dr B was not vaccinated for COVID-19 at the time of his appointment with Mr A. This was contrary to the COVID-19 vaccine mandate in place at the time, which required health practitioners providing health services to patients in person to be vaccinated against COVID-19. At that time, Dr B had an obligation to be vaccinated to protect his patients when providing in-person services, and in my view his actions placed Mr A at risk.
17. By providing in-person health services to Mr A whilst unvaccinated, Dr B failed to provide services that complied with the legal and professional standards at the time, and therefore I consider that he breached Right 4(2) of the Code of Health and Disability Services Consumers' Rights (the Code).
18. In addition, under the Code, Dr B was required to provide information that a reasonable consumer, in that consumer's circumstances, would expect to receive.
19. In my opinion, Dr B's vaccination status was information that Mr A would have expected to receive at the time, given the context of the COVID-19 vaccine mandate for health practitioners applicable at the time, that the consultation occurred in person, and the purpose of the vaccine mandate being to support the public health response to the COVID-19 pandemic and to protect patients and the wider community. I agree with Mr A that this information should have been discussed with him so that he could make an informed decision about whether to attend the appointment with Dr B.
20. Dr B contends that he did not understand that he was required to provide his vaccination status, as he considered it a personal health matter, with private health details protected under the Health Information Privacy Code.
21. I accept that a provider's vaccination status will not always be information that a reasonable consumer would expect to receive, and that the decision to vaccinate is a personal choice. However, in circumstances where a vaccine mandate was in force, and consumers have a reasonable expectation that any provider they see in person will have received a COVID-19 vaccine, I do not agree with Dr B's contention. In my view, the fact that a provider is not

vaccinated and therefore not complying with the vaccine mandate is information the consumer is entitled to know, and in this context is not private information.

22. I therefore consider that by failing to provide Mr A with information about his vaccination status when providing services to Mr A in person, Dr B breached Right 6(1) of the Code. It follows that by failing to provide this information, Mr A was not in a position to make an informed choice about whether to proceed with the appointment, and therefore I consider that Dr B also breached Right 7(1) of the Code.

Refusal to provide information to HDC — adverse comment

23. Despite multiple requests, Dr B failed to confirm to HDC his vaccination status at the time of providing services to Mr A. Every provider must facilitate the efficient resolution of complaints, and I am very critical of Dr B's failure to comply with the information requests of my staff in order to progress the assessment of Mr A's complaint.

Standard of care — other comment

24. For completeness, Mr A also raised concerns about the standard of care that was provided to him by Dr B. HDC obtained independent advice from an ophthalmologist on the standard of care provided to Mr A on 23 January 2022. The ophthalmologist considered that the service provided was largely appropriate. Notwithstanding my criticisms outlined above, I do not have concerns about the standard of clinical care that was provided to Mr A by Dr B.

Recommendations

25. I recommend that Dr B provide a formal written apology to Mr A. This is to be sent to HDC, for forwarding to Mr A, within three weeks of the date of this report.
26. I recommend that should Dr B return to New Zealand to practise, the Medical Council of New Zealand consider whether a review of his competence or conduct is warranted.

Follow-up actions

27. A copy of this report with details identifying the parties removed will be sent to the Medical Council of New Zealand, and it will be advised of Dr B's name.
28. A copy of this report with details identifying the parties removed will be sent to the Director-General of Health at Manatū Hauora | Ministry of Health and to the Royal Australian and New Zealand College of Ophthalmologists, and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.

Addendum

29. The ophthalmologist did not provide any instructions to his legal representatives regarding the Commissioner's recommendation to provide the consumer with a written apology and has not responded to the Health and Disability Commissioner's further attempts to request this apology. As such, as at the date of publication I consider that this recommendation has not been complied with.