

Your ref

Our ref

# Kennedys

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14 October 2021

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Dear Frances,

## ADVICE TO AMA VICTORIA

We refer to your email dated 11 October 2021.

AMA Victoria seek our advice on whether it is legally permissible for private specialists to refuse to see (face-to-face) unvaccinated patients (who are eligible for COVID-19 vaccination) in non-emergency situations to protect healthcare workers and staff; and to avoid clinic closures/staff being serially furloughed due to exposure to unvaccinated COVID-19 positive patients.

### 1 EXECUTIVE SUMMARY

- 1.1 There are currently no formal guidelines in place in Victoria which determine that it is legally permissible for private specialists to refuse to undertake face-to-face consultations with unvaccinated patients in non-emergency situations.

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- 1.2 We have reviewed guidelines from the Victorian Equal Opportunity and Human Rights Commission<sup>1</sup> and the American Medical Association<sup>2</sup>, however these sources have not been endorsed by the Medical Board in Victoria.
- 1.3 Accordingly, if medical practitioners refuse to undertake face-to-face consultations with unvaccinated patients in non-emergency situations, there remains a risk of a notification to AHPRA on the basis that their conduct may be below the standard expected and that they may pose a current or future risk to patient safety. In order to mitigate against the Medical Board taking regulatory action, we recommend that medical practitioners take all reasonable steps to ensure unvaccinated patients are not denied access to medical care.

## 2 MEDICAL BOARD

- 2.1 Medical practitioners must abide by the Medical Board's *Good medical practice: a code of conduct for doctors in Australia (Code)*, which stipulates the standards of ethical and professional conduct. We have extracted the relevant sections of the Code below:
- (a) **Clauses 3.1 and 3.1.4** - the care of your patient is your primary concern; good patient care includes referring a patient to another practitioner when this is in the patient's best interests.
  - (b) **Clause 3.4.2** - not prejudicing a patient's care because a practitioner believes that a patient's behaviour has contributed to their condition.
  - (c) **Clause 3.4.5** - not discriminating against a patient on grounds such as race, religion, sex, gender identity, sexual orientation, disability or other grounds, as described in anti-discrimination legislation.
  - (d) **Clause 3.4.7** - not allowing your moral or religious views to deny patients access to medical care, recognising that you are free to decline to personally provide or directly participate in that care.
  - (e) **Clause 3.4.5** - keeping yourself and your staff safe when caring for patients. If a patient poses a risk to your health and safety, or that of your staff, take action to protect against that risk. Such a patient should not be denied care if reasonable steps can be taken to keep you and your staff safe.
  - (f) **Clauses 8.1 and 8.1.2** - making patient safety the first priority and understanding and applying the key principles of risk minimisation and

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<sup>1</sup> Victorian Equal Opportunity & Human Rights Commission, *Explainer: Mandatory COVID-19 vaccinations and your rights*, updated September 2021.

<sup>2</sup> American Medical Association, 'Can physicians decline unvaccinated patients?' dated 15 September 2021.

management in your practice; taking all reasonable steps to address the issue if you have reason to think that patient safety may be compromised.

- 2.2 In relation to clause 3.4.5, based on the guidance of the Victorian Equal Opportunity and Human Rights Commission, a decision to not get vaccinated is not a protected category and therefore refusal to provide care to unvaccinated patients is unlikely to constitute discrimination.
- 2.3 In our view, the overriding obligation in the Code is that medical practitioners must take all reasonable steps to ensure they do not prejudice or deny patients access to medical care. In addition to the standard COVID-19 safe protocols, we consider that reasonable steps to minimise the risk an unvaccinated patient may pose to medical practitioners, other patients and staff may include:
- (a) Having a dedicated examination room for unvaccinated patients;
  - (b) Having dedicated appointment times for unvaccinated patients;
  - (c) Requiring proof of a recent negative COVID-19 test being a condition of attending face-to-face consultations;
  - (d) Offering to provide a referral to another medical practitioner who is able to offer face-to-face consultations to ensure continuity of care.
- 2.4 Taking into account the above, if a notification is made to the Medical Board for refusing to undertake face-to-face consultations with unvaccinated patients, medical practitioners, if relevant, may submit that their conduct was at the standard expected of them because:
- (a) The practice is inadequately supplied with PPE;
  - (b) The practice has a high-risk patient demographic, for example patients that:
    - (i) Are aged 70 years and over;
    - (ii) Are vaccine exempt;
    - (iii) Have conditions which compromise their immune systems;
  - (c) The practice does not have adequate space inside;
  - (d) Face-to-face consultations with unvaccinated patients would seriously compromise the medical practitioner's ability to provide care to other vaccinated patients;

- (e) The practice is located in an area that is experiencing a high volume of COVID-19 cases;
- (f) The unvaccinated patient refused referral to another medical practitioner.

2.5 Given that the issues above are wide-spread, we are currently awaiting insights from our Kennedys' global healthcare teams, which may provide further examples of reasonable steps that have been endorsed in other jurisdictions. Once we receive this information, we would be happy to provide further advice to AMA Victoria.

Yours faithfully  
**KENNEDYS**



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