



NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION
AUSTRALIAN NURSING AND MIDWIFERY FEDERATION NEW SOUTH WALES BRANCH



POSITION STATEMENT ON COVID VACCINATION

Re-endorsed 4 February 2021

NSW Nurses and Midwives' Association
50 O'Dea Avenue Waterloo NSW 2017

P 02 8595 1234 (metro) • 1300 367 962 (regional)

www.nswnma.asn.au

Position Statement on COVID Vaccination

This position statement should be read in conjunction with:

- [NSWNMA Policy on Work Health and Safety](#)
- [AMNF Policy on Vaccination and Immunisation](#)
- [AHPRA Position Statement: Registered health practitioners and students and COVID-19 vaccination](#)

NSWNMA supports vaccination and strongly encourages all healthcare workers to be fully vaccinated if there is no medical contraindication, including booster doses to mitigate against waning immunity. Vaccination of nurses, midwives, nursing and midwifery students undertaking placements (students) and assistants in nursing/midwifery (AiN/Ms) will assist in preventing the spread of COVID-19 to vulnerable patients/residents in healthcare settings. Vaccination of healthcare workers also helps protect nurses, midwives, students and AiNs from contracting COVID-19 at work. Crucially, people who are fully vaccinated have a much lower risk of becoming infected and if they do contract COVID-19, they have a much lower risk of serious illness.

NSWNMA has confidence in the [Therapeutic Goods Administration](#) (TGA) and the [Australian Technical Advisory Group on Immunisation](#) (ATAGI), and we rely on their guidance about the safety of the COVID vaccine. More detailed information is available in the [ANMF COVID-19 resources](#) developed by the AMNF National Policy Research Unit.

NSWNMA is aware that some nurses and midwives have concerns about the safety of the vaccine. We encourage anyone with concerns to discuss them with their trusted healthcare provider. NSWNMA has also worked with experts to develop relevant education for our members, and this can be accessed by members on the NSWNMA website via member central.

If you have a medical contraindication this will need to be verified and documented by a medical practitioner. Nurses and midwives who are unable to be vaccinated due to a medical contraindication may be re-deployed but should be supported to maintain roles that are professionally fulfilling.

NSWNMA is also aware that some nurses, midwives, students and AiN/Ms may decide for their own reasons that they will not receive a COVID-19 vaccination under any circumstances. The following sections of this document cover this issue from the public health, professional,



industrial and work health and safety (WHS) perspectives to provide information that is relevant to the rights and obligations that should be considered when making this decision.

NSW PUBLIC HEALTH ORDERS ISSUED

[Public Health \(COVID-19 Vaccination of Health Care Workers\) Order \(No 3\) 2021](#)

The NSW Minister for Health issued in 2021 a public health order (PHO) setting out vaccination requirement on health care workers. This was subject to some amendment during the latter part of 2021, and the above PHO now includes an expanded scope / definition for health care worker. It was originally directed to workers in public health services (including ambulance) and private hospital facilities. These workers are now required to be double vaccinated to be permitted to enter the workplace / work (excepting for an accepted medical contraindication certificate).

The subsequent amendment extended its reach to include workers in a range of other health settings, including for example "a receptionist at a doctor's surgery", which sets out the intended far reaching scope of the PHO.

It includes all registered health professionals providing a service, along with all health practitioners who are not registered under the *Health Practitioner Regulation National Law (NSW)* but provide services that are subject to the code of conduct made under the *Public Health Regulation 2012, Schedule 3*. This includes de-registered health practitioners, and registered health practitioners who provide health services that are unrelated to their registration.

This later group of health care workers now included will be required to have had their first vaccination by 31 January 2022, and the second by 28 February 2022.

[Public Health \(COVID-19 Care Services\) Order \(No 3\) 2021](#)

Also in 2021, the NSW Minister for Health issued a PHO in relation to the vaccination requirements, which whilst commencing with aged care workers, was amended as per the above PHO to also now include disability and home care workers. Similar to the original tranche of health care workers noted above, all aged, disability, and home care workers are now required to be double vaccinated to be permitted to enter the workplace / work (excepting for an accepted medical contraindication certificate).

PROFESSIONAL RIGHTS AND OBLIGATIONS

Note that AiNs and AiMs (however named) are not regulated by NMBA and this section on professional rights and obligations does not apply to them.

Under the National Law, the Nursing and Midwifery Board of Australia (NMBA) is responsible for the regulation of the nursing and midwifery professions and is supported in this role by the



Australian Health Practitioner Regulation Agency (AHPRA). Nurses, midwives and students who wish to maintain their registration must adhere to the NMBA's expectations in relation to vaccination.

The NMBA [Position statement on nurses, midwives and vaccination](#) makes it clear that *registered nurses, enrolled nurses and midwives who are promoting anti-vaccination statements to patients and the public via social media which contradict the best available scientific evidence are in breach of their professional obligations and may be subject to regulatory action.*

The National Boards and the Australian Health Practitioner Regulation Agency (AHPRA) have published a joint statement, [Registered health practitioners and students: What you need to know about the COVID-19 vaccine rollout](#), to clarify their expectations in relation giving, receiving and advising on and sharing information about COVID-19 vaccination.

In this advice it is clear that all registered health practitioners and students (particularly those undertaking placements in various practice settings) are strongly encouraged to have the full COVID-19 vaccination course as scheduled unless medically contraindicated.

The National Boards also state that *all regulated practitioners have a responsibility to participate in efforts to promote the health of communities and meet obligations with respect to disease prevention including vaccination, health screening and the reporting of notifiable diseases.*

The National Boards recognise that *while some health practitioners may have a conscientious objection to COVID-19 vaccination, all practitioners, including students on placement, must comply with local employer, health service or health department policies, procedures and guidelines relating to COVID-19 vaccination. Any queries about these should be directed towards the individual employer, health service, state or territory health department and/or education provider for registered students.*

INDUSTRIAL RIGHTS AND OBLIGATIONS

Mandatory vaccination of workers in certain workplaces is not a new feature of the working and legal landscape. Many health and aged care settings, for example, have had a mandatory requirement for workers to demonstrate vaccination against various illness or disease. Some of these are legal requirements. Others are requirements established by the employer themselves on the premise that they are in the best interests and protective of the worker and those they care for.

Currently in the NSW public health system, there are several well-established vaccination requirements for staff via NSW Ministry of Health policy directives. Private hospital providers also



have developed similar expectations of their staff. These existing requirements have to date been relatively uncontroversial.

In residential aged care, it is a legal requirement for its workers (as well as visitors) to have the influenza vaccination. In the absence of the influenza vaccination, the worker or visitor are not permitted to enter a Residential Aged Care Facility ('RACF') unless exceptional / special circumstances exist.

These longstanding requirements in the health and aged care settings have now been added to include vaccination for COVID-19 by virtue of the PHOs issued and previously described.

If a worker is dismissed for refusing or being unable to be vaccinated, contrary to a legal requirement or direction of their employer, then as is the case with any termination, an assessment would need to be made as to whether there is a sound basis to proceed with, for example, an unfair dismissal application.

Any application for unfair dismissal would need to be assessed against the legislative criteria established in the Fair Work Act 2009 to determine if a dismissal was harsh, unjust, or unreasonable. This will turn on the facts of the individual case, actions by the employer and worker during the process, as well as what precedents may exist from previous decisions of the Fair Work Commission.

When assessing an individual's workplace rights, along with what remedies may exist if trouble is encountered, it will inevitably turn on the specific circumstances, facts, and laws that apply to the dispute or workplace situation.

The Fair Work Commission has recently found against a number of workers who had refused to comply with requirements to be vaccinated against COVID-19.

In [Sean Heron v McKenzie Aged Care Group Pty Ltd \[2021\] FWC 6707 \(31 December 2021\)](#) the Commission refused to extend a worker's time for filing an unfair dismissal claim on the basis that the claim had "weak" merits under s.394(3)(e) of the *Fair Work Act 2009* (Cth) because of the applicant's failure to comply with vaccination requirements for residential aged care facilities under Queensland public health orders.

In [Floors Aucamp v Association for Christian Senior Citizens Homes Inc. \[2021\] FWC 6669 \(22 December 2021\)](#) the Commission accepted that an aged care facility had a valid reason to dismiss its maintenance manager because of his incapacity as an unvaccinated person to perform his job. The Commission noted that "[i]n truth, [the manager's] grievance lies with the decision of the Victorian Government's Acting Chief Health Officer".

Finally, in [Marola Amin v Mainfreight Distribution Pty Ltd \[2021\] FWC 5288 \(23 December 2021\)](#) the Commission again refused to extend a worker's time for filing an unfair



dismissal claim on the basis that the claim had "weak" merits. In this case the worker had refused to be vaccinated on religious grounds.

It should also importantly be noted that the Supreme Court of New South Wales (and the NSW Court of Appeal) have rejected all legal challenges to date which have sought to overturn or question the legal validity of the PHOs made setting out requirements upon workers to be vaccinated against COVID-19.

WORK HEALTH AND SAFETY (WHS) RIGHTS AND OBLIGATIONS

In terms of WHS, the following principles are relevant:

- Employers must ensure, so far as is reasonably practicable, the health and safety of workers and others. In this context, "others" includes patients, residents, visitors, (s19).
- Ensuring health and safety requires the employer to eliminate risks to health and safety, so far as is reasonably practicable, and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable, (s17).
- When making decisions about how to minimise risks to health and safety, employers must use the hierarchy of controls (WHS Reg Part 3.1)
- Workers must ensure that they take reasonable care for their own health and safety, ensure that their acts and omissions do not adversely affect the health and safety of others, comply with reasonable instruction of their employer and cooperate with reasonable policies and procedures (s28)

Thus, employers are required to do what they can to eliminate or minimise the risks associated with exposure to COVID-19 for both their workers and patients/residents. The best way to eliminate exposure is to ensure people are not bringing the virus into the workplace and vaccination is the only way to do this. Personal protective equipment (PPE) certainly has a place, but it is a lower order control because it is attempting to minimise the risk of the virus spreading rather than stopping it getting into the facility in the first place.

Workers must follow reasonable instructions and cooperate with policy and procedure. There is existing case law to say that vaccination is a reasonable requirement when working with vulnerable persons.

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