

Primary care responsibility for positive COVID-19 tests

Primary care responsibility for positive SARS-CoV-2 tests — legal risk

1. Some MPS members working in General Practice are concerned about expectations that they assume primary responsibility for responding 24/7 to positive SARS-CoV-2 test results for enrolled patients which are delivered automatically via practice management system inboxes.
2. This advice describes the situation some General Practices are facing and gives MPS's view on whether deciding not to work beyond normal hours to clear positive test results by contacting and triaging patients will give rise to legal risk.

The current situation

3. With the caveats that the situation is both rapidly evolving and may vary from DHB to DHB and PHO to PHO, in broad terms MPS understands that:
 - 3.1 The Ministry of Health has published a document titled *COVID-19 Care in the Community Framework* (20 December 2021).¹ Under the *Framework*, each DHB region should have a COVID-19 Care Coordination Hub, the responsibilities of which include:²
 - (a) “Ensuring clarity between DHBs and General Practice regarding roles and responsibilities, including what role post-diagnosis General Practice plays for a patient who is low risk and remaining well”; and
 - (b) *Ensuring Planned Care continues as resources allow, with particular emphasis on not allowing existing health inequities to worsen*”.
 - 3.2 The reality is that the Care in the Community model envisaged by the *Framework*³ has, in some regions, been overwhelmed by the number of people testing positive.
 - 3.3 The Ministry of Health is advising the public:⁴

If you are looking after yourself at home

You will have support from local healthcare providers to meet your health, welfare and wellbeing needs while you recover from COVID-19.

A 24-hour contact phone number will be available for health support. Contacts for health support may differ across the country. Your point of contact may be an individual or a team from your general practice, primary care provider or from a local community health service.

If you need medication, contact your doctor or your local community pharmacy who can get it safely delivered to your home.

¹ <https://www.health.govt.nz/system/files/documents/pages/covid-19_care-in-the-community-framework-v2-0-20dec21.pdf>.

² <https://www.health.govt.nz/system/files/documents/pages/covid-19_care-in-the-community-framework-v2-0-20dec21.pdf> at 14.

³ <https://www.health.govt.nz/system/files/documents/pages/covid-19_care-in-the-community-framework-v2-0-20dec21.pdf> at 20.

⁴ <<https://covid19.govt.nz/isolation-and-care/if-you-have-covid-19/#wellbeing-help>> (emphasis added).

When to expect wellbeing checks

How often you receive health and wellbeing checks while you are self-isolating will depend on your symptoms and recovery.

If you have moderate symptoms or are more at risk, you will get a virtual health check, like a phone call, from your health provider every day.

If you have mild symptoms, you will likely get a virtual health check from your health provider every second day. ...

- 3.4 The Ministry of Health has published Testing Operational Guidance for General Practice which includes:

A person with a positive RAT or PCR result is to be treated as a case and managed according to clinical guidance available on HealthPathways.

When a test result is entered in HealthLink, the patient will receive an automated text message with their result and details of the next steps

- 3.5 In general terms, MPS understands some DHB regions have adopted health pathways that mean:

- (a) where a person enrolled with a General Practice tests positive for SARS-CoV-2, the result will be reported electronically to that primary care provider; and
- (b) General Practices are expected to take over clinical management of their enrolled patients who test positive. This involves telephoning each positive patient, determining their acuity and then adopting a management plan/providing advice consistent with the assessed acuity.

- 3.6 Some General Practices are struggling to keep up with reported positive test results. In some regions there may be an expectation that General Practices review results and contact and determine the acuity of patients after hours and over the weekend.

4. The clinical difficulties arising from the above include:

- 4.1 General Practices may be insufficiently resourced to provide optimal clinical management/follow-up for every enrolled patient testing positive;
- 4.2 prioritising the care of patients suffering from COVID-19 may impact the ability of General Practices to provide other 'business as usual' (BAU) care; and
- 4.3 General Practices will not always be able to easily contact enrolled patients who have been reported as positive for SARS-CoV-2.

Medicolegal considerations

HDC

- 5. The HDC's role includes "to investigate ... any action that is or appears to the Commissioner to be in breach of" the Code of Health and Disability Services Consumers' Rights (**Code**).⁵
- 6. The Code provides patients with the right to services of an appropriate standard (Right 4). The HDC has not publicly addressed the issue of resource constraints caused by the COVID-19 pandemic, however the Code includes:

Provider compliance

- (1) *A provider is not in breach of this Code if the provider has taken reasonable actions in the circumstances to give effect to the rights, and comply with the duties, in this Code.*

⁵ Health and Disability Commissioner Act 1994, s 14(1)(e).

(2) *The onus is on the provider to prove it took reasonable actions.*

(3) *For the purposes of this clause, the circumstances means all the relevant circumstances, including the consumer's clinical circumstances and the provider's resource constraints.*

7. With respect to test results, there are various HDC opinions touching on the standard of care expected from General Practices. The HDC has also published articles about test results,⁶ however these are not directly relevant to the situation General Practices are currently facing due to COVID-19.
8. To find a General Practice to have breached the Code for not contacting an enrolled patient who had tested positive, the HDC would need to rely on an expert opinion that the failure to make contact was — in all the circumstances — inconsistent with the expected standard of care. MPS's advice is that resource constraints will be highly relevant to such an assessment, and it would be difficult for the HDC to reach an opinion that a General Practice unable to resource responding to positive test results 24/7 was in breach of Right 4 of the Code.

Medical Council

9. The Medical Council's functions include to set standards of clinical competence and act on information about the practice, conduct or competence of medical practitioners.⁷ The most relevant standards adopted by the Medical Council are:
- 9.1 *Safe practice in an environment of resource limitation.*⁸ This acknowledges the reality of resource constraints and emphasises the importance of good quality triage. Reassuringly, it also states "*You cannot be held responsible for not providing what is not in your power to provide*".
- 9.2 *Managing patient records.*⁹ This requires medical practitioners to have systems in place to follow up test results promptly.
- 9.3 *Good Medical Practice.*¹⁰ As well as requiring a good standard of clinical care, this directs medical practitioners to "*Strive to use resources efficiently, consistent with good evidence based patient care, and balance your duty of care to each patient with your duty of care to the community and wider population*".
10. Based on experience, MPS considers it unlikely that the Medical Council would act against otherwise competent individuals who have been overwhelmed by enrolled patients testing positive unless the HDC has first found there to have been a breach of the Code (a process likely to take over a year). Even then, the likelihood of adverse consequences for individuals would be low.

Contractual rights and obligations

11. Each PHO will be a party to a PHO Services Agreement with the local DHB. Each General Practice will then be a party to a Contracted Provider Agreement with a PHO. MPS understands that the standard terms of these agreements include provision for 'uncontrollable events', which are defined to mean "*an event that is beyond the reasonable control of the party immediately affected by the event, but does not include an event that the party could have prevented or overcome by taking reasonable care*". In MPS's view the COVID-19 pandemic falls within this definition of uncontrollable event.
12. Each General Practice will need to check their own contract, however these are likely to include the following provision (or something similar):

X Uncontrollable Events

X.1 *Neither of us will be in default under this Agreement if the default is caused by an Uncontrollable Event.*

⁶ For example, <<https://www.hdc.org.nz/media/4641/communication-and-test-results.pdf>>.

⁷ Health Practitioners Competence Assurance Act 2003, s 118.

⁸ <<https://www.mcnz.org.nz/assets/standards/ca25302789/Safe-practice-in-an-environment-of-resource-limitation.pdf>>.

⁹ <<https://www.mcnz.org.nz/assets/standards/0c24a75f7b/Maintenance-patient-records.pdf>>.

¹⁰ <<https://www.mcnz.org.nz/assets/standards/b3ad8bfa4/Good-Medical-Practice.pdf>>.

X.2 *If either of us is affected by an Uncontrollable Event, the party affected must:*

- (a) *notify the other party of:*
 - (i) *the nature of the circumstances giving rise to the Uncontrollable Event;*
 - (ii) *the extent of the affected party's inability to perform; and*
 - (iii) *the likely duration of that non-performance;*
- (b) *take all reasonable steps to remedy, or reduce the impact of, the Uncontrollable Event; and*
- (c) *resume performance of the obligation affected by the Uncontrollable Event as soon as possible. ...*

Practical advice

13. General Practices (and individual General Practitioners) are reasonably well protected from legal risk arising from the current situation. The most likely issue to arise is a complaint to the HDC made by a patient or patient's family member. The HDC will respond to complaints by initially gathering information and may then decide to formally investigate. Such an investigation would be a slow process and, given the obvious resource constraints impacting General Practices, it may prove difficult for the HDC to source an expert opinion that the expected standard of care has not been met.
14. If a General Practice is contracted to be open and functioning only at certain hours (with care outside of those times provided by an after-hours service), then there cannot be a professional/legal expectation that SARS-CoV-2 test results will be checked and acted upon outside of those times (for example, at night or over the weekend).
15. A professional obligation would however arise in a situation where a General Practitioner became aware of a specific need for emergency care, in which case the Medical Council's statement *A doctor's duty to help in a medical emergency* provides that "You have an ethical obligation as a doctor to respond promptly if needed for a medical emergency".¹¹
16. While some General Practices may choose to respond to the current public health crisis by working additional hours, those who are unable to — or judge it to be an overall better clinical decision to preserve capacity to work safely during normal hours — will not be at significant legal risk from making that choice. In other words, MPS's view is that a DHB 'expectation' that General Practices will provide round-the-clock care to COVID-19 patients, including clearing positive test results and triaging after-hours and over the weekend, is not an enforceable obligation. Nor would a reasoned decision not to shift to a 24/7 model of care give rise to significant legal risk.
17. Our practical advice to mitigate legal risk is:
 - 17.1 General Practices unable to check and act on positive test results after-hours and/or over the weekend should advise their PHO of this.
 - 17.2 General Practices which have an 'uncontrollable event' clause in their Contracted Provider Agreement should notify their PHO of:
 - (a) the extent of any inability to perform COVID-19 follow-up and/or undertake BAU care as a consequence of prioritising COVID-19 patients; and
 - (b) the likely duration of that inability (for example what approximate level of daily enrolled patient infection rates is manageable?).
 - 17.3 General Practices should advise their COVID-19 Care Coordination Hub of any enrolled patients who have tested positive but they have been unable to establish contact with.

¹¹ <<https://www.mcnz.org.nz/assets/standards/f85b311466/A-doctors-duty-to-help-in-a-medical-emergency.pdf>>.

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- 17.4 General Practices unable to keep up with both BAU care and responding to positive test results will need to triage. Triage is a matter for clinical, not legal, advice. Such measures may however include:
- (a) Prioritising staff time between following-up COVID-19 patients and non-acute consultations.
 - (b) Mass communication to enrolled patients advising them that contact may be delayed giving advice on how to respond to symptoms of COVID-19.
 - (c) Prioritising which patients will be contacted to assess acuity. For example, triple vaccinated young adults without comorbidities may not need to be contacted at all.