



Public consultation paper – Medical Board stakeholders

April 2013

Consultation on guidelines and policy

Proposed:

- revised *Guidelines for advertising*
- proposed *Social media policy*
- revised *Guidelines for mandatory notifications*

Please provide feedback by email to guidelinesconsultation@ahpra.gov.au by close of business on 30 May 2013.

Public consultation

The 14 National Boards in the National Registration and Accreditation Scheme (the National Scheme) are releasing this paper for public consultation. The consultation paper (attached) proposes:

- revisions to the *Guidelines for advertising* (common to all National Boards)
- a *Social media policy* (common to all National Boards)
- revisions to the *Guidelines for mandatory notifications* (common to all National Boards)

Some other National Boards are also consulting on their *Code of conduct*. (The Medical Board of Australia's *Code of Conduct*, *Good Medical Practice*, is being reviewed and the Board will be consulting on the revised code in the coming months.)

Stakeholders who wish to provide comment on the Code of Conduct of other National Boards can access the revised code on each Board's website.

How your submission will be treated

Submissions will generally be published unless you request otherwise. The Boards publish submissions on their websites to encourage discussion and inform the community and stakeholders. However, the Boards retain the right to not publish submissions at their discretion, and will not place on their website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the consultation.

Before publication, the Boards may remove personally-identifying information from submissions, including contact details. The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Boards.

The Boards also accept submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. Any request for access to a confidential submission will be determined in accordance with the *Freedom of Information Act 1982* (Cwlth), which has provisions designed to protect personal information and information given in confidence.

Please let the Boards know if you do not want your submission published, or want all or part of it treated as confidential.

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Aboriginal and Torres Strait Islander Health Practice	Occupational Therapy
Chinese Medicine	Optometry
Chiropractic	Osteopathy
Dental	Pharmacy
Medical	Physiotherapy
Medical Radiation Practice	Podiatry
Nursing and Midwifery	Psychology

Australian Health Practitioner Regulation Agency

Overview

April 2013

Consultation on common codes and guidelines

The Health Practitioner Regulation National Law, as in force in each state and territory (the National Law), empowers the National Boards to develop and approve codes and guidelines to provide guidance to the profession.

The first 10 National Boards to enter the National Registration and Accreditation Scheme (the National Scheme) developed guidelines and codes for its commencement on 1 July 2010. These guidelines and codes were scheduled for review at least every three years.

The National Law requires the Boards to ensure there is wide-ranging consultation on the content of any proposed code or guideline.

This consultation paper seeks feedback on several related documents:

1. Revised *Guidelines for advertising* – which provide guidance about the advertising restrictions imposed by the National Law, including social media.
2. Draft proposed *Social media policy* – to address social media issues which are not covered in the *Guidelines for advertising* and the *Code of Conduct*.
3. Revised *Guidelines for mandatory notifications* – which provide guidance about the requirements for mandatory notifications under the National Law.

The National Boards are inviting general comments on these documents. There are also specific questions about each document in this consultation paper, which you may wish to address in your response.

The first two documents are grouped together, as they discuss some common issues. These are explained below in the section on the draft *Social media policy*.

The National Boards will consider the consultation feedback on the proposed guidelines, code and policy, before finalising the documents.

Please provide feedback by email to guidelinesconsultation@ahpra.gov.au by close of business on 30 May 2013.

Background

There are 14 National Boards in the National Registration and Accreditation Scheme (the National Scheme). Ten National Boards entered the National Scheme in 2010, and a further four joined in 2012. The Boards are:

- Aboriginal and Torres Strait Islander Health Practice Board of Australia (from 1 July 2012)
- Chinese Medicine Board of Australia (from 1 July 2012)
- Chiropractic Board of Australia
- Dental Board of Australia
- Medical Board of Australia

- Nursing and Midwifery Board of Australia
- Medical Radiation Practice Board of Australia (from 1 July 2012)
- Occupational Therapy Board of Australia (from 1 July 2012)
- Optometry Board of Australia
- Osteopathy Board of Australia
- Pharmacy Board of Australia
- Physiotherapy Board of Australia
- Podiatry Board of Australia, and
- Psychology Board of Australia.

The Australian Health Practitioner Regulation Agency (AHPRA) works in partnership with each of the National Boards to implement the requirements of the National Scheme, which has public safety at its heart. Further information is available at www.ahpra.gov.au.

All National Boards participating in the review

The current *Guidelines for mandatory notifications* and *Guidelines for advertising* are the same for all professions in the National Scheme. The four National Boards that entered the National Scheme on 1 July 2012 (the 2012 Boards) have the same *Code of Conduct* as many of the 10 National Boards that joined in 2010. Because these documents are common across Boards, all 14 National Boards are participating in these consultations.

The 2012 Boards only recently finalised their *Guidelines for mandatory notifications*, *Guidelines for advertising* and *Codes of Conduct*. The timeframes for consultation on these documents was tight. The 2012 Boards consider that there are benefits in participating in the current reviews to identify further opportunities to improve the Guidelines and Code, to maintain consistency of common documents and to give stakeholders a further opportunity for input.

Relationship between the *Guidelines for advertising of regulated health services*, the *Code of Conduct* and the *Social media policy*

The revised draft *Guidelines for advertising of regulated health services* (the *Advertising guidelines*) and the proposed draft *Social media policy* attached to this paper include information about social media. *Good Medical Practice* is currently being reviewed and will also make reference to social media.

- The *Advertising guidelines* provide guidance about how the legal restrictions on advertising under the National Law apply to social media.
- The proposed draft *Social media policy* explains this approach and identifies other guidance that may be useful to practitioners.

Accordingly, these documents are presented as a package in this consultation paper and should be read together.

Good Medical Practice will include references to social media and will confirm that professional values and conduct apply regardless of the setting of practice.

Estimated impacts of the revised documents

The Board expects minimal impacts on practitioners, businesses and other stakeholders arising from the changes proposed in the revised documents. The changes proposed focus on providing explanation and clarification.

The status quo would involve making no changes to the *Guidelines for mandatory notifications* and *Guidelines for advertising of regulated health services*. These Guidelines explain the provisions of the National Law rather than imposing new requirements. The proposed changes improve the clarity and usefulness of the explanatory information rather than adding new requirements.

Guidelines for advertising of regulated health services (the Guidelines for advertising)

Section 133 of the National Law contains legal restrictions on advertising involving a health practitioner or the services they provide. Section 133 is set out in the attachment.

The *Guidelines for advertising* provide guidance about the advertising restrictions imposed by the National Law.

National Boards have had a range of feedback about the *Guidelines for advertising* over the 30 months that the guidelines have been in place. In particular, there has been feedback that the guidelines:

1. could provide clearer information
2. could have better examples
3. could be more clearly linked to the legal restrictions on advertising in the National Law, and
4. should explain how the legal restrictions in the National Law apply to social media.

The attached draft *Guidelines for advertising* have been substantially revised to address these issues. A summary of the changes is also attached to highlight what is different in the revised guidelines.

The National Boards are seeking feedback on the revised *Guidelines for advertising* and also on the following questions:

- How are the existing guidelines working?
- Is the content of the revised guidelines helpful, clear and relevant?
- Is there any content that needs to be changed, deleted or added in the revised guidelines?
- Is there anything missing that should be added to the revised guidelines?
- Do you have any other comments on the revised guidelines?

In preliminary consultation, some comments suggested that the revised guidelines should include more real-life examples. Others suggested that the revised guidelines should be simpler and shorter. Although some additional examples have been added, it is not possible to include an exhaustive list of examples, so the guidelines now include some guiding principles to help practitioners evaluate whether their advertising complies with the National Law.

Social media policy

As regulators, National Boards have a role in providing appropriate guidance on social media from a regulatory perspective. This perspective is different to the role of other organisations that may, for example, provide advice to facilitate use of social media. For example, health professional peak organisations have often dedicated time and resources to develop detailed documents on social media use. These can provide helpful information for registered health practitioners.

The National Boards' responsibility in relation to social media is to clearly articulate how the obligations under the National Law that focus on protecting the public apply to social media.

The National Boards have had a range of feedback about the development of a social media policy. Some practitioners are seeking guidance from National Boards about their use of social media. Other practitioners are concerned that a social media policy could constrain the use of social media to assist good practice.

The National Boards have responded to this feedback and are proposing an approach that addresses the regulatory issues related to social media, consistent with the Boards' role, but which does not unnecessarily restrict the use of social media that is unrelated to a practitioner's professional life. The approach focuses on actions that are regulated under the National Law, or general standards of professional conduct, consistent with the National Boards' regulatory role.

The revised *Guidelines for advertising* attached to this paper include guidance about social media. This is in the context of the legal restrictions on advertising under the National Law and the general guidance that Boards have established about good practice and practitioner behaviour.

The attached draft *Social media policy* explains this approach. It makes explicit that the National Boards do not intend to limit the use of social media consistent with good practice. The draft policy explains that the principles of professional behaviour and ethical conduct apply equally in person or online.

You are invited to provide feedback

The National Boards are seeking feedback on the proposed draft *Social media policy* as well as on the following questions.

- Do you support the approach of including general guidance in the draft policy, the *Guidelines for advertising* and Good Medical Practice, with appropriate cross-referencing?
- Does the guidance in these documents reflect the National Boards' regulatory role?
- Do you agree with the approach of referring practitioners to other sources for guidance on social media that goes beyond the National Boards' regulatory role?
- Is the content of the draft *Social media policy* helpful?
- Is there any content that needs to be changed, added or deleted in the draft policy?
- Do you have any other comments on the draft policy?

Guidelines for mandatory notifications

The National Boards have developed guidelines to help explain the National Law requirements for registered health practitioners, employers of registered practitioners and education providers to make mandatory notifications (complaints) to protect the public. The guidelines provide a detailed explanation of the mandatory notification requirements.

The *Guidelines for mandatory notifications* aim to help practitioners, employers, and education providers understand whether and when they must make a notification about a practitioner's conduct, and whether to make a notification about a student with impairment. Making a mandatory notification is a serious step to prevent the public from being placed at risk of harm and should only be taken when there are sufficient grounds. This guideline explains when these grounds are likely to arise and aim to guide decision-making. The National Law protects practitioners, employers and education providers who make notifications in good faith under the National Law.

Only a small number of issues have been raised about the *Guidelines for mandatory notifications* since they took effect. The attached revised *Guidelines for mandatory notifications* address the issues that have been raised.

The revisions have been shaded in gray in this consultation document. A summary of the revisions is also attached later in this document.

You are invited to provide feedback

The National Boards are seeking feedback on the proposed changes to the *Guidelines for mandatory notifications* and also on the following questions.

- How are the current guidelines working?
- Is the content of the revised guidelines helpful, clear and relevant?
- Is there any content that needs to be changed, deleted or added in the revised guidelines?
- Is there anything missing that needs to be added to the guidelines?
- Do you have any other comments on the guidelines?

Relevant sections of the National Law

Section 35 of the National Law allows the National Boards to develop or approve standards, codes and guidelines for the health profession, including the development and approval of codes and guidelines that provide guidance to health practitioners registered in the profession. Section 39 explicitly states that a National Board may develop and approve codes and guidelines to provide guidance to the health practitioners it registers; and about other matters relevant to the exercise of its functions.

Section 133 of the National Law limits how regulated health services can be advertised. It provides:

(1) *A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that—*

- (a) is false, misleading or deceptive or is likely to be misleading or deceptive; or*
- (b) offers a gift, discount or other inducement to attract a person to use the service or the business, unless the advertisement also states the terms and conditions of the offer; or*
- (c) uses testimonials or purported testimonials about the service or business; or*
- (d) creates an unreasonable expectation of beneficial treatment; or*
- (e) directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services.*

Maximum penalty—

- (a) in the case of an individual—\$5,000; or*
- (b) in the case of a body corporate—\$10,000.*

(2) A person does not commit an offence against subsection (1) merely because the person, as part of the person's business, prints or publishes an advertisement for another person.

(3) In proceedings for an offence against this section, a court may have regard to a guideline approved by a National Board about the advertising of regulated health services.

*In this section — **regulated health service** means a service provided by, or usually provided by, a health practitioner.*

Next steps

The National Boards will consider the valuable feedback from this consultation and decide whether revisions to the documents would be useful. National Boards will then release the final version of the Guidelines and Policy with information about the timeframe for implementation.

Public consultation draft

April 2013

Guidelines for advertising regulated health services

1. Authority

The *Guidelines for advertising regulated health services* were jointly developed by the National Boards under section 39 of the Health Practitioner Regulation National Law, as in force in each state and territory (the National Law).

All obligations outlined in this document are those required under the National Law unless stated otherwise.

2. Definitions

A list of definitions is included in **appendix 1**.

Restrictions on advertising are included in other legislation. Practitioners should note that definitions in that legislation may be different and should refer to the relevant definitions to ensure compliance with that legislation.

3. Purpose

This document provides guidance on the legal requirements of advertising services that are provided by, or usually provided by, a health practitioner ('regulated health services' or 'services'). Section 133 of the National Law regulates advertising by health practitioners.

Section 133 of the National Law provides:

- (1) *A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that—*
 - (a) *is false, misleading or deceptive or is likely to be misleading or deceptive; or*
 - (b) *offers a gift, discount or other inducement to attract a person to use the service or the business, unless the advertisement also states the terms and conditions of the offer; or*
 - (c) *uses testimonials or purported testimonials about the service or business; or*
 - (d) *creates an unreasonable expectation of beneficial treatment; or*
 - (e) *directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services.*

Maximum penalty—

- (a) *in the case of an individual—\$5,000; or*
 - (b) *in the case of a body corporate—\$10,000.*
- (2) *A person does not commit an offence against subsection (1) merely because the person, as part of the person's business, prints or publishes an advertisement for another person.*
- (3) *In proceedings for an offence against this section, a court may have regard to a guideline approved by a National Board about the advertising of regulated health services.*

*In this section — **regulated health service** means a service provided by, or usually provided by, a health practitioner.*

These guidelines:

- set out the obligations of advertisers (see definition in **appendix 1**)
- explain advertising that is prohibited
- describe information commonly found in advertising, and
- clarify that advertisers of regulated health services also have responsibilities under other legislation administered by other regulators.

The National Law and these guidelines focus on consumer protection. The role of these guidelines is to explain the limits placed on regulated health services advertising under the National Law, not to explain to practitioners how to advertise. The wording of s. 133 is broad and it is not possible to provide an exhaustive list of advertising that will, or will not, contravene the National Law.

People or organisations advertising regulated health services, including individual practitioners, are responsible for ensuring that their advertisements comply with the law. Neither AHPRA nor the National Boards are able to provide legal advice to health practitioners about advertising and these guidelines are not a substitute for legal advice.

4. Who these guidelines apply to

These guidelines apply to any person (as defined in **appendix 1**) who advertises a regulated health service, including registered health practitioners, non-registered health practitioners, individuals and bodies corporate (advertisers).

A breach of advertising requirements is a criminal offence. The National Law imposes a penalty up to \$5,000 for an individual and \$10,000 for a body corporate.

A court may consider these guidelines when hearing advertising offences against section 133 of the National Law.

5. The basis for these guidelines

The following principles apply to these guidelines:

- advertising may be a valuable tool in communicating the services health practitioners offer to the public to enable health consumers to make informed choices
- advertising which contains false and misleading information undermines the integrity of our health system as well as the trust of the public in the health profession being advertised
- the public should be protected from false and misleading advertisements, and
- the indiscriminate or unnecessary use of health services should be discouraged.

6. Obligations under the National Law and other legislation

Advertisers of regulated health services must comply with the National Law, available at www.ahpra.gov.au.

Australian regulators such as the Australian Competition and Consumer Commission (ACCC) and the Therapeutics Goods Administration (TGA) also have responsibility for laws governing the advertising of health products and services. More information about this is included in **appendices 3 and 4**.

A registered health practitioner (and those who have previously been registered health practitioners) may also be subject to disciplinary action under Part 8 of the National Law (which relates to health, performance and conduct) for unprofessional conduct (this is described as 'unsatisfactory professional conduct' in NSW) in relation to advertising. One of the grounds for a voluntary notification is that the health practitioner has, or may have, contravened the National Law (see section 144).

These guidelines should also be read in conjunction with codes and guidelines published by National Boards that convey the Board's expected standards of professional conduct. Each National Board has published a *Code of Conduct for registered health practitioners*, or similar document. Practitioners have a

professional responsibility to be familiar with, and apply, this code. The code describes the professional standards expected of practitioners, including when advertising.

In some circumstances, advertisers may also breach the title and practice protection provisions of the National Law, whether or not they have been prosecuted under the advertising provisions.

Compliance with these guidelines does not excuse advertisers of regulated health services from the need to comply with other applicable laws. Advertising of regulated health services often involves the advertising of products and/or therapeutic goods and care must be taken to ensure compliance with all relevant legislation.

If a complaint about an advertisement may be of interest to another Australian regulatory authority such as the TGA or ACCC, AHPRA may refer the matter to the most appropriate regulator.

Other laws and authorities that regulate advertising are described in **appendix 2**.

7. The advertising provisions of the National Law

The following sections explain advertising that may contravene or is not likely to contravene the advertising requirements of the National Law.

The ACCC has provided the following information about how to avoid being misleading and deceptive when advertising, which may be useful for advertisers considering the requirements of the National Law:

- *Sell your professional services on their merits.*
- *Be honest about what you say and do commercially.*
- *Look at the overall impression of your advertisement. Ask yourself who the audience is and what the advertisement is likely to say or mean to them.*
- *Remember, at a minimum, that it is the viewpoint of a layperson with little or no knowledge of the professional service you are selling that should be considered.¹*

7.1 Information included in advertisements. The following factual information is commonly included in health services advertisements, and may assist advertisers. The list below is not intended to be exhaustive.

Information commonly included in health services advertising

- Office details
 - contact details
 - office hours, availability of after-hours services
 - accessibility (e.g. wheelchair access)
 - languages spoken (this does not affect other guidance provided by the national board about use of qualified interpreters where appropriate)
 - emergency contact details
- Fees
 - a statement about fees charged, bulk-billing arrangements, or other insurance plan arrangements and installment fee plans regularly accepted
- Qualifications
 - a statement of the names of schools and training programs from which the practitioner has

¹ Australian Competition and Consumer Commission, *Professions and the Competition and Consumer Act*, 2011, www.accc.gov.au/content/index.phtml/tag/professions

graduated and the qualifications received, subject to the specific information in these guidelines on 'advertising of qualifications and titles'

- reference to any practitioners who hold specialist registration or endorsement under the national law and their area of specialty or endorsement
- a statement about the teaching positions currently or formerly held by the practitioner in board-approved or accredited institutions, together with relevant dates
- a statement about the accreditation or certification of the practitioner with a public board or agency, including any affiliations with hospitals or clinics
- a statement about safety and quality accreditation of the practice or health care setting
- For any surgical and/or invasive procedures, the appropriate warning statement in a clearly visible position²
- Non-enhanced photos or drawings of the practitioner or his or her office
- Any statement providing public health information encouraging preventive, restorative or corrective care (public health information should also be evidence based wherever possible)

7.2 Prohibited advertising under the National Law

Section 133 of the National Law covers five key aspects of advertising. These relate to advertising that:

- a) is false, misleading or deceptive or is likely to be so
- b) offers a gift, discount or other inducement to attract a user of the health service without stating the terms and conditions of the offer
- c) uses testimonials or purported testimonials
- d) creates an unreasonable expectation of beneficial treatment, and/or
- e) encourages the indiscriminate or unnecessary use of health services.

The section below explains what may constitute a breach of the National Law and what could generally be considered inconsistent with the National Law.

7.2.1 *Misleading or deceptive advertising*

Section 133 of the National Law states:

- (1) *A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that –*
 - a. *Is false, misleading or deceptive or is likely to be misleading or deceptive*

A common meaning of 'mislead or deceive' is 'lead into error'. The courts have considered the phrase 'mislead or deceive' and those that are misled are almost by definition deceived as well. Misleading someone may include lying to them, leading them to a wrong conclusion, creating a false impression, leaving out (or hiding) important information, making false or inaccurate claims.

As the ACCC explains, 'Patients can be physically, psychologically or financially affected by misleading conduct, and these effects can be long lasting. It is essential that patients be given honest, accurate and complete information in a form they can understand.'³

More information about the meaning of 'mislead or deceive' is available on the ACCC website.⁴

² Note that some Boards may provide specific guidance on the use of warning statements for surgical and invasive procedures. See appendix 6.

³ www.accc.gov.au/business/professional-services/medical-professionals

⁴ www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-claims

Examples of advertising that may be false or misleading include:

- misleading, either directly, or by implication, using emphasis, comparison, contrast or omission
- comparing different regulated health professions or practitioners, in the same profession or across professions, in a way that may mislead or deceive
- only providing partial information which could be misleading
- using phrases like 'as low as' or 'lowest prices', or similar words or phrases when advertising fees for services, prices for products or price information in a way which is misleading or deceptive
- implying that the regulated health services can be a substitute for public health vaccination or immunisation, and/or
- using words, letters or titles that may mislead or deceive a health consumer into thinking that the provider of a regulated health service is more qualified or more competent than a holder of the same registration category (e.g. 'specialising in XX' when there is no specialist registration category for that profession).

For example, the ACCC comments that it would be misleading or deceptive for a business to advertise the health benefits of a therapeutic device or health product but have no proof that such benefits can be attained.⁵

7.2.2 Gifts and discounts

Section 133 of the National Law states:

- (1) *A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that –*
 - b. *Offers a gift, discount or other inducement to attract a person to use the service or the business, unless the advertisement also states the terms and conditions of the offer*

Any advertisement that offers gifts, prizes or free items must state the terms and conditions of the offer. The use of unclear, unreadable or misleading terms and conditions attached to gifts, discounts and other inducements would not meet this requirement.

Consumers generally consider the word 'free' to mean absolutely free. When the costs of a 'free offer' are recouped through a price rise elsewhere, the offer is not truly free. An example is an advertisement which offers 'make one consultation appointment, get one free', but raises the price of the first consultation to largely cover the cost of the second (free) appointment. This type of advertising could also be misleading or deceptive.

The terms and conditions should be in plain English, readily understandable, accurate and not in themselves misleading about the conditions and limitations of the offered service.

Advertising may contravene the National Law when it:

- contains price information that is inexact
- contains price information that fails to specify any terms and conditions or variables to an advertised price, or that could be considered misleading or deceptive
- states an instalment amount without stating the total cost (which is a condition of the offer), and/or
- does not state the terms and conditions of offers of gifts, discounts or other inducements.

7.2.3 Testimonials

Section 133 of the National Law states:

- (1) *A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that –*
 - c) *Uses testimonials or purported testimonials about the service or business*

⁵ Australian Competition and Consumer Commission, Misleading and deceptive conduct, <http://www.accc.gov.au/consumers/misleading-claims-advertising/false-or-misleading-claims>

The National Law does not define testimonial, so the word has its ordinary meaning, which includes a recommendation about a service or its quality.

A testimonial includes recommendations, or statements, made by an individual about their experience or benefits of a particular practitioner or regulated health service.

Testimonials can distort a person's judgment in his or her choice of health practitioner, may misrepresent the skills and or expertise of practitioners and create unrealistic expectations of the benefits such practitioners may offer health consumers.

Testimonials in advertising include:

- (i) using or quoting testimonials on a website, such as patients posting comments about a practitioner on the practitioner's business website, particularly when the website encourages patients to post comments and/or selectively publishes patient comments
- (ii) self-testimonials, such as in a newsletter or on a website, and
- (iii) the use of patient stories.

A practitioner must take reasonable steps to have any unsolicited testimonials associated with their advertising removed once they become aware of them. Reasonable steps include taking action within the practitioner's power, such as directly removing, or requesting removal, of the testimonials.

For example, an advertisement on a social media site such as a Facebook page that includes a recommendation from a patient, or statement from a person about the benefits of the regulated health service or business they received from a registered health practitioner, may contravene the National Law. Once the practitioner is aware of the testimonials, he or she must take reasonable steps to have the testimonial removed (also refer to section 8.1 on social media).

7.2.4 Unreasonable expectation of beneficial treatment

Section 133 of the National Law states:

(1) A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that –

d) Creates an unreasonable expectation of beneficial treatment

This often arises when advertisers take advantage of the vulnerability of health consumers in their search for a cure or remedy. The claims of beneficial treatment can range from miracle cures to unsubstantiated scientific claims. The expectation has to be reasonable from an objective point of view.

For example, advertising may contravene the National Law when it:

- creates an unreasonable expectation (such as by exaggerating or by providing incomplete or biased information) of recovery time following provision of a regulated health service
- fails to disclose the health risks associated with a treatment
- omits the necessary warning statement for a surgical or invasive procedure⁶
- contains any information or material that is likely to make a person believe his or her health or wellbeing may suffer from not taking or undertaking the health service, and/or
- contains a claim, statement or implication that is likely to create an unreasonable expectation of beneficial treatment by:
 - either expressly or by omission, indicating that the treatment is infallible, unfailing, magical, miraculous or a certain, guaranteed or sure cure, and/or
 - a practitioner has an exclusive or unique skill or remedy, or that a product is 'exclusive' or contains a 'secret ingredient' that will benefit the patient.

⁶ Note that some Boards may provide specific guidance on the use of warning statements for surgical and invasive procedures. See **appendix 6**.

7.2.5 Encouraging indiscriminate or unnecessary use of health services

Section 133 of the National Law states:

(1) A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that –

- e) Directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services*

The unnecessary use of health services is not in the public interest.

Advertising may contravene the National Law when it:

- encourages a person to improve their physical appearance together with the use of phrases such as ‘don’t delay’, ‘achieve the look you want’ and ‘looking better and feeling more confident’
- provides a patient or client with an unsolicited appointment time
- uses prizes, bonuses, bulk purchases, bulk discounts or other endorsements to encourage the unnecessary consumption of health services that are unrelated to clinical need or therapeutic benefit
- uses promotional techniques that are likely to encourage consumers to use health services regardless of clinical need or therapeutic benefit, such as offers or discounts, online/internet deals, vouchers, and/or coupons, and/or
- advertises time-limited offers that influence a consumer to make decisions under the pressure of time and money rather than about their health care needs. An offer is considered time-limited if it is offered for purchase for a limited or specific period of time (or available for use within a limited period of time or by a specific date).

8. Further information about specific types of advertising

These guidelines cover all types of advertising, including social media, blogs and websites. The following sections discuss some aspects of advertising in more detail, to provide further guidance to practitioners.

8.1 Social media

The National Law prohibits advertising in any way that uses testimonials or purported testimonials. Testimonials, or comments that may amount to testimonials, made on social media sites by patients or other people may contravene the National Law.

Social media includes work related and personal pages on social networks such as Facebook, LinkedIn and Twitter.

A person is responsible for content on their social networking pages even if they were not responsible for the initial publication of the information or testimonial. This is because a person responsible for a social networking account accepts responsibility for any comment published on it, once alerted to the comment. Practitioners with social networking accounts should carefully review content regularly to make sure that all material complies with their obligations under the National Law.

These guidelines should be read in conjunction with the *Social media policy*, to be published on National Boards’ websites.

8.2 Advertising qualifications and titles⁷

Advertisers should take care using qualifications and titles when advertising regulated health services (as defined in **appendix 1**).

The inclusion of professional qualifications in an advertisement that also promotes the use or supply of therapeutic goods may be interpreted as a professional endorsement. These are prohibited under the *Therapeutic Goods Advertising Code 2007*.

⁷ A National Board may provide further, profession specific advice on the use of titles in advertising in **appendix 5**

The misuse of titles in advertising may also contravene other sections of the National Law related to title protection (please refer to **appendix 5(a)**). For specific guidance on use of titles in the psychology and physiotherapy professions, please refer to **appendix 5(b)**.

8.2.1 Use of titles in advertising

The National Law regulates the use of certain titles. Misuse of a protected title is an offence under the National Law.

Advertisers should be aware of the protected titles for the profession that they are advertising.⁸

Advertisers should avoid developing abbreviations of protected titles as these may mislead the public. It may also be misleading to use symbols, words or descriptions associated with titles.

There is no provision in the National Law that prohibits a practitioner from using titles such as 'doctor' but there is potential to mislead or deceive if the title is not applied clearly. If practitioners choose to adopt the title 'Dr' in their advertising and they are not registered medical practitioners, then (whether or not they hold a Doctorate degree or PhD) they should clearly state their profession.

Clarity may be achieved by including a reference to their health profession whenever the title is used, such as:

- Dr Isobel Jones (dentist), and
- Dr Walter Lin (chiropractor).

8.2.2 Advertising specialties and endorsements

The National Law allows for and protects specialties and endorsements. A registered health practitioner who does not hold specialist registration may not use the title 'specialist', or through advertising or other means, present themselves to the public as holding specialist registration in a health profession.

The National Law prohibits claims of:

- holding a type of registration, including specialist registration, or endorsement of registration not held, and/or
- being qualified to hold an endorsement they do not hold.

While the National Law protects specific titles, use of some words (such as 'specialises in') may be misleading or deceptive as patients or clients can interpret the advertisements as implying that the practitioner is more skilled or has more experience than is the case.

These words should be used with caution and need to be supported by fact. Words such as 'substantial experience in' or 'working primarily in' are less likely to be misunderstood as a reference to endorsement or specialist registration.

A registered health practitioner who does not hold an endorsement may not, through advertising or other means, present themselves to the public as holding such an endorsement (such as using professional titles that are associated with an approved area of practice endorsement).

A list of health professions with approved endorsements, including endorsements for scheduled medicines and area of practice endorsements, is available on the websites of the relevant National Board. These websites also explain the titles that a registered health practitioner with an area of practice endorsement may use.

8.2.3 Advertising qualifications or memberships

Advertising qualifications or memberships may be useful in providing the public with information about the experience and expertise of health practitioners. However, it may be misleading or deceptive if the advertisement implies that the practitioner has more skill or experience than is in fact the case.

⁸ Refer to the relevant National Board website for a list of the endorsements and recognised specialties for that profession.

Patients or clients are best protected when practitioners only advertise qualifications that are:

- approved for the purposes of registration, including specialist registration and endorsement of registration
- conferred by approved higher education providers⁹, or
- conferred by an education provider that has been accredited by an accreditation authority.

A list of accreditation authorities and approved qualifications for each health profession is available on the relevant National Board's website.

Helpful questions to consider

Practitioners who are considering the use of titles, words or letters to identify and distinguish themselves in advertising, other than those professional titles protected under the National Law for their profession, are encouraged to ask themselves the following questions.

- *Is it appropriate for me to use this title, qualification, membership, words or letters in advertising material?*
- *Am I skilled in the services I am advertising?*
- *If I display or promote my qualifications in advertising materials, is it easy to understand?*
- *Is there any risk of people being misled or deceived by the words, letters or titles that I use?*
- *Is the basis for my use of title, qualification, membership, or other words or letters:*
 - *relevant to my practice?*
 - *current?*
 - *verifiable?*
 - *credible?*

8.3 Advertising therapeutic goods

The Therapeutic Goods Administration (TGA) is responsible for regulating therapeutic goods including medicines, medical devices, biologicals, blood and blood products.

If the advertising comprises only pricing for prescription-only (Schedule 4 and 8) and certain pharmacist-only (Schedule 3 of the Poisons Standard) medicines, then the advertisement must comply with the *Therapeutic Goods Act 1989*, *Therapeutic Goods Regulations 1990*, the Therapeutic Goods Advertising Code 2007 and the Price Information Code of Practice. A list of practitioners permitted to advertise price information for certain Schedule 3, Schedule 4 and Schedule 8 medicines is included in the Price Information Code of Practice, available via the TGA website: www.tga.gov.au.

If the advertising promotes one or more products (i.e. therapeutic goods under the Therapeutic Goods Act 1989), then the advertising must comply with the *Therapeutic Goods Act 1989*, *Therapeutic Goods Regulations 1990*, the Therapeutic Goods Advertising code 2007 and, where relevant, the Price Information Code of Practice.

The definition of 'advertisement' in the *Therapeutic Goods Act 1989* should be noted.

8.4 Advertising price information

⁹ Within the meaning of the *Higher Education Support Act 2003* (Cth),

Any information about the price of procedures used in advertising of regulated health services must be clear and not misleading.

It is often difficult to provide an accurate price of a regulated health service in an advertisement due to the individual nature of services and the number of variables involved in the treatment. If fees and price information are to be advertised, then price information should be clear, with all costs involved and out of pocket expenses clearly identifiable, and any conditions or other variables to an advertised price or fee disclosed. This is to avoid misleading consumers and to ensure they are fully informed and are able to provide their full consent about health services.

Use of phrases like 'as low as' or 'lowest prices', or similar words, phrases or questions when advertising fees for services, prices for products or price information, or stating an installment amount without stating the total cost may be misleading and could contravene the advertising provisions of the National Law.

8.5 Use of scientific information in advertising

To not mislead or create false impressions, caution should be taken when using scientific information in the advertising. When a practitioner chooses to include scientific information in advertising, the information should:

- be presented in a manner that is accurate, balanced and not misleading
- use terminology that is understood readily by the audience to whom it is directed
- identify clearly the relevant researchers, sponsors and the academic publication in which the results appear and
- be from a reputable (e.g. peer reviewed), and verifiable source.

9. Consequence of a breach of advertising requirements

Complaints about possible breaches of the National Law and these guidelines should be reported to AHPRA. Information about how to do this is available on the AHPRA website.¹⁰

Table 2 summarises the options available to the Boards/AHPRA when there is a breach of the National Law or guidelines.

¹⁰ Go to www.ahpra.gov.au and follow the *Make a notification* link

Table 2

Who breached the National Law or guidelines	Options available to the Boards/AHPRA
<ul style="list-style-type: none"> • Registered health practitioners • People who don't hold current registration but who have been registered health practitioners in the past 	<ul style="list-style-type: none"> • Prosecute under the advertising provisions of the National Law in the relevant state or territory magistrates court, which may lead to a financial penalty • Take action under the National Law for unprofessional conduct (described as 'unsatisfactory professional' conduct in NSW) • Take action under the title protection provisions of the National Law, as relevant • Refer the matter to another regulator for investigation of a potential breach of other legislation • A person (see definition in appendix 1) may also be disciplined under the National Law as a result of action taken under other legislation. This can occur regardless of whether or not they are prosecuted under the National Law or any other legislation
<ul style="list-style-type: none"> • People who are not registered health practitioners • Bodies corporate 	<ul style="list-style-type: none"> • Prosecute under the advertising provisions of the National Law in the relevant state or territory magistrates court, which may lead to a financial penalty • Take action under the National Law about the use of protected titles • Refer the matter to another regulator for investigation of a potential breach of other legislation

10. Associated documents

These guidelines should be read in conjunction with codes and guidelines published by National Boards that convey the Boards' expected standards of professional practice.

11. Review

This guideline will be reviewed at least every three years. This guideline replaces any previously published National Board guidelines on advertising.

Date of issue:
Date of review:

Appendix 1 Definitions

Advertiser

Any person or business which advertises a regulated health service

Advertising

For the purpose of the Guidelines, advertising includes but is not limited to all forms of printed and electronic media that promotes a regulated health service and includes any public communication using:

- television
- radio
- motion pictures
- newspapers
- billboards
- books
- public and professional lists
- pictorial representations
- designs
- mobile communications or other displays
- internet
- social media
- all electronic media that promote a regulated health service
- business cards, announcement cards
- office signs
- letterhead
- public and professional directory listings, and
- any other similar professional notice (e.g. patient recall notices)

Advertising also includes situations in which practitioners make themselves available or provide information for media reports, magazine articles or advertorials, including where practitioners make comment or provide information on particular products or services, or particular practitioners for the purposes of promoting or advertising a regulated health service.

This definition *excludes* material:

- issued to persons during consultations where such material is designed to provide the person with clinical or technical information about health conditions or procedures, and where the person is afforded sufficient opportunity to discuss and ask questions about the material. The information should not refer to services by the practitioner that could be interpreted as promoting that practitioner's services as opposed to providing general information to the patient or client about a procedure or practice.
- issued by a person or organisation for the purpose of public health information, or as part of a public health program or to health promotion activities (e.g. free diabetes screening, which confer no promotional benefits on the practitioners involved)
- tenders, tender process, competitive business quotations and proposals, and the use of references about non-health services in those processes, provided the relevant material is not made available to the general public or used for promotional purposes (such as being published on a website).

The definition of “advertising” and “advertisement” may be different in other legislation. These definitions should be taken into account when considering compliance with that legislation. In particular the definition of “advertisement” in the *Therapeutic Goods Act 1989* should be noted.

AHPRA

AHPRA is the abbreviation for the Australian Health Practitioner Regulation Agency. AHPRA's operations are governed by the National Law (defined below), which came into effect on 1 July 2010. AHPRA

supports the 14 National Boards that are responsible for regulating the health professions. The primary role of the National Boards is to protect the public and they set standards and policies that all registered health practitioners must meet.

Health practitioner

A health practitioner means an individual who practises a health profession.

Health service

A health service includes the following services, whether provided as public or private services:

- a) services provided by registered health practitioners
- b) hospital services
- c) mental health services
- d) pharmaceutical services
- e) ambulance services
- f) community health services
- g) health education services
- h) welfare services necessary to implement any services referred to in a) to g) above
- i) services provided by dietitians, masseurs, naturopaths, social workers, speech pathologists, audiologists or audiometrists, and
- j) pathology services.

Also refer to the definition of regulated health service

Invasive Procedure

For the purposes of these guidelines:

Invasive procedure means any operation or other procedure that:

- a) penetrates or pierces the skin by any instrument other than a needle, other than minor dental or minor podiatric procedures, or
- b) is an elective procedure requiring more than local anaesthetic or sedation, or
- c) requires admission to a day procedure centre (DPC) or hospital, or
- d) involves significant risk associated with surgical and/or anaesthetic complications.

National Law

The 'National Law' means the *Health Practitioner Regulation National Law* as in force in each state and territory.

Person

A person includes an individual or a body politic or corporate.

Purported testimonial

A purported testimonial is a statement or representation that appears to be a testimonial.

Product

For the purpose of these guidelines, a 'product' is a therapeutic good within the meaning of the therapeutic Goods Act 1989 (Cwlth) and does not apply to the advertising of other products that are not associated with the provision of regulated health services.

Regulated health service

Means a service provided by, or usually provided by, a health practitioner (as defined in the National Law).

Social media

'Social media' describes the online and mobile tools that people use to share opinions, information, experiences, images, and video or audio clips and includes websites and applications used for social networking. Common sources of social media include, but are not limited to, social networking sites such

as Facebook and LinkedIn, blogs (personal, professional and those published anonymously), WOMO, True Local and microblogs such as Twitter, content sharing websites such as YouTube and Instagram, and discussion forums and message boards.

Appendix 2 Associated legislation and agencies

Legislation	Responsible agency	Further information
Australian Consumer Law	Australian Competition and Consumer Commission (ACCC) and relevant state and territory consumer protection departments and agencies	www.accc.gov.au
Therapeutic Goods Act 1989 (Cth) Therapeutic Goods Regulations 1990 Therapeutic Goods Advertising Code 2007 Price Information Code of Practice	Department of Health and Ageing - Therapeutic Goods Administration	www.tga.gov.au
Poisons Standard (Standard for the Uniform Scheduling of medicines and Poisons)	Department of Health and Ageing – Therapeutic Goods Administration	www.tga.gov.au
Drugs and Poisons legislation	Agencies in each Australian state and territory	<p>Queensland: Health (Drugs and Poisons) Regulation 1996, www.legislation.qld.gov.au</p> <p>New South Wales: <i>Poisons and Therapeutic Goods Act 1966</i>, Poisons and Therapeutic Goods Regulation 2008, www.legislation.nsw.gov.au</p> <p>Victoria: <i>Drugs, Poisons and Controlled Substances Act 1981</i>, and Drugs, Poisons and Controlled Substances Regulations 2006, www.legislation.vic.gov.au/</p> <p>Tasmania: Poisons Act 1971, www.thelaw.tas.gov.au</p> <p>ACT: Medicines, Poisons and therapeutic goods Act 2008. Medicines, Poisons and therapeutic goods Regulation 2008, www.legislation.act.gov.au</p> <p>South Australia: <i>Controlled Substances Act 1984</i> Controlled Substances (Poisons) Regulations 2011, www.legislation.sa.gov.au</p> <p>Western Australia: <i>Poisons Act 1964</i>, Poisons Regulations 1965 www.slp.wa.gov.au/legislation/statutes.nsf/default</p>

		html Northern Territory: Poisons & Dangerous Drugs Act, www.dcm.nt.gov.au/strong_service_delivery/supporting_government/current_northern_territory_legislation_database
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Appendix 3 The Australian Consumer Law

In addition to complying with these guidelines, regulated health services need to comply with the Australian Consumer Law (ACL) which commenced on 1 January 2011. The ACL harmonised the consumer protection provisions in the Trade Practices Act 1974 (TPA) and in State and Territory fair trading laws, and replaced consumer protection provisions in at least 20 different Commonwealth, state and territory laws with one law.

The ACL is a national law which applies in the same way to all sectors and in all Australian jurisdictions. This means that all consumers in Australia enjoy the same rights and all businesses have the same obligations, irrespective of which state or territory they engaged in transactions.

The ACL covers general standards of business conduct, prohibits unfair trading practices, regulates specific types of business-to-consumer transactions, provides basic consumer guarantees for goods and services and regulates the safety of consumer products and product-related services.

The ACL is located in Schedule 2 to the Competition and Consumer Act 2010 (Cwlth).

The ACL includes:

- a national unfair contract terms law covering standard form consumer contracts
- a national law guaranteeing consumer rights when buying goods and services
- a national product safety law and enforcement system
- a national law for unsolicited consumer agreements covering door-to-door sales and telephone sales
- simple national rules for lay-by agreements, and
- new penalties, enforcement powers and consumer redress options.

The ACL applies nationally and in all States and Territories, and to all Australian businesses. For transactions that occurred prior to 1 January 2011, the previous national, State and Territory consumer laws continue to apply.

The ACL is administered and enforced jointly by the Australian Competition and Consumer Commission and the State and Territory consumer protection agencies, with the involvement of the Australian Securities and Investments Commission for financial services matters.

Advertisements must comply with all requirements of the ACL in addition to compliance with these guidelines.

Appendix 4 Advertising of therapeutic goods

As stated, compliance with these guidelines does not exempt advertisements for regulated health services from the need to comply with other applicable laws. This includes legislation administered by the [Therapeutics Goods Administration](#) (TGA).

The TGA is part of the Australian Government Department of Health and Ageing, and is responsible for regulating therapeutic goods including medicines, medical devices, biological, blood and blood products.

Certain advertisements directed at consumers require approval prior to broadcast or publication.

The advertising of therapeutic goods to consumers and health practitioners is controlled respectively by statutory measures administered by the TGA and self-regulation through codes of practice administered by the relevant therapeutic goods industry associations. Certain advertisements directed to consumers require approval prior to broadcast or publication.

Advertisements for therapeutic goods in Australia are subject to the requirements of the *Therapeutic Goods Act 1989*, Therapeutic Goods Regulations 1990, the Therapeutic Goods Advertising Code and the Price Information Code of Practice (collectively the therapeutic goods legislation) and other relevant laws including the *Competition and Consumer Act 2010*.

Health practitioners should note the definition of “advertisement” in the *Therapeutic Goods Act 1989* when considering their compliance with the therapeutic goods legislation. Implicit and explicit references to specific therapeutic products as well as more generic references may fall within the meaning of “advertisement”.

In general, the advertising to the public of “Prescription Medicines” (Schedule 4) or “Controlled Drugs” (Schedule 8) and certain Pharmacist-only Medicines (Schedule 3 of the Poisons Standard) is prohibited by the therapeutic goods legislation. Exceptions to this are set out in the therapeutic goods legislation.

The purpose of these requirements is to protect public health by promoting the safe use of therapeutic goods and ensuring that they are honestly promoted as to their benefits, uses and effects. Controls are placed on the advertising of therapeutic goods (medicines and medical devices) to ensure advertisements are socially responsible, truthful, appropriate and not misleading.

Further information on Australia's advertising regulation for therapeutic goods, including details of the Complaints Resolution Panel (TGACRP) and the Complaints register, may be obtained from the [TGACC website](#) and the TGACRP website.

This includes:

- advertising to consumers
- advertising prescription medications to health professionals (including Best practice guideline on prescription medicine labelling)
- advertising medical services that include Schedule 4 (prescription) substances
- Price Information Code of Practice, and
- The application and approval process for advertising of therapeutic goods.

Those intending to advertise therapeutic goods are advised to familiarise themselves with the requirements of the therapeutic goods legislation in addition to any requirements under the National Law and in these guidelines.

Appendix 5 Title Protection

A5(a) Relevant sections of the National Law

Sections 113 – 119 describe the title and practice protections under the National Law including the penalties for offences by individuals and body corporate.

[Section 113](#) provides that a person cannot knowingly or recklessly take or use a protected title found in the table of that section or a prescribed title for a health profession which would induce a belief that the person is registered in that profession.

[Section 115](#) provides that a person cannot knowingly or recklessly take or use the titles, 'dental specialist', 'medical specialist' or 'a specialist title for a recognised specialty' unless the person is registered under that specialty.

[Section 116](#) provides that a person who is not a registered health practitioner must not knowingly or recklessly (i) take or use the title 'registered health practitioner' or claim to be so registered or (ii) take or use a title, name, initial, symbol, word or description to indicate the person is a health practitioner or claim to be a health practitioner or (iii) indicate the person is authorised or qualified to practise as a health practitioner.

[Section 117](#) provides that a person must not knowingly or recklessly claim or hold him or herself out to be registered or qualified to practise in a health profession or a division of a health profession if the person is not so registered. Section 117 also provides that a person cannot use or take a title which would induce a belief that such a person is so registered.

[Section 118](#) provides that a person who is not a specialist health practitioner must not knowingly or recklessly take or use the title 'specialist health practitioner'. Further a person must not use a title, name, symbol, word or description that would induce a belief that a person is or is authorised or qualified as a specialist health practitioner. Further the person must not claim or hold out to be registered in a recognised specialty or claim to be qualified to practise as a specialist health practitioner.

[Section 119](#) provides that a person must not knowingly or recklessly claim or hold out to have or be qualified to have a type of registration or endorsement in a specialty if the person does not have that registration or endorsement. Further a person must not claim or hold out to have or be qualified with a specialised registration endorsement in a specialty.

A5(b) Board specific advice on the use of titles in advertising

Some Boards have developed statements to assist in the use of titles by the practitioners of the specific profession.

Psychology Board of Australia

The Psychology Board of Australia advises registered psychologists that use of the title 'doctor' in their practice has the potential to mislead members of the public.

Specifically, the use of tiles may be misleading into believing that the practitioner is a psychiatrist when they are not. Therefore, registered psychologists may not use such a title unless they hold a doctoral qualification from an approved higher education provider or an overseas institution with an equivalent accreditation status.

Where a registered psychologist holds a doctoral qualification that meets the above, if they advertise their services to the public, they should make it clear when using the title 'doctor' that they are not a registered medical practitioner or psychiatrist, for example:

- Dr Vanessa Singh (Psychologist),and
- Dr Ivan Hassam (Doctor of Psychology).

Physiotherapy Board of Australia

The Physiotherapy Board of Australia recognises the established history of specialised physiotherapy practice achieved through recognised higher education via the Australian College of Physiotherapy. As such the Board considers that appropriate use of qualifications in advertising is acceptable when accompanied by wording that establishes those credentials.

For Example: "Mr P Smith, Specialist Musculoskeletal Physiotherapist (as awarded by the Australian College of Physiotherapists in 2008")

Appendix 6

A6(a) Use of graphic or visual representations

If a practitioner chooses to use any graphic or visual representations in health service advertising (including photographs of patients, clients or models; diagram; cartoons; or other images), they should be used with caution.

If photographs of people are used in advertising of treatments, use of a real patient or client who has actually undergone the advertised treatment by the advertising practitioner or practice, and who has provided written consent for publication of the photograph in the circumstances in which the photograph is used is less likely to be misleading.

Practitioners should not use photographs of actual patients or clients if the patient or client is vulnerable as a result of the type of treatment involved or if their ability to consent may be otherwise impaired.

Use of 'before and after' photographs in advertising of regulated health services has a significant potential to be misleading or deceptive, to convey to a member of the public inappropriately high expectations of a successful outcome and to encourage the unnecessary use of health services.

Use of 'before and after' photographs is less likely to be misleading if:

- the images are as similar as possible in content, camera angle, background, framing and exposure
- there is consistency in posture, clothing and make up
- there is consistency in lighting and contrast
- there is an explanation if photographs have been altered in any way, and
- the referenced procedure is the only visible change that has occurred for the person being photographed.

The guidelines do not limit use of stock photographs and models other than in relation to the advertising of particular treatments, provided that the provisions of the National Law and these guidelines are otherwise met. However, practitioners should exercise caution due to the potential to mislead consumers.

A6(b) Use of warning statements for surgical or invasive procedures

Where a surgical (or 'an invasive') procedure is advertised directly to the public, the advertisement should include a clearly visible warning, with text along the following lines:

'Any surgical or invasive procedure carries risks. Before proceeding, you should seek a second opinion from an appropriately qualified health practitioner.'

If the text of any warning label is in smaller print than the main text or placed in an obscure position of an advertisement, the advertisement may contravene the National Law.

April 2013

Proposed *Social media policy*

Introduction

The use of social media is expanding rapidly. Individuals and organisations are embracing user-generated content, such as social networking, personal websites, discussion forums and message boards, blogs and microblogs.

Whether an online activity is able to be viewed by the public or is limited to a specific group of people, health practitioners need to maintain professional standards and be aware of the implications of their actions, as in all professional circumstances. Health practitioners need to be aware that information circulated on social media may end up in the public domain, and remain there, irrespective of the intent at the time of posting.

Context

A key objective of the National Registration and Accreditation Scheme and of the National Boards is to protect the public. The Health Practitioner Regulation National Law, as in force in each state and territory (National Law), and codes and guidelines developed by National Boards are relevant when considering social media.

This policy explains how the National Law and the following existing codes and guidelines relate to social media:

- section 133 of the National Law which establishes obligations about advertising by registered health practitioners provisions and the *Guidelines on advertising of regulated health services*, and
- the relevant National Board's code of ethics and professional conduct/practice (the *Code of conduct*).

Health practitioners should be aware of their ethical and regulatory responsibilities when they are interacting online, just as in person. This policy provides guidance to registered health practitioners on understanding their responsibilities and obligations when using and communicating on social media.

Who needs to use this policy?

Registered health practitioners and students in Board-approved courses should be aware of the implications of using social media.

Definition of social media

'Social media' includes websites and applications used for social networking. Common sources of social media include, but are not limited to, social networking sites such as Facebook and LinkedIn, blogs (personal, professional and those published anonymously) and microblogs such as Twitter, content sharing websites such as YouTube and Instagram, and discussion forums and message boards.

Obligations in relation to social media

In using social media, just as with all aspects of professional behaviour, health practitioners should be aware of their obligations under the National Law, the *Code of Conduct* for their profession, the *Guidelines for advertising regulated health services* (*Advertising guidelines*) and other relevant legislation.

1. Professional obligations

The *Code of Conduct* contains guidance about the required standards of professional behaviour that apply to registered health practitioners whether they are interacting in person or online. The *Code of Conduct* also articulates standards of professional conduct in relation to privacy and confidentiality of patient information, including when using social media. For example, posting unauthorised photographs of patients in any medium is a breach of the patient's privacy and confidentiality, including on a personal Facebook site or group, even if the privacy settings are set at the highest setting (such as for a closed, 'invisible' group).

2. Obligations in relation to advertising

Section 133 of the National Law imposes limits on how health services delivered by registered health practitioners can be advertised. These limits apply to all forms of advertising, including through social media and on the internet. For example, the National Law prohibits the use of testimonials in advertising. The *Advertising guidelines* provide guidance about how the legal restrictions on advertising under the National Law apply to social media.

Summary

When using social media, health practitioners should remember that the National Law, the *Code of Conduct* and the *Advertising guidelines* apply.

Registered health practitioners should only post information that is not in breach of these obligations by:

- not breaching professional obligations
- not breaching confidentiality and privacy obligations (such as discussing patients or posting pictures of procedures, case studies, patients or sensitive material which may enable patients to be identified and/or without having obtained consent in appropriate situations), and/or
- presenting information in an unbiased, evidence informed context and not making unsubstantiated claims.

Additional information material may be available from professional bodies and/or employers, which aims to support health practitioners' use of social media. However, the legal obligations that registered health practitioners must adhere to are set out in the National Boards' respective *Code of Conduct* and *Advertising guidelines*.

Review

This policy will commence on (date/month) and be reviewed annually.



Aboriginal and Torres Strait Islander Health Practice	Occupational Therapy
Chinese Medicine	Optometry
Chiropractic	Osteopathy
Dental	Pharmacy
Medical	Physiotherapy
Medical Radiation Practice	Podiatry
Nursing and Midwifery	Psychology

Australian Health Practitioner Regulation Agency

Public consultation draft¹¹

March 2013

Draft revised *Guidelines for mandatory notifications*

Overview

These guidelines have been developed jointly by the national boards under s. 39 of the *Health Practitioner Regulation National Law Act* as in force in each state and territory (the National Law). The guidelines are developed to provide direction to registered health practitioners, employers of practitioners and education providers about the requirements for mandatory notifications under the National Law.

The inclusion of mandatory notification requirements in the National Law is an important policy initiative for public protection.

The relevant sections of the National Law are attached.

Who needs to use these guidelines?

These guidelines are relevant to:

- health practitioners registered under the National Law
- employers of practitioners
- education providers.

Students who are registered in a health profession under the National Law should be familiar with these guidelines. Although the National Law does not require a student to make a mandatory notification, a notification can be made about an impaired student.

Summary of guidelines

These guidelines explain the requirements for practitioners, employers of practitioners and education providers to make mandatory notifications under the National Law to prevent the public being placed at risk of harm.

The threshold to trigger a mandatory notification in relation to a practitioner is high. The practitioner or employer must have first formed a reasonable belief that the behaviour constitutes notifiable conduct or a notifiable impairment or, in the case of an education provider, a notifiable impairment.

Making a mandatory notification is a serious step to prevent the public from being placed at risk of harm and should only be taken on sufficient grounds. The guidelines explain when these grounds are likely to arise.

Importantly, the obligation to make a mandatory notification applies to the conduct or impairment of all practitioners, not just those within the practitioner's own health profession.

¹¹ The revisions to the existing guidelines are highlighted in gray. A summary of the changes is included later in this consultation document.

These guidelines also address the role of the Australian Health Practitioner Regulation Agency (AHPRA) as the body for receiving notifications and referring them to the relevant board.

1. Introduction

The National Law requires practitioners, employers and education providers to report 'notifiable conduct', as defined in s. 140 of the National Law, to the National Agency in order to prevent the public being placed at risk of harm.

These guidelines explain how the boards will interpret these mandatory notification requirements. They will help practitioners, employers and education providers understand how to work with these requirements; that is, whether they must make a notification about a practitioner's conduct and when.

The threshold to be met to trigger the requirement to report notifiable conduct in relation to a practitioner is high; and the practitioner or employer must have first formed a reasonable belief that the behaviour constitutes notifiable conduct.

The aim of the notification requirements is to prevent the public from being placed at risk of harm. The intention is that practitioners notify the Agency if they believe that another practitioner has behaved in a way that presents a serious risk to the public. The requirements focus on serious instances of sub-standard practice or conduct by practitioners, or practitioners with serious impairment, that could place members of the public at risk. For students, the requirements focus on students with serious impairment.

That is, the requirements focus on behaviour that puts the public at risk of harm, rather than not liking the way someone else does something or feeling that they could do their job better.

Similarly, if the only risk is to the practitioner him or herself, and there is no risk to the public, the threshold for making a mandatory notification would not be reached. For example, a case where the risk is clearly addressed by being appropriately managed through treatment and the practitioner is known to be fully compliant with that, notification would not be required. Conversely, a mandatory notification is required if the risk to the public is not mitigated by treatment of the practitioner or in some other way.

Voluntary notifications

The National Law also provides for voluntary notifications for behaviour that presents a risk but does not meet the threshold for notifiable conduct or for notifications made by individuals who are not subject to the mandatory notification obligations such as patients or clients (see ss. 144 and 145 of the National Law).

Protection for people making a notification

The National Law protects practitioners, employers and education providers who make notifications in good faith under the National Law. 'Good faith' is not defined in the National Law so has its ordinary meaning of being well-intentioned or without malice. Section 237 provides protection from civil, criminal and administrative liability, including defamation, for people making notifications in good faith. The National Law clarifies that making a notification is not a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct. These provisions protect practitioners making mandatory notifications from legal liability and reinforce that making mandatory notifications under the National Law is consistent with professional conduct and a practitioner's ethical responsibilities. Legally mandated notification requirements override privacy laws. Practitioners should be aware that if they make notifications that are frivolous, vexatious or not in good faith, they may be subject to conduct action.

2. General obligations

The obligation is on any practitioner or employer who forms a reasonable belief that another practitioner has engaged in notifiable conduct to make a report to the National Agency as soon as practicable. The definition of 'notifiable conduct' is set out in section 140 of the National Law (also refer to section 3 of these

guidelines for more information on Notifiable conduct). In this context, the word 'practicable' has its ordinary meaning of "feasible" or "possible".

The mandatory notification obligation applies to all practitioners and employers of practitioners in relation to the notifiable conduct of practitioners. The obligation applies to practitioners in all registered health professions, not just those in the same health profession as the practitioner. It also applies where the notifying practitioner is also the treating practitioner for a practitioner, except in Western Australia (see Section 4 *Exceptions to the requirements of practitioners to make a mandatory notification* of these *Guidelines* for details).

There is also a mandatory obligation for education providers and practitioners to report a student with an impairment that may place the public at substantial risk of harm.

While the mandatory reporting provisions in the National Law are an important policy change and are new to most practitioners, the duties covered in them are consistent with current ethical practice and professional obligations. In addition to their legal obligations with respect to mandatory reporting, practitioners are also under an ethical obligation to notify concerns about a practitioner, in accordance with the broad ethical framework set out in the health profession's code of conduct (see the code of conduct and the voluntary reporting provisions of the National Law).

There are some exceptions to the requirement for practitioners to notify the National Agency of notifiable conduct, which are discussed at Section 4 *Exceptions to the requirement of practitioners to make a mandatory notification*.

These Guidelines do not affect other mandatory reporting requirements that may be established in separate legislation, for example requirements to report child abuse.

What is a reasonable belief?

For practitioners reporting notifiable conduct, a 'reasonable belief' must be formed in the course of practising the profession. The following principles are drawn from legal cases which have considered the meaning of reasonable belief.

1. A belief is a state of mind.
2. A reasonable belief is a belief based on reasonable grounds.
3. A belief is based on reasonable grounds when:
 - i. all known considerations relevant to the formation of a belief are taken into account including matters of opinion, and
 - ii. those known considerations are objectively assessed.
4. A just and fair judgement that reasonable grounds exist in support of a belief can be made when all known considerations are taken into account and objectively assessed.

A reasonable belief requires a stronger level of knowledge than a mere suspicion. Generally it would involve direct knowledge or observation of the behaviour which gives rise to the notification, or, in the case of an employer, it could also involve a report from a reliable source or sources. Mere speculation, rumours, gossip or innuendo are not enough to form a reasonable belief.

A reasonable belief has an objective element – that there are facts which could cause the belief in a reasonable person; and a subjective element – that the person making the notification actually has that belief.

A **notification** should be based on personal knowledge of facts or circumstances that are reasonably trustworthy and that would justify a person of average caution, acting in good faith, to believe that notifiable conduct has occurred or that a notifiable impairment exists. Conclusive proof is not needed. The professional background, experience and expertise of a practitioner, employer or education provider will also be relevant in forming a reasonable belief.

The most likely example of where a practitioner or employer would form a reasonable belief is when the person directly observes notifiable conduct, or, in relation to an education provider, observes the behaviour of an impaired student. When a practitioner is told about notifiable conduct that another practitioner or patient has directly experienced or observed, the person with most direct knowledge about the notifiable conduct should be encouraged to make a notification themselves.

What is ‘the public’?

Several of the mandatory notification provisions refer to ‘the public being placed at risk of harm’. In the context of notifications, ‘the public’ can be interpreted as persons that access the practitioner’s regulated health services or the wider community that could potentially have been placed at risk of harm by the practitioner’s services.

3. Notifiable conduct

Section 140 of the National Law defines ‘notifiable conduct’ as when a practitioner has:

- (a) practised the practitioner’s profession while intoxicated by alcohol or drugs; or*
- (b) engaged in sexual misconduct in connection with the practice of the practitioner’s profession; or*
- (c) placed the public at risk of substantial harm in the practitioner’s practice of the profession because the practitioner has an impairment; or*
- (d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.’*

The following sections of the guidelines discuss these types of notifiable conduct, followed by the exceptions. The guidelines are only examples of decision-making processes, so practitioners, employers and education providers should check the exceptions to make sure they do not apply.

If a practitioner engages in more than one type of notifiable conduct, each type is required to be notified.

Practise while intoxicated by alcohol or drugs (section 140(a))

The requirement to make a mandatory notification is triggered by a practitioner practising his or her profession while intoxicated by alcohol or drugs. The word ‘intoxicated’ is not defined in the National Law, so the word has its ordinary meaning of ‘under the influence of alcohol or drugs’.

The boards will consider a practitioner to be intoxicated where his or her capacity to exercise reasonable care and skill in the practice of the health profession is impaired or adversely affected as a result of being under the influence of drugs or alcohol. The key issue is that the practitioner has practised whilst intoxicated, regardless of the time that the drugs or alcohol were consumed.

The National Law does not require mandatory notification of a practitioner who is intoxicated when he or she is not practising his or her health profession (that is, in their private life), unless the intoxication triggers another ground for mandatory notification.

Decision guide – notifying intoxication



Note: Voluntary notifications can still be made.

Sexual misconduct in connection with the practice of the practitioner's profession (section 140(b))

Section 140(b) relates to sexual misconduct in connection with the practice of the practitioner's health profession; that is, in relation to persons under the practitioner's care or linked to the practitioner's practice of his or her health profession.

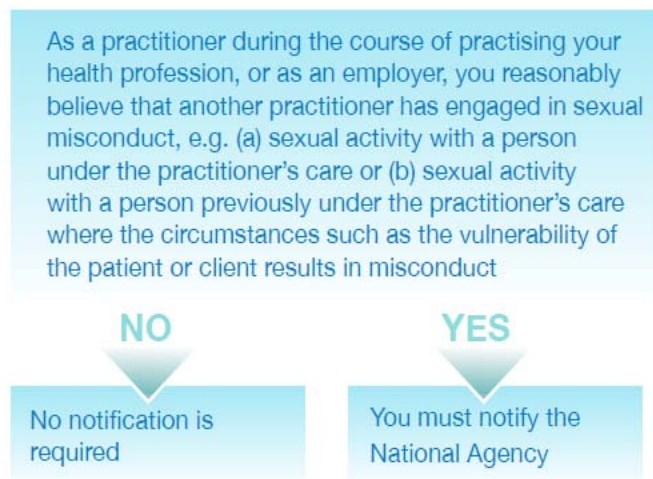
Engaging in sexual activity with a current patient or client will constitute sexual misconduct in connection with the practice of the practitioner's health profession, regardless of whether the patient or client consented to the activity or not. This is because of the power imbalance between practitioners and their patients or clients.

Sexual misconduct also includes making sexual remarks, touching patients or clients in a sexual way, or engaging in sexual behaviour in front of a patient or client, etc. Engaging in sexual activity with a person who is closely related to a patient or client under the practitioner's care may also constitute misconduct. In some cases, someone who is closely related to a patient or client may also be considered a patient or client; for example, the parent of a child patient or client.

Engaging in sexual activity with a person formerly under a practitioner's care (i.e. after the termination of the practitioner-patient/client relationship) may also constitute sexual misconduct. Relevant factors will include the vulnerability of the patient or client due to issues such as age, capacity and/or health conditions; the extent of the professional relationships; for example, a one-off treatment in an emergency department

compared to a long term program of treatment; and the length of time since the practitioner-patient/client relationship ceased.

Decision guide – notifying sexual misconduct



Note: Voluntary notifications can be made.

Placing the public at risk of substantial harm because of an impairment (section 140(c))

Section 5 of the National Law defines 'impairment' for a practitioner or an applicant for registration in a health profession as meaning a person has 'a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect the person's capacity to practise the profession.'

To trigger this notification, a practitioner must have placed the public at risk of substantial harm . 'Substantial harm' has its ordinary meaning; that is, considerable harm such as a failure to correctly or appropriately diagnose or treat because of the impairment. For example, a practitioner who has an illness which causes cognitive impairment so he or she cannot practise effectively would require a mandatory notification. However, a practitioner who has a blood borne virus who practises appropriately and safely in light of his or her condition and complies with any registration standards or guidelines and professional standards and protocols would not trigger a notification.

The context of the practitioner's work is also relevant. If registered health practitioners, employers and education providers are aware that the employer knows of the practitioner's impairment, and has put safeguards in place such as monitoring and supervision, this may reduce or prevent the risk of substantial harm.

Decision guide – notifying impairment in relation to a practitioner



Note: Voluntary notifications can be made.

* for notification of student impairment, please see Education Providers Section 6 of guidelines

The context of the practitioner's work is also relevant. If registered health practitioners are aware that the employer knows of the practitioner's impairment, and has put safeguards in place such as monitoring and supervision, this may reduce or prevent the risk of substantial harm.

Placing the public at risk of harm because of practice in a way that constitutes a significant departure from accepted professional standards (section 140(d))

The term 'accepted professional standards' requires knowledge of the professional standards that are accepted within the health profession and a judgement about whether there has been a significant departure from them. This judgement may be easier for other members of the practitioner's health profession.

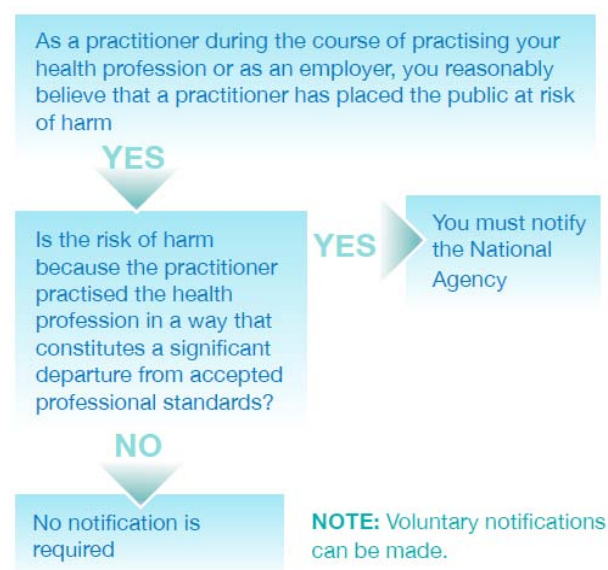
Mandatory notifications about a practitioner from another health profession are most likely to arise in a team environment where different health professions are working closely together and have a good understanding of the contribution of each practitioner; for example, a surgical or mental health team.

The difference from accepted professional standards must be significant. The term 'significant' means important, or of consequence (Macquarie Concise Dictionary). Professional standards cover not only clinical skills but also other standards of professional behaviour. A significant departure is one which is serious and would be obvious to any reasonable practitioner.

The notifiable conduct of the practitioner must place the public at risk of harm as well as being a significant departure from accepted professional standards before a notification is required. However, the risk of harm just needs to be present - it does not need to be a substantial risk, as long as the practitioner's practice involves a significant departure from accepted professional standards. For example, a clear breach of the health profession's code of conduct which places the public at risk of harm would be enough.

This provision is not meant to trigger notifications based on different professional standards within a health profession, provided the standards are accepted within the health profession; that is, by a reasonable proportion of practitioners. For example, if one practitioner uses a different standard to another practitioner, but both are accepted standards within the particular health profession, this would not qualify as a case of notifiable conduct. Similarly, if a practitioner is engaged in innovative practice but within accepted professional standards, it would not trigger the requirement to report.

Decision guide – significant departure from accepted professional standards



4. Exceptions to the requirement of practitioners to make a mandatory notification

There are particular exceptions to the requirement to make a mandatory notification for practitioners. The exceptions relate to the circumstances in which the practitioner forms the reasonable belief in misconduct or impairment. They arise where the practitioner who would be required to make the notification:

- is employed or engaged by a professional indemnity insurer, and forms the belief because of a disclosure in the course of a legal proceeding or the provision of legal advice arising from the insurance policy
- forms the belief while providing advice about legal proceedings or the preparation of legal advice
- is exercising functions as a member of a quality assurance committee, council or other similar body approved or authorised under legislation which prohibits the disclosure of the information
- reasonably believes that someone else has already made a notification, or
- is a treating practitioner, practising in Western Australia

Practitioners in Western Australia are not required to make a mandatory notification about patients (or clients) who are practitioners or students in one of the health professions. However, practitioners in Western Australia continue to have a professional and ethical obligation to protect and promote public health and safety. They may therefore make a voluntary notification or may encourage the practitioner or student they are treating to self-report.

Practitioners should refer to **appendix A** of these Guidelines for an extract of the relevant legislation; see section 141(4) if it is possible one of these exceptions might apply.

5. Exceptions to the requirement of practitioners to make a mandatory notification

Education providers are also required, under section 143 of the National Law, to make mandatory notifications in relation to students, if the provider reasonably believes:

- a student enrolled with the provider has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm
- a student for whom the provider has arranged clinical training has an impairment that, in the course of the student undertaking the clinical training, may place the public at substantial risk of harm.

Practitioners are required to make a mandatory notification in relation to a student if the practitioner reasonably believes that a student has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm (section 141(1)(b)).

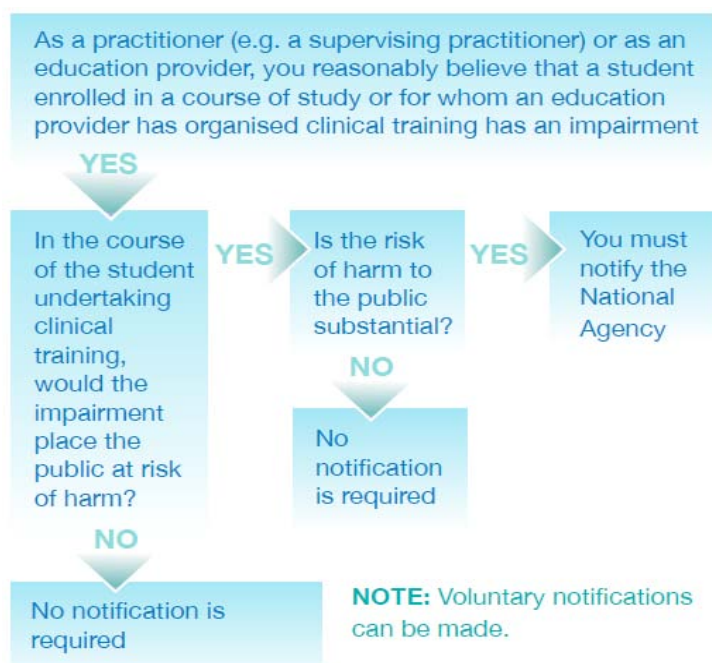
In all cases, the student's impairment must place the public at substantial, or considerable, risk of harm in the course of clinical training.

In relation to a student, 'impairment' is defined under section 5 of the National Law to mean the student 'has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect the student's capacity to undertake clinical training —

- (i) as part of the approved program of study in which the student is enrolled; or
- (ii) arranged by an education provider.'

An education provider who does not notify the National Agency as required by section 143 does not commit an offence. However, the national board that registered the student must publish details of the failure to notify on the board's website and the National Agency may, on the recommendation of the national board, include a statement about the failure in the National Agency's annual report.

Decision guide – student impairment



6. Consequences of failure to notify

Registered health practitioners

Although there are no penalties prescribed under the National Law for a practitioner who fails to make a mandatory notification, any practitioner who fails to make a mandatory notification when required may be subject to health, conduct or performance action.

Employers of practitioners

There are also consequences for an employer who fails to notify the National Agency of notifiable conduct as required by section 142 of the National Law.

If the National Agency becomes aware of such a failure, the National Agency must give a written report about the failure to the responsible Minister for the jurisdiction in which the notifiable conduct occurred. As soon as practicable after receiving such a report, the responsible Minister must report the employer's failure to notify to a health complaints entity, the employer's licensing authority or another appropriate entity in that participating jurisdiction.

Importantly, the requirement to make a mandatory notification does not reduce an employer's responsibility to manage the practitioner employee's performance and protect the public from being placed at risk of harm. However, if an employer has a reasonable belief that a practitioner has behaved in a way that constitutes notifiable conduct, then the employer must notify, regardless of whether steps are put in place to prevent recurrence of the conduct or impairment, or whether the practitioner subsequently leaves the employment.

7. How a notification is made (section 146)

Under the National Law, notifications are be made to AHPRA, which receives notifications and refers them to the relevant National Board. The notification must include the basis for making the notification; that is, practitioners, employers and education providers must say what the notification is about. It may assist practitioners, employers and education providers in making a notification if they have documented the reasons for the notification, including the date and time that they noticed the conduct or impairment.

To make a notification verbally, practitioners, employers and education providers may ring 1300 419 495 or go to any of the State and Territory AHPRA office.

To make a notification in writing, go to the Notifications and Outcomes section of the AHPRA website at www.ahpra.gov.au, download a notification form and post your completed form to AHPRA, GPO Box 9958 in your capital city.

Date of issue:
Date of review: This guideline will be reviewed at least every three years
Last reviewed: 1 February 2011 (minor corrections only)

Appendix A – Extract of relevant provisions from National Law

s. 5 impairment, in relation to a person, means the person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect—

- (a) for a registered health practitioner or an applicant for registration in a health profession, the person's capacity to practise the profession; or*
- (b) for a student, the student's capacity to undertake clinical training—*
 - (i) as part of the approved program of study in which the student is enrolled; or*
 - (ii) arranged by an education provider.*

Part 5, Division 3 Registration standards and codes and guidelines

39 Codes and guidelines

A National Board may develop and approve codes and guidelines—

- (a) to provide guidance to the health practitioners it registers; and*
- (b) about other matters relevant to the exercise of its functions.*

Example. *A National Board may develop guidelines about the advertising of regulated health services by health practitioners registered by the Board or other persons for the purposes of section 133.*

40 Consultation about registration standards, codes and guidelines

- (1) If a National Board develops a registration standard or a code or guideline, it must ensure there is wide-ranging consultation about its content.*
- (2) A contravention of subsection (1) does not invalidate a registration standard, code or guideline.*
- (3) The following must be published on a National Board's website—*
 - (a) a registration standard developed by the Board and approved by the Ministerial Council;*
 - (b) a code or guideline approved by the National Board.*
- (4) An approved registration standard or a code or guideline takes effect—*
 - (a) on the day it is published on the National Board's website; or*
 - (b) if a later day is stated in the registration standard, code or guideline, on that day.*

41 Use of registration standards, codes or guidelines in disciplinary proceedings

An approved registration standard for a health profession, or a code or guideline approved by a National Board, is admissible in proceedings under this Law or a law of a co-regulatory jurisdiction against a health practitioner registered by the Board as evidence of what constitutes appropriate professional conduct or practice for the health profession.

Part 8, Division 2 Mandatory notifications

140 Definition of notifiable conduct

In this Division—

notifiable conduct, *in relation to a registered health practitioner, means the practitioner has—*

- (a) practised the practitioner's profession while intoxicated by alcohol or drugs; or*
- (b) engaged in sexual misconduct in connection with the practice of the practitioner's profession; or*
- (c) placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or*
- (d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.*

Education provider means-

- (a) a university; or
- (b) a tertiary education institution, or another institution or organisation, that provides vocational training; or
- (c) a specialist medical college or other health profession college.

141 Mandatory notifications by health practitioners

(1) This section applies to a registered health practitioner (the **first health practitioner**) who, in the course of practising the first health practitioner's profession, forms a reasonable belief that—

- (a) another registered health practitioner (the **second health practitioner**) has behaved in a way that constitutes notifiable conduct; or
- (b) a student has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm.

(2) The first health practitioner must, as soon as practicable after forming the reasonable belief, notify the National Agency of the second health practitioner's notifiable conduct or the student's impairment.

Note. See section 237 which provides protection from civil, criminal and administrative liability for persons who, in good faith, make a notification under this Law. Section 237(3) provides that the making of a notification does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct and nor is any liability for defamation incurred.

(3) A contravention of subsection (2) by a registered health practitioner does not constitute an offence but may constitute behaviour for which action may be taken under this Part.

(4) For the purposes of subsection (1), the first health practitioner does not form the reasonable belief in the course of practising the profession if—

(a) the first health practitioner—

- (i) is employed or otherwise engaged by an insurer that provides professional indemnity insurance that relates to the second health practitioner or student; and
- (ii) forms the reasonable belief the second health practitioner has behaved in a way that constitutes notifiable conduct, or the student has an impairment, as a result of a disclosure made by a person to the first health practitioner in the course of a legal proceeding or the provision of legal advice arising from the insurance policy; or

(b) the first health practitioner forms the reasonable belief in the course of providing advice in relation to the notifiable conduct or impairment for the purposes of a legal proceeding or the preparation of legal advice; or

(c) the first health practitioner is a legal practitioner and forms the reasonable belief in the course of providing legal services to the second health practitioner or student in relation to a legal proceeding or the preparation of legal advice in which the notifiable conduct or impairment is an issue; or

Application of National Law in Western Australia

Part 2, Section 4(7) Health Practitioner Regulation National Law (WA) Act 2010

In this Schedule after section 141(4)(c) insert:

141(4)(d) the first health practitioner forms the reasonable belief in the course of providing health services to the second health practitioner or student; or

(d) the first health practitioner—

- (i) forms the reasonable belief in the course of exercising functions as a member of a quality assurance committee, council or other body approved or authorised under an Act of a participating jurisdiction; and

- (ii) *is unable to disclose the information that forms the basis of the reasonable belief because a provision of that Act prohibits the disclosure of the information; or*
- (e) *the first health practitioner knows, or reasonably believes, the National Agency has been notified of the notifiable conduct or impairment that forms the basis of the reasonable belief.*

142 Mandatory notifications by employers

- (1) *If an employer of a registered health practitioner reasonably believes the health practitioner has behaved in a way that constitutes notifiable conduct, the employer must notify the National Agency of the notifiable conduct.*

Note. See section 237 which provides protection from civil, criminal and administrative liability for persons who, in good faith, make a notification under this Law. Section 237(3) provides that the making of a notification does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct and nor is any liability for defamation incurred.

- (2) *If the National Agency becomes aware that an employer of a registered health practitioner has failed to notify the Agency of notifiable conduct as required by subsection (1), the Agency must give a written report about the failure to the responsible Minister for the participating jurisdiction in which the notifiable conduct occurred.*
- (3) *As soon as practicable after receiving a report under subsection (2), the responsible Minister must report the employer's failure to notify the Agency of the notifiable conduct to a health complaints entity, the employer's licensing authority or another appropriate entity in that participating jurisdiction.*
- (4) *In this section—*

employer, of a registered health practitioner, means an entity that employs the health practitioner under a contract of employment or a contract for services.

licensing authority, of an employer, means an entity that under a law of a participating jurisdiction is responsible for licensing, registering or authorising the employer to conduct the employer's business.

143 Mandatory notifications by education providers

- (1) *An education provider must notify the National Agency if the provider reasonably believes—*
 - (a) *a student enrolled in a program of study provided by the provider has an impairment that, in the course of the student undertaking clinical training as part of the program of study, may place the public at substantial risk of harm; or*
 - (b) *a student for whom the education provider has arranged clinical training has an impairment that, in the course of the student undertaking the clinical training, may place the public at substantial risk of harm;*

Note. See section 237 which provides protection from civil, criminal and administrative liability for persons who make a notification under this Law. Section 237(3) provides that the making of a notification does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct and nor is any liability for defamation incurred.

- (2) *A contravention of subsection (1) does not constitute an offence.*

144 Grounds for voluntary notification

- (1) *A voluntary notification about a registered health practitioner may be made to the National Agency on any of the following grounds—*
 - (a) *that the practitioner's professional conduct is, or may be, of a lesser standard than that which might reasonably be expected of the practitioner by the public or the practitioner's professional peers;*
 - (b) *that the knowledge, skill or judgment possessed, or care exercised by, the practitioner in the practice of the practitioner's health profession is, or may be, below the standard reasonably expected;*

- (c) *that the practitioner is not, or may not be, a suitable person to hold registration in the health profession, including, for example, that the practitioner is not a fit and proper person to be registered in the profession;*
- (d) *that the practitioner has, or may have, an impairment;*
- (e) *that the practitioner has, or may have, contravened this Law;*
- (f) *that the practitioner has, or may have, contravened a condition of the practitioner's registration or an undertaking given by the practitioner to a National Board;*
- (g) *that the practitioner's registration was, or may have been, improperly obtained because the practitioner or someone else gave the National Board information or a document that was false or misleading in a material particular.*

(2) A voluntary notification about a student may be made to the National Agency on the grounds that—

- (a) *the student has been charged with an offence, or has been convicted or found guilty of an offence, that is punishable by 12 months imprisonment or more; or*
- (b) *the student has, or may have, an impairment; or*
- (c) *that the student has, or may have, contravened a condition of the student's registration or an undertaking given by the student to a National Board.*

145 Who may make voluntary notification

Any entity that believes that a ground on which a voluntary notification may be made exists in relation to a registered health practitioner or a student may notify the National Agency.

Note. See section 237 which provides protection from civil, criminal and administrative liability for persons who, in good faith, make a notification under this Law.

Part 8, Division 4 Making a notification

146 How notification is made

(1) A notification may be made to the National Agency—

- (a) *verbally, including by telephone; or*
- (b) *in writing, including by email or other electronic means.*

(2) A notification must include particulars of the basis on which it is made.

(3) If a notification is made verbally, the National Agency must make a record of the notification.

Part 11, Division 1, section 237 Protection from liability for persons making notification or otherwise providing information

(1) This section applies to a person who, in good faith—

- (a) *makes a notification under this Law; or*
- (b) *gives information in the course of an investigation or for another purpose under this Law to a person exercising functions under this Law.*

(2) The person is not liable, civilly, criminally or under an administrative process, for giving the information.

(3) Without limiting subsection (2)—

- (a) *the making of the notification or giving of the information does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct; and*
- (b) *no liability for defamation is incurred by the person because of the making of the notification or giving of the information.*

(4) The protection given to the person by this section extends to—

- (a) *a person who, in good faith, provided the person with any information on the basis of which the notification was made or the information was given; and*

- (b) *a person who, in good faith, was otherwise concerned in the making of the notification or giving of the information.*



Aboriginal and Torres Strait
Islander Health Practice
Chinese Medicine
Chiropractic
Dental
Medical
Medical Radiation Practice
Nursing and Midwifery
Occupational Therapy
Optometry
Osteopathy
Pharmacy
Physiotherapy
Podiatry
Psychology

Australian Health Practitioner Regulation Agency

Summary

Summary of changes to *Guidelines for advertising of regulated health services*

The following table outlines the key changes to the Guidelines for advertising of regulated health services (the Guidelines) to allow for comparison of the existing guidelines to the guidelines published for preliminary consultation.

Current guidelines section	Change	Rationale
Introduction	<p>Information broken up into:</p> <ul style="list-style-type: none"> - authority - purpose - who these guidelines apply to - the basis for these guidelines - obligations under National Law and other legislation 	<p>Clarity for practitioners</p> <p>More prominent authority statement communicates how the guidelines may be used linking to Part 8 action and prosecution. This is consistent with common AHPRA policy framework sections.</p> <p>Purpose clarifies the precise requirements of the National Law and clarifies the purpose of the guideline in that context and clarifies that the guideline is not intended to explain to practitioners how to advertise.</p> <p>'Who these guidelines apply to' makes clearer that they apply to anyone who advertises a regulated health service.</p> <p>The 'Basis for these guidelines' embodies the principles upon which this guideline is based and is consistent with AHPRA policy framework.</p> <p>Purpose section now includes a copy of section 133 for clarity.</p> <p>Wording simplified.</p>

Current guidelines section	Change	Rationale
Summary of guidelines	Now articulated under ‘ ‘the basis for these guidelines’	<p>The current version had repetition and detail that created a dense document with the important key points lost.</p> <p>The new version has been developed around tight and specific links to the provisions under section 133 and a set of principles (bases) that underpin the guidelines.</p> <p>This allows for consistent principle-based decision making in applying the guidelines, is clearer and will better support compliance.</p>
1. Definition	Definition section	<p>The current guidelines define terms throughout the document.</p> <p>These have been collated and have been formatted into a distinct section at the end of the document (Appendix 1) to allow for easier reference for the reader. As a way of standardising nomenclature throughout the document so as to encompass all those who are obliged to adhere to the advertising provisions (and other sections of the National Law), the term ‘advertiser’ has been defined in the definition section</p>
1.2 Advertising of products	Moved to definitions, item 8.3 and appendix 4.	As above and at item 8.3 (Advertising therapeutic goods) and expanded upon at appendix 4 (in recognition that not all registered health practitioners advertise products).
2 Obligations under other legislation	<p>Condensed</p> <p>Specific reference to other legislation summarised in table 2.</p> <p>Reference websites for practitioners to seek out other information included</p>	<p>The guideline is specific to the provisions of the National Law but explains that other authorities also have responsibility for laws governing advertising of health products and services. The guideline also clarifies the links between other <i>sections</i> of the National Law regarding professional conduct in relation to advertising of health services.</p> <p>There is a stronger focus in this and the introductory section on the course of action available under other legislation and the links and referral paths open to the Boards and AHPRA to other entities.</p> <p>Where possible, practitioners are referred to primary sources of information on the work of other regulators and the legislation they oversee. Duplication in text from other regulators and legislation is avoided so that the risk of a Board publishing out of date information is reduced.</p>

Current guidelines section	Change	Rationale
3 Professional obligations	<p>Concepts referred to in the current version converted to 'the basis for these guidelines'.</p> <p>New section 'Obligations under National Law and other legislation' with link to other codes and guidelines by which Boards convey the expected standards of professional practice.</p> <p>New section 7. The advertising provisions of the National Law</p>	<p>Some current concepts described broader concepts of professional practice usually covered in other Board codes and guidelines</p> <p>Narrows the scope specifically to s133 but allows for action under other codes or guidelines. Content which goes beyond the parameters of the advertising provisions of the National law could compromise the effectiveness of the guidelines and any prosecutions.</p> <p>Provides a 'checklist' for advertisers in plain language as a means of guidance (also includes information from the ACCC)</p>
4 What is acceptable advertising	<p>Existing examples reviewed and now presented as <i>Information commonly included in advertisements</i>.</p>	<p>Term 'acceptable' advertising was ambiguous.</p> <p>Aim is now to strike a balance between providing some guidance and the following principle listed: 'It is the responsibility of practitioners to ensure their advertisement complies with the National Law. Neither AHPRA or the National Boards are able to provide legal advice to health practitioners. Nor should these guidelines be considered by advertisers as substitution for legal advice' Importantly, this list is not intended to be exhaustive.</p> <p>The section on testimonials explains that it is the National Law which prohibits the use of testimonials and purported testimonials and so the document provides guidance about what a testimonial is and the obligations of a practitioner from a third-party testimonial.</p>

Current guidelines section	Change	Rationale
What is unacceptable advertising	<p>Now refers to 'Prohibited advertising under the National Law'</p> <p>This links specifically to each of the 5 key criteria listed under s133.</p> <p>(r) and (s) removed</p>	<p>Specific link to section 133</p> <p>Helps define scope and an understanding of what the Boards may actually not have 'jurisdiction' over. Information broken up into each of the 5 areas of section 133.</p> <p>Some examples removed as refer more to the notion of what is 'professional practice' and would be covered under other Board codes and guidelines on acceptable standards of professional (see earlier note on inclusion of 'Obligations under the National Law and other legislation' section).</p> <p>The usefulness of the guideline is weakened with language that constrains its scope – e.g. what is acceptable/unacceptable. It is not possible to list all examples, therefore, this language is no longer used. The document is not intended to, and cannot, provide a checklist of things that may or may not be in possible breach or not of the National Law.</p>
Specific requirements		
6.1 Use of graphic or visual representations	Moved to a topic-specific appendix as may not be applicable to all professions. Original inclusion was to address matters arising from cosmetic procedures.	Not applicable for all professions so moved to appendix 6.
6.2 Use of warning statements for surgical or invasive procedures	Refer to 'Topic specific application' appendix 6(b) as required	Not applicable for all professions
6.3 Use of comparative advertising	Listed as an example of what may be considered a breach of the National Law	Clarity
6.4 Advertising of qualifications and titles	Retained with minor editorial change only. Now listed under '8. Further information about specific types of advertising'	Further detail contained in appendix 5.
6.5 Advertising of price information	Retained with modifications to better link to the National Law and listed under '8. Further information about specific types of advertising'.	Clearer link to the applicable provision of the National Law. Further detail provided in appendix 4 for those professions which advertise price information.

Current guidelines section	Change	Rationale
6.6 Use of gifts or discounts	Listed as an example of what may be considered a breach of the National Law if not clearly displaying terms and conditions. Now listed under 'item 7.2.2.	Clarity and clearer links to the applicable provision of the National Law.
6.7 Use of scientific information in advertising	Retained with some editorial change Now and listed under '8. Further information about specific types of advertising' at item 8.5	Clearer link to the applicable provision of the National Law.
7 Advertising of therapeutic goods	Included as an appendix of the main document	Does not apply to all professions but of extreme importance to others e.g. pharmacy Refers to matters that are covered in detail by other legislation. This appendix directs readers to the primary source of information and further guidance on the application of the other legislation
8. Consequences of breach of advertising requirements	Some concepts moved introductory section, specifically 'the basis for these guidelines' List consequence of referral to another entity as one outcome. See Table 2 at end of document.	Provides clarity of who can be held to account. Provides further clarity regarding the options open to National Boards and AHPRA and the links with other parts of the National Law.
9 How a notification or complaint may be made	General reference in section above.	This information is available on the AHPRA website Plain-language information sheets being developed for notification processes in general
10 Definitions	Expanded and moved to the end of the document into appendix 1.	The current guidelines define terms throughout the document. These have been collated and formatted into a distinct section at the end of the document to allow for easier reference for the reader.
Relevant sections of the National Law	Deleted	Referred to and linked throughout.

Summary

Summary of changes to *Guidelines for mandatory notifications*

The following table outlines the key changes to the Guidelines for Mandatory Notifications (the Guidelines) to allow for comparison of the existing guidelines to the guidelines published for preliminary consultation.

Current guidelines section	Change	Rationale
1. Introduction	Content added to clarify the situation where a practitioner is only a risk to him or herself.	Clarifies that a mandatory notification is required if the risk to the public is not mitigated by treatment of the practitioner or in some other way.
Voluntary notifications	Words added to clarify the scope of voluntary notifications	Clarity
Protection for people making a notification	Editorial change to last sentence.	Clarifies language.
2. General Obligations	Sentences added at end of first paragraph and end of section	Clarifies the meaning of 'practicable' and the difference between mandatory reporting under the National Law and other mandatory reporting requirements.
What is a reasonable belief	Editorial changes and further detail	Clarity and consistency
3. Notifiable conduct: Practise while intoxicated by alcohol or drugs	Editorial changes to clarify circumstances that trigger a mandatory notification	Existing document does not clearly delineate between practising while intoxicated and being intoxicated when not practising.
Exceptions	Paragraph 4(a) reworded	Clarity
7. How a notification is made	Deleted street addresses of AHPRA offices	Links to AHPRA website in line with other Board documents – directing practitioners and others to the AHPRA/National Board website in the first instance (where street addresses of AHPRA offices are listed) as well as enabling telephone and email notifications to be made.