



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

Public consultation paper

September 2019

Consultation on the review of the *Guidelines for advertising a regulated health service*

AHPRA and the 15 National Boards are undertaking a joint review of the *Guidelines for advertising regulated health services* (the guidelines).

Preliminary consultation

In late 2018 AHPRA and the 15 National Boards undertook a targeted preliminary consultation with key stakeholders. This enabled the National Boards to test their proposals with key stakeholders and refine them before proceeding to public consultation. It also provided an opportunity for feedback to improve the clarity of the consultation documents.

A range of stakeholders submitted written responses, including professional associations, jurisdictions (Commonwealth and state/territory health departments) and other regulatory bodies.

AHPRA and the Boards are now releasing this consultation paper for public feedback.

Providing feedback

AHPRA and the Boards are seeking to consult on their draft revised guidelines. In addition to general feedback, we are interested in stakeholders' feedback on specific questions about the revised guidelines.

Feedback can be provided by completing the submission form available on [our website](#) by close of business on 26 November.

Publication of submissions

The Boards and AHPRA publish submissions at their discretion. We generally publish submissions on our websites to encourage discussion and inform the community and stakeholders. Please advise us if you do not want your submission published.

We will not place on our websites, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the subject of the consultation. Before publication, we may remove personally-identifying information from submissions, including contact details.

The Boards and AHPRA can 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 These submissions will not be published on the website or elsewhere.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 (Cth), which has provisions designed to protect personal information and information given in confidence. Please let us know if you do not want us to publish your submission or want us to treat all or part of it as confidential.

Published submissions will include the names of the individuals and/or the organisations that made the submission unless confidentiality is requested.

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Overview

1. The Health Practitioner Regulation National Law as in force in each state and territory (the National Law) enables the National Boards to develop codes and guidelines to provide guidance to the health practitioners they register.
2. The National Boards first developed, approved and published *Guidelines for advertising registered health services* in 2010. The guidelines were reviewed, and a revised version published in May 2014. These are now due for review, in keeping with good regulatory practice.
3. The National Boards have carefully considered the objectives and guiding principles of the National Law and the *Regulatory principles for the National Scheme*¹ in deciding whether they should propose changes to the existing guidelines, adopting a risk-based approach to the review.
4. The National Boards are inviting responses to specific questions and general comments on the draft revised guidelines.

¹ The National Registration and Accreditation Scheme

Background

5. Section 133 of the National Law regulates advertising of regulated health services. It 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; 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—

in the case of an individual—\$5,000; or

in the case of a body corporate—\$10,000.

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.

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.

6. The National Law allows the National Boards to develop and approve codes and guidelines to provide guidance to the health practitioners they register.
7. The *Guidelines for advertising regulated health services* (the guidelines) were developed to explain the advertising requirements in the National Law and help advertisers (including registered health practitioners) to meet these requirements and advertise responsibly.
8. Unlawful advertising can negatively influence health care choices and therefore involve risks to public safety. The guidelines explain the limits and obligations placed on advertising regulated health services established by the National Law. The wording of section 133 of the National Law is broad and it is not possible to provide an exhaustive list of advertising that will, or will not, contravene it.
9. The National Boards and AHPRA have published substantial resources to supplement the revised draft guidelines and help advertisers understand their obligations. These resources include fact sheets, self-assessment tools, case studies and examples that provide more detailed information and guidance. The resources are available on the [Advertising resources website](#) and are therefore not replicated or reproduced in these guidelines.
10. The guidelines do not explain how to advertise. Neither AHPRA nor the National Boards can provide advertisers with specific advice about their advertising or approve advertising. As explained in the guidelines, anyone needing advice about how to advertise a regulated health service can seek appropriate advice such as from their indemnity insurer or legal advisor.

Objectives of the review

11. The objective of the review is to make sure that the guidelines are as effective as possible.

Proposed changes to the current guidelines

12. The purpose of the Guidelines is to:

- clarify the scope/application of the advertising obligations under the National Law when advertising a regulated health service
 - explain and provide guidance on these obligations
 - describe advertising that is unlawful
 - provide definitions and explain terms used in relation to advertising a regulated health service, and
 - highlight other relevant legislation.
13. The proposed changes to the guidelines are mostly structural with only minor changes to the substantive content. The draft revised guidelines continue to explain the National Law requirements for advertising regulated health services. The clarity and readability of the guidelines has been improved so they are easier to understand.
14. Structure – to improve readability and make it easier to find relevant content, the guidelines have been re-arranged under the relevant subsections in the legislation, and wording streamlined and consolidated. The Summary of advertising obligations included in the guidelines was developed as a key part of implementing the *Advertising compliance and enforcement strategy* and has been revised to better align with the content of the guidelines. Once the guidelines are finalised the web pages will be updated with the revised Summary. Relevant core content has been moved from appendices to the body of the guidelines.
15. Style – the revised draft is expressed in plain language and explains the legislation, rather than re-stating it.
16. Content – Most of the core content has been retained in the revised draft of the guidelines, with the following exceptions:

Content	Proposed change	Rationale
Appendix 6 (b) - Use of warning statements for surgical or invasive procedures	Remove and include in the examples of false, misleading or deceptive advertising: <i>“Minimises or underplays or under represents the risk or potential risk associated with a treatment or procedure.”</i>	The intent of this requirement was to ensure that advertising did not minimise or negate the potential risk involved when undertaking high risk procedures. As the requirement applied to all surgical procedures it unintentionally captured advertising that did not require such warnings.
Appendix 7 – options available to the National Boards/AHPRA if the advertising breaches the National Law	Removed	The process for managing complaints and potential breaches of the guidelines is now outlined in the <i>Advertising compliance and enforcement strategy for the National Scheme</i>
Appendix 3 - The Consumer Appendix 4 - Advertising therapeutic goods Law	Replaced by reference to website regarding relevant legislation in a table	Reference to a web site for the relevant legislation’ or entity avoids the risk of publishing out of date or inaccurate information. Including references to where advertisers can read more, rather than attempting to interpret external legislation, allows advertisers to access information directly from the authoritative source.

Options statement – *Guidelines for advertising regulated health services*

Option 1 – Status quo (continue with current guidelines)

17. Option 1 would continue the existing guidelines. The guidelines would continue to explain the National Law requirements for advertising regulated health services with only minor corrections and updates to ensure accuracy.

Option 2 – Proposed revised guidelines

18. Option 2 would involve the National Boards approving and publishing revised guidelines.
19. Since the guidelines were last reviewed in 2010, AHPRA and National Boards have undertaken substantial work to support compliance with the National Law advertising requirements.
20. In April 2017 the *Advertising compliance and enforcement strategy* for the National Scheme (the Strategy) was launched to improve voluntary compliance with the advertising requirements and to expedite how breaches are dealt with. This work has prompted further development of internal and external guidance to clarify the thresholds for breaches of the Law and support practitioners and other advertisers to comply with the Law.
21. A review of the guidelines is timely to reflect work since 2014 and ensure that the guidelines align with contemporary approaches to practitioner regulation, meet stakeholder needs and are relevant and effective.
22. The revised draft guidelines improve the overall readability and accessibility and provide greater clarity and guidance to advertisers to help them comply with the National Law advertising requirements.

Preferred option

23. The National Boards prefer Option 2.

Issues for discussion

Potential benefits and costs of the proposed option

24. The benefits of the preferred option are that the draft revised guidelines:
 - are more user-friendly
 - strike a balance between protecting the public and impact on advertisers, and
 - have been reworded to be simpler and clearer.
25. The costs of the preferred option are:
 - registrants, advertisers, other stakeholders, AHPRA and National Boards will need to become familiar with the new guidelines, noting that the guidelines are explanatory rather than imposing new obligations and the changes are minor.

Estimated impacts of the draft revised guidelines

26. The changes proposed in the draft revised guidelines are minor, although more significant changes may be identified through public consultation. While the changes are minor, the National Boards recognise that advertising can be a complex area and will continue to work on materials to support advertisers' understanding of the changes.
27. We anticipate that the proposed changes will have a relatively minor impact on practitioners, advertisers and other stakeholders.
28. Public consultation will help ensure that any unintended consequences are identified and addressed.

Relevant sections of the National Law

29. Section 133 of the National Law contains the limits on advertising a regulated health service.

Questions for consideration

The National Boards are inviting feedback on the following questions:

1. How clear are the draft guidelines?
2. How relevant is the content of the draft guidelines?
3. Please describe any content that needs to be changed or deleted in the draft guidelines.
4. Should some of the content be moved out of the draft guidelines to the website?

If so, please describe what should be moved.

5. How helpful is the structure of the draft guidelines?
6. Are the flow charts and diagrams helpful?

If not, how could they be improved?

7. Is there anything that needs to be added to the draft guidelines?
8. It is proposed that the guidelines will be reviewed every five years, or earlier if required.

Is this reasonable?

9. Please describe anything else the National Boards should consider in the review of the guidelines.
10. Please add any other comments or suggestions for the draft guidelines

Other relevant National Board documents and parts of the National Law

The revised draft guidelines, *Social media policy* and each National Board's *Code of conduct* or equivalent document include information about advertising and social media.

- The Codes of conduct include general references to advertising and social media in the broad guidance that National Boards have established about good practice and practitioner behaviour, and
- the Social media policy was developed to help practitioners understand their obligations when using social media. It explains how the National Law; the guidelines and the relevant National Board's Code of Conduct relate to social media. The Social media policy (the Policy) published in 2014 is also due for review. This will proceed separately in 2019. The Policy reiterates relevant content in the guidelines and Codes of conduct and does not include any additional requirements.

Other relevant parts of the National Law

The National Law also has several offence provisions related to use of protected titles. Use of a protected title in advertising may therefore also be unlawful. Relevant parts of the National Law are:

- unlawful use of a protected titles (sections 113-114)
- use of specialist titles (section 115)
- holding out (claims by individuals or organisations as to registration in a profession or specialty) (sections 116-119)

Other guidance

Each National Board may also issue additional guidance for health practitioners from time to time that may be relevant to advertising a regulated health service.

Anticipated impacts of the revised guidelines

The impacts on practitioners, business and other stakeholders arising from the changes proposed in the revised guidelines are expected to be small. The changes proposed are minimal and focus on providing explanation and clarification.

Next steps

After public consultation closes, the Boards will review and consider all feedback from this consultation before making decisions about the final version of the revised guidelines.

Statement of assessment

Board's statement of assessment against AHPRA's Procedures for the development of registration standards, codes and guidelines and COAG principles for best practice regulation

Draft revised guidelines for advertising regulated health services

The Australian Health Practitioner Regulation Agency (AHPRA) has Procedures for the development of registration standards, codes and guidelines which are available at: www.ahpra.gov.au

Section 25 of the Health Practitioner Regulation National Law as in force in each state and territory (the National Law) requires AHPRA to establish procedures for the purpose of ensuring that the National Registration and Accreditation Scheme (the National Scheme) operates in accordance with good regulatory practice.

Below is the National Boards' assessment of their proposal for draft revised guidelines for advertising regulated health services, against the three elements outlined in the AHPRA procedures.

1. The proposal takes into account the National Scheme's objectives and guiding principles set out in section 3 of the National Law

Boards' assessment

The Boards consider that the proposed draft revised guidelines meet the objectives and guiding principles of the National Law.

The proposal takes into account the National Scheme's key objective of protecting the public by explaining the National Law requirements for advertising regulated health services.

The draft revised guidelines also support the National Scheme to operate in a transparent, accountable, efficient, effective and fair way. The proposal gives clear guidance on National Law requirements and a practitioner/advertiser can be subject to regulatory action or prosecution if they do not meet these requirements.

The revised guidelines also facilitate access to services provided by health practitioners in accordance with the public interest by ensuring that advertising is not false, misleading or deceptive and does not therefore compromise informed decision-making.

2. The proposal takes into account the National Scheme's objectives and guiding principles set out in section 3 of the National Law

Boards' assessment

The National Law requires wide-ranging consultation on proposed guidelines.

The Boards are ensuring that there is public exposure of its proposal and the opportunity for public comment by undertaking an eight-week public consultation process. This will include the publication of the consultation paper on National Board websites and informing practitioners about the consultation.

The Boards will also draw this paper to the attention of key stakeholders including third party online review sites.

The Boards will take into account the feedback it receives when finalising the guidelines.

3. The proposal takes into account the COAG Principles for Best Practice Regulation

Boards' assessment

In developing the draft revised guidelines the Boards have taken into account the Council of Australian Governments (COAG) Principles for Best Practice Regulation.

As an overall statement, the Boards have taken care not to propose unnecessary regulatory burdens that would create unjustified costs for the professions or the community. In addition, as these guidelines only explain the requirements in the National Law, they do not create extra regulatory burden.

The Boards make the following assessment specific to each of the COAG principles expressed in the AHPRA procedures.

COAG principles

A. Whether the proposal is the best option for achieving the proposal's stated purpose and protection of the public

Boards' assessment:

The Boards consider that their proposal is the best option for achieving the stated purposes. The proposed draft revised guidelines do not propose significant changes to the current guidelines but would protect the public by making the advertising obligations clearer and more accessible (easier to find and reference specific aspects of advertising) and would provide additional guidance for registered practitioners.

B. Whether the proposal results in an unnecessary restriction of competition among health practitioners

Boards' assessment:

The proposal will not restrict competition, as it would apply to all individuals and businesses advertising a regulated health service in the same way as the National Law.

C. Whether the proposal results in an unnecessary restriction of consumer choice

Boards' assessment:

The proposal will not result in any unnecessary restrictions of consumer choice as the proposed draft guidelines would apply to all individuals and businesses advertising a regulated health service.

The revised guidelines are not intended to prevent health service providers informing the public about the services they provide or stop members of the community from discussing their experiences online or in person. They seek to explain the advertising requirements in the National Law and protect the public from advertising that is unlawful.

In the context of the National Law, advertising is used to provide information to inform decision-making, or to promote or encourage the use of a regulated health service. However, advertising can lead to poor decision-making if it is false, deceptive or misleading or otherwise unlawful.

D. Whether the overall costs of the proposal to members of the public and/or registrants and/or governments are reasonable in relation to the benefits to be achieved

Boards' assessment:

The Boards have considered the overall costs of the proposed draft revised guidelines to members of the public, registered practitioners, advertisers and governments and concluded that the likely costs are minimal as the Boards are not proposing significant changes to the current guidelines.

Subject to stakeholder feedback on the proposed draft guidelines, the benefits of having clearer guidelines for advertising outweigh any minimal costs related to advertisers and other stakeholders being required to become familiar with the revised guidelines, if approved.

E. Whether the proposal's requirements are clearly stated using 'plain language' to reduce uncertainty, enable the public to understand the requirements, and enable understanding and compliance by registrants

Boards' assessment:

The Boards consider the proposed draft guidelines have been written in plain English that will help advertisers and the public to understand the obligations for advertising a regulated health service.

F. Whether the Board has procedures in place to ensure that the proposed registration standard, code or guideline remains relevant and effective over time

Boards' assessment:

If approved, the Boards will review the revised guidelines regularly, generally every five years, including an assessment against the objectives and guiding principles in the National Law and the COAG principles for best practice regulation.

However, the Boards may choose to review the guidelines earlier, in response to any issues which arise or new evidence which emerges to ensure the guidelines' continued relevance and workability.