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

Response template: Public consultation - revised *Guidelines for advertising regulated health services*

National Boards and the Australian Health Practitioner Regulation Agency (AHPRA) are seeking feedback about the revised *Guidelines for advertising regulated health services.*

This response template is an alternative to providing your response through the online platform available on the consultation website.

IMPORTANT INFORMATION

Privacy

Your response will be anonymous unless you choose to provide your name and/or the name of your organisation.

The information collected will be used by AHPRA to evaluate the revised guidelines. The information will be handled in accordance with AHPRA's privacy policy available here.

Publication of responses

Published responses will include the name (if provided) of the individual and/or the organisation that made the response.

You must let us know if you do **not** want us to publish your response.

Please see the public consultation papers for more information about publication of responses.

Submitting your response

Please send your response to: AHPRA.consultation@ahpra.gov.au

Please use the subject line: Feedback on guidelines for advertising regulated health services

Responses are due by **26 November 2019**

General information about your response

Are you responding on behalf of an organisation?	
Yes	What is the name of your organisation? **Australian Dental Association (ADA)**
No	Are you a registered health practitioner? ~~Yes~~/No If yes, which profession(s)? Are you a student? ~~Yes/~~No If yes, which profession?
We may need to contact you about your response. Please write your name and contact details below. **(Skip if you wish to remain anonymous)**	
Name (optional)	**Damian Mitsch**
Contact details (optional)	**ceo@ada.org.au**

Public consultation questions

1. How clear are the revised guidelines?

The revised guidelines (henceforth '*Guidelines*') are a significant improvement on the existing guidelines, both in terms of clarity and content.

Positive changes include the inclusion of:

- the "*Summary of advertising obligations*" prior to more detailed content
- detail about what is meant by "acceptable evidence' of effectiveness of treatments
- a greater number of specific examples of acceptable and unacceptable advertising
- more guidance around testimonials and whether the practitioner would be considered responsible for them in various contexts; and

However, as detailed below, there are several further improvements that should be made to the *Guidelines* to help clarify advertiser and practitioner obligations, particularly in relation to testimonials.

2. How relevant is the content of the revised guidelines?

The content is relevant for dental professionals and other regulated health professionals, but not sufficiently comprehensive to cover the obligations of non-health professionals who are subject to the provisions of s.133 of the National Law given that they advertise regulated health services (e.g. 3rd party review sites or directories, private health insurers).

As discussed in Section 9 below, the ADA is frequently contacted both by practitioners and members of the public about the advertising of 3rd party health directories and private health insurers. Practitioners often raise apparent breaches of the law by these entities, whilst patients often reveal statements made by health fund staff that they have taken in good faith, but which are blatantly untrue or misleading.

For example, they are told that the ADA sets the level of health fund rebates, or dentist fees, or that they should see a preferred provider as their own dentist is way too expensive, when in fact there's little or no difference in the fee charged by each provider. Sometimes patients with a referral to see specialist who ring their fund are told they should see one of the fund's preferred providers instead - but they are *not* told that this provider is not a specialist. When the ADA or the dentist raises this sort of behaviour with the health fund, they simply deny it, or say it won't happen again – but it always does.

In conjunction with the ACCC, AHPRA should consider jointly publishing a more comprehensive set of guidelines that would cover the obligations of these entities when advertising regulated health services, and include specific examples of practices that they need to avoid in order not to breach both the National Law and Australian Consumer Law.

A publication that clarified the obligations of *all* who advertise regulated health services, and the appropriate agency to contact to raise concerns or complaints would be helpful to the public, health practitioners, *and* professional associations.

3. Please describe any content that needs to be changed or deleted in the revised guidelines.

See 5 & 7.

4. Should some of the content be moved out of the revised guidelines to be published in the advertising resources section of the AHPRA website instead? If yes, please describe what should be moved and your reasons why.

No. The ADA believes that all the content now included in the *Guidelines* should remain in the document, where it can be accessed in one place.

As the *Guidelines* can be admitted as evidence during court/tribunal hearings on advertising matters, it is important that AHPRA present and promote the *Guidelines* as the single source of the "essential' information that practitioners/advertisers of regulated health services need to know to meet their advertising obligations.

The AHPRA website should clearly advise practitioners/advertisers seeking to understand these obligations to refer to the *Guidelines* in the first instance, and to other supplementary resources on the Advertising section of the AHPRA website second, should they need further information.

5. How helpful is the structure of the revised guidelines?

The structure of the *Guidelines* is easy to follow, although as mentioned above, it provides relatively little guidance to 3rd parties like review sites and private health insurers who advertise regulated health services.

6. Are the flow charts and diagrams helpful? Please explain your answer.

Figures 1 and 2 don't appear to add a great deal, although some readers may find them helpful. Regarding the table in section 4.3.3, see the suggestion at point 7. below.

7. Is there anything that needs to be added to the revised guidelines?

The following should be added to the *Guidelines:*

1. **Definition of 'clinical aspects of care' given under 4.3.1 *What is a testimonial?***
   The *Guidelines* specify that a review is considered a testimonial when it mentions any of the following 'clinical aspects' of care –
   - **symptoms** or reasons for seeking treatment,
   - **intervention**: the specific treatment provided, and/or
   - **outcome:** the skills or experience of the practitioner or specific outcome of the treatment.

   However, in a footnote (footnote 9) the Guidelines also say that 'practitioner-patient communication' is considered a clinical aspect of care'. It is not clear why this point is made in a footnote, rather than included in the list of 'clinical aspects' provided in the body of the text. For the sake of clarity, 'patient-practitioner communication' should be added to the main list of "clinical aspects", along with any necessary clarification of the type of comments about patient-practitioner communication that are relevant.

2. **The table under section 4.3.3 needs a clearer explanation of where responsibility for compliance in relation to testimonials lies in certain situations.**

   The table is a helpful addition, but the sections of the table dealing with Third Party Review sites (bottom two rows) don't cover all the nuances of situations that health practitioners face in dealing with 3rd party sites like Whitecoat.

   The table suggests that there are two relevant issues – whether the review was solicited by the practitioner, and whether the practitioner published the review, or asked for the review to be published.

The examples given in the bottom two rows of the table deal with two situations – one where the practitioner didn't solicit the review, and didn't have control over publication, and the other where the practitioner did solicit the review, and either published it or asked someone else to publish it.

But what about the situation many practitioners face with Whitecoat? Note that many practitioners are listed on Whitecoat against their wishes, as Whitecoat mines practice data, lists practices on the site, and will not remove the details of practitioners who don't want to be associated with the site or those who run it. (see "Can my profile be removed from Whitecoat" at https://www.whitecoat.com.au/providers/page/frequentlyaskedquestions.)

Technically, even practitioners who do not wish to be listed on Whitecoat "have control over" the review function, as they can turn it off and even remove comments. The catch is that Whitecoat then notifies any member of the public who view the provider's 'Profile' that the provider has elected to remove patient comments. Of course, this may give the consumer the misimpression that the provider has something to hide – when it is more likely that the provider does not trust Whitecoat to moderate reviews, and/or does not wish to be associated with Whitecoat and its tactics at all.

Thus, in the case of Whitecoat, there is an incentive *not* to turn off or remove online patient reviews, particularly given compelling evidence that such reviews are becoming increasingly influential in determining choice of practitioner and treatment pathways.[1]

This dilemma raises two questions: if a practitioner is on a 3rd party site that solicits reviews but gives them control to turn off reviews if they wish, is the practitioner effectively "soliciting" reviews if they don't turn off the review function? And is the practitioner who is on a site against their wishes responsible for any testimonials that appear if they don't turn off the review function?

The *Guidelines* fail to make the answers to these questions 100% clear to practitioners. They should be revised so that they *are* clear on these issues.

3. Section 3 on testimonials in the *Summary of advertising obligations* on p. 5 should include a clearer definition of a testimonials, and the circumstances in which a health practitioner is deemed to be "in control' of their publication.

Unlike the more detailed section on testimonials on p.12, this section does not explain the difference between a testimonial and a comment or review – i.e. that testimonials refer to clinical aspects of care. Nor does it explain that comments about symptoms, interventions, outcomes, or practitioner/patient communication are considered to refer to clinical aspects of care. For clarity's sake, these details should be included in the *Summary*, particularly as there is enough room to include it on the single *Summary* page.

An additional paragraph that clarifies in which circumstances a practitioner is considered (a) to have solicited a review/testimonial, and/or (b) to have been in control of publication of a testimonial should also be added to this section.

8. It is proposed that the guidelines will be reviewed every five years, or earlier if required. Is this reasonable? Please explain your answer.

Given the rapidly evolving online and social media landscape, the ADA recommends a review period of 3 years in the first instance.

The review should commence with a review of the outcomes of the *Advertising and Enforcement Strate*gy, the findings of which should be publicly reported. After this, a review of the Advertising *Guidelines,* informed by trends in compliance, and any other significant issues that arise out of review of the Enforcement strategy, should follow.

[1] Hong, Y. A. et al. (2019). What do patients say about doctors online? a systematic review of studies on patient online reviews. *Journal of medical Internet research*, *21*(4), e12521.

9. Please describe anything else the National Boards should consider in the review of the guidelines.

One of the areas of great concern to ADA members is the *uneven advertising playing field* between regulated health providers, third parties who advertise regulated health services like Whitecoat and private health funds, and non-health providers who advertise teeth whitening or straightening products/services.

This concern is about the way regulators appear to ignore clear breaches of advertising and other laws on the part of the latter two groups, the risks to consumer safety this poses, and its effects on the public perception of dentists and dentistry.

For example, several months ago, the ADA tendered a submission to the ACCC providing many examples of the availability of illegal, high concentration teeth whitening products online, of misleading advertising by non-health practitioners who provide teeth whitening services, and the likely damage this is doing to consumer oral health. To date, the ACCC has chosen not to respond.

Likewise, for many years, the ADA has provided the ACCC with examples of the misleading advertising used by private health insurers and the misleading advice given by their customer service staff and asked it to act. Examples of this kind of advertising, and its effects on dentists and consumer impressions of them and of the ADA are set out in detail in the ADA's Submission to the Senate Community Affairs' Committees Inquiry into Private Health Insurance, and in the submissions of over 200 dentists to the same Inquiry.[2] However, to date, regulators have taken no action on this.

Whitecoat, which advertises many dentists against their wishes, and offers a paid booking platform that many do not wish to use, gives patients who would like to book with such practitioners the impression that it will pass on the details of the patient to the practitioner. However, instead, it may ring the practitioner, but will only give them patient's surname and phone number if the practitioner agrees to pay to sign up to the Whitecoat booking engine.

Unless the practitioner submits to this high-pressure sales tactic, the practitioner cannot contact the potential patient, and the potential patient is given a poor impression of the practitioner who appears not to have bothered to try to contact them back.

The reality is that regulatory agencies such as the ACCC and AHPRA cannot rely on patient or consumer complaint mechanisms to alert them to where action on misleading or deceptive advertising is required, because many consumers are either not aware that they are being misled, or do not know who to complain to.

Health practitioners are also often unsure about who regulates what, and to whom they can complain about unfair tactics, or misleading advertising. Although professional associations do their best to educate their members, more should be done by regulators themselves.

As mentioned earlier, development of a joint ACCC/AHPRA publication on advertising guidelines for *all* persons and organisations who advertise regulated health services, with details of where practitioner and consumer complaints can be directed, may thus provide a useful educative function in this regard.

The ADA understands that AHPRA meets regularly with the ACCC and the TGA as part of the Consumer Health Regulators Group. On behalf of our members and consumers, we request that AHPRA raise the concerns outlined in this submission at that forum at its earliest opportunity.

10. Please add any other comments or suggestions for the revised guidelines.

N/A.

[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Privatehealthinsurance/Submissions