

## Health Insights

# Getting it right – meeting your legal and professional obligations in advertising

**New resources provided by AHPRA and National Boards aim to help health practitioners understand and comply with their legal and professional obligations under the National Law.**

Understanding and meeting legal obligations with regard to advertising and avoiding complaints to regulators can be a daunting task for health practitioners.

The national regulator, AHPRA, has released a welcome resource to add to the existing toolbox for practitioners seeking to remain compliant with advertising regulations. The “Testimonial Tool” is available on the AHPRA website and is the latest in a series of advertising support materials created by AHPRA and the National Boards.<sup>1</sup> The tool is aimed at helping health practitioners understand their legislative obligations around the use of testimonials. Responsible advertising is a professional and legal obligation.

All National Boards have now published advertising guidelines (The Guidelines)<sup>2</sup> in addition to the *Code of conduct for health professionals*, and guidance about specific issues which are causing ongoing complaints and concern.<sup>3</sup> Any person or business advertising a regulated health service must comply with



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<sup>1</sup> Testimonials in health advertising, June 2018 <http://www.ahpra.gov.au/Publications/Advertising-resources/Check-and-correct/Testimonial-tool.aspx>

<sup>2</sup> AHPRA 'Guidelines for Advertising Regulated Health Services' at <http://www.ahpra.gov.au/Publications/Advertising-resources>

<sup>3</sup> Chiropractic Board of Australia, Position statement on advertising, at <http://www.ahpra.gov.au/Publications/Advertising-resources/What-health-practitioners-and-healthcare-providers-need-to-know.aspx>

the Guidelines, the National Law, as well as other legislation<sup>4</sup>. The laws apply to any person or business advertising a regulated health service. The definition of a regulated health service is very broad and applies to public and private services and is not limited to direct clinical services.

To help educate practitioners regarding their legislative obligations, AHPRA has also added examples of advertising breaches and how to correct the statements. The published examples are based on AHPRA's review of advertising complaints across the 14 regulated health professions. The examples also reflect the common issues Meridian Lawyers encounter with practitioner's advertising.

The penalties for non-compliance are significant, with fines of \$5,000 for individuals per offence, and \$10,000 for a body corporate per offence. Advertising is also a professional conduct issue.

Practitioners are reminded that what constitutes 'advertising', for the purposes of the legislation, is very broad. It includes all forms of printed and electronic media, such as:-

- Professional websites, the internet or directories
- Any public communication using television, radio, pictorial representations, mobile communications or other displays
- Business cards, office signs, letterhead, professional lists and directories

AHPRA focuses widely on the promotional quality of advertising, including instances in which registered health practitioners give information for media reports, magazine articles or advertorials. This encompasses comments and information on particular products and services, or about other health practitioners.

The National Law (section 133) prohibits advertising by a regulated health service or business that:-

- Is false, misleading or deceptive or is likely to mislead or deceive, or
- 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
- Uses testimonials or purported testimonials about the service or business, or
- Creates an unreasonable expectation of beneficial treatment, or
- Directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services.

Websites and social media are potential problem areas. Many practitioners find themselves the subject of disciplinary action as a result of unsolicited comments made by customers on their business Facebook page, which amount to testimonials. While social media can present opportunities for patient feedback, care must be taken to ensure comments that are made do not amount to unlawful advertising.

The National Law does not prohibit consumers sharing their views on a consumer information or sharing site. However, if that site is controlled by the practice or a practitioner referred to in the comments or reviews, it cannot be used to advertise a regulated health service. Advertisers are responsible for all testimonials, both solicited and unsolicited, that are published within their control. Testimonials about clinical care are prohibited

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<sup>4</sup> *The Health Practitioner National Law 2009*, as in force in each state and territory, the *Therapeutic Goods Act 1989*, [Australian Consumer Law](#), and the expectations of the [Australian Competition and Consumer Commission](#) (ACCC).

in advertising regulated health services.

Two recent cases, highlight the importance of practitioners being vigilant when it comes to ensuring all of their advertising is compliant.

- In NSW a chiropractor was fined \$29,500 and ordered to pay AHPRA's legal costs, for using testimonials.<sup>5</sup>
- In NSW a corporation was fined \$127,500 for unlawful advertising under the National Law.<sup>6</sup>

The consequences of failing to take steps personally, to ensure that your advertising and your business is fully compliant, can be costly.

THIS ARTICLE WAS WRITTEN BY PRINCIPAL KELLIE DELL'ORO AND SOLICITOR ROSEMARY BLANDEN. PLEASE CONTACT US IF YOU HAVE ANY QUESTIONS OR IF YOU WOULD LIKE FURTHER INFORMATION.

Disclaimer: This information is current as of August 2018. These articles do not constitute legal advice and do not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of these articles.

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<sup>5</sup> <http://www.chiropracticboard.gov.au/News/2017-02-15-media-release.aspx>; and *Health Care Complaints Commission v Limboro* [2018] NSWCATOD 117

<sup>6</sup> <http://www.ahpra.gov.au/News/2017-10-04-media-release-advertising.aspx>