

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

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Submitted by: Dr Margaret Faux
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Dr Margaret Faux, PhD, LLB, RN
Founder and CEO, Synapse Medical

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Submission to the Health and Environment Committee of the Queensland Parliament in relation to the Australian Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022.

By email to: hec@parliament.qld.gov.au

Thank you for giving me the opportunity to provide this submission.

INTRODUCTION AND BACKGROUND

I am a Solicitor admitted to practice in the Supreme Court of NSW and the High Court of Australia, and have practiced law for over two decades. I am also an academic scholar of Medicare and health insurance law, and I have recently been awarded a PhD on the topic of Medicare claiming and compliance. I have been a health system administrator since Medicare began, am a Registered Nurse, and the founder and CEO of global MedTech company, Synapse Medical, which provides medical billing and clinical coding solutions globally. I contribute widely to the national health reform debate with over 100 publications (both peer reviewed and popular media) which are available [here](#).

I offer the following submissions in my personal capacity as a health system lawyer, academic and administrator with 40 years' experience in the health sector, and deep knowledge of the regulatory layers of Australia's health system, and how they are applied in practice.

SUBMISSIONS

- My submissions relate to proposed changes to the advertising provisions in Section 133 of the National Law.
- While I welcome the increased penalties for advertising offences, I am concerned that the proposed changes to the ban on testimonials, which have a stated purpose of aligning the advertising provisions with general consumer law, will worsen the already problematic regulatory overlap between AHPRA and the ACCC.
- There is no evidence that either AHPRA or the ACCC has ever taken an active interest in actioning claims for misleading and deceptive conduct against individual medical practitioners, presumably because each regulator has viewed this as the other's responsibility. This is despite a significant point of difference being AHPRA's clear responsibility to enforce the testimonial ban – which, to the best of my knowledge, it has never done.
- I am concerned that, by relaxing the ban and bringing testimonials within the broad definition of advertising, the offence of misleading and deceptive conduct will be almost identical as between the Health Practitioner National Law and the Australian Consumer Law, and as a

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result, patient safety will fall between the cracks with neither regulator taking responsibility for enforcement when breaches occur.

- The existing testimonial ban has served Australian consumers well in most areas of medical practice, by protecting them from predatory medical marketing. The cosmetic industry is a notable exception that I will come to shortly.
- In my area of work, I have been involved in private medical practice education for over a decade. As part of this work, which prepares medical practitioners for private practice, I have had the pleasure of working alongside many reputable medical marketing providers who have provided excellent training to medical practitioners about the testimonial ban, its purpose, importance, and effectiveness. As a result of these and other educational initiatives, the majority of medical practitioners have responsibly complied with the ban.
- Recent commentary about the testimonial ban in major medical media outlets have stated that *“AHPRA’s longstanding ban on doctors advertising their skills through patient testimonials is being lifted, in part because the ban is deemed unenforceable with the rise of social media”*.¹ However, there does not appear to be any evidence that AHPRA has actively tried to enforce the ban, such as by using available digital technologies that scan social media and websites. These are technologies that have existed for many years. It is therefore somewhat troubling that the underlying reason for this change appears to be that the regulator has found that policing testimonials is too hard, but the regulator does not appear to have been pressed to provide evidence around its efforts to meet its enforcement obligations over the last decade, and explain why such efforts were unsuccessful.
- I am concerned that the negative effects of suddenly relaxing the ban will be felt quickly, with an avalanche of breaches that will exacerbate not ameliorate AHPRA’s apparent existing enforcement challenges. It is unclear how AHPRA intends to meet this new challenge, which will be critical in keeping patients safe, particularly in the area of cosmetic treatments and procedures.
- The explanatory memorandum states:

“Advertisements, including those that use testimonials, will be prohibited if they are false, misleading or deceptive; offer a gift or inducement without stating the terms and conditions; create an unreasonable expectation of beneficial treatment; or encourage the unnecessary use of regulated health services.”
- In the area of cosmetic treatments and procedures every advertisement (whether a testimonial or otherwise), will likely breach the provisions of Section 133 because by definition, cosmetic treatments and procedures are not medically necessary. Therefore, all

¹ New laws will end AHPRA's ban on doctors using patient testimonials,
<https://www.ausdoc.com.au/news/new-laws-will-end-ahpras-ban-doctors-using-patient-testimonials>

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advertising for cosmetic services can have no purpose other than to 'encourage unnecessary use of regulated health services', usually by creating unreasonable expectation of beneficial treatment.

CONCLUSION

The current testimonial ban is not perfect, but it has for many years protected patients from predatory medical marketing by having a speed camera effect on medical practitioners. The current proposal to relax the testimonial ban appears likely to exacerbate enforcement challenges, making patients less safe, and may worsen the existing problem of having two regulators (AHPRA and the ACCC) responsible for enforcing what is essentially the same offence – misleading and deceptive conduct.

My suggestion is that further research be undertaken before this decision is made.

Yours sincerely



Dr Margaret Faux