

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

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Mr Karl Holden, Committee Secretary
Health and Environment Committee
Parliament House
George Street, Brisbane QLD 4000

31 May 2022

Dear Mr Holden

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 (Qld)

1. We represent Eucalyptus, a digital health platform which seeks to provide high quality telehealth services to Australians.
2. Eucalyptus strives for compliance with all applicable regulations and believes that the telehealth sector, like the rest of the healthcare industry, ought to be bound by robust rules which ensure that patients (both present and prospective) are informed safely and appropriately about regulated health services in Australia.
3. We are grateful for the opportunity to provide comments on the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 (Qld)* (**Bill**).
4. Our comments are limited to clause 85 of the Bill, which proposes to amend section 133 of the *Health Practitioner Regulation National Law (National Law)* by removing the present prohibition on the use of testimonials in the advertising of regulated health services.
5. In short, Eucalyptus is strongly supportive of the proposed amendment, for the following reasons.

The current regulatory position is unclear and difficult to both observe and enforce

6. Section 133(1)(c) of the National Law presently provides a broad prohibition against “us[ing] testimonials or purported testimonials about the service or business” in relation to a regulated health service. On its face, this prohibits any type of testimonial advertising. However, in practice, not all forms of testimonial advertising are in fact prohibited – or, at least, the prohibition will not be enforced in all cases by the Australian Health Practitioner Regulation Agency (**AHPRA**).
7. This is because AHPRA’s *Guidelines for Advertising a Regulated Health Service (Guidelines)* effectively narrow the definition of “testimonial” by stating that the relevant prohibition only applies to “recommendations or positive statements about the clinical aspects of a regulated health service used in advertising”.¹ The Guidelines then exhaustively define the term “clinical aspects” (a term which does not appear in the National Law) as comprising:
 - a. “symptom – the specific symptom or the reason for seeking treatment”;
 - b. “diagnosis or treatment – the specific diagnosis or treatment provided by the practitioner”;and

¹ Guidelines, [4.3.1].



- c. “*outcome – the specific outcome or the skills or experience of the practitioner either directly or via comparison*”.
8. Accordingly, the Guidelines state that it is acceptable for a testimonial to be used in the advertising of a regulated health service where it relates only to “*comments about customer service or communication style that do not include a reference to clinical aspects*”.
 9. However, these multiple definitions within definitions only increase the complexity inherent in the practical application of this regulation, and raise further questions for both regulated entities and the regulator. For instance, is a testimonial acceptable if it refers in *general* terms to a patient’s symptom (provided that the “*specific symptom*” is not stated)? Does a description of a patient’s lifestyle changes as a result of a health service constitute a prohibited reference to the “*outcome*”? And what is the policy basis for distinguishing between testimonials which refer to “*clinical aspects*” and those which do not, given the breadth of the legislative language?
 10. We therefore echo the comment made in the Bill’s Explanatory Notes that “*practitioners and regulators can find it difficult to distinguish testimonials about clinical care from testimonials about non-clinical care*”.²
 11. In other words, these interpretative ambiguities render the practical observance and enforcement of the prohibition challenging and promote misunderstanding. Indeed, some such misunderstanding was evident in the recent public briefing for the Bill itself: one attendee noted, in support of the amendment proposed by clause 85 of the Bill, that “*some consumers do find it helpful to have peer experiences such as, ‘This person is helpful’, ‘This person is a good listener’, ‘This person is good with women’, ‘This person is supportive of the LGBTI community’ et cetera*”.³ Ironically, the reality is that, given AHPRA’s definition of “*clinical aspects*” quoted above (and its explicit carve-out for “*comments about customer service or communication style*”), such testimonials are already permitted under the National Law.
 12. In those circumstances, it is clear that the present regulatory approach – dependent on scrutinising the *subject matter* of a testimonial – is not working.

Uniformity with the regulatory position for therapeutic goods is needed

13. Eucalyptus supports the proposition, advanced in both the Explanatory Notes and the public briefing, that the regulation of testimonial advertising ought to be brought in line with other forms of advertising of health services.
14. But there is an additional benefit from the perspective of regulatory uniformity: that between the regulation of testimonials of health services and the regulation of testimonials of therapeutic goods. Presently, while the former is prohibited (subject to the boundaries described above), the latter is largely permitted with some limits: the *Therapeutic Goods (Therapeutic Goods Advertising Code) Instrument 2021 (Cth) (TGA Code)* allows (in s 24) the use of testimonials – broadly speaking, as

² *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022*, Explanatory Notes (available at:

<https://documents.parliament.qld.gov.au/bills/2022/3093/Health-Practitioner-Regulation-National-Law-and-Other-Legislation-Amendment-Bill-2022---Explanatory-Notes-8010.pdf>), p 64.

³ Queensland Parliament, Health and Environment Committee, *Public Briefing – Inquiry into the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022*, Transcript of Proceedings, 23 May 2022 (available at:

<https://documents.parliament.qld.gov.au/com/HEC-B5E1/HPRNLOLAB2-5F6C/Transcript%20-%2023%20May%2022%20-%20HEC%20-%20Briefing-%20Inquiry%20into%20the%20Health%20Practitioner%20Regulation%20National%20Law%20and%20Other%20Legislation%20Amendment%20Bill%202022.pdf>), p 8.

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long as they are not misleading, are representative of average patient results, and are not presented by health practitioners or social media influencers.

15. The practical reality is that many organisations offer products and services which straddle the line between both ‘regulated health services’ and ‘therapeutic goods’. The Therapeutic Goods Administration’s *Australian Regulatory Guidelines for Advertising Therapeutic Goods* discuss several examples of such types of organisations.⁴ They include imaging and vaccination services, extemporaneous compounding of medications, and cosmetic services and injections. Many others can readily be contemplated.
16. Currently, such organisations must comply with both the National Law and the TGA Code in their advertising. Applying two different sets of rules to the advertising of testimonials (particularly where one set of rules is plagued by interpretative difficulties, as discussed above) is complex to navigate and ultimately does not promote compliance.

Consumers expect, and benefit from, testimonials

17. We note that both the Explanatory Notes and the public briefing have made the point that the advertising landscape has changed considerably since the National Law was first introduced and that online testimonials are a common feature of consumers’ investigation into health services. This is because they are already permitted on platforms outside the control of the health service. As the AHPRA Guidelines state, “[a]dvertisers are not responsible ... for testimonials published on platforms they do not control”.⁵ They are also widely available on websites hosted in other countries (for instance, they are permitted in other jurisdictions such as the UK).⁶
18. Further, the Explanatory Notes observed that “[c]onsumers increasingly expect to have access to reviews and testimonials when purchasing health services and expect to be able to share their views about health services and practitioners”.
19. Indeed, previous academic research has indicated that consumers use testimonials to speed up their decision-making and to ultimately make better decisions.⁷ Similarly, the educational potential of patient narratives in the healthcare context has been studied and their benefits demonstrated to both consumers and healthcare professionals.⁸
20. More recent research into testimonials in the Australian healthcare advertising context specifically has also found, among other things, that consumers consider online comparison platforms (which routinely feature testimonials) to be a trustworthy source of information and that such advertising influences their decisions.⁹ While the same research also found that testimonials have the potential to be misleading (discussed further below), it is at least clear that they can – when presented appropriately – provide real assistance to consumers in making informed decisions about health services.

⁴ Available at

<https://www.tga.gov.au/sites/default/files/australian-regulatory-guidelines-advertising-therapeutic-goods-argatg.pdf> (see pp 21-25).

⁵ Guidelines, at [4.3.3].

⁶ See, eg, the *UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing* (available [here](#)), at [3.45]-[3.48].

⁷ Hennig-Thurau and Walsh, ‘Electronic Word-of-Mouth: Motives for and Consequences of Reading Customer Articulations on the Internet’ (2003) 8(2) *International Journal of Electronic Commerce* 51-74.

⁸ Drewniak et al, ‘Risks and Benefits of Web-Based Patient Narratives: Systematic Review’ (2020) 22(3) *Journal of Medical Internet Research*.

⁹ Holden et al, ‘What do Australian health consumers believe about commercial advertisements and testimonials? A survey on health service advertising’ (2021) 21 *BMC Public Health* 71.

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It is more important that testimonials not be misleading

21. None of the foregoing should be taken to suggest that testimonials in health advertising ought to be permitted without judicious limitations.
22. For this reason, Eucalyptus also supports the Bill's reinforcement that testimonials are subject to the other provisions of s 133 of the National Law. Chief among these is that testimonials (like all other forms of advertising of regulated health services) must not be false, misleading or deceptive or be likely to mislead or deceive.
23. Limitations such as this – which focus on the *import* of a testimonial, rather than on its *subject matter* (unlike the current AHPRA definition of 'testimonial' as discussed above) – are both clearer to observe and easier to enforce. They also concentrate on characteristics which are arguably more critical for the protection of consumers' interests.
24. This is because, whether or not a testimonial includes references to a health service's "*clinical aspects*", the integrity of a prospective patient's decision-making process would be far more undermined if the testimonial was not genuine or was deceptive in some other way.

Next steps

25. We understand that the health ministers of all Australian states and territories, sitting as the Ministerial Council for the National Registration and Accreditation Scheme, approved the draft Bill in a communiqué published on 18 February 2022.¹⁰ If the Bill is passed, we assume that the three jurisdictions which must enact their own separate regulations applying the changes effected by the Bill (NSW, Queensland and South Australia), will follow Queensland's lead.¹¹
26. Eucalyptus is once again grateful for the opportunity to present its views to the Committee.
27. We would be happy to discuss any of the matters in this letter.

Yours sincerely



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Head of Legal



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Senior Legal Counsel

¹⁰ See

https://www.health.gov.au/sites/default/files/documents/2022/03/hmm-communique-health-practitioner-regulation-national-law-amendments-health-ministers-approve-bill-to-amend-the-health-practitioner-regulation-national-law_0.pdf.

¹¹ NSW, pursuant to an amendment made to its legislation in March 2022, must pass its own separate regulation adopting (with or without modification) any changes made to the National Law as enacted in Queensland: see the *Health Legislation (Miscellaneous) Amendment Act 2022* (NSW), which inserted subs (2)-(6) of s 4 of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW). Similarly, South Australia must make its own adopting regulation and Western Australia must amend its own state legislation: see Parliament of Queensland, *Hansard*, 11 May 2022, p 1036, accessible at:

https://documents.parliament.qld.gov.au/events/han/2022/2022_05_11_WEEKLY.pdf.