

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

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The Australian Society of Plastic Surgeons (ASPS) would like to thank you for the opportunity to provide feedback on the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022. We particularly wish to comment on the proposed changes to the use of testimonials.

ASPS is the peak body for the plastic and reconstructive surgical community in Australia. We represent over 500 Australian surgeons. All ASPS members are FRACS qualified by the Australian Plastic and Reconstructive Surgery Training Board, as administered by the Royal Australasian College of Surgeons.

A testimonial is taken by AHPRA to mean “a positive statement about a person or thing”, and “includes recommendations, or statements about the clinical aspects of a regulated health service.” Testimonials may also be referred to as patient reviews, stories, opinions, recommendations, experiences or feedback. Regardless of the name, the same regulations apply.

There has been considerable confusion regarding the legitimacy of using patient testimonials on websites and social media. There are multiple regulations and codes of practice applicable to plastic surgeons – regulations which differ in their approach to testimonials.

However, AHPRA in January 2019, clarified their position regarding external review sites, and ASPS’s current understanding is that:

- It is appropriate for a surgeon’s or practice’s websites or social media accounts to acknowledge the regulations regarding testimonials. This makes it clear to both the authorities and to patients that you value compliance.
- Re-publishing or quoting some or all of the actual text of a testimonial, or using the text of an extract as the link to a testimonial, constitutes a breach of existing regulations.
- Including links to external sites where patient reviews, testimonials or similar may be found does constitute a breach of the existing regulations. AHPRA are specifically requesting the removal of any links to external forums, review sites, etc.
- Using an external review to advertise, by responding to the review, may breach the regulations

The extent to which a surgeon has control over internet content concerning them and their practice is an important factor. Authorities are aware that there may be testimonials or patient reviews on sites which are outside the surgeon's control. However, on those sites which are under the surgeon's control, such as the surgeon's or practice's website or social media accounts (including Facebook, Instagram, Twitter, Snapchat, Periscope et al), it is therefore important to maintain a clear distinction between factual information given on these sites, and the subjective, unmoderated opinions found on external sites.

The most stringent regulation regarding testimonials is from AHPRA (see below), which states that it is not acceptable to use, quote or provide links to testimonials on your website.

Listed in order of increasing restriction, the current relevant regulations and codes are:

ACCC, Fair Treatment, Ch. 5 p. 23 (T):

"Testimonials may mislead or deceive if the person providing the testimonial does not exist, did not have the advertised treatment, does not truthfully represent the outcomes of the treatment, or has been offered some inducement.

Therapeutic Goods, Advertising Code 2015, 4.7:

"Testimonials ... must be documented, genuine, not misleading and illustrate typical cases only."

Royal Australasian College of Surgeons, Code of Conduct, 8.2:

"It is a breach of this Code to... use testimonials or 'before and after' photographs that could be perceived to create an unrealistic expectation of outcome in patients".

The phrasing here does not make it clear whether the use of any testimonial at all breaches the code, or only the use of testimonials that "could be perceived to create an unrealistic expectation" etc.

AHPRA, Good Medical Practice: A Code of Conduct for Doctors in Australia, 8.6.4:

"Good medical practice involves... Not offering inducements or using testimonials."

AHPRA, Social Media Policy:

"When using social media, health practitioners should remember that the National Law, their National Board's code of ethics and professional conduct and the Guidelines for advertising regulated health services apply."

AHPRA, Guidelines for Advertising Regulated Health Services, 6.2.3:

"Section 133 of the National Law states:

1. A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that...

c) Uses testimonials or purported testimonials about the service or business

The National Law does not define 'testimonial', so the word has its ordinary meaning of a positive statement about a person or thing. In the context of the National Law, a testimonial includes recommendations, or statements about the clinical aspects of a regulated health service.

The National Law ban on using testimonials means it is not acceptable to use testimonials in your own advertising, such as on your Facebook page, in a print, radio or television advertisement, or on your website. This means that:

1. you cannot use or quote testimonials on a site or in social media that is advertising a regulated health service, including patients posting comments about a practitioner on the practitioner's business website, and
2. you cannot use testimonials in advertising a regulated health service to promote a practitioner or service.

Health practitioners should therefore not encourage patients to leave testimonials on websites health practitioners control that advertise their own regulated health services, and should remove any testimonials that are posted there."

AHPRA also provides a tool to help practitioners understand the regulations around testimonials in health advertising: <http://www.ahpra.gov.au/Publications/Advertising-resources/Check-and-correct/Testimonial-tool.aspx>.

Impact of changes

A testimonial by a member of the public is not the same as a review about a restaurant or a hotel. The general public are not usually possessed of the clinical expertise that is required to assess surgical outcomes. There is a lot of "inferred" competency based on simple things such as, how politely the receptionist answered the phone or what the consulting rooms looked like. We have seen this inferred competency lead to patients going to practitioners who do not have appropriate qualifications. This is most evident in the field of cosmetic surgery.

Introducing testimonials on medical websites will significantly increase the task of the legislator with respect to surveillance and enforcement of ACCC principles above. The assessment of complaints will have to be more nuanced than at present.

There are plenty of cases demonstrating the risks associated with attracting patients to a medical practice via testimonials. I have not seen any evidence that testimonials drive improved patient outcomes.

There are some of our members who are very much in favour of deregulating this area of advertising. The majority however, see it as a way for unqualified practitioners to promote themselves or for qualified practitioners to overstate their skill level.

Standards in cosmetic surgery and associated public safety issues are currently the subject of a review by AHPRA. ASPS believes that it would be appropriate to wait until the review is concluded with recommendations that may or may not support the use of testimonials as outlined in the bill.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Kennedy', with a long horizontal stroke extending to the right.

Dan Kennedy
President
ASPS