

# Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

Submission to the Queensland Parliament Health and  
Environment Committee

**1 JUNE 2022**



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to have input into the Queensland Parliament Health and Environment Committee's ('the Committee') consideration of the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 ('the Bill').
2. The Bill seeks to amend the *Health Practitioner Regulation National Law Act 2009* ('the *National Law*'). It is a nationally-consistent law, with Queensland as the host jurisdiction for the national version of the legislation.<sup>2</sup> A version of the legislation is governed by and has been passed into effect by every State and Territory in their respective parliaments.<sup>3</sup>
3. The focus of this submission are the proposed amendments to the *National Law* regarding advertising health services, as detailed in Part 16 of the Bill.
4. One change proposed by the Bill is to allow the use of testimonials in advertising health services.<sup>4</sup> The use of testimonials in health services advertising is currently banned, as per in section 133 of the *National Law*, which prohibits the use of "testimonials or purported testimonials about the service or business" when advertising regulated health services.<sup>5</sup> The current legislative ban on testimonials reflects a clear concern for public safety.
5. The ALA holds serious concerns about this proposed amendment due to the dangers posed to the general public (including certain vulnerable groups) by the use of testimonials in health services advertising, including in but not limited to the realm of cosmetic procedures advertising.<sup>6</sup> The ALA addressed matters regarding specifically the advertising of cosmetic procedures, including the dangers posed by the use of testimonials, in our 2021 policy report entitled [\*Facing the facts – The urgent need for further regulation of cosmetic procedures advertising\*](#). A copy of this report is included at the end of this submission.

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<sup>2</sup> Australian Health Practitioner Regulation Agency, *Legislation* (Web Page, 17 May 2022) <<https://www.ahpra.gov.au/About-Ahpra/What-We-Do/Legislation.aspx>>.

<sup>3</sup> Ibid.

<sup>4</sup> Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022, cl 85.

<sup>5</sup> *Health Practitioner Regulation National Law* s 133(c).

<sup>6</sup> Cosmetic procedures are referred to by the Australian Health Practitioner Regulation Agency in a number of different ways, including 'cosmetic procedures or surgery' and 'cosmetic medical and surgical procedures'. For clarity and concision, we have adopted the term 'cosmetic procedures' in this paper to refer to all procedures (surgical or non-surgical) performed for cosmetic or aesthetic purposes.

6. The first part of this submission will detail the dangers posed to the general public by the use of testimonials in health services advertising, with the support of case studies, and additionally will detail why the status quo ban on the use of testimonials in health services advertising is appropriate and should remain in effect across Australia.
7. The Bill also seeks to raise increase penalties for advertising offences for both individuals and body corporates.<sup>7</sup> The ALA supports this amendment as a potential deterrent to practitioners, who are breaching or who are considering breaching advertising regulations. The second part of this submission will focus on this proposed amendment.
8. The final part of this submission will address stakeholder education, which has been identified as a priority before any changes to the National Law come into effect.<sup>8</sup> The ALA welcomes this commitment to stakeholder education and encourages the Committee to ensure, as a matter of public safety, that consumer (i.e. prospective patient) education is a priority following any legislative change in relation to health services advertising.

## **The dangers posed to public safety by the use of testimonials in health services advertising**

9. Testimonials carry with them significant persuasive power for consumers, including when they are communicated through online platforms, which have the potential to reach many more consumers than traditional forms of advertising can reach. Online testimonials can come in many forms, be it a post on a practitioner's website, a Google review or in content posted on social media.
10. In relation to health services advertising, the consumers in question are patients or prospective patients, who may undertake a certain procedure and/or select a particular practitioner based on that advertising.
11. While the use of advertising online and on social media platforms has arguably improved patients' access to medical therapies and treatments, there are also a number of dangers that

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<sup>7</sup> Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022, cl 85.

<sup>8</sup> Explanatory Notes, Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022, 30.

pose significant risks to patients. This includes the use of testimonials online by practitioners when advertising their health services, for which only positive and glowing testimonials will be chosen. Practitioners will not utilise testimonials in their own advertising that portray a negative patient experience.

12. This means that health services advertising containing testimonials will by their very nature present prospective patients with a skewed view on that practitioner. This may not reflect the experience of every patient with that practitioner, in part or even at all; but it would be this skewed perspective that will be selected to present to prospective patients in health services advertising if the ban on the use of testimonials is lifted.
13. Given the power this form of advertising has in inducing prospective patients towards a particular practitioner or a certain cosmetic procedure, the ALA is concerned that testimonials may be misused by some practitioners in their advertising of health services advertising.
14. Affirming the current legislative ban on the use of testimonials,<sup>9</sup> the Australian Health Practitioner Regulation Agency (Ahpra) highlights the significant and innate issues with the use of testimonials in health services advertising:<sup>10</sup>

Testimonials are prohibited in advertising a regulated health service because:

- they are often personal opinions and may have no objective basis for recommending a registered health practitioner or health service
- the outcomes experienced by one patient do not necessarily reflect the outcome, or likely outcome available to all patients
- they can be misleading as they are not usually a balanced source of information (they often include a selection of positive comments about experiences and do not tell the whole story), and/or
- the public may not have expert knowledge to assess if the information is accurate.

15. Carly Smith and Daniel George of Penn State University have also noted a number of significant risks to patients posed by the engagement between practitioners and the general public online, including that “flattering testimonials from former patients (including

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<sup>9</sup> As per the *Health Practitioner Regulation National Law s 133(c)*.

<sup>10</sup> Australian Health Practitioner Regulation Agency, ‘Why are testimonials prohibited in advertising?’, *Testimonials: Understand the requirements* (Web Page, 23 August 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Resources-for-advertisers/Testimonial-tool.aspx>>.

celebrities) ... may give prospective patients a distorted sense of confidence or trust in the service provided".<sup>11</sup>

16. The following two case studies from recent litigation demonstrate how problematic the use of testimonials in health services advertising is, material which is often aimed at particularly vulnerable groups:

**17. CASE STUDY 1: The prosecution of Dr Hance Limboro<sup>12</sup>**

New South Wales chiropractor Dr Hance Limboro was convicted on 15 February 2017 of unlawfully advertising a regulated health service (contrary to section 133(1)(a) of the *National Law*) and using testimonials in his advertising (contrary to section 133(1)(c) of the *National Law*).

The two complaints about the use of testimonials concerned material placed on the website [actionhealth.com.au](http://actionhealth.com.au), titled, 'Would have been in wheelchair' and 'Sports Injuries and Chiropractic Care', in which a number of statements about the benefits of chiropractic treatment are attributed to 'Sheila', 'Anthony', 'Damien', 'Julian', 'Danielle', 'Anita' and 'Therese'.

At sentencing, Magistrate Alison Viney commented on the vulnerability of the prospective patients to whom Dr Limboro was advertising, including with the use of testimonials:

Unfortunately the target of these sites are people who have chronic or devastating diseases, which make them so vulnerable ... in regards to a cure or a fix.<sup>13</sup>

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<sup>11</sup> Carly P Smith and Daniel George, 'When Is Advertising a Plastic Surgeon's Individual "Brand" Unethical?' (2018) 20(4) *AMA Journal of Ethics* 372, 375-376.

<sup>12</sup> As detailed in a subsequent case regarding the cancellation of Dr Limboro's registration as a chiropractor: *Health Care Complaints Commission v Limboro* [2018] NSWCATOD 117.

<sup>13</sup> Stephanie Gardiner, 'Sydney chiropractor Hance Limboro fined \$27,500 for cancer cure advertisements', *The Sydney Morning Herald* (online, 16 February 2017) <<https://www.smh.com.au/national/nsw/sydney-chiropractor-hance-limboro-fined-27500-for-cancer-cure-advertisements-20170215-gudkpr.html>>.

## 18. CASE STUDY 2: Class action against The Cosmetic Institute<sup>14</sup>

There is currently a class action being prosecuted against The Cosmetic Institute ('TCI'). TCI ran a number of clinics across Sydney and the Gold Coast offering cosmetic procedures. It is alleged that hundreds of women suffered adverse outcomes following breast augmentation surgeries performed by cosmetic surgeons working for TCI.

The allegations contained in the Statement of Claim include allegations that the surgeons operating through TCI made a number of representations to their patients, including that they received overwhelmingly positive feedback from their past customers and this was evidence that their services changed lives and made their customers feel more confident.

These are serious allegations which have affected hundreds of women.

19. The ALA is concerned that younger people, especially women, may be more vulnerable to advertising that includes testimonials, especially about cosmetic procedures.

20. Recent research provides evidence that social media – where undoubtedly testimonials would flourish should the proposed amendments proceed – may adversely impact upon young women's healthcare choices in relation to cosmetic procedures in particular.<sup>15</sup> In response to these concerns, cosmetic procedures advertising that targets under-18s is banned in the United Kingdom as of May 2022.<sup>16</sup>

21. There are clear, demonstrated dangers posed by the use of testimonials in health services advertising. The ALA contends that neither the proposed amendments in the Bill, nor the commentary around them, offer any direct remedy to these fundamental concerns about and the dangers posed by the use of testimonials in health services advertising.

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<sup>14</sup> Originally *Amy Rickhuss v The Cosmetic Institute Pty Ltd* (Supreme Court of New South Wales, 2017/00279308, commenced 14 September 2017).

<sup>15</sup> Candice E Walker et al, 'Effects of social media use on desire for cosmetic surgery among young women' (2019) 30 *Current Psychology* 1; Dimitri Reissis et al, 'Advertising on social media: the plastic surgeon's prerogative' (2016) 37(1) *Aesthetic Surgery Journal* NP1; Gemma Sharp et al, 'Factors that influence the decision to undergo labiaplasty: media, relationships, and psychological well-being' (2016) 36(4) *Aesthetic Surgery Journal* 469.

<sup>16</sup> Sam Gruet, 'Cosmetic surgery adverts targeting under-18s banned', *BBC News* (online, 25 May 2022) <<https://www.bbc.com/news/newsbeat-61578346>>.

## Frequency does not negate the danger

22. Proponents of the Bill characterise testimonials as “common online”, including in advertising broadly.<sup>17</sup> In relation to health services advertising specifically, advocates for the amendments proposed by the Bill argue that “[t]he proliferation of online testimonials about health practitioners has negated previous policy rationales for regulating testimonials about health services differently from other forms of advertising”.<sup>18</sup>
23. The ALA contends that the frequency of testimonials in the advertising of general consumer goods does not negate or even dilute the dangers to consumers (patients or potential patients alike) posed by the use of testimonials in health services advertising.
24. There is a significant difference between the outcomes, even the negative outcomes, for consumers being influenced by a testimonial to purchase a particular television, choose a certain hairdresser based on customer testimonials, or even order expensive beauty products online; and for an individual consumer being influenced by a testimonial to undertake a medical procedure with a particular practitioner, especially elective medical procedures such as cosmetic procedures. These procedures are very likely to be painful, invasive, body-altering and even expensive, many with lengthy recovery times. Additionally, the advertised procedures could have lasting effects on both physical and mental health – especially if something goes wrong.
25. Thus, it is vital for public safety that all steps are taken by regulators to ensure that the legislative framework governing the advertising of regulated health services – namely, the *National Law* – is strong and definitive. This advertising is often the first interaction prospective patients have with practitioners and can be very influential on patient decision-making.
26. The response to the frequency of testimonials in general advertising, therefore, is not to relax laws around the use of testimonials in health services advertising, as the Bill proposes to do. This will expose prospective (and often vulnerable) patients to the coercive nature of those testimonials.

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<sup>17</sup> Explanatory Notes, Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022, 64.

<sup>18</sup> *Ibid.*

## Ensuring public safety must be paramount

27. Given the aforementioned dangers posed by the influence of advertising medical treatments and procedures, including the use of testimonials, on potentially very vulnerable consumers, the ALA urges the Committee to regard ensuring public safety as paramount in any consideration of proposed amendments to the *National Law*.
28. After all, the *National Law* was designed specifically to provide legislative support for one of Ahpra's goals of ensuring that "advertising about regulated health services is done responsibly in order to keep the public safe from unlawful advertising and to help the public to make informed decisions about their healthcare".<sup>19</sup>
29. Additional resources published by Ahpra – namely, the *Advertising compliance and enforcement strategy for the National Scheme* ('the Strategy')<sup>20</sup> and the *Guidelines for advertising regulated health services* ('the Guidelines')<sup>21</sup> – set out how Ahpra aims to achieve this goal of public safety, equipped with the available regulatory tools.
30. Much of the current regime in respect of compliance with the *National Law* and the Strategy relies on complaints being made with respect to the advertisement of regulated health services. This means Ahpra takes a reactive approach to advertising compliance, relying on complaints being made *ab initio* by the general public or other practitioners.
31. This system relies on the general public being able to identify issues with an advertisement, then knowing where to make a complaint, and then actually going through the complaints process. The success of this regime is also dependent on sufficient resourcing of Ahpra to comprehensively respond to complaints and to prosecute alleged breaches. Ahpra has commented that it has finite resources at its disposal to manage advertising compliance.<sup>22</sup>

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<sup>19</sup> Australian Health Practitioner Regulation Agency, *Advertising compliance and enforcement strategy* (Web Page, 9 February 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Advertising-complaints/Advertising-compliance-and-enforcement-strategy.aspx>>.

<sup>20</sup> Ibid.

<sup>21</sup> Australian Health Practitioner Regulation Agency, *Guidelines for advertising a regulated health service* (Guidelines, December 2020) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Advertising-guidelines-and-other-guidance/Advertising-guidelines.aspx>>.

<sup>22</sup> Australian Health Practitioner Regulation Agency, *Advertising compliance and enforcement strategy* (Web Page, 9 February 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Advertising-complaints/Advertising-compliance-and-enforcement-strategy.aspx>>

32. The ALA considers that the vast majority of advertising breaches are going unreported, which raises serious concerns about public safety. It is the general public who are more likely to engage with a wide variety of practitioners, and the general public is – through no fault of their own – unlikely to be aware of whether a practitioner is complying with advertising regulations, or not. This means that such breaches are unlikely to be reported, let alone investigated or prosecuted.
33. The Bill proposes to draw the use of testimonials in health services advertising further into this arguably tenuous process, exposing the general public to the influence of testimonials but without effective preventative or proactive protections in place to guarantee public safety.
34. The ALA maintains that it is imperative for public safety that a preventative measure like the current ban on testimonials remains in force (as detailed further below), and additionally that Ahpra adopts a proactive approach to uncovering breaches and ensuring compliance with its own advertising regulations. In our 2021 policy report on health services advertising, the ALA recommended that:

Ahpra takes a proactive approach to monitoring compliance with the *National Law* and the *Strategy*, without the need for a complaint to first be made, and to identify practitioners or cohorts of practitioners that may be more likely to breach advertising regulations.<sup>23</sup>

35. While it is beyond the scope of this submission, the ALA offers the following proposals of proactive regulatory approaches to greater ensure public safety:
- extensive auditing of practitioners by Ahpra to ensure ongoing regulatory compliance;
  - a requirement, as part of their registration process, that practitioners provide Ahpra with the details of any websites and social media platforms that they intend to use to advertise the regulated health services they offer; and
  - the listing of advertising breaches on practitioner’s registration/s available on the Ahpra website.<sup>24</sup>

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<sup>23</sup> Australian Lawyers Alliance, ‘Facing the facts – The urgent need for further regulation of cosmetic procedures advertising’ (Policy Report, November 2021) 5, Recommendation #2 <<https://www.lawyersalliance.com.au/documents/item/2249>>.

<sup>24</sup> See also: Australian Lawyers Alliance, ‘Facing the facts – The urgent need for further regulation of cosmetic procedures advertising’ (Policy Report, November 2021) 13–16 <<https://www.lawyersalliance.com.au/documents/item/2249>>.

36. The ALA maintains that, given Ahpra already has finite resources to investigate compliance with advertising regulations, the solution is not to relax the current regulations, as the Bill proposes to do. This will expose the public to preventable dangers and would thus be a risk to public safety.

### **The suitability of the status quo: Why the current legislative ban on using testimonials in advertising should remain in effect**

37. The ALA contends that a ban on the use of testimonials in advertising sends a clear message to practitioners from the outset that the practice is not acceptable and is even a threat to public safety.

38. A ban avoids the subjectivity that arises when there is a need to interpret further regulations – qualifications, exceptions, etc.

39. Removing the ban on the use of testimonials in advertising, as the Bill proposes, would mean testimonials are “treated the same as other forms of advertising”.<sup>25</sup> As such, monitoring advertisements using testimonials for any breaches of the amended *National Law* (such as false testimonials) would be reliant mostly on complaints from the general public and other practitioners, and to a lesser extent on monitoring by Ahpra, which (as mentioned above) does not have the resources to monitor the volume of testimonials which would emerge in health services advertising, should these amendments pass.

40. Earlier in this submission, the ALA detailed our concerns for public safety arising from the structure of this regulatory system and the agents on whom its success relies.

41. Further, the ALA does not consider the current ban on the use of testimonials in advertising at all onerous on either practitioners or on the general public since:

- a. Practitioners still have a range of ways to advertise their health services on various media and fora honestly and in good faith, without needing to utilise testimonials. Practitioners can still engage with material and comments from patients, provided that content does not contain “recommendations or positive statements about the

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<sup>25</sup> Explanatory Notes, Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022, 64.

clinical aspects of a regulated health service”<sup>26</sup>. Examples endorsed by Ahpra include comments about “customer service or communication style”, which are not considered testimonials and may be used in advertising;<sup>27</sup> and

- b. Under the current legislative framework, there is nothing that prevents a satisfied patient publishing a positive statement about a practitioner, including on review platforms. There is nothing stopping how members of the public interact with those reviews. The line has been drawn at the *use* of those testimonials by the practitioners themselves to target broader audiences through advertising.

42. The ALA, therefore, contends that the current legislative ban on testimonials acknowledges the reality of the power practitioners yield over patients or potential patients, the size of those practitioners’ reach when advertising their health services, and the potential for devastating consequences to result arising from the influence of a testimonial on an individual’s decision to undertake certain medical procedures – many of which are designed to be permanent, or require further, invasive medical procedures to reverse.

## **Increasing penalties for advertising breaches in general**

43. The ALA welcomes the amendment to the *National Law* to increase penalties for advertising offences from \$5,000 to \$60,000 for individuals and from \$10,000 to \$120,000 for body corporates.<sup>28</sup>

44. The ALA encourages all State and Territory jurisdictions to adopt this measure, should the Bill pass, independent of whether the final version of the Bill also allows for the use of testimonials.

45. An increased financial penalty may act as a deterrent to practitioners, who are breaching or who are considering breaching advertising regulations. With a significant increase in the financial penalties for advertising offences, it will be more difficult for practitioners to view

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<sup>26</sup> Australian Health Practitioner Regulation Agency, *Testimonials: Understand the requirements* (Web Page, 23 August 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Resources-for-advertisers/Testimonial-tool.aspx>>.

<sup>27</sup> *Ibid.*

<sup>28</sup> Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022, cl 85.

such a penalty as just another business cost that the practitioner can simply absorb. It may lead to greater compliance with advertising regulations and guidelines.

46. The ALA suggests that the revenue from increased fines could, in turn, be utilised by Ahpra to routinely audit practitioner adherence to advertising standards, including monitoring compliance with the current and appropriate ban on the use of testimonials in health services advertising.

## Comprehensive education preceding any legislative change

47. Evaluating compliance with the *National Law* and enforcing penalties for advertising breaches require that someone – presumably patients or other practitioners – reports those alleged breaches *ab initio*.
48. This requires those in industry but also the general public being aware of the legislative landscape (consumer rights, the obligations on advertisers, what advertising is or is not acceptable, etc), or at the very least having easy access to resources regarding advertising regulations and also a complaints mechanism.
49. Proponents for the Bill have acknowledged the need for education and guidance, should these changes be implemented: “It is intended that updated guidance and other stakeholder education will occur prior to commencing the provisions of the Bill allowing testimonials.”<sup>29</sup>
50. The ALA welcomes this commitment to stakeholder education and encourages the Committee to ensure, as a matter of public safety, that consumer education is also a priority following any legislative change in relation to health services advertising. This is particularly important if the ban on the use of testimonials is lifted and the system is then reliant on consumers identifying and reporting breaches of advertising standards.

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<sup>29</sup> Explanatory Notes, Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022, 30.

## Conclusion

51. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Queensland Parliament Health and Environment Committee's consideration of the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022.

52. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



**Ngaire Watson**

**Spokesperson on Health Law and Medical Negligence**

**Chair, Medical Law Special Interest Group**

**Australian Lawyers Alliance**

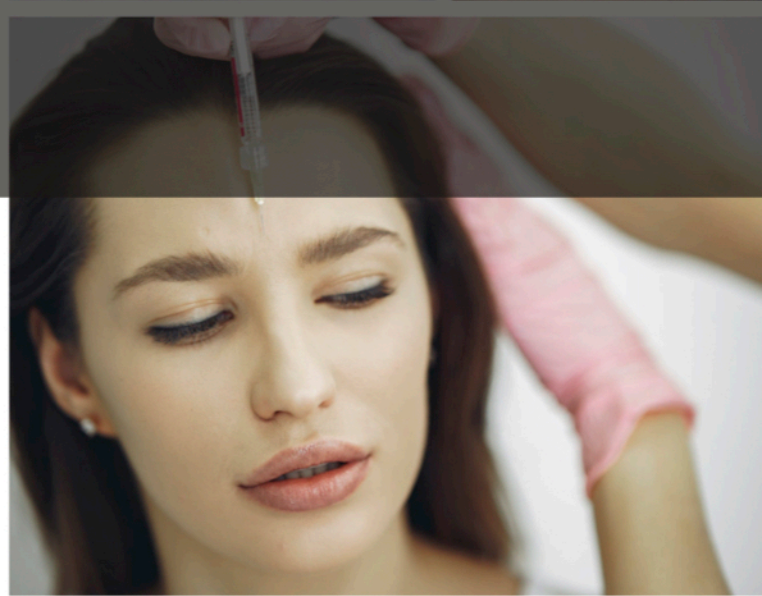
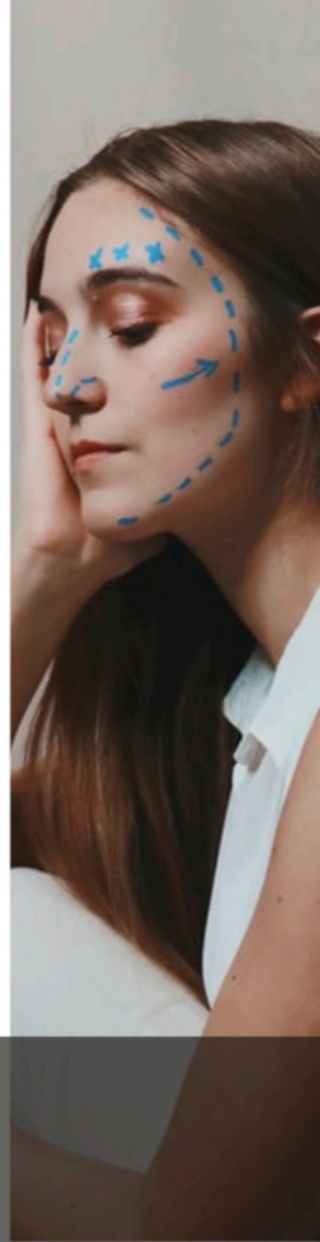
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## ***Appendix 1: Facing the facts – The urgent need for further regulation of cosmetic procedures advertising***

***A copy of the Australian Lawyers Alliance's policy report begins on following page.***

**AUSTRALIAN  
LAWYERS  
ALLIANCE**

Lawyers  
for the People



# FACING THE FACTS

NOVEMBER  
2021

THE URGENT NEED FOR  
FURTHER REGULATION OF  
COSMETIC PROCEDURES  
ADVERTISING



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## Australian Lawyers Alliance

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

The ALA estimates that its 1,500 members represent up to 200,000 people each year in Australia. The ALA promotes access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about the ALA is available on its website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

## Acknowledgments

The ALA acknowledges the contributions from the following people who assisted in the research and analysis of material included in this report:

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Sarah Vallance

Louis Schetzer

Elenore Levi

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

Over the past 15 years, advertising of regulated health services on websites and social media platforms has become the new norm, especially because these platforms have the potential to reach many more consumers than traditional forms of advertising can reach. However, while the use of advertising on social media platforms has arguably improved patients' access to medical therapies and treatments, there are also a number of dangers that pose significant risks to patients.

The purpose of this paper is to review the current framework governing health services advertising and make recommendations for changes to improve public safety, with specific reference to the advertising of cosmetic procedures.

Cosmetic procedures are referred to by the Australian Health Practitioner Regulation Agency (Ahpra) in a number of different ways, including 'cosmetic procedures or surgery' and 'cosmetic medical and surgical procedures'. For clarity and concision, we have adopted the term 'cosmetic procedures' in this paper to refer to all procedures (surgical or non-surgical) performed for cosmetic or aesthetic purposes.

The *Health Practitioner Regulation National Law Act 2009* ('the *National Law*') provides legislative support for one of Ahpra's goals of ensuring that advertising about regulated health services is published responsibly, in order to keep the public safe from false or misleading claims and to help them make informed choices about their healthcare.<sup>2</sup> The *Advertising compliance and enforcement strategy for the National Scheme* ('the *Strategy*') sets out how Ahpra aims to achieve this goal by using the regulatory tools available to them.<sup>3</sup> Ahpra has also published guidelines to further explain the advertising obligations under the *National Law*, entitled *Guidelines for advertising regulated health services* ('the *Guidelines*').<sup>4</sup>

The ALA considers that this legal framework is not presently adequate for encouraging regulatory compliance by health services practitioners, facilitating robust oversight by Ahpra of the health services advertising disseminated by practitioners, or for ensuring public safety.

**The ALA therefore makes the following recommendations regarding the legal framework that regulates the advertising of health services, namely that:**

- 1.** Advertising regulations should be amended to make it unlawful to advertise cosmetic procedures (surgical or non-surgical) to people under the age of 18, including advertising through social media;
- 2.** Ahpra takes a proactive approach to monitoring compliance with the *National Law* and the *Strategy*, without the need for a complaint to first be made, and to identify practitioners or cohorts of practitioners that may be more likely to breach advertising regulations;

<sup>2</sup> Australian Health Practitioner Regulation Agency, *Advertising compliance and enforcement strategy* (Web Page, 9 February 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Advertising-complaints/Advertising-compliance-and-enforcement-strategy.aspx>> ('The *Strategy*').

<sup>3</sup> Ibid.

<sup>4</sup> Australian Health Practitioner Regulation Agency, *Guidelines for advertising a regulated health service* (Guidelines, December 2020) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Advertising-guidelines-and-other-guidance/Advertising-guidelines.aspx>> ('The *Guidelines*').

- 3.** Ahpra enforces the removal or amendment within 48 hours of online advertising material that is known or is suspected to be in breach of the *National Law* and that Ahpra has been deemed 'medium risk' or 'high risk', with Ahpra officers performing audits to ensure compliance. The Strategy must detail the process and frequency of such audits;
- 4.** Ahpra provides clarity within the Strategy as to how often practitioners are required to make a formal declaration regarding their compliance with the *National Law*, as well as whether this obligation is attached to their annual renewal of registration;
- 5.** Registration of practitioners should also be dependent on supply by the practitioner of the website and social media accounts that they intend to use to advertise their services. Failure to supply all such sites should result in a serious penalty, especially if such advertising is non-compliant with regulations and standards;
- 6.** Any breaches of the *National Law* with respect to health services advertising are listed on a practitioner's registration/s available on the Ahpra website, including whether any action has been taken in respect of those breaches;
- 7.** All State and Territory jurisdictions adopt the proposal outlined in the *Health Practitioner Regulation National Law Amendment Bill 2021* to increase the maximum financial penalties for advertising offences under the *National Law*;
- 8.** Ahpra develops clear guidelines and comprehensive resources for practitioners and the public in respect of advertising cosmetic procedures, just as Ahpra has done for Chinese Medicine, Chiropractic and Osteopathy;
- 9.** Ahpra ensures that any advertising guidelines directed at cosmetic procedures make it mandatory for practitioners to clearly identify their qualifications and particularly whether or not they are a specialist plastic surgeon; and
- 10.** Ahpra commits to reviewing and updating the Strategy and the Guidelines on a pre-determined, regular basis to ensure both are working to improve advertising compliance.

In addition to recommending changes to the general advertising of regulated health services, the ALA has also made recommendations above that reflect our view that stronger, more meaningful regulation of cosmetic procedures advertising is required. This is because there has been increased demand for and consequent increased provision of cosmetic procedures in Australia. These services are usually offered with commercial interests at the forefront and, therefore, the standards that the public associates with regulated health services are often ignored. These services are also often offered by practitioners from a number of different medical backgrounds rather than from one specialist background. Patients are often unaware of the significance of this and may think that their practitioner is more qualified than they actually are. Patients are often able to access cosmetic procedures directly without engaging with other practitioners, such as their general practitioners. This means that patients may be undergoing unnecessary procedures or undergoing treatment by practitioners who are not suitably qualified.

Given that cosmetic procedures are not a defined specialty under the *National Law*, it is even more difficult to ascertain the level of advertising compliance by practitioners who practise in this area. A simple review of social media and practitioner websites indicates that there is poor compliance with the Strategy and the *National Law*. There are plenty of anecdotal examples of poor compliance in broader advertising

too, including a clinic in Western Australia that took out bus advertisements urging prospective patients to “Put your Job Seeker to bigger use”.<sup>5</sup>

The ALA is particularly concerned about the use of websites and social media to advertise cosmetic procedures, particularly as such advertising is often targeted at more vulnerable patients, such as young women.

The ALA proposes that further reforms should be introduced to the legal framework governing the advertising of cosmetic procedures, with a view to providing greater clarity to practitioners, in order to ultimately increase public safety.

The first section of this paper details the prevalence of online health services advertising, including the impact of this advertising on young women’s health.

The next section outlines the current legal framework governing the advertising of regulated health services; Ahpra’s role in ensuring the compliance of practitioners, including those advertising cosmetic procedures; and Ahpra’s reporting of advertising breaches through its annual reports.

The third section focuses on recent reforms and proposed changes to the Strategy, the *National Law* and the Guidelines, as well as the areas that the ALA considers require further amendment to ensure public safety through greater practitioner compliance with advertising.

The final section of this paper offers case studies that further illuminate the issue of unlawful advertising, underscoring the need for a more tailored approach to cosmetic procedures advertising.

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<sup>5</sup> Sarah Mourad, “Put your money to bigger use’: Ad encourages hard-up Aussies to spend their JobSeeker cash on BOOB JOBS’, *Daily Mail Australia* (online, 9 October 2020) <<https://www.dailymail.co.uk/news/article-8822069>>.

## The prevalence of online advertising of health services

The use of websites and social media platforms for the advertising of health services, including cosmetic procedures, has become increasingly common. According to one study from 2010, 70 per cent of people seeking to inform themselves about plastic surgery abroad relied on the internet as their main source of information.<sup>6</sup> Another 2010 survey of breast augmentation patients found that 41 per cent had accessed an internet search engine for information, and a further 18 per cent used a breast augmentation website.<sup>7</sup>

According to Carly Smith and Daniel George of Penn State University, the ability for patients to connect with a cosmetic physician online may have several benefits. These include that:

- Using social media can be an effective way for physicians to engage with patients by demonstrating how their practice undertakes certain procedures and what reasonable expectations might be associated with particular clinical treatments;
- A physician may use social media to provide information to a wide audience about preventative medicine and self-care;
- Social media can be used to counter non-evidence-based advertisements and sham science; and
- Social media can be used to share new scientific innovations.<sup>8</sup>

However, while there are a number of benefits to patients, there are also significant risks. According to Smith and George, these include:

- The vulnerability of prospective patients, due to dissatisfaction with their appearance, may make them susceptible to developing trust in a clinic or practitioner on the basis of the false intimacy that can develop via social media;
- The use of labels such as ‘cosmetic surgeon’, flattering testimonials from former patients (including celebrities), or the use of scientific language may give prospective patients a distorted sense of confidence or trust in the service provided; and
- Websites and social media may include certain information that emphasises the scientific rigour of ‘innovative’ treatments, such as videos or photos that show portions of a procedure, or ‘before and after’ pictures, thereby inflating a prospective patient’s knowledge and expectations of a particular procedure.<sup>9</sup>

The ALA is concerned that social media, especially targeted advertising on social media platforms, may inflate a patient’s sense of their own knowledge about regulated health services, while not actually increasing their knowledge about the risks involved, how the procedure may meet their individual needs, or about the qualifications of the practitioner. This includes the advertising of cosmetic procedures carried out by registered health practitioners, who – alongside anyone who advertises a regulated health service – are legally required to comply with advertising standards, including on social media.<sup>10</sup>

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<sup>6</sup> Reza Nassab et al, ‘Cosmetic tourism: public opinion and analysis of information and content available on the internet’ (2010) 30(3) *Aesthetic Surgery Journal* 465, 466.

<sup>7</sup> Jennifer L Walden et al, ‘Contemporary decision making and perception in patients undergoing cosmetic breast augmentation’ (2010) 30(3) *Aesthetic Surgery Journal* 395, 396.

<sup>8</sup> Carly P Smith and Daniel George, ‘When Is Advertising a Plastic Surgeon’s Individual “Brand” Unethical?’ (2018) 20(4) *AMA Journal of Ethics* 372, 376.

<sup>9</sup> *Ibid* 375–376.

<sup>10</sup> Australian Health Practitioner Regulation Agency, ‘The Strategy’ (n 2).

## The impact of cosmetic procedures advertising on young women's health

The ALA is concerned that younger women may be more vulnerable to advertising about cosmetic procedures and as such, advertising aimed at younger women for the provision of such services should be classified as 'high-risk'.

Recent research provides evidence that social media may adversely impact upon young women's healthcare choices in relation to cosmetic procedures.<sup>11</sup> Even social media platforms have acknowledged the concern and have restricted viewing of diet-related and cosmetic surgery posts for people under the age of 18.<sup>12</sup>

However, frequent posts by practitioners, in whom many members of the general public place a great amount of trust, are potentially still very powerful in subconsciously persuading young women to undergo invasive cosmetic procedures. The ALA considers that advertising regulations should be amended to make it unlawful to advertise cosmetic procedures (surgical or non-surgical) to people under the age of 18 years.

Since the ALA considers that advertising of cosmetic procedures is a high-risk area, Ahpra needs to consider how it can better identify practitioners who advertise these treatments and closely monitor their advertising for content that contravenes advertising guidelines.

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<sup>11</sup> Candice E Walker et al, 'Effects of social media use on desire for cosmetic surgery among young women' (2019) 30 *Current Psychology* 1; Dimitri Reissis et al, 'Advertising on social media: the plastic surgeon's prerogative' (2016) 37(1) *Aesthetic Surgery Journal* NP1; Gemma Sharp et al, 'Factors that influence the decision to undergo labiaplasty: media, relationships, and psychological well-being' (2016) 36(4) *Aesthetic Surgery Journal* 469.

<sup>12</sup> BBC News, 'Instagram clamps down on diet and cosmetic surgery posts', *BBC News* (online, 19 September 2019) <<https://www.bbc.com/news/technology-49746065>>.

## The current legal framework

Ahpra was created in 2010 as the governing body for national health regulation as part of the National Registration and Accreditation Scheme ('the National Scheme'). The National Scheme's aim is to "protect the public by regulating health practitioners efficiently and effectively in the public interest to facilitate access to safer healthcare" by creating a national framework for such regulation.<sup>13</sup> The *National Law* governs the National Scheme.<sup>14</sup> It is a nationally-consistent law, with Queensland as the host jurisdiction for the national version of the legislation, and a version of the legislation is passed into effect by every State and Territory in their respective parliaments.<sup>15</sup> Each State and Territory can, therefore, modify some parts of the law to suit their jurisdiction before passing the *National Law*.

One of Ahpra's goals is to ensure that "advertising about regulated health services is done responsibly in order to keep the public safe from unlawful advertising and to help the public to make informed decisions about their healthcare".<sup>16</sup> This goal seems to be at the core of the legal framework around the advertising of regulated health services, with the Strategy outlining how Ahpra aims to achieve this goal by using the regulatory tools available to it. The Strategy was launched in April 2017 and, following a 2019 review, was updated in December 2020.

The Guidelines were developed to explain the advertising obligations under the *National Law*, and in doing so contribute to Ahpra's goal of protecting the public from unlawful advertising, which can "cause harm to the public if it results in poorly informed healthcare choices".<sup>17</sup> The Guidelines were also updated last year, with the new version having come into effect on 14 December 2020.

Section 133 of the *National Law* is the key provision relating to the advertising of regulated health services, and it currently states:

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

- (a) is false, misleading or deceptive or is likely to be misleading or deceptive; or
- (b) 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
- (c) uses testimonials or purported testimonials about the service or business; or
- (d) creates an unreasonable expectation of beneficial treatment; or
- (e) directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services.<sup>18</sup>

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<sup>13</sup> Australian Health Practitioner Regulation Agency, *National Registration and Accreditation Scheme: Strategy 2015-20* (Strategy Document, February 2015) <<https://www.ahpra.gov.au/About-Ahpra/National-Scheme-Strategy.aspx>>.

<sup>14</sup> Australian Health Practitioner Regulation Agency, *Legislation* (Web Page, 16 September 2020) <<https://www.ahpra.gov.au/About-Ahpra/What-We-Do/Legislation.aspx>>.

<sup>15</sup> *Ibid.*

<sup>16</sup> Australian Health Practitioner Regulation Agency, 'The Strategy' (n 2).

<sup>17</sup> Australian Health Practitioner Regulation Agency, 'The Guidelines' (n 4) 5.

<sup>18</sup> *Health Practitioner Regulation National Law* s 133(1)(a)-(e) ('*The National Law*').

For the purposes of this section, a regulated health service means "a service provided by, or usually provided by, a health practitioner".<sup>19</sup> A 'health practitioner' is defined by the *National Law* as "an individual who practises a health profession".<sup>20</sup>

As a result of extensive reviews and consultation processes, amendments to the *National Law* endorsed by the Health Chief Executives Forum (formerly known as the COAG Health Council) will be put to each jurisdiction in late 2021/early 2022 based on the *Health Practitioner Regulation National Law Amendment Bill 2021* ('the Draft Bill'). The reforms therein include changes to the provisions relating to advertising, and the second half of this paper will address those proposed changes, where relevant, based on the Draft Bill's February 2021 *Consultation Draft Summary*.

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<sup>19</sup> Ibid s 133(4).

<sup>20</sup> Ibid s 5.

## Advertising breaches and Ahpra's reporting of them

It is currently difficult to assess the types and severity of advertising breaches because the vast majority are handled by Ahpra prior to prosecution. This effectively means that most advertising breaches are dealt with behind closed doors.

Since July 2015, only two cases relating to unlawful advertising have been prosecuted by Ahpra.<sup>21</sup> Ahpra's 2015/16 annual report noted that complaints about advertising generally had risen by 237.7 per cent,<sup>22</sup> and then in 2016/17 had risen again by 87.1 per cent.<sup>23</sup> The 2017/18, 2018/19 and 2019/20 annual reports all refer to data confirming that nearly 50 per cent of registrants became compliant in response to Ahpra's initial letter about an advertising breach, with the remainder becoming compliant when the imposition of advertising restrictions was being considered.<sup>24</sup> According to Ahpra, this demonstrates the effectiveness of the Strategy in educating practitioners. However, this data only reflects changes made by practitioners in response to a complaint and does not indicate overall practitioner compliance with the Strategy.

In the 2019/20 annual report, there were 13,006 notifications (complaints) made about health practitioners generally.<sup>25</sup> Of those notifications, 584 (4.5 per cent) related to advertising. A total of 172 serious (high risk) advertising breaches were notified and managed by Ahpra's Criminal Offences Unit.<sup>26</sup> The remaining 412 were not differentiated between low or moderate risk and were managed by Ahpra.<sup>27</sup> Ahpra reported that there were no instances of continued non-compliant advertising that required regulatory action through the imposition of advertising restrictions.<sup>28</sup>

This reveals that advertising breaches by themselves are unlikely to amount to conduct so serious that it would require prosecution in most instances. Despite this, it is vital that all steps are taken to ensure advertising of regulated health services complies with the *National Law* and the Strategy, as this advertising is often the first interaction prospective patients have with practitioners.

Currently, it appears Ahpra's reporting also does not differentiate between medical specialities who advertise cosmetic medical and surgical procedures and, therefore, the data is of limited use in determining which regulated health services are at greater risk of non-compliance with the Strategy and the Guidelines. If such data were available, Ahpra would be in a position to target particular regulated health services and ensure compliance with the Strategy and Guidelines, thereby achieving greater public safety.

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<sup>21</sup> Australian Health Practitioner Regulation Agency, *Court and tribunal decisions* (Web Page, 7 May 2021) <<https://www.ahpra.gov.au/Publications/Tribunal-Decisions.aspx>>.

<sup>22</sup> Australian Health Practitioner Regulation Agency, *2015/2016 Annual Report* (Report, 2 November 2016) 68 <<https://www.ahpra.gov.au/annualreport/2016>>.

<sup>23</sup> Australian Health Practitioner Regulation Agency, *2016/2017 Annual Report* (Report, November 2017) 61 <<https://www.ahpra.gov.au/annualreport/2017>>.

<sup>24</sup> Australian Health Practitioner Regulation Agency, *2017/2018 Annual Report* (Report, November 2018) 63 <<https://www.ahpra.gov.au/annualreport/2018/downloads.html>>; Australian Health Practitioner Regulation Agency, *2018/2019 Annual Report* (Report, November 2019) 83 <<https://www.ahpra.gov.au/Publications/Annual-reports/Annual-Report-2019.aspx>>; and Australian Health Practitioner Regulation Agency, *2019/2020 Annual Report* (Report, November 2020) 91 <<https://www.ahpra.gov.au/Publications/Annual-reports/Annual-Report-2020.aspx>> ('2019/2020 Annual Report').

<sup>25</sup> Australian Health Practitioner Regulation Agency, '2019/2020 Annual Report' (n 24) 3.

<sup>26</sup> *Ibid* 86.

<sup>27</sup> *Ibid* 91.

<sup>28</sup> *Ibid*.

## Recent reforms and proposed changes: The case for further action

The ALA welcomes the aforementioned updating of both the Strategy and the Guidelines, as well as movement on amending the *National Law*. Many of these changes or proposed changes touch on reforms for which the ALA has previously advocated.

However, the ALA considers that there remains a need for further evaluation and amendment of the Strategy and the Guidelines, as well as for ensuring that key provisions of the Draft Bill are adopted by every State and Territory in the coming year, to achieve protection of the public.

### Proactive enforcement of compliance

The current regime in respect of compliance with the Strategy and the *National Law* relies upon complaints being made with respect to the advertisement of regulated health services. This means Ahpra takes a reactive approach to advertising compliance, rather than proactively identifying practitioners and practice areas, especially in high-risk areas, where there may be less compliance with the *National Law*, the Guidelines and the Strategy.

#### *The risks of a risk assessment approach*

The Strategy adopts a risk-based approach to regulation and states that Ahpra's resources will be concentrated "on the highest risk matters and those with most benefit to the public".<sup>29</sup> The current process for assigning risk is set out in the Strategy as follows:

All complaints that raise concerns about alleged criminal offences under the National Law are risk assessed. The issues considered when assessing risk include the offence type and risk (such as allegations of potential or actual harm).

Types of matters we have identified as high risk (critical or major) include advertising practices that:

- raise concerns of actual harm to consumers
- make misleading claims about curing serious illnesses, such as cancer or public health emergencies e.g. COVID-19
- target vulnerable groups, such as advertising directed at consumers with serious illnesses or parents of children with certain childhood conditions that are not easily treated
- are widespread in a profession, and have potential to have significant adverse impacts on healthcare choices, and/or
- may also involve allegations of a person holding themselves out to be a registered health practitioner or unlawfully using a protected title.<sup>30</sup>

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<sup>29</sup> Australian Health Practitioner Regulation Agency, 'The Strategy' (n 2) 6.

<sup>30</sup> Ibid 8.

Once a complaint is made about alleged advertising breaches, it is assigned as 'low risk', 'medium risk' or 'high risk'.<sup>31</sup> 'High risk' matters are subject to "prosecution or disciplinary action from the outset", while 'medium risk' matters are addressed with initial contact to encourage compliance and targeted audits to check future compliance.<sup>32</sup> Practitioners at the centre of 'low risk' advertising compliance issues are contacted by Ahpra to encourage compliance. The 'medium risk' category is a new feature from the recent update of the Strategy. The 'medium risk' category also applies to advertising matters initially regarded as 'low risk' but where the practitioner has continued not complying with advertising standards.

The ALA welcomes the addition of the 'medium risk' category. Its inclusion will mean that practitioners who do not reach the 'high-risk' threshold but who are not complying with advertising standards are brought to the attention of Ahpra earlier, giving it the opportunity to assess breaches and take appropriate regulatory action earlier.

However, this risk-based approach relies on complaints being made in the first instance by the general public or other practitioners. This approach is problematic as it depends on the general public recognising when advertising is not compliant and practitioners lodging complaints about one another. This passive approach by Ahpra undermines meaningful regulation and enables practitioners who are not complying with advertising regulations to fly under the radar unless a complaint is made about them.

The ALA considers that the vast majority of advertising breaches are going unreported, as it is the general public who are more likely to engage with a wide variety of practitioners. The general public is unlikely to be aware of whether a practitioner is complying with advertising regulations, meaning that such breaches are unlikely to be reported, let alone investigated.

This is especially concerning given that the Draft Bill proposes to amend the *National Law* to allow certain testimonials in advertising, a practice that is currently banned by section 133 of the *National Law*.<sup>33</sup> Testimonials carry with them significant persuasive power for prospective patients. They come in many forms, be it a post on a practitioner's website, a Google review or in content posted on social media. Given the power this form of advertising has in inducing prospective patients towards a particular practitioner or a certain cosmetic procedure, there is concern that testimonials may be misused by some practitioners in their advertising of cosmetic procedures. As such, it is imperative for public safety that Ahpra adopts a proactive approach to uncovering breaches and ensuring compliance with its own advertising regulations.

Given the deficiencies highlighted above, the ALA considers that Ahpra ought to be given powers and greater resources to investigate practitioners with respect to advertising compliance without the need for a complaint to be made first. The ALA considers a few simple measures should be implemented that would enable Ahpra to take a more proactive approach in identifying practitioners or cohorts of practitioners that are not complying with the *National Law* and are therefore endangering the safety of the public.

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<sup>31</sup> Ibid 10.

<sup>32</sup> Ibid.

<sup>33</sup> Health Chief Executives Forum, *Health Practitioner Regulation National Law Amendment Bill 2021: Consultation Summary Paper* (February 2021) 21 ('The Draft Bill').

### *Audits following immediate content removal or amendment*

The ALA considers that allowing advertising that is known or is suspected to be in breach of the *National Law* to remain online exposes the public to real danger and risk, which in turn undermines the objectives of Ahpra, the *National Law* and the Strategy.

As such, for breaches classed as ‘medium risk’ or ‘high risk’, the ALA considers that immediate removal or amendment of the material should be enforced by Ahpra within a period of 48 hours of the breach being identified (such as, following the receipt of a complaint), with an Ahpra officer performing checks to ensure compliance has been achieved. This will ensure public safety and allows Ahpra time to investigate the complaint.

Further and extensive auditing of practitioners is required to ensure ongoing compliance with advertising regulations. While the Strategy mentions that some level of auditing will take place for alleged ‘low risk’ and ‘medium risk’ breaches,<sup>34</sup> the process and frequency of such audits is not articulated. It is imperative that these details be determined and released so that the public can have confidence in Ahpra’s auditing and compliance processes.

### *Declaring online assets as a requirement for registration*

As of December 2020, practitioners who advertise their health services must declare that their advertising complies with the *National Law*.<sup>35</sup> Ahpra has expressed its intention to check for compliance, although the auditing process and its frequency are not specified.<sup>36</sup> The Strategy is not clear on whether practitioners are required to make a one-off declaration regarding compliance, or whether this is an obligation attached to renewal of their registration each year. The ALA calls on Ahpra to clarify these aspects of the Strategy.

The ALA is of the view that the practitioner declaration should go further, such that practitioners should, as part of their registration process, be required to provide Ahpra with the details of any websites and social media platforms that they intend to use to advertise the regulated health services they offer. This will place the onus on practitioners to ensure disclosure of all their online advertising channels. A database of practitioner websites and social media accounts would enable Ahpra to more easily identify breaches in advertising. Ahpra could also utilise this database to identify cohorts of practitioners that are at greater risk of non-compliance with the *National Law*.

### *Publicly publishing conditions on practitioner registration*

At present, when practitioners provide treatment that departs from a reasonable standard and a complaint is made, Ahpra can take disciplinary action, require further education and/or training of the practitioner and place conditions on a practitioner’s registration. When searching a practitioner on Ahpra’s website, one can clearly see whether a practitioner has any current conditions, undertakings or reprimands on their registration.<sup>37</sup>

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<sup>34</sup> Australian Health Practitioner Regulation Agency, ‘The Strategy’ (n 2) 10.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Australian Health Practitioner Regulation Agency, *Register of practitioners* (Web Page, 2021) <<https://www.ahpra.gov.au/Registration/Registers-of-Practitioners.aspx>>.

The ALA considers that advertising breaches should be listed on the practitioner’s registration/s available on the Ahpra website, including whether any action has been taken in respect of those breaches. This would allow the public the opportunity to fully research their prospective practitioner and make a properly informed decision regarding their healthcare.

## Financial penalties

Currently, if a practitioner is convicted of unlawful advertising as an individual, the *National Law* imposes a maximum financial penalty of \$5,000.<sup>38</sup> The ALA considers this amount wholly inadequate as a deterrent, and welcome the Health Chief Executives Forum’s assessment of the financial penalties under the *National Law* for advertising offences as “too low” and “not a sufficient deterrent”.<sup>39</sup>

The Draft Bill increases the maximum penalties for advertising offences to \$60,000 for an individual, with the aim of sending a clear message that “protecting consumers from false, misleading or deceptive practices is an enforcement priority under the National Law”.<sup>40</sup>

The ALA encourages all State and Territory jurisdictions to adopt this measure when the reforms detailed in the Draft Bill are put to each State and Territory Parliament. An increased financial penalty may be more of a deterrent to practitioners, who are breaching or who are considering breaching advertising regulations. With a significant increase in the financial penalty for advertising offences, it will be more difficult for practitioners to view the penalty as just another business cost that the practitioner can simply absorb.<sup>41</sup> The revenue from increased fines, in turn, could be utilised to routinely audit practitioner adherence to the Guidelines.

## A tailored approach to regulating cosmetic procedures advertising

The Strategy states that education and engagement are regulatory tools that have been shown to be key parts of an effective overall strategy for achieving behaviour change.<sup>42</sup> This includes “developing profession-specific, evidence-based and user-tested resources to target the types of non-compliance most common in each profession, including providing resources in different media”.<sup>43</sup> Ahpra has developed such profession-specific guidelines for Chinese Medicine,<sup>44</sup> Chiropractic,<sup>45</sup> and Osteopathy.<sup>46</sup>

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<sup>38</sup> *The National Law* (n 18) s133(1).

<sup>39</sup> Health Chief Executives Forum, ‘The Draft Bill’ (n 33) 22.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Australian Health Practitioner Regulation Agency, ‘The Strategy’ (n 2) 8.

<sup>43</sup> *Ibid.*

<sup>44</sup> Australian Health Practitioner Regulation Agency, *Check your advertising: Chinese medicine examples* (Web Page, 23 August 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Resources-for-advertisers/Chinese-medicine-examples.aspx>>.

<sup>45</sup> Australian Health Practitioner Regulation Agency, *Check your advertising: Chiropractic examples* (Web Page, 23 August 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Resources-for-advertisers/Chiropractic-examples.aspx>>.

<sup>46</sup> Australian Health Practitioner Regulation Agency, *Check your advertising: Osteopathy examples* (Web Page, 23 August 2021) <<https://www.ahpra.gov.au/Publications/Advertising-hub/Resources-for-advertisers/Osteopathy-examples.aspx>>.

Ahpra has published some resources on its website about cosmetic procedures, entitled 'Cosmetic procedures: #besafefirst'.<sup>47</sup> This includes information about standards for procedures and informed consent; a link to the national online Register of practitioners; information for the public about who to contact with complaints about practitioners; and information for practitioners which refers generally to the *National Law* and the Guidelines.

The publication of these resources is an indication that Ahpra acknowledges there is an issue concerning cosmetic procedures which needs to be addressed. While a helpful step in regulating the advertising of cosmetic procedures, these resources are not as comprehensive or tailored to the cosmetic procedures industry as those Ahpra has developed for the three other aforementioned industries.

When Ahpra reviewed advertising of Chinese Medicine, especially advertising regarding the alleged therapeutic benefits of such treatment, Ahpra responded appropriately by releasing clear and well-articulated guidelines regarding the legal requirements for this specific industry.<sup>48</sup> In addition, it provided a number of resources and educational tools, which can be accessed by practitioners and the public, to enable easy determination of whether the advertising complies with the legal requirements. Following this release, Ahpra made serious efforts to ensure compliance with the *National Law* by practitioners of Chinese Medicine.

The ALA considers that a similar approach needs to be adopted for the providers of cosmetic procedures.

As a first step, a variety of examples of cosmetic procedures advertisements should be developed and placed on the Ahpra website as a resource for practitioners to check whether their advertising complies with regulations, like Ahpra has done for Chinese Medicine, Chiropractic and Osteopathy.<sup>49</sup> Such guides provide specific examples to the health service and provide practitioners with greater clarity regarding advertising.

The ALA considers this to be a relatively simple yet very useful step to allow practitioners to self-monitor their compliance. It is an important step for Ahpra to take as cosmetic procedures can be provided by practitioners from a number of different regulated health service backgrounds, such as general practice, surgery or nursing. By virtue of this diverse background of practitioners of cosmetic procedures, there is no one professional association that can provide advertising guidance tailored to these practitioners.

Since a range of practitioners offer cosmetic health services with varying levels of expertise and surgical skill, the ALA considers it vital that any advertising guidelines directed at cosmetic procedures make it mandatory that practitioners clearly identify their qualifications and particularly whether or not they are a specialist plastic surgeon. The public is often unaware of the differences in qualification between a specialist plastic surgeon and a 'cosmetic surgeon', and they select a practitioner on the basis of an often-mistaken belief that the practitioner has specialised training. Statements made by practitioners can often

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<sup>47</sup> Australian Health Practitioner Regulation Agency, *Cosmetic procedures: #besafefirst* (Web Page, 7 December 2020) <<https://www.ahpra.gov.au/Publications/Cosmetic-surgery-and-procedures.aspx>>.

<sup>48</sup> Australian Health Practitioner Regulation Agency (n 44).

<sup>49</sup> Australian Health Practitioner Regulation Agency, *Resources for advertisers* (Web Page, 18 December 2020) <<https://www.ahpra.gov.au/Publications/Advertising-resources/Check-and-correct.aspx>>.

be exaggerated or misleading in terms of the outcomes of the cosmetic procedures they offer, or regarding their level of experience and qualifications.<sup>50</sup>

The ALA considers that if practitioners are required to make their level of training and specialty clear, the public will be better equipped to make informed decisions when selecting their practitioner and cosmetic procedures.

## **Reviewing and updating the legal framework**

In order to determine the effectiveness of the Strategy and the practical relevance of the Guidelines, and to make adaptations to continually improve the protection of the public, it is essential that both the Strategy and the Guidelines are regularly reviewed and evaluated.

At present, however, the review timelines are not clearly specified. The initial review period for the Strategy was set at 12 months.<sup>51</sup> The Strategy was reviewed and updated in December 2020, some three and a half years after its initial implementation. Future reviews of the Strategy “will occur as required to check whether the objectives of the strategy are being met”.<sup>52</sup> The Guidelines “will be reviewed from time to time as required”, which “will generally be at least every five years”.<sup>53</sup>

The ALA considers that Ahpra should commit to reviewing and updating to the Strategy and the Guidelines on a pre-determined, regular basis to ensure both are working to improve advertising compliance.

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<sup>50</sup> See, eg, Henrietta Cook, ‘Botched procedures spark calls for ban on ‘cosmetic surgeon’ title’, *The Age* (online, 26 August 2021) <<https://www.theage.com.au/national/botched-procedures-spark-calls-for-ban-on-cosmetic-surgeon-title-20210825-p58lq7.html>>.

<sup>51</sup> Australian Health Practitioner Regulation Agency, *Advertising compliance and enforcement strategy for the National Scheme* (June 2019) 6 <<https://www.ahpra.gov.au/documents/default.aspx?record=WD17%2F23116&dbid=AP&chksum=MVfbTf4nBlwpK6WNXyeVmA%3D%3D>>.

<sup>52</sup> Australian Health Practitioner Regulation Agency, ‘The Strategy’ (n 2) 11.

<sup>53</sup> Australian Health Practitioner Regulation Agency, ‘The Guidelines’ (n 4) 20.

## Advertising of cosmetic procedures: Case studies

As outlined above, the ALA considers that advertising of cosmetic procedures is a high-risk area that requires a more tailored approach to ensure compliance with the *National Law* and the Guidelines. This is because unlawful advertising of cosmetic procedures appears to be widespread. Patients considering and/or agreeing to cosmetic procedures represent a cohort of patients that the ALA considers should be regarded as 'vulnerable'.

Due to the lack of information about the nature of complaints received by Ahpra, determining the number of complaints made about advertising by 'cosmetic surgeons', as opposed to other practitioners, is quite difficult. This is complicated further by the number of different regulated health services from which many 'cosmetic surgeons' come. Therefore, in order to identify high-risk groups within a particular specialty or profession, data needs to be captured in a way that allows those groups to be identified.

Despite the lack of useful available data, unlawful advertising of cosmetic procedures appears to be widespread by both individual practitioners and third-party businesses advertising on behalf of practitioners. Inappropriate advertising and images that sexualise and objectify patients are used extensively on social media.

There have been very few prosecutions for non-compliance with advertising regulations. This increases the need for further regulation and tightening of the current framework. Of the following case studies, only one is an example of a successful prosecution. The other two examples demonstrate how effective advertising cosmetic procedures on social media is as a medium for reaching prospective patients, and the consequences of such advertising.

### Case study 1

*Health Care Complaints Commission v Bechara*.<sup>54</sup>

Tanya Bechara was first registered as an enrolled nurse on 20 August 2014. She opened her own cosmetic clinic around six months later. In March and June 2016 three complaints were made against Ms Bechara, including that she was claiming to be a registered nurse; that she was uploading photographs of patients on social media without permission from the clients or her then employer; and that she was falsely advertising that she was a clinical nurse specialist. On 14 June 2017 conditions were imposed on her registration. She was later found guilty of unsatisfactory professional conduct and professional misconduct. Her registration was cancelled and she was precluded from re-applying for registration for a period of 18 months.

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<sup>54</sup> [2020] NSWCATOD 140.

## Case study 2

*Class action against The Cosmetic Institute (Amy Rickhuss v The Cosmetic Institute Pty Ltd):*<sup>55</sup>

There is currently a class action being prosecuted against The Cosmetic Institute ('TCI'). TCI ran a number of clinics across Sydney and the Gold Coast offering cosmetic procedures. It is alleged that hundreds of women suffered adverse outcomes following breast augmentation surgeries performed by cosmetic surgeons working for TCI. The allegations contained in the Statement of Claim include allegations that the surgeons operating through TCI made a number of representations to their patients, including that they received overwhelmingly positive feedback from their past customers and this was evidence that their services changed lives and made their customers feel more confident. It is also alleged that the difference between plastic surgeons and cosmetic surgeons is that plastic surgeons deal more with reconstructive procedures, whereas cosmetic surgeons specialise in breast augmentation surgery.

These are serious allegations which have affected hundreds of women. The ALA is not aware of any prosecutions as yet in respect of advertising breaches for any of the clinics or surgeons named in the class action.

## Case study 3

*Health Care Complaints Commission v Blackstock:*<sup>56</sup>

Dr Leslie Blackstock was a general practitioner who practised in Western Sydney. He held himself to be a cosmetic surgeon. Twelve patients made complaints against him in respect of his failure to perform appropriate pre-operative assessments; his failure to obtain proper informed consent (including inappropriately sitting sedated patients up during surgery and then seeking comment on or consent from them for a breast implant); his failure to provide adequate post-operative care for his patients; Dr Blackstock inviting friends and relatives to come into the operating room to obtain their opinion about a patient's breast implants his failure to keep appropriate records; and, in one instance, Dr Blackstock conducting a labiaplasty at the same time as breast augmentation. The Tribunal noted that many patients were young women with body image issues and who were influenced by Dr Blackstock's website. Most of the patients had suffered poor outcomes following their surgeries.

The Tribunal found that most of the allegations against Dr Blackstock had been made out. The Tribunal had "no hesitation in finding this practitioner's conduct constitutes serious unprofessional conduct" and cancelled his registration for a period of seven years.

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<sup>55</sup> (Supreme Court of New South Wales, 2017/00279308, commenced 14 September 2017).

<sup>56</sup> [2020] NSWCATOD 110.

## Conclusion

Online advertising of cosmetic procedures has undoubtedly become widespread, especially on social media, and is usually accompanied by endorsements from celebrities and other ‘influencers’. This advertising is ubiquitous and frequently includes practitioners using titles such as ‘cosmetic surgeon’ to describe themselves. This encourages members of the public to feel a level of trust or sense of confidence in the practitioners and in the services those practitioners offer. It puts the public at a significant risk of being misled.

The current regulations do not adequately protect prospective patients, particularly vulnerable people, from misleading advertising about cosmetic procedures. Despite changes made to the Strategy and to the Guidelines in 2020, the ALA considers that the current regulatory framework around advertising requires urgent further review and changes.

The ALA contends that resources should be allocated to Ahpra to allow it to take a proactive approach to monitoring and fully investigating practitioner compliance regarding health services advertising, without the need for a complaint to be made first. This includes Ahpra requiring practitioners to remove advertisements under investigation for alleged breaches while they are being investigated. Ahpra officers must conduct subsequent audits to ensure removal of such content and the Strategy must outline the process and frequency of such audits.

The ALA also considers that greater transparency around Ahpra’s processes is required, including concerning the declarations practitioners are now required to make about compliance with health services advertising standards. More generally, Ahpra must also clarify the processes and timing of reviews of the Strategy and the Guidelines themselves.

Further, there should be more substantial deterrents in place that discourage practitioners from advertising in ways that contradict Ahpra’s standards, including greater financial penalties for advertising offences.

There is strong precedent for Ahpra reviewing advertising from a specific health profession and then setting behaviour-changing expectations for that industry, as seen with respect to Chinese Medicine, Chiropractic and Osteopathy. The ALA urges Ahpra to undertake a similarly intensive review process in relation to the cosmetic procedures industry where specific guidelines and comprehensive resources are essential. The ALA contends that these advertising guidelines must mandate that practitioners clearly identify their qualifications.

The ALA considers that the recommendations made in this position paper are required to achieve greater public safety in the advertising and provision of regulated health services and cosmetic procedures.

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