



Submission: Review of the Regulation of Health Practitioners in Cosmetic Surgery

Acknowledgement

It's important to note we have great respect for the many health professionals working each day in such important and often life saving roles. We acknowledge that health practitioners are put in difficult situations that we could never understand, particularly during COVID-19. In addition, we have both experienced medical emergencies that required emergency surgery: we would not be here today without this intervention.

Who we are

Advocacy

We are researchers and advocates who have helped expose systemic wage theft (7-Eleven^{1 2}, Domino's Pizza³, etc.), systemic issues in the franchising sector (Retail Food Group [Brumby's Bakery, Crust Pizza, Donut King, Michel's Patisserie]⁴, Mortgage Choice⁵, etc.), fee gouging with Australia's largest toll road operator Transurban^{6 7 8}, and more recently, systemic issues in Australia's cosmetic surgery industry^{9 10}.

Operation Redress Pty Ltd was formed as a grassroots advocacy entity. Our purpose is to achieve regulatory and legislative change Australia-wide and aim to work with the media, regulators, politicians, and other stakeholders to ensure positive change is created. Our focus for almost two years has been on social media advertising and use by doctors who perform cosmetic surgery. Social media is the easiest and cheapest way for doctors or clinics to have such a wide reach of their potential patients. Without tighter regulation and oversight, we will see cowboys thrive in the cosmetic surgery industry, further creating risk to the public's safety.

Software

Separate to our advocacy we have a software and research company which enables us to offer insights into how software can be used to increase the efficiency of regulator activities and reduce costs. We also have software that monitors courts and other publicly available government data which is used by many journalists around Australia.

¹ <https://www.abc.net.au/4corners/7-eleven-promo/6729716>

² <https://www.smh.com.au/interactive/2015/7-eleven-revealed/>

³ <https://www.smh.com.au/interactive/2017/the-dominos-effect/>

⁴ <https://www.smh.com.au/business/companies/cup-of-sorrow-the-brutal-reality-of-australias-franchise-king-20171207-h00l.html>

⁵ <https://www.franchisebusiness.com.au/media-spotlight-shines-on-mortgage-choice-and-its-remuneration-model/>

⁶ <https://www.choice.com.au/transport/cars/fines/articles/road-toll-costs-and-fines>

⁷ <https://www.abc.net.au/news/2018-03-20/how-does-a-road-toll-debt-get-to-200000-dollars/9555960>

⁸ <https://www.9news.com.au/national/tolls-ombudsman-calls-for-better-system-to-deal-with-driver-complaints/5a1a4e9f-547d-498b-a61c-c29e1f09e145>

⁹ <https://www.abc.net.au/4corners/cosmetic-cowboys/13603636>

¹⁰ <https://www.smh.com.au/business/consumer-affairs/how-the-cosmetic-cowboys-ran-free-on-the-wild-west-of-social-media-20211028-p593vc.html>

The Problem

Breaches of AHPRA's advertising guidelines and of the National Law are occurring many times a day across social media platforms by registered healthcare professionals. The cosmetic surgery industry has adapted to modern marketing techniques, and will continue to do so even if the regulator fails to keep up.

Advertising in this consumer-driven industry now means doctors and clinics can access potentially millions of Australians at the click of a button using their own personal electronic devices, at any time. No longer do providers need to draw up a marketing plan, seek legal and marketing advice from external experts on their medical advertising, or even think too deeply about their advertising; the daily, unregulated, and social nature of platforms like Instagram means advertising doesn't feel like advertising.

This has resulted in an overwhelming amount of advertising content for AHPRA and other regulators to monitor proactively, and cosmetic surgery providers know this. The result is that consumers are subconsciously falling victim to effective marketing strategies that are breaching advertising guidelines. As consumer advocates, this is deeply concerning to us.

Themes

We have spoken to many industry stakeholders including associations, doctors, nurses, and patients. Some of the issues we identified are mentioned below.

Non-Disclosure Agreements (NDA)

Cosmetic surgery is unique in the sense it involves both a serious medical procedure, but is also not often medically required. This has meant in some instances profit is put before people and the industry increasingly becomes commercialised. One way to evidence this is the prevalence of NDAs in the cosmetic surgery space. We are unaware of any other areas in the medical space using NDAs to such an extent. It is common for businesses in other industries to rely on NDAs, but the slow creep into the medical space is of concern.

NDAs are especially problematic in the cosmetic surgery space because they pose a risk to the public. Patients who feel disfigured, misled, or were critically harmed, may be asked to sign an NDA by the provider. We have heard multiple instances of this occurring at some large cosmetic surgery clinics in Australia. The effect this has on the public is that patients who have had bad experiences are essentially silenced. Breaching their NDA could lead to court action. They have no way to inform the public of what has happened to them. They will normally sign an NDA if it means they will receive a refund, or if the doctor agrees to do revision surgery. If they choose not to sign an NDA, the doctor may refuse to do revision surgery or refuse a refund.

AHPRA and this review needs to consider the use of NDAs in cosmetic procedure businesses going forward, and how these should be managed to ensure the public is protected from rogue operators who are covering their tracks through NDAs.

We suggest:

1. Ensure the AHPRA website clearly specifies that even if a patient has signed an NDA, they still have access to regulator functions like making a complaint to AHPRA or a state authority.
2. Require providers in the cosmetic procedure space to ensure their NDAs clearly outline that patients are still able to make a complaint to a regulator after signing the document.
3. Consider requiring a provider in the cosmetic procedure space to supply a copy of each NDA should they reach a certain amount in a 12-month period. For example, if a clinic has asked 2 or more patients to sign an NDA in 12 months, should there be a process which alerts AHPRA or the state authorities? This is to ensure public safety is front of mind and problematic patterns aren't emerging.

Taking Photos and Advertising Consent

Through the course of our research, we have identified concerns through the way providers take photos of patients and the way consent is taken from patients to use these photos.

We have noticed an increase in cosmetic surgery providers using personal electronic devices (PEDs) to take photos of patients. The use of their personal mobile phone and other PEDs is an issue for a number of reasons and patients may not be expressly aware of them.

These issues are:

- The provider could have access to the patient's (often nude) photo or video in a non-clinical setting.
- Should the provider's PED be lost or stolen, these photos are now accessible to others not part of the doctor-patient relationship.
- Any person in the provider's household or who otherwise has access to the PED could then have access to the patient's photos.
- The PED might have app-based or cloud-based storage, which means patient photos could be accessible on other devices and by third-party apps.
- Photos taken on a PED should be uploaded to the patient file then removed from the PED. Photos accessible elsewhere means there is no log of the patient's photos being viewed, downloaded, edited, or sent to someone else.

These concerns are reiterated if the photos are taken on a practice device which is not properly secured or has third-party storage.

In terms of using these photos for advertising, we have seen a number of consent forms used for patient advertising. The consent forms do not go into enough detail and some concerningly involve dual consent, meaning you consent to the surgery and marketing; there is no ability to consent to just the surgery.

Further, social media advertising is unique in the way services are marketed to audiences. Patients should be made aware in the consent forms of the following:

- The provider has no control if the patient's photo is downloaded, copied, or screenshot (these could then be uploaded to other websites),
- Photos will be used in advertising cosmetic surgery to audiences that include children and young people,
- Social media users might interact negatively with the photo of the patient, including sexualised, racist, sexist or otherwise offensive and hurtful comments,
- The photo or video could be used in perpetuity.

Further, patients should be giving informed consent about how they want their photos used:

- Nudity in photos and videos: does the patient consent to topless photos/videos being taken and used, are sensitive areas to be covered or censored prior to being used?
- Protecting patient confidentiality: does the patient consent to social media advertising only if their identity is concealed? Do they want tattoos, birthmarks, and other identifying features covered?
- Patients should be told which platform it will be uploaded to and when it will be uploaded. Patients should be provided a copy of the photos, videos and wording used.
- The consent forms must be signed well before the surgery is to happen, not on the day, and not when they are affected by sedation.

We have heard of instances where doctors have asked patients to sign a consent form when they are being wheeled or walked into the operating theatre. This puts the patient in a vulnerable position given they are often naked, sedated, and very nervous already. We believe they will often say yes as they don't want to upset the person who is about to operate on them.

We suggest:

1. Standardise advertising consent forms. Social media is entirely different to advertising anywhere else due to its ease of access and wide reach. Consent forms should separate social media with any other type of advertising.
2. Standardised consent forms should include a more detailed approach to ensure informed consent is received from patients.
3. The patient must receive a copy of their signed consent form. It should also be uploaded to their patient file.

Making a complaint

When visiting AHPRA's website, making a complaint is a difficult task. In Queensland, patients can't use the online portal to make a complaint, and are instead directed to a different authority. This in itself can deter people from making a complaint.

Firstly, it's important to recognise that many patients would not understand what constitutes a "risk to the public" in terms of making a complaint about a doctor. This is especially true for cosmetic surgery patients as their surgeries are not often medically necessary.

Some providers will tell patients that they have never had a complication, and when the patient is unhappy or disfigured, they are made to feel like they had unrealistic expectations or they are the only one who has ever had a bad result. This manipulative language only reinforces the patient's belief that the doctor isn't a risk to the public.

The video¹¹ on AHPRA's website says: "The Board takes action on very serious matters" and "It's possible your concern won't meet the threshold for action to be taken." The problem with this messaging is most cosmetic surgery patients will not believe what has happened to them to be a "very serious matter" as this sounds like a matter involving a near-death experience. Being discouraged by the health regulator to make a complaint could explain why relatively few complaints about cosmetic surgery have been captured by AHPRA.

Further, the video says, "If a patient has an operation where there is a known risk of something going wrong, and then it does go wrong, it is unlikely we need to take any action." Many patients who have complications or have things go wrong might have been informed of the risks: this doesn't mean the provider was operating in a safe way or to the correct standards. Informing patients of the risks shouldn't be a green light for doctors to operate in an unsafe, unsterile, or unprofessional way that could increase the likelihood of those risks materialising. This messaging could leave the patient feeling that if they were informed of the risks, then they have no right to make a complaint. It is concerning, and dangerous.

We suggest:

- AHPRA needs to supply better direction of what constitutes "risk to the public".
- Preferably, AHPRA should have a central system to capture, log and categorise all complaints and internally assess what is a risk to the public and what is not, then forward to the appropriate state regulator, while maintaining a master database of complaints.
- Remove messaging that makes a patient question whether they are important enough, or their concern is significant enough, to make a complaint.

Advertising guidelines

AHPRA's Advertising Guidelines have room for improvement. We accept that the guidelines will always be one step behind due to new, unforeseen ways to advertise. However when these new approaches are identified, AHPRA must remain vigilant, present, and open to updating the guidelines periodically to reflect changing landscapes.

Sexualisation

An emerging theme we are seeing on Instagram is the use of sexualised images to advertise cosmetic surgery. The word "sexualise" is not explicitly referenced in AHPRA's guidelines. We argue that the use of sexualised images in advertising is against the guidelines as it is an image of an unrealistic outcome, and is often enhanced.

¹¹ <https://www.ahpra.gov.au/Notifications/Concerned-about-a-health-practitioner.aspx>

Our argument is backed up by a study published by the Australasian Journal of Plastic Surgery, titled “Compliance of plastic surgeons with advertising guidelines”, which one of the authors commented¹²: “It’s important sexualised images that don’t fully represent the clinical negatives of the procedure have no place.”

As such, we flag obviously sexualised images to be against the guidelines. It would be clearer for doctors, lawyers, consumers, and authorities, if AHPRA ensured the guidelines explicitly stated that sexualising patient photos, for example advertising cosmetic surgery by sharing imagery of patients in lingerie or topless on a beach, is against the guidelines.

It is concerning that this issue even needs to be raised at all.

Testimonials

Testimonials are being used in advertising on social media. We have identified doctors using the ‘Stories’ function (expiring content) to re-share stories by their patients where they express a positive statement about their surgery. This, to us, is a clear breach of the guidelines. Some doctors have expressed concern that it is a “grey area”. The guidelines could be clearer in establishing that sharing disappearing content published by others is within the control of the provider and they cannot republish testimonials.

Testimonial variants are on the rise: An example of a testimonial variant is where a doctor holds a mirror up to a patient immediately after surgery and waits for an emotional reaction without asking the patient to say anything. The patient, who is often already quite emotional immediately after surgery, breaks down in tears of joy. To any potential patient watching, it could not be more clear that the patient is very happy with the clinical outcome. It says much more than words could and doctors doing cosmetic procedures know this. Often the reality is the patient hasn’t even had time to process what has happened and not in a position to know if the outcome is good yet. Testimonial variants must be banned.

Use of images

The guidelines detail how before and after photos could be misleading. The guidelines state that by informing consumers that before and after photos might not be exact could be enough to relieve a provider of their obligation to only publish photos that are as exact as possible. We believe this should be removed from the guidelines, as it falsely gives the impression that doctors only need to say “pictures not exact”, and they don’t need to do anything else. There is widespread abuse of this online. Consumers or social media users often won’t read the whole post and will only view the imagery. It’s vitally important that providers always use clinical photos that are as similar as possible: if they are not, they should not use it in advertising.

¹²<https://www.dailytelegraph.com.au/news/nsw/plastic-surgeons-using-sex-to-sell-cosmetic-surgery-study-finds/news-story/daa19ac6b784465703d208a8ea7fd560>

Further, the use of selfies in advertising on social media is reaching record highs. Providers appear to be publishing photos sent in by patients and are encouraging them to do so. This is misleading because the provider has no knowledge of whether the image has been enhanced using filters or Photoshop, or whether the person has been enhanced with make-up, bronzer, glitter, or oil. Further, the clothing the patient is wearing can enhance results. These photos often don't reference the procedure, or they are published without any comparison to how the patient looked beforehand. It leads potential consumers to think they can attain that look through cosmetic surgery and advertising in this way is a substantial risk to the public.

While AHPRA might argue these are already clear in the guidelines, more needs to be done to ensure there is oversight and subsequent warnings to providers who are not abiding by the guidelines. Having rules but not taking action when they are repeatedly broken only ensures this type of conduct flourishes. Other providers will determine there is low risk of AHPRA taking action, but great opportunity in advertising this way to attract new customers. There is great risk that this conduct will become standard practice.

Use of emojis, colours, glitter filters, and music

The use of emojis, bright colours, glitter and sparkling filters, and certain music in advertising is similar to the way lolly-flavoured and scented vapes are advertised¹³. While vape companies may not intend to target children and young people to sell their product to, their advertising and flavours attracted young people, causing an epidemic among those who would never have otherwise smoked nicotine.

A similar way of thinking needs to be applied in this instance. Without reigning this type of advertising conduct in and explicitly referencing it in the guidelines, young people will continue to seek out irreversible cosmetic surgery they may soon regret, or become disfigured by.

Summer-ready bodies: hashtags and captions

Too many providers are using hashtags and captions such as #bodygoals, #curveinspo, #bikinibody, #bodyinspo and #summerbody to promote cosmetic surgery. The idea that some human bodies are not Summer-ready for aesthetic reasons is surely not supported by acceptable evidence. Doctors, who are esteemed people in society should not, in our view, be perpetuating the myth that you must look a certain way or be a certain size in order to wear a bikini, or be allowed to enjoy the Summer. Further research is also needed to determine what role hashtags like these have on the mental health of those struggling with eating disorders and body dysmorphia.

Providers should immediately cease the use of these types of hashtags. The use of problematic hashtags like these should be explicitly referred to in the guidelines.

¹³ <https://www.vichealth.vic.gov.au/media-and-resources/media-releases/world-no-tobacco-day-2020>

Magic, art, and sculptures

Providers are using variations of the term “magic” on social media. We have observed providers refer to certain procedures as magic, and others use magic in taglines to describe their abilities.

The term “magic” is one of the few terms explicitly referred to in the advertising guidelines as creating an unreasonable expectation of beneficial treatment. It minimises the risks of surgery, and while it could be argued that reasonable people understand magic isn’t real, it still has an effect on consumers. Especially when used in combination with other marketing techniques.

Surgery is not magic or art, and patients are not the creative outlets of doctors. They are not there to be sculpted. Surgery is painful and carries risks that can lead to life-changing consequences. Any use of these terms by any provider distorts the public's perception of cosmetic surgery.

Curing confidence issues

A number of providers include messaging around self-esteem and confidence essentially being cured when their patients undergo cosmetic surgery. Unfortunately our observations lead us to conclude that a lot of confidence issues are brought on by excessive and aggressive cosmetic surgery advertising on Instagram -- a conclusion which is in part supported by this study¹⁴.

Providers should not be explaining that self-esteem, mental health, or confidence are improved when undertaking cosmetic surgery unless it is supported by acceptable evidence detailed in AHPRA’s Advertising Guidelines. We have noticed these claims are often made in relation to trend-based surgeries such as the Brazilian Butt Lift (BBL). It is particularly problematic when this type of confidence-boosting messaging also omits the comparably high risk of mortality, and that this trend may not last much longer.

Oversight of social media by authorities

We have some suggestions on how authorities can have better oversight of social media. To have rules is one thing, but without adequate oversight, the rules seem more like suggestions than something that can result in penalties or other consequences.

Providers might feel that their social media approach is no different to how ordinary people or ordinary businesses use Instagram or TikTok. Therefore, they might argue, it's harmless. However, doctors must be reminded that they are not offering ordinary services. It can be easy for providers to fall into the trap of believing they aren’t doing anything wrong.

¹⁴ <https://link.springer.com/article/10.1007/s12144-019-00282-1>

We suggest:

1. Require providers in the cosmetic surgery space to supply their social media handles to AHPRA. Alternatively, build a list of providers. Use software that monitors all content published on these profiles. Using software is possible to monitor and flag content efficiently, as we have been building, improving and testing a system for almost two years to perform these types of functions.
2. Require all posts made by doctors and businesses or by persons associated with that business who are attempting to attract business on social media to register each post with an easy-to-use AHPRA controlled advertising register.

Defamation lawsuits

We have come across a number of lawsuits where doctors who do cosmetic surgery are the litigant. Further research shows they are suing patients for defamation after a review sharing a negative outcome or experience was left online. As consumer advocates, we have concerns around this approach. Obviously very egregious false elements of reviews should be removed. However we are seeing instances of patients being sued for sharing their experiences on review websites about their results.

This has considerable risk of public harm as patients are not able to share negative experiences publicly without risking a lawsuit. Doctors who do cosmetic surgery are not only curating their social media feeds of just positive results, but are also threatening legal action for anyone who leaves negative statements on review sites. It's deeply problematic when the public cannot rely on any type of public information to conduct research.

There is a power imbalance that frequently exists between doctors and patients. AHPRA needs to be aware of this and consider how they can balance the rights of a doctor with patients having the ability to share their honest experience publicly.

Influencers

Like other industries, the advertising of cosmetic surgery must take into account the presence of influencers. We have seen multiple instances of cosmetic surgery being advertised using influencers who have purportedly used the services of a provider. The consumer, and likely the regulator, would have no idea they are being advertised to as the influencer does not disclose they received the surgery for free or discounted in exchange for social media posts promoting the provider. The provider should be ensuring these partnerships are disclosed.

AHPRA should determine whether providing discounts or free surgery to influencers in exchange for promotion is appropriate at all (with or without a partnership disclosure). We believe it isn't appropriate and should be banned because:

- It adds to the commercialised aspect of the cosmetic surgery industry.

- It provides an unrealistic expectation of outcomes, as influencers control their image in many ways, not just surgery.
- It encourages the indiscriminate use of cosmetic surgery (influencing decisions of target markets).
- If the influencer has a bad experience or a poor outcome, they might feel obligated to mislead the public about this as their contract comes with stipulations.
- Providers often share posts or stories made by influencers about their experience (and are therefore sharing testimonials). In other instances, they link to the influencers profile where audiences can read the paid-for testimonials.

Influencers often promote fashion, food, and fun which might best cater to their audience. Promoting cosmetic surgery is not like any of these things; there is a very real risk of infection, and possibly death.

Influencers tend to have a lot of trust with their audiences, and without a) disclosing there is a partnership and b) outlining negative experiences or risks gives rise to potentially misleading or unrealistic expectations. The ACCC should be investigating the increasing prevalence of influencers failing to disclose their partnerships in the cosmetic surgery space, but AHPRA could be more active here too and possibly ban the conduct altogether.

If AHPRA determines it is not appropriate to utilise influencers, this should be reflected in the advertising guidelines.

AHPRA's Public Register

AHPRA's public register is what we would class as a good start to assist consumers in researching practitioners. However, it is not enough for consumers to rely on in terms of making a decision.

While we understand there are privacy provisions to protect doctors, we need this review to consider making available complaint data around cosmetic surgeons. Prospective patients are already faced with an onslaught of positive advertising on clinics: providers control their social media, website, and threaten to sue for defamation to take down bad reviews. They ask patients to sign NDAs. There are enormous limitations on how patients can research without being swallowed up in a world controlled by public relations.

As professional researchers and consumer advocates, we actually aren't sure how potential consumers can conduct quality research on a particular provider. The register is not enough in its current form.

[REDACTED] he AHPRA register was useless in warning patients off having surgery done there. The public were not protected by AHPRA, the media was needed to shed light on the issue.

AHPRA should also consider requiring providers to inform them if they choose to sue for defamation, or are involved in legal proceedings relating to their cosmetic surgery. Updating the register on how much litigation a provider is involved in could assist consumers in doing further research. For example, a number of providers of cosmetic surgery are being sued in a class action, yet the AHPRA Register makes no mention of this.

Further, a previous recommendation was to require providers who exceed an acceptable amount of NDAs per year to report this to AHPRA. For example, it could be 2 or more NDAs must be supplied to AHPRA to ensure patterns aren't emerging and problematic behaviour isn't being covered up. The amount of NDAs being signed could also be included on the register.

Campaign around educating the public on cosmetic surgery consults

Many cosmetic surgery patients have not had any type of medical journey beyond going to their General Practitioner. They are not sure what is standard at the first appointment, or throughout the entire process. This makes cosmetic surgery patients particularly vulnerable, as they are likely to be attending clinics in office buildings or places away from standard hospitals.

Through monitoring social media use of doctors, we have observed patients unnecessarily nude in images. Arm liposuction is a procedure we have seen patients be unnecessarily nude for in their before and after photos. Sometimes we see images where a patient is wearing a bra in a before shot, but not wearing a bra in an after shot, or vice versa. It leads us to question the provider: either the patient needed to be topless, or they didn't. In which case, why are providers taking unnecessarily nude photos of patients? Further, the fact that these photos are ending up online for everyone to see (even if censored) makes us question what is happening behind closed doors.

A campaign around what consumers can expect when attending consults could be very useful. The public being educated on these matters will help keep them safe. The campaign could centre around doctors using PEDs to take unnecessarily nude photos of patients for procedures like arm liposuction.

Touching The Surface

As a final word, these recommendations and observations only touch the surface of the cosmetic surgery industry in Australia. This country has the potential to be a leader in the way cosmetic surgery is regulated in terms of advertising -- reigning in cowboy conduct and stopping other alarming themes from becoming standard practice is crucial.

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