



National Health
Practitioner
Ombudsman

Submission

Regulation of medical practitioners who
provide cosmetic medical and surgical
procedures

9 December 2022

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Authorised and published by the National Health Practitioner Ombudsman,
50 Lonsdale St, Melbourne.

GPO Box 2630

Melbourne VIC 3001

Phone 1300 795 265

[Email National Health Practitioner Ombudsman](mailto:complaints@nhpo.gov.au) <complaints@nhpo.gov.au>

[National Health Practitioner Ombudsman website](https://nhpo.gov.au) <https://nhpo.gov.au>

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Submission

The office of the National Health Practitioner Ombudsman (NHPO) is pleased to provide this submission to the Medical Board of Australia (the Board) in response to its public consultation on the:

- draft Guidelines for medical practitioners who advertise cosmetic surgery (the draft advertising guidelines)
- draft revised Guidelines for medical practitioners who perform cosmetic medical and surgical procedures (the draft guidelines)
- draft Registration standard: Endorsement of registration for cosmetic surgery for registered medical practitioners (the draft standard).

The NHPO welcomes the Board's commitment to implementing the recommendations made by the independent review of the regulation of medical practitioners who perform cosmetic surgery (the independent review). It is clear that the three documents subject to consultation have been developed or revised with the intention to address and implement the independent review's recommendations.

The proposed changes to the draft advertising guidelines and draft guidelines (specifically in regard to major cosmetic procedures (cosmetic surgery)) are wide-ranging and will assist medical practitioners performing cosmetic surgery to better understand their obligations and the Board's expectations. The NHPO's submission focusses on suggesting improvements which could be made to provide further clarity and consistency (see Table 1).

The NHPO is concerned, however, that there is not a sufficient evidence basis or rationale for some of the changes proposed in the draft guidelines regarding minor (non-surgical) cosmetic procedures (non-surgical cosmetic procedures). The independent review did not consider, nor provide recommendations in relation to, these types of procedures. The NHPO suggests that a more in-depth consideration of issues related to non-surgical cosmetic procedures is needed to ensure the draft guidelines are fit-for-purpose.

Similarly, the NHPO suggests that consultation on the draft standard is premature. The NHPO recognises that the Board is seeking a swift consultation process to make necessary changes to improve patient safety. However, the NHPO is concerned that health practitioners and other relevant stakeholders affected by the draft standard cannot adequately respond to consultation on it without first understanding the intended accreditation standards and approved qualifications under the endorsement model.

Table 1: Summary of suggestions for improvement

Area of suggestion for improvement	Summary of suggestion
The draft advertising guidelines	
Definitions and consistent use of terminology	The NHPO suggests that clear definitions and consistent use of terminology is used to increase accessibility and readability.
Interaction with existing advertising guidelines for all professions	The NHPO suggests that links between different guidelines are highlighted and referenced where needed, particularly in relation to the use of testimonials and guidance regarding financial arrangements.
Practitioner responsibility	The NHPO cautions against the use of language which appears to connote that experiencing adverse effects of cosmetic surgery is limited to those who have unrealistic expectations.
Use of images and before and after photos	<p>The NHPO suggests that relevant provisions should apply to both individual and before and after photos.</p> <p>Altered images</p> <p>The NHPO suggests it should be clearer that altering images, including the use of filters or editing software, is not acceptable (unless necessary for deidentification).</p> <p>Use of images, photos or videos</p> <p>The NHPO suggests the draft advertising guidelines and the draft guidelines provide inconsistent advice about the use of images, photos or videos, particularly regarding relevant consent processes.</p> <p>The NHPO suggests that:</p> <ul style="list-style-type: none"> • informed consent to take or use any image of a patient for advertising purposes must be requested separately to providing informed consent to take or use any image of a patient for clinical purposes • patients must be provided with an opportunity to view images after their cosmetic surgery before consenting to their use in advertising. <p>The NHPO suggests clarifying that financial or other incentives (such as providing a free procedure)</p>

	cannot be used to gain consent for the use of patient photos in advertising.
Use of images of those under 18	The NHPO suggests that the use of images of those under 18 years old should be explicitly prohibited.
Risk, recovery and idealising cosmetic surgery	The NHPO suggests clarifying and setting requirements regarding the use of video, particularly in relation to social media platforms' ability to live stream content. The NHPO suggests that consideration is given to: <ul style="list-style-type: none"> prohibiting the medical practitioner who is performing a procedure from filming it themselves and prohibiting live streams of procedures the types of videos used within the cosmetic surgery industry, and the features of inappropriate advertising that could be included in the draft advertising guidelines.
Providing case studies and examples	The NHPO suggests more examples related to the inappropriate use of images and emojis could be provided.
The draft guidelines	
Accessibility	The NHPO suggests the draft guidelines should use consistent, accessible terminology. The use of terminology such as 'cosmetic surgery' and 'non-surgical cosmetic procedures' is preferable because it is more factual than referring to 'major' and 'minor' procedures.
The draft guidelines – major cosmetic procedures	
Assessment of patient suitability	The NHPO suggests the terms 'significant underlying psychological issues' and 'best interests of the patient' are further defined and clarified.
Patient consultation type and timing	The NHPO suggests clarifying that: <ul style="list-style-type: none"> cosmetic surgery cannot be scheduled until after the cooling off period a deposit cannot be made to secure a cosmetic surgery until after the cooling off period.
Informed consent, including financial consent	The NHPO suggests language is updated from 'should' to 'must' in section 5.1 because practitioners

	<p>have an obligation to take practical steps to provide information in a language understood by the patient.</p> <p>The NHPO suggests that the term ‘all practical steps’ is clarified, and reference to ensuring that information is provided in a language understood by the consumer is included.</p>
Patient management	<p>The NHPO suggests the Board may wish to consider whether medical practitioners have an obligation to provide:</p> <ul style="list-style-type: none"> • alternative suggestions or referral pathways to alternative practitioners for revision surgery • details about how patients can make a complaint if informed that a patient is seeking revision surgery.
Provision of patient care by other health practitioners	<p>The NHPO suggests further consideration should be given to how section 7.2. would operate in practice, and what evidence the Board would rely on to determine whether a medical practitioner had retained overall responsibility for their patient.</p>
Complaints	<p>The NHPO suggests clarifying that:</p> <ul style="list-style-type: none"> • information about the complaint process must be provided both pre-operatively and post-operatively • patients have a right to complain after a medical practitioner has provided revision surgery, including if that revision surgery was provided free or partial of charge.
Qualifications and titles	<p>The NHPO strongly suggests that updates are made to ensure medical practitioners:</p> <ul style="list-style-type: none"> • are required to clearly inform patients of their registration type, specialist registration and whether they have an endorsement in cosmetic surgery (once established) • are required to declare if they do not hold an endorsement in cosmetic surgery (once it is established) • cannot advertise themselves as having an endorsement in cosmetic surgery without holding one (once established).

The draft guidelines – minor (non-surgical) procedures	
Ensuring informed and evidence-based guidelines	<p>The NHPO suggests that it is only through further research and consideration of the complexities associated with regulating health practitioners undertaking non-surgical cosmetic procedures that Ahpra and the Boards can come to provide quality, evidence-based guidance to health practitioners, and ultimately achieve their object of public protection. In particular, the NHPO suggests further consideration is given to:</p> <ul style="list-style-type: none"> • scope • availability of non-surgical procedures to under 18s • medical practitioners’ core obligations in relation to the prescription of cosmetic injectables • medical practitioners’ obligations to provide information about substances prescribed, such as cosmetic injectables. <p>The NHPO suggests the Board provide sufficient evidence for any proposed changes.</p>
Towards shared guidelines on non-surgical procedures	<p>The NHPO suggests further consideration of shared guidelines across multiple professions.</p> <p>At a minimum, the NHPO suggests clarification about the interconnection between registered practitioners providing non-surgical cosmetic procedures is necessary.</p>
Title protection, qualifications and endorsement	<p>The NHPO suggests further evidence and understanding is required about whether there is a need to introduce relevant minimum qualification or training standards for registered practitioners who perform non-surgical cosmetic procedures, including medical, nursing and dental practitioners.</p>
The draft standard	
Consultation process	<p>The NHPO suggests it would be better if consultation on the draft standard is not sought until the accreditation standards and the approved qualifications for endorsement are available.</p> <p>The NHPO suggests there is an opportunity to coordinate consultation on the draft accreditation standards and the draft standard.</p>

Draft advertising guidelines

The NHPO welcomes the Board's commitment to implementing the recommendations made by the independent review in relation to the draft advertising guidelines. The NHPO recognises the draft advertising guidelines make changes to clarify expected standards and ensure patient safety, particularly in relation to:

- providing further guidance to ensure advertising does not trivialise or downplay potential risks associated with cosmetic surgery
- preventing the use of paid social media influencers
- strengthening guidance regarding the use of photos
- preventing targeted advertising to those under 18, including on social media.

The NHPO acknowledges that the draft advertising guidelines have broadly been updated to reflect the independent review's recommendations. However, the NHPO submits that further improvements could be made in the following areas.

Definitions and consistent use of terminology

Throughout the three documents subject to consultation, various terms are used to describe to what the documents relate to. These terms include:

- cosmetic surgery
- surgery
- cosmetic medical and surgical procedure
- medical and surgical procedure
- major or minor procedure
- procedure
- cosmetic procedure
- cosmetic injectable.

In relation to the draft advertising guidelines in particular, the terms 'cosmetic surgery' and 'surgery' are used most commonly. In contrast, the terms "procedure" (including "cosmetic procedure" and "major procedure") are used in the major cosmetic procedures (cosmetic surgery) section of the draft guidelines. This could lead to confusion for some practitioners about which types of procedures the guidelines apply to.

The NHPO suggests that clear definitions and consistent use of terminology is foundational to ensuring these documents are understood. It is vital that health practitioners and others interpreting the guidelines can easily determine their applicability. Efforts to improve these definitions and the use of terminology would likely increase accessibility and readability.

Interaction with the existing advertising guidelines

It is expected that health practitioners should read the draft advertising guidelines alongside the following documents:

- Guidelines for advertising a regulated health service
- Guidelines for registered medical practitioners who perform medical and surgical procedures
- Social media: How to meet your obligations under the National Law.

The NHPO notes, however, that some sections of these other documents are repeated in the draft advertising guidelines, while other sections are not. For example, the draft advertising guidelines repeat information related to titles and claims about registration, competence and qualifications found in the guidelines for advertising a regulated health service. This has the potential to create some confusion, as it is not clear why other important parts of the guidelines for advertising a regulated health service are not replicated. The NHPO suggests that links between the guidelines are highlighted and referenced where needed, particularly in relation to the use of testimonials and guidance regarding financial arrangements.

Testimonials

The guidelines for advertising a regulated health service outline the prohibition on the use of testimonials to advertise a regulated health service. However, the draft advertising guidelines do not mention the prohibition, or how this may apply to cosmetic surgery. This appears to be an oversight, particularly given the use of social media advertising in relation to cosmetic surgery.

For example, it may be helpful to clarify in the draft advertising guidelines that sharing a patient's personal post about their experience on the health practitioner's social media would constitute use of a testimonial. Similarly, it may be helpful to clarify how patient testimonials interact with video content (for example, a patient giving a thumbs up in a video after a procedure).

Financial arrangements

The draft advertising guidelines could also be strengthened by including reference to the draft guidelines which specifies that practitioners must not provide or offer to provide financial inducements or free treatment for promotion of procedures or services. This is particularly relevant to advertising, as it precludes practitioners from offering financial inducements or free treatment to social media influencers and other potential advertisers.

Practitioner responsibility (section 1.2)

The NHPO is concerned that section 1.2 of the draft advertising guidelines does not appear to be based on evidence outlined in the independent review. It states:

Responsible practitioners advertising cosmetic surgery recognise that there is strong demand from patients who are not suitable candidates and may be adversely affected by treatment because they have unrealistic expectations of cosmetic surgery outcomes.

This statement appears to be an unhelpful simplification of observations made in the independent review that:

- body dysmorphic disorder (BDD) is more prevalent in cosmetic surgery patients (estimates range between 5 per cent and 20 per cent)
- patients with BDD often have unrealistic expectations about cosmetic surgery and are more likely to be dissatisfied with the results irrespective of the objective outcome.¹

The NHPO cautions against the use of language which appears to connote that experiencing adverse effects of cosmetic surgery is limited to those who have unrealistic expectations. The independent review found, for example, that the outcomes of cosmetic surgery (whether or not the practitioner may have been at fault) have had a “devastating impact” on some patients, including physically, psychologically and financially. It is important that the draft advertising guidelines do not inadvertently imply fault on the part of the patient or consumer for choosing to undertake a procedure which resulted in an unintended or unsatisfactory outcome.

Use of images and before and after photos (section 4, including 4.1 and 4.3)

The NHPO suggests that section four of the draft advertising guidelines could be further strengthened by ensuring that the relevant provisions apply to both individual and before and after photos. Section 4.1, for example, states that:

Use of single images alone, rather than ‘before’ and ‘after’ photographs can idealise cosmetic surgery and must not be used as they can mislead and increase unreasonable expectations of beneficial treatment. This includes the use of stock images, models and celebrities or re-posting a patient’s social media image.

The NHPO suggests that the wording of this section incorrectly implies that before and after photos do not have the potential to idealise cosmetic surgery. Similarly, the reference to not re-posting a patient’s social media image or using models or stock images is also relevant to before and after photos.

The requirements outlined in section 4.3 are also relevant to single use images, not only before and after photos. For example, there is no reason that single images could not also involve gratuitous nudity. The NHPO suggests it should be made clear that these guidelines apply to all images.

Altered images

Submissions to the independent review highlighted that there was concern about the use of filters and other editing of photos or videos of patients.² The NHPO suggests that the draft advertising guidelines could make it clearer that altering images, including the use of filters or editing software, is not acceptable (unless necessary for deidentification). This is consistent with the advertising

¹ Independent review, p95

² Independent review, p79

guidelines which state advertising may be in breach of the National Law if “images are not genuine and/or have been edited or enhanced.”³

Use of images, photos or videos (section 4.4)

It is important that the draft advertising guidelines and the draft guidelines provide consistent advice about the use of images, photos or videos. Currently, these two documents contain complementary but inconsistent guidance (see section 5.3 of the draft guidelines). It is vital for this information to be clearly stated either in both documents or stated fully in the draft guidelines and referred to by the draft advertising guidelines. The NHPO suggests that this information be included sequentially based on the steps to ensuring the appropriate use of images, photos or videos as outlined below.

- Medical practitioners must have fully informed consent to take or use any image of their patient, including for any advertising purposes.
- Patients must be informed about the proposed use of any images of them, including the purpose, how images will be used and where they will be stored.
- Informed consent to take or use any image of a patient for advertising purposes must be requested separately to providing informed consent to take or use any image of a patient for clinical purposes.
- Consent for the use of patient photos in advertising cannot be tied to a financial or other incentives (for example, providing a free procedure).
- Patients must be provided an opportunity to view images after their cosmetic surgery before consenting to their use in advertising.
- Patients have a right to refuse use of their images and a patient cannot be required to agree to use of their images.
- Medical practitioners must store patient images securely, and not on a personal device.
- Patients must be free to withdraw their consent for the use of their images at any time and practitioners must provide clear information and a process for them to do so.
- If a patient withdraws consent to use of their images, the practitioner must promptly remove those images, including from their advertising.
- Patient consent for taking, use and storage of any images must be documented.

The NHPO acknowledges that the draft advertising guidelines and draft guidelines when combined cover many of the steps outlined. However, the NHPO is concerned that the fragmentation of this information means that medical practitioners may be left without a clear view of their responsibilities.

The additional information the NHPO has suggested adding relates primarily to how informed consent is requested for the use of patient images in advertising. The NHPO suggests patients should be given the opportunity to view images after their cosmetic surgery before consenting to their use in advertising. This would assist patients in making an informed decision about the public use of their

³ Guidelines for advertising a regulated health service, 4.4.1 Images and photographs.

often sensitive and personal images. In turn, this would necessitate a separate informed consent process for the use of images in advertising, which would occur after the cosmetic surgery.

Informed consent procedures for use of images for clinical purpose and for advertising purposes

The NHPO suggests separate informed consent processes for the use of photos for advertising purposes or for clinical purposes could assist patients to provide informed consent. The NHPO is concerned that medical practitioners may request consent for the use of their images for clinical purposes and for advertising concurrently. This may make patients may feel compelled to provide consent for both without understanding the purpose of, and the vastly different uses for, these images. The use of before and after photos for clinical purposes can provide evidence of the cosmetic surgery's outcome. For example, the independent review found in its review of notifications related to cosmetic surgery that in some cases there was a failure to obtain or consider before or after photos which could assist in determining whether the practitioner's professional performance was to the expected standard. It therefore suggested that Ahpra seek before and after photos where available to consider in its assessment of the notification. However, the use of before and after photos in advertising does not have the same intention, it is primarily concerned with the promotion of the practitioner's services, not with the patient's outcome. The NHPO therefore suggests that:

- informed consent to take or use any image of a patient for advertising purposes must be requested separately to providing informed consent to take or use any image of a patient for clinical purposes
- patients must be provided with an opportunity to view images after their cosmetic surgery before consenting to their use in advertising.

The draft guidelines clearly state that medical practitioners cannot use financial or other incentives to gain patient consent for a procedure. The NHPO suggests that it is also important to clarify and reinforce that medical practitioners do not use financial or other incentives (such as providing a free procedure) to gain consent for the use of patient photos in advertising.

Use of images of those under 18

The independent review recommended that the draft advertising guidelines seek to “[prevent] the targeting of young or otherwise vulnerable groups with advertising (including through algorithms and other marketing technology).”⁴ The review observed:

...research suggests a connection between social media use and the increasing incidence of body dysmorphia and other body image concerns (particularly amongst young women). In these circumstances, the review is particularly concerned with tactics employed by some practitioners on social media, including...content that actively encourages people to pursue what is promoted as a socially accepted or perfect body type and the use of influencers to promote procedures.

The NHPO therefore suggests that the use of images of those under 18 years old should be explicitly prohibited in advertising related to cosmetic surgery.

⁴ Independent review, p83

Risk, recovery and idealising cosmetic surgery (section 5)

The NHPO recognises that in response to the independent review's recommendations, this section of the draft advertising guidelines has been significantly strengthened. The NHPO supports this approach to ensuring that advertising does not set false expectations for patients.

However, the NHPO suggests that further details are needed to clarify and set requirements regarding the use of video, particularly in relation to social media platforms' ability to live stream content. Media reports which sparked the independent review provided examples of videos posted on social media which appeared to trivialise cosmetic surgery, and which raised questions about whether filming procedures could negatively affect concentration on the procedure itself. Video is a staple of many social media platforms such as TikTok, Instagram and Facebook, and it is important that the draft advertising guidelines recognise the changing form of advertising and the challenges that may arise for the regulator in determining whether a video was posted for education or entertainment purposes.

The NHPO suggests that consideration is given to prohibiting the medical practitioner who is performing a procedure from filming it themselves and prohibiting live streams of procedures. It would be difficult to argue that these practices support an educative purpose, and these practices appear to increase risks associated with concentration on the procedure.

The NHPO suggests that further review is also undertaken into the types of videos used within the cosmetic surgery industry, and the features of inappropriate advertising that could be included in the draft advertising guidelines. For example, elements which trivialise cosmetic surgery may be identified, such as:

- upbeat background music
- dancing, singing or making jokes
- excessive editing (such as a montage of procedures/bodies)
- the tone and conversational style of the voiceover/health practitioner.

Providing case studies and examples

The independent review focused on the importance of providing examples to help medical practitioners distinguish between acceptable and unacceptable advertising in relation to cosmetic surgery. The independent review stated:

There would also be benefit in providing examples of what would be considered to be unacceptable cosmetic surgery advertising. Greater clarity would not only benefit practitioners who advertise, or are contemplating advertising, but also Ahpra and the Medical Board when assessing advertising complaints or auditing advertising. Having more detailed and specific examples should assist in categorising the advertising against the Strategy risk categories.⁵

⁵ Independent review, p86

The NHPO welcomes the inclusion of more examples in the draft advertising guidelines about how the guidance operates in practice. The inclusion of examples can help to reduce confusion about the intended meaning of the relevant section.

The NHPO suggests, however, that the guidelines could provide more examples related to the use of images and use of emojis to strengthen the guidelines. For example, it appears that emojis are commonly used in relation to cosmetic surgery to comply with social media platforms' rules around nudity. The guidelines could specify that emojis should not be used on images, either for modesty purposes or to denote an emotional reaction to an image. Similarly, the meaning of a 'sexualised image' may not be universal to practitioners. Providing an example, such as using an image of a model in a push up bra advertising a breast augmentation, may assist in helping practitioners to understand the parameters being set by the Board.

Draft guidelines

The NHPO was pleased to observe significant changes to the draft guidelines in response to the independent review's findings. The NHPO notes particularly positive changes to the guidelines for cosmetic surgery to:

- change references from 'should' to 'must' as appropriate
- strengthen the assessment of patients for underlying psychological conditions such as BDD, including ensuring the referral of patients for treatment of significant underlying psychological conditions
- update requirements for pre-operative consultations, including that the first consultation must be with a registered health practitioner and at least one face-to-face consult must be held with the medical practitioner performing the procedure
- ensure informed consent is provided by including additional information about:
 - the risks and possible complications associated with the procedure, in the short and long term
 - cost, including possible costs for further revision surgery or additional treatment
- clearly outline complaint pathways and mechanisms, including that a non-disclosure agreement does not preclude a patient from making a notification
- ensure that practitioners who visit or 'fly-in/fly out' are available at that location for at least 24 hours after the cosmetic surgery
- clarify that practitioners must not provide or offer to provide financial inducements or free treatment for promotion of procedures or services
- clarify that practitioners must not offer, promote or recommend finance schemes to patients or encourage patients to take on debt, or access superannuation to access cosmetic surgery.

However, the NHPO suggests that the guidelines in relation to non-surgical cosmetic procedures are in need of further review and consultation with stakeholders to ensure they are backed by evidence and respond to the unique circumstances of these type of procedures.

Accessibility

It is not clear from the design of the draft guidelines that it contains two distinct sections, one for *major cosmetic medical and surgical procedures* (cosmetic surgery) and one for *minor (non-surgical) cosmetic medical procedures* (non-surgical cosmetic procedures). The NHPO notes that the distinction is made in the header of the guidelines, but it is not easily apparent from the text of the draft guidelines. The NHPO suggests that this could cause confusion for those accessing the guidelines, as the reader may not notice the shift between these two guidelines or that there are in fact different obligations depending on the type of cosmetic procedure being undertaken.

Scope of the consultation

The NHPO notes that the combination of cosmetic surgery and non-surgical cosmetic procedures in the draft guidelines may also be particularly confusing for those seeking to understand how Ahpra and the Board have implemented the recommendations of the independent review. The independent review considered only cosmetic surgery, not non-surgical cosmetic procedures. It did not consider stakeholder views or evidence related to the range of non-surgical cosmetic procedures to which the guidelines would apply. The NHPO is therefore concerned that consultation on the draft guidelines as a whole may give the incorrect impression that the review considered the issues related to these non-surgical cosmetic procedures.

Consistent use of terminology

As detailed in relation to the draft advertising guidelines, the NHPO suggests the draft guidelines should use consistent terminology to ensure its content is clear and accessible to medical practitioners and the broader community.

In relation to the draft guidelines, the term 'procedure' is used frequently. This term could be confusing to the reader, because it could refer to a 'cosmetic medical and surgical procedure', a 'major cosmetic medical and surgical procedure' or a 'minor (non-surgical) procedure.' In addition, the terms 'surgery' and 'procedure' sometimes appear to be used interchangeably. The NHPO notes that the draft advertising guidelines did not include references to the term 'procedure' following its introductory information.

The use of terms such as 'minor' or 'major' also has the potential to minimise the risks associated with 'minor' procedures. It is particularly important that the risks associated with non-surgical cosmetic procedures are not downplayed. The NHPO acknowledges that there are challenges in deciding which terminology should be used, particularly when medical practitioners may be familiar with one lexicon, and patients with another. However, the NHPO suggests that wherever possible, efforts should be made to ensure the terminology is as accessible as possible. The NHPO suggests that the use of terminology such as 'cosmetic surgery' and 'non-surgical cosmetic procedures' is preferable because it is more factual.

Draft guidelines regarding cosmetic surgery

Assessment of patient suitability (section 2.4 and 2.6)

As previously noted, the NHPO supports changes made to strengthen processes to assess patients for underlying psychological treatments such as BDD with a validated psychological screening tool. As outlined in the independent review, it is clear that ensuring patients are assessed and referred to appropriate services where necessary for psychological support and assessment will help ensure better patient outcomes. However, the NHPO suggests that it is important to clarify terms used in this section to ensure the guidelines can be understood, followed and compliance determined.

Significant underlying psychological issue

The draft guidelines state:

The patient must be referred for evaluation to a psychologist, psychiatrist or general practitioner,⁶ who works independently of the medical practitioner who will perform the procedure, if screening indicates that the patient has significant underlying psychological issues which may make them an unsuitable candidate for the procedure.

The NHPO is concerned that the term ‘significant underlying psychological issue’ is not well-defined in the guidelines, despite its centrality to medical practitioners’ obligations regarding the assessment and referral process. ‘Significant’ is a subjective term, which could be used for a range of different mental health concerns. In addition, some patients may have a serious underlying psychological issue that may not directly affect or relate to their desire to have cosmetic surgery. Further consideration of this wording may therefore assist in clarifying practitioner obligations.

Best interests of the patient

The draft guidelines state:

A medical practitioner must decline to perform a cosmetic procedure if they believe that it is not in the best interests of the patient.

The draft guidelines provide a thorough outline of the different elements essential to patient care. They cover areas such as recognising potential conflicts of interest, informed consent (including informed financial consent), patient management and financial arrangements. It is unclear, however, how practitioners should assess what is in the ‘best interests of the patient.’ The NHPO suggests it would be reasonable for practitioners to assume that following the guidelines would sufficiently demonstrate they are acting in the best interests of the patient. For example, the guidelines outline that the medical practitioner who will perform the cosmetic surgery must obtain informed consent from the patient. Further clarifying how practitioners are required to determine what is in the best interests of the patient would likely assist in removing any uncertainty regarding this requirement.

⁶ Referral to a general practitioner excludes referral to general practitioners who provide cosmetic procedures.

Patient consultation type and timing (section 3.3)

The NHPO supports updates to the draft guidelines to ensure there is an adequate level of face-to-face contact between the medical practitioner who will be performing the cosmetic surgery and their patient and an appropriate cooling off period. However, the NHPO suggests that the intention of the guidelines should be clarified regarding the requirements for:

- when a cosmetic surgery can be scheduled
- when a deposit can be made to secure a date for a cosmetic surgery.

The independent review was concerned that:

...if at the first consultation, the consumer has signed the consent form and possibly agreed upon a date for the procedure, they have potentially (in their mind) locked themselves in, making it difficult to change their mind. Noting the invasive and permanent nature of what is a purely elective procedure, the review considers that the current Cosmetic Guidelines may (inadvertently) be encouraging this practice.

Section 3.3 of the draft guidelines state:

A patient cannot consent to, or schedule, cosmetic surgery until they have had a face-to-face consultation with the medical practitioner who will perform the procedure.

The NHPO suggests that this wording does not adequately reflect the recommendations of the independent review. It would appear that, under section 3.3, if a patient's first consultation was face-to-face with the medical practitioner who will perform the cosmetic surgery, a patient could schedule their surgery after this first consultation. As outlined by the independent review, this could have the effect of negating the cooling off period because the patient has already psychologically committed to the cosmetic surgery. The NHPO therefore suggests that the draft guidelines clearly state that cosmetic surgery cannot be scheduled until after the cooling off period.

In addition, the NHPO suggests that the guidelines should clarify in section 13.1 that a deposit cannot be made to secure a cosmetic surgery until after the cooling off period for the same reason outlined above. If a patient has already made a deposit, they have already agreed in some way to the procedure.

The NHPO notes that the current wording of the guidelines makes the timing of the consent process quite challenging to follow. It may be that a diagram, or more sequential approach, could help to improve readability and accessibility. For example:

- A patient's first consultation about the cosmetic surgery can be face-to-face or by video and must be with a registered health practitioner. A patient cannot consent to the cosmetic surgery, schedule it, or make a deposit, in the first consultation.
- The decision to provide informed consent for the cosmetic surgery must be made at a face-to-face consultation with the practitioner who will perform the cosmetic surgery.
- A cooling period of at least seven days is required after informed consent is provided before the cosmetic surgery is scheduled or a deposit is made.

Informed consent including informed financial consent

The independent review's consultation process identified concern that relevant information about cosmetic surgery was not being provided in the patient's preferred language and that it was important to enable patients to give consent in their preferred language. The independent review found that the guidelines were generally comprehensive but acknowledged that the guidelines did not address the issue of consumers from non-English speaking backgrounds. It recommended that the guidelines should:

...be amended to include reference to ensuring that information is provided in a language understood by the consumer.

Section 5.1 of the draft guidelines outlines that:

The practitioner must have a verbal consent discussion with the patient as well as provide written information in plain language. Practitioners should take all practical steps to provide information in a language understood by the patient.

Section 5.4 of the draft guidelines also states:

Informed consent must be obtained by the medical practitioner who will perform the procedure. The medical practitioner must take reasonable steps to ensure the patient understands the information provided.

The NHPO suggests that practitioners have an obligation to take practical steps to provide information in a language understood by the patient. To reflect this, the NHPO suggests the language in section 5.1 be changed from 'should' to 'must.' The NHPO also suggests the term 'all practical steps' in section 5.1 is quite vague and could mean different things to different practitioners. The inclusion of the independent review's suggested amendment would help to clarify this.

Patient management (section 6)

The issue of complications following cosmetic surgery, or the need for revision surgery, was frequently raised with the independent review. Its Technical Advisor Group, for example, identified postoperative care as an area critical to patient safety. The review stated:

Some members had concerns about cases when consumers had seemingly been left to manage their own complications and determine when escalation of care was required and how to access it.

The NHPO acknowledges that significant change to the draft guidance regarding medical practitioner's responsibilities for postoperative care addresses many of the concerns raised throughout the independent review. However, the NHPO suggests that the Board consider whether further guidance should be provided about medical practitioners' obligations to respond if a patient experiences complications or seeks revision surgery. For example, the NHPO has observed in cosmetic surgery related complaints that patients have often sought revision surgery, which they are then not satisfied with. The NHPO suggests that the Board may wish to consider whether medical practitioners have an obligation to provide:

- alternative suggestions or referral pathways to alternative practitioners for revision surgery

- details about how patients can make a complaint if informed that a patient is seeking revision surgery.

Provision of patient care by other health practitioners (section 7)

As outlined above, the independent review focussed on the issue of other registered health practitioners' involvement regarding appropriate postoperative care.

Section 7.2 of the draft guidelines, however, goes further in stating:

When a medical practitioner is assisted by another registered health practitioner or assigns an aspect of a procedure or patient care to another registered health practitioner, the medical practitioner retains overall responsibility for the patient. This does not apply when the medical practitioner has formally referred the patient to another registered health practitioner.

The NHPO notes that factors relevant to this issue were raised in patient stories shared in the media and as part of the independent review. This included concerns that patients thought they were undertaking cosmetic surgery with one medical practitioner, but another medical practitioner or other registered health practitioners appeared to be involved in their care, without their consent or knowledge.

The NHPO therefore supports the inclusion of section 7.2 but suggests further consideration should be given to how it would operate in practice, and what evidence the Board would rely on to determine whether overall responsibility for the patient had been retained. For example, would medical practitioners be required to review patients notes from follow up consultations for their patient's wound care with, for example, a registered nurse? To what extent would medical practitioners be obliged to monitor whether those providing care to their patient continue to act within their scope of practise? The NHPO suggests that providing further clarity about these requirements would help ensure practitioners are aware of the Board's expectations.

Complaints (section 8)

The NHPO suggests the Board could provide more guidance regarding instances where medical practitioners are required to inform patients of their right to make a complaint. As identified previously, the NHPO is pleased the draft guidelines have been updated to ensure patients are informed that signing a non-disclosure agreement does not prevent them from making a notification. The NHPO suggests that, similarly, the draft guidelines should reiterate that:

- information about the complaint process must be provided both pre-operatively and post-operatively
- patients have a right to complain after a medical practitioner has provided revision surgery, including if that revision surgery was provided free or partial of charge.

Qualifications and titles (section 10.2)

The NHPO strongly suggests that the draft guidelines are updated to ensure that medical practitioners are required to clearly inform patients of their registration type, specialist registration and whether they have an endorsement in cosmetic surgery.

Submitters to the independent review said that practitioners

...should be required to provide more information on:

- *their training and qualifications, including whether or not the practitioner meets any minimum standards or endorsements that may be required for cosmetic surgery...*

The independent review's recommendation to create an endorsement for cosmetic surgery has been accepted. However, it does not appear that its recommendation regarding medical practitioners disclosing if they do not hold an area of practice endorsement has been included. The independent review recommended:

requiring medical practitioners to disclose to consumers if they do not meet minimum training requirements detailed in the Cosmetic Guidelines or do not hold an area of practice endorsement.

The NHPO suggests that this recommendation should be embedded in the draft guidelines as a priority. The draft guidelines should require practitioners to declare if they do not hold an endorsement in cosmetic surgery (once it is established).

The draft guidelines should also specify that practitioners cannot advertise themselves as having an endorsement in cosmetic surgery without holding one.

Draft guidelines in relation to non-surgical cosmetic procedures

As outlined previously, the NHPO is concerned that the draft guidelines attempt to incorporate information about cosmetic surgery and non-surgical cosmetic procedures in the same document.

Ensuring informed and evidence-based guidelines

The independent review did not consider the types of non-surgical cosmetic procedures outlined in the draft guidelines. Instead, the review was solely focussed on cosmetic surgery. Ahpra and the Board have characterised this public consultation process as an opportunity for the Board to implement the recommendations of the independent review. The NHPO is therefore concerned that including the draft guidelines for minor cosmetic procedures is misleading, as it was not considered by the independent review.

The broader underlying issue in relation to revising guidelines on non-surgical cosmetic surgery as part of this consultation is that the Board has not sought appropriate information about the root causes of issues in this area, or potential mechanisms to address them. It was clear from media reporting and the Board's response to the independent review that there is a need to improve how cosmetic surgery is regulated in Australia. However, the issues which require reform in relation to non-surgical cosmetic procedures are likely to be different to cosmetic surgery procedures, although they may require similar obligations. For example, the NHPO notes that the Board has not provided sufficient evidence to determine why the following sections of the non-surgical guidelines are different from the cosmetic surgery guidelines:

- medical practitioners are not required to use a validated psychological screening tool to screen for BDD, for example, prior to providing dermal fillers or cosmetic injectables, as outlined in section 2.3 of the cosmetic surgery section of the draft guidelines

- medical practitioners can prescribe schedule 4 cosmetic injectables after a video consult. The cosmetic surgery section of the guidelines require that a patient undergo two pre-operative consultations prior to surgery, one of which must be face to face.
- requirements not to 'glamourise procedures, minimise the complexity of the procedure, overstate results or imply patients can achieve outcomes that are not realists' outlined in section 5.1 of the cosmetic surgery section of the draft guidelines are not included
- requirements to provide information about the possible further costs of revision of the procedure or additional treatment are not included as they are in section 5.2 of the cosmetic surgery section of the draft guidelines
- requirements not to encourage patients to take on debt, access superannuation or offer patients additional products or services that could act as an incentive to treatment as outlined in sections 13.5 and 13.6 of the cosmetic surgery section of the draft guidelines are not included.

The NHPO is concerned that there is not strong evidence to support why certain obligations (as outlined above) are not included in the non-surgical cosmetic procedures section of the draft guidelines but are included in the cosmetic surgery section of the draft guidelines.

The NHPO acknowledges that the issues in relation to non-surgical cosmetic procedures, like cosmetic surgery procedures, involve the interplay of many issues which relate to broader society, and a range of other stakeholder, regulator and government bodies. However, the NHPO suggests that the Board has a role in setting expectations about what is expected of medical practitioners in this area, as it has done in relation to surgical cosmetic procedures.

Defining non-surgical procedures

The NHPO is concerned that the scope of the current draft guidelines is broad, and this creates unique problems regarding the appropriateness of the guidance. The non-surgical procedures covered by the draft guidelines range from laser hair removal to administering cosmetic injectables. The definition of non-surgical procedures is complex, but there may be opportunities to better articulate its scope. For example, a 2018 NSW Health review outlined (in relation to non-registered health practitioners):

Some cosmetic procedures are more akin to beauty procedures would not be, and should not be, seen as a health service, for example hair removal.⁷

The NHPO suggests that further exploration of the scope of the non-surgical cosmetic procedure section of the draft guidelines is necessary.

⁷ NSW Health, Report on the Review of the Regulation of Cosmetic Procedures, April 2018, p10

Non-surgical cosmetic procedures available to under 18s

The NHPO is also concerned that sufficient consideration has not been given to the treatment of those under 18 years old in relation to non-surgical cosmetic procedures, and whether the current draft guidelines provide adequate protection to young patients. For example, the United Kingdom has:

- banned the administration of non-surgical cosmetic procedures such as Botox injections and cosmetic fillers to under 18s. Registered health practitioners can provide treatments to under 18s, but only in cases where the treatment has been approved by a doctor.⁸
- banned advertising for cosmetic surgery (major and minor) that target under 18s.⁹

Prescription of scheduled medicines

Another area which likely requires further consideration is medical practitioners' prescription of medicines used in non-surgical cosmetic procedures such as botulinum toxin and injectable hyaluronic acid dermal fillers. Section 6 of the draft guidelines outline:

Medical practitioners must know and comply with the requirements of their state or territory drugs and poisons (or equivalent) legislation for schedule 4 (prescription only) cosmetic injectables. For example, requirements relating to permits, supply, storage and transport.

The NHPO suggests, however, that further consideration and detail regarding medical practitioner core obligations in relation to cosmetic injectables (irrespective of specific drug and poisons legislation) could be beneficial. For example, NSW Health's review outlined:

Based on a number of investigations by the Pharmaceutical Regulatory Unit, the Ministry is concerned as to whether medical practitioners who prescribe these medicines used in cosmetic procedures, such as botulinum toxin and injectable hyaluronic acid dermal fillers, have appropriate oversight over the receipt, storage, access, use and administration of these medicines at cosmetic clinics.

The Royal Australian College of General Practitioners (RACGP) submitted to the Board in 2015 that because non-surgical cosmetic procedures (such as injectable Botox and collagen treatments) are often performed by a beautician or nurse, it is 'likely there are instances' when a treating doctor is not supervising. RACGP President Adjunct Professor Karen Price in April 2022 said to NewsGP:

This is why we believe it's important that clinical groups agree on a delineation of cosmetic surgery services according to the complexity of the procedures – and ensure that the person performing the

⁸ UK Department of Health and Social Care, Guidance Botulinum toxin and cosmetic fillers for under 18s. Accessed December 2022: www.gov.uk/government/publications/botulinum-toxin-and-cosmetic-fillers-for-under-18s/botulinum-toxin-and-cosmetic-fillers-for-under-18s#:~:text=If%20you're%20under%2018%2C%20it%20is%20illegal%20for%20anyone,the%20procedures%20to%20take%20place.

⁹ UK Advertising Standards Authority and Committee of Advertising Practice Ltd, Cosmetic surgery. Accessed December 2022: www.asa.org.uk/news/strict-new-rules-for-ads-for-cosmetic-interventions.html

*procedure has the appropriate training, expertise and experience. A person performing any procedure should be able to deal with all routine aspects of care and any likely complications.*¹⁰

The NHPO therefore suggests that it may be beneficial for the Board to consider obligations related to:

- providing examples of how medical practitioners can maintain overall responsibility for the patient's treatment (unless a formal patient referral has been made)
- ensuring the medical practitioner has appropriate oversight of the use and administration of these medicines, including the required process to ensure if the medical practitioner is assigning another registered practitioner to administer the medicine, that they are appropriately qualified, and that appropriate aftercare is provided.

In addition, the NHPO suggests that the Board should consider whether there are further obligations for medical practitioners to provide information about substances prescribed, such as cosmetic injectables. The draft guidelines provide that if any surgery involves an implantable device, that a patient is given a Therapeutic Goods Administration (TGA) approved patient information leaflet before surgery and a patient implant card after surgery for the device. The TGA's website suggests that patients research cosmetic injectable products and avoid counterfeit products by searching the Australian Register of Therapeutic Goods (ARTG) list of products to ensure it is registered.¹¹ The NHPO suggests that further consideration could be given to whether the draft guidelines should outline that medical practitioners are required to only prescribe ARTG registered products for the non-surgical procedure, and what information should be provided to patients about the product.

Towards shared guidelines on non-surgical cosmetic procedures

The NHPO suggests that further consideration is necessary to determine whether there is a need to develop shared guidelines across multiple professions regarding non-surgical cosmetic procedures. The NHPO notes that other professions regulated under the National Scheme, such as the nursing and dental professions can provide non-surgical cosmetic procedures. The NHPO notes that the Dental Board of Australia (the Dental Board) and the Nursing and Midwifery Board of Australia (the NMBA) have sought to provide guidance to practitioners related to non-surgical cosmetic procedures. For example, the:

- Dental Board has published a fact sheet on the use of botulinum toxin and dermal fillers by dentists¹²
- NMBA has published a position statement on nurses and cosmetic medical procedures.¹³

¹⁰ Morgan Liotta, RACGP continues push for overhaul of cosmetic surgery industry, NewsGP, 22 April 2022

¹¹ TGA website, Cosmetic injections checklist, 22 August 2019. Accessed December 2022: www.tga.gov.au/news/news/cosmetic-injections-checklist

¹² Dental Board of Australia, Fact sheet on the use of botulinum toxin and dermal fillers by dentists. Accessed December 2022: www.dentalboard.gov.au/Codes-Guidelines/FAQ/botulinum-toxin-and-dermal-fillers.aspx

¹³ Nursing and Midwifery Board of Australia, Position statement on nurses and cosmetic medical procedures. Accessed December 2022: www.nursingmidwiferyboard.gov.au/Codes-Guidelines-Statements/Position-Statements/nurses-and-cosmetic-procedures.aspx

The interconnection and collaboration that can occur between these registered professions suggests that there could be benefit in providing shared guidance regarding non-surgical cosmetic procedures. The NHPO suggests that the draft guidelines, at a minimum, should be based on a clear understanding of the interconnection between these registered professions.

Title protection, qualifications and endorsement

The NHPO suggests that further evidence and understanding is also required about whether there is a need to introduce relevant minimum qualification or training standards for registered practitioners who perform non-surgical cosmetic procedures, including medical, nursing and dental practitioners. The NHPO notes that the independent review's scope prevented it from considering whether an endorsement was also necessary in relation to non-surgical cosmetic procedures.

Currently, available guidance to consumers appears to suggest that cosmetic injectables should be administered by a registered health practitioner to reduce risks. The Department of Health's Better Health Channel's website (which has been approved by the Australian Society of Plastic Surgeons), for example, states:

To minimise risks, cosmetic injections should be given by a registered health practitioner (such as a nurse) under the instruction of a registered medical practitioner. This medical practitioner should have experience in the field and should have personally consulted the patient.¹⁴

The NHPO suggests that this recommendation points to concern that cosmetic injections being given by other non-registered people could increase risks to patient safety.

The NHPO notes that concern regarding the regulation of non-surgical cosmetic procedures is not specific to Australia. For example, a report published in August 2022 by the House of Commons Health and Social Care Committee recommended that the UK government introduce a licensing regime for non-surgical cosmetic procedures.

We are convinced that there is a need for a minimum standard to be met in regards to the education and training of practitioners who perform non-surgical cosmetic procedures. It is essential to ensure patient safety, and thus should be a central pillar of a future licensing regime. The Professional Standards Authority should be given the power to oversee a register of approved training providers. All training providers should have to meet an Ofqual-regulated standard.

The NHPO acknowledges that any system to accredit non-registered health practitioners to administer non-surgical cosmetic procedures would fall outside of Ahpra and the National Boards' remit. However, the NHPO suggests that this does not preclude Ahpra and the Boards from setting standards expected of registered health practitioners in relation to providing non-surgical cosmetic procedures. Due to the complexity of such arrangements, the NHPO suggests that it is only through further research and consideration of these complexities that Ahpra and the Boards can come to provide quality, evidence-based guidance to health practitioners, and ultimately achieve their object of public protection.

¹⁴ Better Health Channel, Cosmetic treatments – injectables. Accessed December 2022: www.betterhealth.vic.gov.au/health/ConditionsAndTreatments/cosmetic-treatments-injectables

Draft standard

The NHPO appreciates that Ahpra and the Boards are seeking to ensure the quick and efficient updating of the relevant documentation to support the recommendations of the independent review. However, the NHPO is concerned that there is insufficient detail to enable those affected by the draft standard to meaningfully comment on its contents. The substance of the endorsement model is central to the operation of the draft standard and details should therefore be provided about:

- the accreditation standards
- the approved qualifications.

The NHPO suggests that this content is necessary to provide an informed response to the Board's consultation on the draft standard, particularly because the draft standard has no provisions related to:

- exemptions
- grandparenting practitioners who have experience in cosmetic surgery who do not have the required qualifications for endorsement.

The Australian Medical Council (AMC) has indicated that the consultation period for the accreditation standards is due to begin in December 2022 to January 2023.¹⁵ The NHPO suggests there is an opportunity to coordinate consultation on the draft accreditation standards and the draft standard.

Contact details

The Ombudsman and Commissioner thanks the Board for the opportunity to provide this submission.

Please feel free to contact the office's media and communications adviser, [REDACTED], for further information about this submission.

E: [REDACTED]

P: [REDACTED]

¹⁵ AMC website, Cosmetic surgery. Accessed December 2022: www.amc.org.au/cosmetic-surgery