

Avant Mutual Group Limited

Submissions to AHPRA Consultation on Guidelines and Policy

1. Introduction

Avant Mutual Group Limited ("Avant") is Australia's leading medical defence organisation and one of Australia's leading mutuals, offering a range of insurance products and expert legal advice and assistance to over 60,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals, practices and private hospitals and private health insurance, which is offered through our subsidiary The Doctors' Health Fund Pty Limited.

We also provide extensive risk advisory and education services to our members, as well as access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, providing personalised support and rapid response to urgent medico-legal issues.

In our role as provider of medico-legal advice to members, we are often called upon to advise on the content of AHPRA guidelines and their implications in a particular case.

2. General comments

As a general comment, we support the use of guidelines to assist health practitioners to understand their obligations under the National Law.

As a general principle, to be helpful, guidelines and policies should be easy to read, easy to follow, and internally consistent. The draft guidelines in the main reflect this, but as a general comment we suggest that the material be laid out in a way that is easy to read online, perhaps with boxes and bullet points to highlight key aspects of the guidelines.

The Guidelines for Mandatory Notifications are an excellent example. They are well set out, have a logical flow and provide practical guidance on how to comply with the relevant requirements.

We recommend that each of the guides include a suggestion that health practitioners obtain advice from their lawyer, professional indemnity insurer, medical defence organisation or other body if they have any queries about their legal position under the guidelines.

3. Revised guidelines on advertising

The format of the mandatory reporting guidelines could be adopted in these guidelines, commencing with an overview, commentary on who the guidelines apply to, and a summary. A breakout box at the beginning of the guidelines listing key points would be of assistance. These could include points such as: don't use testimonials; take care in the use of titles; it is an offence to misuse a protected title, etc.

The “helpful questions to consider” in section 7 are useful and could be used in each section.

We appreciate the need to cater for a range of health practitioners in the guidelines, and the resulting placement of information that does not apply to all health practitioners in appendices. However, as noted below, in our view much relevant information is “hidden” in the appendices and risks being overlooked by busy practitioners.

Section 1 Authority

According to the summary of changes document, this section was included to communicate “how the guidelines may be used linking Part 8 action and prosecution”. However there is no mention in this section of Part 8 or how these guidelines link in with it. Rather this information appears to be included in section 6.

Recommendation

We recommend that the paragraph in section 6 referring to disciplinary action be moved to section 1.

Section 2 Definitions

Section 2 refers to “other legislation” but does not state exactly what this legislation is or what definitions practitioners must comply with. Appendix 1 refers to the definition of advertising in the *Therapeutic Goods Act* as an example, and appendix 2 refers to several other pieces of legislation with which health practitioners must comply.

Recommendation

We recommend that appendix 2 be referred to in this section. We recommend that there be a statement at the beginning of the guidelines (whether in this section or in section 1) that health practitioners need to ensure that they comply with all applicable legislation, as listed in appendix 2.

Section 6 Obligations under the National Law and other legislation

This section firstly refers to the need to comply with the National Law and then refers to a website link. The relevant section of the national law is included in section 3 of the draft guideline and later in section 7. The section also refers to information contained in appendices 3 and 4.

The purpose of this section is not clear and it seems repetitive.

The statement “Advertisements must comply with all requirements of the ACL in addition to compliance with these guidelines” is hidden at the end of appendix 3 and therefore may be missed. Similarly, other applicable legislation with which health practitioners are required to comply is contained in appendix 2. Putting information in appendices may suggest that it is not as important as the content in the body of the guidelines and the risk is that it will not be read, or will be missed.

Whilst we understand that material about advertising therapeutic goods may not apply to all registered health practitioners, for ease of use it would in our view be preferable to include it in the body of the guidelines.

Recommendations

- All laws relating to advertising with which a health practitioner is required to comply should be listed in one place.
- Relevant material should be included in the body of the guidelines rather than in the appendices.
- A summary of the key requirements could be included at the beginning of the section with more detail below.

Section 7 The advertising provisions of the National Law

We agree with the removal of the references to acceptable and unacceptable advertising.

Section 7.1 Information included in advertisements

There should be a heading to this section and the text below. The section states what information may be included in advertisements but does not guide practitioners as to whether it is appropriate or not.

Recommendation

We recommend that there be a statement that the information contained within the text box is appropriate for health practitioners to use. This could also be achieved simply by amending the first sentence of 7.1 to read "*Information that can be included in advertisements*"

Section 7.2.2 Gifts and Discounts and relationship with section 7.2.5

Section 7.2.2 states that "offers, gifts, prizes or free items must state the terms and conditions of the offer". On the face of this section all offers and gifts are acceptable if their terms and conditions are readily understandable and accurate.

However, section 7.2.5 states that advertising may contravene the National Law when it "...uses promotional techniques that are likely to encourage consumers to use health services regardless of clinical need or therapeutic benefit, *such as* offers or discounts, online /internet deals, vouchers, and/or coupons".

There is a potential inconsistency between the two sections as section 7.2.5 suggests that "...offers or discounts, online/ internet deals, vouchers, and/or coupons" are by definition promotional techniques that are unacceptable, whereas in section 7.2.2 they are an acceptable form of promotional technique as long as they are readily understandable.

This inconsistency has caused problems and confusion for our members, particularly in relation to the use of "Groupon" types of advertising. It is not always clear if it is acceptable or not.

With the influx of new forms of online marketing it is important for AHPRA to use this opportunity to clarify some current uncertainties in the guidelines. Members who perform aesthetic procedures are complaining that they are having to "compete" with unregulated laser or beauty clinics offering a range of offers and coupons etc. They are uncertain if and when they can offer similar deals to patients.

Recommendations

We recommend that:

- 7.2.2 and 7.2.5 be combined to make it clear that offers, gifts, coupons etc. will only be appropriate if (a) the terms are readily understandable, accurate and not misleading and (b) they do not have the effect of encouraging consumers to use health services regardless of clinical need or therapeutic benefit.
- Some examples of the type of advertising that would contravene these requirements would be very helpful. For example, is a Groupon offer for cosmetic treatment acceptable if the terms and conditions of the offer are clear?

Section 7.2.3 Testimonials

The guidance on testimonials is generally very helpful. The guidelines prohibit any form of testimonial because of the need to protect the public and the difficulty in regulating the content of such testimonials.

The practical effect however is that it often leaves practitioners powerless to respond to the growing online "ratings" blogs which can contain highly derogatory and critical assessments of doctors by patients. While practitioners can request that such comments are removed from websites it is up to the owners to decide whether to do so, and many of the more established sites are strident in their refusal to do so unless the content is explicitly defamatory. Taking action for defamation, even threatening such action, can backfire against practitioners and, in any event, is a long and expensive process.

We are receiving increasing numbers of requests for advice from our members about how they can respond to what they often perceive as unfair comments about them. These comments are often hurtful and cause significant stress to practitioners, partly because of their limited ability to respond.

It would be useful for these guidelines and the social media policy to address this issue. This could be done by means of an acknowledgment in the guidelines that this is a complex issue for practitioners and that if faced with this issue practitioners should obtain legal advice on what action they may be able to take.

There may be some confusion caused by the sentence:

"A practitioner must take reasonable steps to have any unsolicited testimonials removed."

Recommendation

As all testimonials are prohibited, we recommend that the word "unsolicited" be removed from the sentence.

Section 7.2.4 Unreasonable expectation of beneficial treatment

The use of graphic or visual representations in advertising is increasingly common especially with the increasing use of social media. Many practices and individual

practitioners have websites advertising their services, and the visual content of those websites can have a significant influence on patients and their expectations of the level of service provided and the potential outcomes of their treatment.

Having information about the use of visual representations including photographs in the appendix again risks this important guidance being not read or missed.

Recommendation

We recommend that the discussion about the use of graphic or visual representations in appendix 6 be moved to section 7.2.4. Although the section may not apply to all health practitioners, it risks being missed if placed in an appendix.

As to the content of appendix 6, the sentence that "*practitioners should not use photographs of actual patients or clients if the patient or client is vulnerable as a result of the type of treatment involved...*" is fairly vague and may be difficult to interpret in practice. What does "vulnerable" mean and what "type of treatment" is contemplated?

Appendix 6 also refers to the need for practitioners to include a warning that patients should seek a second opinion for surgical procedures from another health practitioner. The need for this statement is unclear and does not allow for the position where patients may be seeking a second opinion from that particular practitioner.

Section 8.2 Advertising qualifications and titles

The use of titles in advertising is an area of increasing concern, especially in the context of advertising specialities. We have assisted members who have been the subject of complaints by colleagues (rather than patients) over the words used in their advertising to describe their work and experience. These complaints are often indicative of "turf wars" between specialities or subspecialties.

We therefore agree with the caution contained in the guidelines about the use of the words "specialises in", and we agree with the suggestion to use words such as "substantial experience in" or "working primarily in". However the words used by a practitioner to describe their area of "substantial experience" or "primary work" can still cause difficulty if those words are contained within a specialist title.

The clear boundaries that may have existed in the past between subspecialties are in our experience becoming increasingly blurred. It may be time to reconsider the use of current specialist titles to further guide practitioners on appropriate advertising of their services.

Section 8.3 Advertising therapeutic goods

This section notes the definition of advertising contained in appendix 4. The guidelines may be more user friendly if the definition in the *Therapeutic Goods Act* were included in the body rather than in the appendix. However if it is not included in the text of the guidelines, there should be a specific reference to appendix 4 being the place where this information can be located.

4. Proposed social media policy

We agree with the approach taken in the policy that behaviour on social media is akin to any other behaviour and therefore is subject to the requirements of the Code of Conduct and National Law.

However, the policy could provide some guidance, perhaps by way of examples, about whether a certain practice would contravene the policy or other requirements of the National Law. For example, is a Facebook "like" a testimonial? Is a retweet a testimonial? If a practitioner "friends" a patient is that a violation of practitioner-patient boundaries? What is the Boards' power regarding posting "fake" positive reviews?

To meet their obligations regarding privacy, defamation and maintaining boundaries, a practitioner may need to educate themselves on features of social media relating to its permanency, how easily and how far it can spread, privacy settings, how comments can be tracked back to who originally posted it etc.

Recommendation

The policy refers to the availability of additional information from professional bodies and/or employers which aims to support health practitioners' use of social media. We recommend that the policy provide a recommendation to practitioners that they educate themselves on the use of social media and its associated issues before deciding whether and in what manner to use social media.

Above we noted the increasing numbers of requests for advice that we are receiving from our members about to how they can respond to what they often perceive as unfair comments about them on social media and websites generally. These comments are often hurtful and cause significant stress to practitioners, partly because of their limited ability to respond.

As noted above, it would be useful for the this policy and advertising guidelines to address this issue. This could be done by means of an acknowledgment in the guidelines that this is a complex issue for practitioners and that if faced with this issue practitioners should obtain legal advice on what action they may be able to take.

5. Revised guidelines on mandatory notifications

In our experience, the guidelines on mandatory notifications have been helpful to clarify the obligations of health practitioners. The decision guides in particular provide a useful practical method to guide decision-making. The proposed amendments to the guidelines further clarify health practitioners' obligations in this area.

From our experience of assisting practitioners, we have a particular concern about mandatory notifications where they are incorrectly used by other practitioners for commercial advantage, personal gain or for some motive other than protection of the public. There has in the past been some confusion regarding the threshold for mandatory reporting and we are pleased to see the amendment to the guidelines in the introduction that makes it clear that the threshold for mandatory reporting is high. Similarly the clarification regarding intoxication is helpful.

AHPRA's 2012 Annual Report reveals that the overall number of mandatory notifications increased by about 40% between 2010/11 and 2011/12 (not including NSW). Mandatory notification is serious, and can have significant consequences. Based on our experience of assisting members, practitioners should be encouraged to seek legal advice before deciding whether to make a mandatory notification under the National Law.

Recommendations

In the shaded box headed "Protection for people making a notification" we recommend that the guidelines contain a statement that practitioners should seek legal advice before deciding whether to make a mandatory notification.

We recommend that it also be made clearer that the mandatory reporting provisions should not be used because there is a difference of opinion about appropriate professional standards. Discussion about this is included at the end of section 3 of the guidelines but we suggest that it be included in a breakout box so that the reader's attention is drawn to it.

We recommend that the guidelines contain a statement that if a practitioner has concerns about whether a procedure is within accepted standards they should speak with their colleagues, college, professional indemnity insurer, or medical defence organisation (or equivalent) about it, and again, that they should seek legal advice when deciding whether or not it should be reported. There should be a reminder that the threshold in this regard is high.

The additional paragraph under the heading "What is a reasonable belief?" listing principles drawn from legal cases is legalistic and may not clarify the matter for practitioners as intended. In our view the current wording of the guidelines is a helpful summary of the situation.

Recommendation

We recommend that the highlighted paragraph not be included in the revised guidelines as in our view it does not make the concept of reasonable belief clearer for practitioners.

6. Final Comments

Both the mandatory reporting and advertising requirements should not be used as a "sword" for practitioners motivated by commercial interests rather than the protection of the public. We noted above some of our experiences assisting practitioners who have been respondents to complaints about their use of titles in advertising, and notifications which the complainants considered fell within their mandatory reporting obligations. Practitioners may subsequently be named in the media and suffer damage to their reputation as a result, and this can have a devastating effect on their personal and professional lives.

We would welcome the opportunity to meet with you to discuss with you how AHPRA and Avant can provide further guidance to practitioners about the appropriate use of titles in advertising and compliance with the mandatory reporting guidelines.

Avant contact details

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