



# Victoria Government Gazette

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## Health Professions Registration Act 2005

### GUIDELINES ABOUT THE MINIMUM STANDARDS WITH RESPECT TO THE ADVERTISING OF HEALTH SERVICES REGULATED BY THE MEDICAL PRACTITIONERS BOARD OF VICTORIA

#### Order in Council

The Lieutenant-Governor as the Governor's deputy, with the advice of the Executive Council, under section 95(1) of the **Health Professions Registration Act 2005**, issues the 'Advertising Guidelines for Registered Medical Practitioners', being guidelines about the minimum standards formulated by the Medical Practitioners Board of Victoria ('the board') and approved by the Minister for Health, with respect to the advertising of health services regulated by the board.

These Guidelines come into effect on the date of publication in the Government Gazette.

Dated 28 October 2008

Responsible Minister:

DANIEL ANDREWS  
Minister for Health

ZOE WONG  
Acting Clerk of the Executive Council

#### MEDICAL PRACTITIONERS BOARD OF VICTORIA

#### Advertising Guidelines for Registered Medical Practitioners

### 1. Introduction

The **Health Professions Registration Act 2005** ('the Act') outlines the responsibilities of the Medical Practitioners Board of Victoria ('the Board') in relation to regulation of advertising of medical services. Section 94 of the Act (see Appendix 1) states that a person must not advertise a medical practice or medical services in a manner which:

- a. is or is intended to be false, misleading or deceptive; or
- b. offers a discount, gift or other inducement to attract clients to a business providing regulated health services unless the advertisement also sets out the terms and conditions of that offer; or
- c. refers to, uses or quotes from testimonials or purported testimonials; or
- d. creates an unreasonable expectation of beneficial treatment; or
- e. directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services or medicines.

The penalty for breaches of this provision is 60 penalty units for a natural person and 300 penalty units for a body corporate.

Under section 95 (see Appendix 1) of the Act, the Board has the power to formulate guidelines about the advertising of medical services. Once approved by the Minister, the Governor in Council may issue the guidelines. Under section 96, the courts have the power to require corrective advertising.

According to the definition of unprofessional conduct, contained in section 3(1) of the Act, a contravention of section 94, or of the guidelines issued under section 95, may constitute unprofessional conduct and be investigated by the Board as a breach of professional standards.

**SPECIAL**

## 2. Purpose of the advertising guidelines (the Guidelines)

The Board recognises that it is valuable to provide information to the public about medical practitioners and the services they provide. Information provided should be reliable and useful, and facilitate consumers making an informed choice about services. Advertising can provide a means of conveying general information on the availability of services and procedures to consumers, helping them obtain a better understanding of services and options available and enabling them to make informed health care choices.

Advertising may be part of public health campaigns that provide important information about specific health risks and preventive strategies. Such campaigns, if they do not refer to the services of individual practitioners or facilities, are exempt from these guidelines.

There are risks that advertising which is false, misleading or deceptive can lead to the provision of indiscriminate or unnecessary medical services, or create unrealistic expectations about the benefits, success and safety of such services, with adverse consequences for consumers. Indeed, there is potential for inaccurate or misleading advertising of health or medical services to cause great harm to consumers, both physically and psychologically. This is particularly relevant in cases in which the consumer may be vulnerable or not sufficiently well informed to make a decision about the use of certain services.

These Guidelines have been developed by the Board to advise medical practitioners:

- of the provisions of section 94 of the Act
- how the Board interprets section 94 and
- what the Board has determined to be minimum standards of practice in relation to advertising of medical services.

These Guidelines relate specifically to medical advertising but are designed to be read in conjunction with existing consumer protection legislation (see section 5 of these Guidelines). The Guidelines aim to protect the public from advertising that is false, deceptive and misleading and provide guidance to registered medical practitioners about advertising of medical services.

Compliance with the Guidelines does not represent endorsement of an advertisement or a medical service by the Board or any government agency.

### Definition of advertising

For the purposes of these Guidelines, advertising includes but is not limited to any public communication using television, radio, motion picture, newspaper, billboard, book, list, display, the internet or directory and includes business cards, announcement cards, office signs, letterhead, telephone directory listings, professional lists, professional directory listings and similar professional notices. Importantly, this definition excludes material issued to patients during consultations where such material is designed to provide the patient with clinical or technical information about health conditions or procedures and where the patient is afforded sufficient opportunity to discuss and ask questions about the material. Also, this definition is not intended to apply to material issued by a person or organisation for the purpose of public health information or as part of a public health program.

Advertising also includes situations in which practitioners make themselves available for, or provide information to, media reports, magazine articles or advertorials. In such circumstances, practitioners are required to authorise all content contained within such articles and are responsible for all published material. The Board may view failure to take reasonable steps to control content under these circumstances as constituting unprofessional conduct.

A medical practitioner cannot devolve responsibility for the advertising of their medical services to another party. Medical practitioners are ultimately responsible for the style, content and likely inference of all advertised material associated with the provision of their medical services. Specifically, practitioners cannot delegate the responsibility for ensuring accuracy of advertising and compliance with these guidelines to an administrator, manager, director or other non-medical staff member.

The Board will not consider it a defence to an allegation of unprofessional conduct that a practitioner did not have control over the content of an advertisement. Practitioners should not make themselves available for ‘advertorials’ unless they have made explicit arrangements to approve and sign off the content and have had reasonable opportunity to ensure that the published version of the advertorial adheres to these guidelines.

### 3. Professional obligations of medical practitioners

In addition to a medical practitioner’s responsibility to adhere to the relevant statutes and common law, medical practitioners have an ethical responsibility to avoid any advertising that may be interpreted as attempting to profit from or take advantage of the public’s more limited understanding or perception of medical procedures and services. This ethical responsibility includes ensuring that any advertising does not, advertently or inadvertently, encourage the provision of unnecessary or excessive medical services or attempt to coerce or put pressure on consumers to agree to such services or in any other way attempt to exploit consumers’ vulnerability.

The Board views these matters seriously and may initiate investigations into practitioners’ professional conduct in response to a notification, or on its own motion. Practitioners are referred to the AMA publication ‘Code of Ethics’ and the Board publication ‘Good Medical Practice’ and any national code of professional conduct for further explanation about their professional responsibilities in these areas.

### 4. Consequences of breaching the Guidelines

A breach of section 94 of the Act may result in the practitioner (or a body corporate) being prosecuted in the Magistrates’ Court of Victoria and a financial penalty may be imposed. A breach of these Guidelines may also be considered evidence of unprofessional conduct or professional misconduct and may be investigated by the Board, either on its own motion or in response to a complaint or notification. When a medical practitioner is found by a professional standards panel of the Board or the Victorian Civil and Administrative Tribunal to have engaged in unprofessional conduct and/or professional misconduct in relation to advertising of medical services, the determinations that may be made under the Act include, but are not limited to, the following:

- require the practitioner to undergo counselling
- caution the practitioner
- reprimand the practitioner
- require the practitioner to undertake further education
- impose conditions on the registration of the practitioner
- impose a fine on the practitioner
- suspend or cancel the practitioner’s registration.

Breach of consumer legislation independent of these guidelines will be dealt with by relevant agencies.

### 5. Consumer legislation

All advertisements for medical services are subject to the applicable statutes and common law of the Commonwealth, States and Territories. Compliance with these Guidelines does not exempt advertisements from the application of those laws. Under federal law, the **Trade Practices Act 1974** (Cth) (‘TPA’) permits advertising unless it is misleading or deceptive or likely to mislead or deceive. As well as becoming familiar with relevant Commonwealth legislation, medical practitioners should also become familiar with the provisions of State legislation, specifically, the **Fair Trading Act 1999** (Vic.) (‘FTA’).

#### 5.1. Trade Practices Act 1974

The Australian Competition and Consumer Commission (‘ACCC’) takes action against medical practitioners who make false or misleading claims about their products or

services and profit from the desire of vulnerable people to change their appearance or improve their well-being. The ACCC is also a member of the International Marketing Supervision Network ('IMSN'), a network of law enforcement agencies in 30 countries that regularly undertakes internet sweeps to prevent and redress deceptive marketing practices that have an international component.

Medical practitioners should become familiar with this relevant Commonwealth legislation. The Board also refers medical practitioners to the publication 'Fair Treatment: Guide to the Trade Practices Act for the advertising or promotion of medical and health services' (Commonwealth of Australia, July 2000). This publication can be accessed on the ACCC's website at <http://www.accc.gov.au/fs-pubs.htm>.

## 5.2 Fair Trading Act 1999

In Victoria, Consumer Affairs Victoria administers the **Fair Trading Act 1999**.

The sections most relevant to advertising are:

- section 8 addressing unconscionable conduct and
- sections 9–12 and 106A addressing misleading or deceptive conduct and false representations.

These provisions mirror those contained in the **Trade Practices Act 1974**.

The FTA refers to the substantiation of claims, unconscionable conduct and misleading and deceptive conduct, including false representation in relation to goods and services.

Consumer Affairs Victoria has also published information brochures entitled 'Compliance and Enforcement Policy' and 'Vulnerable and Disadvantaged Consumers', both of which contain relevant information regarding the advertising of medical services and penalties for breaches of the FTA.

## 6. General guidelines

Medical practitioners should always consider their professional ethical obligations when advertising medical services. They should always consider how members of the public will receive their advertisement and be mindful that some consumers may have particular vulnerabilities in relation to the advertising and provision of medical services.

When advertising a medical service a registered medical practitioner should ensure that he or she is competent by reason of his or her education, training and/or experience, to perform the medical service advertised or to act in the manner or professional capacity advertised.

The medical practitioner must state clearly their professional qualifications. Credentials and a practitioner's expertise in a particular field should be clear to the public. A medical practitioner whose registration has not been endorsed as a specialist under section 27 of the Act must not claim or hold him or herself out to be a specialist, either explicitly or by implication, or attempt to convey that perception to the public.

Medical practitioners must be certain that they can substantiate any claims made in advertising material, particularly in relation to outcomes of treatment, whether implied or explicitly stated. Unless there is accepted scientific evidence that there are no risks at all, an advertisement for medical services should alert the public to the fact that there are health risks associated with the treatment.

In determining whether an advertisement is misleading, or whether it creates an unreasonable expectation of beneficial treatment, or directly or indirectly encourages the indiscriminate or unnecessary use of medical services or medicines, the Board will consider the overall impression of the advertisement and the likely impact the advertisement may have on a member of the public. Specifically, the Board will consider what conclusions a member of the public can reasonably infer from material contained within an advertisement and whether the material is likely to mislead or deceive either directly or by omission. Qualifiers or disclaimers should be displayed obviously, rather than contained in fine print.

### 6.1 What is acceptable advertising?

The main purpose of advertising of medical services is to present information that is reasonably needed by consumers to make an informed initial decision about the availability and suitability of medical services offered.

It is important to note that any initial decision by a consumer in this respect does not substitute for informed consent and does not remove the obligation on a practitioner to obtain informed consent.

Advertising used to inform the public of the availability of medical services will be considered acceptable to the Board if it is information published in the public interest, and is factual, honest, accurate, clear, verifiable and not misleading. As such, advertising may contain:

- a. a factual and clear statement of the service(s) and/or any product(s) offered
- b. contact details of the office of the medical practitioner, including e-mail or website addresses and telephone numbers
- c. a statement of office hours regularly maintained by the medical practitioner and the availability of after hours services
- d. non-enhanced photos or drawings of the medical practitioner or his/her office
- e. advice on the availability of wheelchair access to any premises to which the advertisements relate
- f. a statement of any language(s) other than English fluently spoken by the medical practitioner or another person in his/her office
- g. a statement about fees charged, bulk billing arrangements or other insurance plan arrangements and instalment fee plans regularly accepted
- h. a statement of the names of schools and training programs from which the medical practitioner has graduated and the qualifications received, subject to guideline 7.3
- i. reference to any medical specialties approved by the Board under section 27 of the Act
- j. a list of the medical practitioner's publications in peer-reviewed journals
- k. a statement of the teaching positions currently or formerly held by the medical practitioner in AMC accredited institutions, together with relevant dates
- l. a statement of the accreditation or certification of the medical practitioner with a public board or agency, including any affiliations with hospitals or clinics and
- m. any statement providing public health information encouraging preventative or corrective care.

### 6.2 What is unacceptable advertising?

This section of the Guidelines is intended to provide a clear indication of the type of advertising of medical services that the Board considers to be unacceptable. Where examples are provided they are intended to assist medical practitioners to comply with the advertising provisions. They are not intended to be exhaustive.

To comply with the Act and these Guidelines, advertising of medical services must not:

- a. create or be likely to create unwarranted and unrealistic expectations about the effectiveness of the medical services advertised
- b. directly or indirectly encourage inappropriate, indiscriminate, unnecessary or excessive use of medical services. For example, the Board considers that references to a person improving their physical appearance and the use of

phrases such as ‘don’t delay’, ‘achieve the look you want’, ‘looking better and feeling more confident’ have the potential to create unrealistic expectations about the effectiveness of certain medical services and encourage unnecessary use of medical services

- c. mislead either:
- directly
  - by implication
  - through emphasis
  - by comparison
  - by contrast, or
  - by omission
- d. use testimonials or purported testimonials
- e. compare different medical services
- f. claim that a particular medical service is better or safer than another
- g. refer to the recovery time following provision of a medical service
- h. lead to, or be likely to lead to inappropriate self-diagnosis or self-treatment
- i. abuse the trust or exploit the lack of knowledge of consumers
- j. fail to disclose that there are health risks associated with the treatment
- k. omit the necessary warning statement (see paragraph 7.2)
- l. contain language that could cause fear or distress
- m. contain any information or material which is likely to make a person believe his or her health or well-being may suffer from not taking /undertaking the medical service
- n. contain price information that is inexact or fails to specify any conditions or variables to an advertised price (see paragraph 7.4), or offers time limited discounts or inducements
- o. contain any claim, statement or implication:
- either expressly or by omission, that the treatment is infallible, unfailing, magical, miraculous, a certain, guaranteed or sure cure
  - that a medical practitioner has an exclusive or unique skill or remedy, or that a product is ‘exclusive’ or contains a ‘secret ingredient’
  - that a medical practitioner provides superior services to those provided by other medical practitioners
  - that the results of the medical service offered are always effective or
  - that the medical services can be substituted for public health vaccination or immunisation
- p. purport to fully inform the public of the risks of undertaking a medical procedure or to replace the process of informed consent
- q. provide a consumer with a pre-set appointment time which has not been requested by the consumer
- r. promote tobacco products, smoking or alcohol or any other addictive substances or products that are known to adversely affect health and
- s. be vulgar, sensational or likely to bring the profession into disrepute.

## 7. Specific guidelines

### 7.1 Use of graphic or visual representations

Medical practitioners should use any graphic or visual representations in medical or surgical advertising with caution. This includes photographs of patients or models, diagrams, cartoons or other images. If photographs of people are used in advertising the photographs must only depict patients who have actually undergone the advertised treatment and who have provided consent for publication of the photograph.

The Board considers that use of 'before and after' photographs has a significant potential to be misleading or deceptive, to convey to a member of the public inappropriately high expectations of a successful outcome and to encourage the unnecessary use of medical services. If before and after photographs are used, care must be taken to ensure the public can trust the truthfulness of the images. For example by:

- providing images that are as similar as possible in content, camera angle, background, framing and exposure
- ensuring consistency in clothing and make up
- ensuring consistency in lighting and contrast
- acknowledging whether photographs have been altered in any way, and
- acknowledging that the procedure being referred to is the only change that has occurred for the person being photographed.

### 7.2 Use of warning statements

Where a surgical (or 'an invasive') procedure is advertised directly to the public, thus bypassing the usual gate-keeping and referral role of the general practitioner, the advertisement should include a clearly visible warning, with text along the following lines:

'Any surgical or invasive procedure carries risks. Before proceeding, you should seek a second medical opinion.'

The text must not be in small print or an obscure position in the advertisement.

### 7.3 Comparative advertising

Medical practitioners should use comparative advertising responsibly. Since it is difficult to include all required information to avoid a false or inaccurate comparison being made, comparing one medical service with another risks misleading the public. Practitioners need to avoid making unsubstantiated claims, refrain from deriding or otherwise criticising the services offered by another practitioner or making sensational statements which cannot be corroborated.

### 7.4 Advertising of qualifications and titles

A medical practitioner should state clearly their professional qualifications. Credentials and a practitioner's expertise in a particular field should be clear to the public.

It is an offence under section 80 of the Act for an unregistered person to claim or hold himself or herself out to be a registered medical practitioner. It is also an offence under section 80 of the Act for a medical practitioner to hold him or herself out to be a specialist, either explicitly or by implication, or attempt to convey that perception to the public unless his or her registration has been endorsed under section 27 of the **Health Professions Registration Act 2005**.

A person who has completed a doctorate in a field other than medicine, who does not otherwise hold a medical qualification and who advertises medical services must clearly state in any advertisement that he or she is not a registered medical practitioner under the Act.

Advertising qualifications or memberships may be useful in providing the public with information about experience and expertise, but may be misleading or deceptive if consumers can readily interpret the advertisements to imply that the practitioner is more skilled, or has greater experience than is the case.

To ensure that the public is not misled by the advertisement of qualifications and titles, medical practitioners, upon inquiry, should simply and accurately explain the:

- professional standing of the qualification
- nature of the awarding body and
- requirements of the qualifying course.

The Board considers that consumers are best protected when practitioners advertise only qualifications that have been awarded by institutions accredited by the Australian Medical Council (AMC). A list of AMC accredited qualifications appears on the Board's website at [www.medicalboardvic.org.au](http://www.medicalboardvic.org.au).

#### **7.5 Advertising price information**

Information in medical advertising about the price of procedures must be clear and not misleading.

The Board considers that it is generally difficult to provide an accurate price of a medical service in an advertisement due to the personal nature of medical services and the number of variables involved in the treatment of each patient. The Board considers that medical practitioners should be very careful when including price information in medical advertising due to the significant potential for such information to mislead or encourage the unnecessary use of medical services.

If fees and price information are to be advertised, then prices for products and price information should be exact, with all fees for services, prices for products and price information clearly identifiable and any conditions or other variables to an advertised price or fee disclosed. Prices for advertised products should include fees for related professional services and other applicable price information unless the advertisement clearly states otherwise.

The Board advises against using phrases like 'as low as' or 'lowest prices' or similar words or phrases when advertising fees for services, prices for products or price information or stating an instalment amount without stating the total cost.

Medical practitioners should not compensate or give anything of value to a representative of the press, radio, television or other communication medium for professional publicity unless the fact of compensation is made known publicly. Time limited and special offers must not be advertised.

#### **7.6 Use of gifts or discounts in advertising**

The Board does not support the use of gifts or discounts in advertising due to the potential for such inducements to encourage the unnecessary use of medical services. A medical practitioner must not use a discount, gift or any other inducement to attract consumers to a medical service unless the offer is truthful and the terms and conditions of that offer are set out clearly in the advertisement.

#### **7.7 Use of endorsements in advertising**

The Board does not support the provision of endorsements by medical practitioners in advertising of health related services such as pharmacies, nursing homes, private clinics and private hospitals, or products including pharmaceuticals and complementary health products, or particular brands of medical equipment. This is due to the potential for such endorsements to be misleading. However, when a medical practitioner chooses to endorse a health related product or service, the following apply:



- An endorsement should be based on an objective assessment of available scientific data supporting the use of the product or services
- When an advertisement contains or implies an endorsement by bodies or associations that:
  - represent the interests of consumers
  - conduct or fund research into a disease, condition, disorder or syndrome, or
  - represent healthcare professionsthen:
  - the body or association should be named
  - the endorsement should be authenticated and formally authorised by the body or association
  - the nature and limits of the endorsement should clearly be specified, and
  - when the body or association has received payment or valuable consideration for the endorsement, the advertisement must acknowledge that consideration or payment.

#### 7.8 Use of scientific information

The Board encourages caution in the use of scientific information in medical or surgical advertising. When a practitioner chooses to use scientific information, the following apply:

Scientific information in an advertisement should:

- be presented in a manner that is accurate, balanced and not misleading
- use terminology that is readily understood by the audience to whom it is directed
- clearly identify the relevant researchers, sponsors and the academic publication in which the results appear, and
- be from a reputable and verifiable source.

#### 8. Conclusions

The Board reminds all medical practitioners of their legal and ethical responsibilities in providing the public with clear and accurate information about the availability of medical and surgical procedures and services. Practitioners are also reminded that the public may have limited understanding of many aspects of these services and may be vulnerable as a result. Medical advertising is therefore required to conform with these Guidelines so as to safeguard the public.

Failure to adhere to the Guidelines may be investigated by the Board (either in response to a notification or on its own motion) and may constitute unprofessional conduct and/or professional misconduct.

The Board cannot give legal advice or opinion and cannot 'vet' advertisements.

Medical practitioners should seek advice from their medical defence organisations before placing advertisements.

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**Definitions**

In these Guidelines:

**'Act'** means the **Health Professions Registration Act 2005**

**'Board'** means the Medical Practitioners Board of Victoria

**'Guidelines'** means the Guidelines developed by the Board and issued by the Governor in Council on the recommendation of the Minister pursuant to section 94 of the Act

**'medical services'** includes surgical services and all other aspects of medical practice including the sale of medical products

**'photograph'** in relation to the advertising of medical services includes images, graphic or other visual representations or facsimiles

**'registered medical practitioner'** has the same meaning as in the **Health Professions Registration Act 2005**

**'visual representations'** includes photographs

**Appendix 1:**

Section 94 of the **Health Professions Registration Act 2005** is as follows:

- (1) A person must not advertise a regulated health service or a business providing regulated health services in a manner which —
  - (a) is or is intended to be false, misleading or deceptive; or
  - (b) offers a discount, gift or other inducement to attract clients to a business providing regulated health services unless the advertisement also sets out the terms and conditions of that offer; or
  - (c) refers to, uses or quotes from testimonials or purported testimonials; or
  - (d) creates an unreasonable expectation of beneficial treatment; or
  - (e) directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services or medicines.

Penalty: 60 penalty units in the case of a natural person and 300 penalty units in the case of a body corporate.

- (2) If a body corporate contravenes sub-section (1), an officer, within the meaning of section 9 of the Corporations Act, of the body corporate who was, in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence also commits an offence under sub-section (1) and is liable for the penalty applicable to a natural person for that offence.
- (3) A person who, in good faith, publishes or prints an advertisement which contravenes sub-section (1) on behalf of another person, is not guilty of an offence under that sub-section.

Section 95 of the **Health Professions Registration Act 2005** is as follows:

- (1) The Governor in Council may, on the recommendation of the Minister, by notice published in the Government Gazette, issue guidelines about the minimum standards formulated by the responsible board and approved by the Minister for or with respect to the advertising of regulated health services.
  - (2) The responsible board must consult with any person nominated by the Minister in formulating guidelines for the consideration of the Minister.
  - (3) The responsible board must ensure that any guidelines that it has formulated for approval of the Minister have been notified with a request for public comment in the Government Gazette, a newspaper circulating generally throughout Victoria and in any professional magazine, newsletter or journal circulating amongst health practitioners regulated by that board in Victoria at least 60 days before the guidelines are forwarded to the Minister for consideration.
  - (4) The responsible board must have regard to any comments received in response to a notice under this section in formulating guidelines for the approval of the Minister.
  - (5) The responsible board must have regard to any guidelines issued by the Governor in Council under this section.
  - (6) A court may have regard to any guidelines issued by the Governor in Council under this section.
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