



Reproductive Technology Accreditation Committee

TECHNICAL BULLETIN 7

PUBLIC INFORMATION, COMMUNICATION AND ADVERTISING AUSTRALIAN CLINICS

April 2017

From time to time RTAC will become aware of issues, questions or comments where it may consider assisting units enhance the quality of their service to patients. A Technical Bulletin is an educational communication to all units, and Bodies certifying units to the RTAC Code of Practice, offering advice and guidance. It is not normally enforceable unless also incorporated into the Code of Practice.

BACKGROUND

In 2014 the Australian Health Practitioner Regulation Agency (AHPRA) released “Guidelines for Advertising Regulated Health Services” and a “Social Media Policy” clarifying section 6.2.3 of the *Guidelines for advertising regulated health services* under the Health Practitioner Regulation National Law. In 2015 RTAC developed Technical Bulletin 7 taking advice from the Fertility Society of Australia Board and the FSA IVF Directors Group, to assist units in maintaining compliance with the Health Practitioner Regulation National Law. In 2015 and 2016, the Fertility Society of Australia Board has been in discussion with the Australian Competition and Consumer Commission (ACCC) in relation to obligations set out in Australian consumer law (see Appendix).

SUGGESTED BEST PRACTICE GUIDELINES IN ACCEPTABLE SUCCESS RATE ADVERTISING AND INFORMATION PROVISION

The below guidelines apply to advertising in all forms, not limited to the unit's own website or social media platforms but also those of registered health practitioners delivering ART services for the unit.

- Advertised success rates should be divided by age group. The age groups must reflect the age grouping used in ANZARD data (i.e. < 30; 30-34; 35-39; 40-44 and ≥ 45 at start of treatment cycle), and not some other age grouping.

- Advertised success rates should specify live birth rates for fresh and frozen embryo transfers separately. Use of clinical pregnancy rates in advertised success rates may be permissible provided that the live birth rates are also available for comparison on the same webpage or similar social communication. In addition, the context must clarify to the consumer that the live birth rate is the more meaningful outcome for the patient.
- The advertised success rates must be accompanied with the following clarifying information: the time period during which the advertised data was collected and unambiguous details of the population group from which they are derived (e.g. whether they relate to IVF, ICSI, PGS/PGD or FET, and age group)
- Cumulative success rates may be published provided that their mode of calculation is clearly explained in clear language.
- A qualifying statement of broad factors that affect success rates e.g. age, weight, and cause of infertility, must accompany any statement of clinic success rates, wherever appearing.
- There must be a statement accompanying success rates that not every treatment cycle will result in an egg collection, an embryo transfer or embryos to freeze.
- Reference and/or hyperlink to the FSA statement on “Interpreting Pregnancy Rates: a consumer guide” must be included whenever success rates are provided.
- The use in advertising of any technical terms such as ‘clinical pregnancy’ and ‘live birth’ where it may not necessarily match an ordinary meaning of the words has the potential to mislead unless it is defined in a meaningful way. Any clarification should be clear and prominent and not hidden in a disclaimer.
- Media announcements of scientific or clinical “breakthroughs” in the field of ART should only be made after a peer review process such as acceptance of an abstract for a scientific meeting or a manuscript publication in an appropriate scientific journal. Such announcements should be in language that can be understood by the lay public and ensure the overall conclusion is not misleading in any way.
- Units should have appropriate governance in place to ensure that all public information, communication and advertising comply with the requirements of the Australian Consumer Law, as well as AHPRA and ACCC guidance as in (<https://www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-statements>) and these recommendations. Specifically, marketing departments and consultancies should be made aware of these requirements and only release information to the public domain once its accuracy is verified and approved by the Medical Director.
- RTAC, the FSA, and the IVF Directors Group are developing standardised patient groups for the publication of ART success rates. When complete they will be notified through a circulated update to this Technical Bulletin at which point their use in information and promotional material which references success rates will become mandatory and they will be incorporated into the RTAC Code of Practice.

UNITS ARE CAUTIONED AGAINST MAKING REPRESENTATIONS OF THE FOLLOWING KIND, WHICH MAY CONTRAVENE THE AUSTRALIAN CONSUMER LAW

The below cautions apply to advertising in all forms, not limited to the unit's own website or social media platforms but also those of registered health practitioners delivering ART services for the unit.

- Average or overall success rates not separated by age group. The age groups must reflect the age grouping used in ANZARD data (i.e. < 30; 30-34; 35-39; 40-44 and ≥ 45) at start of treatment cycle, and not some other age grouping.
- Success rates without details of the population group from which they are derived (e.g. whether IVF, ICSI, PGS/PGD or FET, and age group).
- Statements of success rates which lack appropriate explanation or details of the population group from which they are derived or which do not make it sufficiently clear that individual results will vary with individual circumstances.
- Selectively reporting data of certain subgroups to the exclusion of other subgroups that are relevant for the whole patient population (e.g. only reporting the success rates of the age group 30-34 years).
- Actual or purported patient testimonials. This is particularly important if clinics use social media in their promotion. AHPRA takes the view that the control of the content of a social media site is held by the social networking account even if the account holder did not make the comment. Similarly, units or doctors should not share or re-tweet patient comments on social media that promoted their practice or service.
- Comparison of a clinic's results with public databases has the potential to be misleading and provide incorrect or inaccurate information to patients due to their derivation from differing patient populations. Comparative data must only be used when the statistical methods used to derive the clinic's data can be shown to be very similar or identical to the publicly available data sets (such as ANZARD). The comparisons must be of an equivalent time frame. Comparative data fields would include age distribution, cycle number, number of oocytes collected, PGS status, blastocyst versus cleavage stage transfer, embryo transfer numbers, cause of infertility and proportion of freeze all cycles as well as any other confounding factors which may affect outcomes in a particular group of patients which are collected in the publicly accessible databases. Comparative data advertising which does not meet these standards is considered to be potentially misleading or inaccurate and not in the best interests of patients.

MAKING A COMPLAINT REGARDING INFORMATION, COMMUNICATION OR ADVERTISING

1. Directly to the Medical Director of the Alleged Noncompliant Clinic

In the consensual and collegiate manner in which the FSA has evolved, the Medical Director of a clinic identifying an alleged breach of these guidelines by another clinic is encouraged to communicate directly with the Medical Director of that clinic with a view to resolving the issue.

2. To Australian Health Professional Registration Agency (AHPRA)

A complaint to AHPRA is known as a "*notification*". Notifications of proposed breaches by registered health practitioners of AHPRA's Guidelines should be made to AHPRA which manages the notifications on behalf of the National Boards.

A concern about a registered health practitioner and/or unit can be lodged with AHPRA:

- by calling 1300 419 495;
- by completing a notification form available from the AHPRA website (www.ahpra.gov.au) and submitting it by post; or;
- in person at an AHPRA office.

Any RTAC accredited unit receiving a notification from AHPRA of a complaint in relation to advertising by the ART clinic or one of its registered health practitioners must advise the Chair of RTAC to enable monitoring of complaints by RTAC.

3. To the Australian Competition & Consumer Commission (ACCC) or state-based Department of Fair Trading

A report about potentially unlawful behaviour by a registered health practitioner and/or an ART clinic may be lodged with ACCC or Department of Fair Trading as a personal complaint or a business complaint. Mechanisms for lodging both forms of complaint may be found on the ACCC website and state/territory based Department of Fair Trading Websites:

- www.accc.gov.au

Any RTAC accredited unit receiving a notification from the ACCC or a Department of Fair Trading of a complaint in relation to advertising by the ART clinic or one of its registered health practitioners must advise the Chair of RTAC to enable monitoring of complaints by RTAC.

Consequences of Non-Compliance

In the case of continued non-compliance with applicable law after action has been taken by a Federal (or in the case of the Department of Fair Trading, state/territory based) body, RTAC through the Board of the FSA reserves the right to suspend the licence of the clinic.

APPENDIX

Brief summary of relevant provisions of the *Australian Consumer Law (ACL)*

WARNING: These notes are provided for convenience only and are not intended to be an exhaustive summary of the Australian Consumer Law. Units should ensure that they are familiar with all the provisions of the Australian Consumer Law as they apply to their individual businesses, not just those which are outlined briefly below. Units should seek individual legal advice to ensure that they comply with all provisions of the Competition & Consumer Act 2010, including all of the Australian Consumer Law.

Under the ACL, it is unlawful for a business or person to make statements in trade or commerce that are misleading or deceptive or are likely to mislead or deceive.

It is also unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply or promoting those goods or services. This includes (among other things) false representations that goods or services are of a particular standard, false representations regarding testimonials, false representations that goods or services have sponsorship, approval, performance characteristics etc that they do not, among other matters.

Any statements made by clinics promoting their services should be true, accurate and able to be substantiated. It does not matter whether a false or misleading statement was intentional or not.

The ACCC, the state and territory consumer protection agencies, consumers and other businesses can all take legal action against businesses and individuals for contraventions of the ACL.

Misleading or deceptive conduct and/or false or misleading representations may result in various different court-ordered remedies including payment of penalties or fines, injunctions, declarations, damages, compensation orders, disqualification orders, orders for non-party consumer redress and non-punitive orders. The Australian Competition & Consumer Commission may also issue infringement notices requiring the payment of a penalty in lieu of proceedings and may also issue public warning notices. It also has power to accept court-enforceable undertakings.

Ultimately only a court of law can determine if the business in question has breached a provision of the ACL.

What claims are illegal?

It is illegal for a clinic to make statements that are incorrect or likely to create a false impression. For example, a clinic must not make false or misleading claims about the quality, value, price, or benefits of their goods or services. Using false testimonials or 'passing off' (impersonating another business) is also illegal.

When assessing whether conduct is likely to mislead or deceive, clinics should consider whether the overall impression created by the conduct is false or inaccurate.

Comparative advertising

Comparative advertising may be used to promote the superiority of a clinic's products or services over competitors as long as it is accurate. The comparison may relate to factors such as price, quality, range or volume. (<https://www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-statements>)

Fine print and qualifications

Clinics should not rely on small print and disclaimers as an excuse for a misleading overall message.

If a clinic needs to qualify a representation, they should make sure the qualifying statements are clear and prominent so that consumers can make an informed decision about without the need to refer to information elsewhere.

What you should do in advertising

When presenting information about products or services to customers, be sure to:

- give current and correct information,
- use simple language,
- check that the overall impression is accurate,
- back up claims with facts and documented evidence where appropriate,
- note important limitations or exemptions,
- correct any misunderstandings,
- be prepared to substantiate.