

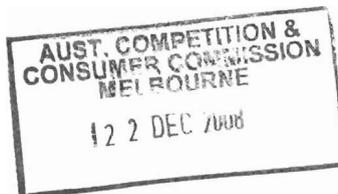


Department of Human Services

Incorporating: Health, Community Services, Mental Health, Senior Victorians and Housing

50 Lonsdale St
GPO Box 4057
Melbourne Victoria 3001
DX210081
www.dhs.vic.gov.au
Telephone: 1300 650 172
Facsimile: 1300 785 859

18 DEC 2008



OUR REF: e1412859

YOUR REF: TRACKIT 35146

Mr Gavin Jones
Director
Adjudication Branch
Australian Competition & Consumer Commission
GPO BOX 520
MELBOURNE 3001

FILE No:
DOC:
MARS/PRISM:

Dear Mr Jones

Thank you for your letter of 14 November 2008 to Ms Fran Thorn, Secretary to the Department of Human Services about an application from the Australasian College of Cosmetic Surgery (the College) for authorisation. The Department welcomes the opportunity to provide comment in relation to the Australian Competition & Consumer Commission (ACCC) about the College's Code of Practice and parts of its By-laws.

As you would appreciate, industry Codes of Practice are generally used to establish specific expectations or standards in relation to the conduct of a practitioner or business and, importantly, how that practitioner or business should deal with consumers. In the case of the health care industry, where there are no specific regulatory standards governing conduct, practice or expertise of a specific practitioner group, voluntary Codes of Practice often play a particularly important role. They help to ensure the protection of patients in situations where typically there is a significant power imbalance and asymmetry of information between the patient and the practitioner. The patient is often in a vulnerable position relying upon the knowledge and skills of the practitioner. As a consequence, the safety and well being of patients is of paramount importance to this Department and it is in that context that a review of the Code of Practice and parts of the by-laws has been conducted. Set out in the attachment are the Department's concerns in relation to a number of clauses in the Code. Those concerns are heightened because of the nature of the application that has been made to the ACCC.

I trust that the information provided will be of value to you in your deliberations.

Yours sincerely

Peter Allen
Under Secretary
Portfolio Services & Strategic Projects

Advertising

At the outset, the Code of Practice explains that "in addition to any State, Territory or Federal legislative requirements and professional medical relevant guidelines, the College requires all its Fellows and Members to adhere to strict guidelines...".

However, a number of the clauses of the Code that relate to advertising do not, in the Department's view, accord with the *Advertising Guidelines for Medical Practitioners* issued by the Medical Practitioners' Board of Victoria. Further, there are particular clauses, for instance, Clause 5 which refers to the use of testimonials, which appear to be in breach of Section 94 of the *Health Professions Registration Act 2005*.

Cosmetic surgery could be considered a high risk area of medicine given the potential for it to attract those patients who may be psychologically vulnerable. As a consequence, the nature of the information conveyed to patients and how that information is conveyed is of significant importance. In that regard, Clause 9 of the Code of Practice presents some concern. First, it needs to be understood that the Members or Fellows of the Australasian College of Cosmetic Surgery may not be what the general public would understand to be 'medical specialists'. This is because these Members or Fellows may not be trained as surgeons by the Royal Australasian College of Surgeons, which is the only recognised trainer of surgeons in Australia. It is highly likely that the general public would not understand this distinction and thereby assume that being a Member or Fellow of the Australasian College of Cosmetic Surgery is indicative of specialist surgical training in a discrete area of plastic surgery.

Guidelines for informed consent

Clause 10 of the Code of Practice states that

No procedure should take place unless the Member has interviewed the patient beforehand and has fully explained to the patient the procedures and any associated risks.

However, this is incongruous with Clause 13 of the Code of Practice that explains that the guidelines for informed consent refer to "invasive procedures which have a significant risk of an adverse long terms outcome".

The Department is of the view that the prudent course of action for cosmetic surgeons is to consult with a patient and obtain that patient's informed consent prior to any procedure, and that the surgeon takes reasonable care to ensure the patient understands the proposed action and associated material risks. It is important to ensure that 'associated material risks' include consideration of the material risks associated with anaesthesia and sedation. The High Court of Australia has held that a risk is material if, in the particular patient's circumstances, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it, or if the practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

The Department is also of the view that a patient's consent must be confirmed in writing prior to the proposed surgery or procedure. To this end, while the Department supports paragraphs 13.5, 13.6, 13.7 and 13.9 of the Code of Practice, the suggestion made in Clause 13.2 that a cosmetic surgeon may examine photographs of a patient, and subsequently consults with that patient by telephone, is somewhat concerning. Given the potential vulnerability of patients that seek the services of a cosmetic surgeon, the Department believes that it is not appropriate for any consultation to be based upon photographs and a telephone conversation, even if it is considered to be 'the initial consultation'.

Informed financial consent

Clause 13.2 raises another point of concern – that being the issue of a patient’s informed financial consent. As with all medical procedures, the Department maintains that for a patient to be able to decide whether or not to undergo a procedure, being fully apprised of all financial costs (including any fees that may be charged by other practitioners involved in the procedure such as anaesthetists) is just as important as being fully informed about the procedure itself and its associated material risks. This is particularly important in relation to cosmetic surgery procedures as neither Medicare nor private health insurers provide any financial assistance to patients. It is concerning that the Code of Practice does not provide any instruction about the need to provide patients with comprehensive advice about fees and charges prior to the procedure being undertaken, especially when this is a basic expectation of all medical practitioners.

Clause 13.8 of the Code of Practice provides for a ‘cooling off period’. To ensure that patients are given sufficient time to consider all of the information provided – both about the procedure and any associated material risks and the likely full cost of the procedure - the Clause should be tightened to require the mandatory implementation of a cooling off period.

The Department is also concerned about Clause 13.4 in which it is stated that “the doctor must inform the patient if he or she has performed the procedure less than 100 times”. However, more important than the number of times that a procedure has been performed is that there is a mechanism in place to ensure an independent assessment of the practitioner’s competence and outcomes of the procedure. That is what a patient should be informed of, rather than how many times a procedure has been conducted.

Immediate post-operative care

It is of concern to the Department that the Code of Practice does not set out any expectations about the cosmetic surgeon’s role in the immediate post-operative care of a patient. It is imperative that the cosmetic surgeon undertakes full responsibility to ensure the adequate and appropriate care of a patient post-operatively. Further, it is incumbent upon the cosmetic surgeon to ensure that emergency protocols are established for the appropriate care and, if necessary, transfer of the patient to a public or private hospital in an emergency.

Provision of services in safe settings

Comparable services to the invasive procedures performed by cosmetic surgeons are generally performed in regulated settings such as private hospitals and day procedure centres. If the Australasian College of Cosmetic Surgery is supportive of its Members or Fellows continuing to perform invasive procedures, then it would be prudent for the College to encourage, if not mandate, that those procedures only be conducted in regulated settings and not in the cosmetic surgeon’s rooms.

This would ensure that patients are treated and cared for in appropriate settings under the care of appropriately trained nurses. Further, such settings would ensure that appropriate emergency protocols are in place and that sterilisation procedures, including the use of appropriate sterilisation procedures for the types of instruments used, accord with AS/NZ Standard 4187.