

Managing negative online reviews

Considerations for doctors



CPD 

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Background

In an increasingly digital world, particularly with the rapid rise in the use of telehealth, online reviews from members of the public regarding clinician performance are becoming more ubiquitous.

Objective

This article considers the measures clinicians can take to manage unwanted negative online reviews. While this is a complex area, the aim of this article is to provide a starting point and overview of practical responses clinicians may consider.

Discussion

When faced with negative online reviews, clinicians need to be mindful of the way in which they respond from a confidentiality and privacy perspective, and to consider practical manners in which they can respond, incorporating legal and ethical considerations, as well as activation of professional and personal supports.

IN AN INCREASINGLY DIGITAL ENVIRONMENT,

clinicians may find themselves subject to negative online reviews. This occurs in a number of contexts, arguably often when a difference of perception between clinicians and patients exists in respect to clinical events and standard of care. Under certain circumstances, constructive reviews, even if critical, can provide an impetus to reflect and improve practice. This is consistent with learnings from the patient advocacy movement, which promoted patient participation in their healthcare decision making and feedback.¹ However, negative online reviews may be disproportionate, unreasonable or malicious. Such reviews may have significant ramifications for a clinician's reputation, medical practice and wellbeing.

This article articulates a number of practical considerations and options available to clinicians who find themselves the recipients of negative online reviews.

Confidentiality and privacy

When confronted by negative online reviews, clinicians need to be aware that they remain subject to standard ethical principles and laws governing patient confidentiality. For this reason,

responding to negative online reviews should be done with caution. Any discussion of a patient in a forum accessible by others may breach patient confidentiality, generating complaints to the Australian Health Practitioner Regulation Agency (AHPRA), the Office of Australian Information (and Privacy) Commissioner and/or relevant state- and territory-based privacy commissioners. Clinicians should be aware of AHPRA's *Guidelines for advertising a regulated health service*,² which supplement legislation prohibiting certain advertising practices, to ensure any responses are not in breach. It is important to realise that information not usually identifiable in isolation may become so in combination with data that have already been shared, such as the individual's suburb and first name.

When faced with a negative online review, it may be challenging to identify the author. One approach is to contact the platform that hosts the review and, if appropriate based on the terms of use, request that the online review be removed. This may be challenging to accomplish, particularly if the platform is based offshore and thus subject to a foreign jurisdiction's laws and regulations.

Negative online reviews may constitute defamation, and other legal and practical remedies may be pursued.

Defamation proceedings

A number of recent successful defamation cases involving negative online reviews or negative comments regarding Australian clinicians on social media platforms have resulted in substantial damages orders. In *Dean v Puleio*, a Melbourne dentist was awarded \$170,000 as compensation for defamatory reviews;³ in *Webster v Brewer*, a larger figure was awarded to a general practitioner who was subject to baseless publications asserting involvement in a criminal network;⁴ and in *Tavakoli v Imisides*, \$500,000 was awarded to a surgeon after a patient's defamatory review asserted incompetence and cruelty, resulting in a 25% decrease in visitors to his website.⁵ Adversaries in such proceedings may not necessarily be patients and clinicians – in the case of *Khoury v Kirwan*, defamation was claimed by a surgeon against another surgeon.⁶

Defamation law is complex, and professional legal representation is strongly recommended. An unsuccessful party may be required to cover the legal costs of both parties to the proceedings. Doctors should note and weigh the fact that legal action may generate additional publicity regarding the initial negative online publication and result in a broader audience becoming aware of the publication. This can lead to an associated risk of increased negative public perception. The law surrounding defamation consists of common (judge-made) law as well as uniform defamation law that has operated throughout Australia since 1 January 2006.⁷

In the context of a rising number of defamation cases (including perceived trivial actions) and high-damages payouts, amendments to the uniform defamation law occurred through the *Defamation Amendment Act 2020*. As of 1 July 2021 these amendments have been passed by New South Wales, Queensland, South Australia and Victoria, with planned amendments underway in other jurisdictions. A key change is the inclusion of a 'serious harm threshold', requiring that the publication of the defamatory material has caused, or is likely to cause, serious harm to the reputation of the

person.⁸ Satisfaction of this threshold can be determined by a judge before the trial.

Civil actions for defamation are relatively rare and involve establishing three key elements: 1) that the communication has been published to a third person, including an internet audience; 2) that the communication identifies the doctor; and 3) that the communication is defamatory, in that it would cause an ordinary reasonable person to think the doctor's reputation diminished, or cause them to avoid the doctor. A negative online review may incorporate a number of imputations, and the meaning and implication of each will need to be carefully mapped. In practice, it may be difficult to identify the author of a negative comment, which is a necessary early step in bringing a defamation case. Websites may not disclose reviewer details on request, although they may on court order. Possible outcomes of legal proceedings can include financial compensation, removal of a review or publication of a retraction or apology.

Among the range of possible defences, the most likely to be put forward by a review writer's legal representative are those of 'truth' and 'honest opinion'. The defence of truth requires the reviewer to have firsthand knowledge of the issue and be able to prove that the particular imputation was substantially true. The defence of honest opinion (or 'fair comment' at common law) requires the comment to be on a matter of public interest and to be an honestly held view identifiable as opinion. Importantly, for the defence to succeed, the comment must also include the facts on which the opinion is based in a way that facts and opinion are not conflated. A reasonable person must be able to distinguish, and potentially disagree with, the opinion.

There is a requirement in the uniform laws that damages awarded be proportional to the amount of harm suffered.⁹ The uniform legislation also sets a cap on the amount of general damages (financial compensation for loss or harm suffered, including emotional distress and reputational harm) that can be awarded. This figure is indexed each year (currently \$432,500 in Victoria). Aggravated

damages may be awarded in addition to the cap¹⁰ when the unreasonableness of the defendant's behaviour is found to have exacerbated the negative impacts of their actions on the plaintiff, or in circumstances of improper conduct,¹⁰ such as in *Stokes v Ragless*, where an individual published a large volume of defamatory material over a significant period of time and then continued publishing defamatory statements despite a court order to cease.¹¹

Each state and territory also has its own legislation in respect to online harassment. In instances of serious or sustained online harassment, this may be a criminal act. In terms of Federal legislation, section 474.17 *Criminal Code Act 1995* (Cwlth) establishes a Commonwealth offence of the use of a 'carriage service to menace, harass or cause offence'. Depending on the circumstances, a doctor may also be able to involve the police, including requesting an intervention or protection order if they are fearful for their safety.

Practical recommendations

It can be challenging to navigate managing negative online reviews successfully in a legally and ethically sound manner, and early consultation of legal and medical defence professionals is recommended.

Where the patient is known, the doctor can consider directly contacting the person offline to resolve their concerns. Clinicians may request directly that they remove the review.

Responding to a review may not change the complainant's mind or result in them removing the review. The benefit of responding may be in demonstrating that you are responsive to feedback; however, in certain circumstances it may be preferable not to provide public acknowledgement. Should the negative reviews be part of stalking behaviour, contacting the person could reward this person's efforts to maintain contact, instil hope or reward optimism and so prolong this behaviour, according to applied behavioural analysis and reinforcement theory.¹² If clinicians choose to respond, it is important to respond succinctly, politely and respectfully. Acknowledge the core concern presented and propose an offline

option to continue the conversation to avoid ongoing conflict in a public forum.

The eSafety commissioner encourages reporting to the provider/platform and if no response within 48 hours and have this stated threshold for action:¹³

For eSafety to investigate, the harmful content must meet the legal definition of 'adult cyber abuse'. This means it must target a specific Australian adult and be both:

1. *intended to cause serious harm, and*
2. *menacing, harassing or offensive in all the circumstances.*

Maintaining the confidentiality of the patient is of paramount importance. It is important to avoid disclosing any information that could be identifiable on a public forum, including confirming any content provided by the complainant or engaging in discussion of clinical content. Even in private forums, clinicians need to be mindful that it is possible for parties to copy documents and share these with external third persons.

If a review is considered to be defamatory, clinicians may approach the hosting administrators and request that it is removed on these grounds. If this is unsuccessful, clinicians may consider seeking legal advice and/or sending a formal letter to the reviewer and/or the website proprietor, requesting removal of the review.

More broadly, growing recognition of the impact of negative online reviews of healthcare professionals highlights the need to streamline unreasonably onerous legal and regulatory processes associated with these events and discourage individuals from engaging in this behaviour. Successful clinician-led campaigning has seen AHPRA commit to removal of online case listings lacking adverse findings, and similar advocacy is critical to the maintenance of professional standards and autonomy. Detrimental impacts on clinician wellbeing are well recognised; beyond drawing on individual social supports, professional peer supports and treating health practitioners, various

resources, such as clinician support hotlines, may be of significant benefit in supporting clinicians managing negative online reviews.

Conclusion

Experiencing a negative online review as a clinician can have wide-ranging ramifications. A comprehensive and practical management approach is required, incorporating legal and ethical considerations, as well as activation of professional and personal supports.

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