



PARLIAMENT OF NEW SOUTH WALES

# COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION

REPORT 5/55 – NOVEMBER 2014

THE PROMOTION OF FALSE AND MISLEADING HEALTH-RELATED INFORMATION  
AND PRACTICES



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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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# Membership

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## Terms of Reference

That the Committee on the Health Care Complaints Commission inquire into and report on possible measures to address the promotion of unscientific health-related information or practices which may be detrimental to individual or public health. The Inquiry will focus on individuals who are not recognised health practitioners, and organisations that are not recognised health service providers. The Committee will have particular regard to:

- (a) the publication and/or dissemination of false or misleading health-related information that may cause general community mistrust of, or anxiety toward, accepted medical practice;
- (b) the publication and/or dissemination of information that encourages individuals or the public to unsafely refuse preventative health measures, medical treatments, or cures;
- (c) the promotion of health-related activities and/or provision of treatment that departs from accepted medical practice which may be harmful to individual or public health;
- (d) the adequacy of the powers of the Health Care Complaints Commission to investigate such organisations or individuals;
- (e) the capacity, appropriateness, and effectiveness of the Health Care Complaints Commission to take enforcement action against such organisations or individuals; and
- (f) any other related matter.

## Chair's Foreword

I am pleased to present the fifth report of the Committee on the Health Care Complaints Commission (the Committee) in this 55<sup>th</sup> Parliament. The report includes recommendations that aim to strengthen the potential responses to false and misleading health-related information and practices and offer further protection to the public.

In the course of this Inquiry, the Committee was alarmed to discover the significant amount of false or misleading health-related information and practices available to the public. Given the ease with which less reputable organisations can disseminate information, for example through the internet and social media, health consumers can be overwhelmed.

The Committee recognises the work being done to protect consumers from some of the most harmful examples of misleading health practices by organisations in New South Wales and across Australia. Nevertheless, the Committee found that more could be done to protect health consumers. In particular, the Committee has made a number of recommendations to amend the *Health Care Complaints Act 1993* and provide more power to the Health Care Complaints Commission (the Commission).

This Inquiry arose from concerns about the lack of sufficient oversight of individuals and organisations that publish and disseminate potentially harmful misinformation. The Committee found that, despite recent changes, doubts remained as to whether the Commission could fully investigate all instances of potentially unsafe medical treatments and dangerous misinformation. As such, the Committee has made a number of recommendations to address these concerns. First, it recommends that the definition of 'health service' be broadened to ensure that more individuals are captured and do not escape investigation. Second, the Committee recommends that concerned individuals, who may not necessarily themselves be patients, be allowed to lodge a complaint with the Commission concerning unsafe medical procedures available or incorrect information being promoted.

The Committee found that the Commission continues to play an important role in advising the public on some of the more hazardous examples of misinformation and treatments. As such, it recommends that the Commission's powers to issue public warnings be strengthened so that it can issue a warning in circumstances where the risk to public health is clear without requiring an investigation. The Commission should also have the power to issue a warning when an investigation is on foot and the investigation uncovers information that points to a real threat to public health and safety.

The dangers of the availability of information, supposedly of a medical nature but contrary to mainstream medical practice, are amplified when health consumers find it difficult to make the distinction. To address the problems of declining health literacy, especially amongst society's vulnerable groups, the Committee recommends that NSW Health and the Commission provide more information to counter misleading claims.

The Committee found that while there are several agencies involved in protecting the public in this area, they do not always work together to achieve the best outcomes. As such, the Committee recommends the establishment of an interagency committee to allow relevant

authorities, particularly the Commission and NSW Fair Trading, to discuss common issues, share expertise and perform joint investigations.

I would like to state my appreciation for the assistance provided by the Commission. I also thank my fellow Committee members for their assistance in the Inquiry process and the preparation of this report.

A handwritten signature in blue ink, appearing to read 'Don Page', with a stylized flourish at the end.

**The Hon. Don Page MP**  
Chair

# List of Recommendations

RECOMMENDATION 1	24
<p>The Committee recommends that the definition of ‘health service’ under section 4 of the <i>Health Care Complaints Act 1993</i> be amended by inserting an additional paragraph to provide that ‘a health service may also be, or purport to be, a service for maintaining, improving, restoring or managing people’s health and wellbeing’.</p>	
RECOMMENDATION 2	27
<p>The Committee recommends that section 7(1)(b) of the <i>Health Care Complaints Act 1993</i> be amended to provide that a complaint under the Act can be brought ‘by any individual’ and be about ‘a health service that affects, or is likely to affect, the clinical management or care of an individual client, or the public, or any member of the public.’</p>	
RECOMMENDATION 3	29
<p>The Committee recommends that NSW Health and the Health Care Complaints Commission monitor and report on the compliance of prohibition orders issued by the Commission under sections 41AA – 42 of the <i>Health Care Complaints Act 1993</i>, in their annual reports.</p>	
RECOMMENDATION 4	32
<p>The Committee recommends that the <i>Health Care Complaints Act 1993</i> be amended to allow the Commission to issue public warnings without first requiring an investigation in circumstances where the risk to public health and safety is such that any further delay may compromise individual and public health.</p>	
RECOMMENDATION 5	32
<p>The Committee recommends that the <i>Health Care Complaints Act 1993</i> be amended so that the Health Care Complaints Commission can issue a public warning on an interim basis in circumstances where an investigation is on foot but the Commissioner is reasonably of the opinion that there is a risk to public health and safety and that any further delay may compromise individual and public health.</p>	
RECOMMENDATION 6	34
<p>The Committee recommends that NSW Health and the Health Care Complaints Commission monitor and report on the use of enforcement powers against health service providers who are in breach of section 99 of the <i>Public Health Act 2010</i> pertaining to the advertising or promotion of health services, in their annual reports.</p>	
RECOMMENDATION 7	41
<p>The Committee recommends that an interagency committee be established to allow relevant regulatory authorities involved in the protection of health consumers (particularly the Health Care Complaints Commission and NSW Fair Trading) the opportunity to discuss common issues, share expertise, and conduct joint investigations.</p>	
RECOMMENDATION 8	43
<p>The Committee recommends that NSW Health, in conjunction with the Health Care Complaints Commission, undertake accessible education initiatives and awareness campaigns to provide</p>	

information to counteract misleading claims about mainstream healthcare practices. The Committee further recommends that emphasis is placed on targeting individuals with low levels of health literacy and vulnerable individuals in the community.

# Glossary

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AMA	Australian Medical Association (NSW)
ATMS	Australian Traditional Medicine Society
AVN	The Australian Vaccination-skeptics Network
HCCC	Health Care Complaints Commission
MTAA	Medical Technology Association of Australia
NIP	National Immunisation Program
TGA	Therapeutic Goods Administration
the Act	The Health Care Complaints Act 1993
the Commission	The Health Care Complaints Commission
the Commissioner	The Health Care Complaints Commissioner
the Committee	The Committee on the Health Care Complaints Commission

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# Chapter One – Introduction

- 1.1 The Committee on the Health Care Complaints Commission (the Committee) is a current joint statutory committee of the Parliament of New South Wales, first established on 13 May 1994, and reconstituted for the 55<sup>th</sup> Parliament on 22 June 2011.
- 1.2 The Committee primarily oversees the operations of the Health Care Complaints Commission (the Commission), an independent statutory agency responsible for protecting the health and safety of the public by dealing with complaints about health service providers in NSW.
- 1.3 Provisions for the establishment of the Committee, and appointment of individual Committee members, are found under Part 4 of the *Health Care Complaints Act 1993* (the Act).
- 1.4 Specifically, section 65 of the Act details the Committee's core functions, as follows:
- (a) to monitor and to review the exercise by the Commission of the Commission's functions under this or any other Act,
  - (a1) without limiting paragraph (a), to monitor and review the exercise of functions by the Health Conciliation Registry,
  - (b) to report to both Houses of Parliament, with such comments as it think fit, on any matter appertaining to the Commission or connected with the exercise of the Commission's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
  - (c) to examine each annual and other report made by the Commission, and presented to parliament, under this or any other Act and to report to both Houses of Parliament, on any matter appearing in, or arising out of, any such request,
  - (d) to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Commission,
  - (e) to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.
- 1.5 As with equivalent committees, the terms of reference of the Committee enable it to examine, inquire into and report on matters related to the functions and operation of the Commission. These matters may be referred to the Committee by both Houses of Parliament, or may be self-referred.

1.6 The Committee adopted terms of reference for an inquiry into the promotion of false and misleading health-related information and practices on 16 October 2013. The terms of reference are as follows:

That the Committee on the Health Care Complaints Commission inquire into and report on possible measures to address the promotion of unscientific health-related information or practices which may be detrimental to individual or public health. The Inquiry will focus on individuals who are not recognised health practitioners, and organisations that are not recognised health service providers.

The Committee will have particular regard to:

- (a) the publication and/or dissemination of false or misleading health-related information that may cause general community mistrust of, or anxiety toward, accepted medical practice;
- (b) the publication and/or dissemination of information that encourages individuals or the public to unsafely refuse preventative health measures, medical treatments, or cures;
- (c) the promotion of health-related activities and/or provision of treatment that departs from accepted medical practice which may be harmful to individual or public health;
- (d) the adequacy of the powers of the Health Care Complaints Commission to investigate such organisations or individuals;
- (e) the capacity, appropriateness, and effectiveness of the Health Care Complaints Commission to take enforcement action against such organisations or individuals; and
- (f) any other related matter.

1.7 This inquiry was prompted by ongoing concerns about the possible lack of oversight of individuals and organisations that publish or disseminate information of a purportedly medical nature that is not only contrary to accepted medical practice, but which may be harmful to individual or public health.

1.8 Particular concern was raised about the proliferation of health practices promoted by individuals outside of the medical profession, who may not only actively advise against mainstream medical practices, but encourage the use of alternative practices with harmful consequences.

1.9 Given these concerns, the Committee has expressed the view that an appropriate level of scrutiny should exist, and that sufficient measures are instituted.

1.10 The Committee made a public call for submissions in October 2013 by writing directly to key stakeholders, including health consumer organisations, medical professional associations, and government departments and agencies. The Committee also advertised the Inquiry on the Committee's webpage and in the

Sydney Morning Herald, and received some coverage in community and professional publications.

- 1.11 In total, the Committee received 72 submissions from a broad range of sources. This includes professional associates, consumer advocates, health groups, and Government departments and agencies. A full list of submissions received can be found at Appendix One, and copies of the submissions are available on the Committee's webpage. The Committee also received in excess of 200 items of correspondence – mostly emails – from various members of the public, expressing a range of opinions about the conduct of the Inquiry, with particular emphasis placed on the terms of reference and its possible implications.
- 1.12 Subsequent to the receipt of submissions, the Committee held two days of public hearings at Parliament House on 2 September 2014 and 3 September 2014. The Committee received evidence from 10 witnesses representing seven organisations, each of which had previously made a submission to the Inquiry.
- 1.13 The public hearings gave the Committee an opportunity to examine in greater detail some of the issues raised in the submissions, as well as giving stakeholders further opportunities to express their concerns and identify appropriate responses where warranted.
- 1.14 The complete list of witnesses who appeared before the Committee can be found at Appendix Two. Transcripts of the evidence provided are also available on the Committee's webpage.
- 1.15 The Committee also met subsequently with Kieran Pehm, Commissioner, Health Care Complaints Commission (the Commissioner) on an informal basis to discuss some of the matters brought to the Committee during the course of the Inquiry that were of interest to the Committee and that may have warranted the Commissioner's attention.
- 1.16 This report has been organised into five chapters, including this Chapter. Chapter Two provides an overview of the administrative and judicial framework that currently exists with respect to health-related complaints, together with a brief history of some of the key legislative changes that have occurred in recent years. This Chapter also examines the crucial outcome of the Supreme Court case of *Australian Vaccination Network Inc (AVN) v Health Care Complaints Commission* and its impact on the work of the Commission.
- 1.17 Chapter Three considers some of the matters that prompted this Inquiry, including an examination of the types of advice promoted, and treatments provided, that may have adverse consequences to public health and which have caused consternation within some sectors of the community. This Chapter also considers the role of complementary and alternative medicine in broader health care and management.
- 1.18 Chapter Four addresses key provisions of the Act relevant to this Inquiry, and canvasses some possible amendments to ensure that the Commission and other statutory bodies are equipped with sufficient and appropriate powers.

- 1.19 Chapter Five considers further policy responses. This includes facilitating arrangements between the Commission and other relevant statutory bodies, as well as a renewed focus on education and awareness campaigns. This Chapter also canvasses some of the concerns raised about overregulation in this field, with possible implications on the right to freedom of speech, and freedom of choice in health care.
- 1.20 As appropriate, this report draws on the submissions and evidence received throughout the course of this Inquiry, through both the correspondence received by the Committee, and from the Committee's two formal hearings at Parliament House. Where relevant, recommendations for both the Commission and the Government are provided.
- 1.21 The Committee's emphasis throughout this Inquiry has been on examining 'health-related' information or practices. The use of the term 'health-related' is employed to distinguish between those mainstream medical and complementary healthcare practices that are widely accepted, and those that purport to be about health but demonstratively put the public at risk or otherwise dangerously depart from accepted medical practices.
- 1.22 From many of the emails the Committee received, it is apparent that there has been concern from some quarters – and in some respects, hostility – to this Inquiry. Many of the emails suggested that the Committee was primarily or solely interested in sidelining complementary and alternative healthcare and, in doing so, intent on placing restrictions on freedom of speech and freedom of choice.
- 1.23 At its hearing of 3 September 2014, representatives from Complementary Medicines Australia expressed their concern, telling the Committee:
- I hope that the Committee is acting in good faith and genuinely wants to protect consumers and not, in fact, attack the complementary medicines industry.<sup>1</sup>
- 1.24 The Committee respects the diversity of opinion expressed throughout this Inquiry, and appreciates that some of the subject matter discussed has invited a strong and sometimes emotional response. However, these perceptions are misplaced. The Committee has not recommended that any action be taken to restrict individual access to complementary healthcare, or recommended any other regulation that fetters overall healthcare practices.
- 1.25 However, the Committee recognises that this Inquiry has raised important issues that demand consideration, and the Committee has not been shy in broaching matters that may otherwise excite controversy. The recommendations that the Committee has made reflect the gravity of these issues at hand, and are appropriate and proportionate responses to those issues.
- 1.26 The Committee thanks all participants in this Inquiry, particularly those stakeholders who provided submissions and witnesses who gave evidence at the Committee's two days of hearings.

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<sup>1</sup> Carl Gibson, Chief Executive Officer, Complementary Medicines Australia, *Transcript of Evidence*, 3 September 2014, at p10

- 1.27 The Committee notes that the Government is required to respond to the recommendations contained in this report within six months of tabling. The Committee also recognises that the expiration of this Parliament will take place before the due date for the Government response, ahead of the 2015 general election.
- 1.28 The Committee nonetheless encourages the incoming Government, the Commission, and all other relevant stakeholders, to take note of the recommendations contained in this report given its importance to public health policy.

## Chapter Two – The Administrative and Judicial Framework

- 2.1 This Chapter examines the administrative framework of the investigation of health care complaints received by the Health Care Complaints Commission (the Commission). The Chapter also briefly analyses the key amendments to the *Health Care Complaints Act 1993* (the Act) that have occurred in the past few years prompted by a crucial Supreme Court case and the issue that sparked this Inquiry.

### Health Care Complaints Commission

- 2.2 Responsibility for the oversight of health care practitioners and health care providers is different between New South Wales and the rest of Australia. While there have been some moves toward a convergence of healthcare regulation on a national scale, the situation in New South Wales is co-regulatory, and therefore distributed across a few key bodies.
- 2.3 The Commission has primary responsibility to protect public health and safety by dealing with complaints about health service providers within the State. It is the principal authority in NSW and complaints about individual practitioners can be about both registered and unregistered practitioners. The stated objective of the Commission is the protection of public health and safety, expressly defined by the Act as its ‘paramount consideration’.<sup>2</sup>
- 2.4 The Commission can receive and assess complaints concerning registered health care practitioners, including doctors, nurses, dentists, physiotherapists and dietitians. In total, there are 14 registered professions under the Australian Health Practitioner Regulation Agency which sets standards for accreditation and registration.<sup>3</sup>
- 2.5 The Commission also has the power to deal with complaints about unregistered health care practitioners. Unregistered practitioners are all those who are not required to be registered, or who provide services unrelated to their registration.
- 2.6 Unregistered health practitioners must abide by the Code of Conduct under Schedule 2 of the *Public Health Regulation 2012*. The intention of the code is to set out the minimum practice and ethical standards with which unregistered health service providers are required to comply. The Code of Conduct informs consumers what they can expect from practitioners and the mechanisms by which they may complain about the conduct of, or services provided by, an unregistered health service provider.

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<sup>2</sup> *Health Care Complaints Act 1993*, s3(2)

<sup>3</sup> Australian Health Practitioner Regulation Agency, <<https://www.ahpra.gov.au/>>, viewed 4 November 2014

## NSW Fair Trading

- 2.7 NSW Fair Trading is the statutory agency responsible for consumer protection and administering the laws pertaining to fair trading. NSW Fair Trading has jurisdiction when traders are making false and misleading representations to consumers about the supposed benefits or effects of the product being promoted and sold.
- 2.8 As advised in its submission, NSW Fair Trading has investigated ‘a number of traders that have made claims about being able to cure medical conditions contrary to accepted medical practice’.<sup>4</sup>
- 2.9 Although approaching this area of the law through the prism of protecting consumer rights – rather than healthcare rights – NSW Fair Trading has also been involved in the oversight and regulation of health-related services and products.
- 2.10 Where investigations have commenced, NSW Fair Trading advised the Committee that it may issue a substantiation notice to the trader concerned which, in effect, requires the trader to:
- ... provide Fair Trading with evidence that substantiates their claims, and may require medical experts to provide evidence of acceptable medical practice.<sup>5</sup>
- 2.11 NSW Fair Trading also has a large suite of enforcement provisions at its disposal. This includes action through ‘administrative action, civil remedies, and criminal proceedings’.<sup>6</sup>

## Therapeutic Goods Administration

- 2.12 The Therapeutic Goods Administration (TGA) is a Commonwealth body whose overall purpose is to protect public health and safety by regulating therapeutic goods that are supplied in or exported from Australia.
- 2.13 While the TGA does not regulate the dissemination of health-related information in circumstances where it is not related to a particular therapeutic good, its regulatory remit does extend to the advertising of therapeutic goods and regulation of complementary medicines.<sup>7</sup> Importantly, the TGA does not oversee health care practitioners.

## Judicial Considerations

### *Australian Vaccination Network Inc (AVN) v Health Care Complaints Commission*

- 2.14 In May 2013, key changes came into effect that affected the operation of the Commission. One of the key amendments to the Act was to provide a broader scope of the Commission’s jurisdiction, and the Commission now no longer requires that an individual client or patient lodge a complaint before it commences investigative action, as was previously the case.

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<sup>4</sup> NSW Fair Trading, Submission No 48, at p3

<sup>5</sup> NSW Fair Trading, Submission No 48, at p3

<sup>6</sup> NSW Fair Trading, *Compliance and Enforcement Policy*, July 2013 at p7

<sup>7</sup> Therapeutic Goods Administration, Submission No 21, at p1

- 2.15 The catalyst for this amendment was a court decision in *Australian Vaccination Network Inc (AVN) v Health Care Complaints Commission* [2012] NSWSC 110. The Australian Vaccination-skeptics Network (as it is now known) is an organisation that promotes vaccine scepticism, campaigns against the mainstream practice of mass immunisation, and promotes online discussion about the supposed possible adverse effects of vaccination.
- 2.16 In response to the activities of the AVN, two complaints were made with the Commission in which it was alleged that the AVN had engaged in misleading and deceptive conduct about the information it was providing. This conduct included, *inter alia*, statements on the AVN's website that major communicable diseases such as measles and mumps were not life threatening. The website also included spurious claims that linked vaccination with various autoimmune and neurological disorders, particularly autism.
- 2.17 The Commission, mindful of the public health consequences of encouraging vaccine refusal, investigated these complaints on the basis that they 'raised significant issues of public health and safety'.<sup>8</sup>
- 2.18 On completing its investigation, the Commission was satisfied that the AVN was publishing information that was inaccurate through its selective quoting of sources and misstatements of research.<sup>9</sup> As such, the Commission recommended that the AVN publishes a statement in a prominent position on its website that advises the public about the true nature and intent of the AVN. The Commission made this recommendation reliant on powers under section 42 of the Act.
- 2.19 This statement was to reflect the fact that the AVN is more sceptical about the merits of vaccination than it had previously intimated. In particular, the Commission recommended that the suggested statement include disclaimers that the information contained on the AVN website should not be regarded as medical advice, and clarify that the AVN's purpose was essentially to 'provide information against vaccination' as a 'balance (to) what it believes is the substantial amount of pro-vaccination information elsewhere'.<sup>10</sup>
- 2.20 The AVN did not implement the Commission's recommendation and, in response, the Commission issued a public warning on its own website, this time pursuant to powers under section 94A of the Act. The warning stated:

The AVN's failure to include a notice on its website of the nature recommended by the Commission may result in members of the public making improperly informed decisions about whether or not to vaccinate, and therefore poses a risk to public health and safety.<sup>11</sup>

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<sup>8</sup> Thomas Faunce & Tim Vines, *Civil Liberties and the Critics of Safe Vaccination: Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 in *Medical Law Reporter* (2012) 20 JLM 44 at p48

<sup>9</sup> Thomas Faunce & Tim Vines, *Civil Liberties and the Critics of Safe Vaccination: Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 in *Medical Law Reporter* (2012) 20 JLM 44 at p48

<sup>10</sup> Thomas Faunce & Tim Vines, *Civil Liberties and the Critics of Safe Vaccination: Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 in *Medical Law Reporter* (2012) 20 JLM 44 at p48

<sup>11</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC110, para 3

- 2.21 The AVN appealed to the New South Wales Supreme Court seeking a declaration that the Commission had erred in making its recommendation, arguing that the Commission's handling of the complaint, and the publishing of a warning on its own website, were *ultra vires*. Specifically, the AVN argued that section 7(1)(b) of the Act was not applicable as the complaints made did not 'affect the clinical management and care of an individual client', a key requirement mandated by the Act at the time.
- 2.22 Before the Supreme Court, the Commission argued that the AVN *did* affect the care of individual clients, despite none being identified in either complaint.
- 2.23 In its decision of 24 February 2012, the Supreme Court found in favour of the AVN, finding that a complaint must have a 'concrete (even if) indirect effect on a particular person or persons'.<sup>12</sup> The Commission's directions to the AVN were therefore unenforceable, and the AVN was able to continue its campaign without regulatory controls or effective oversight.
- 2.24 As a result, the Committee expressed concern that the Supreme Court decision would leave a regulatory gap concerning the AVN, and therefore its activities would continue to jeopardise public health.<sup>13</sup>
- 2.25 Following from the decision, the Committee also met with the Health Care Complaints Commissioner (the Commissioner) in June 2012 to discuss its implications and possible responses. The Commissioner discussed possible amendments to the Act to ensure that, for future matters, sound authority is provided to deal with complaints that may not necessarily deal with a single individual client or in cases where an individual client has not been identified. The Committee supported the Commissioner's proposed course of action and wrote separately to the Minister to advise of such.
- 2.26 On 9 May 2013, the Parliament of New South Wales passed the *Health Legislation Amendment Act 2013* that, *inter alia*, gave the Commission the power to initiate an investigation on his or her own accord without first requiring an external complainant to trigger the investigation.
- 2.27 Specifically, the amendments clarified that a complaint can be made against a health service practitioner if the health service affects, *or is likely to affect*, the clinical management or care of an individual. As such, the amendment removed the direct nexus that was previously required between a complainant and a health service practitioner for a complaint to be investigated.
- 2.28 In its *Review of the 2011-2012 Annual Report of the Health Care Complaints Commission*, the Committee welcomed these changes. In particular, the Committee stated that it 'would be monitoring the use and effectiveness of these new powers', further stating that:

The Committee strongly supports the new powers afforded to the Commission and encourages the Commission, within its remit and resource capacities, to use the new

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<sup>12</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC110, para 45

<sup>13</sup> Committee on the Health Care Complaints Commission, *Review of the 2011-2012 Annual Report of the Health Care Complaints Commission*, Report 3/55, October 2013, at p56

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powers to investigate other organisations which promote activity that could be detrimental to public health and safety.<sup>14</sup>

- 2.29 Although the new powers have only been operational for 18 months, the Committee was keen to understand what effect the new powers may have had, and whether they have yet been exercised. The Committee has also been eager to ascertain what other individuals and organisations are active that may be engaged in activities that are contrary to public health and safety.
- 2.30 The Committee was of the opinion that this Inquiry process would provide an opportune moment to audit the types of information being promoted by some quarters that promote health-related information and treatments that could be dangerous to individual and public health. Those very types of treatments and practices promoted are canvassed in further detail in the following chapter.

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<sup>14</sup> Committee on the Health Care Complaints Commission, *Review of the 2011-2012 Annual Report of the Health Care Complaints Commission*, Report 3/55, October 2013, at p13

## Chapter Three – Misinformation and Practices of Concern

- 3.1 While most unregistered health practitioners play an important role in the overall health care system, the absence of a sound regulatory framework makes it possible for practitioners of questionable merit to set up practice with little to no oversight. This Chapter considers the prevalence of such unregistered health practitioners and looks at some of their practices and methods of promotion. It also examines the associated health and safety risks.
- 3.2 This Chapter also examines some of the false or misleading health-related information or health practices that were brought to the Committee's attention as being potentially dangerous. It explores some of the dangers this information creates and the classes of people that may be most vulnerable.
- 3.3 Lastly, this Chapter evaluates the status of recognised and regulated alternative modalities of healthcare as an addition to current mainstream medical practice.

### Types of Misinformation and Practices of Concern

- 3.4 During the course of this Inquiry, the Committee was made aware of a number of organisations and companies advertising misleading health information or providing potentially unsafe procedures.
- 3.5 The Friends of Science in Medicine stated that:
- The promotion of potentially harmful, unscientific information by providers offering health-related products and services is widespread. In an era of mass international communication, entering almost every home, people are more vulnerable than ever to misinformation.<sup>15</sup>
- 3.6 Some of these groups and products are discussed below.

### *Vaccine Scepticism and the Australian Vaccination-skeptics Network*

- 3.7 The main concern in this area for many stakeholders was organisations that argue against the recommended schedule of immunisations. The most prominent group of concern, to date, has been the Australian Vaccination-skeptics Network (AVN), the primary lobby group promoting vaccine scepticism and refusal in Australia.
- 3.8 These groups will often appeal to parents' concerns for the health and safety of their children. Despite the lack of evidence, they will allege that there are potential harmful side effects from vaccinations. The Federal Department of Health noted that:

New parents are particularly vulnerable to misinformation, with fear being a powerful motivator. Incorrect allegations regarding adverse effects from vaccines

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<sup>15</sup> Friends of Science in Medicine, Submission No 39, at p1

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typically target feared diseases, syndromes or conditions of unknown or uncertain cause such as autism, sudden infant death syndrome or multiple sclerosis.<sup>16</sup>

- 3.9 The most common argument brought against vaccination is the claim that it may cause Autism Spectrum Disorder. This is based on research conducted by Dr Andrew Wakefield of the Royal Free Hospital in the UK. The research 'suggested a link between the Mumps, Measles and Rubella (MMR) vaccine and inflammatory bowel disease (IBD) that in turn contributed to the development of disorders such as autism'.<sup>17</sup>
- 3.10 This paper has since been discredited by expert peer review and numerous studies. Furthermore, 10 of the 13 authors of the paper retracted the findings, Dr Wakefield was struck off the UK's Medical Register for dishonest falsification, and the original data was found to be fraudulent. As stated by the Federal Department of Health, there is 'conclusive evidence that there is no link between MMR vaccine and autism and IBD'.<sup>18</sup>
- 3.11 Despite this research being widely discredited, anti-vaccination organisations such as the AVN, continue to disseminate this misinformation. NSW Health explained that:
- ... the AVN continues to actively promote the existence of a causative link between vaccination and autism on its website, in the print, radio and television media, and in community forums. The AVN website selectively links only to articles that purportedly support the existence of such a link and do not reference authoritative sources with a dissenting view.<sup>19</sup>
- 3.12 Some stakeholders noted that rather than being anti-vaccination, the AVN claims to be pro-choice and pro-information, and aims to educate health consumers. However, as an organisation it seeks to persuade people not to immunise their children. As noted by the Federal Department of Health:
- ... more detailed analysis identifies a focus deeply embedded in an opposition to immunisation and an implicit desire to dissuade parents from vaccinating their children.<sup>20</sup>
- 3.13 The AVN has a presence across a range of media including print, radio, social media and members of their organisation often appear at symposia. In this variety of situations, information presented can be difficult to trace back to the source. The AVN presents information out of context and promotes anecdotal evidence over proper scientific findings. This use of selective evidence can confuse the issue for many health consumers, particularly those that do not recognise the intention of the AVN and are not aware of the filter through which the information is being presented.<sup>21</sup> This is further compounded by the fact that

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<sup>16</sup> Australian Government Department of Health, Submission 52, at p5

<sup>17</sup> Australian Government Department of Health, Submission 52, at p5

<sup>18</sup> Australian Government Department of Health, Submission 52, at p5

<sup>19</sup> NSW Health, Submission 46, at p1

<sup>20</sup> Australian Government Department of Health, Submission 52, at p4

<sup>21</sup> Australian Government Department of Health, Submission 52, at p5

the AVN is often the first result returned in Australia when googling for 'vaccination' or related word searches.

### *Black Salve*

- 3.14 Black salve is a product which has been sold in Australia as an alternative treatment for cancer, particularly skin cancer. It is a corrosive ointment which burns off layers off skin and surrounding normal tissue. It is claimed that this can destroy cancerous lesions and other cancerous cells. However, the Therapeutic Goods Association (TGA) states that they are 'not aware of any credible, scientific evidence that black salve, red salve or cansema can cure or treat cancer'.<sup>22</sup> Furthermore, 'the evidence shows that they will cause skin irritation *regardless* of whether any malignancy is present'.<sup>23</sup>
- 3.15 These products were advertised on a number of websites, including that of the AVN, along with associated products such as DVDs promoting their use. Following a complaint, the TGA ordered the AVN to stop publicising the product as an alternative treatment for cancer, for the aforementioned reasons that there was no evidence to suggest it was effective. The TGA also found that the product was being promoted in a way that implied that it was more effective than clinically proven cancer treatments and 'may lead to self-diagnosis and a failure to seek out proper medical attention for a potentially fatal disease'.<sup>24</sup>
- 3.16 While black salve or similar products are no longer promoted on the AVN website, information can be found about the products online. The Committee received a number of submissions concerned that consumers may seek to use this product instead of accepted cancer treatments.<sup>25</sup>

### *False Diagnostic Tools*

- 3.17 A number of organisations are currently marketing diagnostic tools directly to consumers. One such example is the offer of a full body scan, often a CT scan, which claims to look for evidence of cardiovascular calcification or cancer, amongst other things. It is unclear who analyses the scans and the results may not be available to the patient or their GP.
- 3.18 Dr Saxon Smith, President, Australian Medical Association (NSW)(the AMA), told the Committee that:

Importantly, it also fragments care because it is not part of the role in that the investigation is not being performed in the construct of the whole person's health through their general practitioner or treating specialist, which is coordinating for all the other issues that they might be having.<sup>26</sup>

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<sup>22</sup> Therapeutic Goods Administration, <<http://www.tga.gov.au/consumers/information-salve-cansema.htm#.VE2eUfmSzh4>>, viewed 9 October 2014

<sup>23</sup> Therapeutic Goods Administration, <<http://www.tga.gov.au/consumers/information-salve-cansema.htm#.VE2eUfmSzh4>>, viewed 9 October 2014

<sup>24</sup> Therapeutic Goods Administration, *Black Salve – Australian Vaccination Network Inc – Complaint No. 2012-04-022, Decision*, May 2013

<sup>25</sup> For example, Australian Medical Association (NSW) Limited, Submission 43, at p3

<sup>26</sup> Dr Saxon Smith, President, Australian Medical Association (NSW) Limited, *Transcript of Evidence*, 2 September 2014, at p16

- 3.19 There is concern as to the significant amount of radiation emitted by these scans, and the effects of such radiation on individual health.<sup>27</sup>
- 3.20 Another service offered is unscientific tests on patients' blood or hair samples. These are often promoted by alternative healthcare providers, to patients with disorders such as chronic fatigue syndrome, food intolerances or genetic disorders.<sup>28</sup>
- 3.21 Of concern with both these services is the fact that they are not reliable diagnostic methods and can lead to false negatives. In turn, this can cause a health consumer to delay seeking effective medical care.
- 3.22 On the subject of body scanning services, Professor John Dwyer, President, Friends of Science in Medicine, explained:
- ... that is something where people can spend a lot of money and get information that falsely reassures them. There is no scientific evidence to suggest that this is a proper screening mechanism.<sup>29</sup>
- 3.23 Similarly, the AMA highlighted the dangers of unscientific pathology tests:
- ... the tests are also unreliable, lack clinical validity or utility, and provide no assistance in treatment. Most concerning of course, is the delay in patients seeking evidence based and effective medical care and treatment that pursuing these tests creates.<sup>30</sup>

### *Conversion Therapy*

- 3.24 Conversion or reparative therapy is treatment which aims to change a person's sexual orientation so that they are no longer attracted to people of the same-sex, or manage these desires so they can live a celibate life. It is usually based on counselling, psychotherapy and group sessions, and is often based on religious beliefs. The Committee received evidence that people in New South Wales were being offered or referred to these services.<sup>31</sup>
- 3.25 While there is anecdotal evidence of some success, this is countered by more anecdotal evidence of people who undertake this therapy becoming depressed and suffering serious psychological harm.
- 3.26 As a result of this and its position that homosexuality is not a diagnosable mental disorder, the Australian Psychological Society has recommended that 'ethical practitioners refrain from attempting to change individuals' sexual orientation'.<sup>32</sup>

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<sup>27</sup> See Dr Andrew McDonald, *Transcript of Evidence*, 3 September 2014, at p20

<sup>28</sup> Australian Medical Association (NSW) Limited, Submission 43, at p4

<sup>29</sup> Professor John Dwyer, President, Friends of Science in Medicine, *Transcript of Evidence*, 3 September 2014, at p6

<sup>30</sup> Australian Medical Association (NSW) Limited, Submission 43, at p4

<sup>31</sup> Gay and Lesbian Rights Lobby (NSW), Submission 35, at p2

<sup>32</sup> The Australian Psychological Society Ltd, *Position Statement on the Use of Therapies that Attempt to Change Sexual Orientation*, June 2000

### *Universal Medicine*

- 3.27 Universal Medicine is a Lismore-based organisation which offers a number of unique treatments purportedly for the health and wellbeing of its clients. These treatments include: esoteric breast massage; esoteric chakra puncture; and esoteric connective tissue therapy, amongst others. The treatments claim to be able to help with a variety of conditions through the manipulation of the body's energy.
- 3.28 The founder of this organisation does not have any medical qualifications, nor have any of the treatments been proven effective by evidence-based, scientific research.
- 3.29 The treatments offered were devised by the organisation's founder and while the organisation provides courses and qualifications for practitioners, they are not accredited. The Friends of Science in Medicine explained that:
- ... patients are subjected to a whole series of nonsense therapeutic approaches... they claim they can massage your back and actually massage your lungs if you have lung conditions; the practitioners say they have the power to talk to a woman's ovaries and learn about that; and they explain that all illnesses are due to past misdeeds in previous incarnations of your life.<sup>33</sup>
- 3.30 While there is little anecdotal evidence to suggest actual harm caused by these treatments, concerns were raised that patients may forego seeking proper medical advice and care. Two patients who were undergoing therapies at Universal Medicine were independently diagnosed with cancer and bronchiectasis respectively, and required proper medical intervention in order to be properly treated.<sup>34</sup>
- 3.31 The Committee has received assurances that the Commissioner is aware of the activities of Universal Medicine and that he has received complaints concerning the treatments being offered.

### *Further Sources of Misinformation*

- 3.32 In addition to the types of false or misleading health-related information or health practices highlighted here, the Committee was also informed about:
- Light therapy, which examines which colours resonate with a person and use these colours to improve their health;<sup>35</sup>
  - Electro-dermal treatments, which claim to cure disease based on the use of the resonating frequency emitted by parasites or bacteria;<sup>36</sup>
  - Turmeric tablets, to help osteoarthritis and joint inflammation, particularly aimed at seniors.<sup>37</sup>

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<sup>33</sup> Professor John Dwyer, President, Friends of Science in Medicine, *Transcript of Evidence*, 3 September 2014, at p2

<sup>34</sup> Sydney Morning Herald, 'Cult' Cures on Medicare', 22 July 2012 and The Daily Telegraph, 'Doctor sent woman for two years of new age healing in a galaxy far, far away for a cough – costing her \$35,000', 31 August 2014.

<sup>35</sup> Professor John Dwyer, President, Friends of Science in Medicine, *Transcript of Evidence*, 3 September 2014, at p9

<sup>36</sup> Friends of Science in Medicine, Submission 39, at p9

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- 3.33 While these are specific examples of health treatments and information available, it was also emphasised that the amount of information presented to health consumers is growing. Even when some of this information is accurate and includes that from reputable sources, it can quickly become overwhelming.
- 3.34 Whereas previously, health consumers would get most of their health-related information from a GP, there is now far more information on the internet and in the media. Friends of Science in Medicine argued that:
- The traditional and almost sole provider of reliable advice regarding personal and family health have been general practitioners. Increasingly, however, people turn to the Internet and social media to learn more about a range of issues including health care. Ironically, in this most scientific of ages, such outlets provide much potentially dangerous and unscientific misinformation, which is superficially appealing but certainly not reliable.<sup>38</sup>
- 3.35 Information that is inaccurate and can be harmful is widely available. As noted by the Commission:
- Information published by websites and effectively making claims which disparage conventional treatment and discourage readers from pursuing conventional treatment is widely accessible.<sup>39</sup>
- 3.36 However, it is not always clear that this information departs from accepted medical practice. The Commission highlights that:
- Generally, [the claims] are carefully worded, for example, rather than promising 'cures' they might say their product can 'assist with treatment of' relevant conditions.<sup>40</sup>
- 3.37 Similarly, the Royal Australian College of General Practitioners told the Committee that promotional claims will often use 'evidence based terms such as 'scientifically shown to', 'clinical evidence' or 'tests have proven''.<sup>41</sup> These terms lend weight to the claims made but they further confuse the issue for health consumers who are looking for accurate and effective information.

*Committee Comment*

- 3.38 The Committee was alarmed at the range of misinformation available to the general public. Given the ease with which information can now be published, particularly online, and the fact that consumers are more likely than ever to seek out their own information, it is clear that this dangerous misinformation is reaching a large audience.
- 3.39 Despite the fact that much of this information has been shown to be false, it continues to be promoted and to find an audience. The Committee notes that

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<sup>37</sup> Dr Saxon Smith, President, Australian Medical Association (NSW) Limited, *Transcript of Evidence*, 2 September 2014, at p18

<sup>38</sup> Friends of Science in Medicine, Submission 39, at p1

<sup>39</sup> Healthcare Complaints Commission, Submission 62, at p5

<sup>40</sup> Healthcare Complaints Commission, Submission 62, at p5

<sup>41</sup> The Royal Australian College of General Practitioners, Submission 56, at p2

much of the misinformation is aimed at people who are suffering or those who are vulnerable. It recognises that many people are desperate for a solution or a different opinion to that proffered by the orthodox medical professional. While the information may be appealing, it carries a real danger. The Committee also notes that much of this misinformation is promoted subtly and can potentially catch consumers unaware.

### **The Impacts of Misleading Health Information and Practices**

- 3.40 The most basic risk of false and misleading health information and practices is that health consumers choose not to undergo surgery or other treatments that have been proven to be the most effective and safest option. If they instead opt to do nothing or to submit to unregulated healthcare, this can lead to suffering and also a potential delay in effective treatment. Assistant Professor Bruce Arnold argued that:

If someone is persuaded to forego immunization or antiretrovirals or surgery in favour of 'magic touch', homeopathy, nutritional supplements or a green tea diet there are likely to be grave consequences for both that individual and for other people.<sup>42</sup>

- 3.41 Some of the real dangers of these practices were outlined earlier in this chapter in the discussion on the relevant treatments. However, the dangers of vaccination misinformation can also affect the wider community.

#### *Dangers of Anti-vaccination*

- 3.42 As was indicated earlier, the major source of misinformation on which the Committee received evidence was that of anti-vaccination proponents. There are a number of impacts of people following the advice of organisations which argue against the recommended schedule of vaccinations.

- 3.43 The most obvious benefit of vaccinations is that they prevent the vaccinated person from suffering from the relevant disease. As most vaccinations are given to young children, the decision to vaccinate rests with the parent or guardian of the child. Should the parent or guardian choose not to vaccinate their child, this endangers them and also goes against their best interests. The Committee received evidence from Civil Liberties Australia that, by choosing not to vaccinate, parents or guardians could be contravening their child's rights:

The childhood schedule of vaccines should be encouraged as it promotes the 'best interests of the child', an obligation imposed on parents, guardians and the State by the Convention on the Rights of the Child.<sup>43</sup>

- 3.44 The importance of vaccinating children can be seen in the success of vaccines. Since their introduction, the number of deaths from vaccine-preventable diseases has decreased significantly. According to the Federal Department of Health:

The use of vaccines is one of the most significant public health interventions in the last two hundred years. Since the introduction of vaccination for children in Australia

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<sup>42</sup> Assistant Professor Bruce Arnold, Submission 23, at p3

<sup>43</sup> Civil Liberties Australia, Submission 29, at p1

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in 1932, deaths from vaccine-preventable diseases have fallen by 99 per cent, despite a three-fold increase in the Australian population over that period.<sup>44</sup>

- 3.45 In fact, due to the success of vaccination programs, a number of diseases are no longer, or very rarely, found in Australia. The Federal Department of Health advised the Committee that:

The success of the NIP [National Immunisation Program] can be demonstrated through the elimination of smallpox and near elimination of polio and diphtheria in Australia. Since the introduction of the haemophilus influenza type b (Hib) vaccine in 1993 ... Australia now has the lowest rates of Hib infection in the world.<sup>45</sup>

- 3.46 Some stakeholders argued that vaccinations had become victims of their own success. Since people are no longer experiencing these diseases, they are no longer perceived as a real threat and the need to vaccinate becomes less pressing. Mr Timothy Vines, Vice President, Civil Liberties Australia pointed out that:

... vaccines and immunisation programs have ... eradicated endemic measles in Australia, whooping cough is in most areas of Australia a rather rare condition and, of course, we are on the verge globally of eradicating polio. The generation of people who grew up knowing people who died or suffered lifelong disabilities from those illnesses has receded. That is all due to the successful nature of vaccination programs.<sup>46</sup>

- 3.47 This complacency can encourage the thinking that the risks of vaccines are greater than the risk of disease.

- 3.48 Of equal significance when considering vaccination is the concept of 'herd immunity'. For immunisation to be most efficient and provide the greatest benefit to the population, a sufficient number of people need to be vaccinated to halt the spread of any bacteria and viruses that cause disease. This level of immunity is known as herd immunity and is around 90 per cent for many vaccine preventable diseases.<sup>47</sup>

- 3.49 Herd immunity becomes particularly important for children who cannot be vaccinated because they are too young or are medically unable to receive vaccinations. Should vaccination levels drop across the community, these people are put at an increased risk.

- 3.50 The Committee heard that there had been recent outbreaks of vaccine-preventable diseases in lower vaccination areas. Dr Jeremy McAnulty, Director, Centre for Health Protection, NSW Health, told the Committee:

... we have seen outbreaks of whooping cough and measles on the North Coast associated with areas of lower vaccination. Biologically we know that vaccination protects against these diseases. So when you get communities with low vaccination rates you get both the individual at risk but also the more individuals who are not

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<sup>44</sup> Australian Government Department of Health, Submission 52, at p3

<sup>45</sup> Australian Government Department of Health, Submission 52, at p3

<sup>46</sup> Mr Timothy Vines, Vice President, Civil Liberties Australia, *Transcript of Evidence*, 2 September 2014, at p24

<sup>47</sup> Australian Government Department of Health, Submission 52, at p3

vaccinated you get lower herd immunity and, therefore, it increases substantially the risk that epidemics will take off and be sustained.<sup>48</sup>

## Complementary Healthcare

- 3.51 Complementary healthcare remains a popular option for the people of New South Wales. The Committee received evidence that ‘two out of every three Australians regularly [use] a complementary medicine product’.<sup>49</sup> This includes:
- Acupuncture;
  - Herbal and homeopathic remedies;
  - Osteopathy;
  - Ayurvedic medicine;
  - Traditional Chinese medicine; and
  - Australian Indigenous medicines.
- 3.52 Complementary healthcare is well established in Australia with a number of recognised professional bodies such as the Australian Traditional Medicine Society and Complementary Medicines Australia (formerly known as the Complementary Healthcare Council of Australia).
- 3.53 These bodies promote industry best practice and operate their own codes of conduct for members. These codes of conduct cover areas such as duty of care, professional conduct, confidentiality, patients’ records and advertising.<sup>50</sup> An important part of these codes of conduct is that patients are not dissuaded from seeking advice from a qualified healthcare professional. Complementary Medicines Australia explained:
- ... the Code of Practice specifically provides that no advertisement should in any way tend to discourage the consumer from seeking the advice of a qualified health care professional.
- The guidance provided to industry by these publications adds to the level of assurance that advertising materials for these healthcare products do not create a sense of mistrust in the community for orthodox medical practice.<sup>51</sup>
- 3.54 Breaching these codes carry a range of sanctions, up to and including expulsion from the organisation.
- 3.55 Further, complementary medicines supplied in Australia are regulated by the TGA. The TGA maintains the Australia Register of Therapeutic Goods which lists or registers all medicines supplied in Australia. High risk medicines, such as those

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<sup>48</sup> Dr Jeremy McNulty, Director, Centre for Health Protection, NSW Health, *Transcript of Evidence*, 2 September 2014, at p10

<sup>49</sup> Complementary Healthcare Council of Australia, Submission 63, at p2

<sup>50</sup> Australian Traditional Medicine Society Ltd, Submission 38, at p5

<sup>51</sup> Complementary Healthcare Council of Australia, Submission 63, at p4

requiring a prescription, are *registered* while lower risk medicines are *listed* on the Register.<sup>52</sup>

- 3.56 The vast majority of complementary medicines are considered low risk and are therefore *listed* rather than *registered*.<sup>53</sup>
- 3.57 Sponsors of these medicines must, certify that ‘they hold information or evidence to support any indication (specific therapeutic use) or claim made in relation to the listed medicine’.<sup>54</sup> Limits are also set on how these medicines can be advertised. This is to prevent consumers from attempting to self-treat a condition which requires the involvement of a healthcare professional.
- 3.58 Similarly, complementary or alternative healthcare practitioners come under the jurisdiction of NSW Fair Trading. This means they can be investigated for contraventions under Australian Consumer Law and the *Fair Trading Act 1987* should they engage in false or misleading conduct.<sup>55</sup>
- 3.59 The majority of evidence for complementary healthcare recognised that it was used in conjunction with mainstream healthcare. However, some concerns were raised that should consumers be forced to make a choice between the two, for example if costs became a factor, they may choose to only use complementary healthcare which could put them at risk. The AMA explained that:

In extreme cases, if it [alternative healthcare] is followed without some intersection or discussion with what we in Australia believe is best practice, which is western evidence-based medicine, it is a concern. We have had examples even in my working space in dermatology where people have chosen not to intersect and follow complementary and alternative medicine practices, leading to death.<sup>56</sup>

#### *Committee Comment*

- 3.60 At the beginning of this inquiry, the former Chair issued a media release which clarified that ‘this inquiry is not focused on the alternative health remedies which many Australians have adopted as part of responsible supplementary health care’.<sup>57</sup> Despite this clarification, the Committee received a number of submissions supporting the role of complementary health care.
- 3.61 The Committee reiterates its support for the responsible use of alternative and complementary healthcare when it is used in conjunction with orthodox health practices. These healthcare practices are often well established and are already well regulated. While the efficacy of these treatments may be doubtful, the Committee has no concerns about the continuing use and promotion of regulated alternative and complementary healthcare.

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<sup>52</sup> Therapeutic Goods Administration, Submission 21, at p3

<sup>53</sup> Therapeutic Goods Administration, Submission 21, at p3

<sup>54</sup> Therapeutic Goods Administration, Submission 21, at p3

<sup>55</sup> NSW Fair Trading, Submission 48, at p3

<sup>56</sup> Dr Saxon Smith, President, Australian Medical Association, *Transcript of Evidence*, 2 September 2014, at pp20-21

<sup>57</sup> Ms Leslie Williams MP, Chair, Committee on the Health Care Complaints Commission, *Media Release*, 29 November 2013

## Chapter Four – Legislative Responses

- 4.1 The purpose of this Chapter is to identify key provisions of the *Health Care Complaints Act 1993* (the Act), as well as related legislation, and determine whether the provisions as currently drafted are effective and appropriate.
- 4.2 The Committee has recommended amendments that clarify the definitions of key legislative provisions that are in some respects ambiguous, and tighten the language to ensure that these provisions give proper effect to the legislative intent. Recommendations have also been made to bolster the Commission's current suite of powers and extend its remit.

### *The Health Care Complaints Act 1993*

- 4.3 Following the Supreme Court decision in *Australian Vaccination Network Inc (AVN) v Health Care Complaints Commission*, and subsequent amendments to the Act, the powers of the Commission and its remit have been defined more clearly. Despite some positive remarks about the changes brought about by the 2013 amendment, this has also been tempered by discussion of some of the Act's limitations, including that the changes did not go far enough.
- 4.4 One of the major initiatives of this Inquiry has been to examine the effectiveness and appropriateness of the Act, as currently in force. This was underscored by the Committee's adoption of Term of Reference (e). Throughout the Inquiry, attention turned to a few key components of the Act. These are:
- (a) the definition of a health service (section 4);
  - (b) the making of a complaint (section 7);
  - (c) enforcement provisions (section 42); and
  - (d) public warnings (section 94A)

### *The Definition of a Health Service (Section 4)*

- 4.5 Action under the Act is complaints-driven, and complaints must be about the provision of a health service by a health service provider, or must relate to the professional conduct of a health practitioner.
- 4.6 A health service is defined under section 4 of the Act as one of a number of health services. The list includes a comprehensive number of professional services, reproduced as follows:
- (a) medical, hospital, nursing and midwifery;
  - (b) dental services;
  - (c) mental health services;
  - (d) pharmaceutical services;

- (e) ambulance services;
- (f) community health services;
- (g) health education services;
- (h) welfare services necessary to implement any services referred to in paragraphs (a) – (g);
- (i) services provided in connection with Aboriginal and Torres Strait Islander health practices and medical radiation practices;
- (j) Chinese medicine, chiropractic, occupational therapy, optometry, osteopathy, physiotherapy, podiatry and psychology services;
- (j1) optical dispensing, dietician, massage therapy, naturopathy, acupuncture, speech therapy, audiology and audiometry services;
- (k) services provided in other alternative health care fields;
- (k1) forensic pathology services;
- (l) a service prescribed by the regulation as a health service for the purposes of this Act.

4.7 Despite the extensive list of professional services covered under the definition, the list is not considered to be exclusive. In response to a question asked at the Committee's hearing of 2 September 2014, NSW Health advised:

... [the] health services set out in paragraphs (a) – (l) are inclusive, and is *not* an exhaustive list of the health categories in respect of which complaints may be made under the Act.<sup>58</sup>

4.8 NSW Health also noted that paragraph (l) allows for additional classes of health services to be prescribed by regulation, although there are no additional classes currently prescribed.

4.9 Despite its lack of exhaustiveness, there is an assumption that there is limited scope to derogate from the health services listed under this provision. On this point, the Commission advised the Committee that:

It appears that the current definition of a health service under the Act is a list of specific health services that may not cover some type of health-related information and services...<sup>59</sup>

4.10 When pressed on this issue during the Committee's hearing of 3 September 2014, the Health Care Complaints Commissioner (the Commissioner) advised that the definition of a health service appeared to be 'unnecessarily narrow'.<sup>60</sup>

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<sup>58</sup> NSW Health, Responses to Questions on Notice, 8 October 2014 at p2

<sup>59</sup> Health Care Complaints Commission, Submission No 62 at p3

<sup>60</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014 at p20

- 4.11 Similarly, in its submission, the Australian Medical Association (AMA) noted that while the Act's current definition of a 'health service' may be broad enough to incorporate an 'unrecognised' health service, an 'unrecognised' health service remains unlisted as a specific category under section 4.<sup>61</sup>
- 4.12 It was widely discussed that the current definition under section 4 may be limiting the ability of the Commission to investigate complaints by restricting its capacity to only examine health service providers of the professions or bodies specifically enumerated. Even if it was not the legislative intent that the section 4 definition of health service be an exhaustive list, the risk remains of a misplaced assumption that it is.
- 4.13 This has the potential to cause confusion amongst certain health service providers whose services are unspecified under section 4 as to whether they are covered by the legislation or not. Similarly, members of the public, and the Commission itself, may not be aware of the Commission's reach in oversighting these classes of practitioners.
- 4.14 As such, the AMA recommended:
- ... for certainty and clarity, the definition of a health service at (k) [services provided in other alternative health care fields] ought to include 'unrecognised health service providers and organisations'.<sup>62</sup>
- 4.15 By way of contrast, the definition of a health service under Queensland's *Health Ombudsman Act 2013* is more broad-based, to cover a more complete range of activities and treatments that could be constituted as a health service. In particular, section 7(1) of that Act provides that:
- A health service is a service that is, or purports to be, a service for maintaining, improving, restoring or managing people's health and well-being.<sup>63</sup>
- 4.16 An alternative definition can similarly be found under the definition of health services under the Commonwealth *Privacy Act 1988*. It provides that a health service is:
- (a) An activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the person performing it:
    - (i) to assess, record, maintain or improve the individual's health; or
    - (ii) to diagnose the individual's illness or disability; or
    - (iii) to treat the individual's illness or disability or suspected illness or disability; or

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<sup>61</sup> Australian Medical Association (NSW), Submission 43, p5

<sup>62</sup> Australian Medical Association (NSW), Submission 43, p5

<sup>63</sup> *Health Ombudsman Act 2013* (Qld), s7(1)

(b) The dispensing on prescription of a drug or medicinal preparation by a pharmacist.<sup>64</sup>

- 4.17 The Commission noted that these definitions shift ‘from specifying occupational based health provision to generic descriptions which would include less conventional health services’.<sup>65</sup>
- 4.18 As such, the Commission suggested that the current definition under the Act could be amended and broadened along the lines of Queensland’s *Health Ombudsman Act 2013* and/or the Commonwealth’s *Privacy Act 1988*.

### *Committee Comment*

- 4.19 The Committee notes the potential problems with the current definition of ‘health service’ under section 4 of the Act. While there is an extensive list of health professional services captured by the definition, there remains some uncertainty as to whether this list is exhaustive. This uncertainty exists amongst key stakeholders and its effect is to cast doubt as to whether health services that are not specifically recognised are nonetheless captured by the Act.
- 4.20 One of the preferred approaches has been for the definition of health service to be less prescriptive. That is, that it be redrafted along the lines of the current definition of ‘health service’ under Queensland’s *Health Ombudsman Act 2013* or the Commonwealth *Privacy Act 1988*. This approach has been supported by the Commission.
- 4.21 A more widely-encompassing definition would remove doubt about the Commission’s capacity to investigate complaints that may otherwise be on the margins of the Commission’s current remit, and ensure that complaints from across the spectrum of health-related services, whether recognised or not, are able to be investigated.
- 4.22 In the alternative, the current list of health services could remain, and an additional subsection be inserted after paragraph (l) as proposed by the AMA. This subsection could provide that any other related recognised or unrecognised health service provider is similarly covered by the provision.
- 4.23 The Committee recognises the merits of both of the suggested approaches, and considers that both options could reasonably be incorporated by an amendment to the Act. This would involve inserting an additional paragraph after (l) which would provide that all other health service providers are included in the definition, with wording similar to Queensland’s *Health Ombudsman Act 2013*.

## RECOMMENDATION 1

**The Committee recommends that the definition of ‘health service’ under section 4 of the *Health Care Complaints Act 1993* be amended by inserting an additional paragraph to provide that ‘a health service may also be, or purport to be, a service for maintaining, improving, restoring or managing people’s health and wellbeing’.**

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<sup>64</sup> *Privacy Act 1988*, s6

<sup>65</sup> Health Care Complaints Commission, Submission No 62, at p4

*The Making of a Complaint (Section 7)*

4.24 Section 7 of the Act deals with who is able to lodge a complaint and this provision was subject to particular scrutiny from some quarters. At present, section 7 reads:

- (1) A complaint may be made under this Act concerning:
  - (a) the professional conduct of a health practitioner (including any alleged breach by the health practitioner of Division 1 or 3 of Part 7 of the *Public Health Act 2010* or of a code of conduct prescribed under section 100 of that Act), or
  - (b) a health service which affects, or is likely to affect, the clinical management or care of an individual client.
- (2) A complaint may be made against a health service provider.
- (3) A complaint may be made against a health service provider even though, at the time the complaint is made, the health service provider is not qualified or entitled to provide the health service concerned.

4.25 As noted, the current definition was modified by the 2013 amendment which previously did not include the words '*or is likely to affect*' under section 7(1)(b). The amendment therefore widened the remit of the Commission by removing the requirement for a direct nexus to be established between practitioner conduct and clinical management or care of the individual client.

4.26 NSW Fair Trading noted that, prior to the amendment in 2013, the scope of section 7(1)(b) of the Act was 'quite narrow in relation to the type of complaint the Commission could investigate' and recognised that the amendment was introduced to 'address the limitation'.<sup>66</sup>

4.27 Given that the new amendments have only been operational for 18 months, there has not been an adequate opportunity to assess either the success or shortcomings of this provision since its change.

4.28 NSW Health made this point in its submission to the Inquiry, noting that the provision remained 'untested', but added that it was 'appropriate to monitor implementation of these broadened powers over time'.<sup>67</sup>

4.29 Despite the short passage of time that has passed since the amendment, many stakeholders still had reservations that the change did not go far enough.

4.30 NSW Fair Trading recommended that consideration be given to expanding the type of complaint that can be investigated by the Commission to include conduct by a health service that is 'misleading or deceptive, or is likely to mislead or deceive'.<sup>68</sup>

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<sup>66</sup> NSW Fair Trading, Submission No 48, at p4

<sup>67</sup> NSW Health, Submission No 46, at p3

<sup>68</sup> NSW Fair Trading, Submission No 48, at p6

- 4.31 A further amendment of this nature would align closely with the general prohibition against trading or engaging in commerce that is misleading or deceptive, or likely to mislead or deceive, currently provided for under the Australian Consumer Law and regulated by NSW Fair Trading.<sup>69</sup>
- 4.32 The AMA similarly regarded the amendment as not having gone far enough, and further recommended that section 7(1)(b) be amended to provide that complaints should be about ‘a health service, whether *registered or unrecognised or unregistered*, which affects, or is likely to affect, the clinical management of the *public or any member of the public*’.<sup>70</sup>
- 4.33 This proposal affects the current wording in two ways. First, it casts the net widely as to who may be considered a health service provider by including those not only registered and unregistered, but also those not presently ‘recognised’. Who may be covered as an ‘unrecognised’ practitioner may be a matter of guesswork, but presumably it would include those practitioners, currently not foreseeable, who may be a cause for concern in the future.
- 4.34 Second, the Commission would have scope to investigate a complaint irrespective of whether the individual bringing the complaint was a client of the practitioner concerned. This would extend the operation of the provision to ensure for the general public’s health and wellbeing. As the Commissioner advised the Committee:
- The complaints generally are not by users of these health services, if you want to call them that; they are generally by passionate advocates and people who philosophically disagree with the service they are providing.<sup>71</sup>
- 4.35 For example, Mr Ken McLeod, one of the original complainants against the AVN, did so from the perspective of an interested third party, rather than an adversely affected patient. Indeed, one of largest campaign groups – the Friends of Science in Medicine – is run by medical professionals who would be well aware of the dangers of many of the health-related ‘services’ available.
- 4.36 For its part, the Commission also acknowledged that section 7 still poses a high bar to overcome. In evidence provided to the Committee, the Commissioner advised:
- Wherever we have jurisdiction we will act and assess the complaints and investigate them under the Act. We also have an own motion power, but that is conditional on the complaint raising a significant issue of public health and safety or involving disciplinary action against the practitioner. So it is a fairly high threshold.<sup>72</sup>

### *Committee Comment*

- 4.37 The Committee notes the various suggestions put to it concerning a further redefinition of section 7. Although the amendment to section 7 has only been

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<sup>69</sup> Australian Consumer Law, s18(2)

<sup>70</sup> Australian Medical Association (NSW), Submission 43, p5

<sup>71</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p18

<sup>72</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p18

operational for 18 months, the Committee is of the opinion that further changes should be made for clarification purposes.

- 4.38 As the Commissioner has noted, it is often passionate individuals who bring forward complaints as a form of social advocacy. These individuals, often sceptical of dubious health practices and who are generally very health literate, are unlikely to be affected by health service providers of questionable quality and service.
- 4.39 However, it is unclear whether the current provisions would enable such 'third party' advocates to bring forward a complaint given the absence of any actual reliance they might have on the health service of the practitioner concerned.
- 4.40 The Committee is also aware that while the Commissioner is able to initiate 'own motion' investigations on receipt of such complaints, this is a separate proposition to the one where any member of the public can be a complainant to any advice, treatment or practice of a health-related nature that they have concerns with.
- 4.41 As such, the Committee considers it appropriate that, even if for the avoidance of doubt, additional words are inserted in section 7 to enable any member of the public to bring a complaint about a health service. This provision will ensure that complaints can be brought by an individual whether or not they are a patient of the practitioner complained about, or whether or not they have been affected by the clinical management and care of the practitioner.

## RECOMMENDATION 2

**The Committee recommends that section 7(1)(b) of the *Health Care Complaints Act 1993* be amended to provide that a complaint under the Act can be brought 'by any individual' and be about 'a health service that affects, or is likely to affect, the clinical management or care of an individual client, or the public, or any member of the public.'**

### *Enforcement Provisions (Sections 41AA – 42)*

- 4.42 The Commission presently has a number of methods at its disposal to take enforcement action against individuals who, following investigation, are in breach of their professional duties or have acted in a way deemed to be unsatisfactory professional conduct.
- 4.43 This includes the power to handle matters concerning unregistered health practitioners. As noted earlier, an unregistered health practitioner is any health service provider not required to be registered under the *Health Practitioner Regulation National Law (NSW)*.
- 4.44 All unregistered health practitioners are required to adhere to the Code of Conduct, which first came into effect in 2008. The Code of Conduct sets out the minimum standards of practice and treatment expected of unregistered health practitioners. This includes the requirement not to make claims to cure certain serious illnesses, the need for appropriate conduct in relation to treatment advice, and rule not to practise under the influence of drugs or alcohol.

- 4.45 Crucially, clause 12 of the Code of Conduct provides that health practitioners must not misinform their clients. In particular, that they must not engage in any form of misinformation or misrepresentation in relation to the product or services he or she provides. Further, practitioners must not dissuade patients from seeking or continuing treatment from a registered health practitioner.<sup>73</sup>
- 4.46 Enforcement action against unregistered health practitioners is provided for under Division 6 and section 42 of the Act. Specifically, prohibition orders and the making of public statements is authorised under section 41A of the Act, with interim prohibition orders authorised under section 41AA.
- 4.47 The Commission may make a prohibition order in circumstances where a health practitioner has breached a code of conduct for unregistered health practitioners or has been convicted of a relevant offence, and the Commission is of the opinion that the health practitioner poses a risk to the health or safety of members of the public.
- 4.48 In making a prohibition order, the Commission is able to prevent the health practitioner concerned from providing health services for a specified period or permanently, and place such conditions as the Commission thinks appropriate in the circumstances. The Commission may also issue a public statement identifying and giving warnings or information about the health practitioner and the services provided.
- 4.49 It is an offence under section 102(3) of the *Public Health Act 2010* to breach a prohibition order and a practitioner can be prosecuted for breach of the order. The maximum penalty for this offence is 200 penalty units, or twelve months imprisonment, or both.
- 4.50 Despite this, there has been some commentary that the Commission lacks appropriate enforcement powers.
- 4.51 In its submission, the Friends of Science in Medicine commented that:
- ... although the 2013 amendment appears to give the Commission appropriate powers to initiate and investigate complaints against unregistered health service providers, there do not appear to be specified actions or penalties for failure to comply.<sup>74</sup>
- 4.52 The Commission itself noted that it:
- ... does not routinely monitor compliance with prohibition orders. The Commission has no powers to enter premises or ask questions for this purpose and relies on the public to bring any suspected breaches to its attention.<sup>75</sup>
- 4.53 On the issue of the absence of routine monitoring that prohibition orders are being complied with, the Medical Technology Association of Australia (MTAA) similarly noted:

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<sup>73</sup> Public Health Regulation 2012, Schedule 3, Code of Conduct, cl7(1)

<sup>74</sup> Friends of Science in Medicine, Submission 39, at p6

<sup>75</sup> Health Care Complaints Commission, Submission No 62, at p6

In relation to the HCCC's ability to take enforcement action where necessary, section 42 of the Health Care Complaints Act allows the HCCC to make recommendations or comments to a health organisation on the subject of a complaint at the end of the investigation of that organisation. However, if a health organisation does not implement the HCCC's recommendations, the misinformation may not be rectified in a timely manner.<sup>76</sup>

- 4.54 On occasions when the Commission has inquired why prohibition orders were not being adhered to, the Commission noted that this was usually remedied quickly by the practitioner concerned. At the time of publication, there is only one matter that the Commission is prosecuting for breach of a prohibition order.

#### *Committee Comment*

- 4.55 The Committee notes that between the *Health Care Complaints Act 1993*, the *Public Health Act 2010*, and the *Code of Conduct for Unregistered Practitioners*, there are numerous enforcement and penalty provisions at the disposal of the Commission and other appropriate authorities.
- 4.56 The Committee received some evidence to suggest that the enforcement and penalty provisions were inadequate. However, most stakeholders were silent on this matter and there was no urgent call for reform, or suggestions as to how any reform should take place.
- 4.57 However, there is scope for more information to be obtained as to whether the enforcement powers are effective and appropriate. In particular, whether once a prohibition order has been issued, the follow-through powers of the Commission are sufficient.
- 4.58 While it appears that the need may not be currently warranted, the Committee is interested in receiving further evidence and more information on this matter before recommending any amendment to the Act.

### RECOMMENDATION 3

**The Committee recommends that NSW Health and the Health Care Complaints Commission monitor and report on the compliance of prohibition orders issued by the Commission under sections 41AA – 42 of the *Health Care Complaints Act 1993*, in their annual reports.**

#### *Public Warnings (Section 94)*

- 4.59 Section 94A of the Act provides the Commission with the power to issue warnings about unsafe treatments or services.
- 4.60 Specifically, the section provides that:
- (a) If following an investigation, the Commission is of the view that a particular treatment or health service poses a risk to public health or safety, the Commission may then issue a public statement identifying and giving warnings or information about the treatment or health service.

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<sup>76</sup> Medical Technology Association of Australia, Submission No 42, at p2

(b) The Commission is also authorised to revoke or revise any such statement.<sup>77</sup>

4.61 The Commissioner advised the Committee that when this option is exercised, a warning is placed on its website (usually in a prominent position), and a media release is issued and distributed to its 120 media outlets.<sup>78</sup>

4.62 For example, when the AVN failed to place a disclaimer on its website in accordance with the Commissioner's suggestion, the Commissioner invoked this power and placed a public warning on its own website.

4.63 While this power has been used previously, there has been discussion about whether the Commission has been too reticent or inactive in exercising it.

4.64 In its submission, the AMA stated:

The AMA considers that the Commission should exercise its power under section 94A more broadly and consistently than it has elected to do to date.<sup>79</sup>

4.65 Upon further examination at the Committee's hearing on 2 September 2014, the AMA reiterated its view that the Commission be more proactive in issuing warnings against misleading information.<sup>80</sup>

4.66 Despite the criticisms, there was broad support for the power to issue public warnings to remain and, in a couple of respects, be amended to grant the Commissioner further powers.

4.67 The MTAA identified the shortcomings as follows:

While section 94A allows the HCCC to issue a warning about unsafe treatments or health services, the health service's false or misleading information may remain in the public domain.<sup>81</sup>

4.68 In this respect, the MTAA has acknowledged that the real task is to ensure the removal of the offending material, not just issue a public warning in response.

4.69 Meanwhile, the AMA recommended the creation of a publically available warnings register that could act as a central repository of treatments and practices that the public should be made aware of. The AMA considers that this option 'would provide the public with a convenient reference source whenever the public contemplate any offer of health care'.<sup>82</sup>

4.70 When this was put to the Commissioner, he replied:

I am not sure about the idea of a register. I suppose the issue really is public access to the information—nowadays, just google. They will just type in the name of the

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<sup>77</sup> *Health Care Complaints Act 1993*, s94A

<sup>78</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p23

<sup>79</sup> Australian Medical Association (NSW), Submission 43, at p6

<sup>80</sup> Saxon Smith, *Transcript of Evidence*, 2 September 2014, at p18

<sup>81</sup> Medical Technology Association of Australia, Submission No 42, at p2

<sup>82</sup> Australian Medical Association (NSW), Submission 43, at p6

provider they are concerned about and it will pick up. I am just not sure how and what form a register would take or what further power it would have than just publishing it on our website.<sup>83</sup>

- 4.71 The Committee also canvassed the possibility of the making of public warnings without the need of a formal investigations process. As the Commissioner noted:

... [T]he question is whether there is a need for a formal investigation at all. If some things are so self-evident, should we just have a general power to make public warnings?<sup>84</sup>

- 4.72 It would be unlikely if any of the products and services canvassed in Chapter Three would require investigation given that the vast amounts of research and literature present would justify the making of a public warning without an investigation.

- 4.73 The Commission also called for consideration to be given for 'quicker methods' of issuing a public warning, which may include the making of an interim warning should an investigation be on foot. This would mirror the Commission's current powers to make interim prohibition orders, while reserving the right to make indefinite prohibition orders at the conclusion of an investigation.<sup>85</sup>

- 4.74 Not all stakeholders saw the need for any change. It should be noted that NSW Health supported the retention of section 94A in its current form. Specifically, in response to questions on notice, the Committee was advised that:

The Ministry considers there is no evidence this provision is inadequate... The Ministry of Health considers the Commission's capacity to issue a warning provides the Commission with an effective mechanism for responding to misleading or incorrect claims made by organisations such as the AVN.<sup>86</sup>

### *Committee Comment*

- 4.75 The Committee concurs with the Commissioner that a public register is unlikely to add any further value with respect to warning the public about the risks of certain practices and treatments when compared to those warnings that already exist. As long as a public warning is issued by the Commissioner, and that the warnings are both easily accessible and advertised in a prominent position on the Commission's website, the Committee does not consider the need for a public warnings register.

- 4.76 However, the Committee does appreciate that there are a number of health 'treatments' circulating in the community which may warrant further analysis. As canvassed in Chapter Three, this includes the use of black salve lotion, live blood analysis, and other practices of dubious merit. More importantly, these products and services are likely to cause a degree of harm to the community without early intervention.

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<sup>83</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p23

<sup>84</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p24

<sup>85</sup> *Health Care Complaints Act 1993*, s41AA

<sup>86</sup> NSW Health, Responses to questions on notice, 8 October 2014, at pp4-5

- 4.77 In this respect, it is imperative that the appropriate regulatory authorities (including the Commission), be able to take proactive action before individual and public health is compromised. This may require the Commission's use of its own motion investigation powers and, without prejudicing the outcome of any investigation, a more liberal use of its public warnings power. To this end, the Committee fully supports that the Commission take proactive steps.
- 4.78 Further, there may be two additional approaches made with respect to the public warnings power. The first concerns whether some health treatments and practices are so self-evidently dangerous or detrimental to individual or public health, that they do not require investigation, and that any further delay would compromise individual and public health. This would presumably involve circumstances where a significant amount of material which demonstrates the existing risk is already available.
- 4.79 The second is where, while an investigation is on foot, the risk to public health and safety is such that the Commissioner should be able to make public warnings on an interim basis, before the conclusion of an investigation.
- 4.80 The Committee is supportive of legislative changes to give effect to these two approaches.

#### RECOMMENDATION 4

**The Committee recommends that the *Health Care Complaints Act 1993* be amended to allow the Commission to issue public warnings without first requiring an investigation in circumstances where the risk to public health and safety is such that any further delay may compromise individual and public health.**

#### RECOMMENDATION 5

**The Committee recommends that the *Health Care Complaints Act 1993* be amended so that the Health Care Complaints Commission can issue a public warning on an interim basis in circumstances where an investigation is on foot but the Commissioner is reasonably of the opinion that there is a risk to public health and safety and that any further delay may compromise individual and public health.**

#### *Public Health Act 2010*

- 4.81 Relevant provisions concerning false and misleading health-related information exist under section 99 the *Public Health Act 2010*. Specifically, that section states that:
- A person must not advertise or otherwise promote the provision of a health service in a manner that:
- (a) is false, misleading or deceptive, or
  - (b) is likely to mislead or deceive, or

(c) creates, or is likely to create, an unjustified expectation of beneficial treatment.

- 4.82 The penalties for a breach of section 99, in the case of an individual, are 100 penalty units for a first offence, and 200 penalty units for a second or subsequent offence. The penalties in the case of a corporation are 500 penalty units for a first offence, and 1,000 penalty units for a second or subsequent offence.
- 4.83 The definition of ‘health service’ has the same meaning as under the *Health Care Complaints Act 1993*.<sup>87</sup> As the Commission noted, this presents the same limitations discussed above.<sup>88</sup>
- 4.84 The Commission noted that this provision does not first require the promotion for a health service in such a manner that is a risk to public health and safety. In this respect, the Commission observed that it was therefore ‘broader than the Commission’s core function’.<sup>89</sup>
- 4.85 When asked at the Committee’s hearing of 3 September 2014 about how many prosecutions have been commenced under this provision, the Commissioner advised that none had. The Commissioner further advised that it was not the proper authority of the Commission to involve itself with the powers under section 99, and that reference to it in the Commission’s submission was only intended as a survey of ‘the landscape of potential applicable legislation’.<sup>90</sup>
- 4.86 The Commissioner further noted that there is no proper mechanism for enforcement of a breach of section 99, and that it would be ‘a big accretion of jurisdiction’ should the Commission acquire responsibilities existing under section 99.<sup>91</sup>

#### *Committee Comment*

- 4.87 The Committee notes that section 99 of the *Public Health Act 2010* prohibits the promotion of a health service that is false or misleading. In this respect, legislative authority already exists that directly relate to the purpose of this Inquiry and – in part – address the chief concerns raised in the Terms of Reference.
- 4.88 The Committee received limited evidence of the use and effectiveness of this provision, and how often prosecutions had been brought– if at all – by any of the responsible statutory authorities.
- 4.89 At present, it appears that the need for reform may not be warranted. However, the Committee would need further evidence, and is interested in receiving more information on this matter, before recommending any amendment to either the *Health Care Complaints Act 1993* or the *Public Health Act 2010*.

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<sup>87</sup> *Public Health Act 2010*, s5

<sup>88</sup> Health Care Complaints Commission, Submission No 62, at p7

<sup>89</sup> Health Care Complaints Commission, Submission No 62, at p7

<sup>90</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p25

<sup>91</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p25

## RECOMMENDATION 6

**The Committee recommends that NSW Health and the Health Care Complaints Commission monitor and report on the use of enforcement powers against health service providers who are in breach of section 99 of the *Public Health Act 2010* pertaining to the advertising or promotion of health services, in their annual reports.**

## Chapter Five – Policy Responses

- 5.1 This Chapter considers some of the issues raised throughout the Inquiry and examines appropriate policy responses. In particular, the Committee considers some of the issues raised with respect to possible freedom of speech implications arising from any reforms suggested, possible joint administrative arrangements with other statutory bodies, and the ongoing importance of education and awareness campaigns.

### Freedom of Speech

- 5.2 The Committee received numerous items of correspondence from a wide range of individuals and community groups expressing concern about the perceived direction of this Inquiry.
- 5.3 Broadly speaking, the sentiment expressed was one of concern that the Committee was using the Inquiry process as a vehicle for introducing tighter controls that would censor free speech and attach penalties to infringements on expressing health advice that may be contrary to mainstream and accepted practice. In particular, that new controls may be instituted which would adversely affect practitioners of health-related modalities that are currently unregistered and unrecognised.
- 5.4 Correspondence was received through formal submissions, letters, and by email. The views expressed included concern that new powers would be afforded to the Commission to ‘silence’ critics of mainstream medicine in an attempt to ‘stifle’ debate.
- 5.5 For example, the Australian Traditional Medicine Society (ATMS) advised in its submission that:
- The ATMS position is that freedom of expression is an essential human right, protected under international and domestic human rights instruments. ATMS maintains that the Government’s response to organisations critical of vaccination should not be to introduce laws to limit speech, but rather Government should speak more and more pointedly in favour of facts.<sup>92</sup>
- 5.6 Meryl Dorey, the former President of the Australian Vaccination-skeptics Network (AVN) – although writing in her personal capacity – argued that:
- The Australian constitution and High Court precedents already protect the right to speech provided it is not defamatory, slanderous or inciting hatred... so the Committee should be forewarned that any attempt to take away rights protected by these legal precedents will be swiftly followed by legal action by those who fight to protect freedoms which are considered to be inalienable.<sup>93</sup>

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<sup>92</sup> Australian Traditional Medicine Society, Submission No 38, at p3

<sup>93</sup> Meryl Dorey, Submission No 32, at p2

- 5.7 These views of Ms Dorey and the ATMS were supported by Tim Vines from Civil Liberties Australia, and Thomas Faunce, Professor at the College of Law who, in writing for the Medical Law Reporter,<sup>94</sup> stated:

In a free society, the views and opinions expressed by Ms Dorey and the AVN should be protected against government interference. Arguments against public immunisations programs are not simply debates over health policy, they are also political discussions. As such, the AVN's website, and Ms Dorey's statements, ought to be protected from interference by Parliament or the Executive by the implied constitutional right of political communication.<sup>95</sup>

- 5.8 In a separate submission to the Inquiry, Civil Liberties Australia cautioned against 'measures that have the effect of privileging certain points of view', stressing its point that, while admirable, Government cannot be ensuring that one view emerges prominent through controls of an opposing or dissenting view.<sup>96</sup> Civil Liberties Australia further advised that it would not be acceptable as 'protecting free speech means that the Government cannot pick a winning viewpoint.'<sup>97</sup>

- 5.9 In further evidence to the Committee, Civil Liberties Australia reiterated the concern about possible encroachments on the freedom of speech:

... limitations on human rights can only be justified if they are narrowly designed and, in particular, they have to have a legitimate aim of dealing with particularly harmful types of speech such as fraud, which we think is a much more serious type of speech than just misleading conduct. We are also firmly of the view that an individual has the right as a competent adult or even a mature young person to make decisions concerning their health regardless of whether a medical professional believes that a decision will lead to a beneficial or harmful outcome.<sup>98</sup>

- 5.10 In addition to the 72 submissions before the Committee for consideration, approximately an additional 215 emails were sent to the Committee. These emails either did not specifically address the terms of reference of the Inquiry or were of such brevity, that they were considered only to be items of correspondence.

- 5.11 Many of the emails expressed scepticism with orthodox medical practice, with a particular emphasis on the supposed problems with mainstream science, and the powers and threats of the pharmaceutical industry. Numerous emails stressed the relevance and importance of alternative therapies, and of individual health consumers being able to decide what therapy is most appropriate for them without being fettered by government or the Commission.

- 5.12 One correspondent wrote to the Committee to advise, in a view typically expressed by many others:

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<sup>94</sup> The Committee notes that Mr Vines and Mr Faunce did not support the vaccine-sceptic views of Ms Dorey and, in its submission and at further evidence before the Committee, both Civil Liberties Australia and Mr Vines expressed support for nationwide immunisation programs.

<sup>95</sup> Thomas Faunce & Tim Vines, *Civil Liberties and the Critics of Safe Vaccination: Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 in Medical Law Reporter (2012) 20 JLM 44, at p54

<sup>96</sup> Civil Liberties Australia, Submission No 29, at p2

<sup>97</sup> Civil Liberties Australia, Submission No 29, at p2

<sup>98</sup> Tim Vines, *Transcript of Evidence*, 2 September 2014, at p23

The sovereign right of each individual to determine what health treatment options are best depends on freedom of information, and any health-related information deemed to be false or misleading should be countered with an effective and truthful campaign rather than being banned or treated as criminal.<sup>99</sup>

- 5.13 Other views included concerns about plans by the Commission and the Government to ‘mount an attack on freedom of expression and freedom of speech that is unprecedented in Australia or any other democratic country’, and expressed complete opposition to ‘blacklisted naturopathic modalities being effectively gagged’.<sup>100</sup>
- 5.14 The Committee appreciates the significant amount of apprehension within some quarters of the approach this Inquiry may have taken. The Committee acknowledges that this Inquiry was prompted by concerns that the AVN was publishing and distributing false and misleading health-related material to the detriment of individual and community health. In doing so, the Committee became concerned that the AVN was essentially exploiting a regulatory loophole to promote dangerous messages, and the Committee sought options to prevent similar groups using such gaps to circumvent proper regulatory oversight.
- 5.15 In this respect, the Committee is open to the idea of tightening legislation to enable the Commission – or any other appropriate body – the power to scrutinise the distribution of false and misleading health-related information.
- 5.16 However, it is not and has never been the Committee’s intention to propose or support laws that may have a chilling effect on the freedom of speech and freedom of choice in healthcare. As such, the concerns of many have been misplaced.
- 5.17 Throughout the Inquiry, the Committee has been mindful of the wide range of views about the limits of free speech, and has welcomed the diversity of opinion. However, the Committee has also noted the views, submitted by Associate Professor Bruce Arnold, Faculty of Law at the University of Canberra, that:
- Australian law does not provide for a comprehensive right of free speech or free expression. Such a right is not an explicit feature of the national constitution, of the Commonwealth and state/territory human rights statutes of Australian common law...<sup>101</sup>
- 5.18 Prof Arnold continued:
- [Freedom of Speech] is circumscribed, it does not extend to all expression and accordingly does *not* invalidate legitimate restrictions regarding ethno-religious vilification, victim identification, defamation, or product marketing.<sup>102</sup>
- 5.19 These sentiments were echoed by the Communications Council, which noted:

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<sup>99</sup> Private Correspondence to Committee, 3 February 2014

<sup>100</sup> Private Correspondence to Committee, 6 February 2014

<sup>101</sup> Associate Professor Bruce Arnold, Submission 23, at p9

<sup>102</sup> Associate Professor Bruce Arnold, Submission 23, at p9

Unfortunately the perpetrators of what can be easily proven as misleading information do not feel bound by any regulation and regard themselves as having the right under 'freedom of speech' legislation to voice their opinions, however different they may be from clinically proven opinion. While they have that right in principle under the constitution, there are limitations when such an opinion has the potential to adversely affect 'the public health'...<sup>103</sup>

### *Committee Comment*

- 5.20 The Committee takes a similar view, that moderate and measured approaches to regulate what may otherwise be unregulated 'speech' can, in particular instances, be justified and appropriate.
- 5.21 The Committee notes that this is a separate proposition to information of a benign or redundant nature which, while not demonstratively beneficial, is not itself a cause of harm or does not pose a risk of danger.
- 5.22 However, it is different when an individual or organisation promotes information that, if relied upon, can be dangerous to individual and public health. The Committee is of the view that the active persuasion of individuals to unsafely refuse medical treatments or the promotion of alternative treatments that are harmful is not acceptable.
- 5.23 The Committee is satisfied that the recommendations, if implemented, will not unduly inhibit the right to free speech of individuals and will be appropriate and justified in the circumstances.

## **Interagency Cooperation**

### *Referral of Complaints*

- 5.24 Both NSW Fair Trading and the Commission have the power to refer complaints to each other in circumstances where it may be more appropriate for the other agency to investigate the complaint.
- 5.25 This referral mechanism is supported by legislative provisions. Specifically, sections 9 and 9A of the *Fair Trading Act 1987* provide the authority to exchange information between NSW Fair Trading and other relevant statutory bodies regarding the investigation of a complaint.
- 5.26 Equivalent powers under section 8 of the *Health Care Complaints Act 1993* authorise the Commission to receive such complaints, and section 26 similarly enables the Commission to refer to any person or body if it appears that there are issues raised in that complaint that require investigation by the other person or body.
- 5.27 In response to questions on notice, NSW Fair Trading further advised the Committee that it received 193 complaints relating to medical health care services in the financial years between 2012 and 2014. Of these, seven were investigated.<sup>104</sup>

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<sup>103</sup> The Communications Council, Submission No 58, at p3

<sup>104</sup> NSW Fair Trading, Responses to Questions on Notice, 29 September 2014, at p2

5.28 Given the Commission's obvious interest and access to expertise in complaints of a health-related nature, the Committee asked whether it would have been preferable that these matters be referred to the Commission instead. NSW Fair Trading advised that it would not have been, but added the important caveat that:

...standard practice is that if during an investigation it is identified that there are components that may be better addressed by the Commission, they are referred.<sup>105</sup>

5.29 As advised by NSW Fair Trading, the scope for referral from the Commission to Fair Trading is narrower than the process from Fair Trading to the Commission. This is because matters before the Commission must first be constituted as a complaint under section 7(1)(b) of the *Health Care Complaints Act 1993* before it can be referred onward. For a matter to first be established as a complaint, it must meet the definition of complaint under the Act, at which point the matter can fall short of the threshold requirements previously discussed.

5.30 NSW Fair Trading recommended that appropriate steps be taken, 'including an amendment of the Act if required', to enable the Commission to refer complaints to NSW Fair Trading.<sup>106</sup>

5.31 This concern was not shared by the Commission. When asked at the Committee's hearing of 3 September 2014, the Health Care Complaints Commissioner (the Commissioner) advised:

We have the power to refer matters to them and we do...<sup>107</sup>

#### *Committee Comment*

5.32 The Committee notes the referral arrangements appear to be working soundly, with minimal concern from the Commission despite those expressed by NSW Fair Trading. The Committee has not identified any need for reform.

#### *Joint Investigations*

5.33 One of the proposals suggested was for NSW Fair Trading and the Commission to provide for information sharing arrangements to be entered into between the two agencies and for joint investigations to be conducted by them. This would be of particular use, especially when there are matters before NSW Fair Trading that concern the provision of medical services or are otherwise of a health-related nature.

5.34 For example, NSW Fair Trading has recently prosecuted claims concerning a man who misled consumers about his abilities to cure cancer. In another, NSW Fair Trading pursued a matter concerning the promotion of hair growth solutions in which over-the-counter products were mixed with other ingredients and

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<sup>105</sup> NSW Fair Trading, Responses to Questions on Notice, 29 September 2014, at p2

<sup>106</sup> NSW Fair Trading, Submission No 48, at p5

<sup>107</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014 at p23

consumers then charged an exorbitant fee.<sup>108</sup> These are matters in which input from the Commission may have reasonably been sought.

- 5.35 Evidence presented to the Committee suggested that there would be an advantage in establishing more formal arrangements for joint investigations by relevant statutory bodies in relation to the protection of healthcare consumers. As noted by the Friends of Science in Medicine, matters relating to health-related information and practices will ‘continue to be shared, at least in principle, by a number of different agencies’.<sup>109</sup>
- 5.36 One of the merits in establishing a framework for joint investigations is the general preference in joining forces for areas of overlapping jurisdiction and common interest.
- 5.37 More importantly, it was suggested that joint investigations would enable each statutory body to share resources and, in particular, enable NSW Fair Trading to access the health expertise available to the Commission. As the NSW Fair Trading Commissioner, Rod Stowe, noted:
- ... within Fair Trading we do not have people with the sort of analytical skills that are quite often necessary to examine some of the claims that are made by health-related businesses and services. I think that is an area where we would certainly appreciate the assistance of the Health Care Complaints Commission and generally the Department of Health.<sup>110</sup>
- 5.38 In further evidence at the Committee’s hearing on 3 September 2014, the Health Care Complaints Commissioner advised that:
- We refer matters to one another regularly. We have done joint investigations. We have no formal memorandum of understanding, but we both have powers under our respective legislation to disseminate information and cooperate. So the relationship is on an as-needs basis when an issue comes up that might cross the jurisdictions.<sup>111</sup>
- 5.39 NSW Health recognised the merits of joint investigations, describing them as a ‘sensible collaboration’.<sup>112</sup>
- 5.40 While NSW Fair Trading and the Commission are the obvious two statutory bodies in which greater arrangements can be coordinated, other relevant bodies – such as the Therapeutic Goods Administration (TGA) and the Food Authority – are also appropriate bodies to be brought into the discussion.
- 5.41 The Commissioner himself expressed support for a forum in which to collaborate on matters of common concern. As the Commissioner advised:
- The interaction between the consumer protection agencies and healthcare agencies, that is the major interface. I think the Food Authority, the TGA would be relevant. There is the pharmaceutical services unit of the health department as well that

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<sup>108</sup> NSW Fair Trading, Responses to Questions on Notice, 29 September 2014, at p2

<sup>109</sup> Friends of Science in Medicine, Submission No 39, at p2

<sup>110</sup> Rod Stowe, *Transcript of Evidence*, 2 September 2014, at p4

<sup>111</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p22

<sup>112</sup> Jeremy McNulty, *Transcript of Evidence*, 2 September 2014, at p13

investigates pharmaceutical products. They are issues with importation and non-TGA approved products being disseminated to the public. As you can see, it is a fairly complicated regulatory landscape. I think anyone who had a stake in the issues should be represented. It would allow each of the agencies to flag issues that come up through complaints or other means and say, 'Is this a matter for you?' or 'Has this come up through your processes? Are you doing anything?' I suppose it has the potential to be a little more proactive than just on receipt of a particular issue going to them and saying, 'Let's cooperate on this particular issue.' It would be a forum for airing of more general issues. I think it would be useful.<sup>113</sup>

### *Committee Comment*

- 5.42 The Committee recognises the benefits of closer collaboration between different statutory bodies of overlapping jurisdiction and common interests. This would, first and foremost, relate to NSW Fair Trading and the Commission, but could also extend to closer collaboration with the Therapeutic Goods Administration, the Food Authority and any other interested stakeholder with appropriate regulatory powers.
- 5.43 To this end, the Committee agrees that appropriate arrangements be established to enable participating authorities to form an interagency committee. This would allow relevant stakeholders an opportunity to discuss common issues, share expertise, and conduct joint investigations.
- 5.44 An interagency framework would also formalise the multilateral relationship between the parties, in lieu of the separate ad hoc memorandums of understanding currently in existence.
- 5.45 Lastly, it would enable each agency to determine which agency is best equipped, perhaps due to superior legislative power, to conduct investigations that affect health consumers more broadly.
- 5.46 The Committee considers it appropriate that this interagency committee meet on a periodic basis to enable each agency to be aware as to what investigations the partner agency is involved in.

## RECOMMENDATION 7

**The Committee recommends that an interagency committee be established to allow relevant regulatory authorities involved in the protection of health consumers (particularly the Health Care Complaints Commission and NSW Fair Trading) the opportunity to discuss common issues, share expertise, and conduct joint investigations.**

### *Education and Awareness*

- 5.47 As has been a theme of this report, there is an increasing amount of information available for health consumers, particularly online. This includes information that is accurate and has been approved by relevant authorities but also information that can be dangerously inaccurate.

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<sup>113</sup> Kieran Pehm, *Transcript of Evidence*, 3 September 2014, at p23

- 5.48 This proliferation of information means that health consumers must be more critical when absorbing it. Unfortunately, there is a lack of health literacy amongst a significant portion of citizens. According to the Australian Commission on Safety and Quality in Health Care:

The promotion of false and misleading health-related information is a risk to safe and high quality health care, and is of particular concern given that only 40 per cent of Australian adults have the level of individual health literacy needed to meet the complex demands of everyday life... It affects people's capacity to understand their health and health care, and the choices they make to keep themselves and their family well.<sup>114</sup>

- 5.49 People who are already vulnerable are particularly at risk as they are even more susceptible to health misinformation. Carers NSW reported that:

... low health literacy was especially an issue for Australia's disadvantaged or vulnerable groups, including those born overseas, and those who are unemployed or not in the labour force.<sup>115</sup>

- 5.50 Carers play an important role in enabling health care treatment and supporting consumers to make decisions so it is essential that they are able to access accurate information. However, given that a majority of primary carers are not in the labour force, concerns were raised that this group of people may be particularly susceptible to misinformation. Carers NSW further explained that:

Lower levels of individual health literacy have been found to be associated with poorer ability to interpret health messages, lower use of some medical treatments (including influenza vaccine) poorer knowledge among consumers of their own disease or condition and poorer overall health status among older people.<sup>116</sup>

- 5.51 The problem of reduced health literacy is not limited to vulnerable groups. The Friends of Science in Medicine, advised the Committee that:

It is somewhat frustrating in that in this most scientific of all ages so many consumers, so many people in the public have little or poor knowledge of the health literacy standard; they do not really understand, for example, the importance of taking a personal interest in the evidence for any treatment that is given to them.<sup>117</sup>

- 5.52 Previously it was harder to disseminate misinformation to the public due to the checks in place through, for example, advertising codes or the fact checking by journalists before claims are published. However, it is now much easier for organisations or individuals to self-publish online or through social media. In these cases it is dependent on the target audience to do the verification themselves.<sup>118</sup> If health literacy levels are low, this is particularly difficult.

- 5.53 The increasing use of evidence-based research terms such as 'scientifically shown to' or 'tests have proven' further confuses this issue. When these terms are used

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<sup>114</sup> Australian Commission on Safety and Quality in Health Care, Submission 53, at p1

<sup>115</sup> Carers NSW, Submission 55, at p2

<sup>116</sup> Carers NSW, Submission 55, at p1

<sup>117</sup> Professor John Dwyer, President, Friends of Science in Medicine, *Transcript of Evidence*, 3 September 2014, at p1

<sup>118</sup> The Communications Council, Submission 59, at pp2-3

for research that has not been rigorously reviewed, it leads to confusion for consumers, and makes it more difficult for reputable scientific information to be properly heard.<sup>119</sup>

- 5.54 To counteract this, stakeholders have called for more to be done to educate people in this sphere. Assistant Professor Bruce Arnold pointed out that:

Education initiatives are a valuable mechanism for addressing harms attributable to false or misleading health information and practices ... Education initiatives also involve community awareness campaigns that address people who have finished secondary schooling.<sup>120</sup>

*Committee Comment*

- 5.55 The sheer volume of information available to consumers, both accurate and misleading can make it difficult to make well-informed decisions. This is especially problematic given that health literacy in general is dropping, based partly on the increasing presence of misinformation. This is compounded by the fact that accurate medical information can often be presented in a manner that is overly academic and inaccessible to many people.
- 5.56 As such, it may be beneficial for more information to be made available aimed at people with low health literacy, with a particular focus on refuting some of the more common or dangerous claims made against orthodox medical procedure.

**RECOMMENDATION 8**

**The Committee recommends that NSW Health, in conjunction with the Health Care Complaints Commission, undertake accessible education initiatives and awareness campaigns to provide information to counteract misleading claims about mainstream healthcare practices. The Committee further recommends that emphasis is placed on targeting individuals with low levels of health literacy and vulnerable individuals in the community.**

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<sup>119</sup> The Royal Australian College of General Practitioners, Submission 56, at p2

<sup>120</sup> Associate Professor Bruce Arnold, Submission 23, at p5

## Appendix One – List of Submissions

1	Ms Carole Hubbard
2	Ms Judy Wilyman
3	Ms Faye Thornhill
4a	Name Suppressed
4	Name Suppressed
5	Ms Bev Pattenden
6	Confidential
7	Mr Bruce Thompson
8	Dr Leong-Fook Ng
9	Medical Consumers Association Inc
10	Mr Ron Lee
11	Esoteric Practitioners Association Pty Ltd
12	Ms Alison Greig
13	Integrative Pulmonary Care & Medical P/L
14	Mr Fergus McPherson
15	Northern Rivers Vaccination Supporters (NRVS)
16	Mrs Deborah McInnes
17	The Royal College of Pathologists of Australia (RCPA)
18	Ms Jamila Maxwell
19	Confidential
20	Ms Marguerite Lane
21	Australian Department of Health Therapeutic Goods Administration
22	Mr Leonard Thomas
23	Assistant Professor Bruce Arnold, University of Canberra
24	Australian Vaccination Network Inc
25	Cancer Information & Support Society
26	Dr Tom Benjamin
27	Name Suppressed
29	Civil Liberties Australia
30	Australian Osteopathic Association
31	Ms Meryl Dorey

FALSE AND MISLEADING HEALTH-RELATED INFORMATION AND PRACTICES  
LIST OF SUBMISSIONS

32	Australian Homoeopathic Association Inc (AHA)
33	The Australian Kinesiology Association
34	Mr Alex Greenwich MP
35	NSW Gay and Lesbian Rights Lobby
36	National Herbalists Association of Australia
37	Real Health Care Reform Pty Ltd
38	Australian Traditional-Medicine Society Ltd.
39	Friends of Science in Medicine
40	Cr Susan Meehan
41	Ms Susan Snowdon
42	Medical Technology Association Australia
43	Australian Medical Association (NSW)
44	Consumers Health Forum of Australia
45	Mr Trevor Wilson
46	NSW Health
47	Ms Natalie Cooper
48	NSW Fair Trading
49	Ms Dee McLachlan
50	Mr & Mrs Jon & Susan Kirk
52	Australian Government Department of Health
53	Australian Commission on Safety and Quality in Health Care
54	Carers NSW
55	The Royal Australian College of General Practitioners
58	Mental Health Coordinating Council
59	The Communications Council
60	Australian Natural Therapists Association Ltd
61	Mobile Massage Homeopathy
62	Health Care Complaints Commission
63	Complementary Healthcare Council of Australia
64	Mrs Sonja Hardy
65	Mrs Tina Indyka
66	Mr Marc Ahrens
67	Mr Ian Shepherd
68	Ms Liça Bienholz

COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION  
LIST OF SUBMISSIONS

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69	Dr Robert Stacy
70	Miss Lisa Kelly
71	Ms Delena Gaffney
72	Mr Anthony Venn-Brown
73	Mr Alex Greenwich MP

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## Appendix Two – List of Witnesses

### 2 SEPTEMBER 2014, MACQUARIE ROOM

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Witness	Organisation
Mr Rod Stowe Commissioner	NSW Fair Trading
Mr Philip Flogel Assistant Commissioner	
Dr Jeremy McAnulty Director, Centre for Health Protection	NSW Ministry of Health
Dr Saxon Smith President	Australian Medical Association (NSW)
Mr Andrew Took Director, Medico-Legal and Employment Relations	
Mr Timothy Vines Vice-President (by teleconference)	Civil Liberties Australia

### 3 SEPTEMBER 2014, MACQUARIE ROOM

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Witness	Organisation
Professor John Dwyer AO President	Friends of Science in Medicine
Mr Carl Gibson Chief Executive Officer	Complementary Medicines Australia
Ms Emma Burchell Head, Regulatory Affairs	
Mr Kieran Pehm Commissioner	Health Care Complaints Commission NSW

## Appendix Three – Extracts from Minutes

### MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 20)

Wednesday 16 October 2013  
1:01 p.m., Room 1043, Parliament House

#### Members Present

Mrs Williams (Chair), Mrs Sage (Deputy Chair), Ms Cusack, Mr Green, Dr McDonald, Mr Rohan  
Ms Westwood

#### Staff Present

Jason Arditi, Sarah-Anne Fong, Abigail Groves, Jacqueline Isles.

1. **Apologies**
2. **Confirmation of Minutes**

Resolved, on the motion of Mrs Sage: That the Minutes of meeting Number 19 held on 21 August 2013 be adopted.

3. \*\*\*\*

4. **Inquiry into the Promotion of False or Misleading Health-related Information or Practices**

The Committee deliberated upon proposed terms of reference on an Inquiry into the Promotion of False or Misleading Health-related Information or Practices previously circulated to Members.

Resolved, on the motion of Ms Cusack, seconded Ms Westwood: That the words “publication and/or” be inserted before the word “dissemination” in Terms of Reference (a) and (b).

Resolved, on the motion of Dr McDonald, seconded by Mrs Sage: That the words “and/or the provision of treatment” be inserted after the words “the promotion of health-related activities” in Term of Reference (c).

Resolved, on the motion of Ms Cusack, seconded Dr McDonald: That the phrase “capacity and appropriateness of the Health Care Complaints Commission” be amended by omitting the word “and” and inserting a comma after the word “capacity” and by inserting the words “and effectiveness” after the word “appropriateness” in Term of Reference (e).

Resolved, on the motion of Mrs Williams, seconded by Mrs Sage: That the Committee adopt the Terms of Reference as amended

Resolved, on the motion of Mr Green, seconded by Mr Rohan: That the Committee call for submissions with the closing date of 31 December 2013

Resolved, on the motion of Mr Green, seconded by Mr Rohan: That the Committee advertise the inquiry by publishing it on the Committee's website and in the Sydney Morning Herald and by sending letters advising relevant agencies and organisations of the Inquiry. The Committee requested that the secretariat prepare a list of stakeholders to be circulated for the consideration of Members.

5. \*\*\*\*

## 6. Next Meeting

The Committee adjourned at 1:45 pm sine die.

## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 21)

Wednesday, 5 March 2014

8:30am

Room 1254, Parliament House

### Members Present

Mrs Williams (Chair) Mrs Sage (Deputy Chair), Mr Green, Dr McDonald, Mr Rohan

### Staff Present

Jason Ardit, Elaine Schofield

#### 1. Apologies

Apologies were received from Ms Cusack and Ms Westwood

#### 2. Confirmation of Minutes

Resolved, on the motion of Mr Green: That the Minutes of meeting Number 20 held on 5 March 2014 be adopted

3. \*\*\*\*

4. \*\*\*\*

#### 5. Inquiry into the Promotion of False and Misleading Health-related Information and Practices

Committee staff updated the Members as to the number and content of submissions received. Members were informed that the submissions will be distributed in advance of the next meeting.

#### 6. Next Meeting

The Committee adjourned at 8:45 am sine die.

## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 22)

Wednesday, 16 April 2014

9:45am

Waratah Room, Parliament House

### Members Present

Mrs Williams (Chair), Mr Green, Dr McDonald, Ms Westwood

### Staff Present

Jason Arditi, Elaine Schofield, Vedrana Trisic, Jacqueline Isles, Millie Yeoh

The Chair commenced the meeting at 9:50 am.

#### 1. Apologies

Apologies were received from Ms Cusack, Mrs Sage, and Mr Rohan.

#### 2. Confirmation of Minutes

Resolved, on the motion of Ms Westwood that the Minutes of meeting No. 21, held on 5 March 2014, be confirmed.

#### 3. \*\*\*\*

#### 4. \*\*\*\*

#### 5. Inquiry into the Promotion of False and Misleading Health-related Information and Practices

Discussion ensued.

The Committee considered the submissions received and decided that more time is required to adequately consider the submissions before publishing those. The Committee decided to make the final decision in relation to the publication of the submissions at the next Committee meeting, to be held on 7 May 2014.

The committee adjourned at 10:10 am until 10:33 am.

#### 6. \*\*\*\*

The Committee adjourned at 11:57am until 8:30am 7 May 2014.

## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 23)

Thursday, 15 May 2014  
4:00 pm

Room 1254, Parliament House

### Members Present

Mrs Sage (Deputy Chair), Mr Green, Dr McDonald, Mrs MacLaren-Jones, Mr Page, Mr Rohan

### Staff Present

Jason Ardit, Les Gönye, Jacqueline Isles, Leon Last, Elaine Schofield

The Deputy Chair commenced the meeting at 4:00pm

#### 1. Apologies

Apologies were received from Ms Westwood.

#### 2. Confirmation of Minutes

Resolved, on the motion of Mr Green, seconded Dr McDonald, that the Minutes of meeting No. 22, held on 16 April 2014, be confirmed.

#### 3. Committee Membership

The Deputy Chair advised the Committee of a change of membership as Mrs Williams and Ms Cusack ceased to be members of the Committee in accordance with section 68 of the *Health Care Complaint Act*.

The Deputy Chair further advised that, as recorded in the Votes and Proceedings, No. 201, Wednesday 14 May 2014, entry 12, and in the message from the Legislative Council reported in the House on 15 May 2014, that Mr Page and Mrs MacLaren-Jones have been appointed as replacement members of the Committee. The Deputy Chair welcomed to the new members, and acknowledged the work and contribution of the previous members.

#### 4. Election of Chair

There being a vacancy, the Deputy Chair called for nominations for a new Chair.

A nomination for Mr Page was received from Mrs MacLaren-Jones, seconded Mr Rohan. No further nominations were received.

There being only one nomination, the Deputy Chair declared Mr Page to be the Chair.

5. \*\*\*\*

**6. Inquiry into the Promotion of False and Misleading Health-related Information or Practices**

The Chair advised the Committee that both he and Mrs MacLaren-Jones would require an opportunity to review the submissions before consideration of publication.

Resolved, on the motion of Mr Green, seconded Mrs Sage, that consideration of submissions for publication be deferred until the next Committee meeting.

**7. Next Meeting**

The committee adjourned at 4:07pm until 9:30am, Wednesday, 28 May 2014 at a location to be advised.

**MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 24)**

Wednesday, 28 May 2014

1:10 p.m.

Room 1153, Parliament House

**Members Present**

Mrs Sage(Deputy Chair), Mr Green , Mrs MacLaren-Jones and Dr McDonald.

**Staff Present**

Jason Arditi, Elaine Schofield, Vedrana Trisic and Jacqueline Isles

The Deputy Chair took the Chair and opened the meeting at 1.10 p.m.

**1. Apologies**

Apologies were received from Mr Page, Mr Rohan and Ms Westwood

**2. Confirmation of Minutes**

Resolved, on the motion of Mrs Maclaren-Jones: That the Minutes of meeting Number 23 held on 15 May 2014 be adopted

**3. Inquiry into the Promotion of False and Misleading Health-related information and Practices**

a) Consideration of submissions:

Resolved, on the motion of Mr Green: That the Committee authorise publication of submissions listed 1 – 63, with the exception of submission 19 and appendix B of submission 62 in which confidentiality has been requested, and authorise the

Committee staff to redact personal information and other identifying details for all other submissions.

b) Discussion of issues paper

Members agreed to defer discussion of issues arising from submissions until the next meeting.

4. \*\*\*\*

5. **Next Meeting**

The Committee adjourned at 1:16 p.m. sine die.

**MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 25)**

Wednesday, 18 June 2014

1:03 p.m.

Room 1136, Parliament House

**Members Present**

Mr Page (Chair), Mrs Sage (Deputy Chair), Mr Green, Ms MacLaren-Jones, Mr Rohan and Ms Westwood.

**Staff Present**

Carly Maxwell, Jason Arditi, Vedrana Trisic, Leon Last and Jacqueline Isles.

**1. Apologies**

Dr Andrew McDonald

**2. Confirmation of Minutes**

Resolved, on the motion of Mrs Sage, seconded by Mr Rohan: That the Committee confirms the minutes of meeting No 24 held on 28 May 2014.

3. \*\*\*\*

**4. Inquiry into the Promotion of False and Misleading Health-related information and Practices**

(a) Consideration of late submissions:

Members noted receipt of the following late submissions:

- Submission No 6 – Confidential
- Submission No 64 – Mrs Sonja Hardy
- Submission No 65 – Ms Tina Indyka
- Submission No 66 – Mr Marc Ahrens

COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION  
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- Submission No 67 – Mr Ian Shepherd
- Submission No 68 – Ms Lica Bienholz
- Submission No 69 – Mr Robert Stacey
- Submission No 70 – Miss Lisa Kelly
- Submission No 71 – Ms Delena Gaffney

Resolved, on the motion of Ms Westwood, seconded by Mrs Sage: That the Committee authorise publication of Submission No 6 and Submissions Nos 64 to 71 and that the submissions be placed on the Committee's website.

(b) \*\*\*

(c) \*\*\*

## 5. Next Meeting

The Committee adjourned at 1:31 p.m. sine die.

## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 26)

Tuesday, 2<sup>nd</sup> September 2014

9:45am

Macquarie Room, Parliament House

### Members Present

Mr Page (Chair), Mrs Sage (Deputy Chair), Mr Green, Dr McDonald, Mr Rohan and Ms Westwood.

### Staff Present

Jason Arditi, Jacqueline Isles, Elaine Schofield, Tanja Zech

## 1. Apologies

Ms MacLaren-Jones

## 2. Confirmation of Minutes

Resolved, on the motion of Mr Green, seconded by Ms Westwood: 'That the Committee confirms the minutes of meeting No 25 held on 18 June 2014'

## 3. \*\*\*\*

#### **4. Inquiry into the Promotion of False and Misleading Health-related information and Practices**

##### **(a) Correspondence Items**

The Committee noted the correspondence of Ms Serryn O'Regan, Universal Medicine, and Ms Esther Rockett.

##### **(b) Late Submissions**

Resolved, on the motion of Ms Westwood, seconded by Mr Green: That the Committee authorises publication of submissions listed 72 and 73, with the exception of the appendices at submission 72 which are to remain confidential, and authorise the Committee staff to redact personal information and other identifying details

##### **(c) Reconsideration of Submissions 6 and 51**

Resolved, on the motion of Mrs Sage: That the Committee rescinds the resolution of 28 May 2014 (minute item 3(a)) with respect to authorising the publication of Submission 51, and the Committee resolves that the submission be confidential

The Committee also discussed Submission 6, and deferred further deliberations on that submission until the next meeting.

##### **(d) Inquiry Briefing Note**

The Chair drew attention to the briefing note provided by the Committee secretariat with respect to the issues raised by the submissions to the current Inquiry.

##### **(e) Consideration of Witnesses**

Resolved on the motion of Mr Rohan, seconded by Dr McDonald: That the Committee formally accepts the indicative list of witnesses, as previously circulated, to attend the hearing

##### **(f) Media Orders**

Resolved on the motion of Mrs Sage, seconded by Ms Westwood: That the Committee authorises the media and the general public as observers to the hearing in accordance with the guidelines for proceedings administered by the Legislative Assembly

##### **(g) Broadcast of Proceedings**

Resolved on the motion of Mr Rohan, seconded by Ms Westwood: That the Committee broadcast the proceedings of the day

##### **(h) Public Hearing**

The invited witnesses, together with the press and public, were admitted at 9:51am

COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION  
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At 9:51am, the Chair opened the hearing and gave a brief opening address.

Mr Rod Stowe, Commissioner, NSW Fair Trading; and

Mr Philip Flogel, Assistant Commissioner, NSW Fair Trading, sworn and examined.

The witnesses made an opening statement, followed by questions from the Committee members.

The evidence concluded at 10:28am, the Chair thanked the witnesses for the attendance, and the witnesses withdrew.

Dr Jeremy McAnulty, Director, Centre for Health Promotion, NSW Health, sworn and examined.

The witness made an opening statement, followed by questions from the Committee members.

The evidence concluded at 10:57am, the Chair thanked the witness for his attendance, and the witness withdrew.

The Committee took a short adjournment at 10:57am and resumed the public hearing at 11:32am

Dr Saxon Smith, President, Australian Medical Association (NSW), affirmed and examined; and

Mr Andrew Took, Director, Medico-Legal and Employment Relations, sworn and examined

The witnesses made an opening statement, followed by questions from the Committee members.

The evidence concluded at 12:09pm, the Chair thanked the witnesses for their attendance, and the witnesses withdrew.

Mr Timothy Vines, Vice President, Civil Liberties Australia, affirmed and examined (by teleconference).

The witness made an opening statement, followed by questions from the Committee members.

The evidence concluded at 12:51pm, the Chair thanked the witness for his attendance, and the witness withdrew.

(i) Consideration of Questions on Notice and Supplementary Questions

The Committee agreed to send supplementary questions to the Committee secretariat and give two weeks for the return of questions on notice, once they are sent with the transcript for proofing.

(j) Transcript of Evidence

Resolved on the motion of Ms Westwood, seconded by Ms Sage: That the Committee authorises posting the transcript of the day's proceedings on the Committee's webpage once corrections for inaccuracies have been made

5. \*\*\*\*

6. **Next Meeting**

10:00am on Wednesday, 3<sup>rd</sup> September 2014 in the Macquarie Room

**MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 27)**

Wednesday, 3 September 2014

10:00am

Macquarie Room, Parliament House

**Members Present**

Mr Page (Chair), Mrs Sage (Deputy Chair), Mr Green, Dr McDonald and Ms Westwood

**Staff Present**

Jason Arditi, Jacqueline Isles, Elaine Schofield, Tanja Zech

**1. Apologies**

Ms MacLaren-Jones, Mr Rohan

**2. Confirmation of Minutes**

Resolved, on the motion of Ms Westwood, seconded by Mr Green: 'That the Committee confirms the minutes of meeting No 26 held on 2 September 2014'

3. \*\*\*\*

**4. Inquiry into the Promotion of False and Misleading Health-related information and Practices**

(a) Late Submissions

Resolved, on the motion of Mr Green, seconded by Ms Westwood: 'That the Committee rescinds the resolution of 18 June 20154 (minute item 4(a)) with respect to authorising the publication of Submission 6 and resolve that the submission be confidential'

The Committee further noted that it would consider receiving a revised and shorter version of the submission, should it retain its key concerns and content, but without the naming of particular individuals.

(b) Correspondence Items

The Committee noted the correspondence items from Mr Carl Gibson (Complementary Medicines Australia)

(c) Consideration of Witnesses

Resolved on the motion of Mr Green, seconded by Ms Westwood: 'That the Committee formally accepts the indicative list of witnesses, as previously circulated, to attend the hearing'

(d) Media Orders

Resolved on the motion of Ms Sage, seconded by Dr McDonald: 'That the Committee authorises the media and the general public as observers to the hearing in accordance with the guidelines for proceedings administered by the Legislative Assembly'

(e) Broadcast of Proceedings

Resolved on the motion of Mrs Sage, seconded by Dr McDonald: 'That the Committee broadcast the proceedings of the day'

(f) Public Hearing

The invited witnesses, together with the press and public, were admitted at 10:15am

At 10:15am, the Chair opened the hearing and gave a brief opening address.

Prof John Michael Dwyer, President, Friends of Science in Medicine, sworn and examined.

The witness made an opening statement, followed by questions from the Committee members.

The evidence concluded at 11:13am, the Chair thanked the witness for his attendance, and the witness withdrew.

The Committee took a short adjournment at 11:13am and resumed the public hearing at 11:20am

Mr Carl Gibson, Chief Executive Officer, Complementary Medicines Australia; and

Ms Emma Burchell, Head of Regulatory Affairs, Complementary Medicines Australia, sworn and examined.

The witnesses made an opening statement, followed by questions from the Committee members.

The evidence concluded at 11:57am, the Chair thanked the witness for his attendance, and the witness withdrew.

Mr Kieran Pehm, Commissioner, Health Care Complaints Commission, sworn and examined.

The witnesses made an opening statement, followed by questions from the Committee members.

The evidence concluded at 12:55pm, the Chair thanked the witness for his attendance, and the witness withdrew.

(g) Consideration of Questions on Notice and Supplementary Questions

The Committee agreed to send supplementary questions to the Committee secretariat and give two weeks for the return of questions on notice, once they are sent with the transcript for proofing.

(h) Transcript of Evidence

Resolved on the motion of Dr McDonald, seconded by Ms Westwood: That the Committee authorises posting the transcript of the day's proceedings on the Committee's webpage once corrections for inaccuracies have been made'

**5. Next Meeting**

9:00 am, Wednesday, 17<sup>th</sup> September 2014

**MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION (NO. 29)**

Wednesday, 19 November 2014  
5:30pm  
Room 1136, Parliament House

**Members Present**

Mr Page, Chair, Mrs Sage, Deputy Chair, Mr Green, Dr McDonald and Mr Rohan

**Staff Present:**

Jason Ardit, Leon Last, Elaine Schofield.

**1. Apologies**

Ms Maclaren-Jones and Ms Westwood

## 2. Minutes

Resolved, on the motion of Dr McDonald, seconded by Mrs Sage: 'That the Committee confirms the minutes of meeting No 28 held on 17 September 2014'

## 3. Report on the Inquiry into the Promotion of False and Misleading Health-related Information and Practices

### (a) Acceptance of responses to questions on notice

The Committee discussed the responses to the questions on notice received by NSW Fair Trading, NSW Health and Complementary Medicines Australia.

Resolved, on the motion of Mr Green, seconded by Mr Rohan: 'That the Committee adopts the responses to the questions on notice received from NSW Fair Trading, NSW Health and Complementary Medicines Australia, and publishes these responses on the Committee's webpage'

### (b) Consideration of draft report

The Chair's report, having been previously circulated, was taken as read.

Resolved, on the motion of Dr McDonald seconded by Mr Green: That the Committee consider the report chapter by chapter

Resolved, on the motion of Mr Green, seconded by Dr McDonald: 'That Chapter 1 stand as part of the report'

Resolved, on the motion of Mrs Sage, seconded by Mr Rohan: 'That Chapter 2 stand as part of the report'

Resolved, on the motion of Dr McDonald, seconded by Mr Rohan: 'That Chapter 3 stand as part of the report'

Resolved, on the motion of Mr Green: 'That Recommendation 3 be amended by inserting the words 'in their annual reports' at the end of the recommendation'

Resolved, on the motion of Mr Rohan: 'That Recommendation 6 be amended by inserting the words 'in their annual reports' at the end of the recommendation'

Resolved, on the motion of Mrs Sage, seconded by Dr McDonald: 'That Chapter 4 be part of the report as amended'

Resolved, on the motion of Mr Green, seconded by Dr McDonald: 'That Chapter 5 stand as part of the report'

### (c) Adoption of report

Resolved, on the motion of Dr McDonald, seconded by Mr Rohan: 'That the draft report as amended be the report of the Committee, signed by the Chair and presented to the House'

Resolved, on the motion of Mrs Sage, seconded by Mr Rohan: 'That the Chair and secretariat be permitted to correct stylistic, typographical and grammatical errors'

Resolved, on the motion of Mr Green, seconded by Mr Rohan: 'That once tabled, the report be posted on the Committee's webpage'

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**6. Next Meeting**

The Committee adjourned at 6:02pm *sine die*.