



**The Hon Jillian Skinner MP**  
Minister for Health

INQ14/37

Ms Ronda Miller  
Clerk of the Legislative Assembly  
Office of the Legislative Assembly  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Ms Miller

**Parliamentary Committee on the Health Care Complaints Commission Report  
5/55 'The Promotion of False and Misleading Health-Related Information and  
Practices'**

Please accept the NSW Government's response to the Parliamentary Committee on the Health Care Complaints Commission Report 5/55 'The Promotion of False and Misleading Health-Related Information and Practices'.

A copy of the response is enclosed.

Yours sincerely

Jillian Skinner MP

22 MAY 2015

*Encl.*

# COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION – REPORT 5/55 INQUIRY ONTO THE PROMOTION OF FALSE AND MISLEADING HEALTH-RELATED INFORMATION AND PRACTICES

## NSW GOVERNMENT RESPONSE

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### 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 well-being'.

### Response:

The term "health service" is defined in section 4 of the *Health Care Complaints Act 1993* as follows:

Health service includes the following services, whether provided as public or private services:

- (a) medical, hospital, nursing and midwifery services,
- (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, dietitian, 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 regulations as a health service for the purposes of this Act.

The examples of health services set out in paragraphs (a)-(l) are inclusive, and not an exhaustive list of the categories of health services. It is also noted that paragraph (l) of the definition allows additional classes of "health service" to be prescribed by regulation in the event there is any doubt about whether any particular class of health service falls within the definition. At the present time no such additional class of "health service" has been prescribed. It is also important to note that the definition includes "health education services" and "services provided in other alternative health care fields". These categories are broad and encompass categories that capture a range of different health services.

In the Supreme Court of NSW decision, *Australian Vaccination Network v Health Care Complaints Commission* [2012] NSWSC 110, it was accepted by both parties, and the Court found, that the Australian Vaccination-Skeptic Network (AVSN) provides a "health service" since it provides "health education services".

The reason the Court found the HCCC did not have jurisdiction in relation to a complaint against AVSN was because AVSN did not provide a health service which "*affects the clinical management or care of an individual client*". In accordance with comments of the judge in that case the Act has now been amended to provide the HCCC with jurisdiction in relation to any complaint about a health service which "*affects, or is likely to affect, the clinical management or care of an individual client*" (underlining added).

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The Government considers that the definition used in s4 is appropriate and adequate to cover the range of health services offered in NSW and that there is no current need to amend the definition of "health service". However, the Ministry of Health will continue to closely monitor the recent amendment and the definition in s4 to ensure the provisions achieve their intended objective of ensuring the HCCC has adequate powers in relation to complaints about health practitioners and organisations that provide health services, including those that provide alternative or unrecognised health services.

### 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 an 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.'

### Response:

Section 7 of the Act allows complaints to be made about:

- 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
- a health service which affects, or is likely to affect, the clinical management or care of an individual client, or
- a health service provider.

Section 8 sets out who can make a complaint. This section allows "any person" to make a complaint, including, in particular, the following:

- the client concerned
- a parent or guardian of the client concerned
- a person chosen by the client concerned as his or her representative (including an Australian legal practitioner) for the purpose of making the complaint
- a health service provider
- a member of Parliament
- the Health Secretary
- the Minister.

Section 8 is clear that any person can make a complaint. However, until the recent amendments to s7, in relation to a complaint about a health service, the complaint needed to allege that the service affected the clinical management or care of an individual client. This previous constraint had the effect of limiting the jurisdiction of the HCCC to investigate complaints.

The amendment to s7 now allows a complaint to be made against a health service where it is alleged that the service is likely to affect the clinical management or care of an individual client (that is, there does not have to be an actual client who is affected by the health service). This amendment makes it easier for third parties to bring a complaint that the HCCC can investigate.

As the combination of sections 7 and 8 make clear that a third party can bring a complaint which the HCCC can investigate, it is not considered necessary to make any further changes at this stage. However, it is noted that the recent amendments to s7 are untested. As such, the Ministry of Health will keep the amendments under review to ensure that the amendments are appropriately drafted and if necessary further changes can be pursued.

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### 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 41 AA-42 of the *Health Care Complaints Act 1993* in their annual reports.

#### Response:

As noted in the Committee's Report, there are a range of enforcement and penalty provisions to deal with unregistered health practitioners, including the issuing of a prohibition order by the HCCC. If a practitioner has a prohibition order imposed, it is an offence to provide a health service in breach of the order.

The Commission currently reports and publishes any breaches of prohibition orders warranting prosecution and the HCCC will consult with the Ministry on whether annual reporting should include reporting on complaints of non-compliance with prohibition orders.

### Recommendations 4 and 5

Rec 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; and

Rec 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.

#### Response:

The role of the HCCC is to act as an independent body that receives, assesses, investigates and prosecutes complaints against health practitioners and health service providers. Assessments and investigations of complaints allows a proper ventilation and assessment of the evidence presented to the HCCC and ensures natural justice for persons and organisations the subject of a complaint. In the absence of an investigation by the HCCC, there is unlikely to be enough evidence for the HCCC to find that a public warning is necessary.

The Government considers that there are public benefits in giving the HCCC the power to issue an interim public warning where the HCCC is investigating a health service and, during the investigation, forms a reasonable opinion that a treatment or the health service poses a serious risk to public health or safety. The Government notes that the HCCC already has the power to issue an interim prohibition order when investigating a complaint against a health practitioner, subject to a number of safeguards.

However, it is important that the public is appropriately warned of health services that pose a risk to public health or safety. In some instances it may be more appropriate for the Ministry, rather than the HCCC to issue public warnings about health treatments and services.

The Ministry of Health can and does issue warnings to the public where issues or practices arise that are seen as compromising the health and safety of the public. For example:

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- In January 2015, the Ministry of Health issued a warning to the public about the dangers of having cosmetic surgery performed by people who were not registered medical practitioners ([http://www.health.nsw.gov.au/news/Pacres/20150116\\_00.aspx](http://www.health.nsw.gov.au/news/Pacres/20150116_00.aspx));
- In July 2014 a warning was issued regarding traditional Indian medicine and risk of lead poisoning ([http://www.health.nsw.gov.au/news/Pages/20140726\\_00.aspx](http://www.health.nsw.gov.au/news/Pages/20140726_00.aspx)); and
- In 2011 a warning to the community was issued re taking Newton's Pharmacy Prostate Drops or Newton's Pharmacy Asthma Mixture due to a risk of hypothyroidism [http://www.health.nsw.gov.au/news/Pages/20110923\\_00.aspx](http://www.health.nsw.gov.au/news/Pages/20110923_00.aspx).

The Government supports Recommendation 5, and is of the opinion that there are sufficient mechanisms in place within the NSW Ministry of Health to ensure the public are notified of health and safety risks which may not be under investigation by the HCCC.

The Ministry will review its own processes to ensure that public warnings are appropriately made and communicated to the public in addition to consulting with the HCCC and other stakeholders to determine whether the HCCC should have the power to issue interim public warnings during an investigation against a health service and, if so, what safeguards should be included in that power.

### 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.

### Response:

Section 99 of the Public Health Act provides 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.*

While s99 is an important provision, it is often not used in relation to complaints for a number of reasons. If a practitioner is alleged to be advertising or promoting a health service in a false or misleading way, it may be more appropriate for a complaint to be made under the Health Care Complaints Act. This is because the powers available to the HCCC to deal with a substantiated complaint are wider than the offence provision in s99 of the Public Health Act. For example, the HCCC has the power to issue prohibition orders against practitioners.

In addition, in relation to allegations that a person has engaged in false and misleading conduct in the advertising or promotion of a health service, it may be more beneficial to the public to investigate the matter under the Fair Trading Act and Australian Consumer Law. This is because, in the event of a successful investigation and prosecution, there is a wider range of penalties available than a fine, which is the only option under s99 of the Public Health Act.

As such, if the NSW Ministry of Health and the HCCC were to report, in their annual reports, on the utilisation of s99 of the Public Health Act, this is unlikely to give the Committee a realistic view of the powers available and utilised to deal with health practitioners and health services. As such, the Government does not support this recommendation at this time. However, the Ministry

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will continue to monitor the powers available to deal with persons who engage in false and misleading practices in relation to the promotion of health services to determine if any changes are necessary.

### 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.

### Response:

It is routine practice for appropriate agencies to be included in the response to issues which require the conduct of joint investigations and there are mechanisms for sharing information in those situations.

It is the Government's preferred approach that collaboration is facilitated between agencies to respond to specific issues, rather than mandating participation in a non-specific interagency committee. This will allow more flexibility and ensure the relevant specialists from different agencies are brought together to discuss the specific issue or matter being investigated.

However, the Ministry of Health will keep this matter under advisement to ensure that if, in the future, a standing committee is required it can be established.

It is also noted that the Ministry of Health is presently developing a protocol to facilitate:

- support for appropriate sharing of information and disclosures for investigative purposes by the NSW Public Health System so as to ensure that such exchange of information complies with the relevant legislative framework; and
- seamless management and regulatory response to all issues raised for health regulators within NSW.

### 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.

### Response:

It is important to ensure that the public are properly informed about health related matters and that there is appropriate information to counteract misleading claims about health services.

To support this, the NSW Health routinely provides information and implements education initiatives and awareness campaigns in relation to evidence-based health practices. Examples include:

- Vaccination (see <http://www.health.nsw.gov.au/immunisation/Pages/default.aspx>). This includes links to other information about the benefits and safety of vaccination;
- E-cigarettes (<http://www.health.nsw.gov.au/tobacco/Pages/electronic-cigarettes.aspx>); and
- Healthy eating and active living (<http://www.health.nsw.gov.au/obesity/Pages/getthehealthy.aspx>).



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The NSW Health website also includes:

- Information about medicines at:  
<http://www.health.nsw.gov.au/pharmaceutical/patients/Pages/faq-consumers.aspx>.
- A page with general information relating to health claims. The page explains the way in which products and services that are advertised as having health benefits are regulated; links to sites which are good sources of information on health products and services; and information about agencies to which concerns about products or services that are advertised as having health benefits should be. This page is at:  
<http://www.health.nsw.gov.au/patients/hc/Pages/default.aspx>.
- A page with general information relating to complementary health which will be updated in the near future. The page is at:  
<http://www.health.nsw.gov.au/Patients/ch/Pages/default.aspx>

The NSW Ministry of Health will discuss with the HCCC appropriate ways of ensuring there is adequate and appropriate health information in the public domain. Further, the NSW Ministry of Health will review the information it currently provides and continue to develop and implement education initiatives and awareness campaigns as appropriate.