

**Submission  
No 38**

## **THE PROMOTION OF FALSE OR MISLEADING HEALTH-RELATED INFORMATION OR PRACTICES**

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**Date Received:** 17/12/2013



Australian Traditional-  
Medicine Society Ltd

**AUSTRALIAN TRADITIONAL-MEDICINE SOCIETY  
(ATMS)  
SUBMISSION TO THE  
COMMITTEE ON THE HCCC  
INQUIRY INTO FALSE OR MISLEADING HEALTH-  
RELATED INFORMATION  
OR PRACTICES**

December 2013

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## EXECUTIVE SUMMARY

The Inquiry will not cover recognised health practitioners and their organisations<sup>1</sup>. Members of the Australian Traditional-Medicine Society (ATMS) are recognised health practitioners for the purpose of the *Health Care Complaints Act 1993 (NSW)*<sup>2</sup>, and therefore excluded from the Inquiry.

ATMS believes that the HCCC has sufficient authority to adequately address the:

- a) publication and/or dissemination of false or misleading health-related information that may cause health consumer anxiety
- b) publication and/or dissemination of information that encourages individuals or the public to unsafely refuse preventative health measures, medical treatments, or cures
- c) 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.

Further, ATMS believes that the *Health Care Complaints Act 1993 (NSW)* gives the HCCC adequate powers to investigate health organisations that publish and/or disseminate poorly sourced or corrupted health-related information.

Moreover, ATMS believes that the *Health Care Complaints Act 1993 (NSW)* allows the HCCC the capacity, appropriateness and effectiveness to take enforcement action against health organisations and individuals who publish and/or disseminate poorly sourced or corrupted health-related information.

It is the ATMS assessment that the HCCC was not successful against the AVN, not because of a deficiency in its statutory authority, but rather that not a single health consumer was found who had been influenced by the information on the AVN website. Therefore, Justice Adamson dismissed the HCCC's scenario that a health consumer would be influenced by the contents of the AVN website<sup>3</sup>.

The ATMS position is that freedom of expression is an essential human right, protected under international and domestic human rights instruments. ATMS maintains that 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>4</sup>.

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<sup>1</sup> Parliament of New South Wales. Committee on the Health Care Complaints Commission. *Inquiry into the Promotion of False or Misleading Health-Related Information or Practices*. Terms of Reference.

<sup>2</sup> S 4 *Health Care Complaints Act 1993 (NSW)*.

<sup>3</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 at [44].

<sup>4</sup> Vines T, Faunce T. Medical law reporter: Civil liberties and the critics of safe vaccination: *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110. *Journal of Law and Medicine* 2012, 20:44 at 59.

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Signature

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Trevor Le Breton, Chief Executive Officer

## **ABOUT THE AUSTRALIAN TRADITIONAL-MEDICINE SOCIETY**

ATMS is Australia's largest professional association of natural medicine practitioners, representing approximately 65% of the total natural medicine profession. At December 2013, the membership of ATMS was 12,036 practitioners.

ATMS was founded in 1984 and is a not-for-profit company incorporated with the Australian Securities and Investments Commission (ABN 046 002 844 233).

### **1. Executive and Administration**

ATMS is governed by the twelve members of the Board of Directors. The Society's administration consists of nine full-time and part-time staff. Modality experts representing 15 areas have been appointed to specifically address the needs of ATMS' 30 different natural medicine practices.

### **2. Representation on Commonwealth Statutory Bodies**

ATMS is the only complementary medicine professional association represented on two Commonwealth statutory bodies ie. the Therapeutic Goods Advertising Code Council and the Complaints Resolution Panel which have their legal authority underpinned in the *Therapeutic Goods Regulations 1990* (Cth).

### **3. Publications**

ATMS publishes the:

- *Journal of the Australian Traditional-Medicine Society* (ISSN 1326-3390), a quarterly peer reviewed publication. The Journal is indexed in the following international bibliographic indexes: Alt Healthwatch (USA), Cumulative Index of Nursing and Allied Health (CINAHL) (USA) and CAB International (UK).
- *ATMS Annual Report*.

### **4. Continuing Professional Education Program**

ATMS is committed to a high quality Continuing Professional Education (CPE) program. The ATMS CPE program draws upon accomplished practitioners to discuss clinical experiences, as well as theoretical and philosophical perspectives. The CPE program is committed to quality education and it is mandatory that ATMS practising members participate in the CPE program obtaining the equivalent of 20 points equal to 20 hours of study per financial year.

### **5. ATMS Code of Conduct**

The ATMS Code of Conduct sets the standard for adequate professional conduct for ATMS members. The Code deals with duty of care, professional conduct, confidentiality, patients' records, advertising and stationery. It is ATMS policy that members must adhere to the Code. A wide range of sanctions are imposed on members who breach the Code, with a serious breach of the Code resulting in removal from the Society.

**6. Criteria for Practitioner Membership of ATMS**

The ATMS criteria for membership requires that a practitioner meets the education standards determined by the Board. Applicants for membership must have successfully completed an ATMS-accredited course delivered by an ATMS-preferred education institution. The education standards for membership are determined via consideration of national standards reflected in the Australian Qualifications Framework and Tertiary Education Quality Standards Agency and Australian Skills Quality Authority guidelines. International standards for natural medicine education are also considered in the establishment of ATMS education standards.

**7. Professional Indemnity Insurance**

Practicing members must have professional indemnity insurance of a minimum of \$1 million. The Society has a master policy scheme with an insurer.

**8. First Aid Certificate**

Practicing members must hold a current Level II First Aid Certificate.

**9. Website**

The ATMS website address is [www.atms.com.au](http://www.atms.com.au)

**10. Recognition by the Australian Taxation Office for GST-free Status**

ATMS gained a Private Ruling from the ATO on 27 November 2002 that allows its acupuncture, herbal medicine and naturopathy practitioners to have GST-free status.

ATO Private Ruling 21937 consists of two decisions. The first decision is that: ATMS is a professional association that has uniform national registration requirements for practitioners of natural and traditional medicine. Consequently practitioners (acupuncturists, herbalists and naturopaths) who are members of ATMS are recognised professionals for the purposes of paragraph 38-10(1)(b) of the GST Act.

The second decision is that acupuncture, herbal medicine and naturopathy services will continue to be GST-free where the services are provided by:

- a practitioner that satisfies the 'recognised professional' criteria; and
- the services provided are considered by the profession as necessary for the appropriate treatment of the recipient.

ATMS acupuncturists, herbalists and naturopaths must be financial members of ATMS to have GST-free status.

Section 38-10(1) of the GST Act uses the term 'appropriate treatment'. For the purpose of GST legislation, appropriate treatment in this context refers to the process when the practitioner '...assesses the patient's state of health and determines a process to pursue, in an attempt to preserve, restore or improve the physical or psychological wellbeing of that patient insofar as that recognised professional's particular area of training allows'.

## A. INTRODUCTION

On 16 October 2013, the Committee on the Health Care Complaints Commission resolved to conduct an *Inquiry into the Promotion of False or Misleading Health-Related Information or Practices*.

This submission is in response to the Inquiry.

## B. TERMS OF REFERENCE

The purpose of the Inquiry is ‘to address the promotion of unscientific health-related information or practices’ detrimental to health consumers or public health<sup>5</sup>.

### B.1 Matters Not Covered By The Inquiry

The Inquiry will not cover recognised health practitioners and their organisations<sup>6</sup>. Members of the Australian Traditional-Medicine Society (ATMS) are recognised health practitioners for the purpose of the *Health Care Complaints Act 1993 (NSW)*<sup>7</sup>, and therefore excluded from the Inquiry. The following health practices, which are practised by ATMS members, are cited in the *Health Care Complaints Act 1993 (NSW)*:

S 4(j): Chinese medicine, chiropractic, osteopathy

S 4(j1): massage therapy, naturopathy, acupuncture<sup>8</sup>.

Further, S 4(k) cites ‘services provided in other alternative health care fields’<sup>9</sup>. The exclusion of practitioners of ‘alternative health care’ is supported in a media release which affirmed that the Inquiry does not cover:

a) ‘alternative health remedies which many Australians have adopted...’

b) ‘...legitimate discussions and studies...about appropriate health treatments, along with the diversity of health options available’<sup>10</sup>.

### B.2 Matters Covered By The Inquiry

Mrs Leslie Williams, Chair of the Committee on the Health Care Complaints Commission, asserted in the media release that the Inquiry seeks to achieve ‘proper oversight of all organisations that offer health-related services or advice’.

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<sup>5</sup> Parliament of New South Wales. Committee on the Health Care Complaints Commission. *Inquiry into the Promotion of False or Misleading Health-Related Information or Practices*. Terms of Reference.

<sup>6</sup> Parliament of New South Wales. Committee on the Health Care Complaints Commission. *Inquiry into the Promotion of False or Misleading Health-Related Information or Practices*. Terms of Reference.

<sup>7</sup> S 4 *Health Care Complaints Act 1993 (NSW)*.

<sup>8</sup> *Health Care Complaints Act 1993 (NSW)*.

<sup>9</sup> *Health Care Complaints Act 1993 (NSW)*.

<sup>10</sup> Parliament of New South Wales. Committee on the Health Care Complaints Commission. *Inquiry into the Promotion of False or Misleading Health-Related Information or Practices*. Media Release, 29 November 2013.



Mrs Williams confirmed in an interview in the *Medical Observer*<sup>11</sup> that the Inquiry arose from the Supreme Court matter between the Health Care Complaints Commission (HCCC) and the Australian Vaccination Network (AVN)<sup>12</sup>.

However, the Inquiry is not specific to the AVN, but to all health service providers<sup>13</sup>. The specific matters of the Inquiry are<sup>14</sup>:

- (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.

### **C. The ATMS Response To The Inquiry**

The *Health Care Complaints Act 1993* (NSW) believes that the HCCC has sufficient authority to adequately address the:

- a) publication and/or dissemination of false or misleading health-related information that may cause health consumer anxiety
- b) publication and/or dissemination of information that encourages individuals or the public to unsafely refuse preventative health measures, medical treatments, or cures
- c) 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.

Further, the *Health Care Complaints Act 1993* (NSW) gives the HCCC adequate powers to investigate health organisations that publish and/or disseminate poorly sourced or corrupted health-related information.

Moreover, the *Health Care Complaints Act 1993* (NSW) allows the HCCC the capacity, appropriateness and effectiveness to take enforcement action against health organisations and individuals who publish and/or disseminate poorly sourced or corrupted health-related information.

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<sup>11</sup> Kaye B. NSW Inquiry into 'unscientific' practitioners. *Medical Observer*, 5 November 2013.

<sup>12</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110.

<sup>13</sup> Kaye B. NSW Inquiry into 'unscientific' practitioners. *Medical Observer*, 5 November 2013.

<sup>14</sup> Parliament of New South Wales. Committee on the Health Care Complaints Commission. *Inquiry into the Promotion of False or Misleading Health-Related Information or Practices*. Terms of Reference.

## C.1 **The *Health Care Complaints Act 1993 (NSW)* and Health Organisations**

ATMS holds the view that the HCCC currently has adequate statutory power to investigate complaints against health organisations and individuals. This view is supported by an examination of some aspects of the *Health Care Complaints Act 1993 (NSW)*:

S 3 of the *Health Care Complaints Act 1993 (NSW)* defines the authority of the HCCC:

- (1) The primary object of this Act is to establish the Health Care Complaints Commission as an independent body for the purposes of:
  - (a) receiving and assessing complaints under this Act relating to health services and health service providers in New South Wales, and
  - (b) investigating and assessing whether any such complaint is serious and if so, whether it should be prosecuted, and
  - (c) prosecuting serious complaints, and
  - (d) resolving or overseeing the resolution of complaints.

S4 of the *Health Care Complaints Act 1993 (NSW)* defines a complaint as:

a complaint made under this Act or a complaint made under another Act that is able to be dealt with by the Commission under this Act.

S 7(1)(b) of the *Health Care Complaints Act 1993 (NSW)* gives authority to the HCCC to investigate a complaint against:

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

S 20 of the *Health Care Complaints Act 1993 (NSW)* gives the HCCC authority to assess a complaint:

- (1) The assessment of a complaint is for the purpose of deciding whether:
  - the complaint should be investigated
  - the complaint should be conciliated or dealt with under Division 9
  - the complaint should be referred to the Director-General in accordance with section 25 or 25A
  - the complaint should be referred to another person or body in accordance with section 25B or 26
  - the Commission should decline to entertain the complaint.

S 23 of the *Health Care Complaints Act 1993 (NSW)* gives the HCCC authority to investigate a complaint:

- (1) The Commission must investigate a complaint:
  - (a) if, under section 13 (1), the appropriate professional council is of the opinion that the complaint should be investigated, or

- (b) if, following assessment of the complaint, it appears to the Commission that the complaint:
  - (i) raises a significant issue of public health or safety, or
  - (ii) raises a significant question as to the appropriate care or treatment of a client by a health service provider, or
  - (iii) if substantiated, would provide grounds for disciplinary action against a health practitioner, or
  - (iv) if substantiated, would involve gross negligence on the part of a health practitioner, or
  - (v) if substantiated, would result in the health practitioner being found guilty of an offence under Division 1 or 3 of Part 7 of the [Public Health Act 2010](#)
- (2) A complaint is to be investigated in accordance with Division 5.
- (3) The Commission may investigate a complaint despite any agreement the parties to the complaint may have reached concerning the complaint

S 42 of the *Health Care Complaints Act 1993* (NSW) defines the action to be taken at the end of HCCC's investigation:

- (1) At the end of the investigation of a complaint against a health organisation, the Commission must:
  - (a) terminate the matter, or
  - (b) make recommendations or comments to the health organisation on the matter the subject of the complaint, or
  - (c) refer the matter the subject of the complaint to the Director of Public Prosecutions.
- (2) If the Commission makes recommendations or comments, it must prepare a report on the matter for the Director-General.
- (3) The report must include:
  - (a) the reasons for its conclusions, and
  - (b) the reasons for any action recommended to be taken.

S 59 of the *Health Care Complaints Act 1993* (NSW) defines the HCCC authority to investigate health services:

The Commission may, in accordance with this Part, investigate the delivery of health services by a health service provider directly affecting the clinical management or care of clients which may not be the particular object of a complaint but which arises out of a complaint or out of more than one complaint, if it appears to the Commission that:

- (a) the matter raises a significant issue of public health or safety, or
- (b) the matter raises a significant question as to the appropriate care or treatment of clients, or
- (c) the matter, if substantiated, would provide grounds for disciplinary action against a health practitioner

S 80 of the *Health Care Complaints Act 1993* (NSW) defines the functions of the HCCC. S 80(1)(a) allows the HCCC deal with complaints against health service providers:

- (1) The Commission has the following functions:
  - (a) to receive and deal under this Act with the following complaints:
    - complaints concerning a health service that affects, or is likely to affect, the clinical management or care of individual clients

S 94A of the *Health Care Complaints Act 1993* (NSW) confers power on the HCCC to issue warnings:

- (1) 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 cause a public statement to be issued in a manner determined by the Commission identifying and giving warnings or information about the treatment or health service.
- (2) The Commission may revoke or revise a statement under subsection (1).

## **C. 2 Facts of *Australian Vaccination Network Inc v Health Care Complaints Commission***

As this Inquiry is directly related to the matter of *Australian Vaccination Network Inc v Health Care Complaints Commission*<sup>15</sup>, an analysis of this case is essential. The facts in the matter were:

- a) In 2009, two complaints were made against the Australian Vaccination Network.
- b) The HCCC, after assessing the two complaints, decided to investigate them.
- c) The investigation involved a review of the content of AVN's website.
- d) After its investigation, the HCCC released its final report on 7 July 2010 in which it recommended that AVN publish a disclaimer on its website.

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<sup>15</sup> [2012] NSWSC 110.

- e) In the absence of a disclaimer on the AVN's website, the HCCC upheld the complaint and made the following recommendation under S 42 of the *Health Care Complaints Act 1993* (NSW)<sup>16</sup>:

The Australian Vaccination Network should include an appropriate statement in a prominent position on its website which states:

1. the Australian Vaccination Network's purpose is to provide information against vaccination in order to balance what it believes is the substantial amount of pro-vaccination information elsewhere;
  2. the information provided should not be read as medical advice; and
  3. the decision about whether or not to vaccinate should be made in consultation with a health care provider.
- f) The AVN did not do so.
- g) The HCCC issued a public warning on 26 July 2010 pursuant to s 94A of the *Health Care Complaints Act 1993* (NSW) which said:
- 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.
- h) The AVN commenced proceedings in the NSW Supreme Court against the HCCC.
- i) In the proceedings, the AVN sought a declaration that the following HCCC's actions were ultra vires:
- i) investigation,
  - ii) Investigation Report,
  - iii) Recommendation, and
  - iv) Public Warning.
- j) The reason for the ultra vires was that neither of the complaints were within the meaning of the *Health Care Complaints Act 1993* (NSW).
- k) Further, the AVN sought an order in the nature of certiorari quashing the HCCC's decision or determination to issue the Public Warning.

### C.3 The Judgement

It was held that for a complaint to be within the jurisdiction of the HCCC, then the complaint must conform to 'the clinical management or care of an individual client'<sup>17</sup>. Justice Adamson maintained that a health service complaint must have an effect, even if indirect, on a particular person or persons within its jurisdiction<sup>18</sup>.

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<sup>16</sup> Vines T, Faunce T. Medical law reporter: Civil liberties and the critics of safe vaccination: *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110. *Journal of Law and Medicine* 2012, 20:44.

<sup>17</sup> S 7(1)(b) *Health Care Complaints Commission 1993* (NSW).

<sup>18</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110.

In the absence of the HCCC producing a single health consumer who had been influenced by the information on the AVN website, Justice Adamson dismissed the HCCC's scenario that a health consumer would be influenced by the contents of the AVN website<sup>19</sup>:

Had Parliament intended complaints regarding the contents of such websites to be covered by s 7(1)(b), it would, in my view, have used broader words. It might, in that instance, have provided for complaints concerning a health service that affects medical decisions made by clients of the health service.

Justice Adamson held the view that if a complaint about a health organisation can have an impact upon a health consumer, then it must be shown to have had an actual effect. If there is lack of substantive evidence, then it is outside of the HCCC jurisdiction to act on the complaint<sup>20</sup>.

Therefore, Justice Adamson determined that as the HCCC did not produce evidence of a single health consumer who was affected by the information on the AVN website, the HCCC had acted outside of its jurisdiction by taking action against the AVN<sup>21</sup>.

#### **D. The Fine Balance Between Freedom Of Speech and Consumer Protection**

ATMS does not support legislative change to the *Health Care Complaints Act 1993* (NSW). In a free society, the views and opinions expressed by health organisations should be protected against government interference. ATMS supports that the arguments against public immunisation programs are not simply debates over health policy; they are also political discussions<sup>22</sup>. Therefore the AVN website must be protected from interference by Parliamentary intervention.

Moreover, freedom of expression is an essential human right, protected under international and domestic human rights instruments. For example, the *International Covenant on Civil and Political Rights* entered into force in Australia on 13 November 1980. If the information of the AVN is to be challenged, then it should be through the better dissemination of accurate information and the proper management of rare adverse events following immunisation<sup>23</sup>. 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>24</sup>.

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<sup>19</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 at [44].

<sup>20</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 at [45].

<sup>21</sup> *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110 at [60].

<sup>22</sup> Vines T, Faunce T. Medical law reporter: Civil liberties and the critics of safe vaccination: *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110. *Journal of Law and Medicine* 2012, 20:44 at 54.

<sup>23</sup> Vines T, Faunce T. Medical law reporter: Civil liberties and the critics of safe vaccination: *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110. *Journal of Law and Medicine* 2012, 20:44 at 54.

<sup>24</sup> Vines T, Faunce T. Medical law reporter: Civil liberties and the critics of safe vaccination: *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110. *Journal of Law and Medicine* 2012, 20:44 at 59.

## **E. Conclusion**

Clearly the HCCC has the statutory authority to take action against a health organisation that publishes or disseminates false or misleading health-related information that may cause health consumer anxiety. It also has the authority to act where a health organisation encourages individuals or the public to unsafely refuse preventative health measures, medical treatments. Further, the HCCC has adequate authority against a health organisation that promotes health-related activities that departs from accepted medical practice which may be harmful to individual or public health.

The reason for the failure of the HCCC against the AVN was not due to an inadequacy of HCCC's statutory authority, but rather a lack of substantive evidence on behalf of the HCCC.

Therefore, ATMS believes that the HCCC has adequate statutory power to act against a health organisation that publishes or disseminates information that does not reflect the current body of knowledge.