

**Submission
No 43**

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

Organisation: AMA (NSW)
Name: Mr Andrew Took
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**Parliament of New South Wales
Parliamentary Inquiry
Health Care Complaints Commission**

Inquiry into

**The Promotion of False or Misleading Health-Related
Information or Practices**

Submission by

Australian Medical Association (NSW) Limited



SUBMISSIONS

1. AMA (NSW)

AMA (NSW) is a medico-political organisation that represents interns, residents, registrars, career medical officers, staff specialists, visiting medical officers and medical practitioners in private practice.

We acknowledge and support the Joint Standing Committee's Inquiry into the promotion of false or misleading health-related information and /or practices.

AMA (NSW) welcomes the opportunity to make submissions for consideration in the Inquiry. In particular, we welcome the opportunity to comment on whether the current legislative powers provided under the *Health Care Complaints Act* ('the Act') provide adequate scope for the Health Complaints Commission ('the Commission') to investigate false or misleading health related practices by unregistered persons and/or organisations.

Any questions regarding this submission should be directed to:

Mr Andrew Took
Director, Medico Legal and Employment Relations
AMA (NSW)
PO Box 121
St Leonards NSW 1590

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2. INTRODUCTION

The AMA (NSW) notes the Inquiry's focus upon individuals who are not recognised health practitioners, and organisations that are not recognised health service providers. On behalf of our members, we wish to express a genuine interest and concern about such practices.

3. RESPONSE TO TERMS OF REFERENCE (a) and (b)

3.1 Term of Reference (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.

AND

3.2 Term of Reference (b)

The publication and/or dissemination of information that encourages individuals or the public to unsafely refuse preventative health measures, medical treatments, or cures.

The AMA (NSW) represents and supports registered medical practitioners. We have a genuine concern about the publication and dissemination of false or misleading health related information that casts doubt upon evidence based medical practice.

The concern held by the AMA (NSW) is substantiated by the publication and dissemination of information that has in the past and continues to encourage individuals and the public to

refuse preventive health measures, treatments and cures that are evidence based medical practices.

The promotion of this information is well documented in New South Wales and Australia. By way of example, the Australian Vaccination Network's ('AVN') publications and dissemination of materials have incited much controversy. The AVN has encouraged members of the public to refuse vaccination for themselves and their children. The claims made by the AVN, such as linking vaccines to cancer and autism have been proven unfounded. Andrew Wakefield, the author of a seminal paper linking MMR vaccine to autism has been struck off the UK General Medical Council's Register for fraud.¹ Orders have recently been made requiring the AVN to change its name for the very reason that it is has 'misled the community about a very significant public health issue' (Anthony Roberts, NSW Fair Trading Minister)².

The AVN were ordered by the Therapeutic Goods Administration (TGA) to stop the publication and promotion of an "alternative" cancer treatment known as Black Salve. The TGA argued that there was "no credible, reliable clinical or scientific evidence to demonstrate that the product is effective in the treatment of any cancer".³ The AVN were ordered to stop advertising the product as a treatment for cancer, or suggesting that other cancer treatments are ineffective. The AVN failed to stop the advertising of this product and it has been publically reported that three Australians have been injured and required medical intervention following use of the product⁴.

3.3 Term of Reference (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.

In recent years, the AMA (NSW) has become aware that a number of advertised and promoted health services have been scrutinised for not only promoting but providing services that have resulted in harm to clients. To date, it appears those practices have been examined by the Commissioner for Fair Trading. While the AMA (NSW) welcomes the Commissioner for Fair Trading's review of such matters on a consumer level, the context and implications have potential adverse effects on the health of the public at large. We are therefore of the view that when the complaint concerns the health of an individual or the public the investigatory body should be the Commission.

A number of matters have been investigated by the Commissioner for Fair Trading. We are of the view the Commission also ought to have had jurisdiction to investigate such matters.

By way of example, the matter of *Commissioner for Fair Trading, Department of Commerce v Perrett [2007] NSWSC 1130 NSW*⁵ concerned an alternative health practitioner who engaged in misleading and deceptive conduct at a practice named the 'Rutherford Clinic'. The Clinic promoted treatments for cancer, multiple sclerosis and Huntington's disease. The Court found the representation made by Perrett and the Clinic to be misleading and an Order was made preventing further promotion of the services.

¹ General Medical Council. *Serious Professional Misconduct (SPM) and sanction*. http://www.gmc-uk.org/Wakefield_SPM_and_SANCTION.pdf_32595267.pdf

² http://www.fairtrading.nsw.gov.au/ftw/About_us/News_and_events/Media_releases/2013_media_releases/20131125_australian_vaccination_network.page

³ <http://www.tga.gov.au/industry/advertising-reg9-2012-04-022-black-salve.htm>

⁴ <http://www.tga.gov.au/consumers/information-salve-cansema.htm#.UtMhb56Sw3A>;
<http://www.couriermail.com.au/news/queensland/black-salve-pretty-horrific-warning-therapeutic-goods-administration/story-e6freoof-1226280731143>

⁵ <http://www.austlii.edu.au/au/cases/nsw/NWSC/2007/1130.html>

Similarly, the matter of *Commissioner for Fair Trading, Department of Commerce v Hunter [2008] NSWSC 277 NSW*⁶ concerned misleading and deceptive conduct related to advertising supposed naturopathic cures with ‘live blood analysis’. The practitioner also held himself out as a ‘PHD MA Doctor of Natural Medicine’. In this matter the advertising was found to be misleading and an injunction was issued to prevent the defendant from working in that practice area.

This year, the Royal College of Pathologists of Australasia raised its concern about the promotion of unscientific pathology tests on patients’ blood and hair samples. The issue has been widely reported in publications⁷ Australia-wide. The tests are reportedly promoted by alternative health practitioners to patients with disorders such as chronic fatigue syndrome, food intolerances and genetic disorders. The tests are expensive and government rebates do not apply as they are not approved by the TGA. It has come to the AMA (NSW)’s attention via its pathologist members, that it is their professional opinion that 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.

In 2011, a South Australian coronial investigation inquired into a perinatal death of an infant delivered with the assistance of a deregistered ‘midwife’. When investigated the ‘midwife’ (who had been previously de-registered) reverted to the title ‘birthing advocate’ and indicated they did not have a formal role in the delivery, apart from support⁸. The ‘midwife’ investigated marketed herself as ‘home birthing midwife’, she presented herself with experience and qualifications, having attended observational courses. Reportedly, the patients assisted while she was in practice also incurred significant costs for the ‘management’ of pregnancy. The ‘midwife’ had no professional indemnity insurance leaving those adversely affected with limited recourse.

We have been contacted by some of our obstetrician members in New South Wales who have advised us they have intervened in similar situations, which in their opinion may have resulted in fatalities if medical intervention had not been provided.

Notwithstanding that the above example is a South Australian experience, we believe that in cases such as these, the appropriate forum for complaint and investigation must sit with the Commission. Surely then, such tragic outcomes may be circumvented.

3.4 Term of Reference (d)

The adequacy of the powers of the Health Care Complaints Commission to investigate such organisations or individuals.

The Act was amended earlier this year to provide the Commission with an ‘own motion’ power⁹, providing scope to allow it to initiate a complaint in matters where a significant issue of public health or safety or a significant question regarding a health service affects or is likely to affect the clinical care or treatment of a patient. Or, in a case that the likely result will be disciplinary proceedings against a registered practitioner or warrants action against an unregistered practitioner.

⁶ <http://www.austlii.edu.au/au/cases/nsw/NWSC/2008/277.html>

⁷ <http://www.medicalobserver.com.au/news/no-rebates-for-unscientific-blood-tests>

⁸ <http://www.abc.net.au/news/2012-06-06/home-births-deaths-lisa-barrett-coroner/4055300>

⁹ <http://www.hccc.nsw.gov.au/Publications/News/Health-Care-Complaints-Act-amended>

The AMA (NSW) supports the proposition that the Commission be able to investigate unregistered individuals and organisations disseminating false and or misleading material that may be detrimental to the health of an individual or the public.

However, the Act as currently drafted is potentially inadequate in providing the required scope for the Commission to investigate certain unrecognised organisations.

First, the Act ought to be amended to include the Commission as a ‘Complainant’ under its definitions.

While the Act’s definitions of ‘health professional’ and ‘health service’¹⁰ may be broad enough to incorporate an ‘unrecognised’ promoted health service, that is a health service that is not explicitly listed within the definitions but is the subject of this inquiry’s Terms of Reference, for certainty and clarity, the definition of a ‘health service’ at (k) ought to include **‘unrecognised health service providers and organisations’**.

Section 7¹¹ of the Act allows the Commission to investigate an ‘own motion’ complaint that will affect ‘the clinical management or care of an *individual client*’.

In our view, section 7 ought to be amended to provide for a complaint about: ‘*a health service, whether registered or unrecognised or unregistered, which affects, or is likely to affect, the clinical management or care **of the public or any member of the public.***’

The AMA (NSW) is of the view the wording of clause 7(1)(b), ‘*a health service which affects or is likely to affect*’ is sufficient to capture and authorise the investigation of an individual or an organisation disseminating deceptive or misleading material.

For certainty, Section 7(2) requires the addition of ‘a health service provider **or organisation.**’

Further, in circumstances where a provider cannot be identified, section 7(3) must extend to health service provider ‘**or organisation.**’

Section 8(2)¹² of the Act empowers the Commissioner to make a complaint concerning an issue of public health or safety (section 2(a)) or raises a significant question regarding a health service affecting the care of an ‘individual’ and, if substituted would provide grounds for disciplinary action, or find gross negligence, or find the health practitioner guilty of an offence under certain provisions of the *Public Health Act 2010* (NSW).

While the AMA (NSW) appreciates that the Commissioner can make a complaint under section 8(2), we are not of the view this section has the scope to allow the Commission to initiate a complaint concerning an **unrecognised health service**, or allow for action to flow in respect of such a service. The section is targeted at the individual practitioner. Accordingly, section 8 should be amended at 8(2)(c)(i)-(iii) to extend to a ‘health practitioner **or health organisation.**’ We note section 8 may be amended by way of modification to the Regulations.

3.5 Term of Reference (e)

The capacity, appropriateness, and effectiveness of the Health Care Complaints Commission to take enforcement action against such organisations or individuals; and

¹⁰ http://www.austlii.edu.au/au/legis/nsw/consol_act/hcca1993204/s4.html

¹¹ http://www.austlii.edu.au/au/legis/nsw/consol_act/hcca1993204/s7.html

¹² http://www.austlii.edu.au/au/legis/nsw/consol_act/hcca1993204/s8.html

The AMA (NSW) considers that the Commission should exercise its power under section 94A¹³ more broadly and consistently than it has elected to do to date. The section provides that if 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.

AMA (NSW) submits that health services that 'pose a risk to public health' and fall squarely within section 94A include not only those that may directly harm the public, but also those that may harm the public due to their being ineffective, unscientific, and liable to deflect the public from seeking effective evidence-based medical care.

In our view, and flowing from the above submission, the Commission should issue section 94A warnings to protect the public in relation to each of the following:

- The Australian Vaccination Network (or as may be renamed)
- 'Live blood' analysis
- 'Black salve' treatment
- Unqualified and unregistered home birthing services
- Screen For Life (as documented below at 3.6)

The AMA (NSW) recognises that the unregulated treatments available to the public are not restricted to the list above and the Commission may wish to consider other submissions that evidence treatments that ought to be subject of a section 94A notice.

More generally, if the Commission elected to collate its section 94A warnings into a publicly available '94A warning register', that register would provide the public with a convenient reference source whenever the public contemplate any offer of health care.

AMA (NSW) submits that section 94A is sufficiently broad to permit the creation of such a register without any requirement for further legislative amendment, but the addition of a section 94A(3) expressly authorising creation of a warning register would be prudent and is strongly supported by AMA (NSW).

3.6 Term of Reference (f) Any other related matter

The AMA (NSW) wishes to raise the below issues that do not fit strictly within the terms of reference above. However, we believe they are matters that ought to be brought to the attention of this inquiry.

The advertising campaign by the 'Screen for Life'¹⁴ group promotes claims of preventative health measures against stroke, abnormal heartbeat, peripheral arterial disease and abdominal aortic aneurysm. The message promoted by Screen for Life is 'prevention' and while results are forwarded to medical practitioner for review, the concern held by AMA (NSW) is that the group promotes its testing before the patients seeks a medical practitioner's services.

In their Frequently Asked Questions document Screen for Life claim that 'our results are comparable to those that you would receive from an accredited hospital vascular lab', however, nowhere in the document is this claim supported with evidence. Another claim regarding stroke prevention is of concern and is contained in correspondence dated 8

¹³ http://www.austlii.edu.au/au/legis/nsw/consol_act/hcca1993204/s94a.html

¹⁴ <http://www.screenforlife.com.au/about-us.aspx>

February 2013, – ‘Your quick and easy way to help prevent a stroke’. AMA (NSW) is concerned that this may lead individuals to be misled and not seek further treatment, as there are no predisposing factors under examination for stroke. The tests performed by the ‘Screen for Life’ group are promoting expensive and possibly unnecessary tests for patients that may encourage individuals to ignore serious concerns and refuse preventative health measures, medical treatments or cures.

Finally, the AMA (NSW) acknowledges that disclaimers are often used to prevent liability. However, we do not believe that they go far enough to protect the public from unregistered practitioners. Often a disclaimer will contradict the content that is being advertised. An example where this occurs is the ‘The Salt Doctor’ website. This organisation sells unregistered therapeutic products that have no proven benefit and could be potentially harmful. On their website they have the disclaimer

“Disclaimer: The information contained on this website is for educational purposes only. It is not provided to diagnose, prescribe or treat any condition of the body. The information on this website should not be used as a substitute for medical counselling with a health professional.”¹⁵

It is the view of the AMA (NSW) that this does not go far enough to protect the interests of the public and is in direct contention with the content of the site.

The AVN is another example of a website that is using disclaimers to limit their liability to the public.¹⁶

The AMA (NSW) believes that sites promoting ‘alternative’ health measures, medical treatments, or cures ought to be answerable for claims made by their site, regardless of whether or not they have a disclaimer on their site. The *Health Practitioner Regulation National Law (NSW)*¹⁷ prevents medical practitioners from advertising and using testimonials in order to promote their services. The consequences of a complaint associated with such a breach can incur severe penalties including fines and reprimands by professional bodies. In a similar vein, an appropriate forum for complaint and prosecution must be established for unrecognised providers making false and or misleading claims.

4. CONCLUSION

The AMA (NSW) welcomes this inquiry. We are of the view that this inquiry provides a long overdue opportunity for the public to voice concerns about the promotion of false or misleading health practices.

We believe empowering the Commission with the necessary scope to action complaints about such practices will go some way to protecting and educating the NSW public in the future.

¹⁵ <http://www.thesaltdoctor.com.au/>

¹⁶ <http://avn.org.au/disclaimer-and-legal-mumbo-jumbo/>

¹⁷ http://www.austlii.edu.au/au/legis/nsw/consol_act/hprnl460/s133.html