Submission

to the

NSW Committee on the

Health Care Complaints Commission

on the

Review of the

Unregistered Health Practitioners:

The Adequacy and Appropriateness of

Current Mechanisms for Resolving Complaints

Report (1998)

February 2006

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Executive Summary

The Australian Traditional-Medicine Society (ATMS) is Australia's largest professional association of complementary medicine practitioners, representing approximately 65% of the total complementary medicine profession.

The Health Care Complaints Commission (HCCC) lacks the legislative authority for it to effectively resolve complaints made against unregistered health service providers. The majority of professional associations do not have the resources or knowledge to fairly and equitably resolve consumer complaints made against their members.

ATMS therefore supports the HCCC expanding its legislative powers so it can be an effective regulatory agency to deal with complaints against unregistered health service providers. The new powers should enable the HCCC to:

1. take disciplinary action following an investigation of an unregistered health service provider
2. refer the matter to the Director General of Health
3. provide the HCCC with a naming power similar to s86A of the *Fair Trading Act 1987* (NSW)
4. allow the disclosure of information where it is in the public interest to do so
5. allow professional associations to refer matters directly to the HCCC
6. allow the HCCC to initiate an investigation
7. make it mandatory for complementary medicine professional associations to establish a uniform complaints handling and disciplinary mechanism for handling complaints of a non-serious nature with the HCCC having the legislative power to oversee the process.

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About the Australian Traditional-Medicine Society

The Australian Traditional-Medicine Society (ATMS) is Australia's largest professional association of complementary medicine practitioners, representing approximately 65% of the total complementary medicine profession, and is the second largest traditional Chinese medicine professional association. At January 2006, the membership of ATMS was 9,895 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 Executive Board of Directors. The Society's administration consists of 9 full-time and part-time staff. Six Departments have been established within ATMS to address the specific needs of massage therapy, traditional Chinese medicine, naturopathic nutrition, naturopathy, homeopathy and western herbal medicine practitioners.

2. Committees

ATMS has four main national committees:

- *Academic Review Committee*: reviews current standards for all disciplines, conducts college inspections and assesses individual membership applications.
- *Complaints Committee*: handles complaints made by consumers against members and colleges.
- *Executive Management Committee*: handles day-to-day operational matters and makes recommendations to the Executive Board.
- *ATMS Accreditation Board*: assesses course curriculum.

3. 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.*

4. 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).
- *Qualified Natural Therapists Membership Directory* which lists practitioner members and accredited colleges. Fifteen thousand copies are distributed free-of-charge to consumers.
- *ATMS Annual Report.*

5. 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. It is mandatory that ATMS practising members participate in the CPE program.

6. ATMS Code of Ethics and Practice

The ATMS Code of Ethics and Practice lists the requirements 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.

7. Criteria for a College to Gain ATMS Recognised Status

The ATMS Criteria for Recognised College requires that a teaching institution must meet the ATMS requirements for advertising, refunds policy, student information, student grievances, recruitment procedures, general standards as well as a college inspection. If the requirement is met, a teaching institution is granted provisional status for a three year period before being granted full Recognised College status.

8. Professional Indemnity Insurance

Practising members must have professional indemnity insurance of at least $1 million, and the Society has a master policy scheme with an insurer.

9. First Aid Certificate

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

10. Website

The ATMS website address is www.atms.com.au.

A. Introduction

On 7 December 2005, the Joint Parliamentary Committee on the Health Care Complaints Commission announced it was to conduct a review of the December 1998 report on *Unregistered Health Practitioners: The Adequacy and Appropriateness of Current Mechanisms for Resolving Complaints.* The impetus for the Inquiry was developments in other jurisdictions, especially in Victoria and Western Australia.

The terms of reference of the July 1998 Inquiry were:

> That the Committee examine the experience of consumers in dealing with unregistered health practitioners (including those practising in alternative health care fields) with a view to establishing:
>
> a) What complaint mechanisms exist for consumers;
> b) Whether these complaint mechanisms are effective;
> c) Whether there is scope for strengthening voluntary codes of behaviour or conduct;
> d) Whether the provisions in the *Health Care Complaints Act 1993* relating to unregistered health practitioners are appropriate or whether they need strengthening;
> e) Any other related matters.

In December 1998 the Joint Parliamentary Committee released the report from the July inquiry which made the following recommendations:

1. That the Health Care Complaints Commission (HCCC) take a greater role in educating consumers about the Commission's ability to investigate complaints about unregistered health practitioners through the production and dissemination of pamphlets and other information.
2. That the Department of Health and the Colleges support this initiative by encouraging the dissemination of such information through hospitals and Area Health Services.

3. That the Minister for Health consider providing the Health Care Complaints Commission with legislative power to refer matters which concern possible breaches of the Minister's Acts to the Director General of Health.
4. That the *Health Care Complaints Act* be amended to create a power which allows the Health Care Complaints Commission to require health professional associations to establish uniform complaints handling and disciplinary mechanisms and grants the Commission power to monitor the functioning of these.
5. That the Minister for Health examine the feasibility of establishing umbrella legislation to cover unregistered health care practitioners which establishes a generic form of registration, generic complaint and disciplinary mechanisms, a uniform code of conduct, entry criteria agreed amongst the relevant professions and an Advisory Board to the Minister.
6. That the Minister for Health consider providing the Health Care Complaints Commission with a naming power similar to the one available to the Department of Fair Trading by s86A of the *Fair Trading Act 1987.*
7. That the Minister for Health consider either establishing or nominating a body with the power to issue court-enforceable orders to allow health consumers to obtain refunds through the Small Claims Tribunal from unregistered practitioners in circumstances where this body deems it appropriate after receiving recommendations from the HCCC.

ATMS understands that this Review has nothing to do with the efficacy of treatments used by unregistered health service providers.

B. Australian Traditional-Medicine Society's Complaints Resolution Mechanism

The Australian Traditional-Medicine Society's (ATMS) complaints resolution mechanism was developed with assistance from the Victorian Health Services Commissioner and a legal practitioner.

The *Complaint Form* is available upon request for a consumer or practitioner wishing to lodge a complaint, as well as being a downloadable document on the ATMS website (www.atms.com.au) (see Appendix A).

The *Complaint Form* is accompanied by the *Consumer Guidelines For Making A Complaint* which explains to consumers how to complete the form and what is involved in making a complaint (see Appendix B).

The ATMS Complaints Committee process is guided by a document entitled *Internal Procedures for the ATMS Complaints Committee* (see Appendix C). This document is reviewed at each meeting of the Complaints Committee ie it is a living document.

The complaints are assessed against the ATMS Code of Ethics (see Appendix D) and the Code of Practice (see Appendix E).

The Complaints Committee meets 4 times a year, and minutes of the meeting are recorded and archived. The Complaints Committee consists of 5 members, one of which is a member of a Commonwealth Government complaints resolution committee.

The Complaints Committee refers complaints of a difficult nature to a legal practitioner for advice.

The following table shows the number and outcome for complaints handled by the ATMS Complaints Committee for the period 1996 to 2005:

Year	Number of Complaints	Outcome
1996	2	Resolved to satisfaction of both parties through conciliation
	2	Removed from ATMS for practising outside of ATMS accreditation
	1	Removed from ATMS for breach of ATMS policy
	1	Removed from ATMS for health fund misrepresentation
	1	Police charge of sexual harassment
	1	Breach of ethical boundaries
1997	2	Removed from ATMS for breach of ATMS policy
	1	Member resigned
	7	Resolved to satisfaction of both parties through conciliation
1998	3	Removed from ATMS for breach of ATMS policy
	6	Resolved to satisfaction of both parties through conciliation
	4	Members received sanctions regarding practices
1999	1	Member resigned
	2	Members received sanctions regarding practices
	7	Resolved to satisfaction of both parties through conciliation
2000	3	Bruising from massage: all complaints upheld
	5	Sexual misconduct: all investigated by police
	3	Health fund fraud: all complaints upheld
	8	Unprofessional conduct: 2 complaints upheld and resulted in warning and monitoring of clinical practice; 1 member removed; 1 member resigned; 1 member received counselling; 3 complaints not upheld
2001	2	Bruising from massage: both complaints not upheld
	5	Sexual misconduct: 2 complaints investigated by police; 2 members removed from ATMS; 1 complaint not upheld
	1	Health fund fraud: member received sanction and monitoring of clinical practice
	7	Unprofessional conduct: 1 member removed from ATMS; 1 member received counselling and monitoring of clinical practice; 1 member received sanction and monitoring of clinical practice; 4 complaints not upheld
2002	4	Unprofessional conduct: all complaints not upheld

	2	Sexual misconduct: complaints investigated by police
	1	Unprofessional conduct: member received warning and monitoring of clinical practice
	1	Breach of ATMS policy on telephone consultations: member removed from ATMS
	1	Inappropriate advertising: member received warning and monitoring of advertising material
	1	Complaint against a college
2003	6	Unprofessional conduct: 2 complaints not upheld; 4 members received sanctions
	3	Sexual misconduct: 3 members received sanctions
	1	Inappropriate advertising: member resigned
	1	Use of the title of Dr: member removed from ATMS
2004	5	Unprofessional conduct: 2 complaints not upheld; 3 members received sanctions
	4	Sexual misconduct: 2 complaints not upheld; 2 members received sanctions
2005	7	Unprofessional conduct: 4 complaints not upheld; 3 members received sanctions
	2	Health fund matters: 2 members received sanctions
	1	Use of title of Dr: member received sanction

In the period from 1996 to 2005, the ATMS Complaints Committee handled 115 complaints, making an average of nearly 12 complaints per year or about 1 complaint per month.

Of all the complaints handled by the Complaints Committee during this period, 10 complaints involved the police ie 8%, and 14 members were removed from ATMS ie 12%.

The following table shows the alleged breaches of the Codes of Ethics and Practice, the action sought by complainants, the outcome from the Complaints Committee and the sanction/s imposed:

Date of Complaint	Alleged Breaches of Code	Action Sought by Complainant	Breaches Found Justified	Sanction/s
4 April 2003	1.1	For practitioner to be registered with GEHF or a refund of money paid	Breach of 1.1	Either register with GEHF or else refund money
5 April 2003	5.2	Retraction of false advertising	Breach of 5.2	Written assurance of compliance with advertising requirements
19 May 2003	1.1, 1.2	1) Apology 2) That the incident not happen again	Breach of 1.2, 1.2	1) Letter of apology 2) Written assurance that safety procedures are in place to prevent recurrence
20 May 2003	1.2, 2.3	1) Apology 2) Monetary compensation	Nil breach of 1.2, 2.3	Nil
3 June 2003	1.2, 2.4	Wants him to undergo training in appropriate behaviour	Breach of 1.2, 2.4	Written assurance that will not exceed boundaries
4 June 2003	1.2	Not stated	Nil breach of 1.2	Nil
25 June 2003	2.4, 5.2	To address false representation	Nil breach of 2.4, 5.2	Warning of working outside of training
8 July 2003	1.2, 2.2	Strong action so is aware of consequences	Nil breach of 1.2, 2.2	Nil
20 October 2003	1.2, 2.10	So this incident does not happen again	Breach of 1.2, 2.10	Written assurance that

				proper draping procedures will be adhered to
27 November 2003	1.2	Not stated	Nil breach of 1.2	Nil
9 December 2003	1.2, 2.10	Stop him doing this to other women	Breach of 1.2, 2.10	Written assurance that incident will not happen again
8 January 2004	2.4, 8.6 plus breach of Code of Ethics	Retribution	Breach of 2.4, 8.6 and Code of Ethics	Written assurance by member to abide by the Codes of Practice and Ethics
26 March 2004	2.6 and Code of Ethics	To stop him from doing this again	Breach of 2.6 and Code of Ethics	Written assurance that incident will not happen again
7 June 2004	1.2, 2.9	Correct the inaccurate information about health fund rebate	Breach of 1.2, 2.9	1) Letter of apology 2) Refund
8 June 2004	4.1	1) Refund 2) This incident not happen again 3) Respondent made aware of misdiagnosis	Breach of 4.1	Written assurance of proper record keeping procedures
10 June 2004	Not specified	1) Refund 2) Apology		1) Refund 2) Letter of apology
12 June 2004	1.1, 1.3	1) Refund 2) Explanation as to why program failed 3) Investigation	Nil breach of 1.1, 1.3	Nil, but warning issued regarding clinical

		4) Respondent to advise future clients that program may not work 5) Respondent to take responsibility		procedures and brochure
24 June 2004	2.7	Prevention of recurrence	Nil breach of 2.7	Nil
21 September 2004	2.11	1) Disciplinary action for respondent's behaviour 2) Reimbursement for lost income 3) Occupational health issues 4) Record keeping issues	Nil breach of 2.11	Nil
19 November 2004	1.1, 2.4, 2.5, 2.9, 2.10, 2.12, 5.2(a), 7.1	1) Respondent ceases to prescribe and sell products that not trained in 2) Respondent Behaves ethically and professionally	Nil breach of 1.1, 2.4, 2.5, 2.9, 2.10, 2.12, 5.2(a), 7.1	Delete therapeutic claims from brochure
5 February 2005	Ethics and trust	1) To make him realise that he cannot and should not breach his patients rights. 2) To make certain that no-one else has to go through what I have been through	Breach of duty of care	Assessment of respondent's clinic and techniques by ATMS representative
15 February 2005	1.1, 1.3	1) Similar incident does not happen again 2) Compensation	Breach of 1.1	Review of technique by ATMS representative
26 April 2005	2.2	Daughters to receive rebate from health fund	Breach of 2.2	1) Letter of apology 2) Refund of $52

				3) Written assurance that respondent is familiar with health fund requirements
10 May 2005	Not specified	1) Receive receipt for first consultation 2) Make ATMS aware of respondent's behaviour		1) Issue outstanding tax invoices 2) Letter of apology 3) Give written assurance that correct health fund receipt procedures are in place
17 May 2005	Racism, defamation, use of improper title, misleading the public	Apology	Use of improper title	Cease using title of Dr
31 May 2005	1.1, 1.2, 2.2, 2.12, 2.13, 3.1	1) Full refund 2) Return of full bottle of herbal medicine	No breach of 1.1, 1.2, 2.2, 2.12, 2.13, 3.1	1) Refund of $75
17 July 2005	Not specified	Make herbalists aware of how imperative it is not to interfere in pregnant women and unborn children's lives	Breach of 2.17	Advise professional indemnity insurer of matter
12 Sept 2005	2.2, 2.8	1) Practitioner to be educated on how to treat people and correct way to present opinion 2) Apology	No breach of 2.2, 2.8	Letter of apology
16 Sept 2005	2.11, 2.13, 2.15, 5	Action not specified	Nil	Nil

12 October 2005	1.2, 2.2	Acknowledgement of complaint and apology	No breach of 1.2 and 2.2	Letter of apology

C. Do Existing Mechanisms Offer Consumers An Effective Means of Dealing With Their Complaints Against Unregistered Health Practitioners

Discussion Point 1: Does the number of complaints received by the HCCC against unregistered health care practitioners reflect the true state of consumer dissatisfaction with alternative health care?

It is difficult to accurately determine whether the number of complaints received by the Health Care Complaints Commission (HCCC) against complementary medicine practitioners is a reflection of the true state of consumer dissatisfaction. There is no research data to support the hypothesis that there is consumer dissatisfaction, or to what degree dissatisfaction actually exists. In the absence of any reliable information, it is a matter of conjecture that consumer dissatisfaction is an issue.

What is apparent is that there is a consistently low number of complaints against complementary medicine practitioners by bodies that handle complaints ie:

a) HCCC
b) Victorian Health Services Commissioner
c) Professional indemnity insurer of the Australian Traditional-Medicine Society

1.1 HCCC Complaints Against Complementary Medicine Services

The Health Care Complaints Commission (HCCC) is a statutory body established by the *Health Care Complaints Act 1993* (NSW). Section 3 of the Act specifies the functions of the HCCC:

> (a) to facilitate the maintenance of standards of health services in New South Wales,
>
> (b) to promote the rights of clients in the New South Wales health system by providing clear and easily accessible mechanisms for the resolution of complaints,
>
> (c) to facilitate the dissemination of information about clients' rights throughout the health system,

(d) to provide an independent mechanism for assessing whether the prosecution of disciplinary action should be taken against health practitioners who are registered under health registration Acts.

Section 7 of the *Health Care Complaints Act 1993* gives legal authority to the HCCC to investigate allegations against unregistered health service providers, but the Act fails to allow for disciplinary action against unregistered providers, even if found guilty.

The number of complaints received by the Health Care Complaints Commission (HCCC) against complementary medicine services for the period 1998-2005 was very low:

Year	Total Number of Complaints to HCCC	Number of Complaints Against Complementary Medicine Services	% of Complementary Medicine Complaints Compared to Total Complaints
1998-1999[1]	642	2	0.3%
1999-2000[2]	742	8	1.1%
2000-2001[3]	899	0	0%
2001-2002[4]	918	1	0.1%
2002-2003[5]	902	2	0.2%
2003-2004[6]	942	2	0.2%
2004-2005[7]	1,133	2	0.2%

[1] Health Care Complaints Commission. HCCC Annual Report 2000-2001. Table 8, p 32.

[2] Health Care Complaints Commission. HCCC Annual Report 2000-2001. Table 8, p 32.

[3] Health Care Complaints Commission. HCCC Annual Report 2000-2001. Table 8, p 32.

[4] Health Care Complaints Commission. HCCC Annual Report 2001-2002. Table 8, p 32.

[5] Health Care Complaints Commission. HCCC Annual Report 2002-2003. Table 8, p 27.

[6] Health Care Complaints Commission. HCCC Annual Report 2003-2004. Table 32, p 66.

[7] Health Care Complaints Commission. HCCC Annual Report 2004-2005. Table 51, p 86.

Total	**6,178**	**17**	**0.3%**

Of the total number of 6,178 complaints against health services for the period 1998-2005, only 17 were against complementary medicine services representing 0.3% of complaints received by the HCCC.

1.2 HCCC Complaints Against Complementary Medicine Practitioners

The number of complaints received by the Health Care Complaints Commission against complementary medicine practitioners for the period 1998-2005 was also very low:

Year	Total Number of Complaints to HCCC	Number of Complaints Against Complementary Medicine Practitioners	% of Complementary Medicine Complaints Compared to Total Complaints
1998-1999[8]	1,360	11	0.8%
1999-2000[9]	1,678	7	0.4%
2000-2001[10]	1,989	6	0.3%
2001-2002[11]	1,755	9	0.5%
2002-2003[12]	1,814	10	0.5%
2003-2004[13]	1,873	22	1.2%
2004-2005[14]	2,002	13	0.6%

[8] Health Care Complaints Commission. HCCC Annual Report 2000-2001. Table 11, p 35.

[9] Health Care Complaints Commission. HCCC Annual Report 2000-2001. Table 11, p 35.

[10] Health Care Complaints Commission. HCCC Annual Report 2000-2001. Table 11, p 35.

[11] Health Care Complaints Commission. HCCC Annual Report 2001-2002. Table 11, p35.

[12] Health Care Complaints Commission. HCCC Annual Report 2002-2003. Table 11, p 30.

[13] Health Care Complaints Commission. HCCC Annual Report 2003-2004. Table 35, p 68.

Total	**12,471**	**78**	**0.6%**

Of the total number of 12,471 complaints against health practitioners for the period 1998-2005, only 78 were against complementary medicine practitioners representing 0.6% of all complaints received by the HCCC.

1.3 Complaints Received by Victorian Health Services Commissioner

The low number of complaints against complementary medicine practitioners is not confined to NSW. In Victoria the number of complaints to the Victorian Health Services Commissioner (HSC) is also very low as the following table shows:

Year	Total Number of Complaints to HSC	Number of Complaints Against Complementary Medicine Practitioners	% of Complementary Medicine Complaints Compared to Total Complaints
1996-1997[15]	1,871	13	0.7%
1997-1998[16]	2,481	15	0.6%
1998-1999[17]	2,261	24	1.1%
1999-2000[18]	2,354	23	1.0%
2000-2001[19]	2,796	27	1.0%

[14] Health Care Complaints Commission. HCCC Annual Report 2004-2005. Table 53, p 88.
[15] Office of the Health Services Commissioner. Health Services Commissioner Annual Report 1998/1999. Appendix 1.

[16] Office of the Health Services Commissioner. Health Services Commissioner Annual Report 1998/1999. Appendix 1.

[17] Office of the Health Services Commissioner. Health Services Commissioner Annual Report 1998/1999. Appendix 1.

[18] Office of the Health Services Commissioner. Health Services Commissioner Annual Report 1999/2000. Appendix 1.

[19] Office of the Health Services Commissioner. Health Services Commissioner Annual Report 2000/2001. Appendix 1.

2001-2002[20]	2,366	9	0.4%
2002-2003[21]	2,373	12	0.5%
2003-2004[22]	2,450	12	0.5%
2004-2005[23]	2,357	23	0.9%

Of the total number of 21,309 complaints received by the Victorian Health Services Commissioner in the 1996-2005 period, only 0.7% of all complaints in this period were against complementary medicine practitioners.

Data from both NSW and Victorian health care complaints regulatory agencies shows very low number of complaints against complementary medicine services and practitioners.

1.4 Complaints Received by ATMS Professional Indemnity Insurer

In the period 2000 to 2005 Marsh Ltd, the professional indemnity master policy insurer of ATMS, settled 17 claims requiring a payment ie an average of 3 claims per year.

Discussion Point 2: Why is there a disproportionately small number of complaints lodged against unregistered health care practitioners when compared to the number lodged against registered practitioners?

The very low number of complaints received by the HCCC against complementary medicine practitioners was assumed by HCCC Commissioner Walton to be due to three factors:

[20] Office of the Health Services Commissioner. Health Services Commissioner Annual Report 2001/2002. Appendix 1.

[21] Office of the Health Services Commissioner. Health Services Commissioner Annual Report. 2002/2003. Appendix 1, p 51.

[22] Office of the Health Services Commissioner. Health Services Commissioner Annual Report. 2003/2004. Appendix 1, p 50.

[23] Office of the Health Services Commissioner. Health Services Commissioner Annual Report. 2004/2005. Appendix 1.

a) HCCC not focussing on complementary medicine practitioners nor targeting its clients with HCCC information
b) Unawareness by consumers of complementary medicine services of HCCC's role
c) Consumers who found mainstream medicine unsuccessful in treating their condition might accept the outcome of a complementary medicine service without question.

Commissioner Walton's assumptions seem theoretically and logically plausible, and are undoubtedly based on extensive and highly informed experience, but are wanting of supporting evidence.

The author of this submission offers the following casual observations in addition to Commissioner Walton's to assist in understanding why the HCCC receives a disproportionately low number of complaints against complementary medicine practitioners:

d) Consumers see the practitioner's professional association as being a less bureaucratic body to complaint to than the HCCC
e) Consumers see the practitioner's professional association as having more impact, and possibly causing the practitioner greater professional embarrassment, than the HCCC
f) Consumers find the professional association complaint making process easier than the HCCC.

Discussion Point 3: Are consumers of alternative health care less likely to complain about the standard of care they received than consumers of orthodox health care services? If so, why?

In the absence of research or quality information, it is difficult to ascertain as to whether consumers of complementary medicine services are less likely to complain than consumers of orthodox health care.

Complementary medicine services, by a non-medical practitioner, do not attract Medicare rebates. Therefore it is reasonable to assume that complementary medicine

consumers would demand a high level of service as they are paying for it, but this is only an assumption without any reasonable evidence to support it.

Research shows that consumers of complementary medicine have a higher level of education than the average consumer. One reason why consumers seek complementary medicine services is a philosophical belief in the use of natural medicines rather than synthetic pharmaceutical drugs, as well as a holistic approach to manage one's health problems. It may well be the case these consumers expect a higher level of standard of care by complementary medicine practitioners compared to orthodox medicine, and therefore more likely to complain, rather than less likely.

Discussion Point 4: Do existing mechanisms deal effectively with complaints against unregistered health care practitioners? If not, please explain why they are ineffective?

A number of agencies already exist to deal with complaints against complementary medicine practitioners ie:

1. Health Care Complaints Commission
2. Department of Fair Trading
3. Therapeutic Goods Administration
4. Police and Director of Public Prosecutions
5. NSW Medical Board
6. Department of Health
7. Australian Competition and Consumer Commission
8. Professional Associations.

With the exception of the HCCC and professional associations, none of the other bodies are specifically established to deal with professional conduct matters by unregistered health service providers. Hence, of the 8 agencies, only 2 effectively deal with consumer complaints against complementary medicine practitioners.

However, the HCCC has limited powers against unregistered complementary medicine practitioners, and the majority of professional associations do not have legal

understanding or the resources to implement a fair, effective, accountable and equitable complaints resolution mechanism. Moreso, professional association disciplinary action against a member is of limited effect, in that the practitioner can practise without belonging to an association or can readily join another professional association.

The view of the Australian Traditional-Medicine Society (ATMS) is in accordance with that of the Joint Committee on the Health Care Complaints Commission that the range of bodies for consumers to complain about complementary medicine practitioners provides a:

> 'limited and piecemeal protection for health consumers... The result is that complaining about such practitioners can be a confusing, frustrating and ultimately fruitless task for health consumers'.[24]

4.1 Health Care Complaints Commission

Section 7(2) of the *Health Care Complaints Act 1993 (NSW)* allows a complaint to be made against any health service provider and therefore the subject of an investigation. The Act defines a 'health service' as embracing complementary medicine.

Section 39 of the Act allows the HCCC to take action after the investigation of a registered health care practitioner, but there is no provision in the Act for action to be taken against unregistered health service providers after the investigation has been conducted. All the HCCC can do is to either:

a) Make adverse comments to the unregistered health service provider,
b) Terminate the complaint, or
c) Refer the matter to the Director of Public Prosecutions,

The HCCC is unable to make the findings public or take any enforceable action. The HCCC's statutory limitation against unregistered health service providers makes this agency an ineffective mechanism for consumer complaints. Therefore it is

[24] Joint Committee on the Health Care Complaints Commission. Unregistered Health Practitioners: The Adequacy and Appropriateness of Current Mechanisms for Resolving Complaints. Final Report. December 1998. Sydney: Parliament of NSW. p 41.

understandable that the HCCC lacks the will to pursue complaints against unregistered health service providers. This may explain why an informed consumer may not lodge a complaint with the HCCC, but rather with the practitioner's association.

4.2 Department of Fair Trading

Part 5 of the *Fair Trading Act 1987* (NSW) provides general consumer protection by prohibiting deceptive and misleading conduct, unconscionable conduct, making false representations and accepting payment without intending to supply. Part 6 of the Act provides a range of remedies including fines, injunctions, orders and payment of damages.

The Department of Fair Trading handles a small number of complaints against unregistered health service providers. The Department is known in the community as an agency that deals with products and contractual arrangements, rather than matters of professional misconduct by health care practitioners. The core business of the Department is not focussed on professional standards of health care.

4.3 Therapeutic Goods Administration

The *Therapeutic Goods Act (1989)* (Cth) and the *Therapeutic Goods Regulations (1990)* (Cth) is Commonwealth legislation that covers the quality, safety, efficacy and advertising of therapeutic goods and medical devices used or exported from Australia.

The Administration has jurisdiction of corporations that trade interstate or overseas, and has no authority of the professional standards of a health care practitioner, whether registered or not. The Administration has no mechanism to accept complaints about the services of health care practitioners.

4.4 Police and Director of Public Prosecutions

Police investigations will be conducted if the complaint appears to contravene the *Crimes Act 1900* (NSW), which usually means matters of a sexual misconduct nature. However the police is not an appropriate agency for the majority of complaints

against health care practitioners, whether registered or not. Standards of professional health care is not the core business of the police, and the police are dependent on advice received from health professional peer reviewers.

Over the last 10 years, ATMS has worked with the police as a peer reviewer on at least 15 occasions. During this period, an ATMS representative was subpoenaed to give evidence in court on about 6 occasions. The ATMS policy is one of total co-operation with the police, as ATMS takes a critical view of professional misconduct.

The Director of Public Prosecutions will proceed an investigation to prosecution if in the opinion of the Director a jury will make a conviction, not that the jury should make a conviction. This criteria imposes a limitation on the number of investigations undertaken by the Director.

Another limitation in referring matters to the Director is that the standards of evidentiary proof must be beyond reasonable doubt, whereas Registration Boards and professional associations require the lower standard of proof on the balance of probabilities. In many cases involving health professionals, the higher standard of beyond reasonable doubt is very difficult to meet.

The strength of the Director prosecuting serious complaints against health care practitioners, whether registered or not, is that the criminal sanctions sends a loud and clear message to the health care community about legal expectations of standards of professional conduct.

4.5 NSW Medical Board

Section 105(3) of the *Medical Practice Act 1992* (NSW) has an impact on complementary medicine practice in that unregistered health service providers cannot use the title of Doctor:

> a person who is not a registered medical practitioner must not hold himself or herself out to be a registered medical practitioner, doctor of medicine, physician or surgeon, or be entitled, qualified, able or

> willing to practise medicine or surgery in any of its branches or to give or perform any medical or surgical advice, service, attendance or operation.

Even though the Medical Board has a poor record in prosecuting unregistered health service providers, in the matter of the NSW Medical Board v Dummett (Lismore Local Court, 16 November 2001), the Board was successful on this occasion resulting in a $34,000 fine against Dummett. However this did not stop Dummett from moving to Sydney and continuing practice using the title of Doctor.

A limitation of the *Medical Practice Act* and its Regulations is that it does not provide a definition of medical advice, making it very difficult for the Board to exercise influence over the inappropriate activities of unregistered health service providers.

4.6 Department of Health

The HCCC does not have legislative power to refer matters to the Director General of NSW Health. ATMS supports an amendment to the Health Care Complaints Act to allow the HCCC to refer matters directly to the Department of Health.

ATMS also supports a formal arrangement between the Department of Health and the professional associations to allow a matter to be referred directly to the Director General of NSW Health by the professional associations.

4.7 Australian Competition and Consumer Commission

The ACCC is a Commonwealth regulatory agency, and its focus is on national markets, not the misconduct of health care professionals who operate locally. The ACCC generally investigates matters on a selective basis. The ACCC is not an effective agency for complaints against complementary medicine practitioners.

4.8 Complementary Medicine Professional Associations

The complementary medicine professional associations have authority over its members to impose disciplinary action. However without the underpinning of a

legislative framework, or at the very least a formal arrangement between the professional associations and the HCCC, the professional associations cannot offer consumers an effective complaints resolution mechanism for the following reasons:

a) The health service provider needs to be a member of a professional association for disciplinary action to be taken

b) The resignation of a practitioner from an association terminates the complaints resolution process

c) Expulsion of a practitioner from a professional association does not stop the unregistered health service provider from joining another association

d) Where an expelled practitioner appeals to the District Court, the general view of magistrates is to favour the practitioner

e) Most complementary medicine professional associations do not have the knowledge, experience or resources to implement an effective complaints resolution mechanism

f) Most complementary medicine associations do not have an understanding of the principles of procedural fairness or burden of proof

g) Where a respondent uses the services of a legal practitioner, casual observation over many years shows that there is a tendency for most professional associations to dismiss the complaint for fear of legal action being taken against the association

h) Even though the ATMS *Complaint Form* and *Consumer Guidelines For Making A Complaint* are on its website, most of the other complementary medicine professional associations do not publicise their complaints resolution mechanism, making it difficult for consumers to know if a complaints resolution mechanism exists

i) Even though ATMS publishes its complaints data in the *Annual Report*, it is uncommon for complementary medicine professional associations to make known their complaints data

j) Casual observations over many years indicates that some complementary medicine associations do not have an understanding of procedural fairness in order to implement a fair and equitable complaints resolution mechanism

k) Complementary medicine associations do not have an independent appeal mechanism for either the consumer or the respondent

l) Where a complementary medicine association does have a complaints resolution mechanism, the complaints committee is constituted by its members with no representation from consumers or the legal profession

m) It is unlikely that complementary medicine associations would have the knowledge or resources to conduct an investigation of a complaint

n) The HCCC does not give support to complementary medicine professional associations regarding their complaints resolution mechanisms

o) There is no communication between the Registration Boards disciplinary committees and complementary medicine professional associations

p) The result of investigation by Registration Boards against a complementary medicine practitioner is not conveyed to the practitioner's professional association.

For the above reasons, some complementary medicine professional associations are not able to deliver to consumers an accountable, fair and equitable complaints resolution mechanism based on the principles of procedural fairness.

Discussion Point 5: What changes need to be made to existing mechanisms dealing with complaints against unregistered health practitioners?

ATMS supports giving the HCCC the following legislative powers in order to deal with unregistered health service providers:

1. authority by the HCCC to take disciplinary action following an investigation
2. refer the matter to the Director General of Health
3. provide the HCCC with a naming power, similar to s86A of the *Fair Trading Act 1987* (NSW)
4. amendment of s37 of the *Health Care Complaints Act 1993* to allow the disclosure of information where it is in the public interest to do so

5. allow professional associations to refer matters directly to the HCCC
6. allow the HCCC to initiate an investigation
7. legislatively underpinned requirement that complementary medicine professional associations establish a uniform complaints resolution and disciplinary mechanisms and grants the HCCC power to monitor its functioning .

Discussion Point 6: What role should the HCCC play in the handling of complaints of a less serious nature against unregistered practitioners?

With an amendment to the *Health Care Complaints Act 1993*, the HCCC could make it mandatory for professional associations to have uniform complaints resolution procedures to enable to them to handle complaints of a less serious nature, with the HCCC having the legislative authority to oversee the process.

Discussion Point 7: How can consumers of alternative health care be made aware of the complaints mechanisms available to them?

The HCCC conduct an education campaign through the production and dissemination of pamphlets and other information to be distributed through the hospitals and Area Health Services.

This education campaign be supported by complementary medicine associations by having this information on the homepage of their websites with a link to the HCCC website.

D. Do the Provisions of the *Health Care Complaints Act 1993*, relating to unregistered health practitioners, require amendment?

Discussion Point 8: Should the *Health Care Complaints Act 1993*, be amended to give the HCCC the power to impose disciplinary action on unregistered health care practitioners against whom a complaint is made? If so, what changes would need to be made to the Act and the Commission's powers?

ATMS supports an expansion of the HCCC legislative powers to enable it to do the following:

1. refer a matter to the Director General of Health
2. have a naming power similar to the provisions of s86A of the *Fair Trading Act 1987* (NSW)
3. allow the disclosure of information after an investigation where it is in the public interest to do so
4. initiate a complaint against an unregistered health care provider
5. receive a complaint from a professional association.

Discussion Point 9: Should the confidentiality provisions of the *Health Care Complaints Act 1993*, which prevent the Commission from commenting on complaints against unregistered health care practitioners be amended? If so, what changes are required?

ATMS supports an amendment of s37 of the *Health Care Complaints Act 1993* in order for the HCCC to make comment following an investigation about an unregistered health service provider. The extent of the Commission's power should be equal to that of registered health care practitioners and in accordance with the public interest criteria.

Discussion Point 10: Should the *Health Care Complaints Act 1993*, be amended to give the Health Care Complaints Commission the power to initiate complaints against unregistered health care providers? If so, what should be the extent of these powers?

ATMS supports an amendment to the Act to allow the HCCC to initiate an investigation against an unregistered health service provider. The extent of these powers should be equal to that of registered health care practitioners.

Discussion Point 11: Does the *Health Care Complaints Act 1993*, require any other amendment to allow the Health Care Complaints Commission to deal effectively with complaints against unregistered health care practitioners?

ATMS supports amendments to the Health Care Complaints Act 1993 so that the HCCC can refer matters against unregistered health service providers to the Director General of Health, is able to disclose information following an investigation and has a naming power.

E. Is There Scope for Strengthening Self-Regulation in Unregistered Fields of Health Care?

Discussion Point 12: Does the present system of self-regulation of unregistered health care providers offer the public a satisfactory standard of health care and safety?

Research data shows that consumers are increasingly using the services of complementary medicine practitioners, indicating that there is little consumer concern about the standard of care and practices of complementary medicine practitioners.

However for the reasons outlined in this submission, the complaints resolution mechanisms of the majority of complementary medicine professional associations appear to be deficient. Moreso, the complaints resolution mechanisms against unregistered health service providers of State regulatory agencies are also deficient.

Discussion Point 13: What problems are caused by professional fragmentation and how can they be overcome?

Professional fragmentation undermines the professionalisation process and advancement of an occupation. There is no easy answer to remedy fragmentation, other than Government intervention.

Discussion Point 14: What role can professional associations play in the self-regulation of practitioners working within a particular field of health care?

Self-regulation is underpinned by the professional associations.

Discussion Point 15: How can practitioners be encouraged to join a professional association?

The professional association must offer benefits applicable to the clinical practice of the practitioner.

Discussion Point 16: What impact, if any, has the National Competition Policy had on the ability of associations to attract membership and to set standards of practice?

National Competition Policy has had little impact on ATMS's ability to attract membership and set standards of practice.

While National Competition Policy has been the reason given by about 16 health funds deciding to do their own assessment of complementary medicine practitioners to determine eligibility for provider status, about 30 other health funds are still using ATMS membership as their criteria.

Discussion Point 17: How can self-regulation provide more effective control of practitioners practising in unregistered fields of health care?

Self-regulation would allow the implementation of uniform standards of education, a single Code of Conduct applicable to all practitioners and complaints resolution mechanism.

F. Is Further Statutory Regulation of Unregistered Health Care Practitioners Required?

Discussion Point 18: Is there a need to improve the standard of care provided by practitioners in unregistered fields of health care?

There is always a need to continually raise clinical standards for all health care practitioners, whether registered or not.

Discussion Point 19: Would statutory regulation of unregistered fields of health care provide an improved standard of care to the public?

Statutory registration primarily protects the exclusive right of a registered person to use a particular title. The advantages of title protection under statute for a healthcare occupation include:

- Practitioners meet certain standards of training and experience which gives the public some form of guarantee that the practitioner has a basic level of skills necessary to deliver the service

- The registered practitioner is expected to be a person of good character

- Control of advertising and publicity of practitioners which reduces the risk of misinformation and of artificially generating demand for the service

- Provision of a disciplinary mechanism where improper practitioner conduct can be easily reported and addressed

- The creation of a single identifiable professional group for the advancement of standards of practice

- Provides standards of competence based on accepted levels of training.

Discussion Point 20: What field/s of health care should be the subject of statutory regulation?

In April 1993, the Australian Health Ministers Advisory Council (AHMAC) established a Working Group to provide advice on the criteria and process to be applied in the assessment of statutory regulation of partially regulated and unregulated health occupations. The terms of reference of the Working Group were to develop recommendations, not to actually assess applications for statutory registration.

In April 1995 AHMAC released a report entitled *Working Group Advising on Criteria and Process for Assessment of Regulatory Requirements for Unregulated Health Occupations*. The report outlined the six 'criteria for assessing the need for statutory regulation of unregulated health occupations'. All six criteria must be applicable to the health occupation group for an occupation to be considered for statutory regulation. The six criteria of the Working Group are:

1. Is it appropriate for Health Ministers to exercise responsibility for regulating the occupation in question, or does the occupation more appropriately fall within the domain of another Ministry?
2. Do the activities of the occupation pose a significant risk of harm to the health and safety of the public?
3. Do existing regulatory or other mechanisms fail to address health and safety issues?
4. Is regulation possible to implement for the occupation in question?
5. Is regulation practical to implement for the occupation in question?
6. Do the benefits to the public of regulation clearly outweigh the potential negative impact of such regulation?

AHMAC adopted the following principles to develop the six criteria:

- The sole purpose of occupational regulation is to protect the public interest
- The purpose of regulation is not to protect the interests of health occupations.

ATMS is of the view that only those health care occupations that meet the AHMAC criteria should be subject to statutory regulation.

Discussion Point 21: What form of statutory regulation is required?

There is no question that unregistered health service providers must be regulated. The central issue is to determine the most appropriate form of regulation.

Regulation needs to:

- advance unregistered health service providers, but not be solely for the self interest of these providers
- be in the best interests of consumers without limiting consumer choice
- focus on education, clinical standards and the complaints resolution mechanism
- not inhibit the safe practice of unregistered health service providers so as to limit its effectiveness in health care.

Given these considerations, ATMS believes that co-regulation between the complementary medicine profession and the Government is the best form of regulation underpinned by statute. ATMS has called this model Government Monitored Self Regulation (GMSR).

Co-regulation will need to be:

- impartial
- independent, and
- accountable to the community.

Co-regulation must not:

- restrict competition in any way
- involve harsh penalties out of proportion to the infringement
- involve contravention of state or federal law

- deny access to legal remedies in any way.

During the review of the practice of traditional Chinese medicine in Australia, the NSW Health Department suggested three regulatory models for Chinese medicine practitioners[25]:

1) Health regulation by statutes such as the *Public Health Act 1991* (NSW), or those specific to individual safety issue of concern such as the *Poisons and Therapeutic Goods Act 1996* (NSW) or the Skin Penetration Regulations.

2) The development under statute of a generic Health Professionals Registration Board with standards of conduct and safety of practice, and protection of specific titles.

3) The development of a co-regulatory model where Government accredits self-regulatory systems similar to the NSW Professional Standards Council. This model is similar to the GMSR co-regulatory model advocated by ATMS. The NSW Health Department called its model Government Supervised Self Regulation (GSSR).

The NSW Health Department related its co-regulatory model for Chinese medicine practitioners to that found in the *Professional Standards Act 1994*. Under this Act the Professional Standards Council does not assess individual practitioners, but rather assesses proposals for limited liability schemes put forward by professional associations. Where professional associations can demonstrate to the Council that they have strategies in place to minimise risks associated with professional practice, the members of the association can have their liability for damages limited under the Act. Such practitioners could be identified to consumers through the right to use a specified logo indicating that the practitioner has obtained a certain level of competence. The identification strategy is similar to that proposed by ATMS.

Discussion Point 22: What problems would existing competition policies present to the implementation of further statutory regulation of health care?

[25] Victorian Ministerial Advisory Committee. Traditional Chinese medicine. Report on Options for Regulation of Practitioners. July 1998. Melbourne: Victorian Government Department of Human Services, 1998.

If the AHMAC criteria is met for an unregistered health service, then it is understood that National Competition Policy principles would also be considered before a final decision was made as to whether to register an unregistered occupation or not. National Competition Policy did not hinder the introduction of the *Chinese Medicine Registration Act 2000* (Vic).

Discussion Point 23: What problems might arise as a result of further statutory regulation of particular fields of health care?

The following problems could arise of statutory regulation of particular fields of health care:

- The major benefactor from statutory registration of title is not the public but the regulated health practitioners themselves
- Restriction of entry into the profession resulting in shortages of practitioners especially in public institutions, rural areas and amongst particular ethnic groups
- Higher fees by practitioners to support the Registration Board
- The pre-conditions for monopoly can well be established by the controls of competition and on information to the public
- By confining the health care service to a particular group of providers, developments and innovation in the training of that group can be stifled
- Controls on competence are focused when the practitioner is entering the profession, rather than those who are already in practice
- The costs of administration of the registration system may not be recouped in total from the registration fees, which means that the part of the cost is borne by the community

- Registration implies official endorsement of the professional status and methods of practice of the registered group

- Registration can lead to undue emphasis being placed on academic qualifications rather than on practical ability.

Discussion Point 24: Is there support among unregistered health care provider groups for registration rather than a maintenance of the status quo?

ATMS represents about 65% of complementary medicine practitioners. ATMS supports a co-regulatory model of regulation which is underpinned by statute and called this model Government Monitored Self Regulation (GMSR).