

# The power of suggestion

by Karin Mont



Karin Mont,  
MARH, ARH Chair

Since March 2011, the Advertising Standards Authority (ASA) has been engaged in a relentless campaign against homeopaths, and we have been warned that they are about to renew their efforts to enforce their own particular definition of compliance across the sector. The ASA's opinion of homeopathy is both clear and intractable: **There is no evidence to show that homeopathy works, therefore it does not work.** This article explores two specific issues: the ASA's actual (as opposed to suggested) power to enforce this irrational and unacceptable perspective of our profession; and their right to censor information placed in the public domain.

Most of us would agree that advertising should be subject to some control, and that advertising claims should not be deliberately misleading. However, we do have a right to expect the regulation of any industry to be based on principles of fairness, impartiality and proportionality. To date, we have seen little evidence of the ASA's willingness to demonstrate fairness, impartiality and proportionality, and that situation is not about to change. Practitioners across the country have been in receipt of a letter from the compliance team of the Committee of Advertising Practice (CAP), stating that homeopaths may not 'make either direct or implied claims to treat medical conditions', and marketing materials will be 'extensively' spot-checked from 3rd November 2016 onwards.

The ASA comprises two main departments; CAP writes the advertising code, and makes initial contact with advertisers deemed to be in breach of the code. Once contacted, the advertiser is expected to amend any material which CAP considers to be contentious. If the advertiser fails to respond, or challenges the legitimacy of CAP's claim, then the matter is referred to the ASA for adjudication. CAP and the ASA are essentially two sides of the same coin; CAP, an unelected and unrepresentative group of individuals, writes the rules and demands compliance according to its own, selective terms, then calls in the ASA to support its particular perspective, and act as enforcer. Neither group has specific knowledge or expertise in homeopathy, or the treatment of medical conditions, but the tone of their communications suggests otherwise. Many individuals who received the letter from CAP were both shocked and intimidated by its content.

The majority of the public are totally unaware that the ASA is only a private limited company. Its activities are funded by the advertising industry, for whom it acts as a voluntary, self-appointed regulator. The ASA is accountable to no one, and has absolutely no statutory powers, though this fact is not reflected in the manner in which it chooses to present itself. **The ASA's only real power is the power we choose to ascribe to it.** Otherwise the ASA has to refer non-compliant advertising to genuine authorities, such as Trading Standards (TS)

and the Medicines and Healthcare products Regulatory Agency (MHRA). Both of these organisations can investigate alleged breaches of advertising protocol, and take legal action in serious cases.

The key point here is 'serious cases'. Both TS and the MHRA are underfunded and underresourced, and are expected to protect the public from illegal or dangerous trading. The last thing either organisation needs is to have their time wasted by being forced to follow up on apparently spurious complaints made against homeopaths, especially when we have very good reason to believe that most of these complaints are being generated by a small number of pressure groups with a specific, anti-homeopathy agenda. So, what might constitute a serious case? TS are interested in knowing about advertisers who deliberately mislead the consumer into buying unnecessary goods or services, or who sell dangerous, illegal, faulty or fake items. Usually, the advertiser is issued with a warning and instructed to amend or remove their advertising but, if they refuse, or the material is considered to be illegal or dangerous, then TS can prosecute the advertiser.

According to their website, the MHRA regulates '*medicines, medical devices and blood components for transfusion in the UK*'. They are tasked with ensuring that medicines, medical devices and blood components meet agreed standards of safety, quality and efficacy, and are used appropriately by both practitioners and consumers. Homeopathic medicinal products fall into four different categories, full details of which can be found on the MHRA website but, from the profession's perspective, we need to be aware that there are licensed and unlicensed products. **In the UK, the advertising of all unlicensed product is prohibited.** This means that we cannot claim or imply that an unlicensed homeopathic medicine can treat a named medical condition and, as the majority of our medicines are unlicensed, we should not refer to the potential therapeutic benefits of any of them in our promotional materials. A few homeopathic medicines are licensed under the National Rules Scheme (NRS), and include indications for use '*within the UK homeopathic tradition*'. These indications relate to the treatment of mild, self-limiting conditions which would not normally require medical supervision.

It is acceptable to refer to medicines licensed under the NRS, and the indications for which they have been authorised. However, as there does not appear to be a current list of medicines licensed under the NRS, or their permitted indications, it is advisable to avoid referring to homeopathic medicines and specific conditions altogether. Anyway, as homeopaths we treat individuals, not conditions, so there is no need to make therapeutic claims about a particular medicine. If an unlicensed homeopathic medicine is referenced on a

website, or 'unauthorised' conditions are named, then the ASA can refer the matter to the MHRA to investigate. The advertiser would be contacted by the MHRA telling them to remove the contentious reference and, assuming they complied, it is unlikely that further action would be taken.

Both TS and the MHRA are tasked and authorised to uphold specific UK laws and statutes, and they are accountable (directly or indirectly) to a Government department. Their primary remit is to act in the public interest by investigating, and potentially prosecuting, individuals engaged in dangerous or illegal activities. By contrast, the ASA is a voluntary body which creates its own rules, and is accountable to no one. They can only enforce compliance with the CAP Code by involving TS or the MHRA. However, as we have already identified, TS and the MHRA must have credible grounds upon which to pursue a case, and they are obliged to follow due process to secure a prosecution. To date, the ASA appears to have based the majority of its adjudications against homeopaths upon subjective, and highly selective opinion so, in the absence of substantiable fact, it seems unlikely that either TS or the MHRA would be in a position to support the ASA by taking legal action. This point has not deterred the ASA from referring to TS as their 'legal backstop', and misleadingly implying to advertisers that statutory enforcement is the inevitable consequence of non-compliance. This is definitely not the case, which means that if we are contacted by CAP about the wording on our websites or promotional materials, we can choose how to respond.

The easy option is to comply with CAP's demands, and amend any text they deem to be in breach of the CAP Code. Although this may result in the removal of any useful or meaningful information, compliance means that the ASA will not pursue an adjudication, or brand a website as 'non-compliant'. Understandably, many practitioners are likely to choose this option, because challenging the ASA is not for the faint hearted. However, the profession as a whole needs to be aware that surrendering to the ASA's unreasonable demands may result in unintended consequences. The first potential consequence is guilt by implication. The ASA states that its role is to ensure that all advertising is '*legal, decent, truthful and honest*'. Assuming that the text in question already meets those criteria, any amendments imply that the original material was not legal, decent, truthful and honest. To be deemed guilty by implication (as opposed to guilty by proven fact), is a serious violation of 'natural justice', especially since the ASA adjudicates behind closed doors, and does not provide the 'accused' with the right to a proper defence.

The second consequence of unquestioning compliance is to deny the effectiveness of homeopathy altogether. Remember, the ASA's stated position on homeopathy is:

On the basis of expert advice, the ASA concluded that the evidence (*for homeopathy*) was insufficient to support any efficacy claims.

**In other words, the ASA has decided that there is no evidence to show that homeopathy works, therefore it does not work.** In reaching this extraordinary conclusion, they have totally ignored the personal experience of millions of patients and the clinical experience of millions of practitioners. Furthermore, they have dismissed out of hand all the evidence provided by numerous randomised controlled trials (RCTs), outcome-based trials, and government reports, all of which support the effectiveness of homeopathic treatment.

Basically this means that if the profession concedes to the ASA's unjust demands, we are effectively agreeing with their position: **There is no evidence to show that homeopathy works, therefore it does not work!**

Past experience has shown the ASA to assume a consistently narrow, subjective and selective interpretation of the CAP Code, so we can expect their new campaign against homeopaths to be as biased and unfair as previous assaults. What is more, the ASA's unacceptable behaviour doesn't only disadvantage practitioners; it has the potential to deny the public access to correct information about homeopathy through the application of unjustifiable censorship. As a self-appointed regulator of the advertising industry, the ASA should have a duty of care to ensure that its processes adequately reflect the needs of all parties represented by the public sector. This includes the consumer, the advertiser and the information provider (which is the role most of us fulfil when we establish a website). However, so far the ASA has failed to address a number of fundamental issues, including defining the guidelines they apply to distinguish between a 'claim' (advertising / marketing) and a fact (information). We do not know what (if any) measures are undertaken by the ASA to differentiate between advertising and information and, as a result it seems that all website material is regarded as 'advertising', even when it provides factual information. This means that the needs of both the consumer and the information provider are being undermined by the ASA's increasingly aggressive campaign against us.

There must be hundreds of different professions, yet the ASA has chosen to feature '*Advertising standards for homeopathy*' on the homepage of its website for several weeks. Why? Furthermore, CAP is threatening to carry out '*extensive monitoring spot checks*' on marketing communications which appear on websites and on social media. This is a new and sinister development, because previously CAP was only supposed to act upon receipt of a complaint from a member of the public, and the main focus of an investigation was material which appeared on websites. In other words, CAP has covertly extended its self-conferred remit to include spot-checking and the monitoring of social media, which begs two questions: How far is CAP prepared to go in its attempt to silence the homeopathy profession, and what right do they think they have to deny patients access to information about homeopathy? I believe that ASA and CAP have just crossed a line, and it is now time for homeopaths, both singly and collectively, to challenge this unacceptable level of bullying.

Homeopathy *is* an effective therapeutic intervention, and we need to stand by our right to place legal, decent, truthful and honest information in the public domain, through any medium. Perhaps even more importantly, we must uphold the public's right to access useful and accurate information about homeopathy. We live in a so-called 'free society' and, according to section 10-1 of the European Convention on Human Rights:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

We also have a right to practise our lawful occupation without constantly being subjected to groundless persecution or intimidation. We know that homeopathy works, and that as practitioners we can help our patients to achieve improved health and wellbeing. **All we need is the confidence and courage to continue to share that knowledge with the rest of the world.** □