

# Medical Advertisement Policy

September 2016



## A. Introduction

1. The Osteopathic Council of NZ (**the Council**) is the statutory authority established under the [Health Practitioners Competence Assurance Act 2003 \(HPCAA\)](#) responsible for the registration and regulation of osteopaths in NZ. The principal purpose of the HPCAA is to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions.
2. The purpose of this policy is to protect members of the public from medical (including therapeutic) advertising that is false, misleading or deceptive, leads to the provision of inappropriate or unnecessary health services, or creates unrealistic expectations.
3. This policy provides an explanation of the Council's position on medical advertisements and use of client testimonials to guide practitioners in making decisions as to advertising their professional services. This will support the appropriate use of health resources and ensure that patients are able to make informed decisions about their healthcare.

## B. Medicines Act 1981

4. Medical or therapeutic advertisements are regulated through the [Medicines Act 1981 \(the Act\)](#) and the Codes of Practice<sup>1</sup> set out by the [Advertising Standard Authority \(ASA\)](#), as well as the [Osteopathic Council Code of Ethics \(the Code\)](#). Osteopaths must ensure these advertising standards are complied with, and should also be aware of their obligations under the [Consumer Guarantees Act 1993](#) and the [Fair Trading Act 1986](#), as well as the [Health and Disability Commissioner Code of Health and Disability Services Consumers' Rights](#).
5. Section 58 of the Act, prohibits a person from publishing (or causing or permitting to be published) any medical advertisement that:
  - i. *"directly or by implication claims, indicates, or suggests that medicines of the description, or medical devices of the kind, or the method of treatment, advertised will prevent, **alleviate**, or cure any disease, or prevent, **reduce**, or terminate any physiological condition specified, or belonging to a class of disease or physiological condition specified, in [Part 1](#) of Schedule 1"*
  - ii. *"directly or by implication claims, indicates, or suggests that medicines of the description, or medical devices of the kind, or the method of treatment advertised, will prevent or cure any disease, or prevent or terminate any physiological condition specified, or belonging to a class of disease or physiological condition specified, in [Part 2](#) of Schedule 1"*
  - iii. *"directly or by implication claims, indicates, or suggests that a medicine of the description, or a medical device of the kind, or the method of treatment, advertised—*
    - a. *is a panacea or infallible; or*
    - b. *is or has been used or recommended by a practitioner, nurse, or pharmacist, or by any other person qualified to provide therapeutic treatment in the course of a profession or occupation and registered under any enactment as a person so qualified, or by a person who is engaged in study or research in*

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<sup>1</sup> Therapeutic Services Advertising Code; Advertising Code of Ethics; Therapeutic Products Advertising Code.

*relation to any of those professions or occupations or the work performed by persons employed therein; or*

*c. has beneficially affected the health of a particular person or class of persons, whether named or unnamed, and whether real or fictitious, referred to in the advertisement; or*

*d. invites correspondence or the sending of hair, blood, urine, or other bodily specimens or photographs for the purposes of diagnosis or treatment concerning any disease or physiological condition."*

6. Both the Act and the Code (via the Council's publication [Informed Consent: Guidelines for Osteopaths](#)) place strict limits on medical and therapeutic advertisements by all health practitioners.
7. It is an offence to breach section 58 in contravention of the standards outlined above (point 5).<sup>2</sup> The Council would regard a breach of section 58 of the Act and/or the Codes as having the potential to attract disciplinary proceedings under the HPCAA.

### C. The Act contains the following key definitions:

8. "*Advertisement*" means any words, whether written, printed, or spoken, and any pictorial representation or design, used or appearing to be used to promote the sale of medicines or medical devices or the use of any method of treatment; and includes any trade circular, any label, and any advertisement in a trade journal; and **advertising** and **advertised** have corresponding meanings.
9. "*Medical advertisement*" means an advertisement relating, or likely to cause any person to believe that it relates, to any medicine or medical device or any ingredient or component thereof, or to any method of treatment.
10. "*Method of treatment*" means any method of treatment for reward undertaken, or represented to be undertaken, for a therapeutic purpose.
11. "*Publish*" means -
  - i. insert in any newspaper or other periodical publication printed or published in New Zealand; or
  - ii. send to any person through the Post Office or otherwise; or
  - iii. deliver to any person or leave upon premises in the occupation of any person; or
  - iv. broadcast within the meaning of the [Broadcasting Act 1989](#); or
  - v. bring to the notice of the public in New Zealand in any other manner.
12. Section 3A of the Act provides a definition of "*Medical device*" as follows:
  - a. means any device, instrument, apparatus, appliance, or other article that—
    - i. is intended to be used in, on, or for human beings for a therapeutic purpose; and
    - ii. does not achieve its principal intended action in or on the human body by pharmacological, immunological, or metabolic means (but may be assisted in its function by such means); and

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<sup>2</sup> It will be a good defence in a prosecution if claims made under section 58(1)(a) and (b) are true.

- b. includes a material that—
  - i. is intended to be used in or on human beings for a therapeutic purpose; and
- c. does not achieve its principal intended action in or on the human body by pharmacological, immunological, or metabolic means (but may be assisted in its function by such means); and
- d. also includes—
  - i. anything that is intended to be used with a device, instrument, apparatus, appliance, article, or material referred to in paragraph (a) or (b) to enable the device, instrument, apparatus, appliance, article, or material to be used as its manufacturer intends; and
  - ii. any device, instrument, apparatus, appliance, article, or material of a kind or belonging to a class that is declared by regulations to be a medical device for the purposes of this Act; but
- e. does not include a device, instrument, apparatus, appliance, article, or material of a kind or belonging to a class that is declared by regulations not to be a medical device for the purposes of this Act.

#### **D. How to comply with the Act:**

13. Advertising includes but is not limited to the following:

- a. All forms of printed, electronic, social and digital media such as online advertising, websites, emails and SMS messaging that are selling or promoting a product or service;
- b. Public communication using television, radio, motion pictures, newspapers, billboards, books, lists, pictorial representations, designs, mobile communications or displays, the internet or directories and includes business cards, announcement cards, office signs, letterhead, telephone directory listings, professional lists, professional directory listings, and similar professional notices. This would include where osteopaths make comment or provide information on particular products or services such as in media reports, magazine articles or advertorials;
- c. Material not considered advertising is that which is issued to patients during consultations where such material is designed to provide the patient with clinical or technical information about health conditions or procedures and where the person is afforded sufficient opportunity to discuss and ask questions about the material.

#### **14. All advertising must:**

- a. be presented in a manner that is accurate, balanced and not misleading;
- b. use plain language;
- c. facts and statistics must be from a reputable and verifiable source; and
- d. comply with legislative requirements.

15. Osteopaths are ultimately responsible for the style and content of all advertising material, and cannot devolve responsibility for the advertising of their services and or products to another party.

16. An osteopath shall not advertise any material which relates to the osteopath's qualifications, practices, treatment or the premises where they practice osteopathy if the material:

- a. potentially breaches the Fair Trading Act 1986;
- b. is vulgar or sensational;
- c. creates an unjustified expectation of beneficial treatment or unrealistic treatment outcomes;
- d. relates to outcomes without stating that individual results may vary;
- e. is unprofessional or likely to bring the profession into disrepute;
- f. uses testimonials whether from patients or any other person.

## 17. Social Media

- a. Practitioners are increasingly participating in online social media, and this may be perceived as a form of advertising. The use of social media is expanding rapidly. Individuals and organisations are embracing user-generated content, such as social networking, personal websites, discussion forums and message boards, blogs and microblogs. When an online activity is able to be viewed by the public or is limited to a specific group of people, osteopaths need to maintain professional standards and be aware of the implications of their actions, as in all professional matters.
- b. Osteopaths need to be aware that information circulated on social media may end up in the public domain, and remain there, irrespective of the intent at the time of posting. This form of media does have the potential of risk for osteopaths.
- c. Practitioners must be aware of the need to maintain patient confidentiality, the potential for allegations of defamation and the need to maintain appropriate professional boundaries.
- d. Practitioners must:
  - i. Routinely monitor their own social media presence to ensure that the personal and professional information is accurate and appropriate.
  - ii. Maintain appropriate boundaries of the patient-osteopath relationship when interacting with patients online and ensure patient privacy and confidentiality is maintained.
  - iii. Consider separating personal and professional content online.
  - iv. Recognise that actions online and content posted can negatively affect their reputations among patients and colleagues, and may even have consequences for their osteopathic careers.
  - v. Ensure no online testimonials are posted on their social media sites.
  - vi. Obtain patient approval in writing for the use of any personal images or information related to their patients on their social media sites.

## 18. Use of Images in Advertising

- a. Osteopaths should use any images in their advertising with caution. Images, particularly "*before and after*" photos, have a significant potential to mislead or deceive. Such images may convey to a member of the public inappropriately high expectations of successful outcome and encourage the unnecessary use of services or products.
- b. If an osteopath chooses to use images they must ensure that they:
  - i. Are solely for the purpose of providing accurate and useful information;

- ii. Are used only when the patient has given his or her fully informed written consent; and
- iii. If they are “before and after” images they must also:
  - 1. Have not been altered in any way;
  - 2. Show a realistic portrayal of the outcome that can reasonably and typically be expected;
  - 3. Are consistent with regard to positioning, lighting, camera angle and posture.

## 19. Promotion by Inducement

- a. Osteopaths may offer an inducement or similar to health consumers, only when:
  - i. the terms and conditions of that offer are clearly and understandably set out; and
  - ii. the best interests of health consumers are considered when making such an offer; and
  - iii. any offer does not contravene the Code of Health and Disability Services Consumers’ Rights; and
  - iv. in offering goods or services, the osteopath ensures that the product or service is appropriate for that individual and not based on other considerations;
  - v. although strongly discouraged, if osteopaths’ advertise by means of discount coupons or gift certificates, the osteopath must ensure that these do not undermine their relationship with the patient and the informed consent process. In particular, osteopaths must ensure that their coupon or certificate is clear that:
    - 1. purchase of the certificate or coupon does not equate to granting informed consent;
    - 2. prior to treatment the patient will have an opportunity to discuss treatment with the osteopath, to ask questions and to provide their informed consent;
    - 3. the patient has the right to opt out of treatment at any time;
    - 4. the osteopath will not provide the requested treatment if your assessment indicates that the patient is not a suitable candidate.

## 20. Media Contact

- a. Osteopaths may be interviewed by name or prepare articles for the lay press on issues of general interest provided that:
- b. it is made clear that the opinion voiced is that of the practitioner only, if this is the case. If the opinion is that of the profession or part of the profession, this should be stated;
- c. they do not allow the name, address or phone number of their practice to be used in an unreasonable manner or be the primary focus of the media contact;
- d. they do not make any self-laudatory, misleading or sensational statements or deprecate the achievements of others;
- e. they do not use their involvement solely to attract or gain new patients;

- f. testimonials of their patients or other persons are not used.

## **21. Questions about osteopathic advertising**

- a. If osteopaths are unsure whether an advertisement meets legal, industry and Council requirements then they should consider making use of the Therapeutic Advertising Pre-Vetting Services (**TAPS**). TAPS is a commercial service provided under the auspices of the Association of New Zealand Advertisers and is intended to assist advertisers with compliance issues. Contact TAPS at [anza@anza.co.nz](mailto:anza@anza.co.nz) or on 09 488 7455.

## **22. Complaints in respect of medical advertisements**

- a. Due to the fact that advertising by its nature, requires that material is in the public domain;
- b. Any member of the public or osteopathic profession may make, in writing, a complaint directly to the Council; or
- c. A complainant may choose to contact the ASA ([www.asa.co.nz](http://www.asa.co.nz)) or Broadcasting Standards Authority ([www.bsa.govt.nz](http://www.bsa.govt.nz)) directly to make a complaint.