

CAP and BCAP consultation: harm and protected characteristics

Committee of Advertising Practice's and Broadcast Committee of Advertising Practice's proposals for rules on harm and protected characteristics

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1. Executive summary

The Committee of Advertising Practice (CAP), author of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code), and the Broadcast Committee of Advertising Practice, author of the UK Code of Broadcast Advertising (the BCAP Code), are consulting on the introduction of the following rules relating to harm and protected characteristics (as defined in the Equality Act 2010 – see section 3.2, below):

CAP Code

Marketing communications must not include anything likely to cause harm. To comply with this rule, marketers must have particular regard to the likelihood of causing harm to vulnerable people, and to the following characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

BCAP Code

Advertisements must not include anything likely to cause harm. To comply with this rule, broadcasters must have particular regard to the likelihood of causing harm to vulnerable people, and to the following characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

CAP and BCAP have decided to consult for the following reasons:

- CAP and BCAP commit to equality and diversity through the ASA's diversity and inclusion strategy, and, for the reasons set out in 3.2 (below), consider themselves subject to the public sector equality duty. As a result, CAP and BCAP seek to ensure that the protections they provide to those sharing protected characteristics is as strong as possible.
- The ASA system's gender stereotyping work and, more recently, work on racial and ethnic stereotyping have provided CAP and BCAP with a further opportunity to consider the protection that they provide to those sharing protected characteristics. This work has underlined the importance of having a framework in place that allows CAP and BCAP, and the ASA, to respond quickly and flexibly to prevent harm, including to those sharing protected characteristics. Such a framework will allow the ASA system to further its commitment to equality and diversity, and to set out the ways in which it has regard to the public sector equality duty and the duty, under the Communications Act 2003, to prevent harmful advertising from being included in broadcast services. Instead of having to develop new rules to deal with specific harms to specific groups, CAP and BCAP consider that overarching rules, which allow for assessment of new evidence, are quicker and more effective at preventing harm while ensuring governance standards are met.
- The Codes contain many specific rules relating to harm, including harm to those sharing protected characteristics, as well as 'Principles' at the head of Code sections stating that ads must not cause harm. The principle that ads should not be likely to cause harm, both generally and specifically to those sharing protected characteristics, is central to CAP and BCAP's and the ASA's work. Additionally, in 2018, following an internal project, CAP and BCAP, and the ASA, introduced

procedures and guidance to ensure that appropriate regard was given to the public sector equality duty in decision-making, and that this was documented. CAP and BCAP consider that the introduction of explicit rules on harm and protected characteristics in both Codes will send a clear message to stakeholders of the standards that the ASA system already applies in practice in its regulatory decision-making.

Respondents are invited to indicate whether they agree or disagree with CAP's proposals, and provide their rationale for this.

The consultation will close at 5pm on 24 August 2021.

2. Introduction to the UK advertising regulatory system

2.1 The Committee of Advertising Practice (CAP)

CAP is the self-regulatory body that creates, revises and enforces the CAP Code. The CAP Code covers non-broadcast marketing communications, which include those placed in traditional and new media, promotional marketing, direct marketing communications and marketing communications on marketers' own websites. The marketer has primary responsibility for complying with the CAP Code and ads must comply with it. Ads that are judged not to comply with the Code must be withdrawn or amended. Parties that do not comply with the CAP Code could be subject to adverse publicity, resulting from rulings by the Advertising Standards Authority (ASA), or further sanctions including the denial of media space.

CAP's members include organisations that represent advertising, promotional and direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those organisations agree to comply with the Code so that marketing communications are legal, decent, honest and truthful, and consumer confidence is maintained.

By practising self-regulation, the marketing community ensures the integrity of advertising, promotions and direct marketing. The value of self-regulation as an alternative to statutory control is recognised in EC Directives, including Directive 2005/29/EC (on misleading advertising). Self-regulation is accepted by the Department for Business, Energy and Industrial Strategy and the courts as a first line of control in protecting consumers and the industry. CAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). Further information about CAP is available at www.asa.org.uk.

2.2 The Broadcast Committee of Advertising Practice (BCAP)

BCAP is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising ([the BCAP Code](#)) under agreement with the [Office of Communications](#) (Ofcom). Ofcom has a statutory duty, under the [Communications Act 2003](#), to maintain standards in TV and radio advertisements. In 2004, Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in recognition of CAP and the ASA's successful regulation of non-broadcast marketing for over 40 years, and in line with better regulation principles.

The BCAP Code regulates all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to adhere to the standards set out in the BCAP Code.

BCAP members include broadcasters and trade associations representing advertisers, broadcasters and agencies. Under Section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule-making is transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them. Like CAP, BCAP must seek advice on proposed Code changes from an expert consumer panel, the AAC.

Further information about BCAP is available at www.asa.org.uk.

2.3 The Advertising Standards Authority (ASA)

The ASA is the independent body responsible for administering the CAP and BCAP Codes and ensuring that the self-regulatory system works in the public interest. The Codes require that all advertising is legal, decent, honest and truthful.

The ASA assesses complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's rulings are published on the ASA's website and made available to the media. If the ASA Council upholds a complaint about an ad, it must be withdrawn or amended.

An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case. CAP conducts compliance, monitoring and research to help enforce the ASA Council's decisions.

Information about the ASA is available at www.asa.org.uk.

2.4 Funding

The entire system is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making. Information about Asbof and Basbof is available at www.asbof.co.uk and www.basbof.co.uk.

3. Policy background

3.1 General policy objectives

CAP and BCAP's general policy objectives are to set standards to ensure that all advertising is legal, decent, honest and truthful, and prepared with a due sense of social and professional responsibility. They intend their Codes to be based on the enduring principles that advertising should be responsible, respect the principles of fair competition generally accepted in business and should not mislead, harm or offend. CAP and BCAP seek to maintain an environment in which responsible advertising can flourish. The rules are intended to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed, and written so that they are easily understood, easily implemented and easily enforced.

3.2 The Equality Act 2010: public sector equality duty

The Equality Act 2010 (the Act) was introduced for two main purposes: to harmonise discrimination law, and to strengthen the law to support progress on equality. It protects people against discrimination, harassment or victimisation in employment, and as users of private and public services based on the following nine protected characteristics listed in section 4 of the Act:

- age;
- disability;

- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; and
- sexual orientation.

Section 149 of the Act contains a duty (the public sector equality duty) on listed public authorities when carrying out their functions and on other persons when carrying out public functions to have due regard when carrying out their functions to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
- foster good relations between people who share a relevant protected characteristic and people who do not.

The practical effect of the public sector equality duty is that listed public authorities and those carrying out public functions have to consider how their policies and service delivery will affect people with the protected characteristics. “Relevant protected characteristic” includes all those listed in section 4 of the Act except marriage and civil partnership. The effect of this is that the second and third limbs of the public sector equality duty (those relating to equality of opportunity and good relations) do not apply to marriage and civil partnership; however, this distinction is not material to CAP’s consultation proposals.

Neither CAP or BCAP, nor the ASA, are listed as a “public authority” in Schedule 19 of the Act. However, both CAP and BCAP consider that they are likely to fall within the wider definition of “person exercising a public function” in section 149(2), for the following reasons:

- A “public function” is defined in section 150(5) as “a function that is a function of a public nature for the purposes of the Human Rights Act 1998”. There is no statutory definition of such a function in the Human Rights Act 1998.
- CAP considers that in ensuring advertising is responsible, it acts in the public interest and exercises a public function¹, and is therefore subject to the public sector equality duty.
- BCAP considers that because it exercises statutory powers contracted out to it by Ofcom, it also acts in the public interest and exercises a public function, and is therefore subject to the public sector equality duty.

3.3 The Communications Act 2003

As noted in 2.3 (above), in 2004 Ofcom delegated the setting of standards for broadcast advertising to BCAP. Ofcom’s statutory duty to maintain standards in television and radio advertisements – which it has delegated to BCAP – is set out in section 319 of the Communications Act 2003, as follows:

319 OFCOM’s standards code

(1) It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.

(2) The standards objectives are—

...

(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;

3.4 CAP and BCAP Code rules relating to harm and protected characteristics

The following Principles in the Codes concern harm:

BCAP Code

1. Compliance

¹ The EHRC states in its Technical Guidance on the Public Sector Equality Duty that “a private body might be held to be exercising a public function and thus subject to the general equality duty if in respect of that function some or all of the following factors are present: (i) it is publicly funded, or has significant reliance on public funding; (ii) it is exercising powers of a public nature directly assigned to it by statute, or (iii) it is taking the place of central or local government; (iv) it is providing a public service; (v) it is acting in the public interest (vi) its structures and work are closely linked with that of the delegating or contracting-out state body; (vii) there is a close relationship between the private body and any public authority; (viii) it is supervised by a state regulatory body; (ix) it is exercising coercive powers devolved from the state”.

Principle

The overarching principles of this Code are that advertisements should not mislead or cause serious or widespread offence or harm, especially to children or the vulnerable.

4. Harm and offence

Principle

Advertisements must not be harmful or offensive. Advertisements must take account of generally accepted standards to minimise the risk of causing harm or serious or widespread offence...

CAP Code

4. Harm and offence

Principle

Marketers should take account of the prevailing standards in society and the context in which a marketing communication is likely to appear to minimise the risk of causing harm or serious or widespread offence.

The following Code rules in section 4 (Harm and offence) deal with specific forms of harm:

CAP Code

- 4.2 fear and distress
- 4.3 distress relating to dead people
- 4.4 condoning or encouraging anti-social behaviour or violence
- 4.5 condoning or encouraging unsafe practices
- 4.6 encouraging drinking and driving
- 4.7 adversely affecting those with photosensitive epilepsy
- 4.8 sexualisation of under-18s
- 4.9 harmful gender stereotypes

BCAP Code

- 4.1 causing physical, mental or moral harm to under-18s
- 4.3 exploiting trust that under-18s place in people in positions of responsibility
- 4.4 condoning or encouraging behaviour prejudicial to health and safety
- 4.5 sounds likely to cause a safety hazard
- 4.6 adversely affecting those with photosensitive epilepsy
- 4.7 excessive noise
- 4.8 condoning or encouraging harmful discriminatory behaviour
- 4.9 condoning or encouraging violence or anti-social behaviour
- 4.10 causing distress
- 4.11 causing harm to animals
- 4.12 condoning or encouraging behaviour grossly prejudicial to the environment
- 4.13 sexualisation of under-18s
- 4.14 harmful gender stereotypes

Other Code rules deal with specific forms of harm relating to, for example: finance; gambling; alcohol; children; and the environment. These rules refer to a range of harms and to different groups of people who might be harmed.

There are no Code rules dealing with the public sector equality duty or protected characteristics in an overarching manner. However, certain Code rules refer to groups of protected characteristics. The following examples demonstrate this:

The offence rules in both Codes refer to all of the protected characteristics (and, additionally, gender) as follows:

Particular care must be taken to avoid causing offence on the grounds of: age; disability; gender; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

- Section 10 of the CAP Code refers to some of the protected characteristics:

10.9 Marketers must obtain explicit consent before processing special categories (see Definitions) of personal data, unless the data has already manifestly been made public by the consumer and the use of it was fair and within the reasonable expectations of the consumer.

Definitions

“Special categories” of personal data means: personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership; and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

- Appendix 2 of the CAP Code refers to some of the protected characteristics:

30.4 Advertising must not contain any material likely to incite hatred based on race, sex, religion or nationality.

30.5 Advertising must not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.

- Appendix 2 of the BCAP Code includes references to some of the protected characteristics:

1 Members states shall ensure that all audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

...

c) audiovisual commercial communications shall not:

...

ii. include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation

For the reasons set out in 3.2 (above), CAP, BCAP and the ASA consider themselves to be subject to the public sector equality duty, and therefore have regard to this duty in any decision-making where the duty is applicable.

4. Decision to consult and new rules

4.1 Decision to consult

CAP and BCAP's have decided to consult on the introduction of new rules, for the following reasons:

- CAP and BCAP commit to equality and diversity through the ASA's diversity and inclusion strategy, and, for the reasons set out in 3.2 (above), consider themselves subject to the public sector equality duty. As a result, CAP and BCAP seek to ensure that the protections they provide to those sharing protected characteristics is as strong as possible.
- The last wholesale review of the CAP and BCAP Codes was completed before the Equality Act 2010 came into force. In 2019, CAP and BCAP considered that in light of the public sector equality duty, it would be appropriate to examine whether the Codes were consistent in the protections they provided to those sharing any of the protected characteristics included in the Equality Act 2010. The analysis showed that certain changes to the Codes would strengthen the consistency of the protections they provided, and CAP and BCAP therefore carried out a public consultation in late 2019. In April 2020, CAP and BCAP [published changes](#) to the Codes, which included exhaustively listing the protected characteristics included in the Equality Act 2010 in the offence rules of the CAP and BCAP Codes. CAP also amended a rule relating to rolling papers and filters, and BCAP removed a rule on the scheduling of advertising for sanitary protection products. However, this review did not look in general terms at whether additional rules were needed in the CAP and BCAP Codes.
- The ASA system's gender stereotyping work and, more recently, work on racial and ethnic stereotyping have provided CAP and BCAP with a further opportunity to consider the protection that they provide to those sharing protected characteristics. This work has underlined the importance of having a framework in place that allows CAP and BCAP, and the ASA, to respond quickly and flexibly to prevent harm, including to those sharing protected characteristics. Such a framework will allow the ASA system to further its commitment to equality and diversity, and to set out the ways in which it has regard to the public sector equality duty and the duty, under the Communications Act 2003, to prevent harmful advertising from being included in broadcast services. Instead of having to develop new rules to deal with specific harms to specific groups, CAP and BCAP consider that overarching rules, which allow for assessment of new evidence, are quicker and more effective at preventing harm while ensuring governance standards are met.
- The Codes contain many specific rules relating to harm, including harm to those sharing protected characteristics, as well as 'Principles' at the head of Code sections stating that ads must not cause harm. The principle that ads should not be likely to cause harm, both generally and specifically to those sharing protected characteristics, is central to CAP and BCAP's and the ASA's work. Additionally, in

2018, following an internal project, CAP and BCAP, and the ASA, introduced procedures and guidance to ensure that appropriate regard was given to the public sector equality duty in decision-making, and that this was documented. CAP and BCAP consider that the introduction of explicit rules on harm and protected characteristics in both Codes will send a clear message to stakeholders of the standards that the ASA system already applies in practice in its regulatory decision-making.

4.2 New rules on harm and protected characteristics

CAP proposes to introduce the following rule in section 4 (Harm and offence) of the CAP Code:

Marketing communications must not include anything likely to cause harm. To comply with this rule, marketers must have particular regard to the likelihood of causing harm to vulnerable people, and to the following characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

BCAP proposes to introduce the following rule in section 4 (Harm and offence) of the BCAP Code:

Advertisements must not include anything likely to cause harm. To comply with this rule, broadcasters must have particular regard to the likelihood of causing harm to vulnerable people, and to the following characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

CAP and BCAP consider that “harm” is a commonly understood term, which appears throughout the CAP and BCAP Codes, and in the Communications Act 2003. However, the likelihood of harm arising from a particular ad is highly dependent on its content and context. As with all rules in the CAP and BCAP Codes, the proposed rule seeks to address potentially harmful effects of advertising, and is not intended to be a vehicle for disputes regarding products that may legally be advertised.

In some cases, the likelihood of harm arising from particular advertising content can reasonably be inferred without further evidence: for example, ads which incite physical harm to a particular group; ads which encourage the consumption of alcohol in excess of medical guidance; or ads which explicitly call for discrimination. However, such ads appear infrequently, and in many cases, the likelihood of harm is assessed with reference to evidence showing the types of harm that can arise from certain advertising.

In assessing the likelihood of harm arising from particular ads to those sharing certain protected characteristics, under the proposed rules, the ASA must meet its obligations under the public sector equality duty. Among the most relevant principles to which the ASA must have due regard are:

- the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act;
- the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

- the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; and
- the need to tackle prejudice.

Section 149 of the Equality Act makes clear that the public sector equality duty applies to a body in the exercise of its functions, and does not therefore require CAP or the ASA to do anything beyond their remit. In this case, the relevant function would be the assessment of whether a particular ad is likely to cause harm. The Equality and Human Rights Commission's *Technical guidance on the public sector equality duty* makes clear the following:

“How much regard is 'due' will depend on the circumstances and in particular on the relevance of the aims in the general equality duty to the decision or function in question. The greater the relevance and potential impact, the higher the regard required by the duty...The three aims of the duty may be more relevant to some functions than others; or they may be more relevant to some protected characteristics than others” [para 2.20]

“A body subject to the duty must first decide the extent to which the aims of the duty are relevant to the particular functions (including existing or proposed policies, practices, activities and decisions) it carries out, and in relation to which relevant protected characteristics...” [para 5.5]

“In some cases, it will be plain even after cursory consideration, that the aims of the general equality duty have no relevance to a particular function...” [para 5.6]

In determining the relevance of the public sector equality duty to their assessment of the likelihood of harm arising from particular ads or types of content more generally, and in relation to particular protected characteristics, the ASA will have regard to the available evidence base, and where appropriate, carry out its own research to assist in the assessment of complaints.

As proactive regulators, CAP, BCAP and the ASA must ensure that they are aware of how societal values and prevailing standards are consistently evolving and what this means for the interpretation and application of the CAP and BCAP Codes. Examples of this evidence-based approach to harm include:

- CAP's gender stereotyping guidance, which sets out examples of ad content that is likely to cause harm, and which was drafted following ASA research into harms arising from the use of gender stereotypes in advertising.
- CAP's guidance on responsibility and problem gambling, which sets out marketing approaches likely to have a disproportionate impact on problem gamblers and those at risk of problem gambling, and which was published following a review of available evidence.
- The ASA's research into racial and ethnic stereotyping in advertising, which seeks to test the views of the public on attitudes towards racial and ethnic stereotyping in ads and how, if at all, such ads may impact on public attitudes and actions. This research will also examine academic evidence, and seek views from a range of stakeholders, to inform the ASA's consideration of the need for further action to tackle harmful racial and ethnic stereotypes in advertising.

Question: Do you agree or disagree with CAP and BCAP's proposed rules? Please provide your rationale for agreeing or disagreeing.

5. How to respond and next steps

CAP and BCAP are committed to considering all responses carefully and with an open mind. Responses have been invited from a cross-section of interested parties representing both consumers and industry.

The following summarises the consultation process and subsequent stages of CAP and BCAP's consideration of the proposed changes to the Code:

- the consultation will run for 12 weeks, closing at 5pm on 24 August 2021;
- CAP and BCAP will consider each response carefully and evaluate all significant points explaining the reasons behind the decisions they make; and
- the evaluation will be published on the ASA website when the outcome of the consultation is announced.

How to respond

CAP invites written comments and supporting information on the proposals contained in this document by 5pm on 24 August 2021. Responses via email with attachments in Microsoft Word format are preferred to assist in their processing. Please send responses to: harm@cap.org.uk

If you are unable to respond by email you may submit your response by fax to +44(0)20 7404 3404 or post to:

Committee of Advertising Practice
Castle House, 37-45 Paul Street,
London EC2A 4LS

Confidentiality

CAP and BCAP consider that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, CAP and BCAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation and copies of original consultation responses will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed.

If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.


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