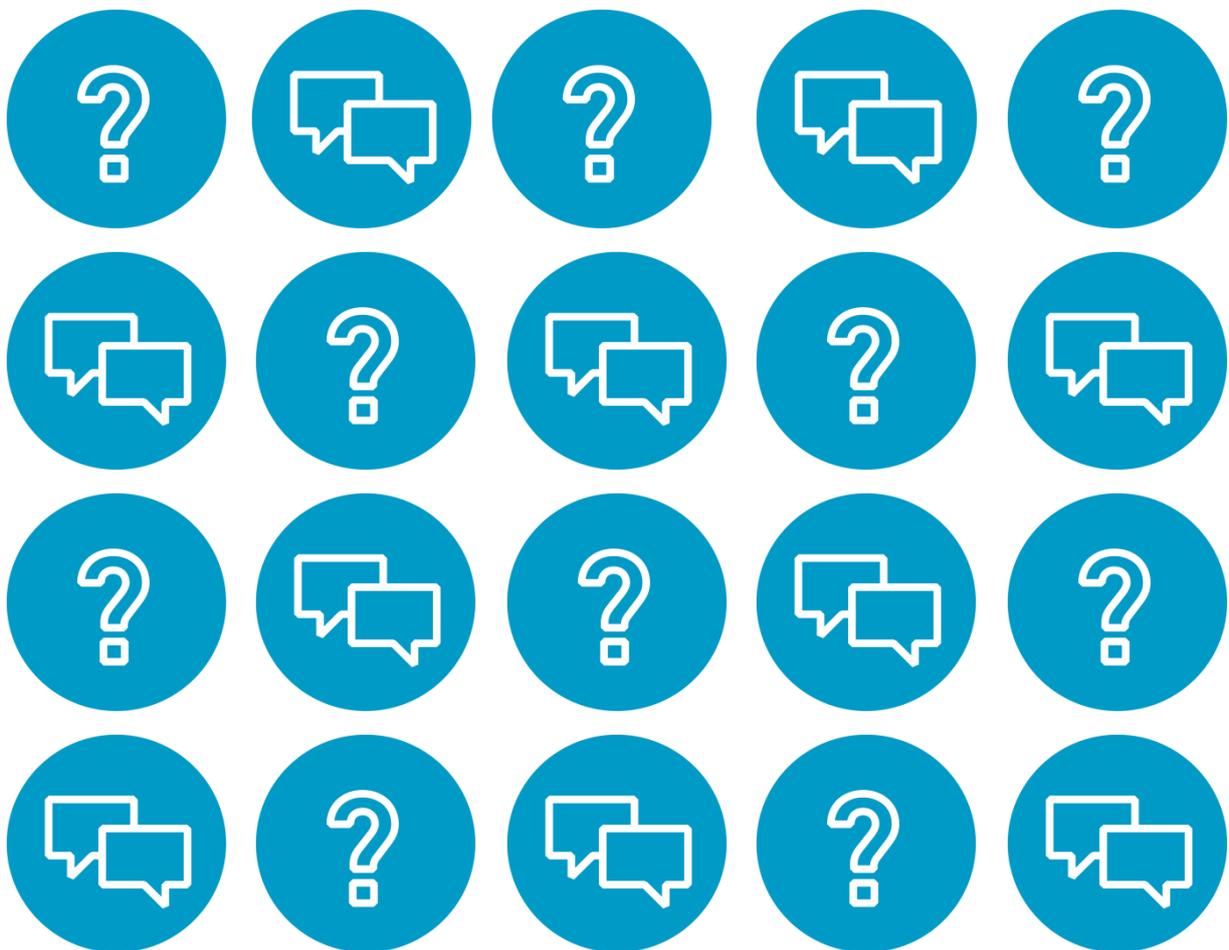


CAP consultation: public sector equality duty

Committee of Advertising Practice's proposals for amendments to its rules on offence and rolling papers and filters

Issue date: 21/06/2019

Closing date: 13/09/2019



Contents

1. Executive summary	3
2. Introduction to the UK advertising regulatory system	4
3. Policy background	5
4. Proposed changes and relevant questions.....	7
5. How to respond and next steps	10
Contact us	11

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), is consulting on changes to its rules on offence (4.1) and rolling papers and filters (20.5) in light of the Equality Act 2010.

The last wholesale review of the CAP Code was completed in 2010, before the Act came into force. CAP therefore considered that in light of the public sector equality duty contained in the Act, to which CAP considers it is subject, it would be appropriate to examine whether the CAP Code is consistent in the protections it provides to those sharing any of the protected characteristics included in the Act. This analysis showed that certain changes to the Code, while not necessarily required by law, would strengthen the protections the CAP Code provides. The relevant provisions of the Act and the rationale for CAP's decision to consult on changes to its rules are set out in part 3.

The proposed changes and the rationale for them, set out in detail in part 4, can be summarised as:

- **Rule 4.1.** This rule obliges marketers to take particular care not to cause serious or widespread offence on the grounds of certain characteristics (race, religion, gender, sexual orientation, disability or age), many of which are “protected characteristics” under the Act. Their inclusion is independent of anti-discrimination legislation, despite pursuing similar aims; instead it reflects characteristics which can cause serious or widespread offence when portrayed or referred to in advertising. CAP considers that treatments of gender reassignment, pregnancy and maternity, sex, and belief in advertising also have the capacity to cause serious or widespread offence, and have resulted in the ASA upholding complaints under rule 4.1. Consequently, and in light of the public sector equality duty including the duty to have regard to the need to eliminate discrimination, CAP proposes to that they should be included in the list of characteristics to ensure that advertisers are alerted to this and the public are protected from offensive advertising.
- **Rule 20.5.** This rule contains restrictions on the advertising of rolling papers and filters based on the proportions of men and women of certain ages in the likely audience. It pre-dates the Act and is based on evidence that that was provided to CAP by the Department of Health (as it then was) at the time of the rule's introduction, of which CAP no longer has a record. CAP proposes to amend the rule so that the restrictions apply equally regardless of the proportion of men or women in the likely audience and the age of those men or women.

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 13 September.

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

2.2 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.

2.3 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's general policy objective is to set standards to ensure that all marketing communications are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility. CAP intends its Code to be based on the enduring principles that marketing communications should be responsible, respect the principles of fair competition generally accepted in business and should not mislead, harm or offend. It seeks 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.

3.3 CAP’s decision to consult

Neither CAP nor the ASA is listed as a “public authority” in Schedule 19 of the Act. However, CAP considers that it is likely to fall within the wider definition of “person exercising a public function” in section 149(2). 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, but CAP considers that in ensuring advertising is responsible, it provides a public service and acts in the public interest, thereby exercising a public function¹ and therefore subject to the public sector equality duty.

The last wholesale review of the CAP Code was completed in 2010, before the Act 2010 came into force. CAP therefore considered that in light the public sector equality duty, it would be appropriate to examine whether the CAP Code is consistent in the protections it provides to those sharing any of the protected characteristics included in the Act 2010. This analysis showed that certain changes to the CAP Code would strengthen the protections it provides, and CAP is therefore consulting on the proposals set out in part 4 of this document.

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”.

4. Proposed changes and relevant questions

4.1 Rule 4.1: offence

Rule 4.1 provides:

Marketing communications must not contain anything that is likely to cause serious or widespread offence. Particular care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age. Compliance will be judged on the context, medium, audience, product and prevailing standards.

Marketing communications may be distasteful without necessarily breaching this rule. Marketers are urged to consider public sensitivities before using potentially offensive material.

The fact that a product is offensive to some people is not grounds for finding a marketing communication in breach of the Code.

The rule obliges marketers to take particular care in relation to certain characteristics. These characteristics have been added to the rule in a piecemeal fashion to reflect grounds for complaints to the ASA, prevailing standards and public sensitivities. While most of the characteristics in the rule are also protected characteristics included in section 4 of the Act, their inclusion is independent of anti-discrimination legislation, despite pursuing similar aims. The inclusion of the six characteristics in the rule pre-dates the Act, and, in some cases, pre-dates the legislation consolidated by the Act. For example, the reference to sexual orientation was added to the CAP Code in 1995, pre-dating the protections provided by the the Employment Equality (Sexual Orientation) Regulations 2003 and the Equality Act (Sexual Orientation) Regulations 2007. Gender is not a protected characteristic under the Act but its treatment in advertising has the capacity to cause serious or widespread offence and because of this, the rule obliges advertisers to take particular care in relation to it.

CAP considers that treatment of gender reassignment, pregnancy and maternity, sex, and belief in advertising also has the capacity to cause serious or widespread offence. Their treatment in advertising has resulted in the ASA upholding complaints under rule 4.1, and, consequently, they should be included in the list to ensure that advertisers are alerted to this and the public are protected from offensive advertising. Under the public sector equality duty, CAP and the ASA must have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Act, and the exhaustive listing of the protected characteristics in the offence rule will contribute to this. However, the rules on offence go beyond the law and CAP includes them in order to prevent the public from being offended, particularly in relation to matters about which there are public sensitivities, as opposed to being legally obliged to do so.

CAP also considers that featuring a more comprehensive list of characteristics will remind advertisers of the need to have regard to them when creating copy. In practice, the ASA will uphold complaints about ads under rule 4.1 if they are likely to cause serious or widespread offence regardless of whether the ads include references to the characteristics listed in the rule. Similarly, the fact that an ad refers to or portrays characteristics listed in the rule will not of itself constitute grounds for complaint: the referral or portrayal must be likely to cause serious or widespread offence.

CAP proposes to amend rule 4.1 to the following:

Marketing communications must not contain anything that is likely to cause serious or widespread offence. 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. Compliance will be judged on the context, medium, audience, product and prevailing standards.

Marketing communications may be distasteful without necessarily breaching this rule. Marketers are urged to consider public sensitivities before using potentially offensive material.

The fact that a product is offensive to some people is not grounds for finding a marketing communication in breach of the Code.

Question 1: do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

4.2 Rule 21.5: rolling papers and filters

Rule 21.5 provides:

Marketing communications for rolling papers or filters must not be targeted at, or be likely to appeal to, people under 18. Anyone depicted in a marketing communication for rolling papers or filters must be, and be seen to be, over 25. No medium may be used to advertise rolling papers or filters if more than 25% of its audience is or is likely to be males under 18 years of age or females under 24 years of age. No direct marketing communication for rolling papers or filters may be distributed to males under 18 years of age or females under 24 years of age.

This rule pre-dates the Act, and CAP understands was introduced on the basis of evidence provided by the Department of Health (as it then was) which suggested that the risk of harm arising from the advertising of rolling papers or filters was different for men and women of different ages: CAP does not have a record of this evidence. CAP considers that in the absence of such evidence, it would not be proportionate to maintain a rule which treats audiences differently according to the proportion of men or women aged under 18 or 24 in the relevant audience, and therefore proposes to amend the rule to read as follows:

Marketing communications for rolling papers or filters must not be targeted at, or be likely to appeal particularly to, people under 18. Anyone depicted in a marketing communication for rolling papers or filters must be, and be seen to be, over 25. No medium may be used to advertise rolling papers or filters if more than 25% of its audience is or is likely to be under 18. No direct marketing communication for rolling papers or filters may be distributed to anyone under 18.

CAP considers that references to the age of 18 and 25 are still necessary to achieve the aim of the rule by preventing under-18s from being targeted with ads for products that they are not lawfully able to buy or be offered for sale. In common with rules on alcohol, gambling and e-cigarettes, the age limit on people featured in marketing communications was chosen because by the age of 25, people clearly look and sound more adult than adolescent. CAP considers that this approach gives more certainty to the advertising industry when creating advertisements and to the ASA Council when deciding if an advertisement has breached the CAP Code, and helps to ensure that children and young

people do not identify, by age, with those featured in the advertising of a product that they are not lawfully able to buy or be offered for sale.

Question 2: do you agree or disagree with this proposal? Please provide your rationale for agreeing or disagreeing.

5. How to respond and next steps

CAP is 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's consideration of the proposed changes to the Code:

- the consultation will run for 12 weeks, closing at 5pm on 13 September;
- CAP 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 CAP 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 13 September. Responses via email with attachments in Microsoft Word format are preferred to assist in their processing. Please send responses to: AdPolicy@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:

Regulatory Policy Team
Committee of Advertising Practice
Mid City Place
71 High Holborn London
WC1V 6QT

Confidentiality

CAP considers that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, CAP 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.

Contact us

Committee of Advertising Practice
Mid City Place, 71 High Holborn
London WC1V 6QT

Telephone: 020 7492 2200
Textphone: 020 7242 8159
Email: enquiries@cap.org.uk

www.cap.org.uk

 Follow us: [@CAP_UK](https://twitter.com/CAP_UK)