

Change to rules on offence and scheduling of advertising for sanitary protection products

Broadcast Committee of Advertising Practice's regulatory statement



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1. Executive summary

Following public consultation, the Broadcast Committee of Advertising Practice (BCAP), author of the UK Code of Broadcast Advertising (the BCAP Code), is introducing changes to its rules on offence (4.2) and the scheduling of advertising for sanitary protection products (32.6.1) in light of the Equality Act 2010 (the Act).

The last wholesale review of the BCAP Code was completed in 2010, before the Act came into force. BCAP therefore considered that in light of the public sector equality duty contained in the Act, to which BCAP considers it is subject, it would be appropriate to examine whether the BCAP 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 BCAP Code provides.

The consultation received two responses, both of which challenged BCAP's proposal on changes to rule 4.2 (offence); no responses commented on the proposed changes to rule 32.6.1 (scheduling of advertising for sanitary protection products). BCAP has published both responses it received, along with a detailed evaluation of all significant points made in these responses.

The changes and the rationale for them are set out in detail in the consultation document and can be summarised as:

- **Rule 4.2.** This rule provides that advertisements must not cause serious or widespread offence. The Committee of Advertising Practice maintains an equivalent rule in the UK Code of Non-broadcast Advertising, Direct & Promotional Marketing which obliges advertisers to take particular care not to cause offence on the grounds of certain characteristics, 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, CAP is has consulted on adding them to the list of characteristics to ensure that advertisers are alerted to this and the public are protected from offensive advertising. BCAP considers that all of the same rationale applies to rule 4.2 of the BCAP Code. The ASA regularly deals with complaints about the characteristics listed in CAP's consultation under BCAP rule 4.2, and BCAP therefore considers that the full list of characteristics that CAP proposes to include in the CAP Code should be included in rule 4.2 of the BCAP Code to achieve consistency with the CAP Code and to contribute to BCAP's duty to have regard to the need to eliminate discrimination.
- **Rule 32.6.1.** This rule prevents sanitary protection products from being advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children below the age of 10. It pre-dates both BCAP's regulation of broadcast advertising and the Act. The rule was introduced on the basis of public sensitivities about the advertising of sanitary protection products expressed during public research. BCAP considers that current attitudes towards the advertising of sanitary protection products have changed and that any concerns that still exist must be examined in light of the public sector equality duty and in light of the rationale for

BCAP's scheduling restrictions generally (to ensure that products are not seen by those for whom they are unsuitable). Given that the rule discriminates on the basis of age, for a product that is legally available with no age restrictions and mainly used by women, BCAP is removing the rule from the BCAP Code.

These changes take immediate effect.

2. BCAP's decision to consult

2.1 The Equality Act 2010: public sector equality duty

Section 149 of the Equality 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.

2.2 BCAP's decision to consult

Neither BCAP nor the ASA is listed as a "public authority" in Schedule 19 of the Act. However, BCAP 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 BCAP considers that because it exercises statutory powers contracted out to it by Ofcom, provides a public service and acts in the public interest, it exercises a public function¹ and is therefore subject to the public sector equality duty.

The last wholesale review of the BCAP Code was completed in 2010, before the Equality Act 2010 came into force. BCAP therefore considered that in light the public sector equality duty,

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

it would be appropriate to examine whether the BCAP 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 BCAP Code would strengthen the protections it provides, and BCAP therefore consulted on the proposals set out in part 4 of the consultation document.

3. Consultation responses and BCAP's decisions

3.1 Consultation responses

The consultation received two responses, both of which challenged BCAP's proposal on changes to rule 4.2 (offence); no responses commented on the proposed changes to rule 32.6.1 (scheduling of advertising for sanitary protection products). BCAP has published both responses it received, along with a detailed evaluation of all significant points made in these responses. In summary, the responses focused significantly on the compatibility of BCAP and the ASA's regulation of offence with the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). These matters fall outside the scope of BCAP's consultation, which related only to a narrow proposal to add certain characteristics to the list of those about which advertisers should take particular care to avoid causing offence, as opposed to the wider question of the compatibility of the regulation of offence with Article 10 of the ECHR. In order to ensure fairness to all respondents and deal with the aims and objectives of the consultation efficiently, BCAP was only able to consider points that related to the specific consultation proposal. However, BCAP remains open to considering these important questions through its wider work.

3.2 Changes to BCAP's rules

For the reasons set out in section 4.1 and 4.2 of the consultation document, BCAP has decided to make the following changes:

Rule 4.2: offence

BCAP will amend rule 4.2 as follows:

Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.

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.

Rule 32.6.1: scheduling of advertising for sanitary protection products

Rule 32.6.1 provides:

[32.6 These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children below the age of 10:]

32.6.1 sanitary protection products

public authority; (viii) it is supervised by a state regulatory body; (ix) it is exercising coercive powers devolved from the state".

BCAP will remove this rule.

4. Next steps

4.1 Revised rules


BCAP's revised rule 4.2 and the removal of rule 32.6.1 will take effect immediately.

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