

Changes to rules on offence and rolling papers and filters

Committee of Advertising Practice's regulatory statement



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1. Executive summary

Following public consultation, the Committee of Advertising Practice (CAP), author of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code), is introducing changes to its rules on offence (4.1) and rolling papers and filters (21.5) in light of the Equality Act 2010 (the Act).

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 consultation received two responses, both of which challenged CAP's proposal on changes to rule 4.1 (offence); no responses commented on the proposed changes to rule 21.5 (rolling papers and filters). CAP 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 4.1.** 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 will include them in the list of characteristics to ensure that advertisers are alerted to this and the public are protected from offensive advertising.
- **Rule 21.5.** 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 will 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.

These changes take immediate effect.

2. CAP'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 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 Equality 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 therefore consulted on the proposals set out in part 4 of the consultation 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".

3. Consultation responses and CAP's decisions

3.1 Consultation responses

The consultation received two responses, both of which challenged CAP's proposal on changes to rule 4.1 (offence); no responses commented on the proposed changes to rule 21.5 (rolling papers and filters). CAP 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 CAP 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 CAP'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, CAP was only able to consider points that related to the specific consultation proposal. However, CAP remains open to considering these important questions through its wider work.

3.2 Changes to CAP's rules

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

Rule 4.1: offence

CAP will amend rule 4.1 by adding the characteristics in bold:

*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.

Rule 21.5: rolling papers and filters

CAP will amend rule 21.5 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 ~~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~~ anyone ~~under 18 years of age or females under 24 years of age~~.

4. Next steps

4.1 Revised rules

CAP's revised rule 4.1 and rule 21.5 will take effect immediately.

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