

BCAP consultation: public sector equality duty

Broadcast Committee of Advertising Practice's proposals for amendments to its rules on offence and the scheduling of advertising for sanitary protection products

Issue date: 21/06/2019

Closing date: 13/09/2019



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1. Executive summary

The Broadcast Committee of Advertising Practice (CAP), author of the UK Code of Broadcast Advertising (the BCAP Code), is consulting on changes to its rules on offence (4.1) 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 BCAP Code, while not necessarily required by law, would strengthen the protections it provides. The relevant provisions of the Act and the rationale for BCAP'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 4.2.** 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 consulting 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 often relates to products used by women, BCAP proposes that the rule is removed from the BCAP Code unless it receives evidence demonstrating it is necessary and proportionate to maintain the rule.

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 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. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). 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.

Further information about BCAP and the AAC 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

BCAP'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. BCAP intends its Code to be based on the enduring principles that advertisements 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 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 BCAP’s consultation proposals.

3.3 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 Act came into force. BCAP therefore considered that in light the public sector equality duty, 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 BCAP Code would strengthen the protections it provides, and BCAP 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 4.2: offence

Rule 4.2 provides:

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

The equivalent rule in the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) includes the following wording:

“Particular care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age.”

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.

After carrying out an analysis of its Code, CAP considers that treatment of gender reassignment, pregnancy and maternity, sex, and belief in advertising also have 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, CAP considers 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. For these reasons, CAP is consulting on the addition of gender reassignment, pregnancy and maternity, sex, and belief to rule 4.1 of the CAP Code.

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. The new rule would read:

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.

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

4.2 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

This rule pre-dates both the regulation of broadcast advertising by BCAP and the Act. The history of television advertising can be briefly summarised as:

- Following two six-month trials of sanitary protection product advertising during the 1970s and 1980s, this advertising was not permitted on television.
- Following a two-year trial in the late 1980s, timing restrictions were introduced on some channels for sanitary protection products.
- In 1998, the Independent Television Commission relaxed timing restrictions and introduced the current rule.

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 often relates to products used by women, BCAP proposes that the rule is removed from the BCAP Code unless it receives evidence demonstrating it is necessary and proportionate to maintain the rule.

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

BCAP 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 BCAP's consideration of the proposed changes to the Code:

- the consultation will run for 12 weeks, closing at 5pm on 13 September;
- 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

BCAP 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

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