

EHRC consultation on religion and belief advertising **1 February 2015**



Response from the British Humanist Association (BHA)

We welcome the opportunity to respond to this consultation by the EHRC on its approach to what it labels 'religious advertising' but which should more accurately be described as 'religion and belief advertising'. In our view, there are two separate questions at play here: the first is whether or not it would be acceptable for a commercial organisation take a blanket approach to precluding religion and belief advertising from certain spaces; and the second is whether or not it would be acceptable for such an organisation or an advertising regulator to take a selective approach (i.e. excluding some adverts but allowing others).

On the former we think that it is acceptable, and think that the Church of England's campaign around its 'Just Pray' advert has been highly misleading as to the nature of the 'ban' that occurred. On the latter we think that the acceptability depends upon the nature of the approach, and in particular we think that the Advertising Standards Authority (ASA) has taken a much too censorious approach to what it deems to be 'offensive'.

We will expand on the context for both of these points before answering the specific questions that you have asked.

'Just Pray' and the cinemas

First, it is worth being clear about the chronology of events that led to the 'Just Pray' advert being prevented from being shown in cinemas. Correspondence between the Church of England (CofE) and Digital Cinema Media (DCM),¹ which manages the advertising space, shows that while the DCM staff involved were initially unaware of the policy of not allowing religious or political advertising, the policy was a pre-existing one, and the CofE was made aware of it on 3 August, with a final confirmation that the ad would not run received on 16 September. At that time the CofE was told that this was because 'DCM has a policy not to run advertising connected to personal beliefs, specifically those related to politics or religion. Our Members have found that showing such advertisements carries the risk of upsetting, or offending, audiences.'

The Church of England did not announce the decision until 22 November, timed for the day of the launch of JustPray.uk – so that the news could be used in the promotion of the new website.² Indeed, the advert in question was not even fully filmed until October.³ So it is clear that this 'ban' was used

¹ <https://humanism.org.uk/wp-content/uploads/CofEDCM-correspondence.pdf>

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<https://www.churchofengland.org/media-centre/news/2015/11/church-of-england-%E2%80%9Cbewildered%E2%80%9D-by-cinema-ban-on-lord%E2%80%99s-prayer.aspx>

³ A couple who got married in the ad did so that month: <http://www.justpray.uk/the-ad/> - and the ad includes a link to the website, but the domain was not registered until 19 October:

<http://www.whois.com/whois/justpray.uk>

by the CofE as a marketing tool for JustPray, and in fact the amount of coverage the CofE received surely far outstripped what it would have received had the ad been shown as purportedly planned.⁴

It is also worth noting that the Church of England's press release announcing the 'ban' was misleading in a number of ways. First, it states that the cinema chains decided that this specific advert 'carries the risk of upsetting, or offending, audiences', when they said no such thing – all they said was that religious advertising *as a whole* carries such risks.

Finally, we are highly sceptical of the claim by the CofE that it was 'bewildered' by the decision not to run the ads. From our experience it is very common for advertisers to have a blanket policy refusing all religion and belief advertising – we run into it all the time. For example, last year we ran a photography competition on the simple theme of 'happiness'. Entrants were simply asked to 'Show what makes or has made you happy', 'Try to capture the essence of happiness in the world around you', or 'Reflect on the things that make you feel good about being human, either individually or as a community'.⁵ We sought to publicise this highly innocuous competition with some equally innocuous adverts in photography magazines, but found it difficult to do so, as blanket policies disallowing religion and belief advertising are common. This therefore adds to our cynicism about the CofE's reaction.

Offence and the Advertising Standards Authority

In announcing this consultation, the EHRC said that 'There is no right not to be offended in the UK; what is offensive is very subjective and this is a slippery slope towards increasing censorship.'⁶ It also said that 'what is offensive is very subjective and lies in the eye of the beholder. This does not mean groups or individuals are free to express themselves without restriction. Freedom of expression can be and is restricted but only in order to prevent violence, abuse or discrimination for example.'⁷

We agree. And yet the Advertising Standards Authority has, as rule 4.1 of the CAP Code, '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.'⁸

Similarly, BCAP Code section 4 opens by saying, '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.' It goes on to say in rule 4.2 that 'Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.'⁹ Freedom of expression is not mentioned in these relevant sections at all.

Although the ASA is an unofficial body, it is in fact in a very powerful position, since few if any owners of advertising space in any medium are willing to go against its Codes and rulings. And it has in fact

⁴ We count about 2,600 individual items of online coverage in the following week.

⁵ <https://humanism.org.uk/happiness2015/>

⁶ <http://www.equalityhumanrights.com/statement-freedom-expression-and-lord%E2%80%99s-prayer>

⁷ <http://www.equalityhumanrights.com/commission-comments-christian-advert-being-banned-cinemas>

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<https://www.cap.org.uk/Advertising-Codes/Non-Broadcast/CodelItem.aspx?cscid=%7B9850dc70-0ca5-4ef1-a38f-b638ed990014%7D#.VrCXBrKLS71>

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<https://www.cap.org.uk/Advertising-Codes/Broadcast/CodelItem.aspx?cscid={c653e60d-d7fc-4b6a-9f43-afe2e489211d}#.VrCXILKLS70>

repeatedly banned adverts that, at best, we think are mildly offensive to some, and at worst cannot really be said to be offensive at all. To provide some examples:

- In August 2014, the ASA deemed offensive under rule 4.1 a Sporting Index advert about placing bets during that summer's World Cup in Brazil. The ad featured a picture of Christ the Redeemer and a bikini-clad woman, encouraging '£500 in free bets' and with the tagline 'There's a more exciting side to Brazil'. The ad broke rules linking gambling to sex, but it also broke religious offence rules because, 'despite this secular use [of the statue], it was still a depiction of Jesus and was likely to carry a large degree of religious significance for Christians in particular', and 'we considered that a depiction of Jesus with his arm around a largely undressed woman, holding a champagne bottle and apparently celebrating a gambling win was likely to cause offence to a significant number of Christians, regardless of this humorous intention or references to Rio de Janeiro and the World Cup, because it depicted the person of Jesus in a context at odds with commonly held beliefs about the nature of Christ.'
- In September 2011, the ASA deemed offensive under rule 4.1 a Phones 4 U advert that featured a drawing of the Buddy Christ from the movie *Dogma* saying 'Miraculous deals on Samsung Galaxy Android phones'. They reached this view because 'We considered that, although the ads were intended to be light-hearted and humorous, their depiction of Jesus winking and holding a thumbs-up sign, with the text "Miraculous" deals during Easter, the Christian Holy Week which celebrated Christ's resurrection, gave the impression that they were mocking and belittling core Christian beliefs. We agreed that the ads were disrespectful to the Christian faith and were likely to cause serious offence, particularly to Christians.'¹⁰



- In rulings in 2009-2010, the ASA banned three adverts under rule 4.1 by ice cream company Antonio Federici that depicted, respectively, a priest and a nun about to kiss; two priests

about to kiss; and a pregnant nun.¹¹ The ads were deemed to be ‘mocking the beliefs of Roman Catholics and was therefore likely to cause serious offence to some readers.’



- In 2008, ghd hair straightener adverts were deemed offensive under BCAP for using the tagline ‘thy will be done’ while juxtaposing pictures of women.¹²



We also have a number of further examples available. Indeed, the ASA has a number more on a page on its own website.¹³

And we have an example of our own: in 2011, in the run-up to the 2011 Census, we proposed to run three adverts (below) in railway stations encouraging people to tick ‘no religion’ on the form. However, the owners of the advertising space submitted the ads to the ASA’s sister organisation, the Committee on Advertising Practice prior to their running to see whether or not they might be offensive. The Committee replied that were the ads to run and then be subject to an ASA adjudication, in their view it was likely that the ASA would deem the phrase ‘For God’s Sake’ as

¹¹

https://web.archive.org/web/20120423052417/http://www.asa.org.uk/ASA-action/Adjudications/2009/7/Antonio-Federici/TF_ADJ_46491.aspx and

https://web.archive.org/web/20150316043352/http://www.asa.org.uk/Rulings/Adjudications/2010/9/Antonio-Federici/TF_ADJ_49041.aspx#VrCeRLKLS70 and

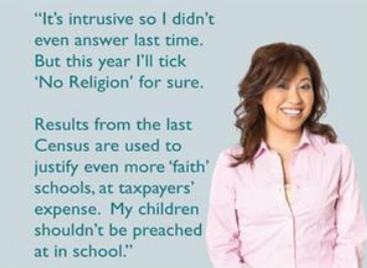
https://www.asa.org.uk/Rulings/Adjudications/2010/10/Antonio-Federici/TF_ADJ_49253.aspx#VrCbZrKLS70

¹² <http://news.bbc.co.uk/1/hi/uk/7291155.stm>

¹³

<https://www.asa.org.uk/News-resources/Media-Centre/2015/Advertising-and-religion-Avoiding-offence.aspx#VrCZMrKLS71>

offensive under paragraph 4.1 of the Code. As a consequence, the company controlling the advertising space at the railway stations immediately refused to even carry the ads.¹⁴

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| <p>NOT RELIGIOUS? IN THE 2011 CENSUS TICK "NO RELIGION"</p>  <p>"I put 'Jedi' in the last census. But I'll tick 'No Religion' this time. I'm not religious and I don't want Bishops and the government saying this is a religious country. That's just an excuse to keep religion in politics."</p> | <p>NOT RELIGIOUS? IN THE 2011 CENSUS TICK "NO RELIGION"</p>  <p>"It's intrusive so I didn't even answer last time. But this year I'll tick 'No Religion' for sure. Results from the last Census are used to justify even more 'faith' schools, at taxpayers' expense. My children shouldn't be preached at in school."</p> | <p>NOT RELIGIOUS? IN THE 2011 CENSUS TICK "NO RELIGION"</p>  <p>"We used to tick 'Christian' but we're not really religious. We'll tick 'No Religion' this time. We're sick of hearing politicians say this is a religious country and giving millions to religious organisations and the Pope's state visit. Money like that should go where it's needed."</p> |
| <p>IF YOU'RE NOT RELIGIOUS FOR GOD'S SAKE SAY SO</p> <p>CENSUS-CAMPAIGN.ORG.UK </p> <p><small>Paid for with public donations. Passed by a majority. The quote was given by a supporter of the Census Campaign.</small></p> | <p>IF YOU'RE NOT RELIGIOUS FOR GOD'S SAKE SAY SO</p> <p>CENSUS-CAMPAIGN.ORG.UK </p> <p><small>Paid for with public donations. Passed by a majority. The quote was given by a supporter of the Census Campaign.</small></p> | <p>IF YOU'RE NOT RELIGIOUS FOR GOD'S SAKE SAY SO</p> <p>CENSUS-CAMPAIGN.ORG.UK </p> <p><small>Paid for with public donations. Passed by a majority. The quote was given by a supporter of the Census Campaign.</small></p> |

The ASA is not the only body to use subjective 'offence' tests in deciding which adverts to run. Paragraph 3.1 of Transport for London's advertising policy that states that 'Advertisements will not be approved for, or permitted to remain on TfL's services, if, in TfL's reasonable opinion, the advertisement falls within any of the following categories: ... (d) The advertisement is likely to cause widespread or serious offence to members of the public on account of the nature of the product or service being advertised, the wording or design of the advertisement or by way of inference... (k) The advertisement contains images or messages which relate to matters of public controversy and sensitivity.'¹⁵

In 2013 a High Court judge ruled, and in 2014 a Court of Appeal judge agreed, that adverts by Stonewall and the BHA – saying, respectively, 'Some people are gay. Get over it!' and 'There's probably no God. Now stop worrying and enjoy your life' – broke this policy, and so if TfL had been implementing the policy correctly, the adverts should not have been allowed to run.¹⁶ The rulings in question have had no practical impact on these two ads, as they were incidental to the main thrust of the case. But it is particularly alarming, given that both adverts were subject to ASA complaints but deemed by the ASA to be Code-compliant.¹⁷



¹⁴ <https://humanism.org.uk/2011/03/04/news-758/>

¹⁵ <http://content.tfl.gov.uk/tfl-advertising-policy.pdf>

¹⁶ <http://www.bailii.org/ew/cases/EWHC/Admin/2013/651.html> and <http://www.bailii.org/ew/cases/EWCA/Civ/2014/34.html>

¹⁷ <http://www.pinknews.co.uk/2008/03/17/complaints-about-gay-billboard-ads-rejected/> and <http://news.bbc.co.uk/1/hi/uk/7842769.stm>

Put together, these decisions by the ASA and by the courts seem to be exactly the kind of slippery-slope subjective judgments that the EHRC are voicing concern about.

We will now turn to the three questions that you have asked.

1) What are your views about the law in England and Wales and in Scotland in relation to religious advertising in the public sphere, particularly in cinemas, on buses and other forms of public transport, and on billboards? Does the law allow sufficient freedom of expression?

Our understanding of the law, as it stands, is that it allows policies such as that of DCM that preclude all advertising designed to promote any religion or belief, as this means treating all religion and belief groups equally.¹⁸ What is more difficult, however, is whether or not it allows the imposition of subjective tests of 'offence', such as those applied by the ASA, on advertising that uses religious imagery or references to promote other goods and services.

With regard to the former, we are relaxed about such policies continuing to be legal since they treat all parties fairly and equally. The counter-argument to that put forward by the Church of England was perhaps best summarised by *The Times* columnist Alice Thomson, who wrote:

'I'm happy to watch the new instalment of the saga, *The Force Awakens*, but I don't want to watch a religious advertisement first — or a political one for that matter. It's just not appropriate. I don't want to be thinking about God or the European Union as I'm settling down for a fantasy battle in space. I wouldn't be able to turn the page, switch channels, block it or walk away.

...

'My aversion to having religion thrust upon me while staring up at a big screen and eating popcorn is not because I am agnostic, an atheist or have ever claimed to be a Jedi on the census form. I am a Christian, I was confirmed in the Church of England and I go to church occasionally. The archbishop says rightly: "this advert is about as offensive as a carol service". But he misses the point — it's about choice and we choose to go to a carol service. I will go to at least five before Christmas where I can spend an hour thinking about my faith, surrounded by candles and choirs. Many others feel the same. There has been a revival of interest in cathedrals, with attendance up 35 per cent in the past decade.

'But I feel uncomfortable with the church proselytising to a reluctant audience in some shopping mall. This country — its laws, ethics, parliament, monarchy, literature, art and architecture — is inspired by Christian values but our Anglicanism isn't pushy or possessive.'¹⁹

This is what leads some advertising space owners to decide to reject all religion or belief advertising — not because they worry that some such advertising would be offensive, but for commercial reasons. So long as such policies are consistently applied, they do not discriminate in favour of or against any particular group, and so we have no problem with them.

Quite distinct, however, are policies like the ASA's and TfL's, which appear to apply subjective assessments and result in decisions that are both arbitrary and unaccountable. We are unsure of the lawfulness of such policies but TfL is a public authority and the ASA arguably exercises a quasi-public function. Their present practice in our view unjustifiably inhibits freedom of expression. It sees the

¹⁸ As per

<http://ukhumanrightsblog.com/2015/11/30/whats-all-the-fuss-about-the-lords-prayer-emma-fenelon/>

¹⁹ <http://www.thetimes.co.uk/tto/opinion/columnists/article4622788.ece>

ASA and Tfl take moral positions on religion and belief questions where they should be neutral, and in so doing effectively reintroduce the blasphemy law by the back door, in spite of Parliament having repealed it in England and Wales in 2008.

2) Should religion or belief organisations be protected from discrimination as individuals are on the basis of their religion or belief?

This question raises much broader implications than just advertising. For example, it has bearings on questions of treating non-natural persons as having human rights, as in *Hobby Lobby*, which we reject: it would open a Pandora's Box of problems for employees and clients of such organisations. It would also lead naturally to proposals to extend this protection to organisations linked to other protected characteristics, something that would need very careful consideration. We are therefore very chary of any such extension of the law and are inclined to oppose it. At any rate, it will often be the case that when the issue in question is cogent then the discrimination against the organisation would also constitute discrimination against an individual.

3) To what extent should those commercial organisations, which control a very large portion of the market, be permitted to choose advertisements based on their own ideas of acceptable content, rather than based on regulation (such as Codes of Practice, e.g. the Committee of Advertising Practice's UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing)?

Our understanding is that these codes have no statutory force and that organisations of any kind are in fact allowed to make their own decisions on what advertising to accept. However, in practice, largely for commercial, contract and convenience reasons, all or almost all advertising space owners follow the codes and any decisions made by the regulators. We do not see how existing laws on equality or discrimination (as against maybe and theoretically laws on restraint of trade) can intrude into such decisions, and have set out in question 1 our views on the desirability of their doing so.

We would, however, welcome an examination of whether the PSED does or should apply to bodies such as the ASA and clear statement from the EHRC deploring the subjective and restrictive approach the ASA takes in its definition of offence.

Summary

We are relaxed about organisations like DCM choosing to have a blanket preclusion of all religion and belief advertising as such a policy is fair and objective, treating all such advertisers equally and so creating a level playing field. At the moment some owners of advertising space choose to take such an approach and some don't; the outcome is that all groups have publicity routes available to them and so no-one is unable to advertise their message despite routes being unavailable to some would-be advertisers.

What is more concerning is when advertising space owners and the ASA take a subjective approach, ruling in unaccountable ways that some adverts are offensive and others are not. We do not think the law should step in to prevent media owners from deciding whether to accept or reject advertising, whether for political, moral, religious or any other reason. However, given that the ASA makes such judgments for almost all advertising space across the country, with a significant impact on freedom of expression, we would welcome a ruling that the PSED applied to it as performing a quasi-public function.

About the BHA

The British Humanist Association is the national charity working on behalf of non-religious people who seek to live ethical and fulfilling lives on the basis of reason and humanity. We promote Humanism, support and represent the non-religious, and promote a secular state and equal treatment in law and policy of everyone, regardless of religion or belief. Founded in 1896, we have around 30,000 members and supporters, and over 70 local and special interest affiliates.

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