

COMMITTEE OF ADVERTISING PRACTICE: OFFENCE AND ADVERTISING



Response from Humanists UK, September 2019

ABOUT HUMANISTS UK

At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by over 85,000 members and supporters and over 100 members of the All Party Parliamentary Humanist Group. Through our ceremonies, pastoral support, education services, and campaigning work, we advance free thinking and freedom of choice so everyone can live in a fair and equal society.

We are a founding member of the End Blasphemy Laws campaign, which since its inception in 2015 has prompted the repeal of such restrictions in eight countries. We make regular interventions in support of freedom of expression and freedom of religion and belief at the United Nations Human Rights Council and led the successful campaign to repeal the blasphemy laws in England and Wales in 2008.

RESPONSE TO CONSULTATION QUESTIONS

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

We oppose CAP and BCAP's restrictions on advertising material deemed capable of causing offence on religion or belief grounds. Their rules, both in their current form and under these proposals, constitute an illegitimate impediment to free expression.

We agree that there are duties under the Equality Act and Racial and Religious Hatred Act to restrict language used in advertising that relates to religion or belief if that language discriminates, harasses, victimises, or incites hatred or violence against adherents of those beliefs, and the Codes should broadly reflect this. However, under both the current rules and draft proposals CAP/BCAP are maintaining a *de facto* new blasphemy law contrary to public policy as expressed in the abolition of the blasphemy laws in 2008. All blasphemy laws are regarded under international law to be a violation of the right to freedom of expression.

Freedom of expression as a fundamental right

Freedom of expression is a fundamental right for every individual, and is vital for all societies to enable a plurality of opinions. It is protected by all major international human rights instruments, including Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The vast majority of countries, including the UK, are signed up to these conventions, and there is a strong claim even on the countries that are not signed up, namely that the right to speak freely is a basic moral right which states should uphold and protect.

Free expression is necessary for the preservation of democracy and in a society that values freedom of religion or belief for three reasons. Firstly, we can only make effective and informed choices between different moral actions and competing beliefs if all points of view are given a hearing without the interference of a public body. Free expression, then, is a common good.



Secondly, free expression is essential to a community's sense of its identity. We each of us want to be able to express our own political, religious, or non-religious beliefs, we want to be able to express our deepest feelings and emotions, because these are essential to our sense of who we are. If we have to repress our most personal beliefs and feelings, our very identity is threatened. Implicit in this is the idea of reciprocity. Each of us wants the right to free expression as something vital to our own life, and we respect the corresponding rights of others who may disagree as a condition of their respecting our rights. Finally, freedom of expression is necessary for equality. Human rights are possessed by all human beings equally, and respect for people's right to express their ideas and beliefs is an essential aspect of respect for all persons as equals.

Of course, the right to freedom of expression is not unlimited, there are legitimate restrictions on expression, most notably with regard to incitement to violence or threat of violence. However, restriction on the grounds of offence is highly problematic. Offence by its very nature is subjective and contextually dependent. If offensive content is to be legally or *de facto* restricted the question arises over who has the power to make such decisions, and in practice are the restrictions being applied consistently and equitably. We highlight some examples below where we think that this has not been the case with the CAP/BCAP Codes. But fundamentally, many types of offence, including mockery and ridicule, are legitimate ways of criticising beliefs and ideas, including religious or humanist beliefs. The freedom to criticise such beliefs does not include a licence to hurl indiscriminate abuse, but it may include satire and parody as legitimate critical devices. Often the best way to show the flaws in a view is to throw it into sharp relief. This is as true in religion or belief as in politics or philosophy.

Blasphemy restrictions as a violation of freedom of expression

The right to express dissent from religion, including criticising, ridiculing, or parodying religious beliefs, is a central tenet of both the right to freedom of religion or belief and the right to freedom of expression. This is laid out in Articles 18 and 19 of the Universal Declaration of Human Rights, Articles 9 and 10 of the ECHR, and the International Covenant on Civil and Political Rights.

Each of the rights contained under these articles contains limitations when there is a genuine societal need to restrict expression. However, as previously stated, offence against religious sentiment does not feature in any of these restrictions. In fact, in 2011, the UN Human Rights Council issued General Comment 34 on the International Covenant on Civil and Political Rights stating that 'prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.'¹ This principle applies to all forms of expression, including advertising which is critical or disrespectful of religion.

Furthermore, it is generally accepted that forbidding dissenting speech against religion promotes religious intolerance rather than protecting adherents. The UN's Special Rapporteur on Freedom of Religion or Belief, Dr Ahmed Shaheed, made this case strongly in his report to the UN General Assembly in 2017 on the elimination of all forms of religious intolerance.

'Anti-blasphemy, anti-apostasy and anti-conversion laws, some of which are falsely presented as "anti-incitement" legislation, often serve as platforms for enabling incitement to discrimination, hostility or violence against persons based on religion or belief. Such laws also frequently afford varying levels of protection to different religions and are often applied in a discriminatory manner. Those who support criminalizing blasphemy argue that criticism of religion or defamation of religious figures is a variant of hate speech. In reality, however,

¹ UN International Covenant on Civil and Political Rights, General Comment 34, July 2011.
<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

anti-blasphemy laws are generally focused on the degree to which speech causes offence or outrage to religious sentiments, and not the extent to which that speech undermines the safety and equality of individuals holding those religious views.

'Anti-blasphemy laws often give States licence to determine which conversations on religion are admissible and which ones are too controversial to be voiced. The Special Rapporteur notes that when governments restrict freedom of expression on the grounds of "insult to religion", any peaceful expression of political or religious views is subject to potential prohibition. In practice, those laws can be used for the suppression of any dissenting view in violation of international human rights standards protecting freedom of opinion and expression and freedom of religion or belief. Consequently, the international community, in several recent action plans, have called upon States that still have blasphemy laws on the books to repeal them because such laws have a stifling impact on the enjoyment of the right to freedom of religion or belief, not to mention the ability to engage in healthy dialogue and debate about religion. Legislation on religious offences is thus often used to facilitate the persecution of members of religious minority groups, dissenters, atheists and non-theists.'²

In 2009, Humanists UK (then known as the British Humanist Association) was successful in its campaign for the repeal of the blasphemy laws in England and Wales. This was an important recognition in the UK that insult and offence against religious sentiment should not be prohibited by law or interfered with by the state, and thus by extension by those fulfilling a public function such as the CAP and BCAP in their advertising regulations. This recognition was not taken solely on grounds of principle but because of the serious harm that retaining blasphemy restrictions on our statute books has in countries where there is active persecution of religious and non-religious minorities.

There are 14 countries where blasphemy is punishable by death³ and approximately a further 40 where a person can be imprisoned. Many of these countries' penal codes are based upon blasphemy laws that date from colonial times, and their governments look to equivalent laws in European states, even when dead letters, as justification for their serious human rights violations. For example, at the thirteenth session of the Human Rights Council in 2010, a motion by the Organisation of Islamic Cooperation calling for international restrictions took the wording of its definition of blasphemy directly from that of the Republic of Ireland's law, now to be repealed. Professor Heiner Bielefeldt, the then United Nations Special Rapporteur on Freedom of Religion or Belief, stated, 'those countries that continue to have an intimidating anti-blasphemy practice like to quote European countries to unmask Western hypocrisy.'⁴

The CAP/BCAP rules on offence on the grounds of religion or belief run counter to these established principles of international law and to the UK's commitment to lead by example in combating religious intolerance manifested in the misuse of restrictions on religious offence. By suggesting that adherents should be protected from being exposed to criticism of religious or non-religious beliefs, these rules not only ignore established principles of freedom of expression,

² Dr Ahmed Shaheed, UN General Assembly, Seventy-second session. Interim report of the Special Rapporteur on freedom of religion or belief https://www.un.org/en/ga/search/view_doc.asp?symbol=A/72/365

³ Afghanistan, Iran, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, United Arab Emirates, and Yemen.

⁴ Michael Nugent, *Atheist Ireland asks Constitutional Convention to remove blasphemy offence*. Atheist NI. <https://www.blasphemy.ie/2013/07/19/atheist-ireland-asks-constitutional-convention-to-remove-blasphemy-offence/>

but acquiesce in and give legitimacy to these restrictions in countries which employ the full force of their blasphemy law to deadly effect such as in Pakistan.

Duty to protect freedom of expression and freedom of religion or belief

We agree with CAP/BCAP that there should be parity among the protected characteristics under the Equality Act, and accept that as a body performing a public function, it has a duty to eliminate harassment, defined under the Equality Act as ‘conduct that has the purpose or effect of... creating an intimidating, hostile, degrading, humiliating or offensive environment.’ However, there is a countervailing duty to protect freedom of expression and freedom of religion and belief and CAP/BCAP must strike a balance between the two duties. We believe that the current Codes, by restricting adverts that could be deemed offensive on the grounds of religion, have been applied too censoriously, and this has not been mitigated by the proposed changes.

In *Handyside v. the United Kingdom* in 1976, the European Court of Human Rights determined that

‘Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”’

Moreover, CAP/BCAP must consider advertisers’ rights to hold, not hold, and change religion or belief, as well as the public manifestation of those beliefs. It is certainly the case that many religion or belief groups consider proselytising, attempting to convert, and publicly proclaiming their own beliefs to be the only true beliefs, to be part of their right to manifest their beliefs, which is rightly protected by this law and should not be curtailed by the interference of a public authority. By their very nature, such manifestations of religion or belief are critical of or deny the legitimacy of other religions or beliefs and therefore can, and often are, deemed offensive by those who do not share those beliefs. But this does not mean that there is a legal duty or right for a public authority to limit such manifestations.

The European Court of Human Rights has made this clear in the case of *Ibragim Ibragimov and Others v. Russia* where it stated

‘the Court further reiterates that religious groups cannot reasonably expect to be exempt from all criticism; they must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. The same principle applies to non-religious ideologies, including atheism and agnosticism.’⁵

All religion and belief groups should be able to promote their beliefs and criticise others through advertising as long as they do not incite violence or stir up religious hatred, which is significantly different from causing offence even if it is widespread or serious. The European Court of Human Rights has consistently dismissed complaints brought under Article 9 from persons who believe that their religious beliefs have been offended (see *Church of Scientology and Other v. Sweden*, and *Choudhury v. the United Kingdom*). The right to freedom of thought, conscience, and religion guaranteed by Article 9 does not bring with it any right to bring proceedings against those who, by authorship or publication, merely offend one’s sensitivities. In the two cases cited above, regarding

⁵ *Ibragim Ibragimov and Others v. Russia* paragraph 117.
<https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%22001-185293%22%5D%7D>

negative comments published by a professor of theology in a Swedish newspaper about the Church of Scientology and the refusal to bring criminal proceedings against Salman Rushdie in relation to the publication of *The Satanic Verses*, it is clear that unless the offence caused by publishing or advertising these materials in some way prevented the offended from being able to worship, interference by a public authority is unlawful. This principle can be applied to the CAP and BCAP codes: unless an advert interferes or prevents a religious adherent from being able to continue to hold or practise their beliefs, there is a duty not to interfere with the advertisers' right to freedom of belief.

In practice the Codes are applied to limit all offensive content

It has been suggested that these competing duties have been balanced in the Codes by the inclusion of wording that stresses that offensive content would only be limited if it has the capacity to cause 'serious or widespread' offence, suggesting only the most serious of cases would be banned from appearing in advertising. We find this problematic as we would not wish to see a tiered system of freedom of expression with larger religion or belief groups able to limit offensive content whereas smaller groups would not have equal protection under the law.

Moreover, in reality this balance has not been struck, and the Codes have been used to prevent advertising appearing if it was deemed to be possible that it might cause offence, regardless of whether this offence is mild or the number of people likely to be offended is small. For example, in 2008, ghd hair straightener adverts were deemed offensive under the broadcasting code for using the tagline 'thy will be done' while juxtaposing pictures of women.⁶ It is hard to see who the offended group would be in this case or how such offence could have been deemed to be widespread. In 2011, a Phones4U advert depicting cartoon version of the Buddy Christ from the comedy film *Dogma*, along with the tagline 'Miraculous deals on Samsung Galaxy Android phones' was ruled to be in breach of the Code despite the ASA finding 'the ads were intended to be light-hearted and humorous... [they] gave the impression that they were mocking and belittling core Christian beliefs.'⁷ We agree with the findings that the adverts were light-heartedly disrespectful to Christians. But disrespect for a religious belief does not reach the bar of serious or widespread offence, and is another example of the Codes being used to close down all expression that touches upon religious beliefs, rather than being limited to the most serious cases.

Similarly in 2016, a Boylesports Gaming advert which compared the crucifixion to its promotional offer was deemed to be in breach of the Code. The ASA wrote, 'we considered that the way in which the ad made light of the subject matter, with the play on words "NAILED ON BONUS"; the jokey language of "BETWEEN 5-25 QUID", "dearly departed JC" and "sacrilegious Bonus"...were likely to cause serious offence to some recipients.'⁸ This raises several questions. How did the ASA determine that the advert would cause serious offence? Was a poll conducted? The advert, which ran for four days, only received one complaint. As Boylesports pointed out they believed there was no religious symbolism in the image and that crucifixion was a common practice in Christ's time. They believed that the language and imagery associated with crucifixion had been absorbed into everyday culture and cited examples from film, music and everyday language. Religious adherents cannot reasonably expect imagery connected to their beliefs to be completely excluded from wider use when it has wider social and historical significance, even if portrayed irrelevantly. Further the ASA's assessment admits that the offence is subjective suggesting that if the advert had been run

⁶ BBC News, 'Hair prayer ads ruled "offensive"', 12 March 2008 <http://news.bbc.co.uk/1/hi/uk/7291155.stm>

⁷ <https://humanism.org.uk/2011/09/07/news-886/>

⁸ The Guardian, 'Gambling ad banned for mocking Christ's crucifixion'

<https://www.theguardian.com/media/2016/may/18/gambling-ad-christ-crucifixion-banned>

at a different time of year the offence would not have been serious. It further fails to demonstrate or give consideration to whether any harm would have been caused by the offensive content.

A 2014 advert for Sporting Index about placing bets during that summer's World Cup in Brazil was deemed offensive under these rules. 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'.⁹ Although the advert may have been in breach of other parts of the Code, it should not have been removed on the basis of religious offense. Again, the advert only received one complaint, so it is hard to see how the argument that the offence caused was widespread.

Our own adverts were disallowed in 2011, when in the run-up to the 2011 Census, we proposed to run three adverts in railway stations encouraging people to tick 'no religion' on the form. However, the owners of the advertising space we had asked to use submitted the ads to the CAP 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 its view it was likely that the ASA would deem the phrase 'for God's Sake' offensive under paragraph 4.1 of the Code. (The posters carried the words: 'If you're not religious, for God's sake say so'.)¹⁰ As a consequence, the company controlling the advertising space immediately refused to carry the ads. The language used in this advert is a common expression used to express a sense of urgency or frustration, and the advert itself does not aim to harass or victimise adherents of other belief systems, being solely aimed at a non-religious audience. So it cannot be said to have reached the threshold of severe or widespread offence, if it was perceived to be offensive at all.

What the examples illustrate are that the codes (or similar rules) have been used in practice to shut down adverts deemed to be offensive regardless of the strength of the offence and carry the risk of much wider interference with free speech, despite the Committees' assurances to the contrary.

The problems with extending Code protections to 'beliefs'

We believe that the proposed change to the Codes to include 'belief' as a protected ground is a step in the wrong direction, away from solving equality issues in the Codes. It is unclear what other beliefs the CAP/BCAP envisions would be covered by the addition of belief, as other beliefs that have been suggested as protected under the Equality Act by Employment Tribunals include pacifism, vegetarianism, and the belief that climate change is a man-made phenomenon, as well as belief in 'democratic socialism',¹¹ belief in the sanctity of life extending to a fervent anti-fox hunting and hare-coursing belief,¹² belief that public service broadcasting has the 'higher purpose of promoting cultural interchange and social cohesion',¹³ and belief that 'it is wrong to lie under any circumstances'.¹⁴ Therefore as well as being unnecessary, we are concerned that the proposed changes to the Codes may result in unintended consequences whereby adverts that express opposing views to the aforementioned beliefs, such as advertising recruitment into the armed forces, or for meat products, should not be run. Such a system would be unacceptably censorious and stifle public debate on sensitive and contemporary issues.

⁹ ASA Rulings,

https://www.asa.org.uk/codes-and-rulings/rulings.html?q=Sporting+Index&sort_order=relevant&from_date=&to_date=#informally-resolved

¹⁰ <https://humanism.org.uk/2011/03/04/news-758/>

¹¹ Olivier v Department of Work and Pensions.

¹² Hashman v Milton Park (Dorset) Ltd t/a Orchard Park.

¹³ Maistry v BBC.

¹⁴ *Hawkins v Universal Utilities Ltd t/a Unicom*.

Secondly, as outlined above, there are limited circumstances when legal limitations should be applied to offence on the grounds of religion or belief, and that adherents must accept criticism, and even ridicule, of their beliefs in an open and democratic society. We believe that the Codes should reflect this striking of the balance between protection of freedom of expression and protection from offence. Humanists do not generally believe that we should be protected from offensive comments about our belief systems. We respect the right of those who do not share our beliefs to express their disagreement in whatever manner they so choose, so long as it does not threaten or incite violence. Rather than addressing the inequality between religious and non-religious beliefs by imposing censorious rules on all groups, the Codes should be amended to offer the same freedom to express negative views about others' belief systems. Religious groups should be able to express their disagreement or mockery of non-religious groups and vice-versa. Such freedom of expression, as outlined above, is necessary for the preservation of both the right to freedom of expression and freedom of religion or belief in a democratic society.

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