

Mr Keith Porteous Wood
Executive Director
National Secular Society
25 Red Lion Square
London WC1R 4RL

11 January 2012

Dear Mr Porteous Wood

Thank you for your detailed submission explaining your concern that the ASA is unreasonably restricting advertisers' freedom of expression. Please accept our apologies for the late response.

As you will appreciate, our role requires us to balance the competing objectives of ensuring that advertising does not cause serious or widespread offence and preserving freedom of expression in advertising; the ASA is frequently called upon to make fine judgements and, inevitably, some people will disagree with the decisions we make on specific cases. You have, however, raised some more fundamental concerns about the willingness of the ASA to uphold complaints on the grounds of religious offence, and this letter will address the policy framework within which the ASA makes its decisions.

As you are aware, article 10 of the European Convention of Human Rights establishes that the right to freedom of expression may, under certain conditions, be restricted. The question for us, as a regulator, is whether the restrictions we impose on freedom of expression are reasonable. We believe that they are.

Religion is of a different order to age, disability, race, sex, etc

You argue that, because religion is something over which people can exercise choice, it should not be considered grounds for offence. We are not convinced that religious sensitivity is necessarily a matter of choice, or that it is only ever appropriate to protect those characteristics over which people have no choice.

We consider that there is good precedent for protecting even elective characteristics. The Equality Act (which does not apply directly to advertising but is nonetheless relevant to this discussion) continues to include religion and belief in its list of protected characteristics, alongside characteristics over which individuals have no control such as sex and disability.

Whilst religion is, for many people, a matter of personal decision, there are some for whom religion is part of their cultural identity and not primarily a matter of conviction. A non-practising Jewish person may well take offence at a disrespectful portrayal of Jewish people or aspects of the Jewish faith, not on the grounds of their personal religious convictions but rather on the grounds that such portrayals have historically been linked to discrimination or persecution. There are, in our view, good grounds for continuing to consider the possibility of religious offence, even in a secular society.

The application of Article 10 to religious speech has been considered by a number of courts in various jurisdictions. For example, the European Court of Human Rights ruled in the case of *Murphy v Ireland* that it was reasonable to restrict freedom of expression on the basis of concerns about religious sensitivity. That decision is specific to Ireland and concerns advertising about religious matters, which we realise is not the focus of your concern, but it does demonstrate that religious sensitivity may, consistently with article 10, be taken into account. The *ASA v Sandown* case also revealed that the “freely-chosen” characteristic of religious belief may prevail over the “unchosen” characteristic of sexual orientation. The argument that religion is an elective characteristic and therefore less worthy of protection seems to us at odds with prevailing thinking on equality.

Offending a religion / offending people

You point out that those who claim that an advertisement offends their religion mean that the ad offends people of that faith. You also observe that, under law, it is individuals that have rights, not belief systems. To be clear, when we talk about “religious offence” and when we assess complaints, we assume that the offence caused is to people, not to an abstract idea.

The sentence you quote from CAP’s AdviceOnLine that “the use of religious images and words is often acceptable as long as it is not mocking, disrespectful or contrary to central or sensitive beliefs” should be read in that spirit: it does not single out beliefs as having rights but rather points to the possibility that images and words that mock central Christian beliefs might offend Christian people.

Emotional offence

You argue that, because complainants are personally offended, they are alleging “emotional offence”. “Emotional offence” is not in our view less valid than “rational offence”. In fact, “rational offence” is the weaker category: it includes “proxy” complaints, from people who state that they themselves are not offended but that other people might be; it includes those who merely disapprove as well as those who are offended.

You object to the comment in the Help Note that “certain religious groups are more sensitive and particular about their beliefs against a perceived background of secularity” and argue that the sensitivity of a certain group does not itself warrant special consideration.

Particular sensitivities are relevant to the likelihood that an advertisement will cause offence. They do not, as you point out, necessarily justify regulatory action, but they are

clearly a relevant factor for advertisers who wish to avoid causing unnecessary offence. The Help Note is designed to help advertisers, agencies and publishers to navigate contentious issues when they make decisions about advertising, as well as clarifying the way the ASA is likely to assess complaints. The statement does not mean that the ASA will uphold complaints merely because some particularly sensitive viewers object to it.

You point out that some complaints on the grounds of offence are made by orthodox believers who are unrepresentative of their faith. The rights of the orthodox minority are not, however, diminished by the existence of a more liberal faction.

Serious offence

We disagree with your view that it is disproportionate to allow a sincerely-held minority belief to determine the fate of an advertisement intended to be seen by a significant number of the population. As you noted in your original letter to us, the ASA may uphold complaints on the basis that an advertisement is likely to cause either widespread or serious offence. Widespread offence covers treatments that are likely to offend a significant proportion of those who see the treatment in question: serious offence covers treatments that are likely to offend only a minority, but so deeply as to warrant a restriction on the distribution of the treatment.

In other fields it is perhaps more obvious that the strong offence felt by a minority may legitimately prevail over the indifference of the majority. For example, the fact that the majority of the population may feel comfortable with advertisements that ridicule transgender people should not prevent a finding that such advertisements are offensive.

We recognise that minority groups often object more strongly to offensive depictions of their minority characteristic than majority groups. Often, this is prompted by the memory or fear of persecution or social exclusion. We consider that, in a liberal democracy and a diverse society, it is appropriate to consider the interests of minority groups as well as the views of the majority.

The comment in CAP's AdviceOnLine that "references to non-Christian religions can be more likely to cause serious or widespread offence [...] because non-Christian faiths are less established in the UK and might need to be treated with more sensitivity" should be read in the context outlined in this letter: the advice is intended to help advertisers to make considered decisions about the images and words they choose to make in their advertising, and does not imply that the ASA will always uphold complaints from followers of non-Christian religions. It indicates that, even though disrespectful references to non-Christian religions are unlikely to cause widespread offence, they may cause serious offence.

Recommendation 1805

We disagree with your view that the Code is incompatible with the recommendation that "Freedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of the population within the limits of Article 10 of the Convention". The Code does not prohibit all advertisements that may shock or offend; indeed, the ASA rejects

many if not most of the complaints it receives from people who are shocked or offended by something they have seen in advertising. In our view, adverts may shock, offend or disturb viewers, subject only to those restrictions that are consistent with Article 10.

The recent judgement on the Sandown case found that the ASA system and its Codes were consistent with Article 10: that the ASA's practice of restricting advertising (including advertising on religious matters and restrictions on the grounds of offence) did not, in itself, contravene the ECHR. The judge found, however, that in this particular instance, the ASA should have attached greater weight to the rights of the advertiser to express their religious views than to the rights of readers who might have been offended.

You also note that Resolution 1510 (2006) of the Parliamentary Assembly of the Council of Europe states "what is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time and time and from place to place" and observe that it may be impracticable for advertisers to try to second guess what is currently giving offence and what is permissible. That the sensitivities, either of a minority group or of mainstream society, vary over time and in different places is not, in our view, reason to disregard them. Indeed, it is one of the reasons why self-regulation can be more effective in this field than legislation: we do not operate hard-and-fast rules, but rather consider every advertisement in context, at the time and in the place that it appeared. The Resolution, in fact, speaks in support of our efforts to give guidance to advertisers.

You point out that amendments to the Protection of Freedoms Bill have been proposed, including the omission of the word "insulting" from the list of offences under the Public Order Act. The ASA does not, however, assert that advertisements that breach the Codes are public order offences. That an advertisement may fall short of a public order offence does not preclude regulatory action against it. You quoted the passage, we realise, in support of your view that the prevailing climate was changing. We will continue to take note of changes in this and related legislation, as part of our efforts to ensure that the Codes and the ASA's adjudications remain proportionate and relevant. But at this stage, we continue to disagree with you about the weight that may be placed on religious sensitivity within our work and the consistency of our approach with prevailing attitudes to offence and religious belief.

You request that we review the Code to allow the ASA to reject complaints more easily. The relevant Code rule presently states "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. Compliance will be judged on the context, medium, audience, product and prevailing standards". For the reasons set out in this letter, we consider that "religion" should remain amongst the list of characteristics in respect of which advertisers should take particular care. We believe the Code rule allows the ASA sufficient flexibility in its assessment of complaints. In fact, we believe the rule would allow for the less restrictive approach that you would prefer to see (although, as explained, we believe the ASA's present approach is justifiable).

Your letter has, however, highlighted some weaknesses in the drafting of our Help Notes and Advice OnLine entries and we intend to review those. The changes we make are

unlikely to have the effect you would like to see, but we believe they will improve our guidance.

We would like to thank you for your interest in the work of CAP and the ASA and for your close commentary on this complex issue. We encourage you to respond to our public consultations, on issues that concern you, and may contact you, with your permission, in future for informal discussion of developing policy in this field.

Yours sincerely

James Best
Chairman CAP and BCAP