

The 2015 fundraising controversy: lessons for trustees, the Charity Commission and regulators - Public Administration and Constitutional Affairs Committee Report

On 25 January 2016 the Public Administration and Constitutional Affairs Committee (“PACAC”) ¹ published its report entitled “The 2015 fundraising controversy: lessons for trustees, the Charity Commission and regulators” (“the Report”).

Background

In the summer of 2015 the Mail on Sunday and the Daily Mail carried a series of reports which alleged that many of the UK’s household named charities (including Oxfam, the NSPCC, Save the Children and the RSPCA) had used, often through sub-contractors, exploitative and unethical fundraising methods.

Current regulation of charity fundraising and proposed changes

The charity fundraising sector is self-regulated by three membership organisations:-

- The Institute of Fundraising (“IoF”), which sets a code of fundraising practice;
- The Fundraising Standards Board (“FRSB”), which receives complaints and adjudicates on whether any of its member charities have, or have not, broken the code; and
- The Public Fundraising Regulatory Association (“PFRA”), which regulates street and doorstep direct debit fundraising.

The Government reacted to the newspaper allegations by announcing a review of fundraising regulation, which was chaired by Sir Stuart Etherington, Chief Executive of the National Council for Voluntary Organisations (“NCVO”). The review’s findings entitled “Regulating Fundraising for the Future: Trust in charities, confidence in fundraising regulation” were published on 21 September 2015 (“the Etherington Review”), the full text of which can be downloaded from the link below:-

https://www.ncvo.org.uk/images/documents/policy_and_research/giving_and_philanthropy/fundraising-review-report-2015.pdf

The Government accepted in full the proposals set out in the Etherington Review as soon as they were published: the main recommendation being that a new single fundraising regulatory body should be established to replace the FRSB and the PFRA and to take over the role of settling the fundraising code from the IoF. The new fundraising regulatory body has not yet been established and for the time being charities are still operating under the existing regulatory regime.

¹ The PACAC is appointed by the House of Commons whose function is, amongst other things, to consider matters relating to the quality and standards of administration provided by civil service departments and other matters relating to the civil service.

The Charities (Protection and Social Investment) Bill

In May 2015 the Government introduced in the House of Lords the new Charities (Protection and Social Investment) Bill. The “Protection” part of the Bill gives the Charity Commission additional regulatory and protective powers. It also includes specific provisions in relation to charity fundraising, namely:-

- additional reserve powers for the Government (see page 5 below for details);
- additional reporting requirements regarding fundraising for charities with an annual income over £1 million; and
- additional provisions to be included in the agreements between charities and professional fundraisers and commercial participators.

The Bill has now been agreed by both Houses and is awaiting Royal Assent, following which it will become an Act of Parliament.

Charity Commission fundraising guidance

In the light of last summer’s fundraising episode, the Charity Commission has reviewed its fundraising guidance CC20 entitled Charity fundraising: a guide to trustee duties. The revised guidance went out for consultation in December 2015. The consultation closes on 11 February 2016. I will be commenting on the finalised guidance in due course. In the meantime, the consultation document can be downloaded from the following link:-

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490340/Consultation_Charity_fundraising.pdf

The PACAC fundraising inquiry

The PACAC also launched an inquiry following the newspaper allegations to examine both the regulation of charity fundraising and the way in which large charities govern fundraising. The Report is the result of that inquiry and can be downloaded in full from the link below:-

<http://www.publications.parliament.uk/pa/cm201516/cmselect/cmpubadm/431/431.pdf>

The PACAC inquiry took oral evidence from many of the charities (both from their chief executives and chairs of their trustee bodies) who were named in the newspaper reports (RSPCA, NSPCC, Oxfam and Save the Children); Sir Stuart Etherington; William Shawcross, Chair of the Charity Commission; Rob Wilson, the Minister for Civil Society at the Cabinet Office (the Government department responsible for charities); and the Daily Mail Reporter, Katherine Faulkner.

The Report looks at:-

- the practices exposed by the media and the role of trustees in the governance of their charities;
- the recommendations of the Etherington Review; and

- the respective roles of the Charity Commission, the Information Commissioner and the Cabinet Office.

The details of the fundraising allegations are set out at pages 6 to 10 of the Report. I am not going to rehearse these in this paper. Instead, I will focus in particular on the Report's findings so far as they relate to the role of charity trustees and governance. It is interesting to note that in the introduction to the Report the PACAC says that it regards:-

“the lessons for charity governance to be by far the most important lessons learned from this episode.”

I will also briefly touch upon the Report's comments/recommendations regarding the proposed new fundraising regulator and the respective roles of the Charity Commission, the Information Commissioner and the Cabinet Office.

The role of charity trustees in relation to charity fundraising

In the Report the PACAC stresses the legal reality that it is the trustees who are ultimately responsible for the management and control of the administration of their charity:-

“The governance of charities does not depend on anyone except the trustees. Trustees are utterly responsible for the governance of their charities...”

Last summer's controversies were evidence of a failure of governance by trustees. The evidence reported here suggests that there is still some reluctance on the part of many trustees to accept that this was not just a failure of process or an excusable oversight, but failure of trustees to understand that their primary role is governance, which means their overriding responsibility is to sustain the mission and values of their organisation. Managing reputational risk is central to this role, for without good reputation no organisation can be effective. In this role they failed. Trustees are as responsible for the activities of any sub-contractors, as for any part of a charity's operations. All chief executives of the charities that gave oral evidence to us admitted that they did not scrutinise fundraising sub-contractors enough. This only possible conclusion is that, by failing in this responsibility, trustees were either negligent or wilfully blind to what was being done in their names.”

The Report also stresses that trustees must ensure that their charity's values are reflected in the way the charity operates at all levels, having regard to the Charity Commission's guidance and the interests of the charity, its beneficiaries, donors, employees and volunteers and that:-

“Charitable ends can never justify uncharitable means. The conduct of sub-contractors should be subject to the same degree of governance. This is as true of fundraising as it is of any of their other activities.”

The Charity Commission is commended in the Report for emphasising in its draft revised fundraising guidance that the primary responsibility for fundraising rests with charity trustees.

The Report recommends that the new fundraising regulatory body (when established) publicises its view of good trustee practice. It also recommends that the new fundraising regulatory body, and

where necessary the Charity Commission, validates and recommends suitable training courses for trustees.

Although the Report focuses on fundraising issues, the duties and responsibilities of charity trustees are wide ranging. The PACAC report on the collapse of Kids Company, published on 1 February 2016, touches on some of the other duties and responsibilities of charity trustees. For further details please see the section headed “Charity trustees” of my paper in which I comment on the Kids Company report and the wider implications for charity trustees: this can be downloaded from www.filanthropia.co.uk.

The new fundraising regulator

The Report confirms the PACAC’s endorsement of the recommendation in the Etherington Review for a single, more proactive, fundraising regulator.

The Etherington Review also recommended the establishment of a new Fundraising Preference Service whereby consumers would be able to opt out of receiving unsolicited calls in relation to charity fundraising. However, given that there already exists a Telephone Preference Service (“TPS”) which allows consumers to opt out of all unsolicited calls (whatever the subject matter), the Report confirms that in the light of the Information Commissioner’s concerns regarding duplication with the TPS, the PACAC is “not persuaded of the case for a new fundraising preference service.”

The role of the Charity Commission in relation to charity fundraising

The current position

The Charity Commission has at present no formal regulatory role with respect to fundraising. During the inquiry the Chair of the Charity Commission, William Shawcross, confirmed that the Commission “kept a watching brief, but our job has not been to regulate charity fundraising”. The Commission carries out this watching brief by working with the FRSB and other regulators. For example, the Charity Commission has a memorandum of understanding in place with the FRSB, which sets out the respective roles of the Charity Commission and the FRSB. (In essence, the Charity Commission will only investigate a complaint where there is a serious risk of significant harm or abuse to the charity, its assets, beneficiaries or reputation and in the most severe cases a formal statutory inquiry will be opened).

As referred to above, the Charity Commission also publishes guidance setting out trustees’ duties and responsibilities in relation to fundraising (the revised CC20 which is out for consultation until 11 February 2016).

The proposed position

The Etherington Review recommended that the Charity Commission has a much larger role in fundraising regulation, whereby the Commission will support the new fundraising regulator by interpreting a failure to comply with the regulator’s instructions as a failure of governance over which the Commission will have responsibility. The new regulator will also be able to refer charities to the Charity Commission. As with the current position, the Etherington Review recommended

that the respective roles of the Charity Commission and the new fundraising regulator will be set out in a memorandum of understanding.

The Report recommends that primarily it should be the role of the Charity Commission, rather than the PACAC, which will hold the new fundraising regulator to account. The Report specifically recommends that the Charity Commission should hold annual hearings on fundraising regulation and other public hearings into the workings of charities in relation to fundraising. Sir Stuart Etherington has rejected this proposal on the basis that a direct reporting line to Parliament was more fitting for a self-regulator.

Future funding of the Charity Commission

In the light of the anticipated enhanced role of the Charity Commission regarding charity fundraising, the Report recommends that HM Treasury and the Cabinet Office address the future funding of the Commission as a matter of urgency.

The Charity Commission's response to the Report

On the same day that the Report was published (25 January 2015), the Charity Commission issued the following response:-

“We welcome publication of this report and the committee’s view that the commission needs to be properly funded to fulfil its regulatory role. Trustees must grip fundraising in their charities and have much better oversight of their charity’s activities. We will consider all of the committee’s recommendations and continue to assist with the creation of the new body that will oversee fundraising.”

The role of the Information Commissioner in relation to charity fundraising

The Report concludes that:-

“It is a failing of the Information Commissioner in the past that his office was not more proactive in the past in respect of charities’ misuse of data. The Commissioner is right now to be more proactive.”

The role of the Cabinet Office in relation to charity fundraising

As mentioned at the beginning of this paper, the Charities (Protection and Social Investment) Bill includes a provision relating to additional reporting requirements regarding fundraising for charities with an annual income over £1 million. The Report confirms that the PACAC has received representations from charities which have limited fundraising activities but still reach the above mentioned income threshold: the PACAC suggests that the Cabinet Office should be mindful of this.

The Charities Act 2006 gave the Government reserve powers to suspend the self-regulation of charity fundraising should it deem it desirable or necessary. The Report supports the amendment to the Charities (Protection and Social Investment) Bill to extend the existing reserve powers to give the Government the right to (a) order a charity that has not joined the self-regulatory system to join it, (b) hold the new fundraising regulator to account and (c) allow fundraising regulation to be carried out by the Charity Commission should self-regulation be suspended.

Summary

The Report serves as an important reminder to charity trustees that they are “ultimately responsible for every aspect of their charity’s activity, including fundraising.” The regime for the regulation of fundraising will be stricter in the future. Although the regulation of charity fundraising will, at least for the time being, continue to be self-regulating, the new fundraising regulator will have enhanced powers and will work more closely with the Charity Commission than the present regulators do presently.

Although the PACAC inquiry focused on the fundraising practices of some of the larger and most well known charities, the findings and recommendations of the Report apply to all charities and their trustees. Therefore, all trustees of charities which undertake fundraising activities should ensure that their “fundraising houses are in order”. To this end, it would be prudent for trustees to undertake a review of their charity’s activities and arrangements, in particular in relation to the engagement of third parties – e.g. volunteers, professional fundraisers or commercial participators. Trustees should then take such remedial steps and seek such specialist advice as deemed necessary. Charity trustees should also remember that they may be personally liable for any loss to their charity arising from a breach of their duties.

Trustees should also keep abreast of Charity Commission guidance in relation to fundraising - in particular the revised CC20 Charity fundraising: a guide to trustee duties.

This is probably the last chance for charities to self-regulate their fundraising activities. Indeed, at the end of the Report the PACAC asserts:-

“The Government should not be deterred from using its reserve powers if necessary, as the reputation of the sector depends upon proper governance of charities and their fundraising. However, it would be a sad and inexcusable failure of charities to govern their own behaviour should statutory regulation become necessary.”

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