

Fundraising: the new dawn

March 2017

Briefing

As the dust settles over the many fundraising scandals dominating news headlines in 2015 and 2016, the fundraising provisions contained in the Charities (Protection and Social Investment) Act 2016 (the Act) intended to help protect donors, charity supporters and the public from intrusive fundraising practices came into force on 1st November 2016.

The changes set out in the Act amend the existing fundraising provisions contained in the Charities Act 1992 and in the Charities Act 2011 and introduce two new requirements.

The first requirement

The first requirement affects all charitable institutions, (whether or not they are registered with the Charity Commission), that work with commercial participators or professional fundraisers (as defined in section 58 Charities Act 1992) to raise funds. The Charities Act 1992 required charities and these third parties to enter into written agreements setting out prescribed information relating to the arrangements between them. However, these provisions were originally drafted from the perspective of protecting the charity from the unscrupulous practices of third parties, rather than from the perspective of protecting the public from misrepresentation or aggressive fundraising tactics, and the new legislation now addresses this by requiring all such agreements to specify:

- 1) any voluntary scheme for fundraising, or any voluntary standard of fundraising that the commercial participator or professional fundraiser (as the case may be) undertakes to be bound by for the purposes of the agreement;
- 2) how the commercial participator or professional fundraiser is to protect vulnerable people and other members of the public from (a) any unreasonable intrusion on a person's privacy, (b) unreasonably persistent approaches for the purpose of soliciting or otherwise procuring money or other property and (c) undue pressure to give money or other property, in the course of, or in connection with the activities to which the agreement relates; and
- 3) the arrangements in place to enable the charity to monitor ongoing compliance with the agreement.



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Transitional arrangements

The new Fundraising Regulator established last year to investigate poor fundraising practices and to assume the role of setting fundraising standards has announced that it will be flexible until 31 March 2017 to enable charities to get to grips with the new law and to allow time for charities to make reasonable contingency arrangements to ensure compliance. However, the absence of any transitional provisions in the Act means that there is uncertainty regarding the regulator's approach to agreements in place between charitable institutions and commercial participators and professional fundraisers prior to the new rules coming into force, and whether or not there is now a need to renegotiate and amend current agreements to ensure they are compliant. Definitive guidance on this point has not been forthcoming. However, the general consensus appears to be that agreements lasting for longer than 12 months entered into prior to the 1st November should be revisited to ensure compliance.

Sanctions for non-compliance

If fundraising agreements aren't compliant with the new legal requirements, it will affect the ability of the professional fundraiser or commercial participator to enforce the terms of the agreement against the charity. The charity will be acting in breach of the Code of Fundraising Practice and the Charity Commission and the Fundraising Regulator both expect trustees to ensure that their charity's arrangements with professional fundraisers and commercial participators conform to the law. However, perhaps most importantly, the reputational damage that is likely to follow any failure to comply with the new requirements is likely to be significant for the charity, the connected party and the charity's trustees. Particularly as the media appears to be on a campaign against the sector and therefore any issues are unlikely to go unnoticed.

The Fundraising Regulator has recently published its first adjudication decision regarding the Neet Feet scandal and criticised many well-known charities for their involvement with and monitoring of Neet Feet's operations. Lessons learnt from the investigation are likely to inform an updated Code of Fundraising Practice when it is eventually reviewed by the Fundraising Regulator.

The second requirement

The second change in the Act affects charities required by law to have their accounts audited and prescribes that the Trustees' Annual Report must now include: statements about the charity's approach to fundraising; the use of and oversight of third parties such as commercial participators and professional fundraisers; information on the charity's compliance with recognised standards and schemes regulating fundraising practices; details of any complaints relating to the charity's fundraising activities or the activities of any third party fundraising on its behalf; and details of the action taken by the charity to protect vulnerable people and other members of the public from persistent approaches, intrusions on privacy and undue pressure to give.

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The Charity Commission's publication, Charity Fundraising: a guide to trustee duties (CC20) has been updated to reflect the new requirements.

Data Protection

The changes above will certainly keep charities and their fundraisers on their toes until the new requirements become the 'new normal'. However, it is not the end of the story as the spotlight on fundraising and fundraising practices is not fading and the next hot topic for fundraisers and charity trustees is the urgent need for them to improve their awareness of, and compliance with both existing data protection law and the new EU Data Protection Regulation coming into force (irrespective of Brexit) in early 2018.

In December 2016, two high profile charities were found to be in breach of the Data Protection Act 1998, in connection with their use of personal data for activities for which they had not acquired the necessary explicit consent. The Information Commissioner issued the charities with significant monetary penalties prompting a joint alert issued by the Charity Commission and the Fundraising Regulator, which stated that other charities are also under investigation. Described by Stephen Dunmore, Chief Executive of the Fundraising Regulator as a "wake-up call for the whole sector", compliance with data protection law is now an urgent priority for charities and new practical guidance is expected from the Fundraising Regulator early this year.

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