

All in a good cause...

Gerry Morrison offers some tips on the dos & don'ts of fundraising

Fundraising is an essential activity for many charities and the legal framework is complex. It is not listed in the Charities Act 2011 (CA 2011) as one of the 13 charitable purposes, hence it is not possible to set up a charitable organisation with just fundraising as its purpose. Fundraising is an activity which enables charities to raise income to fulfil their charitable purposes, as opposed to being recognised as a charitable purpose in its own right. This is a subtle, but important distinction in considering the law as it applies to fundraising, in particular to arrangements between charities and commercial participators, events and trading activities.

Self-regulation

The Charity Commission does not routinely regulate fundraising as an activity in its own right. Instead, the principle of self-regulation applies to fundraising practice and charity trustees are under legal duties to ensure that their charity complies with the law and observes best practice.

There has been much debate about whether self-regulation works, but there appears to be a reluctance to introduce further statutory regulations, despite the government's reserve power to control fundraising by charities which was included in the Charities Act 2006 (in CA 2006), now replaced by CA 2011. Provisions in CA 2006, intended to regulate public charitable collections and empower the Charity Commission to issue public collection certificates, have not been brought into force and were not consolidated in CA 2011. Provisions in the Charities Act 1992, which regulate arrangements between charities and professional fundraisers and commercial participators remain in force, but were not consolidated in CA 2011. This has been criticised for giving the appearance of relegating these provisions.

The Institute of Fundraising (IOF) was formed by a group of fundraisers in 1983 to promote self-regulation. The IOF publishes the *Code of Fundraising Practice*, sets fundraising standards and promotes best practice. Membership of the IOF is not compulsory for fundraisers, but the Charity Commission encourages charities and fundraisers to have regard to its codes and works with the IOF to develop them. Charity trustees can help to discharge their legal duties by having regard to its guidance.

The Fundraising Standards Board (FRSB) is an independent self-regulatory body which upholds the IOF's codes by requiring its members to adhere to them. It also helps its members to handle complaints from members of the public about its members' fundraising activities. Membership of the FRSB is not compulsory, but is also encouraged by the Charity Commission to promote public confidence. The FRSB's members are entitled to display its "give with confidence" tick logo on their fundraising marketing and materials. The Charity Commission recently announced its intention to display which charities are members of the FRSB on its website and it will be interesting to see if this will lead to an increase in membership.

The Public Fundraising Regulatory Association (PFRA) is another self-regulatory membership body, which was set up to self-regulate all forms of



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direct debit face-to-face fundraising. Its members undertake to abide by the IOF's codes and the PFRA's interpretation of the codes as they apply to face-to-face fundraising.

In his review of CA 2006, published in July 2012, Lord Hodgson did not call for membership of the FRSB to be compulsory, but he described the self-regulatory landscape as confused and called for the IOF, FRSB and PFRA to agree a division of responsibilities to provide clarity and simplicity to the public and remove duplication. In response, the self-regulatory bodies proposed a division of responsibilities with:

- ▶ the IOF setting the standards, rules and codes of conduct;
- ▶ the FRSB as the public facing regulatory body; and
- ▶ the PRFA monitoring agreements with local authorities in relation to face to face fundraising.

The government agreed with Lord Hodgson that membership of the FRSB should not be compulsory, but said it would review the self-regulation of

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fundraising in 2017. Therefore, the sector will have to wait and see whether the 2017 review leads to any legislative changes.

Legal landscape

Charities engaged in fundraising, or contemplating fundraising activity, need to be aware of how the law regulates different types of fundraising activities. This is a summary of some of the legal aspects.

Gift Aid

Charities can register with HM Revenue & Customs (HMRC) for the Gift Aid scheme to increase the value of voluntary donations. Charities can claim back the basic rate of tax which donors, who are UK tax payers, have paid on their donations. Charities must obtain valid Gift Aid declarations from donors to benefit from the scheme. Higher rate taxpayers are incentivised to give, by being able to reclaim the difference between the basic and higher rate of tax.

Public collections

Charities carrying out public collections, such as door-to-door collections, are required to obtain a licence from the local authority. Certain larger charities are exempt from this requirement via National Exemption Orders, which have been criticised for creating a two-tier system, but the government agreed with Lord Hodgson that these orders should not be dropped.

Charities should have regard to the IOF's codes and take into account factors like the timing and method of conducting door-to-door collections, avoid Cold Calling Control Zones, accommodation housing vulnerable adults and provide appropriate training for fundraisers. Trustees should be conscious that this is also a public relations exercise: some people dislike this style of fundraising and, if not conducted appropriately, this activity can have a negative impact upon the public's perception of the charity. Trustees of charities which use this fundraising method should be satisfied that their charities have appropriate procedures in place to ensure fundraisers observe best practice.

The law restricts the benefits which donors can receive in return for their donations for donations to qualify for Gift Aid. HMRC sets out the limits on the value of benefits on its website and charities should be aware of these to avoid incurring penalties.

Charities can now sign up with HMRC to submit Gift Aid claims online. Charities can also take advantage of legislation which enables them to submit top-up payments for small cash donations of £20 or less received after 6 April 2013, to a limit of £5,000 of small cash donations per financial year. Known as the Gift Aid Small Donations Scheme, it is helpful for charities which fundraise via collection buckets, but the legislation has been criticised because, to take advantage of the scheme:

- ▶ charities have to have been in existence for at least two complete tax years;
- ▶ have made successful Gift Aid claims in two out of the four last tax years, without a gap, or two or more tax years between those Gift Aid claims or since the last Gift Aid claims were made; and
- ▶ have not incurred a penalty on a Gift Aid or Gift Aid Small Donation claim in the current or previous tax year.

Therefore, it is not accessible to new charities or charities which have not previously made Gift Aid claims.

Broadcast and telephone fundraising

This is a legal minefield for charities and advice should be obtained before conducting this type of campaign. The Charity Commission's guidance *Charities and Fundraising* states that charities should have regard to data protection and charity law issues. Charities should also comply with the requirements in the Charities Act 1992 (CA 1992) in terms of written statements and refunds and the Consumer Protection (Distance Selling) Regulations 2000 and Consumer Protection from Unfair Trading Regulations 2008.

Appeal literature

Charities conducting appeals for specific purposes should have regard to the Charity Commission's guidance *Charities and Fundraising* to prevent

failed appeals. Charities should seek advice on the wording of appeal literature, to clarify what will happen if insufficient or surplus funds are raised. In some circumstances a Charity Commission scheme may be required before funds can be used for another purpose. Appeal literature should also contain specific details about the charity including, for registered charities, the charity's registration number.

Commercial participators and professional fundraisers

Charities using professional fundraisers, or engaging with commercial participators, must abide by provisions in CA 1992 and the Charitable Institutions (Fundraising) Regulations 1994. Professional fundraisers provide fundraising services to charities and commercial participators are businesses which advertise that a proportion of their profits will be donated to one or more charities.

A written agreement must be put in place between the charity and the professional fundraiser or commercial participator, which complies with the Charitable Institutions (Fundraising) Regulations 1994. The purpose of the legislation is to provide transparency to the public about these arrangements, including how much will go to the charity and the remuneration.

Trading

Charities should be conscious that certain types of fundraising activity are deemed non-charitable trading. Trading activity which is carried out only to raise funds for the charity, and which does not directly further its charitable aims, can only be carried out by charities themselves if it is low risk and to a limited extent, which is based upon turnover. HMRC sets out the small non-charitable trading limits on its website. Charities which do not observe these limits breach charity law and risk adverse tax penalties.

Many charities get around this by using a non-charitable trading subsidiary to carry out the trading and then tax efficiently gift the profits to the parent charity via the Gift Aid scheme. It is a common arrangement, but needs careful thought from a legal and taxation perspective to avoid potential pitfalls.

Digital media

Charities making use of digital media should have regard to the IOF's *Code of Fundraising Practice* and the section on digital media. It emphasises that all digital platforms must comply with the Equality Act 2010 and reasonable adjustments must be made to ensure these are accessible to all users. The code recommends that charities making use of social media should ensure that usernames and passwords for their social media accounts are only available to trusted individuals. It also provides guidance for charities using mobile devices and platforms, email, online trading and e-commerce.

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