

More

The Etherington Review on Fundraising Regulation

A reaction and a call to action

30 September 2015

More Partnership

This report was prepared by
Adrian Beney

Adrian Beney
+44 7941 174350
abeney@morepartnership.com

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Introduction

This article highlights some of the issues which we think could affect our clients over the next two years or so as various bodies take forward the recommendations of the Etherington Review.

Matters which we believe are a cause for immediate concern and action have been highlighted with a red bar.

Matters which we believe are important but may be of more technical or philosophical nature, or which can be dealt with internally are highlighted with a yellow bar.

Executive Summary

Much of the Etherington Review is sensible. We highlight the following positive recommendations:

- the retention of self-regulation, but with a statutory “back stop” for those unhappy with fundraising behaviour;
- a change in the Institute of Fundraising’s role in regulation;
- a renewed Code of Fundraising Practice;
- clear advice to trustees, governors and CEOs that they need to take responsibility for fundraising behaviours and that "fundraising activity be included on the risk register managed accordingly."

The Review found that although mechanisms for policing fundraising currently exist, their structure is flawed. However, quick fixes to a regulatory regime don't always make regulation better. Up until now the debate within the sector has been characterised by bold, often political, statements, with only scant formal evidence and all with at least half an eye on the media reaction. There is a significant risk that some of the changes recommended will make it harder to raise charitable gifts, while simultaneously distancing the giving public from the charities they support.

The review was undertaken without the involvement of some of the largest fundraising organisations in the country – arts, education and cultural institutions. The Etherington review claims to speak about the "main forms of fundraising", but by this it refers to quantity of solicitation, not sums raised. There is a significant risk that regulation designed to address abuses in one sector or type of fundraising will have significant unintended consequences on another sector or type of fundraising.

Particular areas of concern where further discussion and debate are needed:

- The relationship between the proposed Fundraising Regulator and a fundraising organisation's primary regulator where that regulator is not the Charity Commission, CCNI or OSCR. (HEFCE for English universities, DCMS for National Museums in England etc.)
- The proposal for the creation of a Fundraising Preference Service – a national "reset button" to require organisations to "screen their donor listings against the suppression list."
- The way in which it is proposed the new regulator be funded. It is suggested that this is based entirely on fundraising spend with no allowance for the types of fundraising undertaken and their relative likelihood of causing compliance action.
- The Review's enthusiasm for the new European General Regulation on Data Protection. This threatens to consolidate the view that the state should defend the right of people never to receive any charity marketing to which they haven't given express consent. Of course we think that people should not be inundated with mailings and other contact from organisations they have never heard of, and we welcome guidance to make it clearer how people's data may or may not be shared, and outlaws unrestricted list sharing. But we need to balance people's "rights" not to be contacted with the benefits which accrue to people who are helped by the work of fundraising charities.
- The extent to which universities, schools, arts organisations, museums and galleries, cathedrals and other "non-mainstream" charities – many of which have deep and complex relationships with their supporters which go far beyond giving – will have a voice in the proposed Sector Summit to begin to implement the Review's findings.

It is important that fundraising organisations understand the potential impact of the Review on their ability respectfully to seek support from their donors and potential donors. They need to lobby for a new regulatory regime which is properly informed and based on solid evidence. Full account must be taken of the widely varying fundraising methods and complex nature of donor / supporter relationships in the "non-mainstream" charity sector.

Background

No-one connected with fundraising in the UK in the summer of 2015 can have missed the media furore about fundraising practice which followed the death of Olive Cooke in May. Her family very quickly assured the public that her death had nothing to do with the extent of the charitable support she gave, and that sought from her. But the newspapers persisted and unearthed some fundraising practices which appear to have fallen a long way short of proper respect for donors and potential donors. The Prime Minister then promised action.

The existing voluntary regulator, the Fundraising Standards Board (FRSB), published a review three weeks later. It had had little time formally to collect evidence.¹ This review recommended a variety of changes to the Fundraising Codes of Practice, a series of standards created by the Institute of Fundraising (IoF) which form the basis of the existing regulatory regime. In addition, the Information Commissioner's Office (ICO) withdrew informal guidance to charities relating to the circumstances in which an existing relationship between a donor and a charity might take preference over that person's registration with the Telephone Preference Service.

In the circumstances events continued to overtake the response from FRSB and IoF. The Cabinet Office appointed Sir Stuart Etherington, Chief Executive of the National Council of Voluntary Organisations (NCVO) to lead a review of fundraising regulation. This is the review that really matters since it is the one with government backing, although the Parliamentary Administration and Constitutional Affairs Committee (PACAC) is conducting its own investigation and is yet to report. In addition, the Scottish Government asked the Scottish Council for Voluntary Service to undertake an informal review which reported on the same day as the Etherington Review.²

Thus, on 23rd September the Etherington Review³ was published, having held an open consultation period through the summer.⁴

¹ http://www.frsb.org.uk/wp-content/uploads/2015/06/FRSB-Interim-investigation-report_Published-9June2015.pdf This reports highlights, for example, the 14 complaints it received after Olive Cooke died concerning a perceived lack of effectiveness of the Telephone Preference Service. On the basis of these 14 complaints the FRSB recommended a change in the IoF Fundraising Code of Practice; a change which IoF says it had no option to make on receipt of advice from ICO.

² <http://www.scvo.org.uk/media-release/charities-must-take-responsibility-for-fundraising-in-scotland/>

The result of this review is a more discursive and wide ranging document than Etherington. It notes, in contrast to Etherington, a Scottish appetite for Scottish regulation of fundraising. The review's recognition of fundraising organisations beyond mainstream charities was thoughtful and welcome.

³ <https://www.ncvo.org.uk/fundraisingreview> - press release and full report available at this link

⁴ It's worth noting that the whole consultation period was during the English school summer holidays. "An Emerging Profession: the higher education philanthropy workforce", commissioned by HEFCE in 2013 found that a very significant proportion of the workforce were women with childcare responsibilities. This may go some way to explaining the lack of response to the consultation from the HE sector.

A new Regulator with a new Codes of Practice

The Review calls for a new regulator (the Fundraising Regulator) with considerable independence from the fundraising profession and ultimately reporting to PACAC. The new regulator will adjudicate against a new fundraising Code of Practice which will be created by a Fundraising Practice Committee which will have representation from fundraisers, donor, the general public and legal expertise. IoF will have observer status only. Membership of the regulatory body will continue to be voluntary, but the Regulator will be able to adjudicate on all fundraising, whether or not the organisation is a member.

The proposals ignore entirely both major gift fundraising and fundraising from constituencies which have deeper and more complex relationships with charities than simply as donors.⁵ The impact of the Review's proposals was entirely unexplored in respect of these areas fundraising. It is vital that education, arts and cultural organisations engage with the development of new codes.

On the extent to which the Review considers fundraising outside mainstream charities

There are clues throughout the review that suggest that fundraising beyond mainstream charities has not really played much part in the thinking that's been applied. This UK-wide Review refers to 160,000 charities; this is actually the number of registered charities, and only in England and Wales. It does not include all the exempt and excepted charities. And the language of the report is heavily biased towards mass fundraising – direct mail, telephone, on street and door-to-door fundraising. There is no mention of trust fundraising, major gift fundraising or corporate fundraising.

In one area, nomenclature is very important. The term “face-to-face fundraising” is predominantly understood to refer to on-street or door-to-door fundraising. However, certain sectors use the term to refer to major gift fundraising. Future regulation must not confuse mass face-to-face fundraising and major gift fundraising since this would result in inappropriate restrictions on major gift fundraising which is entirely reliant on a respectful relationship with the donor.

Regulatory Sanctions

One of the criticisms of the existing FRSB has been that it is unable to do much more than “name and shame” those who break the Code, and then only in respect of organisations which are members. It is proposed that the new Regulator would have far greater powers, which beyond “Naming and Shaming” would include;

- Ordering compulsory training for fundraisers;
- Requiring an organisation to stop a particular method of fundraising for a time;
- Requiring an organisation to submit its “future fundraising campaign plans for its [the Regulator's] approval”;

Of course a regulator must have “teeth” but here we see again a very “activity focussed” approach to regulation which seems to assume that fundraising is simply a series of mailings, telephone calls and other outbound activity.

⁵ Examples would be alumni groups, members of membership and professional organisations, cathedral and heritage Friends' organisations, ticket buyers etc.

Funding the new Regulator

The Review discusses a number of models for funding the regulator, and proposes that it be funded by a sliding levy on fundraising expenditure for those which spend more than £100,000 per annum on fundraising. It argues that this would be:

- easy to operate because charities already report their fundraising expenditure in their annual return to the Charity Commission;

and

- fair because it introduces proportionality, and that it disincentivises “mass campaigns which do not generate sufficient return.”

While we understand the arguments put forward (and think all the other options discussed are worse) we have three specific concerns about the implementation of a fundraising expenditure based model.

Firstly, a quick search of a number of university and arts company accounts shows little or no indication in the annual accounts of the cost of fundraising. Many (but not all) universities provide this information in the annual Ross CASE survey, but there is currently no facility to audit either the amount stated, or the specific division of costs between fundraising and alumni relations. Charity accounts which follow the charity Statement of Recommended Practice (SORP) do show the “costs of generating funds” but this heading is not always confined to charity fundraising. So there remains a question about how easily accessible is the information on fundraising expenditure, and the extent to which this is auditable.

Secondly, the Review argues that charging for regulation in proportion to fundraising expenditure is fair because fundraising expenditure is proportional to the quantity of asking.⁶ This is a huge over-simplification which assumes each charity’s mix of fundraising behaviour is the same. It discriminates significantly against organisations whose fundraising relationships are much more staff intensive, more personal, more focussed on major gifts and much less likely to generate complaints.⁷

Thirdly, the funding model takes no account of the extent to which complaints are likely to be raised against an organisation. For example, door to door fundraising is one of the most complained about methods of fundraising, yet certain types of charity simply never do this kind of fundraising.

⁶ p 56, col 1, para 3

⁷ For example, one major national charity reports in its most recent annual accounts that it spent around 40% of its fundraising budget on “direct giving” and under 5% on major gifts and appeals. Across the whole University sector it is inconceivable that this mix would exist. Instead there is a much greater emphasis on employing staff to engage in major gift fundraising. Our Regular Giving benchmarking work suggests that even in the most active universities, only around 15% of total fundraising budget is spent on direct marketing related fundraising.

The funding regime for a new Regulator needs to be fair and auditable. It needs to be based on risk and likelihood that the Regulator would be invoked by a complainant. We think there is more work to do to ensure that any funding regime is fair. We think that those organisations which, by the nature of their constituencies of potential donors and fundraising activity, are unlikely to generate much compliance activity may argue that they should not subsidise those who engage in more complaint prone techniques.

On Governance

The report highlights a need for Trustees and CEOs to take responsibility for the quality of fundraising practice as well as simply the amount of money coming in. Fundraising, its quality and effectiveness, and questions around donor stewardship do feature on many of our clients' governing body or senior management team agendas.. All of this is welcome, and is perhaps an area where the mainstream charity sector can learn from some of the newcomers.

In amongst the report, though, are two less welcome suggestions relating to the use of agencies which raise funds on behalf of the charity (e.g. telephone or direct mail agencies). The first suggests that trustees should ensure that the agency does not risk causing a negative perception not only of their own charity, but of charities generally. This latter seems a tall order. The second is the suggestion that where charities use agencies, the CEO and the trustees should "get involved in the agency's work" including "jointly authoring materials." We think there is an important line for the trustees between governance and operations, and feel that trustees should, unless they have specialist expertise, confine their involvement to the proper governance of fundraising.

Trustees have a responsibility to understand the line between proper governance and operational interference. This is not to suggest that a trustee with specialist expertise should not be engaged operationally with fundraising. But it is to say that it is important that s/he clearly understands when s/he is acting as a specialist volunteer and when s/he is acting as a trustee, and should not confuse the two.

Those in senior leadership positions will want to be sure that fundraising messages speak with the authentic voice and ethos of the institution. In addition, many heads of fundraising would welcome more attention from their CEO. But experience has shown that senior staff involvement and expertise is usually best deployed strategically rather than through detailed, word by word, involvement of senior staff in copywriting and design..

The report notes that some types of charities are not regulated by their national charity regulator. The implication of this situation is largely unexplored. This affects academy schools, most universities, national museums and galleries and others. The proposed mode of fundraising regulation relies on a statutory regulator as a "back-stop" in cases where there has been a failure of governance to control fundraising. This would make HEFCE, DCMS and a range of other organisations the regulator of last resort responsible, ultimately, for enforcing good fundraising behaviour in "their" institutions. The implications of this or their response are not yet clear.

Representative organisations (e.g. Universities UK, the National Museum Directors' Conference) will need to engage with their own regulators to discuss the implications of this proposed new structure and the extent to which they (the regulators) are able to take on this function.

The Right to be “left alone” and to control communications

One of the big themes of the report is a perception that it is hard for anyone to control the way in which a charity communicates with them, and in particular, fundraises from them. The FRSB report claims that it is much easier for people to find themselves on a charity's database than it is to suppress communications from the same charity.

Legislation in this area is dominated by the Data Protection Act 1998 (DPA) and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). The DPA sets out certain individual rights, including the right to opt out of having data used for direct marketing purposes. It is clear that mass fundraising is direct marketing.⁸ The PECR adds various tighter obligations in respect of communications by telephone, e-mail and text messages.

And of course, there is the telephone preference service (TPS). This is a scheme which allows a telephone subscriber to opt-out of receiving unsolicited direct marketing calls and is operated under PECR. The ICO has recently unilaterally withdrawn a concession which allowed charities to regard existing donors as close enough to them to allow calls to be made even if they are TPS registered.

Clearly there has to be an appropriate way of stopping mailings or phone calls or other approaches that are unwelcome. The DPA and PECT/TPS do provide a series of safeguards. But the FRSB report argued that some charities were ignoring them (it reports 14 complaints in the period between announcing its review and publication.)⁹ Following a partially correct analysis of the current situation,¹⁰ Etherington suggests a whole new remedy.

⁸ According to the ICO definition at <https://ico.org.uk/media/1555/direct-marketing-guidance.pdf> para 35, major gift fundraising appears also to be direct marketing.

⁹ It is true that some people have given their data to an organisation which has then (usually legally) shared or sold that data to a charity, so that a person in that situation would have received an entirely unsolicited mailing. That people are upset about this demonstrates a failure on the part of organisation which collected their data in the first place to explain properly the uses to which the data was doing to be put. It is not a failure of the legislation governing the use of the data.

¹⁰ The Review says “At the moment there is no way to ‘opt-out’ of being approached by fundraisers other than contacting the organisation concerned directly and relying on their good will to unsubscribe an individual.” (p 59, col 2, para 2) This is only partially true. No legislation currently prevents a charity from legally acquiring someone's address and writing to them for the first time. But if the individual contacts the organisation and asks for no more contact, then the DPA requires that the organisation must stop contacting them; it is not a case of fundraisers' goodwill.

It suggests the creation of a Fundraising Preference Service (FPS) which would allow any person in the UK to add their name to a list which charities must then consult before engaging in fundraising. Not only that, but individuals could add others in their family to such a list.¹¹

The Review says that: *“The FPS would provide the public with a ‘reset button’ for all fundraising communications, completely preventing the receipt of unsolicited contact by charities and other fundraising organisations. The data file of individuals who have registered would be accessible to charities and fundraising organisations that should screen their donor listings against the suppression list.”*

The report totally fails to engage with the questions of:

- Whether those who go on the list realise the extent to which it may suppress contact from organisations they care about and have links with;
- The wording “screen their donor listings” [our emphasis] suggests that this would apply as much to contact with donors as with potential donors;
- How the list will be maintained;
- How long someone would stay on the list;
- What would happen if the person moves house;
- How the list would be maintained (aside from saying FRSB’s successor should do it);
- What would be the status of charities with existing relationships with donors who discovered that their donors were now on the FPS list;
- How charities with complex relationships with supporters, alumni, members etc. would be affected. Would FPS registration be regarded as overriding an existing relationship, or not. And how would one calibrate that?
- How one would engage with a major donor who is registered on FPS.

It could be argued that Etherington is a report about principles, not implementation, and so it would not address the issues above. However, an FPS scheme has the potential to restrict very substantially the extent to which funds can be raised from constituencies like alumni, members, ticket buyers and other non-traditional charity donors.

We believe the FPS is unnecessary and should be campaigned against as strongly as possible. It is our view that, properly explained and implemented, existing legislation is more than adequate to allow the public to control the manner in which charities communicate with them.

More Partnership believes strongly in the power of philanthropy to change lives. We think that the government-supported creation of a scheme to allow people to opt out entirely from being invited to take that first step towards engaging with organisations working to solve some of our most challenging societal issues, is not the mark of a civilised society.

¹¹ The aim is to allow carers to add the vulnerable to the list, but it is hard to see how it will be limited to this.

The European General Regulation on Data Protection

The Review refers on page 19 to the forthcoming EU Regulation on Data Protection which is likely to make it even harder for those with existing relationships with their supporters to contact them without explicit permission. The Review offers the view that: “Some of the changes that will follow [the introduction of the Regulations] are likely to have a profound effect on fundraising practices.” It goes on to say that “These are welcome steps in the light of longstanding concerns about fundraising tactics and behaviours that have been occurring for some time.”

We are concerned that there appears to be an increasing view that the state should defend the right of people never to receive any marketing to which they haven't given express consent without consideration of whether or not they may at time welcome communication about how they can help change society for the better..

Charities of all types need to engage with the lobbying of their legislators, at home and in Europe, to ensure that the rights of the donor / potential donor are properly balanced against the needs of the beneficiaries they serve.

Implementation - a Sector Summit

The Review calls for a “Sector Summit” to begin to process the matters it has raised. We welcome this call for involvement of the sector. This will lay the foundations for operationalising the regulatory change.

It is vital that the “non-mainstream” charity sector engages fully with the Sector Summit process, explaining the nuances and complexities of constituent relationships and fundraising methods.

In Summary

The Review contains some good news, and new possibilities. If it puts to bed the lie that most fundraising is badly done, aggressive and / or manipulative then this will be a good thing. And it will introduce a degree of accountability and redress that has perhaps been missing hitherto.

But it also contains a number of significant threats to our sector's ability properly and respectfully to fundraise from donors and potential donors. These threats must be responded to with evidence, persuasiveness, and a conviction that giving is good and builds a better world.

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More Partnership

We believe in the power of philanthropy to create a better world – and in partnering with our clients as a force to make that happen. We have been putting that belief into action – for the benefit of educational, cultural, charitable and other organisations all over the world since 1989.

More Partnership’s collective expertise helps our clients – in education, the arts, healthcare, science and charities to fundraise more effectively and create a better world.

More Partnership is a close-knit team of fundraising professionals: more than 20 partners across Europe and a small group of specialist support staff at head office in Scotland.

Some of the better known clients we have worked with are University of Oxford and Cancer Research UK, the Royal Botanic Gardens at Kew and the Science Museum Group. Those perhaps less well known include Peacock Visual Arts, the Shobana Jeyasingh Dance Company, the Carbon Disclosure Project and the European Council on Foreign Relations. Outside the UK we have worked in a range of different sectors and geographies. Clients include Ecole Polytechnique in Paris, Aalto University in Helsinki, Università Bocconi in Milan, AMREF – the African Medical and Research Foundation in Nairobi and the Singapore Management University.

We work with our clients at all levels, from board chair and Chief Executive Office to recently recruited fundraiser. In the course of 20 years of fundraising feasibility studies, we have interviewed around 3,000 major donors. Our award winning Regular Giving Benchmarking project is possibly the largest study of individual giving in the UK and Ireland, involving donors to 20 leading universities.

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