

More

The Sector Summit following the Etherington Review on Fundraising Regulation

Some notes and comments

Contents

| | |
|---|----|
| Background | 1 |
| Sir Stuart Etherington, Chief Executive of NCVO | 1 |
| William Shawcross, Chair of the Charity Commission | 2 |
| Rob Wilson MP, Minister for Civil Society | 3 |
| Martin Sime, Chief Executive of the Scottish Council of Voluntary Organisations | 4 |
| Lord Grade, interim Chair of the Fundraising Regulator | 4 |
| George Kidd, chair of the Fundraising Preference Service Working Group | 5 |
| How to “engage with the process” | 6 |
| Other Matters: Data Protection | 7 |
| Other Matters: The new Regulator’s jurisdiction and funding | 7 |
| Other matters: a important word about nomenclature. | 8 |
| Appendix 1 – Who regulates whom? | 9 |
| Appendix 2 – Summit Attendance List | 10 |

More Partnership

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Background

An audience of around 100 people gathered at NCVO's office in London on Friday 4th December to hear from a variety of people about the future of Fundraising regulation.¹ This was the "Sector Summit", an important part of the process of establishing a new fundraising regulator for the UK. Or possibly just for England and Wales; charity regulation is a devolved matter for Scotland and Northern Ireland, and Scotland, at least, has not yet decided whether it will join in with the new English and Welsh regulator.

These notes contains a number of direct quotes from the speakers which we hope will be helpful in explaining the tone and politics of the meeting – each of which are important to what happens next.

Sir Stuart Etherington, Chief Executive of NCVO

We heard first from Sir Stuart, to whom Minister for Civil Society Rob Wilson MP turned in July 2015 after fundraising practice had become a hot topic in the lobbies of Westminster and the pages of the Daily Mail.

Sir Stuart gave us a recap of events leading up to, and following his appointment as Chair of the review panel looking at fundraising regulation. He said that they had tried to ensure very wide sector representation. Many outside the core group of large mass-marketing charities might suggest that the panel had not succeeded in doing so within the very limited timescale it had been allowed.

He acknowledged that "people give when they're asked to give" but argued that there is a greater risk to charities from lack of public confidence than from new regulation. Thus the new Fundraising Regulator would need to balance "a charity's right to ask" against "the public's right to be left alone."

He said that the Fundraising Preference Service was a subsidiary part of the new regulatory structure, not least because the FPS would be implemented by the new Regulator. He said FPS was a work in progress, with the ability to control not only whether one heard from charities, but from which charities one heard being highly desirable if possible." There was more on FPS later in the session.

There followed an impassioned plea for the sector to "get involved" with the development of the new regulatory structure.

The key messages from Sir Stuart Etherington were:

- The Minister has accepted all the recommendations of the Review
- FPS would happen, and a working group was in the process of being appointed
- An interim Chair of the new Regulatory Body had been appointed (Lord Grade)
- Fundraising charities should engage with the process
- Charities should "rise above regulation" – it was important not just to do the right thing but to do things right.

¹ Full minutes and a recording are at <http://blogs.ncvo.org.uk/2015/12/04/fundraising-summit-what-happened-what-you-need-to-know/>

More Partnership Comment

We heard repeated pleas for the “sector to get involved.”

I asked later how this would happen and asked for any and all consultation to be open to anyone to contribute and to share wisdom and concerns alike. I said that I felt that there was no lack of willingness to engage – the problem was that the channels and method for that engagement was not clear, maybe especially for those outside the large mainstream charities.

I was assured that input from the all parts of the fundraising sector would be welcomed. This is most likely to be possible in an organised fashion once the new Regulator has a Chief Executive in place, with working groups on the proposed Fundraising Preference Service and on the new Code of Practice.

William Shawcross, Chair of the Charity Commission

The Commission has just published a draft of the latest version of its guidance to charity trustees on fundraising (CC20). This is out to consultation until 11 February 2016 and Mr Shawcross urged charities to read it and to comment.

This guidance sat neatly with his observations on the Etherington Review. He said “the fundraising practices revealed over the summer were shocking – I am sure to you as well as me.” He reiterated that the Charity Commission did not wish to be the regulator of fundraising, but that if trustees continued to fail in their governance of fundraising then the self-regulation system would have failed and statutory regulation would be necessary. For now, however, the Commission would provide the “statutory backstop” for a new self-regulatory regime; it would only expect to step in cases where trustees had failed in their governance duties to control fundraising behaviour.

He argued that trustees had not kept a close enough eye on their fundraisers and consequently, abuses had been allowed to develop. In future the Commission would expect the trustees of all fundraising charities to ensure that their fundraising complies with the new Code of Practice. Thus compliance with the Code will become a core governance requirement.

Key messages from William Shawcross were:

- Engage with the CC20 “fundraising for trustees” consultation
- Trustees were responsible for the overall fundraising approach of a charity and the way in which that reflects the values of the charity. This was a core trustee responsibility.

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For those clients which are regulated by the Charity Commission of England and Wales their submission to the CC20 consultation is recommended, not least because of the proposed governance requirement to comply with the Code.

Many of our clients are not regulated by the Charity Commission and we await news on HEFCE and DCMS' reaction to the Etherington Review, as well as the views of the Scottish and Northern Irish charity sectors. (An Appendix is attached showing who is regulated by whom.) In England and Wales it is possible that HEFCE / DCMS etc. will take a lead from the Charity Commission's approach. If they do, then conforming to the Code will also become a governance requirement of university councils, museum trustees etc. even if these institutions were not directly subject to the new Regulation scheme.

Thus the content of the new Code becomes something of importance to all fundraising organisations in England and Wales, and possibly in Scotland and Northern Ireland.

Rob Wilson MP, Minister for Civil Society

The Minister said that discontent amongst the public about fundraising had been growing, and that the sector was now at a crossroads. It was important to “put the public back in control” of the way in which it was contacted. He claimed that over the summer he had “fought strongly to give charities a last chance for self-regulation” but said that it had come “this close” to having statutory regulation imposed. But, “things do have to, and indeed, must change.”

He said that the sector needed to “calm down” about the Fundraising Preference Service, saying that he did not see it becoming the “default way” of donors dealing with charities. But we should be in no doubt that it was going to happen, and he was in any case “sceptical about the dire predictions” he had heard from the sector about its possible impact.

However, he said that he hoped that FPS would be “far more nuanced” in practice than had been thus far discussed in theory, suggesting there might be an exemption for small charities “who don't engage in this type of fundraising.” He said he had “every confidence that it could be made to work for everyone.” But there must be “no delay and it must not be too complicated.”

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Of the five speakers from whom we heard on the day, it felt as if the Minister was the one who had most made his mind up about how things should be from now on. Aside from the small concession on FPS and small charities, it was clear that he wanted all the provisions of the Etherington report implemented by the end of 2016.

We remain sceptical about how an FPS of the kind the Minister proposes can actually be made to work in practice without being a very blunt instrument.

Martin Sime, Chief Executive of the Scottish Council of Voluntary

Organisations was briefly introduced and asked to summarise the position in Scotland. He said that charities in Scotland had had their own “Summit” recently, and the decision would be made by Scottish fundraisers on whether to join an English and Welsh fundraising regulation scheme, or whether to design their own.

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Scotland appears to be taking a slower and more evidence based approach to the question of fundraising regulation. If this results in a less onerous regime in Scotland, especially one without a Fundraising Preference Service, then it could be argued that a combination of the less assertive fundraising style taken by many Scottish charities, together with a higher regard in Scotland for the not-for-profit sector will have been vindicated.

This leaves unanswered the question of cross-border fundraising, and whether Scottish based charities which fundraise from people in England and Wales will need to have regard for fundraising regulation beyond the Scottish regime, and vice-versa, especially since Charity Regulation is a fully devolved matter for Scotland. The model of “self regulation backed up by a statutory regulator” can surely not easily work across a border if the self-regulatory regime belongs to a different jurisdiction than the statutory “backstop.”

Lord Grade, interim Chair of the Fundraising Regulator

We were next introduced to the Lord Grade, known to many as Michael Grade who has held important posts in all the UK’s major terrestrial broadcasting services.

He first sought to reassure the sector about his own experience; “I’ve been very, very heavily regulated in a situation where they can take away your business.” He told us that at least one of the chairs of the broadcasting regulator had only bought a television when becoming its chair, and of being criticised for having made soap operas “too popular.” He talked about his role in having promoted Childline, Children in Need and Comic Relief while at the BBC.

He intended the new regulatory regime to be in place by the end of 2016. He was committed to listening (that was the point of self-regulation), but implementation of the Etherington Review was not negotiable. Importantly, he said he had heard the sector concerns about unintended consequences. He was “not in a rush” but equally, things must not move too slowly. He was at pains to emphasise that this was self-regulation so that it would not work without the involvement of the fundraising profession.

He announced a series of practical steps as follows:

- The Board of the Regulatory body was being put together, and “you will know by the composition of the board that your voice will be heard.”
- Interviews for a Chief Executive were about to take place, and he hoped someone would be in place by Christmas. There had not been time for a formal advertising / headhunter process but several good people had expressed an interest in the post.
- The appointment of the Chief Executive would signal the beginning of substantive work on the development of the new Regulatory Body.
- The recently appointed lay chair of the IoF Standards Committee, Suzanne Macarthy had agreed to become chair of a new group which would become the “owner” of the Code of Practice.
- He had appointed a Chair of the Fundraising Preference Service working group, George Kidd, currently chair of the Direct Marketing Commission and Chief Executive of the Online Dating Association. He was previously Chief Executive of PhonePayPlus, the premium telephone line self regulator. This was perhaps the biggest surprise of the morning.

In closing and before handing over the George Kidd, Lord Grade said that once a Chief Executive had been appointed, there would be “an intense few months of batting ideas around – we do want to be open and transparent; reading what you write, listening to what you say. We won’t undo Etherington, but we will listen.”

George Kidd, chair of the Fundraising Preference Service Working Group

George Kidd came across as someone who had been well briefed and had already done some significant thinking about the issues. Important comments were:

- “I’ve heard what you’ve all been saying about the importance of pre-existing relationships.”
- “The Regulatory side of the Telephone Preference Service wasn’t working”
- FPS needs to be a safe haven – a refuge for those who feel fundraising volume is intolerable.
- “I’m instinctively an opt-out person (*i.e. giving people the opportunity to opt-out, rather than requiring them to opt-in to receiving information*) – if you want to demonstrate why opt-out is wrong, then you’ve got to say why opt-in is right.”

He then listed some of the challenges he faced in getting FPS right. These included:

- How to deal properly with different sized charities, from the very large to the very small
- How FPS might actually work in practice – from registering to screening etc?
- Warm vs cold relationships
- Is registration one-off?
- Might there be a way for donors to “switch back on” from certain charities?

George Kidd handed back to Lord Grade who encouraged us all once again to “get involved” with contributing to standard setting, the design of FPS and the development of self regulation. Lord Grade closed with a caveat that “some short term revenue risk was a small price to pay for restoring public confidence in the sector.”

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It’s perhaps easy to be taken in by appeasing words from a new regulator and his FPS appointee. But Lord Grade appeared to be a pragmatist, and without question he knows what it is like to be regulated. He and George Kidd came across as “can do” people with a commercial background who realise that charities need money to carry on their work. Lord Grade is a ministerial appointee, and George Kidd is Lord Grade’s appointee, so it is clear who their “masters” are. But one had a sense that they would also be willing to tell the minister what would and what would not work, so long as they were helped by the sector to address the fundamental issues which had caused the Etherington Review to be commissioned in the first place.

It seems that the Fundraising Preference Service will happen in some form. The challenge will now be to minimise its impact on those who are happy to hear from a charity while maximising its effectiveness in stopping unwanted communication.

Practically speaking, it is now very important that evidence is assembled and presented to the Chief Executive of the Fundraising Regulator once that person is appointed.

Submissions will need to be made to the Fundraising Preference Service working group to ensure that FPS is effective without harming charities’ ability to communicate with those who wish to hear from them.

And finally, as it becomes clearer how the new Code of Practice will develop, it will be important that fundraising areas which have not caused concern are properly represented and heard so that inappropriate regulation does not restrict their growth. Here we include major gift fundraising, fundraising from members of arts organisations and alumni of education institutions, trusts and foundation fundraising and corporate fundraising.

How to “engage with the process”

On 9 December 2015 I asked NVCO what the next steps would be for charities and other bodies which wished to contribute their views and evidence. I was told by NCVO’s expert on charity law and regulation that:

“We are currently discussing with George Kidd, who as you are aware has been appointed as chair of the working group on the FPS, how to best ensure wide engagement from the sector. I expect that there will be a formal consultation process, although we still need to decide on the detail.

“With regards to the Standards Committee, that work will be led by Lord Grade so we are not directly involved. My understanding is that the current Standards Committee will transfer to the new fundraising regulator once it is set up, although its membership will need to be reviewed.”

Other Matters: Data Protection

The new European General Regulation on Data Protection was mentioned briefly, specifically asking if FPS might be superseded by the new EU Regulation. The new Fundraising Regulator said he was not going to wait for the EU before deciding what to do.

The Information Commissioner, though present, did not comment on this or any other matter. He is on record as an opponent of the Fundraising Preference Service, regarding it as unenforceable – at least by his office. He has recently adopted a much more demanding stance on the meaning and duration of “consent” and expressed his frustration with any charity’s special pleading about the nature of its relationship with its supporters. Sir Stuart Etherington said that NCVO had been specifically asked to develop a dialogue with the Information Commissioner, although no more information was given on this.

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Unlike much of the discussion around Etherington, the Data Protection Act and the regulations covering telephone and email fundraising are already on the statute book. The guidance published by the Information Commissioner’s Office over the last fifteen years has evolved somewhat, with a much more literal interpretation now being taken of what is and is appropriate and / or permissible. We feel that ICO’s public approach has been to take a very “binary” view as to whether someone has or has not given consent to be approached. This approach is particularly problematic in the case of people with complex pre-existing relationships with fundraising institutions.

As the dialogue develops, in whatever form, between ICO and NCVO, those with an interest in its outcome will need to make sure appropriate evidence is presented to both parties.

Other Matters: The new Regulator’s jurisdiction and funding

In some of the speeches we sensed a degree of uncertainty over the enforceability of the new Regulator’s proposed jurisdiction. The Etherington Review proposes a universal system of regulation – for registered charities at least. A contrast is very deliberately drawn between the current voluntary FRSB system, with charities being free to join, or not to join² and a new system where the Regulator would have jurisdiction over all fundraising charities. It is proposed that the new Regulator would have powers to require a charity to change behaviour which contravenes the new Code of Practice and even to desist from fundraising in a particular way for a period, and to be required to submit alternative fundraising plans for approval to the new Regulator.

What appears unexplored at this stage is the extent of enforcement powers which will be held by the new Regulator. It is also unclear as to the extent to which the new Regulator will be able to require charities to pay the levy and what will happen if they choose not to. Finally, will the Regulator’s powers differ in respect of charities which are assessed to pay the regulator’s levy and those which are not, or indeed those who have been assessed to pay but have not done so?

² Only fifteen “.ac.uk” domain institutions have joined the FRSB, according to its website, the majority of which are registered charities. Just one pre-1992 university and only three national museums have joined.

It is clear that the “statutory backstop” model is intended to provide some guarantees about compliance. It is likely both the Regulator and the Charity Commission would argue that non-payment of a levy, and / or non-compliance with the Regulator’s enforcement action would amount to a failure of Governance and would therefore properly be a matter for the statutory regulator.

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It is clearly the Etherington Review’s ambition that all fundraising charities in England and Wales should be subject to the new Regulator’s jurisdiction. But at this stage the model for requiring charities to pay the levy and to comply with any enforcement action is unclear unless the “statutory backstop” structure is to be invoked.

In respect of exempt charities, most of their primary regulators now have some kind of memorandum of understanding with the Charity Commission regarding investigations and corrective action (see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433972/CC23_Annex_2.pdf) Maybe this will become the model for invoking a statutory backstop in respect of fundraising Regulation.

If indeed this is chosen as the method for implementing the Etherington Review in exempt charities then the effect will be to place upon exempt charities the same requirements and liabilities in respect of enforcement action as placed upon Registered Charities by the Charity Commission.

Separately, we remain concerned about the Regulator’s proposed funding model which will require payment of a levy proportional to fundraising expenditure. This creates significant potential for an unfair burden to fall on those charities which spend a higher than average proportion of their fundraising budget on major gift fundraising staff. This is because the number of fundraising contacts being made by these staff will be a tiny proportion of the number which would be made if the same budget were spent on telephone, direct mail or door-to-door / street fundraising. We think a levy on non-staff expenditure would be more proportionate.

Other matters: a important word about nomenclature.

In the education and arts worlds, “face to face fundraising” usually means major gift fundraising. In the rest of the charity sector, this is the formal term for what the Daily Mail (and many others) would refer to as “chuggers” – on street fundraising. Any new regulation or Codes of Practice referring to these areas of fundraising need to be very clear about which of these they refer to.

Adrian Beney
Partner, More Partnership
11 December 2015

Appendix 1 – Who regulates whom?

| Organisation Type | Example | Regulator |
|--|---|--|
| English or Welsh Organisations with a Registered Charity Number (not to be confused with an HMRC claim number) | Most Oxford Colleges Most Cambridge Colleges Some Durham Colleges Most Arts organisations Most mainstream charities Churches with a turnover more than £100k | Charity Commission for England and Wales |
| Universities which are also Registered Charities | Royal Agricultural University Conservatoire for Dance and Drama Royal College of Music | Charity Commission for England and Wales |
| English Universities which are Exempt Charities | University of Oxford University of Salford University for the Creative Arts | Higher Education Funding Council for England |
| National Museums in England which are exempt charities | British Museum Tate Wallace Collection | Department for Culture, Media and Sport |
| Royal Botanic Gardens, Kew | Kew Gardens | Department for Environment, Food and Rural Affairs |
| English Further Education Corporations | FE Colleges | Department for Business, Information and Skills |
| English Foundation schools, academies and sixth form colleges | | Department for Education |
| Welsh charities, including Universities | Bangor University Glyndŵr University University of South Wales | Charity Commission for England and Wales |
| Scottish charities, including Universities | University of Edinburgh University of Paisley National Museum of Scotland Children 1 st | Office of the Scottish Charity Regulator |
| Northern Irish charities, including Universities | University of Ulster Queen's University Belfast National Museums & Galleries Of Northern Ireland Lyric Theatre | Charity Commission for Northern Ireland |

A definitive explanation of English and Welsh exempt charities is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449941/cc23_lowink.pdf

Appendix 2 – Summit Attendance List

| Person Attending | Organisation Represented |
|-----------------------|--|
| Adrian Beney | More Partnership |
| Adrian Burder | Dogs Trust |
| Aidan Warner | NCVO |
| Alistair McLean | Fundraising Standards Board |
| Barbara Frost | WaterAid |
| Ben Harrison | Office for Civil Society |
| Ben McNaught | National Deaf Children's Society |
| Campbell Robb | Shelter (Head office) |
| Caroline Harper | Sightsavers |
| Catherine Cottrell | United Nations Children's Fund UK |
| Ceri Edwards | Institute of Fundraising |
| Charlotte Guiver | Arthritis Research UK |
| Chris Millward | Institute of Legacy Management |
| Chris Wade | Motor Neurone Disease Association |
| Christopher Graham | Information Commissioner's Office |
| Clive Emmerson | Help for Heroes |
| Daniel Fluskey | Institute of Fundraising |
| Danielle Atkinson | Breast Cancer Now |
| David Bull | United Nations Children's Fund UK |
| David Canavan | Royal Society for the Prevention of Cruelty to Animals |
| David Cook | Donkey Sanctuary |
| David Murray | SSAFA |
| David Robb | OSCR |
| Di Flatt | Sweetpea Charity |
| Dianne Hayter | House of Lords |
| Donna Day Lafferty | University of Chichester |
| Ed Aspel | Cancer Research UK |
| Ed Owen | Direct Marketing Association |
| Elisabeth Anderson | Institute of Development Professionals in Education |
| Elizabeth Chamberlain | NCVO |
| Esther Jackson | Age UK |
| Frances McCandless | Charity Commission For Northern Ireland |
| George Kidd | Direct Marketing Commission |
| Girish Menon | ActionAid |
| Heidi Travis | Sue Ryder |
| Helen Raftery | NCVO |
| Howard Leigh | House of Lords |
| Ian Farthing | Catholic Agency for Overseas Development |
| Jan McLoughlin | PDSA |
| Javed Khan | Barnardo's |
| Jayne George | Guide Dogs For the Blind |
| Jill Pitkeathley | House of Lords |
| Jo Chettleburgh | YMCA |

| Person Attending | Organisation Represented |
|--------------------|--|
| Jo O'Neill | Medical Aid for Palestinians |
| John Low | Charities Aid Foundation |
| John Middleton | CASE Europe |
| John Mitchison | Direct Marketing Association |
| Karl Mitchell | Woodland Trust |
| Karl Wilding | NCVO |
| Kath Abrahams | Diabetes UK |
| Ken Burnett | Consultant |
| Lindsey Rennard | PDSA |
| Liz Tait | Battersea Dogs And Cats Home |
| Loretta Minghella | Christian Aid |
| Lori Houlihan | UCL and representing Universities UK |
| Marcus Missen | WaterAid |
| Mark Atkinson | Scope |
| Mark Maliniak | Mencap |
| Mark Wood | NSPCC |
| Martin Sheehan | Alzheimer's Society |
| Martin Sime | Scottish Council for Voluntary Organisations |
| Martyn Lewis | NCVO |
| Matt Hyde | Scout Association |
| Matthew Reed | Children's Society |
| Michael Clarke | Royal Society for the Protection of Birds |
| Michael Grade | House of Lords |
| Michael Payne | Help for Heroes |
| Michele Settle | Comic Relief |
| Mike Smith | Institute of Fundraising |
| Nick Starkey | Office for Civil Society |
| Paul Boissier | Royal National Lifeboat Institution |
| Paul Stallard | Public Fundraising Regulatory Association |
| Paul Taylor | British Red Cross |
| Pauline Broomhead | The FSI (Foundation for Social Improvement) |
| Peter Hepburn | Cats Protection |
| Peter Hills-Jones | Public Fundraising Regulatory Association |
| Philip Kirkpatrick | Bates Wells Braithwaite |
| Rachel Kirby-Rider | CLIC Sargent |
| Richard Leaman | The Guide Dogs for the Blind Association |
| Richard Raine | Fundraising Standards Board |
| Richard Spencer | Donor Experience |
| Richard Taylor | Cancer Research UK |
| Rob Wilson | House of Commons |
| Rodney Green | St John Ambulance |
| Ruth Grice | Wildlife Trusts |
| Saleh Saeed | Disasters Emergency Committee |
| Sally Nichols | Action for Children |
| Sally O'Neill | Royal Opera House Foundation |

| Person Attending | Organisation Represented |
|-------------------------|---------------------------------|
| Stephanie Hilborne | RSWT |
| Steve Conway | St John's Ambulance |
| Stuart Etherington | NCVO |
| Sue Wilkinson | National Trust |
| Susann Hering | Cabinet Office |
| Suzanne McCarthy | Institute of Fundraising |
| Tanya Barron | Plan UK |
| Tim Bradshaw | Russell Group |
| Tim Hunter | Oxfam |
| Tim Johnson | Great Ormond St Hospital |
| Tim Pilkington | World Vision UK |
| Vicky Browning | CharityComms |
| William Shawcross | Charity Commission |
| William Wallace | House of Lords |