

Radcliffe
Chambers

Professional charity fundraisers

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The background

In the 1980s, there were 3 key developments:

1. More fundraising charities (rather than endowment charities)
2. More professional fundraisers
3. Public concern about fundraisers' fees and practices

The current law

1. Part II Charities Act 1992
2. Charitable Institutions (Fund-Raising) Regulations 1994
3. Office of the Third Sector, *Charitable Fundraising: Guidance on Part 2 of the Charities Act 1992* ([2008](#))

Our topics

Part 1: Who is regulated?

- a) Professional fundraisers
- b) Commercial participators
- c) Quasi-commercial participators

Part 2: What does the law require?

- a) Agreements in the prescribed form
- b) Solicitation statements
- c) Cancellation rights
- d) Record keeping
- e) Transmitting money and property

Part 3: What are the consequences of failing to comply?

- a) Injunctions
- b) Winding up and director disqualification
- c) Criminal prosecution

1. Who is regulated?

General comments

- The Act is “*drawn deliberately widely so as to apply to as many instances of business fundraising by third parties as possible*”: *Tolley’s Charities Manual*, Division A, paragraph [3.44]
 1. E.g. institutions which are established for charitable, benevolent or philanthropic purposes: section 58(1)
- The Act is not well drafted or easy to apply in practice
- In 2013, the government said it would develop simpler guidance. Nothing has yet been published.

Who is not covered by the Act?

(See section 58)

1. A charity which fundraises for itself
2. Charities which jointly fundraise for themselves
3. A charity which fundraises for another charity
4. Individuals who enter sponsored events (e.g. a marathon) and solicit sponsorship
5. Fundraising organisations which are controlled by the charity in question (e.g. subsidiaries)
6. Celebrities who appear in fundraising adverts

Professional fundraisers

Two types of professional fundraisers (section 58(1)):

1. Any person carrying on a fundraising business
 - i.e. their primary business is soliciting or procuring money or property for charitable purposes
 - To establish what a company's 'primary' business is, look at its most recent annual return
2. Any other person who for reward solicitors money or property for the benefit of a charity
 - i.e. *part* of the business model involves fundraising

Professional fundraisers

For example:

1. Middlemen who take their fee out of the donation
 2. A company paid by a charity to seek donations
 3. Someone paid by a charity to assist with funding applications
 4. Someone paid by a charity to develop a fundraising strategy
 5. A company paid by a charity to sell lottery tickets
- **Exception:** a fundraiser which earns less than £10 per day or £1,000 per year

Commercial participators

Someone who promotes their own goods or services by saying proceeds or a donation will go to *a named charity* (section 58)

1. Must be independent of the charity
2. Cannot be a 'professional fundraiser'; one or the other
3. Must make a representation "*in any manner whatever, whether expressly or impliedly*" (e.g. using a logo)
4. The money must go to a named charity (not just charitable purposes)
5. **No** exception for low-earning organisations

Commercial participators

For example:

1. A card shop which sells cards stating that a named charity will receive 10p for every pack sold
2. An organisation which runs a competition in which part of the proceeds will go to a named charity
3. A bank which handles a charity's fundraising account and charges the usual fees is **not** a commercial participator
4. A company which sponsors an event put on by a charity is probably **not** a commercial participator

Quasi-commercial participants

- Not a phrase used in the Act, but the category of people caught by regulation 7
- Someone who promotes their own goods or services by saying proceeds or a donation will go to *charitable purposes*
- E.g. a card shop which sells cards which state that 10p from every pack sold will go to support needy children

2. What do the rules require?

Agreements in prescribed form Radcliffe Chambers

- It is unlawful to raise funds for the benefit of a charity without an agreement in the prescribed form with that charity: section 59 and regulations 2-3
- If you have an agreement which does not satisfy the requirements, the fundraiser cannot enforce it: s. 59(4)
- Fundraisers can only receive remuneration or expenses if the agreement satisfies the prescribed requirements: section 59(5)

Agreements in prescribed form Radcliffe Chambers

The requirements (ss 59(7)-(8) and regs 2-3):

1. Name and address of each of the parties
2. The date on which the agreement was signed by each party
3. How long the agreement will last
4. Any terms for earlier termination
5. Any terms relating to the variation of the agreement
6. A statement of the principal objectives of the agreement and the methods to achieve them
7. How money will be divided between the charities (if more than one)

Agreements in prescribed form Radcliffe Chambers

The requirements (ss 59(7)-(8) and regs 2-3):

8. How much will be given to the charity for each sale (for commercial participators)
9. How much the fundraiser can charge
10. The name of any voluntary scheme by which the fundraiser agrees to be bound
11. How the fundraiser will protect vulnerable people from unreasonable intrusion, unreasonably persistent approaches, and undue pressure
12. How the charity can monitor the fundraiser's performance

Solicitation statements

Fundraisers must provide a 'solicitation statement' every time they contact a new potential donor or client: section 60

1. If money is being raised for charitable **purposes**, the statement must state this and explain how the fundraiser will decide how to distribute the funds
2. If money is being raised for **charities**, the statement must name the charities and state the proportions in which the charities will benefit
3. How the fundraiser's remuneration is calculated
4. How much the fundraiser will be paid for the *entire* appeal
5. Explain the right to cancel (if soliciting by TV, radio or phone)

Solicitation statement

- There is no particular form of words
- Appendix B of the Cabinet Office guidance gives precedents
- Make the statement at the right time. For example:
 1. For street collections, display it on your stand or your person
 2. For a charity event, display on the ticket or brochure
 3. For TV or radio fundraising, give the information orally and follow up within 7 days with a written copy if the customer pays or donates £100 or more

The right to cancel

- A donor/purchaser has a right to cancel within 7 days **if** (s61):
 1. Hear a radio or TV advert or were solicited orally without the donor being present (e.g. over the phone)
 2. Make a donation or purchase of £100 or more; **and**
 3. Pay by card
- To exercise the right, simply write to the fundraiser
- Doubt over whether this can be sent by email: cf section 76
- Refund the full amount less any reasonable expenses
- Purchaser must return any goods purchased
- Cannot claim a refund if the service has been provided

Record keeping

- Any charity which is party to a prescribed agreement can ask at any reasonable time for a copy of (regulation 5):
 1. Books, documents, or other records;
 2. Which the fundraiser holds; **and**
 3. Which relate to the charity *and* the prescribed agreement
- The obligation continues for a reasonable period after the agreement has expired

Transmitting money & property

Regardless of any term in the agreement (regulation 6):

1. Money & cheques must be transferred to the charity:
 - a) As soon as reasonably practicable
 - b) In any event within 28 days (or longer if this is agreed or there is a reasonable excuse)
 - c) Without deducting fundraiser's fees
2. Any other property must be:
 - a) Dealt with in accordance with charity's instructions
 - b) Held securely pending transfer

3. The consequences of failing to comply

Injunctions

A charity can obtain an injunction against a fundraiser if the fundraiser (ss. 59(3) and 62):

1. Is fundraising for the charity without an agreement in the prescribed form;
2. Is fundraising using methods to which the charity objects;
3. Is not a fit and proper person to fundraise for the charity; **or**
4. Is making representations or promotions with which the charity does not wish to be associated.

Injunctions

- The charity needs to prove that the fundraiser will continue to act wrongfully unless restrained by the court
- If there is an agreement in the prescribed form, the charity must give 28 days' written notice to the fundraiser asking them to stop forthwith
- There is no need to serve notice on the fundraiser if:
 1. The fundraiser does not have an agreement in the prescribed form with the charity; **or**
 2. The unlawful fundraising restarts within 12 months of the charity's last written notice
- There is no other remedy available to the charity

Winding up and disqualification Radcliffe Chambers

- Secretary of State has power under s.124A Insolvency Act 1986 to petition to wind up a company if it is:
 1. Expedient in the public interest; **and**
 2. Just an equitable to do so
- E.g. Re Supporting Link Ltd [2004] EWHC 523 (Ch) and Re Derek Colins Associates Ltd, 31st July 2002, Mr Anthony Mann QC
- Insolvency Service can also apply to disqualify the directors of the unlawful fundraiser
- Both of these orders are rare in the fundraising context

Criminal prosecution

- It is a criminal offence to fail to (ss60(7)-(10) and reg 8):
 1. Keep appropriate records
 2. Transfer money or property as required
 3. Provide appropriate solicitation statements
 4. Fundraise without a prescribed agreement in force
- For the solicitation statement offence, there is a defence of taking all reasonable precautions and due diligence
- Offences are punishable by a fine *per* offence (e.g. *per* donation made without a prescribed statement given)
- No known prosecutions of these offences



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