

# CONTROL OF FUND-RAISING FOR CHARITABLE INSTITUTIONS: THE NEW LAW - PART I

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## A. Introduction

When Part II of the Charities Act 1992 is brought into force, English law will, for the first time, have in place controls upon what the 1992 Act terms "professional fundraisers" and "commercial participators". Persons now identified as professional fundraisers or commercial participators may currently be subject to the various legislative provisions relating to collections: they might, for instance, rank as promoters under the House to House Collections Act 1939. Such controls, which will be superseded by Part III of the Charities Act 1992 (see (1992-3) 1 CL & PR 35-44), relate largely, however, to matters of public order. They do not take account of modern-day fundraising methods and the growth of independent fund-raising firms. This is the function of Part II, which finally places on the statute book recommendations, some of which can be traced back beyond the White Paper and Woodfield to the NCVO Report, *Malpractice in Fundraising for Charity* (1986).

Part II of the Act (like Part III) applies to fund-raising, not merely for charitable purposes and institutions in the narrower sense, but for "charitable, benevolent and philanthropic purposes" and for institutions established for such purposes. By way of word-saving, the expression "charitable institution" means one established for such purposes: s.58(1). This is not in itself objectionable; but, rather disconcertingly, the expression "charity" (like "charitable" when not qualifying the word "institution") retains the narrower meaning which it has under the Charities Act 1960: s.58(1).

In essence, Part II introduces rights and duties of four kinds. These relate, first, to fund-raising agreements with charitable institutions; secondly, to disclosure of information to persons solicited; thirdly, in special situations, to refunds; and, fourthly, to the granting of injunctions to prevent objectionable fund-raising. These provisions are therefore designed in part to protect charities, and in part to protect donors. Donor protection is to be achieved by a system of disclosure at the point of solicitation (which may be termed "up-front" disclosure) with (in special cases) a right to a cooling-off period analogous to that provided to consumers under the Consumer Credit Act 1974.

The provisions of Part II (particularly the definition sections) are complex; and, although considerably improved in their passage through Parliament, they are still not

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entirely free of difficulties. In places, the draftsmanship is neither succinct nor felicitous. Additionally, there remains to be clarified, in the regulations which the Secretary of State is empowered to make under s.64, a number of important points.

## **B. Definitions**

### **1. Professional Fund-raiser**

In essence, this is (a) any person (apart from a charitable institution) who carries on a fund-raising business, or (b) any other person (not otherwise excluded) who for reward solicits money or other property for the benefit of a charitable institution: s.58(1).

"Fund-raising business" means any business carried on for gain and wholly or primarily engaged in soliciting or otherwise procuring money or other property for charitable, benevolent or philanthropic purposes: s.58(1).

Thus the hallmark of a professional fund-raiser is that he solicits. This excludes the marketing, advertising, or fund-raising, consultant. It also excludes any other person who performs a function other than soliciting - such as a direct mailing organisation hired to send out charity appeal letters, or a catering company contracted to provide food at a fund-raising dinner.

### **Excluded Persons**

Specified categories of persons who solicit are excluded from the definition of professional fund-raiser: s.58(2). These are:

- (a) any charitable institution or company connected with it;
- (b) any officer, employee or trustee of such institution acting in that capacity;
- (c) any person acting as a collector of a public charitable collection within Part III (except for a promoter);

- (d) any person who in the course of a "relevant programme" makes any solicitation at the instance of that institution or company; "relevant programme" means a radio or television programme in the course of which a fund-raising venture is undertaken by a charitable institution or a company connected with it;
- (e) any commercial participator.

A company is connected with a charitable institution if the latter (together, if necessary, with other such institutions) is entitled to control the whole of the voting power at the company's general meeting: s.58(5).

Thus, in-house fund-raisers, including wholly-owned trading companies and their employees, are excluded under paras (a) and (b). As regards the public, this exclusion undermines the principle of up-front disclosure. Calls for such disclosure were in part prompted by evidence that a few professional fund-raisers were charging excessively high fees. Less reputable professional fund-raisers might now seek to escape the disclosure provisions by forming their own (captive) charities to employ themselves as fund-raisers at large salaries.

The exclusion in para (d), together with others relating to television and radio, was added during the Bill's progress through Parliament. Fears were there expressed that, as the Bill originally stood, some persons appearing on the television in a fund-raising event might themselves rank as professional fund-raisers. Terry Wogan was specifically mentioned; but there was concern that other persons paid a small appearance fee might also be caught: see Parliamentary Debates, House of Lords, Committee (hereafter HL Com.), 11 December 1991, cols. 222-223. Arguably the exclusion was unnecessary in the case of Terry Wogan (who traditionally hosts the BBC's Children in Need Appeal) since he does not solicit on such programme for reward - he is paid by the BBC to do a job, of which hosting such programme is merely a part: see HL Com., *ibid.* Regard should also be had to s.58(8). This provides that any solicitation made by a person (whether or not for reward) at the instance of a professional fund-raiser in the course of a radio or television programme is to be regarded as made only by the professional fund-raiser.

### **Persons Receiving Nominal Pay**

Excluded from the definition of a professional fund-raiser is a person who does not receive remuneration exceeding £5 per day or £500 per year for soliciting for the charitable institution, or £500 in respect of any fund-raising venture: s.58(3). This provision (which was added in Parliament) excludes persons who are essentially volunteers but receive a small honorarium: see HL Com., cols. 218-219.

### **2. Commercial Participator**

This means any person who: (a) carries on for gain a business other than a fund-raising business, but (b) in the course of that business, engages in any promotional venture during which it is represented that charitable contributions are to benefit a charitable institution: s.58(1).

"Promotional venture" means "any advertising or sales campaign or any other venture undertaken for promotional purposes": s.58(1). The expression "charitable

contributions" is widely defined, and includes "the consideration given for goods or services sold or supplied": s.58(1).

The definition of a commercial participator therefore clearly includes a manufacturer of goods who sells them with the representation that a proportion of the purchase price will be given to charity. The word "services" includes facilities, and in particular: access to any premises or event; membership of any organisation; the provision of advertising space; and the provision of any financial facilities: s.58(9). This last inclusion makes it clear that credit-card companies which offer charity cards are commercial participators.

Just as the hallmark of a professional fund-raiser is that he solicits, so the hallmark of a commercial participator is that he makes a representation. Thus persons who provide ancillary services for a charitable institution who do not themselves make representations are not commercial participators. This means that a firm contracted for a fee to send out a charity's appeal letters, or to put appeal notices in envelopes, is not a commercial participator. Similarly, a bank is not a commercial participator merely because it charges a fee for handling the charity's fund-raising account. Again, if a company sponsors a promotion which is undertaken by the charitable institution itself, such as a theatrical event, the company is not thereby rendered a commercial participator: see HL Com., col. 220.

### **C. Agreements with Charitable Institutions**

The first control, then, is that prohibiting a professional fund-raiser from soliciting for a charitable institution, or a commercial participator from representing that charitable contributions are to benefit a charitable institution, unless, in either case, he does so in accordance with an agreement with the institution satisfying the prescribed requirements: s.59(1) and (2). The prescribed requirements are those which may be specified in regulations: ss.59(6) and 64(2)(a).

The consequences of a breach of these provisions are three-fold. First, the charitable institution (and no other person) may apply for an injunction restraining the breach: s.59(3). Secondly, the agreement is not enforceable against the institution except to the extent (if any) as may be provided by court order: s.59(4). Thirdly, the professional fund-raiser or commercial participator is not, without a court order, entitled to any remuneration or expenses provided for in the agreement: s.59(5).

Regulations may require professional fund-raisers and commercial participators who are parties to such agreements to make available to the charitable institutions all relevant documents and records: s.64(2)(b). There is, however, to be no register of professional fund-raisers or commercial participators: to this extent the legislation does not go so far as that in force in the State of New York.

### **D. General Up-front Disclosure Requirements**

Where these apply, the solicitation or representation must be accompanied by a statement clearly giving specified information. No particular form is indicated: an oral statement therefore suffices.

The nature of the disclosure obligations depends upon whether the solicitation or representation is in respect of institutions or purposes. A professional fund-raiser can solicit for either of these; the representations of a commercial participator, however,

must by definition be made in respect of institutions. It is convenient to deal first with fund-raising for institutions.

### **1. Particular Charitable Institutions**

Where the solicitation is for the benefit of, or the representation is made in respect of, one or more particular charitable institutions, the statement must indicate:

- (a) the name(s) of the institution(s);
- (b) the proportions in which the institutions (if more than one) are to benefit; and
- (c) (in general terms) the method by which is to be determined:
  - (i) a professional fund-raiser's remuneration; or
  - (ii) what proportion of the consideration for goods or services sold or supplied by the commercial participator, or of any other proceeds of a promotional venture, will benefit the institutions concerned: or what sums are to be given by him in connection with such sale or supply: s.60(1) and (3).

### **2. Purposes**

Where the solicitation is for charitable, benevolent or philanthropic purposes of any description, the statement must indicate:

- (a) the fact that the professional fund-raiser is soliciting for those purposes and not for the benefit of any particular charitable institution(s);
- (b) the method for determining how the proceeds of the appeal are to be distributed between different charitable institutions; and
- (c) (in general terms) the method for determining his remuneration: s.60(2).

The expression "in general terms" is vague: will a mere statement by a professional fund-raiser that he is paid (for instance) a fixed percentage of the funds raised suffice; or will he also have to state the percentage itself? If compliance can be achieved without some indication of the professional fund-raiser's share, the information - although it may provoke inquiry - is in itself of little use.

Problems may also arise where a professional fund-raiser's remuneration is to be calculated by means of a more complex formula (e.g., according to a mixture of flat fee, time spent, and funds raised). In such cases, it is difficult to know what must be stated. Some professional fund-raisers may be tempted to calculate their

remuneration according to complex formulae in an attempt to ensure that a statement "in general terms" has no useful content. It is therefore to be hoped that the expression "in general terms" will be taken to require the imparting of a minimum amount of information in every case. This could be clarified in the regulations.