



Updating 'Charity fundraising: a guide to trustee duties'

ICAEW welcomes the opportunity to comment on the *Updating 'Charity fundraising: a guide to trustee duties'* published by Charity Commission on 3 December 2015, a copy of which is available from this [link](#).

This ICAEW response of 11 February 2016 reflects consultation with the Charity Technical Sub-Committee of the ICAEW Business Law Committee. The Sub-Committee includes representatives from public practice and the charity sector and the Business Law Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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MAJOR POINTS

1. We are responding to this consultation as our members participate in charities in ways that require them to have knowledge of fundraising law and practice, including as trustees of charities and as auditors or independent examiners of them.
2. While we understand that the Charity Commission wishes to highlight trustee fundraising duties and has therefore primarily addressed the guidance to trustees, we believe that the content would be of interest to others, such as donors and advisers and that the title of the old guidance was preferable to the title of the new. While 'fundraising charities' is defined, we wonder whether the term might nevertheless create the impression that the guidance applies only to charities involved in public collections or that use third parties to fundraise when, in fact, it has a much broader application.
3. The concerns arising in practice in relation to fundraising may vary depending upon the size of a charity and much of the guidance appears to be addressed towards larger charities with staff or professional fundraisers; it would be helpful to provide more guidance as to how different types of charity may be affected.
4. The use of 'must' or 'should' is not always consistent and 'should' is frequently used in prescriptive way. The result is that, notwithstanding the explanation of these terms, it is not clear whether some provisions reflect legal or regulatory requirements, regulatory expectations or simply good practice.
5. We have a number of reservations about the nature of this consultation. It would have been preferable for a longer period to have been allowed for responses, particularly given the time of year it was released. While we understand that the Commission may have felt a need to respond to recent events in this context, the existing guidance is in many ways still serviceable and it might have been preferable for the extensive changes envisaged here to have been made in a co-ordinated way with the new fundraising code (and, indeed, OSCR and CCNI, given that many of the main fundraising charities operate across the UK) even if this would have meant issuing the revised guidance at a later date.
6. We do not believe that the on-line only format is well designed to elicit the best possible responses from the public and some of the tick box questions are too absolute. We have attempted to include all the substance of this response in our online submission, but the order is different as not all questions permitted comment in the on-line form; we have therefore included comment as opportunities to do so have arisen and cross referred as appropriate. This has been very time consuming. We believe that there must be more usable online systems available (for instance, ones that enable printing of responses more readily) and that alternative options for responding should be made available to cater for the disadvantaged or others who do not have access to online tools if nothing else.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Have you used the current version of our fundraising guidance which is called 'Charities and Fundraising' (CC20)?

☐ Yes ☐ No

Q1a: When did you last use the current version?

☐ This month ☐ This year ☐ Last year ☐ A few years ago
☒ Other

If you selected other, please specify:

7. Q1 is not applicable to us as a body replying in relation to its members whose frequency of use of the guidance will vary.

Q1b: Do you find the current or new version most helpful?

☒ Current version is most helpful ☐ New version is most helpful

Please give reasons why:

8. See our 'major points' above regarding the tick box approach of this consultation. We have answered on the basis of the choice offered, but each version has strengths and weaknesses and we do not believe that it is appropriate to ask respondents which they prefer. We are not convinced that it was necessary to completely replace the old guidance and it would certainly be easier to comment if the old guidance had been updated with explanations as to why changes had been made.
9. For instance, section H of the old guidance contained a useful list of legislation that was useful but omitted from the new version.

Q2: The new version is shorter than the current version. Please select whether you think the new version is:

☐ Too short ☐ Too long ☒ About the right length

Please give reasons why:

10. We do not think that length is the best measure to judge the value of this publication. It could be shortened without any loss of substance. For instance the headings indicate the nature of the subject matter, so why say 'this section is about' (particularly so often)? Is it necessary to have 'Definition of key terms' at the front, as well as 'technical terms' at the back? Much is so obvious that it scarcely needs saying at all (for instance the opening paragraphs of the introduction). Do we really need to a page to say why the document exists and who 'should' read it and another page for an 'at a glance' summary? If it simply got to the point, it might be short enough for the reader to know at a glance what it is about and whether or not it is of interest.

11. However, we believe that more issues of substance could be covered, as noted elsewhere in this response. The guidance could, therefore, be more effective without necessarily being longer.

In the new version

Q3: Do you find the explanation of trustees duties in relation to fundraising clear?

☐ Yes ☒ No

12. We believe that some of the substance from the old guidance has been lost that might usefully have been retained (including the list of relevant legislation). There could usefully be more about the benefits of the Gift Aid scheme and the use of trading subsidiaries. Please see our introductory comments on use of 'should' and 'must'.
13. In places the guidance creates the impression that trustees should be involved in the day to day management of fundraising activity, rather than exercising a strategic and monitoring role; we suggest that it be made clearer that trustees, as such, are not necessarily required to run the charity on a day to day basis.

Q4: There are six principles trustees can use to fulfil their responsibility for their charity's fundraising. Do you find these a useful way of describing what trustees need to know and do?

☒ Yes ☐ No

14. We think that it would be more helpful to start with trustees' legal duties and for the activities that are required as a result (eg planning, delegating, monitoring) to be put in that context. The document might also usefully distinguish more between larger and smaller charities and the issues that might be relevant to each of them.

Q5: The commission has focused less on describing the wider legal rules that apply, in addition to trustee duties, to specific types and aspects of fundraising. For example, the rules on data handling and protection, collections in public spaces, and lotteries. This is:

- So that we can focus on trustee duties which we regulate
- To avoid duplication the free information on these rules which is produced by other regulators, agencies and the Institute of Fundraising
- To reduce the length of our guidance

Should the commission keep this focus on trustee role and duties?

☐ Yes ☒ No

If you answered no, what information about the wider legal framework do you think should be included in the guidance?

15. We think that the list of laws contained in the old guidance was helpful. If such a list exists elsewhere, then this guidance could link to it instead. The guidance emphasises trustee responsibilities for a charity's compliance with applicable laws and it should therefore help trustees to know what those laws are (particularly as the legal environment is now so complicated).

Q5a: Do you think the guidance includes enough links to sources of information about the wider legal framework for fundraising?

☐ Yes ☒ No

16. There are numerous links to other Charity Commission guidance and we think that cross references could be better and more precise. Referring readers (which include trustees of smaller charities and fundraising volunteers) to other long guidance documents is not necessarily the best approach. For example there is a link to CC8 guidance on financial controls, but a link to, or summary of, the relevant sections might be more helpful. The link on page 15 (7.3) for 'common types of fundraising fraud' goes to separate guidance on 'disaster appeals', without explanation, but a link to chapter 3 of the Commission's compliance toolkit on fraud and financial crime 'protecting charities from harm' – page 26 D5 – might be more helpful. There are substantial areas of overlap with CC3 *'The Essential Trustee'* and focused cross references to that might shorten the new guidance document and help ensure consistency. If it is difficult to provide links to specific sections of other documents, perhaps the new guidance could state in one place, which other publications are relevant to fundraising with page number/clause references and a brief summary of what the relevance is.

Q6: The commission has included two examples to help trustees avoid mistakes. Do you think it is useful to have these examples?

17.
☒ Yes ☐ No

If you answered no, please give reasons why:

Q6a: Are there other parts of the guidance where it would be useful to include an example?

☒ Yes ☐ No

If you answered yes, please give details:

18. It is helpful to include practical examples of common mistakes and how to avoid them and any other examples in the old guidance might usefully be carried across to the new.

Q7: The system for regulating fundraising is principally self-regulating and the final version of the guidance will describe the new self-regulation system, which is currently being developed. This version of the guidance seeks to describe the commission's role and its regulatory expectations of fundraising charities.

Does this guidance help you to understand what the commission expects of the trustees of fundraising charities?

☒ Yes ☐ No

19. It is helpful up to a point, but there is a great deal of uncertainty in this area with the establishment of the Fundraising Regulator and it will therefore need to be kept under review and updated when appropriate. It is also unclear how a trustee's legal duty to act in the interests of the particular charity might be reconciled with some of the broader expectations of the Charity Commission regarding the public perception of fundraising generally.

Q8: Would you use the checklist which has been produced in section 13 of this guidance?

☒ Yes ☐ No

20. We believe that the checklist requires some refinement, but that it is helpful to have a checklist. In particular, more consideration might be given to whether one checklist can cover charities of all sizes (for instance references to 'our in-house staff' would not be relevant to small charities with no staff).

Q9: How do you think the Commission can best help trustees become familiar with how their duties apply to fundraising? How could your organisation help us with this?

21. ICAEW provides information about being a trustee to its members and will be happy to highlight duties applying to fundraising and to discuss this further with the Charity Commission.
22. It is essential that the guidance is readily available on the Charity Commission's web-site. The gov website has a number of shortcomings which we have previously noted to the Charity Commission (and various government departments).

Q10: The Regulators' Code is a short document which sets out a framework for how regulators should engage with those they regulate. Section 2 of the Code is about regulators providing straightforward ways to hear the views of those they regulate. Section 5 is about the advice and guidance that regulators provide.

Do you think that this consultation process meets the principles in section 2 of the Regulators' Code?

☐ Yes ☒ No

If you answered no, please give details on what you think would help meet those principles:

23. While we welcome the opportunity to comment and have found the Charity Commission to be open and helpful in its relationship with us generally, we do not find the tick box on-line only approach adopted in this consultation to be helpful.

Q10a: Do you think that this guidance meets the principles in section 5 of the Regulator's Code? If not, what do you think would help meet those principles?

24. We have noted that the guidance does not properly and consistently distinguish legal or regulatory requirements from suggested good practice. We also wonder whether emphasis in the Code on use of 'plain English' is contributing to the discursive nature of some guidance, such as this.