

DATED 1st December 2006

**THE HIGHER EDUCATION FUNDING
COUNCIL FOR ENGLAND (1)**

and

THE EQUALITY CHALLENGE UNIT (2)

FUNDING AGREEMENT

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THIS AGREEMENT is made on 1st December 2006 **BETWEEN**

- (1) **THE HIGHER EDUCATION FUNDING COUNCIL FOR ENGLAND** whose address for correspondence is at Northavon House, Coldharbour Lane, Bristol, BS16 1QD ("**HEFCE**"); and
- (2) **THE EQUALITY CHALLENGE UNIT** (a company limited by guarantee and not having a share capital, registered in England No. 05689975) whose registered office is at 7th Floor, Queens House, Lincoln's Inn Fields, London, WC24 3LJ ("**ECU**").

WHEREAS:

- A. HEFCE is permitted by Section 65 of the Further and Higher Education Act 1992 to make grants, loans or other payments to any persons in respect of expenditure incurred or to be incurred by them for the purposes of the provision of services for the purposes of, or in connection with, the provision of education or the undertaking of research by institutions within the higher education sector, subject, in each case, to such terms and conditions as HEFCE think fit.
- B. ECU was established to promote equality of opportunity and promote diversity for all who work or seek to work in the higher education sector in the UK. Its remit has been extended to the promotion of equality of opportunity for students, excluding matters relating to the content of the curriculum. Its strategic aims are:
 - To be an authoritative and independent voice on policies that influence the delivery of equality of opportunity within the higher education sector.
 - To support institutions in their strategies for improving equality of opportunity and diversity for staff and students.
 - To benchmark the higher education sector's equal opportunities performance.
 - To inform the higher education sector about legislative developments relating to equality and advise it about their implications.
 - To provide strategic support in the implementation of legislative provision and policy relating to disabled students in England in collaboration with the Higher Education Academy and Action on Access.

These objectives constitute services falling within Section 65 of the Further and Higher Education Act 1992.

- C. HEFCE enters into this agreement on behalf of all the UK funding bodies, including the Scottish Funding Council (SFC), the Higher Education Funding Council for Wales (HEFCW), the Department for Employment and Learning in Northern Ireland (DELNI), Guild HE (formerly SCOP), and Universities UK (UUK), and this agreement will apply to grants and funds paid to the ECU by all these bodies as Funders of the ECU. This group shall periodically meet as a Funders' Forum. As lead funder and signatory to this Agreement, HEFCE recognises its responsibility to advise, and/or consult with, the other Funding Bodies on any significant issues arising from the oversight of the ECU carried out in accordance with this Agreement.

- D. HEFCE has agreed to make grants to the ECU to enable it to meet expenditure, in connection with the development, consideration and promulgation of best practice, support and guidance to further promote equality and diversity within the HE sector and the parties agree that the grants are to be applied against the activities set out in the ECU's Strategic and Operational Plans, as agreed by the Funders, and are not consideration for supplies of any description.

- E. This Agreement sets out the terms and conditions subject to which HEFCE has agreed to make grants available to the ECU. This Agreement supersedes any previous agreement made between the ECU and HEFCE.

- F. The Chief Executive of HEFCE is responsible and accountable to Parliament, as HEFCE's Accounting Officer, for payments made to the ECU and for satisfying himself that such payments are consistent with the purposes for which they were given to HEFCE and comply with the conditions attached to them. The Accounting Officer is also responsible for satisfying himself that the corporate governance, risk management and internal control system of the ECU is appropriate and sufficient to safeguard public funds and that the ECU observes the conditions of this Agreement. The ECU acknowledges these responsibilities of the HEFCE Chief Executive and that the chief executives of HEFCW, SFC and DELNI have comparable responsibilities in their own jurisdiction.

IT IS HEREBY AGREED as follows:

1 Definitions

1.1 In this Agreement unless the context otherwise requires:

"Commencement Date" means 1 December 2006 or, if later, the date of this Agreement;

"Force Majeure" means any event outside the reasonable control of either party affecting its ability to perform any of its obligations (other than payment) under this Agreement including Act of God, fire, flood, lightning, war, revolution, act of terrorism, riot or civil commotion, strikes, lock-outs or other industrial action, whether of the affected party's own employees or others, failure of supplies of power, fuel, transport, equipment, raw materials or other goods or services;

The **"Funding Bodies"** or **"Funders"** shall mean the HEFCE, the Scottish Funding Council (SFC), the Higher Education Funding Council for Wales (HEFCW), the Department for Employment and Learning in Northern Ireland (DELNI), Guild HE (formerly SCOP) and Universities UK (UUK). Where the **"other funding bodies"** are referred to, this shall mean all Funders except HEFCE.

"Month" means a calendar month.

1.2 The headings to clauses are inserted for convenience only and shall not affect the interpretation or construction of this Agreement.

1.3 Words importing the singular shall include the plural and vice versa. Words imparting a gender include every gender and references to persons include an individual, company, corporation, firm or partnership.

1.4 The words and phrases "other", "including" and "in particular" shall not limit the generality of any preceding words or be construed as being limited to the same class as any preceding words where a wider construction is possible.

1.5 References to any statute or statutory provision shall include (i) any subordinate legislation made under it, (ii) any provision which it has modified or re-enacted (whether with or without modification), and (iii) any provision which subsequently supersedes it or re-enacts it (whether with or without modification).

- 1.6 References to clauses and the schedule are to clauses of, and the schedule to, this Agreement.

2 Grant

- 2.1 HEFCE and the other funding bodies agree to make annual grants of agreed amounts to the ECU subject to, and in accordance with, the terms and conditions of this Agreement.
- 2.2 The ECU shall, unless otherwise agreed in writing by HEFCE on behalf of the Funding Bodies, use the proceeds of the grant made by the Funding Bodies pursuant to clause 2.1 to meet the aims and objectives of the ECU's Strategic and Operational plans.
- 2.3 The Funding Bodies shall be under no obligation to make any further payments or grants to the ECU, but if they agree to make further payments or grants to the ECU, such payments or grants shall be subject to such other conditions and variations to this Agreement as may be agreed at the same time between HEFCE, on behalf of the Funding Bodies, and the ECU.

3 Payment of Grant

- 3.1 Each of the Funding Bodies shall, subject as provided in this Agreement, make the agreed annual grant payment to the ECU by instalments on such dates as may be agreed between with the ECU (save to the extent that any such payment has been made to the ECU in whole or in part prior to the Commencement Date).
- 3.2 Payments made will normally be based on the budget agreed with ECU. None of the Funding Bodies shall be obliged to increase its annual grant during the period of this Agreement. HEFCE shall not be obliged to make any payment pursuant to clause 3.1 unless and until the other Funding Bodies have, at the time such payments are due, made the payments they have agreed to make. Ad hoc payments may also be made by agreement by HEFCE and/or the other Funding Bodies to the ECU. If any of the Funding Bodies agrees to make further payments of grant to the ECU, such payments of grant shall be subject to such other conditions and/or variations to this Agreement as may be agreed at the time between the Funding Bodies concerned and the ECU.

- 3.3 HEFCE and the other Funding Bodies anticipate that the ECU will seek income from other sources to supplement the grants paid by them to the ECU.
- 3.4 The Funding Bodies will normally pay grant so as not to be in advance of need. This will mainly be achieved through the agreement of an annual profile of payments of grants made by HEFCE to the ECU. Notwithstanding this, the Funding Bodies recognise that it is likely that the ECU will have cash balances on which interest may be earned. Any such interest derived from grant may be retained by the ECU up to a reasonable level, provided it is used for the same purposes as for the original grant. If there is a significant variation in the use of funds compared with the agreed profile the Funding Bodies reserve the right to adjust the grant or profile or to seek repayment of any excess income of this nature by agreement with the ECU. (HEFCE and the ECU will make arrangements for the ECU to maintain an appropriate working capital balance during the year and at the year-end).
- 3.5 The Funding Bodies shall not be obliged to make any payment pursuant to clause 3.1 if, in its reasonable opinion, the ECU is not, at the time such payment is due, being appropriately supported by the higher education sector, the determination of whether that support is being given to be within the reasonable discretion of HEFCE, in consultation with the other Funding Bodies.

4 Duration

- 4.1 This Agreement shall come into force on the Commencement Date and (subject to the provisions for earlier termination in clause 8) shall last until 31 December 2010. There is no guarantee of funding beyond this date unless otherwise agreed between HEFCE, ECU and/or the other Funding Bodies. If funding continues beyond 31 December 2010, then the provisions of this Agreement shall continue to apply unless otherwise agreed, unless and until either party gives to the other not less than three months' prior written notice of termination.
- 4.2 To assist the Funding Bodies' determination of any possible continuation of funding, the Funding Bodies will subject the funding arrangement to a review in 2008 or 2009. The ECU and other relevant stakeholders will be invited to contribute to that review.

5 Obligations of the ECU

- 5.1 The ECU acknowledges to HEFCE that the funding bodies have agreed to make the grant referred to in clause 2.1 in order that the ECU should carry out its aims and objectives in accordance with the ECU's Strategic and Operational plans. It is a requirement of this Agreement that the ECU should satisfy HEFCE (as lead organisation for the Funding Bodies) that the ECU has utilised the payments for that purpose. Accordingly, this clause 5 sets out various obligations which the ECU has agreed to undertake during the period of this Agreement.
- 5.2 The ECU will produce a Strategic Plan for its financial years 2006/07 to 2010 ("**Strategic Plan**"). The Strategic Plan will:
- (a) Include information and projections for each financial year of the ECU including likely planned activities and related income and expenditure. The Funding Bodies shall be entitled to make representations to the ECU in respect of the Strategic Plan and such representations will be considered by the Board of Directors (the Board) of the ECU.
 - (b) Include an assessment of the significant risks facing the ECU and such other information and projections as HEFCE, as lead organisation for the Funding Bodies, shall reasonably request.
 - (c) The ECU will produce and submit to HEFCE an annual operating plan ("**Operating Plan**") and annual budget at least 90 days prior to each financial year of the ECU. The budget for each year will reflect the activities contained within the Strategic Plan and the Operating Plan.
 - (d) The Strategic Plan and the Operating Plans may be updated from time to time to reflect any changes which the ECU may consider appropriate, provided always that the ECU will provide HEFCE and the other Funding Bodies with an opportunity to make representations with regard to the proposed revisions to the Strategic Plan and/or the Operating Plans (as the case may be).
- 5.3 The ECU shall use all reasonable endeavours to ensure that the funds provided to it by the Funding Bodies are used for the purposes specifically contemplated in the ECU's Strategic Plan and/or Operating Plans (provided always that HEFCE acknowledges the ECU's need to be able to undertake activities or to incur expenditure on items falling outside of the Strategic Plan and/or Operating Plans from time to time to ensure the most effective operation of the ECU within its objectives).

- 5.4 The ECU shall, at the same time as the annual accounts referred to at clause 5.8 are provided to HEFCE, supply to HEFCE a certificate from its auditors that the grants and other income received from the Funding Bodies has been used for the purposes provided.
- 5.5 The ECU shall promptly notify HEFCE in writing of any significant variances of expenditure to the figures contained in the annual Operating Plan and/or budget referred to in clause 5.2.
- 5.6 The ECU shall set up and maintain adequate and effective accounting and other systems that cover all aspects of its business, assets, personnel and premises. The ECU shall endeavour to ensure the economic, efficient and effective use of its resources and expenditure. All cases of attempted, suspected or actual fraud or loss in excess of £5,000 shall be reported to the HEFCE Head of Internal Audit at the earliest opportunity.
- 5.7 The ECU shall promptly provide to HEFCE (or shall provide HEFCE with access to) such of the ECU's accounting and other information, records, personnel and assets as HEFCE (or any person appointed by HEFCE including the HEFCE Assurance Service) shall reasonably require from time to time in order to discharge HEFCE's functions in respect of public funds or for any other reasonable purpose on behalf of the other Funding Bodies.
- 5.8 The ECU shall provide HEFCE within 120 days after the end of each of its financial years with two copies of its annual audited financial statements, together with the associated director's and auditor's reports, as approved by the Board of the ECU and signed by the Chairman and another director of the ECU.
- 5.9 Within 28 days after the end of each quarter in each financial year (or at alternative intervals as agreed) the ECU will provide to HEFCE a copy of its management accounts including an income statement, balance sheet and cash flow statement each compared with budget and including such other information as may from time to time reasonably be specified by HEFCE. A representative of HEFCE may during business hours and upon reasonable notice inspect the financial information supporting such management information and a senior member of the management of the ECU will be available upon reasonable notice

to answer reasonable questions that may arise as a result of such access by HEFCE.

- 5.10 ECU agrees that, if in HEFCE's reasonable opinion there has been a material breakdown of internal control within the ECU then HEFCE shall have the right to make representations to the Board of the ECU and the ECU shall use its best endeavours to comply with any reasonable directions of HEFCE relating to the efficient and effective discharge by the ECU of its obligations under this Agreement.
- 5.11 The ECU accepts that HEFCE reserves the right to appoint auditors and/or an independent third party to report on areas of performance of this Agreement by the ECU which cause HEFCE concern. Before exercising this right, HEFCE shall consult the ECU. Appointment of the auditor and/or independent third party shall not delay any payment due to the ECU and shall not preclude either party from referring the matter for dispute resolution in accordance with clause 12.
- 5.12 The ECU agrees that HEFCE shall be entitled to inform any directors of the ECU for the time being, and/or the Funding Bodies, and/or the Department for Education and Skills (DfES) and/or the National Audit Office (NAO) of any material matters which come to HEFCE's attention as a result of the monitoring referred to in this clause 5.
- 5.13 The books and records of the ECU relating to the discharge of its responsibilities to HEFCE and the other Funding Bodies under this Agreement shall be open to inspection by the Comptroller and Auditor General as and when he requires, in order to discharge his statutory duties as auditor of HEFCE (and equivalent arrangements in the other countries?). The Comptroller and Auditor General may also carry out examinations into the economy, efficiency and effectiveness with which the ECU has used funds provided by HEFCE under this Agreement.
- 5.14 The ECU shall adopt good practice standards in corporate governance and risk management and shall make an appropriate corporate governance statement in its annual financial statements.
- 5.15 The ECU shall maintain a register of interests operating to good practice standards for Board members, senior management and those with a significant

interest in the procurement of large contracts. The ECU will maintain a register of gifts given and received, operating to good practice standards.

- 5.16 The ECU may charge for services provided to third parties. When doing so, the ECU shall have regard to the recovery of the full economic cost of providing those services when determining the charge made, and to any Value Added Tax and Corporation Tax implications for the transaction.
- 5.17 The ECU shall not borrow on the security of the grant payments provided pursuant to this Agreement but may borrow against its other assets. Where the servicing of debt is likely to involve the use of Funding Bodies' funds, the ECU shall seek appropriate prior consent, such consent not to be unreasonably withheld or delayed.
- 5.18 The ECU may not, without the prior consent of HEFCE (such consent not to be unreasonably withheld or delayed) other than in the normal course of business, give any guarantees, financial indemnities or letters of comfort, or incur any contingent liabilities (whether or not in legally binding form) where such guarantees, financial incentives or letters of comfort or contingent liabilities will be given or incurred using grant payments provided pursuant to this Agreement as security or collateral. In this context, HEFCE specifically acknowledges that the ECU works in an area where the ownership of, or taking acceptable risks with, intellectual property rights (IPR) is a frequently encountered issue.
- 5.19 ECU must advise the HEFCE Assurance Service without delay of the removal or resignation of the ECU's external auditors, for whatever reason.
- 5.20 The pay and conditions of ECU staff should be determined by the Board of the company, having regard for the Treasury guidelines on pay in the Civil Service and analogue bodies. Severance arrangements for staff should be consistent with the extant HEFCE guidance.
- 5.21 ECU may only establish a subsidiary undertaking with the prior consent of HEFCE.
- 5.22 The ECU will ensure that the Intellectual Property Rights (IPR) for any material which is generated or delivered as part of its funded services shall ultimately vest in HEFCE. The vesting of the IPR in HEFCE is intended to ensure that the long

term integrity of the service is protected on behalf of the UK higher education sector. This is not intended to impinge on the use of any IPR generated which the ECU wishes to exploit for commercial purposes.

6 Freedom of Information Act

- 6.1 As a public body, HEFCE is obliged to conform to the Freedom of Information Act 2000. As a result, information held by HEFCE in connection with the ECU may be required to be disclosed in the event of a relevant request. The HEFCE will consult with the ECU should a relevant disclosure request be received. The HEFCE's obligations and how it responds to these are described on its website.

7 Force Majeure

- 7.1 If either party is affected by Force Majeure it shall immediately notify the other party in writing of the matters constituting the Force Majeure and shall keep that party fully informed of their continuance and of any relevant change of circumstances whilst such Force Majeure continues.
- 7.2 The party affected by Force Majeure shall take all reasonable steps available to it to minimise the effects of Force Majeure on the performance of its obligations under this Agreement.
- 7.3 Save as provided in clause 7.5, Force Majeure shall not entitle either party to terminate this Agreement and neither party shall be in breach of this Agreement, or otherwise liable to the other, by reason of any delay in performance, or non-performance of any of its obligations due to Force Majeure.
- 7.4 If the party affected by Force Majeure fails to comply with its obligations under clauses 7.1 and 7.2 then no relief for Force Majeure, including from the provisions of clause 7.3, shall be available to it and the obligations of each party shall continue in force.
- 7.5 If the Force Majeure continues for longer than three months either party may at any time whilst such Force Majeure continues by notice in writing to the other terminate this Agreement.

8 Termination

8.1 HEFCE may immediately terminate this Agreement without payment of compensation or other damages caused to the ECU solely by such termination by giving notice in writing to the ECU if any one or more of the following events happens:

8.1.1 The ECU fails to remedy, where it is capable of remedy, or persists in any breach of any of its obligations under this Agreement (save as to payment) after having been required in writing to remedy or desist from such breach within a period of 60 days;

8.1.2 any steps are taken or negotiations commenced by the ECU or any of its creditors with a view to proposing any kind of composition, compromise or arrangement involving the ECU and any of its creditors;

8.1.3 the ECU has any distress or execution levied on its assets which is not paid out within seven days of its being levied;

8.1.4 the ECU is deemed to be unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986, or calls a meeting for the purpose of passing a resolution to wind it up, or such a resolution is passed, or a resolution is passed by the Board of the ECU to seek a winding up or administration order, or the ECU presents, or has presented, a petition for a winding up order, or presents, or has presented, a petition to appoint an administrator, or has an administrative receiver, or receiver appointed over all or any part of its business, undertaking, property or assets;

8.1.5 The ECU stops or suspends making payments (whether of principal or interest) with respect to all or any class of its debts or announces an intention to do so or the ECU suspends or ceases or threatens to suspend or cease to carry on its business;

8.1.6 A secured lender to the ECU takes any steps to obtain possession of the property on which it has security or otherwise to enforce its security.

- 8.2 The termination of this Agreement shall be without prejudice to the rights and remedies of either party which may have accrued up to the date of termination.

9 Consequences of Termination

- 9.1 Upon termination of this Agreement for any reason whatsoever:
- i. (subject to clause 8.2) the relationship of the parties shall cease save as (and to the extent) expressly provided for in this clause 9;
 - ii. the provisions of clauses 5, 6, 7, 12, 14, 15, and 16 and any provision which expressly or by implication is intended to come into or remain in force on or after termination shall continue in full force and effect;
 - iii. each of the parties shall immediately return to the other party, if so requested by the other party in writing (or, if the other party so requests by notice in writing, destroy) all of the other party's property (except, for the avoidance of doubt, the sums properly paid by HEFCE to the ECU pursuant to clause 3) in its possession at the date of termination.

10 Assignment

- 10.1 This Agreement is personal to both parties. Neither party shall assign, delegate, sub-contract, transfer, charge or otherwise dispose of all or any of its rights and responsibilities under this Agreement.

11 General

- 11.1 The ECU shall not pledge the credit of the Funding Bodies nor represent itself as being any Funding Body nor an agent, partner, employee or representative of any Funding Body and the ECU shall not hold itself out as such nor as having any power or authority to incur any obligation of any nature, express or implied on behalf of any Funding Body and nothing in this Agreement shall create, or be deemed to create, a partnership or joint venture or relationship of employer and employee or principal and agent between the parties and no employee of the ECU shall be deemed to be or have become an employee of any Funding Body.

- 11.2 This Agreement contains the entire agreement between the parties in relation to its subject-matter. Each of the parties irrevocably and unconditionally waives any right it may have to claim damages for, and/or to rescind this Agreement because of breach of any warranty not contained in this Agreement, or any misrepresentation whether or not contained in this Agreement, unless such misrepresentation was made fraudulently.
- 11.3 No purported alteration or variation of this Agreement shall be effective unless it is in writing, refers specifically to this Agreement and is signed by a director or the Chief Executive of each of the parties to this Agreement.
- 11.4 The rights and remedies of either party in respect of this Agreement shall not be diminished, waived or extinguished by the granting of any indulgence, forbearance or extension of time granted by such party to the other nor by any failure of, or delay by the said party in ascertaining or exercising any such rights or remedies. The waiver by either party of any breach of this Agreement shall not prevent the subsequent enforcement of that provision and shall not be deemed to be a waiver of any subsequent breach of that or any other provision.
- 11.5 If at any time any part of this Agreement (including any one or more of the clauses of this Agreement or any sub-clause or paragraph or any part of one or more of these clauses) is held to be or becomes void or otherwise unenforceable for any reason under any applicable law, the same shall be deemed omitted from this Agreement and the validity and/or enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired as a result of that omission.
- 11.6 This Agreement may be entered into in the form of two counterparts, each executed by one of the parties but, taken together, executed by all, and, provided that both the parties shall so enter into the Agreement, each of the executed counterparts, when duly exchanged or delivered, shall be deemed to be an original but, taken together, they shall constitute one instrument.
- 11.7 Each of the parties shall, and shall use their reasonable endeavours to procure that any necessary third parties shall, execute and deliver to the ECU such other instruments and documents and take such other action as is necessary to fulfil the provisions of this Agreement in accordance with its terms.

12 Alternative Dispute Resolution

- 12.1 In the event of any dispute arising out of or in connection with this Agreement the parties will in good faith seek to resolve that dispute by using an alternative dispute resolution ("**ADR**") method acceptable to both parties before pursuing any other remedies available to them.
- 12.2 If the matter has not been resolved by mediation within 60 days after the date of the ADR Notice, the parties will be free to pursue their remedies without further reference to this clause 12.
- 12.3 Nothing in this clause 12 should prevent any party seeking a preliminary injunction or other judicial relief at any time if in its judgement such action is necessary to prevent irreparable damage.

13 Notices

- 13.1 Any notices sent under this Agreement must be in writing and may be served by personal delivery or by sending the notice by first class post, facsimile or electronic data transmission at the address given above or at such other address as the relevant party may give for the purpose of service of notices under this Agreement and every such notice shall be deemed to have been served upon delivery if served by hand or at the expiration of 2 business days after despatch of the same if delivered by post or at ten hours am local time of the recipient on the next Business Day following despatch if sent by facsimile or electronic data transmission.
- 13.2 To prove service of any notice it shall be sufficient to show in the case of a notice delivered by hand that the same was duly addressed and delivered by hand and in the case of a notice served by post that the same was duly addressed prepaid and posted in the manner set out above. In the case of a notice given by facsimile or electronic data transmission, it shall be sufficient to show that it was despatched in a legible and complete form to the correct telephone number, electronic data number or address without any error message provided that a confirmation copy of the transmission is sent to the recipient by post in the

manner set out above. Failure to send a confirmation copy will invalidate the service of any facsimile or electronic data transmission.

14 Third Party Rights

14.1 For the purpose of section 1(2) of the Contracts (Rights of Third Parties) Act 1999 the parties state that they do not intend any terms of this Agreement to be enforced by any third parties but any third party right which exists or is available independently of that Act is preserved.

15 Law

15.1 This Agreement shall be governed by, and construed in accordance with, the laws of England.

16 Jurisdiction

16.1 All disputes arising out of or relating to this Agreement and not settled under the procedures referred to in clause 12 shall be subject to the exclusive jurisdiction of the English Courts to which the parties irrevocably submit.

IN WITNESS OF THE ABOVE the parties have signed this Agreement on the date written at the head of this Agreement.

SIGNED by)
)
duly authorised by and)
for and on behalf of HEFCE)



.....
Authorised Signatory

Name: Steve Egan
Position: Deputy Chief Executive

SIGNED by


)

duly authorised by and

)

for and on behalf of the ECU

)


.....
Authorised Signatory

)

Name: Nicola Dandridge

Position: Chief Executive