

# **Memorandum of understanding between the Charity Commission for England and Wales and the Higher Education Funding Council for England as principal regulator of higher education institutions in England that are exempt charities**

## **Section 1 What this memorandum of understanding is for**

This memorandum of understanding (MoU) sets out how the Charity Commission for England and Wales (the Commission) and the Higher Education Funding Council for England (HEFCE) propose to work together:

- in formulating the regulatory policy framework within which we work; and
- in coordinating our regulatory operations.

It is intended to promote:

- effective working and communication between us; and
- clarity about our respective roles and responsibilities.

## **Section 2 Our roles**

A. The Commission is established by the Charities Acts 1993 and 2006 as the non-ministerial Government department that regulates and registers charities in England and Wales. It fulfils this role by:

- securing compliance with charity law, and dealing with abuse and poor practice;
- enabling charities to work better within an effective legal, accounting and governance framework, keeping pace with developments in society, the economy and the law;
- promoting sound governance and accountability.

Its aim is to provide the best possible regulation of charities in England and Wales, in order to increase their efficiency and effectiveness and public confidence and trust. The Commission has a range of powers that it may use to protect charities and their property and/or reputation from abuse and poor practice. The Charities Act 2006<sup>1</sup> (the 2006 Act) extends most of the Commission's powers to apply to exempt charities; the most significant of these are set out at Appendix A. The Commission must consult the relevant principal regulator before exercising any specific power in respect of an exempt charity. The powers were extended on 1 June 2010 (the commencement date). Legal decisions of the Commission are subject to appeal to the Charity Tribunal.

B. HEFCE was established by the Further and Higher Education Act 1992 and its responsibilities include:

- funding Higher Education Institutions (HEIs) in England, and others who provide services connected with the higher education sector;
- ensuring the quality of education provided is assessed;
- providing information and advice to the Secretary of State responsible for higher education.

Underpinning these functions is the need to ensure the public accountability of HEIs and other recipients of funding.

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<sup>1</sup> Charities Act 2006, Section 12 and Schedule 5

Regulations made under the 2006 Act<sup>2</sup> appoint HEFCE as principal regulator of:

- HEIs (listed in Appendix B) that are exempt charities, or that become exempt charities by Ministerial order<sup>3</sup>;
- charities administered by or on behalf of those HEIs.

The principal regulator role is intended to be 'forward-looking' and HEFCE may act as principal regulator only in respect of anything about an HEI's charity law compliance that it becomes aware of on or after 1 June 2010. This will include a cause for concern that had arisen or was continuing on or after 1 August 2009 (the start of the financial year current for all HEIs when the regulations came into force) and was continuing on 1 June 2010.

The Regulations referred to in the previous paragraph and this MoU do not apply to those HEIs that are currently registered charities (except as noted in Section 3 D below) or to the HEI that is part of a non-charitable public body. These are listed in Appendix B for the sake of completeness.

C. The 2006 Act<sup>4</sup> gives principal regulators a general duty to do all they reasonably can to meet the compliance objective, namely, to do all they reasonably can to promote compliance by the trustees of the charities for which they are responsible with their legal obligations in exercising control and management of the administration of their charities. If principal regulators identify a concern about a charity they may invite the Commission to use its statutory powers of investigation and intervention. Principal regulators' other powers and duties are not affected by the 2006 Act.

### **Section 3 Working together**

#### **A. Regulating charities and points of contact**

The key principles of an effective charity regulation framework are set out at Appendix C. We consider these to comply with general better regulation principles that both of us follow. In particular, we each operate a risk-based regulatory regime and adapt the type and degree of our direct regulatory engagement in relation to our assessment of risk. In order to ensure that issues are handled at the appropriate level and that developing policy considerations are taken fully into account, we have established designated points of contact (see Appendix D).

Where they consider it appropriate, designated points of contact may:

- delegate ongoing liaison to members of their staff;
- agree detailed working arrangements or protocols that are relevant to their particular areas of responsibility or in relation to a particular case, charity or group of charities.

#### **B. Monitoring**

HEFCE will continue to apply its usual processes for monitoring HEIs, and we will work together so that HEFCE can determine any additional monitoring that may be necessary to enable HEFCE to fulfil its responsibilities as principal regulator of HEIs as charities.

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<sup>2</sup> SI 2009 Nos.501 and 503

<sup>3</sup> Charities Act 2006, Section 11(11)(a)

<sup>4</sup> Charities Act 2006, Section 13(3)

### C. Collecting and publishing information

As a principal regulator HEFCE must ensure that the information it collects from HEIs includes that required by the Charities Acts and any regulations made under those Acts. We will work together to ensure that the information provided by HEIs complies with those requirements.

The Register of Charities, which is publicly available, includes such information about the charities included on it as the Commission thinks fit. We will work together to ensure that similar information about HEIs is available through HEFCE's website, with suitable links with the Commission's website.

All charities for which HEFCE is principal regulator submit audited financial statements to it as required by the Financial Memorandum between HEFCE and each HEI. HEIs themselves are required to make that information publicly available – often by inclusion on their websites - and we will ensure that it is also available through appropriate links with the Commission's and HEFCE's websites.

### D. Sharing information

Charity legislation<sup>5</sup> permits the Commission and HEFCE to share information about any charity within HEFCE's jurisdiction. The legislation does not impose information-sharing as a duty on either of us.

However, we will:

- Establish channels of communication for our operational staff to enable them to offer what they believe to be relevant information when they consider it reasonable to do so, and to respond appropriately and promptly to requests for such information.
- Encourage the disclosure and exchange of information, in order to maximise the efficiency of our respective functions.
- Ensure that information is disclosed in a manner that is efficient, proportionate and fully complies with the Human Rights Act 1998, the Data Protection Act 1998 and the Freedom of Information Act 2000.

Where information is disclosed in connection with an ongoing investigation, neither of us will prejudge the outcome or (except as set out in section 3E) take action before the conclusion of that investigation.

Neither the Commission nor HEFCE will disclose information received from the other to any other person or body without first consulting the disclosing party. When exchanging information the provider will mark it with the appropriate security classification and the recipient will treat the information received accordingly.

### E. Investigations and action short of investigations

We both have statutory powers that we can use if there are serious concerns about the administration of a HEI. This section relates to the operation of each of our regulatory regimes and how we will enable clear and timely communication.

Where either the Commission or HEFCE identifies concerns about the administration of an HEI as a charity, it will notify the other in writing as soon as possible, setting out any

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<sup>5</sup> Charities Act 1993, Section 10, as amended by Charities Act 2006, Section 75(1) and Schedule 8, paragraph 104

charity law issues it has identified. Concerns may arise from our normal interaction with HEIs (including public information disclosures), or from reports to us by the auditors of HEIs<sup>6</sup>, or in other ways.

We will then work closely to seek to agree a course of action to be taken. Insofar as they do not conflict, and the course of action decided upon is compatible with our respective statutory functions, duties and powers, we will follow the principles set out in:

- the Commission's publication 'Risk and Proportionality Framework' (and related operational guidance);
- HEFCE's institutional engagement and support strategy<sup>7</sup>.

The notification by HEFCE to the Commission may invite it to use any of its regulatory powers or indicate that those powers may be required at some stage during the conduct of the case. The Commission is not obliged to accept the invitation and, in such cases, will explain to HEFCE in writing why it has decided not to use its powers and if it proposes to take any action that does not require their use.

The Commission will provide HEFCE with any comments it wishes to make on charity law issues. It will advise HEFCE whether it believes that there may be any aspects of the case that require its intervention including, in exceptional circumstances, the need to conduct a formal inquiry<sup>8</sup>.

The Commission must consult HEFCE before using any of its regulatory powers in respect of HEIs. Unless it has identified a significant and urgent risk to a charity's property and/or reputation the Commission's method of consultation will usually be in writing. HEFCE will respond to such a consultation within two working days, unless a longer period is agreed between the points of contact.

If the Commission has identified a significant and urgent risk to charity property and/or reputation, it will consult HEFCE in such manner and for such time as it decides, to enable it to take the action it considers to be necessary. Information that may cause such action to be taken may have been acquired through the Commission's own evidence-gathering operations. When such action has been taken, we will jointly consider what further action may be needed and which of us has the relevant expertise to take it.

Where we have a shared concern about a charity or charitable assets we will agree at the earliest opportunity a case strategy, the role of each of us in the investigation, areas of responsibility, and liaison arrangements.

The outcome of any investigation will be made available to both organisations and may be placed on, or linked to, our websites in accordance with our respective published policies on disclosing information, including inquiry and regulatory reports.

#### F. Support powers

All charities can use the Commission's support powers, for example they can apply for orders that will enable them to take an action, such as:

- making payments they have no legal obligation to make and not otherwise allowed by their governing document (ex gratia payments);
- seeking the Commission's advice on charity law issues.

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<sup>6</sup> Charities Act 1993, Sections 44 and 46, as amended by Charities Act 2006, Section 29

<sup>7</sup> 'Model Financial Memorandum between HEFCE and institutions', Annex D

<sup>8</sup> Charities Act 1993, Section 8

To ensure that any proposed advice or action would not lead to a conflict between the HEI and HEFCE in relation to HEFCE's existing functions, when using its support powers in ways that affect the use of the assets of a HEI or where the Commission thinks it would otherwise assist HEFCE, the Commission will discuss with HEFCE in advance:

- the advice it is giving or the action it is proposing;
- how it has been demonstrated to the Commission that the proposed advice or action is in the best interests of the HEI.

For proposed changes to a HEI's governing document, it should be noted that the Commission provides advice to the Department of Business, Innovation and Skills which has responsibilities relating to such changes. HEFCE has no formal powers or responsibilities in this area but is notified when such changes are being considered. This practice will continue.

#### G. External communications

We will consult on draft texts before publishing reports or issuing public statements relating to issues that we have jointly worked on under the terms of this MoU.

#### H. Policy development and liaison

We are both key stakeholders in the regulation of HEIs and in the development of the law and policy in our respective areas of expertise. We will work together to develop, interpret and apply relevant law and policy in a way that is consistent with the key principles of charity regulation set out at Appendix C, with the aim of minimising the administrative burden on HEIs. Joint developments may include working practices or protocols, and public and operational guidance.

In order to ensure that this aim is achieved we will:

- have meetings at least twice a year to identify areas where we need to work jointly;
- provide annual updates, including reports to our Boards, on the operation of the principal regulator relationship;
- review the provisions of this MoU every two to four years and where necessary renegotiate its terms.

Where we are developing policy that impacts on both of us, the lead individual responsible for that work in each organisation will also be responsible for ensuring at an early stage that they establish with their counterpart their respective responsibilities and how they will deliver the work, identifying the way in which each of us will approve such work (for example, Board or executive level) and the timetable for doing so. In order for this to be effective, we will provide each other with information on our respective structures and individual staff responsibilities in relevant areas of our organisations, and update these as they change.

#### I. Staff development and training

As part of our respective staff development and training programmes, we will ensure that our staff are made aware of the differing organisational, operational and legal frameworks. In order to facilitate this, appropriate staff may be offered familiarisation visits to each other's offices. We will also explore the possibility of providing joint training

and development initiatives and, where practical, will offer places to each other's staff on relevant internal training courses and seminars.

J. Responding to complaints

This section is about complaints about our performance, but distinguishes between those that should be routed through the Commission's or HEFCE's own complaints procedures and those that are about how we interact.

We will each retain responsibility and accountability for handling complaints about the services we provide when working separately and that fall within our own complaints procedures.

Where the complaint is about how we interact with each other, the recipient will notify the other, and provide a copy of material received as part of the complaint, within three working days. We will ensure that there is a prompt analysis of the complaint and, where appropriate and practical, take a joint approach to resolving the issues raised.

K. General

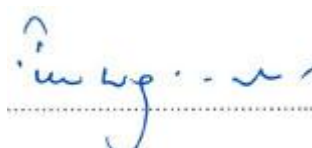
It is intended that the arrangements in this MoU should apply generally. However, we recognise that some circumstances will require special handling and nothing prevents us from making exceptional arrangements to meet specific and urgent needs in relation to a particular case, charity or group of charities.

Any disagreement arising from the interpretation of this MoU will be referred to our respective Chief Executives for resolution within the spirit implicit in this MoU. If necessary, this MoU will be amended to reflect the agreed outcome of the referral. Nothing in this MoU is intended to create a legally binding obligation or to confer legal rights on either party.

**Signed**



Andrew Hind  
Chief Executive  
Charity Commission for England  
and Wales



Alan Langlands  
Chief Executive  
Higher Education Funding Council for  
England

1 June 2010

## Appendix A

### Powers of the Charity Commission

The Commission's powers include those listed below. It may only exercise these powers in relation to HEIs that are exempt charities after consultation with HEFCE as principal regulator. The Commission's support powers are usually only exercised at the request of the charity.

<b>Protective Powers</b>	<b>Statutory reference</b>
Require a charity to change its name in certain specified circumstances	S6(1) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Institute inquiries into the administration of a charity	S8 CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Suspend or remove any trustee, charity trustee, officer, agent or employee of a charity	S18(1)(i), (2) and (4) CA1993 (inserted by S12 and Schedule 5 CA 2006)
Call for documents and search records	S9 CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Appoint new trustees	S18(1)(ii) CA 1993 and S18(5) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Vest charity property in the Official Custodian for Charities	S18(1)(iii) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Order individuals not to part with charity property without its approval ("freezing orders")	S18(1)(iv) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Order individuals not to pay debts owed to the charity without its approval	S18(1)(v) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Restrict transactions that can be entered into on behalf of a charity	S18(1)(vi) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Appoint an interim manager for a charity	S18(1)(vii) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Suspend or remove trustees etc from membership of a charity	S18A CA 1993 (inserted by S19 CA 2006)
Give specific directions for protection of a charity	S19A CA 1993 (inserted by S20 CA 2006)
Direct the application of charity property	S19B CA 1993 (inserted by S21 CA 2006)
Give directions about dormant bank accounts	S28 CA 1993
Determine the membership of a charity	S29A CA 1993 (inserted by S25 CA 2006)
Ensure the safekeeping of charity documents	S30 CA 1993
Enter premises and seize documents	S31A CA 1993 (inserted by S26 CA 2006)
Exercise the same powers as the Attorney General with respect to taking legal proceedings, except for petitioning for the winding up of a charity	S32 CA 1993
Order a disqualified person to repay sums received from a charity while acting as charity trustee or trustee for the charity	S73(4) CA 1993 (inserted by S12 and Schedule 5 CA 2006)
Disqualify trustees who are receiving remuneration by virtue of sections 73A CA 1993	S73C CA 1993 (inserted by S37 CA2 2006)

<b>Support powers</b>	<b>Statutory reference</b>
Authorise cy-près application of gifts belonging to unknown or disclaiming donors	S14 CA 1993
Make a scheme in relation to a charity governed by charter or by or under statute, subject to Order in Council	S15 CA 1993
Establish a scheme for the administration of a charity (including the alteration of purposes cy-près)	S16 (1)(a) CA 1993 (see also S13 and S14B CA 1993 as amended by CA 2006)
Appoint or remove trustees; remove officers or employees	S16 (1)(b) CA 1993
Vest or transfer property, or require or permit any person to call for or make any transfer of property or any payment	S16 (1)(c) CA 1993
Alter provisions in Acts of Parliament establishing or regulating a charity, subject to Parliamentary approval	S17 CA 1993
Establish common investment funds and common deposit funds	S24 and S 25 CA 1993
Authorise dealings with charity property or other actions in the interests of the charity	S26 CA 1993
Authorise ex-gratia payments	S27 CA 1993
Give advice and guidance (including formal advice to a charity trustee or trustee for a charity)	S29 CA 1993 (amended by S24 CA 2006)
Grant a waiver to a person disqualified from acting as a charity trustee	S72(4) and (4A) CA 1993 (as amended by CA 2006)
Relieve trustees, auditors etc from liability for breach of trust or duty	S73D CA 1993 (inserted by S38 CA2006)

## Appendix B

### English Higher Education Institutions that were exempt charities on 1 June 2010

Anglia Ruskin University	Keele University
Aston University	University of Kent
University of Bath	King's College London
Bath Spa University	Kingston University
University of Bedfordshire	Lancaster University
Birkbeck College	University of Leeds
University of Birmingham	Leeds Metropolitan University
Birmingham City University	Leeds College of Music
University College Birmingham	University of Leicester
University of Bolton	University of Lincoln
Arts University College at Bournemouth	University of Liverpool
Bournemouth University	Liverpool John Moores University
University of Bradford	University of the Arts London
University of Brighton	University of London
University of Bristol	London Business School
Brunel University	London School of Economics and Political Science
Buckinghamshire New University	London School of Hygiene & Tropical Medicine
University of Cambridge	London Metropolitan University
Institute of Cancer Research	London South Bank University
University of Central Lancashire	Loughborough University
Central School of Speech and Drama	University of Manchester
University of Chichester	Manchester Metropolitan University
City University, London	Middlesex University
Courtauld Institute of Art	University of Newcastle upon Tyne
Coventry University	University of Northampton
Cranfield University	University of Northumbria at Newcastle
University for the Creative Arts	Norwich University College of the Arts
University of Cumbria	University of Nottingham
De Montfort University	Nottingham Trent University
University of Derby	Open University
University of Durham	School of Oriental and African Studies
University of East Anglia	University of Oxford
University of East London	Oxford Brookes University
Edge Hill University	School of Pharmacy
Institute of Education	University of Plymouth
University of Essex	University of Portsmouth
University of Exeter	Queen Mary, University of London
University College Falmouth	Ravensbourne College of Design and Communication
University of Gloucestershire	University of Reading
Goldsmiths' College	Roehampton University
University of Greenwich	Royal College of Art
University of Hertfordshire	Royal Holloway, University of London
University of Huddersfield	Royal Northern College of Music
University of Hull	
Imperial College London	

Royal Veterinary College	University of Teesside
St George's Hospital Medical School	Thames Valley University
University of Salford	University College London
University of Sheffield	University of Warwick
Sheffield Hallam University	University of the West of England, Bristol
University of Southampton	University of Winchester
Southampton Solent University	University of Westminster
Staffordshire University	University of Wolverhampton
University of Sunderland	University of Worcester
University of Surrey	Writtle College
University of Sussex	University of York

**English Higher Education Institutions that were registered charities on 1 June 2010**

	<u>Registered number</u>
Bishop Grosseteste University College Lincoln	527276
Canterbury Christ Church University	1098136
University of Chester	525938
Conservatoire for Dance and Drama	1095623
Harper Adams University College	528384
Heythrop College	312923
Leeds Trinity University College	1120102
Liverpool Hope University	1060579
Liverpool Institute for Performing Arts	1001565
Newman University College	1110346
University College Plymouth St Mark & St John	312929
Rose Bruford College	307907
Royal Academy of Music	310007
Royal Agricultural College	311780
Royal College of Music	309268
St Mary's University College	1120192
Trinity Laban Conservatoire of Music and Dance	309998
York St John University	529589

**English Higher Education Institution that is part of a non-charitable body**

Guildhall School of Music & Drama

## Appendix C

### **Key principles of an effective charity regulation framework**

An effective framework of charity regulation should:

- A be based on the Better Regulation Commission's (BRC) principles of good regulation and the Charity Commission's statutory objectives together with other principles that the Commission applies to charity regulation;
- B cover all the assets of a charity and ensure that they are only used to further the purposes of the charity (which must be for the public benefit);
- C ensure that a charity's governance arrangements are adequate for the effective and efficient furtherance of its purposes, are followed in its administration and can be changed when necessary to ensure its continuing effective operation;
- D ensure that the charity complies with all relevant legal and statutory requirements;
- E require the charity to provide to all stakeholders adequate financial information about the use and application of its resources.

Appendix D

**Designated points of contact**

<b>Area of liaison</b>	<b>Charity Commission</b>	<b>Higher Education Funding Council for England</b>
Development of policy	Executive Director of Policy and Effectiveness	Deputy Chief Executive
Development of legal framework	Executive Director, Legal Services and Compliance	Head of Governance
General approach to operational liaison	Head of Compliance	Head of Governance
Initial contact at individual casework level	Head of Specialist Casework Division	Head of Institutional Risk
Contact for supervision / investigation / statutory action.	Head of Compliance	Head of Assurance