



# Memorandum of understanding between the Charity Commission and the Secretary of State for BIS in his role as Principal Regulator of Further Education Corporations in England

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## Section 1 What this memorandum of understanding is for

1. This MoU sets out how the Commission and the Secretary of State for Business Innovation and Skills (BIS) propose to work together, both in co-ordinating our regulatory operations and formulating the regulatory policy framework within which we work, in the specific context of the Secretary of State's role as principal regulator of further education corporations and their connected charities in England.
2. It is intended to promote effective working and communication between us, and clarity about our respective roles and responsibilities, working procedures, legal powers and constraints.

## Section 2 Our roles

### The Commission

3. The Commission is the regulator of charities in England and Wales. It is also responsible for maintaining the Register of Charities which includes deciding if organisations are charitable and should be added to the Register.

4. Parliament has given the Commission five statutory objectives<sup>1</sup>. These are:

- to increase public trust and confidence in charities
- to promote awareness and understanding of the operation of the public benefit requirement
- to promote compliance by charity trustees with their legal obligations in exercising control and management of their charities
- to promote the effective use of charitable resources
- to enhance the accountability of charities to donors, beneficiaries and the general public

The Commission has a wide discretion to decide how to achieve its objectives and carry out its functions.

5. The public have an interest in charities, in particular as beneficiaries, donors, volunteers and taxpayers. The Commission's work seeks to protect the public's interest in charity and ensure that, as the law requires, charities:

- consistently focus on those purposes for the public benefit which give them their charitable status,
- act independently of any private, governmental or political interests.

6. The Commission aims to:

- assure the public that money intended for charitable purposes is used by charities in accordance with charity law;
- assure the public that organisations with the status of 'charity' are legitimate, operate independently, and wholly in pursuit of their charitable purposes;
- ensure the public has as much free access as possible to appropriate information about charities and their activities;
- ensure that charity trustees carry out their duties and responsibilities as required by law; and
- promote high standards of governance and accountability by charities.

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<sup>1</sup> Section 14 Charities Act 2011

7. 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 (now consolidated in the Charities Act 2011) extended most of the Commission's powers (summarised at Appendix A) to apply to exempt charities. The Charities Act 2011 (Principal Regulators of Exempt Charities) Regulations 2013 (SI 2013/1764) and Charities Act 2011 (Commencement No 2) Order 2013 (SI 2013/1775) brought these powers into effect with respect to further education corporations. The Commission must consult the relevant Principal Regulator before exercising any specific power in respect of an exempt charity. It may not exercise its power to institute inquiries unless requested to do so by the Principal Regulator. Legal decisions of the Commission are subject to appeal to the First-tier Tribunal (Charity).

### **Secretary of State for Business, Innovation and Skills**

8. BIS was formed on 5 June 2009; it works with further and higher education providers to give students the skills they need to compete in a global employment market.

9. Regulations made under the Charities Act 2011 which took effect on 1 September 2013 appointed the Secretary of State for BIS as the Principal Regulator in England of Further Education Corporations. Regulations also appoint him as the Principal Regulator of any exempt charity which is administered by or on behalf of one of these corporations and is established for the general purposes of, or any special purpose of or in connection with, that corporation. (In this MoU, a charity for which the Secretary of State is the Principal Regulator is referred to as a 'relevant charity').

10. Principal Regulators have a 'compliance objective' which is to do all they reasonably can to promote compliance by trustees of the charities for which they are responsible with their legal obligations in exercising control and management of the administration of their charity. If they identify a concern about a charity, they may invite the Commission to use its powers of investigation and intervention under the Charities Act 2011. This does not affect the use by the Principal Regulator of its own regulatory powers.

11. In addition to his role as Principal Regulator for relevant charities, the Secretary of State may, in exercising his statutory powers, take action which impacts on the operation of charities for which he is not Principal Regulator including institutions designated under section 28 of the Further and Higher Education Act 1992.

## **Section 3 Working together**

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

12. The key principles of an effective charity regulation framework are set out at Appendix C. We consider that these comply with better regulation principles that both of us follow. In particular we both operate a risk-based regulatory regime and adapt the type and degree of our direct regulatory engagement to our assessment of risk.

13. In order to ensure that issues are handled at the appropriate level and that relevant policy developments are taken fully into account, contact between us shall be established through 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, and
- agree detailed working arrangements or protocols that are relevant to their particular area of responsibility.

## **B. Collecting information and monitoring**

We both collect information about the charities that we monitor.

14. BIS will continue to apply its usual process for monitoring further education corporations. With the support of the Skills Funding Agency, it will monitor further education corporations wherever possible using existing returns of information as listed in para 15.

15. The information that further education corporations are required to provide under the conditions of funding imposed by the Chief Executive of Skills Funding is as follows:

- The name of the Accounting Officer and any arrangements to cover this if the Accounting Officer is absent for any length of time.
- Information about the vacating and filling of the posts of Principal, Chair of the Corporation and the Clerk.
- The Accounting Officer must inform the Chief Executive if he considers the Corporation is in breach of the Financial Memorandum or any other conditions of Funding.
- Learner data
- Information about subcontractors
- Quality improvement plans and outcome of Ofsted inspections
- Information about the death of any Learner
- Information required by the Chief Executive to investigate any complaint about the College.
- Evidence to support payments made by the Chief Executive
- Any audit report requested by the Chief Executive on College's financial systems and controls, accuracy and regularity of funding claims or evidence to support funding claims.
- Copy of audited financial statements.
- All cases of suspected fraud and any investigation carried out
- Information about the disposal or leasing of any property in respect of which the Chief Executive has provided capital funding.

16. The Principal Regulator will work with further education corporations and the Skills Funding Agency to ensure effective and proportionate monitoring is maintained.

### **C. Public information**

17. The Register of Charities includes such information about the charities included on it as the Commission thinks fit. The Commission publishes this information to increase charities' accountability to their supporters, beneficiaries and the public.

18. We will work together to ensure that similar information about charities regulated by the Secretary of State for BIS is available to the public.

19. Further Education Corporations must adhere to the legislative requirements of schedule 4 of the Further and Higher Education Act 1992 (as amended by the Education Act 2011) which require it to make available a copy of the instrument and Articles to be given free of charge to anyone who requests it. Schedule 4 also prohibits changes that would result in the body ceasing to be a charity.

20. Further education corporations are required to publish their accounts.

### **D. Sharing information**

21. Sections 54-59 of the Charities Act 2011 (as applied by section 58) permit the Commission and a Principal Regulator to share information about any charity within the Principal Regulator's jurisdiction. It does not, however, impose a duty on either of us to disclose information.

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 positively and promptly to requests for such information.
- encourage the disclosure and exchange of information, where appropriate, in order to maximise the efficiency of our respective functions.
- ensure that information is disclosed in a manner that is efficient, proportionate and fully in compliance with the Human Rights Act 1998, and the Data Protection Act 1998.
- recognise that we both have obligations to disclose information in response to requests made under the Freedom of Information Act 2000. Where either party receives a request for disclosure of information that is relevant to the exercise of the other party's

functions under this MOU, the party in receipt of the request will consult the other before making any disclosure of information.

22. Where information is disclosed about an ongoing investigation, neither of us will pre-judge the outcome nor take action before the conclusion of that investigation.

23. Neither the Commission nor the Secretary of State for Business, Innovation and Skills will disclose any information received from the other to any other person or body without first obtaining confirmation that the party from whom the information originally came has been consulted about disclosure. When exchanging information the provider will mark it with the appropriate Government Protective Marking Scheme security classification and the recipient will treat the information received accordingly and apply the necessary controls that arise as a result of the marking given.

## **E. Use of statutory powers**

### **Regulatory Powers**

24. We both have intervention powers that we can use if there are serious concerns about the administration of relevant charities. This section relates to the operation of each of our regulatory regimes and how we will enable clear and timely communication. The Commission's powers are outlined in Appendix A to this MoU and the Secretary of State for BIS' powers are outlined in Appendix B.

25. Where either the Commission or the Secretary of State for BIS identifies potentially serious concerns about the administration of a relevant charity, it will notify the other in writing as soon as possible, setting out any charity law issues it has identified.

26. A notification from the Secretary of State for BIS 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. In such cases, the Secretary of State for BIS will supply the Commission with all information that is relevant and appropriate in the circumstances. The Commission is not obliged to accept the invitation and, in such cases, will explain to the Secretary of State for BIS 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's response will have regard to any relevant published statements about its approach to regulation as well as any published by the Secretary of State for BIS.

27. The Commission will provide the Secretary of State for BIS with any comments it wishes to make on charity law issues, in particular it will advise the Secretary of State for BIS of whether it believes that there may be any aspects of the case that require its intervention.

28. The Commission must consult the Secretary of State for BIS before using any of its regulatory powers in relation to a relevant charity.

Unless it has identified a significant and urgent risk to a charity's property and/or reputation, this consultation will usually be in writing. The Secretary of State for BIS will respond to the consultation within a period that may be agreed between the points of contact.

29. If the Commission has identified a clear risk to charity property, beneficiaries and/or reputation the consultation method and period will be of such type and length as the Commission shall decide, 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 the action has been taken we will jointly consider what further action is needed and which of us has the relevant expertise to take it.
30. Where we both have a mutual interest in a charity or charitable assets we will aim to agree at the earliest opportunity a case strategy, the role of each of us in the investigation, areas of responsibility and liaison arrangements.
31. The outcome of any such investigation will be made available to both organisations and may be placed on, or linked to, the respective websites in accordance with our respective published policies on disclosing inquiry and regulatory case reports.

#### **Support powers**

32. All charities can use the Commission's support powers, for example seeking the Commission's advice on charity law issues. In no case will this authorise a relevant charity to act contrary to education legislation. To ensure that no breach of the Secretary of State for BIS' regulatory function occurs, when using its support powers in relation to a specific relevant charity in ways that could affect the use of its assets, the Commission will consult the Secretary of State for Business, Innovation and Skills in advance, advising it of the action it proposes to take and why.
33. The Commission also publishes general guidance for all charities on its website, and may generally or specifically refer relevant charities to that guidance without first consulting the Secretary of State for BIS.

#### **F. Policy development and liaison**

34. We are both key stakeholders in the regulation of the relevant charities, and the development of relevant 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 the relevant bodies.
35. In order to ensure that this aim is achieved, we will:

- have meetings as often as we agree may be necessary to identify areas where we need to work jointly;
- provide annual updates to the Commission's Board and the Secretary of State for Business, Innovation and Skills on the operation of the principal regulator relationship; and
- review the provisions of this MoU every two to four years and where necessary renegotiate its terms.

36. Work that may be developed jointly may include working practices and public and operational guidance.

37. 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.

38. 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.

## **G. Staff development and training**

39. 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.

40. 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.

## **H. Responding to complaints**

41. This section is about complaints about our performance in relation to matters covered by this MoU, but distinguishes between complaints that should be routed through the Commission's or the Secretary of State for Business, Innovation and Skills complaints procedure and complaints that are about how we interact.

- Each of us will maintain separate responsibility and accountability for complaints about the services we each provide within our own complaints procedures.
- Where the correspondence is concerned with complaints, feedback or suggestions concerning how we interact with each other, the recipient



will notify the other of information that they receive that is relevant to their responsibilities. We will ensure that there is a prompt exchange and analysis of information and, where appropriate and practical, take a joint approach to resolving the issues raised. We anticipate that this situation will most probably result from a review of individual complaints or a joint review of complaints.

**I. General**

42. 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.

43. Any disagreement arising from the interpretation of this memorandum will be referred to both the Chief Executive of the Commission and the Secretary of State for BIS for resolution within the spirit implicit in this memorandum. If necessary, this memorandum 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



Martin Donnelly  
Permanent Secretary  
Department for Business,  
Innovation and Skills



Sam Younger  
Chief Executive  
The Charity Commission

Date: 8 January 2014

Date: 8 January 2014

## Appendix A

### The Commission's powers

The Commission's powers include those listed below. It may only apply most of these powers to a relevant charity after consultation with the Principal Regulator. It may only exercise its power to institute inquiries if requested to do so by the Principal Regulator. The Commission's support powers are usually only exercised at the request of the charity.

Protective Powers	Statutory reference
Require a charity to change its name in certain specified circumstances	S42-45 CA 2011
Institute inquiries into the administration of a charity	S46 CA 2011 <sup>2</sup>
Call for documents and search records	S52-53 CA 2011
Suspend or remove any trustee, charity trustee, officer, agent or employee of a charity	S76, <sup>3</sup> 79, <sup>3</sup> 80(1) <sup>3</sup> , CA2011
Make a scheme for the administration of a charity	S79(2)(b) CA 2011 <sup>3</sup>
Appoint new trustees	S76(3)(b) CA 2011 <sup>3</sup> and S80(2) <sup>3</sup> CA 2011
Vest charity property in the Official Custodian for Charities	S76(3)(c) CA 2011 <sup>3</sup>
Order individuals not to part with charity property without its approval ("freezing orders")	S76(3)(d) CA 2011 <sup>3</sup>
Order individuals not to pay debts owed to the charity without its approval	S76(3)(e) CA 2011 <sup>3</sup>
Restrict transactions that can be entered into on behalf of a charity	S76(3)(f) CA 2011 <sup>3</sup>
Appoint an interim manager for a charity	S76(3)(g) CA 2011 <sup>3</sup>
Suspend or remove trustees etc from membership of a charity	S83 CA 2011 <sup>3</sup>
Give specific directions for protection of a charity	S84 CA 2011 <sup>3</sup>
Direct the application of charity property	S85 CA 2011 <sup>3</sup>
Give directions about dormant bank accounts	S107-109 CA 2011
Determine the membership of a charity	S111 CA 2011
Ensure the safekeeping of charity documents	S340 CA 2011
Enter premises and seize documents	S48-49 CA 2011 <sup>3</sup>
Exercise the same powers as the Attorney General with respect to taking legal proceedings, except for petitioning for the winding up of a charity	S114 CA 2011

<sup>2</sup> This power may only be exercised on request of the Principal Regulator

<sup>3</sup> Powers only exercisable pursuant to an inquiry under s.46

Order a disqualified person to repay sums received from a charity while acting as charity trustee or trustee for the charity	S184(2)-(4) CA 2011
Disqualify trustees who are receiving remuneration by virtue of sections 73A CA 1993	S186 CA 2011

<b>Support powers</b>	<b>Statutory reference</b>
Authorise cy-près application of gifts belonging to unknown or disclaiming donors	S63-66 CA 2011
Make a scheme in relation to a charity governed by charter or by or under statute, subject to Order in Council	S68 CA 2011
Establish a scheme for the administration of a charity (including the alteration of purposes cy-près)	S69 (1)(a) CA 2011 (see also S62 and 67 CA 2011)
Appoint or remove trustees; remove officers or employees	S69 (1)(b) CA 2011
Vest or transfer property, or require or permit any person to call for or make any transfer of property or any payment	S69 (1)(c) CA 2011
Alter provisions in Acts of Parliament establishing or regulating a charity, subject to Parliamentary approval	S73 CA 2011
Establish common investment funds and common deposit funds	S96-103 CA 2011
Authorise dealings with charity property or other actions in the interests of the charity	S105 CA 2011
Authorise ex-gratia payments	S106 CA 2011
Give advice and guidance to a charity trustee or trustee for a charity	S110 CA 2011 (see also S15(2)-(3) CA 2011)
Authorise regulated amendments to memoranda and articles of charitable companies	S198 CA 2011 (as amended)
Grant a waiver to a person disqualified from acting as a charity trustee	S181 CA 2011
Relieve trustees, auditors etc from liability for breach of trust or duty	S191 CA 2011

## Appendix B

### A summary of the Secretary of State's key powers

The Secretary of State has a wide range of powers (both statutory and non statutory). The powers set out in this appendix are anticipated to be those which are most relevant to the Principal Regulator role. However, the list of powers is not exhaustive.

If the Secretary of State is satisfied to one or more of these matters as listed in sub section (2) of section 56A of the Further and Higher Education Act 1992 (as inserted by the Education Act 2011)-

- that the institution's affairs have been or are being mismanaged by the institution's governing body;
- that the institution's governing body have failed to discharge any duty imposed on them by of the purposes of any Act.
- that the institution's governing body have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under any Act.
- that the institution is performing significantly less well than it might in all the circumstances it can reasonably be expected to perform, or is failing or likely to fail to give an acceptable standard of education or training.

He may do one or more of the following -

- Remove all or any of the members of the institution's governing body
- Appoint new members of that body if there are vacancies (how ever arising)
- Give that body such directions as the Secretary of State thinks expedient as to the exercise of their powers and performance of their duties. Including (in extremis) a direction to a corporation requiring it to pass a resolution to dissolve the corporation and transfer its assets and liabilities to a third party.

## Appendix C

### Key principles of an effective charity regulation framework

An effective framework of charity regulation should:

- A be consistent with the principles in the government's better regulation strategy<sup>4</sup>, the Charity Commission's statutory objectives and 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 promote standards of governance that ensure the effective and efficient furtherance of the charity's purposes;
- D ensure that the charity complies with relevant legal and statutory requirements;
- E require the charity to provide to stakeholders adequate financial information about the use and application of its resources.

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<sup>4</sup> <http://www.bis.gov.uk/policies/bre>

## Appendix D

### Designated Points of Contact

Area of Liaison	Charity Commission	BIS
Development of Policy	Head of Policy	Deputy Director, standards and qualifications unit
Development of Legal Framework	Head of Legal Services	Deputy Director, legal services B
General approach to Operational Liaison	Head of Operations Taunton	Deputy Director, standards and qualifications unit
Initial contact at Individual Casework Level	Head of Operations Taunton	Deputy Director, standards and qualifications unit
Contact for Supervision/Investigation/Statutory action	Head of Investigations and Enforcement	Deputy Director, standards and qualifications unit