

## **Memorandum of Understanding (MoU) between the Charity Commission and the Secretary of State for Environment, Food and Rural Affairs as principal regulator of the Royal Botanic Gardens, Kew.**

### **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 Secretary of State for Environment, Food and Rural Affairs (Defra) (together referred to in this MoU as 'we' and 'us') propose to work together both in coordinating our regulation operations and formulating the policy to which we work. This MoU is not a binding agreement or contract but is intended to promote effective working and communication between us, and clarity about our respective roles and responsibilities. Nothing in this MoU shall create a contract of employment, a relationship of agency or partnership or a joint venture between us and accordingly neither party shall be authorised to act in the name of, or on behalf of, or otherwise bind the other party save as expressly permitted by the terms of this MoU.

### **Section 2 Our roles**

#### The Commission

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; and
- 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.

A list of the Commission's statutory powers is at Appendix A.

#### Defra

Defra sponsors the Royal Botanic Gardens (RBG), Kew which is an exempt charity under the provisions of the Charities Acts. Its stewardship of RBG, Kew is on an 'arms-length' principle and is described in more detail at Appendix B.

Regulations made under the Charities Act 2006 appoint the Secretary of State for Environment, Food and Rural Affairs as 'principal regulator' of the Royal Botanic Gardens, Kew (a function delegated to Defra). Principal regulators have a 'compliance objective', which is 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 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 Acts. This does not affect the principal regulator using its powers as sponsor.

### **Section 3 Working together**

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

We are both committed to the Better Regulation Executive's principles of good regulation. 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. A list of the key principles of an effective charity regulation framework is at Appendix C.

In order to ensure that issues are handled at the appropriate level and that developing policy considerations 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 or in relation to a particular case, charity or group of charities.

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

We both collect information about the charities that we monitor.

The charity for which Defra is principal regulator submits an annual report and accounts to it as required by the National Heritage Act 1983 and makes that information publicly available.

As a principal regulator, Defra must ensure as far as it can that the information it collects about RBG, Kew includes that required by the Charities Acts and any regulations made under those Acts. We will work together to ensure that the information provided complies with those requirements.

#### **C. Public information**

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

#### **D. Sharing information**

Sections 10 to 10C of the Charities Act 1993, as amended by the Charities Act 2006, permit the Commission to share information with a principal regulator in relation to a charity within the principal regulator's jurisdiction. A principal regulator has the same permission to share information with the Commission. 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, the Data Protection Act 1998, the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.

Where information is disclosed about an ongoing investigation, neither of us will pre-judge the outcome or take action on that basis.

Neither the Commission nor Defra will disclose information received from the other to any other person or body without first consulting the party from whom the information originally came.

When exchanging information the provider will mark it with the appropriate security classification.

#### E. Use of statutory powers

##### *Regulatory powers*

We both have statutory powers that we can use if there are serious concerns about the administration of the RBG, Kew. This section relates to how we will each use our respective powers and how we will enable clear and timely communication.

Where Defra identifies concerns about the administration of RBG, Kew, it will notify the Commission in writing of those concerns as soon as possible, including any charity law issues it has identified, at the same time that it advises RBG, Kew, of any action it proposes to take (unless in the circumstances it is not appropriate to notify RBG, Kew at the same time). The notification 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 Defra 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 relevant published statements by the Commission or by Defra about their respective approaches to regulation.

The Commission will provide Defra with any comments it wishes to make on charity law issues, in particular it will advise Defra of whether it believes that there may be any aspects of the case that require the Commission's intervention.

The Commission must consult Defra before using any of its regulatory powers in respect of RBG, Kew. Unless it has identified a significant risk to a charity's property and/or reputation the Commission's method of consultation will usually be in writing. Defra will respond to such a consultation within a period that may be agreed between the points of contact.

If the Commission has identified a clear risk to charity property 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 would be the most appropriate to take it.

Where we both have a mutual interest in a charity or charitable assets we will aim to agree a written protocol at the earliest opportunity to cover case strategy, the role of each of us in the investigation, areas of responsibility and liaison arrangements. The protocols will build on the agreements in this MoU.

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

##### *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.

To ensure that no breach of Defra's regulatory function occurs, when using its support powers in ways that affect the use of the assets of RBG, Kew, the Commission will advise Defra of:

- the action it is taking
- how it has been demonstrated to the Commission that the proposed action is in the best interests of RBG, Kew.

#### F. Policy development and liaison

We are both key stakeholders in the regulation of RBG, Kew and the development of the law and policy in our respective areas of expertise. We will work together to ensure as far as we can that relevant law and policy is developed, interpreted and applied in a way that is consistent with the key principles of charity regulation set out at Appendix B/C with the aim of minimising the administrative burden on RBG, Kew.

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 the Commission's Board and Defra's Management Board, 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. Without prejudice to the foregoing, either party may terminate this MoU on one month's written notice at any time and for any reason.

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

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 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

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.

#### H. Responding to complaints

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 Defra's complaints procedure and complaints that are about how we interact.

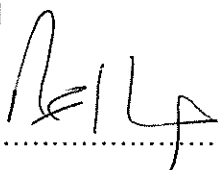
- Each of us will maintain separate responsibility and accountability for complaints about the services we each provide within our own complaints procedures.
- Where the correspondence is concerned with complaints, feedback or suggestions concerning how we interact with each other, the recipient will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

Whilst it is intended that the arrangements in this MoU should apply generally, we recognise that some circumstances will require special handling and nothing prevents us from making exceptional arrangements to meet specific needs in relation to a particular matter relating to RBG, Kew.

Any disagreement arising from the interpretation of this MoU will be referred to the Chief Executive of the Charity Commission and the Deputy Chief Scientific Advisor at Defra for resolution within the spirit implicit in this MoU. If necessary, this MoU will be amended to reflect the agreed outcome of the referral.

**Signed**



Andrew Hind  
Chief Executive  
Charity Commission for England  
and Wales



Miles Parker  
Deputy Chief Scientific Advisor  
On behalf of the Secretary of State for  
Environment, Food and Rural Affairs

1 June 2010



**The Commission's powers**

The Commission's powers include those listed below. It may only apply most of these powers to RGB, Kew after consultation with Defra as 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.

<b>Protective Powers</b>	<b>Statutory reference</b>
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>1</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>2</sup> 79, <sup>2</sup> 80(1), CA2011
Make a scheme for the administration of a charity	S79(2)(b) CA 2011 <sup>2</sup>
Appoint new trustees	S76(3)(b) CA 2011 <sup>2</sup> and S80(2) CA 2011
Vest charity property in the Official Custodian for Charities	S76(3)(c) CA 2011 <sup>2</sup>
Order individuals not to part with charity property without its approval ("freezing orders")	S76(3)(d) CA 2011 <sup>2</sup>
Order individuals not to pay debts owed to the charity without its approval	S76(3)(e) CA 2011 <sup>2</sup>
Restrict transactions that can be entered into on behalf of a charity	S76(3)(f) CA 2011 <sup>2</sup>
Appoint an interim manager for a charity	S76(3)(g) CA 2011 <sup>2</sup>
Suspend or remove trustees etc from membership of a charity	S83 CA 2011 <sup>2</sup>
Give specific directions for protection of a charity	S84 CA 2011 <sup>2</sup>
Direct the application of charity property	S85 CA 2011 <sup>2</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>2</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
Order a disqualified person to repay sums received	S184(2)-(4) CA 2011

<sup>1</sup> This power may only be exercised on request of the Principal Regulator

<sup>2</sup> Powers only exercisable pursuant to an inquiry under s.46

from a charity while acting as charity trustee or trustee for the charity	
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
Make a scheme for the administration of a charity (including 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



### **Defra's sponsorship of the Royal Botanic Gardens, Kew, an exempt charity**

The Royal Botanic Gardens, Kew, an exempt Charity is a Non-Departmental Public Body and its public nature and responsibilities are set out in legislation under the National Heritage Act 1983 and in its Framework Document (Management Statement and Financial Memorandum). Their Trustees are accountable through Ministers to Parliament for the public money that they spend, including money that comes from the taxpayer through grant-in-aid or from charitable donations and bequests. In so doing, they follow the guidance *Managing Public Money* issued by HM Treasury which covers a wide variety of issues relating to the proper handling and reporting of public money.

The respective responsibilities of the Trustees and the Director of RBG, Kew are set out in the legislation and in Kew's Framework Document or Management Statement, which sets out the nature of its relationship with Defra at a strategic level and explains the roles and responsibilities of all parties and their lines of accountability. Detailed financial arrangements are also set out in the Framework Document or Financial Memorandum, which describes the framework within which Kew receives grant-in-aid or incurs public expenditure.

The Director of Kew is appointed as Accounting Officer by the Accounting Officer (Permanent Secretary) of Defra. The particular rules that apply to this appointment are set out in the letter issued to each Accounting Officer on appointment, together with the HM treasury publication *Regularity, Propriety and Value for Money*. 'Dear Accounting Officer Letters' (DAOs) issued by the Treasury Officer of Accounts team in HM Treasury also provide specific advice on issues of accountability, regularity and propriety and annual accounting exercises.

A Public Service Agreement (PSA) is agreed between HM Treasury and Defra during each spending review period. It sets a few high level targets that Defra is committed to achieving with the allocation of government funding received. The Department's PSA is reflected in the funding agreements agreed between Defra and its executive NDPBs. The Funding Agreement sets out what the Department expects the sponsored body to achieve, in terms of its delivery of objectives, in return for the public funding it receives.

Most appointments of Trustees to the Board of Trustees for Kew, an exempt charity, are the responsibility of the Secretary of State for Defra; one Trustee is appointed by the Queen. All appointments are subject to the detailed rules and procedures laid down by the Office of the Commissioner for Public Appointments (OCPA). All appointments made by the Secretary of State (or the Queen) are subject to audit by an auditor appointed by the Commissioner for Public Appointments.

In preparing their annual report and accounts, NDPBs that are exempt charities comply with the Statement of Recommended Practice (SORP) *Accounting by Charities* issued by the Charity Commission and also follow principles in the HM Treasury Financial Reporting Manual (FReM) where these go beyond the SORP.

**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>3</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>3</sup> <http://www.bis.gov.uk/policies/bre>

**Designated points of contact**

<b>Area of Liaison</b>	<b>Charity Commission</b>	<b>Defra</b>
Development of policy	Head of Policy	Commercial Director
Development of legal framework	Head of Legal Services	Legal Director
General approach to operational liaison	Head of Operations London	Commercial Director
Initial contact at individual casework level	Head of Operations London	Commercial Director
Contact for supervision / investigation / statutory action.	Head of Investigations and Enforcement	Commercial Director