



Department  
for Education



**CHARITY COMMISSION**  
FOR ENGLAND AND WALES

**MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE CHARITY COMMISSION FOR ENGLAND AND WALES  
AND  
THE DEPARTMENT FOR EDUCATION**

**JULY 2017**

## **Memorandum of Understanding between the Charity Commission and the Department for Education**

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### **1. Purpose of Memorandum of Understanding**

1. This Memorandum of Understanding (MoU) sets out how the Charity Commission for England and Wales (the Commission) and the Department for Education (DfE), including its executive agency - the Education and Skills Funding Agency (ESFA) - propose to work together and communicate effectively, both in our respective regulatory operations and in formulating the regulatory policy framework within which we both work.

2. Both the Commission and DfE are fully committed to the aims of the MoU which are to assist in their respective functions in the following ways to:

- promote a common understanding of the Commission and the DfE's responsibilities, working procedures, legal powers and constraints;
- promote co-operation between the Commission and DfE staff at a strategic and operational level;
- facilitate effective investigation with the objective of prevention, detection and remedy of misconduct or mismanagement in the administration of charities and charitable funds;
- ensure the effective disclosure of information in compliance with all relevant legislation; and
- ensure appropriate consultation on matters of relevant and significant policy initiatives to ensure that charities comply fully with their legal obligations and adopt best practice in governance and accountability.

3. The MoU is intended to cover the full range of the DfE's regulatory interest in charities carrying out educational activities, and in particular the Secretary of State's role as Principal Regulator of the following exempt charities<sup>1</sup> in England:

(a) the governing bodies of foundation, foundation special and voluntary schools and foundation bodies (referred to in this MoU as foundation and voluntary schools)

(b) Academy Trusts,<sup>2</sup>

(c) sixth form college corporations,

(d) further education corporations, and

(e) their relevant associated charities (paragraph 28 of Schedule 3 to the Charities Act 2011)

## 2. Our roles

### The Commission

4. The Commission is subject to the legal framework as set out in the Charities Act 2011 ("The Act") and is the statutory regulator and registrar of charities in England and Wales. The Commission is a non-ministerial government department. Section 13 of the Act specifically prohibits the exercise of any Commission function being subject to the direction or control of any Minister or other government department.

5. The Commission's objectives as defined in section 14 of the Act are to:

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

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<sup>1</sup> An exempt charity is one that is exempt from registration and direct regulation by the Commission. Exempt charities still have to comply with the general principles of charity law, such as trustees' responsibilities, but different rules apply, in terms of applicability of the *Charities Act 2011* to exempt charities, depending on whether it has a Principal Regulator or not (see [Commission's guidance Exempt Charities \(CC23\)](#)).

<sup>2</sup> For the purpose of this MoU, an "Academy Trust" is a Academy Proprietor that has entered into Academy arrangements with the Secretary of State (as per section 1 of the Academies Act 2010), thus making it a qualifying Academy Proprietor under section 12 of the Academies Act. Qualifying Academy Proprietors are exempt charities under Schedule 3 of the Charities Act 2011 and fall within the Principal Regulator's (SoS for DfE) regulatory remit, however, remaining Academy Proprietors (charitable companies) fall within the Commission's jurisdiction.

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6. The Commission's general functions as set out in section 15 of the Act include:

- determining whether institutions are or are not charities;
- encouraging and facilitating the better administration of charities; this function includes a power to give advice or guidance to charities;
- identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement; and
- obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives; this function includes the maintenance of an accurate and up to date register of charities.

7. In carrying out its functions the Commission will have regard to the principles of best regulatory practice, including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent, and targeted only at cases in which action is needed (section 16 of the Act). The Commission has a wide discretion to decide how to achieve its objectives, and carry out its functions and duties.

8. 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.

9. The Commission considers that it can best fulfil all its statutory objectives by concentrating on the following:<sup>3</sup>

- promoting compliance by charity trustees with their legal obligations;
- enhancing transparency and the rigour with which it holds charities accountable;
- promoting the effective use of charitable resources by raising awareness, supporting trustees and enabling them to comply with their duties; and
- ensuring that only bodies that properly qualify as charities under the law are registered.

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<sup>3</sup> [Charity Commission statement of mission, regulatory approach and values](#), published 9 January 2017.

10. The Commission believes this is the best way to promote public trust and confidence in charities and thereby to encourage charitable giving and endeavour in all its forms.

11. In pursuance of its objectives and functions, the Commission maintains a register of charities. The Commission's jurisdiction extends to all registered charities and unregistered charities (other than limitation on the use of its powers in relation to exempt charities) (sections 12 and 25 of the Act). The term "charities" and "charitable purposes" refers to organisations and purposes which are exclusively under the law of England and Wales. They will include charitable collections and funds managed on an informal basis by any person or organisation.

12. The Commission has powers for the protection of charities (and may consider using these when dealing with the situation above, although they can only be used in certain circumstances and for some powers, only within a statutory inquiry. These powers are listed at Appendix A.

13. The Commission also has extensive information-gathering powers. It may for example:

- order anyone to provide the Commission with information in his or her possession which relates to any charity and is relevant to the discharge of any of its functions (section 52 of the Act); and
- direct anyone to provide accounts and written statements, or written answers to questions concerning any matter which it is investigating about which that individual has or can reasonably obtain information (section 47 of the Act).

14. The supply of false or misleading information to the Commission is a criminal offence (section 60 of the Act). However, information acquired by the use of these powers can only be used for the purpose for which the powers were given.

15. It follows that the Commission can use these information-gathering powers only in order to acquire information for use in discharging statutory purposes, not (for example) simply in order to obtain information for another body.

16. The Act extends the Commission's powers including in relation to exempt charities (summarised at Appendix A). The Commission must consult the relevant Principal Regulator before exercising any specific power in respect of an exempt charity. The Commission may not exercise its power to institute an inquiry under section 46 of the Act ("statutory inquiry") into an exempt charity unless requested to do so by the Principal Regulator. The Commission may open monitoring and operational cases without a request from the Principal Regulator. Decisions of the Commission may be subject to appeal to the First-tier Tribunal (Charity) (schedule 6 of the Act) or judicial review in the Administrative Court.

17. Charities in England and Wales have to be established for charitable purposes for the public benefit and be independent of the state. Appendix D sets out guidance on independence for charitable educational institutions.

## **The Department for Education**

18. The Department for Education works to achieve a highly educated society in which opportunity is equal for all, no matter what their background or family circumstances. It was formed in July 2016, following the Machinery of Government changes, with its current responsibilities: education; children's services; higher and further education policy; apprenticeships and wider skills in England; and equalities. The Department's Business Plan Aims and Objectives sets out further details of the Department's priorities and commitments.

19. The Secretary of State for Education is the Principal Regulator in England of the following exempt charities (under Schedule 3 of the Act) from 1 August 2011: (a) the governing bodies of foundation, foundation special and voluntary schools and foundation bodies; (b) Academy Trusts; (c) sixth form college corporations; and (d) further education corporations from 9 November 2016 (reflecting the July 2016 Machinery of Government changes).

20. The Secretary of State is also the Principal Regulator of any exempt charity which is an institution administered by or on behalf of a further education corporation, or the governing body of a foundation, voluntary or foundation special school, and is established for the general purposes of, or for any special purpose of, or in connection with, that corporation or governing body. In this MoU, a charity for which the Secretary of State is Principal Regulator is referred to as a 'relevant charity'.

21. 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 (section 26 of the Act). If they identify a concern about a charity, they may invite the Commission to use its powers of investigation and intervention under the Act. This does not affect the use by the Principal Regulator of its own regulatory powers.

22. In addition to his/her role as Principal Regulator for relevant charities, the Secretary of State may, in exercising the statutory powers that he/she has in other areas, take action, which impacts on the operation of charities for which he/she is not the Principal Regulator. For example, the intervention power in section 56A of the Further and Higher Education Act 1992 covers institutions designated under section 28 of the Further and Higher Education Act 1992, which are currently all registered charities.

23. As the regulatory authority for Independent Schools in England, the Secretary of State is legally obliged to prescribe standards ("the Independent School Standards", made under section 94 of the Education and Skills Act 2008) that Independent Schools must comply with. DfE may work with the Commission if it has any concerns relating to an Independent School that is a charity and which is failing to comply with any of the independent school standards. The Commission has powers to remove trustees, officers, agents or employees, and disqualify trustees, which the Secretary of State does not.

24. The Secretary of State's powers in relation to independent schools, and the implications for working with the Charity Commission, are set out in the relevant section of Appendix B. DfE will keep the Commission informed of regulatory or enforcement action which is being taken in respect of a school which is a charity and is not meeting the Independent School Standards, so that the Commission can consider the implications of that for assessing compliance with charity law.

25. The Department and the Commission will exchange general and school-specific information relating to public benefit and charitable status of schools as required by their respective roles, either through agreement or as set out in relevant legislation.

### **3. Working together**

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

26. The key principles of an effective charity regulation framework are set out at Appendix D. We consider these to 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.

27. 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 single points of contact (see Appendix E). Where they consider it appropriate, the designated points of contact may:

- delegate ongoing liaison to other members of staff, and
- agree detailed working arrangements or protocols that are relevant to particular areas of responsibility.

#### **Framework documentation**

28. When DfE or the Commission develop new or update existing model or framework documentation (e.g. Articles of association) for any relevant charity or group of charities they will consult each other as soon as practically possible.

#### **Collecting information and monitoring**

29. We both collect information about the charities that we regulate.

30. DfE will continue to apply its usual process for monitoring the institutions for which the Secretary of State is the Principal Regulator wherever possible using existing returns of information.

31. The Principal Regulator will work with these institutions to ensure effective and proportionate monitoring is maintained, in line with his/her powers as set out in Appendix B.

## **Public information**

32. The public Register of Charities includes such information about the registered charity as the Commission thinks fit. The Commission publishes this information to increase charities' accountability to their supporters, beneficiaries and the public.

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

## **Disclosure of information**

34. When disclosing information under the statutory gateway or its general powers, the Commission and DfE must ensure the provisions of sections 54 to 59 of the Act (where applicable) and the terms of this MoU are satisfied. Nothing in this MoU commits either party to disclose information nor imposes upon the Commission or other person or organisation a duty to disclose information.

35. Sections 54 to 59 of the Act provide a statutory gateway, as well as our general powers, for the disclosure of information by the Commission and DfE. However, nothing in sections 54 to 57 authorise the making of a disclosure which is:

- contrary to the Data Protection Act 1998 (and any subsequent legislation) (section 59); or
- prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (section 59); or
- contrary to the Human Rights Act 1998 and other relevant legislation.

36. Section 56 of the Act deals with disclosures by the Commission generally and gives the Commission the powers exercisable at its discretion to disclose to any relevant public authority any information received by the Commission in connection with any of the Commission's functions if:

- a) the disclosure is made for the purposes of enabling or assisting relevant public authority to discharge any of its functions; or
- b) the information so disclosed is otherwise relevant to the discharge of any functions of the relevant public authority.

37. The Commission has the discretion to disclose information it has received in connection with any of its functions under section 56. However if:

- the information has been received by the Commission under s.54(1) subject to an express restriction the Commission must first obtain consent to further disclose the information (section 56(3)); or
- the information has been received by the Commission from HMRC the Commission must first obtain the consent of HMRC to further disclose the information (section 57(2)). Section 57(3) makes it an offence to disclose HMRC information in contravention of 57(2).

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38. Section 54 of the Act deals with disclosure to the Commission generally and gives any relevant public authority the ability, at its discretion, to disclose information to the Commission if the disclosure is made for the purposes of enabling or assisting the Commission with the discharge of any of its functions.

39. The Secretary of State for Education as Principal Regulator and DfE are relevant public authorities for the purpose of section 54 and 56 of the Charities Act 2011. Sections 54 to 57 of the Act apply, with modifications, as if references to the Commission were references to a Principal Regulator.

40. The Commission also has the discretion to disclose, under its general powers under the Act, information other than that which it has received from third parties. Such disclosures must also be compliant with all relevant legislation.

41. The Commission may not be able to share sensitive information where acting upon this information could have a detrimental impact on on-going investigations.

42. The Commission and DfE agree that there will be no further dissemination or disclosure of disclosed information received from the Commission or DfE, without the written consent of the party that disclosed the information. Such permission must not be unreasonably withheld. For the avoidance of doubt, this includes intelligence information which conforms to the rules of the National Intelligence Model. The exceptions to this are:

- with regard to all information other than that received by way of intelligence, the receiving organisation might, in the case of court proceedings, be required to disclose some of this information at short notice to the court. As a consequence, the receiving organisation might, on an exceptional basis, be unable to obtain prior permission from the originator because of time constraints. In such cases, the receiving organisation will inform the originator of the disclosure retrospectively and without undue delay; or
- the circumstances set out in paragraph 54 below

43. If the originating party gives written permission for the information to be disclosed to a third party, the origin of the information should be made clear to the third party, in order that they can take appropriate action on flagging the origin of the information on their own internal systems

44. In order for the Commission and DfE to share information, they will:

- establish channels of communication for operational staff to enable relevant information to be exchanged promptly and where appropriate to do so; and
- encourage the disclosure and exchange of information, where appropriate, in order to maximise the efficiency of our respective functions.

## Information Handling

45. When exchanging information, the Commission and the DfE shall ensure that information is:

- marked with the appropriate security classification (paragraph 47 below);
- exchanged using a secure platform as detailed in paragraph 46 below; and
- stored securely in accordance with all applicable requirements including HM Government guidelines and the Data Protection Act 1998 ('the DPA').

46. The Commission and DfE will disclose information via a secured data sharing platform. For the Commission this would normally be the government secure ".gsi" email channel. In the event that such arrangements are not feasible or if another method of information disclosure is required, for example, absence of access to government secure email or information provided on removable media, then this may be mutually agreed by both parties. Appropriate communication or transportation arrangements suitable to the security classification of the information or communication, in particular secure encryption, must be made for the transfer.

47. Both parties will ensure that all disclosures are appropriately protected using the Government Security Classification (GSC) system as follows:

- Official – the majority of information that is created or processed by the public sector. This includes the sub set of information to be protected by Official – Sensitive.
- Secret – very sensitive information that justifies heightened protective measures to defend against determined and highly capable threat actors
- Top Secret – the most sensitive information requiring the highest level of protection from the most serious threats.

Information shared through this agreement will attract a protective marking under the Government Protective Marking System of at least OFFICIAL.

48. The Commission and DfE agree that the information disclosed between the parties is to be used by the receiving party only for the purpose that it was shared. The written consent of the originating party must be obtained before the disclosed information can be used for any other purpose unless the receiving party is authorised by law to use the information for another purpose.

49. Information will be provided to DfE on the condition that it is handled as per the DfE's own information handling policy. It is the responsibility of DfE to ensure this occurs. DfE will retain information supplied by the Commission only for as long as there is a business purpose to do so and not any longer than is necessary for DfE to perform its functions. Where the Commission's material is used to inform a specific research paper, it will be clearly referenced.

50. Information will be provided to the Commission on the condition that it is handled as per the Commission's information handling policies. It is the responsibility of the Commission to ensure this occurs. The Commission will retain information supplied by DfE only as long as there is a business purpose to do so and not any longer than is necessary for the Commission to perform its functions. Where DfE material is used to inform a specific research paper, it will be clearly referenced.

51. The Commission and DfE will ensure that any information losses, wrongful disclosures or breaches of security relating to information received from the other organisation is reported to the other organisation as soon as practically possible following the loss, wrongful disclosure or breach.

52. The Commission may from time to time, mark information disclosed to DfE as 'for intelligence purposes only' ("Marked Information"). Marked Information may be used by DfE to inform their investigations, and assist any information gathering. DfE may not publish or use Marked Information to form decisions and/or take action on their matters. This may be necessary in order to protect ongoing cases by the Commission or other public bodies.

53. Information about the status of charities (whether registered or removed, or if an interim manager has been appointed), the activities of a charity and where it is able to operate, main contact details, the financial history, and whether there is a public statement regarding the opening of an inquiry are also available as part of the [Public Register of Charities for England and Wales](https://www.gov.uk/government/organisations/charity-commission) (<https://www.gov.uk/government/organisations/charity-commission>).

### **Freedom of Information**

54. The Commission and DfE are obliged to comply with the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004 ("EIR"). If the Commission receives a FOIA/EIR request for information provided to it by DfE, the Commission will inform DfE of the request. DfE will then inform the Commission whether in its opinion the information should be released under FOIA/EIR and if not, DfE will provide the Commission with the details of which of the exemptions it considers may apply within the statutory timescales provided for in FOIA/EIR to assist the Commission in its decision-making. If DfE receives a FOIA/EIR request for information provided to it by the Commission, DfE will inform the Commission of the request. The Commission will then inform DfE whether it considers that the information should be released under FOIA/EIR, and if not, the Commission will provide DfE with details of which exemptions it considers may apply within the statutory timescales provided for in FOIA/EIR to assist DfE in its decision-making. Any final decision in relation to an FOIA/EIR request to the Commission is a matter for the Commission. Any final decision in relation to an FOIA/EIR request to DfE is a matter for DfE.

## **Data protection**

55. For the purpose of the DPA or any subsequent legislation, DfE is the data controller for all personal data it holds in order to fulfil its own functions. DfE will become the data controller for the personal data it receives from the Commission as part of any information disclosure.

56. The Commission is the data controller for all personal data it holds in order to fulfil its own functions for the purpose of the DPA. The Commission will become the data controller for the personal data it receives from DfE as part of any information disclosure.

57. The Commission and DfE will undertake all reasonable steps to ensure that the personal data held by them and supplied to them will only be processed (including internally) in accordance with the DPA.

58. Where the Commission and DfE wish to share information on individuals, this information will be kept to the minimum necessary to facilitate the purpose for which the information is shared. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or purposes.

## **Liaison at Operational Level**

### *General liaison and collaboration process*

59. In order to facilitate the flow of information and technical expertise, DfE and the Commission will appoint officers to act as single points of contact (“SPoCs”).

60. Requests for information by DfE to the Commission about a new matter must be made via the Commission’s SPoC. Requests for information by the Commission to DfE should be sent via DfE’s SPoC (see Appendix E). SPoCs may also be able to provide general advice.

61. The SPoCs will aim to ensure that:

- the disclosure of information and referral of individual cases are screened and processed with an appropriate degree of uniformity and speed;
- routine referrals will be dealt with within fifteen working days of receipt, and any urgent referrals within eight working days;
- if action on a referral cannot be completed within the timescale specified above, the receiving SPoCs will provide the originating SPoC with progress reports at agreed intervals;
- any general information, intelligence, announcement, or warning that either the Commission or DfE considers will impact directly on the other is brought to the attention of the other, and reported up and/or disseminated appropriately within the Commission and the DfE.

## **Use of statutory and non-statutory powers**

62. We both have intervention powers that we can use if there are serious concerns about the administration of 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 Education's powers are outlined in Appendix B.

## **Outline process for concerns**

63. Where either the Commission or DfE 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.

64. A notification from DfE to the Commission may invite it to use any of its regulatory powers (including but not limited to opening an inquiry under section 46 of the Act ("a Statutory Inquiry")) or indicate that those powers may be required at some stage during the conduct of the case. In such cases, DfE will supply the Commission with all information that is relevant and appropriate in the circumstances. Where DfE requests the Commission to open a Statutory Inquiry, permission to disclose some or all of the information supplied in support of the invitation must be included.<sup>4</sup> The Commission is not obliged to accept the invitation and, in such cases, will explain to DfE in writing, why it has decided not to open a Statutory Inquiry, and if it proposes to take any other action (e.g. issuing regulatory advice, disqualification of individuals as trustees).

65. The Commission may provide DfE with any comments on charity law issues, in particular, whether it believes that there may be any aspects of the case that require its intervention.

66. The Commission must consult DfE before using any of its regulatory powers in respect of a relevant charity. Unless the Commission has identified a significant and urgent risk to a charity's property, beneficiaries and/or reputation, this consultation will usually be in writing (by email). DfE will respond to the consultation within a period that may be agreed between the points of contact.

67. If the Commission has identified a clear risk to a relevant charity's 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 in respect of a relevant charity we may jointly consider what further action is needed

68. The Commission or DfE may also identify potentially serious concerns about a charity other than a relevant charity. Where we both have a mutual interest in a charity or charitable assets we may agree at the earliest opportunity a case strategy, the role of each of us in the case, areas of responsibility and liaison arrangements.

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<sup>4</sup> Decisions by the Commission to open an Inquiry are subject to appeal to the Tribunal and the full reasons and evidence relied upon are publically disclosable in that hearing. The Commission must be able to rely on the information supplied in that context.

69. The outcome of any such case 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**

70. All charities can ask the Commission to exercise its 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.

71. The Commission also publishes general guidance for all charities on its website, and may generally or specifically refer relevant charities to that guidance.

### **Policy development and liaison**

72. 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 D, with the aim of minimising the administrative burden on the relevant bodies.

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

74. 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.

75. 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.

### **Staff development and training**

76. 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.

77. 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.

### **Responding to complaints**

78. 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 DfE's complaints procedure and complaints that are about how we interact:

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- 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.

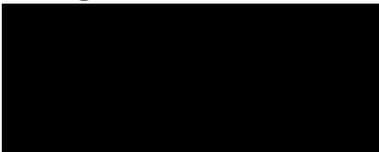
### General

79. 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 such circumstances should be agreed in writing between the Commission and the DfE.

80. Any disagreement arising from the interpretation of this memorandum will be referred to both the Chief Executive of the Commission and the Permanent Secretary of the DfE for resolution within the spirit implicit in this memorandum. If necessary, this memorandum will be amended to reflect the agreed outcome of the referral.

81. Nothing in this MoU is intended to create a legally binding obligation or to confer legal rights on either party.

### Signatures



**Jonathan Slater**

**Permanent Secretary  
Department for Education**



**Paula Sussex**

**Chief Executive  
The Charity Commission**

**Date: 6 July 2017**

**Date: 17 July 2017**

### 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 DfE as Principal Regulator. It may only exercise its power to institute inquiries if requested to do so by the Principal Regulator.

<b>Protective Powers</b>	<b>Statutory reference</b>
Require a registered charity to change its name in certain specified circumstances	S42-45 CA 2011
Call for documents and search records	S52-53 CA 2011
Issue an official warning to a charity, charity trustee or trustee for a charity	S75A CA 2011
Remove a trustee who has been disqualified	S79A CA 2011
Remove or appoint a charity trustee (non-exempt charity)	S80 CA 2011
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
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
Disqualify an individual from being a trustee in specified circumstances	S181A-181D CA 2011
Order a disqualified person to repay sums received from a charity while acting as charity trustee or trustee for the charity	S184(2)-(4)
Disqualify trustees who are receiving remuneration by virtue of section 73A CA 1993	S186 CA 2011
<b>Protective Power exercisable only at the request of the Principal regulator</b>	<b>Statutory reference</b>
Institute inquiries into the administration of a charity	S46 CA 2011
<b>Protective Powers exercisable only after a statutory inquiry has been opened</b>	<b>Statutory reference</b>
Suspend or remove any trustee, charity trustee, officer, agent or employee of a charity	S76, 79, CA2011
Remove or appoint a charity trustee (exempt charity)	S80 CA 2011
Make a scheme for the administration of a charity	S79(2)(b) CA 2011
Appoint new trustees	S76(3)(b) CA 2011

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Vest charity property in the Official Custodian for Charities	S76(3)(c) CA 2011
Order individuals not to part with charity property without its approval (“freezing orders”)	S76(3)(d) CA 2011
Order individuals not to pay debts owed to the charity without its approval	S76(3)(e) CA 2011
Restrict transactions that can be entered into on behalf of a charity	S76(3)(f) CA 2011
Appoint an interim manager for a charity	S76(3)(g) CA 2011
Suspend or remove trustees etc. from membership of a charity	S83 CA 2011
Give specific directions for protection of a charity	S84 CA 2011
Direct specific action not to be taken	S84A CA 2011
Direct winding up of a charity	S84B CA 2011
Enter premises and seize documents	S48-49 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 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

## **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 that are most relevant to the Principal Regulator role. However, the list of powers is not exhaustive.

### **Foundation and voluntary schools**

Under sections 496 and 497 of the Education Act 1996, the Secretary of State may issue a direction to a governing body about the performance of any duty imposed on it under the Education Acts, if he or she is satisfied that it has acted or is proposing to act unreasonably in respect of any such duty, or have failed to discharge any such duty.

Under Part 4 of the Education and Inspections Act 2006, both local authorities and the Secretary of State have powers to intervene in schools causing concern. In particular, under section 69 of the Act, the Secretary of State may replace the governing body of a school eligible for intervention with an Interim Executive Board consisting of members appointed by him.

### Transfer and disposal of school land held by foundation and voluntary schools

Where land held by the governing bodies of foundation schools or voluntary schools was previously owned by a local authority and transferred without payment, or was provided directly by the Secretary of State, the Education Acts give both local authorities and the Secretary of State a continuing interest in this public land.

Land held by the trusts of foundation and voluntary schools may have similarly originated from the local authority or Secretary of State and therefore be public land with the same continuing public interest. Alternatively, it may be originally privately funded charitable land, which has been significantly enhanced at public expense, so that it meets the Education Acts' definitions of "publicly funded" land, and a new public interest in the land has been created.

Academy Trusts generally hold land originally provided by the local authority or Secretary of State.

Generally, the disposal or change of use of any sort of public land requires the consent of the Secretary of State, or that he/she be notified and has an opportunity to exercise powers to retain the land in education use. When notified of a disposal or asked for consent, the Secretary of State may instead direct that land proposed for disposal should be transferred to a party concerned with the running an Academy – usually any academy trust - with appropriate compensation for any private interest which remains.

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However, the previous government made a policy statement that in general, the Secretary of State will not exercise these powers over trust land, unless the public investment in the land is greater than 50%, or where the land or proceeds of sale are to be used for other charitable purposes of the trust, where these are wider than just educational purposes.

### **Academy Trusts**

The term 'Academy Trust' refers to the legal entity that runs either a single Academy or a group of Academies, including: converter Academies, sponsored Academies, Free Schools, University Technical Colleges (UTCs) and Studio Schools that are controlled and/or administered on behalf of an Academy.

Full details of the Secretary of State's powers are set out in the funding agreement for each Academy. This Memorandum of Understanding has been drafted on the basis of the current model documentation, which is subject to review and change.

A summary of his/her key powers are set out below.

Either the Secretary of State or the Academy Trust may give at least seven years' notice to terminate the funding agreement. However, the Secretary of State may terminate the funding agreement on a shorter timescale, if he/she believes that:

- the Academy has breached the provisions of the funding agreement; or
- the standards or performance of pupils at the Academy are unacceptably low; or
- there has been a serious breakdown in the way the Academy is managed or governed; or
- the safety of pupils or staff is threatened, including a breakdown of discipline; or
- the Academy is coasting, provided he/she has notified the Academy Trust that it is coasting; or
- special measures are required to be taken in relation to the Academy; or
- the Academy requires significant improvement; or
- a decision has been made to remove the Academy from the Register of Independent Schools; or
- the Academy Trust becomes insolvent.

## **Independent Schools**

The Secretary of State has a discretionary power to take action in respect of Independent Schools failing to comply with the independent school standards (section 94 of the Education and Skills Act 2008). This will apply equally to independent schools for which the Secretary of State is not Principal Regulator, as well as Academy schools and alternative provision academies for which the Secretary of State is Principal Regulator of the relevant Academy Trust.

If an independent school fails to meet any of the independent school standards, this can lead to regulatory action through a statutory notice and requirement for an action plan. In the most serious cases, de-registration (or imposition of a 'relevant restriction') by the Secretary of State, (as permitted under section 116 of the Education and Skills Act 2008)) may occur, although this is subject to appeal by the school to the First-Tier Tribunal. In any of these cases, it is desirable for the Commission to be kept informed of the action being taken by DfE.

If a school was to be removed from the register and had to close, the school was recognised as a charity and had no other purpose or business than the operation of the school, the Commission may need to consider altering the purposes or ensuring the application of net assets to a proper charitable purpose. It is expected that where DfE is considering de-registering a school, it will liaise with the Commission to ensure that any regulatory concerns are addressed.

It is also possible for an independent school to be in breach of charity law (for example in relation to expenditure of funds) but still be meeting the independent school standards because those standards either do not apply, or have only a very general application, in some parts of a school's operations which do not directly affect pupils.

## **Sixth form college corporations**

If the Secretary of State is satisfied as to one or more of the matters listed in sub section (2) of section 56E of the Further and Higher Education Act 1992 (as inserted by the Apprenticeships, Skills, Children & Learning Act 2009 and amended by the Education Act 2011):

- that the sixth form college's affairs have been or are being mismanaged by its governing body;
- that the sixth form college's governing body have failed to discharge any duty imposed on them by or for the purposes of any Act;
- that the sixth form college'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 sixth form college is performing significantly less well than it might in all the circumstances reasonably be expected to perform, or is failing or likely to fail to give an accepted standard of education or training.

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He/She may do one or more of the following:

- Remove all or any of the members of the sixth form college's governing body;
- Appoint new members of that body if there are vacancies (however arising);
- Give to that body such directions as the [Secretary of State thinks] expedient as to the exercise of the body's powers and performance of the body's duties, including (in extremis) a direction to a corporation requiring it to pass a resolution to dissolve the corporation.

In using these powers, the Secretary of State must have regard to the fact that members of the governing body will be trustees and that trustees have an obligation to act independently and only in the interest of the charity and not any third party.

### **Further Education Corporations**

If the Secretary of State is satisfied as to one or more of the matters listed in sub section (2) of section 56A of the Further and Higher Education Act 1992 (as inserted by the Further Education and Training Act 2007):

- 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/She 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 (however 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.

In using these powers, the Secretary of State must have regard to the fact that members of the governing body will be trustees and that trustees have an obligation to act independently and only in the interest of the charity and not any third party.

## Information requirements

### a) Foundation and voluntary schools

The governing bodies of foundation and voluntary schools are already under a duty to provide advice and assistance to certain persons (governing bodies of other maintained schools, a local authority and proprietor of an Academy.<sup>5</sup> This could include requests for information (e.g. governance, financial) about the school.

Regulations provide that the governing body must make available for inspection, to any interested person, a copy of the agenda, signed minutes and reports or papers considered at meetings of the governing body (or its committees) as soon as is reasonably practicable (the Governing Body has the right to not disclose information certain personal information and information it deems confidential). This transparency also relates to where schools have federated.<sup>6</sup>

Although governing bodies of foundation and voluntary schools do not have to publish their annual accounts on their web sites (where they have one), they must ensure that they provide the local authority with annual income and expenditure returns<sup>7</sup> in accordance with the Consistent Financial Reporting framework. The governing bodies must also, as an exempt charity, ensure a copy of its most recent accounts are provided to anyone who makes a written request and pays any reasonable fee being charged.<sup>8</sup>

### b) Academy Trusts

The DfE's model articles of association require:

- the Academy Trust to prepare annual accounts in accordance with the relevant Statement of Recommended Practice as if the Academy Trust were a non-exempt charity and parts 15 and 16 of the Companies Act 2006, and file them with the Principal Regulator;
- the governors to prepare an annual report in accordance with the Statement of Recommended Practice as if the Academy Trust were a non-exempt charity, and file it with the Principal Regulator; and
- the governors to prepare an annual return to the Registrar of Companies, in accordance with the Statement of Recommended Practice as if the Academy Trust were a non-exempt charity, and send it to the Principal Regulator.

The articles also require a copy of the governing body's meeting agendas, minutes and any reports or document considered at the meetings (except for any confidential information) to be made available at the Academy to anyone wishing to see them.

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<sup>5</sup> Paragraph 3(2) and 3(2A) of Schedule 1 of the Education Act 2002.

<sup>6</sup> Regulation 15(2), 15(3), 26(8), 26(9) of the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013 and 24 of the School Governance (Federations) (England) Regulations 2012.

<sup>7</sup> The Consistent Financial Reporting (England) Regulations 2012.

<sup>8</sup> S.172 of the Charities Act 2011.

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The DfE's model funding agreement requires the Academy Trust to publish on its website its annual accounts, annual report, memorandum and articles of association, funding agreement and a list of the names of the governors of the Academy Trust. It also requires the accounts and other records of the Academy Trust to be open to the National Audit Office.

The Secretary of State will report on how he/she has carried out his/her Principal Regulator duties in relation to Academy Trusts in his/her annual report to Parliament under section 11 of the Academies Act 2010.

Full details of the Secretary of State's powers in relation to Academy Trusts are set out in the funding agreement for each Academy. This MoU has been drafted on the basis of the current model documentation, which is subject to review and change. A summary of the Secretary of State's key powers is set out at Appendix B.

### **c) Sixth form college corporations and d) Further education corporations**

Sixth form college corporations are required under schedule 4 of the Further and Higher Education Act 1992 (as amended by the Education Act 2011 and the Further and Higher Education (Governance and Information) (Wales) Act 2014) to make a copy of their instrument and articles available for inspection or to provide a copy to any requester.

Both sixth form college corporations and further education corporations, as exempt charities, are required under the Charities Act 2011 (s 172) to provide a copy of their most recent accounts to any requester.

The grant funding agreements between the Secretary of State, acting through the Education and Skills Funding Agency, and sixth form college corporations; and the financial memoranda between the Secretary of State, acting through the ESFA and further education corporations, set out respectively the conditions of funding for sixth form colleges and further education colleges. The conditions include inter alia the responsibilities of governing bodies for accounting, for financial reporting and audit and for the provision of additional financial information.

## 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>9</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>9</sup> <http://www.bis.gov.uk/policies/bre>

**Charity Commission and DfE Points of Contact**

<b>Area of Liaison</b>	<b>Charity Commission</b>	<b>DfE</b>
Schools and sixth form colleges	Public Affairs Manager	School Infrastructure and Access Division, System Reform Group Infrastructure and Funding Directorate
Further education corporations	Public Affairs Manager	Skills Provider Base Division, Professional and Technical Education Group Higher and Further Education Directorate

Information sharing should initially be routed to: [REDACTED] [@charitycommission.gsi.gov.uk](mailto:[REDACTED]@charitycommission.gsi.gov.uk)  
and [REDACTED] [@education.gov.uk](mailto:[REDACTED]@education.gov.uk)