EXPLANATORY MEMORANDUM TO

THE STUDENTS' UNIONS (FREEDOM OF SPEECH) (MONETARY PENALTIES) (ENGLAND) REGULATIONS 2024

2024 No. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Education and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 David Johnston, Minister for Children, Families and Wellbeing at the Department for Education confirms that this Explanatory Memorandum meets the required standard.

2.2 Zoe Forbes, Deputy Director for Higher Education Quality and Regulation at the Department for Education confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Jennifer Allen at the Department for Education.
Email: Jennifer.Allen@education.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument makes provision in relation to the Office for Students' (OfS)[1] power to impose a monetary penalty on a students' union at approved (fee cap) higher education (HE) providers for breach of their duties to secure freedom of speech within the law and maintain a related code of practice. These Regulations set the maximum monetary penalty that the OfS may impose and the matters to which the OfS must have regard in doing so.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

[1] The Office for Students is the independent regulator of higher education and their website sets out their duties and functions: https://www.officeforstudents.org.uk/.

5. Policy Context

What is being done and why?

5.1 These Regulations are required to ensure there are visible and meaningful consequences for students' unions which breach their new free speech duties.

5.2 The Higher Education (Freedom of Speech) Act 2023 (the 2023 Act)[2] was introduced following a commitment in the Conservative Manifesto of 2019 to strengthen academic freedom and free speech in universities. This commitment was made because of growing concern about students and staff at higher HE providers feeling unable to express themselves without fear of repercussion. [

5.3 The 2017 Act to strengthen existing freedom of speech duties on registered HE providers in England and introduce clear consequences for breaches of the duties.

5.4 The 2023 Act also extends duties to students' unions at English approved (fee cap) HE providers. This is the registration category for HE providers that are eligible for OfS grant funding in return for meeting certain fee cap obligations.

5.5 These new duties on students' unions were introduced because students' unions play an important part in the academic and overall student experience. Students' unions also play an important role in representing their members and work closely with HE providers to do so. As student representatives, it is important that students' unions ensure students are exposed to, and can express, a diverse range of views, defending and actively taking steps to secure their lawful freedom of speech. It is also important that they are accountable for their actions.

5.6 The duty on students' unions is to take reasonably practicable steps to secure freedom of speech within the law for staff, members, students and visiting speakers. What is reasonably practicable for a small union will be different from what is reasonably practicable for a large union at a large university. There is also a duty on students' unions to maintain a code of practice, with a view to discharging their duty to secure freedom of speech.

5.7 These Regulations prescribe the maximum monetary penalty which the OfS may impose on a student's union found in breach of its new duties, and the matters to which the OfS must have regard when exercising this new power. The OfS is the independent regulator of HE and its approach to regulation is underpinned by the functions, duties and powers given to it in the 2017 Act.[3]

5.8 While there are no existing monetary penalty regulations in place for students' unions, there are Regulations in place under the 2017 Act which set the maximum monetary penalty the OfS may impose on a registered HE provider for any breach of its registration conditions - the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 (the 2019 Regulations).[4] These 2019 Regulations set a maximum penalty at 2% of a provider's qualifying income, or £500,000, whichever is higher. We have considered the structure and principles of the 2019 Regulations as a guide for the proposals for these Regulations, to ensure some consistency in the approach where it is

[2] The Higher Education (Freedom of Speech) Act 2023 is available at: https://www.legislation.gov.uk/ukpga/2023/16.

[3] Further details are available on the OfS website: https://www.officeforstudents.org.uk/publications/regulatory-framework-for-higher-education-in-england/part-i-the-ofs-s-risk-based-approach/.

[4] The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019: https://www.legislation.gov.uk/ukdsi/2019/9780111185353/contents

appropriate. However, the context for students' unions is different and we have taken account of the narrower remit the OfS has in regulating students' unions, which will not be required to register with the OfS and are therefore not subject to the full range of regulatory conditions.

5.9 We have only included a fixed maximum penalty because the qualifying income for students' unions cannot be defined or measured as accurately as that of HE providers using existing data. To obtain more accurate date, the OfS would have to request additional information from students' unions which we view to be disproportionately burdensome on both parties. In addition, having only a maximum penalty better provides clarity for students' unions and the OfS.

5.10 In setting the maximum figure of £50,000, we analysed the income of a sample of students' unions against that of HE providers to assess what would be a proportionate figure whilst providing a sufficient deterrent for all students' unions.

5.11 There is no current statistical release that collates data on the grants that HE providers make to their students' unions, although it is possible to identify these from individual provider financial returns. HE providers are required to return data on the expenditure on 'staff and student facilities' which includes expenditure incurred on 'grants to student societies' alongside careers and other activities, as part of the data return to the dedicated data body.[5] Our analysis used the reported income of each individual students' union as recorded on the Charity Commission website[6] and mapped this against the data from HE providers. This was used to compare the approximate percentage of HE provider income that the income of students' unions represented. £50,000 represents approximately 2% of a large HE provider's student union income.

5.12 In exercising its power to impose a monetary penalty on a students' union, these new Regulations outline the matters which OfS must take account of when making its decision. This includes:

5.12.1 the nature, seriousness, duration and impact of the relevant breach;

5.12.2 any financial or other gain made (or loss avoided) by the students' union as a result of the relevant breach which benefits the students' union;

5.12.3 any previous breach of its duties;

5.12.4 any steps taken by the students' union following the relevant breach to avoid a breach in the future;

5.12.5 the impact that imposing a monetary penalty is likely to have on students.

5.13 This will allow the OfS to be able to deal effectively with a diverse range of circumstances, varying types and size of students' union, and breaches of varying levels of seriousness and impact. These matters are broadly consistent with the matters to which the OfS must have regard when imposing a monetary penalty on an HE provider under the 2019 Regulations.

[5] The 2017 Act makes provision for the OfS to work with a designated data body. This body is Jisc. The Higher Education and Statistics Agency (HESA) is now part of Jisc. This analysis used HESA income and expenditure data which is available at https://www.hesa.ac.uk/data-and-analysis/finances/table-1.
[6] You can search charity commission records at: https://www.gov.uk/find-charity-information.

What was the previous policy, how is this different?

5.14 There are existing statutory duties on HE providers to take reasonably practicable steps to ensure freedom of speech within the law is secured for members, students, and employees.

5.15 Although there were protections for free speech and academic freedom in the Education (No. 2) Act 1986, there were no penalties for HE providers which did not meet the duties, and no duties on Students' Unions under that Act.

5.16 The changes made by the 2023 Act replace these duties with strengthened free speech duties on registered providers in England and extend them to students' unions at approved (fee cap) HE providers for the first time.

5.17 The OfS is also being given new monitoring and regulatory roles in relation to these free speech duties including in relation to students' unions.

6. Legislative and Legal Context

How has the law changed?

6.1 These Regulations are required to implement the measures in the 2023 Act relating to the OfS's enforcement powers for breaches by students' unions of their new free speech duties. They form part of the main tranche of free speech reforms which will come into force on 1 August 2024 and are being made alongside commencement regulations that will commence the main provisions of the 2023 Act (see section 10 below). There are more limited protections for free speech and academic freedom in the Education (No. 2) Act 1986 (as noted above the 2023 Act replaces these protections) but there are no duties on students' unions under that Act.[7]

6.2 The 2023 Act is a piece of amending legislation, and primarily amends the 2017 Act. It inserts Part A1 in the 2017 Act on the protection of freedom of speech as well as sections 69A to 69E which relate to free speech functions of the OfS. Of particular relevance to these Regulations, section 69B of the 2017 Act (inserted by section 7 of the 2023 Act) places a new duty on the OfS to monitor whether students' unions are complying with their duties to take reasonably practicable steps to secure freedom of speech within the law (section A5 of the 2017 Act which was inserted by section 3 of the 2023 Act) and to maintain a corresponding code of practice (section A6 of the 2017 Act which was also inserted by section 3 of the 2023 Act).

6.3 Where it appears to the OfS that a students' union is failing or has failed to comply with any of these duties, the OfS may impose a monetary penalty of an amount determined by the OfS in accordance with Regulations made by the Secretary of State. These Regulations set those parameters and aim to ensure that any penalty imposed by the OfS is appropriate and proportionate. The power to make these Regulations contained in section 69B(3) and (4) was commenced on the day on which the 2023 Act was passed (see section 13(1)(a) of the 2023 Act) and this is the first time it is being used.

Why was this approach taken to change the law?

6.4 These Regulations are required to implement the new legislation, and to specify a maximum penalty amount and matters to which the OfS must have regard in

[7] Section 43 of the Education (No.2) Act 1986 is available at: https://www.legislation.gov.uk/ukpga/1986/61/section/43.

exercising its power. This is the only possible approach to make the required changes to the law.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Department is not required to carry out a statutory consultation before making these Regulations. As set out above there are already regulations in place in relation to monetary penalties for providers, which were consulted on.

7.2 The Department has engaged with the HE sector on the proposed approach to these Regulations and shared those views with Ministers as part of the decision-making process. Most concerns related to practical compliance issues for students' unions, and the feasibility and methodology for setting an appropriate monetary penalty.

7.3 Throughout the course of the Bill (now the 2023 Act) there was significant sector and stakeholder engagement, given that timings did not allow for a full public consultation. However, there is now a period of consultation on implementation which is being conducted by the OfS.[8]

7.4 The OfS launched a consultation in December 2023 on their proposed approach to regulating students' unions on free speech matters[9]. The consultation set out, on a conditional basis, how the OfS proposes to determine a monetary penalty imposed on a students' union if it appears to them that it is failing or has failed to comply with any of its free speech duties. The proposals are contingent on these Regulations. The OfS's response to its consultation and corresponding guidance for students' unions will be published before 1 August 2024.

7.5 While the mandatory factors to which the OfS must have regard when setting a penalty are aligned to those the OfS proposed in its own consultation, they are included in these Regulations as a form of legal restraint on the OfS, designed to ensure that it is required to take appropriate, reasonable and proportionate action, and that the interests of students are taken into account when setting monetary penalties.

7.6 As part of the quality review process the draft Regulations were sent to the OfS to advise on the extent to which the Regulations can be effectively implemented.

7.7 Both the OfS and the Department have worked with the sector to consider the feasibility of the proposed approach to calculating monetary penalties and to understand the challenges for students' unions. The OfS has specifically run consultation events to encourage students' unions to respond to the proposed approach to regulation.

7.8 The OfS consultation analysis will be used to finalise plans for August 2024 implementation, and relevant regulatory advice and guidance.

8. Applicable Guidance

8.1 Once the provisions of the 2023 Act are in force, the OfS will have a new role in regulating students' unions on free speech issues. The OfS is consulting on their approach and expect to publish outcomes of the consultation and guidance for students' unions prior to 1 August 2024 as set out above.

[8] The OfS indicative timetable is available at: https://www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/freedom-of-speech/changes-to-regulation/

[9] All OfS consultations are available at: https://www.officeforstudents.org.uk/publications/consultations/

8.2 The OfS published its updated Regulatory Framework on 24 November 2022[10] setting out how it intends to perform its functions (including its enforcement functions) and guidance for registered HE providers on the registration conditions. The new free speech condition of registration contained in the 2023 Act will come into force on 1 September 2025, and the OfS will consult on proposed revisions to the regulatory framework, publishing guidance in order to ensure it is in place by the commencement date of 1 September 2025.

8.3 In deciding whether to impose a penalty, and if so the amount of penalty, the OfS will be required under section 2(1) of the 2017 Act to have regard to relevant principles of best regulatory practice, including that regulatory activities should be proportionate and targeted only at cases in which action is needed. The Regulators' Code[11], which the OfS is committed to follow, notes that regulators should choose proportionate approaches to those they regulate, based on relevant factors including, for example, business size and capacity. In addition, the 2017 Act lays down detailed procedural safeguards in relation to the imposition of penalties.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 The Department has published a full impact assessment, including on HE providers and their constituent institutions and students' unions, for the 2023 Act.[12]

9.2 An additional impact assessment has not been prepared for this instrument because these Regulations do not introduce further burdens that would have an impact on businesses, charities or voluntary bodies. The OfS can only impose a monetary penalty where it appears a students' union has breached its duties under the 2023 Act. There will be no financial impact on those students' unions who are compliant.

9.3 Non-compliance would mean that students' unions could incur penalties imposed by the OfS.

9.4 Students' unions are diverse, in terms of their financial circumstances, and the student demographic they serve. It is possible that monetary penalties could jeopardise the financial viability and sustainability of some student unions, particularly those already in financial difficulties. Resources may have to be diverted or stripped away from services or support provision for students with a consequential impact on the student experience.

9.5 Some students' unions have expressed concern that a penalty could harm their charitable objectives or their financial sustainability. However, we are confident that the OfS can be expected to impose penalties that are appropriate, reasonable and proportionate, whilst having taken into account all the circumstances of a particular case. Imposing a monetary penalty should not seek to bankrupt, or severely damage the finance of a students' union. Nor will penalties be imposed on individual students or staff.

[10] The OfS Regulatory Framework: https://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/
[11] The Regulators' Code: www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf.
[12] Impact assessment available at: https://www.legislation.gov.uk/ukpga/2023/16/pdfs/ukpgaod_20230016_en_001.pdf

9.6 Overall, we are confident that these Regulations will allow OfS to set penalties at an appropriate level that ensures there are visible and meaningful consequences for student unions that are in breach of their new duties.

Impact on businesses, charities and voluntary bodies

9.7 Although most students' unions are charities, there is no, or no significant, impact on business, charities or voluntary bodies unless they fail to meet their free speech duties. It will be the responsibility of students' unions to comply with new legislation in order to avoid receiving monetary penalties from the OfS. Students' unions will not receive any monetary penalties if they comply with free speech legislation.

9.8 The legislation does not impact small or micro businesses.

9.9 There is no, or no significant, impact on the public sector because these are powers that will only be relied on with regards to students' unions, and only if they are in breach of their free speech duties.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The OfS will lead on monitoring and evaluation of the impact of the 2023 Act post-implementation, including the approach taken to monetary penalties and the effectiveness of such sanctions with respect to achieving the aims for the 2023 Act.

10.2 The impact assessment for the 2023 Act sets out how the Department and the OfS will work together to review the initial impact of the legislation, and subsequent statutory instruments. On the administrative burden of the legislation, the Government has committed to conduct workshops with HE providers and this will be extended to include students' unions, and for these to consider specific requirements related to these Regulations.

10.3 The Regulations do not include a statutory review and in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Minister has made the following statement: "The provisions in relation to monetary penalties have been estimated to have minimal additional impact on business. As such the Department has concluded that it would be disproportionate on cost grounds to include a review provision within the instrument."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 The Department made commencement regulations, the Higher Education (Freedom of Speech) Act 2023 (Commencement No. 2) Regulations 2024, on 25 April 2024 to commence the remaining provisions of the 2023 Act in phases. Provisions relating to the new free speech duties on students' unions and the new power of the OfS to regulate students' unions will come into force on 1 August 2024.

11.2 As noted above, the power to make these Regulations was commenced when the 2023 Act was passed and this is the first time this power is being used.

12. European Convention on Human Rights

12.1 The Minister for Children, Families and Wellbeing, David Johnston, has made the following statement regarding Human Rights:

"In my view the provisions of The Students' Unions (Freedom of Speech) (Monetary Penalties) (England) Regulations 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").