

**Consultation**

**Office for  
Students**



**OfS**

# **Consultation on the OfS's approach to regulating students' unions on free speech matters**

This consultation runs from 14 December 2023  
to 17 March 2024.

**Reference** OfS 2023.65

**Enquiries to** [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk)

**Publication date** 14 December 2023

The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

### **Our four regulatory objectives**

All students, from all backgrounds, and with the ability and desire to undertake higher education:

- are supported to access, succeed in, and progress from, higher education
- receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure
- are able to progress into employment or further study, and their qualifications hold their value over time
- receive value for money.

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## About this consultation

The Office for Students (OfS) is implementing regulation of students' unions in relation to their free speech duties. This consultation sets out the background to our proposals for regulation, the reasons we are making these proposals and what we expect their implementation to achieve.

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### Timing

Start: **14 December 2023**

End: **17 March 2024**

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### Who should respond?

We welcome responses from anyone with an interest in freedom of speech in English higher education.

We are particularly (but not only) interested in hearing from **students, students' union representatives, and staff and leaders at higher education providers that will be engaging in the new arrangements.**

We welcome views from all types and size of students' union and provider. We also welcome the views of **schools, employers, third sector organisations, policy bodies** and others with an interest in freedom of speech in English higher education.

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### How to respond

Please respond by **17 March 2024**.

Please use the online response form available at <https://survey.officeforstudents.org.uk/s/free-speech-students-unions/>

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### How we will treat your response

We will summarise and/or publish the responses to this consultation on the OfS website (and in alternative formats on request). This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details.

If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy).<sup>1</sup>

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<sup>1</sup> Available at [www.officeforstudents.org.uk/ofs-privacy/](http://www.officeforstudents.org.uk/ofs-privacy/).

We may need to disclose or publish information that you provide in the performance of our functions, or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

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## Next steps

We will publish a summary of responses to this consultation in summer 2024. We will explain how and why we have arrived at our decisions, and how we have addressed any concerns raised by respondents. We will then set out next steps in the policy and implementation process.

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## Enquiries

Email [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk)

Alternatively, call our public enquiry line on 0117 931 7317.

Consultation events are planned for early 2024. These events will provide a further opportunity for you to discuss these proposals. Details are available on our website at [www.officeforstudents.org.uk/news-blog-and-events/events/freedom-of-speech-consultation-webinars/](http://www.officeforstudents.org.uk/news-blog-and-events/events/freedom-of-speech-consultation-webinars/)

If you require this document in an **alternative format**, or you need assistance with the online form, contact [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk). (**Please note:** this email address should **not** be used for submitting your consultation response.)

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For more information about our work to date on freedom of speech, please visit the OfS website: [www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/freedom-of-speech/](http://www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/freedom-of-speech/).

# Executive summary

## Background

Freedom of speech and academic freedom are essential to higher education. The core mission of universities and colleges is the pursuit of knowledge, and the principles of free speech and academic freedom are fundamental to this purpose. They provide an environment to advance new ideas, encourage productive debate and challenge conventional wisdom. All staff and students are entitled to teach, learn and research in a culture that values vigorous debate, including in relation to difficult or contentious or uncomfortable topics. There is currently evidence to support concerns about freedom of speech in higher education: the 2023 National Student Survey<sup>2</sup> found that one in every seven students in England feels unable to express their own views.

The Office for Students (OfS) is an independent public body. We are not part of central government, but we report to Parliament through the Department for Education (DfE). We regulate higher education in England. Our primary aim is to ensure that English higher education is delivering positive outcomes for students – past, present, and future. We seek to ensure that students, from all backgrounds (particularly the most disadvantaged), can access, succeed in, and progress from, higher education. You can read more about how we currently regulate universities and colleges in England, on our website.<sup>3</sup> The Higher Education (Freedom of Speech) Act 2023 was passed earlier this year. When its provisions come into force, it will give the OfS more powers and duties to regulate universities and colleges, and their students' unions, on free speech issues. You can read more about this on our website.<sup>4</sup>

## Regulation of students' unions

Students' unions can play an important part in the academic and wider experience of students and form a significant element of the overall student experience.

The Act will impose new duties on some students' unions. These will generally apply to students' unions at universities and colleges that are registered with us in the 'Approved (fee cap)' category. The new duties are about the securing of free speech, and the maintenance of a code of practice relating to free speech.

Once the provisions are in force, we will have a new role in regulating students' unions on free speech issues. Specifically: from 1 August 2024 the OfS will monitor and regulate how students' unions comply with these new free speech duties. This document sets out proposals for how we will do this. We are now seeking feedback on our proposals.

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<sup>2</sup> See [www.officeforstudents.org.uk/advice-and-guidance/student-information-and-data/national-student-survey-nss/](https://www.officeforstudents.org.uk/advice-and-guidance/student-information-and-data/national-student-survey-nss/).

<sup>3</sup> See [www.officeforstudents.org.uk](https://www.officeforstudents.org.uk).

<sup>4</sup> See [www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/freedom-of-speech/](https://www.officeforstudents.org.uk/advice-and-guidance/quality-and-standards/freedom-of-speech/).

## How we propose to regulate students' unions on free speech matters

Our proposals cover:

- Maintaining and making public a list of relevant students' unions. This is about how we gather information to create a list of students' unions that are subject to the new duties and to regulation by the OfS. The proposal also covers publication of the list.
- Guidance for relevant students' unions about their free speech duties. The proposed guidance notes the boundaries of free speech within the law. It considers the framing of the duty related to securing free speech. And it notes that the code of practice should apply to a broad range of activities.
- Monitoring relevant students' unions. The proposals set out a risk-based approach to monitoring whether students' unions are complying with their free speech duties. They also set out what we might do if we consider that a students' union is not complying. This could include imposing fines on the students' union. They also set out our approach to intervention and the range of interventions that we may make.
- Determining the amount of a fine (or 'monetary penalty'). These proposals are contingent on forthcoming regulations. They set out, on that conditional basis, how we propose to calculate a monetary penalty on a students' union if it appears to us that it is failing or has failed to comply with any of its free speech duties.
- Minor and consequential amendments to the regulatory framework to reflect our new regulation of students' unions on free speech matters.
- The publication of information. These proposals set out what information we would normally expect to publish in connection with a students' union's compliance or non-compliance with its free speech duties.

Our new role will also include operating a free speech complaints scheme for students, staff and visiting speakers to bring complaints about free speech issues at universities, colleges and students' unions. People who want to make a complaint will not have to pay to use the scheme. You can give feedback on our proposals on how we will operate the scheme.<sup>5</sup>

### Who should provide feedback on our proposals

We are particularly (but not only) interested in hearing from students, students' union representatives, and staff and leaders at providers that will be engaging in the new arrangements.<sup>6</sup> We welcome views from all types and size of provider and students' union. We also welcome the views of schools, employers, third sector organisations, policy bodies and others with an interest in freedom of speech in English higher education.

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<sup>5</sup> See [www.officeforstudents.org.uk/free-speech-complaints-consultation/](http://www.officeforstudents.org.uk/free-speech-complaints-consultation/).

<sup>6</sup> We use the terms 'providers' and 'registered providers' to refer to registered higher education providers as specified on the OfS Register ([www.officeforstudents.org.uk/register](http://www.officeforstudents.org.uk/register)).

Feedback on the proposals can be given via the online survey<sup>7</sup> or you can find out more at one of the consultation events: [www.officeforstudents.org.uk/news-blog-and-events/events/freedom-of-speech-consultation-webinars/](https://www.officeforstudents.org.uk/news-blog-and-events/events/freedom-of-speech-consultation-webinars/).

You may be interested in reading and responding to our consultation on a new freedom of speech complaint scheme.<sup>8</sup>

## **Next steps**

Once the consultation has closed on 17 March 2024, we will consider the feedback and make decisions in respect of our proposals for how we regulate students' unions on free speech matters.

We expect to consult on further key elements of our implementation of the legislation. This will give providers, their staff and students and other interested parties an opportunity to inform our approach.

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<sup>7</sup> See <https://survey.officeforstudents.org.uk/s/free-speech-students-unions/>.

<sup>8</sup> See [www.officeforstudents.org.uk/free-speech-complaints-consultation/](https://www.officeforstudents.org.uk/free-speech-complaints-consultation/).



# Introduction

1. Freedom of speech and academic freedom are fundamental to higher education. The core mission of universities and colleges is the pursuit of knowledge. The principles of free speech and academic freedom are fundamental to this purpose. They provide a necessary context for advancing new ideas, encouraging productive debate and challenging conventional wisdom.
2. All staff and students are entitled to teach, learn and research in a culture that values vigorous debate. This is especially true in relation to difficult or contentious or discomfiting topics.
3. As the statutory regulator for higher education in England, the Office for Students (OfS) wants every student to have a fulfilling experience of higher education that enriches their lives and careers. In March 2022, we published our strategy for 2022 to 2025, in which we described the two key areas of focus for this period that will inform our regulatory activity: quality and standards; and equality of opportunity.
4. Students will not have a high quality education if that education is not grounded in freedom of speech. That includes freedom of speech for themselves, for fellow students, for those who teach or supervise them and for visiting speakers.
5. Students' unions provide an important context for students to engage with a range of ideas and debates alongside, and beyond the scope of, their studies. They play an integral role in securing freedom of speech in higher education.
6. As a priority for our activities focusing on quality and standards, we have set a goal that 'providers secure free speech within the law for students, staff and visiting speakers'.<sup>9</sup>
7. We have included a glossary of some of the key terms used in this document, in [Annex E](#).

## Existing requirements

8. Most of the universities and colleges that are registered with the OfS are 'public bodies' for the purposes of the Human Rights Act 1998. It is unlawful for them, as public bodies, to act incompatibly with the European Convention on Human Rights (the 'ECHR'). Article 10 of the ECHR relates to freedom of expression.<sup>10</sup>
9. Section 43 of the Education (No 2) Act 1986 requires universities and colleges to 'take such steps as are reasonably practicable' to ensure that freedom of speech within the law is secured for their members, students, employees and visiting speakers.<sup>11</sup>
10. Currently, the OfS regulates providers on free speech matters through the public interest governance principles on academic freedom and free speech, which underpin initial and ongoing conditions of registration relating to management and governance (the E conditions).

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<sup>9</sup> In this consultation, we use the terms 'free speech' and 'freedom of speech' interchangeably. 'Providers' and 'registered providers' refer to registered higher education providers as specified on the OfS Register ([www.officeforstudents.org.uk/register](http://www.officeforstudents.org.uk/register)). Our strategy for 2022 to 2025 can be found here: [www.officeforstudents.org.uk/about/our-strategy/](http://www.officeforstudents.org.uk/about/our-strategy/).

<sup>10</sup> Human Rights Act 1998 (<https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/9>).

<sup>11</sup> Education (No. 2) Act 1986 (<https://www.legislation.gov.uk/ukpga/1986/61/section/43>).

Our regulatory framework states how the OfS intends to perform its various functions, and provides guidance for registered higher education providers on the ongoing conditions of registration. You can read more about these requirements in our regulatory framework.<sup>12</sup>

11. The OfS has not previously played a direct regulatory role in relation to students' unions.

## **New legislation**

12. New legislation will strengthen the legal requirements on providers and introduce new requirements for their constituent institutions and for some students' unions, relating to freedom of speech. A 'constituent institution' means any constituent college, school, hall or other institution of the provider. For example, the individual colleges of the University of Cambridge are constituent institutions of that university.

13. The new legislation will also strengthen the OfS's regulatory role in relation to freedom of speech and academic freedom.

14. The new legislation is the Higher Education (Freedom of Speech) Act 2023 ('the Act'). The Act received Royal Assent on 11 May 2023. However, most of the provisions of the Act are not yet in force. They will come into force through secondary legislation. We expect this implementation to be phased over the next two years, although the precise dates are a matter for the Department of Education.

15. The Act amends the Higher Education and Research Act 2017 ('HERA') to incorporate new provisions relating to freedom of speech and academic freedom. In this document, we refer to the sections of the amended version of HERA rather than to the corresponding sections of the Act.

## **Freedom of speech within the law**

16. The Act protects freedom of speech within the law. Unlawful speech is not protected. This means that speech that amounts to unlawful harassment, victimisation or discrimination is not protected. Similarly, unlawful incitement of religious or racial hatred, or speech that is otherwise unlawful, is not protected.

## **Definitions of freedom of speech and academic freedom**

17. 'Freedom of speech' is defined in the Act as:

Part A1 of HERA (as amended)

A1 (13) In this part:

references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the [European Convention on Human Rights] as it has effect for

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<sup>12</sup> Our regulatory framework is available at: [www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/](http://www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/).

the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form)[.]

18. Academic freedom is defined in the Act as:

Part A1 of HERA (as amended)

A1 (6) In this Part, 'academic freedom', in relation to academic staff at a registered higher education provider, means their freedom within the law—

(a) to question and test received wisdom, and

(b) to put forward new ideas and controversial or unpopular opinions, without placing themselves at risk of being adversely affected in any of the ways described in subsection (7).

A1 (7) Those ways are—

(a) loss of their jobs or privileges at the provider;

(b) the likelihood of their securing promotion or different jobs at the provider being reduced.

### **Free speech duties of providers and constituent institutions**

19. The Act will impose new duties on providers in relation to freedom of speech and academic freedom, and on their constituent institutions.

20. In brief, the new duties will require each provider and constituent institution:

- a. to take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to secure freedom of speech within the law for its staff, members, students and visiting speakers; this includes, in relation to academic staff, securing their academic freedom (Section A1 and Section A4 of Part A1 of HERA);
- b. to maintain a code of practice setting out matters relating to freedom of speech (Section A2 and Section A4 of Part A1 of HERA); and
- c. to promote the importance of freedom of speech within the law and of academic freedom for academic staff, in the provision of higher education (Section A3 and Section A4 of Part A1 of HERA).

21. These duties are expected to come into force on 1 August 2024.<sup>13</sup>

### **Free speech duties of relevant students' unions**

22. The Act will also impose new duties on some students' unions. A 'students' union' is defined in the Act as:

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<sup>13</sup> These duties are set out in full at <https://www.legislation.gov.uk/ukpga/2023/16/contents/enacted?p00059>.

Section A5(6) of Part A1 HERA (as amended)

‘students’ union’ has the same meaning as it has in Part 2 of the Education Act 1994 in relation to establishments to which that Part applies (see section 20 of that Act)

except that, as stated in Section A5(7) of Part A1 HERA (as amended),

‘In this Part, references to a students’ union for students at a registered higher education provider that is eligible for financial support do not include a students’ union for students at a constituent institution of such a provider.’

23. The new duties will only apply to students’ unions of providers that are registered in the ‘Approved (fee cap) category’.<sup>14</sup> In this document, we refer to those students’ unions as ‘relevant students’ unions’.

24. The new duties for relevant students’ unions will require each relevant students’ union:

- a. to take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to secure freedom of speech within the law for its members, students, staff, members and staff of the provider and of its constituent institutions and visiting speakers (Section A5 of Part A1 of HERA); and
- b. to maintain a code of practice setting out matters relating to freedom of speech (Section A6 of Part A1 of HERA).<sup>15</sup>

25. These duties are expected to come into force on 1 August 2024.<sup>16</sup>

### **New duties and functions for the OfS**

26. The Act will also strengthen the OfS’s regulatory role in relation to freedom of speech and academic freedom. This will include:

- a. new general duties for the OfS, under section 2 of HERA, relating to freedom of speech and academic freedom;
- b. new general functions for the OfS relating to freedom of speech and academic freedom;
- c. a new complaints scheme, operated by the OfS, to consider free speech complaints about providers, constituent institutions or relevant students’ unions, from students, staff (including applicants for academic posts) or visiting speakers;
- d. an extension of the OfS’s regulation on free speech matters to apply directly to relevant students’ unions;

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<sup>14</sup> See [www.officeforstudents.org.uk/register](http://www.officeforstudents.org.uk/register).

<sup>15</sup> See further section A6 in Part A1 of HERA as amended:  
<https://www.legislation.gov.uk/ukpga/2023/16/section/3>.

<sup>16</sup> These duties are set out in full at <https://www.legislation.gov.uk/ukpga/2023/16/section/3/enacted>.

- e. new conditions of registration for providers relating to free speech and academic freedom. These will include conditions requiring providers to comply with their new free speech duties referred to above. This will give the OfS a direct role in determining whether providers are meeting those statutory duties;
- f. powers for the OfS to monitor overseas funding received by providers, constituent institutions and relevant students' unions, with a view to assessing the extent to which that funding may present a risk to free speech and academic freedom.

## **Timescales for implementation**

- 27. The provisions relating to the OfS's new general duties and general functions (a. and b. in paragraph 26 above) are expected to come into force on 1 August 2024. We expect to consult on those matters in 2024.
- 28. The provisions relating to the new free speech complaints scheme and the extension of the OfS's regulation on free speech matters to relevant students' unions (c. and d. in paragraph 26 above) are expected to come into force on 1 August 2024.
- 29. The provisions relating to the new conditions of registration and the OfS's monitoring of overseas funding (e. and f. in paragraph 26 above) are expected to come into force on 1 September 2025.
- 30. In this consultation, we have set out our proposals relating to our regulation of relevant students' unions on free speech matters. We are also separately consulting on our new free speech complaints scheme.<sup>17</sup>

## **Our proposals**

- 31. Our proposals, relating to our regulation of relevant students' unions in relation to free speech matters, are described in detail in the Proposals section of this document.
- 32. In this consultation, we are seeking views on our proposed approach to regulating relevant students' unions on free speech matters. In setting out our proposed approach, we have also explained alternative options that we have considered and discounted.
- 33. We have not considered alternatives to the regulation of relevant students' unions, by the OfS, on free speech matters. This is because the Act will require us to regulate relevant students' unions on free speech matters.
- 34. In summary, our proposals relating to the regulation of relevant students' unions on free speech matters are:
  - a. Proposal A: Maintaining and making public a list of relevant students' unions.
  - b. Proposal B: Guidance for relevant students' unions about their free speech duties.
  - c. Proposal C: Monitoring relevant students' unions.

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<sup>17</sup> Our consultation on our new free speech complaints scheme is available at: [www.officeforstudents.org.uk/free-speech-complaints-consultation/](http://www.officeforstudents.org.uk/free-speech-complaints-consultation/).

- d. Proposal D: Determining the amount of a monetary penalty.
- e. Proposal E: Minor and consequential amendments to the regulatory framework.
- f. Proposal F: The publication of information.

## **Matters to which we have had regard in developing our proposals**

35. When developing our proposals, we have carefully considered the matters to which we must have regard, including our general duties in section 2 of HERA, the Regulators' Code, the Public Sector Equality Duty, and the statutory guidance issues by the Secretary of State. Our assessment of these matters is set out in Annex D.

36. This document constitutes our consultation for the purposes of section 75(8) of HERA.

## **Feedback and consultation questions**

37. We welcome responses from anyone with an interest in freedom of speech in English higher education. We are particularly (but not only) interested in hearing from students, students' union representatives, and staff and leaders at providers that will be engaging in the new arrangements. We welcome views from all types and size of provider and students' union. We also welcome the views of schools, employers, third sector organisations, policy bodies and others with an interest in freedom of speech in English higher education.

38. The consultation questions are listed in full in Annex A.

## **Documents and legislation referred to in this consultation**

In this consultation we refer to the following documents and legislation:

- Education Act 1994 (<https://www.legislation.gov.uk/ukpga/1994/30/contents>)
- Education (No.2) Act 1986 (<https://www.legislation.gov.uk/ukpga/1986/61/contents>)
- Higher Education and Research Act 2017 (<https://www.legislation.gov.uk/ukpga/2017/29/contents>)
- Higher Education (Freedom of Speech) Act 2023 (<https://www.legislation.gov.uk/ukpga/2023/16/contents/enacted?p00059>)
- OfS strategy 2022 to 2025 ([www.officeforstudents.org.uk/publications/office-for-students-strategy-2022-to-2025/](http://www.officeforstudents.org.uk/publications/office-for-students-strategy-2022-to-2025/))
- Regulatory advice 15: Guidance on monitoring and intervention ([www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/](http://www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/))
- Regulatory advice 16: Reportable events ([www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/](http://www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events/))
- Regulatory advice 19: The OfS's approach to determining the amount of a monetary penalty ([www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/](http://www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/))

- Regulatory advice 21: Publication of information  
([www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/](http://www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/))
- Securing student success: Regulatory framework for higher education in England  
([www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/](http://www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/))

## Proposals

### The OfS's new functions in relation to relevant students' unions

39. The Act will amend HERA to extend the OfS's regulation of free speech matters to relevant students' unions. This will be implemented through the insertion of a new section 69B to HERA. Section 69B of HERA is set out below. We expect these provisions to come into force on 1 August 2024.

#### **Section 69B of HERA: Functions of the OfS in relation to students' unions**

(1) The OfS must monitor whether students' unions to which sections A5 and A6 apply are complying with their duties under those sections.

(2) The OfS may impose a monetary penalty on a students' union if it appears to the OfS that it is failing or has failed to comply with any of its duties under those sections.

(3) A 'monetary penalty' is a requirement to pay the OfS a penalty of an amount determined by the OfS in accordance with regulations made by the Secretary of State.

(4) The Secretary of State may by regulations make provision about matters to which the OfS must, or must not, have regard in exercising its power under subsection (2).

(5) Schedule 3 (monetary penalties: procedure etc) applies in relation to the imposition of a penalty on a students' union under subsection (2), but as if—

(a) references to a registered higher education provider or the governing body of such a provider were references to the students' union, and

(b) references to section 15 were references to subsection (2).

(6) The OfS must maintain a list of the students' unions to which, according to the information held by the OfS, sections A5 and A6 apply.

(7) The OfS must make the list maintained under subsection (6) publicly available by such means as it considers appropriate.

(8) A students' union to which sections A5 and A6 apply must provide the OfS, or a person nominated by the OfS, with such information for the purposes of the performance of the OfS's functions under this section as the OfS may require it to provide.

(9) If a students' union fails to comply with a requirement under subsection (8) and does not satisfy the OfS that it is unable to provide the information, the OfS may enforce the duty to comply with the requirement in civil proceedings for an injunction.

40. Sections A5 and A6 of HERA set out the new free speech duties for relevant students' unions. We have summarised these in the 'Introduction' section of this document. They are also set out in full in our proposed new Part IIIA of our regulatory framework ([Annex B](#)).



41. 'Relevant students' unions' are students' unions of providers that are registered with the OfS in the 'Approved (fee cap) category', excluding students' unions of any constituent college, school, hall or other institution of the provider.<sup>18</sup>

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<sup>18</sup> See HERA Part A1 section A5(6)-(7) and the OfS Register ([www.officeforstudents.org.uk/register](http://www.officeforstudents.org.uk/register)).

# Proposal A: Maintaining and making public a list of relevant students' unions

## Summary

Our proposed approach to maintaining a list of students' unions and making this list publicly available. This proposal is about how we gather the information to create a list of students' unions that are subject to the new duties and to regulation by the OfS. The proposal also covers publication of the list.

## What are we proposing?

42. Under section 69B(6) of HERA, the OfS will be required to maintain a list of relevant students' unions to which, according to information held by the OfS, the new free speech duties apply. This requirement is expected to come into force on 1 August 2024.
43. We are proposing to maintain a list of relevant students' unions from information that we require from providers registered in the Approved (fee cap) category. This is because the relevant duties apply to students' unions at providers in that category (see paragraph 41 above).
44. The Act will require the OfS to impose new initial and ongoing conditions of registration on providers in relation to free speech and academic freedom matters. The new ongoing conditions of registration for a provider registered in the Approved (fee cap) category must include a requirement that it keeps the OfS informed of its students' union(s). These provisions are expected to come into force on 1 September 2025. We expect to consult on the new conditions of registration in due course.
45. Before the new conditions of registration come into effect, we have decided to obtain information about students' unions from providers registered in the Approved (fee cap) category by using the existing powers set out in ongoing condition of registration F3. We have imposed an enduring reporting requirement on those providers to provide us with basic information about their students' unions, and to inform us of any changes to this information in the future.
46. We have already imposed this reporting requirement, in connection with the work that we are doing to prepare for the commencement of our new duties and functions.
47. We propose to use the information that providers submit to us, to compile a list of relevant students' unions, for the purposes of section 69B(6) of HERA.
48. Under section 69B(7) of HERA, the OfS will also be required to make the list of relevant students' unions 'publicly available by such means as it considers appropriate'.
49. We are proposing to make the list of relevant students' unions publicly available by publishing it on our website. We propose that each entry on this list will include the name of the students' union and of the associated provider(s). We propose to publish this list no later than 1 August 2024.

50. From time to time, we may receive information about an organisation that is not on our list of students' unions. In those circumstances, we propose to consider, on a case-by-case basis, whether the organisation is a 'relevant students' union' for our purposes.

## Why are we proposing this?

51. The OfS does not currently hold information about, or contact details for, students' unions at providers.

52. In our view, it is appropriate to obtain this information from providers rather than from other information sources. We consider that providers are well-placed to determine whether bodies and associations that represent their students are 'students' unions' within the definition set out in the Act. That definition refers to the Education Act 1994, which imposes other requirements on providers, in relation to their 'students' unions'. Therefore, providers should already have identified any 'students' unions' that they have.

53. Requiring providers to provide us with information about their students' unions, also reflects the approach set out in the legislative requirements that will underpin the proposed new conditions of registration relating to free speech.<sup>19</sup> Those conditions of registration are expected to come into force on 1 September 2025.

54. We are proposing to publish only the name of each relevant students' union, together with the names of the associated provider(s). We consider that this will provide students, providers and other relevant stakeholders with enough information to enable them to identify which students' unions are regulated by the OfS on free speech matters and fall within the OfS's free speech complaints scheme.

55. We propose to publish the list on our website since this will make the information easily accessible to stakeholders. It will also make it easy for the OfS to keep the list updated. We have considered whether other forms of making the list publicly available would be appropriate. For example, we could make the list available on request. However, we consider that other alternatives would make the information less accessible and could result in stakeholders' referring to information that is out of date.

56. The OfS's new regulatory functions and free speech complaints scheme relate to all students' unions of providers registered in the Approved (fee cap) category. They are not limited to the students' unions that are included in the OfS's published list. Therefore, we propose to make clear that the list that we publish is not necessarily exhaustive.

**Question A: Do you have any comments on our proposals on maintaining and making publicly available a list of relevant students' unions?**

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<sup>19</sup> See HERA section 8A(3).

## Proposal B: Guidance for relevant students' unions about their free speech duties

### Summary

Our proposed approach to providing guidance for relevant students' unions on their free speech duties, in the regulatory framework. The proposed guidance notes the boundaries of free speech within the law. It considers the framing of the duty related to securing free speech. And it notes that the code of practice should apply to a broad range of activities.

### What are we proposing?

57. The OfS will provide guidance for relevant students' unions on their free speech duties. This guidance will appear in the regulatory framework. The Act will amend section 75 of HERA to require this.
58. Under section 75 (7A) of HERA, as amended, that guidance:
- a. **must** include guidance for the purpose of helping to determine whether or not students' unions are complying with their free speech duties; and
  - b. **may** in particular specify:
    - i. what the OfS considers students' unions need to do to comply with their free speech duties;
    - ii. factors which the OfS will take into account in determining whether or not a students' union is complying with its free speech duties.
59. Under Proposal B, we are proposing to include a new section in the regulatory framework. This new section sets out our proposed approach to the regulation of students' unions in relation to free speech matters. The proposed section, entitled 'Part IIIA – Regulation of relevant students' unions on free speech matters', is attached at Annex B.
60. In that proposed section, we have set out in full the free speech duties that apply to relevant students' unions. We have also included guidance for the purpose of helping to determine whether or not relevant students' unions are complying with those duties. The guidance that we have provided focuses on three important areas:
- a. freedom of speech within the law;
  - b. factors that may be relevant to an assessment of whether steps are reasonably practicable for the purposes of the free speech duty set out in section A5 of Part A1 of HERA;
  - c. the scope of a free speech code of practice, required under section A6 of Part A1 of HERA.

61. In that proposed section, we have also stated that the OfS may from time to time, set out in separate guidance further information about how it will determine whether or not relevant students' unions are complying with their free speech duties. Any guidance may include illustrative factors which the OfS may take into account in determining whether or not a relevant students' union is complying with its free speech duties.

## Why are we proposing this?

62. The guidance that we are proposing to add to the regulatory framework focuses on three key areas underpinning the new free speech duties of relevant students' unions. To comply with their free speech duties, relevant students' unions must understand each of those areas, amongst other things.

63. First, the guidance notes the **boundaries of the protections for free speech**. Free speech 'within the law' is protected. Unlawful speech is not protected. Relevant students' unions must have an accurate understanding of the boundaries of protected speech.

64. Second, the guidance considers the framing of the duty to **take 'reasonably practicable' steps** to secure freedom of speech within the law. The framing of that duty is important and relevant students' unions are likely to have to take a wide range of steps to comply with it.

65. Third, we note that relevant students' unions should ensure that their **codes of practice**, required under section A6 of Part A1 of HERA, apply to a broad range of their activities. We consider that a code of practice should not be limited to matters relating to procedures to be followed in relation to the organisation of speaking events.

66. We have considered whether to provide more detailed guidance on individual elements of the free speech duties. We have decided not to do so at this stage, for the following reasons:

- a. In monitoring relevant students' unions' compliance with their free speech duties, the OfS will undertake a quasi-judicial role. The OfS will be required to determine each individual case on its own facts. Given that role, we consider that it would not be appropriate to provide generic guidance on specific subject matters, or in relation to specific policies or definitions that relevant students' unions may have adopted. Doing so may risk prejudging our determination of cases in the future which concern those subject matters or those policies or definitions.
- b. A diverse range of organisations may fall within the definition of 'relevant students' union'. The definition may include incorporated bodies and unincorporated bodies, with membership ranging from a small number of students to several thousand students. It will be important that our approach is appropriately sensitive to this diversity. As the OfS develops its approach to regulation in this area, we will continue to consider what form of further guidance, if any, may be suitable.
- c. The free speech duties are newly extended to relevant students' unions. The development of any guidance should be informed by the OfS's actual experience of monitoring relevant students' unions. Through our role we may identify recurring issues on which it would be appropriate for the OfS to publish guidance.

67. Under our proposals, the OfS may, from time to time, publish further guidance for the purpose of helping to determine whether or not students' unions are complying with their free speech duties.
68. We would also expect to comment in due course on the decisions we make under our new monitoring duties and to explain the view that we have reached based on the facts and circumstances of individual investigations concerning relevant students' unions. This will provide relevant students' unions and other stakeholders with insights into how we have reached these decisions in the particular circumstances that informed them.

**Question B: Do you have any comments on our proposed approach to providing guidance for students' unions, in the regulatory framework?**

## Proposal C: Monitoring relevant students' unions

### Summary

Our proposed approach to regulating relevant students' unions on free speech matters. The proposals set out what we might do if we consider that a students' union is not complying. This could include imposing fines on the students' union. They also set out our approach to intervention and the range of interventions that we may make.

### What are we proposing?

69. The Act will require us to monitor relevant students' unions on free speech matters.<sup>20</sup> We are proposing to include a new section in the regulatory framework setting out our approach to this matter. The proposed section is attached at [Annex B](#). We have discussed the main elements of that new section below.

### Risk-based approach to monitoring

70. The OfS is not proposing systematically to assess the compliance of each relevant students' union with each of its free speech duties on a scheduled cyclical basis. Instead, we are proposing to take a risk-based and targeted approach to monitoring. This reflects our established regulatory approach.

71. The key elements of our proposed approach to general monitoring of relevant students' unions are as follows:

- a. We will use a range of sources of information which may include interactions with students' unions, 'reportable events'<sup>21</sup> about free speech matters from providers, notifications and complaints from third parties, including whistleblowers. The information may also include wider intelligence relating to the sector and/or individual relevant students' unions or providers, including surveys or media reporting.
- b. The OfS may also use input from students – this may be insights from surveys, complaints raised with the Office of the Independent Adjudicator (OIA – the higher education complaints handling body), or information that we have sought from individual students.
- c. An enduring information reporting requirement on relevant students' unions. This will require each relevant students' union to inform the OfS of any event or matter that, in the reasonable judgement of the OfS, negatively affects or could negatively affect the relevant students' union's ability to comply with any of its free speech duties. In interpreting 'the reasonable judgement of the OfS', the OfS will, as a matter of policy, consider whether a reasonable students' union, acting in the interests of complying with

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<sup>20</sup> See HERA section 69B(1).

<sup>21</sup> A reportable event is defined in paragraph 494 of the regulatory framework. Broadly, it is a requirement for registered providers to inform us about any events or matters that could negatively affect their: eligibility for registration; ability to comply with the conditions of registration; or (if applicable) eligibility for degree awarding powers or university title.

its free speech duties (rather than in its own commercial, reputational or other interests), would consider the event or matter to be material. We have set out further details of this proposal in the 'Why are we proposing this?' section below.

72. We propose that, as a result of information that we receive through our general monitoring, we may decide to undertake further activity to help us to determine whether the relevant students' union is failing, or has failed, or is at risk of failing, to comply with any of its free speech duties. We may decide to engage with a relevant students' union to seek further information. We may decide to impose additional information reporting requirements on the relevant students' union, in addition to the enduring information reporting requirement referred to above. An additional requirement may, for example, require the relevant students' union to provide us with specific information. Or it may include an enduring element which requires the relevant students' unions to inform us when they propose to take, or take, particular actions. We propose to set out any such requirement in a notice to the relevant students' union. The relevant students' union would then be required to provide us with the information at the time, and in the form and manner, specified in the notice.
73. We propose that we may also decide to investigate a relevant students' union. In deciding whether to investigate a relevant students' union, we propose that we would have regard to the matters referred to in paragraph 95 below. An investigation may include a requirement for the relevant students' union to provide us with specified information at specified times.

### **Proposed interventions**

74. Under our proposals, the OfS may intervene where we consider that a relevant students' union is failing, or has failed, or is at risk of failing, to comply with any of its free speech duties.
75. We are proposing the following possible interventions:
- a. Seeking a **voluntary undertaking** from a relevant students' union that it will do, or refrain from doing, things set out in the undertaking.
  - b. Imposing a **monetary penalty**. A monetary penalty will only be imposed where it appears to the OfS that a relevant students' union is failing, or has failed, to comply with any of its free speech duties.
76. We are proposing that, when deciding whether and how to intervene:
- a. The OfS must have regard to its general duties under section 2 of HERA. The OfS's general functions relating to the promotion of freedom of speech and academic freedom, under section 69A of HERA, will also be relevant.
  - b. The OfS will also consider a range of factors. These may include the intervention factors in paragraph 167 of the regulatory framework. In considering those factors, the OfS will interpret them to refer to relevant students' unions and in a way that reflects the character of their free speech duties. This means that, for example, we may consider the impact of non-compliance with the free speech duties, on students and other members of the relevant students' union, and on visiting speakers. Not all intervention factors will be relevant in every circumstance, and the OfS will consider the relevant factors in the round when making its decision.



77. Under our proposals, the primary purpose of intervening is to ensure that a relevant students' union complies with its free speech duties. The approach that we take will depend on the features of an individual case. For example, we may decide to impose a monetary penalty where we consider that non-compliance is particularly serious, without having first sought a voluntary undertaking. Alternatively, we may seek a voluntary undertaking whilst also imposing a monetary penalty.

## **Monetary penalties**

78. The OfS will be empowered by HERA to impose a monetary penalty on a relevant students' union if it appears to the OfS that it is failing or has failed to comply with any of its free speech duties.<sup>22</sup> Therefore, we are not consulting on whether we should have, or should exercise, that power.

79. The Secretary of State will set out in regulations the matters to which the OfS must or must not have regard when imposing a monetary penalty and the penalty amount.

80. We have set out, in paragraph 76 above, other matters relevant to our consideration of when and how to intervene. This includes our consideration of whether to impose a monetary penalty.

81. In the proposed new section of the regulatory framework (see [Annex B](#)), we have also set out the processes that we must follow if we are minded to impose a monetary penalty and the appeals process to the First Tier Tribunal. In HERA as amended by the Act, these matters will be set out in schedule 3.<sup>23</sup> Therefore, we are not consulting on these matters.

82. In [Proposal D](#) below, we have set out how we propose to determine the amount of a monetary penalty.

## **Why are we proposing this?**

### **Risk-based approach to monitoring**

83. The OfS takes a risk-based approach to the regulation of providers. Everything that we do is designed to mitigate the risk that our four primary regulatory objectives are not met. Those objectives are that all students, from all backgrounds, and with the ability and desire to undertake higher education:

- a. are supported to access, succeed in, and progress from, higher education;
- b. receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure;
- c. are able to progress into employment or further study, and their qualifications hold their value over time;
- d. receive value for money.

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<sup>22</sup> See HERA 69B(2).

<sup>23</sup> See HERA Section 69B paragraph (5).

84. Those regulatory objectives apply also to our functions of monitoring relevant students' unions on free speech matters. We consider that students will not have a high quality education if that education is not grounded in freedom of speech. That includes freedom of speech for themselves, for fellow students, for those who teach or supervise them and for visiting speakers.
85. In our view, it is appropriate to regulate relevant students' unions in proportion to the regulatory risk that they pose, rather than other matters such as their legal form, their size or the type of provider to which they relate where these factors are not relevant to regulatory risk. In this context, the regulatory risk posed by a relevant students' union means the risk of its failing to comply with at least one of its free speech duties.
86. Our proposed risk-based approach allows us to focus attention in the areas where it is needed most, to secure free speech for students, staff and visiting speakers. Our proposed approach to monitoring is therefore designed to indicate to us where further engagement or investigation might be necessary before we decide whether a relevant students' union is failing, or has failed, to comply with any of its free speech duties. Our proposed approach provides for the imposition of information reporting requirements on relevant students' unions. Section 69B(8) of HERA will give us the power to impose such requirements.
87. Our proposed risk-based approach is also designed to minimise regulatory burden on relevant students' unions that are complying with their free speech duties. Our regulatory attention, and regulatory burden, will be focused on relevant students' unions that pose the greatest regulatory risk of non-compliance with their free speech duties.
88. Taking a risk-based approach means that we will need to set our approach to risk. Adopting a low-risk approach might mean that we follow up on every case where there is any evidence of non-compliance with the free speech duties. A high-risk approach might mean that we follow up on cases only where there is strong evidence suggesting non-compliance that has resulted in significant regulatory harm. In practice, we are likely to set our approach between those two examples.
89. We have considered whether to take a different approach to monitoring – for example, to undertake scheduled reviews of relevant students' unions, on a cyclical basis. However, we consider that such an approach would impose unnecessary regulatory burden on relevant students' unions that pose little regulatory risk, because they are complying with their free speech duties. Such an approach is also unlikely to be the best use of OfS resources given the number of relevant students' unions that we expect to regulate. It may also provide little regulatory incentive for relevant students' unions to comply with their free speech duties on an ongoing basis, in between scheduled reviews.

### **Our proposed enduring information reporting requirement**

90. Our proposed enduring information reporting requirement for relevant students' unions would apply to all relevant students' unions. We consider that this supports our risk-based approach. The Act requires relevant students' unions to comply with their free speech duties. They should therefore, as a matter of course, be monitoring their own compliance with those duties. In our view, our proposed enduring information reporting requirement does not impose any additional information-gathering burden on relevant students' unions. Section 69B(8) of HERA will give us the power to impose this requirement.

91. We propose that this enduring information reporting requirement will be set out in a notice that we issue to each relevant students' union on an annual basis. We propose that the students' union must provide us with the information at the time, and in the form and manner, specified in the notice.
92. It is important that matters are reported to the OfS in a timely way. We propose that, under the enduring information reporting requirement, a relevant students' union will be required to report an event or matter within ten days of the date that it is identified or, if that is not possible due to exceptional circumstances beyond the control of the students' union, as soon as reasonably practicable thereafter and without undue delay. This time frame would be set out in the proposed notice we would issue to each relevant students' union.
93. We also propose that, where the relevant students' union is planning or can foresee an event or matter that could affect its ability to comply, the event or matter should be reported within ten days of its being first planned or foreseen by the relevant students' union or, if that is not possible due to exceptional circumstances beyond the control of the students' union, as soon as reasonably practicable thereafter and without undue delay. This time frame would be set out in the proposed notice we would issue to each relevant students' union.

### **Proposed interventions and monetary penalties**

94. We have proposed the following interventions:

- a. Seeking a voluntary undertaking from a relevant students' union. We may use this to mitigate an increased risk of non-compliance by a relevant students' union. We may also seek an undertaking as an alternative to imposing a monetary penalty, in circumstances where it appears to us that a relevant students' union is failing, or has failed, to comply with any of its free speech duties. We may also seek a voluntary undertaking from a students' union, in addition to imposing a monetary penalty. An undertaking would, by its nature, require the agreement of the relevant students' union.
- b. Imposing a monetary penalty. A monetary penalty will only be imposed where it appears to the OfS that a relevant students' union is failing, or has failed, to comply with any of its free speech duties. The Secretary of State will set out in regulations the matters to which the OfS must have regard in determining a monetary penalty and the penalty amount.

95. We are proposing that, when deciding when and how to intervene, we may consider the intervention factors in paragraph 167 of the regulatory framework.<sup>24</sup> Those factors refer to higher education providers and our regulatory requirements of those providers. Therefore, in considering the intervention factors in this context, we will interpret them to refer to relevant students' unions and to reflect the character of their free speech duties. This means that, for example, we may consider the impact of non-compliance with the free speech duties on students and other members of the relevant students' union, and on visiting speakers. Not all factors will be relevant in every circumstance, and the OfS will consider the relevant factors in the round when making its decision.

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<sup>24</sup> The regulatory framework is available at: [www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/](http://www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/).

96. We considered whether to propose a different or amended set of intervention factors in relation to students' unions. However, we consider that the existing intervention factors cover a range of pertinent issues. In many cases, a free speech matter may concern a registered provider's compliance with its conditions of registration and its students' union's compliance with its free speech duties. In those circumstances, it would be helpful for there to be consistency in the intervention factors that we consider in relation to each party in determining our regulatory approach.
97. Under section 2 of HERA, in performing our functions we must have regard to our general duties. Those functions include our monitoring functions in relation to students' unions on free speech matters. Our general functions relating to the promotion of freedom of speech and academic freedom, under section 69A of HERA, will also be relevant.
98. The primary purpose of intervening is to ensure that a relevant students' union complies with its free speech duties. The approach that we take to intervention will depend upon the circumstances of the individual case. This flexibility underpins our risk-based approach. We propose that whilst we may use our interventions in an escalatory way, we will not always do so. For example, we may decide to impose a monetary penalty where we consider that non-compliance is particularly serious, without having first sought a voluntary undertaking.

**Question C1: Do you have any comments about our proposed approach to monitoring?**

**Question C2: Do you have any comments about our proposed approach to interventions?**

## Proposal D: Determining the amount of a monetary penalty

### Summary

Our proposed approach to determining the amount of a monetary penalty imposed on relevant students' unions. These proposals are contingent on forthcoming regulations. They set out on that conditional basis, how we propose to calculate a monetary penalty on a students' union if it appears to us that it is failing or has failed to comply with any of its free speech duties.

### What are we proposing?

99. The Act will amend HERA to give the OfS the power to impose a monetary penalty on a relevant students' union if it appears to the OfS that the students' union is failing or has failed to comply with any of its free speech duties.<sup>25</sup>
100. A monetary penalty is defined as 'a requirement to pay the OfS a penalty of an amount determined by the OfS in accordance with regulations made by the Secretary of State'. The Secretary of State will set out in regulations the matters to which the OfS must or must not have regard when imposing a monetary penalty on a relevant students' union and the penalty amount.
101. The OfS is already empowered to impose monetary penalties on providers in relation to breaches of their ongoing conditions of registration. The Secretary of State has set out in regulations the matters to which the OfS must or must not have regard when imposing a monetary penalty on a provider, and the penalty amount.<sup>26</sup> The relevant provisions are set out in regulation 4 of those regulations:

(1) In exercising its power to impose a monetary penalty on a registered higher education provider under section 15(1) of the Act, in **addition to any other matters it considers appropriate, the OfS must have regard to—**

(a) the nature, seriousness, duration and impact of the relevant breach;

(b) any financial or other gain made by the provider as a result of the relevant breach which benefits the provider;

(c) **any financial or other loss avoided as a result of the relevant breach which benefits the provider;**

(d) where any gain described in sub-paragraph (b) or avoided loss described in sub-paragraph (c) can be quantified, the amount of any such gain or avoided loss;

<sup>25</sup> See HERA section 69B paragraph (2).

<sup>26</sup> See The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 available at: [www.legislation.gov.uk/uksi/2019/1026/regulation/4/made](http://www.legislation.gov.uk/uksi/2019/1026/regulation/4/made).

(e) any previous breach of the provider's ongoing registration conditions;

(f) any steps taken by the provider following the relevant breach to avoid a breach in the future of its ongoing registration conditions;

(g) the impact that imposing a monetary penalty on the provider is likely to have on—

(i) students on higher education courses at the provider,

(ii) students generally, or students of a particular description, on higher education courses provided by registered higher education providers.

(2) In this regulation '**relevant breach**' means a breach of one or more of a registered higher education provider's ongoing registration conditions in respect of which the OfS is considering the imposition of a monetary penalty.

102. We have published guidance (Regulatory advice 19) for providers on our approach to the calculation of a monetary penalty.<sup>27</sup> We published this guidance following a public consultation on our proposed approach.

103. The regulations for relevant students' unions may set out factors which, in our judgement, when taken together are materially the same as those referred to in paragraph 101 above. If in our judgement they do so, we propose to apply the five-step approach set out in Regulatory advice 19, when calculating monetary penalties for relevant students' unions. In doing so, we would interpret that approach to refer to relevant students' unions, and in a way that reflects the character of their free speech duties. For example, we may consider the impact of a breach of free speech duties on visiting speakers, where that is relevant.

104. Our proposals are contingent on regulations to be laid by the Secretary of State. The regulations on monetary penalties for relevant students' unions may set out factors which, in our judgement, when taken together are materially different from the factors referred to in paragraph 101 above. In that event, we would propose to calculate monetary penalties on a case-by-case basis, having regard to the factors set out in the new regulations. In that event, we may also consult further on a general approach to calculating monetary penalties for relevant students' unions.

## Why are we proposing this?

105. Our power to impose monetary penalties will be set out in HERA. Our ability to impose, and the imposition of, monetary penalties are likely to be important tools to incentivise compliance with the free speech duties from all relevant students' unions. We will have the power to impose a monetary penalty from 1 August 2024, subject to the relevant provisions of HERA coming into force at that time.

106. We could decide to calculate monetary penalties on a case-by-case basis under the new regulations. In our view, that would be reasonable. However, we consider that providing more information about how, conditional on the regulations, we will calculate monetary

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<sup>27</sup> Available at: [www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/](http://www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/).

penalties, improves transparency. In conditionally proposing to follow the approach that we have set out in Regulatory advice 19, we are providing clarity to relevant students' unions about our approach.

107. The approach set out in Regulatory advice 19 was subject to public consultation. We have published our analysis of the responses to that consultation and the reasons for our decision to adopt the approach set out in Regulatory advice 19.<sup>28</sup>
108. Assuming that the new regulations set out factors that are, in our judgment, when taken together materially the same as those mentioned in paragraph 101, we consider that this approach would also be appropriate for calculating monetary penalties for relevant students' unions. A principles-based approach will allow us to take account of the specific circumstances of the relevant students' union and of its non-compliance. This will allow us to impose a monetary penalty which is proportionate to those circumstances. We have considered whether we should propose a more rules-based approach. For example, we considered whether we should propose a banded scale of monetary penalties by reference to the severity of the non-compliance, or fixed rates of monetary penalties, for particular types of non-compliance, subject to any maximum penalty to be set out in the regulations. However, we consider that detailed rules would introduce unhelpful complexity and could not properly accommodate the specific circumstances of the relevant students' union and of its non-compliance.
109. We considered whether to defer any consideration of a general approach to the calculation of monetary penalties until after the relevant regulations have been laid. However, we are mindful of the regulatory burden that a further consultation may impose on the sector. We are also mindful of the benefits of providing transparency of our proposed approach, well in advance of the implementation of that approach. Given that we are proposing an approach that is based on published guidance, we considered it appropriate to include this proposal in this consultation.

**Question D: Do you have any comments on our proposed approach to determining the amount of a monetary penalty?**

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<sup>28</sup> Analysis of responses to the consultation is available at: [www.officeforstudents.org.uk/publications/consultation-on-the-ofs-s-approach-to-monetary-penalties-analysis-of-responses/](http://www.officeforstudents.org.uk/publications/consultation-on-the-ofs-s-approach-to-monetary-penalties-analysis-of-responses/).

# Proposal E: Minor and consequential amendments to the regulatory framework

## Summary

Proposed consequential amendments to the regulatory framework to ensure that it reflects the OfS's regulation of students' unions.

## What are we proposing?

110. We are proposing to make minor and consequential amendments to the regulatory framework to reflect our new regulatory role in relation to relevant students' unions. Our proposed amendments are set out in [Annex C](#).

## Why are we proposing this?

111. The amendments that we are proposing refer to our new regulatory role in relation to relevant students' unions.

**Question E: Do you have any comments on our proposed minor and consequential revisions to the regulatory framework?**



## Proposal F: Publication of information

These proposals are relevant to the OfS's publication of information about relevant students' unions' compliance with their free speech duties. These proposals set out the information we would normally expect to publish in connection with a students' union's compliance or non-compliance with its free speech duties.

### What are we proposing?

#### Relevant legislation

112. Under section 67A of HERA, we have a statutory power to publish notices, decisions and reports given or made in the performance of our functions; this includes publishing decisions to conduct or terminate an investigation.

113. Schedule 6A of HERA, which is inserted by the Act, will also state, at paragraph 13:

#### Defamation

13. For the purposes of the law of defamation, absolute privilege attaches to the publication under section 67A of—

(a) any decision or recommendation made by the OfS under the [free speech complaints] scheme, and

(b) any report under paragraph 12(1)(b)<sup>[29]</sup>

114. We expect these provisions to come into force on 1 August 2024.

#### Our proposals

115. We have previously published guidance for providers on the approach we will take to the publication of information about providers and connected individuals. This guidance is set out in Regulatory advice 21: Publication of information. This guidance was published following publication consultations on our proposed approach.<sup>30</sup>

116. The guidance sets out how we normally use our powers in sections 67A to 67C of HERA and contains our general policy for the publication of information about providers and individuals connected with them. It sets out the information that we would normally expect to publish and the information that we would not normally expect to publish. It also sets out the factors to which we will have regard in making a publication decision.

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<sup>29</sup> HERA Sch. 6A 12(1), as amended by the Act, says: '(1) This paragraph applies if the Secretary of State requests the OfS to—

(a) conduct a review of the scheme or its operation (or any aspect of either of those matters), and

(b) report the results of the review to the Secretary of State.'

<sup>30</sup> See [www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/](http://www.officeforstudents.org.uk/publications/regulatory-advice-21-publication-of-information/).

117. We are now proposing to amend Regulatory advice 21 to set out the information that we would normally expect to publish, and the information that we would not normally expect to publish, in relation to our regulation of relevant students' unions on free speech matters.

118. In our consultation on the free speech complaints scheme, we are also proposing to amend Regulatory advice 21 to set out the information that we would normally expect to publish, and the information that we would not normally expect to publish, in relation to the OfS free speech complaints scheme. Those proposals include the publication of information about students' unions that is not covered in the table below.<sup>31</sup>

### Information we would normally expect to publish

119. We propose that items 4a and 7a in the table below are added to 'Table 1: Information the OfS would normally expect to publish', in Regulatory advice 21. We also propose to amend existing items 4 and 8 in Table 1. Our proposed additions and amendments are set out in red font in the table below.

	Main subject matter	Main content in respect of that subject matter	Any related or ancillary material
4 <sup>32</sup>	<p>Information about an investigation <b>of a provider and</b> into any type of potential non-compliance with a condition of registration or into other potential regulatory harm:</p> <p>A decision to open an investigation, or information about a live investigation at any time after it has been opened</p> <p>The progress of an investigation at key milestones where that investigation has previously been announced</p> <p>Any provisional decisions taken as a result of an investigation that has previously been announced</p> <p>Where information has been published about a</p>	<p>The identity of a provider subject to investigation, a summary of the matters being investigated, and the progress of an investigation</p> <p>A provisional decision and the reasons for that decision</p> <p>A decision to close an investigation and the reasons for that decision</p>	<p>The OfS's detailed assessment of the relevant issues, including the underlying evidence considered in that assessment</p>

<sup>31</sup> See [www.officeforstudents.org.uk/free-speech-complaints-consultation/](http://www.officeforstudents.org.uk/free-speech-complaints-consultation/).

<sup>32</sup> We are consulting separately on our proposed new free speech complaints scheme: [www.officeforstudents.org.uk/free-speech-complaints-consultation/](http://www.officeforstudents.org.uk/free-speech-complaints-consultation/). In Proposal P in that consultation, we have proposed an amendment to existing item 4 to state that it does not include matters relating to our review of complaints under the proposed free speech complaints scheme.

	Main subject matter	Main content in respect of that subject matter	Any related or ancillary material
	decision to conduct an investigation, any decision to close that investigation without making any finding, or if the findings of that investigation do not result in any further action		
4a	<p>Information about an investigation into any type of potential non-compliance with a free speech duty by a relevant students' union:</p> <p>A decision to open an investigation, or information about a live investigation at any time after it has been opened</p> <p>The progress of an investigation at key milestones where that investigation has previously been announced</p> <p>Any provisional decisions taken as a result of an investigation that has previously been announced</p> <p>Where information has been published about a decision to conduct an investigation, any decision to close that investigation without making any finding, or if the findings of that investigation do not result in any further action</p> <p>This does not include matters relating to the review of complaints under the OfS free speech complaints scheme</p>	<p>The identity of a relevant students' union subject to investigation, a summary of the matters being investigated, and the progress of an investigation</p> <p>A provisional decision and the reasons for that decision</p> <p>A decision to close an investigation and the reasons for that decision</p>	The OfS's detailed assessment of the relevant issues, including the underlying evidence considered in that assessment
7a	Information about a relevant students' union's compliance with any of its	The decision that there is or has been a breach of a free	The OfS's detailed assessment of compliance with the relevant duties,

	Main subject matter	Main content in respect of that subject matter	Any related or ancillary material
	<p>free speech duties and any action the OfS has taken in response to actual or potential non-compliance:</p> <p>A breach of any of the free speech duties</p> <p>A voluntary undertaking by a relevant students' union that it will do, or refrain from doing, things set out in the undertaking</p> <p>Imposition of a monetary penalty</p>	<p>speech duty and the reasons for that decision</p> <p>The content of any undertaking from the students' union and the reasons why the OfS sought this</p> <p>The decision to impose a monetary penalty, the amount of that penalty (and how it was calculated), and the reasons for those decisions</p>	<p>including the underlying evidence considered in that assessment</p>
8 <sup>33</sup>	<p>Information that relates to individuals connected with a provider or, where specified below, a constituent institution or a relevant students' union:</p> <p>A finding that an individual is not suitable to be approved as a provider's accountable officer</p> <p>A finding that an individual is not a fit and proper person</p> <p>The conduct of an individual where this is relevant to the reasons for a regulatory finding about (i) a provider including a breach of a condition or (ii) a relevant students' union including a breach of any of its free speech duties</p>	<p>The decision about an individual and the reasons for that decision</p>	<p>The OfS's detailed assessment of the relevant issues, including the underlying evidence considered in that assessment.</p>

<sup>33</sup> We are consulting separately on our proposed new free speech complaints scheme: [www.officeforstudents.org.uk/free-speech-complaints-consultation/](http://www.officeforstudents.org.uk/free-speech-complaints-consultation/). In Proposal P in that consultation, we have proposed an amendment to existing item 8 in relation to the publication of information in relation to the conduct of an individual where this is relevant to the reasons for finding a free speech complaint to be partly justified or justified.

## **Factors to which we will have regard in making publication decisions**

120. In making publication decisions about the matters referred to in paragraph 119 above, we propose to consider the ‘Factors to which we will have regard in making publication decisions’ in Regulatory advice 21. In doing so, and where the context of the publication decision so requires, we propose to interpret the factors in Regulatory advice 21 to refer to relevant students’ unions.

## **Engagement with providers, constituent institutions, relevant students’ unions and connected individuals**

121. We propose that the nature of our engagement in relation to a publication decision, on the matters referred to in this Proposal F, will depend on the particular circumstances of the case. We propose that we will seek representations from relevant students’ union before making a final decision to publish information where we consider it is appropriate to do so and in the manner we consider appropriate. This reflects the existing approach set out in paragraph 15 of Regulatory advice 21.

122. We also propose that we would expect to seek the views of a relevant students’ union, and an individual connected to that relevant students’ union where relevant, before making a final decision to publish information about an investigation – this is the subject matter covered in new proposed row 4a of Table 1 in Regulatory advice 21 (and set out above, with our proposed amendment).

## **Other consequential amendments**

123. We propose to make further minor, consequential amendments to Regulatory advice 21, to reflect the fact that publication decisions may relate to information about relevant students’ unions, and persons connected to them, and in relation to the OfS’s regulation of relevant students’ unions on free speech matters.

## **Why are we proposing this?**

124. The law gives the OfS powers to publish notices, decisions and reports given or made in the performance of our functions.<sup>34</sup>

125. Regulatory advice 21 sets out the framework within which we currently make decisions about publication matters. Our policy states that, when making a publication decision, we will have regard to the factors set out in that policy and will consider them in the manner we consider to be appropriate for an individual case. The factors directly incorporate the language used in section 67A of HERA. The factors also include a final factor, which reflects the other legal requirements placed on us by HERA and other legislation. This includes the requirement for us to have regard to our general duties under section 2 of HERA. Our policy also makes clear that we may have regard to other relevant factors in making publication decisions, and those will depend on the particular circumstances of a case.

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<sup>34</sup> See section 67A of HERA.

126. We explained our reasons for adopting the policy set out in Regulatory advice 21, in our analysis of responses and decision document to our public consultation on the policy.<sup>35</sup> Those reasons also underpin our proposal to extend the general policy to matters referred to in this proposal. The inclusion of decision-making factors, and the illustrative considerations for and against publication that sit underneath them, give us a level of flexibility that we consider appropriate. We consider that it would be inappropriate to introduce a rigid overarching approach to publication since each case should be determined on its own particular circumstances. We recognise that this may make our decision-making process more complex and reduce the certainty that relevant students' unions have about whether information relevant to them will be published. However, we consider that a more rigid or rules-based system would fetter our discretion and be inconsistent with our public law obligations.
127. We considered whether it is necessary to make changes to our published policy on publication of information and whether we should instead make publication decisions on the matters referred to in this proposal, on an individual basis without reference to a policy. Whilst we consider that would be reasonable, we also consider that there are benefits to increased transparency about the types of information that we are likely to publish or not to publish, and the factors that we will take into account in reaching individual decisions. Our proposals set out how we propose to interpret those factors, to refer to relevant students' unions where the context of the publication decision so requires.
128. In our proposals, we have set out matters that we propose 'we will normally publish'. We considered whether our starting point should be that 'we would not normally' publish those matters. However, we consider that it is in the public interest for the OfS to be transparent about its regulatory and other decisions and its reasons for making them. In our view, visibility creates confidence in the regulatory system. We consider this to be in the interests of the public, of current and potential students, and of other providers and relevant students' unions that have satisfied the OfS's regulatory requirements and complied with their free speech duties. Identifying areas where bodies have not complied with their free speech duties may also support compliance with those duties by others.

**Question F: Do you have any comments on our proposed approach to the publication of information?**

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<sup>35</sup> See [www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers-analysis-of-responses-and-decision/](http://www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers-analysis-of-responses-and-decision/).

## What would be the effect of these proposals?

129. Our proposals are designed to implement the requirements in the Act relating to our regulation of students' unions on free speech matters. Our proposals reflect our risk-based regulatory approach. They will establish a proportionate approach to our monitoring of students' unions, enabling us to focus our regulatory attention, and regulatory burden, on areas where there is the greatest risk of non-compliance with the free speech duties.
130. Students will not have a high quality education if that education is not grounded in freedom of speech. That includes freedom of speech for themselves, for fellow students, for those who teach or supervise them, and for visiting speakers. Our proposals are designed to ensure that relevant students' unions secure freedom of speech within the law for staff, students and visiting speakers.
131. The proposal relating to the publication of information would provide transparency and clarity about the type of information that the OfS would normally expect to publish, or not to publish, in relation to the OfS's regulation of relevant students' unions on free speech matters. It would provide transparency and clarity about the factors that the OfS would have regard to when making publication decisions about those matters. More generally, the proposal is likely to increase transparency about the OfS's activities and decisions, for students and other stakeholders.

## **Annex A: List of consultation questions**

**Question A: Do you have any comments on our proposals on maintaining and making publicly available a list of relevant students' unions?**

**Question B: Do you have any comments on our proposed approach to providing guidance for students' unions, in the regulatory framework?**

**Question C1: Do you have any comments about our proposed approach to monitoring?**

**Question C2: Do you have any comments about our proposed approach to interventions?**

**Question D: Do you have any comments on our proposed approach to determining the amount of a monetary penalty?**

**Question E: Do you have any comments on our proposed minor and consequential revisions to the regulatory framework?**

**Question F: Do you have any comments on our proposed approach to the publication of information?**

**Question G: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider, constituent institution or students' union or for any particular types of student?**

**Question H: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?**

**Question I: Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.**



# Annex B: Proposed text of ‘Part IIIA – Regulation of relevant students’ unions on free speech matters’

## Part IIIA – Regulation of students’ unions

### Free speech duties

201A. The OfS will monitor whether students’ unions at providers registered in the Approved (fee cap) category (‘relevant students’ unions’) are complying with their free speech duties.

201B. For these purposes, ‘free speech duties’ means the duties set out in section A5 and section A6 of Part A1 of HERA. These duties are set out below.

#### **Section A5 of Part A1 of HERA: Duty to take steps to secure freedom of speech**

(1) A students’ union for students at a registered higher education provider that is eligible for financial support must take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective in subsection (2).

(2) That objective is securing freedom of speech within the law for—

- (a) members of the students’ union,
- (b) students of the provider,
- (c) staff of the students’ union,
- (d) staff and members of the provider and of its constituent institutions, and
- (e) visiting speakers.

(3) The objective in subsection (2) includes securing that—

- (a) the use of any premises occupied by the students’ union is not denied to any individual or body on grounds specified in subsection (4),
- (b) the terms on which such premises are provided are not to any extent based on such grounds, and
- (c) affiliation to the students’ union is not denied to any student society on grounds specified in subsection (4)(b).

(4) The grounds referred to in subsection 3 are—

- (a) in relation to an individual, their ideas or opinions;
- (b) in relation to a society or other body, its policy or objectives or the ideas or opinions of any of its members.

(5) In order to achieve the objective in subsection (2), a students' union for students at a registered higher education provider that is eligible for financial support must secure that, apart from in exceptional circumstances, use by any individual or body of premises occupied by the students' union is not on terms that require the individual or body to bear some or all of the costs of security relating to their use of the premises.

(6) In this Part—

'member', in relation to a students' union which is a representative body and not an association (see section 20(1)(b) of the Education Act 1994), means those whom it is the purpose of the union to represent, excluding any student who has signified that they do not wish to be represented by it;

'registered higher education provider that is eligible for financial support' means a registered higher education provider that is an eligible higher education provider for the purposes of section 39;

'students' union', in relation to any institution, has the same meaning as it has in Part 2 of the Education Act 1994 in relation to establishments to which that Part applies (see section 20 of that Act).

(7) In this Part, references to a students' union for students at a registered higher education provider that is eligible for financial support do not include a students' union for students at a constituent institution of such a provider.

### **Section A6 of Part A1 of HERA: Code of practice**

(1) A students' union to which section A5 applies must, with a view to facilitating the discharge of its duties under that section, maintain a code of practice setting out the matters referred to in subsection (2).

(2) Those matters are—

(a) the students' union's values relating to freedom of speech and an explanation of how those values uphold freedom of speech,

(b) the procedures to be followed by its staff and its members who are students of the registered higher education provider referred to in section A5(1) in connection with the organisation of—

(i) meetings which are to be held on the premises occupied by the students' union and which fall within any class of meeting specified in the code, and

(ii) other activities which are to take place on those premises and which fall within any class of activity so specified,

(c) the conduct required of such persons in connection with any such meeting or activity, and

(d) the criteria to be used by the students' union in making decisions about—

- (i) the union's support and funding for events and activities to which the duties in section A5 are relevant, and
  - (ii) whether to allow the use of premises and on what terms (which must include its criteria for determining whether there are exceptional circumstances for the purposes of section A5(5)).
- (3) The code of practice may deal with such other matters as the students' union considers appropriate.
- (4) A students' union to which section A5 applies must take the steps that are reasonably practicable for it to take (including where appropriate the initiation of disciplinary measures) in order to secure compliance with its code of practice.
- (5) A students' union to which section A5 applies must, at least once a year, bring—
- (a) the provisions of section A5, and
  - (b) its code of practice under this section,
- to the attention of all of its members who are students of the provider.

## List of relevant students' unions

201C. The OfS will maintain and make publicly available a list of relevant students' unions to which, according to the information held by the OfS, the free speech duties apply.

## Guidance for relevant students' unions

201D. The OfS has set out below guidance for relevant students' unions on their free speech duties. This includes guidance for the purpose of helping to determine whether or not relevant students' unions are complying with their free speech duties. The terms 'free speech' and 'freedom of speech' are used interchangeably.

201E. References to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the European Convention of Human Rights as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form).

201F. The objective in section A5(2) of Part A1 of HERA is securing free speech 'within the law'. There is no requirement to point to a legal basis for free speech. Speech is permissible and 'within the law' unless restricted by a specific law. Speech that is restricted by law is not lawful. For example, speech that amounts to unlawful harassment, victimisation or discrimination as defined in the Equality Act 2010 is not within the law.<sup>36</sup>

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<sup>36</sup> Speech/certain actions will not be unlawful if an exemption applies under the Equality Act 2010 or where there are provisions that permit certain actions/speech in certain circumstances, for example indirect discrimination if it is objectively justified.

- 201G. The duty set out in section A5 of Part A1 of HERA is framed around the duty ‘...to take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for [the relevant students’ union] to take’.
- 201H. In practice, the duty in section A5 of Part A1 of HERA is likely to require a wide range of steps to be taken. The OfS interprets the duty ‘to take the steps that... are reasonably practicable for it to take...’ to include deciding not to take a step which would have an adverse impact on freedom of speech without compelling lawful justification.
- 201I. Factors which may be relevant to an assessment of whether steps are ‘reasonably practicable’ may include, amongst other things:
- a. the extent to which taking the step, or not taking the step, would prevent restrictions on freedom of speech;
  - b. the financial and other costs which would be incurred in taking the step and the extent to which it would directly disrupt other lawful activities.
- 201J. The duty in section A6 of Part A1 of HERA requires relevant students’ unions to maintain a code of practice dealing with the matters set out in that section. Those matters are:
- a. the students’ union’s values relating to freedom of speech and an explanation of how those values uphold freedom of speech,
  - b. the procedures to be followed by its staff and its members who are students of the registered higher education provider referred to in section A5(1) of Part A1 of HERA in connection with the organisation of—
    - i. meetings which are to be held on the premises occupied by the students’ union and which fall within any class of meeting specified in the code, and
    - ii. other activities which are to take place on those premises and which fall within any class of activity so specified,
  - c. the conduct required of such persons in connection with any such meeting or activity, and
  - d. the criteria to be used by the students’ union in making decisions about—
    - i. the union’s support and funding for events and activities to which the duties in section A5 of Part A1 of HERA are relevant, and
    - ii. whether to allow the use of premises and on what terms (which must include its criteria for determining whether there are exceptional circumstances for the purposes of section A5(5) of Part A1 of HERA).
- 201K. Section A6(3) of Part A1 of HERA also states that the code of practice ‘may deal with such other matters as the students’ union considers appropriate.’ The OfS considers that the code of practice should provide a broad framework for securing free speech at the relevant students’ union. This means that the code of practice may extend to a broad range of the

relevant students' union's activities. A code of practice should not be limited to matters relating to procedures to be followed in relation to the organisation of speaking events.

201L. The OfS may from time to time, set out in separate guidance further information about how it will determine whether or not relevant students' unions are complying with their free speech duties. Any guidance may include illustrative factors which the OfS will take into account in determining whether or not a relevant students' union is complying with its free speech duties.

## **The OfS's approach to monitoring of relevant students' unions**

### **Approach to general monitoring**

201M. The OfS will take a risk-based and targeted approach to monitoring relevant students' unions in relation to their free speech duties.

201N. The OfS will use a range of sources of information which may include interactions with students' unions, 'reportable events' that providers must report to the OfS, notifications and complaints from third parties, including whistleblowers. The information may also include wider intelligence relating to the sector and/or individual relevant students' unions or providers, including surveys or media reporting.

201O. The OfS may also use input from students – this may be insights from surveys, complaints raised with the OIA, or information that we have sought from individual students.

201P. The OfS will not systematically assess the compliance of each relevant students' union with each of its free speech duties on a scheduled cyclical basis.

### **Enduring reporting requirement**

201Q. Under HERA, each relevant students' union must provide the OfS, or a person nominated by the OfS, with such information for the purposes of the performance of the OfS's functions in relation to the monitoring of relevant students' unions, as the OfS may require it to provide.<sup>37</sup>

201R. If a relevant students' union fails to comply with this requirement under HERA, and does not satisfy the OfS that it is unable to provide the information, the OfS may enforce the duty to comply with the requirement in civil proceedings for an injunction.

201S. The OfS will impose an enduring information reporting requirement on each relevant students' union. Under that requirement, each relevant students' union is required to inform the OfS of any event or matter that, in the reasonable judgement of the OfS, negatively affects or could negatively affect the relevant students' union's ability to comply with any of its free speech duties.

201T. In interpreting 'the reasonable judgement of the OfS', under paragraph 201S above, the OfS will, as a matter of policy, consider whether a reasonable students' union acting in the interests of complying with its free speech duties (rather than in its own commercial, reputational or other interests), would consider the event or matter to be material.

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<sup>37</sup> See HERA 69B(8).

201U. The enduring information reporting requirement will be set out in a notice issued by the OfS to each relevant students' union. A relevant students' union must provide the OfS with the information at the time, and in the form and manner, specified in the notice.

### **Seeking further information from individual relevant students' unions**

201V. As a result of information that the OfS receives through its general monitoring, the OfS may decide to undertake further activity to help it to determine whether the relevant students' union is failing, or has failed, or is at risk of failing, to comply with any of its free speech duties.

201W. The OfS may decide to engage with a relevant students' union to seek further information. The OfS may decide to impose additional information reporting requirements on the relevant students' union, in addition to the enduring information reporting requirement referred to above. An additional requirement may, for example, require the relevant students' union to provide the OfS with specific information. Or it may include an enduring element which requires the relevant students' unions to inform the OfS when the relevant students' union proposes to take, or takes, particular actions. Any such information reporting requirement will be set out in a notice to the relevant students' union. The relevant students' union must provide the OfS with the information at the time, and in the form and manner, specified in the notice.

201X. The OfS may also decide to investigate a relevant students' union. In deciding whether to investigate a relevant students' union, the OfS will have regard to the matters referred to in paragraphs 201AA and 201BB below. An investigation may include a requirement for the relevant students' union to provide the OfS with specified information at specified times.

### **Interventions**

201Y. The OfS may intervene where it considers that a relevant students' union is failing, or has failed, or is at risk of failing, to comply with any of its free speech duties.

201Z. The OfS has the following interventions at its disposal:

- a. Seeking a voluntary undertaking from a relevant students' union that it will do, or refrain from doing, things set out in the undertaking.
- b. Imposing a monetary penalty. A monetary penalty will only be imposed where it appears to the OfS that a relevant students' union is failing, or has failed, to comply with any of its free speech duties.

201AA. When deciding whether and how to intervene, the OfS must have regard to its general duties under section 2 of HERA. The OfS's general functions relating to freedom of speech and academic freedom under section 69A of HERA, will also be relevant.

201BB. The OfS will also consider a range of factors. These may include the intervention factors in paragraph 167 of this regulatory framework. In considering those factors, the OfS will interpret them to refer to relevant students' unions and in a way that reflects the character of their free speech duties. This means that, for example, the OfS may consider the impact of non-compliance with the free speech duties on students and other members of the relevant students' union, and on visiting speakers. Not all intervention factors will be

relevant in every circumstance, and the OfS will consider the relevant factors in the round when making its decision.

201CC. The primary purpose of intervening is to ensure that a relevant students' union complies with its free speech duties. The approach that the OfS takes will depend on the features of an individual case. For example, the OfS may decide to impose a monetary penalty where it considers that non-compliance is particularly serious, without having first sought a voluntary undertaking. Alternatively, the OfS may seek a voluntary undertaking whilst also imposing a monetary penalty.

### **Monetary penalties**

201DD. The OfS is empowered by HERA to impose a monetary penalty on a relevant students' union if it appears to the OfS that it is failing or has failed to comply with any of its free speech duties.

201EE. The Secretary of State has set out in regulations the matters to which the OfS must or must not have regard when imposing a monetary penalty and the penalty amount.

201FF. If the OfS intends to impose a monetary penalty, it will notify the relevant students' union of this intention and the amount of, and reason for, the proposed penalty. The relevant students' union will have a specified period to make representations, which must not be less than 28 days from the date when the notice is received by the relevant students' union. The OfS must have regard to these representations in taking a final decision about the monetary penalty. At the end of that process the OfS may issue a penalty, specifying the amount and the period within which it must be paid.

201GG. If the relevant students' union disagrees with the decision to impose the monetary penalty, or the amount of the penalty, the relevant students' union can appeal to the First Tier Tribunal. The requirement to pay the monetary penalty is suspended at any time when an appeal could be brought in respect of a penalty, or such an appeal is pending, unless the relevant students' union informs the OfS that it does not intend to appeal.<sup>38</sup> An appeal can be made on one or more of the following grounds:

- a. The decision is based on a factual error.
- b. That it is wrong in law.
- c. That it is unreasonable.

201HH. There are four possible outcomes of an appeal. The Tribunal may:

- a. Withdraw the requirement to pay the penalty.
- b. Confirm that requirement.
- c. Vary that requirement.

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<sup>38</sup> HERA Schedule 3(8)(a and b), and (9).

- d. Remit the decision whether to confirm the requirement to pay the penalty, or any matter relating to that decision, to the OfS.



## Annex C: Minor and consequential amendments to the regulatory framework to reflect the OfS’s regulation of relevant students’ unions

1. This annex sets out minor and consequential amendments to the regulatory framework to reflect the OfS’s regulation of relevant students’ unions. Where we are amending a body of text, we have used red text to indicate additions and red strikethrough text to indicate deletions.
2. Add the Higher Education (Freedom of Speech) Act to ‘Wider context for the regulatory framework’ as follows:
  - Higher Education Freedom of Speech Act 2023:  
<https://www.legislation.gov.uk/ukpga/2023/16/contents/enacted>

3. Amend para 23 as follows:

The OfS’s relationship with students **and with students’ unions**

Alongside the student representation on the board and Student Panel, the OfS will seek the input of individual students and their representative bodies, including students’ unions. ~~The main regulator of student unions is the Charity Commission.~~ Students’ unions can play an important part in the academic and wider experience of students, and form a significant element of the overall student experience. The OfS ~~will~~ therefore wants to work with students’ unions, taking account of their role and contribution. **The main regulator of students’ unions is the Charity Commission. However, from 1 August 2024, the OfS regulates students’ unions for students at providers registered in the Approved (fee cap) category (see paragraphs 59-60) in relation to free speech matters.**

4. In the table under paragraph 72, make the following amendment:

The category in which the provider is registered*	This information allows users of the Register to understand the regulatory requirements placed on a provider and the provider’s eligibility for public grant funding, student support funding, and a student sponsor licence. <b>It also allows users of the Register to identify whether a provider’s students’ union is required to comply with free speech duties and is subject to OfS regulation in respect of free speech matters.</b>
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5. In the Glossary of the regulatory framework, add:

### **Constituent institution**

Any constituent college, school, hall or other institution of a registered higher education provider

### **Registered higher education provider**

‘Registered higher education provider’ has the same meaning as in Part 1 of HERA (see section 85 of that Act).

**Relevant students' union**

A students' union at a registered higher education provider that is eligible for financial support. This does not include a students' union for students at a constituent institution of such a provider.

**Students' union**

'Students' union' has the same meaning as it has in Part 2 of the Education Act 1994 in relation to establishments to which that Part applies (see section 20 of that Act).

**Member of a students' union**

'Member', in relation to a students' union which is a representative body and not an association (see section 20(1)(b) of the Education Act 1994), means those whom it is the purpose of the union to represent, excluding any student who has signified that they do not wish to be represented by it.

## Annex D: Matters to which we have had regard in developing our proposals

1. In formulating these proposals, we have had regard to the matters set out below.

### The OfS's general duties

2. The OfS's general duties are set out in section 2 of the Higher Education and Research Act 2017 (HERA). In performing our functions, we are required to have regard to:
  - a. The need to protect the institutional autonomy of English higher education providers.
  - b. The need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers.
  - c. The need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers.
  - d. The need to promote value for money in the provision of higher education by English higher education providers.
  - e. The need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers.
  - f. The need to use the OfS's resources in an efficient, effective and economic way, and
  - g. so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be —
    - i. transparent, accountable, proportionate and consistent, and
    - ii. targeted only at cases in which action is needed.
3. We have carefully considered each of our general duties. We consider that the proposals set out in this consultation are particularly relevant to general duties (b), (e), (f) and (g): quality, choice and opportunity for students; equality of opportunity; efficient, effective and economic use of the OfS's resources; and best regulatory practice.
4. As relevant students' unions are not higher education providers, they do not fall within the definition of our general duty (a), which concerns the institutional autonomy of higher education providers. We therefore place less weight on this duty in formulating these proposals than we might do for proposals which are aimed at regulating higher education providers.
5. However, HERA currently defines 'institutional autonomy' to include 'the freedom within the law of academic staff at English higher education providers—
  - i. to question and test received wisdom, and
  - ii. to put forward new ideas and controversial or unpopular opinions,

without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.<sup>39</sup>

6. In formulating our proposals for regulating relevant students' unions' compliance with their free speech duties, we have placed significant weight on the need to protect this aspect of institutional autonomy concerning academic staff. We consider that our proposals relating to our regulation of relevant students' unions will support a breadth of contexts in which academic staff can put forward ideas and opinions and therefore will enhance this aspect of institutional autonomy.
7. The OfS must have regard to the general duty (b): the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers. We consider that students will not have a high quality education if that education is not grounded in freedom of speech. That includes freedom of speech for themselves, for fellow students, for those who teach or supervise them and for visiting speakers. In formulating our proposals, we have taken the view that freedom of speech and academic freedom provide a necessary context for advancing new ideas, encouraging productive debate and challenging conventional wisdom, and that these are essential characteristics of quality higher education provision. We consider that our proposals advance the aim that all providers and relevant students' unions secure freedom of speech within the law for students, staff and visiting speakers. We therefore consider that they would promote quality in the provision of higher education.
8. We propose that we would normally expect to publish information about a relevant students' union's compliance with its free speech duties. This may provide students with information that may help to inform their choices about where to study.
9. The OfS must also have regard to the general duty (e): the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers. Without free speech within the law being secured for all students, they will not have equal opportunity to participate fully in higher education or research. This may be especially important for those who could otherwise suffer harassment, discrimination and victimisation on account of their protected characteristics, including their religious or philosophical beliefs.
10. Our proposed regulation of relevant students' unions may support the lawful expression of views which others may find offensive. Some groups who share protected characteristics may consider that they will be particularly negatively affected by the lawful expression of views that they find offensive. However, our proposed approach to regulating relevant students' unions may support those groups to put forward their counter views (within the law), and that may be a positive effect. Moreover, we consider that open, tolerant discussion of controversial matters may be more likely to promote good relations between such groups than censorship or silencing. Censorship or silencing risks concealing tensions without going any way to resolving them. We therefore consider that our proposals concerning our regulation of students' unions

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<sup>39</sup> HERA 2017 2(8)(c). The Act will amend HERA to omit 2(8)(c): see Schedule para 2(4)(c) of the Act. However, the Act will also add two additional general duties to s. 2 of HERA, of which one will be '(ab) the need to protect the academic freedom of academic staff at English higher education providers'. See s5(1) of the Act. The Act will also introduce a new definition of academic freedom into HERA.

will help create an environment in which students from all backgrounds can succeed in higher education.

11. The OfS must have regard to the need to use its resources in an efficient, effective and economic way (general duty (f)). In formulating our proposals, we have considered how we will have regard to these factors in regulating relevant students' unions. It is our view that a risk-based approach to our regulation of relevant students' unions will make the most efficient and effective use of our resources, while also reducing the burden on students' unions.
12. The OfS is required to have regard so far as relevant, to the principles of best regulatory practice (general duty (g)). These include the principles that regulatory activities should be transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed.
13. As stated above, we propose to adopt a risk-based approach to the regulation of relevant students' unions. We consider that this approach would enable our regulation to be proportionate and targeted. We also propose to publish information relating to relevant students' unions about their compliance with their free speech duties. We consider that doing so is in the interests of transparency and accountability. Published examples of investigations and outcomes may support knowledge and understanding associated with the application of the new free speech duties and will provide assurances that the OfS is regulating effectively around freedom of speech.
14. Duties (c) and (d) relate to the need to encourage competition between higher education providers where this is in the interests of students and the need to promote value for money in the provision of higher education.
15. We consider these duties to be important, but in formulating these proposals we have given more weight to our other general duties. This is because relevant students' unions are not providers, and matters relating to competition with one another or the provision of higher education are less relevant to these organisations.
16. However, as we consider that freedom of speech within the law and academic freedom are both essential conditions for higher education that is high quality and accessible, it follows that securing free speech is also a pre-requisite of value for money for students. This means that students will receive best value for money where both their provider and students' union(s) that are at their provider act to secure freedom of speech.

## **The Regulators' Code**

17. We have had regard to the Regulators' Code<sup>40</sup> in developing these proposals.
18. Provision 1 of the Code states that regulators should carry out their activities in a way that supports those they regulate to comply and grow. We have framed our proposals in a way that will help relevant students' unions to comply. For instance, we are proposing that we would normally publish information relating to an investigation into a potential breach, by a relevant

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<sup>40</sup> See <https://www.gov.uk/government/publications/regulators-code>.

students' union, of its free speech duties. We consider that our publication of relevant information may help providers and relevant students' unions to comply in the future.

19. Provision 2 of the Code states that regulators should provide simple and straightforward ways to engage with those they regulate and hear their views. We have sought to explain both our proposals and our policy intention in making them throughout this consultation document. Where relevant, we have also explained the alternatives we have considered and discounted, to enable respondents to tell us if they consider we should not have discounted a particular option. We will promote and run several consultation events during the consultation period to engage with potential participants.
20. Provision 3 of the Code states that regulators should base their regulatory activities on risk. As stated above, we propose to adopt a risk-based approach to the regulation of relevant students' unions. We are not proposing systematically to assess the compliance of each relevant students' union with each of its free speech duties on a scheduled cyclical basis. We consider that this approach would enable our regulation to be proportionate and targeted.
21. Provision 4 of the Code states that regulators should share information about compliance and risk. We are proposing to publish information about the compliance of relevant students' unions with their free speech duties. We consider that these proposals will inform relevant students' unions about relevant risks to free speech.
22. Provision 5 of the Code states that regulators should ensure clear information, guidance and advice is available to help those we regulate meet their responsibilities to comply. We are proposing guidance to relevant students' unions that includes information about three key areas that are relevant to compliance. We are also proposing to publish information relating to relevant students' unions' non-compliance with their free speech duties, including reasons for, and the evidence underlying, our assessments. We consider that this information will help relevant students' unions to meet their duties to comply.
23. Provision 6 of the Code states that regulators should ensure that their approach to their regulatory activities is transparent. We are proposing to publish information relating to students' unions' non-compliance with their free speech duties, including the evidence underlying our assessments.

## **Public Sector Equality Duty**

24. We have had regard to the Public Sector Equality Duty set out in section 149 of the Equality Act 2010. This duty states that the OfS 'must, in the exercise of its functions, have due regard to the need to:
  - a. eliminate unlawful discrimination, harassment, victimisation and any other conduct that is prohibited under the Equality Act 2010;
  - b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

25. Our proposals are intended to ensure that individuals in English higher education both feel free and are in fact free to express their views within the law. We are not consulting on whether we should regulate relevant students' unions on free speech matters. We will be required to do this under the Act. Rather, we are consulting on how we should do this.
26. Under existing legal and regulatory requirements, providers and relevant students' unions must comply with any relevant free speech duties and equality law duties, including the public sector equality duty where it applies. The matters on which we are consulting do not change this requirement.
27. Our proposed regulation of relevant students' unions may support the expression of lawful views which others may find offensive. Some groups who share protected characteristics may consider that they will be particularly negatively affected by the lawful expression of views that they find offensive. However, our proposed approach to regulation of relevant students' unions may support those groups to put forward their counter views (within the law), and that may be positive. Moreover, we consider that open, tolerant discussion of controversial matters may be more likely to promote good relations between such groups than censorship or silencing. The latter approach risks concealing tensions without going any way to resolving them. We therefore consider that our proposed regulation may foster good relations, particularly between students who share a relevant protected characteristic and those who do not share it.
28. Moreover, one of the relevant protected characteristics is 'religion or philosophical belief'. Our proposed approach to regulating students' unions may offer a route for addressing, and may also disincentivise, unlawful discrimination, harassment and victimisation directed at persons who share this characteristic. This may be a positive effect.
29. Our proposed regulation of relevant students' unions may result in students being exposed to a wider range of views and staff feeling able to teach and research a wider range of topics. These effects may be positive, in particular for individuals who share a protected characteristic who may currently be particularly impacted by restrictions on free speech, such as those with protected religious or philosophical beliefs relating to minority views.
30. Our proposals may be in the wider public interest as providers should be environments where received wisdom is challenged, and contentious or discomfiting topics are confronted, in the pursuit of new knowledge.
31. This consultation gives stakeholders an opportunity to inform the development of our proposals. Through this consultation we are seeking views on any unintended consequences of our proposals, for example on particular types of provider or student. We are also seeking views about the potential impact of our proposals on individuals on the basis of their protected characteristics. Responses to this consultation will inform our assessment of the impact of our proposals on different groups.

## Guidance issued by the Secretary of State

32. We have a duty to have regard to guidance issued by the Secretary of State under section 2(3) of HERA. Guidance issued in March 2022<sup>41</sup> set out the government's view that it is essential for the higher education sector to uphold freedom of speech and for the OfS to regulate around freedom of speech and academic freedom:

'Freedom of speech and academic freedom are fundamental principles which underpin our HE sector. Without action to counter attempts to discourage or even silence unpopular views, intellectual life on campus for both staff and students may be unfairly narrowed and diminished.'

33. We consider that freedom of speech and academic freedom are fundamental, and that steps should be taken to secure free speech in higher education. Our proposals are designed to ensure that our implementation of the requirements of the Act, including enforcing of new duties for students' unions, is effective in upholding these fundamental principles.

34. The guidance recognised that the work of the OfS creates regulatory burden for the sector and stated that the OfS should work to ensure that this burden is proportionate to our regulatory requirements. In formulating our proposals we have made efforts to minimise unnecessary regulatory burden, for instance through our proposed risk-based approach to monitoring.

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<sup>41</sup> See [https://www.officeforstudents.org.uk/media/be054f0b-696a-41fc-8f50-218eb0e3dcab/ofs-strategic-guidance-20220331\\_amend.pdf](https://www.officeforstudents.org.uk/media/be054f0b-696a-41fc-8f50-218eb0e3dcab/ofs-strategic-guidance-20220331_amend.pdf). This guidance was intended to supersede previous guidance from the Secretary of State.



## **Annex E: Glossary for this consultation**

### **The Act**

'The Act' refers to the Higher Education (Freedom of Speech) Act 2023.

### **Constituent institution**

In relation to a registered higher education provider, any constituent college, school, hall or other institution of the provider.

### **HERA**

The Higher Education and Research Act 2017.

### **Member**

'Member', in relation to a registered higher education provider, may include board members, faculty, staff, students and administrators. A member does not include a person who is a member of the provider solely because of having been a student of the provider.

'Member', in relation to a constituent institution of a registered higher education provider, may include board members, faculty, staff, students and administrators. A member does not include a person who is a member of the institution solely because of having been a student of the institution.

'Member', in relation to a students' union which is a representative body and not an association (see section 20(1)(b) of the Education Act 1994), means those whom it is the purpose of the union to represent, excluding any student who has signified that they do not wish to be represented by it.

### **OIA**

Office of the Independent Adjudicator (OIA).

### **Registered higher education provider and governing body**

'Registered higher education provider' and 'governing body' in relation to such a provider have the same meanings as in Part 1 of HERA (see section 85 of that Act).

### **Registered higher education provider that is eligible for financial support**

A registered higher education provider that is eligible for financial support is a registered higher education provider that is an eligible higher education provider for the purposes of section 39 of HERA. These providers are registered in the OfS's 'Approved (fee cap)' registration category.

## **Registered in the Approved (fee cap) category**

Higher education providers registered with the Office for Students, are registered in one of two categories: Approved and Approved (fee cap). Providers registered in the Approved (fee cap) category are eligible for certain benefits. See our website for more detail.<sup>42</sup>

## **Relevant students' union**

A students' union at a registered higher education provider that is eligible for financial support. This does not include a students' union for students at a constituent institution of such a provider.

## **Students' unions**

'Students' union' has the same meaning as it has in Part 2 of the Education Act 1994 in relation to establishments to which that Part applies (see section 20 of that Act).

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<sup>42</sup> See [www.officeforstudents.org.uk/advice-and-guidance/regulation/registration-with-the-ofs-a-guide/benefits-of-registration/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/registration-with-the-ofs-a-guide/benefits-of-registration/).



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