

## HIGHER EDUCATION (FREEDOM OF SPEECH) BILL

### Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee

#### A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Higher Education (Freedom of Speech) Bill (“the Bill”). The Bill was introduced in the House of Commons on 12 May 2021 and was considered in Committee in September 2021. A carry-over motion was passed in the House of Commons on 25 April 2022. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

#### B. PURPOSE AND EFFECT OF THE BILL

2. The Bill strengthens freedom of speech and academic freedom in higher education in England, as set out in the 2019 Conservative Manifesto. There is growing concern within government of a ‘chilling effect’ on university campuses that means that not all students and staff feel able to express themselves without fear of repercussion – suggesting that the space for freedom of speech at universities, often contested and febrile, may be becoming constrained. This is emphasised by a small number of high-profile incidents in which staff or students have been threatened with negative consequences, including loss of privileges or dismissal, sometimes successfully, confirming that the fear of repercussion is not always unfounded. This may diminish intellectual life on campus.
3. There is already a legal framework in place, which in particular imposes on those concerned in the government of higher education providers a legal duty to take reasonably practicable steps to ensure freedom of speech within the law is secured for their members, students, employees and visiting speakers. Increasing reports of concerns in relation to freedom of speech, however, suggest that this duty is not being fully complied with and that there is insufficient enforcement of the duty; and the Joint Committee on Human Rights (JCHR) found in 2018 there are a number of factors which may interfere with freedom of speech at universities, one of which was regulatory complexity.
4. The Bill strengthens freedom of speech duties of higher education providers registered with the Office for Students (“OfS”), the higher education regulator in England, and imposes a new duty to promote lawful freedom of speech and academic freedom in higher education. Similar duties are imposed on constituent institutions of registered higher education providers.
5. The Bill also imposes new freedom of speech duties on the students’ unions (“SUs”) of approved (fee cap) providers (a category of registered higher education provider).

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6. The Bill creates a new cause of action (a tort for breach of a statutory duty) against registered higher education providers, constituent institutions of such providers and SUs which breach specified freedom of speech duties.
7. The Bill provides for new registration conditions for higher education providers in relation to freedom of speech and academic freedom. It also provides for the OfS to regulate SUs in relation to their compliance with their freedom of speech duties. Finally, the Bill creates a new office on the OfS Board, the Director for Freedom of Speech and Academic Freedom, to champion freedom of speech and academic freedom on campus, and to be responsible for investigations of infringements of freedom of speech duties which may result in sanctions or individual compensation via a new complaints scheme.

### **C. DELEGATED POWERS**

8. There are three delegated powers in the Bill. Two concern monetary penalties that can be imposed by the OfS in relation to its new regulation of SUs at approved (fee cap) providers as regards their freedom of speech duties. One is a power to commence the provisions of the Bill, which allows for transitional provision and savings.

#### **Clause 7(1): Regulation of duties of students' unions**

#### **Clause 7(1) inserts a new section 69B(3) of the Higher Education and Research Act 2017: Functions of the OfS in relation to students' unions**

*Power conferred on:* the Secretary of State

*Power exercised by:* regulations

*Parliamentary Procedure:* affirmative procedure

#### Context and Purpose

9. Section 69B(2) (as inserted into the Higher Education and Research Act 2017 (“HERA”) by the Bill) confers power on the OfS to impose monetary penalties on an SU at an approved (fee cap) provider if it appears to the OfS that it is failing or has failed to comply with any of its duties under sections A5 and A6 of HERA (as inserted into HERA by the Bill). Section 69B(3) provides that a monetary penalty is an amount determined by the OfS in accordance with regulations made by the Secretary of State.
10. These provisions mirror similar provision in section 15 of HERA as regards monetary penalties that the OfS may impose on registered higher education providers. To note that the Delegated Powers and Regulatory Reform Committee did not draw the power in section 15 to the attention of the House.
11. These provisions are required to support the OfS’s role in ensuring compliance with freedom of speech duties imposed by sections A5 and A6 of HERA. This is the main compliance measure available to the OfS as regards SUs, since it does not have powers to suspend or de-register SUs in the way that it can in relation to registered higher education providers. A decision by the OfS to impose a monetary penalty can be appealed by the SU to the First

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Tier Tribunal that may decide to set aside or vary the penalty imposed, affording the necessary protection to SUs.

### Justification for taking the power

12. The Department considers that a delegated power is necessary to allow it to keep the penalties under review, see if they are working effectively and amend them if needed. The subject matter is limited to the amount of the penalty and not any wider aspect. It is in line with the approach taken in relation to the equivalent power concerning monetary penalties that can be imposed by the OfS in respect of higher education providers.
13. In relation to the equivalent power concerning higher education providers, regulations were made in 2019 (the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019).

### Justification for the procedure

14. The Department considers that the affirmative procedure is suitable for this measure because this level of scrutiny will provide a significant safeguard in setting the limits of penalties that could be introduced, and will allow for consideration and debate in both Houses.
15. This is in line with the approach taken in respect of the equivalent power in section 15.

### **Clause 7(1): Regulation of duties of students' unions**

#### **Clause 7(1) inserts a new section 69B(4) of the Higher Education and Research Act 2017: Functions of the OfS in relation to students' unions**

*Power conferred on:* the Secretary of State

*Power exercised by:* regulations

*Parliamentary Procedure:* negative procedure

### Context and Purpose

16. Section 69B(2) (as inserted into HERA by the Bill) confers power on the OfS to impose monetary penalties on an SU at an approved (fee cap) provider if it appears to the OfS that it is failing or has failed to comply with any of its duties under sections A5 and A6 of HERA (as inserted into HERA by the Bill). Section 69B(4) enables the Secretary of State by regulations to set out matters to which the OfS must, or must not, have regard when exercising the power to impose monetary penalties.
17. These provisions mirror similar provision in section 15 of HERA as regards monetary penalties that the OfS may impose on registered higher education providers. To note that the Delegated Powers and Regulatory Reform Committee did not draw the power in section 15 to the attention of the House.

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18. These provisions are required to support the OfS's role in ensuring compliance with freedom of speech duties imposed by sections A5 and A6 of HERA. The Department's reasoning in this regard is the same as that set out above in relation to section 69B(3) setting the limits of monetary penalties.

### Justification for taking the power

19. The Department considers that a delegated power is necessary to allow it to keep the considerations relevant to the imposition of penalties under review and amend them if needed. We expect that over time the matters to which the OfS should have regard, and the circumstances in which it is appropriate for the OfS to decide to impose a monetary penalty, may change as the new regulation of SUs by the OfS evolves and SUs adapt to the new regulatory environment. This flexibility sits within the parameters set by the overall limit to the monetary penalties, which will be prescribed by regulations subject to the affirmative resolution procedure.
20. In relation to the equivalent power concerning higher education providers, regulations were made in 2019 (the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019).

### Justification for the procedure

21. The Department considers that the negative resolution procedure gives an appropriate level of scrutiny. It reflects the need for transparency regarding the operation of the monetary penalties on the one hand, whilst ensuring necessary flexibility and avoiding the need for affirmative parliamentary approval for every change made to the factors to be considered by the OfS in imposing such penalties. These matters are unlikely to prove controversial but they do nonetheless warrant a degree of parliamentary scrutiny, which the negative procedure provides. The overall limits of the monetary penalties will be prescribed by regulations subject to the affirmative procedure (see the analysis in relation to section 69B(3) above).

## **Clause 12: Power for the Secretary of State to bring the Bill into force and make transitional provision and savings**

*Power conferred on:* the Secretary of State

*Power exercised by:* regulations

*Parliamentary Procedure:* none

### Context and Purpose

22. Clause 12(1) and (2) brings certain provisions of the Bill into force on the day on which the Act is passed and two months afterwards. Clause 12(3) gives the Secretary of State power to bring the remaining provisions of the Bill into force on such day as the Secretary of State may appoint by regulations. Clause 12(4) provides that different days may be appointed for different purposes. Clause 12(5) provides that the commencement regulations under subsection (3) may include transitional or saving provision.

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### Justification for taking the power

23. This power will enable the Secretary of State to commence the main provisions of the Bill at a suitable time. This will allow time for the OfS to create the complaints scheme and consult on the changes required as appropriate, as well as for the sector to prepare for the changes.
24. There are numerous examples of powers to make commencement regulations for the substantive provisions of the Bill, without a parliamentary procedure applying.
25. Clause 12(5) ensures that the Secretary of State can provide a smooth commencement of the new legislation and transition between existing legislation and the Bill, without creating any undue difficulty or unfairness in making these changes. This may arise, for example, in relation to making clear how the new complaints scheme created by the Bill should deal with complaints regarding conduct prior to the coming into force of the Bill provisions, alongside conduct occurring afterwards.

### Justification for the procedure

26. The Department considers that the power to make commencement regulations does not need to be subject to any parliamentary procedure as it only sets the date on which the new provisions will come into force. The substance of those provisions will be considered during the passage of the Bill through Parliament. This also applies to the related power to make transitional provision and savings, which is intended to ensure a smooth transition between existing law and the Bill and will only deal with technical aspects of that which will have a temporary effect.

**Department for Education**  
**May 2022**