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1 August 2024

Dear Government Legal Department

**Your client: The Secretary of State for Education (“the Secretary of State”)**

**Our client: The Free Speech Union Limited (“the Free Speech Union”)**

**Concerning the Higher Education (Freedom of Speech) Act 2023 (Commencement No. 2) (Revocation) Regulations 2024 and statements made by the Secretary of State in relation to the Higher Education (Freedom of Speech) Act 2023**

**In the proposed judicial review between the Free Speech Union and the Secretary of State**

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1. We are instructed by the Free Speech Union Limited (“**FSU**” and/or “**the Claimant**”), a non-partisan, mass membership public interest body that stands up for the speech rights of its members and campaigns for free speech more widely. The FSU champions the right of people from all walks of life to express themselves without fear of punishment or persecution.
2. We write regarding the Higher Education (Freedom of Speech) Act 2023 (Commencement No. 2) Regulations 2024 (“**the Revocation Regulations**”) made by the Secretary of State for Education (“**the Education Secretary**” and/or “**the Defendant**”) on 25 July 2024 purportedly in exercise of the powers conferred by section 13(3) and (4) of the Higher Education (Freedom of Speech) Act 2023 (“**HEFSA**”), and statements which she has made.
3. This letter is a formal letter before claim in accordance with the Pre-Action Protocol for Judicial Review (the “**Protocol**”) under the Civil Procedure Rules.

**The proposed claimant**

4. The proposed claimant is the FSU.

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5. Our reference for this matter is: GM/601/46. The lawyer at Sharpe Pritchard LLP with conduct of this matter is George McLellan (Partner) whose contact details are: gmclellan@sharpepritchard.co.uk; +44 (0)7554 227 732; Elm Yard, 10-16 Elm Street, London WC1X 0BJ.
6. Our client accepts service by email as long as the aforementioned individual is in receipt of, or copied into, all of the relevant email correspondence. The size limit for receiving emails is 20MB. Should documents exceed this, we politely ask that you make arrangements for service by way of a secure link.

### **The proposed defendant**

7. The proposed defendant is the Secretary of State for Education. She is represented by The Government Legal Department in connection with the Claim. This Protocol letter has been sent by way of email to the following email address in accordance with the directions<sup>1</sup> on the website of The Government Legal Department: thetreasurysolicitor@governmentlegal.gov.uk.
8. As this is a new claim, the Defendant's reference details are not yet available. Please confirm in the Defendant's response to this Protocol letter to whom correspondence about this matter should be directed, and by which means.
9. We would be grateful if you would confirm by return whether your client is prepared to accept service on a similar basis, and if so, to whom service by email or electronic means should be directed. If your client is prepared to accept service by email, please confirm if there are any requirements to which we should adhere, either generally or specifically, under paragraph 4.1 of Practice Direction 6A of the Civil Procedure Rules.

### **Interested parties**

10. The FSU is considering whether any other persons are likely to be directly affected by the claim. We ask the Defendant to confirm whether they consider that any persons ought to be served with a Claim Form as interested parties, should a claim be issued.

### **RELEVANT CONTEXT**

11. Below, we set out the relevant context to the matters raised in this Protocol letter.

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<sup>1</sup> Contact GLD, "Service Requirements": <https://www.gov.uk/government/organisations/government-legal-department> (accessed 31 July 2024).

### ***The HEFSA***

12. The HEFSA received Royal Assent and became law on 11 May 2023. Its Preamble states that it is to make provision in relation to freedom of speech and academic freedom in higher education institutions and in students' unions; and for connected purposes.
13. The HEFSA primarily amends the Higher Education and Research Act 2017 ("**HERA 2017**"), as well as making amendments to the Counter-Terrorism and Security Act 2015, the Higher Education Act 2004 and the Education (No. 2) Act 1986.
14. The HEFSA introduced a range of measures aimed at strengthening legislation on freedom of speech and academic freedom in higher education. The measures include:
  - i. Creating new duties on higher education providers to promote the importance of lawful freedom of speech and academic freedom (section 1) including an obligation not to enter into non-disclosure agreements (section 1(11)), as well as duties regarding freedom of speech for constituent institutions (section 2), and students' unions at approved (fee cap) providers (a category of registered higher education provider) (section 3); as well as introducing regulation by the Office for Students ("**OfS**") of students' unions at approved (fee cap) providers in relation to their compliance with the new duties (section 7).
  - ii. A new statutory tort for breach of specified freedom of speech duties, enabling individuals who have suffered loss to seek legal redress for loss they have suffered as a result of breach of specified duties (section 4).
  - iii. A new complaints scheme to be operated by the OfS, allowing individuals to seek compensation for loss they have suffered as a result of the breach of specified duties (section 8).
  - iv. Introducing transparency measures concerning overseas funding as regards the risk to freedom of speech and academic freedom (section 9).
  - v. Creating a new role within the OfS of a Director for Freedom of Speech and Academic Freedom, with a remit to champion freedom of speech and academic freedom on campus, and responsibility for investigations of infringements of freedom of speech duties in higher education which may result in sanctions or individual redress via the new complaints scheme (section 10).
15. Section 13 of the HEFSA provides for commencement of the legislation:

#### *"13 Commencement*

*(1) The following provisions of this Act come into force on the day on which this Act is passed—*

*(a) section 7, so far as is necessary for enabling the exercise on or after the day on which this Act is passed of the powers to make regulations conferred by section 69B(3) and (4) of the [HERA 2017] (inserted by section 7);*

*(b) section 9, so far as is necessary for enabling the exercise on or after the day on which this Act is passed of the powers to make regulations conferred by section 69D of the [HERA 2017] (inserted by section 9);*

*(c) section 12;*

*(d) this section;*

*(e) section 14;*

*(f) paragraph 11 of the Schedule.*

*(2) Paragraph 9 of the Schedule comes into force at the end of the period of two months beginning with the day on which this Act is passed.*

*(3) The other provisions of this Act come into force on such day as the Secretary of State may by regulations made by statutory instrument appoint.*

*(4) Different days may be appointed for different purposes.*

*(5) Regulations under subsection (3) may include transitional provision and savings."*

16. Accordingly, it provides for the coming into force of the provisions in three stages:

- (i) First, on the day on which the Act was passed (11 May 2023), sections of the Act empowering the Secretary of State to make certain necessary regulations including regulations on the determination of monetary penalties by the OfS (section 7(3)/(4)), and regulations concerning the OfS's duty to monitor overseas funding of higher education providers (section 9(9)/(10)/(11)).
- (ii) Secondly, two months later (11 July 2023) paragraph 9 of the Schedule came into force which amended section 75 of the Higher Education and Research Act 2017 ("HERA"). Those amendments included a requirement that the regulatory framework published by the OfS now include guidance for students' unions, on helping those student unions comply with their new duties established under the HEFSA. Section 75 of HERA now requires the OfS to ensure that its regulatory framework includes guidance for students' unions on their duties under section A5 and A6. The OfS by dint of section 75(8) is required to consult prior to publishing the regulatory framework.

- (iii) Thirdly, the remaining provisions “come into force on such day as the Secretary of State may by regulations made by statutory instrument appoint”: section 13(3).

17. The Explanatory Note to the HEFSA states:

***“Commencement***

*56 This section provides for the coming into force of the provisions of the Act.”*

...

***Commencement***

*64 Section 13 makes provision about the coming into force of the provisions of this Act. Certain provisions come into force on the day on which the Act is passed. These include sections 7 and 9, for the purpose of enabling the exercise of the powers to make regulations conferred by sections 69B(3) and (4) and 69D of the Higher Education and Research Act 2017 (as inserted by sections 7 and 9 of the Act). In addition, paragraph 9 of the Schedule comes into force two months after the Act is passed, for the purpose of enabling the OfS to comply with its statutory duty to consult on changes to the regulatory framework set out in section 75 of the Higher Education and Research Act 2017. The section otherwise provides the Secretary of State with power to make regulations to commence its provisions. Different days may be appointed for different purposes. Such regulations may include transitional provisions and savings.”*

18. During the passage of the HEFSA through Parliament, the Government published a Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee dated June 2022 (“**the June 2022 Memorandum**”). The June 2022 Memorandum states as follows in relation to section 13:

*“Justification for taking the power*

*38. 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.*

*39. There are numerous examples of powers to make commencement regulations for the substantive provisions of the Bill, without a parliamentary procedure applying.*

*40. Clause 13(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

41. *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.”*

**The Commencement Regulations**

19. On 17 July 2023, the Secretary of State made the Higher Education (Freedom of Speech) Act 2023 (Commencement No. 1) Regulations 2023 in exercise of the powers conferred by section 13(3) and (4) of the HEFSA (“**the First Commencement Regulations**”). By regulation 2 of the First Commencement Regulations, section 10, section 11 insofar as it relates to the provision set out in paragraphs (c) and (d), paragraph 1 of the Schedule insofar as it relates to the provision set out in paragraph (d), and paragraph 12 of the Schedule came into force on 14 August 2023.
20. Section 10 of the HEFSA established the role of Director for Freedom of Speech and Academic Freedom (“**the Free Speech Director**”) as a member of the OfS Board. The role of the Free Speech Director is to oversee the “*free speech functions*” of the OfS. The OfS’s free speech functions are new functions of the OfS established by the Act: Schedule 6A, Section 8A, and Sections 69A-69E. The Schedule then contains consequential amendments to the Higher Education and Research Act 2017 including the obligation for the Board of the OfS to include the Free Speech Director.
21. On 25 April 2024, the Secretary of State made the Higher Education (Freedom of Speech) Act 2023 (Commencement No. 2) Regulations 2024 in exercise of the powers conferred by section 13(3) and (4) of the HEFSA (“**the Second Commencement Regulations**”). Regulation 2 listed those provisions of the Act that were to come into force on 1 August 2024, namely:
  - i. Extending the duties on registered Higher Education providers (section 1) and constituent institutions (section 2) in England to require them to take reasonably practicable steps to secure freedom of speech within the law for their staff, students, members and visiting speakers, and to promote the importance of lawful freedom of speech and academic freedom;
  - ii. Creating duties on students’ unions at certain registered Higher Education providers to secure freedom of speech within the law for their members, staff and visiting speakers (section 3);
  - iii. Creating a statutory tort for breach of specified freedom of speech duties, enabling individuals who have suffered loss to seek legal redress (section 4);

- iv. Creating a free-to-use complaints scheme to be operated by the OfS, enabling staff, students, members or external speakers to raise complaints about providers or students' unions breaching their duties under the Act to secure or promote freedom of speech within the law (section 8);
- v. Enhancing protection for academic freedom by extending coverage to include recruitment and promotion of academics (Section 1(7) and paragraph 11 of the Schedule); and
- vi. Banning the use of non-disclosure agreements by registered Higher Education providers in relation to complaints to the provider of sexual misconduct, bullying or harassment (section 1(11)).

22. Regulation 3 listed those provisions that were to come into force on 1 September 2025, namely:

- i. Introducing new registration conditions for registered higher education providers on freedom of speech and academic freedom (requiring them, for example, to have in place suitable codes of conduct) (section 6); and
- ii. Introducing new transparency measures in relation to overseas funding to enable the OfS to assess whether that funding might pose a risk to freedom of speech or academic freedom (section 9).

### ***The Revocation Regulations***

23. On 25 July 2024, the Secretary of State made the Revocation Regulations, purportedly in exercise of the powers conferred by section 13(3) and (4) of the HEFSA. By regulation 2, the Second Commencement Regulations are purportedly revoked. The Explanatory Note of the Revocation Order states that as a result, those provisions of the HEFSA, as listed in regulations 2 and 3 of the Second Commencement Regulations (see above), will no longer come into force on 1 August 2024 and 1 September 2025 respectively.

### ***The Secretary of State's statements***

24. On 26 July 2024, the Secretary of State made statements relating to the Revocation Regulations.

25. First, she made a written statement to Parliament, stating:

*“Lastly, I have written to colleagues separately about my decision to stop further commencement of the Higher Education (Freedom of Speech) Act 2023, in order to consider options, including its repeal. I am aware of concerns that the Act would be burdensome on providers and on the OfS, and I will confirm my long term plans as soon as possible. To enable students to thrive in higher education, I welcome the OfS’s plans to introduce strengthened protections for students facing harassment and sexual misconduct, including relating to the use of non-disclosure agreements in such cases by universities and colleges.”*

26. Secondly, she sent a letter to all Members of Parliament, stating:

*“I am writing to inform you that I have today revoked the second commencement regulations made under the Higher Education (Freedom of Speech) Act 2023 (c. 16) (the Act) earlier this year. The previous Secretary of State made these Regulations in exercise of the powers conferred by section 13(3) and (4) of the Higher Education (Freedom of Speech) Act, powers I now use to revoke them.*

*[...]*

*During the passage of the Bill, Peers from all parties raised concerns about elements of this Act: from concern about the implications of the tort, to fears that students’ unions were not equipped to fulfil their new duties. Many felt that the burden that the Act would impose was not outweighed by the issues it intended to solve. We also know that many in the higher education sector feel that the Act is disproportionate, burdensome and damaging to the welfare of students. I am concerned that it will expose higher education providers to costly legal action, and I have listened to Jewish groups and unions representing university staff and students who are concerned that fear of sanction will push providers to overlook the safety and well-being of minorities.*

*I have therefore made the decision to stop further commencement of the Act, and I am considering options, including its repeal. I intend to confirm as soon as possible my longer-term plans. I recognise that this decision at short notice could be frustrating for those who have put significant work into preparing for these new duties, but I am confident it is the right approach.*

*I know that many of you supported the provisions in the Act which banned non-disclosure agreements at higher education providers, where there have been instances of sexual misconduct, bullying or harassment. I am therefore very pleased that the Office for Students (the OfS) is planning to introduce strengthened protections for students facing harassment and sexual misconduct, including relating to the use of NDAs in such cases by universities and colleges.”*

27. Thirdly, she made a statement published on the Government website<sup>2</sup>, which stated:

*“For too long, universities have been a political battlefield and treated with contempt, rather than as a public good, distracting people from the core issues they face. The steps announced today will sharpen the focus of the Office for Students, with greater emphasis on ensuring the financial stability of the sector.*

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<sup>2</sup> See: <https://www.gov.uk/government/news/government-watchdog-to-help-stabilise-university-finances> (accessed 31 July 2024).

*We are absolutely committed to freedom of speech and academic freedom, but the Free Speech Act introduced last year is not fit for purpose and risked imposing serious burdens on our world class universities.*

*This legislation could expose students to harm and appalling hate speech on campuses. That is why I have quickly ordered this legislation to be stopped so that we can take a view on next steps and protect everyone's best interests, working closely with a refocussed [sic] Office for Students."*

28. Accordingly, the Secretary of State has purported to decide that the HEFSA should not be further commenced for the reasons given. The Revocation Regulations reflect that decision.

## **PROPOSED GROUNDS OF CHALLENGE**

### **Ground 1: *Ultra vires***

29. The Revocation Regulations, and / or the Secretary of State's decision that the HEFSA should not be further commenced, are *ultra vires*.
30. The Preamble to the Revocation Regulations identifies the power under which they were purportedly made as that contained in ss.13(3)/(4) of HEFSA. However, those provisions contained a power only to determine the day on which the provisions to which they related should come into force. They contained no power to revoke regulations appointing the day on which they should come into force; nor to decide that provisions in HEFSA should not be commenced.
31. The position is not otherwise because of section 14 of the Interpretation Act 1978. That states that: "*Where an Act confers power to make (a) ... regulations ... it implies, unless the contrary intention appears, a power, exercisable in the same manner and subject to the same conditions or limitations, to revoke, amend or re-enact any instrument made under the power*". Here, the contrary intention appears. The intention of Parliament in enacting section 13(3)/(4) was to grant the Secretary of State power to determine the day on which the relevant provisions should come into force, but was not to grant her power to determine that they should not come into force. The purpose behind section 13(3)/(4) was, as the 22 June Memorandum explains and is otherwise clear from the context, to allow time for the OfS and the sector to prepare for the changes. Deciding that the provisions should not be commenced is inimical to that purpose.
32. The Revocation Regulations and / or decision fails to promote the policy and objects of HEFSA, contrary to the principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (see esp. at 1030 per Lord Reid, 1045 per Lord Hodson, and 1053-1054 per Lord Pearce). It was accordingly *ultra vires* (see *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16 [2020] 1 WLR 1774). The policy and objects of HEFSA includes, in particular, the creation of the complaints scheme, and the rights and duties, for which it provides. The policy and object of section

13(3)/(4) is as reflected in the 22 June Memorandum and as is otherwise clear. It fails to promote, and frustrates, such policy and objects, to revoke the Second Commencement Regulations by which the provisions were to be commenced, and/or to decide not further to commence HEFSA.

33. The construction of a provision similar to section 13(3), in a different Act from the HEFSA, was considered in *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 ("FBU").
34. Lord Browne-Wilkinson explained, at 550, that such discretion as such a section affords does not import an unfettered discretion, since (at 551): *"So to hold would lead to the conclusion that both Houses of Parliament had passed the Bill through all its stages and the Act received the Royal Assent merely to confer an enabling power on the executive to decide at will whether or not to make the parliamentary provisions a part of the law"*. Lord Browne-Wilkinson construed an analogue of section 13(3) as being a power to be exercised *"so as to bring the relevant provisions into force when it is appropriate and unless there is a subsequent change of circumstances which would render it inappropriate to do so"*. The Secretary of State could not *"lawfully surrender or release the power ... so as to purport to exclude its future exercise either by himself or by his successors"*. See also Lord Lloyd of Berwick, explaining, at 570-571, that the section confers a power *"to say when, but not whether"* and, in relation to the provisions to be commenced, that the Secretary of State *"has no power to reject them or set them aside, as if they had never been passed"*.
35. At 574, Lord Nicholls of Birkenhead identified *"the purpose for which this common form provision exists"* as being *"to facilitate bringing legislation into force. Parliament enacts legislation in the expectation that it will come into operation. This is so even when Parliament does not itself fix the date on which that shall happen. Conferring power on the executive to fix the date will often be the most convenient way of coping with the practical difficulty that, when the legislation is passing through Parliament, it is not always possible to know for certain what will be a suitable date for the legislation to take effect. Regulations may need drafting, staff and accommodation may have to be arranged, literature may have to be prepared and printed. There may be a host of other practical considerations. A wide measure of flexibility may be needed. So the decision can best be left to the minister whose department will be giving effect to the legislation when it is in operation. He is given a power to select the most suitable date, in the exercise of his discretion"*. In deciding *"whether the moment has come to appoint a day"*, the Minister may take account of certain factors, but that does not detract from the purpose.
36. In the present case, the Secretary of State has frustrated the purpose. Her statements are consistent only with the fact that she has decided against bringing the relevant provisions into force. That was unlawful. This is not a case in which she has taken the view that the provisions should not be brought into force because of a change of circumstances subsequent to the passing of the Act; or any which she is entitled to take account of having regard to the statutory purpose. The issues to which she has referred in her statements were considered at the time of the passage of the Bill which became the Act, and Parliament passed it. The

Secretary of State was not entitled to act as she has done because she opposes the legislation or its policy. Any repeal of the legislation is a matter for Parliament not the executive.

**Ground 2: unauthorised purpose / irrelevant considerations**

37. Further or alternatively, the Revocation Regulations and/or the decision not further to commence HEFSA was/were made for an unauthorised and thus improper purpose (or dominant purpose). The purpose for which the power in section 13(3)/(4) was provided was as above. It was no part of the purpose to allow the Secretary of State to decide that the relevant provisions should not be commenced. Insofar as the Secretary of State acted for any other purpose other than that for which she was given the power, she acted unlawfully, and / or took into account an irrelevant consideration.

**Ground 3: undermining statutory duties already commenced**

38. The First Commencement Regulations brought certain provisions into force on 14 August 2023 (as summarised above). The Revocation Regulations has left these untouched. One such is section 10 of the HEFSA which inserts into Schedule 1 to the HERA 2017, after paragraph 3, provisions relating specifically to the role of the Director for Freedom of Speech and Academic Freedom at the OfS (“**the Free Speech Director**”). These provisions therefore remain in force, and provide:

*“The Director for Freedom of Speech and Academic Freedom*

3A (1) *The Director for Freedom of Speech and Academic Freedom (“the Free Speech Director”) is responsible for -*

*(a) overseeing the performance of the OfS’s free speech functions,*

*(b) performing, in accordance with paragraph 11, any of those functions, or other functions, of the OfS which are delegated to the Free Speech Director under that paragraph, and*

*(c) reporting to the other members of the OfS on the performance of the OfS’s free speech functions.*

*(2) For the purposes of this Schedule, the OfS’s “free speech functions” are—*

*(a) its functions relating to monitoring and enforcing the registration conditions of registered higher education providers under section 8A, and*

*(b) its functions under sections 69A to 69E and Schedule 6A.”*

39. Those duties of the Free Speech Director cannot be discharged unless the “free speech functions” are able to be performed.
40. The “free speech functions” (defined as above) include the following, in summary:
- i. Schedule 6A: providing for a scheme for the making and investigation of complaints relating to the duties of registered higher education providers, their constituent institutions and students’ unions in respect of freedom of speech and academic freedom;
  - ii. Section 8A of HERA 2017: monitoring and enforcing the registration conditions of registered higher education providers;
  - iii. Section 69A of HERA: general functions relating to freedom of speech and academic freedom;
  - iv. Section 69B: functions of the OfS in relation to students’ unions;
  - v. Section 69D of the HERA 2017: monitoring the overseas funding of registered higher education providers and their constituent institutions with a view to assessing the extent to which the funding presents a risk to freedom of speech and academic freedom of academic staff of registered higher education providers and their constituent institutions in;
  - vi. Section 69E of HERA 2017: monitoring the overseas funding of students’ unions at registered higher education providers that are eligible for financial support with a view to assessing the extent to which the funding presents a risk.
41. The effect of the Revocation Regulations and/or the Secretary of State’s decision not further to commence HEFSA is that free speech functions will not be commenced. It renders the Free Speech Director to that extent unable to perform his duties in relation to the free speech functions of the OfS. The Secretary of State has thus undermined the performance of statutory duties to which the Free Speech Director remains subject. That is unlawful.
42. The problem does not relate only to provisions commenced by the First Commencement Regulations. It also relates to provisions brought into force automatically by the primary legislation itself. As explained above, these include, for instance, the obligation on the OfS imposed by section 75 of HERA to make amendments to its Regulatory Framework to include guidance on the duties of students’ unions under sections A5 and A6. But, as a result of the Revocation Regulations and/or the decision of the Secretary of State, sections A5 and A6 are not brought into force. The regulator of Higher Education providers is required to include in its Regulatory Framework guidance on compliance with provisions not commenced.

#### **Ground 4: public sector equality duty**

43. Alternatively, if contrary to the above the Secretary of State had the power to make the Revocation Regulations and/or to decide not further to commence HEFSA, she was nevertheless required to discharge section 149 of the Equality Act 2010 ("**EqA**"). She was required to have due regard to the need to achieve the objectives set out in section 149(1). Deciding that there should no longer be or not be a complaints scheme and / or new tort so as better to enable protection of the free speech of certain protected groups (such as, simply by way of example, gender critical persons or those who espouse minority political views falling under section 10 EqA, or persons of a particular nationality, or sex) has potential adverse impact on persons with protected characteristics. Indeed, one of the aspects of the context in which HEFSA was enacted was precisely a concern that protected groups required stronger free speech protection.
44. However, the Secretary of State did not undertake any or any lawful consideration of the effect of her action on protected groups by reference to the statutory objectives. This included a failure to consult as necessary in order that the Secretary of State be in a position to consider the statutory objectives. This was unlawful in any event.

#### **Ground 5: irrationality / relevant considerations**

45. The Revocation Regulations and/or decision not further to commence HEFSA was in any event irrational and/or failed to have regard to relevant considerations and/or had regard to irrelevant considerations.

#### **INFORMATION REQUESTS**

46. Your duty of candour applies at this pre-action stage. With your response, please disclose any Ministerial submission or decision-making documents showing the basis for the decision to make the Revocation Regulations and/or not further to commence the provisions of HEFSA. These need fully to show the matters which the Secretary of State took into account, including any options that were put to and/or considered by the Education Secretary falling short of revoking *all* provisions due to come into force. In particular, disclosure at this stage must include, but is not limited to, any surveys,<sup>3</sup> any "case studies",<sup>4</sup> and any other evidence that the Secretary of State had regard to in making the decision. Any failure to show this is by its nature a failure to comply with candour. Please also disclose the Equality Impact Assessment, or other document,

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<sup>3</sup> For example, The Policy Institute at King's College London published its report, "*Students and the public have quite different starting points on free speech and offence*", in September 2022: <https://www.kcl.ac.uk/policy-institute/assets/the-state-of-free-speech-in-uk-universities.pdf> (accessed 1 August 2024).

<sup>4</sup> For example, Academics for Academic Freedom maintain "*The Banned List*", an up-to-date compendium of stories concerning individuals who have been banned from speaking at universities in the UK and Ireland, including 20 entries in 2024 (as at the date of this Protocol letter): <https://www.afaf.org.uk/the-banned-list/> (accessed 1 August 2024).

which demonstrates compliance with the PSED for (i) the passage of the First and Second Commencement Regulations and (ii) the Revocation Regulations.

**ADR**

47. We do not consider that this matter is suitable for ADR. Please indicate if you disagree.

**ACTION WE REQUEST YOU TO TAKE**

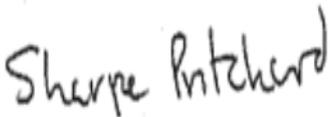
48. In order to avoid litigation, we request that the Secretary of State agree to (a) revoke the Revocation Regulations and (b) confirm that she will comply with her duty under section 13(3)/(4) of HEFSA to bring the remaining provisions of HEFSA into force. In her second statement as above, the Secretary of State rightly recognised that “significant work” has already been done, by the OfS and the sector, such that the relevant provisions are now ready to be commenced. The Secretary of State does not suggest that they are not able to be commenced for any practical reason.

**NEXT STEPS**

49. The time-period for replying to pre-action correspondence is 14 days. Whilst there is urgency to the matter, FSU does not ask for a response within a shortened period. But the more limited availability of lawyers and officials in August would not justify a longer timeframe for response in the circumstances of this case. The relevant provisions of HEFSA were substantially due to come into force on 1 August 2024. Please provide your response (with the documents as above) by **16:00 on 15 August 2024**.

50. Our client's rights remain fully reserved in respect of this matter.

Yours faithfully,



**SHARPE PRITCHARD LLP**