EXPLANATORY MEMORANDUM TO

HER MAJESTY'S CHIEF INSPECTOR OF EDUCATION, CHILDREN'S SERVICES AND SKILLS (FEES AND FREQUENCY OF INSPECTIONS) (CHILDREN'S HOMES ETC.) (AMENDMENT) REGULATIONS 2022

2022 No. 196

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education (DfE) and is laid before Parliament by Command of Her Majesty.

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

2. Purpose of the Instrument

2.1 Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc.) Regulations 2015 (S.I. 2015/551) ("the 2015 Regulations") prescribe the fees payable to the Office for Standards in Education, Children's Services and Skills (Ofsted) by a number of schools[1], agencies and other establishments, as well as the minimum frequency of inspections for children's homes, residential family centres, voluntary adoption agencies, adoption support agencies, fostering agencies and holiday schemes for disabled children.

2.2 This Instrument increases fees payable to Ofsted by up to 10% for providers not paying the full cost of inspection and regulation, and also introduces registration, variation and annual fees for multi-building children's homes, which are homes where the care and accommodation is provided in more than one building (this does not include secure children's homes or a school that is also a children's home under s.1(6) of the Care Standards Act 2000).

2.3 As a consequence of the fee increase, this Instrument also amends the per place fee threshold for children's homes and residential colleges in the 2015 Regulations. Please refer to paragraphs 7.6-7.8 for further detail.

2.4 This Instrument also makes changes to regulation 27 of the 2015 Regulations, which deals with frequency of inspections, by implementing a reset to the inspection cycle for residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Instrument imposes an increase of up to 10% on certain registration, variation and annual fees payable to Ofsted by a number of schools, agencies and other establishments. Further detail is provided in the policy background section.

[1] Residential special schools, residential colleges and boarding schools as defined under regulation 2 of the 2015 Regulations are the only schools deemed to be within scope.

4. Extent and Territorial Application

4.1 The extent of this Instrument is England and Wales.

4.2 The territorial application of this Instrument is England only.

5. European Convention on Human Rights

5.1 As the Instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This Instrument will implement an increase in fees payable to Ofsted by 10% for a number of schools, agencies and other establishments not yet at full cost recovery; introduce new registration, variation and annual fees for multi-building children's homes; and reset the three-year inspection cycle for residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies to address the backlog of routine graded inspections caused by the COVID-19 pandemic.

6.2 The 2015 Regulations prescribe the fees payable to Ofsted in respect of:

- registration fees, variation fees and annual fees for children's homes, voluntary adoption agencies, adoption support agencies, fostering agencies and residential family centres and holiday schemes for disabled children under sections 12(2), 15(3) and 16(3) of the Care Standards Act 2000 ("CSA 2000");
- annual fees for residential special schools, boarding schools and residential colleges under section 87D(2) of the Children Act 1989; and
- annual fees payable by local authorities in respect of their adoption and fostering functions under section 155 (1) and (2) of the Education and Inspections Act 2006.

6.3 The 2015 Regulations also deal with frequency of inspections under s.31(7) of the CSA 2000 and prescribe that residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies are to be inspected at least once in every three-year period (starting on 1st April in any year and ending on 31st March in the third year following).

7. Policy background

What is being done and why?

Registration, variation and annual fees

7.1 Since 2010-11, the fees payable to Ofsted by children's social care providers have been set using a model for calculation developed by Ofsted in 2008-09 and updated on an annual basis. The cost of each inspection and regulatory activity is calculated based on a mix of direct and indirect costs, including the tariff for each inspection and/or visit and the wider costs of regulating the sector. Ofsted have developed this model to give greater transparency to providers on how fees were set, providing a more accurate and readily understandable indication of the time and resource involved on inspection and regulatory activity.

7.2 The majority of children's social care providers are not paying the full cost of the inspection and regulatory activity undertaken by Ofsted with around 70% still paying

less than 50% of the full cost. This means that the government continues to subsidise the regulation of the majority of children's social care providers.

7.3 Since 2010, the government has usually increased registration, variation and annual fees by up to 10% on an annual basis in order to move the sector closer to full cost recovery. However, in 2020-21 and 2021-22, the government recognised the impact of the COVID-19 pandemic and froze fees at 2019-20 levels.

7.4 The pandemic also caused routine graded inspections of children's social care settings to be paused during 2020-21. These were then restarted in April 2021 and therefore reinstating the annual increase is prudent. As in previous years, the level of proposed increase is designed to maintain stability in the market and avoid imposing unsustainable pressure on individual providers, while moving towards full cost recovery. By way of illustration, a typical children's home has 3-5 places so the fee increase would represent an annual increase of £258-310[2] or an extra £5-6 per week. Children's homes typically charge £3,830[3] per week per child.

7.5 Fees for providers already at full cost recovery level will be capped at the full cost rate. The annual fees for residential holiday schemes for disabled children will also remain capped at a reduced rate as has been the case so since 1 April 2017. This continues to represent a proportionate fee structure in relation to the operating model for this specific setting. Some variation fees where a visit is required are also being reduced to be more reflective of the resources required to undertake this regulatory activity.

7.6 Certain providers are also charged fees on the basis of the number of approved places that they offer. In these circumstances there is a set lower fee for a minimum number of places and an additional fee for each place above that minimum – the per place fee. This does not apply when a provider is paying fees at full cost recovery.

7.7 For example, a children's home that is approved to accommodate 3 or less children will pay an annual fee of £2,836. For children's homes that are approved to accommodate between 4 and 26 children, they will pay the £2,836 fee and an additional £283 per each approved place from the 4th up to the 26th place. Children's homes that are approved to accommodate 27 or more children, will pay fees at the full cost recovery rate and no more.

7.8 As a result of per place fees increasing by 10%, the point at which providers paying on this basis reach full cost recovery, changes. Full cost recovery is therefore achieved on the basis of a lower number of places offered. The changes made by this Instrument to the per place fee threshold are necessary to avoid fees payable by some children's homes and residential further education colleges from exceeding the full cost rate.

Multi-building children's homes

7.9 Ofsted has been considering ways in which they can boost capacity and flexibility within children's homes. They have recently published guidance on multi-building

[2] The base fee for a children's home with 3 approved places will increase by £258. Children's homes with 4 or 5 approved places will pay the increase on the base fee (£258) plus the increase per each approved place (£26). For example for 4 approve places the increase will be (£258+£26) and for 5, (£258+£26+£26).
[3] CMA Children's social care market study interim report – average is representative of costs taken from 13 large providers of children's homes.

children's homes, which is defined in this Instrument as a children's home where the care and accommodation is being provided in more than one building (but does not include secure children's homes or a school that is a children's home under s.1(6) of the CSA 2000 (for example, a residential special school that is dual registered as a children's home). Currently, Ofsted allow a maximum of six children to be accommodated across up to four buildings under a single children's home registration. This will allow homes to work more flexibly, be more creative and provide more options for children, especially those with highly complex needs.

7.10 There is currently no specific fee category for multi-building children's homes within the 2015 Regulations. While an initial fee has been charged by Ofsted for multi-building children's homes since November 2021, this does not consider the increased work in regulating and inspecting the increased number of buildings which form part of the home.

7.11 This Instrument introduces a fee structure for multi-building children's homes. A multi-building children's home that is approved to accommodate up to 3 children will pay an annual fee of £4,254. Children's homes that are approved to accommodate between 4 and 6 children will pay the £4,254 fee and an additional £283 per each approved place from the 4th up to the 6th place. Therefore, the maximum annual fee for providers of a multi-building children's home would be £5,103. Like the fees for the majority of children's homes, they are not set at the full cost recovery rate and providers should expect that these fees may also rise on an annual basis.

7.12 This Instrument confirms that the multi-building children's home fee structure does not apply to either schools that are children's homes under s.1(6) of the CSA 2000, for example, residential special schools that are dual-registered as children's homes or to secure children's homes even though these often include multiple buildings. It only applies to homes that are registered in line with Ofsted's new arrangements described above.

Provision inspected on three-year cycles

7.13 Under regulation 27(1)(b) of the 2015 Regulations, residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies are to be inspected at least once in every three-year period (starting on 1st April in any year and ending on 31st March in the third year following).

7.14 Some of these providers would have been due an inspection during 2020-21 when routine graded inspections were paused as a result of the COVID-19 pandemic, and this has created a backlog of providers who are overdue an inspection.

7.15 Ofsted restarted graded inspections in April 2021 and has been working hard to address the backlog of providers who were not inspected in the 2020-21 inspection year. However, to avoid Ofsted being required to complete an unattainable number of inspections within a shortened time period and to provide Ofsted with greater flexibility to focus their resources on those providers that require more support, this Instrument amends the 2015 Regulations to reset the three-year inspection cycles from 1 April 2022.

7.16 This would mean that for providers of residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies only:

- Providers that had been due an inspection in 2020-21 (and are not inspected in 2021-22) will be inspected by 2022-23, and at least once every 3 years thereafter;
- Providers that had been due an inspection in 2021-22 (and are not inspected in 2021-22 or 2022-23) will be inspected by 2023-24, and at least once every three years thereafter; and
- Providers that had been due an inspection in 2022-23 (and are not inspected in 2022-23 or 23-24) will be inspected by 2024-25, and at least once every three years thereafter.

7.17 Ofsted continues to have discretion to conduct additional inspections and visits in the same inspection year for all providers, irrespective of judgement, as they determine necessary, taking into account the current judgement, recent notifications and monitoring, concerns reported and other relevant information. In practice, this means that providers rated as less than 'good' will be prioritised and seen more frequently than once every three years. This helps to ensure that standards and quality provision are maintained. The DfE will continue to work with Ofsted to monitor inspection outcomes for the affected settings.

7.18 The inspection cycle reset does not mean a reduction in the number of inspections for these settings, but gives Ofsted more flexibility to deploy their resources to focus on providers requiring further support.

8. European Union Withdrawal and Future Relationship

8.1 This Instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate the relevant regulations.

10. Consultation outcome

10.1 The DfE consulted publicly from 19 November 2021 to 14 January 2022. The consultation covered a proposed 10% increase to fees for children's social care and education providers for those not already paying full cost, new fees for multi-building children's homes and a reset to the three-year inspection cycle for residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies.

10.2 The DfE received 27 responses to the consultation and 73 stakeholders attended webinars the DfE ran to discuss the changes. Responses were received from children's homes providers, fostering agencies, local authorities and adoption agencies.

10.3 A low number of responses is typical for this type of consultation. However, it is larger than the number of responses we have received to previous consultations on a 10% fee increase (8 responses were received in 2020 and in 2019).

10.4 14 respondents (54%) said the fee increase will have a neutral, minor or no impact. When explaining the reasons for their response, 11 of the 14 respondents thought the increase was either fair, understood why fees were now being increased or thought the fee increase could be sufficiently covered.

10.5 Almost all other respondents (38%) told us that the increase would have a moderate impact and only two respondents said it would have a major impact. Common issues raised by these respondents were concerns about additional financial pressures they were facing along with restrictions on their ability to fundraise caused by the pandemic.

10.6 Most (78%) (excluding those who indicated that the proposed fees were not applicable) respondents to the consultation agreed with our proposals to introduce a fee structure for multi-building children's homes. While respondents welcomed allowing providers to register multiple buildings under one children's home registration and did not identify any major issues with the proposed fees, one identified that further clarity was required on which type of provision would be captured under the fees, while another advised that the fees should not be a barrier to providers. The fees for multi-building children's homes will not apply to residential special schools or secure children's homes and this has been reflected in the Statutory Instrument.

10.7 The majority of respondents (73%) agreed with our proposal to reset the three year inspection cycle. Some respondents did highlight the need to ensure that those judged to be less than "good" were inspected more frequently and that if there were any longer periods between inspections, it was important that standards are maintained.

10.8 The government's response to the public consultation is published here: Children's social care providers: fees and inspections 2022 - GOV.UK (www.gov.uk)

11. Guidance

11.1 No guidance will be introduced by DfE, but providers will be advised by Ofsted of the changes to fees payable and any impact of the changes to the inspection cycle.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this Instrument because the changes only regulate the public sector or a public service. That is, they are made regarding registration, variation, and annual fees charged by Ofsted for the regulation of children's social care and certain education settings and a reset to the current inspection cycle for residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies.

13. Regulating small business

13.1 The legislation applies to activities undertaken by small businesses and they were able to contribute their views as part of the consultation.

13.2 To minimise the impact of the requirements on small businesses the approach taken is to limit the fee increase to 10%. This fee increase does not apply specifically to small businesses, but to all children's social care and education providers within the scope of the 2015 Regulations, regardless of size, where full cost recovery has not yet been achieved. However, the policy intention is to introduce a fee increase in a measured way of bringing fees closer towards full cost recovery and has been designed to maintain stability in the market and to avoid over-pressurising individual providers.

13.3 New fees for multi-building children's homes would apply to all children's social care providers and as a new type of provision, it would be open to small businesses to choose whether they intend to enter this market. The fee structure is also in line with other fees and will not be set at the full cost recovery rate.

13.4 The reset to the inspection cycle is only amending the years specified and does not change the requirement that residential family centres, voluntary adoption agencies, adoption support agencies and fostering agencies be inspected once every three years from when an inspection is carried out.

13.5 Overall, there is no specific action proposed to minimise the regulatory burdens on small businesses of these changes.

14. Monitoring & review

14.1 This Instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Parliamentary Under Secretary of State for Children and Families, Will Quince, has made the following statement: "A review would be disproportionate when taking into account the economic impact of the regulatory provisions on the qualifying activity."

14.2 The DfE will keep the operation of this Instrument under review via its regular meetings with Ofsted and children's social care providers. The changes set out in this Instrument to increase the fees payable by children's social care and education providers to Ofsted aim to bring fees closer to full cost recovery. Ofsted will continue to monitor the cost of regulation, including the impact of the new fees for multi-building children's homes.

14.3 Ofsted publishes regular data and information on its inspections of children's homes and other children's social care providers. The DfE will continue to work together with Ofsted to monitor the inspection outcomes for those inspected on three-year cycles. The DfE periodically amends the 2015 Regulations (usually on an annual basis to amend the fees).

15. Contact

15.1 Paul Stern at the Department for Education Telephone: 0204 551 5067 or email: paul.stern@education.gov.uk can be contacted with any queries regarding the Instrument.

15.2 Jonathan Bacon, Deputy Director for Looked After Children, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State for Children and Families, Will Quince, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.