

EXPLANATORY MEMORANDUM TO

**THE CHILDREN’S HOMES ETC. INSPECTION FEES, CHILDCARE FEES,
ADOPTION AND CHILDREN ACT REGISTER (AMENDMENT) REGULATIONS
2019**

2019 No. 835

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 Her Majesty’s Chief Inspector of Education, Children’s Services and Skills (“the Chief Inspector”) by a number of schools, agencies and other establishments. The 2015 Regulations also set out the minimum frequency of inspections in relation to children’s homes. Part 2 of this Instrument amends the 2015 Regulations to increase the level of certain registration, variation and annual fees payable to the Chief Inspector, the head of the Office for Standards in Education, Children’s Services and Skills (“Ofsted”) by those schools, agencies and establishments and to lower the threshold for the higher fee, for residential special schools and for children’s homes.
- 2.2 The Childcare (Fees) Regulations 2008 (S.I.2008/1804) (“the 2008 Regulations”) prescribe application fees and annual fees payable by registered childcare providers to the Chief Inspector. Part 3 of this Instrument extends the transitional provision in the 2008 Regulations which allows childcare providers (other than childminders) who operate for less than 4 hours per day and who automatically transferred on 1st September 2008 from the previous childcare register onto the early years register under the Childcare Act 2006, to pay a lower annual fee than would otherwise be the case. By extending the transitional provision this group will continue to pay the lower annual fee until 31st August 2021.
- 2.3 The Adoption Agencies Regulations 2005 (“the 2005 Regulations”) and the Adoption and Children Act Register Regulations 2014 (“the 2014 Regulations”) contain provisions related to the duty on adoption agencies to provide relevant information to the Secretary of State about both children approved for adoption and approved prospective adopters who have not been matched in order to be placed on the Adoption Register as provided for by section 125 of the Adoption and Children Act 2002. Part 4 of this Instrument amends the 2005 Regulations to revoke this duty on adoption agencies and consequentially revokes the provision of the 2014 Regulations prescribing the information to be provided to the Secretary of State in relation to children for whom an adoption agency is considering adoption. These revocations are necessary as the Secretary of State will not be operating or maintaining an Adoption Register from 01 April 2019.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Part 2 of this Instrument imposes an increase of 10% on certain registration, variation and annual fees payable to the Chief Inspector by a number of schools, agencies and other establishments. The reason for this increase is that the majority of fees payable to the Chief Inspector do not cover the full cost of the associated regulatory activity. An increase of 10% on fees payable to the Chief Inspector represents a proportionate way of bringing fees closer to full cost recovery. The intention is to increase these fees each year by 10% until the fees cover the full cost of the associated regulatory activity.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the Instrument is subject to negative resolution procedure and is not likely to be scheduled for debate there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage

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 The purpose of the current Instrument is threefold. Part 2 of the Instrument amends the 2015 Regulations in order to increase fees payable to the Chief Inspector by 10% and to lower the threshold for the higher fee, for residential special schools and for children's homes. Part 3 of the Instrument amends the 2008 Regulations to extend the transitional provision for certain childcare providers to continue to pay a lower annual fee until 31 August 2021. Part 4 of the Instrument amends the 2005 Regulations to revoke the duty on adoption agencies to refer unmatched children and approved prospective adopters to the Adoption Register and the 2014 Regulations are also amended to revoke the reference to the related provisions of the 2005 Regulations.
- 6.2 The 2015 Regulations prescribe the fees payable to the Chief Inspector in respect of:
- registration fees, variation of registration fees and annual fees for children's homes, voluntary adoption agencies, adoption support agencies, fostering agencies and residential family centres, providers of social work services 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 2008 Regulations prescribe the fees payable by childcare providers to the Chief Inspector in respect of childcare providers registered under Part 3 of the Childcare Act 2006 (“the 2006 Act”). This amendment extends the transitional arrangement in respect of providers who transferred from the previous register maintained under the Children Act 1989 to the Early Years Register (“EYR”) (introduced by the 2006 Act) and who provide childcare for less than 4 hours per day. This amendment allows the providers to pay the same annual fee rate for a further two years (to 31 August 2021).
- 6.4 The Adoption Register is established under s.125 of the Adoption and Children Act 2002. Regulation 19A of the 2005 Regulations requires adoption agencies to provide the information in Schedule 1A to the 2005 Regulations to the Secretary of State for entry into Part 1 of the Register where the adoption agency has decided the child is suitable for adoption in accordance with regulation 19 of the 2005 Regulations, but no prospective adopters have been identified. Regulation 30G of the 2005 Regulations requires the adoption agency to provide information in Schedule 4B to the 2005 Regulations to the organisation for entry in Part 3 of the Register. This is where the adoption agency has determined that a prospective adopter is approved to adopt and the adoption agency has not already identified a child for placement with the prospective adopter. The information must be provided as soon as possible by the adoption agency after the decision on suitability for adoption has been made and in any event must be provided no later than 3 months from the date of the relevant decision. Regulation 4 of the 2014 Regulations prescribes the information that must be provided by an adoption agency considering adoption for a child where the adoption agency chooses to provide that information. The information is prescribed by reference to certain parts of the information in Schedule 1A to the 2005 Regulations.

7. Policy background

What is being done and why?

The 2015 Regulations

- 7.1 Since 2010-11, the fees which are payable by children’s social care providers to the Chief Inspector are 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 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 in each inspection or other regulatory activity.
- 7.2 The majority of providers are a long way from paying the full cost of the inspection and regulatory activity undertaken by Ofsted. This means that the government continues to subsidise the cost of the inspection or other regulatory activity, which it pays Ofsted to carry out, for the majority of children’s social care settings.
- 7.3 Given that the majority of providers are a long way from paying the full costs of the regulatory activity undertaken by Ofsted, the policy of an annual 10% increase in fees

represents a measured way of bringing fees closer to full cost recovery. The level of proposed annual increase has been designed to maintain stability in the markets and to avoid over pressurising individual providers.

- 7.4 As in previous years, the inspection fees for settings that have already reached “full cost recovery” level are capped at the full-cost rate. Currently, this only applies to a small number of larger settings. This is also the rationale for lowering the threshold for the higher fee for residential special schools and children’s homes, in order to ensure that full cost recovery is not exceeded in those settings.
- 7.5 As an exception, the annual fee and provider and registration fees for residential holiday schemes for disabled children have been held at the levels applied for financial year 2017/18. This reflects a more appropriate and proportionate fee level for the scope of activity that these schemes undertake.

The 2008 Regulations

- 7.6 The 2008 Regulations prescribe the application fees for registration as a childcare provider, and annual fees for those who are so registered. The application fees and annual fees for the EYR are based on three “bands”:
- Band 1: Childminders and other childcare providers below the operating time thresholds of Band 3 providers - £35
 - Band 2: Certain sessional childcare providers (not childminders) - £50
 - Band 3: Other childcare providers (not childminders) which operate for at least 3 hours per day and at least 5 days per week and at least 45 weeks per year - £220.
- 7.7 The consultation held in 2008, entitled “Childcare Act 2006: Future Approach to Fees and Subsidies”, set out proposals for EYR fee increases that would increase the contribution of EYR fee revenue to Ofsted’s costs of providing its services. In its response to the consultation the Government announced a phased increase in EYR fees over a 3 year period to 2010. The fees applicable from 1 September 2010 were £35 for Band 1, £220 for Band 3 and £50 for Band 2 providers subject to the transitional arrangements. There have been no further fee increases since 2010.
- 7.8 The amendment made by this Instrument to the 2008 Regulations is to extend, from 1 September 2019 until 31 August 2021, the transitional provision for Band 2 providers, i.e. a particular group of about 8,000 sessional childcare providers who transferred from the previous register maintained under the Children Act 1989 to the EYR and who provide childcare provision for less than 4 hours per day.
- 7.9 The transitional arrangement was put in place in order to avoid this particular group of childcare providers having to pay a significantly increased annual fee. Under the previous system, the annual fee applicable to this group of providers was approximately £30. This was modestly increased to £50 in 2010, in recognition that these were mainly voluntary and not-for-profit providers of childcare. Without the transitional provision, they would be required to pay an annual fee of £220. The policy initially was to increase the Band 2 fee gradually. However, fees have not been increased since 2010 for any of the provider fee bands. In 2011, the Government considered whether to remove transitional arrangements for fees but decided to retain subsidised fees to reduce burdens on these providers and help promote affordability of childcare. Expiry of the transitional arrangement would result in a large fee increase for Band 2 providers.

The 2005 and 2014 Regulations

- 7.10 The 2005 Regulations place a duty on adoption agencies to refer unmatched children and approved prospective adopters to the Adoption Register. A non-statutory register was launched in August 2001, and was fully operational from April 2002, following recommendations of the then Prime Minister’s review of adoption in 2000. The Children and Families Act 2014 placed this on a statutory basis. The Adoption Register is currently run under contract on behalf of the Secretary of State for Education, in accordance with section 126 of the Adoption and Children Act 2002 which allows the Secretary of State to make arrangements with an organisation to establish and maintain the Register. The Adoption Register is a database that includes details of (a) children who are approved for adoption but who are waiting to be matched; (b) approved prospective adopters; and (c) prescribed information about children for whom the adoption agency is considering adoption.
- 7.11 The present contract for running the Adoption Register comes to an end on 31 March 2019 and the Department is exploring what may take its place. In its response to the Education Select Committee’s inquiry into fostering and *Foster Care in England* (an independent review commissioned by the Department), the Government said it would look at where and how technology could be used to enhance the national infrastructure that supports foster care. It also signalled a move away from considering the component parts of the care system in isolation which ‘creates an unhelpful divide in the way we approach a child’s experience in the system and his or her routes to permanence.’ Responding to the recommendations made by the two reports allowed the Department to explore potential solutions that could potentially bring the fostering and adoption sectors closer together.
- 7.12 A Digital Discovery Phase was carried out and this found that information is not shared effectively, causing inefficiency. An Alpha phase is now underway to analyse whether there is viable means of collating, storing and sharing real-time, sensitive information across fostering, adoption and potentially other parts of children’s social care. Whilst this work continues, adoption agencies are still able to undertake matching by using commercial alternatives to the Adoption Register which are already widely used by adoption agencies.
- 7.13 In discussions with the sector, adoption agencies questioned how they would fulfil their statutory duty to refer children and approved prospective adopters to the Adoption Register in the meantime. We agreed that it was best to revoke the duty on adoption agencies and communicated that we would do so at the earliest opportunity. This Instrument will do this. We will consider any longer term legislative requirements as part our continuing work to explore technological solutions that potentially bring the fostering and adoption sectors closer together.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 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 currently no plans to consolidate any of the amended regulations.

10. Consultation outcome

- 10.1 The DfE consulted publicly from 7 January to 18 February 2019 on increasing the fees payable by children's social care providers to the Chief Inspector, for Ofsted's regulatory activity for those settings that are not currently meeting the full costs of that activity (with the exception of residential holiday schemes for disabled children). The DfE consulted on the proposed future level of registration, variation and annual fees for settings and services caring for children to apply from May 2019.
- 10.2 Eight responses were received to the consultation. A low number of responses to the consultations on changes to the 2015 Regulations is typical. The consultation on the 2018 amendment to the Regulations received 16 responses and the consultation on the 2017 amendment to the Regulations received 21 responses.
- 10.3 The majority of respondents (75%) opposed an increase in fees. One respondent agreed with the increases.
- 10.4 Respondents were concerned that an increase in fees would put pressure on providers' budgets. While recognising respondents' views, given the wide gap between the cost of inspection and many providers' fees, the increase of 10% in registration, variation and annual fees represents a measured way of bringing fees closer to full cost recovery.

11. Guidance

- 11.1 No guidance is being produced by the DfE regarding the increases to the fees payable by children's social care providers to the Chief Inspector. The providers affected will be notified by Ofsted of the level of fees payable by virtue of the increases made in this Instrument.
- 11.2 In terms of the 2008 Regulations, the Department will ensure that Ofsted is clear about the fee levels from September 2019. There is no need for new guidance to providers who are already paying fees at this level.
- 11.3 No guidance will be produced for the amendment to the 2005 Regulations and 2014 Regulations. The Department will ensure that local authorities and adoption agencies are aware that this duty has been revoked and will include it in the next revision of the 'Statutory Guidance on Adoption'.

12. Impact

- 12.1 There is 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 amounts involved fall below the threshold for producing one.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the increase on small businesses (employing up to 50 people), the approach taken is to limit fee increases to 10%.
- 13.3 The basis for the final decision on what action to take to assist small business is that the DfE considers a 10% increase to be affordable for providers. The policy of an annual 10% increase in fees represents a measured way of bringing fees closer to full

cost recovery, and has been designed to maintain stability in the market and to avoid over-pressurising individual providers therefore no mitigating action is proposed.

- 13.4 Small businesses were able to contribute their views on these fee increases via the consultation.
- 13.5 In terms of the 2008 Regulations, the legislation applies to activities that are undertaken by small businesses. The amendment will not impose new requirements on firms employing up to 50 people. Instead, it will have a beneficial effect on those affected by the transitional arrangements as they will not have to pay higher fees from September 2019. As the change avoids cost for small businesses, no action is necessary to assist them.
- 13.6 In terms of the 2005 Regulations and 2014 Regulations, this legislation does not apply to activities that are undertaken by small businesses.

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, Minister of State for Apprenticeships and Skills, Anne Milton, 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 changes set out in this Instrument to increase the fees payable by children’s social care providers to the Chief Inspector aim to bring fees closer to full cost recovery. Ofsted will continue to monitor the cost of regulation and the new inspection arrangements and the Regulations may be amended accordingly. Ofsted also plan to undertake a review of the basis on which fees are set at all levels. Any proposed changes to the fee structure will be fully consulted upon before implementation and will not be implemented until April 2020, at the earliest.
- 14.3 In terms of the 2008 Regulations, the Department will continue to monitor the impact of the fees paid by EYR providers.
- 14.4 In terms of the 2005 Regulations and the 2014 Regulations, the Department will continue to monitor the impact of these regulations during regular discussions with the sector and by monitoring data relating to adoption.

15. Contact

- 15.1 Her Majesty’s Chief Inspector of Education, Children’s Services and Skills (Fees and Frequency of Inspections) (Children’s Homes etc.) Regulations 2015: Andrew Senior at the Department for Education (telephone: 0114 2742624; email: andrew.senior@education.gov.uk) can answer any queries regarding the Instrument.
- 15.2 Childcare (Fees) Regulations 2008: John Trakos at the Department for Education (telephone: 020 7340 7050; email: John.Trakos@education.gov.uk) can answer any queries regarding the Instrument.
- 15.3 Adoption Agencies Regulations 2005 and Adoption and Children Act Register Regulations 2014: Rachel Phillipson at the Department for Education (telephone: 01325 340464; email: rachel.phillipson@education.gov.uk) can answer any queries regarding the Instrument.

- 15.4 Christina Bankes, Deputy Director for Children in Care and Permanence, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.5 Minister of State for Apprenticeships and Skills, Anne Milton, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.