

**EXPLANATORY MEMORANDUM TO**  
**THE HIGHER EDUCATION (ASSESSMENT FEES) (ENGLAND) REGULATIONS**  
**2023**

**2023 No. 801**

**1. Introduction**

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

**2. Purpose of the instrument**

2.1 This instrument makes provision under section 71 of the Higher Education and Research Act 2017 (“HERA”) for fees to be payable to the Office for Students (“OfS”) by higher education providers for the assessment of the quality of, and the standards applied to, higher education provided by them.

2.2 The OfS assumed responsibility for undertaking quality and standards assessments in April 2023, following the de-designation of the Quality Assurance Agency for Higher Education (“QAA”) as designated quality body under HERA. This instrument is intended to enable the OfS to charge fees to fund this assessment activity.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

3.1 None.

**4. Extent and Territorial Application**

4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

**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 OfS was created by HERA and is the regulator of higher education in England. HERA gives the OfS the power to impose initial and ongoing conditions of registration that relate to quality and standards (sections 5 and 13(1)(a)), and a duty to assess, or make arrangements for the assessment of, the quality of, and the standards applied to, higher education provided by higher education providers for the purpose of determining whether they satisfy those conditions (section 23(2)). HERA also gives the OfS the power to authorise higher education providers to grant their own taught and research awards (section 42), and to vary or revoke such authorisations (sections 44 and 45), and this involves an assessment of quality and standards.

- 6.2 Schedule 4 to HERA makes provision for a body to be designated to perform the assessment functions under the Act. Section 28 of HERA gives the designated body the power to charge fees for the performance of these functions. QAA was designated by the Secretary of State from 1 April 2018 to 31 March 2023, and charged providers fees in accordance with section 28<sup>1</sup>. Following the removal of QAA’s designation, the assessment functions have reverted to the OfS.
- 6.3 These regulations are made under section 71 of HERA and will enable the OfS to charge fees in relation to the performance of these functions. Section 71 provides that the OfS may, in accordance with regulations made by the Secretary of State, charge a fee for any activity undertaken, or service provided, by it in the performance of its functions which is specified in the regulations. This instrument makes provision about the assessment activities for which the OfS may charge a fee, together with certain other related matters.

## **7. Policy background**

### *What is being done and why?*

- 7.1 This instrument provides for fees to be payable to the OfS by higher education providers for the undertaking of assessments of the quality of, and the standards applied to, higher education provided by those providers.
- 7.2 Assessments may be undertaken under section 23(2) of HERA for the purpose of determining whether the provider satisfies any initial or ongoing registration condition applicable to it relating to the quality and standards of its higher education provision; deciding whether to make an order under section 42(1) of HERA authorising the provider to grant taught awards, research awards or both; deciding whether to make an order under section 42(1) or 45(1) of HERA varying or revoking the provider’s authorisation to grant awards; or monitoring the exercise by the provider of its authorisation to grant awards (this is relevant where a provider has been granted degree awarding powers on a time-limited basis and the OfS undertakes monitoring during this probationary period).
- 7.3 Undertaking an assessment is defined to include engaging in any activity in connection with undertaking the assessment and communicating the outcome of the assessment. However, it does not include the decision to undertake the assessment, or any decision or activity for which a fee is payable under the Higher Education (Investigation Fees) (England) Regulations 2022 (“Investigation Fees Regulations”)<sup>2</sup>, or would be payable were it not for specific requirements and restrictions as to the scope of those regulations. This instrument also amends the Investigation Fees Regulations to exclude assessment activity for which a fee is payable under these regulations from the scope of those regulations. This is to prevent an overlap between the chargeable activity under the two sets of regulations where, for example, an assessment might be carried out as part of an investigation, or where the outcome of an assessment results in an investigation. The policy intent is for assessment activity to be charged for under these regulations, with investigations activity being charged for under the Investigation Fees Regulations, and no double recovery between the two.

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<sup>1</sup> [Payment of Annual Designated Quality Body Fees for 2021-22 and Reconciliation Fees for 2020-21 \(qaa.ac.uk\)](https://www.qaa.ac.uk)

<sup>2</sup> [The Higher Education \(Investigation Fees\) \(England\) Regulations 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

## *Explanations*

### What did any law do before the changes to be made by this instrument?

- 7.4 Section 28 of HERA provides that, where a body is designated to perform the assessment functions, it may charge a fee for any activity undertaken, or service provided, by it in the performance of its functions. Unlike the designated body, the OfS does not have a specific power under HERA to charge a fee for assessment activity, but can charge fees pursuant to regulations made by the Secretary of State under sections 70 and 71 of HERA. This instrument will enable the OfS to charge fees for specific assessment activity.

### Why is it being changed?

- 7.5 Following the removal of QAA's designation on 1 April 2023, the assessment functions reverted to the OfS. Quality and standards assessments are integral to the OfS registration process and for holding providers accountable for the quality of their higher education provision. Section 23(2) of HERA requires the OfS to assess, or make arrangements for the assessment of, the quality of, and standards applied to, higher education provided by institutions that have applied to be registered or are registered with the OfS.
- 7.6 Quality and standards assessments are also important when the OfS makes decisions about the authorisation, variation and revocation of providers' degree awarding powers in accordance with sections 42 to 49 of HERA.
- 7.7 This instrument makes provision for the OfS to charge fees for this assessment activity. This is necessary so that the OfS can fund and perform its functions effectively, and to help ensure continuity and minimise delays in the processing of applications for registration and degree awarding powers. Any fee payable under these regulations will be payable by the institution whose provision of higher education is the subject of the assessment. The principle that the bodies being regulated should fund the cost of their regulation is government policy and consistent with other regulatory regimes. It follows good practice as set out in HM Treasury's Managing Public Money guidance.<sup>3</sup>

### What will it now do?

- 7.8 A fixed fee of £28,463 will be payable for assessments undertaken under section 23(2)(a) of HERA for the purpose of determining whether an institution satisfies any initial registration condition relating to quality or standards. It is anticipated that this will be a standardised assessment, applicable to all providers seeking registration, and so subject to a standard, fixed fee. The amount of the fee has been determined by reference to the minimum average cost of undertaking the assessment as calculated by the OfS, on the basis that assessments relating to registration are more likely to be undertaken for smaller rather than larger providers.
- 7.9 A fee will also be payable for assessments which are undertaken under section 23(2)(b) of HERA to determine whether a registered provider satisfies any ongoing registration condition relating to quality or standards, or for the purpose of deciding whether to authorise, vary or revoke a provider's degree awarding powers, or to monitor a provider's exercise of degree awarding powers.

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<sup>3</sup> [MPM updates .docx \(publishing.service.gov.uk\)](#)

- 7.10 The amount of this fee is to be determined according to the total amount of all costs reasonably incurred by the OfS in undertaking the assessment. The regulations require the OfS to prepare an estimate of the total costs to be reasonably incurred by it and notify the provider of this amount. The provider must then pay that amount upfront within the period specified in the notice. On completion of the assessment, the OfS must prepare a statement of the actual costs reasonably incurred by it and notify the provider of the final fee amount. The amount of any shortfall between the initial estimate and the total amount of costs reasonably incurred is to be paid by the provider to the OfS. Where the amount of the estimate is greater than the total amount of costs reasonably incurred, the OfS must pay the difference, and where the two amounts are the same, no further sum is payable.
- 7.11 The OfS is required to publish a statement about its approach to determining the total amount of all costs reasonably incurred, or to be reasonably incurred, by it in undertaking assessments.
- 7.12 This instrument provides for any of the fees to be paid by instalments with the approval of the OfS. This is intended to provide potential flexibility for the OfS and providers, with a view to reducing the burden on providers.
- 7.13 This instrument also gives the OfS a power to waive or refund part or all of any fee. The Department would expect the exercise of this power to be dependent on the circumstances of each individual case, but exceptional in practice. As the fees provided for by these regulations are not discretionary, the power is intended to enable the OfS to take account of the circumstances of a particular case. A waiver or refund might, for example, be considered appropriate in a case where payment of the fee, or its payment in full, could have significant adverse consequences for a provider and its students. As a public body, the OfS would be expected to exercise its discretion subject to the usual constraints of public law.
- 7.14 The instrument provides for a representations process in relation to the final settlement of any fee payable under regulation 6. This will enable institutions to make representations about the fee to the OfS. The OfS must have regard to the representations and either confirm, vary or withdraw the fee notice. No representations process applies in relation to the fee under regulation 4, since the amount of the fee is prescribed by the regulations, and it is expected that a provider would only apply for registration if it consents to pay the fee for the initial quality and standards assessment.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union.

## **9. Consolidation**

- 9.1 These regulations are not suitable for consolidation with any other instrument. Fees will only be payable under these regulations in so far as (and for so long as) the OfS is undertaking quality and standards assessments because there is no designated quality body. As such, the Department considers that it is appropriate for the instrument to be treated as creating a separate, discreet fee scheme for this assessment activity, rather than being consolidated with the Investigation Fees Regulations.

## **10. Consultation outcome**

- 10.1 No formal consultation was undertaken regarding this instrument.
- 10.2 A related consultation on the de-designation of QAA was undertaken between 8 February and 3 March 2023. The Secretary of State confirmed the removal of QAA's designation on 30 March 2023.

## **11. Guidance**

- 11.1 The OfS provides extensive guidance in its regulatory framework on the conditions of registration providers must meet in order to remain registered, as well as the enforcement action that may be taken if a provider is found to be in breach of, or at risk of breaching, a condition of registration. This includes information about ongoing condition of registration G3, which requires a registered provider to pay fees in accordance with regulations made by the Secretary of State.<sup>4</sup>
- 11.2 The instrument requires the OfS to publish a statement about its approach to estimating and determining its total reasonable costs for the purposes of calculating the amount of the fee for assessments related to ongoing registration and authorisations to grant awards.

## **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 A full Impact Assessment has not been prepared for this instrument because no, or no significant impact on the private, voluntary, or public sector is foreseen.
- 12.4 The Department has self-assessed this measure through its internal triage process, because it is below the +/-£5m equivalent annual net direct cost to business threshold.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact on small businesses, the fixed fee for assessments related to initial registration has been calculated based on the minimum average estimated cost for that assessment type, to reflect estimated resource requirement to assess a smaller higher education provider. Fees for assessments related to ongoing registration and degree awarding powers will vary between providers according to the cost of the assessment. The regulations also allow for fees to be paid by instalments with the approval of the OfS, which could provide greater flexibility and reduce burden on small providers.

## **14. Monitoring & review**

- 14.1 As with all OfS fees, this instrument will be kept under review and revisited if and when necessary, including if a new body is designated as the designated quality body under HERA.

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<sup>4</sup> [Securing student success: Regulatory framework for higher education in England \(officeforstudents.org.uk\)](https://www.officeforstudents.org.uk)

14.2 The instrument does not include a statutory review clause because the relevant requirements of the Small Business, Enterprise and Employment Act 2015 do not apply to provisions imposing fees.

**15. Contact**

15.1 Rebecca Martin at the Department for Education ([rebecca.martin@education.gov.uk](mailto:rebecca.martin@education.gov.uk)) can be contacted with any queries regarding the instrument.

15.2 Zoe Forbes, Deputy Director for Higher Education Quality and Regulation at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Robert Halfon MP, Minister of State at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.