

Office for
Students



Consultation on paying fees for investigations

Analysis of responses and decisions

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Introduction

What we consulted on

1. The Higher Education (Investigation Fees) (England) Regulations 2022 ('the Regulations')¹ came into force on 8 December 2022. They give the OfS the power to charge a fee that recovers the costs of investigating a registered higher education provider's activities.
2. We consulted on how we will determine the fee that a provider under investigation by the OfS should pay on the basis of these regulations.
3. We provided draft guidance for providers that set out how we propose to determine the fee payable, including:
 - a. How investigation fees will be calculated.
 - b. How the fee for an investigation will be communicated to a provider.
 - c. How a provider can make representations in relation to an investigation fee.
 - d. When a fee is payable.
 - e. How to pay a fee.
4. We invited comments about the guidance.
5. We also proposed that the approach set out in the consultation for the calculation of costs would also apply to the calculation of costs under our powers in Section 73 of HERA. These powers allow us to recover costs of investigations that lead to the imposition of a sanction. We also proposed that the approach in the consultation should apply, in so far as they require any calculation of costs, to any further regulations made under Section 71 of HERA.

Feedback and analysis

6. We received 35 responses. Five of these were blank and did not contain any information in relation to the consultation question. The majority of responses were from higher education providers, their staff, representative groups or sector mission groups. There were a small number from other stakeholders.
7. We considered all of the complete responses received. In this document we set out a summary of the substantive points raised and our response to these.
8. The main themes from responses were about how the OfS would ensure the reasonableness of its costs and suggestions for how this could be achieved. There were also a number of comments about the proportionality of costs and in particular a suggestion that the financial position of a provider should be considered when determining the costs that should be recovered. Many of the responses made points that were outside the scope of the consultation

¹ See <https://www.legislation.gov.uk/ukxi/2022/1191/regulation/3/made>.

and we have therefore not responded to these in this document. These are summarised at paragraph 38.

Final decision

9. Following our consideration of responses we have decided to adopt the approach to calculating costs as consulted on. We have made some changes to the proposed guidance. These include that we will consider the impact on the financial viability and sustainability of a provider when determining the amount of costs that should be recovered.
10. We have also decided that the calculation of costs set out in this guidance will apply in its entirety to the calculation of costs under our powers in Section 73 of HERA and to any further regulations made in relation to Section 71.

Matters to which we have had regard in reaching our final decision.

11. We refer to the reasoning for our proposals at paragraphs 24 to 35 of the consultation document.

General duties

12. We have had regard to our general duties set out in Section 2 of HERA. We have placed particular weight on general duty (f) which requires the OfS to have regard to using its resources in an efficient, effective and economic way and suggests that the OfS should use the express powers provided in the Regulations to recover all costs where these are reasonably incurred. Doing so will fund investigatory activity in the interests of students, in particular supporting the promotion of quality, equality of opportunity and value for money. Our approach to ensuring that the costs we seek to recover were reasonably incurred will also ensure that costs recovered are efficient, effective and economic.
13. In relation to general duty (g), which refers to best regulatory practice, we will publish guidance ensuring transparency of approach to calculating and recovering the costs of an investigation.

Public Sector Equality Duty

14. We have had regard to the Public Sector Equality Duty set out in Section 149 of the Equality Act 2010. This requires the OfS to have due regard to eliminating unlawful discrimination, fostering good relations between different groups and taking steps to advance equality of opportunity.
15. We do not consider that the calculation of costs will have negative consequences for equality of opportunity. It is possible that the financial impact of a decision to recover costs could have a negative impact on students, including groups with protected characteristics. We have set out that we will take account of a provider's financial position in determining the costs to be recovered. This, and more broadly our consideration of the proportionality of costs, will appropriately mitigate any adverse effect on groups with protected characteristics.

Guidance from the Secretary of State

16. We have had regard to statutory guidance issued by the Secretary of State on the basis of Section 2(3) of HERA on 31 March 2022.² This highlighted quality as one of the highest priorities of government and requested that ‘the OfS takes this work forward as rapidly as possible.’ The letter sets out an expectation that that OfS will identify and take action in relation to quality through investigatory activity. For example, it asks that we ‘implement a visible and effective inspections regime against the other B (Quality) conditions of registration, that will involve on-site inspection of 10-15 providers next year’. This emphasis on investigating and taking action on quality matters favours the introduction of cost recovery, as recovering investigation costs will support the OfS in undertaking a robust and sustained programme of investigatory activity.

Regulators’ Code

17. We have also had regard to the Regulators’ Code. We consider that Section 5 of the code ‘Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply’ and Section 6 ‘Regulators should ensure that their approach to their regulatory activities is transparent’ are particularly relevant.

18. With a view to taking a transparent approach to our regulatory activities, and to making clear information and guidance available to those we regulate. We have produced a guidance document that sets out the approach we will take to the calculation of costs and arrangements for payment of these fees. We will conduct a review on the approach after 18 to 24 months of operation and, as part of that review, will consider what further information it might be appropriate to publish about the costs of investigations.

² See www.officeforstudents.org.uk/media/be054f0b-696a-41fc-8f50-218eb0e3dcab/ofs-strategic-guidance-20220331_amend.pdf.

Analysis of responses and decisions

19. Our consultation asked whether respondents had any comments about the proposed guidance.
20. We also set out that we were not seeking views on the powers that the Regulations give the OfS, whether we should seek to recover the costs of our investigations or matters relating to the OfS's approach to monitoring registered providers and the circumstances that may or may not lead to opening an investigation.

Summary of responses

How fees are calculated

21. The majority of respondents considered that the definition of investigation and the activities that fell within it, and would therefore be included in the calculation of costs, was too broad. Many respondents commented that some activities that constituted general monitoring were listed as chargeable investigatory activities, for example engaging with a provider, requesting information on a voluntary basis or the consideration of notifications and reportable events. They considered that such activities should not be chargeable through an investigation fee because they represented 'business as usual' activities for a regulator. Some respondents wanted additional information about the point at which an investigation starts and ends and for an individual provider to be notified of this.
22. Many respondents asked how the OfS would demonstrate that the costs it was seeking to recover were reasonably incurred and considered that providers may find it difficult to budget for a significant payment without prior estimates of costs. It was suggested that there should be an estimate of costs incurred either before or throughout the investigation which would help providers plan, and that if an estimate of costs were provided upfront, this would also help demonstrate reasonableness.
23. Other suggestions were that there should be a set hourly rate or average rate for staff working on investigations in order to balance the higher costs that might be associated with a more experienced or senior member of staff. One suggestion was that costs should be aligned to median rates of pay in higher education for similar work. We have taken this to mean that if OfS staff costs for investigations were set against pay rates in the sector, this would demonstrate their reasonableness.
24. One respondent asked how costs would be attributed if there were an investigation that looked into several providers, for example in relation to a partnership arrangement.
25. Some respondents recommended that there should be a cap on potential costs incurred, including reduced costs for smaller providers, or no cost for micro-providers. This was because of the likely lower income and ability to pay for investigation costs of smaller providers and the proportion of that income that is derived from tuition fees meaning that the costs of any investigation were seen to be borne directly by students. Some respondents suggested the investigation fees should be a fixed percentage of a provider's qualifying income, because this would be a fairer approach and would be consistent with the OfS approach for calculating monetary penalties.

26. One respondent asked for clarification about whether the costs reasonably incurred in 'making and communicating a decision to conduct the investigation' would include costs of the relevant decision-making committee and communications with the press. The respondent suggested that these activities should be seen as the normal running costs of the OfS and not included in investigation fees.
27. Many respondents commented on the proportionality of costs and thought it would be unreasonable for the OfS to recover all costs where only minor issues were found.
28. One respondent did not think it was reasonable to include national insurance and pension costs of OfS staff working on an investigation because they considered that these were general running costs for the OfS and should not be included.
29. Several respondents said that more detail on parameters and controls for instructing third parties would be helpful for providers and in providing assurance that the costs associated with third parties would be efficient. Respondents suggested there should be a transparent process for deciding when external consultants would be used and ensuring that they offer value for money, for example through a tender process.
30. There was a suggestion that maximum travel and subsistence costs for OfS investigators should be set out in guidance and published.
31. Some respondents asked for more information on the possible reasons that the OfS would waive fees, because they thought there should be clarity and transparency about this.

Communicating fees

32. Some respondents suggested that fees should be presented in itemised invoices to make it clear where the costs have been incurred.

Representations

33. Many respondents suggested that the 14-day time limit for providers to submit representations was too short as providers may want to seek additional legal advice prior to responding. Respondents recommended 21 or 30 days as a more appropriate amount of time, or that the timeframe for representations should be determined on a case-by-case basis, depending on the length and complexity of an investigation.
34. A few respondents asked if the number of days in which a provider is expected to make payment relates to working days and for this to be clarified in the guidance.
35. One respondent asked whether there were separate representations for the outcomes of an investigation itself.

Paying fees

36. Most respondents asked for additional information on the circumstances that would trigger fee payment. One responder asked whether investigation fees would replace the costs previously incurred in relation to the work of the designated quality body.
37. Some respondents suggested that a schedule, for the payment of fees should consider the financial position of providers. For example, providers could pay in tranches in cases where

significant costs were incurred in order to make the costs more manageable and avoid negatively affecting a provider's financial position.

Other points

38. We received a number of responses that commented on matters that were outside the scope of the consultation:

- a. The definition and scope of investigations.
- b. The criteria for opening investigations and how decisions are taken.
- c. The length of investigations.
- d. The type of work the OfS undertakes during investigations.
- e. Previous or ongoing investigations.
- f. The Regulations and rights to appeal to the First Tier Tribunal.

39. As the consultation specifically aims to address the calculation and payment of fees relating to investigations, we have not responded to these points within this document. However, we understand the interest of providers in having further information about the OfS's investigatory work. We will consider publishing further information about this in due course.

OfS response and decision

40. We agree that some activities such as engaging with a provider, requesting information on a voluntary basis or the consideration of notifications and reportable events may in certain circumstances be activities that we undertake as part of our routine business and this activity may be separate from an investigation.

41. However, there may be circumstances where consideration of notifications and reportable events, or other intelligence, is the prompt for us to make a decision to open an investigation. In those circumstances such consideration would involve us 'engaging in any other activity in connection with beginning the investigation' and/or 'making and communicating a decision to conduct the investigation' and the Regulations allow us to recover the costs involved in this work.

42. This means that the OfS has the ability to recover such costs under the Regulations. However, we have decided to adopt a general policy position that we will use a formal decision to open an investigation as the reference point for determining which activities are undertaken in connection to opening an investigation. We will normally expect to start recording costs (including staff time) for potential recovery at the point that a member of staff is asked to produce a written recommendation to open an investigation. This would be likely to include the time spent by staff in producing or reviewing the content of the recommendation document.

43. If a decision is then made to open an investigation, the costs incurred by the OfS will continue to be recorded to facilitate potential future decisions on the recovery of costs (depending on the final outcome of the investigation).

44. In most cases we would expect to write to a provider shortly after a decision to open an investigation has been taken to inform it of the decision, and to tell it the scope of the investigation. On some occasions we may not notify a provider that we have decided to open an investigation until a later stage in the process – this may be the case where we have a concern about sensitivity and preservation of information. One example of a situation where such concerns may arise is in investigations relating to potential mis-use of public funding.
45. In relation to how the OfS will ensure costs it recovers are reasonably incurred, we set out in the guidance that we will calculate costs based on staff time. Staff will be asked to record exact time spent on investigatory work in order to maintain an accurate record. We will carefully consider the reasonableness of the time taken in each part of an investigation, for example we would consider excluding time spent on making substantial amendments to work following quality assurance processes. If we intend to recover costs, we will tell a provider the costs at the end of an investigation. The provider will have an opportunity to make representations if it thinks the costs were not reasonably incurred.
46. The costs in any investigation may vary considerably because of the particular context for a case. It is therefore difficult to provide an estimate of costs at the start of investigation. For example the volume of information that a provider gives to the OfS will affect the time it takes to consider the case and this is an unknown factor when a decision to open an investigation is made. Costs will also be affected by time spent in the resolution of disputes with a provider. We will therefore not provide upfront estimates but will review our approach in 18 to 24 months. In the meantime we intend to make information about current staff costs per day available on our website and we will update this from time to time to reflect changes in OfS staff pay.
47. In relation to quality investigations which include a visit from an assessment team, when we have completed the first round of investigations we expect to publish guidance for providers about what they can expect from a visit and the likely timescales for producing an assessment report. For these investigations, we expect to be able to publish the costs normally associated with a visit to a provider by an assessment team.
48. We have considered whether it would be appropriate to give a provider updates about the cost of an investigation as it progresses. While we understand that providers may find this helpful for planning and budgetary purposes, we do not consider that cost reporting of this kind would be an effective and efficient use of our time and we note this is not usual practice among other regulators.
49. In relation to the suggestion that the OfS should apply a set hourly rate or average rate for staff working on investigations, we consider that the level of involvement required from staff at different grades will vary for different investigations. It would not be appropriate to adopt an average rate, which would suggest that a predetermined ratio of involvement of staff at various levels of seniority would be appropriate in all cases. OfS staff pay is subject to public sector pay remit guidelines and each year the pay remit complies with and is approved by the Department for Education. As part of this process our pay bands are broadly based on civil service pay grades. In addition, the OfS benchmarks its pay bands regularly against public sector median market rates and across other regulatory bodies. We are therefore confident that our pay costs are appropriate compared to other organisations that conduct comparable work.

50. In relation to how costs would be attributed if there were an investigation that covered the activities of more than one provider, the appropriate approach will vary depending on the circumstances. In an investigation relating to a partnership arrangement, as at paragraph 65 of the OfS Regulatory Framework,³ lead providers retain responsibility for students on courses subcontracted all, or in part, to a delivery provider, and for the quality and standards of provision. We would consider in the circumstances of the particular case whether the most appropriate approach would be to seek to recover costs from the lead provider or whether in that case costs should be directly attributed to a specific provider. We would consider any factors which may be relevant to a decision about the potential to attribute costs between providers.
51. In relation to suggestions that there should be a cap on costs, or reduced or no costs, for smaller and micro-providers, we considered these approaches in making our proposals. The principle of cost recovery is that the OfS should be able to fully fund investigatory activity and that in a risk-based system those costs should be borne by the individual provider. However we agree that a provider's ability to pay for costs (rather than its size) should be considered before final decisions are taken on the costs that are payable to the OfS.
52. We have therefore decided that the fee charged for an investigation should take account of the impact that paying the fee would have on the financial viability and sustainability of the provider and whether payment of the fee would be appropriate where a provider is in financial difficulty. We will consider this as a separate step after we determine the total of our costs reasonably incurred. We consider that the practical effect of this step may be to reduce the fee for a provider based on its ability to pay the fee, where we consider this is appropriate. We note that the consequence of this is that our approach could be less risk-based in practice than we had set out in our consultation. We expect to review this position as part of our review of how the process has been operating in 18 to 24 months.
53. We can confirm that the costs reasonably incurred in 'making and communicating a decision to conduct the investigation' will include the staff costs of those working directly on the investigation – undertaking assessments and making recommendations. The Regulations also allow the OfS to recover the costs associated with making relevant decisions and therefore our reasonably incurred costs for the relevant decision-making individual or committee are also recoverable. Costs incurred and charged to a provider will not include the costs involved with communications with the press.
54. In relation to comments about the proportionality of costs, we set out in the consultation that the amount that we seek to recover will reflect what the OfS considers to be appropriate in the context of an investigation's outcomes. The starting point will be an assessment of what our reasonably incurred costs are. We will then go on to consider proportionality as part of a consideration of our general duties – this could, depending on the circumstances, result in a decision that it would not be appropriate to recover all of the costs that have been reasonably incurred. An example of circumstances in which we might determine that it would not be appropriate to recover all of our reasonably incurred costs may be if only very minor issues are

³ See www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/.

found at the end of an investigation. However our starting point is that we would normally expect to recover all of our reasonably incurred costs.

55. We have considered the suggestion that we should not include national insurance and pension costs in the calculation of investigation fees. The costs that will be recovered in relation to an investigation will be predominantly made up of staff time. If we did not recover the full costs of staff time we would not be able to adequately cover the cost of investigatory activity. When staff work on an investigation they will record the time they spend on an individual case. We are therefore including the full costs to the OfS of staff time in the costs we seek to recover. As set out in the consultation, not including national insurance and pension costs would artificially limit the amount of investigatory activity that we might be able to undertake, which would not be in the interests of students, taxpayers, or compliant providers.
56. In relation to the efficiency of third party costs, the OfS will seek to recover reasonably incurred costs associated with third party contractors. Where we decide it is appropriate to tender for third party work, effectiveness and efficiency would be considered as part of the tender process. Not all third party work will be subject to a tender process, for example external academic assessors are appointed via direct recruitment to the OfS and subject to appropriate market rates. Providers will have the opportunity to make representations about whether such costs have been reasonably incurred as part of the representations process described in the guidance.
57. Assessors who are recruited to undertake quality and standards assessment work for the OfS are subject to the same travel and subsistence arrangements as OfS staff. These are benchmarked with other public bodies to ensure staff expenses represent appropriate value for money to the OfS.
58. In response to the request for examples of when we might choose to waive fees, as set out in the guidance fees will be waived only in exceptional circumstances. As we have not yet recovered fees in these circumstances we do not have examples that we may consider to be exceptional. It would be open to a provider to make representations about any circumstances it may believe are exceptional and which could justify a waiver of fees. As set out in the guidance, we would not expect to waive fees as a matter of course and therefore the circumstances would have to be out of the ordinary and unique. We will consider in future whether we could include examples in the guidance based on our experience of operating the fee process.

Communicating fees

59. When we notify a provider of the fee payable we will set this out in a fee notification that will be sufficiently detailed for a provider to make representations about the reasonableness of the costs incurred, for example a summary of staff hours by pay band.

Representations

60. The 14-day time limit to submit representations is the statutory minimum allowed for in the Regulations. However, we will consider whether a longer period is appropriate where a case is particularly long or complex. The guidance sets out that the period allowed is 'not less than 14 days' and we will consider the appropriate period for representations on a case-by-case basis. A provider would be notified of the representations period that applies as part of the notification of payment of fees.

61. We have included in the guidance that representations can be made if a provider considers that costs have not been reasonably incurred. However we do not place limits on the grounds on which a provider may make representations.
62. We can confirm that there would be a separate representation process in relation to the outcomes of the investigation itself, where appropriate.

Paying fees

63. In relation to the circumstances that would trigger fee payment, a fee notification will be sent to a provider following the conclusion of an investigation where the OfS has reached a final decision. This means that the fee will be calculated and sent following the conclusion of any representations process with the provider in relation to the regulatory outcome of the investigation.
64. In relation to whether investigation fees would replace the costs previously recovered by the designated quality body, the Quality Assurance Agency would have charged a provider fees for any assessment activity the OfS asked it to undertake as part of an investigation. As there is no longer a designated quality body, the costs of the use of academic assessors would form part of the investigation costs charged by the OfS but would not be not the total cost of an investigation.
65. We have confirmed in paragraph 52 that our approach will take account of the impact that the payment of fees may have on a provider's financial viability and sustainability. We may consider flexible payment terms such as payment in instalments – where, for example, the payment of fees might otherwise affect a provider's financial viability or sustainability, or otherwise have an adverse impact on the interests of students. Whether we do offer flexible payment terms will depend on the circumstances of the case.

Decisions

66. Having considered responses to the consultation we have decided to proceed with the approach to the calculation of costs as set out in the proposed guidance. There are no changes to how costs will be calculated. We have, however, added some additional text to the guidance to respond to points made in consultation and as set out in this document.
67. We can confirm that we have adopted a general policy position that we will normally expect to start to record costs at the point that a member of staff is asked to produce a written recommendation to open an investigation.
68. We have also decided that the fee charged for an investigation will take account of the impact that payment of fees would have on the financial viability and sustainability of the provider and whether payment of fees would be appropriate where a provider is in financial difficulty. We have added wording to the guidance to reflect this position.
69. We have also decided that the calculation of costs set out in this guidance will apply in its entirety to the calculation of costs under our powers in Section 73 of HERA and to any further regulations made in relation to Section 71.
70. As set out in the consultation document we will review on our approach in 18 to 24 months.



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