EXPLANATORY MEMORANDUM TO

THE COMBINED AUTHORITIES (OVERVIEW AND SCRUTINY COMMITTEES, ACCESS TO INFORMATION AND AUDIT COMMITTEES) ORDER 2017

2017 No. 68

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument makes provision for the membership and proceedings of overview and scrutiny committees, and audit committees, of combined authorities.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 This entire instrument applies only to England.

3.3 This instrument applies only to England as it is entirely concerned with combined authorities created under section 103(2) of the Local Democracy, Economic Development and Construction Act 2009 (the 2009 Act). The instrument does not give rise to minor or consequential effects outside England.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly, if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament, and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

3.5 The Department has reached this view because it considers that the primary purpose of the provisions in this instrument relate to local government, which is within the devolved legislative competence of the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales.

4. Legislative Context

4.1 Part 6 of the 2009 Act sets the framework for the establishment of combined authorities in England. A combined authority for an area of two or more local authorities is established by an order under Part 6 and has such functions (including functions relating to economic development and regeneration and transport) as are conferred by the order. A number of combined authorities have been established under Part 6. Part 6 of the 2009 Act was substantially amended by the Cities and

Local Government Devolution Act 2016 (the 2016 Act) – in particular to provide for elected mayors for combined authorities, to broaden the range of functions that might be conferred on a combined authority and to provide for overview and scrutiny arrangements.

4.2 This Order is made under powers in paragraph 3 of Schedule 5A to the 2009 Act, which was inserted by section 8 of the 2016 Act, and requires all combined authorities to establish at least one overview and scrutiny committee and an audit committee. Schedule 5A also enables the Secretary of State to make provision by order about the overview and scrutiny committee(s) of a combined authority. This provision may include details about the membership of an overview and scrutiny committee and the voting rights of such members; the person who is to be chair of such a committee; the appointment of a scrutiny officer; the circumstances in which matters may be referred to an overview and scrutiny committee; obligations on persons to respond to reports or recommendations made by an overview and scrutiny committee; the publication of reports, recommendations or responses; and the information which must, or must not, be disclosed to an overview and scrutiny committee.

4.3 This Order is the first piece of secondary legislation to be made under paragraphs 3 and 4(3) of Schedule 5A to the 2009 Act, and makes provision for the composition and proceedings of overview and scrutiny and audit committees overview and scrutiny committees similar to the provision for local authorities in the Local Authorities (Committee System) (England) Regulations 2012 (S.I. 2012/1020) and the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012/2089. The Secretary of State intends to make specific provision under paragraph 3(4) of Schedule 5A to the 2009 Act for each combined authority regarding whether an independent person or an appropriate person is to be the chair of the overview and scrutiny committee in that authority.

5. Extent and Territorial Application

5.1 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Rt Hon Sajid Javid MP, Secretary of State for Communities and Local Government, has made the following statement regarding Human Rights:

"In my view the provisions of the Combined Authorities (Overview and Scrutiny Committees, Access to Information and Audit Committees) Order 2017 are compatible with the Convention rights".

7. Policy background

What is being done and why

7.1 The Government committed in its 2015 manifesto to "devolve far-reaching powers over economic development, transport and social care to large cities which choose to have elected mayors". The Cities and Local Government Devolution Act 2016 enables new powers and budgets to be devolved to combined authorities, and provides for mayors for an area of a combined authority. Through Schedule 5A, it also sets out the basic requirements for overview and scrutiny, and audit committees, and requires

the Secretary of State to make further provision in relation to these requirements in secondary legislation.

7.2 This Order builds on these basic requirements, further strengthening the accountability of combined authorities and ensures there are robust, independent and clear governance arrangements in place consistently in combined authorities across the country.

7.3 To achieve this, the Order provides that:

- where practicable, the membership of the overview and scrutiny committee reflects the political balance for the time being prevailing among members of the constituent councils on the combined authority;
- to ensure the independence of the chair of the overview and scrutiny committee, a member of the majority political party on the combined authority is not considered an appropriate person who may become the chair if the mayor is not a member of a registered political party;
- to ensure consistency of approach with other local authority requirements of independent persons the definition of 'independent person' (as required by paragraph 3 (4) (a) of Schedule 5A to the 2009 Act) reflects the requirements at Section 28(7) of the Localism Act 2011;
- in order to be considered an independent person for the purposes of Articles 5 and 14 certain procedures must be adhered to when appointing such a person, ensuring consistency of approach with the requirements for appointing an independent person in local authorities;
- to ensure overview and scrutiny committees are properly representative and accountable, the majority of members on the overview and scrutiny committee are to be taken from the combined authority's constituent councils;
- to ensure transparency locally, overview and scrutiny committees must publish notices of appointments to the committee;
- at least two thirds of members are required to be present at a meeting of the overview and scrutiny committee before business may be transacted;
- to clarify outcomes in practice, no member of an overview and scrutiny committee has a casting vote and if a vote is tied it is deemed not to have been carried;
- the scrutiny function is provided with the tools it needs to work, will not impede efficient decision-making and will accommodate key decisions by enabling overview and scrutiny committees to be able to call-in a decision made, but not implemented, and that this decision can be required to remain unimplemented for up to 14 days; following receipt of any recommendation by the overview and scrutiny committee the combined authority or mayor must hold a meeting to reconsider the decision within 10 days;
- to ensure that the combined authority efficiently considers any recommendations or reports, the combined authority must respond to the overview and scrutiny committee's report or recommendations within 2 months;
- to protect the overview and scrutiny committee's independence, the committee may not include any officer from the combined authority or the combined authority's constituent councils;

- overview and scrutiny committees of combined authorities have access to the necessary documents to enable them to effectively scrutinise proposals and decisions;
- audit committees must appoint at least one independent person;
- where practicable, the membership of the audit committee reflects the political balance of the constituent councils of the combined authority;
- an audit committee may not include any officer from the combined authority or the combined authority's constituent councils.

8. Consultation outcome

8.1 Whilst there is no requirement in the 2016 Act for consultation on any proposed order relating to overview and scrutiny, the Government has sought and considered the views of relevant stakeholders before making this Order. These include the National Audit Office, the Centre for Public Scrutiny, existing combined authorities and those involved with the setting up of combined authorities currently in the establishment process.

8.2 This engagement has provided for a helpful and constructive exchange of views and has resulted in both policy and drafting proposals from these stakeholders being included in the Order. These proposals include: clarifying the drafting in Article 3(1) regarding the make-up of an overview and scrutiny committee; inserting provision in Article 3(4) to clarify the voting rights for non-constituent members; providing for cases of special urgency in Article 13; and expanding the definition of 'decision-maker' in Article 11(1)(b) so as to include both mayoral and non-mayoral combined authorities. On the suggestion of stakeholders a provision was also included at Article 5(6) so that where there is an independent mayor, the chair could not be from the political party with the most representatives among the members of the combined authority.

8.3 Representatives of existing and proposed combined authorities also requested that provision is included in the Order requiring overview and scrutiny committees to review certain decisions as a matter of course. This suggestion has not been incorporated as it was not consistent with the Government's policy approach on overview and scrutiny. This approach is to establish clear principles for overview and scrutiny which whilst ensuring each combined authority adopts a robust approach, allows each authority the flexibility to decide its own day to day operating arrangements for overview and scrutiny which are best fitted to the local circumstances.

8.4 Likewise, a proposal to include in the provisions of the Order a 'governance framework' has not been adopted. Such a framework would have set out the detailed operation of overview and scrutiny committees, including such matters as to how often they are to meet. The Government believes that scrutiny is likely to be more effective if such detailed operational matters are for each combined authority to decide within principles established by the Order.

8.5 There was also a suggestion that the threshold of 'two or more wards or electoral divisions' at which point a decision could be considered a 'key decision' was insufficient (see Article 11(1)(a)(ii)). This suggestion has not been adopted as it was out of step with precedents set by the overview and scrutiny legislation applicable to

the generality of local authorities. While two wards or divisions of a combined authority is a relatively smaller part of the authority's area than in the case of a local authority, it was decided given the circumstances of combined authorities which may be exercising local authority functions, that sticking with this precedent was appropriate. To do otherwise could risk diluting scrutiny when the exercise of functions was passed to a combined authority.

8.6 Following debates in Parliament, the Government undertook to consider the process for appointing an independent chair of the overview and scrutiny committee or an independent member of the audit committee. In response to the debates, the Government has inserted additional provision at Articles 5 and 14 to ensure a wholly transparent appointment process mirroring the approach which councils must use when appointing independent persons under the Localism Act 2011 for the purposes of the councillors conduct regime.

9. Guidance

9.1 The 2016 Act requires combined authorities, in exercising any of their functions in relation to overview and scrutiny committees, to have regard to guidance issued by the Secretary of State. The Government will keep under review whether specific guidance is required.

9.2 Guidance made available to local authorities on overview and scrutiny committees by the Centre for Public Scrutiny (http://www.cfps.org.uk), and on audit committees by the Chartered Institute of Public Finance and Accountancy, may be of assistance to combined authorities.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies, or the public sector.

10.2 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring and review

12.1 Each mayoral combined authority is required to put in place a programme of evaluation, including the governance arrangements which may include the operation of overview and scrutiny committees and audit committees.

13. Contact

13.1 Hannah Duffy at the Department for Communities and Local Government, telephone: 0303 444 3861 or email: Hannah.Duffy@communities.gsi.gov.uk can answer any queries regarding the instrument.