EXPLANATORY MEMORANDUM TO

THE BYELAWS (ALTERNATIVE PROCEDURE) (ENGLAND) REGULATIONS 2015

2015 No. [XXXX]

1. 1.1 This explanatory memorandum has been prepared by the Department for Communities and Local Government ("the Department") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Byelaws (Alternative Procedure) (England) Regulations 2015 ("the Regulations"), in relation to England, prescribe classes of byelaws to which section 236 (procedure, etc, for byelaws) of the Local Government Act 1972 ("the Act") does not apply and make provision about the procedure ("the alternative procedure") for the making, coming into force and revoking of such byelaws. Whereas, if section 236 of the Act applied, the prescribed byelaws would need to be confirmed by the Secretary of State before they could come into force, the alternative procedure provided for in these Regulations contains no such requirement.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Byelaws are local enactments made under an enabling power contained in a public general Act or a local Act. They are usually made by a statutory body such as a local authority.

4.2 Section 236 of the Act specifies the byelaw-making procedure to be followed by a local authority, the Greater London Authority, Transport for London, an Integrated Transport Authority for an integrated transport area in England or a combined authority (within the meaning of section 103 of the Local Democracy, Economic Development and Construction Act 2009 (c. 20)). Section 270 of the Act defines an English local authority as a county council, a district council, a London borough council or a parish council.

4.3 The section 236 procedure applies to byelaws made by these bodies under powers contained in the Act or under powers contained in any other enactment where specific provision about the procedure is not otherwise made. The alternative procedure differs in a number of respects; the most important being that the removal of central Government confirmation means that the scrutiny of byelaws is now a matter for local authorities, their communities and the wider public alone. Accordingly, the alternative procedure requires authorities, before making the

byelaws, to undertake a deregulatory assessment, including consultation with those affected by, likely to be affected by, or those with an interest in the byelaws. The alternative procedure also requires authorities to carry out an assessment of the need for the byelaws and publish a deregulatory assessment recording its conclusions from the deregulatory assessments, which must be made available to the public. The alternative procedure requires authorities to submit that deregulatory assessment together with the draft byelaw(s) to the Secretary of State, who must respond within 30 calendar days. That response can give the authority leave to proceed, not give leave, or provide a holding response. Unless leave is given, the authority cannot proceed. The authority is also required to consider all representations made during a specified period, before deciding within 6 months of the end of that period, whether to make the byelaws, with or without modifications.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State Kris Hopkins has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Byelaws (Alternative Procedure) (England) Regulations 2015 are compatible with the European Convention of Human Rights.

7. Policy background

- ***What is being done and why***

7.1 The Department for Communities and Local Government is responsible for byelaws made by local authorities on Good Rule and Government. The policy aim is to specify a procedure for making and bringing into force certain byelaws without any central Government confirmation involvement, which decentralises this power to specified local authorities, who then assume complete responsibility for these byelaws and their lawfulness.

7.2 We are not giving authorities powers to create new categories of byelaws; authorities already have a wide range of byelaw-making powers. What is new is that following leave to proceed to make the byelaw by the relevant Secretary of State, authorities will need to seek approval for the byelaws from the community rather than the Secretary of State, through consultation with their community and consideration of any representations received– whether this is about making new byelaws or repealing redundant ones.

7.3 Under the alternative procedure authorities will undertake a two stage process for byelaws preparation and consultation before making and advertising byelaws. As such the resolving of any objections and the bringing into force of certain byelaws will be undertaken locally, instead of by the Secretary of State of the central Government department with oversight for the byelaws in question, as currently happens.

7.4 Guidance already exists on the Department's website for the existing byelaws making regime. The Secretary of State reserves the right to publish on the website guidance on the alternative procedure. Local authorities using the alternative procedure are required by section 237E of the Act (inserted by section 132 of the 2007 Act) to have regard to any guidance which may be published when the Regulations come into force or at a later date

Classes of byelaws

7.5 The prescribed classes of byelaws are defined in the Regulations by reference to a description of the byelaws, the enactment under which they are made and the authority by whom they are made. In prescribing the class of byelaws in this way, the Regulations provide that only those authorities which are democratically accountable to the community, that is, where the members of that authority have been elected by voters in the area the byelaws will apply to, are able to make byelaws without having to have those byelaws confirmed by the Secretary of State.

Assessment and consultation under the new alternative procedure

7.6 The Regulations specify the consultation requirements that a byelaw-making authority must undertake as part of preparing a deregulatory assessment when using the alternative procedure. The authority must consult the wider community where they consider that the byelaws may affect the wider public who may not be resident in the authority, and not just consider the wishes and needs of the local community. This is particularly important in relation to byelaws concerning parks and recreation grounds, where those visiting and using public facilities and therefore subject to the byelaws, if made, may not be local residents.

7.7 Regulation 6 requires the authority to carry out an assessment of need for the byelaws and prepare a deregulatory assessment, which must include specified matters. This ensures that the authority gives proper consideration to various matters, including the views of those who may be affected by the byelaws, in order to determine whether there is a sufficient basis for making the byelaws and to avoid making inappropriate byelaws or byelaws that impose a disproportionate regulatory burden. The requirement to publish the deregulatory statement will reassure people who may be affected by the byelaws that these issues have been considered. The policy behind these provisions is to bring transparency and local accountability into the new decentralised regime.

Publication of proposals for a new byelaw

7.8 The Regulations require that, following consultation and assessment, the relevant authority may apply to the Secretary of State for approval of a scheme of the making of the byelaw which has been prepared in accordance with the requirements in Regulation 6. The Secretary of State must respond within 30 calendar days. If the Secretary of State gives leave for the proposed byelaw to be progressed, the authority must give notice of the proposed byelaw in one or more local newspapers circulating in the area to which the byelaw applies and on its website (if any). The authority must

state the period ("consultation period"), not less than 28 days, within which the public may inspect the draft byelaws and also publish an address to which representations on the byelaws can be made within this period.

7.9 Regulation 9 makes provision for an extensive consultation opportunity with the community on the proposed byelaws and is central to the policy objective of the byelaw making authority and community working together to create byelaws tailored to address local issues.

7.10 This Regulation also provides members of the public with the right to obtain copies of the proposed byelaws and the report, for a reasonable charge. This will allow effective engagement in the consultation process.

Consideration of representations to the new byelaw

7.11 Regulation 10 requires the authority to consider all representations received, including objections, before making any decision. It is for the byelaw-making authority to determine how they proceed with any representations they receive. The policy objective is to ensure local authorities consider the views of the community at large before deciding whether or not to make the proposed byelaws, with or without modification.

Making the Byelaw

7.12 Regulation 11 specifies that once the 28 days (or longer) period has expired, the authority then has 6 months to decide whether or not to make the byelaws (with or without modification). This 6 month period allows an adequate time for representations to be considered, for a council meeting to be arranged and a decision about whether to make the byelaws to be taken. In addition it prevents an unacceptable length of time elapsing between the consultation with the community about new byelaws and a decision being made about the byelaws. Therefore, if byelaws are made, it is likely that the conditions requiring those byelaws will still exist and the community will have a clear recollection of the consultation.

7.13 Where an authority decides to modify the proposed byelaws that they have already consulted on in a way which would substantially alter its effect, they must give notice of this on their website (if any) or in one or more local newspapers circulating in the area to which the byelaws, if made, will apply. At the same time the authority must give notice to previous consultees so they have an opportunity to comment on these changes. Where such a notice is published, the authority must decide whether or not to make the modified byelaws within the period of 6 months after the expiration of the period of consultation specified in the notice.

Publicity after making the byelaw

7.14 Regulation 12 specifies a wide duty on an authority to publicise the fact that new byelaws have been made. Signs will be placed near the area where the byelaws apply (except where this is not practicable, for example because the byelaws have effect throughout the authority's whole area) so that, as far as possible, people are made aware of the byelaws. For the same reason, the authority must also give notice

of the proposed byelaws on its website (if any) or in one or more local newspapers circulating in the area to which the byelaws, if made, will apply.

7.15 After making the byelaws, the authority must send copies of it to other authorities: a county council must send copies to district councils (if any) in their area and a district council must send copies to the county council (if any) for their area, but the district council need only send copies to a parish council or chairman of a parish meeting in their district if the byelaws apply to the parish area. A London borough council shall also send a copy of its byelaws to the proper officer of every parish council where the byelaws apply.

7.16 Where an authority is revoking a byelaw and doing nothing else, consistent with providing a streamlined revocation procedure for byelaws which have become spent, obsolete or unnecessary, the authority will still need to consult with the community and publicise the revocation afterwards. However, the authority will not be required to undertake Regulation 6 (3) and 6(4) and Regulation 7.

8. Consultation outcome

8.1 The discussion paper *Local Authority Byelaws in England: Procedures for making, confirming and enforcing byelaws*, issued by the (then) Office of the Deputy Prime Minister in April 2006, emphasised that the vast majority of byelaws deal with truly local matters in local spaces such as parks, beaches, walkways and public places such as libraries and museums. The document proposed that continuing direct central Government involvement in such matters was unnecessarily bureaucratic and proposed that the role of central Government should in future be confined to publishing good practice guidance and model byelaws to assist authorities in their byelaw-making role.

8.2 The April 2006 discussion paper established a clear consensus that byelaws currently confirmed by the Secretary of State for the Department for Communities and Local Government should no longer require confirmation by central Government before they can be enacted and enforced. It also established the view that there was no need for central Government to take a direct role in many of the other byelaws which are made by authorities and which are confirmed by the Secretary of State of other Government departments.

8.3 The 2006 local government white paper ‘Strong and prosperous communities’ announced that in accordance with Government’s aim of placing decision making on local matters in the hands of authorities and local people, byelaws would be made easier to make, understand and enforce. The policy was reiterated in the 2008 local government white paper ‘Communities in control, *real people, real power’*. Parliament gave the Secretary of State powers to devolve the making and enforcement of certain byelaws to authorities in the Local Government and Public Involvement in Health Act 2007 (“the 2007 Act”)

8.4 The Department published, on 27 August 2008, its consultation paper *'Making and Enforcing Byelaws'*[1]. The consultation invited responses on proposals to implement the byelaws provisions contained in the 2007 Act to make byelaws easier to make, understand and enforce. The consultation ran for twelve weeks until 20 November 2008.

8.5 The consultation sought views on developing a transparent and locally accountable procedure for enabling certain authorities to make certain byelaws without the need for confirmation by the Secretary of State.

8.6 533 responses were received from a wide range of organisations and individuals.

8.7 The consultation showed the majority of the respondents supported the proposals on the new procedure for making byelaws. The only exception to this support for the proposals concerned the minimum consultation period during the where the consultation document proposed a 21 day limit.

8.8 Some authorities, mainly parish councils were also concerned that the consultation process was burdensome and some authorities qualified their support for the list of byelaws proposed to be devolved to local authorities, provided this list was regularly reviewed with a view to devolving greater number of byelaws.

8.9 As a result of the consultation responses, the Regulations, subject to Parliamentary approval, specify that the minimum consultation period for local authorities proposing to make byelaws is 28 days rather than the suggested 21 days in the consultation.

8.10 A full detailed analysis of the summary of responses[2] was published alongside the Government response.

8.11 This Government has continued to progress this issue, including announcing these proposals in August 2010 on the Government's website[3]

9. Guidance

9.1 Section 237D of the Act requires authorities which makes byelaws of a class prescribed by regulations under the alternative procedure to have regard to any guidance issued by the Secretary of State. While there is no guidance being issued to accompany the Regulations, the Secretary of State may issue guidance on the Alternative Procedure Regulations at a later date

[1] This document is available on the Department's website at http://webarchive.nationalarchives.gov.uk/20120919132719/http:/www.communities.gov.uk/documents/localgovernment/pdf/byelaws.pdf

[2] This document is available on the Department's website at http://www.communities.gov.uk/publications/localgovernment/byelawssummaryresponses?view=Standard

[3] https://www.gov.uk/government/news/bypass-whitehall-and-scrap-outdated-byelaws

9.2 Department officials will write to every principal and parish council advising them of the introduction of the alternative procedure, highlighting when it will be available to local authorities.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible. The Regulations have no effect upon the range of byelaws that local authorities can make, rather they change the process for making them.

10.3 An impact assessment has not been prepared for this instrument. As stated in the impact assessment for the 2007 Act, all provisions in that Act went through a process of screening or an initial impact assessment so that a clear understanding of the possible impacts of the measures could be obtained. The byelaws provisions were deemed to have negligible impact and therefore required no further analysis. By 'negligible' the Department means that the introduction of the legislation will have no significant material difference in terms of resource.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Department maintains a continuous dialogue with key stakeholders, the Local Government Association and the National Association of Local Councils. Other than responding to issues which may arise through our constant contact with partners and other than any future ad hoc review of expanding the class of byelaws to which the Regulations apply, the Department does not intend to revisit these Regulations.

13. Contact

13.1 Stephen McAllister and Vanita Patel at the Department for Communities and Local Government, Tel: 0303 444 2582/2581 email: stephen.mcallister@communities.gsi.gov.uk, vanita.patel@communities.gsi.gov.uk can answer any queries regarding the instrument.