EXPLANATORY MEMORANDUM TO

THE LOCAL AUTHORITIES (PUBLIC HEALTH FUNCTIONS AND ENTRY TO PREMISES BY LOCAL HEALTHWATCH REPRESENTATIVES) AND LOCAL AUTHORITY (PUBLIC HEALTH, HEALTH AND WELLBEING BOARDS AND HEALTH SCRUTINY) (AMENDMENT) REGULATIONS 2015

2015 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends Part 2 of the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013 (S.I. 2013/351) to require provision of five health and development assessment and reviews as set out in the Department's *Healthy Child Programme*[1] (HCP) to be offered to pregnant mothers and children between the ages of 0 – 5.

2.2 The instrument also adjusts the 12 month exemption period from the Community Right to Challenge for health visiting, Family Nurse Partnership and other child health services for children aged under 5 years so that it begins on 1st October 2015, to reflect the changed date of taking on of responsibility for commissioning of these public health services by local authorities (LAs) from 1st April 2015 to 1st October 2015. The period of exemption is to be amended in the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 (S.I. 2013/218).

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

3.1 None.

4. Legislative Context

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4.1 The Health and Social Care Act 2012 ("the 2012 Act") gave upper tier and unitary local authorities ("LA"s) a duty to take appropriate steps to improve the health of their populations (section 2B(1) of the National Health Service Act 2006 (the 2006 Act)) and other public health functions. The Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013, S.I. 2013/351 ("the principal Regulations") set out steps that LAs were obliged to take in carrying out their health improvement functions and

[1] Healthy Child Programme

certain steps they must take in the exercise of the Secretary of State's public health functions. This instrument amends the principal Regulations by prescribing steps that LAs must take to provide or secure the provision of universal health visitor reviews, to carry out a policy intention to ensure that elements of the HCP, led by health visitors, should be provided in a universal fashion.

Community Right to Challenge

4.2 Sections 81 to 86 of the Localism Act 2011 make provision for a "right to challenge", under which LAs have a duty to consider expressions of interest in providing or assisting in the provision of LA services. Such expressions may be made by voluntary and community bodies, and certain other persons. The duty applies to all services provided by or on behalf of an authority, unless regulations under section 81(5) exclude that service. The relevant regulations are the Community Right to Challenge (Expressions of Interest and Excluded Services) (England). Regulations 2012 (S.I. 2012/13/13) ("the 2012 Regulations"). This instrument was amended by the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013, S.I. 2013/218 ("the 2013 Regulations"), to add an exemption for health visiting and other child health services for children under 5 years for the period from 1st April 2015 to 1st April 2016.

4.3 Plans to transfer responsibility for the commissioning of public health services for children aged 0-5 on 1st April 2015 were changed, and a later date of transfer of 1st October 2015 was agreed. As a consequence the exemption period also provided for in the 2013 Regulations, which further amended the 2012 Regulations, would only cover 6 months. In line with the original Government intention to exempt for one year, this instrument amends the exemption period by amending the 2013 Regulations.

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 for Health Dr Daniel Poulter has made the following statement regarding Human Rights:

'In my view the provisions of the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) and Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) (Amendment) Regulations 2015 are compatible with the Convention rights'.

7. Policy Background

- What is being done and why

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7.1 The Government is, '*committed to improving the health outcomes of our children and young people so that they become amongst the best in the world*'[2]. As part of delivering this vision, responsibility for commissioning 0-5 children's public health services is transferring from NHS England to Local Government on 1 October 2015. This joins up the commissioning for children under 5 with the commissioning for 5-19 year olds and other public health functions.

7.2 *Healthy Lives, Healthy People: update and way forward*[3] sets out the Government's intention to transfer responsibility for public health and power to the local level, allowing local public health services to be shaped to meet local needs, but also set out the intention to prescribe certain steps that must be taken by LAs where a greater degree of uniformity of delivery (or "universality") may be required.

7.3 A number of these steps were mandated in the principal Regulations but it was agreed that legislation to prescribe steps in relation to elements of the HCP would not be put forward to come into force before 2015, to provide NHS England with sufficient time to deliver on the Government's commitment to raise the number of health visitors and support improved stability of the system before the transfer of responsibility for services.

7.4 The specific objective behind prescribing steps in relation to certain universal elements of the HCP is to ensure the ongoing provision of a universal health visiting service that is essential to supporting the health and well-being of families and children at critical stages of development and also contributes to the wider benefit of society because it:

- offers the opportunity to reduce health and social care needs later in life;
- contributes to the reduction of disease e.g. through reviewing immunisation status; and,
- allows for the collection of data at a national level that enables measurement against elements of the Public Health Outcomes Framework (PHOF).

7.5 It also sends a clear signal to health visitors, family nurses and local authorities of the Government's ongoing commitment to universal public health support for pregnant women, children and families.

7.6 The HCP is the clinical and public health early intervention and prevention programme for children and families from pregnancy to 5

[2] Better Health Outcomes for Children and Young People: Our Pledge
[3] Healthy Lives, Healthy People: update and way forward

years of age, published by the Department of Health (DH). There is strong evidence supporting delivery of all aspects of the HCP.

7.7 It is not intended to suggest that the full scope of the HCP is covered simply by the 5 reviews mentioned in the draft Regulations. Instead, they provide a 'gateway' to identify additional needs that the HCP guidance also addresses. The HCP plays a key role in improving the health and wellbeing of children as part of an integrated approach to supporting children and families. Mandating only some elements of the HCP allows LAs autonomy to determine delivery of the remainder. To demonstrate this the **Health Visiting Service** as described in the HCP comprises four tiers, which assess and respond to children's and families' needs:

- **Community Services** -linking families and resources and building community capacity.
- **Universal Services** -primary prevention services and early intervention provided for all families with children aged 0-5 as per the HCP universal schedule of visits assessments and development reviews.
- **Universal Plus Services** -time limited support on specific issues offered to families with children aged 0-5 where there has been an assessed or expressed need for more targeted support.
- **Universal Partnership Plus Services** -offered to families with children aged 0-5 where there is a need for ongoing support and interagency partnership working to help families with continuing complex needs.

7.8 LAs will be expected to take a reasonable approach to continuous improvement in participation in the 5 mandated reviews from the point of transfer from NHS England on 1st October 2015.

7.9 The Family Nurse Partnership ("the FNP") is a licensed programme for first time mothers aged 19 and under, starting in early pregnancy and continuing until the child is 2. It involves more intense support on the emotional problems and behaviours which prevent some parents from giving their child the best start in life. The FNP programme complements the health visiting service but works independently. However, if the draft Regulations are approved by Parliament, the 5 mandated reviews will be undertaken by a family nurse where a family is under the care of the FNP programme. In some circumstances the family nurse will undertake the 2-2.5 year mandated review in order to maintain continuity with the family. Similarly, if the mother becomes pregnant with another child while under the care of the FNP programme, the family nurse delivering that programme will undertake the mandated reviews whether or not the pregnant mother and/or child following the birth is under the care of the FNP programme.

Community Right to Challenge

7.10 The Localism Act 2011 makes provision for a Community Right to Challenge ('the Right') and associated regulations. This involves a right for certain types of body to express an interest in running certain services which the local authority has responsibility for. The authority must consider and respond to this expression of interest, rejecting any only on grounds specified in regulations. If an expression of interest is accepted, the authority must carry out a procurement exercise for the service.

7.11 DH responded to a Department of Communities and Local Government (DCLG) consultation that asked about extending the Community Right to Challenge to allow services of other bodies carrying out functions of a public nature to be subject to this challenge. DH raised concerns that LAs could potentially have to consider an expression of interest under the Right before they had the opportunity to take stock of their new responsibilities. This led to negotiations resulting amongst other things in a time limited exemption for certain health visiting and related services for children aged under five. A time-limited exemption was agreed from the Community Right to Challenge for 12 months from the date of transfer of the services.

- Consolidation

7.12 These Regulations amend the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013 and the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013. There are no current plans to consolidate either sets of Regulations. In each case, the original Regulations are recent legislation, dating from 2013. Neither are there any current plans to consolidate the Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012.

8. Consultation outcome

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8.1 On 30th November 2010, the Government published the White Paper *Healthy Lives, Healthy People: our strategy for public health in England*[4] which set out a bold vision for a reformed public health system. Alongside this, DH published the following consultation documents, which provided more detail on the funding and commissioning routes for public health services, and proposed how DH might create a public health outcomes framework (PHOF):

[4] Healthy Lives, Healthy People: our strategy for public health in England

- *Heathy Lives, Healthy People: consultation on the funding and commissioning routes for public health*[5]
- *Healthy Lives, Healthy People: transparency in outcomes, proposals for a public health outcomes framework*[6]

8.2 DH wanted to ensure extensive engagement for public health and involved as wide an audience as possible. Therefore, the consultation was carried out at both the national and local level.

8.3 DH were directly involved in over 60 consultation events, with groups including the Department's Social Partnership Forum, the National Stakeholder Forum, Directors of Public Health, Local Government Group, the Public Health Taskforce, British Medical Association, Faculty of Public Health and other key partners. Regional Directors of Public Health and their teams led on engagement with local stakeholders. DH received feedback from stakeholders that the localised approach combined with key national events did mean that key partners felt fully engaged.

8.4 Over 2000 responses to the consultation documents were received, from a wide spectrum of individuals and organisations, including patients and the public, clinicians and NHS organisations, local authorities, pharmacists, independent providers of health care and services, professional bodies including Royal Colleges, and trade unions. Overall, there were clear endorsements from many organisations and individuals, as well as from views expressed at the consultation events, welcoming the recognition of the importance of public health, and the direction of travel.

8.5 Following the consultation, *Healthy Lives, Healthy People: Update and Way Forward set* out the Government's intention to prescribe certain services that must be commissioned or provided, including certain universal elements of the HCP that this instrument seeks to mandate. Respondents were generally supportive of the proposal that LAs should commission public health services for 5-19s. However, a number of responses commented that having different commissioning routes for children's public health services from pregnancy 0-5 and 5-19 at the outset could lead to fragmentation. Subject to Parliamentary approval, these Regulations would allay that concern.

8.6 In preparation for transferring responsibility to LAs for the universal health visitor reviews set out in the draft Regulations, which formed part of the formal consultation, more recent informal consultation has taken place. DH held workshops and linked up with key stakeholders including the Local Government Association, Public Health England and NHS England to deliver a series of events to raise awareness at a

[5] Healthy Lives, Healthy People: consultation on the funding and commissioning routes for public health
[6] Healthy Lives, Healthy People: transparency in outcomes, proposals for a public health outcomes framework

local level of the transfer of responsibility for 0-5 public health services for children. These events covered all aspects of the transfer including prescribing steps in secondary legislation, funding and contracting. Feedback received from LAs, local NHS organisations and health visitors attending was positive with wide support for the transfer and the benefits anticipated by joining up commissioning of services with the HCP for children aged 5-19 already commissioned by LAs.

Community Right to Challenge

8.7 DCLG's consultation document published on 4 February 2011 sought views on the proposed right. The consultation ran until May 2011. The consultation document also sought views on whether any services should be excluded from the new power and proposed excluding services that are jointly commissioned between LAs and the NHS. A total of 206 responses were received. A variety of services were proposed for exclusion, although none were supported by a majority of respondents. Additionally, as part of the internal government clearance process, DH raised concerns that LAs taking responsibility for services previously commissioned by the NHS could potentially have to consider an expression of interest under the right before they had the opportunity to take stock of their new responsibilities and contracts. This led to negotiations resulting in agreement to time limited exemptions from the Community Right to Challenge, amongst others, for services transferring in 2015 (Health Visiting and certain other services for children aged 0-5).

9. Guidance

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9.1 DH has published guidance as set out in the HCP and the recommended standards for delivery. Further guidance to supplement the proposed Regulations is planned.

Community Right to Challenge

9.2 DCLG, as the lead Department for the Right, published *Community Right to Challenge Statutory Guidance*[7] in June 2012 and DCLG publicised it through the Permanent Secretary's newsletter to LAs as well as on the Local Government Association's Knowledge Hub.

9.3 Revised Guidance to include the proposed Regulations will be published to coincide with this statutory instrument being laid. This will be advertised and communicated as previously, by DCLG.

10. Impact

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

[7] Community Right to Challenge Statutory Guidance

10.2 The impact on the public sector is minor. Health professionals, in particular health visitors, already provide a range of services to families and children 0-5. There is no change in the provision of those services, only the commissioning which is currently being undertaken by NHS England.

10.3 An *Impact Assessment*[8] is attached to this memorandum and will be published alongside the Explanatory Memorandum.

10.4 The Government has committed to fund LAs for the new commissioning responsibilities that will transfer to them on 1st October 2015, of which the mandated steps in these draft Regulations form a part. The exact costs of delivering the reviews is unknown, as it will depend on the level of delivery at the point of transfer. However, the Impact Assessment includes an illustrative amount based on an assumption that 100% of the services proposed for mandation were being delivered. The illustrated example demonstrates that the funds being transferred are more than sufficient to enable LAs to comply with the obligations set out in the draft Regulations.

10.5 Initial allocations were published on 11 December 2014 in a *Baseline Agreement Exercise*[9]. Final LA funding allocations for commissioning 0 to 5 children's public health, for the remainder of the financial year from 1st October 2016, are expected to be confirmed by early February 2015.

Community Right to Challenge

10.6 The impact on the public sector is minimal. The original *DCLG Impact Assessment*[10] on the impact of the Community Right to Challenge estimated that there would be between 298 and 318 additional procurement exercises per year across local government as a whole resulting from the Community Right to Challenge – about one per authority. The actual take up has been lower – around 50 challenges to date that DCLG knows of. The addition of health visiting services from 2016 is unlikely to increase this number significantly, given the breadth of LA responsibilities. The impact assessment also states that the long term impact of the policy will be positive as a result of lower service delivery costs.

10.7 The impact on business, charities or voluntary organisations is minimal. These provisions create no new burdens on them. Charities and voluntary organisations will be able, if they choose to do so, to express an interest in bidding to run health visiting services for children under 5 from October 2016.

[8] DH Impact Assessment
[9] Baseline Agreement Exercise
[10] DCLG Impact Assessment

10.8 A further impact assessment for the provisions regarding the change to the dates of the time-limited exemption in this draft statutory instrument was not carried out for the following reasons:

- As this instrument provides for amendment of the period of the time- limited exemption for the purpose of satisfying the original policy intention of a 12 month exemption of these services from the Community Right to Challenge, DCLG does not view this instrument as creating additional impacts. There are no additional costs imposed on service providers. There will be no new or direct impact on providers currently delivering these services. It is recognised that the potential benefit from delaying the Community Right to Challenge, such as increased innovation or efficiency, may be foregone for the 12 month exemption period, although these potential lost benefits have not been quantified by DH or DCLG.
- The primary impact is on the LA through assessing challenges and undertaking procurement exercises once the time-limited exemptions are over. LAs have already put in place mechanisms for responding to Expressions of Interest under the Community Right to Challenge so there will not be any set up costs.
- There is likely to be no additional cost imposed on the NHS, or providers who wish to make the challenge.

10.9 New burdens payments have been released to LAs to cover the costs of assessing Expressions of Interest and additional procurement exercises under the Community Right to Challenge. DCLG have also made funding available for providers to assist in any costs of preparing and making a challenge.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

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12.1 Subject to Parliamentary approval, the Regulations will provide that a review may be carried out of the new regulations 5A and 5B, and, if carried out, a report of the review must be published by 30th March 2017. The draft Regulations confirm that new regulations 5A and 5B will cease to have effect on 31st March 2017. However, if such a review recommends that new regulations 5A and 5B should continue to have effect, then the principal Regulations will need to be be amended accordingly.

12.2 A report of any review will not be published before 12 months from the time responsibility for commissioning of universal health visitor reviews is transferred. This is to allow the new requirements to settle.

12.3 Work is ongoing to agree what information will be available to LAs covering performance levels of the delivery of the universal elements of the Healthy Child Programme at the point of transfer on 1st October 2015. We are clear that any requirement of Local Government will be no greater than the requirements that apply to NHS England at the point of transfer.

12.4 On the services that LAs are already required to provide under the principal Regulations it is still too early to see an improvement in Public Health Outcome Framework indicators.

13. Contact

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13.1 Gillian Donachie at the Department of Health Tel: 0113 2546429 or email: Gillian.Donachie@dh.gsi.gov.uk can answer any queries regarding the instrument.

Community Right to Challenge

13.2 Matthew West at the Department for Communities and Local Government, emailMatthew.West@communities.gsi.gov.uk can answer any queries regarding the Community Right to Challenge.