EXPLANATORY MEMORANDUM TO

THE LOCAL AUTHORITIES (FUNCTIONS AND RESPONSIBILITIES) (ENGLAND) (AMENDMENT No. 3) REGULATIONS 2008

2008 No. 2787

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. Description

The Regulations amend the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (S.I. 2000/2853) ("the 2000 Regulations") for the purposes of certain local authority functions under a number of enactments.

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

The Department for Communities and Local Government will be consolidating the amendments that have been made to the 2000 Regulations into a new set of Regulations to come into force in mid-2009.

4. Legislative Background

4.1 The 2000 Regulations, which have been amended in relevant respects by S.I. 2008/516, were made under sections 13 and 105 of the Local Government Act 2000 ("the 2000 Act"). Under section 13 of the 2000 Act, a function of a local authority which is the responsibility of an executive of the local authority under executive arrangements is the responsibility of the executive subject to any provision made by the 2000 Act or by any enactment passed or made after 28th July 2000 or if the relevant function is specified in regulations made under that section. The current regulations are the 2000 Regulations, as amended.

4.2 The 2000 Regulations may be used to specify a function of a local authority to be a function─

(a) which is not to be the responsibility of an authority's executive;

(b) which may be (but need not be) the responsibility of such an executive; or

(c) which─

(i) to the extent provided is to be the responsibility of such an executive; and

(ii) to the extent provided is not to be the responsibility of such an executive.

4.3 The functions which are the subject of these Regulations are those relating to—

- the registration of common land and town or village greens under Part 1 of the Commons Act 2006 ("the 2006 Act") and under the Commons Registration (England) Regulations 2008[1];

- the power to apply for an enforcement order against unlawful works on common land under section 41 of the 2006 Act;

- the power to protect unclaimed registered common land and unclaimed town or village greens ("unclaimed land") against unlawful interference under section 45(2)(a) of the 2006 Act;

- the power to institute proceedings for offences in respect of such unclaimed land under section 45(2)(b) of the 2006 Act; and

- changing governance arrangements under Part 2 of the 2000 Act.

4.4 The 2006 Act has been partially brought into force. Part 1 generally (functions of commons registration authorities) has been brought into force in relation to seven pilot registration authority areas[2]. Certain provisions in Part 1, notably section 15 (registration of town or village greens), and sections 41 and 45, have been brought into force throughout England. The effect of these Regulations is as follows.

4.5 Functions of commons registration authorities under Part 1 of the 2006 Act are not to be the responsibility of an authority's executive. These functions are inserted as item 72 of paragraph B (Licensing and registration functions) of Schedule 1 (Functions not to be the responsibility of an authority's executive) to the 2000 Regulations by regulation 4 of these Regulations. Certain similar existing functions of commons registration authorities, under regulations made under the Commons Registration Act 1965, are already specified in items 37 and 38 of paragraph B of Schedule 1 to the 2000 Regulations.[3]

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[1] S.I. 2008/1961.

[2] Except section 25: the Commons Act 2006 (Commencement No. 4 and Savings) (England) Order 2008 (SI 2008/1960). The pilot registration authorities are specified in the Schedule to the Order. They are Blackburn with Darwen Borough Council, Cornwall County Council, Devon County Council, County of Herefordshire District Council, Herefordshire Country Council, Kent Council and Lancashire County Council.

[3] The entries in Schedule 1 to the 2000 Regulations relating to functions under the Commons Registration Act 1965 remain relevant in relation to the functions of commons registration authorities outside the pilot areas.

4.6 The functions of applying for an enforcement order in respect of unlawful works on common land carried out in contravention of section 38 of the Commons Act 2006, of protecting unclaimed land against unlawful interference and of instituting proceedings for offences in respect of unclaimed land are not to be the responsibility of the executive. These functions are inserted as items 51 to 53 of paragraph I (Miscellaneous functions) of Schedule 1 (Functions not to be the responsibility of the authority's executive) to the 2000 Regulations by regulation 6 of these Regulations.

4.7 Paragraph EA of Schedule 1 to the 2000 Regulations was inserted by S.I. 2008/516 to provide for functions relating to changing governance arrangements under Part 2 of the 2000 Act not to be the responsibility of the executive. However, section 48(6) of the 2000 Act provides that functions conferred on a local authority by virtue of Part 2 of the 2000 Act are not to be the responsibility of an executive of the authority under executive arrangements. There was therefore no need to specify these functions in the 2000 Regulations. The position is rectified by regulations 3, 5 and 7 of these Regulations which omit these functions from regulation 2 of, and Schedule 1 to, the 2000 Regulations.

4.8 The Regulations come into force on 28th November 2008.

5. Territorial Extent and Application

This instrument applies to local authorities in England only. However, certain functions of commons registration authorities under Part 1 of the 2006 Act have been brought into force only in relation to pilot areas (see paragraph 4.4 above), and certain amendments made to the 2000 Regulations by these Regulations will therefore only apply to the pilot registration authorities for the time being.

6. European Convention on Human Rights

As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The policy relating to the allocation of responsibility for functions in an authority operating executive arrangements is that a function should not be the responsibility of the authority's executive, if it involves:

- constitutional and quasi-legislative matters;
- the determination of an application for a licence, approval, consent permission or registration; or
- the direct regulation of a person together with any related enforcement action (other than cases where there is only limited discretion in the discharge of the function).

The Commons Act 2006 and the Commons Registration (England) Regulations 2008

7.2 The functions conferred on local authorities under the Commons Act 2006 and the Commons Registration (England) Regulations 2008 relate to the registration of common land and town and village greens and enforcement action taken in relation to such land. These Regulations therefore specify these functions as functions which are not to be the responsibility of the executive of an authority.

Section 2 of the 2000 Act – Governance Arrangements

7.3 As mentioned above, section 48(6) of the 2000 Act already provides for functions relating to changing governance arrangements under Part 2 of that Act not to be the responsibility of the executive of an authority. Amendments to the 2000 Regulations subsequently made by SI 2008/516 to specify those functions as functions which are not to be the responsibility of the executive were therefore unnecessary. In light of the above, regulations 3, 5 and 7 of the Regulations omit reference to these functions from the 2000 Regulations.

Consultation

7.4 The Department for Environment Food and Rural Affairs (Defra), as the Department with policy responsibility for the 2006 Act and associated regulations, has consulted the Local Government Association, the Commons and Greens Registration and Management Association (CGRMA, representing commons registration authorities, now the Association of Commons Registration Authorities) and those commons registration authorities which are participating in its pilot implementation of Part 1 of the 2006 Act on the proposed allocation of functions within local authorities.

7.5 The consensus among participating pilot commons registration authorities is that the arrangements prescribed by these Regulations are consistent with existing arrangements in relation to similar functions undertaken under the Commons Registration Act 1965 (which remains in force outside the pilot areas), and will enable those authorities to continue with present arrangements for the discharge of commons registration functions. Authorities have expressed a wish to be able to delegate functions under Part 1 of the 2006 Act and the associated regulations where appropriate, as they are able to do in relation to functions under the Commons Registration Act 1965. The Regulations enable such delegation, as the amendments do not prevent section 101 of the Local Government Act 1972 from applying in relation to commons registration functions.

Guidance

7.6 Guidance to participating pilot commons registration authorities on the arrangements in the 2000 Regulations is included in Defra's *Guidance to*

Commons Registration Authorities in the pilot areas: the Commons Act 2006[4], and revised guidance will be issued in consequence of the publication of these Regulations. An update email will also be sent to all commons registration authorities.

8. Impact

8.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. These Regulations have no impact on the public sector.

8.2 This instrument has no impact on small businesses.

9. Contact

Karl Holden at the Department for Communities and Local Government Tel: 020 7944 5962 or e-mail: karl.holden@communities.gsi.gov.uk can answer any queries regarding the instrument.

[4] www.defra.gov.uk/wildlife-countryside/issues/common/registration/index.htm.