

EXPLANATORY MEMORANDUM TO
THE LOCAL GOVERNMENT (STRUCTURAL CHANGES)
(TRANSITIONAL ARRANGEMENTS) REGULATIONS 2008

2008 No. 2113

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

- 2.1. The Local Government (Structural Changes) (Transitional Arrangements) Regulations 2008 (“the Transitional Regulations”) make provision for the transition to a single tier of local government in relation to areas in England for which an order has been made under section 7 of the Local Government and Public Involvement in Health Act 2007 (“the 2007 Act”). There is a single tier of local government where there is a sole principal authority for the area (a “single tier council”).
- 2.2. An order which establishes a single tier council under section 7 of the 2007 Act (a “section 7 order”) will provide for a specified reorganisation date on which one or more of the existing councils is abolished and their functions transferred to the new single tier council. These Regulations make provision about the functions of a council which will be abolished on the reorganisation date (a “predecessor council”) and of the future single tier council (a “successor council”) during the transitional period after the making of a section 7 order but before the reorganisation date. A successor council may be an existing district or county council or a newly constituted body which does not become a local authority until the reorganisation date (a “shadow council”).
- 2.3. The Regulations provide, in particular, that functions of a predecessor council relating to the creation of new parishes and parish councils; the preparation of local area agreements (“LAAs”), and assessments of relevant needs will be exercised during the transitional period by the successor council. They also confer powers on a successor council that is a shadow council to enable it to appoint a returning officer and proper officer for the purpose of filling casual vacancies of its councillors and for the purposes of elections of parish councillors. They disapply requirements for predecessor councils to make changes to their executive arrangements or to hold elections of councillors to fill casual vacancies in the period prior to their abolition. They also provide for how functions to be discharged by virtue of the Regulations should be exercised.

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

3.1. None

4. Legislative Background

- 4.1. Part 1 of the 2007 Act provides for the making of local government structural and boundary changes in England. So far as is relevant to the Transitional Regulations, it enables provision to be made by a section 7 order for the restructuring of an area in which there are two tiers of local government (a county council and district councils) into a single tier of local government (a county council or a district council). Section 1(2) provides, for the purposes of Chapter 1 (structural and boundary change), that there is ‘a single tier of local government’ for an area if ‘there is a county council and no district councils for that area or there is a district council and no county council for that area’.
- 4.2. Seven section 7 orders have been made to date, as follows:
- 4.2.1. Five orders providing for the existing county council for an area to be established as a single tier council (Cornwall (SI 2008/491); Durham (SI 2008/493); Northumberland (SI 2008/494); Shropshire (SI 2008/492); and Wiltshire (SI 2008/490)).
- 4.2.2. Two further orders, one providing for the establishment of two new single tier district councils for Cheshire (SI 2008/634); and one providing for the existing Bedford Borough Council to be established as a single tier council and for a new single tier council for Central Bedfordshire (SI 2008/907)).
- 4.3. Further details about the section 7 orders made to date can be found in the Explanatory Memoranda which were laid alongside the draft orders¹. In this document ‘single tier council(s)’ has the same meaning as ‘unitary council(s)’ in the Explanatory Memoranda previously laid alongside those orders. The term “single tier council” is the term used in the regulations to describe what is commonly known as a unitary council, and reflects the 2007 Act’s description of unitary local government as “a single tier of local government” (2007 Act, section 1(2)).
- 4.4. Section 14 of the 2007 Act gives the Secretary of State power, by regulations of general application, to make incidental, consequential, transitional and supplementary provision for the purposes or in consequence of any structural change orders, or for giving full effect to such orders. Section 14(2) provides for subsection 14(1) to be read with section 15 of the 2007 Act. Section 15 provides that references to “incidental, consequential, transitional or supplementary provision” include, in particular, provisions for the transfer of

¹ The Explanatory Memorandum for the five county Orders can be found at: http://www.opsi.gov.uk/si/si2008/draft/em/ukdsiem_9780110808154_en.pdf. The Memorandum for Cheshire is at http://www.opsi.gov.uk/si/si2008/em/uksiem_20080634_en.pdf, and for Bedfordshire at http://www.opsi.gov.uk/si/si2008/em/uksiem_20080907_en.pdf

functions from a local authority for an area to another local authority whose area consists of or includes the whole or part of that area and for treating any body to whom a transfer is made for some or all purposes as the same person in law as the body from whom the transfer is made. Section 15(2)(a) provides that regulations under section 14 may modify, exclude or apply (with or without modifications) any enactment. The 2007 Act also provides that regulations made under that Act may make different provision for different cases (section 240(10)).

- 4.5. The Transitional Regulations are made under section 14 (to be read with section 15) and section 240(10) of the 2007 Act. Their purpose is to make provision about the functions of predecessor and successor councils during the transitional period after the making of a structural change order (and after the coming into force of the Transitional Regulations, if that date is later) but before the reorganisation date.

5. Territorial Extent and Application

- 5.1. This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

The Transitional Regulations

- 7.1. Between February and March 2008, seven orders under section 7 of the 2007 Act came into force, implementing from 1st April 2009 a single tier of local government in the county areas of Bedfordshire, Cheshire, Cornwall, Durham, Northumberland, Shropshire and Wiltshire. As set out at paragraph 2.2 above, a successor council which will become a single tier council on the reorganisation date may be either an existing district or county council or a newly constituted shadow council. As the Explanatory Memoranda to these orders explained, they also made provision for arrangements affecting the implementation of this structural change. This included making provision about the executive arrangements of the successor councils (i.e. who has responsibilities for implementation of the structural change by that council), and as to the joint teams of council officers supporting these executives.
- 7.2. The Transitional Regulations are of general application, applying where a section 7 order is made. The Government's intention in making these Regulations is to ensure that during the "transitional period" (the period beginning with the date on which these Regulations come into force, or, if later, the date on which a section 7 order implementing a structural change is made, and ending immediately before the reorganisation date), the successor councils are able to undertake specific functions, and have powers in relation to the specified electoral and governance matters. They further provide for

anything done by or in relation to a predecessor council relating to functions which are to be exercised by a successor council by virtue of these Regulations, to be treated as done by or in relation to the successor council.

Timing of Regulations

- 7.3. Following discussions with the successor councils in each area, it has been agreed that two sets of transitional regulations will be made. This first set deals with the way in which the following issues are to be dealt with during the transitional period:
- The creation of new parishes and parish councils in areas undergoing reorganisation;
 - The preparation of LAAs and joint strategic needs assessments;
 - The administration of elections to fill casual vacancies in predecessor councils, and the appointment of returning officers for the purposes of parish council elections and elections to fill casual vacancies in shadow councils.

They also disapply requirements in the 2007 Act for predecessor councils to change their executive arrangements and they provide for how functions under the regulations are to be exercised.

- 7.4. It is planned that a further set of transitional regulations will be laid before Parliament in the Autumn. This second set of Regulations is likely to include provision relating to town and country planning, housing, and education; and may also include transitional provision which extends beyond the reorganisation date.
- 7.5. The primary reason for this approach is to address the pressing need for the provisions relating to elections and governance to come into force. In particular, provision needs to be made for returning officers and proper officers in relation to the filling of casual vacancies for shadow councils, as there is at least one such vacancy which needs to be filled. In relation to community governance reviews, the Government considers it a priority that these provisions come into force, so that inappropriate decisions about new parishes and parish councils are not made by predecessor councils. It has been agreed with stakeholders that other transitional issues that need to be addressed in regulations may be dealt with later in the year without risk to the success of the implementation process.

Discussion and consultation with stakeholders

- 7.6. These regulations deal with those matters Government and its stakeholders, in particular councils affected by section 7 orders, consider need to be done in advance of the reorganisation date to facilitate the smooth transfer from two-tier to single tier local government. Therefore, the focus of the Department's consultative procedure in preparing these regulations has been to understand from affected local authorities and central government departments which functions should be exercised by the successor councils in advance of the reorganisation date, and how those functions should be exercised.

- 7.7. In August 2007, during the process of assessment of proposals, the Department published a discussion document, *Councils' Proposals for Unitary Local Government: An Approach to Implementation*² ("the Discussion Paper"). The Discussion Paper set out the Department's initial intentions as to the approach to be adopted for implementing any proposals for single tier local government. This document generally dealt with higher level issues than those addressed in these Regulations, but the section concerning LAAs (paragraphs 88-95 of the Discussion Paper) is relevant to regulations 11 and 12 of the Transitional Regulations. This section set out the Government's view that LAAs would need to be in place for the new single tier councils in time for the reorganisation date, and that predecessor councils should involve the future single tier councils in their LAAs before that date, and set out a number of options for how this might be achieved. The Discussion Paper was brought to the attention of the potentially affected councils, with the request that they involve their own local and regional stakeholders in its consideration, and was the starting point for the Government's discussion with authorities about the issues it covered, including LAAs.
- 7.8. Since the publication of the Discussion Paper, and in particular since the coming into force of the seven section 7 orders made to date, the electoral and governance issues addressed in these Regulations have been the subject of extensive discussions between the Department and the Joint Implementation Teams (JITs) for each area, formed of senior officers of the preparing and other affected authorities, and led by the Chief Executive of a proposing council.
- 7.9. Draft copies of these regulations have been circulated to lead officers of the successor councils at various points in the drafting process, who in turn cascaded them to their relevant colleagues (in particular Heads of Democratic Services). A number of comments were received. The majority of these related to minor drafting points, and are reflected in the regulations now laid before Parliament. The only two substantive policy issues on which comments were received were as follows, and have been reflected in the regulations as made:
- Shadow councils expressed concern that they would not be in a position to comply with the obligation in section 106 of the 2007 Act to have regard to a community strategy when preparing an LAA, as they are not required until the reorganisation date to have such a strategy (and the consultation requirements necessary to adopt a new strategy make it unfeasible to do so before the reorganisation date). Consequently, regulation 11(2)(c)(i) modifies that requirement so that shadow councils are required to have regard to the strategies prepared by their predecessor councils.
 - Officers in Cheshire East and Cheshire West & Chester expressed concerns in relation to regulation 14(1) that they may have difficulty in

² <http://www.communities.gov.uk/publications/localgovernment/unitarycouncilsimplementation>

appointing a returning officer in the near future, since they have not yet appointed any officers who could fulfil this role. As recently established shadow councils with no officers of their own, these authorities are still in the process of appointing their senior officers. They were therefore concerned that they would not have a suitable officer in post to be appointed as returning officer, or proper officer, at the point at which these Regulations come into force. Consequently, we have provided at 14(1)(b) that where the shadow council has not yet appointed a returning officer or proper officer, the returning officer appointed under the section 7 order for the first election to a shadow council will fulfil these roles.

Provisions of the Transitional Regulations

- 7.10. Regulation 3 of the Transitional Regulations provides for continuity in relation to any function which is to be exercised by a successor council by virtue of these regulations. Anything in the process of being done by or in relation to the predecessor council immediately before the transitional period can be continued by the successor council, and anything which was done by or in relation to the predecessor council has effect as if done by or in relation to the successor council. The policy intention is to ensure that the transition to single tier government is as seamless as possible.
- 7.11. Regulations 4 to 6 and the Schedule make provision about which part of a successor council is responsible for discharging functions which are to be exercised by it by virtue of these regulations
- 7.12. These provisions apply to a successor council if under the relevant section 7 order it is either a shadow council with an appointed or nominated executive (see regulation 4) or an existing council with an appointed or nominated executive committee known as an Implementation Executive (see regulation 5). A nominated or appointed shadow executive or Implementation Executive is established by the relevant section 7 order where elections have not yet been held to the successor council, or will not be held until after the reorganisation date.
- 7.13. Under section 13 of the Local Government Act 2000, functions will be the responsibility of an authority's executive unless otherwise specified. The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (S.I. 2000/2853) ("the 2000 Regulations") specify those functions which are not, or need not be, functions of an authority's executive.
- 7.14. The effect of regulations 4 to 6 and the Schedule is to modify the 2000 Regulations so that any function which is exercisable by a successor council under the Transitional Regulations is an executive function of the nominated or appointed shadow executive or Implementation Executive, even if it would otherwise have been a non-executive function.
- 7.15. The purpose of these modifications is to ensure that functions relating to the transition are discharged by the part of the council which is best able to

represent the interests of the future single tier council and its area. The section 7 orders establishing the future single tier councils provide for appointed or nominated executives or Implementation Executives until elections to the council take place and these executives therefore are still in place where it has been agreed that elections should not be held until after the reorganisation date (see the Explanatory Memoranda accompanying the section 7 orders made to date). The persons nominated or appointed to such a shadow executive or Implementation Executive represent all affected councils in the area, including those which are to be abolished on the reorganisation date.

- 7.16. Regulations 7 and 8 make provision to transfer the exercise of functions relating to community governance (in particular the establishment of new parishes and parish councils) from predecessor councils to successor councils.
- 7.17. If the process of local government reorganisation were to proceed without this provision, there exists the possibility that a predecessor district council could establish a new parish council without the input – or even the knowledge – of the successor council. The Government believes that this would not be consistent with either the process of reorganisation, or the potential ability of the new single tier council to realise its stated aims, particularly around neighbourhood empowerment. For instance, a new parish council established without the agreement of the successor council may not fit with the neighbourhood arrangements envisaged for the new council area as a whole, as set out in the successor council’s proposal for single tier status, to which they are required to have regard by the section 7 orders which established them. The Government also considers it imperative that those responsible for the establishment of the new single tier councils are able to influence the process of establishment of new parish councils, for example as to what property, if any, is transferred from the predecessor council to the new parish council.
- 7.18. Regulations 9 and 10 disapply in relation to predecessor councils paragraphs 3 and 4 of Schedule 4 to the 2007 Act and section 34 of the Local Government Act 2000, concerning resolutions and referenda about changes to the authority’s executive arrangements. These requirements are considered inappropriate to councils which will cease to exist shortly afterwards.
- 7.19. Regulation 11 makes provision for a successor council which is either a shadow council or an existing district council to be treated as a responsible local authority for the purposes of a Part 5 of the 2007 Act (in the context of LAAs, a “responsible local authority” means the local authority required under s.106 of the 2007 Act to prepare a draft of the LAA). A successor county council will already be a responsible local authority for these purposes. The effect of this is that the Secretary of State can direct such a council to prepare and submit an LAA to him in advance of the reorganisation date and that such a council must prepare and publish an assessment of relevant needs under that Part. A responsible local authority which is preparing an LAA is required by section 106(2)(c)(i) of the 2007 Act to have regard to its community strategy. As a shadow council is not required to have

such a strategy during the transitional period, it is instead required to have regard to the strategies prepared by its predecessor councils.

- 7.20. Regulation 11 makes provision for this by making it possible for the Secretary of State to issue a direction requiring an LAA or a joint strategic needs assessment to be prepared by the successor council during the transition period. The requirement in regulation 12(3) for successor councils to consult with a predecessor county council when preparing their assessment mirrors the existing consultation requirement for district councils in section 116(8)(c) of the 2007 Act.
- 7.21. Regulation 12 provides for a successor council which is a shadow council to be treated as a partner authority and a relevant district council in relation to the preparation or revision of an LAA or assessment of relevant needs by a predecessor council. The two areas in which the county councils will be abolished as a result of section 7 orders which have been made to date are Bedfordshire and Cheshire. Bedfordshire and Cheshire county councils have now submitted LAAs which took effect from the end of June 2008. If those councils decided to submit a revision proposal to the Secretary of State, they would first have to consult with their partner authorities under section 111 of the 2007 Act.
- 7.22. Regulation 13 disapplies the requirement for a predecessor council to hold a by-election where a casual vacancy in the office of a councillor arises within six months of the reorganisation date (when the predecessor council will be abolished). The Government considers that to fill such a vacancy would be counter-productive to the reorganisation process in that area in terms of the cost of holding such an election and the very short term of office available. This approach is consistent with section 89 of the LGA 1972, which disapplies the requirement for a by-election to be held within six months of the date on which a councillor would regularly have retired (but which is unlikely to apply to a councillor whose term of office comes to an end as a consequence of the council ceasing to exist). Most of the section 7 orders that have already been made contain a similar provision in relation to predecessor councils, but this is a general policy that we wish to apply in all areas, including areas subject to any future structural change orders.
- 7.23. Regulation 14(1) provides for a shadow council to appoint a returning officer and proper officer for the purpose of any election to fill a casual vacancy in the office of councillor. These provisions are necessary because a shadow council does not enjoy the full powers of local authority until it becomes a single tier council on the reorganisation date. However, as a shadow council may not yet have officers who can be appointed to those roles, regulation 14(1)(b) provides that if it has not made those appointments, the returning officer and proper officer shall be the person appointed in the relevant section 7 order as returning officer for the first election of councillors to that Council. The Government's expectation is that as soon as these councils have appointed officers of the council, a permanent returning officer and proper officer will be appointed.

- 7.24. Regulation 14(2) makes provision as to who will be the returning officer and proper officer for the purposes of the Local Elections (Parishes and Communities) (England and Wales) Rules 2006 for any parish council elections which are to be held after the reorganisation date, but in respect of which proceedings need to be taken before that date. The returning officer and proper officer for such an election would normally be appointed by the district council in whose area the parish is situated. Where that district council will be abolished on the reorganisation date, the administration of the election is likely to be smoother if administered by officers of the successor council throughout, rather than being administered by different officers before and after the reorganisation date.

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.
- 8.2 There will be no additional impact on the public sector above that already identified in the Impact Assessments accompanying the seven structural change orders providing for the creation of the nine new single tier councils, which were based on the figures provided by the local authorities in their proposals.

9 Contact

- 9.1 Terry Willows at Communities and Local Government, tel: 020 7944 4086 or email: terry.willows@communities.gsi.gov.uk, can answer any queries regarding the instrument.