

EXPLANATORY MEMORANDUM TO
THE BYELAWS (ALTERNATIVE PROCEDURE) (ENGLAND) REGULATIONS
2016

2016 No. 165

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 These Regulations prescribe classes of byelaws to which section 236 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 revocation of such byelaws. In particular the alternative procedure removes the requirement for byelaws to be confirmed by the Secretary of State before they come into force.
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 Section 236A of the Act (inserted by section 129 of the Local Government and Public Involvement in Health Act 2007) gives the Secretary of State the power to specify classes of byelaws to which section 236 does not apply and to specify an alternative procedure for such byelaws.
 - 4.4 Section 236B of the Act (inserted by section 134 of the Local Government and Public Involvement in Health Act 2007) gives an authority the power to revoke a byelaw made by it where the authority does not otherwise have such a power.

4.5 Section 273E of the Act requires an authority which makes a byelaw of a class prescribed by regulations using the alternative procedure to have regard to any guidance issued by the Secretary of State.

5. Territorial Extent and Application

5.1 This instrument applies to England only.

6. European Convention on Human Rights

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

“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

7.1 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 The Regulations do not give 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 Secretary of State, there is no requirement for subsequent confirmation by the Secretary of State – it will be a matter for the authority having taken account of any representations made about the proposed byelaw. The Secretary of State for Communities and Local Government is responsible for byelaws made by local authorities on Good Rule and Government¹.

7.3 Under the alternative procedure authorities will undertake a two stage process for byelaw preparation and consultation before advertising and making a new byelaw. 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, as currently happens.

Classes of byelaws

7.4 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.

¹ See section 235 of the Local Government Act 1972 and guidance published by DCLG on 18 September 2012 “Local Government Legislation: Byelaws” <https://www.gov.uk/local-government-legislation-byelaws>

Assessment and consultation under the new alternative procedure

7.5 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 such persons as it considers may be affected by the proposed byelaw – which may include persons who are not resident in the area of the authority. 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.

7.6 Regulation 5 requires the authority to carry out an assessment of need for the byelaws and prepare a deregulatory statement, 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 and whether the proposed byelaws increase regulation, 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.

Secretary of State consent

7.7 The Regulations put in place new arrangements for the revoking and making of byelaws. Under the new arrangements, certain byelaws are no longer confirmed by the Secretary of State but are instead revoked or made by authorities after consultation with those affected by the proposed byelaw and following a deregulatory assessment by the authority.

7.8 The new, decentralised, arrangements recognise that authorities are best placed to make the final decision on whether or not byelaws are appropriate in their area, and the deregulatory test ensures that byelaws are proportionate and do not have an unnecessary, excessive or disproportionate effect on individuals or businesses.

7.9 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 5. The Secretary of State must respond within 30 calendar days.

7.10 Where an authority submits a proposed byelaw together with a deregulatory statement recording the conclusions of the deregulatory assessment that it has undertaken in relation to the proposed byelaw to the Secretary of State, the Secretary of State may give leave for the authority to make the proposed byelaw, reserve judgement and give a substantive response at a later date, or refuse to give leave to the authority to make the byelaw.

Publication of proposals for a new byelaw

7.11 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, on its website (if it has one) and in such other manner as it sees fit. The authority must state the period (“consultation period”), of 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. The authority is free to state a longer consultation period, as byelaw proposals vary, some being more complex than others.

7.12 Regulation 8 makes provision for further consultation with those affected by the proposed byelaw and is central to the policy objective of the byelaw making authority and community working together to create byelaws tailored to address local issues.

7.13 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

7.14 Regulation 9 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 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

7.15 Regulation 10 specifies that once the 28 days (or longer) consultation period has expired, the authority then has 6 months to decide whether or not to make the byelaws (with or without minor 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 a new byelaw and a decision being made about the byelaw. Therefore, if a byelaw is made, it is likely that the conditions requiring that byelaw will still exist and the community will have a clear recollection of the consultation.

7.16 Where an authority decides that a more than minor modification is required to the byelaw than that authority is making a major modification and so essentially creating a new byelaw. Accordingly, if the authority decides that a major modification is required to the byelaw it must recommence the byelaw making process from the beginning.

Publicity after making the byelaw

7.17 Regulation 12 imposes a duty on an authority to publicise the fact that a new byelaw has been made. Signs will be placed near the area where the byelaw applies (except where this is not practicable, for example because the byelaw has effect throughout the authority’s whole area) so that, as far as possible, people are made

aware of the byelaw. The authority must also publicise the new byelaw on its website, if it has one, and publicise the new byelaw in such other manner as it sees fit.

7.18 As byelaws are local enactments that may result in a prosecution in the courts and a fine, publicising the byelaw is an integral part of ensuring any new byelaw that will soon come into force is brought to the attention of the wider local community and as part of bringing local accountability to the process. Therefore after making the byelaw, 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 byelaw to the proper officer of every parish council where the byelaw applies.

7.19 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 make an assessment, prepare a draft byelaw, consult with the community and publicise the revocation afterwards. However, the authority will not be required to undertake a number of steps that would otherwise be required for making a byelaw, including undertaking a deregulatory assessment, preparing a deregulatory statement or seeking Secretary of State consent.

Transitional arrangements

7.20 The new arrangements for revoking and making byelaws apply to those byelaws made by authorities after these Regulations have come into force, ensuring that those authorities that have put time and resource into getting their proposed byelaw to the point where the council decide to make it, prior to advertising it, do not have to re-start the byelaw making process.

8. Consultation outcome

8.1 The Department published, on 27 August 2008, its consultation paper '*Making and Enforcing Byelaws*'². 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. A full detailed analysis of the summary of responses³ was published alongside the then Government's response.

8.2 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. 533 responses were received from a wide range of organisations and individuals. The responses showed the majority of the respondents supported the proposals on the new procedure for

² 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>

³ This document is available on the Department's website at <http://www.communities.gov.uk/publications/localgovernment/byelawsummaryresponses?view=Standard>

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.

8.3 As a result of the consultation responses, the Regulations specify that the minimum consultation period for authorities proposing to make byelaws is a minimum of 28 days rather than the suggested 21 days proposed in the consultation. This minimum recognises that authorities may wish to choose to consult for a longer period.

8.4 The Conservative led Coalition Government continued to progress this issue. On 31st August 2010 the Coalition Government announced plans to give councils a new power to review and make byelaws as part of wider Government plans to hand power back to councils and communities. The then Local Government Minister said:

“It should not take a rubber stamp from central government to scrap outdated local laws.”⁴

8.5 On 6th September 2010, in a written statement on Departmental business, the Secretary of State referred to work on decentralising, devolving and reducing the bureaucratic burden faced by local authorities from Government regulation and referred to the work to give local authorities new powers to review and revoke byelaws without needing permission from this Department.

8.6 On 27th April 2011, the then Local Government Minister, the Rt Hon Grant Shapps MP, in response to a written Parliamentary question stated:

“We intend to take forward proposals to reduce unnecessary bureaucracy associated with byelaws, and will make a further announcement in due course.”

8.7 This was followed by a public announcement on 27 May 2011 on giving councils more freedoms to remove outdated byelaws, where the then Local Government Minister argued that Councils know their areas best and will therefore know how best to maintain their local public spaces.

8.8 On 5th November 2013, the Parliamentary Under Secretary of State, Brandon Lewis MP, stated in a written question:

“We intend to lay Regulations before the end of this Parliamentary session to lay Regulations simplifying councils’ byelaw making processes.

8.9 There has been active engagement and correspondence with a number of local authorities about the Government’s commitment to taking forward the provisions in the 2007 Act through Regulations. The Regulations do not substantially depart from the consultation carried out in 2008, which evidenced overwhelming support for the proposals and the decentralisation of the process for making certain byelaws to local

⁴ <https://www.gov.uk/government/news/bypass-whitehall-and-scrap-outdated-byelaws>

authorities. Any further consultation will delay bringing these Regulations, which authorities have been eagerly awaiting and pressing for, into force.

9. Guidance

9.1 There is no current intention to issue formal guidance on these Regulations.

9.2 Officials will write to every principal local authority advising them of the introduction of the alternative procedure, highlighting when it will be available to local authorities. In addition, the Department for Communities and Local Government's byelaws team offer advice and guidance to those wishing to make or revoke a byelaw.

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 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. There has been no substantial departure from that set out in the 2007 assessment.

11. Regulating small business

11.1 The legislation does not apply to small business. The byelaws for which DCLG have oversight for mainly cover the enjoyment of open spaces. Where the byelaws do apply to businesses, these byelaws regulate hygiene and health and safety that would already be addressed through national legislation.

12. Monitoring & review

12.1 The Department maintains a continuous dialogue with key stakeholders. 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.