Explanatory memorandum to:

1. **The Town and Country Planning (Determination of Procedure) (Wales) Order 2014;**
2. **The Town and Country Planning (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014;**
3. **The Planning (Listed Buildings and Conservation Areas) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014; and**
4. **The Planning (Hazardous Substances) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014.**

This Explanatory Memorandum has been prepared by Department for Housing and Regeneration and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

1. The Town and Country Planning (Determination of Procedure) (Wales) Order 2014;
2. The Town and Country Planning (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014;
3. The Planning (Listed Buildings and Conservation Areas) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014; and
4. The Planning (Hazardous Substances) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014.

I am satisfied that the benefits outweigh any costs.

Carl Sargeant AM
Minister for Natural Resources

DATE

1. Description

1.1 The Welsh Ministers appoint the Planning Inspectorate to administer planning appeals and references to the Welsh Ministers ("call-ins") , with the majority of appeals decided by an Inspector. A very small number of appeals are recovered for decision by the Welsh Ministers. All call-ins are determined by the Welsh Ministers. Appeals and call-ins proceed by one of three basic procedures:

- Written representations;
- Public hearing; or
- Public inquiry.

1.2 An efficient system should ensure that every set of proceedings is determined by the most appropriate and proportionate method. The written method is the quickest and least expensive procedure for determining an appeal or application. A hearing usually lasts for up to 1 day whilst public inquiries can last several days and are the slowest and most costly method.

1.3 At present, appellants or applicants have the right to be offered the opportunity to appear before and be heard by a person appointed by the Welsh Ministers, when making a planning appeal to the Welsh Ministers or where an application is called in. This results in many cases unnecessarily proceeding by a hearing when the written method would be more appropriate.

1.4 The report by the Independent Advisory Group on the reform of the planning system in Wales[1] ("The IAG Report") received evidence calling for a system which is "more flexible, less confrontational, quicker and more efficient". The report made specific recommendations relating to the powers of Inspectors and procedures (Recommendations 44-46).

1.5 In response, the four statutory instruments make provision to enable the Welsh Ministers to determine the procedure for appeals and call-in cases.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 This Explanatory Memorandum covers four separate Statutory Instruments; one subject to the affirmative procedure and three which are subject to the negative procedure. For clarity these are identified below:

Statutory Instrument subject to the Affirmative procedure

- The Town and Country Planning (Determination of Procedure) (Wales) Order 2014.

[1] "Towards a Welsh Planning Act: Ensuring the Planning System Delivers", a report to the Welsh Government by the Independent Advisory Group, June 2012.

Statutory Instruments subject to the Negative procedure

- The Town and Country Planning (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014;
- The Planning (Listed Buildings and Conservation Areas) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014; and
- The Planning (Hazardous Substances) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014.

2.2 As all of the above Statutory Instruments are interlinked, a composite Explanatory Memorandum has been prepared to describe these.

3. Legislative background

The Town and Country Planning (Determination of Procedure) (Wales) Order 2014.

3.1 Section 196 of the Planning Act 2008 added Section 319A to the Town and Country Planning Act 1990 ("TCPA"), Section 88D to the Planning (Listed Buildings and Conservation Areas) Act 1990 ("Listed Buildings Act") and Section 21A to the Planning (Hazardous Substances) Act 1990 ("Hazardous Substances Act"). This has given the Secretary of State the function of determining the procedure by which certain proceedings under those Acts in England are to be considered. Subsection (3) of those provisions provides that the Secretary of State makes that determination within a prescribed period (prescribed as 7 working days in England). Subsection (4) provides that the Secretary of State may change his determination of procedure up until the time that the proceedings are determined.

3.2 Schedule 10 of the Planning Act 2008 also makes various consequential amendments to the TCPA, Listed Buildings Act and Hazardous Substances Act to give full effect to the new sections described above.

3.3 Section 203 of the Planning Act 2008 gives the Welsh Minsters the power to make provision by order which has an effect in relation to Wales that corresponds to the effect section 196 and Schedule 10 have in relation to England. Section 203(6)(a) provides that an order made under section 203 may amend, repeal, revoke or otherwise repeal a provision of an Act. Section 203(8), gives the Welsh Ministers the power to make provisions which are consequential, incidental or supplementary to the provisions that correspond to England-only provisions.

3.4 This instrument is subject to approval of the Assembly (the affirmative procedure).

3.5 It is the policy intention to create a flexible system, using a mixture of oral and written procedures to examine an appeal or application, where

necessary, and for that procedure to be determined by the Welsh Ministers.

3.6 Powers at Section 203 of the Planning Act 2008 are to be used to make provisions which have an effect in relation to Wales corresponding to the effect that section 196 of and Schedule 10 to that Act have in relation to England, to allow that policy intention to be fulfilled.

The Town and Country Planning (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014;

The Planning (Listed Buildings and Conservation Areas) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014; and

The Planning (Hazardous Substances) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014.

3.7 The making of the above Regulations is dependant upon the making of the Town and Country Planning (Determination of Procedure) (Wales) Order 2014 ("the Order"). Section 319B(3) of the TCPA, Section 88E(3) of the Listed Buildings Act, and Section 21B(3) of the Hazardous Substances Act (all inserted by Article 2 of the Order) provide that the Welsh Ministers must make a determination in respect of proceedings before the end of the 'prescribed period'. The three sets of regulations prescribe that period as 7 working days.

3.8 The negative procedure applies to these regulations. If the Order is approved by resolution of the Assembly, it is intended that the three sets of regulations will be made and laid before the Assembly shortly after the Order has been made, so that all four come into force on the same day.

4. Purpose & intended effect of the legislation

4.1 The Planning Inspectorate's experience shows that the current system in Wales, whereby the applicant and/or local planning authority are able to insist on appearing before and being heard by the Welsh Ministers, results in many cases unnecessarily proceeding by a hearing when the written method would be more appropriate.

4.2 Appellants currently have the right to appear before and be heard by an Inspector. When they choose to appear, the written procedure would be more appropriate, the Planning Inspectorate informally encourages them to switch to the latter. Between 2010 and 2014, the Inspectorate suggested a change of procedure for 118 appeals, with only 35 (or 30%) agreeing to the change. 83 appeals were determined using a procedure that the Inspectorate considered to be inappropriate for the proper consideration of the merits of each case, which is slower and more costly to all parties.

4.3 The intended effect of the legislation is that the Welsh Ministers determine the procedure by which appeals or call-ins are to be considered. It is intended to utilise powers at section 203 of the Planning Act 2008 to achieve this.

4.4 The Town and Country Planning (Determination of Procedure) (Wales) Order 2014 introduces a requirement, whereby the Welsh Ministers must determine the procedure by which appeals and call-ins under the TCPA the Listed Buildings Act and the Hazardous Substances Act, should be considered. The procedure could be a local inquiry, a hearing, written representations, or a combination of any of the above three, as the Welsh Ministers consider appropriate.

4.5 Allowing for an appeal or call-in to be considered through a combination of the three procedures enables the Welsh Ministers to use multiple approaches (i.e. written and oral) when examining an appeal. This increases the efficiency and flexibility of the appeal and call-in examination process in being able to examine separate topics using the most appropriate method.

4.6 The Welsh Ministers must make the determination within the 'prescribed period', notify the appellant/applicant and local planning authority of which procedure has been selected, and publish the criteria that are to be applied in determining the appeal method.

4.7 The Order also makes consequential amendments which correspond to amendments contained in Schedule 10 of the Planning Act 2008.

4.8 The statutory instruments which are subject to the negative procedure contain the aforementioned 'prescribed period'. This is to be 7 working days.

4.9 A statutory procedure whereby the Planning Inspectorate (as the Welsh Ministers' appointed person) directs the procedure by which an appeal or call-in will proceed, will provide:

- A legal basis to a current informal process by which the Inspectorate determines the most appropriate procedure by which appeals or call-ins proceed;
- A more responsive planning system which allows the Welsh Ministers to determine appeals more efficiently, quickly and cost-effectively;
- A more proportionate approach in which an appeal or call-in is dealt with;
- A more consistent approach to procedure in which appeals or call-ins which generate a similar level of interest or are of a similar scale are determined;

4.10 The failure to introduce one of the Statutory Instruments identified above will mean that the policy intention to allow the Welsh Ministers to determine the appeal method will not be met. On this basis, it is considered appropriate to create a composite Explanatory Memorandum that explains and assess them as a single process.

5. Consultation

5.1 The proposed change to legislation was consulted upon in the Positive Planning[2] consultation paper between December 2013 and February 2014.

5.2 From this consultation, there was overall support for these proposals. Of those who directly answered the question, 72% (of 88 respondents) agreed that the Planning Inspectorate, appointed by the Welsh Ministers, should select the appeal method.

5.3 Those comments received in support of the proposal considered that the Planning Inspectorate is best placed to determine the appeal method and the proposals will ensure fairness throughout the process. Some considered that the proposals could result in increased efficiency and reduced costs.

5.4 There were a number of alternative proposals put forward by representors, such as:

- The process should be aligned to the civil courts system;
- A decision on the appeal method should be based on a panel decision or consultation with all interested parties and technical groups;
- The need for clearer guidance in choosing an appeal method; and
- That all proceedings must be open to public observation and scrutiny.

5.5 Concerns raised regarding the proposal are focussed on the principle that the appellant should have the right to be heard at a hearing or inquiry, as the appellant is best placed to determine the complexity of the issues involved. Concern was also raised that objection on the choice of appeal method was not taken into account and that there is no apparent system of redress if the decision on the appeal method was not acceptable to one or more party. It was commented that the key issues for consideration may be determined differently by different parties and it is not appropriate for Inspectors to have the discretion to determine who can speak.

5.6 Certain respondents commented that the introduction of a compulsory mode for appeals in England has led to instances of threatened judicial

[2] Welsh Government consultation document: "Positive Planning: Proposals to reform the planning system in Wales" (4 December 2013), pp.36-41.

review, adjournment and legal difficulties. There are no statistics available to support these comments.

5.7 Particular concern was raised in relation to costs of proceedings being a determining factor in choosing the appeal method. Comments raised in this regard include the need for strong evidence when determining the appeal method and the necessity to be able to regulate the payment of costs by certain bodies depending on the method chosen.

5.8 Some considered that the proposals would be counter productive and reduce democratic participation in the planning system, with local issues being overlooked and certain groups being unable to participate if the written representations method is chosen.

5.9 Some respondents expressed concerns about the role of the Planning Inspectorate in the overall examination process, and commented on their lack of experience.

PART 2 – REGULATORY IMPACT ASSESSMENT

Allowing the Welsh Ministers to determine the appeal method

This section assesses the impact of:

- The Town and Country Planning (Determination of Procedure) (Wales) Order 2014; and the associated Prescribed Period Regulations[3]

6. Options

6.1 The following options are considered:

- **Option 1: Do nothing** – Principal parties would continue to select the appeal method; the Welsh Ministers through the Planning Inspectorate would continue to apply non-statutory criteria to encourage parties to select the most suitable appeal method for their case.
- **Option 2: Empower the Welsh Ministers to determine the method to consider an appeal or call-in, based on published criteria** – appointed by the Welsh Ministers, the Planning Inspectorate would determine the most suitable appeal method, having first considered them against published criteria. Principal parties would no longer be able to select the appeal method.

7. Cost and benefits analysis

7.1 The sectors most likely to be affected by the proposals for introducing the power to apply Ministerially approved criteria to determine the method to consider an appeal or call-in are:

- **Welsh Government** – the Welsh Ministers determine called-in applications and appeals;
- **Local Planning Authorities** who determine applications;
- **Development Industry**; and
- **The community and consultees**.

7.2 The following cost and benefit analysis has been undertaken for each of the above sectors. The costs identified for option 2 are existing costs.

[3] The Town and Country Planning (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014; The Planning (Listed Buildings and Conservation Areas) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014; The Planning (Hazardous Substances) (Determination of Procedure) (Prescribed Period) (Wales) Regulations 2014.

7.3 The power to determine procedure will apply to a wide range of appeal types and to called-in applications. Robust data has been collected for planning appeals by the Planning Inspectorate, but not for other appeal types or called-in applications. For the purposes of this RIA, the data for planning appeals will be used to provide an indication of the impact of the proposed change. It is reasonable to assume that the impact will be similar for all the appeal types and called-in applications to which the new powers will apply.

8. Cost analysis for Option 1

Welsh Government

8.1 The current arrangements will continue to have effect, with the Planning Inspectorate applying non-statutory criteria, with the appellant and/or local planning authority selecting the appeal method.

8.2 It costs the Planning Inspectorate, on average, £1,582 per appeal to process and determine appeals using the written representations procedure; £5,097 using the hearing procedure; and £14,517 using the local inquiry procedure[4].

8.3 Between 2010 and 2014, the Planning Inspectorate suggested a change of procedure for 118 appeals, with only 35 (or 30%) agreeing to the change. Thus, 83 appeals were determined using a procedure that the Planning Inspectorate considered to be inappropriate for the proper consideration of the merits of each case. The use of the more expensive procedures cost an additional £303,555[5], approximately between 2010 and 2014, which is an estimated average of £75,889 per year.

Local Planning Authorities

8.4 It costs a Local Planning Authority on average £1,742 to participate in the appeal process[6]. Figures are only available relating to the average cost for all appeal procedures. The cost or cost benefit of the Inspectorate determining procedure cannot be calculated.

8.5 It can be reasonably assumed that each procedure will carry a different cost and that the cost of participating in appeals or call-ins proceeding by oral methods cost significantly more, in the same way as they do for the Welsh Ministers and appellants. It is therefore assumed that local planning authorities do indeed incur extra costs where an appeal proceeds by a hearing or local inquiry but could have been more

[4] Data provided by the Planning Inspectorate for the financial year 2012-13.

[5] 81 appeals followed the hearing procedure where the Planning Inspectorate considered that the written representations procedure was suitable; and 2 appeals followed the local inquiry procedure where the Planning Inspectorate considered that the hearing procedure was suitable.

[6] CIPFA/PAS Benchmarking 2012, with GDP Deflator. Note, provides only one figure for all appeal procedures.

appropriately determined via the written representations or hearing procedure.

Development Industry

8.6 Appellants will continue to have the right to appear and be heard. It is estimated that, on average, the written representations procedure costs £600 for a developer to participate in the proceedings; the hearing procedure £1,200; and, the local inquiry procedure £4,800[7]. A developer will, therefore, incur extra cost for cases where a different procedure to written representations has been suggested.

8.7 Between 2010 and 2014, 83 appeals were determined using a procedure that the Planning Inspectorate had suggested could be changed (either from hearing to written representations, or local inquiry to a hearing)[5]. The additional cost to the developer of the following the more expensive hearing or inquiry procedures was approximately £55,800 between 2010 and 2014, which is an estimated average of £13,950 per year.

8.8 Where appellants do not agree to the recommendation of the Planning Inspectorate to change from a hearing to written representations, or from a local inquiry to a hearing, they will be subject to an additional cost in terms of time taken to determine the appeal. The hearing and local inquiry procedures take longer to process and determine than written representations appeals.

8.9 In 2012-13, the average time to determine a written representations planning appeal was 15 weeks; a hearing planning appeal, 21 weeks; and, a local inquiry planning appeal, 29 weeks[8].

The community and consultees

8.10 Members of the community and consultees engage in the appeal process, and their level of participation can vary according the method selected. Data relating to the costs incurred cannot be quantified but the Department for Communities and Local Government has previously estimated that the time required for members of the community to provide written comment on an appeal is about 1.5 hours per case[9]. Engagement in the hearing or inquiry process could be more involved due to the ability of parties to attend and present their views orally to the Inspector. Members of the community and consultees may need to expend greater amounts of time on appeals where the principal parties select an appeal method that may not be proportionate to the merits of the case.

9. Benefit analysis for Option 1

[7] *Improving the Appeals Process in the Planning System*, DCLG Consultation May 2007, p44, with GDP Deflator.
[8] http://www.planningportal.gov.uk/uploads/pins/statistics_wales/full_report2012_13.pdf, Table 1.1, p10
[9] *Improving the Appeals Process in the Planning System*, DCL:G Consultation May 2007, p54

Welsh Government

9.1 There are no apparent direct or indirect benefits for the Welsh Ministers. The principal parties have the right to appear and be heard without the need to justify their choice. The Welsh Ministers must give parties the opportunity to be heard, even if the procedure chosen is not considered to be the most suitable procedure. The Planning Inspectorate's resources are taken up with appeals which may have been dealt with more efficiently by another method.

9.2 The power to determine the appeal method is required to enable other changes that the Welsh Ministers intend to make to the appeals process. Therefore, doing nothing would prevent or significantly reduce the impact and effectiveness of other proposed changes and reforms[10].

Local Planning Authorities

9.3 Local Planning Authorities also have the right to be heard. However, they will also participate in appeals which follow a procedure that is not proportionate but has been requested by the other party.

Development Industry

9.4 Appellants have the right to appear and be heard. However, they will also participate in appeals which follow a procedure that is not proportionate but has been requested by the other party.

The community and consultees

9.5 The general public and householders do not have the right to appear and be heard. However, they can make their views known to their Local Planning Authority who can take their views into account when considering the appeal method.

10. Cost analysis for Option 2

Welsh Government

10.1 Option 2 will enable the Welsh Ministers to select the method for each case that they receive. This means that they will be able to use the most suitable procedure to determine each set of proceedings, leading to more efficient and proportionate use of their resources and faster decision times for some proceedings.

[10] Such as: the formal introduction of the Householder Appeal Service and the Commercial Appeal Service and reforms to the costs regime.

10.2 Under Option 1, it was established that the Planning Inspectorate had suggested a change of procedure, but no subsequent change was made. Under Option 2, the Planning Inspectorate would be able to select the method for these appeals. If all of the 83 cases had followed the suggested procedure, the Planning Inspectorate would have saved £303,555 between 2010 and 2014, which is estimated to be £75,889 on average per year.

Local Planning Authorities

10.3 Local Planning Authority engagement in the appeals process costs, on average, £1,742 per case. Figures are only available relating to the average cost for all procedures. The cost or cost benefit of the Inspectorate determining procedure cannot be calculated.

10.4 It can be reasonably assumed that each procedure will carry a different cost and that the cost of participating in appeals or call-ins proceeding by oral methods cost significantly more, in the same way as they do for the Welsh Ministers and appellants. Therefore, it is assumed that Option 2 will likely lead to a reduction in the number of hearing and inquiry cases, resulting in a saving for local planning authorities.

Development Industry

10.5 Option 1 identified that if all 83 appeals had been changed to the procedure recommended by the Planning Inspectorate between 2010 and 2014, appellants would have saved £55,800, which is an estimated £13,950 on average per year.

10.6 Time savings will be achieved through the use of more proportionate appeal methods. For each appeal or application that follows the written representations rather than the hearing procedure, a decision could be expected on average within 15 weeks rather than 21 weeks; and where the appeal or application follows the hearing rather than local inquiry procedure, the decision can be expected on average 8 weeks earlier.

The community and consultees

10.7 Members of the community and consultees engage in the appeal process, and the nature and extent of that engagement can vary according to the method selected. It has been estimated that the time required for members of the community to provide written comment on an appeal is about 1.5 hours per case. Additional time would be required where a case follows the hearing or inquiry procedures. Option 2 is likely to result in a time saving for members of the community and consultees as it is anticipated that there will be a reduction in the number of cases being considered at a hearing or inquiry.

11. Benefits analysis for Option 2

Welsh Government

11.1 The Welsh Ministers will be able to allocate their resources in a way they consider to be most efficient and proportionate. This should improve the Planning Inspectorate's ability to process and determine appeals in good time.

11.2 Option 2 will complement and enable other planning reforms that the Welsh Ministers wish to bring forward. These reforms, including changes to the appeal procedures, will be enhanced and made more effective by the introduction of this power to select the appeal method.

11.3 Changes to the costs regime are also being proposed, enabling parties to claim costs for appeals that follow the written representations procedure. These changes will enable the Welsh Ministers, to select the most appropriate appeal method based on the merits of the case and without needing to consider whether it will prevent costs being able to be claimed.

Local Planning Authorities

11.4 Local planning authorities would lose the right to appear and be heard. But, they will be able to indicate their preferred option, and their reasons for their choice, which the Welsh Ministers will take into account when determining the procedure.

11.5 It is likely that they will have to participate in fewer hearings and local inquiries, resulting in some resource savings that could be used more effectively on other casework.

Development Industry

11.6 Appellants and applicants will lose the ability to select the appeal method. They will, however, be able to indicate their preferred option, and their reasons for their choice, which the Welsh Ministers, will take into account when determining the procedure.

11.7 The proposed changes to the costs regime mean that applicants / appellants will be able to suggest the most appropriate examination method based on the merits of the case, without having regard to any desire to claim costs

The community and consultees

11.8 The general public/householders will retain the ability to provide the Inspectorate with their views on the most suitable appeal method for a case, which they will take into account when determining the procedure.

11.9 The general public/householders will benefit from quicker decision-making on some development which will follow a more proportionate appeal method.

12. Analysis of Other Effects and Impacts

Voluntary Sector

12.1 The proposals are likely to have limited impact on the voluntary sector. Their involvement in the appeal process, and their ability to influence the appeal method, will be largely unchanged by requiring the Welsh Ministers to determine the appeal method.

Equality of Opportunity

12.2 The proposed changes to legislation, whilst removing an applicant's or appellant's right to appear and be heard, will not have any adverse equality impact. Applicants and appellants, as well as local planning authorities will retain a right to be heard, albeit the route through which they can be heard may not be their preferred one. Third party rights will be unaffected. The proposals will have an equal impact on all affected sectors.

Sustainable Development

12.3 The proposed change will not have any significant adverse impact on sustainable development.

The Welsh Language

12.4 The proposal does not have any adverse implications for the Welsh language.

13. Summary

13.1 Option 2, which empowers the Welsh Ministers, to determine the appeal method, should be introduced. This option is preferred in order to:

- Enable the Welsh Ministers to apply the most proportionate method of determining an appeal;
- Enable the Planning Inspectorate to deploy its resources efficiently, resulting in quicker decision making;
- Streamline the planning system so that certain proceedings are processed and determined using the most appropriate method; and,

- Reduce the cost of making an appeal for the principal parties and the Welsh Ministers.

14. Competition assessment

14.1 A competition filter test has been applied to the proposed amendment. The results of the test suggest that the proposals are unlikely to have any significant detrimental effect on competition.

14.2 The proposal will have equal benefit across the business sector. In particular, it will add pace to the process and increase the efficiency of the process.

15. Post implementation review

15.1 The effectiveness of the legislation will be demonstrated through monitoring undertaken by the Planning Inspectorate to ensure that proceedings are handled efficiently.

15.2 The Planning Inspectorate is currently required to submit annual returns to the Welsh Ministers in respect of their performance in determining planning matters. This arrangement is not expected to change.