

EXPLANATORY MEMORANDUM TO
THE WELSH MINISTERS (TRANSFER OF FUNCTIONS) (No. 2) ORDER
2009

2009 No. 3019

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

2. Purpose of the instrument

2.1 The purpose of this Order is to transfer to the Welsh Ministers functions relating to buildings and building standards currently exercised by the Secretary of State under the Building Act 1984 as amended (“the 1984 Act”) and related secondary legislation, and certain functions under the Sustainable and Secure Buildings Act 2004 (“the 2004 Act”) and the Climate Change and Sustainable Energy Act 2006 (“the 2006 Act”).

2.2 The main function which the Order transfers is the power to make building regulations in relation to Wales (except in relation to certain types of energy infrastructure building).

2.3 The Order also provides for the appointment of separate Building Regulations Advisory Committees for each of England and Wales, in place of the existing Building Regulations Advisory Committee, and includes transitional and consequential provisions in connection with the appointment of the new committees.

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

3.1 There are no matters of special interest.

4. Legislative Context

4.1 The Secretary of State has various functions relating to buildings and building standards in England and Wales under the 1984 Act, the 2004 Act and the 2006 Act, and associated regulations.

4.2 Section 1 of the 1984 Act confers on the Secretary of State power to make building regulations imposing requirements with respect to building work. Building regulations address a range of health, safety and sustainability issues including structural stability, fire protection, resistance to moisture and contamination, energy and energy efficiency, ventilation, combustion and accessibility. They also make provision about building control procedures and the testing of certain kinds of work. (See sections 1 to 2A of, and Schedule 1 to, the 1984 Act.)

4.3 The current regulations are the Building Regulations 2000 (S.I. 2000/2531 as amended) (“the 2000 Regulations”). Under Parts 5A and 6 of the 2000 Regulations, the Secretary of State has the functions of approving methodologies, accreditation schemes and procedures for the purpose of assessments of the energy performance of buildings, sound and pressure testing, and commissioning building services.

4.4 Under Part 1 of the 1984 Act, the Secretary of State may approve documents to give practical guidance on the requirements of the regulations (section 6), and has the power to grant exemptions from the regulations (sections 3 and 5), relaxations of the requirements (sections 8-11) and type approvals for any building matter to which the regulations are applicable (sections 12-13).

4.5 The Secretary of State has functions relating to the system of “approved inspectors” under Part 2 of the 1984 Act, which include approving inspectors or designating bodies to approve inspectors, and approving schemes of insurance for inspectors. The Secretary of State may make regulations about various matters relating to approved inspectors and the “initial notices” required for work which they supervise, and about the circumstances in which public authorities may supervise their own building work. The Building (Approved Inspectors etc.) Regulations 2000 (S.I. 2000/ 2532 as amended) were made under these powers and confer further functions on the Secretary of State in relation to these matters. Regulation 21 gives the Welsh Ministers the power to approve the public authorities which may supervise their own building work in Wales.

4.6 Section 6 of the 2004 Act requires the Secretary of State to report on the building stock in England and Wales every two years. Section 14 of the 2006 Act provides for the Secretary of State to report on steps to improve compliance with certain environmental provisions of the building regulations. Reports under both sections must be laid before Parliament.

4.7 Certain functions under the 1984 Act were transferred from the Secretary of State to the old National Assembly for Wales constituted under the Government of Wales Act 1998 (“GoWA 1998”). That transfer was effected by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) (“the 1999 Order”) as varied by the National Assembly for Wales (Transfer of Functions) Order 2000 (S.I. 2000/253), made under section 22 of GoWA 1998. In May 2007, the functions were transferred to the Welsh Ministers by the Government of Wales Act 2006 (“GoWA 2006”), Schedule 11, paragraph 30.

4.8 The functions which have already been transferred are largely related to the resolution of disputes under the 1984 Act. They include the functions of determining whether plans comply with the building regulations under sections 16(10)(a) of the 1984 Act, and of determining appeals against decisions of local authorities under section 20(5) (relating to the use of short-lived materials) and section 39 (refusals to relax requirements). The Welsh Ministers also have the powers to appoint an arbitrator (section 111), to take

action where a local authority fails to exercise its functions (sections 116-118) and to cause a local inquiry to be held in connection with the functions which have been transferred to the Welsh Ministers (section 119).

4.9 This Order provides for the transfer to the Welsh Ministers of the remaining functions of the Secretary of State under the 1984 Act, and of the functions under section 6 of the 2004 Act and section 14 of the 2006 Act. It also transfers functions under secondary legislation made under the 1984 Act. This is subject to a number of exceptions and limitations set out in the Order.

5. Territorial Extent and Application

5.1 The transfer of functions by this order applies only in relation to Wales.

5.2 The order is made under powers which extend to the whole of the United Kingdom, but transfers functions under provisions which extend only to England and Wales. It also makes a number of consequential amendments to other legislation, which have the same extent as the provisions amended.

6. European Convention on Human Rights

The Secretary of State for Wales has made the following statement regarding Human Rights:

In my view the provisions of the Welsh Ministers (Transfer of Functions) (No. 2) Order 2009 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 In “One Wales” (the Welsh Assembly Government’s programme of government for the current Assembly term), the Welsh Ministers committed themselves to action to tackle climate change. This included the establishment of a Climate Change Commission for Wales and a carbon reduction target of 3% per annum from 2011 in areas of devolved competence. Reducing the environmental impact of new building work is key to achieving this target and supporting the Welsh Assembly Government’s statutory responsibility to promote sustainable development.

7.2 Pursuit of these objectives depends critically on the transfer of the function of making building regulations, to enable the Welsh Ministers to specify improvements in building standards which will support the Welsh Assembly Government’s overall carbon reduction targets. The Welsh Assembly Government has therefore committed in “One Wales” to pursuing devolution of the power to make building regulations as a key element in achieving its climate change and sustainability objectives. On 29 November 2007, the Welsh Minister for Environment, Sustainability and Housing wrote to the UK Minister for Housing requesting the transfer of these functions.

7.3 Delivering sustainability in the built environment increasingly relies on a co-ordinated approach taking into account matters of location, site arrangement and detailed design. The Welsh Ministers already have extensive functions in the related areas of housing, town and country planning, and fire safety in non-domestic premises, as well as functions relating to appeals and determinations under the 1984 Act. The transfer of functions which will be made by this Order will complement the functions relating to buildings which have already been devolved to the Welsh Ministers. It will enable the Welsh Ministers to exercise more coherent policy control over the development process, through the stages of planning, design and construction. It will also allow a more holistic view to be taken in other policy areas such as fire safety where responsibility for fire safety in occupation has already been transferred.

7.4 The transfer of these functions should enable the Welsh Ministers to:

- make building regulations setting standards of performance which support Welsh Assembly Government objectives (particularly in relation to sustainability) and which have regard to the Welsh context;
- complement the existing powers of Welsh Ministers, particularly in the related areas of housing, town and country planning and fire safety in non-domestic premises; and
- improve the integration of development and building control functions, so as to provide clarity and coherence, and bring about a simpler regulatory environment within Wales.

7.5 This Order therefore provides for the transfer to the Welsh Ministers of the remaining functions of the Secretary of State under the 1984 Act, including in particular the power to make building regulations in relation to Wales. It also transfers functions under regulations and other instruments made under the 1984 Act (including the 2000 Regulations), and functions under section 6 of the 2004 Act and section 14 of the 2006 Act.

7.6 The Order does not transfer functions of any Minister of the Crown other than the Secretary of State. Thus it does not include the functions which the 1984 Act confers on the Attorney General and Her Majesty's Treasury. (For example section 113 provides that certain proceedings cannot be taken without the written consent of the Attorney General).

7.7 The transfer of functions under the 1984 Act is subject to several exceptions, which are related to provisions of the 1984 Act and 2004 Act which have not yet been brought into force. First, the Order does not transfer to the Welsh Ministers the power to appoint the day on which any uncommenced provisions will come into force.

7.8 Secondly, the buildings of statutory undertakers (other than houses, offices or showrooms) are currently exempt as a class from building regulations by virtue of section 4 of the 1984 Act. This exemption will be

brought to an end by section 5 of the 2004 Act, which is not yet in force. When section 5 is commenced, it is intended that the power to make building regulations for certain buildings of energy undertakers in Wales should vest in the Secretary of State rather than the Welsh Ministers. Therefore, functions under the 1984 Act are not transferred in relation to “excepted energy buildings” which meet the conditions set out in the Schedule to the Order. In general terms, those conditions will not apply where town and country planning functions in relation to a building are wholly devolved (i.e. there is no consenting role for the Secretary of State or the Infrastructure Planning Commission).

7.9 Thirdly, section 44 of the 1984 Act, which is not yet in force, applies the building regulations to Crown authorities, but subsection (5) enables those authorities to dispense with or relax the requirements. The Secretary of State’s power under section 44(5) is not transferred, but the Welsh Ministers will be a Crown authority in their own right because they perform their functions on behalf of the Crown.

7.10 Functions under the 2000 Regulations are transferred to the Welsh Ministers, but the Order limits the purposes for which functions under Part 5A relating to energy performance are transferred. Those functions include approving a methodology for calculating the energy performance of buildings and ways in which that performance is to be expressed, and approving accreditation schemes for energy assessors. These methodologies and accreditation schemes are relevant to the energy performance requirements imposed by Part 5A and by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (S.I. 2007/991) (“the 2007 Regulations”). The Welsh Ministers will have the function of approving the methods of calculating and expressing energy performance which are to be used in setting minimum energy performance requirements for new buildings in Wales, and in preparing energy performance certificates (“EPCs”) required on the construction or alteration of a building. However, the Secretary of State will continue to approve the methods to be used in preparing EPCs required on the sale or rental of a building and display energy certificates. Similarly, the Order transfers the function of approving accreditation schemes for energy assessors who will prepare EPCs on the construction or alteration of a building, but not for assessors who carry out other types of energy assessment. The Order will not transfer any functions under the 2007 Regulations, but will make some amendments to those Regulations to permit the disclosure to the Welsh Ministers of information about EPCs prepared on the construction or alteration of a building.

7.11 Under section 14 of the 1984 Act, the Secretary of State must appoint a Building Regulations Advisory Committee (“BRAC”) and consult it and other representative interests before making certain building regulations. It is considered appropriate that the Welsh Ministers, when they propose to exercise the power to make building regulations in relation to Wales, should receive advice from a statutory committee with specific knowledge and expertise relating to Wales. BRAC will be replaced with separate committees for each of England and Wales. Accordingly, the Order amends section 14 to

require the Secretary of State to appoint and consult a Building Regulations Advisory Committee for England (whose first members will be the existing members of BRAC), and the Welsh Ministers to appoint and consult a Building Regulations Advisory Committee for Wales. It also includes consequential provisions and amendments relating to the creation of the two new advisory committees.

- ***Consolidation***

7.12 The Order transfers most of the functions under the 1984 Act which were not transferred by the 1999 Order (as varied), but does not amend the 1999 Order. It would not be appropriate to consolidate the 1999 Order, as the transfer of functions by that Order has already taken place.

7.13 The Order amends a number of other enactments, but it is not possible to consolidate those enactments using the powers in GoWA 2006 under which this Order is made.

- ***Commencement***

7.14 The Order provides for a commencement date of 31 December 2011. This is intended to provide a lead in period for the establishment of Welsh Assembly Government capacity for the transferred functions and development and engagement work in respect of the first proposed changes to the Building Regulations once transferred.

7.15 It further means that changes to the current Building Regulations for England and Wales for the conservation of fuel and power ('Part L') and ventilation ('Part F') proposed for introduction in 2010 should apply in Wales. The proposed changes, which represent the next phase in the UK Government's plans for zero carbon buildings, are currently the subject of public consultation by the Department for Communities and Local Government (see *Proposals for amending Part L and Part F of the Building Regulations – Consultation*, June 2009).

7.16 The changes proposed for 2010 form part of a phased improvement in energy efficiency standards for buildings, and it is intended that in Wales further improvements in those standards would be made by the Welsh Ministers. The Welsh Assembly Government has commenced a process of engagement through its own funding programmes and the work of the Sustainable Development Commission. There nevertheless remains a significant amount of work in respect of development of changes to Part L. The period between the making and commencement of this Order will allow that work to be undertaken in advance of the formal transfer of functions.

7.17 The commencement date of 31 December 2011 will allow the changes currently proposed for 2010 to take effect, and mean that the Welsh Ministers can build upon those changes when they are in a position to do so.

8. Consultation outcome

8.1 This Order has not been the subject of a public consultation, as no impact on business or the voluntary sector is foreseen, but interested UK Government Departments have been consulted.

8.2 Engagement with industry and other stakeholders over potential changes to building regulations in Wales has begun, led by the Sustainable Development Commission Wales (the Welsh Assembly Government's independent advisory body on sustainable development). Proposed changes would be subject to formal public consultation and impact assessment.

9. Guidance

9.1 No formal guidance has been, or will be, issued in relation to this Order. This Explanatory Memorandum explains the scope and policy context of the Order.

10. Impact

10.1 An impact assessment has not been prepared for this Order as no impact on business, charities or voluntary bodies is foreseen. The impact of any changes to the building regulations proposed by the Welsh Ministers will be addressed through regulatory impact assessment in accordance with the proposed code of practice required by section 76 of GoWA 2006.

10.2 The impact on the public sector is not expected to be significant. There will be no budgetary transfer from the UK Government to the Welsh Consolidated Fund in connection with this Order: the costs of exercising the transferred functions will be borne by the Welsh Assembly Government.

11. Regulating small business

11.1 This instrument may have a limited impact on competent person scheme operators, Approved Inspectors and approved energy assessor accreditation schemes in the cases where these are small businesses, but the impact is thought unlikely to be significant.

12. Monitoring & review

12.1 This Order transfers functions to the Welsh Ministers. The monitoring or review of the carrying out of these functions will be a matter for the Welsh Assembly Government and/or the National Assembly for Wales.

13. Contact

Sandie Green at the Wales Office (Tel: 029 2089 8202 or email: sandie.green@walesoffice.gsi.gov.uk) can answer any general queries regarding this Order.

James George at the Wales Office (Tel: 029 2089 8484 or email: james.george@walesoffice.gsi.gov.uk) can answer any legal queries regarding the Order.