Draft Order laid before Parliament under section 58(4)(a) of the Government of Wales Act 2006, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2009 No.

CONSTITUTIONAL LAW

DEVOLUTION, WALES

The Welsh Ministers (Transfer of Functions) (No. 2) Order 2009

Made - - - - *[ ] 2009*

Coming into force - - *31st December 2011*

At the Court at Buckingham Palace, the [ ] day of [ ] 2009

Present,

The Queen's Most Excellent Majesty in Council

This Order is made by Her Majesty in Council in exercise of the powers conferred upon Her by sections 58 and 157(2) of, and paragraph 2 of Schedule 4 to, the Government of Wales Act 2006(**a**).

In accordance with section 58(4) of that Act a draft of this Order was—

(a) laid before, and approved by resolution of, each House of Parliament; and

(b) approved by the Welsh Ministers.

Accordingly, Her Majesty, by and with the advice of Her Privy Council, makes the following Order:

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Welsh Ministers (Transfer of Functions) (No. 2) Order 2009.

(2) This Order shall come into force on 31st December 2011.

(**a**) 2006 c. 32.

(3) In this Order—

"the 1984 Act" means the Building Act 1984(**a**);

"the 2000 Regulations" means the Building Regulations 2000(**b**)003B

"the 2007 Regulations" means the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007(**c**);

"the construction EPC provisions" means—

(a) regulation 17E of the 2000 Regulations (energy performance certificates);

(b) regulation 12 of the Building (Approved Inspectors etc.) Regulations 2000(d) (energy performance certificates); and

(c) regulation 9 of the 2007 Regulations (construction of Crown and statutory undertakers' buildings);

"excepted energy building" is defined by the Schedule.

Transfer of functions

2. The following functions are, so far as exercisable in relation to Wales, transferred to the Welsh Ministers—

(a) functions conferred or imposed on the Secretary of State by or under the 1984 Act(**e**), subject to articles 3 and 4;

(b) functions of the Secretary of State under—

(i) section 6 of the Sustainable and Secure Buildings Act 2004(**f**) (Secretary of State to report on building stock); and

(ii) section 14 of the Climate Change and Sustainable Energy Act 2006(**g**) (report regarding compliance).

3. Article 2(a) does not transfer—

(a) any functions so far as they are exercisable in relation to an excepted energy building;

(b) functions under section 44(5) of the 1984 Act (functions exercisable by the Secretary of State as a Crown authority); or

(c) functions under section 42(7) or 134(1) of the 1984 Act (power of the Secretary of State to appoint a day for a modification to cease to have effect or for a provision to come into force).

(**a**) 1984 c. 55. Amendments relevant to this Order include those made by the Building Act 1984 (Appointed Day and Repeal) Order 1985 (S.I. 1985/1603), article 2; the Deregulation and Contracting Out Act 1994 (c. 40), section 32; the Deregulation (Building) (Initial Notices and Final Certificates) Order 1996 (S.I. 1996/1905), articles 2 to 4; the Sustainable and Secure Buildings Act 2004 (c. 22) sections 1 to 5 and 7 to 9 (some of which are not yet in force); and the Climate Change and Sustainable Energy Act 2006 (c. 19), sections 11 and 13.

(**b**) S.I. 2000/2531. There have been numerous amending instruments. Those which are most relevant to this Order include the Building (Amendment) (No. 2) Regulations 2002 (S.I. 2002/2871); the Building (Amendment) Regulations 2004 (S.I. 2004/1465); the Building and Approved Inspectors (Amendment) Regulations 2006 (S.I. 2006/652), Part 2; the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (S.I. 2007/991), regulation 8 and Schedule 2, paragraph 1; the Building and Approved Inspectors (Amendment) Regulations 2007 (S.I. 2007/3384), regulation 2; and the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No. 2) Regulations 2008 (S.I. 2008/2363), regulation 3.

(**c**) S.I. 2007/991, amended by S.I. 2007/1669, S.I. 2007/3302, S.I. 2008/647 and S.I. 2008/2363.

(**d**) S.I. 2000/2532. There have been numerous amending instruments. Regulation 12 was substituted by the 2007 Regulations, regulation 8 and Schedule 2, paragraph 2; and amended by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No. 2) Regulations 2008 (S.I. 2008/2363), regulation 4(1) and (2).

(**e**) Certain functions of a Minister of the Crown under the 1984 Act were transferred to the National Assembly for Wales constituted by the Government of Wales Act 1998 (c. 38) by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672), article 2 and Schedule 1, as varied by the National Assembly for Wales (Transfer of Functions) Order 2000 (S.I. 2000/253), article 4 and Schedule 3; and have been transferred to the Welsh Ministers by the Government of Wales Act 2006 (c. 32), Schedule 11, paragraph 30.

(**f**) 2004 c. 22.

(**g**) 2006 c. 19.

4.—(1) The transfer by article 2(a) of functions under Part 5A of the 2000 Regulations(**a**) (energy performance of buildings) is subject to the following provisions.

(2) Functions under regulation 17A (methodology of calculation and expression of energy performance) are transferred only so far as they are exercisable for the purposes of—

(a) regulation 17B (minimum energy performance requirements for buildings); and

(b) the construction EPC provisions.

(3) Functions under regulation 17F (energy assessors) are transferred only so far as they are exercisable in relation to the functions of energy assessors under, or in relation to, the construction EPC provisions.

Powers to confer or impose functions

5.—(1) Any pre-commencement power to confer or impose a relevant function on the Secretary of State shall have effect as a power to confer or impose the function on the Welsh Ministers, the First Minister or the Counsel General.

(2) For the purposes of paragraph (1)—

(a) a pre-commencement power is a power which was exercisable immediately before 31st December 2011; and

(b) a relevant function is a function which, had it been a function of the Secretary of State immediately before 31st December 2011, would have been transferred to the Welsh Ministers by article 2.

Modifications to the 2007 Regulations—disclosure of documents and data

6.—(1) The 2007 Regulations are modified as follows in relation to—

(a) a relevant document;

(b) data collected or used for the purpose of preparing a relevant document; and

(c) information derived from a relevant document.

(2) Regulation 14(2)(f) (purposes for which certificates and recommendation reports may be disclosed to the Secretary of State) shall have effect as if the reference to the Secretary of State included the Welsh Ministers.

(3) Regulation 37 (disclosures to the Secretary of State) shall have effect as if the references to the Secretary of State for Communities and Local Government included the Welsh Ministers.

(4) For the purposes of paragraph (1), a relevant document is an energy performance certificate or recommendation report—

(a) relating to a building in Wales other than an excepted energy building; and

(b) prepared for the purposes of the construction EPC provisions.

Transfer of property, rights and liabilities—exception

7. Paragraph 1(1) of Schedule 4 to the Government of Wales Act 2006 (transfer of property, rights and liabilities connected with transferred functions) does not apply to any documentary or electronic records to which the Secretary of State is entitled at the coming into force of this Order

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(**a**) Part 5A, comprising regulations 17A to 17E, was inserted by the Building and Approved Inspectors (Amendment) Regulations 2006 (S.I. 2006/652), regulations 2 and 15. New regulations 17A and 17E to 17J were substituted for regulations 17A and 17E by the 2007 Regulations, regulation 8 and Schedule 2, paragraph 1(1), (7) and (8). There have been other amendments to regulation 17E. The provisions inserting and amending Part 5A of the 2000 Regulations, which included regulation 8 of the 2007 Regulations and Schedule 2 to those Regulations, were made in the exercise of powers conferred by the 1984 Act. The provisions of the 2007 Regulations other than regulation 8 and Schedule 2, and amendments to those provisions, were made under section 2(2) of the European Communities Act 1972 (c. 68). Functions conferred by those other provisions of the 2007 Regulations are not transferred by this Order (but see article 6 for modifications to the 2007 Regulations).

in connection with any function exercisable by the Secretary of State which is transferred by this Order.

Amendments to section 14 of the 1984 Act

8.—(1) Section 14 of the 1984 Act (consultation with Building Regulations Advisory Committee and other bodies) is amended as follows.

(2) For subsection (1) substitute—

"(1) The Secretary of State shall appoint a committee, to be known as the Building Regulations Advisory Committee for England, for the purpose of advising the Secretary of State on the exercise of the Secretary of State's power to make building regulations, and on other subjects connected with building regulations."

(3) In subsections (2) and (3), after "Committee" insert "for England".

(4) In subsection (4)(**a**)—

(a) in paragraph (a), after "Committee" insert "for England"; and

(b) in paragraph (b), after "local authorities" insert "in England".

(5) After subsection (4) insert—

"(5) The Welsh Ministers shall appoint a committee, to be known as the Building Regulations Advisory Committee for Wales, for the purpose of advising them on the exercise of their power to make building regulations, and on other subjects connected with building regulations.

(6) The Welsh Ministers may pay such expenses incurred by members of the Building Regulations Advisory Committee for Wales as the Welsh Ministers may determine.

(7) Before making any building regulations containing substantive requirements, the Welsh Ministers shall consult the Building Regulations Advisory Committee for Wales and such other bodies as appear to them to be representative of the interests concerned.

(8) Before making any building regulations containing provision of the kind authorised by paragraph 11(1)(c) of Schedule 1 to this Act, the Welsh Ministers shall consult—

(a) the Building Regulations Advisory Committee for Wales,

(b) such persons or bodies as appear to them to be representative of local authorities in Wales, and

(c) such other bodies as appear to them to be representative of the interests concerned.
".

Transitional provision for members of the Building Regulations Advisory Committee

9.—(1) This article applies to a person who, immediately before 31st December 2011, is a member of the Building Regulations Advisory Committee ("the former Committee").

(2) The person shall on 31st December 2011 become a member of the Building Regulations Advisory Committee for England.

(3) The membership shall be—

(a) on the same terms and conditions as the appointment to the former Committee; and

(b) for a period equivalent to the period of that appointment which remains on 31st December 2011.

Amendment to the Parliamentary Commissioner Act 1967

10.—(1) The Parliamentary Commissioner Act 1967(**b**) is amended as follows.

(**a**) Subsection (4) was inserted by the Deregulation and Contracting Out Act 1994 (c. 40), section 32(2).
(**b**) 1967 c. 13.

(2) In Schedule 2 (departments etc. subject to investigation)(**a**), for "Building Regulations Advisory Committee." substitute "Building Regulations Advisory Committee for England.".

Amendment to the Race Relations Act 1976

11.—(1) The Race Relations Act 1976(**b**) is amended as follows.

(2) In Schedule 1A (bodies and other persons subject to general statutory duty), in Part 2 (bodies and other persons added after commencement of general statutory duty)(**c**), for "The Building Regulations Advisory Committee." substitute—

"The Building Regulations Advisory Committee for England.

The Building Regulations Advisory Committee for Wales."

Amendment to the Public Services Ombudsman (Wales) Act 2005

12.—(1) The Public Services Ombudsman (Wales) Act 2005(**d**) is amended as follows.

(2) In Schedule 3 (listed authorities), after the sub-heading "Miscellaneous" insert "The Building Regulations Advisory Committee for Wales.".

Amendment to the Race Relations Act 1976 (Statutory Duties) Order 2001

13.—(1) The Race Relations Act 1976 (Statutory Duties) Order 2001(**e**) is amended as follows.

(2) In Schedule 3 (bodies and other persons excepted by article 5(5)(b)), for "The Building Regulations Advisory Committee." substitute—

"The Building Regulations Advisory Committee for England.

The Building Regulations Advisory Committee for Wales."

Name

Clerk of the Privy Council

(**a**) Schedule 2 was substituted by the Parliamentary Commissioner Order 2008 (S.I. 2008/3115), article 2 and Schedule.
(**b**) 1976 c. 74.
(**c**) Schedule 1A was inserted by the Race Relations (Amendment) Act 2000 (c. 34), section 2(2) and Schedule 1. Schedule 1A was amended, and Part 2 of that Schedule was inserted, by the Race Relations Act 1976 (General Statutory Duty) Order 2001 (S.I. 2001/3457). There have been other amendments to Schedule 1A which are not relevant to this Order.
(**d**) 2005 c. 10. There have been amendments which are not relevant to this Order.
(**e**) S.I. 2001/3458. There have been amendments which are not relevant to this Order.

SCHEDULE

Article 1(3)

Definition of "Excepted Energy Building"

1. An excepted energy building is a building that satisfies the first and second conditions set out below.

First condition

2. The first condition is that the building falls within one of the following descriptions—

(a) a generating station whose construction, extension or operation requires or required the consent of the Secretary of State under section 36 of the Electricity Act 1989(**a**) or any ancillary development;

(b) a generating station whose construction or extension requires or required development consent;

(c) an electric line whose installation, or continued installation, above ground requires the consent of the Secretary of State under section 37 of the Electricity Act 1989 or any ancillary development;

(d) an electric line whose installation above ground requires or required development consent;

(e) a pipe-line whose construction requires or required authorisation under section 1(1) of the Pipe-lines Act 1962(**b**) or development consent; or

(f) a facility for the storage of gas underground in natural porous strata by a gas transporter or surface works or pipes associated with such a facility.

Second condition

3. The second condition is that the building is not used, or not to be used, entirely as one or more of the following—

(a) a residence;

(b) a shop;

(c) an office;

(d) a showroom;

(e) a canteen; or

(f) an outbuilding ancillary to a building used, or to be used, entirely for one or more of the purposes set out in sub-paragraphs (a) to (e).

Interpretation

4. In this Schedule—

(**a**) 1989 c. 29. Part 1 includes interpretation provisions relevant to words and expressions used in the Schedule to this Order: see section 64(1) for the meaning of "electric line" and "generating station", and section 36(9) for the meaning of "extension". There have been extensive amendments to Part 1: see in particular the Utilities Act 2000 (c. 27), Part 4; the Energy Act 2004 (c. 20), Part 3; and the Planning Act 2008 (c. 29), section 36 and Schedule 2, paragraphs 31 to 33.

(**b**) 1962 c. 58. See section 65 for the meaning of "pipe-line" and section 66 for the meaning of "construction". There have been extensive amendments to the provisions about control of construction of pipe-lines: see in particular the Planning Act 2008 (c. 29), section 36 and Schedule 2, paragraphs 5 and 6.

"ancillary development" has the same meaning as in section 90(2) of the Town and Country Planning Act 1990(**a**);

"development consent" means development consent under the Planning Act 2008(**b**);

"gas transporter" has the same meaning as in Part 1 of the Gas Act 1986(**c**);

"outbuilding" means a shed, greenhouse, summerhouse, garage or similar building that is not attached to any other building other than another outbuilding;

"residence" includes—

(a) a dwelling-house;

(b) a flat and any common parts;

(c) a room used for residential purposes and any common parts;

"room used for residential purposes" means a room or a suite of rooms which is not a dwelling-house or a flat and which is used by one or more persons to live and sleep.

(**a**) 1990 c. 8. Section 90 was amended by the Planning and Compensation Act 1991 (c. 34), section 31 and Schedule 6, paragraph 12; the Transport and Works Act 1992 (c. 42), section 16(1); and the Environment Act 1995 (c. 25), section 78 and Schedule 10, paragraph 32(4). For the meaning of "ancillary development" in relation to development consisting of the extension of a generating station, see section 90(5).

(**b**) 2008 c. 29. See Part 4 for the requirement for development consent.

(**c**) 1986 c. 44. See section 7(1) for the meaning of "gas transporter". There have been extensive amendments to Part 1: see in particular the Utilities Act 2000 (c. 27), Part 5, and the Planning Act 2008 (c. 29), section 36 and Schedule 2, paragraphs 11 to 14.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order comes into force on 31st December 2011. It provides for certain functions under the Building Act 1984 (c. 55) ("the 1984 Act"), the Sustainable and Secure Buildings Act 2004 (c. 22) ("the 2004 Act"), and the Climate Change and Sustainable Energy Act 2006 (c. 19) ("the 2006 Act") to be transferred from the Secretary of State to the Welsh Ministers.

This transfer expands upon the previous transfer of functions exercisable under the 1984 Act pursuant to the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) as varied by the National Assembly for Wales (Transfer of Functions) Order 2000 (S.I. 2000/253). The primary function which is transferred is the power to make regulations in respect of the design and construction of buildings and the provision of services, fittings and equipment in or in connection with buildings (known as "building regulations") pursuant to section 1 of the 1984 Act in relation to Wales.

Article 2 of this Order transfers all functions exercisable by the Secretary of State by or under the 1984 Act (including functions conferred or imposed by building regulations) that have not previously been transferred to the Welsh Ministers, so far as they are exercisable in relation to Wales, subject to articles 3 and 4. Article 2 also transfers reporting functions under section 6 of the 2004 Act and section 14 of the 2006 Act, so far as they are exercisable in relation to Wales.

Article 3 excludes functions under the 1984 Act from the transfer in so far as they are exercisable in relation to an "excepted energy building" that fulfils the conditions specified in the Schedule. It also excludes the functions of the Secretary of State as a "Crown authority" under section 44(5) of the 1984 Act (which has not yet been brought into force), and the power to make orders under sections 42(7) or 134(1) bringing provisions of the 1984 Act into force.

Article 4 makes specific provision about the transfer of functions under Part 5A (energy performance of buildings) of the Building Regulations 2000 (S.I. 2000/2531) ("the 2000 Regulations"). (Part 5A was made and amended in the exercise of powers conferred by the 1984 Act, and functions under that Part are therefore transferred by article 2(a).) The functions under regulation 17A of approving methods of calculating and expressing the energy performance of buildings are transferred only so far as they are exercisable for the purposes of regulation 17B of those regulations (minimum energy performance requirements for buildings) and for the purposes of legislation which requires the provision of an energy performance certificate when a building is constructed or modified in certain ways (the "construction EPC provisions" defined in article 1(3)). Functions under regulation 17F relating to the approval of accreditation schemes for energy assessors are transferred only so far as they are exercisable in relation to the functions of energy assessors under or in relation to the construction EPC provisions.

Article 5 provides for any existing power to confer a function on the Secretary of State to have effect as a power to confer the function on the Welsh Ministers, the First Minister or the Counsel General, if the function is one which would have been transferred by this Order had it been exercisable at the time of the transfer.

The Order does not transfer functions under the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (S.I. 2007/991). However, article 6 modifies regulations 14(2)(f) and 37 of those Regulations, which provide for the disclosure to the Secretary of State of certain documents and information relating to energy performance certificates. Where the documents or information relate to a building in respect of which the Welsh Ministers will have functions under Part 5A of the 2000 Regulations, and were prepared or collected for the purposes of the construction EPC provisions, regulations 14(2)(f) and 37 will have effect as if they also permitted disclosure to the Welsh Ministers.

Article 7 excludes the transfer to the Welsh Ministers of documentary or electronic records connected with functions included in this Order, which would otherwise take place by operation of paragraph 1 of Schedule 4 to the Government of Wales Act 2006.

Article 8 amends section 14 of the 1984 Act in order to replace the Building Regulations Advisory Committee with a Building Regulations Advisory Committee for England and a Building Regulations Advisory Committee for Wales.

Article 9 makes transitional provision for members of the Building Regulations Advisory Committee to become members of the Building Regulations Advisory Committee for England.

Articles 10-13 make consequential amendments to other legislation.

Article 10 amends the Parliamentary Commissioner Act 1967 (c. 13) to include the Building Regulations Advisory Committee for England in the list of bodies subject to investigation by the Parliamentary Commissioner for Administration.

Article 11 amends the list of bodies subject to the general statutory duty in the Race Relations Act 1976 (c. 74) to include both of the new advisory committees.

Article 12 amends the Public Services Ombudsman (Wales) Act 2005 (c. 10) to include the Building Regulations Advisory Committee for Wales in the list of authorities subject to investigation by the Public Services Ombudsman for Wales.

Article 13 amends the list of bodies excepted from the monitoring duty in the Race Relations Act 1976 (Statutory Duties) Order 2001 (S.I. 2001/3458) to include both of the new advisory committees.

The Schedule defines the "excepted energy buildings" in relation to which functions under the 1984 Act are not transferred to the Welsh Ministers. Where both of the conditions set out in the Schedule are met in respect of a particular type of building, that building will be an "excepted energy building". Broadly speaking, the conditions mean that the transfer does not include any functions exercisable in relation to energy infrastructure buildings, other than buildings used wholly for residential purposes or as a shop, office, showroom or canteen.

The first condition is that the building falls within one of the categories of energy infrastructure listed in paragraph 2. The categories of building listed are all buildings in relation to which Ministers of the Crown and the Infrastructure Planning Commission have town and country planning functions. The Schedule contains a number of definitions relevant to the first condition.

The second condition is that the building is not used entirely as any one, or any combination of, the following: a residence, a shop, an office, a showroom, a canteen or an outbuilding. The Schedule contains definitions which determine the meaning of "residence" and "outbuilding" in this context.

A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

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