

EXPLANATORY MEMORANDUM TO
THE BUILDING REGULATIONS &c. (AMENDMENT) REGULATIONS 2012
2012 No. 3119

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.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 This instrument enacts, where necessary, the requirements of Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast) (“the EPB Directive”)¹ regarding the energy performance of buildings. It also makes further amendments to the Building Regulations 2010 (S.I. 2010/2214) (“the 2010 Regulations”), the Building (Approved Inspectors etc.) Regulations 2010 (S.I. 2010/2532) (“the AI Regulations”) and the Building (Local Authority Charges) Regulations (S.I. 2010/404) (“the Charges Regulations”) for the purpose of implementing technical requirements and deregulatory provisions.

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

3.1 None.

4. **Legislative Context**

Why is the instrument being made?

4.1 Section 1 of the Building Act 1984 (“the 1984 Act”) confers on the Secretary of State power to make building regulations with respect to the design and construction of buildings and the services, fittings and equipment provided in or in connection with buildings for a number of purposes. These purposes include securing the health, safety, welfare and convenience of persons in and about buildings, preventing waste, undue consumption, misuse or contamination of water, furthering the protection or enhancement of the environment and facilitating sustainable development. There are further powers conferred by other sections of the 1984 Act, in particular in Part 2, which includes provisions relating to approved inspectors.

4.2 The 2010 Regulations, the AI Regulations and the Charges Regulations, have been made pursuant to powers in the 1984 Act. The 2010

¹ Directive 2010/31/EU recasts Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, OJ L 1, 4.1.2003, p. 65.

Regulations establish general functional requirements for buildings when constructed and are supported by the Approved Documents, which set out detailed practical guidance on compliance with the functional requirements. The 2010 Regulations also set out procedures for the control of building work by local authorities. The AI Regulations, in conjunction with Part 2 of the 1984 Act, make provision for a private sector building control system as an alternative to that offered by local authorities.

4.3 The EPB Directive² recasts Directive 2002/91/EC³. A transposition table is attached, showing where new text in the Energy Performance of Buildings (England and Wales) Regulations 2012 (“the 2012 Regulations”) (S.I. 2012/3118) and these Regulations enact the recast EPB Directive. A “copy out” (i.e. the minimum necessary to comply with Directive requirements) approach has been taken transposing only the necessary parts of the EPB Directive, except where doing so would adversely affect UK interests, in particular, the interests of those in the construction industry who are familiar with domestic terminology and policies which, in some cases, already satisfy the requirements of the EPB Directive. The Government will amend the relevant methodologies for the calculation and expression of the energy performance of buildings approved under regulation 24 of the 2010 Regulations and update the accompanying Approved Documents at the same time as making these Regulations. Policy reasons for the details of transposition text, and reference to any changes in methodology and guidance, are set out in the policy section below.

4.4 The majority of the EPB Directive is transposed in the 2012 Regulations. However, the provisions in Articles 2, 3, 6, 7, 9 and Article 11, which relate to the construction or renovation of buildings, are transposed through amendments to the 2010 Regulations. The AI Regulations are also amended to ensure that the changes apply when the building control function is undertaken by an approved inspector. So far as enacting the Directive is concerned, therefore, these Regulations should be read together with the 2012 Regulations.

4.5 The amendments to the 2010 Regulations made by this instrument fall within the following categories:

- rationalisation of Parts K, M and N;
- changes to the provisions on electrical safety in the home in Part P;
- in relation to the local authority building control system: changes to statutory notification and completion certificate provisions;
- in relation to competent person self-certification schemes: new requirements for certificates to contain Green Deal information and for local authorities to store certificates in a retrievable form; authorisation of new types of work and extensions of type of work for competent person schemes;

² A copy of the EPB Directive can be found at:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:153:0013:0035:EN:PDF>

³ See footnote 1.

- in relation to compliance certificates: requirements that the certificates state their legal status as evidence of compliance.

4.6 The amendments to the AI Regulations made by this instrument fall within the following categories;

- changes to the provisions on notices of approval and declarations of insurance, together with related changes to the wording of prescribed forms of notices and certificates and to the grounds for rejecting an approved inspector's notice or certificate; and
- in relation to a final certificate: the requirement that the certificate must state its evidential status.

4.7 A minor amendment is made to the Charges Regulations to clarify the meaning of the term "officer".

5. Territorial Extent and Application

5.1 This instrument applies to England and to certain buildings in Wales.

5.2 In respect of Wales, certain functions under the 1984 Act were transferred from the Secretary of State to the National Assembly for Wales constituted under the Government of Wales Act 1998. The transfer was effected by 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). In May 2007, the functions were transferred to the Welsh Ministers by the Government of Wales Act 2006 (Schedule 11, paragraph 30). These earlier transferred functions related largely to the resolution of disputes under the 1984 Act.

5.3 As a result of the Welsh Ministers (Transfer of Functions) (No 2) Order 2009 (S.I. 2009/3019) most of the Secretary of State's functions under the 1984 Act and related secondary legislation transferred to the Welsh Ministers on 31 December 2011. The following functions under the 1984 Act remain with the Secretary of State: functions relating to certain types of energy infrastructure building; functions exercisable by the Secretary of State as a Crown authority (section 44(5)) and power to appoint a day for modification to cease to have effect or for a provision to come into force (sections 42(7) and 134(1)). The provisions in these Regulations therefore, apply to England and to certain buildings in Wales.

5.4 Under the European Communities (Designation) Order 2008, S.I. 2008/301, the Secretary of State is designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to the environment, but the Welsh Ministers are not. The majority of these Regulations are made using powers conferred by the 1984 Act. Section 2(2) of the European Communities Act 1972 is relied upon for the regulations that implement the EPB Directive in relation to:

- educational buildings and buildings of statutory undertakers⁴, because section 4(1) of the 1984 Act (exemption of educational buildings and buildings of statutory undertakers) operates to exempt such buildings from building regulation provisions; and
- Crown buildings and building work carried out, or proposed to be carried out by Crown authorities, because section 44 of the 1984 Act (application of building regulations to Crown etc) is yet to be commenced, which means that the Crown is not currently covered by building regulation provisions.

6. European Convention on Human Rights

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

7. Policy background

Transposition of the Energy Performance of Buildings Directive (recast)

7.1. The EPB Directive is designed to increase the energy efficiency of buildings, reduce their carbon emissions and lessen the impact of climate change. These Regulations and the 2012 Regulations transpose the Directive's requirements into national law. In particular, these Regulations transpose the provisions in Articles 2, 6, 7, 8, 9 and 11 of the Directive relating to the construction or renovation of buildings through amendments to the 2010 Regulations. The AI Regulations are also amended to ensure that the changes apply when the building control function is undertaken by an approved inspector.

7.2 These Regulations make the minimum requirements required to transpose the EPB Directive, which includes, making minor textual amendments to certain provisions to reflect the new Directive's wording (i.e. regulation 16 which amends regulation 25 of the 2010 Regulations) and amendments to update references to the EPB Directive (i.e. regulations 14, 20 and 21). The Regulations also introduce (under regulation 17) the following additional requirements arising from Articles 6 and 9 of the EPB Directive:

- a consideration of high-efficiency alternative systems for new buildings; and
- a requirement for all new buildings to be nearly zero-energy buildings.

7.3 In addition, the EPB Directive introduces changes to the provisions on energy performance certificates (EPC). The content of the EPC is to be improved by including a list of energy efficiency improvements that could be carried out as part of a major refurbishment, and signposting consumers to more detailed information about the recommendations and how they can be implemented. Regulations 18 and 19 implement these changes. Regulation 18

⁴ The reference to "educational buildings and buildings of statutory undertakers" means buildings falling within paragraphs (a)(b) and (c) of section 4(1) of the 1984 Act.

also includes provisions previously set out in the Energy Performance of Buildings (Certificates and Inspections)(England and Wales) Regulations 2007 (S.I. 2007/991) which transposed Directive 2002/91/EC.

7.4 The EPB Directive's provisions concerning the major renovation of existing buildings (Article 7) fall under a domestic policy area which is already regulated for under regulation 23 of the 2010 Regulations. Regulation 15 amends regulation 23 to transpose fully the requirements of Article 7 at regulation 23(1)(a) of the 2010 Regulations. The remaining provisions of regulation 23 reflect domestic policy where more than 50% of an individual thermal element's surface area is to be renovated or replaced. All the requirements in the amended regulation 23 of the 2010 Regulations are now subject to the Article 7 qualification that the requirement to meet the minimum energy performance requirements applies only where technically, functionally and economically feasible.

7.5 The EPB Directive came into force on 8th June 2010, and EU Member States must complete its implementation by 9th January 2013. In line with current Government policy, these regulations transpose only the minimum requirements set out in the Directive.

Rationalisation of Parts K, M and N of Schedule 1 to the 2010 Regulations

7.6 Parts K, M and N of Schedule 1 to the 2010 Regulations deal with protection from falling, collision and impact, access to and use of buildings and glazing safety respectively. Each provision is supported by an Approved Document that provides statutory guidance on how the regulations can be complied with.

7.7 Engagement with external partners in 2010 about what changes were needed to the 2010 Regulations suggested that areas of overlap and contradiction between these provisions caused uncertainty, confusion and hence unnecessary cost to industry. The Department set out, therefore, to revise and streamline existing guidance in order to minimise these costs whilst maintaining the aspects which deliver a safe and accessible built environment.

7.8 The changes respond to the fact that much of the guidance on, and in relation to, glazing safety in Approved Document N is duplicated in Approved Documents K or M. The guidance supporting Parts K and N, along with some overlapping guidance that currently resides in Approved Document M, has been incorporated into a new consolidated Approved Document K (Protection from falling, collision and impact). As a result Approved Document N is withdrawn and regulation 28 makes a corresponding statutory change by revoking Part N of Schedule 1 to the 2010 Regulations and subsuming its provisions into an amended Part K.

Changes to the Electrical Safety Provisions in Part P of Schedule 1 to the 2010 Regulations

7.9 Part P of Schedule 1 to the 2010 Regulations, supported by the accompanying statutory guidance in Approved Document P, seeks to ensure that electrical work carried out in the home is safe. The consultation (see paragraphs 8.1 and 8.6-8.8 below) highlighted that there was some concern from external partners about the cost associated with these provisions – both from electricians and DIY workers carrying out their own electrical work.

7.10 All electrical work in the home is required to meet the safety requirement in Part P of the 2010 Regulations. Making work non-notifiable avoids the need to notify work to a building control body and to pay building control charges. This benefits DIY workers and unregistered electricians who do not have to pay a fee to a building control body to have their work inspected, tested and certified in respect of work that is not notifiable; nor do electricians registered with a competent person scheme who are allowed to self-certify their own work.

7.11 The changes, delivered through regulations 5, 6 and 32(a), extend the range of work that is non-notifiable to include alteration work outdoors, in kitchens and in lower-risk parts of a room containing a bath or shower while maintaining the requirement of notification for higher risk electrical installation work. Alteration work elsewhere in a dwelling – in bedrooms, sitting rooms, stairs, hallways, etc – is already non-notifiable.

Changes to local authority building control system

7.12 These Regulations make two main changes to the provisions on local authority building control: a change to the requirements on notification of certain stages of work and the introduction of compulsory completion certificates. The aim of the first change is to remove an unnecessary burden on business and of the second to provide all building owners with evidence of compliance which is often needed when buildings are sold.

7.13 Regulation 16 of the 2010 Regulations required those carrying out building work to notify a local authority at certain stages of building work. These notification stages often did not address the stages where the risk of non-compliance was greatest. Regulation 9 therefore amends regulation 16 to remove most of the current notification stages and replace them with the ability of the local authority to specify at which stages it must be notified (together with time limits). The local authority will be able to specify stages only where it has an intention to inspect and that intention is based on the risk of non-compliance. Regulation 9 also restricts the notification of a building to be occupied before completion to those buildings subject to the Regulatory Reform (Fire Safety) Order 2005.

7.14 Regulation 7 revokes the provision of regulation 14(5) of the 2010 Regulations which meant that completion certificates were only available on request in some cases.

7.15 Regulation 17 of the 2010 Regulations governed the giving of completion certificates in respect of both buildings occupied before

completion of building work and those at the completion of building work. Regulations 10 and 11 separate the provisions relating to ‘completion certificates on completion’ and ‘completion certificates on occupation before completion’ (in new regulation 17A inserted in the 2010 Regulations) and provide that they will be given in all cases where the work complies with the requirements specified in the appropriate regulation. In both cases there will be a requirement that the certificates state their evidential status.

Changes to the approved inspectors building control system

7.16 The current AI Regulations require that approved inspectors who send certain notices and certificates to local authorities must also send a copy of their notice of approval and declaration of holding approved professional indemnity insurance to the local authority with each notice or certificate. . This is unnecessarily burdensome on both the approved inspector and the receiving local authority.

7.17 Regulations 35, 36, 40, and 41 therefore remove the need for the notices of approval and the declarations of insurance to be sent with each notice or certificate. This is replaced by requiring the Secretary of State or the designated approval body holding a publicly available register of notices of approval and declarations of insurance which a local authority, or others, could check to ascertain whether an approved inspector did indeed hold a notice of approval and a declaration of insurance. The various statutory forms for notices and certificates (in Schedule 1 to the AI Regulations) are amended to require approved inspectors to declare that they are approved and hold insurance for the work to which the notices or certificates relate.

7.18 Regulations 38, 41(6) and 41(7) also require certain certificates to state their evidential status.

7.19 Regulations 42, 43 and 44 amend the grounds for a local authority rejecting notices or certificates from not having received copies of notices of approval and declarations of insurance to grounds that the approved inspector is not approved or does not hold the required insurance. These grounds are set out in Schedules 2, 3 and 4 of the AI Regulations.

7.20 Regulations 37 and 39 are amendments in consequence of changes to the 2010 Regulations.

Changes to competent person self-certification schemes

7.21 These Regulations make a number of changes to the competent person self-certification scheme arrangements, principally to support the Government’s Green Deal initiative. Installers registered with competent person scheme operators for types of work have the ability to self-certify that their work complies with the requirements of the 2010 Regulations without the need to notify a building control body in advance. No building control fees are payable in respect of work to be self-certified which means that the cost of the

work is lower, giving a competitive advantage to installers registered with a scheme.

7.22 Regulations 24 and 29 authorise a number of extensions of schemes to different types of work and introduce three new types of work related to Green Deal measures for which competent installers can be registered.

7.23 When a property subject to a Green Deal payment plan is sold, the Green Deal payments remain with the property and the payments must be taken on by the new owner. To help make sure that the new owner is aware that the property is subject to a Green Deal payment plan regulation 13 requires that the notices given to building control bodies and the certificates of compliance given to customers state whether there is such a Green Deal plan in force. These notices and certificates are normally made available through a local authority search on an exchange of property so will help the buyer be aware whether there is an outstanding Green Deal plan.

7.24 To make sure that the information on notices given to the local authority is made available regulation 13 also requires the local authority to hold the notices and certificates it receives in a retrievable form.

7.25 Regulation 13(b) requires the certificates given to customers to state their evidential status.

Other changes

7.26 Regulation 32(b) adds a new type of work to Schedule 4 of the 2010 Regulations where no notification to a building control body is necessary as the risk of non-compliance is so low.

7.27 Regulations 3, 4, 8, 14, 20, 21, 23, 25, 26, 27 and 28 make amendments to the 2010 Regulations consequential to other amendments.

7.28 Regulation 33 makes an amendment to the Charges Regulations to clarify the meaning of the term “officer” in those regulations.

Consolidation

7.29 These Regulations do not consolidate any parts of the 2010 Regulations, the AI Regulations or the Charges Regulations. The Department undertakes periodic consolidation of all of the aforementioned regulations, the last having occurred in 2010.

8. Consultation outcome

Introduction

8.1 The Department has carried out public consultations in respect of all the provisions in these Regulations. The consultation on the transposition of the EPB Directive was carried out in 2009 and the consultation on the other

provisions in these Regulations, in 2012. A full summary of the responses to the 2012 consultation is available at:

<https://www.gov.uk/government/consultations/building-regulations-access-statements-security-changing-places-toilets-and-regulation-7>

Transposition of the Energy performance of Buildings Directive

8.2 The consultation on the EPB Directive was carried out in 2009 on a draft version of the EPB Directive. Ministers decided that a further consultation was unnecessary because:

- the content of the draft EPB Directive that was consulted on did not differ significantly from the final version;
- in line with Government policy, the Department is only implementing the minimum requirements of the Directive; and
- the Department wanted to minimise the burden on stakeholders of needing to respond to multiple consultations.

8.3 The 2009 consultation received 75 responses, the majority of which were in support of the Government's position. The full summary of responses can be found at:

<http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/publications/planningandbuilding/energyperformanceconresponse>

Rationalisation of Approved Documents K, M and N

8.4 Consultation on rationalising Approved Documents K, M and N was part of a much larger consultation and in relation to the rationalisation proposals. The Department received 90 responses, mostly from local authority building control, on these proposals. Other respondents were drawn from across the construction industry.

8.5 Responses were largely favourable, but 13 respondents put forward suggestions for further improvements. A number of these made technical comments that have been reflected in the final changes to the guidance. In addition, there were a number of suggestions that the existing references to British Standard 8300 (which deals with how buildings are designed to meet the needs of disabled people) should be updated. Potentially, such a move has significant impacts on how buildings are constructed and was beyond the scope of this current review. The views will, however, be considered as part of any more fundamental review of these provisions.

Changes to the Electrical Safety Provisions in Part P

8.6 The Department received 158 responses to this element of the consultation. Of these, 25% came from electrical installation firms (of which three-quarters were micro-businesses reflecting the make-up of the industry). Responses from local authority building control accounted for 20% and

homeowners were responsible for 11% of the replies. The remainder came from a variety of other groups closely associated with the electrical industry.

8.7 65% of respondents supported making more electrical work non-notifiable (with 27% opposed). Of those that were opposed, many had concerns that the proposed changes might undermine electrical safety. Others disagreed because they believed these areas of work were not actually lower-risk and were therefore not appropriate to make non-notifiable.

8.8 The responses from consultees were also used to refine the costs and benefits in the final Impact Assessment.

Changes to the building control systems

8.9 Overall the Department received 150 responses to the proposed changes to the Building Control system. A majority of responses were from building control bodies – local authorities or approved inspectors. Most of the proposals in these amendment regulations were strongly supported, ranging from 96% in favour of making the evidential status of compliance certificates clearer to 73% in support of the replacement of the current statutory notification stages.

8.10 There was much less support from the extension of competent person schemes to cover further types of building work (43%). Most of the disagreement came from local authority building control bodies. A large majority of other respondents supported the proposal.

9. Guidance

9.1 The rationalisation of Approved Documents K, M and N (which necessitates the revocation of Part N of Schedule 1 of the 2010 Regulations and a new Part K) will be delivered through a new Approved Document K (Protection from falling, collision and impact) and revisions to Approved Document M. The current Approved Document N will be withdrawn. The new Approved Document K will be in a new style for such guidance which has been developed with a particular emphasis on clarity (at consultation 92% agreed that it was easier to read and use). The change to Part P will also be accompanied by a new Approved Document P (Electrical safety in dwellings) which will clearly explain the effect of the change to non-notifiable work.

9.2 An amendment to Approved Document L (Conservation of fuel and power) will give statutory guidance on compliance with the changes made to the 2010 Regulations through the transposition of the EPB Directive.

9.3 The Department will issue a Circular Letter to all building control bodies giving guidance on the changes to the building control systems. The Circular will be publicly available on the Department's website.

10. Impact

10.1 Impact Assessments have been carried out in respect of all the proposed amendments to the 2010 Regulations. There are six assessments, five of which are attached to this memorandum and will be published on the OPSI website:

IA No. DCLG 0078	Parts K, M and N
IA No. DCLG 0084	Part P
IA No. DCLG 0089	Building Control System
IA No. DCLG12019	Competent Person Schemes
IA No. DCLG1051	Energy Performance of Buildings

10.2 The remaining Impact Assessment is the Final Stage Impact Assessment for the Green Deal and Energy Company Obligation which is available at <http://www.decc.gov.uk/assets/decc/11/consultation/green-deal/5533-final-stage-impact-assessment-for-the-green-deal-a.pdf>

10.3 The impact on business of the rationalisation of Parts K, M and N is an annual net saving of approximately £4.4m (at 2012 prices). Changes to the electrical safety provisions in Part P deliver annual net savings to business of £9.4m. In addition, DIY workers who carry out their own electrical work will benefit by approximately £5.3m per year. The Impact Assessment covering the changes to Part P also includes an assessment of the savings from the introduction of third-party certification of electrical work which we intend to implement through further changes to the 2010 Regulations later in 2013.

10.4 The main impact on public sector bodies/ organisations will be to local authorities and through the one-off transitional costs imposed through adapting to the regulatory change. For the rationalisation of Parts M, K and N this is estimated to be £127,000 and for Part P £270,000.

10.5 The Impact Assessment for the changes to the building control systems estimates that there will be a net benefit to business of £1.96m per year. The Impact Assessment for competent person schemes estimates an annual net benefit of £3.6m per year.

10.6 The Impact Assessment for the transposition of the EPB Directive covers not only the changes to the 2010 Regulations but also provisions to be transposed through the 2012 Regulations which were laid the same day as these Regulations. Overall the Impact Assessment shows a net annual benefit of approximately £14m.

10.7 The cost of the amendment of regulation 20 of the 2010 Regulations (amendment regulation 13) that the certificates and notices contain information on whether work was paid for as part of a Green Deal plan is

contained at paragraph 176 in the Impact Assessment for the Green deal and Energy Company Obligation. It estimates a one off cost to business of £34,000.

11. Regulating small business

11.1 The legislation applies to small and micro-businesses.

11.2 Overall these Regulations are deregulatory and therefore businesses of all sizes, including small and micro-businesses, would benefit from a reduction in costs, as set out in the Impact Assessments.

12. Monitoring & review

12.1 As these Regulations are deregulatory there is no need for a formal review under the Government's guidance on sunseting. Nevertheless, the Department keeps all building regulations under periodic review of their effectiveness and cost and these amendments will be part of any such review.

13. Contact

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Tel: 0303 444 1791 or email: ian1.drummond@communities.gsi.gov.uk can answer any queries regarding the instrument.