

EXPLANATORY MEMORANDUM TO
THE HIGHER-RISK BUILDINGS (DESCRIPTIONS AND SUPPLEMENTARY
PROVISIONS) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Levelling Up, Housing and Communities and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 The purpose of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 is to specify descriptions of buildings to be included in the definition of “higher risk building” in the Building Act 1984 (“the 1984 Act”) and to supplement that definition, as well as the definition of “higher-risk building” in the Building Safety Act 2022 (“the 2022 Act”).
- 2.2 Buildings defined as higher-risk buildings are included within the scope of the new more stringent regulatory regime for building safety, created by the 2022 Act.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England only.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Local Government and Building Safety, Lee Rowley MP, has made the following statement regarding Human Rights:
- “In my view the provisions of the Higher-Risk Building (Descriptions and Supplementary Provisions) Regulations 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The 2022 Act establishes a new more stringent building safety regime for “higher-risk buildings”. Section 120D of the 1984 Act (inserted by section 31 of the 2022 Act) defines “higher-risk building” for the purposes of the part of the new regime regulating building work and buildings’ design and construction. For that part of the regime a higher-risk building is a building in England of a specified description that is

at least 18 metres or has at least 7 storeys. This instrument specifies those descriptions of buildings.

- 6.2 Section 65 of the 2022 Act defines “higher-risk building” for the purpose of the part of the new regime that regulates occupied buildings. For that part of the regime, a higher-risk building is a building in England that is at least 18 metres in height or has at least 7 storeys and contains at least 2 residential units.
- 6.3 This instrument supplements both definitions by defining ‘building’, making provision about how height and the number of storeys is to be determined and excluding certain types of buildings.
- 6.4 This is the first use of these powers.

7. Policy background

What is being done and why?

The Context

- 7.1 As set out above, this instrument completes the definition of “higher-risk buildings”; buildings which will be subject to the requirements of the new regime for building safety, established by the 2022 Act.
- 7.2 The new regime is being brought forward to improve safety in high-rise residential buildings. It was a fundamental part of Dame Judith Hackitt’s recommendations, as part of the new approach to managing fire and structural safety risks in high-rise multi-occupied residential buildings outlined in her [Building a Safer Future Report](#), commissioned by government after the Grenfell Tower tragedy.
- 7.3 The report set out that there were extensive flaws with the existing building safety system. The report pointed to an industry that needed significant culture and regulatory change to be fit for purpose and identified a range of problems with current building and fire safety regimes. The report provides the basis of the new regime introduced by the 2022 Act. As part of this reform, Dame Judith Hackitt recommended a strengthened regulatory regime for higher-risk buildings, that improved accountability, risk-management and assurance. The new regime will put in place stronger oversight of, clearer accountability for, and stronger legal duties on, those responsible for the safety of higher-risk buildings throughout design, construction, and occupation, with stronger enforcement and sanctions to deter and rectify non-compliance. This instrument will support and help deliver this new regime, by building on the definition of higher-risk building in the 1984 and 2022 Acts, setting out exactly what buildings are included and excluded.
- 7.4 There are two parts of the new regime. The first establishes a new regulatory framework for the design and construction of new higher-risk buildings and building work to existing higher-risk buildings (the design and construction part) and the second establishes a new regulatory framework when higher-risk buildings are occupied (the in-occupation part).
- 7.5 We estimate that there are currently approximately 13,000 existing buildings which will be subject to the requirements of the new regime as they are at least 18 metres in height, or have at least 7 storeys, and have at least two residential units. We have estimated that on average 490 new buildings which are at least 18 metres in height, or

- have at least 7 storeys, and have at least two residential units will be built per year. These buildings will be subject to the design and construction requirements while being built and will be regulated under the in-occupation requirements once complete.
- 7.6 The new Building Safety Regulator will enforce the new more stringent regulatory regime, overseeing compliance with the 2022 Act and related regulations when they are in force.
 - 7.7 This instrument completes the definition of ‘higher-risk buildings’- which are the buildings that will be required to meet the legal requirements of the new regime.
 - 7.8 Regulation 2 specifies that hospitals, care homes and buildings containing at least two residential units will fall within the scope of the design and construction part of the new regime where they are over 18 metres tall or have 7 or more storeys (the height threshold having been set in the 1984 Act). The new regime is focused on providing proportionate rigour where most necessary. Care homes and hospitals are included in the design and construction requirements for the new regime to help make sure that high-rise buildings which may be occupied by those who are unable to evacuate quickly, or without assistance, are designed and constructed in accordance with the new regime.
 - 7.9 Regulation 4 defines “building”. Some of the buildings under the new regime will be large complex structures with multiple parts, therefore, this definition allows a building to be defined differently depending on the design and structure of the building. It also allows for buildings to be defined differently for the purposes of the design and construction part and in-occupation part of the new regime.
 - 7.10 Where something is being built or is proposed to be built, “building” will refer to the entire construction, so long as the elements within it are attached. This is set out by regulation 4(1) and (3). Where a construction only consists of one structure, that structure will be the “building” (regulation 4(1)). Where the construction consists of different structures joined together, “building” will refer to that set of structures (regulation 4(3)). This might be, for example, a complex development spanning a large area, or a terrace of buildings being built along a road. So long as the elements of that construction are attached, they will all be considered one “building”. The new regime will also use this definition of “building” in any another other circumstance where the building in question does not have any “independent sections” (see below).
 - 7.11 This broad definition of building has been adopted for the design and construction part so that the Building Safety Regulator can consider the entire structure or set of structures while they are built.
 - 7.12 For the purpose of refurbishment work and the in-occupation part of the new regime, it is possible for the “building” to be defined more narrowly in certain circumstances. This is because it would be disproportionate to apply the duties and responsibilities of the new regime across an entire structure or set of structures in circumstances where the section that meets the necessary height and use requirements is independent and separate from the other parts of the wider building.
 - 7.13 Regulation 4(2) and 4(4) therefore allow for sections of a wider building to be defined as their own separate building if they meet a set of criteria. Sections that meet that criteria are known as “independent sections”. An independent section is defined in

regulation 4(6) as a section of the wider building which has its own entrance and exit accessible from anywhere within the section, and which either:

- has no access to any other section of the wider building (for example a residential tower that is part of a terrace of buildings but has no access to its neighbours); or
- only has access to another section of the wider building which does not contain a residential unit (for example, a residential tower within a terrace with access to a shared basement).

- 7.14 Regulations 5 sets out how to measure the height of a building for the purpose of the 2022 and 1984 Acts. The measurement is taken from ground level to the top of the floor surface of the top storey of the building. This approach to measurement is based on the approach taken in the Building Regulations 2010 for the purpose of the ban on combustible materials on buildings over 18m.
- 7.15 Regulation 6 sets out how storeys are to be counted and the circumstances in which a storey is to be ignored (for example storeys below ground level and ones which are purely for roof-top plant rooms or roof-top machinery). This approach also follows the method taken in the Building Regulations 2010. We have included this two-pronged test for height in order to prevent gaming of the system.
- 7.16 Regulations 7 and 8 exclude certain types of buildings from the definition of “higher-risk building”. Hotels, secure residential institutions (e.g. prisons) and military premises (e.g. military barracks and buildings containing accommodation provided by the Ministry of Defence) are excluded from both parts of the new regime. Hospitals and care homes are excluded from the in-occupation part of the new regime. All other buildings with at least two residential units that meet the height threshold will fall within the new regime.
- 7.17 The new regime is focused on providing proportionate rigour where most necessary. Whilst included in the design and construction part of the new regime for the reasons above, care homes and hospitals are not included in the in-occupation part as they are regulated as workplaces through the Regulatory Reform (Fire Safety) Order 2005 (“the Fire Safety Order”) and are already subject to duties placed on those in control of these buildings to make sure the premises are safe. Hospitals and care homes are also subject to the local Fire and Rescue Authorities’ and the Care Quality Commission’s inspection regimes, who will take action if required.
- 7.18 Hotels and secure residential institutions are excluded from both parts of the regime as they are already regulated by the Fire Safety Order. Generally, these buildings are staffed 24 hour per day, have multiple routes of escape, signage and emergency lighting to assist evacuation and have a higher level of detection and alarm systems than residential buildings. Similarly, military premises are also already subject to their own specific safety requirements as they have specific security considerations and are therefore excluded from both parts of the new regime.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 A full public consultation on the provisions contained within this instrument was conducted between 9th June 2022 to the 21st July 2022. 101 responses were received.

10.2 A wide variation of relevant people and organisations responded to the consultation. This included residents, fire and rescue authorities, construction sector and regulatory trade bodies, building control professionals, local councils, developers and large housing associations.

10.3 Overall, respondents broadly agreed with our approach to completing the definition of higher-risk building and were generally supportive of the provisions on which we consulted.

10.4 A full government response to the consultation can be found on the webpage [linked here](#).

11. Guidance

11.1 Guidance related to this instrument will be made available before the first requirements for the new more stringent regime for higher-risk buildings come into force.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full impact assessment has not been prepared for this instrument because it sets out a definition and therefore does not, by itself, have an impact on businesses or other bodies. This instrument supports the new more stringent regime for higher-risk buildings established by the 2022 Act, by determining which buildings will be included in the new regime. An impact assessment was carried out for the 2022 Act and impact assessments will be carried out, as needed, on secondary legislation made under it. A link to the impact assessment for the 2022 Act can be found [linked here](#).

12.4 Section 120F of the 1984 Act (inserted by section 31 of the 2022 Act) and section 67 of the 2022 Act require the Secretary of State to carry out and publish a cost benefit analysis where regulations result in a description of building becoming a higher-risk building. That cost-benefit analysis is available [linked here](#).

13. Regulating small business

13.1 The legislation could apply to small businesses where they build or manage higher-risk buildings as defined by the 2022 Act or this instrument. However, as this instrument sets out a definition it does not, by itself, have an impact on the activities of these small businesses.

14. Monitoring & review

- 14.1 Section 162 of the 2022 Act sets out that the Secretary of State must appoint an independent person to carry out a review of the new regime at least once every five years.
- 14.2 The Building Safety Regulator will also be required to provide oversight of the building safety regulatory system and will analyse data from the operating regime. If, in their view, a new type of building needs to be added to the scope of the regime, the scope can be altered following evidence-based advice or a recommendation by the Building Safety Regulator.

15. Contact

- 15.1 Sara Dmiri at the Department of Levelling Up, Housing and Communities Telephone: 0745 8134 907 or email: Sara.Dmiri@levellingup.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Camilla Sheldon, Deputy Director for Reform, Legislation and Regulators, Safer Greener Buildings Group at the Department of Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Parliamentary Under Secretary of State for Local Government and Building Safety, Lee Rowley MP, at the Department of Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.