

EXPLANATORY MEMORANDUM TO
THE BUILDING SAFETY (RESPONSIBLE ACTORS SCHEME AND
PROHIBITIONS) 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 laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The instrument, which is made under Sections 126, 127, 128 and 129 of the Building Safety Act 2022 (the “Act”), establishes a Responsible Actors Scheme (RAS or scheme) for developers for the purpose of improving the safety and standard of buildings. Members of the scheme will be required to identify and remediate (or pay for the remediation) of life-critical fire safety defects in residential buildings over 11m in height, which they developed or refurbished in England between 1992 and 2022.
- 2.2 The instrument also establishes prohibitions, which will be used in relation to developers (and persons they control) who are eligible for the RAS and opt not to join or comply with the scheme’s conditions. The instrument establishes a planning prohibition to prevent a prohibited person carrying out major development, and a building control prohibition that prevents a prohibited person receiving building control approvals.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is the first use of the powers in sections 126, 127, 128 and 129 of the Building Safety Act 2022.

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 Housing at the Department for Levelling Up, Housing and Communities, Lee Rowley has made the following statement regarding Human Rights:

“In my view the provisions of The Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 In February 2022, Government tabled a package of amendments at the House of Lords Committee stage to the Building Safety Bill to protect leaseholders from the expensive and unfair costs of making their buildings safe. As part of the overall legislative package supporting this approach, the amendments also took steps to ensure that those involved in the development or refurbishment of unsafe buildings took responsibility for fixing or paying to fix them. There were further amendments to refine this approach made at Report Stage, with the Building Safety Act 2022 (the “Act”) reaching Royal Assent in April 2022.
- 6.2 Sections 126-129 of the Act establish these new powers for the Secretary of State to secure that developers remedy defects in buildings and contribute to the costs of doing so through the creation of building industry schemes. This instrument uses those powers to set up a Responsible Actors Scheme with statutory prohibitions.
- 6.3 Section 126 and 127 of the Act gives the Secretary of State powers to establish through affirmative regulations a scheme or schemes aimed at persons in the building industry and makes provision for the regulations to set out how the scheme will work.
- 6.4 Section 126(2) of the Act sets out that a scheme may be established for any purpose connected with securing the safety of persons in or about buildings in relation to risks arising from buildings, or improving the standard of buildings, including by securing those persons in the building industry remedy defects in buildings or contribute to costs associated with remedying defects in buildings.
- 6.5 Section 126(3) of the Act requires that an instrument establishing a building industry scheme sets out a description of the persons in the building industry who are eligible for the scheme, and the conditions of joining the scheme.
- 6.6 Section 126(4) makes clear that the conditions of the scheme may (among other matters) relate to the remediation of buildings with which the eligible person is connected or the making of financial contributions towards costs of remediation.
- 6.7 Section 128 of the Act confers power on the Secretary of State to prohibit persons of a prescribed description from carrying out development of land in England, including where development has planning permission. Implementing the planning prohibition builds on the existing planning system. In particular, the ‘major development’ which is prohibited is defined in relation to regulation 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.
- 6.8 Section 128 also sets out that regulations may make provision for enforcement, including applying, with or without modifications, the enforcement provisions of Part 7 of the Town and Country Planning Act 1990. The Schedule to this instrument makes modifications to Part 7 of the Town and Country Planning Act 1990 in relation to the enforcement of the planning prohibition.
- 6.9 Section 129 of the Act confers on the Secretary of State powers to impose a building control prohibition in relation to persons of a prescribed description. This section provides the legislative basis for this instrument to ensure that any application made by a prohibited person for building control approval (including initial notices and final certificates) will not be accepted by Local Authority Building Control Inspectors.
- 6.10 Sections 128 and 129 of the Act make provision for persons on whom the prohibitions are to be imposed to be prescribed by regulations.

7. Policy background

What is being done and why?

- 7.1 The exercise of these powers is part of the Government's approach to tackling urgent building safety issues, including ensuring that industry contribute to the costs of fixing the building safety crisis, protecting leaseholders from the expensive and unfair costs associated with making their buildings safe and ensuring that residents feel safe in their homes.
- 7.2 Since the Grenfell Tower Fire, it has become evident that a very significant number of residential buildings of 11 metres and above in height were clad with unsafe materials which posed a fire safety risk to residents.
- 7.3 In January 2022, the Government set out its position that industry actors that had profited from the events leading up to the crisis must pay to fix the problems they created, and that the wider industry must also contribute to resolving these issues. Our objective with this instrument is to ensure that developers pay an appropriate share of remediation costs.
- 7.4 The Government initially secured (by Summer 2022) a public pledge from 49 larger developers, committing to fix life-critical fire safety defects in residential buildings 11 metres or more in height which they developed or refurbished in England between 1992 and 2022. In July 2022, the Government published an initial draft developer remediation contract, followed by a period of sustained and intensive engagement with around fifty major developers, coordinated by the Home Builders Federation, until January 2023 on how the Pledge commitments should be codified into a binding contract. The contract terms also include requirements that signatory developers keep residents in buildings which are undergoing remediation informed of progress, and to reimburse taxpayers for money that has already been spent to fix buildings through government funds.
- 7.5 The developer remediation contract is at the heart of the RAS. The Government has been consistent in its public position that developers who are eligible for the scheme but who elect not to make the important commitments set out in the developer remediation contract, or who fail to comply with its terms, should expect to face significant consequences given the significance and urgency of this problem. In such circumstances, they will be prohibited from carrying out major development and gaining building control sign-off in England, subject to certain exceptions set out in the instrument. The RAS is intended to support a level playing field for major developers in the industry, so that those developers who do make commitments to remediate are not disadvantaged. As of 21 April 2023, and subject to change, 46 of the 50 developers who have been invited to sign the contract have done so. In signing the contract, they have committed to remediation works estimated by the industry to be worth over £2 billion.
- 7.6 The description of who is eligible for the scheme captures, in both cases by reference to meeting a profits threshold, (i) major housebuilders who have developed 11m+ residential buildings, and (ii) other large developers who have developed or refurbished two or more residential buildings that are known to have fire safety defects by virtue of having been assessed as eligible for a relevant government cladding remediation scheme. There is also a route for other developers who developed a defective building to volunteer to join the scheme. The developer self-remediation approach, and the RAS, is to be expanded over time to cover other

developers who developed or refurbished defective 11m+ residential buildings and should pay to fix them.

- 7.7 As with the developer remediation contract, the RAS aims to improve the safety of buildings by requiring that any member of the RAS must identify and remediate, or pay for the remediation of, life-critical fire safety defects in residential buildings of over 11m in height which they developed or refurbished between 1992 and 2022. To join the scheme, members of the RAS will be required to enter into the developer remediation contract with DLUHC as published by DLUHC on 16 March 2023 and available at: <https://www.gov.uk/government/publications/developer-remediation-contract>, and comply with its terms.
- 7.8 The prohibitions in this instrument relate to persons who are eligible under the instrument for the new RAS scheme and do not join, or who join but who subsequently fail to comply with the scheme conditions and have their membership revoked, and persons controlled by them. It is necessary for the effectiveness of the scheme and prohibitions to include persons under the control of the prohibited developer so that a prohibited developer cannot continue their development business through other entities which they control.
- 7.9 The regulations enable Secretary of State to make exceptions from the prohibitions covering five main circumstances: businesses under the control of an eligible person who are not in the building industry; exceptions for projects necessary for critical national infrastructure; allowing building control sign-off for residential buildings where people have exchanged contracts on their new home before the prohibition on their developer went into effect; permitting purchasers and owners to obtain a regularisation certificate for unauthorised building work under the Building Regulations 2010; permitting emergency repair works; and permitting building works in occupied buildings to ensure resident safety.
- 7.10 The Government assesses that establishing the RAS, as foreshadowed in its public statements, is an important step towards resolving the building safety issues that came to light following the Grenfell Tower tragedy. It is an important part of the Government's wider strategy for protecting leaseholders from bearing costs unfairly, while ensuring that industry contributes towards putting right historic building safety defects.
- 7.11 The Department estimates that the 46 developers who have signed the developer remediation contract thus far have committed to fixing at least 1,100 residential buildings over 11 metres in height.

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 is the first instrument made under the power in sections 126-129 of the Building Safety Act 2022 and therefore consolidation is not applicable.

10. Consultation outcome

- 10.1 We have not conducted a public consultation in relation to this instrument as it was important to establish the scheme quickly and because we have engaged extensively

with industry and other stakeholders on the terms of the developer remediation contract, which eligible developers must enter into and which contains the core substantive conditions that a developer must comply with as a member of the RAS.

11. Guidance

- 11.1 We plan to issue guidance on the operation of the scheme and to local authorities on the operation of the statutory prohibitions. The guidance will be made publicly available by Summer 2023. Because of the time limits provided for in the instrument, this guidance will be available well in advance of the prohibitions being applied to any developer.

12. Impact

- 12.1 There is no significant impact on charities or voluntary bodies.
- 12.2 There is a limited impact on the public sector, with local planning authorities and local authorities acting as the monitoring and enforcement body for the planning and building control prohibitions.
- 12.3 In the central scenario, there is an impact on business, including familiarisation costs to developers and private building control inspectors, and monitoring costs to private building control inspectors.
- 12.4 The scheme will reduce the risk that developers will delay remediation or fail to remediate entirely. This benefits the general taxpayer and the wider industry, who would otherwise bear the cost for cladding defects through government remediation schemes and the Building Safety Levy respectively. Creating certainty and a standardised set of obligations backed up by the scheme and prohibitions is expected overall to improve certainty for the industry and for the public and reduce the prospect of disputes between the developers and third parties and developers and government, reducing costs associated with such disputes.
- 12.5 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the [legislation.gov.uk](https://www.legislation.gov.uk) website.

13. Regulating small business

- 13.1 The legislation is not expected to apply to the activities undertaken by small businesses.
- 13.2 Persons who are eligible to join the scheme must have had average adjusted operating profits of over £10m per year over three years from 2017-2019. This threshold is expected to exclude small businesses.

14. Monitoring & review

- 14.1 The Department will monitor developers' progress in meeting their remediation obligations under this instrument. The developer remediation contract contains monitoring provisions requiring developers to report quarterly so that the Department can assess the progress they are making towards meeting their obligations.
- 14.2 The Government intends to report on progress to Parliament. The Scheme can be turned off by regulations when it is no longer needed and members may have their membership ended where they have fully discharged their obligations under the

scheme. The remediation effort associated with the scheme and contract is anticipated to take around 10 years to complete, subject to changing market conditions.

14.3 A statutory review clause is included in the instrument.

15. Contact

15.1 Julian Schon at the Department for Levelling Up, Housing and Communities Telephone: 07458 113 142, or email: julian.schon@levellingup.gov.uk can be contacted with any queries regarding the instrument.

15.2 Offer Stern-Weiner, Deputy Director for Responsible Industry Division, at the Department for 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, at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.