

EXPLANATORY MEMORANDUM TO
THE BUILDING REGULATIONS ETC. (AMENDMENT) (ENGLAND)
REGULATIONS 2023

2023 No. 911

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 these Regulations is mainly to amend the Building Regulations 2010 (the 2010 Regulations) to support the new higher-risk building control regime. The amendments made to the Building Act 1984 (the 1984 Act) by amendments in the Building Safety Act 2022 (the 2022 Act) provide for the Building Safety Regulator to be the only building control authority for all higher-risk buildings— local authorities and approved inspectors will not be able to supervise higher-risk building work.

2.2 In addition to amending the 2010 Regulations this instrument makes consequential amendments to the Building (Local Authority Charges) Regulations 2010, the Energy Performance of Buildings (England and Wales) Regulations 2012, the Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023, and the Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023.

2.3 This instrument is one of a package of statutory instruments laid by the Department for Levelling Up, Housing and Communities, which will facilitate the implementation of changes to the current building control system and deliver improvements across the entire built environment.

2.4 Following the Grenfell Tower tragedy, the government appointed Dame Judith Hackitt to lead an independent review of building regulations and fire safety. In her report, ‘Building a Safer Future’, Dame Judith outlined a new approach to managing fire and structural safety risks in high-rise multi-occupied residential buildings.

2.5 The new regulatory regime introduces a new building control process for higher-risk building work, to be overseen by the Building Safety Regulator. The new regime also makes changes to non-higher risk building work, to raise standards and achieve improvements across the built environment. Through this instrument and others, legal responsibilities will be placed on those who commission building work, participate in the design and construction process and carry out the building control function, to ensure standards are met and structural and fire safety are managed.

2.6 These Regulations, in particular, support the introduction of regulator’s notices, which can be used where a project comprises both higher-risk buildings and non-higher-risk buildings. This will allow developers to use a single building control body for both higher-risk and non-higher-risk building work on the same project.

2.7 The Regulations introduce a new definition of ‘commencement’ of work for existing and new buildings, and automatic lapse of building control approval after three years from when the building control approval was granted, for projects that do not meet the

definition of commencement. If the dutyholder cannot demonstrate a project has commenced according to the definition within three years from the date the building control approval was granted, they will have to apply for building control approval again and comply with the new building regulations.

- 2.8 They also strengthen the fire safety information handover for buildings where the Fire Safety Order applies, to make the process safer and more efficient and set out transitional arrangements for the procedural requirements for non-higher risk building work.

3. Matters of special interest to Parliament

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

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdictions 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.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 Section 1 of the 1984 Act enables building regulations to be made for England and Wales for a number of purposes with respect to the design and construction of buildings, building work and the services, fittings and equipment provided in or in connection with buildings. These purposes include securing the health, safety, welfare and convenience of persons in and about buildings.
- 6.2 The 2022 Act establishes a new more stringent building safety regime for higher-risk buildings. Part 3 of the 2022 Act makes a number of amendments to the 1984 Act, including providing for the Building Safety Regulator ('the Regulator') to be the only building control authority for higher-risk buildings in England. Part 3 of the 2022 Act also: amends the 1984 Act so that there are applications for building control approval instead of deposits of plans; provides for building is not commenced; and allows for regulations to define what amounts to commencement of work.
- 6.3 This instrument, in particular, makes amendments to the 2010 Regulations to support these changes. In addition to amending the 2010 Regulations, this instrument also makes amendments to the Building (Local Authority Charges) Regulations 2010, the Energy Performance of Buildings (England and Wales) Regulations 2012, the Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023, and the Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023.
- 6.4 This instrument is one of a series of statutory instruments laid by the Department of Levelling Up, Housing and Communities which will facilitate the implementation of changes to the current building control system and deliver improvements across the

entire built environment. The other instruments include the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 and the Building (Approved Inspectors etc. and Review of Decisions) (England) Regulations 2023.

7. Policy background

What is being done and why?

- 7.1 The 2022 Act establishes a new more stringent building safety regime for higher-risk buildings as part of the new approach to managing fire and structural safety risks in these buildings, and delivers on key aspects of Dame Judith Hackitt's recommendations, as set out in her Building a Safer Future Report (the report), following her Independent Review of Building Regulations and Fire Safety, commissioned by government after the Grenfell Tower fire.
- 7.2 This instrument is part of these reforms and, alongside the commencement of the relevant provisions of the 1984 Act, and the series of statutory instruments mentioned above, introduce the new building control regime for higher-risk buildings, and make a number of other significant changes for other types of buildings.

Building Regulations 2010

- 7.3 Regulation 3 of this instrument amends regulation 2(1) of the 2010 Regulations to add to or amend the definitions in the 2010 Regulations.
- 7.4 Regulation 4 of this instrument inserts new regulations 2A and 2B into the 2010 Regulations. These provisions set out that the 2010 Regulations apply to higher-risk buildings except for the regulations expressly listed in regulation 2B. The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 separately set out the procedures which apply to higher-risk buildings.
- 7.5 Regulation 5 of this instrument amends regulation 10 of the 2010 Regulations, to provide that the exemption from procedural requirements for the Mayor's Office for Policing and Crime does not apply in relation to higher-risk buildings.
- 7.6 Regulation 6 of this instrument amends regulations 11, 16 and 17(2) of the 2010 Regulations to insert new dutyholder and competence requirements: new regulations 11A to 11Q. These requirements will apply to all building work, including that undertaken on higher-risk buildings. The regulations will provide accountability and clarity of roles and responsibilities of those involved in the procurement, design and undertaking of building work, and the duties which will apply to them: 11A, 11B, 11C and 11P set out the requirements for clients, including domestic clients; 11J, 11K, 11L, 11M and 11N set out the duties of those undertaking design work and/or building work, including designers, principal designers, contractors and principal contractors; and 11D to 11I and 11O set out the competence requirements for those appointed to undertake design work and/or building work, when those appointments should be made, and the procedures to be followed when these dutyholders change or cease to be competent.
- 7.7 Regulation 6, 11Q(2) of this instrument also amends regulation 16 of the 2010 Regulations to insert a requirement for the client, within 5 days of completion of the work, to provide compliance declarations from itself and the principal dutyholders in relation to the work. A similar requirement applies in relation to proposals to occupy the building before the work is completed.

- 7.8 Regulation 11 introduces a regulator’s notice. A regulator’s notice is a joint notice issued by the Regulator and the client to the relevant local authority, to allow the Regulator to act as the building control authority for both higher-risk and non-higher-risk building work for the same project. Regulation 11 inserts new regulations 19A to 19F of the 2010 Regulations to set out the process for the submission of a regulator’s notice, the content of such a notice, the grounds on which a local authority may reject a notice and the grounds for an applicant to appeal the local authority’s decision. Without a regulator’s notice, the Regulator is not able to be the building control body for non-higher-risk building work. These provisions will allow the developer, with the agreement of the Regulator, to simplify the building control process for sites containing both higher-risk and non-higher-risk building work, by having only one building control body. Where the Regulator is the building control authority for building work by virtue of a regulator’s notice then the 2010 Regulations apply in relation to that building work, i.e. the procedures in the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 do not apply to that work.
- 7.9 Regulation 12 of this instrument makes amendments to regulations 20 and 20A of the 2010 Regulations, namely requiring that a client makes an installer aware if the work undertaken by the installer is work in relation to a higher-risk building.
- 7.10 Regulations 15, 16 and 17 of this instrument amend regulations 46, 47 and 48 of the 2010 Regulations. The 2022 Act amends the 1984 Act to provide for building control approval to automatically lapse three years after it is granted if work to each individual building is not commenced according to the definition set out in regulation 46A of this instrument. The 1984 Act includes a power to define in regulations when work is to be treated as commenced for these purposes. At present, building control approval does not automatically lapse. This change will mean that, where work relates to more than one building, and this work has not commenced within the three-year time limit, the building control approval for each of those specific buildings where work has not commenced will automatically lapse, even if work on the remainder of the site has commenced. This should simplify the process, whilst also avoiding the situation where a site that has only commenced a minor amount of building work can benefit from transitional provisions and previous building control approval to build to old standards. Regulation 16, as amended, provides for a notice before starting any work on site and a further notice to the local authority when the person carrying out the work is satisfied the building work done meets the new definition of “commencement”.
- 7.11 New regulation 46A of the 2010 Regulations sets out the new definition of what is to be treated as commencement of work, which was previously only set out in guidance. For complex buildings, work is to be regarded as commenced when the foundations supporting the building and the structure of the lowest floor level of that building (but not the other buildings or structures to be supported by those foundations) are completed. Where the work consists of a building that is not complex, or a horizontal extension of a building, work is to be regarded as commenced when the sub-surface structure of the building or the extension including all foundations, basement level (if any) and the structure of ground floor level is completed. Where the work consists of any other building work, work is to be regarded as commenced when 15% of the proposed work is completed.
- 7.12 The Regulations set out the definition of a complex building as a building constructed on the same shared foundation plinth or podium as any other building or structure; a building with more than one storey below ground level or a building where its proposed

use is primarily as a public building with capacity for 100 or more visitors. By a “public building” the Regulation is referring to a shop or shopping centre; premises where food or drink are sold for consumption on the premises, including a nightclub, social club or dance hall; a stadium, theatre, cinema, concert hall; a sports ground; an exhibition hall or conference centre; or a hospital or premises for the provision of health care.

- 7.13 Regulation 16, as amended, also provides for the local authority to reject the “commenced” work notice and a right of appeal against a rejection. Regulation 17 of this instrument makes amendments to the 2010 Regulations to support the strengthening of the enforcement set out in the 1984 Act. In particular, it provides for the content of the new compliance notices and stop notices.
- 7.14 Regulations 7 and 8 of this instrument amend regulations 11, 12, 13, 14, 15, 16, 17, 17A, 18, 20, 20A, 25A, 27, 27A, 27C, 37, 41, 42, 43, 44 and 44ZA of, and Schedules 1, 3, 3A and 4 to, the 2010 Regulations to replace references to the deposit of plans with references to applications for building control approval. This amendment is necessary as the 2022 Act repeals section 16 of the 1984 Act (deposit of plans). Regulation 8 inserts the new procedures for applications for building control approval with full plans, modelled on the procedures in section 16 of the 1984 Act. New regulation 14B and 14C provide for appeals against decisions relating to these applications: these are necessary following the repeal of the current referrals to the Secretary of State under section 16(10) of the 1984 Act. This instrument also makes other amendments to the 2010 Regulations which support the changes to the 1984 Act made by the 2022 Act. These changes, together with others, such as on consultations and the requirement from April 2024 that local authorities must get advice from a registered building control inspector before determining such an application, should allow for a better assessment of how the proposed building work complies with all applicable building regulations’ requirements.
- 7.15 Regulation 10 of this instrument makes provision in new regulations 18A to 18E in relation to a number of new appeals, including for decisions that have included an error of fact, such as being wrong in law, being unreasonable, or not following the correct procedures or regulations. It also amends appeals being made under section 101A of the 1984 Act, which applies when a local authority refuses to consider an application for building control approval, initial notice, or amendment notice because it would apply to a Higher-Risk building. Provision is also made in relation to the grounds of appeal and procedures in relation to appeals to the First-tier Tribunal.
- 7.16 Regulation 13 of this instrument amends regulation 38 of the 2010 Regulations, strengthening fire safety information handover from the person carrying out the work to the responsible person. This will include handing over the information earlier in the process; gaining confirmation from the person who receives the information that it is sufficient to enable them to understand, operate and maintain the building; and giving notice to the relevant authority that the transfer of information has taken place. The fire safety information is information relating to the design and construction of the building or extension, and the services, fittings and equipment provided in or in connection with the building or extension which will assist the responsible person to operate and maintain the building or extension with reasonable safety.
- 7.17 Regulations 9 and 14 of this instrument amend regulations 15 and 19 and omit regulations 45 and 46 of the 2010 Regulations. The 2022 Act provides for article 45 (consultation with fire and rescue authorities) of the Regulatory Reform (Fire Safety) Order 2005 to be revoked to move this requirement into the 2010 Regulations.

Regulation 9 provides for the new consultation requirement (regulation 15A). In separate commencement regulations, the Department intends to commence section 33 (testing) of the 1984 Act. Once section 33 is commenced regulations 45 and 46 of the 2010 Regulations are no longer needed, and regulation 14 of this instrument omits those provisions.

- 7.18 Regulations 22 to 25 of this instrument make transitional arrangements in relation to some of the amendments made. Regulation 22 lists the parts of the legislation that do not apply to building work that has started, or had plans deposited, or had a building notice given to a local authority, before the new regimes start date. These parts are regulations 4, 6, 7, 8, 9, 11, 12, 13 and 15. The disapplication of regulations 6, 13, 15 and 18 ceases on the 6th April 2024 if the building work has not started, using the current definition of started, and not the new definition of commencement. Regulation 23 clarifies that appeals and applications to the magistrates' court made before the regime start date will be carried out without regulation 10 (see above) applying. Regulation 24 disapplies regulations 22 and 23 from Higher-Risk Buildings, except for when this would clash with Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 Schedule 3, which is that legislation's transitional, supplementary, and saving provisions section. Regulation 25 defines terms and defines commencement for the purposes of transition.

Building (Local Authority Charges) Regulations 2010

- 7.19 Regulation 18 of this instrument amends regulations 5(1), 7(5), 8, 11, and 14 of the Building (Local Authority Charges) Regulations 2010 in particular to make provision in relation to the repeal of deposit of plans in England and its replacement with applications for building control approval.

Energy Performance of Buildings (England and Wales) Regulations 2012

- 7.20 Regulation 19 of this instrument amends regulation 32(1) of the Energy Performance of Buildings (England and Wales) Regulations 2012 to update the legislation to include the new definition of the building safety regulator.

Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023

- 7.21 Regulation 20 of this instrument amends regulation 1 of the Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023 to make amendments which are consequential on the changes in this instrument.

Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023

- 7.22 Regulation 21 of this instrument makes consequential amendments to the Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023.
- 7.23 The Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023 establish a Responsible Actors Scheme (RAS) 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.
- 7.24 It 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 from receiving building control approval.

- 7.25 Consequential amendments are made to Regulations 34, 35, 36 and 37 of the Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023 to reflect the changes made to the building control process in this instrument.

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 There are no plans to consolidate the 2010 Regulations in the immediate future.

10. Consultation outcome

- 10.1 The Department conducted a public consultation on implementing the new building control regime for higher-risk buildings and wider changes proposed to the building regulations for all buildings. The duration was 12 weeks from 20 July 2022 to 12 October 2022. This consultation sought views on the proposals that have been included in this instrument. A full consultation response had been prepared and published on GOV.UK.
- 10.2 The consultation received responses from a range of stakeholders, including building control bodies, fire and rescue authorities, trade representation organisations, developers, architects, surveyors and asset management companies. Responses were received online and via email.
- 10.3 The Department has also conducted further consultation through stakeholder engagement with those who would be affected by the proposed changes, including the Building Safety Regulator, local authorities, trade bodies and representatives in the construction sector.

Dutyholder roles and responsibilities

- 10.4 There were 122 responses on new dutyholder roles, responsibilities and competence. On average approximately 69% of respondents agreed with the proposals across eight questions. The proposals included identifying and placing duties on those 'dutyholders' who procure, design, and undertake building work to which the 2010 Regulations apply. The dutyholders will be the client, the principal designer, the designer, the principal contractor, and the contractors. Dutyholders will need to: plan, manage and monitor the design work and the building work so that it complies with all relevant building regulations requirements; cooperate and communicate with each other; coordinate their work; and liaise with and provide information to, other dutyholders. They will also need to have the competence (the skills, knowledge, experience and behaviours) for the work they are to undertake, not work outside the limitations of that competence, and make sure those they appoint have the right competencies. In the case of an organisation, they should have the organisational capability for the work they are engaged to do.
- 10.5 There were 122 responses to the questions on the client and other dutyholders obligations when making appointments. On average, across four questions, approximately 53% agreed with the proposals. Dutyholders must keep a record of the

steps they took to satisfy themselves that the appointed persons have the relevant competence for the roles. This must include any previous serious infractions and an explanation of why this would not have an effect on the appointment to the project and/or the measures the dutyholder will take to mitigate the effects of the appointment.

Definition of commencement of building work

- 10.6 There were 51 responses to the section on wider changes to the building regulations to align the existing system with the new system. The majority of respondents (52% for the new buildings definition and 55% for the existing buildings definition) agreed with all the questions that were posed. Sixty-one per cent provided detailed comments. The issues raised fall into two categories: general concerns applicable to all proposed definitions of commencement, and specific concerns with the proposed definitions of commencement of work. The key general issues, raised by 18% of respondents, was that the definitions of commencement posed are too far into the building process which will have a number of consequential effects on the progress of construction, such as the inability to meet the definition within the proposed 3-year timeframe and the risk of building work completed before meeting the definition of commencement being unregulated. The need for further clarity on the definition and guidance for the sector was also raised by 16% of respondents.

Regulator's notice

- 10.7 There were 47 responses in relation to regulatory notices. On average, across three questions 78% of respondents agreed with proposals. The 2022 Act allows developers to ask the Building Safety Regulator to provide building control oversight for non-higher-risk building work projects if they are part of the same development site as a higher-risk building. The questions sought feedback on the information that must be included in the regulators notice and the grounds on which a local authority could refuse a regulator's notice.

New procedures for building control approval applications for buildings that are not higher-risk buildings

- 10.8 There were 51 responses to the section on new procedures for building control approval applications for buildings that are not higher-risk buildings. The majority of respondents (57%) agreed with the proposal of having a route of appeal for dutyholders who consider that the timeframe for determining their application has been extended beyond what they consider to be reasonable. Some of the points submitted from individual respondents varied from the suggestion that the route of appeal was redundant, as the application can be resubmitted after rejection, and there is no time limit for this. It was also mentioned that local authorities ask for justifications that are not needed, and this extends the appeal process. Another suggestion was that a new process allowing for staged submissions, or approvals with conditions, is put in place to smooth the process, or that the applications themselves could have to pass a pre-submission test, to make sure basic requirements and documents are included.

11. Guidance

- 11.1 The Building Safety Regulator will produce guidance on relevant provisions included within this statutory instrument.

12. Impact

- 12.1 This policy is likely to have impacts on business, building owners, residents, building control inspectors and building control bodies, as well as professionals involved in the design and construction of buildings.
- 12.2 There is no impact on the public sector.
- 12.3 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.
- 12.4 No wider impacts are expected to disproportionately affect protected demographics, the environment, or business.

13. Regulating small business

- 13.1 Small businesses will be subject to the requirements placed by this instrument, because of the need to ensure equal standards across the built environment.
- 13.2 For the majority of these groups, the impacted bodies will be companies of a size sufficient to take on the defined roles in relation to the buildings in scope, and the majority of the burdens of the new regime will fall to such bodies. However, there will also be an impact on individuals, including building control professionals and designers and contractors who are operating as self-employed sub-contractors. These individuals may face a comparatively higher burden in meeting and demonstrating compliance with the required competence standards.
- 13.3 Compliance with duties under part 3 of the 2022 Act, however, is key to delivering safety in the design and construction of higher-risk buildings. Any exemptions for individuals, or for small and microbusinesses, would involve an unacceptable compromise regarding the safe design and construction of these higher-risk buildings. Such groups must be able to demonstrate compliance with the duties under part 3 of the 2022 Act, not least to avoid creating loopholes where unscrupulous companies might look to sub-contract to abrogate their own responsibilities to ensure that the part 3 duties are met.
- 13.4 The wider dutyholder requirements are likely to have a proportionately larger impact on smaller businesses. These requirements relate to non-higher-risk buildings and a larger proportion of these will be constructed by smaller construction firms. However, compliance with the wider dutyholder requirements is key to delivering safety in the design and construction of non-higher-risk buildings.
- 13.5 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to be clear about the requirements that are being enforcements, while taking into consideration feedback from the industry.

14. Monitoring & review

- 14.1 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Parliamentary Under Secretary of State for Local Government and Building Safety, Lee Rowley MP, has made the following statement:

“The regulatory measures in this instrument are within the scope of the periodic review provided for in section 162 of the Building Safety Act 2022, and it would not be appropriate in the circumstances to make provision for a separate review in this instrument”.

15. Contact

- 15.1 Marta Musolino at the Department for Levelling Up, Housing and Communities. Email: Marta.Musolino@levellingup.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Camilla Sheldon, Deputy Director for Regulatory Stewardship and Reform, 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 Lee Rowley at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.