

Explanatory Memorandum to The Building Safety (Description of Higher-Risk Building) (Design and Construction Phase) (Wales) Regulations 2023

This Explanatory Memorandum has been prepared by Building Regulations team of the Planning Directorate and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Building Safety (Description of Higher-Risk Building) (Design and Construction Phase) (Wales) Regulations 2023. I am satisfied the benefits justify the likely costs.

Julie James
Minister for Climate Change
17 October 2023

PART 1

1. Description

- 1.1 The Building Safety (Description of Higher-Risk Building) (Design and Construction Phase) (Wales) Regulations 2023 (“the Regulations”) specify what constitutes a “higher-risk building” for the purposes of the Building Act 1984 (“the 1984 Act”). The Regulations are made under powers inserted into the 1984 Act by the Building Safety Act 2022 (“the 2022 Act”).
- 1.2 “Higher-risk buildings” will be the buildings subject to an enhanced regime during the design, construction and refurbishment phases of a building’s lifecycle. Much of the detail of the enhanced regime, some of which will not exclusively apply to “higher-risk buildings”, will be made in subordinate legislation under powers inserted into the 1984 Act by the 2022 Act.
- 1.3 This description will also enable the restriction of activities and functions to certain individuals and bodies. In April 2024 all Building Inspectors and Building Control Approvers will need to be registered under a new regulatory regime, following the opening of the registers to applicants in early 2024. Some activities and functions will only be capable of being carried out by those whose registration includes advising on “higher-risk building” work.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1 None.

3. Legislative background

- 3.1 Following the Grenfell Tower tragedy, the UK Government appointed Dame Judith Hackitt to lead an independent review of building regulations and fire safety in England. In her final report, Dame Judith Hackitt outlined a new approach to managing fire and structural safety risks in high-rise multi-occupied residential buildings together with

fundamental changes to the way building control operates, alongside driving up competence across the profession and industry more widely.

3.2 The Building Safety Expert Group developed the ‘Road Map to Safer Buildings in Wales’, which applied the Hackitt report recommendations to Wales. These proposals were built on in the White Paper: Safer Buildings in Wales¹ (“the White Paper”) which set out how we planned to address the issues in the design and construction and occupation stages. The White Paper explained that changes to the design and construction regime in Wales would be brought forward through the (what is now) the 2022 Act.

3.3 The 2022 Act which received Royal Assent in April 2022, brought forward a package of legislative changes in relation to building safety. For Wales, the Act contains, amongst other provisions, legislative changes to establish new design and construction processes, oversee the competence of those who operate in the system, and other improvements to support the construction of safer buildings generally, and also makes specific provision in relation to higher-risk buildings.

3.4 The Regulations are made under powers inserted by the 2022 Act into the 1984 Act.

3.5 New section 120I of the 1984 Act provides that the Welsh Ministers can make regulations that specify the meaning of a “higher-risk building”. New section 120A of the 1984 Act applies to regulations made under section 120I and makes supplementary provision about what the Regulations can include.

3.6 The Regulations are subject to the draft affirmative procedure by virtue of new section 120A(9) of the 1984 Act.

4. Purpose and intended effect of the legislation

4.1 The Building Safety (Description of Higher-Risk Building) (Design and Construction Phase) (Wales) Regulations 2023

4.1.1 Currently there is no description of what constitutes a “higher-risk building” in Wales. The Regulations specify what constitutes a “higher-risk

¹ [Safer BuildingS in wales: A consultation \(gov.wales\)](https://gov.wales/safer-buildings-in-wales-a-consultation)

building” and where buildings come within this description there will be implications for the processes that apply to them and who can supervise work on them. Many of the changes will be implemented through the making of subordinate legislation, with some of the changes due to be implemented in April 2024 under phase one of the Building Safety Programme (Design and Construction phase) (“phase one”). Other changes will be made under phase two of the Building Safety Programme (Design and Construction phase) (“phase two”), with implementation currently planned for 2025.

4.1.2 Under phase one, the description in the Regulations will interact with other legislation for the following purposes:

- to restrict the oversight of building control for new high-risk buildings to local authorities (and to make related transitional provisions).
- to put into place classes of registered building inspectors to ensure that those appointed to oversee work on a higher-risk building have the relevant skills, knowledge, experience and behaviours necessary to undertake the role.
- to require that some activities and functions (some of which will apply only in relation to higher-risk buildings) are only carried out through/ with the advice of a registered building inspector (see new sections 46A and 54B of the 1984 Act).

4.1.3 Under phase two of the Building Safety Programme the description will be used to introduce the new design and construction regime which will bring in a more stringent process for plan checking, information retention and site inspection process for these types of buildings.

4.1.4 The Regulations will come into force in January 2024 to allow for the opening of the registers for building control professions, although enforcement activity against such professions will not commence until April 2024 as this is when the new regulatory regime for the profession is due to begin.

4.1.5 From April 2024, as part of the enhanced regime for higher-risk buildings, only Local Authority Building Control will be able to oversee new higher-risk building work. Restricting these activities is in line with recommendations from the Hackitt report.

4.2 Scope of the legislation

- 4.2.1 The types of buildings proposed to be included and excluded from the scope of the new/ enhanced design and construction regimes was originally consulted on through the White Paper – ‘Safer Buildings in Wales: A Consultation’.
- 4.2.2 The description in the Regulations has been amended slightly from the original proposal.
- 4.2.3 The original proposal for the description of higher-risk building (which are referred to as Category 1 buildings in the White Paper) for the design and construction phase was to include residential buildings with a floor 18 metres or more in height above ground level or more than 6 storeys and containing two or more residential dwellings.
- 4.2.4 This height threshold is based upon the guidance set out in Building regulations guidance: part B (fire safety) Approved Document B - Fire Safety², and from fire safety data which indicates that the impact of fires is potentially more significant in a high-rise building.
- 4.2.5 The Regulations provide that a “higher-risk building” is a building (including a structure) that—
- (a) is—
 - (i) at least 18 metres in height (how a building is to be measured is set out in regulation 4), or
 - (ii) has at least 7 storeys (how the number of storeys is to be calculated is set out in regulation 5), and
 - (b) contains—
 - (i) at least one residential unit,
 - (ii) a hospital that has at least one bed intended for use by a person admitted to the premises for an overnight stay,
 - (iii) a care home, or
 - (iv) a children’s home, and
 - (c) is not an excluded building (what constitutes an “excluded building” is set out in regulation 6).

² [Building regulations guidance: part B \(fire safety\) | GOV.WALES](#)

- 4.2.6 A main difference between the original proposal and the Regulations is the change from two to one residential unit.
- 4.2.7 Residential units still present the greater fire risk and therefore remain the core target of the new regime. A building above the height/ storey threshold with a single residential unit is now included within the scope. This means that multi-use buildings are also included in the new regime where they contain a residential unit.
- 4.2.8 The amendment from two residential units to one residential unit aligns with the requirements in respect of combustible cladding.
- 4.2.9 Since the White Paper consultation, the description of a “higher-risk building” has also now, in relation to the design and construction phase, been expanded to include care homes and hospitals. Their inclusion is based on evidence presented during scrutiny of what is now the 2022 Act. Including hospitals and care homes ensures “higher-risk buildings” (i.e. those that meet the height/ storey threshold) which may be occupied by those with limited mobility are designed and constructed in accordance with the new regime. A hospital will only come within scope where it has at least one bed intended for use by a person admitted to the premises for an overnight stay.
- 4.2.10 The buildings excluded from the description are set out in regulation 6 and include:
- secure residential institutions (e.g. prison)
 - hotels
 - military premises (e.g. military barracks)
 - living accommodation provided by the Ministry of Defence.
- 4.2.11 Secure residential institutions and military premises have been excluded as these buildings have specific security considerations which need to be considered. The Ministry of Justice and the Ministry of Defence have their own building and fire safety arrangements. We believe it is right that these are maintained.
- 4.2.12 Hotels have been excluded as hotels in Wales that meet the height criteria are generally managed properties. However, we recognise that there is a change in the way that such establishments are managed, for example the introduction of automatic reception/concierge services, elsewhere in the UK and things could change in Wales. The UK Government are undertaking substantial research on the risk associated

with hotels and all buildings which is due to be published in 2024, and before our gateway regime (phase two of the Building Safety Programme) comes in. We have therefore taken the decision to exclude hotels at this point and revisit this once more research is available.

5. Duty to consult

- 5.1 Before making any regulations under section 120I of the 1984 Act the Welsh Ministers are required, by virtue of section 120C of the 1984 Act, to consult with BRACW and any other person that the Welsh Ministers consider appropriate.
- 5.2 A formal consultation was carried out in the process of developing the Regulations. The Building Regulations Advisory Committee for Wales (“BRACW”) have been consulted and a workshop with key industry stakeholders was undertaken in relation to changes in respect of the regulation of the building control profession.
- 5.3 The Welsh Ministers held a 12 week public consultation from 17 February 2023 to 12 May 2023 on a draft of the Regulations. The consultation was drawn to the attention of a wide audience of key stakeholders such as Approved Inspectors, local authorities and professional bodies such as the Chartered Association of Building Engineers, the Royal Institute of Chartered Surveyors and the Chartered Institute of Building. Respondents included those from building control bodies in both the private and public sector.
- 5.4 There was generally broad agreement to the proposals in the consultation. Some relatively minor amendments to the drafting have subsequently been made to improve clarity. The issue of the exclusion of hotels detailed at 4.2.12 has been identified, although no evidence was given to support their inclusion. As detailed above a review of the research currently being undertaken will be carried out once it is published to consider whether hotels are of a higher-risk and therefore should be included.
- 5.5 The consultation documents and a summary of the responses are available at: [Building safety for higher-risk buildings | GOV.WALES](#)

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

6.1 This Regulatory Impact Assessment (“RIA”) sets out the options available. The RIA considers the scope of what we could include within the description or whether it is possible to not provide a description at all.

6.2 Option 1 – Do not create a description

- The 2022 Act enables Welsh Ministers to specify in regulations a description of the meaning of “higher-risk building”.
- The regimes that will be introduced as part of the 2022 Act rely upon this description for their implementation.
- Without describing what a “higher-risk building” is, there is no way of introducing the new regimes and therefore this option has not been considered further.

6.3 Option 2 – Draft the regulations to include a limited scope which is largely in line with the Category 1 buildings described in the White Paper (Safer Buildings in Wales) recommendations, with minor amendments

- There is an expectation from the public and industry that this is the definition that will be used.
- This scope is in line with the recommendations in the Hackitt report, covering the highest risk buildings.
- The regimes which will use this description will limit building control functions to local authorities in Wales. The number of new buildings constructed annually which would come within this description averages 5.
- The impact of the amendment to include one residential unit as opposed to the two residential units proposed in the White Paper would be negligible as in practice it is extremely unlikely that there will be one residential unit in a higher-risk building.
- As only more qualified/ experienced building inspectors will be able to advise on higher-risk buildings and the enhanced regime will result in more checks/ stages additional costs will be placed on the industry. The costs of these additional burdens are proportionate to the risk in the construction of these types of buildings.

6.4 Option 3 – Draft the regulations in line with the White Paper recommendations, with minor amendments and include hotels.

- The consultation responses overwhelmingly requested hotels to be included.

- There is, at this stage, no evidence to support the inclusion.
- The UK Government is undertaking substantial research on the risk associated with hotels and all buildings which is due to be published in 2024, and before the gateway regime comes in. Evidence presented there may support a review of the Regulations.
- This would add additional burdens to local authorities and hotel developers/owners when the new regimes are introduced. Costs associated will be evaluated as part of any future review.

6.5 Option 4 – Draft the regulations to include category 2 buildings

- Category 2 buildings as described in the White Paper as residential properties with two or more dwellings that are no more than 18m in height.
- The number of category 2 buildings constructed each year is unknown but the numbers of properties currently in existence in Wales is approximately 66,000 (compared to 171 category 1).
- The additional burdens to local authorities of being the only bodies who can oversee building work would certainly, in the first instance, be unmanageable.
- This would add burdens to developers of these properties which would seem disproportionate to the risk in the construction regime.
- Because of the additional burdens we do not think this is a viable option at present.

6.6 There is little difference between Option 2 and Option 3, Option 3 includes hotels within the description and therefore they would be subject to the new enhanced regime being introduced in Phase 2 of the Building Safety programme.

6.7 The number of hotels that are built each year that would meet the height criteria is very low, just over an average of 1 and so would have very little impact on the totals numbers included in the regime.

6.8 However there is no evidence of increased risks of hotels and there is research on going which will provide supporting evidence either for inclusion or not. The main reason respondents to the consultation wished for them to be included was because of the changing nature of management of hotels to being unmanned, however, at present all hotels of relevant height criteria in Wales are manned 24/7.

6.9 If we were to include them now without evidence and subsequently the research finds that there is no reason to include them then we would have placed an unevidenced burden on those constructing hotels. The

economic impact assessment estimated the average additional cost per new build for the new regime would be £165,000 and £40,000 for a major refurbishment project.

6.10 We have therefore decided to proceed with Option 2 and review this once the research detailed above is complete. It should be noted that if the research is published as currently proposed then a review of this definition could take place prior to the introduction of the new gateway regime should it be needed.

7. Costs and benefits

7.1 These Regulations in themselves are not expected to generate any direct costs or benefits since they simply define a 'higher-risk building'. However, what we include in the description of higher-risk buildings will have an impact on future building safety regimes and regulations and it is at that point that businesses and regulators may incur additional costs. Detailed assessments will be undertaken for future regulations in which the definition is applied.

7.2 To provide context for these regulations we have included detail from the cost-benefit analysis³ which was commissioned in relation to the Building Safety Bill (now the 2022 Act). This analysis set out the estimated costs and benefits in Wales of the policy proposal as outlined in the Legislative consent motion for the Building Safety Bill. These proposals were also included within the Welsh Government's White Paper: 'Safer Buildings in Wales' for design and construction works. These policy proposals included:

- The construction and refurbishment of higher risk buildings; and
- Wider dutyholder responsibilities for all construction projects.

7.3 Option 2 has only one minor change from the definition used in this RIA, and this is the change in number of residential units from two to one. This change is insignificant in terms of impact and would, in any case, be within the ranges used to quantify the existing benefits. Therefore it can be assumed that the estimated costs and benefits of using this definition for the new regimes are as stated previously and are as follows:

Benefits

³ [*Estimated Costs & Benefits of 'Safer Buildings in Wales' – for design and construction works \(gov.wales\)](https://www.gov.wales)

7.4 Methodology

The benefit estimates set out in the cost-benefit analysis were calculated over a 70-year appraisal period. This includes benefits experienced in the 10-year policy appraisal period (equal to that used to estimate costs) and those benefits expected to persist over the lifespan of a building, assumed to be 60 years. This is to best capture all the benefits and reflects HM Treasury's Green Book⁴ guidance on 'persistence' of benefits. For example, benefits associated with improvements in the construction quality of new builds will likely last the lifespan of the building.

7.5 Types of benefit

The Building Safety Regime proposals for residential buildings are expected to provide the following benefits:

7.6 For higher-risk buildings four main types of benefits will derive:

- Reduced casualties, fatalities, building and other damage/loss resulting from reduced fire spread and structural failure.
- Avoided costs of resolving another systemic issue.
- Other cost savings to the construction industry, building owners and leaseholders.
- Wider benefits to the construction industry through enhanced skills, expertise and improved systems, processes and techniques.

7.7 For additional dutyholder responsibilities on other building works – the proposals will increase the time spent checking that the work is compliant with the Building Act 1984 and regulations made under it, and information and activities are co-ordinated across dutyholders. This is expected to reduce the amount of non-compliant work being undertaken per annum as well as providing clearer accountability for compliance.

7.8 Extent of benefit

The analysis estimates that the Building Safety Regime proposals for higher-risk buildings will give rise to annual benefits of between £1.4m to £3.3m (central estimate of £2.3m pa). Table 1 provides a breakdown:

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063330/Green_Book_2022.pdf

- Reduced fire spread accounts for between £0.2m to £1.0m annual benefits (central estimate of £0.5m pa).
- Avoided costs of resolving systemic issues accounts for between £0.3m to £0.6m annual benefits (central estimate of £0.5m pa).
- Other avoided costs account for between £0.4m to £0.7m annual benefits (central estimate of £0.6m pa).
- Wider benefits account for between £0.5m and £1.0m annual benefits (central estimate of £0.7m pa)

Table 1

	High Scenario		Central Estimate		Low Scenario	
	70yr Present Value	10yr Equivalent Annual Benefit	70yr Present Value	10yr Equivalent Annual Benefit	70yr Present Value	10yr Equivalent Annual Benefit
	PV £M	EAB £m	PV £M	EAB £m	PV £M	EAB £m
Reduced fire spread	8.88	0.97	4.91	0.54	1.48	0.16
Avoided costs of resolving systemic issues	5.33	0.62	3.99	0.46	2.66	0.31
Other avoided costs	6.24	0.72	4.8	0.56	3.36	0.39
Wider benefits	8.22	0.95	6.32	0.73	4.42	0.51
Total – Category 1 Buildings benefit	28.65	3.27	20.02	2.29	11.93	1.38

7.9 Non-monetised benefits

In addition, there are a range of benefits which have not been monetised, either because there is a lack of robust data and evidence base available or because it was not considered proportionate to carry out this analysis.

The most significant of these non-monetised benefits relates to reassuring residents that risks to their safety and their homes have been reduced. This would mitigate negative mental health and wellbeing impacts arising from any existing uncertainty/concerns as to the safety of people's homes.

The majority of these benefits however relate to improving the safety of, and confidence in, existing buildings rather than to future new buildings.

Costs

7.10 Types of cost

The Building Safety Regime proposals for residential buildings are expected to generate costs. The analysis estimates costs for the new requirements of the regime under the headings of Gateways; Dutyholder responsibilities; Golden Thread; Key Dataset; Sanctions; Appeals; and other regulator costs.

Costs will be borne by the regulator and by industry and will involve transition costs plus annual ongoing costs.

7.11 Extent of costs

	Present Value (10year)			Annual Cost (EAC)		
	Low	Central	High	Low	Central	High
Higher Risk Buildings	£9.05m	£13.40m	£17.59m	£1.05m	£1.56m	£2.04m
Wider Dutyholder role	£4.77m	£5.96m	£7.16m	£0.55m	£0.69m	£0.83m

The analysis estimates that average annual cost of meeting the new requirements of the Building Safety Regime will be between £1.1m and £2.0m (central estimate of £1.6m).

- The average annual cost to industry is estimated to be between £0.7m and £1.3m (central estimate of £1.0m);
- The average annual cost to the Regulator is estimated to be between £0.4m and £0.7m (central estimate of £0.6m).

7.12 Wider dutyholder costs for all buildings

There will be additional requirements for dutyholders in all building work where building regulations are triggered.

- Transition costs of between £0.4m and £0.7m (central estimate of £0.5m);
- Annual on-going costs of £0.5m to £0.8m (central estimate of £0.6m).

7.13 As the new regimes and associated regulations are introduced this regulatory impact assessment will be updated and further relevant impact assessments completed.

8. Competition Assessment

Our competition assessment suggests that the description of higher-risk buildings is unlikely to have a significant detrimental effect on competition. As new information comes to light this will be re-assessed.

9. Post implementation review

As regulations that will use this description are developed and brought into force we will review the scope of this description, its relevance and its

impacts. We will also review this if further evidence is presented that indicates that this description should be changed.