



THE BUILDING SAFETY ACT 'HIGHER-RISK BUILDINGS' REGIME: WHEN IS A HOTEL NOT EXEMPT?

The Building Safety Act 2022, which came into force on 1 April 2023, established a new safety regime for "higher-risk buildings" (the **HRB Regime**). Although hotels are generally considered to be excluded from the HRB Regime, in practice this may not always be the case and hotel owners, operators and investors need to act swiftly to determine whether the exclusion applies to their hotel and, if not, consider and account for their potential liabilities under the HRB Regime.

This article looks at the application of the HRB Regime to hotels in England and when the statutory exclusion may not apply.

What is the statutory exclusion for hotels?

Broadly speaking, a higher-risk building (**HRB**) is any building which:

- is 18 or more metres in height or has seven or more storeys; and
- contains at least two residential units (with 'unit' defined expansively as "a dwelling or any other unit of living accommodation").

The statutory regulations which implemented the HRB Regime (the **HRB Implementing Regulations**) provided that a building which comprises "entirely of a hotel" would be excluded from the regime. This exclusion is on the basis that, unlike many other densely occupied buildings, hotels are "staffed 24/7, 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".

What is a hotel for the purposes of the HRB Regime?

So, what qualifies as a hotel for these purposes? Unhelpfully, there is no relevant statutory definition of "hotel". The accompanying guidance on the HRB Implementing Regulations states that hotels are "buildings which provide overnight accommodation for customers for leisure or business", but then goes on to say that "hotels are excluded regardless of how long these buildings are occupied by individuals or group of customers".

Key issues

This briefing considers the following questions in relation to the Higher-Risk Buildings Regime under the Building Safety Act 2022:

- What is the statutory exclusion for hotels?
- What is a hotel for the purposes of the HRB Regime?
- When is a hotel included in the HRB Regime?
- What is the effect of a hotel development project falling within the HRB Regime?
- Existing hotels: what is the position for extensions, refurbishments, and changes of use?
- Which obligations apply to the occupation of HRBs (new builds or existing buildings)?
- What should the next steps be for the hotel sector?

Given that no distinction seems to be made based on the period of occupation of a room, whether or not a building qualifies as a hotel will be determined on the specifics of the building in question. For example, hostels are expressly stated in the guidance to be a type of hotel, but serviced apartments are not. Although serviced apartments also provide "*overnight accommodation for customers for leisure or business*" and may have hotel-like services, they are generally considered not to be "*staffed 24/7*". However, some "hotels" adopt a similar staffing approach to serviced apartments and offer "contactless check-in" - it is not clear from any guidance whether this would then disqualify such a hotel from relying upon the exemption.

When is a hotel included in the HRB Regime?

A hotel will only be excluded from the regime if the relevant building comprises *entirely of a hotel*. It is common to see hotels form part of a mixed-use building, which includes residential apartments, or the hotel itself may be dual-branded and include extended stay or serviced apartments. In such cases determining to what extent the mixed-use building falls within the HRB Regime is more complex.

If any residential areas forms part of: (i) the building which houses the hotel; or (ii) a building annexed to the hotel building (subject to the transitional provisions mentioned below), and the residential areas cannot be regarded as an independent section the HRB Regime will apply to the hotel.

The HRB Regime guidance provides a range of examples to illustrate when a building (whether it is standalone or annexed to another building) will be treated as one building or *independent sections*. For a hotel, to be treated as an *independent section* it must have its own entrance and exit to the outside, which is accessible from anywhere within that section and either:

- have no access to another section of the building; or
- only have access to another section of that building which does not contain a residential unit.

Interpreting this guidance is far from straightforward and can lead to uncertainty in the context of certain structures. In such situations, careful legal analysis and discussion with the Building Safety Regulator may be required.

However, even if the residential areas can be treated as an *independent section*, the hotel would only be exempt during the "occupational phase", meaning that compliance with the design and construction duties prescribed by the HRB Regime would be required in relation to any development of the relevant mixed-use building (including the hotel).

What is the effect of a hotel development project falling within the HRB Regime?

Where a new hotel development falls within the HRB Regime for the design and construction phase, the various "duty holders" (being the developer/landowner, designers, and contractors) have a number of key duties aimed at prioritising safety of the development. In particular, the developer/landowner must:

- obtain a new form of building control approval and completion certificate from the Building Safety Regulator (called "*Gateways 2 and 3*");

Background to the Building Safety Act

Following the Grenfell tragedy, the Government commissioned an independent review of building regulations and fire safety resulting in a detailed report prepared by Dame Judith Hackitt in May 2018. The report made a large number of recommendations including a key proposal for a new regulatory framework for high-rise buildings establishing safety as a key objective running through the entire building lifecycle from design, through construction and subsequent occupation. The report recommended that the definition of "higher-risk buildings" should not only include high-rise residential buildings but should be expanded to include "*Institutions and other buildings used as living accommodation where people sleep including hospitals, care homes, hotels, prisons, Halls of Residence and boarding schools.*"

Nearly five years after the Hackitt Report was published, the Government enacted the Building Safety Act establishing the new regulatory framework for higher-risk buildings overseen by a new dedicated Building Safety Regulator, a role performed by the Health and Safety Executive.

- establish an electronic facility for storing certain key safety information about the building design, any changes in design or in the duty holder team during construction, relevant approvals and evidence of compliance with building regulations and mandatory occurrence reports (see below). This facility is called the *Golden Thread of Information* (or **GTI**) and will have to be passed on to the *Principal Accountable Person* (see below); and
- take steps to ensure the principal designer and principal contractor are competent.

All duty holders must co-operate with one another (and others involved in the design and construction process) to ensure compliance with the safety requirements and the principal designer and contractor must operate a mandatory occurrence reporting system in relation to any significant safety situations or incidents during the construction process.

It should be noted that a transitional regime applies to design/construction projects in progress as at 1 October 2023 to allow for the project to remain governed by the existing building control process until completion.

Outside of the application of the HRB Regime, since the beginning of 2023 hotel developers have been included in the ban on the use of combustible materials in external walls of buildings of 18m or more in height. This ban applies to new builds and refurbishments, unless both: (i) an initial notice was given or full plans were deposited for the construction works before 1 December 2022; and (ii) work was started before 1 June 2023.

Existing hotels: what is the position for extensions, refurbishments, and changes of use?

Where a hotel that falls within the HRB Regime is refurbished or extended, compliance with the HRB Regime's design/construction duties is likely to be required except for all but the most minor works. The outright ban on the use of combustible materials must also be observed and we expect to see obligations, or at the very least pressure, on those refurbishing hotels to remove and replace any defective cladding.

Redeveloping older stock, adding additional floors to the hotel or incorporating serviced apartments may also mean that the hotel is brought within the HRB Regime for the first time.

There is much talk amongst investors and developers of conversions of offices, retail and trophy buildings to hotels, whether as standalone hotels or as broader mixed-use schemes. In these instances the HRB Regime will apply to the redeveloped, converted property as it would to any new development.

Which obligations apply to the occupation of HRBs (new builds or existing buildings)?

If a hotel falls within the HRB Regime, for any period that two or more hotel rooms (or residential units, e.g., where a residential annex forms part of the HRB) are occupied the *Principal Accountable Person (PAP)* and/or other *Accountable Persons (AP)* (see below) will be responsible for compliance with various obligations under the HRB Regime.

To date, only some of the regulations to deal with these obligations have been published although what is in force is the requirement on the PAP to register the hotel building with the Building Safety Regulator and provide them with

"Key Building Information" within 28 days of this registration. This obligation came into force for existing buildings on 1 October 2023.

As mentioned above, other occupational duties (whether for existing buildings or new buildings) are not in force and some regulations still remain to be published. The implementation timetable for these duties is not yet known, although this may well be co-ordinated with the timetable for Building Assessment Certificates applications (see below). Based on available regulations and Government responses to consultation, these duties are expected to require (in relation to a relevant building):

- the PAP to apply for a Building Assessment Certificate from the Building Safety Regulator when directed to (see further below);
- all APs to carry out regular assessment and management of safety risks;
- the PAP to maintain a system to report serious safety situations or incidents and APs to make reports to the Building Safety Regulator where these situations or incidents arise;
- the PAP to establish a system which allows for complaints from residents or others about safety risks, or performance of AP duties, to be assessed and dealt with;
- the APs to maintain the GTI; and
- the PAP to liaise on safety with residents based on a residents' engagement strategy.

It is expected that 12,500 existing HRBs will be brought into the HRB Regime and will need to be assessed for a Building Assessment Certificate. This is likely to take around 5 years, with the first buildings being called for assessment around 6-12 months after the provisions come into force (probably late 2024). For this reason, existing HRBs will be divided into tranches for assessment with priority given to certain safety risk features (e.g., where aluminium composite material cladding has not been remediated or the building has a single staircase and no sprinklers or there are concerns over past management of risks).

The AP is, broadly speaking, the person (or persons) responsible for repair of the common parts and structure of the relevant building. Depending on the property ownership structure there may be more than one AP, each with responsibility for different parts of the building. Where there is only one AP then, in practice, this is likely to be the hotel owner. This being the case, the hotel owner will then need to: (i) identify an appropriate individual from amongst its hotel staff to discharge the obligations of; and (ii) where applicable, place obligations on its hotel operator to ensure appropriate training and compliance with, their hotel's HRB Regime obligations.

What should the next steps be for the hotel sector?

Hotel investors, owners and operators now find themselves grappling with unfamiliar building regulations and seeking to ensure compliance. Regardless of whether their hotel falls within the HRB Regime, they will be well-aware of the reputational risk they face if their hotel building does not adhere to it. In the past, the health & safety requirements demanded by international operators in order to meet their brand standards often exceeded statutory obligations so it follows that a similar approach may now be adopted when it comes to the HRB Regime and the wider obligations of the Building Safety Act. Given the

Health & Safety duties outside the HRB Regime

Even those in the hotel sector who are confident their hotels are not caught by the HRB Regime will still need to comply with their existing obligations to assess and manage health & safety risks (including fire risks) to their employees, customers, and the public under the Fire Safety Order and/or the Health & Safety at Work Act (as 'responsible person' and / or employer).

Similarly, notwithstanding that there currently exists no express obligation to undertake fire-safety remedial works where a known cladding issue exists, the legislation in place may, in practice, require such works to be undertaken in certain cases.

risk of reputational damage to brands should they fail to conform, we expect to see brand standards quickly align with "best practice" in this area.

Clifford Chance's Real Estate team have a broad and varied experience in advising hotel investors and developers on the HRB Regime and the wider Building Safety Act, as well as more generally on hotel-related matters. If you would like to hear more about the issues discussed in this briefing, or any other hotel-related issues, please contact our real estate team or your usual Clifford Chance contact.

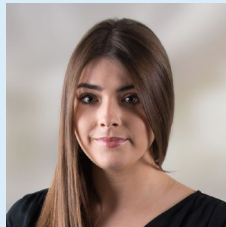
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