



BUILDING SAFETY ACT 2022: HIGHER-RISK BUILDINGS REGIME – A PRIMER

This primer gives a broad overview of the key elements of the Higher Buildings Regime, much of which comes into force substantively as from 1 October 2023, as well as key implications for those involved in commercial real estate projects and transactions.

The Building Safety Act 2022 (the Act) was passed in order to strengthen the building safety regime for buildings in a number of ways following the terrible Grenfell Tower tragedy. A key element of the Act is a new regulatory framework for Higher Risk Buildings (HRBs), and a new specialist Building Safety Regulator (the Health & Safety Executive) to oversee HRBs.

What are higher-risk buildings?

In broad terms, a HRB is a building of at least 18 m (or 7 storeys) high which has at least two residential units. Care homes and hospitals are also HRBs (but only for the design and construction phases). Some types of building are in principle excluded from being a HRB (e.g. hotels). However, mixed use or complex buildings may require detailed analysis as to the extent of any HRB).

What is the consequence of being a HRB ?

Design / construction "Gateway" duties:

HRBs are subject to significant new safety duties during the design, construction and occupational phases of a building and these duties are placed on the client, designers and contractors (dutyholders). These include:

- Submitting a fire statement with a planning application to construct a HRB and paying a building safety levy (although this levy has not yet been finalised);
- Obtaining building control approval and completion certificate from the Building Safety Regulator, along with enhanced duties on dutyholders including to collaborate, collate and maintain key safety information and pass it on for use in the occupational phase; work to existing HRBs may also require building control approval (certain exclusions apply to minor works);
- Generally ensuring building safety is prioritised during the design and construction phases.

These duties will apply as from 1 October 2023 with some transitional provisions applying to some developments which are part way through the building control process as at that date.

Occupational phase duties

Significant new duties are placed on the Accountable Person, broadly speaking the owner or tenant of the HRB with responsibility for repair of the common parts and structure (there might be more than one accountable person and, if so, one of them is designated Principal Accountable Person). In a complex leasehold structure the identity of the Accountable Persons / Principal Accountable Person may require detailed analysis.

The key duties of the Accountable Person / Principal Accountable Person include:

- Registering the HRB with the Regulator before occupation (for existing buildings this must be done before 1 October 2023, with key building information submitted to the regulator within 28 days after registration)
- Ensuring a completion certificate is obtained from the Regulator before occupation
- Assessing building safety risks and preparing a safety case report demonstrating how risks will be managed, and submitting this to the Regulator
- Applying for a Building Assessment Certificate from the Regulator when directed to do so (for existing buildings this will be on a phased basis likely beginning in late 2024) and displaying it prominently in the HRB
- Managing building safety risks and taking all reasonable steps to avoid safety risks materialising, and operating a mandatory occurrence reporting system in case they do
- Maintaining and notifying key safety information to the regulator, residents, other accountable persons and others, and implementing a residents engagement strategy

These duties will apply to all new HRBs which go through the Gateways processes. For existing buildings (aside from registration, submission of key building information and building assessment certification mentioned above), the duties will not be brought into effect until a later unspecified date. While accountable persons can delegate tasks, e.g. to agents / building managers, they remain primarily responsible for compliance with building safety duties.

Implications for commercial real estate projects and transactions

- An existing owner / occupier of a HRB who is a Principal Accountable Person, must register their HRB by 1 October 2023 and send key building information to the regulator within 28 days of registration. If they are Principal Accountable Person or Accountable Person, they will also be subject to significant ongoing safety duties to register HRBs when these duties are brought into force. Existing owners / occupiers will want to consider whether their portfolios contain any HRBs, whether they are an Accountable Person / Principal Accountable Person, and their resulting building safety duties for any HRBs under the Act.
- Prospective buyers, tenants and funders of real estate will want to carry out due diligence as to whether their transaction will involve an HRB, who has, or will have, the relevant duties, to what extent they have been performed, and whether relevant documents and information and

contractual rights to secure compliance are in place (in leases, loan agreements or management agreements).

- Developers or other construction-related dutyholders may be subject to significant duties under the HRB regime where development of HRBs, or even work to existing HRBs, is in preparation or underway as at 1 October 2023. Developers will also want to consider how ongoing occupational duties will be assigned within any leasing structures.
- Breaches of key provisions will amount to criminal offences, with the potential for unlimited fines and up to two years imprisonment. Directors of relevant companies could be liable if offences are caused through their consent, connivance or neglect.

Other related safety reforms

A number of other significant reforms have been made to building safety (under the Act and other legislation) which are not dealt with in this note which include:

- A new Home Ombudsman Scheme replacing the NHBC scheme with new 15 year warranties for purchasers of new homes;
- A Residential Property Developer's Tax on residential property development;
- Powers to block developers from obtaining planning permission or building safety sign-off if they do not sign up to a Responsible Actors Scheme involving commitments to remediate historical cladding defects;
- Rules preventing landlords passing on historical cladding remediation costs to tenants (in buildings over 11m high, or with at least 5 storeys), and capping liability in other cases;
- The possibility for building owners / landlords to apply for funding from the £4.5bn Building Safety Fund administered by the Government, which is available to pay for remediation of defective historic cladding on qualifying residential buildings that are 18m higher or more; details of separate funding for buildings between 11m and 18m are currently being developed;
- Extending the ability for tenants to claim for historic building cladding defects by extending limitation periods to between 15 and 30 years, and creating a new form of building liability order to allow claims against undertakings associated with liable companies;
- Amendments to the Fire Safety Order 2005, increasing the duties of Responsible Persons (those who control premises as a business) to ensure fire safety of buildings they occupy – in particular, accountable persons and responsible persons for a building will have to cooperate and share information.

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