

## UK COMMERCIAL REAL ESTATE

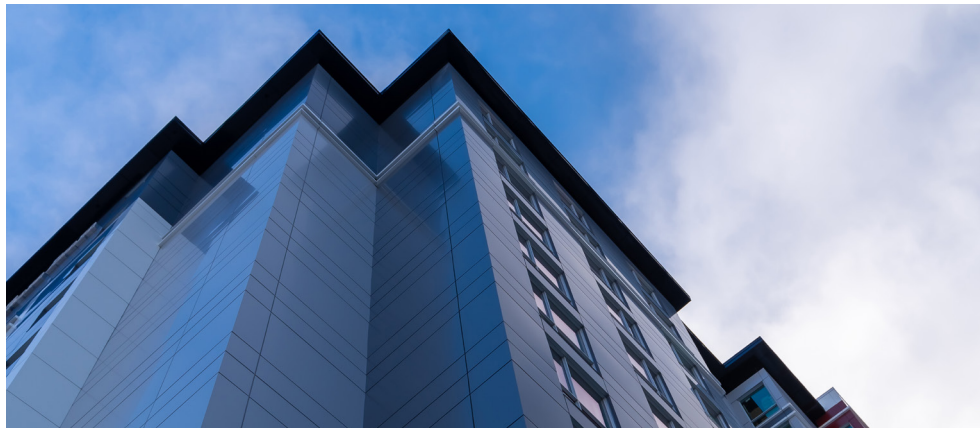
# Managing Safety Risks in Higher-Risk Buildings: Key Information for Owners of Occupied Buildings

The Building Safety Act 2022 aims to ensure that **Higher-Risk Buildings** are designed, constructed, and managed as holistic systems, taking into account building safety at all stages in the life cycle. Recently published secondary legislation sets out some of the detail regarding what is expected — or will soon be expected — from building owners in managing their occupied buildings. Although it was anticipated that the new regime for managing building safety risks would be in place from 1 October 2023, the commencement date has not yet been confirmed. Despite this, it is recommended that owners of **Occupied Higher-Risk Buildings** should now prepare for the significant changes expected from the new regime.

## HOW IS RESPONSIBILITY FOR BUILDING SAFETY IN AN OCCUPIED HIGHER-RISK BUILDING APPORTIONED?

Under the **Act**, responsibility for building safety lies with the **Accountable Person(s)**. It will be necessary in all cases to identify who the **Accountable Person(s)** are and, if more than one, the areas for which they are responsible.

If there is only one **Accountable Person**, that person will be responsible for any residential unit (or commonhold unit, if it is a commonhold association), the



common parts of the building, any balcony, and any other part of the building to which the **Fire Safety Order** does not apply.

If the **Higher-Risk Building** has more than one **Accountable Person**, the position is more complicated. Each **Accountable Person** will be responsible for the common parts of the building for which they hold a legal estate in possession or a repairing obligation, any balcony attached to those areas, and any residential unit which has the right to let (on anything other than a long lease). It will be necessary to identify which **Accountable Person** is the Principal Accountable Person (“**PAP**”): this will often be the freehold owner of the building or the head-lessee.

The **Accountable Persons** must co-operate and co-ordinate with each other.

Responsibilities under the **Fire Safety Order** still apply. From 1 October 2023, the **Responsible Person** needs to keep a detailed record of the fire safety assessment, show how fire safety is managed and share relevant information about fire safety matters with residents. **Accountable Persons** are required to co-operate with the **Responsible Person** under the **Fire Safety Order** (and vice versa). This includes proactively sharing risk assessments.

Where a resident management company is an **Accountable Person**, the **Act** implies terms into the company’s articles of association which allow the appointment of a director to deal with building safety issues.

It is also worth noting that special rules apply where a manager is appointed under s24 Landlord and Tenant Act 1987. Building safety duties will remain with the **Accountable Person** or, in appropriate cases, with the special measure manager.

## BUILDING SAFETY ACT 2022 - OWNERS

**COMPLETION CERTIFICATES FOR NEW HIGHER-RISK BUILDINGS**

From 1 October 2023, if works are carried out:

- To construct a **Higher-Risk Building**; or
- To create additional residential units in such a building; or
- Which cause a building to become a **Higher-Risk Building**.

the **Accountable Person** for the unit(s) in question must obtain a completion certificate for the works before any of the new residential units are occupied. The **Accountable Person** will commit an offence if a unit is occupied before the completion certificate is obtained.

**REGISTRATION AND OCCUPATION OF A HIGHER-RISK BUILDING**

From 1 October 2023, a **Higher-Risk Building** may not be occupied unless it is registered with the Building Safety Regulator (“**BSR**”). Registration is the responsibility of the **PAP**, who will commit an offence if the building is occupied but not registered.

The **PAP** is also responsible for providing key building information to the **BSR**, within 28 days of applying for registration of the **Higher-Risk Building**, and for notifying the **BSR** of any change to that information. Applications are made online and the key building information must be provided in electronic form.

If there is more than one **Accountable Person** for a **Higher-Risk Building**, each **Accountable Person** must provide the **PAP** with key building information regarding the part of the building for which it is responsible.

**DUTY TO ASSESS BUILDING SAFETY RISKS**

The new regime envisages that each **Accountable Person** will be under an obligation to assess the **Building Safety Risks** for the part of the building for which they are responsible. This is expected to be an ongoing duty, with assessments needed:

- As soon as practicable after the building becomes occupied or, if later, when a person becomes the **Accountable Person** for the building;
- At regular intervals;
- At any time when the **Accountable Person** has reason to suspect that the current assessment is no longer valid; and
- At the direction of the **BSR**.

The **Accountable Person** is expected to have to identify the hazards within their building, decide who may be harmed by the hazards, evaluate the likelihood and consequences of those hazards becoming a major incident, decide how to lower the risks of a major incident to an acceptable level and determine the measures that would be needed to mitigate the risk of harm to residents in the event that a major incident occurred.



## BUILDING SAFETY ACT 2022 - OWNERS

### DUTY TO MANAGE BUILDING SAFETY RISKS

It is expected that each **Accountable Person** will also be required to manage the **Building Safety Risks** for the part of the building for which they are responsible. This will mean promptly taking all reasonable steps to reduce a **Building Safety Risk** materialising and reduce the severity of any incident resulting from such a risk.

Best practice is expected to require the **Accountable Person** to:

- Avoid **Building Safety Risks**;
- Evaluate **Building Safety Risks** that cannot be avoided, including identifying the proportionate measures required to address, reduce, mitigate and control the risks;
- Combat **Building Safety Risks** at source by introducing proportionate measures to address, reduce, mitigate and control the risk at the earliest opportunity;
- Ensure suitable and proportionate systems are in place for the effective inspection, testing and maintenance of the efficacy of measures taken;
- Give collective protective measures priority over individual protective measures;
- Adapt to technical progress;
- Where reasonable to do so, replace the dangerous with the non-dangerous or less dangerous;
- Consider the impacts on residents and carry out engagement with residents;

- Give appropriate instructions and information to employees and persons working on or in the building;
- Ensure that any person responsible for or assisting with compliance with a duty has the relevant competence.

The steps will need to be effectively planned, organised, controlled, monitored, and reviewed. The **Accountable Person** will need to understand the measures being employed and be comfortable that those measures are appropriate and effective.

### THE SAFETY CASE REPORT

The **Act** envisages that the **PAP** will be required to prepare a report (the "**Safety Case Report**") for the building. There will only be one **Safety Case Report** for a building, which will include information from all the **Accountable Persons**. The **PAP** will need to prepare the strategy as soon as reasonably practicable after the building becomes occupied or, if later, when he/she becomes the **PAP**.

The **Safety Case Report** will be in electronic form and will contain the assessment of the **Building Safety Risks** and a brief description of the steps taken to manage those risks, with an explanation of why those measures were chosen. As soon as reasonably practicable after preparing or revising it, the **PAP** will need to notify the **BSR** and provide a copy of the **Safety Case Report** if the **BSR** requires one. The **BSR** is expected to issue further guidance explaining how the **Safety Case Report** should be delivered to it.

### MANDATORY OCCURRENCE REPORTING

The **Act** envisages **Accountable Persons** will be obliged to report information to the **BSR** about **Building Safety Risks** in certain circumstances. Further regulations are expected to prescribe which occurrences must be reported to the **BSR**, but it is expected that this will focus on occurrences that present a significant risk to the safety of life.

The **PAP** will be required to establish a "mandatory occurrence reporting system". This will give information to **Accountable Persons** for the purpose of enabling them to comply with their obligations to report information about **Building Safety Risks** to the **BSR**.

It is likely that there will be an online portal for reporting a "mandatory occurrence". It is expected that an immediate notification will need to be made to the **BSR**, followed by a full report within 10 days of the occurrence being identified.



## BUILDING SAFETY ACT 2022 - OWNERS

### RESIDENT ENGAGEMENT

It is expected that the **PAP** will be required to prepare a strategy for promoting the participation of residents and flat owners in building safety decisions. The **PAP** will need to act in accordance with it. The **PAP** will need to prepare the strategy as soon as reasonably practicable after the building becomes occupied or, if later, when he/she becomes the **PAP**.

The strategy will need to be provided to residents and flat owners, and include information about:

- The information that each **Accountable Person** will provide to residents and flat owners about decisions relating to the management of the building.
- Decisions that the **Accountable Person** will consult residents and flat owners about.
- Arrangements for obtaining and taking account of the views of residents and flat owners.
- How the effectiveness of the engagement strategy will be measured and reviewed.

Residents and flat owners will be able to request copies of documents from the **Accountable Persons**, including:

- Full current and historical fire risk assessments.
- Planned maintenance and repair schedules.
- The outcome of building safety inspection checks.
- Information on how assets in the building are managed.
- Details of preventative measures.



- Details of fire protection measures and the fire strategy for the building.
- Information on the maintenance of fire safety systems.
- Structural assessments.
- Planned and historical changes to the building.

It is expected that the **PAP** will also be required to establish complaint procedures which can be used by the residents and flat owners. These will involve a preliminary procedure to be run by the **PAP**, and a subsequent procedure to be run by the **BSR**.

### RESIDENTS' DUTIES

Given the significant and serious duties which are expected to be placed on **Accountable Persons**, the **Act** is also expected to place duties on residents. These will be aimed at ensuring that the **Accountable Persons** can do what is required of them.

The draft envisages that a resident (aged 16 or over) of a **Higher-Risk Building** or an owner of a residential unit in such a building must:

- Not act in a way that creates a significant risk of a **Building Safety Risk** materialising.

- Not interfere with safety equipment that is in the common parts of the building.
- Comply with an **Accountable Person's** request for information that is needed by the **Accountable Person** to carry out their duties in regard to the assessment and management of **Building Safety Risks**.

The **Accountable Person** is expected to be given considerable powers in relation to the residents' duties, including:

- The power to give a contravention notice to a resident who breaches these duties. The notice may require the resident to pay for repairs to, or replacement of, any safety equipment that has been interfered with.
- The ability to apply for a court order in certain situations.

An **Accountable Person** will also be able to request access to a property for the purposes of carrying out their duties in regard to the assessment and management of **Building Safety Risks** or seeing if the resident has breached their duties. If necessary, they will be able to apply to Court for an order compelling the resident to allow access.

## BUILDING SAFETY ACT 2022 - OWNERS

### BUILDING ASSESSMENT CERTIFICATES

The **PAP** will be required to apply for a **Building Assessment Certificate** for a registered building within 28 days of being requested to do so by the **BSR**. This process will be referred to as “call-in” and will allow the **BSR** to assess whether **Accountable Persons** are complying with their duties. It is expected that the **BSR** will call in the first buildings in April 2024. The **PAP** will commit an offence if it does not make the application without a reasonable excuse.

It is expected that, in relation to:

- A new building, the **BSR** will issue such a request “within a defined period following occupation” in accordance with a strategic plan that the **BSR** is expected to publish and will be required to follow.
- Existing buildings, the **BSR** will request applications for a **Building Assessment Certificate** are made over a five-year period, with priority given to those buildings that

are deemed to present the greatest danger (in terms of height or other risk factors).

All buildings will be re-assessed periodically, and regulations will state the maximum period between assessments. The strategic plan may set out automatic triggers for re-assessment, such as a significant refurbishment of a building.

The **PAP** will submit a copy of the **Safety Case Report** with its application for a **Building Assessment Certificate**. The application should otherwise be in the form required by the **BSR**.

The **BSR** will issue a **Building Assessment Certificate** if it is satisfied that the relevant duties (including the duties to assess **Building Safety Risks**; manage **Building Safety Risks**; provide information and produce a residents’ engagement strategy) are being complied with.

Once issued, the **PAP** will need to display the **Building Assessment Certificate** in a prominent position in the building.

### ENFORCEMENT

The **BSR** will be given various powers to ensure compliance with the new regime. These include:

- The power to give a compliance notice to an **Accountable Person** if the **Accountable Person** appears to have contravened a duty. The notice will require that the **Accountable Person** either remedies or avoids the contravention, and a copy will be sent to the local authority, fire authority and social housing regulator (if applicable). The **BSR** will be able to prosecute the **Accountable Person** if the compliance notice is breached.
- The power to apply to the First Tier Tribunal for a special measures order appointing a “special measures manager” to carry out the functions of all **Accountable Persons** for the building in question. A special measures order can be made if there has been a serious failure, or a failure on two or more occasions, by an **Accountable Person** to comply with their duties.

### CONCLUSION

The new legislation creates a new regime regarding the assessment and management of **Building Safety Risks** in occupied **Higher-Risk Buildings**. Owners of such buildings will need to familiarise themselves with the requirements to ensure compliance. The **BSR** has published detailed practical guidance in regard to many of the steps on its website. Professional advice should be obtained where required.



## BUILDING SAFETY ACT 2022 - OWNERS

## GLOSSARY

<b>Accountable Person:</b>	<ol style="list-style-type: none"> <li>1. An owner of any part of the common parts (“an estate owner”) but not if either: <ul style="list-style-type: none"> <li>• each long lease of which the estate owner is lessor provides that another person (who does not own any part of the building) is under a repairing obligation in relation to the common parts (e.g. a management company); or</li> <li>• the repairing obligations in relation to the common parts are functions of an RTM; or</li> </ul> </li> <li>2. A person who is not an owner of any part of the building, but who is under a relevant repairing obligation in relation to any part of the common parts.</li> </ol>
<b>Act:</b>	Building Safety Act 2022
<b>Building Assessment Certificate:</b>	The certificate issued by the <b>BSR</b> in accordance with s79 of the Act and accompanying regulations.
<b>Building Safety Risk:</b>	A risk to the safety of people in or about a building arising from: <ul style="list-style-type: none"> <li>• The spread of fire;</li> <li>• Structural failure;</li> <li>• Any other matter prescribed in regulations.</li> </ul>
<b>BSR (Building Safety Regulator):</b>	The Health and Safety Executive, in its capacity as Building Safety Regulator.
<b>Fire Safety Order:</b>	Regulatory Reform (Fire Safety) Order 2005
<b>Higher-Risk Building:</b>	A Building which is at least 18 metres in height (or has at least seven storeys) and contains at least two residential units. Inc student accommodation. Does not include care homes; hospitals; secure residential institutions; hotels; military barracks and living accommodation for military personnel.
<b>Occupied Higher-Risk Building:</b>	A <b>Higher-Risk Building</b> in which there are residents of more than one residential unit.
<b>PAP (Principal Accountable Person):</b>	If there is more than one <b>Accountable Person</b> , the <b>PAP</b> is: <ul style="list-style-type: none"> <li>• The <b>Accountable Person</b> who holds a legal estate in possession in the relevant parts of the structure and exterior; or</li> <li>• A person who is within the scenario above because of a relevant repairing obligation in relation to the relevant parts of the structure and exterior of the building.</li> </ul>
<b>Responsible Person:</b>	The Responsible Person under the Fire Safety Order.
<b>Safety Case Report:</b>	The report containing an assessment of <b>Building Safety Risks</b> , prepared in accordance with s85 of the <b>Act</b> , and accompanying regulations.

## BUILDING SAFETY ACT 2022 - OWNERS



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