FENWICK ELLIOTT

39 Essex CHAMBERS

The construction & energy law specialists

The Building Safety Bill: updates and implications

29 July 2021

Simon Tolson, Fenwick Elliott LLP
Paul Darling OBE QC, 39 Essex Chambers

FENWICK ELLIOTT

Essex CHAMBERS

Building Safety Bill

[AS INTRODUCED]

A

B I L L

TO

Make provision about the safety of people in or about buildings and the standard of buildings, to amend the Architects Act 1997, and to amend provision about complaints made to a housing ombudsman.

Presented by Secretary Robert Jenrick
supported by The Prime Minister,
The Chancellor of the Exchequer,
Secretary Priti Patel, Michael Gove,
Secretary Robert Buckland,
Secretary Kwasi Kwarteng, Secretary Thérèse Coffey
and Christopher Pincher.

Ordered, by The House of Commons, to be Printed, 5th July 2021.

PUBLISHED BY THE AUTHORITY OF THE HOUSE OF COMMONS

Meaning of "higher-risk building"

62 **Meaning of "higher-risk building" etc**

(1) In this Part "higher-risk building" means a building in England that—

(a) is at least 18 metres in height or has at least 7 storeys, and

(b) contains at least 2 residential units.

126 **Limitation periods**

(1) After section 4A of the Limitation Act 1980 insert—

"4B **Special time limit for certain actions in respect of damage or defects in relation to buildings**

(1) Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought

The construction & energy law specialists

Introduction

FENWICK ELLIOTT

Essex CHAMBERS

What we are going to cover in the Building Safety Bill – the main live issues its publication has raised

1. Background
2. What is new
3. What has gone out
4. What it means for developers and contractors
5. What it means for leaseholders
6. Insurance implications, FFH and HRA
7. Safety cases, the golden thread of information and certification to occupy
8. Building Safety Regulator
9. New Construction Products Regime
10. Timetable for implementation

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

The reforms are set to create "*lasting generational change and a clear pathway for the future on how residential buildings should be constructed and maintained*", affirms the UK Government!

Dame Judith Hackitt said:

FENWICK ELLIOTT

Essex CHAMBERS

- The regulatory system covering high-rise and complex buildings was not fit for purpose.
- The old building control system had become fundamentally flawed by competition, design and build, value engineering, and industry not only choosing its own regulator but also deciding how much regulation they were willing to accept and how much they were willing to pay for.
- Dame Judith Hackitt Final Report, May 2018 said: *"There is a need for a radical rethink of the whole system and how it works. This is most definitely not just a question of the specification of cladding systems, but of an industry that has not reflected and learned for itself, nor looked to other sectors*."
- One sees the opposite of the culture and practices that should exist.
- As Dame Judith Hackitt said , "*the ultimate test of this new framework will be the rebuilding of public confidence in the system. The people who matter most in all of this are the residents of these buildings. The new framework needs to be much more transparent; potential purchasers and tenants need to have clear sight of the true condition of the space they are buying and the integrity of the building system they will be part of*."

Background: building regulation had to reform!

FENWICK ELLIOTT

Essex CHAMBERS

Since 1985, building regulations have been based on what is known as *'functional requirements*' system. Namely rather than setting out prescriptive rules or lists of banned materials, the regulations outline broad outcomes which buildings must achieve. It is then, theoretically, up to the industry to decide how to meet these standards.

This change away from prescriptive deemed to satisfy regulation was introduced by Margaret Thatcher's government in 1985, swept away 306 pages of building regulations and replaced them with just 24.

But by the time of the Lakanal House fire in 2009 the coroner and former TCC Judge Frances Kirkham reported, in 2012 that the Building Regulations on Fire Safety *were almost impossible to understand and needed to be reviewed*.

Then came 2017 Grenfell House tragedy. The rest is history…

Key point is that prior to Grenfell had been living in era of deregulation. Tragedy in 2017 has completely changed this. Obvious ramifications for construction industry – more important than ever to understand legal responsibilities.

Background

FENWICK ELLIOTT

Essex CHAMBERS

- The Building Safety Bill introduced by Robert Jenrick on 5 July 2021 addresses virtually every aspect of the system to design, specify, procure and modify and maintain. As impactful as the 1984 Building Act.
- Pivotal moment in the history of UK construction.
- Everyone needs to understand that the Bill and new Building Safety Regulator **cover all buildings**, not just "high rise residential". It addresses how we design, build and renovate all our buildings in future. It introduces long needed changes to the Building Act 1984, Architects Act 1997, RRFSO and Building Regulations 2010 that apply across the board.
- The revised Bill follows a three-year scrutiny and public consultation process and signifies a wholescale reform of the building safety regime, in line with the recommendations of Dame Judith Hackitt's May 2018 Independent Review: *Building a Safer Future.*
- Primarily bill aimed at residents in residential buildings located in England. Certain provisions apply in Wales, Scotland, NI but important not to get caught out! o Particular obligations coming into effect sooner
- Gateway 1 process coming into force on 1 August this year – various amendments made to the planning system to better incorporate fire safety concerns at the planning stage for schemes involving high-rise residential buildings

Background…

FENWICK ELLIOTT

Essex CHAMBERS

On 11 May 2021, Her Majesty the Queen spoke on the Building Safety Bill in the **Queen's speech 2021**, reiterating:

"***My Ministers will establish in law a new Building Safety Regulator to ensure that the tragedies of the past are never repeated***."

The government described the reforms as "***the biggest changes to building safety regulation in a generation***" *and said that the bill "****will set out a clear pathway for the future on how residential buildings should be constructed and maintained***".

Commentators like the London Cladding Action Group are saying, "***The gulf between the government's rhetoric that developers must pay, and actions to ensure they do pay, remains too wide"***

It demonstrates scope of the government's ambition

Background…

FENWICK ELLIOTT

Essex CHAMBERS

The Building Safety Bill when passed **will impose considerable new liability on the construction industry** via amendment to the Defective Premises Act 1972. While the press focus on residents and leaseholders, the implications go far wider for the industry.

The Ministry for Housing, Communities and Local Government is the ministry behind it.

The Government's focus on a new **Building Safety Regulator** remains, to ensure that no dangerous materials are used in the construction industry. However, the Bill also introduces a retrospective extension of the time in which "residents can seek compensation for substandard construction work", from 6 years to 15.

The rhetoric implies that this will introduce a right which residents alone will be entitled to use, however the provisions of the Bill go further.

Structure of the Bill is split into six main areas of focus:

FENWICK ELLIOTT

Essex CHAMBERS

- **Part 1**: overview
- **Part 2**: deals with the creation of the new Building Safety Regulator and its powers and responsibilities
- **Part 3:** makes particular amendments to the Building Act 1984. In particular it introduces a new regime in relation to higher-risk buildings and the role that the new regulator will have in relation to the design and construction phase of such higher-risk residential buildings. ▪ Worth noting here that 'higher-risk buildings' are defined for England as a building that is either: • At least 18 metres in height or has at least 7 storeys OR • Is of a description specified in regulations which Secretary of State is empowered by the Act to make
- **Part 4:** deals with higher-risk residential buildings in England only once they are occupied. In particular, it places certain duties on the dutyholder in occupation in a building in relation to safety risks within that building.
- **Part 5:** is somewhat of a catch-all section, but includes certain important provisions:
    - Service charges for residents, including the controversial Building Service Charge
    - Provides powers for regulations to be made for the regulation of construction products in the UK
- **Part 6:** deals with mostly technical matters.

Background…

FENWICK ELLIOTT

Essex CHAMBERS

That although the limitation changes have retrospective effect, this will still reach only 15 years. Constructions prior to 2007/2008 therefore will not be affected

It is welcome step in improving the construction standards of our homes but it will not be with us in full effect until late 2022 and it will take a few years to bed down and for industry to meet its requirements.

Whilst the main focus of the Bill is on buildings yet to be constructed, it should also protect most **but not all** leaseholders from excessive bills for fire safety remediation on existing developments (say post 2008 vintage).

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

What is new

What is new – limitation changes

FENWICK ELLIOTT

Essex CHAMBERS

The current regime, where claimants have a six-year limitation period from completion of a project to bring a claim, comes under the Defective Premises Act 1972.

The time limit currently for bringing claims for breaches of the duty in s.1 of the DPA is 6 years from the time the **dwelling was completed**, or from the completion of any further work in respect of the defects.

This 6-year time period means that many potential claimants were time barred from making a claim under the DPA because the works in question were completed so long ago.

It is likely that significant fire safety failings will render dwellings "unfit for habitation" (*Rendlesham* test etc) as a key plank of this concept concerns being able to occupy the dwelling for a reasonable period of time without significant risk to the health and safety of the occupant. The proposed change in the time limit will have both **retrospective and prospective effect**, which means that it will affect all ongoing claims and also resurrect those that had previously expired.

Another potential right of recovery exists with a claim in negligence, which has a potentially longer limitation period, but it is generally not possible for a homeowner to succeed with negligence claims against developers due to legal principles around the recovery of damages for property defects which are considered to be in the nature of "pure economic loss".

What is new – limitation changes

What problem is this trying to address? - Building owners attempting contract / Tort / DPA claims against original project team responsible for design or construction of defective buildings struggled to bring claims because of limitation and project teams that are no longer trading.

- Crucial changes to limitation period within section 1 of the Defective Premises Act 1972 Currently time limit for bringing claims for breach of the duties contained within section 1 of the DPA1972 is six years from when dwelling completed or from completion of any further work in relation to defects o Bill changes this to 15 years, with very important point that this will be retrospective in effect ▪ So if Bill made law in 2022, cut-off point 2007

- Recent poll by UK Cladding Action Group suggested that around 236 buildings with dangerous cladding which would were built prior to this o High-rise residential buildings with unsafe cladding will fail the 'unfit for habitation' duty contained within section 1 of DPA1972

- Key point is *Rendlesham test* – unfit for habitation includes being able to occupy dwelling for a reasonable period of time without significant risk to health and safety of occupant.

What is new – limitation changes

FENWICK ELLIOTT

Essex CHAMBERS

Section 1(1) of that Act imposes a duty on any entity involved in the construction or provision of a dwelling "*to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed*". Any claims for a breach of this statutory duty must be brought, currently, within 6 years.

However, section 126 of the Building Safety Bill amends the Limitation Act 1980 to state that if "…*by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued*." The Bill then goes on to make clear that a relevant provision includes Sections 1 and 2A of the Defective Premises Act.

What is new – limitation changes

This extension of liability (which will apply retrospectively) flows through the Defective Premises Act and therefore any entities who can bring a claim under that DPA now have an **extra 9 years** in which to do so.

This will result in **more litigation and claims** concerning cladding and external wall systems not complying with Building Regulations. Brought chiefly **against contractors, architects, subcontractors** and other parties involved in the construction process.

Important point to draw from this is that substantial contractors are used to contracting with deeds, which give a 12-year limitation period. The changes to DPA mean that there are now potentially three additional years' worth of claims which had previously been statute-barred.

Another important point to make here is about refurbishment and extension. Section 125(1) of the Bill proposes to insert a new section 2A into the DPA creating a new duty on those who do any work on a building which contains a dwelling to ensure that the work does not render the dwelling unfit for habitation

- Limitation for breach of this duty also 15 years
- Important to note that this duty is owed not just to the person for whom the work is done but also each person holding or acquiring a legal or equitable interest in a dwelling in the building.
- So permits residents to being claims even if overall freeholder doesn't wish to.

What is new – limitation changes

FENWICK ELLIOTT

Essex CHAMBERS

The changes to limitation also hint at another potentially major change to come: the bringing into force of section 38 of the Building Act 1984.

- Section 126 of the Bill designates section 38 of the Building Act 1984 as a relevant provision to which the new 15 year limitation period will apply. o Government explanatory notes to the Bill indicate that section 38 will be brought into force soon: 'The extended limitation period will also apply (prospectively only) to action under section 38 of the Building Act 1984 when it is brought into force.'

- Response to pre-legislative scrutiny by select committee: 'We will also be commencing section 38 of the Building Act 1984, which allows compensation to be brought for physical damage caused by a breach of building regulations. Both measures will be subject to a fifteen-year limitation period and will strengthen rights to redress against inadequate work done in the future.'

- This would allow claims to be brought for breaches of building regulations which cause damage

New - amendments relating to service charges in respect of remediation works

FENWICK ELLIOTT

Essex CHAMBERS

Plainly the Building Safety Bill is seeking to protect the interests of homeowners as far as possible. A new provision (at section 124) has been inserted in relation to **service charges** so that landlords **cannot automatically recover** the cost of remedial work directly from homeowners.

Instead, landlords must take "***reasonable steps***" to obtain monies either from available grants or from pursuing third parties, before pushing remediation costs onto homeowners.

One of the problems with the Bill is that the works outlined in clause 124 are currently unspecified. Hence, landlords will not be able to take action against developers until these are known.

Assuming the Bill and subsequent regulations are in statute by 2023, residents in developments built prior to 2008 will be excluded from taking legal action. The Secretary of State for HCLG, Robert Jenrick, admitted that the majority of developments with defective cladding were built between 2000 and 2017, so the current proposals could exclude around a c33% of developments where there are problems.

Service charges in respect of remediation works…

FENWICK ELLIOTT

Essex CHAMBERS

Section 124 requires that for all buildings (not just higher-risk), if the landlord is doing 'remediation works' (to be defined in regulations), landlords will be required to take *reasonable steps* to ascertain and apply for grant funding or third-party funding such as insurance.

- Query extent to which this goes beyond common law – cases like *Continental Property Ventures Inc v White* [2006] had already said that landlords must give credit for third party funding to reduce service charges

These provisions in ss 124 and 126 mean that fire safety/cladding matters are likely to become more litigious looking ahead, as building owners/landlords are likely to formally review their legal relationships with original developers and commence claims that have not been notified until now!

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

What has gone out?

What has gone out?

FENWICK ELLIOTT

Essex CHAMBERS

Building Safety Charge - Important aspect to note here is that there has been a change in the new version of the Bill in relation to the controversial Building Safety Charge.

- Previous drafts of the Bill had allowed building owners to charge for historical building safety costs even for defects which pre-dated residents moving in

- Housing, Communities and Local Government Select Committee recommended this be amended to exclude historical charges

- Bill has accepted and will only allow building owners to use building safety charge to cover ongoing costs of new regulatory regime created by the Bill

Entirely omitted from the Bill is any reference to the loan scheme for buildings under 18 metres

FENWICK ELLIOTT

Essex CHAMBERS

The government's plan announced in February 2021 was to introduce long term loans for leaseholders facing bills to replace cladding on buildings under 18m tall whereby no leaseholder would ever pay more than £50 a month towards removal of unsafe cladding.

- This is nowhere in the bill

Recommendations of Select Committee not taken up

FENWICK ELLIOTT

Essex CHAMBERS

NB Gov response to select committee:
https://www.gov.uk/government/publications/building-safety-bill-government-response-to-pre-legislative-scrutiny-by-the-select-committee

Accreditation systems –

Select committee 'strongly recommended' (recommendation 17) that the government *'include provisions in the Bill itself for establishing a national system of third-party accreditation and registration for all professionals working on the design and construction of higher-risk buildings'* –

- Government's response is that this should not go in the Bill and should rather be left for statutory guidance and wider industry guidance
- Not going to be a mandatory requirement. Similarly, as recommendation 30 the select committee recommended that the government provide for a national system of accreditation to agreed common standards and for a central register of building safety managers
- The government's response is that this is best taken forward by industry.

Blocks between 11 and 18m left in limbo?

FENWICK ELLIOTT

Essex CHAMBERS

For cladding removal on blocks of between 11 and 18 metres, the government said on 10 February 2021 "…***it is developing a long-term low-interest loan scheme under which "no leaseholder will ever pay more than £50 a month towards the removal of unsafe cladding***." The legislative framework for the scheme was expected to be included in the Building Safety Bill.

The Bill as presented on 5 July 2021 as currently drafted it does not include provision for this scheme.

Another thing not addressed

FENWICK ELLIOTT

Essex CHAMBERS

One of key omissions is any sustained attention to what happens for leaseholders living in unsafe buildings **which don't fall into the 'higher-risk' category**

- Should be noted that regulations will further define what 'higher-risk' means – could be broad giving more people protections of the act
- BUT there will inevitably be situations not covered

Another thing not addressed

FENWICK ELLIOTT

Essex CHAMBERS

Practical problems of bringing claims - Although limitation changes may be helpful in some situations, there is a wider problem that lots of the companies against whom claims could be brought are no longer trading or lack sufficient insurance cover or could in between now and the Act be divested of assets. The Bill doesn't do anything to address this

Also, the reality that most developers build through Special Purpose Vehicles which can then be wound up. Risk that the longer limitation period will simply encourage this practice further?

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

What it means for developers and contractors

Implications for developers and contractors…

FENWICK ELLIOTT

Essex CHAMBERS

Housebuilders will bear the brunt of the changes. There are many practical implications for potential defendants of these planned changes:

1. Claims that had previously been discounted by developers as being out of time could now be resuscitated due to the retrospective effect of this new law. While previously developers could adopt a robust legal stance and discount claims that related to matters more than 6 years old, they are now unprotected to a greater number of potential claims because of the longer limitation period that claimants will have to bring an action. This enhances developers' exposure to potential claims, both for legacy issues and looking ahead.

2. Defending some claims will be darned sight harder to defend. Key personnel may have moved on, particularly during Covid, GDPR and retention policies may have resulted in key documentation being destroyed/deleted. Many companies only retain documents for the same length of time that matches their potential liabilities. These companies would not expect to be liable for these matters and the unattainability of these documents may disturb the merits of any defences to the claims.

Implications for developers and contractors…

FENWICK ELLIOTT

Essex CHAMBERS

Big change is potential liability for claims that had previously thought out of time

- Seems inconceivable that a human rights challenge to the retrospective effect of limitation changes won't make it to higher courts in coming years
- Big practical problems in defending claims – destroyed documents, personnel moved on etc

Implications for developers and contractors…

FENWICK ELLIOTT

Essex CHAMBERS

- Potential for difficulties in bringing contribution claims for claims brought at the 12-15 year mark 6.
- Limitation for contract / deed is shorter than 15 years. If limitation for the agreement with a third party at fault (architect, sub-contractor etc) has expired, then may be in trouble.
- Expect to see greater use of the Civil Liabilities (Contribution) Act 1978.

Implications for developers and contractors…

FENWICK ELLIOTT

Essex CHAMBERS

Even if possible, contribution claims are likely to be difficult because of the insurance cover typically taken out by third parties, which frequently only lasts for the period of liability under the contract. This will obviously not be as long as the new 15 year DPA1972 limitation periods

- It will be the case that contracting with third parties in future will require developers to be aware of these changes to ensure that sub-contractors and other relevant parties have insurance cover adequate for any liabilities incurred up to 15 years later.

Implications for developers

FENWICK ELLIOTT

Essex CHAMBERS

- Critical point to make is that the DPA1972 cause of action is not contractual and the duty is owed to subsequent owners.
- Developers may face renewed claims from subsequent purchasers following upon freehold sales, as subsequent purchasers of the freehold to blocks will benefit from the same cause of action under s.1 of the DPA as individual leaseholders, even where there is no contractual nexus between the original developer and a subsequent freehold purchaser.

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

What it means for leaseholders

It is not the long-anticipated solution that many leaseholders hoped for

FENWICK ELLIOTT

Essex CHAMBERS

So the government's offerings to leaseholders are **clauses 124**, requiring landlords to take "***reasonable steps***" to recover money before billing leaseholders for specific works; and

clauses 125 and 126, creating a new 15 year retrospective limitation period to claim for substandard work.

Whilst this is an improvement on the existing framework (with its 6 year limitation period), **the public policy issue is whether it provide sufficient help for leaseholders?**

This significant proposal poses a number of practical problems for all parties who must manage and respond to claims.

It is not the long-anticipated solution that many leaseholders hoped for…

FENWICK ELLIOTT

Essex CHAMBERS

Section 126 (1) of the Bill provides for a "…*special time limit for certain actions in respect of damage or defects in relation to buildings."* This time limit is stated to be **15 years from the date on which the right of action accrued**.

Section 125 of the Bill proposes inserting a new section 2A into the Defective Premises Act 1972 Act, where at section 8, it outlines that the cause of action is **treated as occurring at the time the work is completed**, **or** if work is done after that to rectify work already done, the cause of action will be **from completion of the further work**.

This is obviously a gamechanger for claimants, who in many cases have now been given a right of recovery that they otherwise had lost due to a limitation period expiry under the existing rules.

But in the short term does not address the fact that many leaseholders are currently being charged thousands of pounds by freeholders to remove dangerous cladding and fix fire safety defects.

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

Insurance implications, FFH and HRA

Insurance implications, FFH and HRA

FENWICK ELLIOTT

Essex CHAMBERS

- Grenfell accelerated a hardened market in professional indemnity insurance.

- This has made it more difficult and costly for design professionals to obtain such insurance. It is likely that the Building Safety Bill will increase this trend, and potentially more design consultants will self-insure, restrict the scope of work that they carry and/or tighten up their terms and conditions of engagement to limit or exclude their potential liabilities.

- Expect to see **an increase in cases where the term "fitness for habitation" under s.1 of the DPA is considered by the courts**. This will be a key argument in the success of any claim under this provision, particularly with regard to the fact that this change of law does not just affect cladding claims, but all claims where a dwelling is considered unfit for habitation.

- We also anticipate to see elements of the **Human Rights Act 1998** and the European Convention on Human Rights (the ECHR) argued in claims brought under s.1 of the DPA where the new limitation provisions apply. This could ultimately result in claims being taken to the European Court of Human Rights (ECHR) by a developer defendant or insurer.

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

Human Rights Act 1998?

Fitness for habitation and Human Rights Act 1998

FENWICK ELLIOTT

Essex CHAMBERS

As regards s.1 DPA claims - there are a few safeguards proposed in the Bill - claimed to be in the interests of fairness. EG: Where a claim has already been dismissed or compromised, a claimant cannot resurrect an old claim.

Safeguards

1. Where an action would have been time barred but for the new 15-year limitation period, and the retrospective nature of that new period would breach a defendant's rights under the Human Rights Act 1998 (HRA), (which would include, for example, **the right to a fair trial**), the court must dismiss that claim.

2. Thus the retrospective application is only applicable to the extent that it does not infringe rights under the HRA, see s126. The rights enjoyed under the HRA are not restricted to individuals but also **apply to corporate bodies.** This is likely to be a rich battleground. For example, where the developer no longer has the records available to it to properly defend its position this provision may be relevant. We anticipate **s126 (5)** also seeks to deal with live proceedings where a claim under the DPA either has not been brought (because it would have been out of time) or has been brought and defended on the basis of limitation. There is an established line of case law under the ECHR which limits the extent to which new legislation is capable of extinguishing a claim or defence already advanced in proceedings - *Pressos Compania Naviera S.A. and Others v. Belgium* (1995)

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

Safety cases, the golden thread of information and certification to occupy

The ‘golden thread’

FENWICK ELLIOTT

Essex CHAMBERS

The government is introducing a new more severe regulatory regime, for buildings 18 metres and over or 7 storeys and over, **whichever is reached first**. As part of this stringent regulatory regime, the government is going to require that dutyholders and **Accountable Persons** for **buildings in scope** to create and maintain a golden thread, throughout a building’s life cycle.

The golden thread is both:

- The digital information about a building that allows someone to understand a building and keep it safe

- the information management to ensure the information is accurate, easily understandable, can be accessed by those who need it and is up to date

In occupied higher-risk buildings, the golden thread of information should ensure building owners have to hand well-documented and accurate evidence of their risk assessments and safety arrangements, as well as the documentation supporting these.

Safety cases, the golden thread of information and certification to occupy

FENWICK ELLIOTT

Essex CHAMBERS

The Golden Thread is thus a digital record of all project and asset data, detailing how a building was designed, built, managed and operated. It acts as a **live repository**, linking all data, recording all decisions and therefore giving a clear accountability trail to reduce risk and improve safety.

There BSB introduces the 'Gateway Regime' like hold points/stop / go to support the creation of the Golden Thread of Information. These are as follows:

1. Planning Application – Principal Designer

2. Construction Phase – Principal Contractor

3. Occupation – Accountable Person

For each of the reporting gateways a dutyholder is required to provide the golden thread of information to the Building Safety Regulator.

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

The BSR

Building Safety Regulator

FENWICK ELLIOTT

Essex CHAMBERS

- The creation of a new national Building Safety Regulator (BSR) in England who sits in the Health and Safety Executive and report to the Secretary of State is at the heart of the Building Safety Bill. It comes more than three years after Dame Judith Hackitt first called for a new regulatory body to oversee the built environment as part of her independent review of building regulations and fire safety following Grenfell in her '***Building a Safer Future***' report.
- Peter Baker, Chief Inspector of Buildings at HSE is the BSR in the wings - for now.
- The regulator will have a range of enforcement powers in relation to high-rise buildings, too. To support its work, the bill also gives the BSR a duty to maintain three committees to advise on building functions:
    - a residents' panel,
    - an industry competence committee and
    - a building advisory committee.

The BSR will have three main functions

FENWICK ELLIOTT

Essex CHAMBERS

The Regulator will have three main functions:

- Overseeing the safety and performance system for all buildings, including advising Ministers on changes to building regulations, identifying emerging risks in the built environment and managing the performance of building control bodies and inspectors;

- Assisting and encouraging the improvement of competence in the built environment industry and amongst building control professionals, and improving building standards; and

- Leading implementation of the new, more stringent regulatory regime for higher risk buildings, including powers to order remedial works and stop non-compliant works on higher-risk buildings. The Regulator may also appoint special measures for failing projects and order the replacement of key Dutyholders and fire safety officers.

The government said the Building Safety Regulator will be operating at scale within 12 to 18 months.

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

New Construction Products Regime

New Construction Products Regime

FENWICK ELLIOTT

Essex CHAMBERS

- The establishment of a ***national regulator of construction products*** is a really important step in delivering the new regulatory system for building safety. The evidence of poor practice and lack of enforcement in the past has been laid bare.

- Established within the Office for Product Safety and Standards (OPSS) will operate the powers of enforcement in addition to Trading Standards OPSS.

- The Bill will create powers to reinforce the regulation of construction products to ensure that all products are covered by a regulatory regime.

- Regulations made under these powers will introduce **a new requirement for construction products to be safe**, in line with the existing approach for consumer products.

- It will also create new requirements for products that are '**safety critical**', where their failure could cause death or serious injury to people.

- Manufacturers of these products will be required to declare their performance, put in place factory production controls to ensure that **products consistently perform in line with this declaration** and to correct, withdraw and recall products that don't comply with this or that present a risk.

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

Timetable for implementation

Timetable for implementation

FENWICK ELLIOTT

Essex CHAMBERS

The MHCLG Select Committee wants government to publish a clear timetable for commencement. They have attempted to do this by way of an **'indicative plan'** of what to expect within the next 18 months.

However, the plan is only indicative and a *Transition Board*, chaired by Dame Judith Hackitt, will work in union with the HSE to develop it. The government has stated that they 'will continue to refine and provide further information on transition during the passage of the Bill'. Such information will be disseminated through the HSE.

Notable targets in the indicative plan (transition) include:

• By Spring 2022, the British Standards Institution will publish standards covering the competence requirements for the Principal Designer and Principal Contractor to help dutyholders build the necessary skills, knowledge, experience and behaviours ahead of the Bill becoming law.

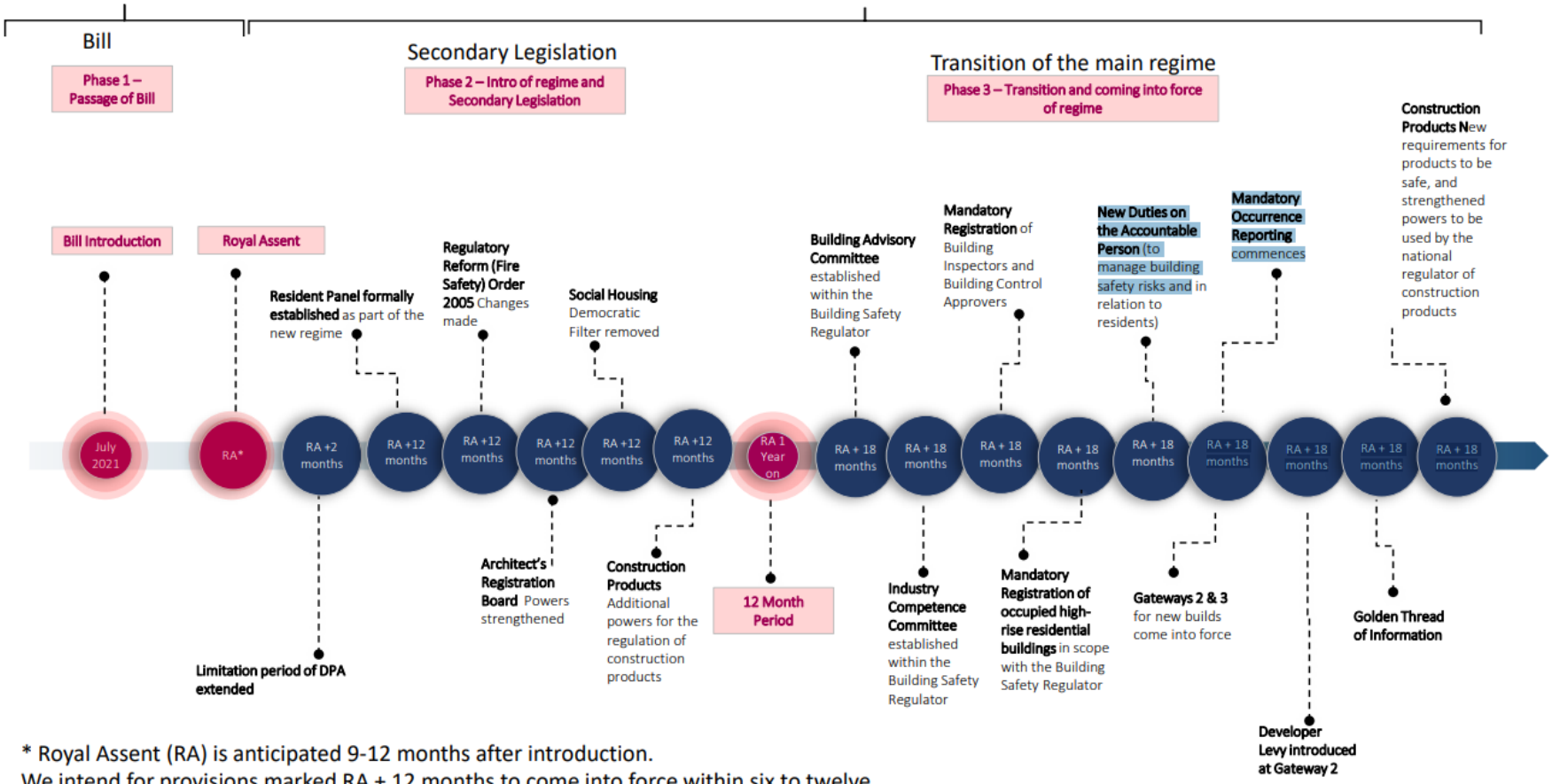
• The Building Safety Regulator is expected to be operating at scale within 12 to 18 months of the Bill receiving Royal Assent.

• The new regime for high rise residential buildings and other in scope buildings is intended to come into force within 12 to 18 months after Royal Assent.

It is apparent that there is an ambitious amount of work to do over the next two years if the indicative dates are to be met.

BSB Transition – whilst not possible to set a firm timetable ahead of scrutiny by Parliament, but to assist industry in preparing see below

FENWICK ELLIOTT



* Royal Assent (RA) is anticipated 9-12 months after introduction.
We intend for provisions marked RA + 12 months to come into force within six to twelve months of Royal Assent.
We intend for provisions marked RA + 18 months to come into force within twelve to eighteen months of Royal Assent.

Building Safety Bill & Transition

Timetable for implementation…

FENWICK ELLIOTT

Essex CHAMBERS

Planning Gateway One has already been implemented and comes into force on 1 August 2021.

Planning Gateway One is intended to ensure that fire safety measures are included at an early stage, which means that a developer must submit a fire statement setting out fire considerations specific to the development before planning permission can be granted.

The changes to planning legislation apply to **all higher risk buildings.**

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

Stop press

21 July 2021
Government announced:

FENWICK ELLIOTT

Essex CHAMBERS

- End of ESW1 nightmare for leaseholders living in buildings (low-to-medium-rise blocks) under 18 metres tall 'ending' fiasco the government advice in January 2020 created re mortgage lenders began demanding fire surveys from a much wider range of sellers.

- Following '***new advice'*** from fire safety experts to government (i.e. *no "systemic risk" of fire in smaller blocks*) it announced people buying flats in buildings lower than 18m (59ft) in England will no longer have to provide safety details on external walls to get a mortgage.

- Thousands of landlords released from 'cladding hell' after EWS1 forms scrapped? Well maybe not as RICS made plain on Monday– see FT etc.

- Whilst the controversial RICS authored **EWS1** forms should no longer be required for buildings below 18m in height. HSBC, Barclays and Lloyds have signed up to stop requiring EWS1 forms. Will others follow?

- But the words they use are "***should not be requested*** for buildings below 18 metres". Will all mainstream lenders say they will follow this guidance.

The lingering concern

FENWICK ELLIOTT

Essex CHAMBERS

New buildings, including schools, under 18 metres with combustible materials, continue to be built across the country.

The Building (Amendment) Regulations, SI 2018/1230 in force since 21 December 2018 implements the ban on combustible cladding by prohibiting the use of combustible materials anywhere in the external walls but only of high-rise buildings over 18m above ground level, containing one or more dwellings.

The Construction Industry Council (CIC) has recommended the government extends the ban on the use of combustible materials to a wider range of buildings, including care homes, halls of residence and schools.

The current ban on combustible materials should say interest groups also be extended to all new buildings of over 11m as called for by RIBA and to include hotels, hostels and boarding houses. The National Housing Federation (NHF) supports this.

…Thereby preserving good timber frame construction below that height!

FENWICK ELLIOTT

Essex CHAMBERS

The construction & energy law specialists

Q&A

FENWICK ELLIOTT

39 Essex CHAMBERS

The construction & energy law specialists

Thank you.

Simon Tolson, Fenwick Elliott LLP
Paul Darling OBE QC, 39 Essex Chambers