

The Welsh Government's Legislative Consent Memorandum on the Commercial Rent (Coronavirus) Bill

February 2022



1. Background

The UK Government's Commercial Rent (Coronavirus) Bill

1. The Commercial Rent (Coronavirus) Bill¹ (the Bill) was introduced into the House of Commons on 9 November 2021. It is sponsored by the Department for Business, Energy and Industrial Strategy.

2. The long title to the Bill states that it is:

"A Bill to make provision enabling relief from payment of certain rent debts under business tenancies adversely affected by coronavirus to be available through arbitration; and for connected purposes."

3. The explanatory notes to the Bill add that the purpose of the Bill is:

"...to support landlords and tenants in resolving disputes relating to rent owed by businesses which were required to close during the COVID-19 pandemic. The Bill enables arbitration to be used to resolve these disputes if landlords and tenants cannot agree a way forward."²

4. The Bill completed its passage through the House of Commons on 12 January 2022, and had its Second Reading in the House of Lords on 27 January 2022. Committee Stage in the Lords is due to commence on 10 February 2022.

The Welsh Government's Legislative Consent Memorandum

5. Standing Orders 29.1 and 29.2 provide that a Legislative Consent Memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

6. On 3 December 2021 Vaughan Gething MS, the Minister for Economy (the Minister), laid before the Senedd a Legislative Consent Memorandum³ (the Memorandum) in respect of the Bill.

¹ [Commercial Rent \(Coronavirus\) Bill, as introduced](#) (Bill 189 2021-22)

² Commercial Rent (Coronavirus) Bill, [Explanatory Notes](#), paragraph 1

³ Welsh Government, [Legislative Consent Memorandum, Commercial Rent \(Coronavirus\) Bill](#), December 2021

7. The Business Committee agreed that the Economy, Trade and Rural Affairs Committee and the Legislation, Justice and Constitution Committee should report on the Memorandum by 10 February 2022.⁴

Provision for which the Senedd's consent is required

8. Paragraphs 11 to 26 of the Memorandum set out the Welsh Government's assessment of which provisions in the Bill require the consent of the Senedd, namely clauses 9, 23 (including Schedule 2), and 27.

9. Paragraphs 27 and 28 of the Memorandum set out the reasons for making provision for Wales in the Bill.

10. The UK Government agrees that consent is required for clause 23 (including Schedule 2) and clause 27, to the extent they apply in devolved areas.⁵ However, the UK Government's explanatory notes to the Bill appear to say that consent is not required for clause 9, but there is no explanation as to why clause 9 does not have a devolved purpose.⁶

The Welsh Government's position

11. The Memorandum notes that section 82 of the *Coronavirus Act 2020* prevents a landlord from exercising their right of re-entry or forfeiture for non-payment of rent under certain business tenancies during the "relevant period", which can be extended in relation to Wales by regulations made by the Welsh Ministers.⁷

12. The Memorandum confirms that the "relevant period" has been extended in Wales on a number of occasions, most recently in the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 3) Regulations 2021 which extend the relevant period to 25 March 2022. The Memorandum notes that this is the same day that the period is currently due to end in England.⁸

13. At paragraph 6 in the Memorandum, the Minister states:

⁴ Business Committee, Timetable for consideration: Legislative Consent Memorandum on the Commercial Rent (Coronavirus) Bill, December 2021

⁵ Commercial Rent (Coronavirus) Bill, Explanatory Notes, Annex- Territorial extent and application in the United Kingdom

⁶ Commercial Rent (Coronavirus) Bill, Explanatory Notes, Annex- Territorial extent and application in the United Kingdom

⁷ Welsh Government, Memorandum, paragraph 5

⁸ Welsh Government, Memorandum, paragraph 5

"A question developed around what is to follow once the relevant period eventually ends and thereby when any arrears accrued during that period becomes payable. It was agreed that my officials would work with UK Government on the development and passing of an England and Wales Bill."

14. At paragraph 28 of the Memorandum, the Minister states that it is the Welsh Government's view that the protections for tenants provided for by the Bill should apply in Wales. The Minister also states:

"This is on the basis that, despite the fact that there is little evidence to suggest whether or not unpaid rent debt from business tenancies is a large scale issue in Wales, it is our assessment that the principles of the Bill would benefit Welsh business tenants by providing protection for those that have been unable to pay rent due to the restrictions in Wales."⁹

15. The Memorandum states that while the Welsh Government is "broadly content" with the Bill as introduced, it has some specific concerns:

"Clause 9: Clause 9 provides for the tenant or landlord to make a reference to arbitration within six months from the Bill being passed and the Secretary of State has the power to extend that period. Welsh Ministers ought to be consulted and their consent obtained, before the Secretary of State exercises such powers in relation to Wales.

Clause 27: This Clause gives the Secretary of State the power to apply the Bill's provisions in the event of a further wave of coronavirus giving rise to further business closures. It would enable different provision for different purposes so that some of the Bill's provisions can be applied in certain cases or to England and/or Wales only. This could arise for example if it is appropriate to pause a particular remedy or if a particular remedy is not considered appropriate in the circumstances of a particular area. The power would enable incidental, consequential saving or transitional provision to be made (by the Secretary of State) which includes amending or otherwise modifying an Act of Parliament.

As drafted, Clause 27 means that whilst the Secretary of State is able to adapt the application of the Bill in response to future closure requirements imposed by UK Government on businesses in England (for example, to

⁹ Welsh Government, Memorandum, paragraph 28

feasibly extend the "relevant period", the "protected period" or the "moratorium period"), the Welsh Ministers have no such flexibility under the Bill to do the same in response to any future closure requirements imposed on businesses in Wales by the Welsh Government. This creates an anomaly and is also inconsistent with the approach taken in terms of the Welsh Ministers being able to extend the relevant period in Wales for the purposes of s.82 of the Coronavirus Act 2020. Welsh Ministers, therefore, ought to have equivalent powers in relation to Wales."¹⁰

16. At paragraph 30 the Minister confirms that he cannot recommend that the Senedd gives its consent to the Bill as currently drafted and that he has raised concerns with the UK Government.¹¹

17. The Minister concludes:

"In my view it is appropriate to use the UK Commercial Rent (Coronavirus) Bill as a vehicle to take forward protection from forfeiture for Welsh businesses, subject to the Bill as introduced being amended to address my concerns."¹²

¹⁰ Welsh Government, Memorandum, paragraph 29

¹¹ Welsh Government, Memorandum, paragraph 30

¹² Welsh Government, Memorandum, paragraph 32

2. Committee consideration

18. We considered the Memorandum at our meeting on 17 January 2022, and we agreed our report on 31 January.¹³

Our view

19. We note the Welsh Government's assessment that clauses 9, 23 and 27 of, and their respective Schedules to, the Bill require the Senedd's consent as set out in the Memorandum. We further note that the UK Government agrees as regards clauses 23 and 27, and that its position on clause 9 is unclear. We agree with the Welsh Government's assessment.

20. We also note the Minister's view that, subject to the Bill being amended to address specific concerns (which are discussed below), it is appropriate to use the Bill as a legislative vehicle to take forward protection from forfeiture for Welsh businesses. However, as a matter of constitutional principle and good law-making, we consider it poor practice to make new law where there is "little evidence" to demonstrate a need for such a law.

Recommendation 1. Given the Minister's statement in paragraph 28 of the Memorandum that there is "little evidence to suggest whether or not unpaid rent debt from business tenancies is a large scale issue in Wales", the Minister should, at the earliest opportunity and in advance of the Senedd's debate on a relevant consent motion, provide more full reasoning and justification for pursuing provision for Wales in the Bill.

21. We further note that, as things currently stand, the Minister will not recommend that the Senedd gives consent to the relevant clauses in the Bill because of outstanding concerns with clauses 9 and 27.

22. Specifically, as regards clause 9, we note the Minister's concerns regarding the regulation-making power provided to the Secretary of State who will be permitted to make regulations under this clause that would extend the time period set out on the face of the Bill within which a tenant or landlord may make a reference to arbitration. While we acknowledge that the Minister has raised this matter with the UK Government, in conclusion 1 we repeat a concern we have

¹³ [Legislation, Justice and Constitution Committee, 17 January 2022](#) and [Legislation, Justice and Constitution Committee, 31 January 2022](#)

most recently raised in our report on the Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Professional Qualifications Bill¹⁴.

Conclusion 1. The Minister's preferred way forward, to seek an amendment to clause 9 of the Bill to require consultation with and the consent of the Welsh Ministers before the Secretary of State exercises the clause 9 regulation-making power, bypasses the Senedd's role as the legislature in Wales. As a result, the Senedd is not only being denied a role in directly affecting the detail of primary legislation on a devolved matter that will take effect in Wales, but also in carrying out its role in scrutinising secondary legislation that will become law in Wales.

23. With regards to clause 27 of the Bill, we first note that this clause provides the Secretary of State with a broad Henry VIII regulation-making power. We acknowledge that such regulations would be subject to the affirmative scrutiny procedure in the UK Parliament.

24. We also note the Minister's view that the Welsh Ministers should have powers equivalent to those given to the Secretary of State, so that the Welsh Ministers may apply the legislation, once enacted, in relation to Wales if there was a new wave of coronavirus that required business to close.

Conclusion 2. We agree with the Minister and support the position that the Welsh Ministers should have equivalent powers under clause 27 to act in Wales to those already given to the Secretary of State.

25. Finally, we again raise the importance of timely information being provided to the Senedd by the Welsh Government, and draw the Senedd's attention to the delay between the Bill being introduced into the House of Commons, on 9 November 2021, and the Welsh Government subsequently laying the Memorandum before the Senedd on 3 December 2021.

¹⁴ Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Professional Qualifications Bill](#) – January 2022
