

## **SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO.3)**

### **BUILDING SAFETY BILL**

1. This legislative consent memorandum (“LCM”) is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The UK Government amendments to the New Homes Ombudsman (“NHO”) and Defective Premises Act 1972 (“DPA72”) provisions in the Building Safety Bill (“the Bill”) were tabled for consideration at Report Stage in the House of Commons on 12 January 2022 and agreed on 19 January 2022. These amendments make provision falling within the legislative competence of the Senedd. The Bill can be found at: Building Safety Bill - Parliamentary Bills - UK Parliament.

### **Policy Objective(s)**

3. The UK Government’s stated policy objectives for the provisions relating to the DPA72 are to increase access to redress for owners of buildings that suffer from significant building defects. The UK Government’s stated objectives for the NHO are to give owners of new homes an effective route to redress so problems are put right when things go wrong.
4. As housing is a devolved matter, the UK Government has worked with devolved governments to seek agreement for the new arrangements under the NHO to be UK-wide for home owners and developers.
5. The UK Government wish to place a requirement on developers across the UK to belong to a single independent New Homes Ombudsman scheme (“NHO scheme”) including a new developers’ Code of Practice. The NHO scheme is designed to replace existing redress methods.

### **Summary of the DPA72 and NHO provisions of the Bill**

6. The Bill is sponsored by the Department for Levelling Up, Housing and Communities.
7. The first LCM was laid on 19 July 2021 and included provisions relating to the design and construction phase of buildings. A Supplementary LCM (Memorandum No.2) was laid on 21 September 2021 and covered technical amendments to the original drafting and amended the commencement and the consequential provisions, at the request of the Welsh Government, and tabled by the UK Government for consideration at Commons Committee Stage.

8. The first LCM also set out changes to the DPA72 to provide greater redress for those with a legal interest in a premises, and provide greater accountability and responsibility for fire and structural safety issues throughout the lifecycle of buildings moving forward. This included extending, prospectively and retrospectively, the limitation period for causes of action under the relevant sections of the DPA72 from the current 6 years to 15 years.
9. The Bill implements the UK Government's proposals to ensure a NHO is established and to legislate so that developers of new build homes can be required to belong to the NHO scheme.
10. The NHO will provide for dispute resolution and determine complaints made by those with a relevant interest in new build homes against developers. Once the arrangements for the NHO scheme have been made, developers (or those of a specified description) may be required to become and remain members of the scheme.
11. It is envisaged the housebuilding industry will meet the costs of the NHO and, once established, the NHO service will be free to complainants.

**Provisions tabled by the UK Government to the Bill at Commons Report stage for which consent is required**

12. The DPA72 clauses, which are within the legislative competence of the Senedd as they relate to housing and building safety, are clauses 128 (Amendments 41-43) and 148 (Amendment 68).
13. The NHO clauses, all of which are within the legislative competence of the Senedd as they relate to housing which is not reserved, are clauses 129-134 of Part 5, Schedule 8 and a new Schedule: *Amendments in connection with the new homes ombudsman scheme*.
14. Amendments to clauses 129, 132, and 134 provide for consultation with the Welsh Ministers before the Secretary of State:
  - makes arrangements for a NHO scheme (which applies to housing in Wales),
  - makes regulations to require persons to join the NHO scheme, and
  - issues, approves, revises or replaces the developers' Code of Practice.
15. The amendments that provide for the NHO scheme to apply to Wales and for the Welsh Ministers to be able to expand the definition of developer are tabled at the request of Welsh Government and are the result of inter-governmental co-operation and engagement, which I am content with. Further the amendments as detailed in paragraph 14 above, for example, are the result of the negotiations with the UK Government and are considered to provide for Welsh Ministers to have meaningful input into important aspects of the NHO provisions.

## Part 5

### Clause 128 (Amendments 41-43): Limitation periods

16. Amendment 41 provides for a 30 year limitation period (rather than a 15 year period, provided for in the Bill as introduced) for actions brought by virtue of section 1 of the DPA72, where the right of action accrued before the commencement of the provision.
17. Amendment 42 provides that where this new 30 year limitation period would expire within “the initial period” the expiration date is delayed to the end of that period.
18. Amendment 43 make changes to the definition of “the Initial period”, which had been 90 days when the Bill was introduced and the amendment extends it to one year, so that where the 30 year limitation period would expire within the “initial period” the time for bringing a claim is extended to one year rather than 90 days.

### Clause 129 (Amendments 44-45): Establishment of the new homes ombudsman scheme

19. Clause 129 is an enabling provision which requires the Secretary of State to arrange for there to be a redress scheme, to be known as the “*new homes ombudsman scheme*”.
20. The clause also provides power to the Secretary of State to arrange with a person to establish and implement the NHO scheme, or establish and implement a NHO scheme themselves. This provision allows for flexibility as to how the scheme will operate.
21. Additionally, the clause provides the Secretary of State with the options for financing the NHO scheme, including potentially providing financial assistance by way of a grant / loan to a person who establishes and maintains the scheme. The intention is for the NHO scheme to cover its own costs and to finance itself through fees charged to developers; consumers raising complaints will not be required to pay fees of any kind. If the NHO scheme is procured and is not self-financing there is also provision to allow the Secretary of State to pay for the service. This duty lies with the Secretary of State and there is no financial liability on Devolved Nations.
22. The tabled amendments to clause 129 mean the NHO scheme will apply in Wales (and Scotland) rather than only in England (Amendment 44) and they also insert new clause 129(4)(a) (Amendment 45) which provides Welsh Ministers must be consulted before arrangements for the NHO scheme are made.

#### Clause 130 (Amendments 46–48): The new homes ombudsman scheme

23. Clause 130 provides that membership of the NHO scheme must be open to all ‘developers’ (as defined by clause 131(6)), and that the scheme will enable ‘relevant owners’ of new build homes to make complaints against scheme members (developers) and to have such complaints investigated and determined by the NHO.
24. This clause defines a “qualifying complainant” as a person who is a “relevant owner” of a “new build home” (the latter terms are both defined in clause 131). However, the clause does not restrict the NHO scheme to receiving complaints from ‘qualifying complainants’ only and may include organisations such as housing associations who may have purchased new build homes for occupation by tenants for example.
25. Amendment 46 removes the reference to “in England” from clause 130(2) so that complaints can be made under the NHO scheme by relevant owners in Wales and Scotland also. Amendment 47 makes a technical amendment to clause 130(6) so that the meaning of “redress scheme” does not only relate to schemes that have a membership requirement. Amendment 48 introduces a new Schedule (detailed at paragraph 42 below).

#### Clause 131 (Amendments 50-55): “Relevant owner”, “new build home” and “developer”

26. Clause 131 provides definitions of the terms used in the NHO provisions such as “*relevant owner*”, “*new build home*” and “*developer*”. A definition of “*relevant interest*” is included (Amendment 50). Amendments 51- 53 remove references to “in England” to reflect that the NHO scheme will also apply in Wales and Scotland.
27. The clause provides that complaints can be made about the NHO scheme’s members within two years of the first acquisition of a new build home from the person who developed it. This could include the conduct and the quality of work of the developer.
28. Clause 131(6)-(7A) will also provide the power for Welsh Ministers to make regulations, to add additional descriptions of who is a developer in Wales (Amendment 54). Before making such regulations Welsh Ministers must consult the other relevant national authorities in relation to regulations under that subsection (Amendment 55).
29. Amendment NC20 will add a new clause connected to the power to make regulations under 131(6)(b) (to add additional descriptions of who is a developer) and provide that the regulations can made different provision for different purposes and may make consequential etc. provision. It also provides that regulations made under section 131 are subject to the affirmative procedure.

Clause 132 (Amendment 56): Power to require persons to join scheme and to provide information

30. Clause 132 is an enabling provision which provides power to the Secretary of State to make regulations to require developers to become members of the NHO scheme and to make provision for civil sanctions for those that fail to do so; and to provide certain information.
31. The clause includes the power to require developers to become and remain members of the NHO scheme and where the requirement to be a member of the scheme has been breached, it also includes a requirement for there to be a right of appeal. Where a developer breaches the requirement to be a member of the NHO scheme, there is provision to set out an enforcement framework through regulations to include the investigation of suspected breaches.
32. The tabled amendments insert clause 132(1A) which requires the Secretary of State to consult the Welsh Ministers and the Scottish Ministers before regulations are made under clause 132(1)(Amendment 56).

Clause 133: Register of members

33. Clause 133 details the requirements to keep and make publically available a register of members of the NHO scheme.

Clause 134 (Amendment 57): Developers' code of practice

34. Clause 134 is also an enabling provision which provides that the Secretary of State "*may issue or approve a code of practice about the standards of conduct and standards of quality of work expected of members of the new homes ombudsman scheme.*" This is to ensure that developers know what is expected of them and homebuyers know what to expect.
35. The tabled amendments make provision for the Welsh Ministers and the Scottish Ministers to be consulted in relation to the approving, issuing, revising or replacing the code.

New Clause (Amendment NC21): Amendment of the Government of Wales Act 2006

36. A new clause has been tabled, to be inserted after clause 134, which makes an amendment to Schedule 7B to the Government of Wales Act 2006 to add the NHO to the list of cross border bodies in paragraph 10(2) of that Schedule, so that the Senedd is not required to obtain consent before removing or modifying the functions of the NHO.

## Part 6

### Clause 148 - Commencement and Transitional Provision

37. Clause 148(3) is amended to provide that clause 127 (Duties relating to work to dwellings etc) comes into force two months after Royal Assent (Amendment 68).
38. Commencement of the NHO provisions is provided for by clause 148(5). The NHO provisions will therefore come into force on a date specified in regulations made by the Secretary of State.
39. Given the Secretary of State will be responsible for establishing the NHO scheme, it is practical and appropriate for the NHO provisions to be commenced by the Secretary of State. The Welsh Ministers can make regulations under clause 131(6)(b) to add to the definition of a “developer”, but as a definition is already included in the Bill these regulations need not be made before the NHO provisions are commenced. Therefore this does not impact on the view that it is appropriate for the NHO provisions to be commenced by the Secretary of State.

## Schedules

### Schedule 8 - The New Homes Ombudsman Scheme

40. Schedule 8, which is introduced by clause 130, contains further provision about the NHO scheme, including details regarding fees, forms of redress, co-operation with persons who exercise functions under other redress schemes etc. (Amendment 71). The amendment to Schedule 8 paragraph 15 provides that where the NHO scheme is maintained by someone other than the Secretary of State the scheme must include provision about information sharing with Welsh Ministers and Scottish Ministers (Amendment 72).

### New Schedule (Amendment NS2) - Amendments in Connection With The New Homes Ombudsman Scheme

41. The new schedule details a number of amendments to legislation to enable joint working with the NHO. The schedule includes a new paragraph which will amend the Public Services Ombudsman (Wales) Act 2019 by adding the NHO to the list of ombudsman in section 65(7) of that Act to facilitate consultation and co-operation between the NHO and the Public Services Ombudsman for Wales.

## **Reasons for extending NHO provisions in the Building Safety Bill to Wales**

42. A scheme of this nature will have more value if it is a cross-border scheme, particularly as many of the house builders here in Wales work cross-border. This will ensure a standard approach, implemented at a single point in time, which will reduce confusion and complexity both for complainants and developers. The application of the NHO scheme to Wales will also be beneficial in terms of cost and timing, ensuring that complainants in Wales have access to effective redress as soon as possible.
43. The NHO scheme is being introduced through legislation by the UK Government as a result of criticism of the house building industry; in its build quality and customer service record. The biggest gap in existing protection has been identified as post occupation. If a buyer has an issue with their new home after they move in, and the developer refuses to fix it, then the courts may be the only option.
44. There are currently a number of industry codes of practice in place, which makes it difficult for consumers to navigate. A condition of a developer receiving a new build warranty, is they must belong to the consumer code the warranty provider is aligned with, this is effectively how redress operates now.
45. The intention through legislation is to introduce a single code of practice, which will build on the protections in the existing codes and place stricter requirements on developers covering the sale and aftercare of new homes, particularly post occupation. It will also set out how developers will have to deal with issues consumers have with their new homes in the first two years. Developers may be required to join and remain members of the NHO scheme.
46. As developers often work across different parts of the UK, they are likely to prefer to have one system to work with so they do not have to navigate separate schemes in different parts of the UK. As the new code of practice under the NHO will replace existing codes, warranty providers may make it a requirement to belong to a single code even if the NHO provisions were not extended to Wales, but without the benefit of the protections through legislation. Alternatively, Wales could develop an alternative scheme, at its own cost.
47. Joining the NHO scheme would therefore have a positive impact on individuals and families who have purchased a home and who are having disputes with the developer.

48. As the Senedd has legislative competence in this area we would, if for example it was felt the NHO scheme wasn't working for Wales, have the option to create our own redress mechanism through Senedd legislation. However, as the NHO will not be a devolved Welsh authority we would need the consent of the appropriate UK Government Minister to remove functions from the NHO. Having to seek such consent would negatively impact on the Senedd's competence. To avoid this, a new clause to be inserted after clause 134 has been tabled, to add the NHO to the "cross-border" bodies in para. 10(2) of Schedule 7B of the Government of Wales Act 2006(GoWA) (see Amendment NC21 detailed above).

### **Reasons for amending the DPA72 provisions in the Bill**

49. The LCM laid on 19 July detailed the provisions to amend the DPA72 (and the related amendments to the Limitation Act 1980) to extend the relevant limitation periods to 15 years. These further amendments, building on those changes, further extend the period in which claims under section 1 of the DPA72 applies to 30 years in respect of retrospective claims. The 30 year period aligns with increased use of cladding and leasehold arrangements on dwellings. This provides a longer period in which a person may claim, providing greater redress for owners and leaseholders.

### **Financial implications**

50. There are no direct financial implications to Welsh Government budgets for the extension of the NHO to Wales.
51. It is envisaged the housebuilding industry will meet the costs of the NHO and, once established, the NHO service will be free to consumers.
52. If the NHO scheme is procured and is not self-financing there is also provision to allow the Secretary of State to pay for the service. There are no financial obligations to devolved nations.
53. If Welsh Government wished to add additional categories in relation to the definition of a 'developer' for example, there may however be a costs associated with this. In addition, there may be some cost implications as we continue to explore the Welsh Language provision through the New Homes Ombudsman.
54. Regarding the extension of the DPA72 the impact assessment which accompanied the previous LCM identified the costs to different parties. The amendment if accepted will increase the retrospective period in which action may be taken. This will be a transfer of impacts of remediation from owners/leaseholders to developers affecting dwellings constructed during the additional 15 years.



## **Conclusion**

55. It is my view that it is appropriate for the NHO and DPA72 provisions within the Bill to apply to Wales. Buying a home is one of the biggest financial commitments many people make in their lives and for purchasers to still be waiting for issues to be addressed months after moving in, or for defects to render a home uninhabitable is simply unacceptable. I recognise the majority of homes built by developers large and small are of sufficient quality, but it is important to me this is consistently the case for all properties. I consider this Bill the most effective way for these provisions to come into force as soon as possible, ensuring a route to redress when things go wrong. Therefore I recommend the Senedd supports the proposals and gives its consent.

**Julie James MS**  
**Minister for Climate Change**  
**20 January 2022**