

The Welsh Government's Supplementary Legislative Consent Memoranda (Memorandum No. 3 and Memorandum No. 4) on the Police, Crime, Sentencing and Courts Bill

January 2022



1. Background

1. The Police, Crime, Sentencing and Courts Bill (the Bill) was originally introduced into the House of Commons and had its first reading on 9 March 2021.¹ It is sponsored by the Ministry of Justice. The Bill² was re-introduced on 18 May 2021 following a carry-over motion.
2. The Bill completed its stages in the House of Commons on 5 July 2021. It was introduced into the House of Lords on 6 July 2021³ and completed its Committee stage on 24 November 2021.⁴ The Bill was at Report stage when this report was agreed.

The Welsh Government's Legislative Consent Memorandum

3. On 28 May 2021, the Minister for Social Justice, Jane Hutt MS (the Minister), laid before the Senedd a Legislative Consent Memorandum⁵ (the original Memorandum) in respect of the Bill.
4. We reported⁶ (first report) on the Memorandum on 14 October 2021. The Minister responded to our report on 12 November 2021.⁷

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2)

5. On 5 November 2021, the Minister laid a Supplementary Legislative Consent Memorandum⁸ (Memorandum No. 2) in respect of the Bill.
6. We reported (second report) on Memorandum No. 2 on 25 November 2021.⁹ The Minister responded to our report on 7 January 2022.¹⁰

¹ [Police, Crime, Sentencing and Courts Bill](#), [HC Bill 268, 2019-21]

² [Police, Crime, Sentencing and Courts Bill](#), [HC Bill 5, 2021-22]

³ [Police, Crime, Sentencing and Courts Bill](#), [HL Bill 40]

⁴ [Police, Crime, Sentencing and Courts Bill](#), [HL Bill 72, as amended in Committee]

⁵ Welsh Government, [Legislative Consent Memorandum, Police, Crime, Sentencing and Courts Bill](#), May 2021

⁶ Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Police, Crime, Sentencing and Courts Bill](#), October 2021

⁷ [Letter from the Minister for Social Justice](#), 12 November 2021

⁸ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\), Police, Crime, Sentencing and Courts Bill](#), November 2021

⁹ Legislation, Justice and Constitution Committee, [The Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Police, Crime, Sentencing and Courts Bill](#), November 2021

¹⁰ [Letter from the Minister for Social Justice](#), 7 January 2022 (first letter)

Summary of our first and second reports

7. Our first report agreed with the Welsh Government that the Senedd's consent is required for the following clauses:

- Clause 1 (Police covenant report);
- Clause 2 (Increase in penalty for assaults on emergency workers);
- Clauses 7 to 22 (Functions relating to serious violence);
- Clauses 23 to 35 (Offensive weapons homicide review);
- Clauses 36 to 37 and 40 to 42 (Extraction of information from electronic devices);
- Clause 46 (Criminal damage to memorials: mode of trial).¹¹

8. We also highlighted that the Welsh Government was recommending, at that point in time, that consent be withheld by the Senedd for clauses 9, 17, 18 and 46.

9. We did not agree with the Welsh Government that the Senedd's consent was required for the following clauses,¹² because in our view, they fall outside the devolved purpose test set out in Standing Order 29.1¹³:

- Clauses 54 to 55 (Public processions and assemblies);¹⁴
- Clause 59 (Intentionally or recklessly causing public nuisance);¹⁵
- Clause 60 (Imposing conditions on one-person protests);¹⁶ and
- Clause 61 to 63 (Unauthorised encampments).¹⁷

¹¹ Clause 47 in HL Bill 72 (as amended in Committee)

¹² Clause 43 is not listed as it was a typographical error in the original Memorandum (see paragraphs 45-47 and recommendation 2 of our first report and the Minister's letter of 12 November 2021).

¹³ As we stated in our first report, when considering whether a particular clause requires consent, we have applied the "purpose test" set out in Standing Order 29.1(i) i.e. does the provision have a devolved purpose.

¹⁴ Clauses 55 to 56 in HL Bill 40; clauses 56 to 57 in HL Bill 72 (as amended in Committee)

¹⁵ Clause 60 in HL Bill 40; clause 61 in HL Bill 72 (as amended in Committee)

¹⁶ Clause 61 in HL Bill 40; clause 62 in HL Bill 72 (as amended in Committee)

¹⁷ Clauses 62-64 in HL Bill 40; clauses 63-65 in HL Bill 72 (as amended in Committee)

10. We also highlighted that the Welsh Government was recommending that consent be withheld by the Senedd for clauses 54, 55, 60, 61, 62 and 63.

11. In our second report, we noted that, following an amendment to the Bill, the Welsh Government is now recommending that the Senedd consents to clauses 9, 17 and 18.

Reports of the House of Lords Delegated Powers and Regulatory Reform Committee

12. In our first report on the original Memorandum, we drew attention to a report of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRR Committee).¹⁸ The UK Government has responded¹⁹ to this report (and a subsequent report). The Chair of the DPRR Committee has commented that the UK Government has taken on board the large number of recommendations made and accepted the majority of them.²⁰

The Welsh Government's Supplementary Legislative Consent Memoranda (Memorandum No. 3 and Memorandum No. 4)

13. On 20 December 2021, the Minister laid a Supplementary Legislative Consent Memorandum²¹ (Memorandum No. 3) in respect of the Bill. Memorandum No. 3 concerns amendments tabled to the Bill²² in the House of Lords on 1 December 2021. It states:

"This memorandum has been laid as soon as possible after the tabling of these amendments allowing for a full analysis of their effect."²³

14. On 7 January 2022, the Minister laid a further Supplementary Legislative Consent Memorandum (Memorandum No. 4) in respect of the Bill. Memorandum No. 4 concerns details

¹⁸ Delegated Powers and Regulatory Reform Committee, House of Lords, 6th Report of Session 2021–22, Police, Crime, Sentencing and Courts Bill, Public Service Pensions and Judicial Offices Bill, September 2021, HL Paper 65

¹⁹ Delegated Powers and Regulatory Reform Committee, House of Lords, 15th Report of Session 2021–22, Health and Care Bill, Cigarette Stick Health Warnings Bill [HL], House of Lords (Hereditary Peers) (Abolition of By-Elections) Bill [HL], Police, Crime, Sentencing and Courts Bill: Government Responses, 16 December 2021, HL Paper 133, Appendix 1

²⁰ House of Lords Debate, 8 December 2021, vol 816 col 1973

²¹ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 3), Police, Crime, Sentencing and Courts Bill, December 2021

²² HL Bill 72 (as amended in Committee)

²³ Welsh Government, Memorandum No. 3, paragraph 4

of a new clause in the Bill not previously referred to, and an amendment tabled to the Bill²⁴ in the House of Lords on 4 January 2022, that require the Senedd's consent.

15. We also received a letter from the Minister on 7 January 2022, which stated:

"In SLCM (No.3), I aimed to outline the Welsh Government's position on the amendments laid on 1 December 2021, which impact on devolved matters and also reaffirm the Welsh Government's position on the remaining clauses of the Bill which I consider require the consent of the Senedd. However, due to time pressures we omitted clauses 1, 2, 23-30, 32-35, 37-38, 41 & 43 and erroneously included clause 40. To note, clauses 1, 2, 23-37 and 41 and 43 were fully addressed in the LCM laid on 28 May 2021. I have since laid SLCM (No.4), which corrects these errors, includes details of the newly inserted clause 38 and my position on it, and amendments tabled by the UK Government on 4 January 2022 which are within the legislative competence of the Senedd.

SLCM (No.4) offers a complete view of the relevant clauses, addressing the previous omissions and providing a comprehensive view of the clauses which impact on devolved matters. I recommend using it as your first point of reference when considering the Bill."²⁵

16. The Business Committee agreed that the Legislation, Justice and Constitution Committee should report on Memorandum No. 3 and Memorandum No. 4 by 18 January 2022.²⁶

The Welsh Government's position on the Bill as amended

17. Paragraphs 19 and 20 of Memorandum No. 4 provide a summary of the provisions in the Bill for which the Minister recommends that the Senedd grants and withholds consent respectively.

18. The Memorandum concludes by saying:

²⁴ HL Bill 72 (as amended in Committee)

²⁵ Letter from the Minister for Social Justice, 7 January 2022 (second letter)

²⁶ Business Committee, Timetable for consideration of the Supplementary Legislative Consent Memorandum (No. 3) for the Police, Crime, Sentencing and Courts Bill, January 2022; Business Committee, Timetable for consideration of the Supplementary Legislative Consent Memorandum (No. 4) for the Police, Crime, Sentencing and Courts Bill, January 2022

"There are provisions in this Bill which we welcome and are in line with our policies. In respect of such provisions, I am recommending the Senedd gives consent to those clauses, as listed in paragraph 19 for the reasons detailed further in paragraphs 21 to 27.

However, there are provisions in this Bill which are not in line with our policies. In respect of such provisions, I am recommending the Senedd 12 withholds consent to those clauses, as listed in paragraph 20 for the reasons detailed further in paragraphs 28 to 30."²⁷

2. Committee consideration

19. We considered Memorandum No. 3 and Memorandum No. 4 at our meeting on 10 January 2022.²⁸

Our view

General observations

20. Memorandum No. 3 was laid, in recess, on 20 December 2021 in respect of amendments tabled in the House of Lords on 1 December 2021. Memorandum No. 4 was also laid, in recess, on 7 January 2022 in respect of amendments tabled in the House of Lords on 4 January 2022. We note also that Memorandum No. 4 made corrections to the contents of Memorandum No. 3.

21. We have not had time to fully scrutinise the issues raised in Memorandum No. 3 or Memorandum No. 4. We recognise that this is partly as a consequence of amendments tabled at the end of the legislative process in the UK Parliament. We note that as regards Memorandum No. 3, the Welsh Government has said that it laid it "as soon as possible after the tabling of these amendments"²⁹ and also that it has highlighted the complexity of the Bill.³⁰ However, we believe that, given the Bill was introduced into the UK Parliament in May 2021, the Welsh Government should have been working with the UK Government in such a way as to ensure an earlier publication of Memorandum No. 3.

²⁷ Welsh Government, Memorandum No. 4, paragraphs 32-33

²⁸ [Legislation, Justice and Constitution Committee, 10 January 2022](#)

²⁹ Welsh Government, Memorandum No. 3, paragraph 4

³⁰ Letter from the Minister for Social Justice, 7 January 2022 (second letter)

Conclusion 1. The provision of timely and accurate information within legislative consent memoranda is fundamental to enable the Senedd and its Committees to scrutinise the Welsh Government, and to hold it to account, for its use (in each case) of a UK Bill to make legislative provision in a devolved area.

22. In the paragraphs that follow, references to clauses are references to clauses in the Bill as amended on 24 November 2021 in the House of Lords.³¹

Clauses for which the Welsh Government recommends consent

23. We agree that the consent of the Senedd is required for the list of clauses set out in paragraph 19 of Memorandum No. 4, with the exception of clause 61. Our previous two reports covered most of these clauses; we comment below on clause 38 and the new clause referred to in Memorandum No. 4.

24. Clause 38 of the Bill sets out requirements which clarify when a person is considered to have voluntarily provided an electronic device for the purpose of clauses 36 and 37. Memorandum No. 4 states that reference to clause 38 was omitted from previous supplementary memoranda given the complexity of the Bill and the volume of UK Government amendments tabled.³² Memorandum No. 4 also states that clause 38 is ancillary to clauses 36 and 37³³ and that consent is required.³⁴

25. Our first report agreed with the Welsh Government that the consent of the Senedd is required for clauses 36 and 37.³⁵ We also agree that clause 38 requires the consent of the Senedd.

26. An amendment tabled on 4 January 2022 in the House of Lords proposes a new clause to increase penalties under the *Night Poaching Act 1828*, and the *Game Act 1831*, in order to further deter hare coursing, which is often carried out on another person's land without permission. It also further amends the *Game Laws (Amendment) Act 1960* so that a vehicle can be forfeited no matter how many people are committing the Game Acts' offences.

³¹ HL Bill 72 (as amended in Committee)

³² Welsh Government, Memorandum No. 4, paragraph 16

³³ Welsh Government, Memorandum No. 4, paragraph 17

³⁴ Welsh Government, Memorandum No. 4, paragraph 25

³⁵ Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memorandum on the Police, Crime, Sentencing and Courts Bill, October 2021, paragraphs 32 and 38-41

27. Memorandum No. 4 states:

"The way we treat our animals is an important reflection of our society's values. As well as being an issue of animal welfare, offending in order to facilitate hare coursing can also have a wider impact. This can include vandalism of property, loss of income for farmers and landowners, theft, intimidation and road traffic issues including the driving of unlicensed and uninsured vehicles. Whilst hare coursing is currently very rare in Wales, the Welsh Government believes many of the criminals taking part in hare coursing in England would move their events to Wales if England only legislation was brought in.

Therefore, I recommend the Senedd gives consent to this clause."³⁶

28. On application of the "devolved purpose" test required by Standing Order 29.1 (i.e. does the provision have a devolved purpose), we agree that the Senedd's consent is required.

29. We also wish to set out our views on clause 61³⁷ of the Bill, which replaces the common law offence of public nuisance. An amendment tabled to this clause in the House of Lords on 1 December 2021 clarifies that the offence of public nuisance will only be committed where a person's act or omission has caused, or created a risk of, serious harm to the public or a section of the public. A definition of "serious harm" is inserted onto the face of the Bill.

30. Memorandum No. 4 continues to recommend that the Senedd gives consent to these provisions, noting that:

"Whilst public order is a reserved matter the noise elements in these clauses relate to environmental health matters, which are devolved to the Senedd and Welsh Ministers. We support the clause in relation to protecting residents from increased noise pollution. For this reason, a LCM was laid in respect of this clause on 28 May in which I recommended the Senedd gives consent to this clause."³⁸

³⁶ Welsh Government, Memorandum No. 4, paragraph 26

³⁷ Clause 59 in HC Bill 5

³⁸ Welsh Government, Memorandum No. 4, paragraph 27

31. However, our first report on this clause expressed dissatisfaction with the Minister's explanation as to why she considered that this clause requires the consent of the Senedd.³⁹ We remain of the view that the consent of the Senedd is not required as the provision falls outside the devolved purpose test in Standing Order 29.1. This is because the main purpose of the provision is to maintain public order and minimise disruption to members of the public in the vicinity. Public order is a reserved matter under Schedule 7A to the *Government of Wales Act 2006* (the 2006 Act).⁴⁰

Clauses for which the Welsh Government recommends that consent is withheld

32. We note the list of clauses for which the Welsh Government recommends that consent is withheld, as set out in paragraph 20 of Memorandum No. 4.

33. In respect of clause 47 (Criminal damage to memorials: mode of trial),⁴¹ as indicated in our first report, we agree that the Senedd's consent is required.⁴²

34. However, in line with our first report, we disagree that the Senedd's consent is required for clauses 56 and 57, and 62 to 65.

35. Clauses 56⁴³ and 57⁴⁴ of the Bill amend sections of the *Public Order Act 1987* (the 1987 Act) by broadening the circumstances in which police officers have the power to impose conditions on public processions and assemblies. Clause 62⁴⁵ also amends the 1987 Act and relates to the imposition of conditions regarding one person protests.

36. Amendments tabled to these clauses in the House of Lords on 1 December 2021 replace the power for the Secretary of State to make regulations about the meaning of "serious disruption" with provisions that place the definition on the face of the Bill, subject to a power for the Secretary of State to amend it through regulations.

37. Memorandum No. 4 states that:

³⁹ Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memorandum on the Police, Crime, Sentencing and Courts Bill, October 2021, paragraphs 53-54

⁴⁰ Paragraph 40 of Schedule 7A to the *Government of Wales Act 2006*

⁴¹ Clause 46 in HC Bill 5

⁴² Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memorandum on the Police, Crime, Sentencing and Courts Bill, October 2021, paragraphs 32 and 42

⁴³ Clause 54 in HC Bill 5

⁴⁴ Clause 55 in HC Bill 5

⁴⁵ Clause 60 in HC Bill 5

"Whilst public order is a reserved matter the noise elements in these clauses relate to environmental health matters, which are devolved to Welsh Government. We support the clause in relation to protecting residents from increased noise pollution, however this is the responsibility of Welsh Government. Whilst the Welsh Government does not have powers to direct the police in relation to noise levels, it does have overall responsibility for noise abatement and is responsible for directing local authorities on this matter. The legislation is not clearly defined and it is therefore difficult to assess its implications on the responsibilities of Devolved Welsh Authorities. For this reason, a LCM was laid in respect of these clauses on 28 May in which I recommended the Senedd withheld consent to them.

These clauses are amended as detailed in paragraph 14 and as supplementary LCM (Memorandum No 3) was laid in respect of these clauses on 20 December in which, again, I recommended the Senedd withholds consent to them.

I continue to recommend the Senedd withholds consent for clauses 56, 57 and 62."⁴⁶

38. We remain of the view that the consent of the Senedd is not required for these clauses as the provisions fall outside the devolved purpose test in Standing Order 29.1. Although the provisions do concern the control of excess noise levels, the main purpose of the provisions is to maintain public order and minimise disruption to members of the public in the vicinity. As stated above (in paragraph 31), public order is a reserved matter under Schedule 7A to the 2006 Act.

39. Clauses 63 to 65⁴⁷ relate to unauthorised encampments. Clause 65 provides the Secretary of State with the power to issue guidance to the police force regarding their functions in respect of trespassers on land. An amendment tabled to this clause in the House of Lords on 1 December 2021 requires any such guidance issued by the Secretary of State to be laid before the UK Parliament.

40. Memorandum No. 4 states:

"The Welsh Government's approach to managing unauthorised encampments is unchanged. We focus on engagement with communities

⁴⁶ Welsh Government, Memorandum No. 4, paragraph 29.

⁴⁷ Clauses 61-63 in HC Bill 5

and investment for adequate provision of authorised sites and enabling local authorities to meet the accommodation needs (residential and transit) of Gypsy and Traveller communities. This area of work is prioritised again in the Race Equality Action Plan, which contains a specific goal on better addressing accommodation needs of these communities. For this reason, a LCM was laid in respect of these clauses on 28 May, in which I recommended the Senedd withheld consent to them.

I continue to recommend the Senedd withholds consent to clauses 63 and 64.

Clause 65 is amended as detailed in paragraph 12 and a supplementary LCM (Memorandum No 3) was laid in respect of this clause on 20 December in which, again, I recommended the Senedd withholds consent to this clause.

I continue to recommend the Senedd withholds consent for clause 65.⁴⁸

41. We remain of the view that the consent of the Senedd is not required for clauses 63 to 65 because the purpose of the provisions is the maintenance of public order, and therefore the provisions fall outside the devolved purpose test in Standing Order 29.1. Again, as we state above, public order is a reserved matter under Schedule 7A to the 2006 Act.

Other matters considered

42. Paragraph 3 of Memorandum No. 3 states that, of the 91 amendments to the Bill that were tabled in the House of Lords on 1 December 2021, 15 require the consent of the Senedd. However, we also note that paragraphs 9 to 13 of Memorandum No. 3 list 18 clauses that are being amended as a result of the amendments tabled.

Recommendation 1. The Minister should, in advance of the debate on the relevant consent motion, explain the difference between the figure stated in paragraph 3 of Memorandum No. 3 and the number of clauses subsequently listed in paragraphs 9 to 13.

43. Paragraph 23 of Memorandum No. 3 states that there “may be financial implications but this will not be clear until the measures in the Bill are implemented”. The same statement is included in paragraph 31 of Memorandum No. 4.

⁴⁸ Welsh Government, Memorandum No. 4, paragraph 30.

44. However, in both the original Memorandum and Memorandum No. 2, the Welsh Government has stated that there are no financial implications for Wales in relation to the Bill.⁴⁹

Recommendation 2. The Minister should, in advance of the debate on the relevant consent motion, explain why the position regarding financial implications has changed.

⁴⁹ Welsh Government, the original Memorandum, paragraph 19; Welsh Government, Memorandum No. 2, paragraph 6.
