

The Welsh Government's Legislative Consent Memoranda on the Domestic Abuse Bill

February 2021

1. Background

The UK Government's Domestic Abuse Bill

1. The Domestic Abuse Bill¹ (the Bill) was introduced to the House of Commons and given its first reading on 3 March 2020. It is sponsored by the Home Office.
2. The explanatory notes to the Bill state:

“The purpose of the Bill is to raise awareness and understanding of domestic abuse and its impact on victims, to further improve the effectiveness of the justice system in providing protection for victims of domestic abuse and bringing perpetrators to justice, and to strengthen the support for victims of abuse and their children provided by other statutory agencies.”²
3. The Bill completed its stages in the House of Commons on 6 July 2020. It was introduced³ in the House of Lords on 7 July 2020. Several UK Government amendments have been made to the Bill, including one new clause during Commons Committee Stage, and five new clauses at Commons Report Stage.
4. Report stage in the House of Lords is scheduled for 8 March 2021.

¹ Domestic Abuse Bill (Bill 96), March 2020

² Domestic Abuse Bill (Bill 96), Explanatory Notes, March 2020

³ Domestic Abuse Bill (HL Bill 124), July 2020



The Welsh Government's Legislative Consent Memorandum

5. In accordance with Standing Orders 29.1 and 29.2, a Legislative Consent Memorandum is required because provisions within the Bill modify or fall within the Senedd's legislative competence.

6. On 3 August 2020 the Deputy Minister and Chief Whip, Jane Hutt MS, laid before the Senedd a Legislative Consent Memorandum⁴ (LCM) in respect of the Bill.

7. The Business Committee agreed⁵ that the Legislation, Justice and Constitution Committee (the Committee) and the Equality, Local Government and Communities (ELGC) Committee should report on the LCM by 5 November 2020. The date was subsequently extended to 25 February 2021.⁶

Provision for which the Senedd's consent is required

8. Clause numbering in the LCM reflects the version of the Bill introduced to the House of Lords.

9. Paragraphs 6 and 7 of the LCM set out the Welsh Government's original assessment of which provisions of the Bill are within the legislative competence of the Senedd and therefore require its consent, as follows:

- clause 3 (children as victims of domestic abuse);
- clause 65 (consent to serious harm for sexual gratification not a defence);
- clause 66 (offences against the person committed outside the UK: England and Wales);
- clause 68 (amendments relating to offences committed outside the UK);
- clause 73 (power of the Secretary of State to issue Guidance about domestic abuse, etc.).

10. While the majority of the Bill's provisions extend to Wales, paragraph 73 of, and Annex B to, the Bill's explanatory notes confirms that the UK Government

⁴ [Welsh Government, Legislative Consent Memorandum, Domestic Abuse Bill](#), August 2020

⁵ [Business Committee, Timetable for consideration of the Legislative Consent Memorandum on the Domestic Abuse Bill](#), September 2020

⁶ See paragraph 29 and footnote 19

does not consider that any of the Bill's provisions are within the legislative competence of the Senedd.

11. Paragraphs 8 to 12 of the LCM assess the provisions in the Bill for which consent is being sought.

12. Paragraph 8 of the LCM states:

“The Welsh Government believes that the measures in relation to reserved authorities will support the work already underway in Wales through the *Violence Against Women Domestic Abuse and Sexual Violence (Wales) Act 2015*.”

13. Paragraph 9 of the LCM states:

“Clause 65 delivers significant and important changes as it legislates for the principle that consent to serious harm for sexual gratification would not be a defence, it is imperative that it is implemented across the jurisdiction of England and Wales at the same time.”

14. With regards to clauses 66 and 68, paragraph 10 of the LCM states:

“Clause 66 and 68 of the Bill are included to fulfil the UK's obligations under article 44 of the Istanbul Convention. Whilst the Senedd could pass legislation to implement international obligations, the Welsh Government is unable to unilaterally ratify the Istanbul Convention because it is not a Nation State and must rely on UK Government for this purpose. The Welsh Government is supportive of measures being taken in collaboration with the UK Government which will permit ratification.”

15. However, as regards clause 73, paragraph 11 of the LCM states:

“It is the view of the Welsh Government that clause 73, (as it is currently drafted), significantly encroaches on the executive functions of the Welsh Minister's and the legislative competence of the Senedd. Officials will work closely with the UK Government to seek an amendment to the clause to ensure it accurately reflects and respects the devolution settlement.”

16. With regards to the financial implications of the Bill, the LCM states:

“While there are no direct financial implications for the Welsh Government or the Senedd Cymru arising from the powers under the

Bill, there may be future financial implications for Wales in terms of the overall effect should a differing approach be taken.”⁷

17. The LCM concludes:

“... there is no space in the Welsh Government's current legislative programme for a Bill making provision for Wales on these matters, nor is there any Bill in the programme to which such provisions could be added. (...)

It is the view of the Welsh Government that it is appropriate to deal with these provisions in this UK Bill as the Bill covers both devolved and non-devolved matters. In terms of coherence, the Welsh Government considers that legislating via a UK-wide Bill is the most effective and proportionate legislative vehicle for raising awareness of domestic abuse matters.”⁸

Committee consideration

18. We considered the LCM at our meetings on 28 September⁹ and 12 October¹⁰ 2020.

19. Standing Order 29.3(ii) requires that an LCM specifies the extent to which the Bill makes (or would make) relevant provision. A ‘relevant provision’ is one that falls within legislative competence. While the LCM does outline which provisions are believed to require consent, it does not provide any analysis on how these clauses fall within the legislative competence of the Senedd.

20. Following our meeting on 28 September 2020, we wrote to the Deputy Minister jointly with the Equality, Local Government and Communities Committee.¹¹

21. We asked the Deputy Minister to provide the analysis she undertook to determine how the five clauses specified in the LCM – clauses 3, 65, 66, 68 and 73 – fall within the Senedd's competence. Furthermore, clause 3 of the Bill is connected to clause 1, as it defines domestic abuse. By extension, clause 3 is also

⁷ Welsh Government, Legislative Consent Memorandum, Domestic Abuse Bill, paragraph 13

⁸ Welsh Government, Legislative Consent Memorandum, Domestic Abuse Bill, paragraphs 12 and 14

⁹ [Legislation, Justice and Constitution Committee, 28 September 2020](#)

¹⁰ [Legislation, Justice and Constitution Committee](#), 12 October 2020

¹¹ [Letter to the Deputy Minister and Chief Whip](#), 30 September 2020

connected to clause 2 of the Bill, which defines how persons are “personally connected” for the purposes of the definition in clause 1. As such we asked the Deputy Minister to provide an explanation as to why she considered that consent is not also required for clauses 1 and 2.

22. The Minister responded to our letter on 6 October 2020¹² and said:

“You have... asked for details of the analysis undertaken in order to determine that clauses 3, 65, 66, 68 and 73 fall within the Senedd's competence, and why clause 1 and 2 are not included in the LCM. You highlight that the UK Government's Explanatory Notes to the Bill states that the Bill is not within legislative competence of Senedd Cymru, and therefore consent is not required. It remains my view that there are good arguments as to why the provisions identified are within the legislative competence of the Senedd Cymru. The overall purpose of the Bill is to raise awareness and understanding of domestic abuse and its impact on victims, the prevention of domestic abuse, including strengthening support for victims of abuse and their families; this has a clear impact on devolved matters.

The Legislative Consent Motion process must be viewed in the context of the Sewell convention as set out in section 107(6) of the *Government of Wales Act 2006* and the Devolution Guidance Note, ‘Parliamentary and Assembly Primary Legislation Affecting Wales’, which provides that Parliament will not legislate “with regard to devolved matters” without the consent of the Senedd Cymru. Domestic abuse in general is a devolved area, as highlighted by the *Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015*.¹³

23. With regards to the timing of the LCM, the Bill was introduced in the House of Commons in March 2020, but the LCM was not laid before the Senedd until 3 August 2020. Standing Order 29.2(i) states that a LCM should be laid “normally no later than 2 weeks after introduction”. While clauses 3 and 65 were included in the Bill at Commons Report Stage, it is unclear why there was a delay in laying the LCM in relation to clauses 66, 68 and 73. We therefore asked the Minister to clarify why there was a delay in laying an LCM in relation to these clauses.

24. The Deputy Minister told us:

¹² [Letter from the Deputy Minister and Chief Whip](#), 6 October 2020

¹³ [Letter from the Deputy Minister and Chief Whip](#), 6 October 2020

“The Bill was introduced before the UK Parliament for its first reading on 3 March and my officials were involved in ongoing discussions with their counterparts in the UK Government; specifically regarding the powers for the proposed Domestic Abuse Commissioner and the ability of the Senedd to scrutinise the same. Further work on reviewing the Bill in its totality was then halted as both Legal Services and policy officials responded to the unprecedented and fast moving work as a result of COVID-19. The scrutiny of the Bill has only recently restarted and my officials have resumed dialogue with UK Government officials and are considering the Bill as a whole. It is unfortunate that the LCM was not laid from the outset due to the huge volume of work created by COVID-19, however, I believe that now presents an opportune time to scrutinise the Bill, given that the UK Government amendments have been recently notified to us and that the Bill is now proceeding before the House of Lords.”¹⁴

25. We considered the letter of 6 October 2020 at our meeting on 12 October and subsequently wrote again with the Equality, Local Government and Communities Committee to the Deputy Minister to make a further request for the analysis we had asked for in our initial letter.¹⁵ The Deputy Minister responded to our letter on 15 October 2020¹⁶ and informed us that the Bill's progress was being delayed and that, consequently, the plenary debate scheduled to take place on 10 November 2020 had been postponed.

26. The Deputy Minister wrote to us again on 16 December 2020.¹⁷ She said:

“I am pleased to confirm that collective UK Government agreement has been reached to bring forward amendments to [clause] 73 of the Bill to ensure the [Secretary of State]'s power to issue guidance is respectfully limited to matters which are reserved and do not encroach on devolved Welsh matters. We will continue to work closely with the UK Government through implementation of c73(6) (*Duty on the SoS to consult with the Welsh Ministers*), to ensure that the guidance issued takes full account of the devolved position.”

¹⁴ Letter from the Deputy Minister and Chief Whip, 6 October 2020

¹⁵ Letter to the Deputy Minister and Chief Whip, 13 October 2020

¹⁶ Letter from the Deputy Minister and Chief Whip, 15 October 2020

¹⁷ Letter from the Deputy Minister and Chief Whip, 16 December 2020

27. The Minister added:

“It remains my position that consent is required for clauses 65, 66 and 68 and Part 1 of Schedule 2 because they fall within the legislative competence of the Senedd. They contain modifications to criminal offences which could be made, in part, by the Senedd. Legislation to observe and implement international obligations, such as those required for the Istanbul convention also fall within the competence of the Senedd where necessary legislation falls within devolved areas.”¹⁸

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

28. On 20 January 2021 the Deputy Minister laid before the Senedd a Supplementary LCM (the Supplementary LCM) in respect of the Bill.¹⁹

29. The Business Committee agreed that the Committee and the ELGC Committee should report on the LCM and the Supplementary LCM by 25 February 2021.²⁰

Provision for which the Senedd's consent is required

30. The Supplementary LCM provides an update on which provisions within the Bill require Senedd consent, in the view of the Welsh Government. It states:

“We stated in the previous Memorandum that we believe that clause 73, (as drafted), significantly encroaches on the executive functions of the Welsh Ministers and the legislative competence of the Senedd. We said that officials would work closely with the UK Government to seek an amendment to the clause to ensure it accurately reflects and respects the devolution settlement.

We welcome the amendment tabled by the UK Government on 7 January 2021 which will ensure the Secretary of State's (SoS) power to issue guidance is respectfully limited to matters which are reserved.

¹⁸ Letter from the Deputy Minister and Chief Whip, 16 December 2020

¹⁹ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\) on the Domestic Abuse Bill](#), January 2021

²⁰ Business Committee, [Revised timetable for consideration of the Legislative Consent Memorandum on the Domestic Abuse Bill](#), January 2021. This new deadline for reporting on the LCM replaced the deadline set by the Business Committee in September 2020.

The amendment to clause 73 will prevent the SoS from issuing guidance that relates to 'Welsh devolved matters'.²¹

31. The Supplementary LCM continues:

"We have reached agreement with the UK Government with regards to clause 73 as stated above. Consequently we do not believe this clause requires the Senedd's consent.

Clause 3, as referenced in the original Memorandum, is also no longer required as it is linked with clause 73."²²

32. Paragraph 14 of the Supplementary LCM states:

"The rationale for including clauses 65, 66 and 68 within the original Memorandum remain the same as previously detailed. We have subsequently written to the Legislation, Justice and Constitution Committee and the Equality, Local Government and Communities Committee, on 16 December 2020, to further clarify our position with regards to these clauses. We stated that they contain modifications to criminal offences which could be made, in part, by the Senedd. Legislation to observe and implement international obligations, such as those required for the Istanbul convention also fall within the competence of the Senedd where necessary legislation falls within devolved areas."²³

33. The concluding paragraph of the Supplementary LCM repeats paragraph 14 of the LCM, stating it is the view of the Welsh Government that it is appropriate to deal with these provisions in this UK Bill as the Bill covers both devolved and non-devolved matters.²⁴

²¹ Welsh Government, Supplementary Legislative Consent Memorandum, Domestic Abuse Bill, paragraphs 8 and 9

²² Welsh Government, Supplementary Legislative Consent Memorandum, Domestic Abuse Bill, paragraphs 10 and 11

²³ Welsh Government, Supplementary Legislative Consent Memorandum, Domestic Abuse Bill, paragraph 14

²⁴ Welsh Government, Supplementary Legislative Consent Memorandum, Domestic Abuse Bill, paragraph 16

Committee consideration

34. We considered the Supplementary LCM at our meeting on 8 February 2021.²⁵

Our view

35. We note the Deputy Minister's assessment of the provisions in the Bill which require Senedd consent, as set out in the Supplementary LCM. We also note the Deputy Minister's reasons as to why, in her view, the Bill making provision for Wales is appropriate, and her explanation for the delay in laying the LCM before the Senedd.

36. Given the UK Government is of the view that none of the Bill's provisions require the Senedd's consent, we believe that the Deputy Minister should have included, in the original LCM, a more thorough analysis and explanation of why the Welsh Government considered that consent is required for clauses 3, 65, 66, 68 and 73 of the Bill.

37. We are disappointed that the Deputy Minister's letter of 6 October 2020 did not provide the clarification we requested or address why clauses 1 and 2 of the Bill were not originally deemed to require consent.

38. The Deputy Minister's letter of 6 October states that the "overall purpose of the Bill is to raise awareness and understanding of domestic abuse and its impact on victims, the prevention of domestic abuse, including strengthening support for victims of abuse and their families; this has a clear impact on devolved matters".

39. We note that consent is being sought as a result of the Bill's overall purpose. Standing Order 29 states that an LCM is required when a Bill makes provision "for any purpose within the legislative competence of the Senedd."

40. In our view, we do not consider that clauses 65, 66 and 68 (as currently drafted) could be made by the Senedd. It is apparent from the correspondence from the Deputy Minister, and from the Supplementary LCM, that the Welsh Government has considered the Bill's wider purpose, which is in a devolved area, namely domestic abuse. Taking this wider view, we agree that these provisions do relate to a purpose within the legislative competence of the Senedd.

41. We further note that, following an amendment to clause 73 that prevents the Secretary of State from issuing guidance that relates to Welsh devolved matters,

²⁵ [Legislation, Justice and Constitution Committee, 8 February 2021](#)

the Welsh Government no longer considers that clauses 3 and 73 require the Senedd's consent.