

# **The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 3) on the Levelling-up and Regeneration Bill**

June 2023



## 1. Background

### **The UK Government's Levelling-up and Regeneration Bill**

1. The Levelling-up and Regeneration Bill<sup>1</sup> (the Bill) was introduced into the House of Commons on 11 May 2022. It is sponsored by the Department for Levelling Up, Housing and Communities.

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

*“make provision for the setting of levelling-up missions and reporting on progress in delivering them; about local democracy; about town and country planning; about Community Infrastructure Levy; about the imposition of Infrastructure Levy; about environmental outcome reports for certain consents and plans; about regeneration; about the compulsory purchase of land; about information and records relating to land, the environment or heritage; for the provision for pavement licences to be permanent; about governance of the Royal Institution of Chartered Surveyors; about vagrancy and begging; and for connected purposes.”*

3. At the time of agreeing our report, the Bill was at Committee Stage in the House of Lords.

4. References to the provisions in the Bill are to those relating to the version brought to the House of Lords from the House of Commons on 19 December 2022<sup>2</sup> to reflect the numbering used in the Welsh Government's Supplementary Legislative Consent Memorandum (No. 3) (Memorandum No. 3), unless otherwise stated.

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

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

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<sup>1</sup> Levelling-up and Regeneration Bill, as introduced (Bill 6)

<sup>2</sup> Levelling-up and Regeneration Bill, as brought from the Commons (HL Bill 84)

Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

**6.** On 28 September 2022, the Minister for Climate Change (the Minister) laid before the Senedd a Legislative Consent Memorandum (the initial Memorandum) in respect of the Bill.<sup>3</sup>

**7.** The Business Committee agreed that the Legislation, Justice and Constitution Committee, the Climate Change, Environment and Infrastructure Committee, the Economy, Trade and Rural Affairs Committee and the Local Government and Housing Committee should report on the initial Memorandum by 8 December 2022.<sup>4</sup>

**8.** On 25 November 2022, the Minister laid a revised Legislative Consent Memorandum (the revised Memorandum) before the Senedd,<sup>5</sup> following correspondence from the Local Government and Housing Committee<sup>6</sup> and this Committee.<sup>7</sup>

**9.** The Business Committee agreed a new reporting deadline for the revised Memorandum of 16 February 2023.<sup>8</sup>

**10.** Following amendments tabled to the Bill by the UK Government during Report Stage in the House of Commons, the Welsh Government laid a Supplementary Legislative Consent Memorandum (Memorandum No. 2) reflecting these amendments on 30 November 2022.<sup>9</sup>

**11.** The Business Committee agreed that Memorandum No. 2 should be reported on by 16 February 2023.<sup>10</sup>

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<sup>3</sup> Welsh Government, Legislative Consent Memorandum, Levelling-up and Regeneration Bill, September 2022

<sup>4</sup> Business Committee, Timetable for consideration: Legislative Consent Memorandum on the Levelling-up and Regeneration Bill, October 2022

<sup>5</sup> Welsh Government, Revised Legislative Consent Memorandum, Levelling-up and Regeneration Bill, November 2022

<sup>6</sup> Letter from the Chair, Local Government and Housing Committee to the Minister for Climate Change, 1 November 2022

<sup>7</sup> Letter to the Minister for Climate Change, 2 November 2022

<sup>8</sup> Business Committee, Revised timetable for consideration: Legislative Consent Memorandum on the Levelling-up and Regeneration Bill, November 2022

<sup>9</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 2), The Levelling-up and Regeneration Bill, 30 November 2022

<sup>10</sup> Business Committee, Timetable for consideration: Supplementary Legislative Consent Memorandum (No. 2) on the Levelling-up and Regeneration Bill, December 2022

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**12.** Our report on the revised Memorandum and Memorandum No. 2 (the original report) was published on 24 February 2023.<sup>11</sup>

**13.** The Minister responded to our report on 25 April 2023.<sup>12</sup>

### **The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 3)**

**14.** The Minister laid a further Supplementary Legislative Memorandum (Memorandum No. 3) in respect of the Bill on 27 April 2023.<sup>13</sup>

**15.** Memorandum No. 3 relates to amendments tabled to the Bill by the UK Government on 13 March 2023 and considered at Committee Stage in the House of Lords.

**16.** The Minister acknowledges the delay in laying Memorandum No. 3 outside of the normal two week time period (as provided by Standing Order 29.2(iii)):

*"I apologise for the delay in laying this SLCM. I have addressed amendments to the Bill where they have been notified to us, however I did not receive the letter from the UK Government until 27 March, which informed me of other amendments that had been tabled, including those within this SLCM."*<sup>14</sup>

**17.** The Business Committee agreed that Memorandum No. 3 should be reported on by 22 May 2023,<sup>15</sup> before granting extensions to 5 June 2023<sup>16</sup> and then 12 June 2023.<sup>17</sup>

### **Provisions for which the Senedd's consent is required**

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**18.** The amendments tabled by the UK Government, which are the subject of Memorandum No. 3, amend clause 139 (Environmental outcomes reports<sup>18</sup> for

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<sup>11</sup> Legislation, Justice and Constitution Committee, [The Welsh Government's Supplementary Legislative Consent Memoranda on the Levelling-up and Regeneration Bill](#), February 2023

<sup>12</sup> [Letter from the Minister for Climate Change](#), 25 April 2023

<sup>13</sup> Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 3\), Levelling-up and Regeneration Bill](#), April 2023

<sup>14</sup> Memorandum No. 3, paragraph 3

<sup>15</sup> [Business Committee, Timetable for consideration: Supplementary Legislative Consent Memorandum \(Memorandum No. 3\) on the Levelling-up and Regeneration Bill](#), April 2023

<sup>16</sup> Business Committee, [Revised timetable for consideration: Supplementary Legislative Consent Memorandum \(Memorandum No. 3\) on the Levelling-up and Regeneration Bill](#), May 2023

<sup>17</sup> Business Committee, [Revised timetable for consideration: Supplementary Legislative Consent Memorandum \(Memorandum No. 3\) on the Levelling-up and Regeneration Bill](#), May 2023

<sup>18</sup> An environmental outcomes report is referenced as an "EOR" in Memorandum No. 3

relevant consents and relevant plans) in Part 6 of the Bill.<sup>19</sup> The Minister states in Memorandum No. 3 that, as currently drafted, clause 139:

*"...allows the Secretary of State to make regulations requiring that an EOR is prepared as a requirement to proceed with relevant plans or grant consent to relevant projects. Subsection (4) (a) captures the need of an EOR to demonstrate how the plan or consent would affect the delivery of specified environmental outcomes as defined in regulations. Subsection (4) (b) reflects that, in addition, an EOR must assess any steps proposed to avoid, mitigate, remedy or compensate effects relation to the delivery of a specified environmental outcome. This is known as the mitigation hierarchy."*<sup>20</sup>

**19.** The amendments tabled to clause 139 are amendments 373A to 373F.

**20.** The Minister states in Memorandum No. 3:

*"The intended collective effect of amendments 373A to 373F is to remove the word 'remedy' as it is not a term generally used in the mitigation hierarchy and moves subsection 139(4)(b)(i) (increase delivery of outcomes) to a separate subclause to emphasise that making environmental enhancements should not mean that the hierarchy can be disappplied.*

*It is UK Government's view that these minor changes to the wording of the clause will ensure that the mitigation hierarchy set out in the Bill is consistent with the hierarchy as is generally understood, as well as the precautionary principle, the prevention principle, and the principle of rectification at source."*<sup>21</sup>

**21.** Amendments 373A to 373F were agreed by the UK Parliament on 18 May 2023.<sup>22</sup>

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<sup>19</sup> Clause 117 in Part 5 of the Bill, as introduced

<sup>20</sup> Memorandum No. 3, paragraph 13

<sup>21</sup> Memorandum No. 3, paragraphs 19 to 20

<sup>22</sup> House of Lords Business. Levelling-up and Regeneration Bill, Committee Stage, 18 May 2023

## **The Welsh Government's position**

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**22.** The Minister previously recommended that the Senedd does not consent to provisions contained within Part 6 of the Bill<sup>23</sup> relating to environmental outcomes reports.<sup>24</sup> This includes clause 139.

**23.** The Welsh Government's position is outlined in paragraph 22 of Memorandum No. 3:

*"In line with our position to date as set out in the LCM and revised LCM, I recommend withholding consent for the provisions relating to EOR. I maintain my line that if regulation making powers were reflective of devolved interests in relation to EOR, we would re-consider our position. Negotiations in relation to the EOR provisions remain ongoing."*

## **The Welsh Government's Written Statements Laid Under Standing Order 30**

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**24.** The Welsh Government has laid three statements under Standing Order 30 noting that provisions within the Bill (including as a result of amendment) will modify the functions of the Welsh Ministers that are outside of devolved competence and therefore are not subject to the Legislative Consent process under Standing Order 29.<sup>25</sup>

## **2. Committee Consideration**

**25.** We note the Welsh Government's assessment of amendments made to clause 139 of the Bill (clause 117 as introduced), that require the consent of the Senedd, as set out in Memorandum No. 3.

**Conclusion 1.** We agree with the Minister that amendments agreed to clause 139, as set out in Memorandum No. 3, fall within a purpose within the legislative competence of the Senedd as described in Standing Order 29, and therefore require the consent of the Senedd.

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<sup>23</sup> Part 5 of the Bill as introduced

<sup>24</sup> Welsh Government, Revised Legislative Consent Memorandum, Levelling-up and Regeneration Bill, November 2022, paragraph 77

<sup>25</sup> Welsh Government, Written Statement: Levelling-up and Regeneration Bill - Compulsory Purchase Provisions, 28 September 2023; Welsh Government, Levelling-up and Regeneration Bill - Virtual Proceedings Amendment, 21 March 2023; Welsh Government, Written Statement: Levelling-up and Regeneration Bill - Compulsory Purchase Amendments - Hope Value and Compensation, 27 April 2023

**26.** In our original report, we expressed disappointment at the circumstances that led to the need to prepare the revised Memorandum and the reduced time available for scrutiny as a result.<sup>26</sup>

**27.** We note the Minister's apology for the delay in providing the response to our original report<sup>27</sup> and in laying Memorandum No. 3. In seeking to explain the delay to the laying of Memorandum No. 3, the Minister referenced a letter from the UK Government not being received until 27 March 2023 (two weeks after the amendments were tabled).<sup>28</sup> Memorandum No. 3 was laid on 27 April 2023, some 4 weeks after the letter from the UK Government was received and 6 weeks after the amendments were tabled, which is well outside the normal two-week period provided for in Standing Order 29.2(iii).

**28.** In Memorandum No. 3 and in the response to our original report, the Minister acknowledges ongoing engagement with the UK Government on matters related to provisions in the Bill about environmental outcomes reports. This engagement includes a Ministerial meeting attended by the Minister for Social Justice on 22 March 2023.<sup>29</sup> In light of this engagement, we would welcome further clarity as to why the letter of 27 March 2023 was considered to be a relevant factor in the delay to laying the Memorandum.

**Recommendation 1.** The Minister should state when the Welsh Government first became aware of amendments to clause 139 and explain more fully the delay in laying Memorandum No. 3, particularly when the matters it contains are relatively narrow in scope.

**29.** We consider the Minister's responses to recommendations 2, 3, 5 and 6 in our original report to be unsatisfactory.

**30.** In our original report we stated:

*"We note that the Minister has also acknowledged that she is 'open to persuasion on amendments to legislation in areas that would benefit Wales but would also protect our devolution settlement.' Given the Minister's acknowledgement that some of these matters could be dealt with in Senedd Acts, we remain*

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<sup>26</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Levelling-up and Regeneration Bill, February 2023, paragraphs 46 to 49.

<sup>27</sup> Letter from the Minister for Climate Change, 25 April 2023

<sup>28</sup> Memorandum No. 3, paragraph 4

<sup>29</sup> Memorandum No. 3, paragraph 22; Letter from the Minister for Climate Change, 25 April 2023, response to recommendations 2 and 8.



*unclear why she is taking this approach rather than asking that the relevant provisions be restricted to England only.*

*This point is particularly important because any amendments to the Bill to provide executive powers to the Welsh Ministers would occur at the end of the legislative process in the UK Parliament (the Bill is at Committee Stage in the second House) and therefore likely to receive minimal scrutiny through the legislative consent process, which is itself limited as a means of Senedd committees and the Senedd influencing legislation in the UK Parliament.*

*In our view, as a matter of principle, any potential benefits for Wales on planning data provisions and environmental outcome reports would be best realised through a Welsh Government Bill subject to full scrutiny by the Senedd, rather than negotiations between the Welsh and UK Governments and the tabling of UK Government amendments at the latter stages of the legislative process in the UK Parliament.”<sup>30</sup>*

**31.** We note, in her response to recommendation 2 of our original report, the Minister's comments that:

*“The system is complicated because EIA covers a very large number of policy areas, ranging from planning, water, marine through to agriculture and transport. More importantly the legislation is unable to adapt to changing circumstances as the majority of these policy areas do not have primary legislation to enable their future amendment. Therefore, what we have now, is what we have.”*

and:

*“Whilst the majority of policy areas are clearly within devolved competence, there are other aspects of the current EIA regime that relate to reserved matters and are therefore dealt with by the UK Government on an England and Wales basis, for example in relation to nationally significant infrastructure projects and national security. If a Senedd Cymru Bill were to*

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<sup>30</sup> Legislation, Justice and Constitution Committee, The Welsh Government's Legislative Consent Memoranda on the Levelling-up and Regeneration Bill, February 2023, paragraphs 60 to 62



*seek to make such provision, consideration would need to be given as to the extent that the reservation was engaged.”<sup>31</sup>*

**32.** We acknowledge the complexity of the provisions, but this does not of itself justify not preparing a Senedd Bill. In addition, the Minister appears to suggest that consideration has not been given to how reservations would be engaged in preparing a Welsh Government Bill. We would expect such work to be undertaken as part of the Welsh Government's assessment of whether or not to use a UK Government Bill to legislate in a devolved area.

**Recommendation 2.** The Minister should confirm whether or not the Welsh Government has undertaken a detailed assessment of the extent to which a Welsh Government Bill seeking to make provision in relation to planning data and environmental outcomes reports would engage reserved matters. If not, the Minister should explain why she has not done so.

**Recommendation 3.** The Minister should publish any assessment undertaken of the extent to which a Welsh Government Bill seeking to make provision in relation to planning data and environmental outcomes reports would engage reserved matters.

**33.** In contrast to the response to recommendation 2 of our original report, we note that in response to recommendation 3, the Minister states that:

*“The Welsh Government would be able to bring forward primary legislation covering planning data provisions and / or environmental outcomes reports.”<sup>32</sup>*

**34.** However, in the Minister's additional comments, she appears to suggest that the barrier to using a Welsh Government Bill was that it did not feature, or a suitable vehicle did not exist, within the First Minister's legislative programme for the year. A conclusion that flows from the response to recommendation 3 is that the Welsh Government considers UK Bills can be used to make provision in devolved areas provided no appropriate legislative proposal or vehicle has been included or referenced in the current annual legislative programme statement. We are concerned at the implications of the Minister's response to recommendation 3 and will pursue these matters further in due course.

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<sup>31</sup> Letter from the Minister for Climate Change, 25 April 2023, Response to recommendation 2

<sup>32</sup> Letter from the Minister for Climate Change, 25 April 2023, Response to recommendation 3

**35.** We are of the view that the Minister did not fully respond to recommendation 6 in our original report.

**Recommendation 4.** The Minister should address more fully recommendation 6 in our original report and, in addition, explain what the impact would be for the Welsh Ministers of not being able to reverse the provision in clause 128(2) of the Bill as introduced and what action the Minister would take as a consequence.

**36.** As we indicated in our original report, we are concerned that providing executive powers for the Welsh Ministers in a UK Bill through amendments at the end of the law-making process in the UK Parliament offers little chance of scrutiny by the Senedd through the legislative consent process.

**37.** On the Bill's introduction, the planning data and environmental outcomes reports provisions were drafted as regulation-making powers for the Secretary of State only, subject to prior consultation with the Welsh Ministers where the regulations contain provision within devolved competence.

**38.** In response to recommendation 2, the Minister indicates that discussions are ongoing relating to the provisions on which she is "open to persuasion on their application to Wales" in order to realise benefits. The Minister concludes:

*"Of course, should those benefits not be realised I would seek to have the provisions apply in England only."<sup>33</sup> <sup>34</sup>*

**39.** In response to recommendation 8, the Minister clarifies the latest position on discussions, stating:

*"The UK Government have subsequently provided draft clauses that offer both the Welsh Ministers and the Secretary of State [power] to make regulations. These powers can also be exercised jointly. However, the Secretary of State retains the constrained power to make provision in devolved areas, following consultation with the Welsh Ministers. The proposed draft clauses have not been formally laid. The draft clauses remain unacceptable as they also do not provide sufficient constitutional protection and do not adhere to the Cabinet principles on concurrent powers. At the meeting on the 22*

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<sup>33</sup> Letter from the Minister for Climate Change, 25 April 2023, response to recommendation 2

<sup>34</sup> The Minister applies the same arguments in respect of recommendation 6.

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*March, draft text providing for equivalent powers was offered, however this is yet to be received.”<sup>35</sup>*

**40.** Given we are at the latter stages of the legislative process in the UK Parliament, it remains unclear to us at what point the Minister will decide whether to stop seeking the application of these provisions to the Welsh Ministers and to seek their application to England only.

**41.** We are concerned that we could be left in a situation where the provisions on planning data and environmental outcomes reports apply to Wales but in a way that the Welsh Government does not accept. In turn, the proposed legislation could then be made by the UK Parliament, potentially without consent from the Senedd (based on the Welsh Government's current recommendation). This would happen despite prolonged negotiations between the Welsh and UK Governments and the Welsh Government having the power to propose its own legislation in a way that delivers its policy objectives and its stated objective of protecting the devolution statement.

**42.** The outcome of these events could be that, in effect, the UK Government is developing planning and environment policy for Wales and translating it through UK parliamentary approval into law. This situation exacerbates our concerns about the UK Government seeking to legislate in devolved areas and continues an unwelcome trend in the adoption of such an approach.

**Conclusion 2.** Given the concerns we expressed in our original report about providing powers to the Welsh Ministers in devolved areas at the end of the UK parliamentary process, we are disappointed that the Minister has not kept us regularly and continually updated on the negotiations with the UK Government about all provisions of the Bill for which she is recommending that consent is withheld.

**Recommendation 5.** The Minister should provide an immediate update on her negotiations with the UK Government including whether, and if so when, the draft text providing for equivalent powers offered on the 22 March 2023 was provided.

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<sup>35</sup> Letter from the Minister for Climate Change, 25 April 2023, response to recommendation 8

**Recommendation 6.** The Minister should explain what action she will take if she is:

- (i) unable to secure agreement on existing provisions relating to planning data and environmental outcomes reports, and unable to secure agreement on applying these provisions to England only;
- (ii) able to secure agreement on applying existing provisions relating to planning data and environmental outcomes reports to England only.

**43.** This report (and others we have written over the course of the last 18 months) highlights how the Senedd is being bypassed in the making of law in devolved areas: proposals are negotiated between the Welsh and UK Governments (without agreement being necessarily reached), with the UK Parliament making the law, potentially without any detailed understanding and knowledge of the policy situation in Wales, or of the extent to which the provisions apply in Wales. This remains an unsatisfactory and, in our view inappropriate, way to make law in devolved areas.

**44.** We note that the Bill includes provisions which modify the Welsh Ministers' functions but in a way that is outside the legislative competence of the Senedd and so consent is not required. Instead, for such provisions, Standing Order 30 requires the Welsh Government to lay a written statement before the Senedd and we note the statements laid by the Minister as a result.