

# Report on the Supplementary Legislative Consent Memoranda (No.3 and No.4) for the Building Safety Bill

## 1. Background

1. On 19 July 2021, the Minister for Climate Change laid a Legislative Consent Memorandum ("the LCM") for the Building Safety Bill currently before the UK Parliament. A Supplementary LCM ("the SLCM No.2") was laid on 21 September 2021 following amendments tabled at the Commons Committee stage. We reported on the LCM and the SLCM No.2 on 15 December 2021.
2. On 20 January 2022, the Welsh Government laid a further Supplementary LCM (Memorandum No.3) ("the SLCM No.3"). On 25 January 2022, the Business Committee referred the SLCM No.3 to the Local Government and Housing Committee ("the Committee") and the Legislation, Justice and Constitution Committee for consideration. The Business Committee set a reporting deadline of 17 March 2022. We considered the SLCM No.3 at our meeting on 9 February 2022.
3. On 22 February 2022, the Welsh Government laid a further Supplementary LCM (Memorandum No.4) ("the SLCM No.4"). On 1 March 2022, the Business Committee referred the SLCM No.4 to the Committee and the Legislation, Justice and Constitution Committee for consideration. The Business Committee revised the reporting deadline for the SLCMs No.3 and No.4 to 22 March 2022. We considered the SLCM No.4 at our meeting on 9 March 2022.
4. On 25 March 2022, the Welsh Government laid a further Supplementary LCM (Memorandum No.5) ("the SLCM No.5").



## 2. The SLCM No.3

**5.** Paragraphs 3 - 5 of the SLCM (No.3) summarise the policy objectives for the amendments tabled to the Bill at report stage on 12 January 2022, and agreed on 19 January 2022.

Paragraphs 6 - 11 summarise the provisions of the Bill which are amended by the amendments tabled. Paragraphs 12 - 41 set out the provisions in the amendments tabled for which consent is being sought by the UK Government. Paragraphs 42 - 49 set out the reasons for extending the provisions in the amendments to Wales and the reasons for amending the provisions in the Bill. Paragraph 55 sets out the Welsh Government's conclusion that it is appropriate to deal with these provisions through a UK Bill and recommends that the Senedd supports the proposals and gives consent.

## 3. The SLCM No.4

**6.** Paragraph 3 of the SLCM (No.4) summarises the policy objectives for the amendments tabled to the Bill at Committee Stage in the House of Lords on 14 February 2022. Paragraphs 4 and 5 summarise the provisions of the Bill which are amended by the amendments tabled.

Paragraphs 6 - 15 set out the provisions in the amendments tabled for which consent is being sought by the UK Government. Paragraph 16 sets out the reasons for extending the provisions in the amendments to Wales and the reasons for amending the provisions in the Bill. Paragraph 18 sets out the Welsh Government's conclusion that it is appropriate to deal with these provisions through a UK Bill and recommends that the Senedd supports the proposals and gives consent.

## 4. Provisions for which consent is sought

### SLCM No.3

**7.** The Senedd's consent is being sought by the UK Government for clauses 128 (Amendments 41 - 43), 129 (Amendments 44 - 45), 130 (Amendments 46 - 48), 131 (Amendments 50 - 55), 132 (Amendment 56), 133, 134 (Amendment 57), a new clause to be inserted after clause 134 and which is inserted by Amendment NC21, clause 148, Schedule 8 and a new Schedule to be inserted by Amendment NS2.

**8.** These clauses require consent from the Senedd because the provisions all relate to building safety, which is a devolved purpose, and do not engage any relevant reservations or general restrictions.

## **Part 5, Clause 128 (Amendments 41 - 43) - Limitation periods**

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- 9.** 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 Defective Premises Act 1972 ("the DPA72"), where the right of action accrued before the commencement of the provision.
- 10.** 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.
- 11.** Amendment 43 makes 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.

## **Part 5, Clause 129 (Amendments 44 - 45) - Establishment of the new homes ombudsman scheme**

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- 12.** 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" ("NHO scheme").
- 13.** 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.
- 14.** 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.
- 15.** 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 that Welsh Ministers must be consulted before arrangements for the NHO scheme are made.

## **Part 5, Clause 130 (Amendments 46 - 48) - The new homes ombudsman scheme**

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**16.** 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.

**17.** 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.

**18.** 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).

## **Part 5, Clause 131 (Amendments 50 - 55) - “Relevant owner”, “new build home” and “developer”**

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**19.** 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.

**20.** 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.

**21.** 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).

**22.** 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.

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### **Part 5, Clause 132 (Amendment 56) - Power to require persons to join scheme and to provide information**

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**23.** 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.

**24.** 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.

**25.** 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).

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### **Part 5, Clause 133 - Register of members**

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**26.** Clause 133 details the requirements to keep and make publicly available a register of members of the NHO scheme.

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### **Part 5, Clause 134 (Amendment 57) - Developers' code of practice**

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**27.** 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.

**28.** 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.

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### **Part 5, New Clause (Amendment NC21) - Amendment of the Government of Wales Act 2006**

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**29.** 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.

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## **Part 6, Clause 148 - Commencement and Transitional Provision**

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**30.** 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).

**31.** 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.

**32.** The Secretary of State will be responsible for establishing the NHO scheme and for the commencement of the provisions. 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.

## **Schedule 8 - The New Homes Ombudsman Scheme**

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**33.** 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**

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**34.** 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.

## **SLCM No.4**

**35.** The Senedd’s consent is being sought by the UK Government for Clause 41, Schedule 5, After Clause 128 and Clause 142.

**36.** These clauses require consent from the Senedd because the provisions all relate to building safety, which is a devolved purpose, and do not engage any relevant reservations or general restrictions.

## **Clause 41**

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**37.** The amendment to this clause provides that regulatory authorities under the proposed new Part 2A of the Building Act 1984 (the building safety regulator in relation to England and the Welsh Ministers in relation to Wales) can share information with each other for the purposes of their respective functions under that Part.

**38.** Further consequential amendments are made to the Bill to allow the information sharing provision in clause 41 to be effective. Consequential amendments are made after clause 57 of the Bill and new clause 131A(5) of the Bill. These allow for the sharing of information provisions to apply to a person to whom the Welsh Ministers have delegated functions as it applies to the Welsh Ministers.

## **Schedule 5**

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**39.** A minor consequential amendment has been made to section 56(3) of the Building Act 1984 as a result of the proposed repeal of section 16 of the Building Act 1984 provided for by paragraph 20 of Schedule 5 of the Bill.

**40.** Further technical amendments simply change the location of the definition of “the data protection legislation” in the Building Act 1984 and are consequential on information sharing proposals set out in Clause 41.

## **After Clause 128**

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**41.** Three further amendments insert new clauses after the existing clause 128. The first new clause (Liability for failure to comply with construction product requirements) makes provision for a new right of action where breach of regulations relating to construction products causes, or is a factor in, a building or dwelling becoming unfit for habitation.

**42.** The second new clause (Liability relating to cladding products) provides for a right of action where historic defaults relating to cladding cause, or are a factor in, a building or dwelling becoming unfit for habitation.

**43.** The third new clause (Liability for failure relating to construction products: limitation) make amendments to the Limitation Act 1980 consequential on the rights of action created by the previous two new clauses. The limitation period for actions under the first new clause is 15 years. The limitation period under the second new clause is 30 years in relation to claims where the right of action accrued prior to the provision coming into force and 15 years for those accruing once the provision has come into force. The right of action accrues when construction work is completed or when refurbishment work is completed.

## Clause 143 - Commencement

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**44.** Section 142 is amended so that the first clause after section 128 relating to liability for failure to comply with construction product requirements comes into force two months after Royal Assent.

## 5. Reasons for making these provisions in Wales

### SLCM (No.3)

**45.** Paragraphs 42 - 49 of the SLCM (No.3) set out the Welsh Government's reasons for making these provisions for Wales through this UK Bill:

*"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."*

## SLCM (No.4)

**46.** Paragraphs 16 and 18 of the SLCM (No.4) set out the Welsh Government's reasons for making these provisions for Wales through this UK Bill:

*"16.The provision on information sharing will assist the Welsh Ministers in undertaking their functions under the Bill, by providing greater evidence on areas such as building safety and competence within industry. The provisions for construction products, including cladding, will introduce enhanced civil liability for construction products which will allow construction product manufacturers, suppliers and developers who have engaged in, and continue to engage in, nefarious behaviours to be held liable for the consequences of this behaviour. It will widen the pool of potential parties that can be pursued, increasing the ability of freeholders and leaseholders to obtain redress. This will contribute to ensuring that all parties that play a part in creating building defects are in line for costs to rectify them. This change will also ensure that building owners/ leaseholders have equal rights of action to those in England. Other provisions are consequential in nature to provisions included within previous or this LCM.*

*18.It is my view that it is appropriate for the amendments within the Bill to apply to Wales. Some provisions are consequential to the existing provisions developed and put forward in the previous LCM and improve the functioning of the system such as the sharing of information, or delegation. The provision of additional routes of redress for the use of defective or mis-sold construction products will ensure that building owners/leaseholders have strengthened redress routes by creating new routes for recovering compensation for those whose buildings have been made 'unfit for habitation' through the use of defective or mis-sold construction products, or through a breach of existing regulations and provide equal rights of action to those in England. I consider this Bill the most effective way for these provisions to come into force as soon as possible. Therefore I recommend the Senedd supports the proposals and gives its consent."*

## 6. Committee consideration and conclusion

**47.** We considered the LCM and the SLCM (No.2) in the autumn term of 2021 and reported on them on 15 December 2021.

**48.** We considered the SLCM (No.3) at our meeting on 9 February 2022, and the SLCM (No.4) at our meeting on 9 March 2022. As was the case during our consideration of the LCM and the SLCM (No.2), some Members were unsatisfied with the Welsh Government's rationale for using UK legislation to deliver the provisions in the SLCM (No.3) and (No.4), rather than a Senedd Bill. We noted during our consideration of the LCM and the SLCM (No.2) that the Welsh Government's rationale for using the UK legislation rather than a Senedd Bill was partly to expediate the implementation of provisions relating to building safety. However, some Members commented that the additional time taken to amend the Bill and to bring forward further supplementary legislative consent memoranda means a Senedd Bill could have been introduced and scrutinised within a similar timeframe. Some Members also questioned the Welsh Government's assertion in the SLCM (No.3) that the cross-border nature of the NHO provisions would have more value than a Wales only scheme.

**49.** We welcome the provisions within the legislation, however we re-iterate the view previously expressed by some Members that bringing these forward through a Senedd Bill would be preferable in order to enable greater scrutiny. Despite the concerns outlined above, the majority of the Committee believes that the Senedd should grant consent to the SLCM (No.3) and (No.4).

**50.** One Member of the Committee, Mabon ap Gwynfor MS, disagrees with the majority view and believes that consent should not be granted. The Member believes that consent should not be granted because in their view, the provisions in the SLCM (No.3) and (No.4) undermine devolution, and the limited time available to the Senedd to scrutinise UK legislation through the LCM process is insufficient.

**51.** Regrettably, we did not have time to consider the SLCM (No.5) laid on 25 March before the reporting deadline and debate on 29 March.