

Report on the Legislative Consent Memorandum for the Commercial Rent (Coronavirus) Bill

February 2022

Introduction

1. The Welsh Government laid a [Legislative Consent Memorandum](#) (LCM) (PDF 188KB) on the Bill before the Senedd on 3 December 2021. The Business Committee referred the LCM to the Economy, Trade and Rural Affairs Committee, and the Legislation, Justice and Constitution Committee, with a [reporting deadline of 10 February 2022](#) (PDF 38.5KB). This Committee considered the LCM on 3 February 2022.

Background

2. The Commercial Rent (Coronavirus) Bill (the Bill) was introduced in the House of Commons on 9 November 2021. The long title to the Bill notes that it is a Bill “to make provision enabling relief from payment of certain rent debts under business tenancies adversely affected by coronavirus to be available through arbitration; and for connected purposes.”

3. The UK Government’s [Explanatory Notes](#) (EN) state that the Bill’s purpose is:

“to support landlords and tenants in resolving disputes relating to rent owed by businesses which were required to close during the COVID-19 pandemic. The Bill enables arbitration to be used to resolve these disputes if landlords and tenants cannot agree a way forward.”



Overview of the Bill

4. The Explanatory Notes to the Bill explain that a voluntary Code of Practice was introduced to help resolve rent collection issues, but that “whilst there is indication that, overall, rent collection is increasing, it remains below average levels, especially in certain sectors.” It states:

“This legislation will support landlords and tenants, who cannot otherwise agree, in resolving disputes relating to the rent owed and facilitate a return to normal market operation.”

5. In brief, Part 1 of the Bill is an introductory part providing an overview and dealing with definitions. Part 2, and Schedule 1, of the Bill provides for an arbitration process and sets the parameters of that process, providing for a modification of the Arbitration Act 1996. Part 3 of the Bill provides for a temporary moratorium on certain remedies and insolvency arrangements, with more detail set out Schedule 2. Schedule 3 relates to protection against winding-up and bankruptcy petitions for “protected rent debts”. Part 4 of the Bill (Final Provisions) includes provision to apply the Act in relation to future periods of Coronavirus control.

Provisions for which consent is sought

6. In Welsh Government’s view, Clauses 9 (to the extent that it relates to the extension of the “moratorium period”), Clause 23, Clause 27 and Schedule 2 of the Bill require legislative consent of the Senedd.

Clause 9

7. Clause 9 specifies the period during which a dispute between a landlord and tenant under a business tenancy can be referred to arbitration. A landlord or tenant can refer a dispute to arbitration within 6 months of the Bill being passed (but the Secretary of State may, by regulations, extend that period).

8. The LCM explains that Clause 9 makes provision which directly affects the length of the “moratorium period” during which a landlord’s ability to use property law remedies in relation to a protected rent debt are restricted, by virtue of Clause 23 and Schedule 2 of the Bill. The LCM goes on to say that:

“Clause 9, therefore, has mixed competency given that it has a dual effect in terms of (1) providing for the period for making a reference to arbitration on the one hand; and (2) also providing for the length of the moratorium period. In so far as it relates to the latter, Clause 9 does not relate to the matter of

arbitration for the purposes of Schedule 7A of GoWA 2006, but instead to property law and economic development which are devolved matters."

Clause 23 and Schedule 2

9. Clause 23 and Schedule 2 set out the legal remedies that landlords are unable to rely upon during the moratorium period. For example, during the moratorium period, a landlord will be unable to make a debt claim for unpaid rent in civil proceedings or use the commercial rent arrears recovery power, and a landlord will be unable to take back possession of the rental property because of unpaid rent, or use a tenant deposit.

10. Welsh Government's LCM states that it is considered that this Clause and Schedule 2 relate to property law and fall within the legislative competence of the Senedd.

11. The purpose of the provisions in Clause 23 and Schedule 2 is to support landlords and tenants in resolving disputes relating to rent owed by business tenants. This is a devolved purpose and, therefore, Senedd consent is required.

Clause 27

12. Clause 27 gives the Secretary of State power to make regulations that apply the Act again in relation to rent debts under business tenancies, where businesses are required to close because of a future wave of coronavirus. The Welsh Government LCM summarises the potential remit of such regulations.

13. The LCM explains that Welsh Government consider Clause 27 to be a **mixed competency provision** because it is reserved in so far as it applies to provisions considered to be reserved, but engages the LCM process to the extent it allows regulations to be made in respect of those provisions that are within the legislative competence of the Senedd.

14. To the extent that the power in clause 27 could be used to apply the Act again in devolved areas (for example, by applying clause 23 and Schedule 2 again in relation to Wales), clause 27 has a devolved purpose and, therefore, Senedd consent is required.

Reasons for making these provisions for Wales in a UK Bill

15. Paragraphs 27 and 28 of the LCM set out why the Welsh Government thinks it is appropriate for the Bill to contain devolved provision. It considers that this is an area where it is "sensible and advantageous" to seek provision in a UK Parliament Bill:

"It is our view that the protections for tenants provided for by the Bill should apply in Wales. This is on the basis that, despite the fact there is little

evidence to suggest whether or not unpaid rent debt from business tenancies is a large scale issue in Wales, it is our assessment that the principles of the Bill would benefit Welsh business tenants by providing protection for those that have been unable to pay rent due to the restrictions in Wales, would not put Welsh businesses at a disadvantage to those in England and would encourage landlords and tenants to agree a position in respect of any such debt."

Welsh Government position

16. Although it sees benefit to the Bill's provisions covering Wales, and Welsh Government's LCM states it is "broadly content with the principles of the Bill", it also sets out "some concerns" with the current drafting:

Clause 9: the Welsh Government believes that the Secretary of State's power to extend the moratorium period should, in relation to Wales, be subject to consultation with, and the consent of, the Welsh Ministers.

Clause 27: the Welsh Government believes that the Welsh Ministers should have powers equivalent to those given to the Secretary of State, so that the Welsh Ministers could apply the Act in relation to Wales if there was a new wave of coronavirus that required businesses to close.

17. Paragraph 29 of the LCM explains the current anomaly in more detail:

"As drafted, Clause 27 means that whilst the Secretary of State is able to adapt the application of the Bill in response to future closure requirements imposed by UK Government on businesses in England (for example, to feasibly extend the "relevant period", the "protected period" or the "moratorium period"), the Welsh Ministers have no such flexibility under the Bill to do the same in response to any future closure requirements imposed on businesses in Wales by the Welsh Government. This creates an anomaly and is also inconsistent with the approach taken in terms of the Welsh Ministers being able to extend the relevant period in Wales for the purposes of s.82 of the Coronavirus Act 2020. Welsh Ministers, therefore, ought to have equivalent powers in relation to Wales."

18. Consequently, the Welsh Government does not recommend that the Senedd consents to the Bill as introduced.

Committee View

19. The Committee agrees that Senedd consent is required for the Clauses and Schedule set out in Welsh Government's LCM as requiring consent.

20. The Committee notes that, as set out in paragraph 16 above, clause 27 as currently drafted creates an anomaly, given devolved powers in relation to any future closure requirements on Welsh businesses. The Committee also notes the desire for the Bill to be amended so that Welsh Ministers must be consulted, and give consent, to any changes to be made to the moratorium period by the Secretary of State (clause 9).

21. Paragraph 6 of the LCM states "It was agreed that my officials would work with UK Government on the development and passing of an England and Wales Bill". But the LCM does not provide any detail on discussions Welsh Government may be having with the UK Department for Business, Energy and Industrial Strategy about these two clauses, or whether amendments are proposed or under consideration. It would have been helpful for the Committee's scrutiny to have more information about this, and the Committee would welcome an update from the Minister as soon as possible. It would also be helpful for Welsh Government to continue to keep Senedd Members updated of any amendments agreed to address these issues, in advance of plenary debate on the Legislative Consent Motion associated with this Memorandum.