Welsh Parliament
Local Government and Housing Committee

Report on the Legislative Consent Memoranda for the Leasehold Reform (Ground Rent) Bill

13 December 2021

1. Background

1. On 26 May 2021, the Minister for Climate Change laid a Legislative Consent Memorandum ("the LCM") on the Leasehold Reform (Ground Rent) Bill ("the Bill") before the Senedd. A Supplementary LCM ("the SLCM") was laid on 26 November 2021. A further SLCM was laid on 3 December 2021.

2. On 29 June 2021, the Business Committee referred the LCM to the Local Government and Housing Committee ("the Committee") and the Legislation, Justice and Constitution Committee for consideration, with a reporting deadline of 14 October 2021. The reporting deadline was subsequently extended four times. Most recently, on 7 December the Business Committee agreed to extend the reporting deadline to 14 December.

3. We first considered the LCM at our meeting on 22 September. We also considered correspondence relating to the LCM at our meetings on 6 October, 3 and 17 November. We considered the SLCM at our meeting on 1 December. We held an additional meeting of the Committee on 10 December to consider the further SLCM.

4. We wrote three letters to the Minister for Climate Change with questions about the LCM. Further detail on the correspondence between the Committee and the Minister is provided in section 5 of this report.

5. The LCM will be debated in Plenary on 14 December 2021.

2. The LCM and SLCMs

6. Paragraphs 8 to 11 of the LCM summarise the Bill and its policy objectives. Paragraph 12 sets out the clauses in the Bill which have particular relevance to matters within the legislative competence of the Senedd. Paragraphs 13 to 80 set out the provisions in the Bill for which consent is being sought by the UK Government. Paragraphs 81 to 84 set out the Welsh Government's views on the provisions being made in a UK Bill, rather than via Senedd legislation.

7. Paragraph 89 of the LCM sets out the Welsh Government's conclusion that it is appropriate to deal with these provisions through a UK Bill.

8. The SLCM laid on 26 November provides an update after 27 amendments were made to the Bill during its passage through the House of Lords. These amendments make provisions which fall within the legislative competence of the Senedd.

9. Paragraphs 22 to 30 of the SLCM set out the changes to the Bill since the publication of the LCM. Paragraphs 31 to 37 set out the Welsh Government's position on the Bill, as amended. Paragraphs 37 to 39 set out the Welsh Government's conclusion that it supports the Bill and the amendments made.

10. The second SLCM laid on 3 December outlines nine proposed amendments to the Bill which are to be considered at Committee Stage in the House of Commons. These proposed amendments fall within the legislative competence of the Senedd.

11. Paragraphs 18 to 23 of the second SLCM set out the proposed amendments to the Bill since the publication of the first SLCM. Paragraphs 24 to 29 set out the Welsh Government's position on the proposed amendments. Paragraphs 32 to 33 set out the Welsh Government's conclusion that it supports the Bill and the proposed amendments.

3. Provisions for which consent is sought

12. The Senedd's consent is being sought by the UK Government for each of the Bill's 26 clauses because they relate to rent regulation and housing policy, which are not reserved under Schedule 7A to the Government of Wales Act 2006.

Clause 1 (Regulated leases)

13. Clause 1 defines the term "regulated lease", which is a lease that is a long lease of dwellings granted on or after commencement of the relevant provision of the Bill.

Clause 2 (Excepted leases)

14. Clause 30 sets out the types of leases that are exempt from regulation by the Bill.

Clause 3 (Restrictions relating to prohibited rent)

15. Clause 3 prohibits any landlord (or an individual acting on the landlord's behalf) under a regulated lease from requiring a tenant to make a payment of a prohibited rent. A prohibited rent is defined in the Bill as any rent that exceeds the permitted rent.

Clauses 4 to 6 (Permitted rent)

16. Clauses 4 to 6 provide further information on permitted rent.

17. Clause 4 details that permitted rent is "a peppercorn rent". This means that rent is restricted so that no money can be charged or paid as rent under the Bill.

18. Clause 5 makes special provision for shared ownership leases, whereby the landlord retains a share. The clause provides that for the tenant's share in the premises, the only rent is a peppercorn rent. In contrast, landlords can continue to charge any rent on their share.

19. Clause 6 details permitted rent payments in leases replacing those granted prior to commencement of the act. It states that the permitted rent for the period of a new lease following the expiry date specified in the "pre-commencement lease" is to be a peppercorn rent.

Clause 7 (Term reserving prohibited rent treated as reserving permitted rent)

20. Clause 7 gives effect to replacing any term in a regulated lease reserving a prohibited rent with a term reserving a permitted rent. The table in clause 7 sets out what rent is to be substituted for the prohibited rent in each case.

Clause 8 (Enforcement authorities)

21. Clause 8 requires local weights and measures authorities (trading standards authorities) in England and Wales to enforce clause 3 (Restrictions relating to prohibited rent) where a breach of that clause occurs in their area.

Clause 9 (Financial penalties)

22. Clause 9 allows the enforcement authority to impose a financial penalty on a person if it is satisfied "beyond reasonable doubt" that the person has breached clause 3 by requiring a tenant to make a payment of prohibited rent. The clause details that the amount of the financial penalty is at the discretion of the enforcement authority, but within the parameters of a minimum amount of £500 and a maximum amount of £5,000.

23. Subsection 3 states that a landlord who commits multiple breaches in relation to the same lease is only liable to one financial penalty. However, they may be liable for a further penalty, if having previously had a financial penalty imposed for an earlier breach, they then commit a further breach.

24. Subsection 9 would enables the Secretary of State to make regulations amending the penalty amounts set out in the clause. This power may only be exercised where the Secretary of State considers it expedient to do so to reflect changes in the value of money.

Clause 10 (Recovered of prohibited rent by enforcement authority)

25. Clause 10 sets out that if the enforcement authority is "satisfied on the balance of probabilities" that a tenant under a regulated lease has made a payment of a prohibited rent where all or part of that rent has not been refunded, it can order a repayment of the rent by:

- the landlord at the time the prohibited rent was made;
- the landlord at the time the enforcement authority makes the order; or
- a person acting on behalf of one of the above where the payment was made to that person.

Clause 11 (Interest on amount ordered to be paid under section 10))

26. Clause 11 provides that where a financial penalty is imposed by an enforcement authority, it can require interest on the outstanding payment. Subsection 5 caps the total amount of the interest is calculated.

Clause 12 (Enforcement authorities: supplementary)

27. Clause 12 requires enforcement authorities to have regard to any guidance issued by the Secretary of State about its functions under this Bill.

28. Subsection 3 makes provision for the investigatory powers available to domestic enforcers under schedule 5 of the Consumer Rights Act 2015 to be available to authorities to enforce clause 3 of the Bill.

29. Subsection 4 introduces the Schedule of the Bill. This Schedule details the procedure for imposing a financial penalty under clause 9 or making an order under clause 10 of the Bill including time limits, rights of appeal, recovering the financial penalty or an amount ordered to be paid and retention of sums received.

Clause 13 (Recovering of prohibited rent by tenant))

30. Clause 13 allows tenants or a person acting on behalf of a tenant under a regulated lease who as paid prohibited rent that has not been refunded to apply to the First-tier Tribunal for a recovery order. This type of order requires the repayment of any prohibited rent that has not been refunded by either:

- the landlord of the lease at the time the prohibited rent was paid;
- the landlord of the lease at the time the application is made; or
- a person acting on behalf of one of the above where the payment was paid to that person.

Clause 14 (Interest on amount ordered to be paid under clause 13)

31. Clause 14 allows the First-tier tribunal to include in the recovery order a requirement for interest to be paid.

Clause 15 (Application to First-tier Tribunal as to effect of this Bill)

32. Clause 15 allows either a tenant or landlord of a regulated lease to apply to the tribunal for a declaration as to the effect of clause 7 on a term in the lease.

Clause 16 (Assistance)

33. Clause 16 allows for certain people to apply for a recovery order and to recover an amount that the tribunal orders to be paid. These people are an enforcement authority helping a tenant, a former tenant, a person acting on behalf of a tenant or former tenant, or the guarantor.

Clause 17 (Interpretation of enforcement provisions)

34. Clause 17 defines “tenant”, for the purposes of clauses 10, 13 and 16, to include a person acting on behalf of a tenant and a former tenant or guarantor.

Clause 18 (Administration charges for peppercorn rents)

35. Clause 18 amends Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to require that no administration charge is payable in relation to the collection of ground rent restricted to a peppercorn by the Bill. A Tenant will be able to apply to the First-tier Tribunal in England or in Wales to a Leasehold Valuation Tribunal for a determination whether an administration charge is payable or for an order varying the lease on the ground that such an administrative charge is not payable.

Clause 19 (Amendments to Housing Act 1985)

36. Clause 19 makes a consequential amendment to Part 5 of the Housing Act 1985.

Clause 20 and 21

37. Clause 20 enables the Secretary of State to make consequential amendments to the Bill by secondary legislation.

38. Clause 21 states that any power to make regulations under the Bill, includes the "power to make consequential, supplementary, incidental, transitional or saving provision and different provision for different purposes". Subsections 3 and 4 of the clause state that regulations under this Act are subject to annulment by a resolution of either House of Parliament, except for regulations under clause 20, which amend an Act of Parliament and must be made in draft and laid before and approved by resolution in both Houses; and commencement regulations under clause 25 in respect of which there is no procedure.

Clauses 22 to 26

39. Clause 22 provides for interpretation of defined terms within the Bill.

40. Clause 23 provides that the Act applies to "Crown land" as further defined and clause 24 confirms that the Act extends to England and Wales.

41. Clause 25 provides for specific provisions to come into force on the day the Act is passed and the remainder are to come into force on such days as the Secretary of State appoints in regulations.

42. Clause 26 specifies the short title of the Bill.

The first SLCM

43. In the original LCM, the Welsh Government stated that it would be seeking amendments to the Bill to address issues in relation to the Leasehold Valuation

Tribunal as well as the provision of comparable Executive Powers to Welsh Ministers.

44. The SLCM tabled on 26 November deals largely with these outstanding issues along with minor technical matters. Paragraph 13 to 21 of the SLCM outline 27 amendments which require the consent of the Senedd.

Clause 1 (Regulated leases)

45. Clause 1 has been amended to clarify that the Bill is intended to apply only to a lease of an individual dwelling and that it only applies to leases granted for a premium. It was considered that there was a risk the Bill could perhaps be interpreted as also applying to cases where a lease is made up of multiple dwellings, held collectively on a business model used in commercial arrangements. This amendment clarifies that the Bill is intended not to capture such leases but to protect individual leaseholders. There was also a concern that the Bill could inadvertently capture long residential leases (granted for over 21 years) that are let with no premium paid, but where a market rent is payable instead. This was not the intention of the Bill, which is intended to protect the large majority of leaseholders who pay a substantial premium on the granting of a lease, often with a mortgage, from paying further rental charges.

Clause 2 (Excepted leases)

46. Clause 2 has been amended to allow the Welsh Ministers to make regulations under Clause 2(6)(b) in relation to premises in Wales.

New clause 8 (Duty to inform the tenant)

47. This new clause has introduced a new duty on landlords to inform their tenants of the changes introduced by this Bill, if the sections of the Bill in relation to prohibited rent are not yet in force and the tenant is considering entering into a lease extension/ renegotiation.

Clause 10 (Financial penalties)

48. Clause 10 has been amended to set the maximum financial penalty at £30,000. This has been done in the hope to ensure that the penalties are regarded as a sufficient deterrent and to strengthen the enforcement regime.

49. Subsection 9 enabled the Secretary of State to make regulations amending the penalty amounts set out in the clause. This has been amended to enable the Welsh Ministers to make regulations changing the amount of the minimum and maximum penalties for breaches of clause 3 in relation to leases of premises in

Wales. This power may only be exercised where the Welsh Ministers consider it expedient to do so to reflect changes in the value of money.

Clause 12 (Enforcement authorities: supplementary)

50. Clause 12 has been amended so that enforcement authorities are required to have regard to guidance issued by the Welsh Ministers in relation to enforcement action in Wales.

Clauses 14 to 18 and Schedule

51. These clauses have been amended so that any leasehold related applications and disputes are heard by Wales' devolved Leasehold Valuation Tribunal instead of the First-tier Tribunal in England.

52. Clause 18 has also has been amended to correct a small drafting error, to reflect that the right to apply to a tribunal for a declaration as to the effect of the Bill on the terms of a lease does not extend to a tenant's guarantor. This amendment rectifies a discrepancy in the Bill that enabled the enforcement authority to be able to assist a guarantor to make such an application, even though a guarantor does not have the right to apply for it.

Clause 23 (Interpretation)

53. Clause 23 has been amended to clarify that payments in respect of rates, council tax, services, repairs, maintenance, insurance or other ancillary are not to be treated as rent only because they are reserved as rent in the lease. The Bill was never intended to capture these payments for services provided.

Clause 27 (Short title)

54. Clause 27 has been amended to include a privilege amendment inserted by the Lords that is routinely added to Bills that commenced in the Lords. As is normal, a UK Government amendment to clause 27 has been tabled to remove the privilege amendment.

The second SLCM

55. The Welsh Government stated in the SCLM laid on 26 November that it would seek further amendments so that any proceeds from a financial penalty imposed in relation to a lease of premises in Wales under the Bill (that had not gone towards legal or administrative costs of enforcement) should be paid to the Welsh Ministers, rather than the Secretary of State.

56. The second SLCM laid on 3 December deals with this outstanding issue along with other technical amendments to ensure that the Bill does not have any unintended consequences. Paragraph 18 to 23 of the SLCM outline nine proposed amendments which require the consent of the Senedd.

Clause 1 (Regulated leases)

57. Two amendments to clause 1 have been made that will dis-apply the requirement for a premium in the case of new leases that result from a deemed surrender and regrant. Without these amendments, if a leaseholder seeks a variation to the term or the demise of their post-commencement lease or their regulated lease, they would risk the new lease not being considered a regulated lease for the purposes of the Bill unless they pay a premium. This would potentially leave some leaseholders at a disadvantage and so this risk has been removed.

Clause 6 (Permitted rent: leases replacing pre-commencement leases)

58. Proposed amendments to Clause 6 would mean that a replacement lease for a premises, which is larger than that originally leased, will be included within the scope of clause 6 provisions (permitted rent: leases replacing pre-commencement leases). The amendment puts replacement leases of larger premises in the same position as replacement leases already covered by clause 6 (that is, replacement leases that relate only to premises, or part of a premises, that was subject to the previous lease). This may encourage freeholders to grant voluntary lease extensions of enlarged premises, where they may not otherwise have done so. A separate proposed amendment to Clause 6 will ensure that it applies to a replacement lease even if the term of that lease does not extend beyond the end of the term of the previous lease.

Clause 8 (Duty to inform the tenant)

59. The proposed amendment by the UK Government removed this clause.

Clause 23 (Interpretation)

60. The proposed amendment changes the definition of a premium, such that only pecuniary consideration, rather than any consideration in money or money's worth, is included.

Clause 27 (Short title)

61. As is normal, a UK Government amendment to Clause 27 has been tabled to remove the privilege amendment.

Schedule (Enforcement: procedure, appeals and recovery etc)

62. The Schedule sets out the procedure to be followed by an enforcement authority when it imposes a financial penalty and/or makes an order to recover prohibited rent. A proposed amendment to the Schedule would require any proceeds of a financial penalty imposed in relation to a lease of premises in Wales (that have not gone towards legal or administrative costs of enforcement) to be paid to the Welsh Ministers, rather than the Secretary of State.

4. Reasons for making these provisions in Wales

63. Paragraphs 81 to 84 of the LCM set out the Welsh Government's reasons for making these provisions for Wales through this UK Bill.

64. Paragraph 81 states:

> *" It is the Welsh Government's position that primary legislation within areas where there is legislative competence should be enacted by the Senedd. However, there are circumstances in which it is advantageous if provisions which could be within legislative competence are included in UK Parliamentary Bills (with the consent of the Senedd)."*

65. According to the LCM, the Bill's provisions are "sensible and important" as they address "widely acknowledged weaknesses in the leasehold market". The Welsh Government considers that a UK Bill providing for a joint Wales and England approach is the best way of bringing forward these reforms. Paragraph 82 states:

> *"The Law Commission's projects on leasehold reform were carried out on an England and Wales basis. Following consultation, the Commission concluded that there was no evidence of a need for different provision in the law in England and Wales."*

66. The Welsh Government refers to some of the benefits of retaining commonality between the law which applies in England and Wales. Paragraph 83 states:

"Given the complexity of the existing leasehold legislation, a coherent and consistent approach would be beneficial to both England and Wales."

67. Paragraph 84 also states that a joint approach will allow reforms to be enacted earlier in Wales. According to the SLCM:

"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 substantial provisions could be readily included." (paragraph 41)

5. Committee consideration and conclusion

68. Following our initial consideration of the LCM on 22 September, we wrote to the Minister for Climate Change requesting more information about the Welsh Government's progress on wider leasehold reform. While we welcomed the decision to set ground rent on new leases to a token one peppercorn per year, effectively restricting ground rents to zero financial value, we noted that the Bill does not apply to existing leases. We also noted that the Bill does not address other weaknesses in the leasehold system, such as service charges and other issues faced by leaseholders. We therefore thought it would be helpful to understand where the changes introduced in the Bill sit within the wider programme of leasehold reform and the Programme for Government commitment to enact the recommendations of the Law Commission.

69. We also asked the Minister to confirm when a SLCM would be laid, as amendments to the Bill that confer powers to make delegated powers to Welsh Ministers were tabled on 20 July but a SLCM was not laid. Standing Order 29.2(iii) provides that when any relevant amendments to a Bill are tabled, a supplementary LCM should be laid normally no later than two weeks later.

70. The Minister responded to our letter on 1 October. The response states:

"The Leasehold Reform (Ground Rent) Bill represents the first, but significant, step towards the implementation of broad-ranging reforms to leasehold as a tenure. [...] Whilst the Bill is not itself responding to the Law Commission's recommendations for reform, it is paving the way for a wider Leasehold Reform Bill to implement those reforms. The UK Government has already committed to introduce this Bill at a

later point in the current Parliamentary term. Whilst this wider Bill has yet to be drafted, it is anticipated it will include provisions to help tackle ground rent issues faced by existing leaseholders. When we receive that Bill, we will review it and consider whether a LCM is required."

71. The Minister goes on to say:

"There are also likely to be some other important areas of leasehold reform that will be taken forward on a Wales-only basis. For example, in relation to building safety proposals, I intend to introduce a new registration and licensing regime which will be brought forward in the planned Building Safety Bill during this Senedd term. This work will include consideration as to how those managing building in the future work with residents and leaseholders in relation to remedial works and associated service costs."

72. We are concerned that making these provisions through multiple UK Bills and a Senedd Bill will reduce the accessibility of Welsh law

73. In response to our question on a SLCM, the Minister said in her letter of 1 October:

"Finally, whilst the Government amendments to the Leasehold Reform (Ground Rent) Bill, which were tabled on 20th July, delegated some powers to Welsh Ministers and made other appropriate changes, in order for the Bill to work effectively further amendments are necessary in my view. The UK Government has acknowledged the need for further discussion on this and our officials are working closely on appropriate amendments. However, I do not anticipate those amendments being tabled before late November or early December. Whilst a supplementary LCM would normally be laid within a fortnight of any amendments being tabled, on this occasion we are aware further important amendments are due to be tabled and so, to be more helpful to members, will look to issue a supplementary LCM at that point."

74. Following our meeting on 3 November, we agreed to write to the Minister again seeking confirmation as to when a SLCM would be laid as we were concerned that we would have limited time to consider and report on the LCM and SLCM. The Minister replied on 11 November stating it was likely that further

amendments to the Bill would be tabled during the second half of November and that she remained "committed to laying the SLCM as soon as possible after the tabling of those amendments".

75. We wrote to the Minister again on 18 November requesting a further update on the likely timetable for the SLCM and expressing our concern that we would not have sufficient time for meaningful scrutiny. We also asked the Minister whether a SLCM relating to the amendments made to the Bill in July could be tabled as soon as possible. In the Minister's letter of 1 October, she stated that it would be more helpful to issue a SLCM once all amendments have been tabled. However, given the four month delay in laying a SLCM and the tight reporting deadline, we thought it would be more useful to Members if a SLCM relating to those amendments was issued as soon as possible. We reiterated these concerns in a letter to Business Committee on 18 November.

76. The Minister responded to our letter on 22 November, stating that she would look to lay a SLCM relating to the amendments made in July by 26 November. She goes on to say:

> *"I still anticipate that the UK Government will table further amendments to the Bill ahead of Committee Stage in the House of Commons but do not yet know when that might be. […]*
>
> *I will lay another SLCM in relation to the anticipated further amendments as soon as possible after they are tabled but in the absence of a confirmed timetable I am unable to commit to any date."*

77. A SLCM was subsequently laid on 26 November. Had the Committee not requested a SLCM in relation to the amendments made in July to be laid at the Minister's earliest convenience, it is likely that we would still be waiting for an update on these provisions.

78. Regrettably, the four month delay in laying the SLCM has considerably constrained our ability to scrutinise the amendments in a timely manner. We are also disappointed that we had very limited time to consider the further SLCM laid on 3 December before the debate in Plenary on 14 December. It is frustrating that the Welsh Government's approach to this LCM process has provided very little time for meaningful scrutiny.

79. We are also concerned that the Welsh Government will not have any control as to when the Act comes into force. Clause 26 of the Bill provides that

clauses 2, 10 and 21-27 will come into force on the day the Bill becomes an Act and receives Royal Assent. However, all other provisions only come into force by Order on a day appointed by the Secretary of State. Similarly, Welsh Ministers do not have any powers to make consequential amendments that may be necessary under Clause 21. The Secretary of State also has regulation making powers under clause 2(2) of the Bill to make further provision about the form and content of notices under subsection (1)(c) relating to excepted leases but the Welsh Ministers do not.

80. In our view, it is deeply unsatisfactory that these delegated powers are conferred on the Secretary of State and not the Welsh Ministers. We would encourage the Minister to seek amendments to the Bill so that Welsh Ministers have equivalent powers to the Secretary of State to pass secondary legislation under this Bill.

81. Despite the concerns outlined above, most Members note the benefits of applying these reforms to Wales in a timely way and of having an England and Wales approach. However, the absence of scrutiny means that we are unable to fully test these assertions.

82. The majority of the Committee recommend the Senedd should grant its consent.

83. One Member of the Committee, Mabon ap Gwynfor MS, disagrees with the majority view and believes that consent should not be granted. The Member is dissatisfied with the Welsh Government's inadequate approach to this LCM process. In his view, the Senedd has not had an opportunity to meaningfully scrutinise the amendments to the Bill. The Welsh Government's decision to bring forward the reforms in a UK Bill, rather than introducing its own Bill, means that Members and stakeholders have been unable to make any changes to the legislation. The Member is also concerned that the Bill sets a dangerous precedent by conferring powers on the Secretary of State instead of the Welsh Ministers.