

# **The Welsh Government's Supplementary Legislative Consent Memoranda (Memorandum No. 3 and Memorandum No. 4) on the Building Safety Bill**

March 2022



# 1. Background

## The UK Government's Building Safety Bill

**1.** The UK Government's Building Safety Bill<sup>1</sup> (the Bill) was introduced into the House of Commons on 5 July 2021. It is sponsored by the Ministry of Housing, Communities and Local Government.

**2.** The Bill completed its passage through the House of Commons on 19 January 2022, and had its first reading in the House of Lords on 20 January. Committee stage in the House of Lords concluded on 2 March 2022. At the time of writing, a date for Report Stage is yet to be announced.

## The Welsh Government's Legislative Consent Memorandum and Memoranda No. 2

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

**4.** On 19 July 2021 Julie James MS, the Minister for Climate Change (the Minister), laid before the Senedd a Legislative Consent Memorandum<sup>2</sup> (the Memorandum) in respect of the Bill. On 21 September, the Minister laid before the Senedd a Supplementary Legislative Consent Memorandum<sup>3</sup> (Memorandum No. 2) in respect of the Bill.

**5.** Paragraphs 13 to 93 of the Memorandum, and paragraphs 11 to 33 of Memorandum No. 2, set out the Welsh Government's assessment, at the time, of the provisions in the Bill that it considered required the consent of the Senedd, namely clauses 1, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 (and Schedule 4), 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54 (and Schedule 5), 55 (and Schedule 6), 56, 125, 126, 134, 142, 143, 144, and 146.<sup>4</sup>

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<sup>1</sup> Building Safety Bill, as introduced (Bill 139)

<sup>2</sup> Welsh Government, Legislative Consent Memorandum, Building Safety Bill, July 2021

<sup>3</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 2), Building Safety Bill, September 2021

<sup>4</sup> Clause numbering refers to the version of the Bill as introduced to the House of Commons in July 2021.

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**6.** Paragraphs 94 to 109 of the Memorandum, and paragraphs 34 to 39 of Memorandum No. 2, set out the Welsh Government's position on the Bill at the time. In the Memorandum, the Minister concluded that it was appropriate to deal with these provisions for Wales in the Bill.<sup>5</sup>

## Summary of our first report

**7.** We reported on the Memorandum and Memorandum No. 2 (first report) on 10 December 2021.<sup>6</sup>

**8.** Paragraphs 18 to 59 of our first report set out in detail our consideration of the Memorandum and Memorandum No. 2.

**9.** In our first report, we acknowledged the difference in Welsh and UK Government views about the clauses (and Schedules) of the Bill for which the consent of the Senedd should be sought.

**10.** We noted that 16 of the clauses which required the consent of the Senedd provided new regulation-making powers to the Welsh Ministers.

**11.** In addition, we discussed, in detail, the Welsh Government's approach to legislating for Wales in this devolved area, the capacity of the Welsh Government to legislate itself, accessibility of the law that applies in Wales, and the completeness of information and scrutiny opportunities for the Senedd.

**12.** In total, our first report included 4 formal conclusions and 5 recommendations.

**13.** The Minister responded to our first report on 4 January 2022.<sup>7</sup>

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

### Memorandum No. 3

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**14.** On 20 January 2022, the Minister laid before the Senedd an additional Supplementary Legislative Consent Memorandum (Memorandum No. 3<sup>8</sup>) in respect of amendments tabled for

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<sup>5</sup> Memorandum, paragraph 109. See also Memorandum No. 2, paragraphs 37-39

<sup>6</sup> Legislation, Justice and Constitution Committee, [Report on the Welsh Government's Legislative Consent Memoranda on the Building Safety Bill](#), December 2021

<sup>7</sup> [Letter from the Minister for Climate Change](#), 4 January 2022

<sup>8</sup> Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 3\), Building Safety Bill](#), January 2022

consideration at Report stage in the House of Commons on 12 January 2022 and subsequently agreed on 19 January. Clause (and Schedule) numbering referred to in Memorandum No. 3 relates to the version of the Bill as amended in Committee stage in the House of Commons.<sup>9</sup>

## **Changes to the Bill for which consent is sought since the publication of the Memorandum and Memorandum No. 2**

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**15.** Paragraphs 12 to 55 in Memorandum No. 3 set out changes made to the Bill for which consent is sought since the publication of Memorandum No. 2, and include the Welsh Government's accompanying views.

## **Changes to the provisions in the Bill which amend the *Defective Premises Act 1972***

### Clause 128: Limitation periods

**16.** Clause 128 (formerly clause 126) relates to limitation periods.

**17.** As set out in the Memorandum, the Bill as introduced made changes to extend the limitation period in respect of action under the *Defective Premises Act 1972* (DPA72) and the yet to be commenced section 38 of the *Building Act 1984* (the 1984 Act), from the current six years to 15 years.

**18.** Paragraphs 8, 12, 16 to 18, and 49 in Memorandum No. 3 provide details as regards the amendments to clause 128 and the corresponding position of the Welsh Government.

**19.** Amendments made to clause 128 now provide for a 30-year limitation period, rather than a 15-year period provided for in the Bill as introduced.

## **Reasons for amending the provisions in the Bill which amend the *Defective Premises Act 1972***

**20.** At paragraph 49 of Memorandum No. 3 the Minister explains why the DPA72 provisions in the Bill are being amended, and states that the 30-year period aligns with increased use of cladding and leasehold arrangements on dwellings, and provides a longer period in which a person may claim "providing greater redress for owners and leaseholders".

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<sup>9</sup> Building Safety Bill, as amended in Public Bill Committee (Bill 177)

## **Changes to the provisions in the Bill relating to the new homes ombudsman scheme**

### Clause 129: Establishment of the new homes ombudsman scheme

**21.** Clause 129 is an enabling clause which requires the Secretary of State to make arrangements for there to be a redress scheme to be known as the new homes ombudsman scheme (NHO scheme).

**22.** On introduction to the House of Commons, this clause of Bill made provision for England only.

**23.** Paragraphs 13 to 15 and 19 to 22 in Memorandum No. 3 provide details as regards the amendments to clause 129 and the corresponding position of the Welsh Government.

**24.** At paragraph 22 of Memorandum No. 3 the Minister states:

*"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 Welsh Ministers must be consulted before arrangements for the NHO scheme are made."*

### Clause 130, Schedule 8 and a new schedule: The new homes ombudsman scheme

**25.** Clause 130 relates to the NHO scheme.

**26.** Paragraphs 23 to 25 and 40 to 41 of Memorandum No. 3 provide details as regards amendments to the clause and to Schedule 8, and the introduction of a new schedule.

**27.** Clause 130 provides that membership of the NHO scheme must be open to all 'developers', and that the scheme will enable 'relevant owners' of new build homes to make complaints against scheme members, which will be investigated by the NHO.

**28.** At paragraph 25 of Memorandum No. 3 the Minister states that an amendment to clause 130 removes reference to "in England" so that complaints can be made under the NHO scheme by relevant owners in Wales (and Scotland).

**29.** Paragraph 40 of Memorandum No. 3 provides details of an amendment to Schedule 8 which means that, where the NHO scheme is maintained by someone other than the Secretary of State, the scheme must include provision about information sharing with the Welsh (and Scottish) Ministers.

**30.** A new schedule was also added to the Bill at Report stage which provides for a number of amendments to existing legislation to enable joint working with the NHO. At paragraph 41 of Memorandum No. 3 the Minister states:

*"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."*

Clause 131 and a new clause: Definitions of terms related to the NHO provisions

**31.** Clause 131 provides definitions of the terms used in the NHO provisions in the Bill, such as "relevant owner", "new build home" and "developer". Amendments to the clause have added a definition of "relevant interest" and removed references to "in England" to reflect the change in scope of the Bill and that the NHO scheme will apply in Wales and Scotland.

**32.** At paragraph 28 of Memorandum No. 3 the Minister states that a further amendment made to clause 131 provides the Welsh Ministers with a regulation-making power to add additional descriptions of who is a developer in Wales. Before making such regulations, the Welsh Ministers must consult the other relevant national authorities.

**33.** Further, a new clause added to the Bill provides that regulations made under clause 131 can make different provision for different purposes and may make consequential provision. Paragraph 29 of Memorandum No. 3 notes that regulations made under clause 131 will be subject to the affirmative scrutiny procedure.

Clauses 132: Power to require persons to join scheme and to provide information, and clause 133: Register of members

**34.** Clause 132 is an enabling clause, providing a regulation-making power to the Secretary of State to require developers to become members of the NHO scheme and to make provision for civil sanctions for those that fail to do so.

**35.** Paragraphs 30 to 32 in Memorandum No. 3 provide details as regards amendments to clause 132. At paragraph 32 the Minister states that, as a result of the amendments, the clause now requires the Secretary of State to consult the Welsh (and Scottish) Ministers before regulations are made under clause 132.

**36.** Paragraph 33 of Memorandum No. 3 provides details of clause 133, which sets out the requirements to keep and make publicly available a register of members of the NHO scheme.

#### Clause 134: Developers' code of practice

**37.** 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 NHO scheme.

**38.** At paragraph 35 of Memorandum No. 3 the Minister states that the amendments to clause 134 make provision for the Welsh (and Scottish) Ministers to be consulted in relation to approving, issuing, revising or replacing the code.

#### New clause: Amendment of the *Government of Wales Act 2006*

**39.** A new clause added to the Bill makes an amendment to Schedule 7B to the *Government of Wales Act 2006* (the 2006 Act) to add the NHO to the list of cross border bodies in paragraph 10(2) of that Schedule. Paragraph 36 of Memorandum No. 3 states that this means "the Senedd is not required to obtain consent before removing or modifying the functions of the NHO".

#### Clause 148: Commencement and Transitional Provision

**40.** Clause 148 (formerly clause 146), which makes commencement and transitional provision, has been amended so that clause 127 (formerly clause 125, regarding duties relating to work to dwellings) comes into force two months after the Bill receives Royal Assent.

**41.** As regards the NHO provisions in the Bill, at paragraphs 38 and 39 of Memorandum No. 3 the Minister states:

*"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.*

*Given the Secretary of State will be responsible for establishing the NHO scheme, it is practical and appropriate for the NHO provisions to be commenced by the Secretary of State.*

*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. Therefore this does not impact on the view that it is appropriate for the NHO provisions to be commenced by the Secretary of State."*

## **Welsh Government's reasons for seeking amendments to the provisions in the Bill relating to the new homes ombudsman scheme**

**42.** At paragraphs 42 to 48 of Memorandum No. 3, the Minister provides her reasoning for seeking the extension of the NHO provisions in the Bill to Wales. In summary, the reasons listed include:

- the NHO scheme will have more value if it is a cross-border scheme (paragraph 42, Memorandum No. 3);
- a cross-border scheme will ensure a standard approach, implemented at a single point in time (paragraph 42, Memorandum No. 3);
- the application of the NHO scheme to Wales will be beneficial in terms of cost and timing (paragraph 42, Memorandum No. 3);
- as developers work across different parts of the UK they are likely to prefer one system (paragraph 46, Memorandum No. 3);
- warranty providers may make it a requirement to belong to a single code of practice (paragraph 46, Memorandum No. 3).

**43.** The Minister states that, "Wales could develop an alternative scheme, at its own cost".<sup>10</sup> At paragraph 48 of Memorandum No. 3 the Minister also states:

*"As the Senedd has legislative competence in this area we would, if for example it was felt that 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."*

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<sup>10</sup> Memorandum No. 3, paragraph 46



## The Welsh Government's Supplementary Legislative Consent Memoranda (Memorandum No. 4)

### Memorandum No. 4

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**44.** On 22 February 2022 the Minister laid before the Senedd a further Supplementary Legislative Consent Memorandum (Memorandum No. 4<sup>11</sup>) in respect of amendments tabled for consideration at Committee stage in the House of Lords. Clause (and Schedule) numbering referred to in Memorandum No. 4 relates to the version of the Bill as brought from the House of Commons.<sup>12</sup>

### Changes to the Bill for which consent is sought since the publication of Memorandum No. 3

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**45.** Paragraphs 6 to 16 of Memorandum No. 4 set out changes made to the Bill since the publication of Memorandum No. 3, and include the Welsh Government's accompanying views.

### Changes to clause 41: Regulation of building control profession, and Welsh Government's reasons for making provision for Wales

**46.** Paragraphs 7, 8 and 16 of Memorandum No. 4 provide details as regards the amendments to clause 41 and the corresponding position of the Welsh Government.

**47.** Paragraph 7 of Memorandum No. 4 states:

*"The final amendment<sup>13</sup> 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."*

**48.** In Memorandum No. 4 the Minister also states that three other "consequential amendments" tabled to clause 41 of the Bill and a further new clause relating to Crown application<sup>14</sup> are all related to the purpose of ensuring that the sharing of information provisions

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<sup>11</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 4), Building Safety Bill, February 2022

<sup>12</sup> Building Safety Bill (HL Bill 98)

<sup>13</sup> Building Safety Bill: Marshalled List of Amendments to be moved in Grand Committee, 7 February 2022 - amendment 22

<sup>14</sup> Building Safety Bill: Marshalled List of Amendments to be moved in Grand Committee, 7 February 2022 – amendments 18-20 and 41

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apply to a person to whom the Welsh Ministers have delegated registration functions as it applies to the Welsh Ministers.<sup>15</sup>

**49.** The Minister states that the provisions 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”.<sup>16</sup>

### **Changes to Schedule 5: Minor and consequential amendments in connection with Part 3 of the Bill, and Welsh Government's reasons for making provision for Wales**

**50.** Paragraphs 9, 10 and 16 of Memorandum No. 4 provide details as regards a number of amendments to Schedule 5 and the corresponding position of the Welsh Government.

**51.** Memorandum No. 4 states that one amendment<sup>17</sup> makes changes to section 56(3) of the 1984 Act as a result of paragraph 20 of Schedule 5 to the Bill which will repeal section 16 of the 1984 Act.<sup>18</sup>

**52.** At paragraph 10 of Memorandum No. 4 the Minister states that two other amendments<sup>19</sup> to Schedule 5 are consequential to the amendments made to clause 41 of the Bill.

### **New clauses: Liability for failure to comply with construction product requirements, Liability relating to cladding products, and Liability for failure relating to construction products: limitation; and the Welsh Government's reasons for making provision Wales, and changes to clause 142: Commencement and transitional provision**

**53.** Paragraphs 11 to 14 of Memorandum No. 4 provide details as regards three new clauses<sup>20</sup> added to the Bill relating to:

- liability for failure to comply with construction product requirements;

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<sup>15</sup> Memorandum No. 4, paragraph 8

<sup>16</sup> Memorandum No. 4, paragraph 16

<sup>17</sup> Building Safety Bill: Marshalled List of Amendments to be moved in Grand Committee, 7 February 2022 - amendment 26

<sup>18</sup> Memorandum No. 4, paragraph 9

<sup>19</sup> Building Safety Bill: Marshalled List of Amendments to be moved in Grand Committee, 7 February 2022 – amendments 28 and 29

<sup>20</sup> Building Safety Bill: Marshalled List of Amendments to be moved in Grand Committee, 7 February 2022 – amendments 107-109

- liability relating to cladding products; and
- liability for failure relating to construction products: limitation.

**54.** Paragraph 15 of Memorandum No. 4 also provides details as regards a relevant amendment to clause 142 which provides that the new clause relating to liability for failure to comply with construction product requirements comes into force two months after Royal Assent.

**55.** At paragraph 16 of Memorandum No. 4 the Minister sets out her positions as regards these amendments. The Minister states:

*"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."*

## **Update on the Welsh Government's overall position since the publication of the Memorandum and Memorandum No. 2**

**56.** In Memorandum No. 3, laid before the Senedd on 20 January 2022, the Minister states:

*"It is my view that it is appropriate for the NHO and DPA72 provisions within the Bill to apply to Wales. (...)*

*Therefore I recommend the Senedd supports the proposals and gives its consent."<sup>21</sup>*

**57.** In Memorandum No. 4, laid before the Senedd on 22 February 2022, the Minister further states:

*"It is my view that it is appropriate for the amendments within [Memorandum No. 4] to apply to Wales. Some provisions are consequential*

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<sup>21</sup> Memorandum No. 3, paragraph 55

*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. (...)*

*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."*<sup>22</sup>

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<sup>22</sup> Memorandum No. 4, paragraph 18

## 2. Committee consideration

**58.** We considered Memorandum No. 3 at our meeting on 14 February 2022<sup>23</sup>, and Memorandum No. 4 at our meeting on 7 March 2022.<sup>24</sup>

**59.** We agreed our report on 14 March 2022.<sup>25</sup>

### Our view

#### General comments

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**60.** We note the position of the Minister as set out in Memorandum No. 3 and Memorandum No. 4 with regards to amendments made to the Bill which are relevant to a devolved purpose.

**Conclusion 1.** We agree with the Minister's assessment and that all clauses and amendments listed in the Memoranda relate to a devolved purpose.

**61.** We also note the Minister's reasons for making further provision for Wales in clauses 41, 128 to 134, 142, 148, Schedule 5, Schedule 8, plus four new clauses and one new Schedule, and our views are expressed in more detail in the following paragraphs.

**62.** In our first report we expressed concerns with the Minister's approach to using a UK Bill to make provision for Wales. In doing so, we highlighted the Welsh Government's principles for UK Bills<sup>26</sup>, which state that the overriding principle is for primary legislation making provision in devolved areas should be enacted by the Senedd.

**63.** In particular, in paragraphs 24 to 32 of our first report, which includes conclusions 2 to 4 and recommendation 2, we discussed extensively our assessment of the Minister's approach to utilising the Bill and what we consider to be the associated risks. Recommendation 2 in our first report asked the Minister to provide a full and detailed assessment of her view that the cumulative constitutional implications of asking the UK Government and allowing the UK Parliament to legislate in wholly devolved areas within her remit were limited.

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<sup>23</sup> Legislation, Justice and Constitution Committee, 14 February 2022

<sup>24</sup> Legislation, Justice and Constitution Committee, 7 March 2022

<sup>25</sup> Legislation, Justice and Constitution Committee, 14 March 2022

<sup>26</sup> Letter from the Counsel General and Minister for the Constitution, 22 October 2021

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**64.** While we acknowledge the Minister's timely response to our first report, we do not share the same view that there are no cumulative constitutional implications as a consequence of the Bill's provisions. Neither do we consider the provisions to be "discrete and self-contained".<sup>27</sup>

**65.** At conclusion 4 in our first report we highlighted that we are determined to monitor the use of UK Bills to deliver law for Wales and the cumulative effect for the Senedd and for devolution.

**66.** We note that, yet again, the Minister has requested that more provisions in the Bill be made applicable to Wales during the amending stages as the Bill progresses through the UK Parliament.

**67.** As regards the extension of the NHO provisions to Wales, we are unclear as to why the Senedd should be asked to handover powers to the UK Government which can shape the NHO according to its own needs and wishes (see also paragraph 85).

**68.** We note that, in setting out reasons for extending the NHO provisions in the Bill to Wales, in Memorandum No. 3 the Minister offers the following justification:

- a scheme such as the NHO "will have more value if it is a cross-border scheme";
- "the application of the NHO scheme to Wales will also be beneficial in terms of cost and timing";
- developers 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"; and
- "warranty providers may make it a requirement to belong to a single code even if the NHO provisions were not extended to Wales".<sup>28</sup>

**69.** While we deliberately steer away from commenting on the policy implications of legislative proposals and respect the views of other relevant Senedd committees, in our view, such reasoning does not reflect the current and factual situation that four devolved nations constitute the United Kingdom, each of which can, does and should legislate as per its settlement.

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<sup>27</sup> Letter from the Minister for Climate Change, 4 January 2022, response to recommendation 2

<sup>28</sup> Memorandum No. 3, paragraphs 42 and 46

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**70.** Further, the Minister's statements that developers are "likely" to prefer one system and warranty providers "may" make certain requirements do not appear to us to be statements that should form the basis for using a UK Bill.

**71.** We also take the opportunity to repeat the points we made in recommendations 3 and 4 in our first report. On these matters, our position is unchanged.

**72.** The Minister did not address each point (as we requested) when responding to recommendation 3 in our first report, which related to the allocation of resources in her department. We note that the Minister said:

*"There is no comparison between the use of the UK Government Bill and the significant resources needed to establish a Bill team for a Senedd Bill in competition with other legislation and policy priorities."*<sup>29</sup>

**73.** We remain unconvinced by the Minister's decision to allocate resources to support the development and passage of a UK Bill through the UK Parliament rather than bringing forward a Welsh Bill to our Senedd.

**74.** The Minister is aware that we are deeply concerned about the Welsh Government's capacity to bring forward primary legislation, and we are pursuing this issue across the Welsh Government.

**75.** Recommendation 4 in our first report also highlighted how we are unclear as to how requesting provisions for Wales in a UK Bill as well as planning for a future Welsh Bill to deal with other matters relating to building safety is in-step with the Welsh Government's commitment to improve the quality and the accessibility of bilingual Welsh law.

**76.** We acknowledge what the Minister has told us as regards the bilingual secondary legislation that may stem from the Bill. However we believe this only serves to add to an already complicated statute book. This is unfortunate, to say the least, given the new duties placed on the Welsh Ministers that came into force last year to initiate steps that will improve the accessibility of Welsh law.<sup>30</sup>

**77.** We also have concerns that the Welsh Government has missed another opportunity to utilise the justice system we already have in Wales to deal with such matters that may be dealt with by the NHO. In expressing this view, we are mindful that the Counsel General has spoken in

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<sup>29</sup> Letter from the Minister for Climate Change, 4 January 2022, response to recommendation 3

<sup>30</sup> [Legislation \(Wales\) Act 2019, Part 1](#)

support of the recent proposals on devolved tribunals in Wales by the Law Commission<sup>31</sup>, particularly as regards the need to avoid the creation of wholly new bodies and administrative arrangements.<sup>32</sup>

**78.** We also wish to highlight a matter which we detail above in paragraph 43. In Memorandum No. 3 the Minister states that if it was felt that the NHO scheme was not working for Wales, the Welsh Government would have the option to create a Wales-specific redress mechanism through a Senedd Bill. We note that the Minister goes on to state that “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. We further note that the Minister adds that “[h]aving to seek such consent would negatively impact on the Senedd’s competence”, which has been avoided by amending the Bill to the effect that the NHO will be listed as a cross-border body in Schedule 7B to the 2006 Act.

**79.** This matter raises two issues on which further explanation and clarity is required.

**80.** First, we agree with the Minister’s assessment that the future modification of the NHO’s functions by the Welsh Ministers would require Minister of the Crown consent should an amendment to Schedule 7B to the 2006 Act not have been agreed. However, this scenario is predicated on the fact that the Welsh Ministers have opted in to the NHO by using the Bill rather than bringing forward a Senedd Bill. While we acknowledge the need for this amendment, it would not have been necessary if a Welsh Bill had been pursued. We believe further explanation and context could and should have been provided in paragraph 48 of Memorandum No. 3.

**81.** Furthermore, and as regards the Minister’s statement that having to seek such consent would “negatively impact” the Senedd’s competence, we are unclear as to the precise meaning of the Minister’s statement. For example, is the Minister of the view that seeking such consent would permanently remove from and therefore reduce the Senedd’s competence as set out in the 2006 Act?

**Recommendation 1.** The Minister should, in advance of the debate on the relevant legislative consent motion, provide a further and full explanation as regards the statements made in paragraph 48 of Memorandum No. 3, and specifically address our concerns outlined in paragraphs 80 and 81 of our report.

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<sup>31</sup> Law Commission – Devolved Tribunals in Wales Report, December 2021

<sup>32</sup> Welsh Government Written Statement: Devolved Tribunals in Wales, 9 December 2021

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**82.** We take the opportunity to reiterate the views we expressed in our first report and would again challenge the Minister on her reasoning for adopting this approach.

**83.** We respectfully disagree with the Minister's overall decision to use a UK Bill to address building safety in Wales. Whatever assessments may have been undertaken as regards the practical benefits of such opportunities should not outweigh the democratic mandate of the Senedd, and the consequential accountability of the Welsh Government to the Senedd.

**Conclusion 2.** We remain deeply concerned at the Welsh Government's approach to using, so extensively, UK Bills to legislate in devolved areas.

**84.** We note that one of the amended clauses (clause 131) listed in Memorandum No. 3, which requires the consent of the Senedd, provides a new regulation-making power to the Welsh Ministers. However, we also note that a number of the relevant provisions detailed in Memorandum No. 3 contain delegated powers for the Secretary of State.

**85.** We also note that a number of amendments have been made to the Bill which mean the Welsh Ministers will now have a consultative role before certain regulation-making powers are exercised by the Secretary of State. This consultation will apply to regulations that are to be made under clauses 129, 131, 132, and 134 relating to both DPA72 and the NHO provisions.

**Conclusion 3.** We do not consider it sufficient or appropriate that the Senedd (or the Welsh Ministers) will not have a formal role before the Secretary of State issues and approves a code of practice about the standards of conduct and quality of work expected from members of the NHO scheme.

**Conclusion 4.** As we have said in many other reports on Welsh Government legislative consent memoranda for UK Bills, a role for the Welsh Ministers – whether that be a consultative or consenting role – before a UK Minister exercises a regulation-making power contained in a UK Bill does not address the inherent democratic deficit which means that the Senedd is excluded from shaping and agreeing to law that will apply in Wales.

**86.** We acknowledge that one new provision (a new clause inserted after clause 134), which is detailed in Memorandum No. 3, modifies the competence of the Senedd, to the effect that the NHO is added to the list of cross border bodies in Schedule 7B to the 2006 Act so that, in future the Senedd would not be required to obtain Minister of the Crown consent before modifying the functions on the NHO.

**87.** Recommendation 1 in our first report asked the Minister to seek amendments to the Bill to ensure that the Welsh Ministers are given equivalent commencement powers relating to the

provisions for Wales to those already given to the Secretary of State so that the Welsh Ministers are fully in control of when the provisions for Wales come into force. We are disappointed with the Minister's response to that recommendation in that she does not consider this necessary and would not pursue such amendments.<sup>33</sup> We do not believe that relinquishing this control is appropriate.

**88.** We note that a new amendment to clause 148 provides the Secretary of State with the power to commence the new provisions regarding the NHO. In line with what we have previously concluded and recommended, we are disappointed with the view expressed by the Minister in Memorandum No. 3 that "it is practical and appropriate for the NHO provisions to be commenced by the Secretary of State".<sup>34</sup>

**89.** Our final observation relates to the quality of Memorandum No. 4 and the transparency of the important information contained within it. By way of example, in our view it is not sufficient or appropriate to state in relation to clause 41 "the final amendment" when the context is not clear. In this example, while we assume the Minister is referring to the final amendment tabled to clause 41 on 14 February 2022, this fact should be made more clear.

**Recommendation 2.** We again ask the Minister, and all the Welsh Ministers, to ensure that legislative consent memoranda laid before the Senedd contain full, accurate and transparent information, in addition to delivering what is required by Standing Order 29.

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<sup>33</sup> Letter from the Minister for Climate Change, 4 January 2022, response to recommendation 1

<sup>34</sup> Memorandum, No. 3, paragraph 24

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