

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change



Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair – Legislation, Justice and Constitutional Committee
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16 November 2021

Dear Huw,

Legislative Consent Memoranda on the UK Government's Leasehold Reform (Ground Rent) Bill and Building Safety Bill

Thank you for your letter of 15 November seeking a written response to your questions on the legislative consent memoranda on the Leasehold Reform (Ground Rent) Bill and Building Safety Bill.

I am sorry that I was not able to attend the Committee's meeting on 15 November to provide evidence in person but trust that my responses in the attached annex will provide you with the information that you need in order to complete your reports.

I am copying this letter to John Griffiths MS, Chair of the Local Government and Housing Committee.

Yours sincerely

A handwritten signature in blue ink that reads "Julie James". The signature is written in a cursive, flowing style.

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Minister for Climate Change

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Legislating in devolved areas:

1. *Given the Welsh Government's overriding principle that legislation in devolved areas should be enacted by the Senedd can you set out your reason why this principle is not being followed in relation to all provisions in the Leasehold (Ground Rent) Bill and 35 clauses in the Building Safety Bill?*
 - i. *Can you confirm if it is your view that commonality can only be achieved via England and Wales legislation in both cases using UK Government Bills and can you clarify why Senedd legislation cannot be used to amend England and Wales legislation to achieve or retain commonality of approach if that is the Welsh Government's objective in these areas?*
 - ii. *Is the priority of your department to achieve a consistency of approach in these policy areas over and above the Welsh Government's principle that legislation in devolved areas should be made in Wales?*
 - iii. *What are your views on the cumulative constitutional implications of asking and allowing the UK Parliament to legislate in two wholly devolved areas?*

The reasons for allowing the UK Government to legislate in these two devolved areas are slightly different in the case of each. Taking the Leasehold Reform (Ground Rent) Bill ('the Ground Rent Bill') and Building Safety Bill in turn:

Leasehold Reform (Ground Rent) Bill

The UK Government's Ground Rent Bill is paving the way for the wider set of leasehold reforms set out in the Law Commission's recommendations. It can be viewed as the first piece in the creation of the very complex legislative jigsaw puzzle that is the wider leasehold reform programme. To create an entirely coherent set of legislative reforms in relation to leasehold, each element of the legislation must fit with the others. Whilst we have indicated in the Legislative Consent Memorandum (LCM) that we consider this Bill to be within the competence of the Senedd, it is entirely possible that some elements of the wider reform programme could fall outside the Senedd's competence. Therefore, it is only by working with the UK Government, and by using legislation made on a Wales and England basis, that we can ensure that all of the individual elements will fit together.

Furthermore, if we do not work collaboratively with the UK Government regarding the leasehold reform programme, when it comes to implementing some of the Law Commission's recommendations we could find that we are unable to legislate in Wales in relation to some matters due to issues of legislative competence. This would not be an acceptable situation in my view as it would potentially leave leaseholders in Wales worse off.

Building Safety Bill

The extension of the parts of the Building Safety Bill to Wales (which we requested) presents an opportunity to respond to some of the issues raised by the Grenfell tragedy in advance of what would be possible if we waited for a Senedd Bill. Dame Judith Hackitt's independent report criticisms apply equally to Wales; for example it is the same 35 year old legislation (Building Act 1984), the same building control system that has been found wanting.

This government has made clear that whilst protecting the devolution settlement remains a critical priority and that our general principle is to legislate in the Senedd in devolved areas, we should be open to taking a pragmatic approach to using UK legislation to achieve the Welsh Government's objectives where necessary. I believe the Grenfell tragedy and the need to respond to the subsequent independent review of building regulations created circumstances where using UK legislation is appropriate. I therefore consider this Bill the most effective way for these provisions to come into force as soon as possible. While I could bring forward the same provisions in our future Wales Bill, these would almost certainly be the same provisions but at a later date.

I consider the cumulative constitutional implications to be limited. Working collaboratively with the UK Government to achieve provisions for Wales that will update and modernise outdated legislation in a devolved area, does not in any way alter or undermine the fact that the Senedd has legislative competence in this area. We have the ability to make amendments in the future if that is needed.

Capacity of the Welsh Government:

2. *Does your department have the capacity it needs to deliver on the Welsh Government's legislative priorities?*
 - i. *Can you explain why both LCMs on the Bill say there is no Senedd time to bring forward the provisions contained in the two UK Bills in the Senedd?*
 - ii. *What are your other legislative priorities and why is there is no capacity to bring forward Senedd legislation in these areas?*
 - iii. *Have you sought the views of stakeholders and Senedd Members on whether they would prioritise the content of these Bill's over others and whether they would prefer Senedd legislation in these areas even if it should take longer than pursuing these provisions through UK Bills?*

Legislating in these two areas is very much a priority for this Government. However, as set out in our Legislative Programme, we have many other priorities, and to deliver them all we have to take a pragmatic and indeed an innovative approach. I consider proceeding in the way we propose is in the interests of the people of Wales. The White Paper set out our intention to use the Building Safety Bill and there was broad support for this approach.

Leasehold Reform (Ground Rent) Bill

In the case of the Ground Rent Bill, legislating through a UK Government Bill is not just the pragmatic approach that supports the best use of our resources, it is also the best approach for ensuring coherent and comprehensive legislative reform. If we choose not to collaborate with the UK Government on the leasehold reform programme, and choose instead to pursue our legislative reform on a Wales only basis, that reform would take longer and divert precious time and resources from areas where a securing legislation specific to Wales is essential. More importantly, it could result in a set of reforms that are incomplete, or do not properly mesh with reforms that the UK Government make in relation to Wales in respect of elements of the programme that may fall outside of the Senedd's legislative competence.

We know from our own research that the issues faced by leaseholders in Wales are the same as those in England, and the solutions proposed by the Law Commission are the same. No stakeholder in Wales has raised any specific concerns about the content of the Ground Rent Bill, and the only correspondence I have received has been supportive of the proposed leasehold reforms – and called upon us to ensure they extend to Wales.

Building Safety Bill

Resources have been allocated to support the passage of the Building Safety Bill and the development of subsequent secondary legislation and related guidance to introduce the more robust building control regime that our White Paper, 'Safer Buildings in Wales', proposed.

The decision to utilise what was an English Bill reflects the urgency of the issues to be addressed following Grenfell and the calls on Senedd time. We have taken a pragmatic approach to extending the scope of the Building Safety Bill to achieve the Welsh Government's objectives where appropriate. The common objectives driven by Dame Judith Hackitt's independent review report and the current common legislative base point to the Building Safety Bill as the most effective way for these provisions to come into force as soon as possible. While we could bring forward the same provisions in our future building safety bill, these would almost certainly be the same provisions but at a later date.

Our White Paper, which has been the subject of a public consultation, set out the need for urgent action and our intentions to utilise the UK Building Safety Bill. Ahead of the analysis of responses and our government response, to be published later this year, there was clear support for the White Paper proposals generally, both in terms of elements common with England e.g. Duty holders, Gateway Stages and the Golden Thread and the Wales bespoke elements e.g. Welsh Ministers' power to define higher risk buildings and local authority as the single regulator for high risk buildings.

Accessibility:

3. *What assessment have you made of the impact of making these provisions in UK Bills on the Welsh Government's duties in relation to the accessibility of Welsh law particularly as regards:*
- *the lack of bi-lingual legislation in these two devolved areas in relation to these Bills;*
 - *that law in relation to leasehold reform for Wales will be contained in two separate UK Bills and a Senedd Bill;*
 - *that law in relation to Building Safety will be contained within a UK Bill which amends an existing Act and in a separate Senedd Bill?*

It is inevitable that allowing the UK Parliament to legislate in these areas will mean that the primary legislation is in English only – and that is clearly regrettable. However, in the case of leasehold reform, the competence issues mentioned above mean that a collaborative approach is likely to best meet our commitment to ensuring that the law in Wales is coherent and accessible. Any secondary legislation we make, and the guidance we produce, under the Ground Rent Bill will, of course, be fully bilingual. Furthermore, in the case of the Building Safety Bill, the crucial detail that operationalises the Bill provisions and which the outside world will tend to interface with, namely the regulations, will be bilingual.

With regard to the suggestion that leasehold reform for Wales will be contained in two separate UK Bills and a Senedd Bill, the LCM for the Ground Rent Bill does indeed note that our proposed building safety bill, to be introduced later this Senedd Term, will incorporate a measure related to leasehold reform. This is the creation of a registration and licensing system in respect of those involved in aspects of building safety. However, we intend this scheme to also include other entities who are involved in property or estate management. This will be a relatively self-contained set of arrangements that will be specific to Wales, in a similar way to the registration and licensing requirements we currently place on residential landlords. As there are some links to wider measures in the proposed building safety bill, I am content that it is appropriate for that to be taken forward as part of that bill.

With regard to the concern that building safety will be dealt with across two pieces of legislation, there are in fact two discrete elements to be addressed:

- i. design and construction and;
- ii. occupation.

Whilst the interface at construction completion and preparation for occupation is important the regulatory regimes for the two elements will be different.

Completeness of information:

4. *Are you satisfied with the quality and completeness of information provided to Members in the LCMs and the Building Safety Bill supplementary LCM? We draw your attention to references made in the summary of clauses in the Leasehold Reform Bill LCM to provisions relating to England only and the lack of information in the Leasehold Reform Bill LCM about what further amendments are being sought.*

I am satisfied with the LCMs we have laid in relation to both the Ground Rent Bill and the Building Safety Bill. However, I recognise the breadth and complexity of the Building Safety Bill and have offered for technical briefing sessions to be arranged for the Local Government and Housing Committee should they so wish. In the case of the Ground Rent Bill, I have indicated that a supplementary LCM will need to be laid once all the amendments have been tabled.

The Committee has suggested that references are made in the LCM for the Ground Rent Bill to provisions which relate to England only. Having asked my officials to re-examine the LCM, I believe this may include the shared ownership model that is set out in paragraph 23. This model is very similar to the one that operates in Wales, in that there are caps on levels of rent and rent increases. In Wales the respective caps are slightly different to those set out in the LCM, with initial rent being capped at 2.75% of the unsold equity and rent increases thereafter limited to RPI plus 1%. I am content with the inclusion of this paragraph but we will update the figures accordingly when the supplementary LCM is laid.

In addition, the explanation of the Bill's clauses briefly references the enforcement powers that district councils in England are being given. I am also content, for the sake of completeness and just a couple of lines of extra text, with the inclusion of this paragraph.

In relation to a suggested lack of information in the LCM regarding the amendments we have sought to this Bill, the LCM stated that amendments were being sought in relation to the Leasehold Valuation Tribunal as well as the

provision of executive powers to Welsh Ministers. Amendments have subsequently been made in relation to these issues.

Scrutiny:

5. *Do you have any concerns that Senedd Members have not had the opportunity to scrutinise in detail the impact and scope of the Leasehold Reform Bill and the 35 clauses currently proposed for Wales in the Building Safety Bill?*
 - i. *What engagement has the Welsh Government had with stakeholders in Wales on the development of these Bills?*
 - ii. *Can you provide examples of how the Welsh Government has responded to stakeholder concerns about any of these Bills given the issues raised during Bill scrutiny in the UK Parliament?*
 - iii. *How do you respond to concerns about the lack of scrutiny of Welsh provisions by the public bill committee on Building Safety and lack of inclusion of any Welsh MPs in that committee's work?*

The Ground Rent Bill is a short bill of 27 clauses, arguably only 19 of which are substantive, which achieves its policy objectives neatly and simply. Members have an opportunity to scrutinise it as part of the legislative consent process and I think the Bill's comparative brevity should allow them to do that with a good degree of rigour.

In the case of the Building Safety Bill, I acknowledge the concern that such a wide ranging bill will not receive the fullest Senedd scrutiny, this was a concern raised by the chair of the Local Government and Housing Committee. I have therefore offered for my officials to provide technical briefings to go clause by clause if necessary to provide the Committee with the fullest understanding of what the bill provides for Wales. I have also offered to provide details on the delegated powers in the Bill.

As regards engagement with stakeholders, as I have mentioned above the intention to use aspects of the UK Government Building Safety Bill were set out in our White Paper for which there has been broad support, the detail of which will be set out in our government response due to be published before the end of the year. In the case of the Ground Rent Bill, it addresses concerns that have been raised by stakeholders time after time, that being the issue of unfair ground rents. Therefore, whilst there has not been a specific consultation on the Ground Rent Bill itself, I think stakeholders have certainly been instrumental in its development. Furthermore, and as I have already stated above, those stakeholders in Wales who contacted me about this Bill, and the wider leasehold reform programme, have been supportive of it. Their only concern has been that these reforms should apply in Wales. I am aware that the Bill has

been criticised in Parliament on the basis it does not tackle high ground rents on current leases. This matter will, however, be addressed by implementing the Law Commission's recommendations. My officials are continuing to work with the Law Commission and the UK Government, with a view to a further Bill being introduced in the next session of Parliament.

The level of scrutiny of the Welsh provisions by the Public Bill Committee on the Building Safety Bill and no Welsh MPs sitting on the Committee are matters for Parliament.

Leasehold Reform (Ground Rent) Bill specific issues

6. *The LCM says the Law Commission concluded there was no evidence of a need for different provision in the law in England and Wales. Did the Commission go on to recommend an England and Wales Bill and did they prepare draft clauses?*

The Law Commission found that the overwhelming majority of consultees who answered its question as to whether there should be any difference between how Wales and England should be treated under a reformed regime, thought that there should not. The Commission therefore concluded that there are no aspects of a reformed regime that should diverge between Wales and England. However, the Ground Rent Bill is not itself part of the Law Commission's recommendations but rather a Bill that paves the way for those recommendations to be implemented in future legislation. Therefore, in this instance, the Commission has played no role in drafting the Bill's clauses.

7. *The LCM on the Leasehold Reform Bill states that the Bill established an important precedent for legislation in Wales to be taken forward via UK legislation. Can you clarify why this precedent is important and what the long term implications for the Senedd are of setting this precedent in this area?*

The LCM indicates that the collaborative approach to leasehold reform embodied in the Ground Rent Bill will set a beneficial precedent for the taking forward of future legislation on leasehold reform. In particular, it is important to the implementation of the Law Commission's recommendations. As indicated above, there may be elements of the wider reforms that are not within the Senedd's legislative competence. Consenting to the UK Government legislating in respect of Wales will help to ensure that a coherent approach is adopted across all aspects of the reforms. At the same time, my department will work with the UK Government to make sure that Welsh interests are properly taken into account and properly protected. I think this is the best way of advancing the interests of leaseholders in Wales whilst ensuring proper respect is paid to the devolution settlement.

8. *In both the LCM on the Leasehold Reform Bill and in correspondence to the Senedd's Local Government and Housing Committee you have indicated your intention to take forward other areas of leasehold reform in separate UK legislation. Can you clarify why this legislation is being taking forward separately in two UK Bills rather than in a single Senedd Bill? Given that you are suggesting future action through UK legislation, how does this fit with your principle that legislation in devolved areas should be enacted by the Senedd?*

Drafting a single Senedd Bill that covers all the desired aspects of leasehold reform would be a very considerable undertaking resulting in a bill of great length and complexity. Even if it were practically possible for us to legislate in relation to every aspect of leasehold reform in the current Senedd Term, I consider it likely that it would require more than one Bill. However, as has been set out above, it is not at all clear that the Senedd will have the legislative competence to legislate in every aspect of leasehold reform.

9. *Can you clarify what further amendments to the Bill you are seeking and confirm whether or not the UK Government has agreed to these amendments?*

There is one other Wales specific amendment that we have sought and which we hope will be laid in due course. This relates to financial penalty monies not spent on enforcement in Wales being payable to the Welsh Ministers rather than the Secretary of State. Our request is the subject of on-going work with the UK Government.

10. *Can you clarify when a second supplementary LCM will be tabled and how much time will Senedd Members be afforded to scrutinise it given that some of the amendments were made in July 2021 and an LCM was not laid within the normal two week period set out in standing orders?*

I have previously written to the Chair of the Local Government and Housing Committee explaining that I intend to lay a supplementary LCM in late November or early December, once all the anticipated amendments to the Bill have been tabled. That remains my intention.

In my view, tabling a single supplementary LCM that covers all the amendments made to the Ground Rent Bill, will be much more useful to Senedd Members than multiple supplementary LCMs dealing with different amendments at different times. A single supplementary LCM will provide a complete and coherent picture while multiple supplementary LCMs will necessarily each provide an incomplete picture, and will risk introducing incoherence and confusion.

I hope that given how short this Bill is, Senedd Members will feel that they have sufficient time to scrutinise it.

11. *Given that the Bill falls within wholly devolved areas why do some of the delegated powers in the Bill only extend to the Secretary of State and what are the implications of this if they remain unamended?*

Only three regulation making powers, excluding those relating to commencement, have not been delegated. I am content they are not critical to the effective operation of the legislation in Wales.

The first non-delegated power is for the prescription of notices to be used in relation to the exemption of business leases from the legislation (clause 2(2)). I am content we do not need the power to prescribe different notices for Wales for this purpose. Not only is it a very technical matter, it is one in which it would be hard to envisage any reason for a divergence of approach between Wales and England.

The second power not delegated is for regulations to be made amending the definition of home finance plan leases, which are exempted from the Bill (clause 2(6)). The Minister in Parliament stated there are no plans to use this power, but it will be held in reserve in the event it is needed to curtail potential abuses of the exemption. I am unaware of any reason why the approach in Wales would ever need to diverge from that in England.

Thirdly, the power to make consequential amendments is not delegated (clause 21(1)). This is not an unusual situation and when legislation is made by the Senedd it will often include the power for the Welsh Ministers to make consequential changes to other, non-devolved, UK legislation.

The Bill itself already makes key consequential amendments (clauses 19 -20) to primary legislation, so this power is unlikely to be used significantly in any case.

12. *Can you clarify why commencement powers are only provided to the Secretary of State given that commencement powers in relation to Wales have been sought in the Building Safety Bill and what are the implications of this for enactment of the provisions in Wales?*

The provisions of the Ground Rent Bill will apply equally across Wales and England in a way that is not true in relation to the Building Safety Bill. Furthermore, our expectation is that the publicising of the new legislation will be a collaborative effort between ourselves and the UK Government.

Given this position, it would not be appropriate that the Bill is commenced at different times in Wales and England, so providing commencement powers to the Welsh Ministers is unnecessary.

13. *Do you have any plans to bring forward a Bill in the Sixth Senedd on further aspects of leasehold reform should the UK Government not bring a further Bill forward?*

I am not planning for that scenario as I fully expect the UK Government to legislate to implement the Law Commission's recommendations, in line with the commitments that have been given in Parliament. If they do not do so, or they do so in a way with which we disagree, we will need to consider our own legislative programme and what scope there is to legislate on a Wales only basis in order to protect the interests of Welsh leaseholders.

Building Safety Bill Specific Issues

14. *When will a summary of consultation responses to the Welsh Government's White Paper on building safety be published, and will this be prior to Members being asked to vote on a consent motion for the Building Safety Bill?*

I anticipate the summary and Government response will be published before the end of the year and therefore before the vote on the motion.

15. *Can you clarify how the Bill's provisions are both 'bespoke' and are necessary for consistency at the same time, and can you clarify whether Welsh drafters or UK Parliamentary drafters drafted the bespoke provisions in the Bill?*

The Bill is a response to the very specific recommendations of the independent Hackitt report, it therefore includes elements that we would equally wish to introduce in Wales as the same core legislation that the report criticises, the Building Act 1984, which the Bill amends applies to both England and Wales, e.g.:

- Duty holder responsibilities;
- Gateway scrutiny stages (planning application, before construction and before occupation) and;
- Competence requirements for industry and regulators.

But it then provides Welsh Ministers with all the necessary powers to customise the Hackitt model for Wales e.g. it is for Welsh Ministers to determine what a higher risk building is, and for local authorities to be the regulator (removing the choice of private sector options for higher risk buildings).

I am mindful of the fact that many building control professionals work in England and Wales and that there is merit in similar provisions being applicable in both nations where there is cross-border activity and they suit our respective needs. Initial drafting was undertaken by the UK Government which was scrutinised, amended as necessary and agreed by our policy and Legal Services officials.

16. *What were the views of stakeholders on taking forward issues in relation to building safety in two separate Bills, one UK Bill and one Senedd Bill?*

The Safer Buildings in Wales White Paper set out our intentions to utilise the Bill and set out its fundamental features, consultation responses were broadly very supportive. I expect the analysis and Government response to be published later this year. The White Paper reflected the different approaches needed for the design and construction stage, and the subsequent occupation stage. The former represented improvements to the existing building control system informed by work already undertaken for the original England only draft Bill, the latter required more fundamental thinking of a new approach to regulation. Development of primary legislation for the occupation stage will therefore take longer.

17. *Do you have any concerns that taking forward legislation on the life-cycle safety of buildings in two separate pieces of legislation will have any impacts on the coherence and accessibility of that legislation?*

This is not seen as an issue as the two separate pieces of legislation will mainly deal with discrete aspects in a building's life, with the UK Government Bill dealing with the design and construction phase and our Bill dealing with the occupation phase. However care is being taken to ensure clarity at the handover stage at building completion to ensure the right information is collated, in the right format and handed over to those responsible in the occupation phase. In a similar way regulations will need to address the management of future refurbishment of what will be an occupied building and how that interfaces with the building control regime.

18. *Can you clarify why the technical amendments made during the House of Commons Committee stage were not included in the Bill on introduction and do you expect any further amendments to be made to the Bill in relation to Wales?*

The timetable for introduction of the Bill meant that some outstanding issues of detail had not been completed. Those introduced at the committee stage as amendments relating to Wales related to expanding provisions for cooperation between bodies and the sharing of information together with extending a power

to ensure flexibility when defining a 'higher risk building'. Subject to my answer to Q20 below I do not expect any further amendments of substance to be made in relation to Wales.

19. *Can you confirm if the Welsh Government has any intention to publish draft regulations for the Senedd to scrutinise your intentions in relation to the delegated powers provided to the Welsh Ministers in the Bill? (The UK Government did so for England in July 2021.)*

There are no plans to publish indicative regulations during the Bill's passage through Parliament however we will in due course be considering our approach to the development and consultation arrangements for the secondary legislation we bring forward following Royal Assent. One option could be to consult on draft regulations.

20. *Can you clarify if there is any intention to extend the scope of the New Homes Building Ombudsman to Wales?*

We have been working positively with the UK Government with a view to extending the scheme as we believe the scheme could benefit home owners and businesses in Wales. A Supplementary Legislative Consent Memorandum will be required if these provisions are extended to Wales and this will be laid after a Government amendment to the Bill. The timing for this is still unclear, however we are working on the basis of December/January.

The NHO is being introduced as a result of criticism of the house building industry; in its build quality and customer service record. The intention through legislation is to introduce a single agreed 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 any issues owners have with their new homes in the first two years. Owners of new homes will also have the option to go to a new independent Ombudsman to help resolve a dispute. Developers may be required to become and remain members of the scheme. It is envisaged that the housebuilding industry will meet the costs of the NHO and, once established, the NHO service will be free to complainants.

21. *Can you confirm that you will notify the Senedd of any regulations made using the powers provided under clause 40 of the Bill*

Clause 40 provides powers for building regulations to revoke provision in building regulations made using the power in section 2(2) of the European Communities Act 1972. It does this by defining regulations made using powers in both section 1 of the Building Act 1984 and section 2(2) of the European Communities Act as a 'combined instrument' and provides powers for building

regulations made under section 1 of the Building Act 1984 to revoke provision in a combined instrument. The repeal of s2(2) of the European Communities Act 1972 at the end of the implementation period has resulted in there being no power to revoke those provisions in existing building regulations which were made under section 2(2), as the section 1 Building Act 1984 power does not suffice; subsection (2) of this clause fixes this problem by conferring powers to revoke combined instruments. This is a power for the Welsh Ministers in relation to Wales and therefore any regulations made under section 1 of the Building Act 1984, in reliance on this power, would be subject to annulment by the Senedd.