

# Illegal Migration Bill Legislative Consent Memoranda

19 June 2023

## 1. Introduction

### The Bill

1. The UK Government's Illegal Migration Bill (the "Bill") was introduced to the UK Parliament on 7 March 2023. At the time of writing, the Bill has progressed through the House of Commons and is currently being considered by the House of Lords. A series of amendments were made to the Bill during its passage through the House of Commons. Any references to specific clauses in this report are to the amended Bill as at 27 April 2023,<sup>1</sup> unless stated otherwise.
2. The Explanatory Notes to the Bill prepared by the UK Government state that the purpose of the Bill is to: "create a scheme whereby anyone arriving illegally in the United Kingdom ("UK") will be promptly removed to their home country or to a safe third country to have any asylum claim processed".<sup>2</sup>
3. The Bill as currently drafted would:
  - Place a duty on the Secretary of State to arrange the removal of a person who has entered the UK in breach of immigration laws after 7 March 2023, who has no permission to be in the UK and did not come directly from a place where they fear persecution. If they meet those four conditions, the Secretary of State has a duty to refuse any application and declare asylum claims inadmissible.

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<sup>1</sup> UK Parliament, 'Illegal Migration Bill', 27/04/23

<sup>2</sup> UK Government, 'Illegal Migration Bill: Explanatory notes', 27/04/23, page 3



- Establish new powers to detain those people covered by the arrangements for removal duty and their relevant family members.
- Amend modern slavery legislation so that people with modern slavery cases would be disqualified from protections against removal.
- Restrict people who have been subject to the removal duty and their children from being granted immigration status or British citizenship in future.
- Require the Secretary of State to introduce an annual limit on the number of places to be provided under certain safe and legal routes of entry to the UK.

4. The House of Commons library has prepared a briefing on the Bill and progress of the Bill which provides further background information.<sup>3</sup> The UK Government has also published factsheets on various aspects of the Bill.<sup>4</sup>

### Legislative Consent Memoranda

5. Under Standing Order 29.1, the Welsh Government must lay a Legislative Consent Memorandum (“LCM”) in relation to any Bill under consideration in the UK Parliament that makes provision in relation to Wales:

*“(i) for any purpose within the legislative competence of the Senedd (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Senedd); or*

*(ii) which modifies the legislative competence of the Senedd.”<sup>5</sup>*

6. The Welsh Government laid an LCM on the Bill on 31 March 2023 in relation to clauses 19 and 20 of the Bill.<sup>6</sup> Following the amendments made to the Bill during its passage through the House of Commons, on 26 May 2023 the Welsh

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<sup>3</sup> See: UK Parliament, ‘[Illegal Migration Bill 2022-23](#)’, 10/03/23 and UK Parliament, ‘[Illegal Migration Bill: Progress of the Bill](#)’, 24/04/23

<sup>4</sup> UK Government, ‘[Illegal Migration Bill](#)’, 31/05/23

<sup>5</sup> Welsh Parliament, ‘[Standing Orders of the Welsh Parliament](#)’, March 2023, page 182

<sup>6</sup> Welsh Government, ‘[Legislative Consent Memorandum: Illegal Migration Bill](#)’, 31/03/23

Government laid a Supplementary LCM relating to clauses 3, 55 and 56 of the amended Bill.<sup>7</sup> This report considers both Legislative Consent Memoranda.

### Approach to Scrutiny

- 7.** The Business Committee originally referred the LCM to the Equality and Social Justice Committee, the Local Government and Housing Committee, and the Legislation, Justice and Constitution Committee.<sup>8</sup> On 9 May 2023 the Business Committee also referred the LCM to the Children, Young People and Education Committee. The committees' reporting deadline was initially set at 15 June 2023.<sup>9</sup>
- 8.** After the Welsh Government laid the Supplementary LCM on 26 May 2023, the Business Committee revised the committees' reporting deadline to 19 June 2023.<sup>10</sup>
- 9.** We agreed to work jointly with the Equality and Social Justice Committee to collect written evidence about the Legislative Consent Memoranda. On 22 May we wrote to a list of specific organisations to seek their views on the Bill, its impact on Welsh care and support services for children, relevant Welsh legislation, and Convention rights.<sup>11</sup> We also wrote to the Minister for Social Justice and the Deputy Minister for Social Services to seek their views on those same issues, an update on the Welsh Government's discussions with the UK Government about the Bill, and the anticipated cost burdens that would be imposed on Welsh local authorities as a result of provisions in the Bill.<sup>12</sup>
- 10.** Annex 1 sets out the organisations that responded to our letter. The Minister for Social Justice ("the Minister") responded on 7 June 2023.<sup>13</sup>

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<sup>7</sup> Welsh Government, 'Supplementary Legislative Consent Memorandum (Memorandum number 2): Illegal Migration Bill', 26/05/23

<sup>8</sup> Welsh Parliament, 'Timetable for consideration: Legislative Consent Memorandum on the Illegal Migration Bill', April 2023

<sup>9</sup> Welsh Parliament, 'Business Committee (Private) – Tuesday, 9 May 2023 09:00'

<sup>10</sup> Welsh Parliament, 'Timetable for consideration: Supplementary Legislative Consent Memorandum (No.2) on the Illegal Migration Bill', May 2023

<sup>11</sup> Welsh Parliament, 'Joint letter from the Chair of the Children, Young People and Education Committee and the Chair of the Equality and Social Justice Committee to Stakeholders', 22/05/23

<sup>12</sup> Welsh Parliament, 'Joint letter from the Chair of the Children, Young People and Education Committee and the Chair of the Equality and Social Justice Committee to the Minister for Social Justice and Chief Whip and the Deputy Minister for Social Services', 22/05/23

<sup>13</sup> Welsh Government, 'Letter from the Minister for Social Justice and Chief Whip', 07/06/23

## 2. Provisions for which consent is sought

### Overview of provisions

#### Clause 3

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**11.** Under clause 3 of the Bill, the Secretary of State has a power to make arrangements for the removal of unaccompanied children who have entered the UK in breach of certain immigration rules.

**12.** Clause 3 was amended during the House of Commons stages to introduce limitations on the Secretary of State's power to remove such children from the UK. The effect of these limitations is that the Secretary of State may only make arrangements for their removal in certain circumstances (specified in clause 3(3) - for example, to reunite a child with their parent). However, the Secretary of State may vary these circumstances via regulations.

**13.** Clause 2 of the Bill places a duty on the Secretary of State to make arrangements to remove persons to their home country or a safe third country who have entered or arrived in the UK in breach of immigration rules (the "duty to remove"). Clause 2 also sets out four conditions that must be satisfied for this duty to apply to a person.

**14.** Under clause 3 of the Bill as originally drafted, a regulation making power was conferred on the Secretary of State to specify further categories of people exempt from the duty to remove under clause 2. The clause has been amended to provide that any such regulations may enable the disapplication of any provision of the Bill or another enactment in relation to a person to whom an exception applies. For these purposes, the Secretary of State may make amendments to any Senedd Acts or Measures without requiring the consent of the Senedd or Welsh Ministers.

#### Clauses 19 and 20

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**15.** Clauses 15 to 20 collectively relate to the provision of accommodation for unaccompanied migrant children, transfers of children between accommodation provided by the Home Office and accommodation provided by local authorities, and transfers of children from one local authority to another.

**16.** Clause 19 specifically confers regulation making powers on the Secretary of State to extend the provisions in clauses 15-18 to Wales. As currently drafted,

there is no requirement for the UK Government to obtain the consent of the Senedd or Welsh Ministers to do so.

**17.** Clause 20 makes consequential amendments to legislation to ensure that the National Transfer Service (as set out in section 69 of the Immigration Act 2016) continues to work effectively in the context of the Bill as a whole. The clause facilitates the transfer from one UK local authority to another (including to and from Welsh local authorities) of unaccompanied children who are not considered to be unaccompanied asylum-seeking children once their claims are deemed to be inadmissible.

### **Clauses 55 and 56**

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**18.** Clauses 55 and 56 were inserted into the Bill during the House of Commons amending stages. They relate to age-assessments for persons arriving in the UK in breach of immigration rules.

**19.** Clause 55 removes the ability for someone who meets the duty to remove conditions in clause 2 (see paragraph 13) to appeal an age assessment decision made under the Nationality and Borders Act 2022.<sup>14</sup> The clause also states that a judicial review of the decision does not prevent the exercise of the duty to remove under the Bill, except for in two limited circumstances.

**20.** Clause 56 allows the Secretary of State to make regulations about the effect of someone refusing to give consent for a so-called scientific age assessment. The regulations may allow the Secretary of State to consider a non-consenting individual to be treated as an adult.

## **UK Government's view**

### **On whether the Senedd's legislative consent is required**

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The UK Government believes that the provisions in the Bill do not relate to matters within the legislative competence of the Senedd.<sup>15</sup>

### **On policy matters**

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<sup>14</sup> We reported on the Nationality and Borders Bill LCM in February 2022. See: Welsh Parliament, '[Nationality and Borders Bill: Legislative Consent Memorandum](#)', 15/02/22

<sup>15</sup> UK Government, '[Illegal Migration Bill: Explanatory notes](#)', 27/04/23, page 12

**21.** The UK Government's policy rationale for the Bill is set out in the updated explanatory notes to the Bill.<sup>16</sup> The Bill has four main stated objectives, to:

- deter illegal entry into the UK;
- break the business model of the people smugglers and save lives;
- promptly remove those with no legal right to remain in the UK; and
- make provision for setting an annual cap on the number of people to be admitted.

**22.** Some additional contextual points made by the UK Government in its explanatory notes are:

- In 2022, over 45,700 illegal entrants entered the UK having crossed the English Channel in small boats, many of which originated from safe countries, and all of whom travel through safe countries. The annual cost of the asylum system is £3 billion.<sup>17</sup>
- Methods of irregular entry can be dangerous and leave migrants open to exploitation by organised crime groups. There has been a significant increase in small boat arrivals since 2020, and, in 2022, 90% (40,302 of 44,666 arrivals) claimed asylum or were recorded as a dependent on an asylum application.<sup>18</sup>
- In 2022, the UK received more than 5,200 asylum applications from unaccompanied asylum seeking children. Of those applications, the most common age group is 16- and 17-year-olds.<sup>19</sup>

## Welsh Government's view

### On whether the Senedd's legislative consent is required

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The Welsh Government believes that clauses 3, 19, 20, 55 and 56 require the consent of the Senedd.

**23.** Clause 3, as amended, confers a regulation-making power on the Secretary of State to modify or disapply any provision in an Act or Measure of the Senedd in

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<sup>16</sup> UK Government, 'Illegal Migration Bill: Explanatory notes', 27/04/23, page 6 onwards

<sup>17</sup> UK Government, 'Illegal Migration Bill: Explanatory notes', 27/04/23, page 7

<sup>18</sup> UK Government, 'Illegal Migration Bill: Explanatory notes', 27/04/23, page 7

<sup>19</sup> UK Government, 'Illegal Migration Bill: Explanatory notes', 27/04/23, page 8

connection with specifying additional exceptions to the duty to remove in clause 2. The Welsh Government argues that, in theory, this power could “impact on the ability of the Senedd to legislate on matters within devolved competence”, specifically in relation to persons exempted from the duty to remove under clause 2.<sup>20</sup>

**24.** Clause 19 could extend the provisions in clauses 15-18 (in relation to unaccompanied migrant children) to Wales. The Welsh Government believes that, when considered together, clauses 15-19 affect the function of Welsh local authorities, and any other devolved authority involved in providing care and support to children under the Social Services and Well-Being (Wales) Act 2014.<sup>21</sup> In her letter to us, the Minister argues that:

*“Should Welsh local authorities find that the person is a child with care and support needs, these can be provided locally – though the UK Government will not provide the funding required to provide necessary services if they consider the young person to be an adult. If the UK Government considers the young person to be an adult, the Secretary of State will be under a duty to remove this young person from the UK regardless of Welsh local authority assessments.”<sup>22</sup>*

**25.** The Welsh Government argues that the Senedd has legislative competence to make provisions that deal with the transfer of unaccompanied children between local authorities. Therefore, clause 20 impacts on the devolved area of social care.<sup>23</sup>

**26.** Clause 55 removes the right of a young person to appeal their age assessment decision. Clause 56 gives the Secretary of State the power to make regulations which presume an adult age where consent is withheld to participate in a so-called scientific age assessment. The Welsh Government argues that these clauses conflict with the requirements and processes set out in

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<sup>20</sup> Welsh Government, '[Supplementary Legislative Consent Memorandum \(Memorandum number 2\): Illegal Migration Bill](#)', 26/05/23, pages 4-5

<sup>21</sup> Welsh Government, '[Legislative Consent Memorandum: Illegal Migration Bill](#)', 31/03/23, pages 4-5

<sup>22</sup> Welsh Government, '[Letter from the Minister for Social Justice and Chief Whip](#)', 07/06/23, page 4

<sup>23</sup> Welsh Government, '[Legislative Consent Memorandum: Illegal Migration Bill](#)', 31/03/23, page 5

the Social Services and Wellbeing (Wales) Act 2014 and the Welsh Government's Age Assessment Toolkit.<sup>24</sup>

**27.** The Minister refers to these provisions collectively as “the constitutional erosion of Senedd Cymru’s competence to legislate on matters of social care in Wales”.<sup>25</sup>

### On policy matters

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The Welsh Government recommends that the Senedd withholds its legislative consent for clauses 3, 19, 20, 55 and 56.

**28.** The Welsh Government sets out its policy position in relation to the Illegal Migration Bill in its Legislative Consent Memoranda:

*“In Wales, we treat all unaccompanied asylum-seeking children as looked after children in line with Part 6 of the Social Services and Well-being (Wales) Act 2014. The Act also provides for a range of assessment functions to help Welsh local authorities to consider the care and support needs of children in their area ... The Illegal Migration Bill provisions, as introduced, do not recognise the devolved context.”*

It adds that the Welsh Government does not support “any diminution of the lead, authoritative role for social workers in assessing what is in the best interests of children in their care.”<sup>26</sup>

**29.** The Welsh Government raises specific concern about clause 55, which removes young people’s right of appeal against age assessment decisions made under the Nationality and Borders Act 2022. It goes on to argue that around two thirds of initial age assessment decisions are later found to be incorrect.<sup>27</sup> The Minister’s letter also raises concern that “children will be treated as adults, either because they refuse to consent to invasive so-called ‘scientific’ methods of age assessment or because the Home Office has removed the right of appeal against an age assessment decision”, which she states will create safeguarding concerns in

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<sup>24</sup> Welsh Government, ‘[Supplementary Legislative Consent Memorandum \(Memorandum number 2\): Illegal Migration Bill](#)’, 26/05/23, pages 5-6

<sup>25</sup> Welsh Government, ‘[Letter from the Minister for Social Justice and Chief Whip](#)’, 07/06/23, page 1

<sup>26</sup> Welsh Government, ‘[Supplementary Legislative Consent Memorandum \(Memorandum number 2\): Illegal Migration Bill](#)’, 26/05/23, pages 3-4

<sup>27</sup> Welsh Government, ‘[Supplementary Legislative Consent Memorandum \(Memorandum number 2\): Illegal Migration Bill](#)’, 26/05/23, page 5



Wales and contradicts 2022 Home Office Age Estimation Scientific Advisory Committee (AESAC) recommendations.<sup>28</sup>

**30.** The Welsh Government also argues that:

- When clauses 15-18 provisions are used in Wales, a child would be removed from the local authority's care. The Minister claims that this will "inevitably have a detrimental effect on that child's ability to exercise their rights and maintain integration in the community they have been living within."<sup>29</sup>
- The explanatory notes to the Bill do not provide any information about the financial costs imposed by the clauses that the Welsh Government believes require the consent of the Senedd.
- The UK Government has failed to confirm that the Bill is compatible with Convention rights.<sup>30</sup> In her letter, the Minister states that:

*"As well as probably breaching International Human Rights Law, provision in the Bill narrows the scope of human rights protections in the UK so as remove such protections entirely in some cases. Doing so puts the UK further in breach of its obligations under the Convention. This sits wholly at odds with the centrality of the Human Rights Act 1998 to the devolution settlement."*<sup>31</sup>

**31.** The Minister for Social Justice's letter goes on to state that "Unfortunately, despite discussions the UK Government has made no offer to engage proactively with our concerns and find ways to ensure the ongoing lead role for local authorities in any consideration of the best interests of these children."<sup>32</sup> The Supplementary LCM concludes as follows:

*"I cannot recommend the Senedd gives its consent to these provisions being included in the Bill because I do not consider*

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<sup>28</sup> Welsh Government, '[Letter from the Minister for Social Justice and Chief Whip](#)', 07/06/23, pages 2-3

<sup>29</sup> Welsh Government, '[Letter from the Minister for Social Justice and Chief Whip](#)', 07/06/23, page 2

<sup>30</sup> Welsh Government, '[Supplementary Legislative Consent Memorandum \(Memorandum number 2\): Illegal Migration Bill](#)', 26/05/23, page 6

<sup>31</sup> Welsh Government, '[Letter from the Minister for Social Justice and Chief Whip](#)', 07/06/23, page 5

<sup>32</sup> Welsh Government, '[Letter from the Minister for Social Justice and Chief Whip](#)', 07/06/23, page 2

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*that it is appropriate for this provision to be made in relation to Welsh social care in this Bill.”<sup>33</sup>*

### 3. Our view

#### On whether the Senedd’s legislative consent is required

**32.** Clause 3 confers regulation making powers that enable the Secretary of State to make amendments to any Senedd Acts or Measures, for certain purposes, without requiring the consent of the Senedd or of Welsh Ministers.

**33.** Clause 19 confers regulation making powers on the Secretary of State to extend certain provisions that relate to social care to Wales, therefore impacting on the devolved area of social care.

**34.** Clause 20 facilitates the transfer from one UK local authority to another of certain unaccompanied children, which impacts on the devolved area of social care.

**35.** Clauses 55 and 56 relate to age-assessments for persons arriving in the UK in breach of immigration rules for immigration purposes. The process by which social work professionals assess the age of young people is devolved to the Welsh Government, and is set out in Welsh legislation and guidance. Clauses 55 and 56 do not recognise that devolved legislation or guidance, therefore impacting on the devolved area of social care.

**Conclusion 1.** We therefore agree with the Welsh Government that clauses 3, 19, 20, 55 and 56 require the legislative consent of the Senedd. Laura Jones MS and James Evans MS do not agree with this conclusion

**36.** Sioned Williams MS objected in principle to any legislation affecting devolved Welsh matters being enacted via a UK Government Bill.

#### On policy matters

**37.** We considered the UK Government’s explanatory notes to the Bill, the Welsh Government Legislative Consent Memoranda, the written evidence we received, and the views of the Joint Committee on Human Rights.

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<sup>33</sup> Welsh Government, ‘[Supplementary Legislative Consent Memorandum \(Memorandum number 2\): Illegal Migration Bill](#)’, 26/05/23, page 6

**38.** Based on the information available to us at this time, we agree with the Welsh Government that the provisions in the Bill that relate to Welsh social care are inappropriate. We do not support the use of so-called scientific age assessments; we do not agree that a young person refusing a so-called scientific age assessment should be presumed to be an adult; and we do not agree with the removal of the right of a young person to appeal their age assessment decision.

**39.** We have committed to placing children's rights at the heart of everything we do. We are deeply concerned by the Illegal Migration Bill's disregard for children's rights and human rights, as set out to us in the evidence and as acknowledged by the UK Government in its inability to confirm that the provisions of the Bill are compatible with Convention rights.

**40.** We therefore recommend that the Senedd withholds its consent to clauses 3, 19, 20, 55 and 56.

**41.** Laura Jones MS and James Evans MS do not agree with the views set out in this section.

**Recommendation 1.** The Senedd should withhold its consent to clauses 3, 19, 20, 55 and 56 being included in the Illegal Migration Bill. Laura Jones MS and James Evans MS do not agree with this recommendation.

## Annex 1: List of written evidence

The following people and organisations provided written evidence to the Committee. All Consultation responses and additional written information can be viewed on the [Committee's website](#).

<b>Date</b>	<b>Organisation</b>
31 May 2023	British Red Cross
1 June 2023	National Youth Advocacy Service
6 June 2023	Bevan Foundation
6 June 2023	Children in Wales
6 June 2023	Joint response from The Children's Society, Bevan Foundation and Children's Legal Centre Wales.
8 June 2023	Children's Commissioner for Wales
8 June 2023	Care Inspectorate Wales
9 June 2023	Welsh Local Government Association
7 June 2023	Welsh Government