

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NUMBER 2)

Illegal Migration Bill

Background

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum (LCM) must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies, the legislative competence of the Senedd.
2. The Illegal Migration Bill (“the Bill”) was introduced into the UK Parliament, House of Commons, on 7 March 2023. The Bill is available here:
<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/220262.pdf>
3. I laid an initial Legislative Consent Memorandum on 31 March 2023, in relation to clauses 19 and 20 of the Bill at introduction. This Supplementary Legislative Consent Memorandum (SLCM) is now laid in relation to clauses 3, 55 and 56 of the amended Bill, alongside clauses 19 and 20.
4. The amended Bill, as at 26 April 2023, can be found here:
<https://bills.parliament.uk/publications/50885/documents/3348>

Policy Objective

5. The UK Government’s stated objective is to stop crossings of small boats and to end the role of people traffickers and smugglers in bringing people to the UK without prior permission.

Summary of Amendments

6. The Bill underwent many amendments during passage through the House of Commons. Some of these were minor or consequential but a summary is provided below in respect of significant changes to the Bill.
7. As originally drafted, clause 3 of the Bill provides that the duty to make arrangements for the removal of a person from the UK (in clause 2) does not apply when the person is an unaccompanied child. Clause 3 goes on to provide however that the Secretary of State *may* make arrangements for the removal of unaccompanied children. Clause 3 also provided that the Secretary of State may specify further categories of people that are exempt from the duty to remove by way of regulations.
8. Clause 3 has been amended to introduce limitations on the Secretary of State’s power to remove an unaccompanied child from the UK. The effect of these limitation is that the Secretary of State may only make arrangements for the removal of an unaccompanied child in the circumstances specified in clause 3(3). However, the Secretary of State may vary these circumstances via regulations.

9. The amendments also clarify the regulation making power conferred on the Secretary of State to specify further categories of people exempt from the duty to make arrangements to remove in clause 2. The amendments clarify that any regulations may enable the disapplication of any provision of the Bill or another enactment in relation to a person to whom an exception applies. The amendments also clarify that the Secretary of State may make consequential amendments to any Senedd Acts or Measures.
10. Clause 5 is amended to make the provisions stating where a person may be removed to subject to limitation on the removal of an accompanied child in clause 3(3).
11. Clause 8 is removed from the Bill. This clause previously enabled the Secretary of State to remove the family members of those caught by the duty to remove in clause 2.
12. Clause 10 introduces additional offences for those who facilitate entrance to the UK for those without immigration permission.
13. Clause 11 limits the power to detain unaccompanied children by requiring adherence to Regulations which the Secretary of State can make. This enables the Secretary of State to specify time limits for detaining children but these Regulations are subject to the annulment procedure.
14. Clause 13 is amended to clarify that a decision to detain during the relevant period is final and cannot be considered by a court or tribunal.
15. Clause 21 is amended to require the Secretary of State to assume that it is not necessary for a person to be present in the UK to cooperate with a modern slavery investigation or criminal proceedings unless there are compelling circumstances requiring presence in the UK.
16. Clause 28 is amended to require the removal of any prohibition on removing a person or the removal of requirement to grant limited leave for those who are a threat to public order or those who have claimed to be a victim of slavery or human trafficking in bad faith, unless there are compelling circumstances which mean such protections should apply to the person.
17. Clause 29 is amended to narrow the grounds on which the Secretary of State may give a person to whom section 8AA of the Immigration Act 1971 limited leave to remain.
18. Clause 51 (relating to Interim measures of the European Court of Human Rights) has been removed but replaced by new clause 53. The clause provides a power for a Minister of the Crown to determine that the duty to remove a person does not apply where the European Court of Human Rights indicates an interim measure relating to the intended removal of a person under the provisions of this Bill. Where the Minister does not make such a determination, the Secretary of State or an immigration officer may not have regard to the interim measure.

19. Clause 58 is amended to set time limits for implementation and required consultees for the annual cap on safe and legal routes entrants to the UK. This includes local authorities but not Welsh Ministers. New Clause 59 also requires an annual report to Parliament on safe and legal routes and sets out what the report should contain.
20. New Clause 38 provides definitions about serious harm suspensive claims and conditions.
21. New Clause 60 broadens the behaviour under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 that shall be treated as designed or likely to conceal information or mislead to include failure to produce a valid identity document or failure to provide any information required to access information stored in electronic form.
22. New Clause 14 provides powers to search vehicles, premises and property (including electronic devices) of those liable to be detained. The power enables seizure and retention of such things and to access, copy and use the information stored.
23. New Clause 55 removes the opportunity for someone who meets the conditions in clause 2 to appeal an age assessment decision made under the Nationality and Borders Act 2022. The clause also states that a judicial review of the decision does not prevent the exercise of the duty (or power) of removal. A court considering a judicial review application may only quash a decision on the basis that it was wrong in law and not on the basis that the decision was wrong as a matter of fact.
24. New 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.
25. New Clause 52 restricts the power of a court to grant interim remedies which may delay removal of a person from the UK.

Current Welsh Government policy position

26. 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.
27. All social services functions are fully devolved to the Welsh Government and as such, all legislative and policy decisions relating to social services are for the Welsh Ministers and the Senedd Cymru.
28. The Illegal Migration Bill provisions, as introduced, do not recognise the devolved context. Clause 19 enables the Secretary of State to extend Clauses 15-18 to Wales without the consent of Welsh Ministers or the Senedd. Therefore, it is important to state that any legislation to be made which impacts on these devolved functions would be subject to Legislative Consent Memoranda being made in the Senedd.

29. We do 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. Over recent years, we have asked for information about the training immigration officers receive in assessing age in line with Welsh social services and UNCRC legislative requirements. This has never been provided. Overall, we are concerned about any UK Government centralising of processes which could diminish existing Welsh national duties and functions in this space.
30. The 2014 Act brings into Welsh domestic law compliance with the UN Convention on the Rights of the Child. The Welsh Government has included a commitment in the Programme for Government to 'continue to support and uphold the rights of unaccompanied asylum-seeking children and young people.' We are proud to take a 'child first, migrant second' which upholds the best interests, rights and entitlements approach to providing care and support to children in Wales.

Provisions in the Bill for which consent is required

31. The Senedd has legislative competence in relation to social care in Wales including the exercise of Welsh local authority social care functions. As set out in the original Legislative Consent Memorandum, the legislative consent of the Senedd is required for the provisions in clauses 19 and 20 because they make provision with regards to devolved matters in so far as they relate to decisions made by devolved Welsh authorities. As a result of the amendments to the Bill, legislative consent of the Senedd is also required for the amended clause 3 and new clauses 55 and 56.

Clause 3 – Unaccompanied Children

32. We consider that the legislative competence test under section 107(6) is engaged by clause 3. Under the original drafting of this clause, we considered it to be a reserved matter. This is because asylum and the status and capacity of persons in the United Kingdom who are not British citizens are included in Schedule 7A of the Wales Act 2017. However, the amendments made to clause 3 provide that the regulation making power conferred on the Secretary of State includes a power to make consequential amendments to any Act or Measure of the Senedd.
33. The principal amendment seeks to enable the Secretary of State to exempt categories of people from the duty to remove in clause 2. A further amendment has been made to enable the Secretary of State to disapply provisions in Senedd legislation to align with exemptions made at Westminster by Regulations. Such a power could be used progressively or in a restrictive manner.
34. Although the purpose of this power may be to ensure persons exempted from removal can access services, it could also be used to ensure persons exempted from removal can only access very basic services. In theory, such a power could be used to prevent the Senedd legislating in areas of devolved competence in relation to persons exempted from the duty to remove in clause 2.

35. The power to amend Senedd legislation in clause 3 would enable the Secretary of State to change decisions taken by the Senedd in respect of those no longer subject to the duty to remove.
36. It is our view that the clause has a dual purpose but due to the impact on the ability of the Senedd to legislate on matters within devolved competence, the legislative consent of the Senedd is required for this provision.

Clause 55 – Decisions relating to a person’s age

37. We consider that the legislative competence test under section 107(6) is engaged by clause 55. The clause will remove the right of a young person to appeal their age assessment decision despite the very significant detrimental impacts which could be caused by an incorrect decision being reached.
38. The Social Services and Wellbeing (Wales) Act 2014 sets out the requirements placed on Welsh local authorities by the Senedd in determining whether children have care and support needs which need to be met.
39. The Senedd has already legislated accordingly to ensure these needs are met and we do not agree the UK Government should be able to undermine the Senedd legislative competence by ignoring established Welsh processes and then removing the right of appeal where decisions are reached. This is particularly concerning as recent reports suggest that around two thirds of initial age assessment decisions are later found to be incorrect.¹
40. The Welsh Government’s Age Assessment Toolkit sets out the process which we believe Welsh local authorities should follow to assess the age of young people. The Nationality and Borders Act 2022 legislated to introduce so-called scientific methods of age assessment but current UK Government guidance refers Welsh local authorities to the Social Services and Wellbeing (Wales) Act 2014 for further information.
41. Whilst relating to social care and Welsh local authorities, the removal of the right of appeal applies only to persons who are unaccompanied migrant children. Therefore, this clause also has a dual purpose.
42. It is our view that while the clause has a dual purpose, due to the impact on the devolved area of social care, the legislative consent of the Senedd is required for this provision.

Clause 56 -

43. As with new clause 55, we consider that the legislative competence test under section 107(6) is engaged by clause 56. The clause will give 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. This is again despite

¹ [Hundreds of UK asylum seeker children wrongly treated as adults, report shows | Immigration and asylum | The Guardian](#)

the very significant detrimental impacts which could be caused by an incorrect decision being reached.

44. The Senedd has already legislated in relation to age disputed young people in Wales and the Welsh Government has extant guidance for local authorities, as noted above.
45. Whilst relating to social care and Welsh local authorities, the removal of the right of appeal applies only to persons who are unaccompanied migrant children. Therefore, this clause also has a dual purpose.
46. It is our view that the clause has a dual purpose but due to the impact on the devolved area of social care, the legislative consent of the Senedd is required for this provision.

Financial implications

47. The explanatory notes to the Bill do not provide any information about the financial costs imposed by these clauses. The UK Government has not yet published a full Explanatory Memorandum with a Regulatory Impact Assessment or Equality Impact Assessment. However, in view of the potential for children to be incorrectly assessed as a child (with the mental health impact on children and safeguarding risks), there could be significant cost burdens imposed for Welsh local authorities and / or Welsh health bodies, by these clauses and regulations made under them. The use of powers under the amended clause 3 to alter Senedd legislation is likely to incur costs in relation to legal advice, changes to guidance, and training but these cannot be estimated at this time.

Conclusion and recommendation

48. As set out above, the Bill makes provision within the devolved competence of the Senedd and therefore the consent of the Senedd is required.
49. I cannot recommend the Senedd gives its consent to these provisions being included in the Bill because I do not consider that it is appropriate for this provision to be made in relation to Welsh social care in this Bill. As with the original LCM, I also cannot recommend consent is given as the UK Government has failed to confirm that the Bill is compatible with Convention rights and many leading international organisations are concerned it is incompatible.

Jane Hutt MS, Minister for Social Justice and Chief Whip

26 May 2023