

# Report on the Legislative Consent Memorandum for the Nationality and Borders Bill

February 2022

## 1. The Nationality and Borders Bill

**1.** The Nationality and Borders Bill (“the Bill”) was introduced to the UK Parliament on 6 July 2021. The Explanatory Notes to the Bill state that its aims are to:

*“- increase the fairness of the system to better protect and support those in need of asylum;*

*- deter illegal entry into the United Kingdom, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger; and*

*- remove more easily those with no right to be in the UK”.<sup>1</sup>*

**2.** The Bill as introduced included a ‘placeholder clause’ at clause 58, in relation to age assessment. On 4 November, during the Commons Committee Stage, amendments were agreed to replace the original clause 58 with new clauses 48-56.

**3.** While the vast majority of the Bill deals mainly with immigration and related matters, which are outside the scope of the Senedd’s powers, clauses 48-55 (excluding clause 50), relating to the age assessment of asylum-seeking children and young people and clause 80 (power to

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<sup>1</sup> Nationality and Borders Bill: [Explanatory Notes](#)



make consequential provision)<sup>2</sup> impact the non-reserved area of social care and therefore require the legislative consent of the Senedd.

## 2. The LCM

### Background

4. On 6 December 2021, the Minister for Social Justice (“the Minister for SJ”) laid before the Senedd a legislative consent memorandum (“the LCM”)<sup>3</sup> for the Bill.<sup>4</sup>

5. The LCM was referred to the Health and Social Care Committee (“HCS Committee”), the Children, Young People and Education Committee (“CYPE Committee”) and the Legislation, Justice and Constitution Committee (“LJC Committee”) for consideration, with an original reporting deadline of 10 February 2022. In response to a joint request from the HSC and CYPE Committees, the Business Committee subsequently agreed to extend the deadline to 17 February. However, following notification by the Welsh Government that it intended to schedule the plenary debate on the LCM for 15 February, on 25 January the Business Committee revised the reporting deadline to 15 February.

### Our approach to scrutiny

6. The HSC and CYPE Committees considered their approaches to scrutiny of the LCM at their meetings on 13 January 2022 and agreed to write jointly to the Minister for SJ and stakeholders with an interest in the matters raised in the LCM. This included NHS bodies, relevant royal colleges and local authority representatives. A full list of consultees, along with our letters, and the responses we received, are available on the Senedd’s website.<sup>5</sup>

7. We considered the responses received at our meeting on 10 February 2022.

8. We recognise that there are significant concerns amongst stakeholders in relation to the provisions in the Bill relating to the age assessment process. However, in line with our remit, we have focused primarily on the implications for the health and social care sectors. The LCM has also been referred to the CYPE Committee, whose remit includes matters relating to children

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<sup>2</sup> The LCM describes this clause as clause 79. However, after amendments were made to the Bill at Report Stage in the House of Commons, it was renumbered as clause 80.

<sup>3</sup> [Legislative Consent Memorandum: Nationality and Borders Bill](#)

<sup>4</sup> [Nationality and Borders Bill](#)

<sup>5</sup> [Welsh Parliament: Legislative Consent – Nationality and Borders Bill](#)

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and young people in Wales. We would encourage Members to give careful consideration to any views expressed by that Committee relating to children's rights and safeguarding.

## Overview

9. Paragraphs 6 to 8 of the LCM summarise the Bill and its policy objectives. Paragraphs 9 to 11 outline the provisions in the Bill for which Welsh Government believes Senedd consent is required. We explore issues relating to these provisions throughout our report.

## The UK Government's position

10. The UK Government does not consider that any clauses in the Bill require the Senedd's legislative consent:

*"Almost all of the provisions in the Bill deal with matters that are reserved to the UK Parliament and therefore extend and apply across the UK. The remainder apply to England and Wales only, either because they amend legislation that itself only applies and extends to England and Wales or because they deal with a policy area that is within the legislative competence of the Scottish Parliament or the Northern Ireland Assembly but not within the legislative competence of Senedd Cymru [...]"*

*None of the provisions in the Bill involve Westminster legislating for a matter that is within the legislative competence of a devolved legislature, and so the consent of devolved legislatures is not required under the Sewell Convention."<sup>6</sup>*

## The Welsh Government's position

11. The Senedd has legislative competence in relation to social care in Wales including the exercise of Welsh local authority social care functions. The LCM states, therefore, that the view of the Welsh Government is that the legislative consent of the Senedd is required for the provisions below because they make provision with regards to devolved matters in so far as they relate to decisions made by devolved Welsh authorities under clause 49(2)(a).

12. Further, the LCM states that the Welsh Government is not able to recommend consent:

*"40. [...] the Bill makes provision within the devolved competence of the Senedd and therefore the consent of the Senedd is required. However, I cannot recommend the Senedd gives its consent to these provisions being included in the Bill because I do not*

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<sup>6</sup> UK Government, '[Nationality and Borders Bill: Explanatory Notes](#)', December 2021, page 16

*consider that it is appropriate for this provision to be made in relation to Welsh social care in this Bill.”<sup>7</sup>*

**13.** In a letter to the HSC and CYPE Committees dated 3 February 2022, the Minister for SJ said that the Welsh Government had repeatedly raised concerns about the impact of the Bill on Wales and sought details of the clauses relating to age assessment from May 2021 onwards, without success:

*“The UK Government has provided no satisfactory assurances and no amendments have been tabled to address the concerns raised by the Welsh Government. The UK Government has maintained its position that the entirety of the Nationality and Borders Bill relates to reserved areas of policy, despite the Bill making provision concerning local authority decisions as to whether and how to exercise functions under “relevant children’s legislation”. ”<sup>8</sup>*

## **Our view**

**14.** We agree with the Welsh Government’s view that the Bill makes provision within the devolved competence of the Senedd and therefore the consent of the Senedd is required.

**15.** We are also concerned that the UK Government has not responded constructively to the matters raised by the Welsh Government, particularly where provisions in the Bill relate to areas of devolved responsibility.

## **3. Provisions in the Bill for which consent is required**

### **Age assessments**

**16.** Part 4 of the Bill (clauses 48-56) relates to age assessments. Age assessments are primarily carried out to determine whether someone can, or cannot, access children’s social services. Part 4 applies in relation to the arrival of unaccompanied asylum-seeking individuals in the UK who do not have documentation to prove their age.

**17.** At present, where there is doubt over a child’s age, an assessment is undertaken by the social services department of the local authority in which the child has ‘presented’. The decision

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<sup>7</sup>*Legislative Consent Memorandum: Nationality and Borders Bill*

<sup>8</sup> Letter from the Minister for Social Justice: 3 February 2022

about age is therefore taken at a devolved level. The Bill proposes to change this process to create a UK wide system which includes:

- The establishment of a National Age Assessment Board (NAAB).
- A regulation-making power for the Secretary of State in respect of procedures to be followed in the age assessment process.
- The use of “scientific” methods to establish age.
- Proposals to reform appeals arrangements.

### **UK Government’s stated objective**

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**18.** The UK Government’s stated objective is to seek to strengthen the framework for determining age. Its view is that this will ensure they quickly identify vulnerable children needing support and address the safeguarding risks from adults posing as children. In a media statement, the Home Office said that the advice of the Scientific Advisory Committee on ways of assessing age would:

*“...help ensure asylum seeking adults posing as children do not get access to support they are not entitled to, and remove the safeguarding risks of adults being wrongly placed in children’s care system.”*

**19.** The statement went on to say:

*“[UK] Government reforms will bring the UK’s age checking policy in line with other countries. Scientific methods are used by most European countries, who primarily use X-ray scans, and sometimes CT scans and MRI imaging to view key parts of the body.*

*[...]*

*This is a significant issue. In the 12 months up to September 2021, of the 1,696 resolved age dispute cases in which an individual’s claim to be a child is disputed, around two thirds were found to be adults.”<sup>9</sup>*

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<sup>9</sup> [Home Office to introduce scientific methods for assessing the age of asylum seekers: 5 January 2022](#)

## Welsh Government's policy position

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**20.** Paragraphs 13 and 14 of the LCM set out the Welsh Government's policy position, and state:

*"13. ... in our response to the UK Government's 'New Plan for Immigration', our policy position arises from our compliance with the UN Convention on the Rights of the Child to act in the best interests of children. The Social Services and Wellbeing (Wales) Act 2014 sets out the requirements placed on Welsh local authorities in determining whether children have care and support needs which need to be met.*

*14. 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 requiring referral of age-disputed children to other decision-makers or mandating particular evidence or methods of age assessment which are not considered good practice in Wales."<sup>10</sup>*

**21.** In her letter of 3 February 2022, the Minister for SJ states:

*"This Bill introduces an additional statutory process for age assessments for unaccompanied asylum seeking children in Wales which contradicts Welsh law, will cause confusion and potentially diminish the law as it stands in Wales."<sup>11</sup>*

## Clause 49: Persons subject to immigration control: referral or assessment by local authority etc

**22.** Clause 49 requires a local authority to refer an age-disputed person to the "designated person" (the NAAB) for an age assessment, to conduct the age assessment itself, or to inform the Secretary of State in writing that it is satisfied that the person is the age that they claim (or are claimed) to be.

**23.** This clause confers power on the Secretary of State to make regulations imposing functions on devolved Welsh authorities. The LCM states that it is the view of the Welsh Government that the legislative consent of the Senedd is required for this provision because it impacts the devolved area of social care and imposes functions on devolved Welsh authorities.

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<sup>10</sup> [Legislative Consent Memorandum: Nationality and Borders Bill](#)

<sup>11</sup> Letter from the Minister for Social Justice: 3 February 2022

## Interaction with commitment to Wales as a nation of sanctuary

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**24.** A number of stakeholders, including Public Health Wales, the National Youth Advocacy Services (NYAS) Cymru, and the Welsh NHS Confederation expressed concerns about the impact of the Bill on the ability of the Welsh Government and its partners to implement the policies that support the vision of a Nation of Sanctuary. NYAS Cymru said:

*"In broad terms, the Bill [...] risks undermining the compassion that Welsh Government have committed to, for Wales to be a nation of sanctuary for all asylum-seeking people."<sup>12</sup>*

## Making of regulations by the Secretary of State

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**25.** Some stakeholders, including Public Health Wales, said it was unclear what powers the Secretary of State would have to make regulations that include areas that are devolved to Wales including health, local government and social services. They stressed that responsibility for the support and care for children and adults who seek sanctuary in Wales is the responsibility of the Welsh Government, with age assessment currently carried out by social services in line with the Social Services and Well-being Wales Act 2014 (the 2014 Act). Children in Wales, with and on behalf of, the UNCRC Monitoring group said:

*"The application of the age assessment process in Wales is undertaken by children's social services, informed by case law and underpinned by existing duties prescribed by Welsh legislation, most notably the Social Services and Well-being (Wales) Act 2014. All persons determined to be children are granted looked after status, and should have access to a range of care and support services to aid recovery and the statutory entitlements that this status offers."<sup>13</sup>*

**26.** The joint submission from the WLGA, ADSS Cymru and All Wales Heads of Children's Services said that, although the 2014 Act does not set out a duty to assess age, it places clear responsibility and legal duties to assess eligibility for children's services and support to meet their needs and safeguard and promote the child's well-being:

*"Given the devolved nature of health and social care in Wales our view is that the Bill confers power on the Secretary of State to make regulations imposing functions on*

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<sup>12</sup> LCM NBB 05: NYAS Cymru

<sup>13</sup> LCM NBB 11: Wales UNCRC Monitoring Group

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*devolved Welsh authorities which could potentially undermine the requirements placed on Welsh local authorities set out in the SSWBA, thereby treating asylum seeking children differently to other children in Wales. The full devolvement of social services functions to Wales does not appear to have been considered, with no specific proposals about the representation of Wales or the impact of decision-making on Welsh devolved services.*

*We believe that it is not in the competence of the UK Government to designate other bodies to do an assessment that would interfere with the Welsh Government competence in social care, as set out in the SSWB Act 2014, without consent. This would not change regardless of the method of identification of age.”<sup>14</sup>*

**27.** The Welsh NHS Confederation stressed the need for conversations between the UK and Welsh Governments to “determine where this Bill crosses into areas of devolved competence, the expectations that may be placed on Welsh public servants, and the interface with existing Welsh Government legislation; namely the Social Services and Wellbeing Act 2014 and the Wellbeing of Future Generations Act 2015”.<sup>15</sup>

### **Scope of the NAAB**

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**28.** The Explanatory Notes to the Bill state that “the intention is that the establishment of the board will achieve greater consistency in quality of assessments and reduce the incentives for adults to provide incorrect ages. In doing so, it will seek to reduce the financial and administrative burden of undertaking assessments on local authorities and ensure that the ages of those people are recorded accurately for the purposes of their immigration or asylum application.”<sup>16</sup>

**29.** Local authorities will retain the right to conduct age assessments themselves if they prefer to do so.

**30.** Paragraph 12 of the LCM states:

*“While we understand from our officials meeting with Home Office officials on 27 May, that the NAAB is to be an England-only body, we still feel it important to comment on the proposal. Little information is provided about the constitution and functions of the*

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<sup>14</sup> LCM NBB 06: Public Health Wales

<sup>15</sup> LCM NBB 10: Welsh NHS Confederation

<sup>16</sup> UK Government, '**Nationality and Borders Bill: Explanatory Notes**', December 2021, page 59

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*NAAB. Again, the full devolvement of social services functions to Wales appears not to have been considered in that there are no specific proposals about the representation of Wales (or Scotland and Northern Ireland)."<sup>17</sup>*

**31.** Stakeholders agreed that there was little acknowledgement by the UK Government of the fact that social care is devolved and age assessments are already established in Wales. A number of witnesses, including Public Health Wales, the Welsh NHS Confederation and the Royal College of Nursing Wales, said there would need to be detailed discussions between the UK and Welsh Governments as to how any England-only Board would engage with Wales and take into account the areas devolved to the Welsh Government that are fundamental to any assessment process, regardless of who undertakes it:

*"The establishment of the Board will require consultation with partners, including the Welsh Local Government Association, Health Boards, Public Health Wales, third sector providers etc. The impact of not doing so carries the risk of establishing a different approach to the consideration of asylum applications in England to Wales, in relation to the definition of how age is assessed."<sup>18</sup>*

### **Governance, accountability and role of the NAAB**

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**32.** A number of stakeholders also highlighted the lack of detail contained in the Bill around the function, power, constitution and independence of the NAAB. National Youth Advisory Service (NYAS) Cymru said it was concerned at the lack of transparency and accountability of the NAAB, including to Welsh Government or Senedd committees. It said that the levels of independence from the Home Office in the process were also currently unclear.

**33.** NYAS Cymru also raised concerns that the proposed NAAB would be able to overrule a local authority age assessment and carry out their own if required to by the Secretary of State (or a designated person on their behalf), rather than just act in a supportive or advisory capacity to local authorities:

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<sup>17</sup> [Legislative Consent Memorandum: Nationality and Borders Bill](#)

<sup>18</sup> LCM NBB 10: Welsh NHS Confederation

*"We share the concerns of the British Association of Social Workers (BASW) that age assessments could be used as a political tool by the UK Government to order age assessments on persons who have attracted media attention."<sup>19</sup>*

**34.** In their joint submission, the WLGA, ADSS Cymru and All Wales Heads of Children's Services raise similar concerns around the ability of the NAAB to undertake an age assessment "if the Secretary of State has reason to doubt an age assessment conducted by a local authority on an age-disputed person or has reason to doubt a local authority's decision not to conduct an age assessment". They argue that this is an extremely broad power and argue that it has the potential to undermine the critical role that local authority social workers play:

*"It is essential that social workers are conducting age assessments using a multi-agency and holistic approach, which requires social work managers, legal teams and partner agencies to engage with the Welsh Government's Age Assessment Toolkit<sup>20</sup>. Social workers are best supported in their assessments when all participants in the age assessment process are knowledgeable and competent—this must be the focus rather than creating a system where one part can question the decisions made by other parts of the system."<sup>21</sup>*

**35.** They went on to say that if the NAAB is to sit within the Home Office, there is concern regarding the required impartiality in decision-making, and NAAB's governance arrangements, especially following the recent High Court judgment (MA and HT v Secretary of State for the Home Department) where it was ruled that the Home Office's process for age assessing young asylum seekers when they arrived in the UK was unlawful:

*"It is a matter of great concern that the way in which the Home Office undertook such assessments [ ] was ruled unlawful, while at the same time seeking powers to set standards for age assessments across the UK through a NAAB. This does not inspire confidence in the revised age assessment policy and processes outlined in the New Plan for Immigration. Given that different legislation applies in Wales accompanied with specific guidance for councils on carrying out an age assessment, we believe that*

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<sup>19</sup> LCM NBB 05: NYAS Cymru

<sup>20</sup> Unaccompanied Asylum Seeking Children: [Age Assessment Toolkit](#)

<sup>21</sup> LCM NBB 13: WLGA, ADSS Cymru and All Wales Heads of Children's Services

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*referrals to the National Age Assessment board should not be mandatory for councils in Wales.*"<sup>22</sup>

**36.** In her letter of 3 February 2022, the Minister for SJ pointed out that in Wales, all unaccompanied asylum-seeking children are treated as looked after children under Part 6 of the 2014 Act, and as such are entitled to the same care and support as all children in care in Wales.

**37.** She went on to say:

*"There are stark differences in views between UK Government and Welsh Government about how age assessments should be conducted and by whom. For example, in Wales, we have an extant policy position on age assessment which does not recommend or support the use of medical examinations as determinants of age and considers such approaches morally wrong. The use of 'scientific methods' will potentially be a fundamental and perennial disagreement between the views of Welsh local authorities and the NAAB."*<sup>23</sup>

### **Impact on the role of social workers**

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**38.** The WLGA, ADSS Cymru and All Wales Heads of Children's Services raised concerns that the Bill, as drafted, has the potential to undermine the critical role that local authority social workers play. They say that the focus should be on equipping social workers to perform their role well with adequate guidance, training, and support. Further, they believe it could diminish the lead, authoritative role social workers play, with the potential to result in officers without the required expertise, experience, and skill conducting assessments, including abbreviated assessments:

*"This remains a considerable concern following the recent court case, rather than local authority's own social workers following nationally agreed approaches and good practice."*<sup>24</sup>

**39.** In her letter dated 3 February 2022, the Minister for SJ said that "all social services functions are fully devolved to the Senedd and as such, all legislative and policy decisions relating to social services are for the Senedd and the Welsh Ministers." She agreed with the

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<sup>22</sup> LCM NBB 13: WLGA, ADSS Cymru and All Wales Heads of Children's Services

<sup>23</sup> Letter from the Minister for Social Justice: 3 February 2022

<sup>24</sup> LCM NBB 13: WLGA, ADSS Cymru and All Wales Heads of Children's Services

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stakeholders that “the NAAB would diminish the lead, authoritative role for social workers in Wales in this function.”<sup>25</sup>

## **Our view**

**40.** We agree with the Welsh Government’s view that the Bill makes provision within the devolved competence of the Senedd and therefore the consent of the Senedd is required.

**41.** Stakeholders have raised significant concerns about the level of detail in the Bill relating to the role of the NAAB, its membership, governance, independence and accountability. We agree with them that detailed discussions between the UK and Welsh Governments are needed as to how the NAAB will engage with Wales and take into account the areas devolved to the Welsh Government that are fundamental to any assessment process.

**42.** Stakeholders have also raised concerns about whether the provisions in the Bill would undermine the arrangements already in place for age assessments in Wales.

**Conclusion 1.** We believe the Senedd should not give its consent to the inclusion of clause 49 in the Bill on the basis that there are already processes in place for age assessments in Wales, and the Bill would risk undermining them.

**43.** We note that the UK Government does not agree that the Senedd’s consent is required. We recognise, therefore that it is possible that even if the Senedd withholds its consent, the Bill could proceed as drafted. On that basis, it is important to consider what the implementation of this provision might mean for Wales.

**Recommendation 1.** The Minister for Social Justice should provide further information about what preparations are being made by Welsh Government and devolved Welsh authorities for the implementation of clause 49 in respect of Wales should the Bill be passed as drafted.

## **Clause 51: Use of scientific methods in age assessments**

**44.** Clause 51 provides the Secretary of State with the power to make regulations specifying the use of scientific methods of age assessment, and for a decision-maker to be able to take a negative credibility inference from a refusal to comply with a request to undergo a scientific age assessment, without good reason.

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<sup>25</sup> Letter from the Minister for Social Justice: 3 February 2022

## The UK Government's position

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45. In a media statement announcing the establishment of a Scientific Advisory Committee (SAC) to advise on methods for age assessment, the UK Government said that scientific methods are used in other countries to assess age:

*"For example, Finland and Norway take radiographs to examine the development of teeth and the fusion of bones in the wrist. In both countries, two certified experts will carry out the age assessment and must jointly agree on the person's age. In France, X-rays are taken to examine the fusion of the collar bone, alongside dental and wrist X-rays, while in Greece, dental X-rays are used alongside social worker assessments."*<sup>26</sup>

46. The statement noted that the SAC would be:

*"...looking at a range of scientific methods for estimating age, and will be considering their accuracy and reliability, as well as ethical and medical issues. They will report their findings directly to the Home Office Chief Scientific Adviser to support her in advising Ministers on appropriate scientific methods for age estimation."*<sup>27</sup>

## The Welsh Government's position

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47. The LCM states that the Welsh Government's view is that the legislative consent of the Senedd is required for this provision because it impacts the devolved area of social care and confers power on the Secretary of State to make regulations imposing functions on devolved Welsh authorities.

48. In her letter dated 3 February 2022, the Minister for SJ confirmed that the Welsh Government is opposed to the use of medical examinations as determinants of age, as the science underpinning the determining of age is inconclusive and unclear:

*"Our view is that subjecting young people to often invasive medical examinations is morally wrong."*<sup>28</sup>

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<sup>26</sup> [Home Office to introduce scientific methods for assessing the age of asylum seekers: 5 January 2022](#)

<sup>27</sup> [Home Office to introduce scientific methods for assessing the age of asylum seekers: 5 January 2022](#)

<sup>28</sup> Letter from the Minister for Social Justice: 3 February 2022

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**49.** She also said that currently age assessment decisions made for immigration purposes are not binding on local authorities. However, under clause 53(5) of the Bill, a determination by the First Tier Tribunal of an appeal is binding on a local authority even where the appeal concerns a decision by the NAAB for immigration purposes:

*"This could lead to holistic and detailed assessments carried out in accordance with the Welsh Government Age Assessment Toolkit being overturned, on the basis of decisions which have been made based on evidence gathered using processes which are antithetical to the approach of the Toolkit, such as "scientific methods" which are highly contested and have wide margins of error. A Welsh local authority in such a position would be subject to two conflicting statutory duties.*

*The Bill will put the age assessment process on a separate statutory footing outside of the 2014 Act. A separate statutory footing which appears to be in conflict with the aims of the 2014 Act and the duty of local authorities under section 7(2) of that Act to have due regard to the UNCRC when exercising functions in relation to a child who may have needs for care and support."<sup>29</sup>*

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### **Use of scientific methods in age assessments**

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**50.** A number of respondents, including the Welsh NHS Confederation and RCN Wales, raised concerns about the use of scientific methods to determine age. The Royal College of Paediatrics and Child Health (RCPCH) say that the use of radiological assessment is "extremely imprecise"<sup>30</sup> and can only give an estimate within two years in either direction, therefore the use of ionising radiation for this purpose is inappropriate.

**51.** The BMA has "serious concerns" about the Bill's potential for ionising radiation to be used for assessing the age of asylum seekers.<sup>31</sup> The Royal College of Physicians (RCP) also has concerns, and strongly supports the view that healthcare professionals should not be using age assessment techniques on Unaccompanied Asylum Seeker Children:

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<sup>29</sup> Letter from the Minister for Social Justice: 3 February 2022

<sup>30</sup> LCM NBB 08: Royal College of Paediatrics and Child Health

<sup>31</sup> LCM NBB 02: BMA Cymru

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*"The use of ionising radiation for age assessment involves direct harms without any medical benefit to the individual and, as such, we do not believe it would be appropriate to expect doctors to participate in such a practice."<sup>32</sup>*

**52.** Public Health Wales has also said it will not support "so-called 'scientific' methods"<sup>33</sup> to assess age until such a time that compelling evidence is available:

*"Age assessment is an imprecise science and the benefit of the doubt must be granted, especially if welfare and access to essential services is to depend on this. Those who have been subject to stress/trauma with natural high steroid responses to these may appear older as impact on ageing process is accelerated. We have previously advised that methods such as dental examination, bone density and other previously suggested methods of scientific evaluation are not underpinned by robust and scientific evidence to merit an intervention that would be supported by Welsh partners."<sup>34</sup>*

**53.** The joint submission from the WLGA, ADSS Cymru and All Wales Heads of Children's Services points out that an incorrect age assessment for an unaccompanied minor can have serious consequences for their care and support and detrimental mental health implications, given the trauma these young people will have encountered in their home countries, and on their journeys to the UK:

*"Being subjected to intrusive methods of scientific age assessment, which does not provide an exact age, may be detrimental to their well-being, potentially unethical, and may not provide a 'silver-bullet' determination. An incorrect determination of the child as an adult will lead to young people being deprived of the support, care, and safeguarding procedures they are entitled to as children. Importantly, the significant margin of error in so-called scientific age assessment methods will increase the likelihood of children being detained in Immigration Removal Centres."<sup>35</sup>*

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<sup>32</sup> LCM NBB 03: Royal College of Physicians

<sup>33</sup> LCM NBB 06: Public Health Wales

<sup>34</sup> LCM NBB 06: Public Health Wales

<sup>35</sup> LCM NBB 13: WLGA, ADSS Cymru and All Wales Heads of Children's Services

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## Our view

**54.** There is already a nationally-agreed Toolkit in place in Wales to support the conducting of age assessments. The Toolkit does not recommend or support the use of medical examinations as determinants of age, and health professionals have said it would not be appropriate for them to engage in such practices.

**55.** We note that the medical professionals who have provided written evidence have concerns regarding the use of “scientific methods of age assessment” particularly given the absence of evidence of the effectiveness of such procedures. In addition, such methods have a wide margin for error, and can result in harm, for example as a result of using ionising radiation.

**Conclusion 2.** We believe the Senedd should not give its consent to the inclusion of clause 51 in the Bill on the basis that health and local authority stakeholders have told us that there is no evidence that “scientific methods of age assessment” are effective, and therefore we are not persuaded that conducting potentially intrusive medical procedures on children and young people who could already be traumatised by their life experiences can be justified.

## Clauses 52-55, and 80

**56.** The LCM also indicates that clauses 52-55 (relating to age assessment) and 80 (relating to transitional and consequential provision)<sup>36</sup> are within the Senedd’s legislative competence:

- Clause 52 provides the Secretary of State with the power to make regulations about the way in which age assessments are conducted under clauses 49 and 50.
- Clause 53 provides for a right of appeal to the First Tier Tribunal for an age disputed person who was determined, following an age assessment under Part 4, to be an age different to the age that they claimed to be.
- Clause 54 details procedural matters in relation to the provision of a right of appeal against age assessment decisions of people subject to immigration control.
- Clause 55 details the process for assessing new evidence that may come to light only after an age assessment has been made, including cases where the individual has been through the appeal process.

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<sup>36</sup> The LCM describes this clause as clause 79. However, after amendments were made to the Bill at Report Stage in the House of Commons, it was renumbered as clause 80.



- Clause 80 provides that the Secretary of State may by regulations make such transitional, or temporary provisions as the Secretary of State considers appropriate in relation to the provisions of this Bill coming into effect. Subsections 2 and 3 enable the Secretary of State to make regulations making such provision as the Secretary of State considers appropriate in consequence of the Bill. Such provision may amend, repeal or revoke any enactment, including a Measure or Act of the Senedd and any instrument made under a Measure or Act of the Senedd.

## Our view

**57.** The provisions in clauses 52-55 and clause 80 give effect to the substantive provisions in clauses 49 and 51 relating to age assessments and the use of scientific methods in age assessments. As we do not support the inclusion in the Bill of clauses 49 and 51, we do not support the inclusion of these clauses either.

**Conclusion 3.** We believe the Senedd should not give its consent to the inclusion of clauses 52-55 and 80 in the Bill.

## 4. Other issues

### Mental health

**58.** Both the Royal College of Psychiatrists (RCPsych) and BMA Cymru Wales (BMA) have raised concerns about the ability of asylum seekers with mental health problems to access suitable assessment and treatment.

**59.** The RCPsych says that:

*"...as a group, asylum seekers are an inherently vulnerable population, having fled persecution, conflict, and human rights violations. They are likely to have experienced adverse events and multiple traumatic bereavements and separations – both in their country of origin and during their journey to the UK. They have a high prevalence of mental health problems including trauma-related symptoms, post-traumatic stress disorder (PTSD), complex PTSD, depression, and anxiety disorders. Some are at high risk of self-harm and suicide, and substance misuse."<sup>37</sup>*

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<sup>37</sup> LCM NBB 01: Royal College of Psychiatrists

**60.** Further, it states that:

*"... it is likely that the proposed changes will adversely impact the mental health of a group of people with pre-existing vulnerabilities and complex needs. Such people are already more likely to experience discrimination and face barriers to accessing suitable mental healthcare services in a timely and appropriate manner. Together this would lead to an increase in morbidity across all settings."<sup>38</sup>*

**61.** This view was supported by the RCP.

**62.** According to the BMA's evidence, under the Bill refugees who arrive in the UK by an irregular route risk being given temporary asylum status. People holding this status would have limited rights to settlement in the UK and to reunification with family who remain overseas. Those with temporary protection status would also be under No Recourse to Public Funds (NRPF) conditions. It said that evidence has shown that individuals under NRPF conditions are prevented from receiving adequate income and housing, which can force families into destitution, further exacerbating health inequalities in the UK:

*"Extended periods of uncertainty faced by asylum seekers in the UK and the NRPF condition already contribute to poor health. Increasing the uncertainty under which people who have fled violence and trauma live will only increase their psychological distress, with the potential to create or compound underlying physical conditions linked to chronic stress, anxiety and depression."<sup>39</sup>*

**63.** Evidence from Public Health Wales states that the definition of a 'child' in terms of traumatised people is complex and the transition from children to adult mental health services may not reflect that person's social, emotional and educational attainment:

*"It is simply not clear cut in terms of the experience of these young people to define some as a child one day and an adult the next."<sup>40</sup>*

**64.** It also suggests that the Bill does not make it clear as to how the mental health and wellbeing of children will be protected during the assessment process, pointing to the mental

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<sup>38</sup> LCM NBB 01: Royal College of Psychiatrists

<sup>39</sup> LCM NBB 02: BMA Cymru

<sup>40</sup> LCM NBB 10: Welsh NHS Confederation

deterioration, self-harm and suicidal ideation of young people being witnessed by clinical colleagues.

### **Our view**

**65.** We agree with stakeholders that the proposals for undertaking age assessments set out in the Bill could have a profound effect on the mental health and well-being of those involved, who may have already experienced significant trauma in their lives.

**Recommendation 2.** The Minister for Social Justice should provide assurances that appropriate mental health and wellbeing support will be made available to people affected by the use of scientific methods for age assessment, should such methods be applied in Wales.

### **Access to other services**

**66.** EYST Wales' evidence highlighted the potential impact on other services, if the NHS are to be responsible for aspects of the age assessment. Similarly, the Welsh NHS Confederation pointed out that some age assessments carried out by the Home Office have been subject to dispute, with inaccurate age assessment leading to a delay in the person being able to access the essential services they require:

*"This has implications for NHS resources as the opportunity to avoid escalation and more resource-intensive intervention is required to protect and improve the mental health of those who are age-disputed. Age assessment must then lead to a rapid and accurate decision so the age-disputed person can begin the process of integration."<sup>41</sup>*

**67.** We also received concerns over potential increased numbers of asylum seekers being placed in unsuitable accommodation and not having access to appropriate health assessment or screening for mental health issues as well as physical health issues:

*"The continued focus on the legitimacy and whether an individual is deserving of compassion and support on account of their age is a damaging and dehumanising position that values the life of one person over another. This has implications for public health in terms of protecting and improving health at the population level and*

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<sup>41</sup> LCM NBB 09: EYST Wales

*system leadership of health services who are trying to support and help all members of the community.*"<sup>42</sup>

## **Our view**

**68.** We share the concerns of stakeholders about the potential implications for individuals who are not able to get the right services, or whose access is delayed. We also recognise the potential impact on NHS resources if early intervention cannot be achieved, resulting in escalation and the need for more resource-intensive intervention.

## **Implications for local authorities and the NHS**

**69.** Evidence from NYAS Cymru states that local authorities automatically assume a corporate parenting responsibility for unaccompanied asylum-seeking children, regardless of whether their age is disputed at that time, and potentially invasive or traumatic procedures are not compatible with the role of a corporate parent. It says that a similar conflict exists for NHS colleagues, and NYAS Cymru has been campaigning for a 'do no harm' principle that extends across agencies to recognise and reduce the likelihood of traumatising or retraumatising young people with certain policies and decision-making.

**70.** RCN Wales raised concern that potential changes to age assessments at a UK level could place registered nurses at odds with their professional requirements under The Nursing and Midwifery Council (NMC) Code to always act in the best interests of people, and to always practise in line with the best available evidence:

*"Nurses are non-judgemental and follow an evidence-base approach to ask them to do otherwise would challenge their profession. Furthermore refugee or asylum seeker without recourse to public funds are amongst the most vulnerable people in society and registrants will bear some emotional burden for these decisions."*<sup>43</sup>

**71.** Concerns were also raised around the ability of healthcare providers to build trusting relationships with unaccompanied asylum-seeking children if the NHS is required to carry out any element of the age assessment. Public Health Wales told us that trusting relationships between health professionals and patients are a key enabler of access to health:

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<sup>42</sup> LCM NBB 10: Welsh NHS Confederation

<sup>43</sup> LCM NBB 12: RCN Wales

*"The Health Experiences of Asylum Seekers and Refugees in Wales (HEAR) report (PHW & Swansea University, 2019)<sup>44</sup> found that challenges to building trust between health professionals and people seeking sanctuary included suspicion by patients that health professionals might contact immigration authorities.*

*This will be entrenched if health professionals are part of an age assessment process overseen by the Home Office. Lack of trusting relationships will further encourage hesitancy in seeking healthcare or public health interventions such as vaccinations."<sup>45</sup>*

**72.** It suggested that involving the NHS in age assessments, which by definition have an element of judgement, would be counterproductive.

**73.** Evidence from EYST Wales raised concerns about the potential impact on the mental and emotional wellbeing of staff having to carry out the age assessments, and questioned whether they would be provided with appropriate training.<sup>46</sup>

**74.** Welsh NHS Confederation raised similar concerns about whether Health Board staff would be ethically prepared to be involved as it may not be in the best interest of the child to undergo an age assessment which would stand contrary to the 'Do Not Harm' principle. It questioned whether a Health Board would be contravening the UNCRC by 'requiring' a young person to comply with invasive testing before being able to access services, and said that Health Boards and local authorities would require clear guidance on the responsibilities to children and young people regardless of their status.<sup>47</sup>

**75.** In her letter of 3 February 2022, the Minister for SJ says that it is unclear whether Welsh NHS bodies will be expected to conduct the "scientific methods" assessment or whether this will be outsourced to private health providers:

*"If the NHS in Wales is expected to provide these assessments, this would place additional workload onto health boards who are already under significant pressure and remain severely impacted by the pandemic."<sup>48</sup>*

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<sup>44</sup> [The Health Experiences of Asylum Seekers and Refugees in Wales](#): March 2019

<sup>45</sup> LCM NBB 06: Public Health Wales

<sup>46</sup> LCM NBB: 09: EYST Wales

<sup>47</sup> LCM NBB 10: Welsh NHS Confederation

<sup>48</sup> Letter from the Minister for Social Justice: 3 February 2022

**76.** She also highlighted the potential for conflict between health professionals, NAAB and other local authorities where health professionals do not support the use of “scientific methods”.

### **Our view**

**77.** We recognise the concerns raised by health professionals about having to carrying out age assessment processes in direct conflict with their professional ethics to act in the best interests of the person. We note that in addition to putting such professionals into a difficult position, some stakeholders have suggested there could be implications for health professionals’ own wellbeing, as well as affecting their ability to build trust with a young person needing support. Further, we are concerned about the potential additional demands carrying out age assessment tests will have on an already stretched workforce.

## **5. Financial implications**

**78.** The LCM notes that the explanatory notes to the Bill do not provide any information about the financial costs imposed by the age assessment clauses, and adds:

*“However, in view of the so called “scientific methods” envisaged which would require health care equipment and health care professionals, there could be significant cost burdens imposed for Welsh local authorities and / or Welsh health bodies, by these clauses and regulations made under them”.<sup>49</sup>*

**79.** In her letter of 3 February 2022, the Minister for SJ confirms that the impact assessment conducted by the Home Office is “silent on the financial implications of this Bill.” However, she says there will clearly be financial implications in relation to the proposed use of “scientific methods” to assess age:

*“It is presumed this will only be done within a health setting, either commissioned from private healthcare or within the NHS. This could have direct costs for local authorities and consequential impacts on health service capacity.”<sup>50</sup>*

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<sup>49</sup> [Legislative Consent Memorandum: Nationality and Borders Bill](#)

<sup>50</sup> Letter from the Minister for Social Justice: 3 February 2022

**80.** Highlighting the potential for conflict between the views of social services officers who may deem a person to be a child with care and support needs and Home Office officers who deem the person to be an adult, she noted that:

*"This conflict would have financial consequences for the local authority who would be obligated to provide care and support if the 2014 Act assessments found this to be required but without the funding which the Home Office would normally provide to local authorities looking after unaccompanied asylum seeking children."<sup>51</sup>*

**81.** The Minister suggests that there is a likelihood of lengthy, costly legal challenge, and says that the Welsh Government will be seeking further information about the financial implications from Home Office if the Bill is passed.

### **Our view**

**82.** We agree with the Welsh Government view that there will inevitably be financial implications on local authorities and Welsh NHS bodies if this Bill is passed.

**Recommendation 3.** The Minister for Social Justice should seek assurances from the UK Government that any financial implications arising from the Bill will be met by the UK Government in line with the Statement of Funding Policy.

## **6. LCM process and procedure**

### **Scrutiny timetable**

**83.** Standing Order 29.4 provides that the Business Committee must normally refer LCMs to a committee or committees for scrutiny, and must establish and publish a timetable for consideration and reporting. On 7 December 2021, the Business Committee referred the LCM to the HSC and LJC Committees for consideration with a reporting deadline of 10 February 2022. The LCM was also referred to the CYPE Committee on 14 December. Although the reporting deadline did allow the minimum allocation of six sitting weeks, our last scheduled committee meeting of the autumn term took place on 2 December, so we did not have an opportunity to consider the LCM until 13 January 2022. This significantly limited the time available for us to gather evidence from stakeholders; we are very grateful to those stakeholders who were able to respond to our requests for evidence.

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<sup>51</sup> Letter from the Minister for Social Justice: 3 February 2022

**84.** What is not clear is why the Welsh Government did not lay an LCM in July in respect of the ‘placeholder clause’ relating to age assessment. This would have given the Senedd more time to explore the issues, even if an sLCM would then have been required after the Bill was amended.

**85.** As previously stated, we wrote to the Business Committee on 6 January 2022<sup>52</sup> to request an extension to the reporting deadline, on the basis that, at that point, the Welsh Government had not indicated when it would be tabling a debate on the LCM, and the meeting time available to us in the committee timetable would otherwise provide insufficient opportunities for us to seek and consider written evidence from the Welsh Government and from stakeholders. The Business Committee agreed our request, and extended the reporting deadline to 17 February 2022<sup>53</sup>. However, following notification by Welsh Government on 25 January that it intended to schedule a plenary debate on 15 February, Business Committee agreed to a revised reporting deadline of 15 February.<sup>54</sup>

## **Our view**

**86.** We have concerns about the increasing use of LCMs as a mechanism for legislating on matters that are devolved to Wales. Not only does this approach limit the ability of Senedd committees to undertake meaningful or detailed scrutiny of the potential implications that might arise from the specific policy, legislative and operational context in Wales, it also risks undermining the Senedd’s role as a primary law-making body in areas of devolved legislative competence. It does not, therefore, represent an optimal approach to legislating.

**87.** We have previously raised concerns about the time available for scrutiny of LCMs. The tight timescales severely limit the potential to gather evidence from stakeholders to inform our consideration of these important issues; the deadline meant we have again had to limit this to written evidence for this LCM. Such timescales also place considerable pressure on our stakeholders, at a time when the health and social care sector are already operating in extremely difficult circumstances.

**88.** Our report on the LCM for the Health and Care Bill<sup>55</sup> suggests that, as a matter of course, the maximum amount of time possible should be made available for scrutiny of LCMs and the

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<sup>52</sup> [HSC & CYPE Committees to Business Committee: 6 January 2022](#)

<sup>53</sup> [Revised timetable for consideration: January 2022](#)

<sup>54</sup> [Revised timetable for consideration: 25 January 2022](#)

<sup>55</sup> [Report on the Legislative Consent Memorandum for the Health and Care Bill](#)

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minimum allocation of six sitting weeks should only be applied when circumstances rule out the allocation of longer scrutiny periods and reporting deadlines.

**89.** It is not clear to what extent the Business Committee takes account of the committee timetable when setting LCM reporting deadlines. We have had to request extensions to the deadline for two LCMs with original deadlines set for committee meeting dates, which would have severely limited the time available to gather and consider evidence before reporting. We are grateful that our requests were agreed, but the initial uncertainty about the time available to us is not helpful when we are planning our scrutiny approach, and it takes administrative time to resolve.

**90.** As part of our response to the Business Committee review of committee timetable and remits, we have recommended that, when setting the reporting deadlines for LCM scrutiny, the Business Committee takes greater account of the interaction of reporting deadlines with the committee timetable. If the current fortnightly timetable is retained, the Business Committee should avoid, as far as possible, setting LCM reporting deadlines during weeks in which the relevant committee is meeting.