

Legislative Consent Memorandum

Nationality and Borders 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 Nationality and Borders Bill (“the Bill”) was introduced into the UK Parliament, House of Commons, on 6 July 2021. The Bill is available here: <https://bills.parliament.uk/bills/3023>
3. The Bill as introduced included a “placeholder clause” at clause 58, in relation to age assessment. Consideration of the Bill at Commons Committee Stage commenced on 21 September, concluding on 4 November. On 21 October, UK Minister Tom Pursglove tabled new clauses 48-56 to replace the original clause 58. Those amendments were agreed and made part of the Bill on 4 November.
4. Clauses 48-55 (excluding clause 50), relating to the age assessment of asylum seeking children and young people and clause 79 (power to make consequential provision) impact the non-reserved area of social care and therefore require the legislative consent of the Senedd.

Policy Objective

5. The UK Government’s stated objective is to seek to improve the framework for determining age, including through the use of scientific technology, to ensure they quickly identify vulnerable children needing support and address the safeguarding risks from adults posing as children.

Summary of the Bill

6. The Bill is sponsored by the Home Office. The Bill is a large, complex Bill, dealing mostly with reserved immigration matters. Many of the provisions will have a direct impact on matters where Welsh Ministers have devolved competence – such as community cohesion, migrant integration, and planning – but almost all of the Bill’s clauses are out of scope for a LCM
7. The Bill has three main stated objectives:
 - Make the [immigration] system fairer and more effective;
 - Deter illegal entry into the UK;
 - Remove from the UK those with no right to be here.
8. The Bill proposes wide-ranging changes to the UK’s immigration and asylum system, including by:

- Introducing a new temporary protection status for those who do not come directly to the UK or claim asylum without delay;
- Introducing accommodation centres for asylum seekers and refused asylum seekers;
- Requiring asylum seekers to present their complete asylum claim soon after arrival;
- Reforming nationality law to address historic anomalies;
- Altering modern slavery protections;
- Introducing tougher criminal offences for those attempting to enter the UK without leave;
- Providing additional powers to Border Force officials to disrupt entry to the UK;
- Increasing penalties for Foreign National Offenders who return to the UK in breach of a deportation order;
- Implementing an Electronic Travel Authorisation scheme;
- Introducing new powers to remove people to safe third countries;
- Introducing visa penalties on countries that do not cooperate on the removal of nationals;
- Amending the asylum appeals system to have a standardised minimum notice period for migrants to access justice prior to enforced removal.

Purpose of age assessments

9. The practice of assessing age is primarily carried out to determine access (or not) to children’s social services. It applies in relation to the arrival of unaccompanied asylum seeking individuals in the UK without proof of age documentation. The practice has developed over several decades and is supported by case law, notably the *R (B) v London Borough of Merton 2003*¹ judgment. Merton is the standard bearer for assessing age. It places the function with children’s social services and in summary:

“The Judge confirmed that the local authority “cannot simply adopt a decision made by UK Visas and Immigration”. The Judge also stated that assessments cannot be made on the basis of demeanour only; that a range of other factors must be taken in to account; there is a duty on decision makers to give reasons for their decisions; the child/young person must be allowed to participate; that two social workers must conduct the assessment together and where there is doubt about age, the child/young person must receive the ‘benefit of the doubt’.”

10. Since 2003, the case law has further developed around the age assessment function, most recently in relation to *AB v Kent County Council (2020) EWHC 109 (Admin)* which describes an amalgamation of the requirements in Merton and all subsequent case law.

¹ <http://www.bailii.org/ew/cases/EWHC/Admin/2003/1689.html>

11. On 24 March 2021, the UK Government published for consultation its New Plan for Immigration (NPfI). It set out proposals relating to the age assessment of unaccompanied asylum seeking children and young people. These related to the establishment of a National Age Assessment Board (NAAB); the making of Regulations by the Secretary of State in respect of procedures to be followed in the age assessment process; the use of scientific methods to establish age; and proposals to reform appeals arrangements.
12. Welsh Government responded to that consultation, setting out our long established policy position which informs the practice position based on case law and which articulates the age assessment function as resting with children's social services. For ease of reference a partial response is as set out below:

2a. " 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 and we treat the assessment of age as part of the 'what matters' assessment functions provided for in Part 4 of the Act. 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. The New Plan proposals as currently set out, do not recognise the devolved context therefore it is important for us 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 Welsh Senedd. And of course, any legislation UK Government creates is required to be informed by existing case law in this area, not least Merton but also, for example, AB v Kent County Council (2020) EWHC 109 (Admin).

2b. 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 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). The function of assessment is a core duty for social workers and the assessment of age is part of this. We do not support any diminution of the lead, authoritative role for social workers in this function and this includes legislating for officers without the required expertise, experience and skill in conducting these assessments. 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. We need to see detailed draft clauses to understand more about what you are trying to achieve and to enable a more detailed response.

...

2i. Finally, we wish to remind you that the 2014 Act brings in to Welsh domestic law compliance with the UNCRC. Welsh Ministers were clear in their Senedd election manifesto that they will 'continue to uphold the rights and entitlements of unaccompanied asylum seeking children.' 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 and any policy proposal which appears to diminish this statutory position is not one which we would support. This includes the large majority of those set out in the New Plan."

Current Welsh Government policy position

13. As set out in paragraph 12 above, 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.

15. In relation to 'scientific' methods of determining age, we have extant policy² on the use of medical reports in age assessments:

"This Toolkit does not recommend or support the use of medical examinations as determinants of age. The science underpinning the determining of age is inconclusive, unclear and in any event, subjecting young people to invasive medical examinations is judged to be morally wrong".

Provisions in the Bill for which consent is required

16. The Senedd has legislative competence in relation to social care in Wales including the exercise of Welsh local authority social care functions. 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).

Clause 48 - Interpretation of Part etc.

17. This clause provides interpretation for Part 4 of the Bill relating to age assessments. This includes defining "relevant children's legislation" to include Senedd legislation that confers corresponding functions on local authorities.

² <https://gov.wales/unaccompanied-asylum-seeking-children-age-assessment-toolkit> Page 27

18. It is our view that the legislative consent of the Senedd is required for this provision because it impacts the devolved area of social care.

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

19. This clause requires a local authority to refer an age-disputed person to the “designated person” (the National Age Assessment Board (NAAB)) for an age assessment, or 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.

20. Subsection (4) provides that if the local authority conducts its own age assessment or informs the Secretary of State that it is satisfied as to the person's age, it must provide the Secretary of State with such evidence as the Secretary of State reasonably requires for the Secretary of State to consider the local authority's decision.

21. Subparagraph (2)(a) makes it clear that clause 49 applies to decision making as to whether and how to exercise Welsh local authorities' functions in the devolved area of assessment of needs for and provision of care and support under the Social Services and Well-being (Wales) Act 2014.

22. Subsection (7) provides that a determination by the designated person is binding on a Welsh local authority.

23. It is our view 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.

Clause 51 - Use of scientific methods in age assessments

24. This clause enables the Secretary of State to make regulations specifying so called “scientific methods” that may be used for the purposes of age assessments conducted under clause 49 or clause 50. The methods may include, examining or measuring parts of the body via imaging technology (such as x-ray) and taking samples to examine DNA. Subsection (7) provides that if a person refuses to consent (or their parent/guardian refuses) without reasonable grounds this will damage the person's (or parent/guardians) credibility. The section does not prevent the use of a scientific method that is not a specified method for the purposes of an age assessment under clause 49 (or clause 50) if the NAAB or local authority considers the method appropriate and consent is given, however refusing consent for the use of such methods will not be considered to damage credibility.

25. It is our view 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.

Clause 52 - Regulations about age assessments

26. This clause enables the Secretary of State to make regulations about age assessments under clause 49 or 50. These regulations could establish the processes for age assessment which must be followed by local authorities, circumstances where 'abbreviated age assessments' may be appropriate, protections and safeguarding measures, required qualifications of the person conducting age assessments, procedures for scientific methods and consequences of non-compliance.
27. The regulations may also make provision about how and when a local must inform the Secretary of State.
28. It is our view 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.

Clauses 53 - Appeals relating to age assessments

29. This clause relates to appeals where an age assessment is conducted under clause 49 or clause 50 by a Local Authority or the NAAB and the Local A or NAAB decides that the person is a different age to that claimed.
30. In such case the person may appeal to the First-Tier Tribunal. On appeal the Tribunal must determine the person's age on the balance of probabilities and assign the person a date of birth.
31. A determination by the Tribunal is binding on a Local Authority that has exercised or may exercise functions under relevant children's legislation (in Wales the Social Services and Well-being (Wales) Act 2014) in relation to the person.
32. It is our view that the legislative consent of the Senedd is required for this provision because it impacts the devolved area of social care.

Clause 54 - Appeals relating to age assessments: supplementary

33. This clause relates to the procedural provision regarding the appeals process under clause 53. Furthermore this clause gives the First Tier Tribunal the power to grant interim relief.
34. It is our view that the legislative consent of the Senedd is required for this provision because it impacts the devolved area of social care.

Clause 55 - New information following age assessment or appeal

35. This clause makes provision about the situation where new information comes to light after an age assessment or an appeal, allowing the NAAB or LA to conduct

a further assessment (which would be subject to further appeal) if the information appears compelling.

36. It is our view that the legislative consent of the Senedd is required for this provision because it impacts devolved matters and imposes functions on devolved Welsh authorities.

Clause 79 – transitional and consequential provision

37. This clause confers clause 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 Act. 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.

38. It is our view that the legislative consent of the Senedd is required for this clause as it impacts the devolved area of social care.

Financial implications

39. The explanatory notes to the Bill do not provide any information about the financial costs imposed by the age assessment clauses. 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.

Conclusion and recommendation

40. As set out in paragraphs 16-38 above, 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 consider that it is appropriate for this provision to be made in relation to Welsh social care in this Bill.

Jane Hutt MS

Minister for Social Justice

6 December 2021