

Legislative Consent: Illegal Migration Bill

June 2023

1. Background

1. This report considers the Welsh Government's Legislative Consent Memorandum (the LCM)¹ and Supplementary LCM (the SLCM)² on the Illegal Migration Bill (the Bill). The Bill's long title states its purpose is to make provision:

“for and in connection with the removal from the United Kingdom of persons who have entered or arrived in breach of immigration control; about detention for immigration purposes; about unaccompanied children; about victims of slavery or human trafficking; about leave to enter or remain in the United Kingdom; about citizenship; about the inadmissibility of certain protection and certain human rights claims relating to immigration; about the maximum number of persons entering the United Kingdom annually using safe and legal routes; and for connected purposes.”³

2. 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.

¹ Welsh Government, [Legislative Consent Memorandum, Illegal Migration Bill](#), 31 March 2023

² Welsh Government, [Supplementary LCM, Illegal Migration Bill](#), 26 May 2023

³ UK Parliament, [Illegal Migration Bill](#)



- 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 Legislative Consent Memoranda

3. The Welsh Government laid an LCM on the Bill on 31 March 2023 in relation to clauses 19 and 20 of the Bill. Following amendments made to the Bill during its passage through the House of Commons, on 26 May 2023 the Welsh Government laid an SLCM relating to clauses 3, 55 and 56 of the amended Bill.

Approach to scrutiny

4. We worked jointly with the Children, Young People and Education Committee to gather written evidence. On 22 May we wrote to 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.⁵ 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.⁶

⁴ UK Parliament, [Explanatory Notes – Illegal Migration Bill](#)

⁵ Welsh Parliament, [‘Joint letter from the Children, Young People and Education Committee and the Equality and Social Justice Committee to Stakeholders’](#), 22 May 2023

⁶ Welsh Parliament, [‘Joint letter from the Children, Young People and Education Committee and the Equality and Social Justice Committee to the Minister for Social Justice and Chief Whip and the Deputy Minister for Social Services’](#), 22 May 2023

5. Annex 1 lists the organisations that responded. The Minister for Social Justice (“the Minister”) responded on 7 June 2023.⁷

2. Overview of provisions for which consent is sought

Clause 3 – Unaccompanied Children

6. Under clause 3 of the Bill, the Secretary of State has a power to remove unaccompanied children who have entered the UK in breach of certain immigration rules. Clause 3 was amended by the Commons 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.⁸

7. 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.

8. Clause 3 of the Bill as originally drafted, conferred a regulation making power 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 – transfer and accommodation of children

9. Clauses 15 to 20 collectively relate to the provision of accommodation for unaccompanied migrant children, transfers of children between

⁷ [Correspondence between the Minister for Social Justice and Chief Whip and the Equality and Social Justice and Children and Young People Committees regarding the UK Government’s Illegal Migration Bill](#)

⁸ See the [Illegal Migration Bill \[As brought from the Commons\]](#)

accommodation provided by the Home Office and accommodation provided by local authorities, and transfers of children from one local authority to another.

10. Clause 19 confers regulation making powers on the Secretary of State to extend the provisions in clauses 15-18 to Wales. There is no requirement for the UK Government to obtain the consent of the Senedd or Welsh Ministers to do so.

11. 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.

Clause 55 and 56 – age assessments

12. New clauses 55 and 56 relate to age-assessments for persons arriving in the UK in breach of immigration rules.

13. Clause 55 removes the ability for such persons to appeal an age assessment decision made by a relevant authority (such as an immigration officer or the Secretary of State). The clause also states that a judicial review of the decision does not prevent the exercise of the duty (or power) of removal under the Bill.

14. 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.

3. Views of interested parties

The UK Government's view

On whether the Senedd's legislative consent is required

15. The explanatory notes state that the UK Government believes "*the provisions in the Bill do not relate to matters within the legislative competence of Senedd Cymru.*"⁹

⁹ UK Parliament, [Explanatory Notes – Illegal Migration Bill](#), page 10

16. The UK Government stated on 11 May 2023 that it “*is satisfied that the provisions of the bill are capable of being applied compatibility with the Convention rights.*”¹⁰

On policy matters

17. In policy terms, the Bill’s stated objectives are 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.¹¹

18. The UK Government set out additional contextual points:

- 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.
- 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.
- 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.¹²

¹⁰ UK Government, [Illegal Migration Bill: overarching factsheet](#), 11 May 2023

¹¹ UK Parliament, ‘[Illegal Migration Bill: Explanatory notes](#)’, page 6

¹² UK Government, ‘[Illegal Migration Bill: Explanatory notes](#)’, page 7 - 8

The Welsh Government's view

On whether the Senedd's legislative consent is required

19. The Welsh Government believes that clauses 3, 19, 20, 55 and 56 require the legislative consent of the Senedd.¹³

20. 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 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 2.¹⁴

21. Clause 19 could extend the provisions relating to unaccompanied migrant children in clauses 15-18, to Wales. The Welsh Government argues that, when considered together, the powers in clauses 15-18 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 (the 2014 Act).¹⁵

22. The Welsh Government argues that legislative consent is required for clauses 19 and 20 on the basis that social care, including the transfer of unaccompanied children between local authorities, is within the Senedd's competence. The LCM acknowledges that the clauses have “*a reserved immigration purpose*”, but that “*due to the impact on the devolved area of social care*” both have a dual purpose which therefore requires the Senedd's consent.¹⁶

23. 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 what the Bill refers to as ‘scientific age assessments’. The Welsh Government argues that these clauses conflict with the requirements and

¹³ Welsh Government, [Legislative Consent Memorandum, Illegal Migration Bill](#), 31 March 2023; Welsh Government, [Supplementary LCM, Illegal Migration Bill](#), 26 May 2023

¹⁴ Welsh Government, [‘Supplementary LCM, Illegal Migration Bill’](#), 26 May 2023, pages 4-5

¹⁵ Welsh Government, [‘LCM: Illegal Migration Bill’](#), 31 March 2023, pages 4-5

¹⁶ Welsh Government, [‘LCM: Illegal Migration Bill’](#), 31 March 2023

processes set out in the 2014 Social Services Act and the Welsh Government's Age Assessment Toolkit.¹⁷

24. 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*”.¹⁸

On policy matters

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

26. The Welsh Government argues that the Senedd should withhold its consent, principally on the grounds that the Bill “*does not recognise the devolved context*”.¹⁹ Currently, unaccompanied asylum-seeking children are treated as looked after children in line with the 2014 Act. The 2014 Act also provides a range of assessment functions to help councils to consider the care and support needs of children.²⁰ The Welsh Government argues that in conferring powers on the Secretary of State (clause 19) to impose functions on devolved authorities the Bill:

“could potentially undermine the requirements placed on Welsh local authorities set out in the 2014 Act, thereby treating asylum seeking children differently to other Welsh children.”²¹

27. Adding that it cannot support:

“any diminution of the lead, authoritative role for social workers in assessing what is in the best interests of children in their care.”²²

28. The Welsh Government raises concerns relating to the age-assessment provisions contained in clauses 55 and 56 stating that:

“[...] recent reports suggest that around two thirds of initial age assessment decisions are later found to be incorrect,” and

¹⁷ Welsh Government, ‘[Supplementary LCM, Illegal Migration Bill](#)’, 26 May 2023, pages 5-6

¹⁸ Welsh Government, ‘[Letter from the Minister for Social Justice and Chief Whip](#)’, 7 June 2023

¹⁹ Welsh Government, ‘[LCM: Illegal Migration Bill](#)’, 31 March 2023 page 4

²⁰ Welsh Government, ‘[Supplementary LCM, Illegal Migration Bill](#)’, 26 May 2023, page 3

²¹ Welsh Government, ‘[Supplementary LCM, Illegal Migration Bill](#)’, 26 May 2023, page 3

²² Welsh Government, ‘[Supplementary LCM, Illegal Migration Bill](#)’, 26 May 2023, page 4

*noted the: “very significant detrimental impacts which could be caused by an incorrect decision being reached”.*²³

29. In relation to the Bill more generally, the Welsh Government state that the Bill’s explanatory notes do not provide information regarding the financial costs imposed by the clauses that the Welsh Government believes require the consent of the Senedd. The LCM highlights that:

*“in view of the potential for children to be moved in and out of Welsh local authority care (with the mental health impact on children), there could be significant cost burdens imposed for Welsh local authorities and /or Welsh health bodies, by these clauses and regulations made under them.”*²⁴

30. In relation to human rights, the Welsh Government highlights that the UK Government has failed to confirm that the Bill is compatible with the European Convention:

*“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.”*²⁵

31. The Minister also criticised the lack of engagement by the Home Office stating that: *“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.”*²⁶ The Welsh Government does not recommend granting legislative consent to the Bill.²⁷

²³ Welsh Government, [Supplementary LCM, Illegal Migration Bill](#), 26 May 2023

²⁴ Welsh Government, [‘LCM: Illegal Migration Bill’](#), 31 March 2023, page 5

²⁵ Welsh Government, [‘Letter from the Minister for Social Justice and Chief Whip’](#), 7 June 2023

²⁶ Welsh Government, [‘Letter from the Minister for Social Justice and Chief Whip’](#), 7 June 2023

²⁷ Welsh Government, [‘LCM: Illegal Migration Bill’](#), 31 March 2023; [‘Supplementary LCM, Illegal Migration Bill’](#), 26 May 2023

4. Responses from stakeholders

32. A majority of stakeholders were opposed to the Bill and argued that the Senedd should withhold its legislative consent.²⁸

33. The feedback received primarily focused on policy (rather than legal) matters and identified several concerns including:

- The lack of compatibility with human rights of the Bill's provisions;
- The potential implications of the legislation for children's rights, particularly the Rights of Children and Young Persons (Wales) Measure 2011; and
- the Bill's potential to undermine the Welsh policy and legislative context particularly in respect of social services and the 2014 Social Services Act.*

34. Incompatibility with human rights were highlighted by a majority of stakeholders²⁹ including Children in Wales:

"The Bill does not provide the necessary assurances that children arriving by boats to the UK and subsequently dispersed should and will be subject to robust assessments of need arrangements guided by the best interests of the child principle, or receive the same level of care, support and protection as is currently provided to other UASC (unaccompanied and separated asylum-seeking children) through existing Welsh statutory arrangements."

They argue that in the absence of an *"independent professional guardianship system for UASC (unlike Scotland), it is unclear how they will get their voices heard and be adequately represented legally."*³⁰

²⁸ See papers to note on 12 June 2023: [Bevan Foundation](#); [British Red Cross](#); [Children in Wales](#); [National Youth Advocacy Service Cymru](#); [Legal Centre Wales-Bevan Foundation-Children's Society joint submission](#)

* Please note that Care Inspectorate Wales responded to say that they were unable to comment on UK Government proposals outside formal consultation mechanisms

²⁹ [Bevan Foundation](#); [British Red Cross](#); [Children in Wales](#); [National Youth Advocacy Service Cymru](#); [Legal Centre Wales-Bevan Foundation-Children's Society joint submission](#); [Welsh Local Government Association \(WLGA\)](#);

³⁰ [Children in Wales](#)

35. Similarly, in their joint submission, Bevan Foundation, Children’s Legal Centre Wales and the Children’s Society urged the Welsh Government to establish a guardianship scheme for unaccompanied children to provide advice and advocacy.³¹

36. All stakeholders spoke of potential implications for children with several noting the lack of a Children’s Rights Impact Assessment to accompany the legislation.³²

37. The Children’s Commissioner for Wales described the implications for children’s rights as “*significant and wide-ranging*” and a “*violation*” of the UN Charter on the Rights of Children (UNCRC).³³ Several referred to the report by the UNCRC Committee on the Rights of the Child which called for the Bill to be amended “urgently” on the basis that it currently violates children’s rights and the UK’s international obligations.³⁴

38. Several stakeholders argued that the Bill would violate the Welsh Government’s “*child first, migrant second*” approach to refugee and asylum-seeking children.³⁵ The British Red Cross called for the Welsh Government to explore opportunities “*to uphold and enhance protections for unaccompanied children arriving in Wales,*” thus “*mitigating the negative impacts*” of the Bill.

39. In terms of the role of local authorities, stakeholders including the WLGA, Bevan Foundation and Children in Wales expressed concerns that clauses 15 – 20 of the Bill undermine legal duties set out in the 2014 Act on social services. such as the duty to carry out needs assessments.³⁶ The Children’s Commissioner described these provisions as “*deeply troubling*” and argued that in treating asylum-seeking children differently to those looked after by local authorities, it would contravene Article 22 (refugee children) of the UNCRC.³⁷

40. The WLGA highlighted concerns regarding the operation of the National Transfer Scheme and that they “*did not believe that the current approach*

³¹ [Legal Centre Wales-Bevan Foundation-Children’s Society joint submission](#)

³² [Bevan Foundation; British Red Cross; Children in Wales; National Youth Advocacy Service Cymru; Legal Centre Wales-Bevan Foundation-Children’s Society joint submission;](#)

³³ [Children’s Commissioner for Wales](#)

³⁴ [Bevan Foundation; Children’s Commissioner; Office of the High Commissioner for Human Rights, Concluding observations on the combined sixth and seventh reports of the United Kingdom of Great Britain and Northern Ireland*](#)

³⁵ [Bevan Foundation; Children in Wales; British Red Cross; NYAS Cymru](#)

³⁶ [Bevan Foundation; British Red Cross; Children in Wales; National Youth Advocacy Service Cymru; Legal Centre Wales-Bevan Foundation-Children’s Society joint submission; Children’s Commissioner; WLGA](#)

³⁷ [Children’s Commissioner](#)

always maintains the best interest of the child". They also called on the Home Office to ensure "*better communication and more effective engagement and planning in relation to the procurement and use of accommodation in Wales*."³⁸

5. Our view

General comments

The LCM process set out in Standing Orders does not ask us to explore the merits of UK Bills in general terms. However, in considering this Bill, we think it is important to preface our comments by remembering the people at the centre of this issue. Individual men, women, and children who will each have their own reasons or circumstances that lead them to attempt often perilous journeys. Some will be victims of criminal gangs and people traffickers; others will have fled war and persecution and made the journey of their own volition. While we share the desire to end dangerous channel crossings and the tragic losses of life happening in the English Channel, it is vital that we seek to do this in a way that is consistent with our rights and values.

Whether legislative consent is required

We agree that the purpose of clauses 19, 20, 55 and 56 relate to social care, which is a devolved matter. Furthermore, we note that clause 3 would empower the Secretary of State to amend enactments within the Senedd's legislative competence without the Senedd's consent. A majority of the Committee agree with the Welsh Government that clauses 3, 19, 20, 55 and 56 require the Senedd's legislative consent. One Member disagreed and argued that the provisions in the Bill build on the existing burden sharing provisions in respect of unaccompanied asylum-seeking children set out in the Immigration Act 2016.

Conclusion 1. A majority agree that clauses 3, 19, 20, 55 and 56 require the Senedd's legislative consent. One Member disagreed.

On whether the Senedd should grant legislative consent

There are significant concerns regarding the Bill in policy terms, particularly the way in which it interacts with social care and support provided by local authorities, and other devolved public bodies, to unaccompanied and asylum-

³⁸ WLGA

seeking children. We note that if the provisions of clauses 15 – 18 were extended to Wales they could undermine the role of local authorities in carrying out assessments of need under the Social Services and Well-being (Wales) Act 2014. Furthermore, in treating unaccompanied and asylum-seeking children differently to other children these clauses may violate the UNCRC and the rights-based approach that is central in Wales. Other established policy approaches adopted in Wales including “child first, migrant second” and the Welsh Government’s ambition for Wales to be a Nation of Sanctuary could also be in jeopardy as a result.

It is inappropriate for the UK Government to legislate to change policy in devolved areas, especially without extensive engagement and agreement between governments and without adherence to the Senedd’s legislative consent procedure. A majority of the Committee urge the Senedd to withhold legislative consent in relation to the Illegal Migration Bill. One Member disagreed.

Recommendation 1. A majority of the Committee recommends that the Senedd should withhold legislative consent in relation to the Illegal Migration Bill. One Member disagreed.

In addition, another Member objected in principle to any legislation affecting devolved Welsh matters being enacted via a UK Government Bill.

On other issues

It is likely that the Bill will proceed even if the Senedd withholds consent, not least given that the UK Government does not agree consent is required. It is important for the Welsh Government therefore to consider what implementation of the Bill might mean for Wales. The lack of a Children’s Rights Impact Assessment to accompany the Bill was a key concern of stakeholders. We believe that the Welsh Government should consider conducting an Impact Assessment on the impact of the Bill in Wales with a view to informing the devolved public sector’s policy response. Although we did not explore this issue thoroughly as part of this work, we think that the Welsh Government should consider full incorporation of the UNCRC into Welsh law and would welcome the Welsh Government’s latest position in relation to this.

Recommendation 2. The Welsh Government should conduct a Children’s Rights Impact Assessment on the Illegal Migration Bill and how its provisions

relate to Wales with a view to informing the Government's policy response. This should be completed by the end of October 2023 and shared with the Senedd.

Recommendation 3. The Welsh Government should consider full incorporation of the UNCRC into Welsh law and set out its latest position in response to this report, including how such a move would interact with the provisions of the Illegal Migration Bill should it come into force as anticipated.

Annex 1 – list of stakeholders who responded

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

Title	Date
British Red Cross	May 2023
National Youth Advocacy Service Cymru	June 2023
Bevan Foundation	June 2023
Children in Wales	June 2023
Legal Centre Wales, the Bevan Foundation and the Children's Society	June 2023
Children's Commissioner for Wales	June 2023
Care Inspectorate Wales	June 2023
Welsh Local Government Association	June 2023