

# Nationality and Borders Bill

## Legislative Consent Memorandum

February 2022

### 1. Introduction

#### The Bill

1. The Nationality and Borders Bill (the "Bill") was introduced in the House of Commons on 6 July 2021. The Bill is sponsored by the Home Office. The long title to the Bill is:

*"Make provision about nationality, asylum and immigration; to make provision about victims of slavery or human trafficking; to provide a power for Tribunals to charge participants where their behaviour has wasted the Tribunal's resources; and for connected purposes."*<sup>1</sup>

2. The Bill as introduced had an age assessment 'placeholder clause' (then clause 58). The UK Minister Tom Pursglove MP tabled new clauses 48-56 to replace the original placeholder clause during Commons Committee Stage. Those amendments were agreed and made part of the Bill on 4 November 2021.

3. The Bill had its first reading in the House of Lords on 9 December 2021. At the time of writing it is at Lords Committee Stage. The 9 December version of the Bill differs slightly from the amended version dated 4 November 2021. An additional set of explanatory notes to the Bill was published on 9 December.<sup>2</sup> The Explanatory Notes state that the aims of the Bill are to:

*"- increase the fairness of the system to better protect and support those in*

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<sup>1</sup> UK Parliament, '[Nationality and Borders Bill](#)', updated February 2022



*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>3</sup>

## **The Legislative Consent Memorandum (LCM)**

4. Under Standing Order 29, the Welsh Government must lay a LCM in relation to any Bill under consideration in the UK Parliament that makes provision in relation to Wales:

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

*(ii) which modifies the legislative competence of the Senedd."*<sup>4</sup>

5. The Welsh Government laid a Legislative Consent Memorandum (LCM) on the Bill before the Senedd on 6 December 2021.<sup>5</sup>

## **Timetable for Senedd scrutiny**

6. On 7 December, the Business Committee of the Senedd invited the Health and Social Care Committee and the Legislation, Justice and Constitution Committee to consider and report on the Welsh Government's Legislative Consent Memorandum. On 14 December, it agreed to also invite the Children, Young People and Education Committee to do so.<sup>6</sup>

7. Business Committee originally agreed that the committees should report to the Senedd by 10 February 2022. We wrote to the Business Committee on 6 January to request an extension to

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<sup>3</sup> UK Government, '**Nationality and Borders Bill: Explanatory Notes**', December 2021, page 4

<sup>4</sup> Welsh Parliament, '**Standing Orders of the Welsh Parliament**', December 2021, page 181

<sup>5</sup> Welsh Government, '**Legislative Consent Memorandum: Nationality and Borders Bill**', December 2021. The LCM was laid before the publication of the 9 December version of the Bill, and therefore reflects the version of the Bill dated 4 November.

<sup>6</sup> Welsh Parliament, '**Business Committee: Revised timetable for consideration: Legislative Consent Memorandum on the Nationality and Borders Bill**', January 2022

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the report deadline to 17 February so that we could seek further evidence to inform our conclusions and recommendations.<sup>7</sup> On 11 January the Business Committee agreed to that request. However, it revisited its decision on 25 January, and subsequently brought forward the deadline for all committees to consider and report on the Legislative Consent Memorandum to the morning of 15 February.<sup>8</sup>

## Our approach

**8.** We considered our approach to scrutiny of the LCM during our meeting of 13 January. We agreed that we would gather written evidence jointly with the Health and Social Care Committee. On 18 January, to request their views on a range of matters relevant to the LCM, we wrote to:

- the Minister for Social Justice, Jane Hutt MS<sup>9</sup>; and
- organisations in the field of children's health and social care, children's rights and those working with refugees and asylum seeker children.<sup>10</sup> Thirteen responses were received as set out at annex A of this report.

**9.** We considered the views of the Minister for Social Justice and of stakeholders during our meeting on 10 February 2022.

**10.** We have restricted our comments on the LCM and the provisions in the Bill to whether we believe that the Bill requires the legislative consent of the Senedd and the implications for children and young people in Wales. The LCM has also been referred to the Health and Social Care Committee. We are expecting that matters relating to the implications for the health and social care sectors will be addressed separately in the report of that Committee.

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<sup>7</sup> Welsh Parliament, '[Joint letter from the Chair of the Children, Young People and Education Committee and the Chair of the Health and Social Care Committee to the Llywydd and Chair of Business Committee](#)', 6 January 2022

<sup>8</sup> Welsh Parliament, '[Business Committee: Revised timetable for consideration: Legislative Consent Memorandum on the Nationality and Borders Bill](#)', January 2022

<sup>9</sup> Welsh Parliament, '[Joint letter from the Chair of the Children, Young People and Education Committee and the Chair of the Health and Social Care Committee to the Minister for Social Justice](#)', 18 January 2022

<sup>10</sup> Welsh Parliament, '[Joint letter from the Chair of the Children, Young People and Education Committee and the Chair of the Health and Social Care Committee to stakeholders](#)', 18 January 2022

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**11.** Officials supporting the Children, Young People and Education Committee and the Health and Social Care Committee have worked jointly to coordinate evidence gathering and support for Members.

## 2. Provisions in the Bill for which consent is sought

**13.** The vast majority of this Bill, which mainly deals with immigration and related matters, is outside the scope of the Senedd's powers. We consider below the clauses that the Welsh Government believes are within the legislative competence of the Senedd, and therefore require the Senedd's legislative consent.

**14.** All references to specific clauses in this section relate to the 9 December version of the Bill unless stated otherwise. The Welsh Government's LCM relates to the 4 November version of the Bill. We will indicate at the relevant points in the text where there is a discrepancy between the clause that this report refers to, and the clause that the LCM refers to.

### Part 4 - Age assessments

**15.** Part 4 of the Bill (Clauses 48-56) relate to age assessments. Age assessments are primarily carried out to determine whether someone can access children's social services and other services for children. Part 4 of the Bill applies in relation to the arrival of unaccompanied asylum seeking individuals in the UK who do not have documentation to prove their age.

**16.** At present, where there is doubt over a child's age, an assessment is undertaken by the Social Services departments of the local authority in which the child has 'presented'. The decision about age is taken at a devolved level in a process underpinned by legislation and statutory guidance.<sup>11</sup>

### Summary of clauses

***Summary of the clauses in Part 4 of the Bill that the Welsh Government believes are within the legislative competence of the Senedd.***

Clause	Provision
<b>Clause 48 - Interpretation of Part etc.</b>	Provides for the interpretation of Part 4. It defines terms such as "age-disputed person", to which clauses 48-56 will apply.
<b>Clause 49 - Persons subject to immigration control:</b>	Confers a power on the Secretary of State to conduct full age assessments on age-disputed persons (as defined in

<sup>11</sup> See the Welsh Government's age assessment toolkit for unaccompanied asylum seeking children, which reflects Welsh legislation such as the Social Services and Well-being (Wales) Act 2014: Welsh Government, '[Unaccompanied asylum seeking children: age assessment toolkit](#)', June 2021

<p><b>referral or assessment by local authority etc. [including the National Age Assessment Board (NAAB)]</b></p>	<p>clause 48), upon referral from a local authority in England, Wales and Scotland or a Health and Social Care Trust in Northern Ireland.</p> <p>The Bill sets out that age assessments carried out on behalf of the Secretary of State will be carried out by a "designated person", defined as "an official of the Secretary of State who is designated by the Secretary of State to conduct age assessments".<sup>12</sup> The Explanatory Notes to the Bill explain that this 'designated person' will be the National Age Assessment Board, which "will largely consist of a team of qualified social workers dedicated to age assessments."<sup>13</sup></p>
<p><b>Clause 51 - Use of scientific methods in age assessments</b></p>	<p>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.</p>
<p><b>Clause 52 - Regulations about age assessments</b></p>	<p>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.</p>
<p><b>Clause 53 - Appeals relating to age assessments</b></p>	<p>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.</p>
<p><b>Clause 54 - Appeals relating to age assessments: supplementary</b></p>	<p>Details procedural matters in relation to the provision of a right of appeal against age assessment decisions of people subject to immigration control.</p>
<p><b>Clause 55 - New information following age assessment or appeal</b></p>	<p>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.</p>

## The UK Government position

<sup>12</sup> UK Parliament, '[Nationality and Borders Bill](#)', updated February 2022, pages 54 - 55

<sup>13</sup> UK Government, '[Nationality and Borders Bill: Explanatory Notes](#)', December 2021, page 59

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

17. 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 [...]"*

*None of the provisions in the Bill involve the UK Parliament 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 Sewel Convention."<sup>14</sup>*

18. Annex B of the Explanatory Notes sets out an assessment of whether the Bill requires the consent of UK legislatures on a clause-by-clause basis.<sup>15</sup>

## On policy matters

19. In an announcement, Home Secretary Priti Patel MP stated that "The Nationality and Borders Bill will end many of the blatant abuses that have led to our immigration and asylum system being abused by those with no right to be in our country." She went on to argue that "single grown adult men, masquerading as children [...] go on to access children's services and schools through deception and deceit; putting children and young adults in school and care at risk."<sup>16</sup>

20. The UK Government's Explanatory Notes set out the following background information:

*"In recent years, the UK has typically received an average of 3,000 asylum claims from unaccompanied children. These claims make up approximately 9-10% of the overall number of asylum seekers that arrive in the UK each year. The vast majority of UASC [Unaccompanied Asylum Seeking Children] claim to be aged 16-17. In the year ending June 2021, 74% of UASC fell into this age range."<sup>17</sup>*

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<sup>14</sup> UK Government, '**Nationality and Borders Bill: Explanatory Notes**', December 2021, pages 18 - 19

<sup>15</sup> UK Government, '**Nationality and Borders Bill: Explanatory Notes**', December 2021, page 99

<sup>16</sup> UK Government, '**Home Office to introduce scientific methods for assessing the age of asylum seekers**', January 2022

<sup>17</sup> UK Government, '**Nationality and Borders Bill: Explanatory Notes**', December 2021, page 58

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**21.** The notes state that the Bill:

*"[...] seeks to strengthen the framework for determining the age of people seeking asylum. This includes establishing a decision-making function in the Home Office to allow the Secretary of State to conduct age assessments. The measures also create a right of appeal against age assessment decisions and look to establish a framework for the use of scientific technology in decision about age."*<sup>18</sup>

**22.** It goes on to state that "Government considers it is necessary and appropriate to provide decision-makers with a wider breadth of evidence on which to base their decisions." It adds that courts have recognised that "even comprehensive and thorough holistic age assessment can carry a significant margin of error", and that "The use of scientific methods offers the opportunity for more informed decision-making around an age disputed person's age."<sup>19</sup>

## **The Welsh Government position**

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

**23.** The LCM states that the legislative consent of the Senedd is required because, in the Welsh Government's view:

*"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) [now clause 80] impact the non-reserved area of social care and therefore require the legislative consent of the Senedd."*<sup>20</sup>

**24.** In her letter dated 3 February 2022, the Minister for Social Justice, Jane Hutt MS, wrote:

*"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".*

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<sup>18</sup> UK Government, '**Nationality and Borders Bill: Explanatory Notes**', December 2021, page 8

<sup>19</sup> UK Government, '**Nationality and Borders Bill: Explanatory Notes**', December 2021, page 60

<sup>20</sup> Welsh Government, '**Legislative Consent Memorandum: Nationality and Borders Bill**', December 2021, page 1

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*These provisions would apply to Welsh local authority decisions about whether and how to exercise their functions under the Social Services and Well-being (Wales) Act 2014.*"<sup>21</sup>

## **On policy matters**

**25.** Paragraphs 13 to 16 of the Legislative Consent Memorandum (LCM) set out the Welsh Government policy position.

*"(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>22</sup>

**26.** Paragraphs 16 to 38 of the LCM<sup>23</sup> and the Minister for Social Justice's letter<sup>24</sup> set out areas of particular concern for the Welsh Government:

- The Bill sets out that a local authority may refer an age-disputed person to a 'designated person' for an age assessment (clause 49). The UK Government intends that a **National Age Assessment Board (NAAB)** will fulfil the function of the 'designated person'. The Welsh Government argues that "Little information is

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<sup>21</sup> Welsh Government, '[Letter from the Minister of Social Justice to the Chairs of the Health and Social Care Committee and the Children, Young People and Education Committee](#)', 3 February 2022

<sup>22</sup> Welsh Government, '[Legislative Consent Memorandum: Nationality and Borders Bill](#)', December 2021, page 4

<sup>23</sup> Welsh Government, '[Legislative Consent Memorandum: Nationality and Borders Bill](#)', December 2021

<sup>24</sup> Welsh Government, '[Letter from the Minister of Social Justice to the Chairs of the Health and Social Care Committee and the Children, Young People and Education Committee](#)', 3 February 2022

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provided on the constitution" of the NAAB. It goes on to state that "The NAAB would diminish the lead, authoritative role for social workers in Wales".

- The Bill introduces the use of **scientific methods in age assessments** which may include examining or measuring parts of the body via imaging technology (such as x-ray) and taking samples to examine DNA (clause 51). The Welsh Government states that the Welsh policy position on age assessments "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." It is the Welsh Government view that "locally based social workers who have established a connection with a child and/or young person are best placed to assess age. These assessments are based upon a 'Merton compliant' (R(B) v London Borough of Merton, 2003) assessment where social workers are likely have spent considerable time understanding the capacity of the young person being assessed."
- The Bill **confers a power on the Secretary of State to make provision about age assessments**, including the processes for age assessment which must be followed by local authorities (clause 52). The Welsh Government states that it is "unclear as to 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 were responsible, this "would place additional workload onto health boards who are already under significant pressure". The Welsh Government provided statistics that it argues demonstrate that fewer individuals are determined to be under 18 when the Home Office carries out age assessments. The Welsh Government anticipates "a conflict between the views of social services officers who may deem the person to be a child with care and support needs and Home Office officers who deem the person to be an adult."
- A **determination by the First Tier Tribunal of an appeal is binding on a Local Authority**, even if the Local Authority may have exercised or may exercise functions under Welsh children's legislation (such as the Social Services and Well-being (Wales) Act 2014) (see clauses 53 and 54). The Welsh Government argues that "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.”

- The Welsh Government's "anticipated impact of centralised assessments is that children may be placed in accommodation which is meant only for adults, creating **safeguarding concerns**, risks of exploitation of children, and potential homelessness where children flee dangerous situations."
- The Welsh Government considers that **community cohesion** may be impacted because "young people are left in limbo in local-authority provided accommodation" because the Home Office will not recognise the child's age "and therefore will not accept the type of asylum application being submitted [...] children are likely to be increasingly isolated and have deteriorating mental health and other outcomes which will impact on community cohesion over time."

**27.** The Minister for Social Justice's letter states that "The Welsh Government has repeatedly raised concerns about the impact of this Bill on Wales and sought details of the clauses relating to age assessment from May 2021 onwards, without success."<sup>25</sup>

## Stakeholders' views

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### National Age Assessment Board (NAAB)

**28.** The National Age Assessment Board (NAAB) is the body referred to by the UK Government that will undertake full age assessments on age disputed persons on behalf of the Secretary of State. See 'Summary of clauses' on page 5 of this report for more information.

**29.** Stakeholders expressed concerns that the provisions in the Bill offer little detail about the role of the National Age Assessment Board (NAAB), such as its membership, independence and to whom it would be accountable (specifically, whether it would be accountable to the Welsh Government and the Senedd).

**30.** Stakeholders provided different interpretations of the Board. Some anticipated that it would be an England-only body, whereas others were concerned that it could overrule decisions carried out by Welsh local authorities.

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<sup>25</sup> Welsh Government, '[Letter from the Minister of Social Justice to the Chairs of the Health and Social Care Committee and the Children, Young People and Education Committee](#)', 3 February 2022

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**31.** In their joint submission, the Welsh Local Government Association (WLGA), Association of Directors of Social Services (ADSS) and the All Wales Heads of Children’s Services raised 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 argued that this is an extremely broad power and one that has the potential to undermine the critical role that local authority social workers play.<sup>26</sup>

**32.** The National Youth Advocacy Service (NYAS) raised concerns that the proposed NAAB will 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”. It said:

*“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>27</sup>*

**33.** Public Health Wales raised concerns that if the NAAB is an England-only body it could result in different approaches to the consideration of asylum applications in England and Wales. They go onto question whether Wales would be required to endorse a decision made by the NAAB if a child arrives in Wales as part of the national transfer scheme.<sup>28</sup>

**34.** Several stakeholders concluded that the provisions in the Bill fail to account or give consideration of the areas devolved to the Welsh Government. They agree that discussions are required to gain a clearer understanding of how the NAAB would work in practice.<sup>29</sup>

### **Making of regulations by the Secretary of State**

**35.** Most stakeholders, including Public Health Wales, the National Youth Advocacy Services (NYAS) Cymru, and the NHS Confederation expressed concerns about the impact of the Bill on the competence of the Welsh Government and its partners to implement the policies that

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<sup>26</sup> **Written evidence, LCM NBB 13 - WLGA, ADSS Cymru and All Wales Heads of Children’s Services**

<sup>27</sup> **Written evidence, LCM NBB 05 - NYAS Cymru**

<sup>28</sup> **Written evidence, LCM NBB 06 - Public Health Wales**

<sup>29</sup> See: **Written evidence, LCM NBB 12 - Royal College of Nursing Wales, Written evidence, LCM NBB 06 - Public Health Wales; Written evidence, LCM NBB 10 - Welsh NHS Confederation; Written evidence, LCM NBB 04 - The Fostering Network Wales; and Written evidence, LCM NBB 13 - WLGA, ADSS Cymru and All Wales Heads of Children’s Services**

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support the vision of a Nation of Sanctuary. Ethnic Minorities & Youth Support (EYST) Wales said:

*"We also welcome the Welsh Government's commitment to being an Antiracist Wales by 2030 as set out by their Race Equality Action Plan. Sadly this bill and its actions will undermine all of this good work and hope."*<sup>30</sup>

**36.** Some stakeholders suggested that 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. Children in Wales (with and on behalf of the UNCRC Monitoring group) wrote:

*"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>31</sup>

**37.** The joint submission from the WLGA, ADSS and All Wales Heads of Children's Services noted that, although the Social Services and Well-being Wales Act 2014 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 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*

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<sup>30</sup> **Written evidence, LCM NBB 09 - EYST Wales**

<sup>31</sup> **Written evidence, LCM NBB 11 - Wales UNCRC Monitoring Group**

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*representation of Wales or the impact of decision-making on Welsh devolved services.*<sup>32</sup>

**38.** It raised further concerns that the Bill could diminish the role of social workers who have the required expertise, experience, and skill conducting assessments, including abbreviated assessments. This was a particular fear in light of the recent court case (MA and HT) v Secretary of State for the Home Department where the Home Office recruited its own social workers to undertake assessments.<sup>33</sup>

**39.** The Welsh NHS Confederation stressed the need for conversations between the UK and Welsh Government 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>34</sup>

### **Use of scientific methods to establish age and proposals to reform appeals arrangements**

**40.** 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. Clause 52 provides the Secretary of State with the power to make regulations about the way in which age assessments are conducted.

**41.** Stakeholders representing health professionals shared similar concerns about the use of scientific methods. The NHS Confederation argued that until there is “compelling evidence” to support its reliability then it is “too imprecise to base access to essential services on its outcome”.<sup>35</sup> Public Health Wales state that they have previously advised that methods such as dental examination, bone density and other suggested methods are “not underpinned by robust and scientific evidence that would be supported by Welsh partners”.<sup>36</sup>

**42.** Some raised issues around the use of ionising radiation. The Royal College of Paediatrics and Child Health (RCPCH) noted that the use of radiological assessment is extremely imprecise

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<sup>32</sup> [Written evidence, LCM NBB 13 - WLGA, ADSS Cymru and All Wales Heads of Children’s Services](#)

<sup>33</sup> [Written evidence, LCM NBB 13 - WLGA, ADSS Cymru and All Wales Heads of Children’s Services](#)

<sup>34</sup> [Written evidence, LCM NBB 10 - Welsh NHS Confederation](#), paragraph 8

<sup>35</sup> [Written evidence, LCM NBB 10 - Welsh NHS Confederation](#), paragraph 6

<sup>36</sup> [Written evidence, LCM NBB 06 - Public Health Wales](#)

and can only give an estimate within two years in either direction; therefore its use for this purpose is inappropriate.<sup>37</sup>

**43.** Despite raising "serious concerns" with the UK Government about the Bill's potential for ionising radiation to be used, BMA Cymru notes that it continues to be an option for verifying the age of asylum seekers:

*"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>38</sup>*

**44.** Several stakeholders highlighted their views of the trauma that age disputed people could face as a result of adopting scientific methods. EYST described the measurement of body parts as "racist, ignorant and homogenous" and added that scientific methods would not take into account physical issues such as growth delays or disability.<sup>39</sup> The Fostering Network and National Youth Advocacy Service shared similar concerns:

*" 'Scientific methods' can be very invasive and traumatic for the individual. This is especially true for those who have suffered torture, inhuman and degrading treatment before arriving in Wales."<sup>40</sup>*

**45.** In their joint submission, the WLGA, ADSS and the All Wales Heads of Children's Services as well as the NHS Confederation noted that there is already an Age Assessment Toolkit in place in Wales.<sup>41</sup> None of the organisations represented by those submissions recommend or support the use of medical examinations to determine age.

**46.** Children in Wales (with and on behalf of the UNCRC Monitoring Group) expressed concerns that any refusal to consent to potentially invasive medical procedures would be taken into account when determining the credibility of an age-disputed individual. In their view, this

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<sup>37</sup> [Written evidence, LCM NBB 08 - Royal College of Paediatrics and Child Health](#)

<sup>38</sup> [Written evidence, LCM NBB 02 - BMA Cymru](#)

<sup>39</sup> [Written evidence, LCM NBB 09 - EYST Wales](#)

<sup>40</sup> [Written evidence, LCM NBB 05 - NYAS Cymru](#)

<sup>41</sup> [Written evidence, LCM NBB 13 - WLGA, ADSS Cymru and All Wales Heads of Children's Services](#) and [Written evidence, LCM NBB 10 - Welsh NHS Confederation](#), paragraph 6

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could force some children to undergo assessments for fear it would have a negative impact on their claim for asylum.<sup>42</sup>

### **UN Convention on the Rights of the Child**

**47.** Article 22 of the UNCRC states that if a child is a refugee or is seeking refuge, governments must make sure that they have the same rights as any other child.<sup>43</sup>

**48.** Several stakeholders expressed concerns that the Bill threatens the principle of the 'child first, migration second approach' which they say underpins the delivery of support to child asylum seekers in Wales.<sup>44</sup> The Rights of Children and Young Persons (Wales) Measure 2011 requires the Welsh Government to pay due regard to the United Nations Convention on the Rights of the Child (UNCRC) when exercising any their functions. Many stakeholders asserted that the Bill will undermine the UNCRC.

**49.** The Children's Commissioner stated that "As the Bill stands, I believe it will be detrimental to children's fundamental rights set out within the UNCRC." The submission goes on to state that the "Bill has the potential to undermine Welsh Minister's duty to uphold children's rights under the Rights of Children and Young Persons (Wales) Measure 2011".<sup>45</sup> Public Health Wales referenced the conclusions made by the Committee on the Rights of the Child which in 2017 confirmed that:

*"States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes" (Age Assessment Toolkit, 2021)."*<sup>46</sup>

**50.** Many stakeholders offered examples where they felt the proposals set out in the Bill undermines the UNCRC. Children in Wales (with and on behalf of the Wales UNCRC Monitoring Group) argued that "Article 1 of the UNCRC ensures that every child under 18 is entitled to all of the rights as prescribed regardless of their characteristics and circumstances. For

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<sup>42</sup> **Written evidence, LCM NBB 11 - Wales UNCRC Monitoring Group**

<sup>43</sup> UNICEF, '**The United Nations Convention on the Rights of the Child**', page 7

<sup>44</sup> See: **Written evidence, LCM NBB 06 - Public Health Wales; Written evidence, LCM NBB 07 - Children's Commissioner for Wales**, page 6; **Written evidence, LCM NBB 04 - The Fostering Network Wales**

<sup>45</sup> **Written evidence, LCM NBB 07 - Children's Commissioner for Wales**, page 4

<sup>46</sup> **Written evidence, LCM NBB 06 - Public Health Wales**

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unaccompanied children, age is a key determinant for being able to access support, protection and interventions to aid their recovery from trauma in line with Article 39".<sup>47</sup>

**51.** In a joint submission, the WLGA, ADSS Cymru and all the Heads of Children's Services said the Bill undermines the duty to act in the best interests of the child principle (Article 3) which:

*"[...] should be at the heart of any decision and, therefore, this must be considered in any age assessment system. The principal of Best Interests has also been incorporated into Welsh Government's Age Assessment Toolkit. 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>48</sup>

**52.** EYST highlight Article 22 which sets out that child refugees have the same rights as children born in the country they move to:

*"A child should not have to undergo "scientific methods" because they are seeking asylum when others do not. Children who are traumatised are protected and those seeking asylum should not be treated differently or physically discriminated against because of their circumstances."*<sup>49</sup>

**53.** The Children's Commissioner refers to Article 2 and the right to non-discrimination::

*"Some 'scientific methods' of assessment have been criticised for failing to recognise the different outcomes amongst diverse ethnicities; or the results are based upon studies within European/American populations. This could indirectly discriminate against some children, systematically placing them at an unfair disadvantage during the age assessment process."*<sup>50</sup>

**54.** The National Youth Advocacy Service (NYAS) Cymru said they were "unaware of any attempt to involve children and young people in the development of this legislation, as would reflect Article 12" and the right of the child to express his or her views in all matters affecting him

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<sup>47</sup> [Written evidence, LCM NBB 11 - Wales UNCRC Monitoring Group](#)

<sup>48</sup> [Written evidence, LCM NBB 13 - WLGA, ADSS Cymru and All Wales Heads of Children's Services](#)

<sup>49</sup> [Written evidence, LCM NBB 09 - EYST Wales](#)

<sup>50</sup> [Written evidence, LCM NBB 07 - Children's Commissioner for Wales](#), page 5

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or her, and to have those views taken into account “nor to enhance this right within any new processes or structures”.<sup>51</sup>

**55.** Other Conventions Rights raised by stakeholders included:

- right to Identity (Articles 1, 7 and 8);
- respect of dignity and right to integrity (Articles 3 and 37);
- rights to life survival and development (Article 6);
- right to identity; (Articles 1, 7 and 8);
- respect of dignity and right to integrity (Articles 3 and 37); and
- and Recovery from trauma and reintegration (Article 39).

**56.** The Welsh NHS Federation<sup>52</sup> and Children in Wales (with and on behalf of the Wales UNCRC Monitoring Group)<sup>53</sup> shared concerns that the UK Government did not appear to carry out a Child Rights Impact Assessment for the Bill. Children in Wales explained that in order to comply with the Rights of Children and Young Persons (Wales) Measure 2011 Welsh Ministers are required to undertake a “a comprehensive Child Rights Impact Assessment (CRIA)”. However:

*"As the UK Government has failed to incorporate the UNCRC into domestic legislation, and as there is no equivalent legislation to that of the Welsh Measure at a Westminster level, ascertaining whether full compliance with the Articles and key principles of the UNCRC, notably non-discrimination (Article 2), best interest (Article 3), protection (Article 19) or participation (Article 12) becomes somewhat more challenging."<sup>54</sup>*

**57.** In summing up its opposition to the Bill, Children in Wales (with and on behalf of the Wales UNCRC monitoring group) wrote:

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<sup>51</sup> **Written evidence, LCM NBB 05 - NYAS Cymru**

<sup>52</sup> **Written evidence, LCM NBB 10 - Welsh NHS Confederation**, paragraph 3

<sup>53</sup> **Written evidence, LCM NBB 11 - Wales UNCRC Monitoring Group**

<sup>54</sup> **Written evidence, LCM NBB 11 - Wales UNCRC Monitoring Group**

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*"We would not wish to see any diminution of existing rights and entitlements through any centralisation of the age assessment decision making processes or the use of disputed methods of age assessment practices, which could result in the rights of asylum seeking children, including child victims of trafficking and criminal exploitation, being undermined and the best interest principle compromised."*<sup>55</sup>

### **Implications for mental health**

**58.** Many stakeholders shared concerns that the Bill will adversely impact the mental health of a group who already have pre-existing vulnerabilities and complex needs. The Royal College of Psychiatrists Wales said the Bill will adversely impact the mental health of a group who "are already more likely to experience discrimination and face barriers to accessing suitable mental healthcare services in a timely and appropriate manner".<sup>56</sup>

**59.** A number of stakeholders highlighted the potential negative impact of the Bill's provisions on children and young people's mental health. The Children's Commissioner for Wales highlighted a report by The Council of Europe Children's Rights Division which concluded that the invasive nature of some methods used to assess age could cause mental harm.<sup>57</sup> Public Health Wales stated that "young people who have experienced significant trauma including witnessing and experiencing violence, parental separation, severe deprivation, exploitation etc. may also be suffering from mental a [SIC] physical health issues".<sup>58</sup>

**60.** The Royal College of Psychiatrists Wales shared similar concerns and argued that unaccompanied asylum seeking children can require specialist mental health support:

*"Childhood and adolescence are formative periods of development, which determine longer term mental health outcomes. Children and young people with mental health problems, particularly those separated from their families, are vulnerable and require specialist mental health assessment and support. Asylum seeking young people have high rates of self-harm, and there are*

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<sup>55</sup> **Written evidence, LCM NBB 11 - Wales UNCRC Monitoring Group**

<sup>56</sup> **Written evidence, LCM NBB 01 - Royal College of Psychiatrists**

<sup>57</sup> Council of Europe Children's Rights Division, '**Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration**', September 2017

<sup>58</sup> **Written evidence, LCM NBB 06 - Public Health Wales**

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*already significant concerns regarding the high numbers of suicides in young people seeking asylum.”<sup>59</sup>*

**61.** Several stakeholders were particularly concerned by the lack of clarity about how the mental health and wellbeing of age disputed people would be protected during the age assessment process. The WLGA and EYST both shared concerns about anticipated delays in undertaking the assessments and the negative impact on the mental health and well-being of those waiting for an assessment. In its evidence EYST said:

*“[...] If the NHS are responsible for aspect of the age assessment then it will impact other services. There are already delays (especially after COVID 19). If the age assessment is in two parts, the interview and the “scientific part” then they may be waiting for the latter for some time. This in turn will create longer waits for asylum decisions, impacting mental health.”<sup>60</sup>*

**62.** The Royal College of Psychiatrists Wales raised safeguarding concerns around children being “treated as adults, being detained, inappropriately supervised, or being accommodated in unsuitable accommodation with adults”.<sup>61</sup> In its submission, the BMA stated that the use of asylum accommodation, including institutional accommodation centres have a detrimental impact on physical and mental health and highlights the challenges that face to access appropriate healthcare, particularly for more complex mental and physical conditions. It fears that:

*“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>62</sup>*

**63.** Evidence from the WLGA, ADSS Cymru and all the Wales Heads of Children’ Service stress the mental health implications for those unaccompanied minors who receive an incorrect age assessment.

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<sup>59</sup> [Written evidence, LCM NBB 01 - Royal College of Psychiatrists](#)

<sup>60</sup> [Written evidence, LCM NBB 09 - EYST Wales](#)

<sup>61</sup> [Written evidence, LCM NBB 01 - Royal College of Psychiatrists](#)

<sup>62</sup> [Written evidence, LCM NBB 02 - BMA Cymru](#)

## Part 7 - General

### Summary of clauses

**Summary of the clauses in Part 7 of the Bill that the Welsh Government believes are within the legislative competence of the Senedd.**

Clause	Provision
<b>Clause 80 (referred to in the Welsh Government's LCM as clause 79, as it then was)</b>	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.

### The UK Government position

**64.** The UK Government does not consider that any clauses in the Bill require the Senedd's legislative consent. See 'The UK Government position' in relation to 'Part 4 - Age assessments' above for more information.

### The Welsh Government position

**65.** The Welsh Government states in the LCM that "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."<sup>63</sup>

## Our view

### Whether the Senedd's legislative consent is required

**66.** Clauses 48-49 and 51-55 in part 4 of the Bill impact the devolved area of social care. In addition, clauses 49, 51, 52 and 55 confer powers on the Secretary of State to make regulations imposing functions on devolved Welsh authorities. Clause 80 in part 7 of the Bill (referred to as clause 79 in the Welsh Government's LCM) impacts the devolved area of social care. We

<sup>63</sup> Welsh Government, '[Legislative Consent Memorandum: Nationality and Borders Bill](#)', December 2021, page 7

therefore agree with the Welsh Government that those clauses require the Senedd's consent. Laura Jones MS and James Evans MS do not agree with this conclusion.

**Conclusion 1.** We agree with the Welsh Government that clauses 48-49 and 51-55 in part 4 and clause 80 in part 7 of the Nationality and Borders Bill require the legislative consent of the Senedd. Laura Jones MS and James Evans MS do not agree with this conclusion.

**67.** We note that the UK Government does not believe that the Nationality and Borders Bill requires legislative consent. However, as set out in Conclusion 1 above, we believe that the Senedd's legislative consent *is* required. We are concerned, therefore, that the UK Government has acted without due regard to section 107(6) of the Government of Wales Act 2006: "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Senedd".<sup>64</sup> Laura Jones MS and James Evans MS do not agree with this conclusion.

**Conclusion 2.** We are concerned that the UK Government is acting without due regard to section 107(6) of the Government of Wales Act 2006 by legislating with regard to devolved matters without the consent of the Senedd. Laura Jones MS and James Evans MS do not agree with this conclusion.

## **Policy matters**

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**68.** The UK Government intends to set out in regulations which scientific age assessment techniques must be used as part of the age assessment process, so it is unclear at this stage which specific techniques will be used. However, based on information in the UK Government's explanatory notes and the evidence that we have received, we do not support the introduction of any 'scientific' age assessment techniques in Wales. We therefore recommend that the Senedd withholds legislative consent in relation to the Nationality and Borders Bill. Laura Jones MS and James Evans MS do not agree with this recommendation.

**Recommendation 1.** The Senedd should withhold legislative consent in relation to the Nationality and Borders Bill. Laura Jones MS and James Evans MS do not agree with this recommendation.

**69.** At the time of writing, the Nationality and Borders Bill is in the report stage in the House of Lords. There may be few further opportunities for the Welsh Government to seek any changes to the Bill to reflect the concerns of this Committee and/or the Senedd more widely. However,

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<sup>64</sup> Legislation.gov.uk, '[Government of Wales Act 2006](#)'

the Welsh Government is able to take action to try to influence any regulations that the UK Government makes in future using powers set out in the Bill - specifically in relation to assessing the age of age-disputed asylum seekers. We urge the Welsh Government to do what it can to press the UK Government to ensure that scientific age assessment techniques are not introduced in Wales. Laura Jones MS and James Evans MS do not agree with this recommendation.

**Recommendation 2.** The Welsh Government should press the UK Government to ensure that scientific age assessment techniques are not introduced in Wales. Laura Jones MS and James Evans MS do not agree with this recommendation.

**70.** As the conclusions and recommendations above illustrate, there are different views across the Committee. However, we are united in our view that children's rights must be at the heart of any approach to assessing the age of asylum seekers or migrants.

**Conclusion 3.** Children's rights must be at the heart of any approach taken to assess the age of asylum seekers or migrants.

## Annex A: Organisations that provided written evidence

Reference	Organisation
<b>LCM NBB 01</b>	Royal College of Psychiatrists
<b>LCM NBB 02</b>	BMA Cymru
<b>LCM NBB 03</b>	Royal College of Physicians
<b>LCM NBB 04</b>	Fostering Network Wales
<b>LCM NBB 05</b>	NYAS Cymru
<b>LCM NBB 06</b>	Public Health Wales
<b>LCM NBB 07</b>	Children's Commissioner for Wales
<b>LCM NBB 08</b>	Royal College of Paediatrics and Child Health
<b>LCM NBB 09</b>	EYST Wales
<b>LCM NBB 10</b>	Welsh NHS Confederation
<b>LCM NBB 11</b>	UNCRC Monitoring Group
<b>LCM NBB 12</b>	Royal College of Nursing Wales
<b>LCM NBB 13</b>	WLGA, ADSS Cymru and All Wales Heads of Children's Services