

Legislative Consent Memorandum

Illegal Migration Bill

Background

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2.(i) SO29 prescribes that a legislative consent memorandum (LCM) must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies, the legislative competence of the Senedd.
2. The Illegal Migration Bill (“the Bill”) was introduced into the UK Parliament, House of Commons, on 7 March 2023. The Bill is available here: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/220262.pdf>

Policy Objective

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

Summary of the Bill

4. The Bill is sponsored by the Home Office. The Bill deals 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, and migrant integration – but almost all of the Bill’s clauses are out of scope for an LCM.
5. The stated purpose of the Bill (as set out in clause 1) is to prevent and deter unlawful migration by requiring the removal from the United Kingdom of persons who enter or arrive in the United Kingdom in breach of immigration control. To advance that purpose, the Act:
 - Places a duty on the Secretary of State to make arrangements for the removal of certain persons who enter or arrive in the United Kingdom in breach of immigration control as soon as is reasonably practicable after their entry or arrival, subject only to the exceptions specified by or under this Act;
 - provides for protection claims and certain human rights claims made by persons who meet the conditions for removal under this Act to be inadmissible;
 - provides for the detention of persons who are subject to removal under this Act;
 - provides that protections and entitlements to assistance and support which are available to victims of slavery or human trafficking shall not apply to persons who are subject to removal under this Act;
 - prevents persons who meet the conditions for removal under this Act from being given leave to enter or remain in the United Kingdom;

- prevents persons who meet the conditions for removal under this Act from settling in the United Kingdom or obtaining citizenship;
 - provides a procedure for persons who are subject to removal under this Act to challenge their removal by means of a suspensive claim; and
 - has the effect that all other legal challenges to the removal of persons under this Act do not suspend the duty to make arrangements for their removal.
6. Clauses 2 to 10 set out the duties on the Secretary of State to make arrangements for the removal from the UK, as reasonably practicable, persons who meet the four conditions in Clause 2 (and their family members who meet the three conditions in Clause 8).
 7. Clauses 11 to 14 deal with detention and bail powers in relation to a person that meets or is suspected of meeting the removal criteria.
 8. Clauses 15 to 20 deal with the provision of accommodation for unaccompanied children. Clause 19 specifically enables these provisions to be extended to Wales.
 9. Clauses 21 to 28 disapply provisions in modern slavery legislation for identified potential victims of slavery or human trafficking who meet the removal requirements in this Bill.
 10. Clauses 29 to 36 deal with entry, settlement and citizenship, and make amendments to various Immigration Acts.
 11. Clauses 37 to 49 deal with appeals and sets out the basis on which a claim can be made.
 12. Clause 50 sets out the amendments required in other Immigration Acts so that certain asylum and human rights claims are declared inadmissible, cannot be considered under the immigration rules, and cannot be appealed.
 13. Clause 51 requires the Secretary of State to set a cap on the annual number of entrants to the UK using safe and legal routes.
 14. Clauses 52 to 58 deal with consequential and minor provisions amendments, regulations, defined expressions, extent, commencement, and short title.

Purpose of Unaccompanied Children clauses (15-20)

15. Clause 3 of the Bill provides the Secretary of State with a power (though not a duty) to make arrangements for the removal of unaccompanied children. Clauses 15 to 20 provide the framework to enable the Secretary of State to utilise this power if desired.
16. Clauses 15-18 require the Secretary of State to provide accommodation for unaccompanied children and enable the Secretary of State to transfer children from local authority care to the Secretary of State (and vice versa), along with duties upon local authorities to provide information and enforcement provisions. Clause 19 enables the extension of these arrangements to Wales (and Scotland and Northern Ireland). Clause 20 relates to an updated definition of children who can be transferred between local authorities for these purposes.
17. The purpose of these provisions is to enable the Secretary of State to move unaccompanied children from wherever they are currently accommodated and cared for, to another place, seemingly pending removal from the UK. A child may also be detained or accommodated by the Secretary of State upon arrival and then transferred to the local authority at a later date.
18. Clause 15 enables the Secretary of State to provide accommodation or to ask a third party to provide accommodation to children instead. There is nothing within the clause which states a time-limit or particular standards of accommodation required.
19. Clause 16 creates a mechanism for the Secretary of State to decide that a child should cease to reside in particular accommodation and to direct a local authority to comply in either accommodating a child within 5 days or ceasing to provide accommodation within 5 days.
20. The stated purpose of Clause 20 is to ensure the National Transfer Scheme continues to work effectively when a child is an unaccompanied child but is not considered to be an unaccompanied asylum-seeking child once their claim is deemed to be inadmissible. Such children may also include potential victims of modern slavery.

Current Welsh Government policy position

21. In Wales, we treat all unaccompanied asylum-seeking children as looked after children in line with Part 6 of the Social Services and Well-being (Wales) Act 2014. The Act also provides for a range of assessment functions to help Welsh local authorities to consider the care and support needs of children in their area.
22. 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.

23. The Illegal Migration Bill provisions, as introduced, do not recognise the devolved context. Clause 19 enables the Secretary of State to extend Clauses 15-18 to Wales without the consent of Welsh Ministers or Senedd Cymru. Therefore, it is important to state that any legislation to be made which impacts on these devolved functions would be subject to Legislative Consent Memoranda being made in the Welsh Senedd.
24. We do not support any diminution of the lead, authoritative role for social workers in assessing what is in the best interests of children in their care. Over recent years, we have asked for information about the training immigration officers receive in assessing age in line with Welsh social services and UNCRC legislative requirements. This has never been provided. Overall, we are concerned about any UK Government centralising of processes which could diminish existing Welsh national duties and functions in this space.
25. The 2014 Act brings into Welsh domestic law compliance with the UN Convention on the Rights of the Child. The Welsh Government has included a commitment in the Programme for Government to ‘continue to support and uphold the rights of unaccompanied asylum-seeking children and young people.’ We are proud to take a ‘child first, migrant second’ which upholds the best interests, rights and entitlements approach to providing care and support to children in Wales.
26. 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 the transfer of unaccompanied children to other accommodation or parts of the UK, irrespective of the care and support needs assessed by local authority social services.

Provisions in the Bill for which consent is required

27. 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 in clauses 19 and 20 because they make provision with regards to devolved matters in so far as they relate to decisions made by devolved Welsh authorities.

Clause 19 – Extension to Wales, Scotland and Northern Ireland

28. We consider that the legislative competence test under section 108(A)(2)(c) is engaged by clause 19. The powers in clauses 15-18 will have an effect on 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.
29. The clause relates specifically to arrangements for unaccompanied migrant children for the purposes of immigration control, so can also be set to have a reserved immigration purpose.

30. It is our view that the clause has a dual purpose but due to the impact on the devolved area of social care, the legislative consent of the Senedd is required for this provision.

Clause 20 – Transfer of children between local authorities

31. We consider that the legislative competence test under section 108(A)(2)(c) is engaged by clause 20. As with clause 19, the Senedd would have legislative competence to make provisions which deal with the transfer of unaccompanied children between local authorities.

32. Whilst relating to social care and Welsh local authorities, the transfer provisions apply only to persons who are unaccompanied migrant children. Therefore, this clause also has a dual purpose.

33. It is our view that the clause has a dual purpose but due to the impact on the devolved area of social care, the legislative consent of the Senedd is required for this provision.

Financial implications

34. The explanatory notes to the Bill do not provide any information about the financial costs imposed by the unaccompanied children clauses. The UK Government has not yet published a full Explanatory Memorandum with a Regulatory Impact Assessment or Equality Impact Assessment. However, in view of the potential for children to be 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.

Conclusion and recommendation

35. As set out above, the Bill makes provision within the devolved competence of the Senedd and therefore the consent of the Senedd is required.

36. 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. In any event, I cannot recommend consent is given as the UK Government has failed to confirm that the Bill is compatible with Convention rights and many leading international organisations are concerned it is incompatible.

Jane Hutt MS

Minister for Social Justice

31 March 2023