

The Welsh Government's Legislative Consent Memorandum on the Nationality and Borders Bill

February 2022



1. Background

The UK Government's Nationality and Borders Bill

1. The Nationality and Borders Bill¹ (the Bill) was introduced into the House of Commons on 6 July 2021. It is sponsored by the Home Office.

2. The long title states that this Bill will:

"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."

3. The Bill completed its passage through the House of Commons on 8 December 2021. It was introduced into the House of Lords on 9 December 2021² and is currently at Report stage in the House of Lords.

The Welsh Government's Legislative Consent Memorandum

4. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

5. On 6 December 2021 Jane Hutt MS, the Minister for Social Justice (the Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.³

6. The Business Committee initially agreed that the Legislation, Justice and Constitution Committee, the Health and Social Care Committee and the Children and Young People Committee should report on the Memorandum by 10 February 2022.⁴ This deadline was

¹ [Nationality and Borders Bill](#), as introduced [HC Bill 141]

² [Nationality and Borders Bill](#), as brought from the Commons [HL Bill 82]

³ Welsh Government, [Legislative Consent Memorandum: Nationality and Borders Bill](#), December 2021

⁴ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Nationality and Borders Bill](#), December 2021; Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Nationality and Borders Bill](#), December 2021

subsequently extended to the 17 February 2022⁵ and then brought forward to the 15 February 2022.⁶

Provisions for which Senedd consent is required

7. Paragraphs 16 to 38 of the Memorandum set out the Welsh Government's assessment of the provisions in the Bill which require Senedd consent, namely, clauses 48 to 49 and 51 to 55 contained in Part 4 and clause 79⁷ in Part 7.

8. Part 4 relates to age assessments, which are primarily carried out to determine whether someone can, or cannot, access children's social services. It applies in relation to the arrival of unaccompanied asylum-seeking individuals in the UK who do not have documentation to prove their age.⁸

9. The specific clauses which the Welsh Government consider require consent are:

- Clause 48 - Interpretation of Part etc.;
- Clause 49 - Persons subject to immigration control: referral or assessment by local authority etc.;
- Clause 51 - Use of scientific methods in age assessments;
- Clause 52 - Regulations about age assessments;
- Clause 53 - Appeals relating to age assessments;
- Clause 54 - Appeals relating to age assessments: supplementary;
- Clause 55 - New information following age assessment or appeal; and
- Clause 79 - Transitional and consequential provision.⁹

⁵ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Nationality and Borders Bill](#), January 2022

⁶ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Nationality and Borders Bill](#), January 2022

⁷ Clause 79 is clause 80 in HL Bill 82, as brought from the Commons

⁸ The Bill as introduced included a "placeholder clause" at clause 58, in relation to age assessment. The UK Government tabled new clauses 48-56 to replace the original placeholder clause 58, on 21 October 2021. Those amendments were agreed and made part of the Bill on 4 November 2021.

⁹ Clause 79 is clause 80 in HL Bill 82, as brought from the Commons

10. The UK Government does not consider that the Senedd's consent is currently required for any provisions of the Bill.¹⁰

The Welsh Government's position

11. The Memorandum notes that, in response to a March 2021 UK Government consultation on its New Plan for Immigration, the Welsh Government responded setting out its "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."¹¹

12. The Memorandum adds:

"... 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.

*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."*¹²

13. Clause 51 enables the Secretary of State to make regulations specifying "scientific methods" that may be used for the purposes of age assessments conducted under clause 49 (or clause 50). The Memorandum refers to the Welsh Government's guidance, *Unaccompanied Asylum Seeking Children: Age Assessment Toolkit*, stating:

"In relation to 'scientific' methods of determining age, we have extant policy 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

¹⁰ [Nationality and Borders Bill, Explanatory Notes](#), July 2021, Annex B

¹¹ Welsh Government, Explanatory Memorandum, paragraphs 11-12

¹² Welsh Government, Explanatory Memorandum, paragraphs 13-14

young people to invasive medical examinations is judged to be morally wrong".¹³

14. Paragraph 40 of the Memorandum concludes:

"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."

2. Committee consideration

15. We considered the Memorandum at our meeting on 24 January 2022, and we agreed our report on 31 January 2022.¹⁴

Our view

16. We note the Minister's views as set out in paragraphs 16 to 38 of the Memorandum that clauses 48 and 49, 51 to 55 and 80¹⁵ impact the devolved area of social care. Specifically, we also note the Minister's views that:

- clauses 49 and 55 impose functions on devolved Welsh authorities;
- clauses 51 and 52 confer powers on the Secretary of State to make regulations imposing functions on devolved Welsh authorities;
- clause 80 enables the Secretary of State to make regulations making such provision as the Secretary of State considers appropriate in consequence of the Bill, including provision that 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.

17. We agree with the Minister that the consent of the Senedd is required for all these clauses.

¹³ Welsh Government, Explanatory Memorandum, paragraph 15

¹⁴ [Legislation, Justice and Constitution Committee, 24 January 2022](#) and [Legislation, Justice and Constitution Committee, 31 January 2022](#)

¹⁵ Clause 79 in HC Bill 141, as introduced

18. We note that the Minister does not recommend that the Senedd gives its consent to these clauses being included in the Bill.

19. We are concerned that, under the Bill, functions can be imposed on devolved authorities in relation to social care, including through regulations, and that neither the Welsh Ministers nor the Senedd will be required to provide consent in such circumstances.

20. We are equally concerned at the powers available to the Secretary of State to make regulations that could amend primary legislation made by the Senedd, without any requirement for its consent. As far as we are aware, there are no limitations on these powers, such that they could also be used to amend the *Government of Wales Act 2006* by means of regulations. As we have said many times previously, we believe such an approach to be constitutionally unacceptable.

21. The difference of opinion between the Welsh and UK Governments as to whether the provisions of the Bill fall within the competence of the Senedd heightens the issues of concern we raise in paragraphs 19 and 20.

22. We note the recent publication of the outcome of the review of intergovernmental relations,¹⁶ which includes a mechanism for dispute resolution.

Recommendation 1. The Minister should, in advance of the Senedd's debate on the relevant consent motion:

- provide an update on her discussions with the UK Government as to whether the provisions of the Bill fall within the legislative competence of the Senedd;
- explain whether, as part of her discussions, she has sought amendments to the Bill relevant to paragraphs 19 and 20 above;
- indicate whether she will be engaging the dispute resolution procedures in line with the final package of reforms announced following the recently published *Review of Intergovernmental Relations*.

¹⁶ UK Government, *Review of Intergovernmental Relations*, 13 January 2022
