

Briefing on the issue of legislative consent in relation to the Illegal Migration Bill and its impact on unaccompanied children in Wales

Key points

- The Illegal Migration Bill puts unaccompanied children at risk of deportation before they turn 18, and they become subject to removal from the UK when they turn 18.
- The Bill encroaches on policy areas devolved to Wales and runs counter to decision-makers in Wales' duty to care for unaccompanied children.
- The provisions in the Bill contravene the obligation under international law to provide protection and assistance for refugees, including unaccompanied child refugees.
- **Recommendation:** The Committee and the Senedd should accept the Minister's recommendation in the Legislative Consent Memorandum to withhold consent to the provisions included in the Bill.

The Illegal Migration Bill (the Bill) has serious implications for the safeguarding and wellbeing of children in Wales. The proposed legislation would have an impact on the ability of the Welsh Government and statutory bodies to abide by Wales's obligations under international human rights law and the United Nations Convention on the Rights of the Child (UNCRC). Under the Rights of Children and Young Persons (Wales) Measure 2011, all Welsh Government Ministers must give due regard to the UNCRC and its optional protocols in the exercise of all of their functions. We believe that the Bill is incompatible with the duties on Welsh Government Ministers and also the duty of due regard to the UNCRC placed on Welsh local authorities under the Social Services and Well-being (Wales) Act 2014. Any child, including asylum seeking children, should be able to enjoy *all* of their rights set out in the UNCRC, and should be accorded the same protection as any other child permanently or temporarily deprived of their family environment.

The Bill also runs counter to the Nation of Sanctuary approach that has been taken in Wales. Furthermore, the Children's Commissioner for Wales has publicly stated that the Bill is unacceptable and is a clear breach of human rights obligations.¹

The Bill and its provisions

There are several key issues which the Committee may wish to consider and which we bring to Members' attention:

1. Which children does the Bill affect?

¹ <https://www.childcomwales.org.uk/2023/03/commissioners-statement-in-response-to-unacceptable-uk-government-illegal-migration-bill/>

Clause 2 of the Bill sets out four conditions which will be applied to people entering the UK. Anyone in this group, including unaccompanied children, seeking humanitarian protection in the UK will have any claim deemed 'inadmissible'. The criteria are:

- they arrived in the UK via an 'irregular' route;
- they arrived in the UK on or after 7 March 2023;
- they did not arrive directly from a country in which their life and liberty were threatened; and
- they require leave to enter or remain in the UK but do not have it.

As of 2022, 110 unaccompanied children are looked after by local authorities in Wales.² Since the National Transfer Scheme (NTS) became mandatory in December 2021, numbers have increased and they are set to increase further. All local authorities in Wales must now receive unaccompanied children through the NTS. As of May 2022, "every local authority in Wales now looks after at least one unaccompanied child".³

In 2022, 30% of unaccompanied children making asylum applications in the UK were aged 15 or under.

2. The Bill's impacts on long term care plans, local authority duties, and corporate parenting

a) Removal on becoming 18 years old

The Social Services and Well-being (Wales) Act considers all unaccompanied children as looked-after children. Unaccompanied children have a right to be safeguarded and protected and should receive looked after status upon arrival and receive care and support from the relevant authorities. The approach taken in Wales is 'child first and migrant second' - no child should be discriminated against and should have equal access to support services and provision. Unfortunately, the provisions in the Bill jeopardise stakeholders in Wales' ability to provide care and support for these children and young people. This is particularly the case when they turn 18.

Clause 2(1) of the Bill places a duty on the Secretary of State to make removal arrangements for unaccompanied asylum-seeking children meeting the conditions above, as soon as they turn 18 years old. This includes children with family members in the UK, even where those families have been granted humanitarian protection and are recognised refugees. Under the proposed legislation, unaccompanied children in the care of a local authority will be made to leave placements on becoming 18, placed in detention, and forcibly removed from the UK.

Duties placed on local authorities under Section 110 of the Social Services and Wellbeing (Wales) Act 2014 recognise the need of young people leaving care for continued support and contact. This would be denied to unaccompanied asylum-seeking children, who are particularly vulnerable and traumatised. Pending deportation will inevitably have considerable impact on the emotional well-being of children throughout their period in care.

b) Detention and removal of children (under 18)

² <https://stats.wales.gov.wales/Catalogue/Health-and-Social-Care/Social-Services/Childrens-Services/Children-Looked-After/unaccompanied-asylum-seeking-children-being-looked-after-at-the-31-march-by-local-authority>

³ <https://www.gov.wales/sites/default/files/pdf-versions/2023/1/4/1674144316/forced-migrants-wales-research-adequacy-and-availability-legal-advice-contents.pdf>, p.43.

Under Clause 3, the Home Secretary has the power to remove unaccompanied children from the UK before they turn 18. The UK Government's [Illegal Migration Bill: children factsheet](#) (updated 11/05/2023) makes clear that the intention is to remove some children under the age of 18, and that these children will be forcibly held in accommodation (detention) prior to removal. Clause 10 gives the Home Secretary the power to detain children "in any place" considered appropriate, including unregulated settings. In the Immigration Act 2014, an unaccompanied child may be detained under paragraph 16(2) in a short-term holding facility for a maximum period of 24 hours, but this bill removes that provision. Given the potential difficulty of arranging removals with other countries, children could be detained for very long periods of time.

Furthermore, on the impact of the risk of deportation, Clause 21(2) bars those who meet the conditions for removal from accessing support for victims of modern slavery or human trafficking. This extends to unaccompanied children as they reach 18.

The UK Government has outlined 'very limited circumstances' in which the deportation of children will take effect, including removal to a 'safe country of origin'. The Secretary of State has the power to designate any country a 'safe country' where they conclude that 'there is in general in that State or part no serious risk of persecution of persons entitled to reside' there. However, the designation of a country as 'safe' frequently fails to take account of the risks posed to certain groups. No indication has been given of how or whether such designation will include an assessment of safety for an unaccompanied child.

Additionally, Clause 3 enables the Home Secretary to make regulations that would apply provisions for persons exempted from removal under Clause 2, which could disapply provisions provided under Senedd legislation or guidance. A possible risk presented here is that current services provided under laws in Wales, such as for an unaccompanied child, might be replaced by provisions under regulations presented by the Home Secretary, that might not adequately meet the needs of an unaccompanied child.

The UN Committee on the Rights of the Child in their Concluding Observations to the UK in 2016, were very clear that the detention of unaccompanied children should be ceased and that children are returned only where there are adequate safeguards, including a formal best-interests determination, effective family tracing, including individual risk and security assessments, and appropriate reception and care arrangements. The UN Committee communicated again strongly in their 2023 recommendations that children's best interests must be taken as the primary consideration.⁴

c) Power to direct local authorities to transfer children from their care

Powers granted to the Home Secretary under Clause 16 to direct local authorities to transfer children from their care initially apply in England only. However, Clause 19 enables the Home Secretary to make regulations extending these powers to Wales and to override Welsh law (see 3b below).

Clause 19 enables the Home Secretary to override the duties of local authorities to care for and support children. The Home Secretary will have the power to order local authorities to provide information about a child or to order a local authority to hand over a child, either before or on becoming 18 years old. This power could be used in order to detain children prior to deportation, but the power is not limited to this purpose. These powers will be enforceable through the Courts regardless of any local authority assessment of the child's needs.

⁴ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FCR%2FGBR%2FCO%2F6-7&Lang=en

d) Age assessment:

Clauses 55 and 56 relate to age assessment and the use of scientific methods. These methods may include scanning, x-raying, or measuring parts of the body, checking teeth, DNA sampling, and intimate physical examination. The accuracy of scientific methods is unproven. Both scientific methods and the establishment of the National Age Assessment Board have been objected to by the British Association of Social Workers (BASW). Age assessment falls under the devolved area of social care in Wales and local authorities have responsibility to assess whether a person is a child in need of care.

Clauses 55 and 56 withdraw the right to appeal against an age assessment decision and limit recourse to judicial review. They also allow for children to be treated as over 18 if they refuse to consent to scientific methods. These provisions are very likely to place children in risky adult situations without recourse to legal remedy. They seriously threaten the safeguarding of children, as well as what is in their best interests. Traumatized children are more likely to refuse to submit to the invasive methods under consideration.

The UN Committee on the Rights of the Child in their 2016 recommendations were clear in stating that age assessments should only be conducted in cases of serious doubt through multidisciplinary and transparent procedures, taking into account all aspects, including the psychological and environmental aspects of the person under assessment.⁵

This was reiterated in the newly released 2023 recommendations, calling for:

an end to the use of unreliable and invasive procedures for determining a child's age; develop an age determination procedure that is child- and gender-sensitive, includes multidisciplinary assessments conducted by relevant professionals of the child's maturity and level of development, and respects the legal principle of the benefit of the doubt; and ensure that children have access to legal advice throughout the process and, if necessary, can challenge the outcome of such assessments.⁶

3. Contravention of Welsh Law and international obligations regarding children's and human rights:

a) Children's rights / human rights

Under the Bill, children would be removed from a place of safety and protection and be exposed through detention and deportation to serious risk of irreversible harm, exploitation, slavery, and death. The clauses of the Bill would place vulnerable children beyond the protection of local authorities, in contravention of Welsh law. Children in these circumstances will have no possibility of making an asylum claim, which will automatically be declared 'inadmissible' under Clause 4. This will extend to child victims of trafficking, slavery, and those making a human rights claim.

In consideration of the Nationality and Borders Bill, the Senedd voted to withhold consent on clauses relating to age assessment by the National Age Assessment Board and the use of scientific methods. We refer to the Legislative Consent Memorandum laid by the Social Justice Minister in December 2021, which outlines impacts in the devolved area of social care. It is worth noting that the UK Government's stated position at that time was that refusal to submit

⁵https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhskHOj6VpDS%2F%2FJqg2Jxb9gncnUyUgbnuttBw_eOlyfyYPkBbwffitW2JurgBRuMMxZqnGgerUdpjxi3uZ0bjQBOLNTNvQ9fUJEOvA5Ltw0GL

⁶https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGBR%2FCO%2F6-7&Lang=en

to scientific methods for age assessment would not damage an applicant's credibility. This is reversed under the Illegal Migration Bill, which states that children may be treated as adults if they refuse to submit.

b) Overriding of devolved powers and potential repeal of Welsh Law:

Clause 19 gives the Home Secretary the power to make regulations to apply Clauses 15 to 18 (powers to order local authorities) in Wales. Clause 19(2) enables these regulations to "amend, repeal, or revoke any enactment" and 19(4) clarifies that this includes legislation previously or concurrently passed in the Senedd. This has major implications for the Social Services and Well-being (Wales) Act and raises grave constitutional questions in relation to devolution.

Amendments made to Clause 3 enable the Home Secretary to disapply provisions of legislation. This clause would allow the Home Secretary to make consequential amendments to any Acts or Measures of the Senedd, to align with regulations made in respect of Clause 2.

c) International obligations

Key aspects of the Bill are incompatible with UK's international obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the European Convention on Human Rights (ECHR) and the European Convention against Trafficking (ECAT) and the UN Convention on the Rights of the Child.

The UNHCR has communicated that they are profoundly concerned by the Bill and have urged the UK Government to pursue more humane and practical policy solutions.⁷

The Council for Europe Commissioner for Human Rights has communicated her concerns in a letter to the House of Commons and the House of Lords. In particular, that the Bill would add to the significant regression of the protection of human rights of asylum seekers in the UK and would incentivise other states to follow the UK's lead in evading and abdicating its responsibilities.⁸

In the recent UN Committee on the Rights of the Child's examination of the UK State party and devolved administrations, UN Committee Members also expressed grave concerns and recommended in their newly published UK Concluding Observations 2023, and called for the UK State Party to:

Urgently amend the Illegal Migration Bill and to repeal all draft provisions that would have the effect of violating children's rights under the Convention and the 1951 Refugee Convention and bring the Bill in line with the State party's obligations under international human rights law.⁹

It is also important to note that no children's rights impact assessment has yet been undertaken on the Bill.

The ECHR is relevant to the competencies of the Senedd. Consequently this Bill, which is in conflict with the ECHR, is of significant devolved concern. The Government of Wales Act 2006, makes compliance with the ECHR a fundamental aspect of Welsh devolution (Section 81 (1))

⁷ <https://www.unhcr.org/uk/uk-asylum-and-policy#:~:text=Illegal%20Migration%20Bill&text=UNHCR%20expressed%20profound%20concern%20in,Bill%20with%20the%20UK%20Government.>

⁸ <https://www.coe.int/en/web/commissioner/-/parliamentarians-should-uphold-the-united-kingdom-s-international-obligations-when-scrutinising-the-illegal-migration-bill->

⁹ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGBR%2FCO%2F6-7&Lang=en

and makes the observation and implementation of international obligations included in the ECHR a devolved matter (schedule 7a).

Guardianship scheme for all Unaccompanied Children

Given the commitment to children's rights in both legislation and policy in Wales, the acknowledgement that unaccompanied children are highly vulnerable, and that children should be treated as children first and migrants second, it is concerning that a guardianship scheme has not yet been implemented in Wales. The establishment of a guardianship scheme has been a clear expectation of the UN Committee on the Rights of the Child in their 2008 Concluding Observations,¹⁰ and their 2016 Concluding Observations, where they stated, in Recommendation: 77 (b):

Establish statutory independent guardians for all unaccompanied and separated children.¹¹

In the examination of the UK State party and devolved administrations (May 18th/19th 2023) the UN Committee on the Rights of the Child asked questions regarding why unaccompanied asylum-seeking children, apart from in Scotland, do not have access to an independent guardian. They reiterated their recommendation for a guardianship scheme in the 2023 UK Concluding Observations stating:

Develop a consistent, statutory system of independent guardianship for all unaccompanied children, and ensure that all unaccompanied children throughout all jurisdictions of the State party are promptly identified and appointed a professionally trained guardian.¹²

They also expressed their concerns regarding unaccompanied children going missing from hotels. As has been recognised in Scotland, guardians provide stability and help children recognise exploitation and trafficking, which are very real threats to unaccompanied children in Wales, and indeed across the UK. The Scottish guardianship scheme has also been demonstrated to offer support, advice, and continuity for all unaccompanied children, helping them through the complex system of asylum applications, appeals, and life in care.¹³

We believe that a guardianship scheme will also help to deliver the UN Committee on the Rights of the Child's 2023 recommendations:

50 (d) Strengthen measures to ensure that all asylum-seeking, refugee and migrant children have equal and prompt access to education, health services, housing, psychosocial support, and social protection including benefit entitlements;

(50 c) ensure that children receive age-appropriate information and legal advice about their rights, asylum procedures and requirements for documentation; that their best interests are given primary consideration in all asylum processes; that their views are heard, taken into account and given due weight; and that they have access to child-friendly justice mechanisms and remedies.¹⁴

¹⁰ <https://www2.ohchr.org/english/bodies/crc/docs/advanceversions/crc.c.gbr.co.4.pdf>

¹¹ <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskHOj6VpDS%2F%2FJqg2Jxb9gncnUyUqbnuttBweOlyfyYPkBBwffitW2JurqBRuMMxZqnGgerUdpixij3uZ0biQBOLNTNvQ9fUIEOvA5Ltw0GL>

¹² https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGBR%2FCO%2F6-7&Lang=en

¹³ <https://www.scottishrefugeecouncil.org.uk/wp-content/uploads/2022/02/An-evaluation-of-the-Scottish-Guardianship-Service-2022.pdf>

¹⁴ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGBR%2FCO%2F6-7&Lang=en

There have been repeated calls to establish a Guardianship Scheme in Wales to provide wraparound legal advice and support and to complement existing advocacy arrangements.¹⁵ This call was reiterated again in a recommendation in a recent report for the Welsh Government.¹⁶

Given the implications of the Bill for unaccompanied children in Wales and the UK, we believe that its introduction strengthens the case for a guardianship scheme for all unaccompanied children in Wales. In addition to the afore-mentioned support, guardians would provide unaccompanied children and young people support through the added complexity brought about by the Bill to the already complicated process of seeking asylum in the UK.

We will prepare another briefing which will focus on our call for guardians for all unaccompanied children in Wales, and we will share this briefing with Members of the Senedd in due course.

Recommendation

In the Legislative Consent Memorandum tabled in March and May 2023, the Minister for Social Justice stated that she “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.” **We urge the committee to accept the Minister’s position and recommendation of withholding consent to the provisions included in the Bill.**

¹⁵ <https://senedd.wales/laid%20documents/cr-ld11012/cr-ld11012-e.pdf>;
https://www.childreninwales.org.uk/application/files/6416/7533/1287/Wales_UNCRC_Monitoring_Group.pdf

¹⁶ <https://www.gov.wales/sites/default/files/pdf-versions/2023/1/4/1674144316/forced-migrants-wales-research-adequacy-and-availability-legal-advice-contents.pdf>