

Cydsyniad Deddfwriaethol Bil Mewnfudo Anghyfreithlon | Legislative Consent Illegal Migration Bill

Ymateb gan Sefydliad Bevan Response from Bevan Foundation

This document is written in reference to the amended Bill as at 1 June 2023 (HL Bill 133)

Key points

- The Bill runs counter to the vision of Wales as a Nation of Sanctuary and to the Child First, Migrant Second approach that underpins the delivery of support to asylum-seeking children in Wales.
- The Bill makes provisions in the devolved area of social care in Wales.
- The Bill introduces powers that conflict with local authority duties under the Social Services and Well-Being (Wales) Act 2014.
- The Bill is incompatible with the international obligations of the UK, and Wales as a devolved government, under the 1951 UN Refugee Convention, the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (UNCRC), and the Council of Europe Convention on Action Against Trafficking in Human Beings.
- The Bill contravenes the Rights of Children and Young Persons (Wales) Measure 2011.
- The Bill fails to consider the best interests of the child.
- The Bill makes provision within the devolved competence of the Senedd. We urge the Committees to recommend that the Senedd refuse legislative consent.

Contents

1. Overview: our view of the Bill	1
2. Separated/unaccompanied children in Wales	2
3. Implications for the care and support of children	3
4. Children's rights and human rights in Wales.....	9
5. Recommendations	11

Evidence

1. Overview: our view of the Bill

- 1.1 This is a response to the Committees' invitation to give evidence regarding the issue of legislative consent for the Illegal Migration Bill. It focuses on aspects of the Bill which require legislative consent from the Senedd.

- 1.2 The Bevan Foundation has broader concerns about the Illegal Migration Bill and its impact on human rights, the UK constitution, and the rule of law. The Bill runs counter to the Nation of Sanctuary principles and undermines the vision of Wales as a country where people seeking sanctuary “[are met with welcome, understanding, and celebration](#)”.
- 1.3 The Illegal Migration Bill is not compatible with the obligations of the UK and Wales under international law.
- 1.4 The Bill’s scope is broad. It removes the right to seek refugee protection for people arriving by irregular routes. It curtails the jurisdiction of the High Court in relation to decisions on detention and in certain circumstances limits the effects of judicial review. It provides extensive powers to the Home Secretary to repeal, amend, and revoke existing legislation and to implement further changes to law with minimal Parliamentary scrutiny.
- 1.5 The speed at which the legislation is being progressed is concerning, particularly given limitations that it will place on the courts and legislature to exercise their vital functions to challenge and constrain Executive powers.

2. Separated/unaccompanied children in Wales

2.1 Background

2.1.1 [StatsWales](#) shows that in 2022, local authorities in Wales looked after 110 unaccompanied children.

- Every local authority in Wales looks after at least one unaccompanied child.
- Numbers of unaccompanied children in Wales are likely to rise as transfers and asylum dispersals increase.
- 30% of unaccompanied children in the UK are aged 15 or under.

2.1.2 In this document we use the term ‘unaccompanied children’ for clarity. We stress that there is no distinction between an unaccompanied child and any other child, other than their circumstances and life experiences.

2.2 Key concerns

2.2.1 Most unaccompanied children are forced to use irregular routes to seek protection in the UK due to the lack of regular routes. The Bill penalises children because of the way in which they are forced to seek protection.

- 2.2.2 More - and more consistent - support is needed for unaccompanied children and young people in Wales. We support the call for a [national guardianship scheme for all unaccompanied children in Wales](#) and ready access to expert legal advice and representation.

3. Implications for the care and support of children

3.1 Background

- 3.1.1 In line with the Social Services and Well-Being (Wales) Act 2014, unaccompanied children in Wales are treated as looked-after children.
- 3.1.2 Unaccompanied children are likely to have additional support needs. The Welsh Government briefing, [Supporting unaccompanied asylum-seeking children in Wales](#), states:

“These children are likely to be at heightened risk of exploitation or abuse and are less able to access education or opportunities to build social relationships with peers because of linguistic barriers.”

3.2 Key concerns

- 3.2.1 Unaccompanied children in Wales already face unacceptable risks. Children recently abducted from hotels in Sussex and Kent [have been found in North and South Wales](#). When the Home Office placed 87 asylum-seekers in a Snowdonia hotel last year, amongst residents were [15 young people in need of local authority care](#).
- 3.2.2 Without robust assessment procedures, appropriate care, and continuity of assistance and support extending beyond their period in care, unaccompanied children are at heightened risk of abduction, trafficking, and exploitation. It is vital for their well-being that the duty and power to provide care, support, and assistance remains with the local authority.
- 3.2.3 The following elements of the Bill would severely impact the welfare of children and young people and clash with duties conferred on local authorities by the Social Services and Well-Being (Wales) Act 2014.

3.3 Duty to remove care leavers from the UK

The current law:

- 3.3.1 [Part 6 of the Social Services and Well-Being \(Wales\) Act](#) places a [duty on local authorities](#) to provide support to care leavers. This recognises that young people leaving care need ongoing support, assistance, and contact.
- 3.3.2 The duty to support continues beyond the age of 18 where a young person has been in local authority care for 13 weeks or more before their 18th birthday.

The proposed law:

- 3.3.3 Clause 2(1) places a duty on the Home Secretary to arrange the removal of adults from the UK if they arrive by irregular routes. This duty would apply to young people on reaching the age of 18 and would result in the compulsory deportation of unaccompanied care leavers.
- 3.3.4 The duty would extend to children with family members in the UK, even where those families have been granted humanitarian protection and are recognised refugees.
- 3.3.5 The Bill severely restricts rights of appeal and limits the basis for legally suspending removal. It introduces a shortened procedure requiring a person to seek legal advice and make a claim within 7 days. The Home Office must reach a decision within 3 days.
- 3.3.6 Asylum claims of young people subject to the duty to deport would be declared inadmissible. Support and protections under the Modern Slavery Act 2015 would be removed. The duty to deport would apply even if a young person is a victim of trafficking, or where there is a human rights application or judicial review.
- 3.3.7 The legislation would restrict future grants of visas, settlement, and citizenship for anyone who has ever been subject to the duty to remove.

The impact:

- 3.3.8 The legislation would create conflicting duties on the part of the Home Secretary and local authorities in respect of 18-year-old care leavers who have been accommodated as unaccompanied children. It would render impossible local authority support for unaccompanied care leavers.
- 3.3.9 Pending deportation would have considerable impact on the emotional well-being of unaccompanied children throughout their period in care.
- 3.4 Powers to remove unaccompanied children from the UK

The current law:

- 3.4.1 The Social Services and Well-Being (Wales) Act 2014 places duties on local authorities towards children in need of care and support. These are:
- a duty to assess needs (Section 21)
 - a duty to meet care and support needs (Section 37)
 - a power to meet care and support needs (Section 38)
- 3.4.2 When looking after unaccompanied children, the local authority has an overarching duty to have due regard to Part 1 of the United Nations Convention on the Rights of the Child (UNCRC).
- 3.4.3 Under Section 28 of the Children Act 2004, local authorities and other statutory bodies have a duty to [work together to safeguard children](#) and young people. Section 47 places a duty on a local authority to make inquiries where it suspects that a child is at risk.
- 3.4.4 [Welsh Government guidance](#) states that when encountering an unaccompanied child, a local authority must consider whether they are at risk of serious harm. They should assess whether a child has been trafficked.
- 3.4.5 The duty to protect and safeguard children is a permanent duty and applies whether or not the child is in local authority care.

The proposed law:

- 3.4.6 Under Clause 3 of the Bill, the Home Secretary would have the power to remove unaccompanied children from the UK before they are 18.

3.4.7 The UK Government's [Illegal Migration Bill: children factsheet](#) (updated 11/05/2023) makes clear that the intention is to deport some children before they reach 18, and that children will be forcibly held in accommodation (detained) prior to removal. The circumstances in which they can be removed can be amended by regulation.

The impact:

3.4.8 The Home Secretary's power to remove unaccompanied children, coupled with extended detention powers (see 3.5 below), would conflict with the local authority duties of assessment and safeguarding. It would restrict the power of local authorities to meet unaccompanied children's needs through care, accommodation, and support.

3.4.9 In opposition to the Child First, Migrant Second approach, the proposed legislation places a child's position as a migrant and their mode of entry to the UK above their status as a child.

3.4.10 The Bill does not prioritise the welfare of the child or make provision for paying due regard to individual children's needs. It makes no reference to assessment of needs or protecting children's rights.

3.5 Extension of detention powers

The current law:

3.5.1 Detention of unaccompanied children is currently limited, under the Immigration Act 2014, to 24 hours in a "short-term holding facility".

3.5.2 [Home Office Enforcement Instructions and Guidance](#) currently lists unaccompanied children under the age of 18, pregnant women, and victims of trafficking, as among those unsuitable for detention.

The proposed law:

3.5.3 Clause 10 of the Bill gives the Home Secretary the power to detain a person "of any age", "in any place" considered appropriate, including unregulated settings. It removes existing statutory time limits on the detention of families with children, unaccompanied children, and pregnant women.

3.5.4 Clause 11 provides for the detention of unaccompanied children. Children may be detained while a decision on removal is reached, pending removal, or while a decision is made about whether to grant leave to remain.

The impact:

- 3.5.5 The Bill reverses the UK Government’s commitment to end child detention. It removes important safeguards for children and vulnerable adults and allows for the detention of victims of child trafficking and slavery.
- 3.5.6 The Bill does not specify time limits for detention. It gives the Secretary of State powers (though no duty) to specify time limits on detention via regulation rather than by primary legislation.
- 3.5.7 The Bill limits court oversight for detention, with no recourse to the courts for the first 28 days.
- 3.5.8 [The BMA has called](#) on “MPs and peers to oppose the bill on medical and ethical grounds”, particularly in relation to clauses enabling the indefinite detention of children.

3.6 Age assessment

The current law:

- 3.6.1 Age assessment falls under the devolved area of social care in Wales. Local authorities currently have responsibility to assess whether a person is a child and in need of care.

The proposed law:

- 3.6.2 Clauses 55 and 56 relate to the National Age Assessment Board and provide for scientific methods of age assessment, which may include scanning, X-raying, or measuring parts of the body, checking teeth, DNA sampling, and physical examination.
- 3.6.3 The Bill withdraws the right to appeal against an age assessment decision. The decision may be judicially reviewed but a child may be removed while judicial review is in progress. The Bill allows for a child to be treated as an adult if they refuse to consent to scientific methods.

The impact:

- 3.6.4 Treating children as adults is a major safeguarding risk and a flagrant breach of their rights. Traumatized children are more likely to refuse to submit to the invasive methods under consideration.

- 3.6.5 Scientific methods are not accurate in determining age. These measures are invasive and traumatic for children. The British Association of Social Workers (BASW) objects to both scientific methods and the establishment of the National Age Assessment Board.
- 3.6.6 Establishing the National Age Assessment Board in Wales would clash with the existing duty of social workers to assess the age and needs of unaccompanied children.
- 3.6.7 It is unethical to expose children to radiation from X-rays without medical cause or to subject them to unnecessary physical examinations.

3.7 Power to direct local authorities to transfer children from their care

The current law:

- 3.7.1 3.3.1, 3.4.1, and 3.4.3 above outline the duties of local authorities to assess, care for where required, and meet the needs of, unaccompanied children.

The proposed law:

- 3.7.2 Clauses 15 to 18 enable the Home Secretary to override the local authority duties to care for and support children. They give the Home Secretary powers to order local authorities to provide information about a child or to order a local authority to hand over a child. This power could be used to detain children prior to deportation but is not limited to this purpose.
- 3.7.3 These powers will be enforceable through courts regardless of any local authority assessment of a child's needs. This directly conflicts with local authority duties under the Social Services and Well-Being (Wales) Act 2014.

3.8 Power to make regulations to repeal or amend Welsh law

The proposed law:

- 3.8.1 Powers granted to the Home Secretary under Clauses 15 to 18 initially apply only in England. However, Clause 19 enables the Home Secretary to make regulations extending their application to Wales and to override Welsh law.
- 3.8.2 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.

- 3.8.3 Clause 3 gives the Secretary of State the power to make consequential amendments to any Act or Measure of the Senedd.

The impact:

- 3.8.4 These clauses have substantial implications for Welsh law, particularly for the Social Services and Well-being (Wales) Act 2014 and the Rights of Children and Young Persons (Wales) Measure 2011.

4. Children's rights and human rights in Wales

- 4.1 Rights of Children and Young Persons (Wales) Measure 2011 and the UN Convention on the Rights of the Child (UNCRC)

The current law:

- 4.1.1 [The Rights of Children and Young Persons \(Wales\) Measure 2011](#) embeds the UN Convention on the Rights of the Child into Welsh law and places a duty on Ministers to have due regard to the Convention when exercising their functions. Decisions must be informed by a robust Children's Rights Impact Assessment. The Convention prioritises commitment to the best interests of the child and sets out key fundamental rights.

- 4.1.2 Article 2 of the UNCRC clarifies that Convention rights apply to all children. State signatories are required to respect and protect these rights:

“...irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

The proposed law:

- 4.1.3 The Bill impacts on the ability of unaccompanied children in Wales to exercise their right to seek refugee protection. It disregards legal protections afforded to children under international law and commitments made under the Council of Europe Convention on Action Against Trafficking in Human Beings. Clause 2(1) risks breaching a child's right to family reunion.

The impact:

- 4.1.4 The Illegal Immigration Bill is not compatible with the Rights of Children and Young Persons (Wales) Measure 2011 or the UN Convention on the Rights of the Child.

4.1.5 The [Children’s Commissioner for Wales](#) has expressed strong objections to the Illegal Immigration Bill on the grounds of children’s rights:

“Wales is a proud nation of sanctuary. This legislation, if passed, flies in the face of everything we stand for as a nation of sanctuary and is in clear breach of our human rights obligations.”

4.2 Committee on the Rights of the Child

4.2.1 On 2nd June, The UNCRC Committee on the Rights of the Child published the [Concluding Observations](#) (findings) of its combined sixth and seventh periodic report of the UK. The Committee highlights deep concerns about the potential impact of the Illegal Migration Bill on children.

4.2.2 The Concluding Observations call on the UK to “urgently amend” the Illegal Migration Bill”, removing provisions that would violate children’s rights and the UK’s international obligations, particularly:

- the “ban on the right to claim asylum”;
- provisions allowing for prolonged detention and removal of children;
- barriers to acquiring nationality; and
- lack of consideration of “the principle of the best interests of the child”.

4.2.3 The Committee also calls on the UK to:

- end “unreliable and invasive” age assessment procedures, ensure that children can challenge assessment outcomes, and have access to legal advice;
- ensure that age-disputed children are not removed to a third country;
- ensure children’s unqualified right to apply for family reunification;
- ensure child victims of trafficking always have access to relevant services; and
- “develop a consistent, statutory system of independent guardianship for all unaccompanied children”.

4.3 European Convention on Human Rights (ECHR)

4.3.1 Much has been written about the Bill’s negative impact on human rights. The [UNHCR has referred to the legislation as an “asylum ban”](#) and many agencies have raised human rights concerns. [A briefing from the Joint Council of the Welfare of Immigrants \(JCWI\)](#) summarises these concerns.

- 4.3.2 The human rights group [Liberty's response to the Illegal Migration Bill](#) highlights how different aspects of the Bill work together to enable primary legislation to be changed without reference to human rights.
- 4.3.3 The [Equality and Human Rights Commission](#) warns of six areas where the Bill risks breaching the UK's legal obligations and risks placing individuals in danger of increased harm.
- Undermining the principle of the universality of human rights (Clauses 1(5), 2 and 4).
 - Removal of protections for victims of trafficking (Clauses 21-28).
 - Restriction of the right to asylum and penalising refugees (Clauses 4, 11-14 and 29-36).
 - Risk of breaching the ECHR and the principle of non-refoulement under the Refugee Convention (particularly Clauses 37-49).
 - Detention, particularly of children (Clauses 3, and 11-15).
 - Insufficient consideration of the impact on equality.
- 4.3.4 The Commission has also expressed concern at the lack of time allocated for parliamentary scrutiny of the Bill.

5. Recommendations

- 5.1.1 The provisions in the Bill fall within the devolved competence of the Senedd in the areas of social care and children's rights. We therefore recommend that the Bill requires legislative consent from the Senedd.
- 5.1.2 In the Legislative Consent Memorandum laid on 31 March and the supplementary LCM of 26 May 2023, the Minister for Social Justice stated that she could not recommend that the Senedd give consent to provisions within the Bill that lie within the devolved competence of the Senedd.
- 5.1.3 We urge the Committees to accept the Minister's position and to recommend that legislative consent be withheld in respect of these elements of the Bill.