

Jane Hutt AS/MS
Gweinidog Cyfiawnder Cymdeithasol a'r Prif Chwip
Minister for Social Justice and Chief Whip



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA-JH-1398-23

Jayne Bryant
Chair, Children and Young People Committee

Jenny Rathbone
Chair, Equality and Social Justice Committee

By email only.

07 June 2023

Dear Jayne and Jenny,

Thank you for your letter of 22 May seeking views on Committee questions relating to the Illegal Migration Bill. Thank you also for agreeing to the slight extension in providing this letter for your consideration.

Below I have listed your questions as sub-headings with my responses underneath.

An update on discussions with the UK Government, including details of any assurances the Welsh Government is seeking on the impact of the Bill on unaccompanied asylum seeker children.

I met with the UK Minister for Immigration, Robert Jenrick MP, on 30 March to ensure he was aware of our concerns with the Bill and our view that some of the Bill's provisions impacted on devolved competence. We have followed up with letters to UK Ministers and through engagement between officials at the Home Office.

We have expressed our concern that the content of the Bill does not place the rights and needs of the child at the forefront of decisions. We have made clear our belief that local authority social workers are best placed to assess the care and support needs of children who arrive in the UK without prior immigration permission. We have stated in the Legislative Consent Memorandum and in engagement with the UK Government that we will not support the diminution of this authoritative role for social workers in assessing what is in the best interests of children in their care.

Our initial concerns related to the constitutional erosion of Senedd Cymru's competence to legislate on matters of social care in Wales, as well as the more practical concern that the

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Gohebiaeth.Jane.Hutt@llyw.cymru
Correspondence.Jane.Hutt@gov.wales

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Secretary of State may remove a child from care in Wales despite the professional opinion of expert social workers.

As amendments have been laid, our concerns have broadened to include concerns that children will be treated as adults, either because they refuse to consent to invasive so-called 'scientific' methods of age assessment or because the Home Office has removed the right of appeal against an age assessment decision. Both of these outcomes will create safeguarding concerns in Wales and the potential removal of children from the UK.

Unfortunately, despite discussions the UK Government has made no offer to engage proactively with our concerns and find ways to ensure the ongoing lead role for local authorities in any consideration of the best interests of these children.

It is also important to note that the Bill proposals do not only affect unaccompanied **asylum seeking** children. The Bill is drafted to include any unaccompanied child who meets the four conditions in clause 2 of the Bill.

The Welsh Government's concerns in respect of the impact the Bill would have on separated asylum seeking children in Wales.

It is noted that clause 19 which is about extending the Bill's provisions in relation to unaccompanied children to Wales, Scotland and Northern Ireland that the Home Secretary has a power to make extending regulations rather than a duty. It is also noted that in relation to the clauses relating to unaccompanied children, these are powers for the Home Secretary rather than duties and s/he will use them 'principally' in specific circumstances.

However, while these powers may or may not be used in Wales, it is important to make the following points.

When the clause 15-18 provisions are used (following extension to Wales through clause 19), a child would be removed from the local authority's care. The local authority will have thought carefully about the care and support needs of that child and will have put such support in place to ensure compliance with its duties under the Social Services and Well-being Act (Wales) 2014. When the child is removed, this will inevitably have a detrimental effect on that child's ability to exercise their rights and maintain integration in the community they have been living within.

The accommodation provided by the Secretary of State for unaccompanied children may be detained or non-detained accommodation, as this is not stated on the face of the Bill. There is no duty to provide care and support to these children, as required by the Children Act 1989 (and in Wales, by Part 6 of the Social Services and Well-being (Wales) Act 2014). The Secretary of State would have a power to provide support for the child but not a duty.

Welsh Government feels it is vital the protection from the power to remove which applies to unaccompanied children should extend beyond their 18th birthday. Having the threat of removal hanging over children's heads as they reach adulthood will risk many of them going missing in an attempt to avoid this, leaving them open to exploitation and abuse.

The reference to the Home Office detaining children and young people is of concern. Welsh Government does not agree the Home Office should be provided with the legal power to accommodate children and is concerned this function could replicate and raise the same issues as the contingency hotel accommodation for unaccompanied asylum-seeking children in England. This has proved to not meet their needs and has highlighted significant safeguarding issues.

Clause 16 enables children to be taken from Secretary of State accommodation and returned to local authority care but there is no requirement (or expectation) that this would mean the child was returned to the local authority where they had previously been cared for, nor is there a clear understanding about how the local authority would ensure placements are kept available for removed children.

Finally in relation to unaccompanied children, Article 22 of the UN Convention on the Rights of the Child states that if a child is seeking refuge, governments must provide them with appropriate protection and assistance to help them enjoy all the rights in the Convention. This Bill is clearly incompatible with this Article.

Ultimately, such children may be removed from the UK regardless of the views of the Welsh local authority social worker's expert opinion about what is in the best interests of that child.

In relation to clauses 55 and 56, the UK Government's approach diverges from established Welsh approaches for assessing the age of unaccompanied children, as set out in the [Welsh Government Age Assessment Toolkit](#).

Welsh Government does not agree with the provision in the Bill relating to 'consequences of a person refusing consent for their age to be assessed by a specified scientific method'. This could result in them being treated as an adult if they refuse consent to scientific age assessment methods. It contradicts the recommendations made by the Home Office Age Estimation Scientific Advisory Committee (AESAC) which recommended in its 2022 report on age assessments: - "unaccompanied asylum-seeking children should be provided with clear information explaining the risks and benefits of biological evaluation in a format that allows the person undergoing the process to give informed consent and no automatic assumptions or consequences should result from refusal to consent."

Welsh Government is concerned the provision will undermine children's right to informed consent as the potential consequences of detention and removal (notwithstanding the trauma they have likely already suffered) will place them under significant pressure to consent to the process.

It remains our position that exposure to radiation (used in x-rays for the biological assessment of age) for a non-medical purpose is an unethical and unreliable indicator of age. Welsh Government feels that children and young people arriving in the UK seeking safety and shelter need to be met with care and dignity and should be treated as children first and migrants second and supported appropriately.

Welsh Government is concerned the Bill will make the appeals process near impossible for children who have been incorrectly assessed as adults. The Bill sets out that someone subject to the duty to arrange removal under the Bill cannot appeal against an age assessment decision. They would be permitted to apply for judicial review, but the application would 'not prevent the exercise of any duty or power under this Act to make arrangements for the person's removal'. Welsh Government feels that it is imperative that all children and young people should have the right to appeal decisions made about them, in particular when these can have such catastrophic consequences on their safety where deportation is considered.

This is particularly concerning as recent reports suggest that around two thirds of initial age assessment decisions are later found to be incorrect.¹ The removal of the appeals process, which was set out in the government's Nationality and Borders Act, could see children

¹ [Hundreds of UK asylum seeker children wrongly treated as adults, report shows | Immigration and asylum | The Guardian](#)

deported back to unsafe countries and denied their UNCRC-afforded rights to shelter and protection.

The impact of the UK Government's changes in this Bill would be that some children are wrongfully considered to be adults and removed from Welsh local authority care, accommodated with adults awaiting removal from the UK with the safeguarding concerns this brings, and then removed from the UK. We know that initial age assessment decisions are frequently successfully challenged and changed from a decision that someone is an adult, to recognition that the person is a child. The changes in the Bill prevent those reconsiderations taking place, leaving children in unsafe situations amongst adults.

The anticipated implications of Bill on the assessment of needs and provision of care and support under the Social Services and Well-being (Wales) Act 2014.

For the most part, the Bill provisions should not prevent Welsh local authorities from assessing the needs of unaccompanied children coming to their area, in accordance with the Social Services and Well-being (Wales) Act 2014. However, utilising the powers in clauses 15-18 would mean the interruption of the provision of care and support to affected children as they will be removed from local authority care. If the UK Government then decides it cannot remove the child from the UK in a timely manner, it is not clear how the child will be returned to local authority care.

Despite the UK Government's age assessment processes, there is no legislative reason why Welsh local authorities cannot also follow the Welsh Government Age Assessment Toolkit as part of their assessment of care and support needs in Wales. However, it is likely that some cases will lead to contrasting age assessment decisions. Should Welsh local authorities find that the person is a child with care and support needs, these can be provided locally – though the UK Government will not provide the funding required to provide necessary services if they consider the young person to be an adult. If the UK Government considers the young person to be an adult, the Secretary of State will be under a duty to remove this young person from the UK regardless of Welsh local authority assessments.

Whether the Bill is compatible with the Rights of Children and Young Persons (Wales) Measure 2011, including what impact it would have on the 'Child First, Migration Second approach' which underpins the delivery of support to child asylum seekers in Wales.

In Wales, local authorities 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. Social services is a subject which is fully devolved to the Welsh Government and as such, all legislative and policy decisions relating to social services are for the Welsh Ministers.

In exercising their functions relating to looked after and accommodated children, local authorities must have regard to their overarching duties to have due regard to Part 1 of the United Nations Convention on the Rights of the Child as set out in section 7 of the Act. However, clauses 19 and 20 of the Bill would enable the Secretary of State to compel the transfer of an unaccompanied children into or out of their care regardless of the determinations that Welsh local authorities might make of the care and support needs of those children, or of what is considered to be in the best interests of those children, under the SSWBA and the UNCRC.

It is noted that there is no specific Children's Rights Impact Assessment (CRIA) carried out on the Bill. A CRIA would likely bring forward several areas where children's rights are denied. There is however reference to 'Age' in UK Government's [Equality Impact Assessment](#) (EIA) published on 26 April 2023 but no clear rationale explaining why UK Government considers the Bill to have no negative impact on children.

The Rights of Children and Young Persons (Wales) Measure 2011 places a due regard duty on Welsh Ministers in relation to the consideration of children's rights in policy making. Children's rights are set out in the Articles of the UNCRC which in turn is the articulation of children and young people's human rights as set out in the Human Rights Act 1998 and the European Convention on Human Rights. It is noted that on the front page of the Bill itself, UK Government cannot confirm that the Bill complies with the European Convention on Human Rights.

Article 1 of the UNCRC states that everyone under the age of 18 has all the rights in the Convention. It is noted that the EIA references the numbers of people who crossed the channel in 2022 – 45,755. It breaks down the figures for 18–39-year-olds (33,464) but does not give the ages of the 12,291 remaining people who travelled. Thus, it is unclear how many were under 18. In any event, all of those that are children have the human right to be treated as children and access the protections afforded by Article 1 of the UNCRC. It is noted that the Bill states that its removal provisions apply from 7 March 2023 and that the Home Secretary has the power to remove an unaccompanied child who arrived here on or after that date. It is clear then that this provision creates a new class of child; one without any of the 42 Convention rights afforded by Article 1.

The anticipated cost burdens which would be imposed on Welsh local authorities.

At present it is not possible to consider the costs of these changes to Welsh local authorities. The explanatory notes for the Bill do not provide information about the costs imposed by these clauses. The costs associated with use of the powers under clauses 15-18 would also only arise if the Secretary of State decides to extend the provisions to Wales.

Nevertheless, it is clear that there would be costs to local authorities if these proposals are implemented. In view of the potential for children to be incorrectly assessed as an adult (with the mental health impact on children and safeguarding risks), there could be significant cost burdens imposed for Welsh local authorities and / or Welsh health bodies, by these clauses and regulations made under them. The use of powers under the amended clause 3 to alter Senedd legislation is likely to incur costs in relation to legal advice, changes to guidance, and training but these cannot be estimated at this time.

Concerns relating to the Bill and compatibility with Convention rights.

In making a s.19(1)(b) statement upon introducing the Bill, the Secretary of State is unable to confirm that its provisions are compatible with the European Convention on Human Rights ("the Convention"). As well as probably breaching International Human Rights Law, provision in the Bill narrows the scope of human rights protections in the UK so as remove such protections entirely in some cases. Doing so puts the UK further in breach of its obligations under the Convention. This sits wholly at odds with the centrality of the Human Rights Act 1998 to the devolution settlement. The Welsh Ministers and the Senedd, in exercising respective powers, must comply with the rights contained in the Convention. Many affected persons will have no legal protection. The few who do are likely to face lengthy procedures which keep them in a state of limbo posing real risks to their emotional well-being and general welfare.

Are you able to confirm whether the post of Independent Anti-Slavery Commissioner is vacant at present and if so, the duration of the vacancy and when we can expect the post to be filled?

I can confirm the position of Independent Anti-Slavery Commissioner has been vacant since Dame Sara Thornton left office in April 2022. I set out my concern about the delay in filling this post in my [Written Statement on tackling modern slavery and supporting survivors](#) in November 2022. My officials have regularly raised these concerns with the Home Office. The Home Office re-opened the recruitment process for appointing a new Commissioner earlier this year. We understand this process is due to conclude shortly.

I hope that these answers are useful in the Committees' considerations on the Illegal Migration Bill Legislative Consent Memoranda.

Yours sincerely,

A handwritten signature in black ink that reads "Jane Hutt". The signature is written in a cursive style with a long horizontal stroke above the first name.

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