



**Ymateb i Ymgynghoriad / Consultation Response**

Date / Dyddiad: 28<sup>th</sup> January 2022

Subject / Pwnc: Legislative Consent Memorandum: Nationality and Borders Bill

Background information about the Children's Commissioner for Wales

The Children's Commissioner for Wales' principal aim is to safeguard and promote the rights and welfare of children. In exercising their functions, the Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner's remit covers all areas of the devolved powers of the Senedd that affect children's rights and welfare.

The UNCRC is an international human rights treaty that applies to all children and young people up to the age of 18. The Welsh Government has adopted the UNCRC as the basis of all policy making for children and young people and the Rights of Children and Young Persons (Wales) Measure 2011 places a duty on Welsh Ministers, in exercising their functions, to have 'due regard' to the UNCRC.

This response is not confidential.

## **Overall views**

The proposals outlined in Part 4 of the Nationality and Borders Bill raise significant concerns. My apprehensions centre on the objective of the proposals to introduce the use of "scientific methods" to assess age, alongside wider concerns that it may increase the use of age assessments, even where there is no reason to doubt age (Clause 48). I believe this poses a risk to the rights of children under the United Nations Convention on the Rights of the Child (UNCRC) with the potential to cause distress and harm.

There are no tried and tested medical assessment models that I am aware of that would enable an accurate and swift age assessment as suggested in this Bill. Whilst the Bill states in Clause 51 that methods may involve "examining or measuring parts of a person's body, including by the use of imaging technology; or the analysis of saliva, cell or other samples taken from a person (including the analysis of DNA in the samples)", further clarity is needed as the procedures are not expressly defined and are subject to change at the discretion of the Secretary of State (Clause 52). This undermines the existing guidance already in place in [Wales](#), developed with a multi-disciplinary approach with professionals in the field. I would be very concerned by the introduction of invasive or intrusive physical or medical examinations for children and young people, particularly as there is no clear consensus or reliable methodology for this.

Further to this, the proposals to revise the age assessment process to make it more 'robust' also raises concern. It is unclear what the authority and role of the proposed National Age Assessment Board would be around this, what the background or expertise of members would be and what their influence would be in resulting policies and processes.

### **'Scientific' methods and assessments**

Several different methods to determine age are used widely across Europe but to my understanding there is no common practice regarding procedure, with [criticism](#) regarding the lack of standardised protocol. [The Royal College of Paediatrics and Children's Health](#) have rejected the use of x-rays, dental records and genital assessments as being inaccurate in assessing age. Further to this, implementation of "scientific" assessments would be in contradiction of current [Welsh Government guidance](#) which states "the science

underpinning the determining of age is inconclusive, unclear and in any event, subjecting young people to invasive medical examinations is judged to be morally wrong".

[Analysis](#) highlights the inaccuracies of the assessment procedures that are used across Europe, which have been found to be especially inexact around the crucial age of 18, and, based on evidence gathered from white European/American populations, failing to differentiate for ethnic background. Notably, a Swedish case in 2019 involving analysis of wisdom teeth and knee joints, lead to conflicting conclusions on the young person's likely age. Ultimately, on appeal, with further examination and on production of some personal documents and a second medical opinion, it was determined that the young person was a minor. This case highlighted the controversial and mixed nature of the various medical approaches, and the unnecessary use of radiation when, as in this case, a variety of social evidence was able to establish age more reliably.

Where dental assessment is used, it is found that there is a variation of four years when considering ethnicity, which demonstrates the inaccuracy and need for understanding of differentiation in this process. In General Comment 24, the UN Committee on the Rights of the Child say that in situations where there is doubt as to a child's age: "States should refrain from using only medical methods based on, inter alia, bone and dental analysis, which is often inaccurate, due to wide margins of error, and can also be traumatic. The least invasive method of assessment should be applied. In the case of inconclusive evidence, the child or young person is to have the benefit of the doubt."

The leading case in the UK is the 'Merton' case, which requires a multitude of factors to be taken into consideration, with young people given the benefit of the doubt and treated as a child in need until otherwise decided. The approach does not recommend medical assessments, and the current Home Office guidance on age assessments (2020) says "All accessible sources of relevant information and evidence must be considered, since no single assessment technique, or combination of techniques, is likely to determine the individual's age with precision." It is therefore concerning to see the proposals in this bill being suggested which mark a significant shift from their own existing guidance, without any evidence for this apparent about-turn. I would anticipate strong and vociferous challenge to these proposals, including legal challenge through the courts, should such assessment methods be introduced. In addition, the current Home Office guidance indicates the need to treat someone as a child unless they very strongly

appear to be above 25; these proposals would change this to appearing to be "significantly over 18". This would be a major shift in practice with courts, as recently as this month ([MA & Anor, R v Coventry City Council & Anor](#)), reconfirming the Merton guidance as the appropriate approach, and that anyone who is not *clearly 25+* should have a full Merton compliant assessment otherwise their detention may be unlawful.

With regards to the impact on local authorities and the NHS in conducting age assessments, Clause 48 of this Bill must be considered. This proposes conducting an age assessment where there is "insufficient evidence of age", which risks age assessments becoming a routine procedure as firm evidence is very often unlikely to be available. This goes against recommendations from the [European Asylum Support Office](#), and current [statutory guidance](#) from the Department of Education, that age assessments should not be part of routine practice. If this threshold for age assessment is implemented it will place additional burden on the multi-disciplinary teams tasked to undertake them. The assessment process is a core duty of social services in Wales under the Social Services and Well-being (Wales) Act, (2014), and any expectation to conduct "scientific assessments" without the relevant expertise, training or experience could be at the detriment of children and their rights.

### **UN Convention on the Rights of the Child**

When considering proposals in relation to migration and asylum, almost every single one of the 42 Convention Rights would be actively engaged. As the Bill stands, I believe it will be detrimental to children's fundamental rights set out within the UNCRC. Particular consideration to how these proposals would potentially undermine the UNCRC to act in the best interests of children are outlined below:

#### **The best interests of the child (Article 3 CRC)**

Best interests of the child should be considered throughout these proposals and given the likelihood of increased age assessments due to Clause 48, this is questionable. In addition to this, the methods proposed present risk of harm, which could be argued to be against a child's best interests. Whilst the processes have not been outlined explicitly, as an example, X-rays of joints have been raised as children's rights issues due to the exposure of radiation unnecessarily.

### **Right to non-discrimination (Article 2 CRC)**

Some 'scientific methods' of assessment have been criticised for failing to recognise the different outcomes amongst diverse ethnicities; or the results are based upon studies within European/American populations. This could indirectly discriminate against some children, systematically placing them at an unfair disadvantage during the age assessment process.

### **Right to identity (Articles 1, 7 and 8 CRC)**

As part of a child's right to identity, they are entitled to their age. An incorrect age assessment could impede access to their rights, potentially causing permanent harm and place a child in a vulnerable position. Given the inaccuracies highlighted, there is a risk associated with the age assessment process which could result in an incorrect age assessment.

### **Respect of dignity and right to integrity (Articles 3 and 37 CRC)**

Any proposed assessment process should consider the integrity and dignity of the child and ensure this is upheld throughout. Without explicit confirmation of age assessment processes being published, these rights cannot be assured.

### **Recovery from trauma and reintegration (Article 39)**

The migration journey and asylum process can be a cause of trauma. To uphold their rights, children should be given the benefit of doubt, allowing the care and support to recover from trauma and reintegrate. The assessments proposed have the potential to re-traumatise and cause further harm from a wellbeing and safety perspective.

In addition to this I'd expect children's rights to be a key and relevant consideration in any proposals around changes to family reunification and entitlements, any proposals that would affect a child's nationality or status as a result of their parents' status, and any changes to the rules around arrival in the UK and securing safe passage for unaccompanied asylum seeking children. One of the key principles stated in this Bill is around deterring illegal entry to the UK and this is backed up by proposals to limit the attainable status for those who have entered illegally. I do not think that the current proposals present sufficient consideration of the position for children in this regard and therefore expect to see this being worked through in detail before any further steps are taken to bring forward legislation.

## **Impact on areas of devolved competence**

In Wales, social work practice is underpinned in legislation by a statutory duty for public bodies to have due regard to the UNCRC in exercising their functions. It is therefore surprising and a significant omission that there is no mention of the UNCRC within the published plan. In developing a White Paper and any further details of these plans, I would expect to see consistent and meaningful reference to the UNCRC and how children's rights have been considered in developing the proposals, as this is a convention ratified by the UK Government and clearly applicable here in Wales. Without due regard to the UNCRC and a consideration of how this will impact on children's rights, it would be my opinion that this Bill has the *potential* to undermine Welsh Minister's duty to uphold children's rights under the Children and Young Persons (Wales) Measure 2011.

It is unclear from the proposals what role Wales will have in the establishment of a 'National Age Assessment Board', if any, and given the concerns raised earlier, what impact it will have on children's rights in Wales and how this will impact on legislative and policy in the devolved settlement of social care practice. The Social Services and Well-being (Wales) Act (2014) outlines the duty of local authorities to assess the care and support needs of children in Wales. Good practice in Wales seeks to promote a 'child first, migrant second' approach to age-assessments when considering the care and support needs of children and I am concerned the changes proposed may undermine this approach.

## **Implications for mental health**

Wales recognises that Asylum Seekers have often experienced traumatic experiences and through the [Nation of Sanctuary Refugee and Asylum Seeker Plan](#) outline how individuals will be supported to rebuild their lives in Wales. By acknowledging trauma it is important consider the impact of Adverse Childhood Experiences (ACEs) and the impact this has on mental health. A [third of settled young asylum seekers in Europe](#) are thought to be affected by a mental disorder, with experience of ACEs increasing the risk of PTSD, depression and anxiety. The age assessment process can cause fear and anxiety, and I am concerned that by introducing "scientific" age assessment methods it could increase anxiety and have further negative impact on mental health. A report by [The Council of Europe Children's Rights Division](#)

highlighted the invasive nature of some methods may cause mental harm to the person undergoing assessment, and could be a cause of concern from an ethical perspective.

In my opinion, taking a trauma-informed approach to the age assessment process, as outlined within [Welsh Government guidance](#), would reduce the risk of re-traumatising individuals, carefully considering the role post-migration processes play in the exacerbation of mental health difficulties.

In addition to the increased risk of negative mental health impacts caused by the assessment process, the increased risk of inaccurate age decisions being made is also a concern. If children are wrongfully identified as adults and care and support is withdrawn, children will be placed in a vulnerable position, which could lead to negative impacts on mental health and social development. [The Council of Europe Children's Rights Division](#) reference the far-reaching impact of the age assessment, highlighting the denial of accurate age recognition could have impact on a child's safety, wellbeing and development. This raises safeguarding concerns alongside the wider concerns that children's rights may be impeded.

Submitted by:



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