

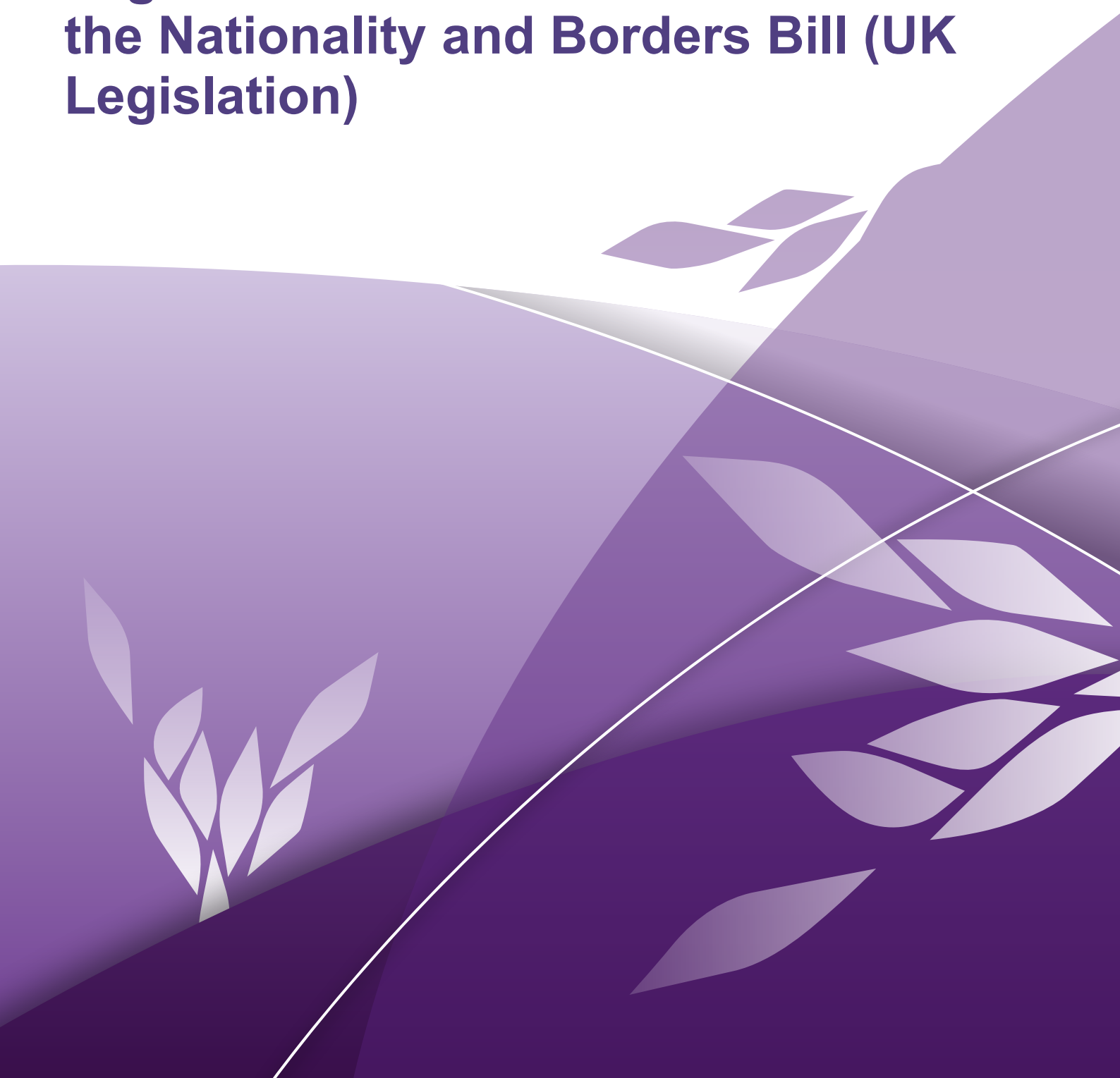


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## **Social Justice and Social Security Committee**

# **Legislative Consent Memorandum on the Nationality and Borders Bill (UK Legislation)**



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# **Social Justice and Social Security Committee**

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Social Justice, Housing and Local Government, excluding matters relating to local government, housing and planning.



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# Committee Membership



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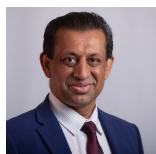
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# Introduction

1. [The Nationality and Borders Bill](#) is a UK Government Bill introduced in the House of Commons on 6 July 2021.
2. A [Legislative Consent Memorandum](#) (LCM) was lodged by Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government, under Rule 9.B.3.1(a) of the Parliament’s standing orders. It is supported by Ash Regan, the Minister for Community Safety and Clare Haughey, the Minister for Children and Young People.
3. Motion [S6M-03152](#) designated the Social Justice and Social Committee as lead committee in consideration of the Memorandum. The motion was agreed by the Parliament on 9 February 2022.
4. According to the LCM, the Nationality and Borders Bill is the cornerstone of the [UK Government’s New Plan for Immigration](#), and sets out significant legislative changes in relation to nationality, immigration and asylum. The UK Government has set out three key objectives for the Bill—
  - ” • To increase the fairness of the system to better protect and support those in need of asylum
  - To deter illegal entry into the United Kingdom, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger, and
  - To remove more easily those with no right to be in the UK.<sup>i</sup>
5. The Bill makes provision about nationality, asylum and immigration; provisions about victims of slavery or human trafficking; provides a power for Tribunals to charge participants where their behaviour is considered to have wasted the Tribunal’s resources; and for connected purposes.
6. The UK Government consider the Bill to be entirely reserved as it relates to nationality and immigration (Schedule 5, section B6 of the Scotland Act 1998 which also includes asylum and the status and capacity of persons in the United Kingdom who are not British citizens).
7. It is the view of the Scottish Government that two provisions in the Bill legislate in a devolved area or for a devolved purpose or altering the executive functions of the Scottish Ministers and so engage the LCM process. These are clause 49, which relates to age assessment, and clause 58, which relates to modern slavery (or human trafficking).
8. Clause 49 confers a power on the Secretary of State to conduct full age assessments on age-disputed persons (as defined in Clause 48), upon referral from a local authority in England, Wales and Scotland or a Health and Social Care Trust in Northern Ireland.
9. Clause 49(3)(a) allows local authorities to refer an age assessment to a person

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<sup>i</sup> Legislative Consent Memorandum Nationality and Borders Bill, paragraph 3.

designated by the Secretary of State (this will be to the new National Age Assessment Board (NAAB)). The resulting age assessment would be binding on the local authorities when exercising their devolved functions (clause 49(7)(b)).

10. Clause 58 requires the competent authority making decisions about whether someone is a victim of human trafficking/modern slavery to take account of late provision of information as damaging to a person's credibility, unless there are good reasons why the information is late.
11. The Scottish Government has explained to the UK Government that it considers the Bill to be making provisions within the legislative competence of the Scottish Parliament and which alter the executive competence of Scottish Ministers. The UK Government position remains that the Bill is entirely reserved.

# Consideration by the Social Justice and Social Security Committee

12. The subject matter of refugees and asylum seekers falls within the remit of the Committee. The Committee has been holding standalone sessions to explore the breadth of its remit and to begin to establish priorities for its work programme over the parliamentary session.
13. Two evidence sessions on refugees and asylum seekers had already been scheduled for 3 and 10 February as part of the Committee's priorities work. These sessions were much broader than the LCM, focusing on No Recourse to Public Funds, the Afghan Citizen Resettlement Scheme, as well as the Nationality and Borders Bill, more generally.
14. Given the limited time to consider the LCM before the debate in the Parliament (at time of writing scheduled for 22 February), the Committee pre-emptively used these sessions to gather some evidence in relation to the Memorandum.
15. The Committee heard from local authority and health bodies on [3 February](#)—

Andrew Morrison, Chief Officer, COSLA Migration, Population & Diversity;

Pat Togher, Assistant Chief Officer, Public Protection Complex Needs, Glasgow City Health and Social Care Partnership

Alistair Dinnie, Refugee and Migration Programme Manager, City of Edinburgh Council

Calum Maciver, Director for Communities , Western Isles Council (Comhairle nan Eilean Sia

Councillor Susan Aitken, Leader of Glasgow City Council, Glasgow City Council.

And on [10 February](#) from third sector and charitable organisations—

Graham O'Neill, Policy Manager, Scottish Refugee Council

Andy Sirel, Legal Director & Partner and Lidia Dancu, JustCitizens Member, JustRight Scotland

Hassan Darasi, Challenging Violence Against Women project manager, Community Infosource

Phil Arnold, Head of Refugee Services – Scotland, Wales and N Ireland, British Red Cross

Maggie Lennon, Director, Bridges Programmes

Pinar Aksu, Human Rights and Advocacy Coordinator, Maryhill Integration Network.



16. The Committee wrote to witnesses that attended the session on 3 February asking the following questions about the LCM:


Do you support the Scottish Government's LCM to withhold consent on two clauses of the Nationality and Borders Bill that it considers are devolved?

What is your experience of undertaking age assessments, how might this clause impact on young asylum seekers in Scotland, and do you agree with the Scottish Government that consent should be withheld on this clause?

What is your experience of assessing and providing support to victims of human trafficking, how might this Clause impact on potential victims of trafficking, and do you agree with the Scottish Government that consent should be withheld on this clause?

17. Of the local authority and health organisations contacted, the Committee received written submissions from [COSLA](#), [Glasgow Health and Social Care Partnership](#) (GHSCP) and Comhairle nan Eilean Siar (Western Isles Council).

# Views on the Legislative Consent Memorandum

18. COSLA has not taken a view on the Scottish Government’s LCM or on whether consent should be withheld. It advised COSLA’s assessment of the potential impact of the clauses is not in relation to the source of the legislation.<sup>ii</sup>
19. Comhairle nan Eilean Siar had not taken a view on this issue.<sup>iii</sup>
20. Glasgow Health and Social Care Partnership would support the Scottish Government’s position to withhold consent on Clauses 49 and 58.<sup>iv</sup>
21. The Scottish Refugee Council and JustRight Scotland instructed Christine O’Neill QC and Brodies LLP to provide a Legal Opinion on the devolved impacts of the Bill on Scotland. The organisations sought to clarify where devolved competences may be directly infringed and devolved policy would be impacted, and recommend what actions could be taken to mitigate adverse impacts on people and devolved services.
22. The [Scottish Refugee Council](#) and [Just Right Scotland](#) outline in detail their support to withhold consent to the relevant clauses in their written submissions.
23. The [British Red Cross](#) asked the Committee to consider the LCM in line with its concerns as set out in its submission.
24. The [Bridges Programmes](#) did not provide a view on the LCM in its written submission. It did however state that the Bill was a fully reserved matter, and noted that “too often the Scottish Government use devolved competence as an excuse and do not do enough to mitigate the hostile immigration system”.
25. However, in response to a question about withholding consent on the human trafficking provision, Maggie Lennon, Bridges Programmes said—  
 We must withhold consent on that, as we should on anything that cuts across devolved legislation.<sup>v</sup>

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ii COSLA, written submission

iii [Comhairle nan Eilean Siar](#), written submission

iv Glasgow Health and Social Care Partnership, written submission

v [The Social Justice and Social Security Committee](#), *the Official Report*, 10 February 2022, Col 37.

# Age assessment

## Experience of age assessment

26. Comhairle nan Eilean Siar confirmed it has not been required to undertake an age assessment at this point and advised the Council works in close partnership with the other agencies and NHS would be the lead in assessing all medical aspects.
27. Although COSLA advised it is not directly involved in age assessment processes, it has concerns about the impact changes to the age assessment process could have on the young people and the local authorities involved. It noted that age assessments can be difficult processes for all involved and must be done in a child-centred and trauma-informed way.
28. COSLA also stated that any changes must be developed in partnership with local authorities and devolved governments to ensure that they improve experiences and processes and do not conflict with devolved child protection legislation. It considered the provisions outlined in the Bill have not been developed in this manner.
29. Phil Arnold, British Red Cross (Scotland, Wales and N Ireland), commented that the age assessment process should stay with specialist social workers who have the time to undertake the assessments, saying—
  - ” Sometimes, going through an age assessment process can itself be quite traumatic. It can raise questions about people’s identity with their family abroad, and there are points where young people are isolated.<sup>vi</sup>

## Impact on local/devolved decision-making

30. Currently, GHSCP explained, decisions about age are made by the local authority and the professional who may know the young person best. Decisions are made on the balance of probability, with a trauma informed approach to assessment.
31. GHSCP was concerned about the new National Age Assessment Board (NAAB)[1]
  - ” The NABB could remove the decision making from the LA, with no right of appeal or dissent, and the regulations and governance as to how the age assessment is undertaken is unclear and does not take into account the expertise and robust processes that we currently have and follow in Glasgow/ Scotland.<sup>vii</sup>
32. JustRight Scotland stated the age assessment provisions in the Bill would reach into Scottish child protection systems as age assessments are usually conducted by Scottish local authorities to determine eligibility for child services under the Children

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vi [The Social Justice and Social Security Committee](#), *the Official Report*, 10 February 2022, Col 29.

vii Glasgow Health and Social Care Partnership, written submission

(Scotland) Act 1995.<sup>viii</sup> Andy Sirel, JustRight Scotland, said—

” Scottish local authorities will be compelled by the Home Office to conduct age assessments on children and young people, or pass that on to a new national age assessment board. Its decisions will be binding on Scottish local authorities. Decisions that are made for immigration purposes will be binding on children’s services in Scotland to determine the eligibility of child protection services.<sup>ix</sup>

33. Scottish Refugee Council wanted consent to be withheld on a Home office-age assessment arrangement.<sup>x</sup>

## Information sharing

34. GHSCP considered the Bill’s approach raised potential implications in relation to information sharing, as the new NAAB may be able to instruct a local authority to share information that it may have gathered for other reasons. As an alternative GHSCP suggested the Home Office provide additional funding directly to the local authority to deliver age assessments given the current demands this places on local authorities.

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viii JustRight Scotland, written submission

ix [The Social Justice and Social Security Committee](#), *the Official Report*, 10 February 2022, Col 18.

x Scottish Refugee Council, additional written submission on LCM

# Modern slavery and human trafficking

## Experience of supporting victims of human trafficking and exploitation

35. The Comhairle nan Eilean Siar (Western Isles Council) has not provided specific support to victims of human trafficking.
36. GHSCP shared its experience of assessing and providing support to victims of human trafficking. It explained that currently Glasgow is the only site for the Home Office’s Devolved Decision Making pilot, which seeks to identify children and young people at risk of child sexual exploitation and trafficking.
37. GHSCP advised it has significant expertise in broader social assessment to offer a relatively reliable age assessment, though it recognises this is a complex area—
- ” Our experience in working with children and young people exposed to trauma and abuse, disclosures often are only made within an established relationship of trust and sense of safety, and may come later once a place of physical safety and stability is established.”<sup>xi</sup>
38. On the approach taken by the Bill, GHSCP is concerned there is a real risk of further victimising and re-traumatising trafficking and exploitation victims by excluding access to support.

## Late compliance with slavery or trafficking information notice: damage to credibility

39. The provisions in clause 58 require the competent authority making decisions about whether someone is a victim of human trafficking/modern slavery to take account of late provision of information as damaging to a person’s credibility, unless there are good reasons why the information is late.
40. GHSCP agreed with the Scottish Government that from a trauma informed perspective on trafficking this approach is “wholly unacceptable”.<sup>xii</sup>

## Potential discrimination

41. GHSCP observed a greater percentage of women experience human trafficking and sexual exploitation and as such, “this may be considered as a discriminatory policy on gender as well as other aspects”.<sup>xiii</sup>

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xi Glasgow Health and Social Care Partnership, written submission  
xii Glasgow Health and Social Care Partnership, written submission  
xiii Glasgow Health and Social Care Partnership, written submission

42. In relation to the human trafficking provision, JustRight Scotland stated in its written evidence—

” The provisions are serious enough to have provoked an intervention from four United Nations Special Rapporteurs (“SRs”) in the form of a joint statement of concern. Their concerns overlap with those set out in the Legal Opinion. The SRs noted that the provisions in the Bill place the effectiveness of ongoing anti-slavery efforts at risk particularly for vulnerable groups such as women, children, disabled people, those with LGBTI+ identity, and other migrants.<sup>xiv</sup>

## Tackling human trafficking

43. JustRight Scotland stated the Bill impacts on “who we recognise as a survivor of human trafficking and how we protect them, as well as our ability to prosecute the perpetrators”.<sup>xv</sup>

44. Andy Sirel, Just Right Scotland, believed the Bill would reduce the number of people who are recognised as victims of human trafficking, which would result in fewer prosecutions. He considered this would inhibit the Scottish criminal justice system tackling traffickers.<sup>xvi</sup>

45. Maggie Lennon, Bridges Programmes, considered it would make it very difficult for Scottish courts to identify victims of trafficking and to work out how best to support them, because it is based on an immigration approach and argued it is against human rights.<sup>xvii</sup>

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<sup>xiv</sup> JustRight Scotland, written submission

<sup>xv</sup> JustRight Scotland, written submission

<sup>xvi</sup> [The Social Justice and Social Security Committee](#), *the Official Report*, 10 February 2022, Col 18.

<sup>xvii</sup> [The Social Justice and Social Security Committee](#), *the Official Report*, 10 February 2022, Cols 37-38.

## Conclusion

46. **The Committee has had limited time in which to seek evidence on the Legislative Consent Memorandum. In particular it has not been possible to hear from the Scottish Government nor the UK Government or to consider the legal arguments. As such the Committee draws the Parliament's attention to the evidence received from local authorities and relevant stakeholders, and notes the Scottish Government's reasons for not recommending consent to the Bill.**

