



## Briefing Note

### Legal Opinion on the Legal Implications of the Illegal Migration Bill in Scotland Summary of Key Points

The following is a summary of the key points of a legal opinion on the [Illegal Migration Bill](#) (“the Bill”) in Scotland, delivered by Kay Springham KC, instructed by JustRight Scotland (JRS), the Scottish Refugee Council (SRC) and the Children and Young People’s Commissioner Scotland in June 2023. The legal opinion was funded by a contribution from the Strategic Legal Fund, managed by the Immigration Law Practitioners’ Association.

We are opposed to the Bill. JRS and SRC have joined together and are working in coalition with other migration sector organisations in Scotland and beyond, to engage with the legislative process as this Bill proceeds through Parliament. The Commissioner’s office is working with other children’s commissioners across the UK to influence the content of the Bill in both the House of Commons and House of Lords.

The legal opinion will help us understand the impact of the Bill on Scottish Ministers, public authorities, and their responsibilities under devolved powers. We will also share it with civil society organisations in Scotland and the UK so they can actively participate in the legislative and implementation processes if the Bill becomes law.

Since the Bill will have retrospective effect – because it will impact on the lives and rights of people who have already arrived in the UK on or after 7<sup>th</sup> March 2023 – a key issue for us is the urgent need to identify and recommend steps that can be taken to mitigate against the significant harm that will result from implementation of the Bill

#### **About the Illegal Migration Bill**

The Bill, which is currently at the report stage in the House of Lords, proposes significant changes to the UK’s asylum system, removal powers, detention powers, corporate parenting powers, the support and assistance to victims of trafficking/modern slavery, leave to remain and British citizenship, and the relationship with the European Court of Human Rights.

The Bill creates a new category of people who either entered the UK, on or after 7 March 2023, ‘illegally’ or with leave to enter obtained through deception. Clause 2 prohibits people who meet this criteria from making a claim for asylum or any immigration application and creates a duty on Home Office staff to seek to remove these people, with very limited exceptions. Trafficking or slavery victims covered by Clause 2 will have their entitlement to support, including the recovery and reflection period, revoked.

The UN High Commission on Refugees has stated that this clause, if enacted would “breach the UK’s obligations under the Refugee Convention” and “extinguishes the right of refugees to be recognized and protected in the UK, for all but a few.”<sup>1</sup>

There has been no public consultation prior to the introduction of this Bill, nor has an economic impact assessment been published, while the equality impact assessment only released after the Bill had completed its stages in the House of Commons.

### **Legal opinion: Summary of Key Points**

The legal opinion confirms the following key points, based on the version of the Bill that was brought from the House of Commons on 23 April 2023:

- **Immigration is a matter reserved to the Westminster Parliament. However, the Bill makes direct and serious intrusions into devolved powers exercised by Scottish Ministers and Scottish public authorities.**
- **It ends Scottish Ministers powers to support survivors of trafficking in Scotland:**
  - For example, Clause 23 proposes to dis-apply the duties and powers Scottish Ministers have under the Human Trafficking & Exploitation (Scotland) Act 2015 (“the 2015 Act”)<sup>2</sup> to provide support and assistance to adult victims of trafficking who meet the Bill’s Clause 2 removal criteria, subject to one very limited exception.
- **It creates new powers for the Home Office to accommodate children in Scotland:**
  - Clause 19 of the Bill gives the Home Office the power to make regulations to directly accommodate unaccompanied migrant children in Scotland. The Home Office will also be able to direct when a local authority in Scotland starts to look after a child (dictating when the relevant sections of the Children (Scotland) Act 1995 apply), and

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<sup>1</sup> UNHCR Legal Observations on the Illegal Migration Bill, 2 May 2023, available here:

<https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023>

<sup>2</sup> Sections 9(1), 9(3) and 10 of the 2015 Act

when it ceases looking after a child so that the child can be transferred into the care of the Home Office.

- **Legislative consent should have been sought from the Scottish Parliament:**
  - The impact of Clause 23 (trafficking) “obviously relate[s] to devolved matters; it would be hard to think of a clearer example”. Counsel has no doubt that the Scottish Parliament should have been asked to consider passing a legislative consent motion.
  - Scottish Parliament should also have been asked to consider passing a legislative consent motion in relation to Clause 19.
- **However, the Bill's validity is unaffected by the failure to seek legislative consent.**
- **If Scottish Ministers cease to provide support and assistance to victims of trafficking in Scotland, that action will breach Scotland's international human rights legal obligations.**
  - Specifically, a blanket ban on providing support and assistance to survivors of trafficking would be unlawfully discriminatory and would breach Article 4 of the European Convention on Human Rights and Article 12 of the European Convention on Action against Trafficking in Human Beings.
- **Local authorities must continue to fulfil their obligations under the Children (Scotland) Act 1995, even if directed by the Home Office to transfer children into Home Office accommodation. This would include an assessment of whether changing accommodation would “safeguard and promote” the child's welfare which remains a “paramount concern”.**
- It is not at all clear how Scottish local authorities would ensure the welfare of children accommodated by the Home Office will be secured, but they **will not be relieved of those duties even if Clause 19 is enacted.**
- It is harder to assess how this clause would operate in practice, but the differential treatment of migrant children in care transferred to Home Office accommodation as compared to other children in care not so transferred is potentially unlawful discriminatory and a breach of international human rights obligations.

## **Recommendations and Conclusions**

In summary, the impact of the Illegal Migration Bill on devolved competencies in Scotland is to create powers for the Home Office that will pose challenges for Scottish Ministers and for other Scottish public authorities, including Scottish local authorities.

The Bill, if enacted, will cut across our current adult protection and child protection frameworks, potentially forcing Scottish Ministers and Scottish public authorities to differentiate in the protection and support that they provide to child and adult victims of abuse, trauma and trafficking.

If Scottish Ministers and Scottish public authorities fail to maintain equal treatment for child and adult victims, regardless of whether or not they are migrants and subject to the Clause 2 criteria, they risk breaching international human rights obligations, as well as engaging in unlawfully discriminatory action under existing domestic legislation (for example, the Children (Scotland) Act 1995).

For this reason, we are pressing for an urgent, concrete and commensurate response from Scottish Ministers and Scottish public authorities to the grave harm this Bill creates. That response must comprise tangible actions the benefits of which will actually be felt by those being assailed by this Bill.

We collectively stress that inaction is unacceptable, as that means in Scotland, people needing refugee or trafficking protection are entirely abandoned. We need the First Minister to lead from the front, and act to protect some of the most vulnerable people in the world, in Scotland by harnessing devolved law, policy and practice. We will play our part, but that must be within a public and third sector plan led by government, rather than charities and communities left carrying all the risk and human carnage that otherwise will ensue from this bill. We stand ready to help.

We are also calling on our civil society and public authority partners across the UK to work with us to identify and recommend steps that can be taken in mitigation against the significant harm that will result from implementation of this cruel, unnecessary and unlawful Bill.

## **Contact Us**

To discuss our legal opinion or any aspect of this work, please contact:

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