

# Refugee and Migrant Children's Consortium

## Nationality and Borders Bill – Committee Stage Evidence on new clauses NC29-37 on Age Assessments

### Introduction

On 21<sup>st</sup> October, the government laid new Clauses 29 to 37, to replace the placeholder Clause 58 (age assessments). For the government to introduce such detailed clauses so late in the process, despite having set out its intentions months ago in the New Plan for Immigration, is very poor and does not allow for proper scrutiny on matters of bodily integrity and fundamental human rights. The clauses ignore many of the concerns raised to date by those organisations working with unaccompanied children and young people<sup>i</sup> and risk violating children's rights. The Refugee and Migrant Children's Consortium (RMCC), a coalition of over 60 organisations, is of the view that all of these clauses should be removed from the Bill, but this briefing focuses on the following most harmful elements:

- New regulations and standard of proof for age assessments.
- Home Office powers to compel local authorities to assess age.
- The use of 'scientific methods' to assess age.
- Penalising children for not consenting to potentially harmful 'scientific methods'.

Children who come to the UK on their own from countries such as Afghanistan, Sudan and Eritrea face a unique problem when asked to prove their date of birth. The registration of births and the importance placed on chronological age differs across the world<sup>ii</sup> and many are unable to show official identity documents, such as passports or birth certificates, because they have either never had them in the first place, have had them taken from them, lost them in the chaos of fleeing or have had to destroy them en route. Some may have had to travel using false documentation (often suggesting they are an adult) provided by smugglers and traffickers. Disputes over age can also arise from a lack of understanding of the way in which dates are calculated in other countries and cultures, and associated confusion over what is being said by a child about his or her age.

In the absence of documentation, it is extremely difficult to determine a child's age accurately, and this is all the more so with children from different countries. Even those from similar ethnic backgrounds who have grown up in the same social and economic environment may display significant physical, emotional and developmental differences. These differences can be exacerbated by experiences of adversity, conflict, violence and the migration process.

The process of age assessment itself can also cause a lot of anxiety, confusion and frustration to many vulnerable children and young people, and have a negative impact to their already poor mental health.

Age is at the heart of a young person's identity and is key to developing trusting relationships from which to understand their experiences of abuse and persecution prior to arrival in the UK. In the UK age determines how or whether they are supported by children's services; their access to education; whether they are provided with asylum support by the Home Office and dispersed to a different part of the UK; and whether they are accommodated or detained with adults. Age also determines how their asylum or immigration application is processed and decided and forms a key part of how their credibility is perceived in this context.<sup>iii</sup> **For unaccompanied children in the asylum system, age is fundamental to their receiving the support and protection they need.**

We understand that there is concern that adults may be incorrectly placed in accommodation with children. However, we urge parliamentarians to consider that the greater safeguarding risk is to children being treated incorrectly as adults and that those as young as 14 have been placed in immigration detention, or alone in accommodation with adults of all ages.<sup>iv</sup> We know that occasionally young adults may be treated as children as a result of the difficulties with assessing age, but given the child protection measures in place and the supervision provided in children's placements it is a lower risk and far safer than children being treated as adults in places where there are no safeguarding measures or supervision. Furthermore, the truth is that a significant number of disputes about age are not over whether the individual is a child or an adult, but over the exact age of the child, for example, whether they are 15 or 17, impacting how they are cared for by local authority children's services and access to education.<sup>v</sup>

There are around 5,000 unaccompanied children looked after by local authorities in England currently – most (85%) are aged 16 and 17.<sup>vi</sup> In 2020 and 2019, there were 6,066 asylum applications from unaccompanied children.<sup>vii</sup> In that period, 1,530 individuals had their ages 'disputed' but, of those where an assessment was concluded, 50% were found to be children at the initial social work assessment. Of those found to be adults by the Home Office, statistics are not available to show how many of these decisions were later overturned, following advocacy and/or finding of fact reviews by judges.<sup>viii</sup> **Government statistics on age disputed cases do not include those applicants who claim to be children but who are treated as adults under Home Office policy and subsequently found to be children.**<sup>ix</sup> There has been a worrying trend of young people deemed adult following 'short' assessments which are not carried out in accordance with case law or Association of Directors of Children's Services guidance.<sup>xxixii</sup>

### **New regulations and standard of proof for age assessments**

It is impossible to know for certain someone's age and international guidance has stressed that age assessments "should only be undertaken by independent and appropriately skilled practitioners"<sup>xiii</sup> and "should not only take into account the physical appearance of the individual, but also his or her psychological maturity"<sup>xivxv</sup>. The process is complicated and nuanced and the guidance that has been developed in England,<sup>xvi</sup> Scotland<sup>xvii</sup> and Wales<sup>xviii</sup> to support the conduct of appropriate and fair age assessments is detailed in light of this.

Age assessments are, and should be, a function of the child protection/safeguarding system. Social workers, by nature of their education, studies, training, experience and specialist skills in working with and interviewing vulnerable children and young people, are uniquely positioned to undertake assessments, with evidence and input from other agencies vital for a truly holistic assessment.<sup>xix</sup>

The government's new clauses give the Home Office the power to make regulations on how to assess age and introduce a standard of proof of 'balance of probabilities' for age assessments. Years of domestic case law regarding age assessments has determined the burden of proof is not attributed to either the child or the state. Furthermore, the case law has also established that there is no burden on the child to prove their age but rather it is a matter of decision makers weighing the available evidence.<sup>xx</sup> The current standard when age is disputed in the context of an asylum appeal is that of a 'reasonable degree of likelihood' and the government has provided no evidence as to why this would need to be amended.<sup>xxi</sup> Given the complicated nature of assessing age, introducing such a high standard of proof would significantly increase the risk of children being wrongly treated as adults.

We are also extremely concerned that changes to age assessment criteria will be introduced via secondary legislation. Concerns have repeatedly been raised about the use of delegated powers and statutory instruments (SI) by government to amend laws without first facing detailed parliamentary scrutiny<sup>xxii</sup> – while SIs have the 'technical approval' of parliament, scrutiny is often perfunctory, particularly for those passed under the negative resolution procedure.

**Suggested amendments:**

*Clause NC30, page X, line X, leave out line X and insert—*

*“reasonable degree of likelihood.”*

Member's explanatory statement

Clause NC30 (6) currently sets out the standard of proof for age assessments at the balance of probabilities. This amendment will ensure the standard of proof is in line with case law and reflects the evidentiary challenges faced when assessing age and the need to give the benefit of the doubt where appropriate.

*Clause NC31, subclause (4), leave out 'balance of probabilities' and insert—*

*“reasonable degree of likelihood.”*

Member's explanatory statement

Clause NC31 (4) currently sets out the standard of proof for age assessments at the balance of probabilities. This amendment will ensure the standard of proof is in line with case law and reflects the evidentiary challenges faced when assessing age and the need to give the benefit of the doubt where appropriate.

*Clause NC34, subclause (3)(a) leave out 'balance of probabilities' and insert—*

*“reasonable degree of likelihood.”*

Member's explanatory statement

This amendment to Clause NC34 (3)(a) provides for the correct standard of proof the First Tier Tribunal must apply when deciding an appeal relating to age assessment.

## Home Office powers to compel local authorities to assess age

Statutory guidance from the Department of Education currently makes clear that local authority age assessments “should only be carried out where there is reason to doubt that the individual is the age they claim” and “should not be a routine part of a local authority’s assessment of unaccompanied or trafficked children”.<sup>xxiii</sup> NC30 undermines this guidance by giving the Home Office powers to compel local authorities to assess the age of a child because it they must provide the Home Office with evidence as to why they believe the child is the age they claim to be.

Local authorities have long expressed frustration over having to conduct age assessments when Home Office caseworkers challenge their view that they see no reason to doubt a young person’s age. Introducing this change undermines the specialist knowledge and experience needed by social work professionals, whilst tying them up in unnecessary age assessment processes at the expense of their stretched resources.

### **Suggested amendments:**

*Clause NC30, subclause (3), leave out “must” and insert “may”*

#### Member’s explanatory statement

This amendment to NC30 (3) would allow local authorities to decide whether to refer, conduct and inform the Secretary of State of an age assessment in line with their statutory duties to children under the Children’s Act 1989.

*Clause NC30, subclause (4)(b), leave out “must” and insert “may”*

#### Member’s explanatory statement

This amendment to NC30 (4)(b) would allow local authorities to decide what evidence to provide the Secretary of State in line with their statutory duties to children under the Children’s Act 1989.

*Clause NC33, subclause (2)(b), leave out “must” and insert “may”*

#### Member’s explanatory statement

This amendment to NC33 (2) (b) would allow local authorities to decide what evidence to provide the Secretary of State in line with their statutory duties to children under the Children’s Act 1989 in the regulations set out by the Secretary of State amendments NC30 and NC31.

## The use of ‘scientific methods’ to assess age

NC32 allows the government to introduce regulations specifying scientific methods to be used to assess age, including ‘examining or measuring parts of a person’s body’ and the analysis of saliva, cell or other samples and the DNA within them.

The use of scientific methods to assess age has long been the subject of debate<sup>xxiv</sup> and professional medical bodies are unequivocal in their rejection of their use. The Royal College of Paediatrics and Child Health’s current guidance states:

*“The use of radiological assessment is extremely imprecise and can only give an estimate of within two years in either direction, and the use of ionising radiation for this purpose is inappropriate. The British Society for Paediatric Endocrinology and Diabetes are clear that it is not possible to accurately assess a child's age based on physical examination or bone age assessment... dental x-rays, bone age and genital examination will currently not add any further information to the assessment process.”<sup>xxv</sup>*

The British Dental Association has long voiced its opposition to the use of dental x-rays stressing that they are inaccurate, inappropriate and unethical.<sup>xxvi</sup> Research has also shown that epigenetics has the same inaccuracies.<sup>xxvii</sup>

In Europe, there are an increasing number of decisions that state how scientific methodology is not sufficiently sound to be relied upon<sup>xxviii</sup> and the Council of Europe (CoE) has made clear that:

*“There is a broad consensus that physical and medical age assessment methods are not backed up by empirically sound medical science and that they cannot be assumed to result in a reliable determination of chronological age. [They] enable, at best, an educated guess. In addition to the scientific weaknesses and inaccuracy of age assessment methods, several methods have been evidenced to have a harmful impact on the physical and mental health and wellbeing of the person undergoing age assessment”<sup>xxix</sup>*

The CoE has also noted that examination of genital maturity should never be used as “this may amount to inhuman and degrading treatment”<sup>xxx</sup>

It has long been clear that scientific methods are not a ‘silver bullet’ for solving the question of age. In the European context, the UK’s approach has been seen as a gold standard and it is unclear why the government wishes to depart from this in the absence of any new scientific techniques that could be used safely and accurately as part of a holistic, multi-agency age assessment. The government’s amendments to the Nationality and Borders Bill will still give significant latitude to the Home Office to define in due course what constitutes an appropriate ‘scientific methods’ of age assessment (NC32 (9)) – it is vital that no new methods are introduced that are inaccurate and/or risk harming children and any new changes are approved by the relevant professional medical body before being introduced.

**Suggested amendment:**

*Clause NC32, page X, line X, at the end insert—*

*“(4) A method may not be specified in regulations under subsection (1) unless the Secretary of State receives approval from the relevant medical, dental and scientific professional bodies that the method is accurate beyond a reasonable doubt for assessing a person’s age.”*

**Member’s explanatory statement**

NC32 provides for use of scientific methods in age assessments. This amendment will ensure those are only introduced if the method is proved accurate by the relevant professional body.

## Penalising children for not consenting to potentially harmful ‘scientific methods’

Even more concerning, in light of the problems identified above, is part (7) of NC32 which states that if a putative child or their parent or guardian does not consent to the use of a ‘specified scientific method’ then this should be taken as damaging their credibility. This will basically force children and young people to undergo assessments that may be harmful.

### Suggested amendments:

*Clause NC32, leave out paragraph (7)*

#### Member’s explanatory statement

This amendment would remove the provision in Clause NC32 (7) to allow the government to take into account as damaging to a person’s credibility (or the credibility of a person who has made a statement on their behalf), the decision not to consent to the use of the specified scientific method.

*Clause NC33, leave out paragraph (1)(f)*

#### Member’s explanatory statement

This amendment would remove the provision in Clause NC33 (1)(f) to allow the Government to make regulations about how age assessments under amendments NC30 and NC31 which would include damage to the person’s credibility due to lack of co-operation with the assessment.

The Refugee and Migrant Children’s Consortium (RMCC) is a group of over 60 NGOs working collaboratively to ensure that the rights and needs of refugee and migrant children are promoted, respected and met in accordance with the relevant domestic, regional and international human rights and welfare standards. For more information and a list of members, please contact Maya Pritchard, Co-Chair at [maya@slr-a.org.uk](mailto:maya@slr-a.org.uk)

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### Case study - K (supported by the British Red Cross from January 2021)

K arrived in the UK in November 2020 from Iran and was held in a police station in Kent. He knew that he was 16 years old when he left Iran and told staff at the police station his date of birth. They explained that based on the date of birth he would have been 17 at that time. Some people believed him but there was one staff member who didn’t. A woman then came to ask him questions about his age, he thinks she was from social services but he wasn’t sure. The woman didn’t believe he was 17 and thought he looked older. K had been living in ‘the jungle’ in Calais, had not properly washed for a long time and had grown a beard. After the lady left, he was questioned by staff and put under pressure to accept he was 18. He was very confused about what was happening and didn’t understand what this would mean. The Home Office recorded his date of birth as 18, he was not referred to a local authority for

a full age assessment and was dispersed into adult asylum support accommodation in a hotel.

Whilst in asylum support accommodation, K tried to get help and was finally given a number for the British Red Cross who referred him to one of their local young refugee projects. He was very scared as he was the only child in the hotel and was worried about the other people staying there who were all adults, some of them were taking drugs and were not 'good people' and he couldn't eat the food. He was relieved to finally speak to someone who was willing to support him and he asked for help to be urgently moved out of the hotel.

The young refugee project made a safeguarding referral to the relevant local authority regarding the young person and explained his situation. The local authority promptly arranged to visit the young person and during an initial 'brief enquiry', two social workers agreed that it was highly likely that K was the age he was claiming to be. In line with guidance they did not feel it was necessary to subject him to a lengthy and intrusive full age assessment process. K was immediately moved into semi-independent accommodation and provided with support under section 20 of the Children Act 1989. The local authority completed a full needs assessment and quickly took action to refer him to a GP, dentist, optician, immigration solicitor and supported him to enrol in college. He had also been suffering from asthma and had not received any medical support since arriving in the UK.

## Endnotes

<sup>i</sup> [https://article39.org.uk/wp-content/uploads/2021/06/New-Plan-for-Immigration-Age-Assessments\\_RMCC-briefing-FINAL.pdf](https://article39.org.uk/wp-content/uploads/2021/06/New-Plan-for-Immigration-Age-Assessments_RMCC-briefing-FINAL.pdf)

<sup>ii</sup> L. Brownlees & T. Smith, *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011

<sup>iii</sup> In the consideration of asylum claims from persons seeking protection from persecution and other forms of human rights violations, international law and guidance recognises the particular vulnerabilities of children. See UNCRC Articles 22 and 37(1); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; CRC General Comment Number 6 on the Treatment of Unaccompanied and Separated Children Outside their Countries of Origin; UNHCR Guidelines on International Protection Number 8: Child asylum claims under articles 1(a)2 and 1(f) of the 1951 convention and/or 1967 protocol relating to the status of refugees.

<sup>iv</sup> See Separated Children in Europe Programme, Position Paper on Age Assessment in the Context of Separated Children in Europe, p 13.

<sup>v</sup> Under the Children Act 1989, placement decisions should be based on need, however many children seeking asylum over the age of 16 will be placed in unregulated semi-independent accommodation with more limited support rather than in family based foster care. It will also have an impact on leaving care support – particularly for those young people who do not meet the 13 week criteria.

<sup>vi</sup> <https://explore-education-statistics.service.gov.uk/find-statistics/children-looked-after-in-england-including-adoptions/2020>

<sup>vii</sup> <https://media.refugeecouncil.org.uk/wp-content/uploads/2021/03/22121107/Children-in-the-Asylum-System-Mar-2021.pdf>

<sup>viii</sup> [Home Office Quarterly Immigration Statistics Year Ending December 2020](#), Table Asy\_D05: Age disputes raised and outcomes of age disputes

<sup>ix</sup> This used to state an individual could be treated as an adult if in the opinion of an Immigration Officer "their physical appearance and/or general demeanour very strongly indicates that they are significantly over 18 years and no other credible evidence exists to the contrary". The wording was changed in May 2019 to "very strongly suggests that they are 25 years or over. <https://media.refugeecouncil.org.uk/wp-content/uploads/2021/03/22121107/Children-in-the-Asylum-System-Mar-2021.pdf>

<sup>x</sup> [https://www.duncanlewis.co.uk/news/Judicial\\_Review\\_issued\\_challenging\\_Age\\_Assessments\\_at\\_Kent\\_Intake\\_Unit\\_\(12\\_February\\_2021\).html](https://www.duncanlewis.co.uk/news/Judicial_Review_issued_challenging_Age_Assessments_at_Kent_Intake_Unit_(12_February_2021).html)

<sup>xi</sup> See *AB v Kent County Council* 2020 <https://www.bailii.org/ew/cases/EWHC/Admin/2019/109.html>

<sup>xii</sup> [https://adcs.org.uk/assets/documentation/Age\\_Assessment\\_Guidance\\_2015\\_Final.pdf](https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf)

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- <sup>xiii</sup> Unicef, *Age Assessment: A Technical Note*, January 2013, available at: <http://www.refworld.org/docid/5130659f2.html>
- <sup>xiv</sup> UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>, para 31. See also UN Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, available at: <http://www.unhcr.org/refworld/docid/4670fca12.html>, para 39.
- <sup>xv</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <http://www.refworld.org/docid/4b2f4f6d2.html> para 75
- <sup>xvi</sup> [https://adcs.org.uk/assets/documentation/Age\\_Assessment\\_Guidance\\_2015\\_Final.pdf](https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf)
- <sup>xvii</sup> <https://www.gov.scot/publications/age-assessment-practice-guidance-scotland-good-practice-guidance-support-social/>.
- <sup>xviii</sup> <https://www.wlga.wales/wales-strategic-migration-partnership>. There is currently no age assessment guidance in Northern Ireland.
- <sup>xix</sup> As highlighted by BASW (British Association of Social Workers) and IFSW (International Federation of Social Workers)
- <sup>xx</sup> *CJ v Cardiff* [2011] EWCH 23 (Ousley J)
- <sup>xxi</sup> Rawofi (age assessment - standard of proof) Afghanistan [2012] UKUT 197 (IAC) (20 June 2012)
- <sup>xxii</sup> See, for example, Brexit and Children Coalition, *Making Brexit work for children - The impact of Brexit on children and young people*, November 2017, p 5-7 and Public Law Project's [SIFT project](#) findings, October 2020.
- <sup>xxiii</sup> Department for Education, *Care of unaccompanied migrant children and child victims of modern slavery*, 2017
- <sup>xxiv</sup> In 2007, the Home Office consulted on a proposal for an automatic adverse inference to be drawn from an individual's refusal to submit to a dental age assessment (*Planning better outcomes and support for unaccompanied asylum seeking children*, Home Office, February 2007; the Home Office subsequently proposed, in September of that year, a new rule 352 of the Immigration Rules). In response to the consultation, multiple medical and professional bodies voiced strong opposition to the use of dental X-rays. On 28 March 2012, the Home Office announced its intention to pilot a trial with Croydon LBC to offer age-disputed young people the opportunity to undergo a DAA conducted by Professor Graham Roberts. This pilot proposal was later abandoned. In October 2016, the Home Office publicly ruled out the use of dental X-rays to assess the age of children arriving in the UK from Calais, criticising this approach as 'inaccurate, inappropriate and unethical' (Alan Travis, 'Home Office rules out "unethical" dental checks for Calais refugees', *Guardian*, 19 October 2016). See Legal Action Group, *The end of dental x-rays in age assessments*. <https://www.lag.org.uk/article/203643/the-end-of-dental-x-rays-in-age-assessments>. The use of dental x-rays as part of an age assessment process has also been considered in a number of legal judgments in the Upper Tribunal which found that the use of dental X-rays in assessing age is unreliable and of no assistance to judges or social workers in determining age (save in unusual circumstances involving a very young child).
- <sup>xxv</sup> Royal College of Paediatrics and Child Health, *Refugee and unaccompanied asylum seeking children and young people - guidance for paediatricians*, 2018
- <sup>xxvi</sup> [Press releases Child asylum seekers: dental age check plan dropped, but key questions remain \(bda.org\)](#)
- <sup>xxvii</sup> [Can epigenetics help verify the age claims of refugees? \(nature.com\)](#)
- <sup>xxviii</sup> See, for example, OCHRRCR, *Spain's age assessment procedures violate migrant children's rights, UN committee finds*
- <sup>xxix</sup> Council of Europe Children's Rights Division, *Age assessment: Council of Europe members states' policies, procedures and practices respectful of children's rights in the context of immigration*, 2017, para 129
- <sup>xxx</sup> *Ibid*, paras 130 and 131