

The Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022

**Child Rights and Wellbeing Impact
Assessment (CRWIA)**

April 2022

Introduction

The Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022

This purpose of these Regulations is to make provision for Deprivation of Liberty (DOL) orders made under the inherent jurisdiction by the High Court in England and Wales or by the High Court of Justice in Northern Ireland, to be recognised in Scotland as if they were Compulsory Supervision Orders (CSOs). This recognition is subject to the conditions specified in these Regulations and is provided for the purposes of authorising the deprivation of liberty of the child who is the subject of the order in Scotland and the application of certain provisions of the Children’s Hearings (Scotland) Act (“the 2011 Act”).

Currently, the non-Scottish authorities who place children into Scottish residential care with DOL orders petition the *nobile officium* jurisdiction of the Court of Session for legal recognition in Scots law of the DOL orders. This is required to ensure compliance with Article 5 of the European Convention of Human Rights (ECHR).

A limited number of children are currently affected, or are likely to be involved in the future. Since the first cross-border (deprivation of liberty) petition in 2019, there have been a further 35 placements of children into residential care in Scotland. Of these, 35 placements have been from England and one from Wales. To date, there have been no placements from Health and Social Care trusts in Northern Ireland.

Scottish Ministers have committed to fulfilling The Promise (the conclusions of the Independent Care Review), which made clear that cross-border placements must be reduced to an absolute minimum. The Scottish Government continues to work with the UK Government to ensure that it addresses the lack of adequate care provision, particularly in England, which has led to the increase in these cross-border DOL order placements.

Petitions to the Court of Session’s *nobile officium* jurisdiction are not intended for routine applications, such as those to recognise DOL orders. The current process of placing authorities petitioning the Court of Session to recognise DOL orders cannot be sustained. It does not serve the interests of the child or young person at the heart of each application, and it places a burden on Local Authorities and on the court itself, when resources could be better directed elsewhere.

That is why we have brought forward the Regulations as an interim step, necessary to better regulate cross-border placements of children and young people on DOL orders into Scottish residential care. This will help us on the way to a longer-term solution that better serves the rights and interests of the cross-border children affected. We are now consulting on proposals for the Children’s Care and Justice (Scotland) Bill.¹

¹ [Children’s Care and Justice Bill - consultation on policy proposals - Scottish Government - Citizen Space](#)

The Regulations make provision so that DOL orders have effect as if they are CSOs, subject to certain conditions. This does not mean that the DOL order will be fully converted into a CSO, which would result in the child entering the Scottish Children's Hearings System (SCHS) with concomitant issues around dual jurisdiction for the children affected and inappropriate obligations being imposed on Scottish Local Authorities and other agencies. Treating the DOL order as if it were a CSO simply provides a legal basis in Scotland for the deprivation of the liberty of the child who is subject to the order and ensures that the responsibilities of the placing authority are clear and legally enforceable. We intend to supplement the Regulations with a Memorandum of Understanding between the Scottish Government, UK Government and other devolved administrations, as well as compiling associated placement templates for placing authorities to complete. Our intention is to have these administrative agreements in place in time for the Regulations coming into force.

The aim is to ensure clarity and accountability around the placing authority's responsibilities prior to any cross-border placement, throughout its duration and at its end. The foundation of the policy is to ensure that the best interests of the children and young people are at the centre of all decisions made about their care, their rights are protected and their needs can be met in practice.

1. Which articles of the UNCRC does this policy/measure impact on?

General principles

Article 3 – Best interests of the child to be a primary consideration

Article 3 is key to the policy intention behind bringing forward the Regulations.

The policy relates to placing children and young people into Scottish residential care when a High Court in another part of the UK has granted a DOL order. These DOL orders are made under the High Court's so-called "inherent jurisdiction" because there is no statutory provision to authorise deprivation of liberty in residential accommodation.

Legal recognition of DOL orders is required to ensure compliance with Article 5 of the European Convention on Human Rights. Currently, the placing authorities petition the Court of Session's *nobile officium* jurisdiction, to seek Scots law recognition of the DOL orders. This jurisdiction is not intended for routine applications.

The Scottish Government is clear that such cross-border DOL placements can only be in the best interests of certain children in exceptional circumstances. There can be exceptional circumstances in which it is in the best interests of the child to be deprived of their liberty, for their safety. There are even more exceptional circumstances in which it is in the best interests of the child to be deprived of their liberty far from home and across a border into Scotland.

The Regulations – and associated administrative agreements - provide an opportunity to better regulate these placements and the policy intent behind this is to ensure that the best interests of the child are a primary consideration. For example:

- the Regulations will set as a condition of legal recognition of a new or continued DOL order that the placing authority must notify key people and agencies in Scotland with information about the DOL order. This includes: key health, education, and residential contacts; the Chief Social Work Officer of the affected Scottish Local Authority; the Commissioner for Children and Young People in Scotland; the Principal Reporter; the Care Inspectorate; and Scottish Ministers. This responds to stakeholder concerns that Scottish Local Authorities and supporting services are often unaware of the existence of such placements and are informed only when there is an emergency, such as a child absconding or a placement breakdown.
- the Regulations will also require undertaking that throughout the duration of a new or continued placement, the placing authority will provide, or secure the provision of, all services required to support the child subject to the DOL order and will be responsible for all of the costs arising as a result of, or in consequence of, the placement (except those relating to Scottish advocacy).
- The Regulations will allow for recognition of a DOL order in Scotland as if it were a CSO for a renewable period of up to three months. This ensures that a court which has granted the DOL order must regularly review the child's placement. This court process is designed to assess the necessity and proportionality of depriving the placed child of their liberty and the associated welfare analysis requires justification of why the proposed placement (and any further extension) is in the child's best interests.

Article 12 - Respect for the views of the child

Article 12 is a key consideration for this policy. A child has a right to express their views freely in all matters affecting them, in particular, in any judicial and administrative proceedings.

The court process through which the High Court in another part of the UK grants, reviews, extends and ends a DOL order for a cross-border placement is a matter for the relevant court. Accordingly, the responsibility for ensuring that the child's views are listened to and respected throughout that court process rests with the relevant authorities outside of Scotland.

We carefully considered how the policy should interact with the non-Scottish court process, to ensure that the child's views are heard and respected as fully as possible in the context of a non-Scottish court order and a non-Scottish Local Authority holding the primary responsibilities for the child under that order, including once they have been placed in Scotland. On that basis, in a policy position paper² published in January 2022, we proposed a role for Scotland's Children's Hearings System (SCHS), including that the children's hearing would be:

² [Cross-border placements of children and young people into residential care in Scotland: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/policy-position-papers/pages/2022-01-20-cross-border-placements-of-children-and-young-people-into-residential-care-in-scotland-policy-position-paper.aspx)

- convened in the Local Authority area in which the child is located in Scotland to: facilitate information-sharing with regard to the child's progress in placements; consider the child's access to local rights protections; and provide a safeguarder for the child, where appropriate.
- able to share information on the child's progress to the High Court outside of Scotland in the context of their reviews of the DOL order.

Many of those who responded to the policy position paper supported the principle behind proposing a role for SCHS. However, most were concerned about the lack of power available to SCHS, meaning the proposal would not lead to parity of treatment between children in Scotland subject to DOL orders and those who are looked after in residential care settings in Scotland. They highlighted that it could be confusing for the child to be involved in systems and processes in another legal jurisdiction when they were already involved in the non-Scottish court process.

Responding to this key area of concern, we developed the policy further and have not provided a dispositive or advisory role for SCHS in the Regulations. Whilst the intention was to provide for parity of treatment as far as possible between children who are subject to DOL orders and those liable to losing their liberty while being looked after in residential care in Scotland, we recognise that the lack of dispositive power available to SCHS would mean this intention could not be fully realised in practice. We also acknowledge concerns that engaging with SCHS could increase confusion, distress and trauma for the child, as they will already be required to interact with the court process in the jurisdiction in which the DOL order was made.

We now intend to put in place an offer of independent advocacy to children and young people on cross-border DOL placements into Scotland. This would operate as a particular extension to the existing national children's hearings advocacy scheme operating under s122 of the 2011 Act, partnering with the primary advocacy providers in the relevant Scottish Local Authorities. This offer of independent advocacy will supplement the support that the child receives through relevant UK systems. This uniquely Scottish offer is intended to support children to provide their views to the residential provider which is hosting them - as to how their in-placement experience in Scotland aligns with their child's plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

The relevant advocacy organisations will be notified by Scottish Ministers when a child on a cross-border DOL placement comes to Scotland and is placed in a setting in the Local Authority for which they hold primary provider status under their children's hearings advocacy grant arrangement. The Scottish Ministers will make contact with the child to offer advocacy support for their time in Scotland, unless they consider that this would not be appropriate, taking into account their age and maturity. If the child agrees, any advocacy worker appointed to them will listen to and advocate for the child's views, with the aim of ensuring the child's rights are upheld whilst living in Scotland. As and when the child returns to their local community within the placing authority, the Scottish advocacy worker will make contact with any advocacy organisation appointed elsewhere in the UK to ensure a smooth transition.

Civil rights and freedoms

Article 8 – Preservation of a child’s identity

Article 8 is about respecting the right of the child to preserve their identity, including nationality, name and family relations. This is relevant to the policy because children placed across a border into Scotland from elsewhere in the UK will experience a different culture and will likely be geographically further away than normal from family and friends. The deprivation of liberty measures will also be likely to affect their communication with their loved ones – for example, the DOL order might include a requirement for any use of social media to be supervised by staff in the residential care setting which accommodates them.

The High Court in another part of the UK makes decisions relating to granting, reviewing, extending, or ending a DOL order and will carefully consider the conditions which are attached to such an order. As noted above, this is a matter for the relevant court. However, it is within the scope of the policy to require the placing authority to make certain notifications and follow the placement process set out in proposed administrative agreements between the placing Local Authority and Scottish Local Authority as well as a proposed Memorandum of Understanding between the Scottish Government and the UK Government, Welsh Government and Northern Ireland Executive. These administrative agreements will set out the importance of ensuring that the child’s nationality and family relations are taken into account when deciding on the most appropriate placement for them and that these links are supported and maintained throughout the duration of the placement.

Article 13 – Freedom of Expression

Article 13 is about the right of the child to freedom of expression. This right could be impacted by deprivation of liberty measures. The High Court in another part of the UK makes decisions relating to granting, reviewing, extending, or ending a DOL order. Ensuring that the child is able to express their views in this process would be matter for the relevant court and placing authority. However, it is within the scope of the policy to ensure this right is taken into account for the child on placement in Scotland. The offer of advocacy to the child for their time in Scotland will support this.

Article 16 – Protection of privacy

Article 16 is focused on ensuring there is no arbitrary or unlawful interference with the child’s privacy, family, home or correspondence. There are some aspects of a DOL order which may inevitably affect this right – for example, the DOL order might authorise the residential home staff to restrict or supervise the child’s use of a mobile phone and the internet. As above, it is for the High Court in another part of the UK that is granting/ reviewing/ extending/ ending the DOL order to decide on the most appropriate conditions to include as part of the order, guided by the principles of necessity and proportionality and considering the child’s best interests. It is then within the scope of the Regulations to provide for the DOL order to be legally recognised and enforceable in Scotland.

Family environment and alternative care

Article 5 – parental guidance and child’s evolving capacities

This Article sets out that State Parties shall respect the responsibilities, rights and duties of parents or other persons legally responsible for the child to provide appropriate direction and guidance in the exercise by the child of UNCRC rights.

The Regulations support this, by requiring an undertaking to be provided by or on behalf of the placing Local Authority that it will provide, or secure, the provision of all services required to support the child who is subject of the DOL order.

Furthermore, we now intend to put in place an offer of independent advocacy to children on cross-border DOL placements into Scotland. This would be offered to children who, considering their age and maturity, may benefit from the offer. The advocacy provision would operate under the existing national children’s hearings advocacy scheme in the relevant Scottish Local Authorities. This offer of independent advocacy will supplement the support that the child receives through relevant UK system. This uniquely Scottish offer is intended to support affected children to provide their views to the residential provider - as to how their in-placement experience aligns with their child’s plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

Article 7 - right to name, nationality and to know and be cared for by parents

Article 9 – separation from parents

Article 10 – family reunification

Article 18 – parental responsibilities and State’s assistance

The DOL order Regulations are relevant to situations in which children are cared for in a residential care setting in Scotland. However, the Regulations will make clear that the placing authority from another part of the UK is designated as the implementation authority responsible for the placement. In carrying out its duties as implementation authority, it is likely that the placing authority would engage Articles 9, 10 and 18 (and also Article 7, under the theme of civil rights and freedoms). Decisions impacting on these Articles are a matter for the placing authority and cannot be provided for via the Regulations. However, it is within the scope of the policy to require the placing authority to make certain notifications and follow the placement process set out in the proposed administrative agreements which will accompany the Regulations. These administrative agreements will set out the importance of ensuring that the child’s nationality and family relations are taken into account when deciding on the most appropriate placement for them and that these links are supported and maintained throughout the duration of the placement.

Article 20 – Children deprived of their family environment

Article 20 states that when a child is temporarily or permanently deprived of their family environment, or in where, in their own best interests, they cannot be allowed to remain in that environment, due regard shall be made to the child’s ethnic, religious, cultural and linguistic background. This should form an important part of the High Court’s consideration when deciding whether a placement across the border into Scotland is the most appropriate for the child and is ultimately a matter

for the court. The Scottish Government continues to work with the UK Government to ensure that it addresses the lack of adequate care provision, particularly in England, which leads to cross-border deprivation of liberty placements being made. In line with Keeping The Promise, the Scottish Government is clear that cross-border placements should only occur in exceptional circumstances and be reduced to a minimum.

Article 25 – Periodic review of placement and treatment

Article 25 sets out the child’s right to a periodic review of their treatment and all other circumstances relevant to their placement. The Regulations will allow for recognition of a DOL order in Scotland as if it were a CSO for a period of up to three months. This ensures that the High Court that has granted the DOL order must regularly review the child’s placement to ensure it remains in their best interests. The High Court granting the DOL order is responsible for reviewing the welfare analysis presented to it, to ensure that any decision to grant, extend, vary or revoke a DOL order is made in the best interests of the child.

Basic health and welfare

We are aware that some of the children on past/ current placements are disabled – for example, they may have an autism diagnosis requiring particular support with their learning and education. For example, in the Care Inspectorate’s *Short thematic review of children and young people placed on Deprivation of Liberty Orders – January 2022*,³ it was stated that five of the 11 children in the review had a formal diagnosis of an autism spectrum condition.

In theory, children may be placed in a residential care setting which is not suitable for their needs. We are aware that poor matching could lead to children being placed in settings where the therapeutic treatment they need is not available. Being placed at a considerable distance from their home environment could also mean that children may not be able to access the services (e.g. diagnosis, assessment, treatment, support) that they need. For example, some services may be more difficult to access in a very rural setting. Furthermore, if there is a lack of planning by the placing authority before a placement, this could lead to delays or gaps in treatment.

However, the decision about whether or not to grant the DOL order and where to place the child is a matter for the relevant court elsewhere in the UK, informed by submissions from the placing authority. Going forward, it will continue to be the responsibility of that court to determine whether or not the placement is in the best interests of the child or young person and whether or not the placement appropriately takes account of a child being disabled should be part of that decision-making.

As above, given the scope of the policy is to provide for legal recognition of orders and better regulate the placement process, it is unlikely that the policy will negatively impact on disability. What the policy will do is ensure that the placement process for

³ [Short Thematic Review of CYP on DoL orders.pdf \(careinspectorate.com\)](#)

those young people is better regulated – so it should have a positive impact on that small group of children, regardless of whether or not the child is disabled.

Article 24 – Right to health and health services

Article 24 recognises the right of the child to the enjoyment of the highest attainable standard of health and to health facilities. The Regulations support this right by requiring an undertaking that throughout the duration of the placement, a placing authority will provide or secure the provision of all services required to support the child who is the subject of the DOL order, which includes health services. The Regulations will also require the placing authority to notify key people in Scotland of information about the DOL order, including the relevant Health Board which provides health services in the area in which the child has been, or is to be, placed.

Article 27 – right to adequate standard of living

The Regulations are relevant to situations in which children are cared for in a residential care setting in Scotland. The Regulations make clear that the placing authority from another part of the UK is designated as the implementation authority responsible for the placement. In carrying out its duties as implementation authority, it is possible that the placing authority would engage this Article.

We intend that the Regulations will be supported by administrative agreements – including a Memorandum of Understanding between the Scottish Government, the Welsh and UK Governments and the Northern Ireland Executive – as well as a placement undertaking between the placing authority and Scottish Local Authority. The placement undertaking will make clear that all the needs of the child are to be met by the implementation authority. This would include consideration of how the right to this Article is met.

Furthermore, the Care Inspectorate will continue their risk-based prioritisation of children’s services which will help to identify the impact of the policy. In Scotland, children’s residential services must be registered with the Care Inspectorate. Services are regulated and inspected by the Care Inspectorate⁴ to ensure they meet the national standards. Children’s residential services have to provide quality care as set out in legislation, The Residential Establishments – Child Care (Scotland) Regulations 1996⁵ and the National Care Standards.⁶

Education, leisure and cultural activities

Article 28 – Right to education

Article 28 recognises the right of the child to education. The Regulations support this right by requiring an undertaking to be provided by or on behalf of the placing Local Authority that it will provide, or secure the provision of all services required to support the child who is the subject of the DOL order, which includes education services, for the duration of the child’s placement. The Regulations will also require the placing

⁴ [Welcome to the Care Inspectorate](#)

⁵ [The Residential Establishments – Child Care \(Scotland\) Regulations 1996 \(legislation.gov.uk\)](#)

⁶ [New Care Standards | Review of Scotland's National Care Standards](#)

authority to notify key people in Scotland of information about the DOL order, including any person acting as the director of the education authority in the receiving Local Authority.

Article 31 – right to leisure, play and participation in cultural and artistic activities

The Regulations are relevant to situations in which children are cared for in a residential care setting in Scotland. The Regulations make clear that the placing authority from another part of the UK is designated as the implementation authority responsible for the placement. In carrying out its duties as implementation authority, it is possible that the placing authority would engage this Article.

We intend that the Regulations will be supported by administrative agreements – including a Memorandum of Understanding between the Scottish Government, the Welsh and UK Governments and the Northern Ireland Executive – as well as a placement undertaking between the placing authority and receiving authority. The placement undertaking will make clear that all the needs of the child are to be met by the implementation authority. This would include consideration of how the right to this Article is met.

Special protection measures

Article 37 – Restriction of liberty

Article 37 states that no child shall be deprived of their liberty unlawfully or arbitrarily. This is a key foundation of the policy; the High Court in another part of the UK grants a DOL order in the best interests of the child. These DOL orders are made under the High Court’s so-called “inherent jurisdiction” because there is no statutory provision to authorise deprivation of liberty in residential accommodation.

The UK Supreme Court has ruled that the use of the inherent jurisdiction to authorise deprivations of liberty in “non-secure” accommodation is lawful.⁷ However, it was noted that use of the inherent jurisdiction in the face of a lack of provision for children and young people should be a temporary measure. **The most appropriate permanent solution is to address this lack of provision.**

Within Scotland, legal recognition of DOL orders granted elsewhere in the UK is required to ensure compliance with Article 37 UNCRC and Article 5 of the ECHR. Currently, the placing authorities petition the Court of Session’s *nobile officium* jurisdiction, to seek Scots law recognition of the DOL orders. This jurisdiction is not intended for routine applications.

The Regulations will allow for recognition of a DOL order in Scotland as if it were a CSO for a period of up to three months. This ensures that the High Court that has granted the DOL order must regularly review the child’s placement. This court process is designed to assess the continued necessity and proportionality of depriving the placed child of their liberty and the associated welfare analysis requires

⁷ UK Supreme Court Case Summary of Case ID UKSC 2019/0188 - ‘In the matter of T (A Child) (Appellant)’: <https://www.supremecourt.uk/cases/uksc-2019-0188.html>

justification of why the proposed placement (and any further extension) is in the child's best interests.

2. What impact will your policy/measure have on children's rights?

The decision to grant a DOL order for the child rests with the High Court in another part of the UK. Ultimately, that decision requires the court to assess whether imposing deprivation of liberty measures is a necessary and proportionate intervention in order to protect the safety, health and wellbeing of the child, or of others.

The Regulations will have a positive impact on children's rights, as the key policy aims are to ensure that:

- The deprivation of a child's liberty on cross-border placement in Scotland is lawfully recognised without requiring recourse to the current recognition process, which is not fit for purpose; and
- The placement process is better regulated, by ensuring that legal recognition is subject to certain conditions – including requirements for the placing authority to act as the implementation authority, and to:
 - notify key people in Scotland of information about the DOL order; and
 - grant an undertaking that, throughout the duration of the placement, it will provide or secure the provision of all services required to support the child who is the subject of the DOL order.

Together, these conditions will ensure that there is greater clarity on the legal responsibilities of the placing authority, ensuring they can be enforced where necessary – as well as wider safeguards from notifications in respect of all relevant Scottish agencies being informed.

The offer of advocacy support could also have a positive impact for the child. If they accept the offer, an advocacy worker could support the child to provide their views to the residential provider - as to how their in-placement experience aligns with their child's plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

3. Will there be different impacts on different groups of children and young people?

The policy only relates to a very specific group of children and young people – namely those in another part of the UK (outside of Scotland) for whom the High Court in that jurisdiction grants a DOL order for a cross-border placement into residential child care in Scotland. Since the first of these cross-border DOL petitions in 2019, there have been a further 35 placements of children into residential care in Scotland. Of these, 35 placements have been from England and one from Wales.

The policy should have the same direct positive impacts (in terms of better regulating these cross-border DOL placements) for all those children on such placements.

It is possible that the policy could have some slightly differing indirect impacts on other groups of children already in care in Scotland. For example, it could have a positive impact on other children who are resident in the same residential care settings, who are subject to different legal measures. For example, if a better regulated cross-border DOL placement is less likely to break down, it reduces the risk of emergency staff time/resource being required (reducing the risk of negative impacts on other children).

The policy would also impact on the adults/authorities who are working with children in care in question, in terms of removing the need for placing authorities to petition the Court of Session for recognition of the DOL orders, but increasing the accountability and transparency around placement process they should follow.

4. If a negative impact is assessed for any area of rights or any group of children and young people, can you explain why this is necessary and proportionate? What options have you considered to modify the proposal, or mitigate the impact?

As explained above, in a policy position paper⁸ published in January 2022, we initially proposed a role for SCHS. Many respondents supported the principle behind proposing a role for SCHS. However, most were concerned about the lack of power available to SCHS, meaning the proposal would not lead to parity of treatment between children in Scotland subject to DOL orders and those who are looked after in residential care settings in Scotland. Stakeholders highlighted that it could be confusing for the child to be involved in another legal jurisdiction when they are already involved in the non-Scottish court process.

Responding to this key area of concern, we developed the policy further and have not provided a role for SCHS in the Regulations. Whilst the intention was to provide for as much parity of treatment as possible between children who are subject to DOL orders and those being looked after in residential care in Scotland, we recognise that the lack of dispositive power available to SCHS, and the concerns that advisory reports from a local children's hearing offered little guaranteed traction with a non-Scottish court, would mean this intention could not be fully realised in practice. We also acknowledge concerns that engaging with SCHS could increase confusion and trauma for the child, as they will already be required to interact with the court process in the jurisdiction in which the DOL order was made.

We now intend to put in place an offer of independent advocacy to children and young people on cross-border DOL placements into Scotland. This would operate as a particular extension to the existing national children's hearings advocacy scheme operating under s122 of the 2011 Act, partnering with the primary advocacy

⁸ [Cross-border placements of children and young people into residential care in Scotland: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/position-papers/pages/summary.aspx?id=1000)

providers in the relevant Scottish Local Authorities. This offer of independent advocacy will supplement the support that the child receives through relevant UK systems. This uniquely Scottish offer is intended to support children to provide their views to the residential provider which is hosting them - as to how their in-placement experience in Scotland aligns with their child's plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

The relevant advocacy organisations will be notified by Scottish Ministers when a child on a cross-border DOL placement comes to Scotland and is placed in a setting in the Local Authority for which they hold primary provider status under their children's hearings advocacy grant arrangement. The Scottish Ministers will make contact with the child to offer advocacy support for their time in Scotland, unless they consider that this would not be appropriate, taking into account their age and maturity. If the child agrees, any advocacy worker appointed to them will listen to and advocate for the child's views, with the aim of ensuring the child's rights are upheld whilst living in Scotland. As and when the child returns to their local community within the placing authority, the Scottish advocacy worker will make contact with any advocacy organisation appointed elsewhere in the UK to ensure a smooth transition.

5. How will the policy/measure give better or further effect to the implementation of the UNCRC in Scotland?

As outlined above, a number of UNCRC Articles are engaged through this policy, including Articles related to:

- General Principles (Articles 3 and 12)
- Civil rights and freedoms (Articles 7, 8, 13 and 16)
- Family environment and alternative care (Articles 5, 9, 10, 18, 20 and 25)
- Basic health and welfare (Article 23, 24 and 27)
- Education, leisure and cultural activities (Article 28 and 31)
- Special protection measures (Articles 37)

The Regulations and accompanying administrative agreements support these UNCRC Articles by:

- Ensuring that the DOL order is recognised in Scots law, ensuring that the deprivation of liberty of a child which has been assessed as necessary and proportionate is lawful in Scotland;
- Better regulating the placement process, by ensuring that legal recognition is subject to certain conditions – including requirements for the placing authority to:
 - notify key people in Scotland of information about the DOL order; and
 - provide an undertaking that throughout the duration of the placement, it will provide or secure the provision of all services required to support the child who is the subject of the DOL order.
- Making it clear what the legal responsibilities of the placing authority are and ensuring that these can be enforced where necessary.

The offer of advocacy support to the children and young people on cross-border DOL placements further supports the implementation of UNCRC, for example, by

ensuring that the child's views are listened to throughout their placement in Scotland and that a smooth transition can be made when the child ultimately returns to their home jurisdiction.

6. How have you consulted with relevant stakeholders, including involving children and young people in the development of the policy/measure?

Targeted stakeholder engagement

On 6 January 2022, we published a policy position paper on *Cross-border placements of children and young people into residential care in Scotland: policy position paper*.⁹ We sought views on the proposals by 28 January 2022.

A variety of feedback was received from around 30 stakeholders. That included responses from regulatory and oversight organisations, health and social care providers, third sector organisations, and legal stakeholders.

The engagement was focused, inviting views by email, given the urgency of bringing forward Regulations to regulate cross-border placements. That means most responses were submitted without the expectation that we would publish them.

We also met with stakeholders and partners, including the UK Government, Welsh Government, Northern Ireland Executive, The Promise Scotland, the Children and Young People's Commissioner Scotland, CELCIS, Children's Hearings Scotland and the Scottish Children's Reporter Administration, Social Work Scotland, Chief Social Workers, COSLA, and the Care Inspectorate.

We have since contacted all those who provided feedback, to seek permission to cite their views in a summary paper. We published that summary paper¹⁰ on 25 March 2022, outlining key themes raised and the updated policy position. In particular, we adapted the policy to remove the original proposed role for SCHS – as explained above.

We have also adapted the policy by extending an offer of advocacy to children and young people on cross-border DOL placements. This would operate as an extension to the existing national children's hearings advocacy scheme in the relevant Scottish Local Authorities. This offer of advocacy will be intended to support children subject to DOL orders to understand and realise their rights, and to provide their views to the residential provider - as to how their in-placement experience aligns with their child's plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

⁹ [Cross-border placements of children and young people into residential care in Scotland: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/policy-position-papers/pages/1.aspx)

¹⁰ [Overview - Cross-border placements of children and young people in residential care in Scotland: regulation of Deprivation of Liberty \(DOL\) orders - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/overviews/pages/1.aspx)

Children and young people's views and experiences

This is a sensitive policy area, because it relates to children who are being deprived of their liberty in a residential care setting far from their home community. These children have often experienced extensive trauma, and DOL orders are primarily granted due to significant concerns for their safety and wellbeing. The placements can often be of an emergency nature, with the children moved to the Scottish placement at short notice. There is scope for the DOL order to be extended, but they are mostly intended to be short-term, for periods of up to three months.

Given the sensitive nature of the placements, great care is required when engaging with the children involved. Therefore, no direct engagement with these children has been undertaken by the Scottish Government, although we have engaged with stakeholders who directly represent their views. We have also worked with the Care Inspectorate to agree that they would undertake a thematic review of DOL orders. This involved a desktop exercise to analyse some of the data and inspection reports held by the Care Inspectorate in relation to DOL placements. It also involved a short thematic review,¹¹ in which the Care Inspectorate met virtually with the placing authority social worker, key worker or a member of house staff for all the children subject to a DOL order in Scotland in January 2022. They also conducted face-to-face meetings with nine of the children and had a telephone interview with one young person.

The Care Inspectorate reported, in anonymised terms, on some of the high level themes reviewed – such as:

- The reasons why the children are being placed in a residential care service in another country, a considerable distance from home.
- The quality of information-sharing and joint decision making in the matching and allocation process of children to placement.
- The restrictions and resulting outcomes for the child during the placement.

Key findings from the small number of cases in the review included:

- All children and their families, as appropriate, had access to an advocate and a solicitor representing their views in the legal proceedings in respect of applications for DOL orders.
- The intensity of the care package required for the children in all cases necessitated a UK-wide placement search. The level of risk posed to the child in their local area was a key factor in the rationale for the cross-border placement.
- The placement in Scotland had positive outcomes for the child in most cases.
- Contact with those important to the child was in place for most children. Where there were issues relating to frequency/quality, these were directly related to factors outwith control of the child or the placing authority.
- In all cases, the child was supported to develop a fuller understanding of their rights once they were placed in Scotland.

¹¹ Care Inspectorate's 'Short thematic review of children and young people placed on Deprivation of Liberty Orders - January 2022':
https://www.careinspectorate.com/images/Short_Thematic_Review_of_CYP_on_DoL_orders.pdf

- In all cases, the host authority and relevant services were not included in the placement decision-making. Notification of the placement was made in all cases at the point of placement or thereafter.
- All children and/or their parents/carers, where appropriate, were involved in decision making.
- Transport to placement was mostly provided by secure escort services. In most cases, the adults transporting the child were not previously known to them and some found the experience negative.
- The children subject to DOL orders in Scotland were in houses delivered by private providers, often in rural areas, where staffing ratios were high.
- The type and number of measures to restrict a child or young person's liberty were particular to the needs and risks for each individual child. The measures were applied in the least restrictive way, promoting the child's rights.
- All children were given the opportunity to participate directly in the most recent review of their DOL order.
- Most were achieving educationally, either through attendance full-time or part-time in mainstream education, education provided by the service provider, or through college and attending work experience.
- Different ways of maintaining family contact had been considered for all children.
- All children were supported to participate in hobbies, activities and leisure pursuits of interest to them, based on a risk assessment / plan and the measures within the DOL order.
- All children were registered with universal health care providers, and most had attended routine appointments and where required, had received more specialised input.
- Almost all of the staff caring for children had not received formal training on court orders made elsewhere in the UK, including DOL orders.

The review also highlighted that whilst a number of positive examples were found, this may not be mirrored if looking at all cross-border cases.

We will continue to take this information into account when further developing our policy position in relation to cross-border placements, particularly in considering longer-term solutions to issues as part of the forthcoming Children's Care and Justice Bill.

7. What evidence have you used to inform your assessment?

There is limited data available, due to the relatively small number of these cross-border DOL placements, and due to the sensitive, confidential nature of the court proceedings. However, we have used a range of evidence, including:

- Notifications data about cross-border placements from the Care Inspectorate
- Feedback from partners and stakeholders on the policy position paper
- Discussions with partners and stakeholders about the current process for recognising DOL orders and the policy proposals
- Anonymised information from the Care Inspectorate's desktop exercise and thematic review of cross-border DOL placements

- Current Litigation practice regarding conditions for recognition of DOL orders

Going forward, by introducing clear requirements for who the placing authority should notify of key details about the placement, the Scottish Government and others will be able to more consistently monitor placement information. The offer of advocacy support to the children and young people will also provide a new opportunity for their voices to be heard in the process. By gaining views and feedback from children through an advocacy worker here in Scotland, we can be further assured that their rights whilst placed here are being upheld in line with the child's plan.

8. How will the impact of the policy/measure be monitored?

We intend that the Regulations will be supported by administrative agreements – including a Memorandum of Understanding between the Scottish Government, the Welsh and UK Governments and the Northern Ireland Executive – to be reviewed annually - as well as a placement undertaking between the placing authority and Scottish Local Authority. These agreements will enable key authorities to monitor how the policy is being followed. The notification of information that will be required from the placing authority to the key Scottish stakeholders (including the Scottish Ministers), will enable us to monitor any changes in numbers of placements or practice around them. The Care Inspectorate will also continue their risk-based prioritisation of inspection of residential care services, which would help to identify the impact of the policy.

9. How will you communicate to children and young people the impact of the policy/measure on their rights?

As above – the offer of advocacy that we intend to extend to children on cross-border DOL placements will support them to understand and realise their rights, and to provide their views to the residential provider - as to how their in-placement experience aligns with their child's plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

As and when the young person returns to their local community within the placing authority, the Scottish advocacy worker will make contact with the advocacy organisation appointed elsewhere in the UK to ensure a smooth transition for the young person.

10. Sign & Date

Policy Lead Signature & Date of Sign Off: Hannah Graham Formal Care and Corporate Parenting Team Leader, 13 April 2022

Deputy Director Signature & Date of Sign Off: Jane Moffat, Deputy Director – Strategy, The Promise and GIRFEC, 13 April 2022



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