

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

**Island Communities Impact Assessment**

**April 2022**



**Scottish Government**  
Riaghaltas na h-Alba  
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## **Island Communities Impact Assessment**

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

The 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 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").<sup>1</sup>

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 and better aligns with the Promise. We are now consulting on proposals in the Children's Care and Justice (Scotland) Bill.<sup>2</sup>

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<sup>1</sup> [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>2</sup> [Children's Care and Justice Bill - consultation on policy proposals - Scottish Government - Citizen Space](#)



and loved ones, this would be accentuated with a cross-border placement to an island. Relevant issues to consider are: distance, geography, connectivity and demography, which could impact the child or young person in a number of ways, including:

- There is potential that a move to areas that are as geographically remote as the islands, particularly for children and young people originally based in England/Wales/Northern Ireland, could potentially have adverse consequences for the child placed there. It is possible that the child or young person could feel disorientated due to the differences from home and this could lead to feelings of isolation.
- On a practical level, their journey to arrive at the placement would be more extended than to a mainland placement – and the same would apply to any family and friends visiting them.
- This could impact on their relationships and in-person meetings with family and friends, due to the distance. Maintaining ongoing and regular contact with birth families and friends is critical to ensuring the child is well settled in placement.
- The child will have a social worker and whilst meetings can be done online, face-to-face is often the preferred mode of communicating.
- Independent advocacy provision will be offered and consideration will need to be given to how that contact is maintained.

However, in the possible scenario of a placement on an island once the Regulations are in force (subject to Parliamentary approval), it would be outwith the scope of the policy to influence any potential impact; it would be for the placing authority applying for the DOL order (and the High Court in granting/rejecting/reviewing the order) to take into account whether or not a cross-border placement to a Scottish island is the right placement for the young person. It could be unlikely that a cross-border placement on a Scottish island would be the right thing for the young person, given the extended distance it would place them from their home environment.

The scope of the policy is to provide for legal recognition in Scots law of these cross-border DOL placements, to ensure compliance with Article 5 of the European Convention of Human Rights. Furthermore, the Regulations and accompanying administrative agreements will seek to better regulate the placement process – for example, by bolstering information-sharing requirements from the placing authority to relevant Scottish authorities. Overall, the policy will therefore have a minimal impact on island communities, but it will ensure that island authorities are more timeously and appropriately informed about placements which may affect them.

There is also the potential that cross-border DOL placements could put a strain on Local Authorities and services. However, these placements are already occurring and Scottish Local Authorities will have no new statutory obligations placed upon them via the Regulations. Indeed, the legislation will make clear that obligations to the placed child in terms of providing/procuring services for them and paying for the placement rest with the authority which has placed them in Scotland. Associated enforcement machinery has been provided for in the Regulations, to ensure that there is a clear incentive to adhere to these obligations and that action can be taken against any placing authority which reneges on these.

In the past, many Scottish Local Authorities have been unaware of the accommodation of children subject to DOL order placements in their local area. To avoid this happening again in the future, the Regulations set out a requirement for the placing authority to notify a key range of contacts when a placement is made, to ensure the DOL order can be appropriately recognised in Scots law. This includes notification of the placement to the Chief Social Work Officer and person acting as the Director of Education in the Scottish Local Authority where the child will be accommodated and the relevant Scottish Health Board, amongst others. In relation to the islands, we feel there will be no impact that would differ significantly from any other part of Scotland.

## **Data**

The Regulations impact on a small group of children in the care system. Since 2019 there have been 35 placements of children with Deprivation of Liberty orders. Only two of these has been on a Scottish island.

The latest Looked After Children Statistics in relation to Scotland published in March 2022 (for 2020-21) show that 13,255 children were looked after as at July 2021. The majority (90%) were placed in the community. This included 33% of children and young people who were placed with Kinship Carers, 24% placed with Foster Carers provided by Local Authorities, and 22% were looked after at home. In addition to this, 10% of Looked After Children were placed with Foster Carers purchased by Local Authorities.

A smaller proportion of Looked After Children – 1,286 (10%) were placed in residential accommodation, including 4% placed in a Local Authority home. Of this, 304 children were placed in 'other residential' placements - private/independent residential placements for young people with complex needs.

It is difficult to correlate this data to cross-border placements involving DOL orders; there have only been 35 such placements involving petitions to the Court of Session, since the first petition in 2019. This number is too small to extrapolate any clear trends.

## **Consultation**

We have already engaged with key stakeholders about the Regulations.

We published a policy paper on our proposals on 6 January, seeking stakeholder responses by 28 January. Officials also met with stakeholders, including The Promise Scotland, Social Work Scotland, COSLA, Scotland's Children's Hearing System (SCHS), the Scottish Children's Reporter Administration, CELCIS, the UK Government, and Chief Social Work Officers. The Minister for Children and Young People also met with her UK Government counterpart, Mr Will Quince MP, on 2 February to express the importance of resolving the capacity issues fuelling these placements as a matter of urgency.

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 have since contacted all those who provided feedback, to seek permission to cite their views in a summary paper. We published that summary paper<sup>5</sup> 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.

Stakeholders largely shared our concerns about current practices and their impacts on the children affected by these placements, agreeing with the need to move to end cross-border placements in the longer-term, in line with Keeping the Promise. There was also agreement from stakeholders that the non-Scottish placing authority should be the implementation authority, and should therefore retain full responsibility for the implementation, oversight, review and financial costs of the placement.

Following the above engagement, we cannot identify any significantly different impacts the Regulations would have on island communities as compared to other communities. These placements entail a child being placed far from home, whether they are placed on an island or not. Often there are distances of hundreds of miles between the child's home and the residential setting in Scotland which accommodates them as part of a cross-border placement, given the lack of suitable accommodation in the child's local area. This means that particular effort needs to be made by the child's social worker to ensure that they are able to make regular and meaningful contact with their loved ones.

It is key to highlight that the Regulations will put in place a more robust and streamlined process for recognition of DOL orders in Scotland than that which currently exists. Whilst this will ensure that the placements are better regulated than they have been to date, the decision as to where to place a child and whether the granting of a DOL order is in their best interests will continue to lie with the relevant court elsewhere in the UK, as informed by submissions from the placing authority. Accordingly, we do not anticipate that the Regulations will impact on how many children are subject to DOL orders are placed in Scotland, nor where they are ultimately accommodated.

Throughout the development of the policy, Ministers have considered the potential impacts on those who could be affected by it, including island communities. As noted above, all interested stakeholders have been given the opportunity to express their views on the proposed policy and, where concerns have been raised, further discussion has been undertaken to address the relevant issues. It is accordingly considered that consultation on the policy has been robust, meaningful and sufficient to comply with the duty under section 7 of the Islands (Scotland) Act 2018.<sup>6</sup>

## **Assessment**

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<sup>5</sup> [Overview - Cross-border placements of children and young people in residential care in Scotland: regulation of Deprivation of Liberty \(DOL\) orders - gov.scot \(www.gov.scot\)](#)

<sup>6</sup> [Islands \(Scotland\) Act 2018 \(legislation.gov.uk\)](#)



- Does your assessment identify any unique impacts on island communities? **No.**
- Does your assessment identify any potential barriers or wider impacts? **No.**
- Does the evidence show different circumstances or different expectations or needs, or different experiences or outcomes (such as different levels of satisfaction, or different rates of participation)? **No.**
- Are these different effects likely? **No.**
- Are these effects significantly different? **No.**
- Could the effect amount to a disadvantage for an island community compared to the mainland or between island groups? **No.**

The Scottish Government's assessment has not identified any potential barriers or wider impacts of the policy on island communities which is significantly different from its effect on other communities. This includes the mainland and other island communities.

Engagement with relevant stakeholders did not highlight impacts that would be considered to have a significantly different effect on island communities as compared to other communities. Similarly, there will be no additional financial impact for island communities in isolation resulting from the Regulations.

Cross-border placements from elsewhere in the UK into residential care settings in Scotland are, by their nature, distance placements. This distance exists irrespective of whether a child is placed on an island or not, but a potential placement on an island should give rise to particular considerations by the placing authority and the relevant court as to whether it is in the child's best interests.

The scope of this policy is to bring forward regulations that will provide for legal recognition in Scots law of DOL orders made by a High Court in another part of the UK. The Regulations and accompanying administrative arrangements will not, and cannot, provide for the process by which a DOL placement into a Scottish residential care setting is approved for a child. Accordingly, the policy will not have a bearing on where in Scotland children are ultimately accommodated and as such, it will not have any unique impact relevant to island communities. We do expect, however, that better regulating the placement process will be of equal benefit to authorities across Scotland, wherever a placement is planned.

Accordingly, we conclude that our policy, strategy or service is **NOT** likely to have an effect on an island community which is significantly different from its effect on other communities (including other island communities). Scottish Government's conclusion is that a full Islands Communities Impact Assessment is not required.

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**Signature and date:** Hannah Graham, 13 April 2022

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