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Education, Children and Young People Committee

May 2022

Dear Convener,

THE CROSS-BORDER PLACEMENTS (EFFECT OF DEPRIVATION OF LIBERTY ORDERS) (SCOTLAND) REGULATIONS 2022 (DRAFT)

I am writing to you in relation to the above Regulations (“the Regulations”) which the Scottish Government laid before Parliament on 26 April.

You have invited me to give evidence at a meeting with the Committee on 25 May. I look forward to discussing the Regulations, and the context within which we have laid them before Parliament, with the Committee in more detail. Ahead of that session, I thought it would be helpful to respond to the concerns raised by the Office of the Children and Young People’s Commissioner Scotland (CYPCS), both in their written submission and in their oral evidence given at the Committee session on 18 May. I understand that the CYPCS has also submitted supplementary evidence to the Committee on 20 May. I would be happy to speak in more detail on any the matters that they have raised at the Committee’s evidence session on Wednesday.

I am grateful to the CYPCS and his officers for their close scrutiny and careful consideration of the Regulations and attendant issues. I also appreciate the candid and collaborative approach that the Commissioner’s office has taken with my officials as we seek to resolve the dilemmas raised by these placements. We agree that children’s rights, needs and wellbeing must be central to this work. However, I thought it was important to clarify the Scottish Government’s view on a number of the Commissioner’s points with regard to the purpose, scope and effect of the proposed legislation. The Annex to this letter contains more detailed clarifying material.

I am aware that CYPCS has called on the Scottish Government to withdraw the Regulations. I have considered that call seriously in recent days, but I can confirm that it is not my intention to withdraw them.

We are all in agreement that we are faced with an extremely challenging set of circumstances, which are not of our own making. Cross-border DOL placements are stemming from a lack of adequate provision elsewhere in the UK, primarily in England. The Independent Review of Children’s Social Care published on 23 May makes clear that there are a small but growing number of children with complex needs being deprived of their liberty by the court because there are no other homes

for them to live in. We will of course continue to study these very recent wider reports, considering them alongside other evidence and experience as we take forward policy development for the longer term (beyond what is proposed in the Regulations.)

The Regulations therefore will not – and should not – be considered a substitute for proper provision being made available in the children’s home nations. I am also clear that funding models based on the acceptance of cross-border children cannot be sustained, and that Scotland must do all it can to prevent the monetisation of the care of our children.

That is why I have pressed – and will continue to press – the UK Government to address these capacity issues as a matter of urgency. However, cross-border DOL order placements are happening now and will continue to happen, at least in the short term. It is imperative that we act now to better protect the rights of children on these placements.

The Regulations cannot resolve all of the issues inherent in cross-border DOL placements. The Regulations before the Committee today, in line with the secondary legislation powers available to us, set conditions for a DOL order to be treated as if it were a Compulsory Supervision Order (CSO) in Scotland. They cannot regulate court processes in another jurisdiction or relitigate the terms of a High Court order. Moreover, more comprehensive and far-reaching changes, as suggested by the CYPCS and other stakeholders, would require primary legislation. The Regulations are therefore a step on the way to a longer-term solution being considered as part of the planned Children’s Care and Justice (Scotland) Bill.

I also want to be clear that DOL order placements are a very specific sub-set of wider cross-border residential placements into Scotland. These children have often experienced extensive trauma and DOL orders are primarily granted due to significant concerns for their safety and wellbeing. The [Children’s Rights and Wellbeing Impact Assessment](#) published alongside the Regulations highlighted findings from the Care Inspectorate’s [Short thematic review focussed specifically on children and young people placed on Deprivation of Liberty Orders](#). This thematic review involved the Care Inspectorate meeting face to face or virtually with the children and young people involved, 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. It therefore provides an important insight into the care and experience of children on DOL orders at that time. That review is careful to highlight that its findings may not be mirrored if looking at all cross-border cases.

In relation to DOL order placements, key findings from the review highlight that:

- The placement in Scotland had positive outcomes for the child in most cases.
- 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.
- In all cases, the child was supported to develop a fuller understanding of their rights once they were placed in Scotland.

- All children and/or their parents/carers, where appropriate, were involved in decision making.
- 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.

There were other findings which highlighted the lack of notification being granted to Scottish Local Authorities, in advance of the placement happening. We have accordingly built provision into the Regulations that the placing authority must provide key information to relevant authorities in Scotland before the DOL order can be lawfully recognised in Scots law. The review also suggested that guidance to support good practice in meeting the needs of all children and young people placed outwith their country of birth be developed. We are developing the administrative agreements which will support the Regulations implementation.

Recognising the complex regulatory and policy landscape, the Scottish Government has engaged closely with a wide range of stakeholders throughout the process of developing these Regulations. We published an [initial policy proposal](#) on 6 January, inviting views from stakeholders. In that paper, we suggested that Children's Hearings be convened in the authority area in which the child is located. The role of the Children's Hearing would have been to facilitate information sharing with regard to the child's progress in placement and, importantly, to consider the child's access to local rights protections. We had also proposed it would be open to the Children's Hearing to appoint a safeguarder and to ensure advocacy provision had been offered to the child. The Children's Hearing would transmit advisory information to the High Court in England / Wales in the context of their own reviews (at least every 3 months) of the DOL order.

A variety of feedback to this policy paper was received from 35 stakeholders. That included responses from the CYPCS, regulatory and oversight organisations, health and social care providers, third sector organisations, and legal stakeholders. After analysing feedback, including the response from the CYPCS, we published a [further paper](#) on 25 March – outlining how we would develop the Regulations further, taking stakeholder feedback into account.

We held follow-up meetings with a number of key stakeholders to further discuss the Regulations. These included meetings with the office of the CYPCS, Chief Social Work Officers, the UK Government, the Association of Directors of Children's Services in England, and Local Authority and Social Work Scotland representatives. We will welcome further engagement with them as we look to develop longer-term

measures for all (not just DOL order) residential cross-border placements into Scotland in the Children's Care and Justice Bill, which is currently out for consultation. The Care Inspectorate's [Distance Placement report](#) published last week – which covers all distance placements, including children within Scotland and children placed cross-border, helpfully highlights areas for consideration as part of the that legislative proposal.

As set out in our policy paper of 25 March, the proposed role for Children's Hearings was not supported by stakeholders, including the CYPCS. They highlighted issues relating to the ability of a child to challenge the basis of the deprivation of liberty. Other 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 area of stakeholder concern, the Regulations instead provide for an offer of independent advocacy to children on cross-border DOL placements – to support them in expressing their views about their experience in Scotland. This offer of advocacy is intended to support affected children 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.

In addition to the offer of advocacy in Scotland, the Regulations provide important safeguards, that do not currently exist, such as:

- **Notifications requirements:** The key feedback we have received from stakeholders in relation to the current process is that Scottish authorities often find out too late that there is a cross-border DOL placement in their area. This can lead to difficulties, for example if the placement breaks down before relevant authorities are even aware of the placement. The notification requirements, which include key information being shared with the CYPCS, are designed to address this area of concern ensuring that placing authorities must provide key information to relevant authorities before the DOL order can be recognised in Scots law.
- **The designation of the placing authority as implementation authority** for the placement. This means that an undertaking must be given by or on behalf of a placing authority 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, and
 - bear all costs directly arising from, or which arise in consequence of, the child's placement, apart from the costs of Scottish advocacy provided to the child.
- The Regulations also include **enforcement provisions** to provide Scottish Ministers with the power to apply to the sheriff court for an enforcement order if a placing authority does not comply with these obligations.

I should be clear that in terms of procedural safeguards between “Scottish” and “cross-border” children, we cannot establish complete parity of treatment between both categories of children - as the CYPCS suggests - unless we bring the cross-border child fully into the Scottish care system.

Such an approach is not supported by stakeholders.

DOL orders are temporary and the intention is for the child to be able to return to their home jurisdiction. We consider that transposing legal and resourcing responsibility for these children into Scottish systems would not be best for the child, would not address the root cause of the issues leading to cross-border placements (lack of adequate provision, particularly in England), and would likely lead to a further proliferation of these placements in Scotland.

The CYPCS had also raised queries regarding the inspection and scrutiny regime that currently exists for children on DOL order placements. Children’s residential services in Scotland must be registered with the Care Inspectorate. There are no “unregulated” services in Scotland. Services are inspected to ensure that they are providing quality care and that they meet the national standards. The Care Inspectorate has introduced a requirement that providers notify them when a young person, placed from a different legal jurisdiction within the UK, moves in and out of a placement. The notification aims to provide assurance in relation to care planning and information for data analysis. The Regulations also include a legal requirement for the placing authority to notify the Care Inspectorate when a DOL order has been granted.

There is also a protocol through which the Care Inspectorate can raise any practice concerns with regard to DOL order placements directly with OFSTED. We are now proposing to broaden that engagement and will be meeting ,on a quadrilateral basis, with UK Government, OFSTED and the Care Inspectorate, .

As the Committee will be aware, Scottish Ministers cannot regulate what happens when a court process in another jurisdiction is engaged, and nor can they affect the outcome of that process. Where a DOL order is made in England, Wales or, as the case may be, Northern Ireland, it is that court order which will govern what is to happen in a particular case.

The decision as to whether a DOL order should be granted, for how long, and the conditions to be attached to any order made, are all quite properly a matter for the relevant court. That court will always undertake a thorough necessity and proportionality assessment, to ensure that the measures a child is subject to are appropriate and that the child’s rights are respected. This means that we cannot introduce measures setting out how and when a DOL order can be granted, for how long it can be granted for and what conditions can be attached to it.

The Scottish Parliament – via section 190 of the Children’s Hearing (Scotland) Act 2011 (“the 2011 Act”) – has given the Scottish Ministers a power to make provision for a non-Scottish order to have effect as if it were a Scottish CSO. We have carefully considered the purposes for which a DOL order should be so treated under the Regulations and the conditions to be attached to this to ensure that, if the

instrument is approved by the Scottish Parliament, significant improvements to the *status quo* for children will be achieved. In particular, the Regulations make the legal recognition of a DOL order in Scotland conditional on a number of requirements, in order to better regulate the existing cross-border placement process.

While we acknowledge and appreciate the thorough and helpful analysis applied to issues relating to cross-border DOL placements by the CYPCS and other colleagues, it is important to note that the Scottish Government does not consider that these issues can be fully addressed using secondary legislation alone.

We have always been clear that these Regulations are an interim step to improve the current situation, and that we are committed to working with all stakeholders to consider longer-term, more fundamental solutions as part of the forthcoming Children's Care and Justice Bill. The consultation for that Bill is open until 22 June. We believe that further input and evidence as part of that exercise – as well as our experience in implementing the Regulations – will provide the most robust basis for bringing forward further legislation relating to cross-border DOL placements.

Recognition of DOL orders in Scotland is a legal imperative. The Regulations form part of a wider package of interventions, including with UK Government. That package represents a carefully calibrated range of measures to support children subject to cross-border DOL placements, without further encouraging their proliferation.

My view is that the improvements to existing cross-border DOL processes and the protection of Scottish local services which these Regulations afford must be implemented as soon as possible. I therefore commend the Regulations to the Committee and reiterate my commitment to implementing more long-term solutions in the forthcoming Children's Care and Justice Bill.

We welcome ongoing dialogue with the CYPCS and other stakeholders as we continue to develop those longer-term solutions. I hope that this letter, and the annexed material, are helpful to the Committee.

Yours sincerely,

Clare Haughey
Minister for Children and Young People

Compatibility with the United Nations Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR)

In their written evidence, CYPCS stated that they do not consider the Regulations to be compatible with UNCRC and ECHR, calling on to the Scottish Government to withdraw them. They refer to: a lack of procedural safeguards for placed children that are analogous to those for “Scottish” children; insufficient safeguards to ensure the DOL is a last resort; and a lack of clarity for those implementing the legislation as to how they will meet their statutory and human rights duties.

In their oral evidence, CYPCS officials raised specific points regarding children not having their health and education needs met on these cross-border DOL placements. This was raised in the context of Scotland’s statutory duties in respect of the child, and the challenging complexity of the interaction between two legal jurisdictions.

SG response: In terms of compatibility, lawful authority of deprivation of liberty is required to ensure compliance with article 5 of the ECHR. Therefore, by providing a statutory basis for recognition and enforcement of the DOL orders in Scots law, the very essence of the Regulations is about ensuring that children’s rights are complied with.

We published a Children’s Rights and Wellbeing Impact Assessment (CRWIA) alongside the Regulations, which sets out in detail our consideration of how the rights of children placed in Scotland on DOL placements will be respected and upheld, including in relation to health and education. As the Committee will be aware, the UNCRC has not yet been incorporated into Scots law, but the CRWIA demonstrates that the Scottish Government has carefully considered the Convention in developing this instrument and, of course, we remain committed to incorporating it into Scots law to the maximum extent possible as soon as practicable.

We also note that the Delegated Powers and Law Reform Committee has considered the Regulations and has not drawn the attention of the Parliament to them under any of its reporting grounds. Those grounds include when there are doubts as to whether the Regulations are within Ministers’ powers - which would apply if there were a question as to their ECHR compatibility - and where the Committee considers that the drafting of the instrument is defective or its meaning could be clearer.

In terms of creating analogous procedural safeguards between “Scottish” and “cross-border” children, we cannot establish complete parity of treatment between both categories of children unless we bring the cross-border child fully into the Scottish care system. However, DOL orders are temporary and the intention is for the child to be able to return to their home jurisdiction. We consider that such an approach would not be best for the child, would not address the root cause of the issues leading to cross-border placements (lack of adequate provision in England), and would likely lead to a further proliferation of these placements in Scotland.

In terms of safeguards in relation to the DOL order itself, as I have noted above, it is not possible for the Scottish Ministers to regulate how and when the DOL order itself can be granted or reviewed; these are appropriately matters for the relevant court in another jurisdiction. However, what we have done in the Regulations is make the recognition of the DOL order conditional on a number of requirements, in order to better regulate the placement process. This presents an important opportunity to improve on current practice; a better-regulated process will ultimately serve the child's best interests.

In terms of statutory and human rights duties, the court and all public authorities interacting with the child are under an obligation to respect the child's ECHR rights by virtue of section 6 of the Human Rights Act 1998. The Regulations also seek to clarify roles and responsibilities in relation to a cross-border DOL placement by clearly designating the authority which has placed the child in Scotland as the authority which has legal responsibility for implementing any requirements imposed by the DOL order which is treated under the Regulations as if it were a CSO.

Further, in order to obtain recognition of a DOL order in Scots law, a placing authority will have to give an undertaking under the Regulations that it will provide or procure all services required to support the placed child and meet all costs arising from, or in consequence of, the child's placement. This will include ensuring that the child has access to appropriate healthcare, educational services and is afforded any support they require as a result of disability or additional needs. Any breach of this undertaking, or failure to adhere to any requirements in the DOL order may result in enforcement action by the Scottish Ministers. We will continue to work with stakeholders – including when developing accompanying administrative agreements and guidance – to ensure that obligations on the part of the placing authority are made as clear as possible.

The Regulations do not prejudice relevant powers and duties of Scottish local authorities – for example, the duty under section 22(1) of the Children (Scotland) Act 1995 to safeguard and promote the welfare of children in a local authority area who are in need. However, we are clear that these should not need to be invoked if the authority which places the child in Scotland fulfils its obligations towards the child under the Regulations and ensures that they receive the services that they require. The intention is that Scottish local authorities should not be required to step in in relation to these placements, but we consider it appropriate that they should retain the ability to do so in the child's best interests if, for example, there is a crisis/emergency situation which demands that urgent action be taken.

In developing the Regulations, we have engaged with counterparts elsewhere in the UK to understand the processes that would be followed outwith Scotland before a child is placed here. The vast majority of cross-border DOL placements have been from England and we are advised by the UK Government that the Care Planning Placement and Case Review (England) Regulations 2010 and associated statutory guidance are clear in setting out the responsibilities of English local authorities generally - particularly when making out of area placements - and that they emphasise the importance of effective planning, engagement and information-sharing with the services likely to be responsible for meeting the child's needs. The guidance highlights the duties on local authorities to draw up other plans such as

Education, Health and Care Plans (EHCPs) in respect of any children who have special educational needs or disabilities. Additionally, the 2010 Regulations set out that the care plan must include a record of the education and training proposed for the child.

Application to High Court for DOL order: notification requirements

As a condition for recognition of the DOL order, the Regulations require placing authorities to notify named Scottish authorities of some key details. CYPCS call for an additional notification requirement. They suggest that within 24 hours, notification of an application to the High Court should be made by the placing authority to the Scottish local authority, Health Board, residential home, the child, and anyone with parental rights and responsibilities (PRRs) for the child. They outline that the notification should include a copy of the application itself and the supporting social work welfare needs assessment and planning reports.

SG response: The Regulations make provision for a range of notifications to be sent to specified persons and bodies when a DOL order is made, including the Scottish Local Authority, Health Board and person in charge of the residential setting in which the child is to be placed. We are satisfied that the notifications requirements, as they currently stand, will achieve the policy intention of improving information-sharing with key Scottish authorities. This, in turn, will enable all Scottish services to be made aware of the placement in good time, which will help to avoid situations (which occur under the current system) of Scottish authorities only finding out about a placement at the point at which there is a placement breakdown.

It is important to note that the process leading up to and following an application for a DOL order elsewhere in the UK is not something that the Scottish Ministers can regulate. Ministers can, however, make provision about recognition of the order in Scots law once it has been granted. We have accordingly made fulfilment of the notification requirements one of the pre-requisites to recognition of a new or continued order in Scotland. We consider that, even in an emergency situation, it will be possible for the relevant notifications to be made before the child is placed here, in order that all relevant parties are aware of their arrival in Scotland.

Restriction on care homes accepting cross-border DOL placements

CYPCS call for additional restrictions in relation to care homes for children and young people which are able to accept cross-border DOL order placements. They give examples of these additional restrictions, including:

- *Conditions to be met by the care home, such as: being registered, regulated and inspected by the Care Inspectorate with a recent 'adequate' marking; providing written confirmation to the Care Inspectorate that it complies with various requirements, standards and guidance; assessing and being satisfied that staff training and experience is sufficient to meet the child's care plan and needs; and providing an undertaking to the placing authority that it will support, promote and facilitate regular and meaningful contact with the child's parents and family); and*

- *Conditions to be met by the placing authority (such as confirming to the care home that it has consulted with the Scottish local authority and Health Board).*

In their oral evidence, CYPCS officials focused on the need to distinguish between policy commitment and legal obligations – stating that it is important to ensure that there is as much in statute as possible regarding obligations of services. They discussed more stringent requirements (such as a requirement that any care home accepting a cross-border DOL placement should have received a Care Inspectorate ‘adequate’ rating within the last 6 months). They also stated that whilst this might lead to a situation whereby fewer settings can accommodate vulnerable children on DOL orders additional regulation is – in their view – necessary.

SG response: Where a child is placed in Scotland on a cross-border DOL placement, the Regulations specify that the setting in which they are placed must be managed by a care service which is registered by Social Care and Social Work Improvement Scotland (SCSWIS, otherwise known as the “Care Inspectorate”). This ensures that the body providing care services to a child on a cross-border DOL placement is subject to regulatory oversight. For example, SCSWIS has the power under the Public Services Reform (Scotland) Act 2010 to inspect care services. If appropriate, it can also issue an improvement notice in respect of provision made by a care service and where necessary, ultimately apply for an order to cancel its registration.

We note that the regulation-making power in s.190 of the 2011 Act allows Ministers to make provision for a specified non-Scottish order to be treated as if it were a CSO for certain purposes and subject to certain conditions. The proposals in relation to imposing additional restrictions and requirements on care services go beyond the scope of this and we consider that the most appropriate and effective way to regulate in this regard is through primary legislation. The regulation of care settings and cross-border placements – including those involving DOL orders - are matters that we are considering as part of the Care and Justice Bill which is currently out for consultation, and we welcome views from stakeholders – including CYPCS – in relation to these.

Transfer of legal order – time limitation

CYPCS state that the initial DOL should be limited to 22 days to reflect the emergency and temporary nature of the placement. They state that this would restrict the order to have the same effect as an interim Compulsory Supervision Order (ICSO).

SG response: The length of the placement and the conditions attached to that are a matter for the relevant court elsewhere in the UK and we cannot interfere with this. However, we have incorporated a condition into the Regulations that a DOL order must be reviewed by the court at least once every three months in order to continue to be recognised as a matter of Scots law. This mirrors the current legal process for recognising a DOL order in Scotland - whereby the Court of Session will grant recognition of the order for up to three months at a time. It also mirrors the requirement for a review to be undertaken at least once every three months where a

“home” child is subject to a secure accommodation authorisation under a “proper” CSO (see section 135 of the 2011 Act.)

Decision of High Court on DOL order: notification requirement

As a condition for recognition of the DOL order, the Regulations require placing authorities to notify named Scottish authorities of some key details. CYPCS call for a strengthened notification requirement. They state that if the High Court grants the DOL order, the placing authority must immediately (but no later than 24 hours after the granting of the order) provide what they describe as a basic notification to some people and an enhanced notification to others.

SG response: We have included notification requirements as part of the Regulations and the making of the notification is one of the pre-requisites for the recognition of a new or continued DOL order in Scotland.

We are also proposing that non-statutory supporting administrative agreements supplement the Regulations and these have been discussed and shared with stakeholders. This will include a Placement Template that the placing authority has to send to the Scottish local authority in advance of the placement. The purpose of this is three-fold:

- To identify and ensure early and comprehensive care planning by the Placing Local Authority in respect of the young person being placed in Scotland under a Deprivation of Liberty Order;
- To ensure that relevant information is robustly communicated to the Scottish Local Authority in which the child is placed; and
- To ensure safe, appropriate and individual needs-led support is in place for the child or young person being placed in Scotland.

We are satisfied that the notifications requirements, as they currently stand, will achieve the policy intention of improving information-sharing with key Scottish authorities.

Duration of placement

CYPCS make a number of suggestions in relation to the duration of the placement, including that:

- *The initial placement should only be made for a maximum of 22 days*
- *No child can be lawfully deprived of their liberty for a period in excess of 6 months from the first date of their placement*

SG response: Whilst we appreciate the CYPCS’s concerns about the potential duration of DOL orders, the length of the placement and the conditions attached to that are a matter for the relevant High Court elsewhere in the UK. The court will always undertake a thorough assessment of the necessity and proportionality of depriving the child or young person of their liberty. In line with its obligation under section 6 of the Human Rights Act 1998 to act in a manner compatible with the child’s ECHR rights, the court must also make sure that the measures imposed by its order go no further than necessary, and are imposed for no longer than required, to ensure the safety of the child, or the safety of others.

The Regulations provide for the recognition of new or continued DOL orders for renewable periods of only up to three months at a time. We consider it appropriate that a regular review of the child's placement should be undertaken by the relevant court in England/Wales/Northern Ireland, to ensure that it continues to be appropriate and meets the child's best interests. As noted above, the recognition of the order for up to three months at a time mirrors the recognition which would be granted under the existing Court of Session process and also mirrors the requirement for a review to be undertaken at least once every three months where a "home" child is subject to a secure accommodation authorisation under a "proper" CSO.

Transport

CYPCS propose that the placing local authority must provide an undertaking that the transportation of the children to and from care placements is child-centred, trauma sensitive, and in accordance with the child's human rights. They also propose other amendments to the Regulations, such as requiring the placing authority to pay for regular visits and contact between the child and their family throughout the placement.

SG response: The Regulations make clear that the placing authority is to act as implementation authority for the recognised DOL order in Scotland, and as such will be responsible for the management of the child's placement.

The placing authority is a public authority which is under an obligation as a matter of Scots law and the law elsewhere in the UK (under section 6 of the Human Rights Act 1998) to respect a placed child's ECHR rights. As such, we would expect that the transportation of the child to a placement would always be carried out in accordance with their human rights and that the child's right to private and family life (under Article 8 ECHR) would be upheld by the placing authority facilitating regular contact between the child and their family.

The Regulations also make clear that the placing authority is responsible for all costs associated with the placement, and that will include the necessary arrangements for regular visits between the child and their family throughout the duration of the placement.

Children's rights and needs

In their written evidence, CYPCS make some suggested amendments in relation to children's rights and needs. They outline that within 72 hours of the child being placed in Scottish residential accommodation, the receiving local authority Social Worker and Mental Health professionals must make contact with and visit the child and if necessary, conduct assessments of needs under sections 22 and 23 of the Children (Scotland) Act 1995 and under relevant mental health legislation.

CYPCS also state that within the 22-day period of the initial order, the placing and the receiving local authorities must convene a multi-agency, Team Around the Child meeting (under the Getting It Right for Every Child - GIRFEC - policy framework for

assessment and planning in children's services) with the child and family and provide a recommendation and report to the High Court about the suitability of the placement for the child and the plan for the continuing care and protection of the child.

In their oral evidence, CYPCS officials focused on the need to ensure parity of treatment for cross-border children and 'Scottish' children.

SG response: The Regulations already make clear that the placing authority will be responsible for the provision (or arrangement of provision) of all services required to support the child, which would include ensuring that their medical and educational needs are met. We consider that introducing the requirements suggested by CYPCS above would, in fact, result in a lack of clarity in terms of the roles of the placing and receiving local authority which the Regulations have been designed to address.

As noted above, planning and support for the child must be put in place by the authorities in the relevant jurisdiction and so the child will be required to interact with those authorities, as well as to engage with the court process elsewhere in the UK. We consider that engaging with a further range of professionals in Scotland could increase confusion, distress and trauma for the child, and, following our discussions with stakeholders, this was a key reason for our decision to move away from our initial policy proposal to include a role for the Children's Hearing System in respect of cross-border DOL placements.

Furthermore, in terms of parity of treatment between placed and "Scottish" children, it would not be possible to provide this without bringing the child fully into the Scottish system. It is highly unlikely that this would be in the child's best interests, as cross-border DOL placements are intended to be temporary rather than to permanently displace the child from their home community and support networks. We consider that bringing the child fully into the Scottish system would also be likely to encourage a further proliferation of cross-border DOL placements, as the resourcing pressures being experienced elsewhere in the UK would essentially be transferred to Scottish local authorities.

Provision of advocacy and legal representation

In their written evidence, CYPCS suggest that the Scottish Government must provide access to state-funded legal advice and representation in relation to the child's legal and human rights, the relevant Scottish public authorities' statutory duties and the child's rights to access to justice and effective remedies under Scots law. They state that it is essential that the Regulations provide clear rights of the child to access free legal advice and assistance from a suitably qualified and experienced Scots lawyer.

In their oral evidence, CYPCS officials highlighted concerns about children's access to justice, participation and effective remedy, stating that the absence of the child's voice in cross-border placements is concerning. They stated that the Regulations do not allow children to challenge decisions related to what is happening to them. They acknowledged the complex interaction between two jurisdictions and welcomed the proposal for independent advocacy, however they stated this did not go far enough – because advocates are not legal representatives.

SG response: The imposition, review and extension/variation/termination of any DOL order that a child is subject to would be undertaken by the relevant court elsewhere in the UK. Children on cross-border placements can already avail themselves of legal advice and representation in the relevant jurisdiction.

Scots law advice and representation has not been provided for in the Regulations, given that decisions affecting the child's placement and care are appropriately for the placing authority and the relevant court to take. However, we recognise the importance of ensuring that the child's voice and experience in Scotland can be clearly heard and so the Regulations provide for Scottish Government-funded advocacy representation in Scotland – in addition to the support that is offered in England/elsewhere in the UK. This seeks to ensure the child's views are effectively conveyed to the residential provider which is accommodating them. Whilst advocates are not legal representatives, part of their role is to help children to understand and realise their rights. Advocacy workers in Scotland have access to legal advice for their advocacy partners via a legal support service operated by Clan Childlaw. This dedicated helpline continuously promotes the development and sustainment of knowledge of the law around children's hearings for independent advocacy workers. Clan Childlaw have agreed to work with advocates assisting children under DOL placements to make links with English counterparts as required.

Review and challenge

In their written evidence, in terms of review and challenge, CYPSC suggest that the Scottish Government consider a provision similar to that in section 7 of the UNCRC (Incorporation)(Scotland) Bill. They consider that this would ensure that children and young people have an effective remedy to challenge any rights violations.

In terms of the enforcement provisions, in their oral evidence, CYPSC officials stated that there were constitutional questions about how these provisions would work, and they also stated that they remove the right of access to remedy and redress from the child, vesting it with Scottish Ministers. They questioned how this would work in practice.

SG response: Firstly, we remain committed to the incorporation of the United Nations Convention on the Rights of the Child (UNCRC) to the maximum extent possible as soon as practicable.

While the Supreme Court judgment means that the UNCRC (Incorporation) (Scotland) Bill could not receive Royal Assent in its current form, the majority of work in relation to implementation of the UNCRC can proceed and is continuing at pace. A Ministerial Statement on next steps with regard to UNCRC incorporation is scheduled for Tuesday 24 May.

The Regulations also modify relevant enforcement provisions of the 2011 Act to provide the Scottish Ministers with the power to apply to the sheriff court for an enforcement order if a placing authority does not comply with its obligations. The process to be followed broadly mirrors that which would be undertaken where a Scottish local authority was in breach of its obligations as the "implementation authority" for a CSO (see sections 144 to 148 of the 2011 Act) – whereby a notice is

issued to the authority in breach of its obligations and the matter can be escalated to court to obtain an enforcement order, as appropriate.

As the Children's Hearing System will not have a role under the Regulations, we did not consider it appropriate that the National Convener would initiate enforcement action against a placing authority (as it would in relation to a Scottish local authority under the 2011 Act). Instead, this process – if required – will be undertaken by Ministers, who will retain oversight through engagement with the child's advocate, Scottish local authorities and the Care Inspectorate, of cross-border placements to ensure that the rights and interests of children are respected and upheld.