

Education, Children and Young People Committee

14th Meeting, 2022 (Session 6), Wednesday 18 May 2022

Subordinate legislation

[Draft SSI: The Cross-border Placements \(Effect of Deprivation of Liberty Orders\) \(Scotland\) Regulations 2022](#)

Introduction

These regulations were laid before the Scottish Parliament on **26 April 2022**.

The purpose of these Regulations is to make provision for Deprivation of Liberty (DOL) orders made under the inherent jurisdiction of the High Court of England and Wales or made by the High Court of Justice in Northern Ireland to be recognised in Scots law. The Regulations provide for a DOL order to be treated as if it were a Compulsory Supervision Order (CSO) made under the Children's Hearings (Scotland) Act 2011 for specified purposes and subject to certain conditions.

They were considered by the Delegated Powers and Law Reform Committee (DPLRC) at its meeting on [3 May 2022](#) and the Committee made no comment.

They will be considered by the Education, Children and Young People Committee at its meetings on **18 May 2022** and **25 May 2022**.

At its meeting today, the Committee will take evidence on the affirmative instrument from the Children and Young People's Commissioner Scotland—

- Nick Hobbs, Head of Advice and Investigations and
- Maria Galli, Legal Officer.

Supporting Information

The policy note published to accompany the statutory instrument is set out at [Annexe A](#). A SPICe briefing prepared for this session is included in at [Annexe B](#). The Committee has received a submission from the Children and Young People's Commissioner Scotland office which is attached in [Annexe C](#).

**Education, Children and Young People Committee Clerks
12 May 2022**

Policy Note

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

SSI 2022/XXX

The above instrument is to be made in exercise of the powers conferred by sections 190 and 195(2) of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). The instrument is subject to the affirmative procedure.

Summary Box

The purpose of these Regulations is to make provision for Deprivation of Liberty (DOL) orders made under the inherent jurisdiction of the High Court of England and Wales or made by the High Court of Justice in Northern Ireland to be recognised in Scots law. The Regulations provide for a DOL order to be treated as if it were a Compulsory Supervision Order (CSO) made under the 2011 Act for specified purposes and subject to certain conditions.

Policy Objectives

A DOL order may be made elsewhere in the UK on the application of a local authority in England or Wales or a Health and Social Care trust in Northern Ireland ("a placing authority"). Such an order authorises the deprivation of liberty of a child in a residential care setting and will only be granted by a court where it considers that this is necessary to safeguard the child's welfare. In recent times, an increasing number of DOL orders have been granted, particularly in England, which authorise the deprivation of liberty of a child in a residential care setting in Scotland.

Currently, such DOL orders are not automatically recognised under Scots law. This means that an authority which is granted a DOL order needs to petition the Court of Session in Scotland to get such recognition through use of the court's *nobile officium/ parens patriae* jurisdiction(s). This is particularly important, as lawful authority is an essential requirement for deprivation of liberty to be compliant with Article 5 of the European Convention on Human Rights.

Petitions to the Court of Session's *nobile officium/parens patriae* jurisdiction(s) are not intended for routine applications, such as those to recognise DOL orders. This current process cannot be sustained. It does not best serve the interests of the child or young person at the heart of each case and it places a burden on placing authorities and the courts when resources could be directed elsewhere.

These Regulations accordingly provide for DOL orders to be treated in Scotland as if they were CSOs. The orders are to be so treated for the purpose of authorising the deprivation of liberty of the child who is the subject of the order in Scotland and for the purpose of the application of certain provisions of the 2011 Act in relation to the order.

DOL orders recognised and enforceable in Scotland on date Regulations come into force

The Regulations include a transitional provision to allow a DOL order that has already been recognised in Scots law through the current Court of Session route on the date of entry into force of the Regulations to be treated as if it were a CSO. The DOL order will be treated in this way until the earlier of the following occurs:

- the DOL order ceases to have effect in the jurisdiction of the court which made it,
- the end of the period during which the DOL order is recognised by the Court of Session's recognition order (referred to in the Regulations as an "interlocutor"),
- regulation 5(1) applying.

Where the occurrences mentioned in paragraph 1 or 2 arise, the Regulations will cease to operate to recognise the DOL order in Scotland, as the deprivation of liberty of the child will no longer be lawful, and accordingly their placement here will have come to an end. However, in a case where paragraph (1) of regulation 5 applies, the DOL order will continue to have effect as if it were a CSO, as long as the requirements of that regulation are met.

The policy intention behind these transitional provisions is to ensure that where the Court of Session in Scotland has decided to recognise a DOL order granted elsewhere in the UK, no immediate further process is required for that order to be treated as if it were a CSO on the entry into force of the Regulations. We consider that this is appropriate since the child will already be established and lawfully deprived of their liberty in Scotland when the Regulations enter into force. In such cases, the Court of Session will have undertaken a review of the child's case before granting recognition of the DOL order for only a short period of up to three months.

Should a placing authority wish to continue the placement of a child subject to a DOL order in Scotland beyond the period for which any Court of Session order has been granted, they will be required to meet the same conditions as any authority which is seeking recognition in Scotland of a new DOL order. Further information on the policy intention behind those conditions is outlined below.

It is recognised that the transitional arrangements in these Regulations may not apply in every case which may arise. For example, if a DOL order is granted shortly before the entry into force of the Regulations, but that order is not yet recognised by the Court of Session, the transitional provision in regulation 4 will not apply. Whilst this may mean that there may be a small number of outstanding petitions for the Court of Session to consider on the entry into force of the Regulations, we do not consider it appropriate to provide for recognition of DOL orders which were granted prior to the entry into force of the Regulations without the Scottish court's oversight.

DOL orders made, or continued, on or after day Regulations enter into force

Where a new DOL order is made, or where an order is continued before the expiry of a Court of Session interlocutor rendering it recognised and enforceable in Scotland, regulation 5 allows for recognition of the order in Scots law as if it were a CSO for a period of up to 3 months. Where a DOL order is continued beyond that period, the order can continue to be treated as if it were a CSO for renewable periods of up to 3 months. This mirrors the maximum period of recognition of DOL orders granted as part of existing Court of Session processes and ensures that the High Court in England, Wales or Northern Ireland must regularly review the child's placement, to ensure it continues to meet their best interests.

Effect of child becoming subject to Compulsory Supervision Order or Interim Compulsory Supervision Order

The Regulations set out that a DOL order ceases to have effect as provided for in regulation 3(1) where a child who is the subject of the order becomes subject to a CSO or interim CSO. The intention behind this provision is to avoid a child becoming subject to two potentially competing orders made in different jurisdictions.

Notice and undertaking required

The Regulations set out conditions to be met to treat a new or continued DOL order as if it were a CSO, including that a placing authority must notify key people in Scotland of certain information about the DOL order and provide them with a copy of an undertaking relating to the placement. This is designed to improve the information-sharing process relating to placements and to ensure there is clear accountability for the placement on the part of the placing authority, following on from our concerns, shared by stakeholders, about the inadequacy of current arrangements.

In terms of notifications, the Regulations set out the people who must receive any notification required and the information which is to be contained within that notification. This includes key health, education, and residential contacts; the Chief Social Work Officer; the Commissioner for Children and Young People in Scotland; the Principal Reporter; the Care Inspectorate; and Scottish Ministers.

In terms of the undertaking, the Regulations set out a condition requiring an undertaking to 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.

It is intended that these provisions in relation to notifications and an undertaking will ensure there is greater clarity in relation to the responsibilities of the placing

authority, ensuring these can be enforced where necessary. Ensuring that all relevant Scottish agencies are informed of a child's placement at the outset will also help to safeguard the child's interests and avoid scenarios in which a Scottish agency first becomes aware of a cross-border DOL placement at a point of crisis.

Our intention is that the Regulations will also be supplemented by administrative agreements in support of the better regulation of the placement process, including a Memorandum of Understanding between the Scottish Government, UK Government, Welsh Government and Northern Ireland Executive, outlining the commitment to co-operate at a national level around cross-border DOL order placements.

Provision of advocacy services

The Regulations provide that where a child becomes subject to a DOL order which has effect as if it were a CSO, the Scottish Ministers must inform the child of the availability of children's advocacy services.

This offer of independent advocacy is intended to supplement the support that the child receives through relevant systems elsewhere in the UK. It 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 applies for the DOL order.

If the child agrees to the offer, any advocacy worker appointed to them will listen to – and advocate for – the child's views, with the aim of ensuring that the child's rights are upheld whilst living in Scotland.

Review following transfers in cases of urgent necessity

Where a child is subject to a DOL order authorising the deprivation of their liberty in a particular Scottish setting, it may become urgently necessary to transfer a child out of that setting to protect their, or another child's, interests. In such a scenario, the effect of the Regulations is that the Chief Social Work Officer can transfer the child to another place but must inform the placing authority as soon as reasonably practicable when this has been done.

To ensure that article 5 of the ECHR continues to be complied with following any transfer of the child, the Regulations provide a legal basis for a child to be deprived of their liberty in a setting to which they have been transferred for a maximum period of 14 days. Within this period, the intention is that the placing authority will revert to the court which granted the DOL order to obtain a review and variation of the order, should this be necessary.

Application and modification of the 2011 Act

The Regulations apply, with certain modifications, provisions of the 2011 Act for the purposes of the Regulations, so that they apply in relation to DOL orders

recognised under them. The key effect of this is to ensure that the non-Scottish placing authority is designated as the implementation authority for the order and therefore has full responsibility to provide or secure all services to support the child placed in Scotland under the recognised DOL order.

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 apply where a Scottish local authority is in breach of its obligations as the implementation authority for a CSO.

Finally, sections 168 to 171 of the 2011 Act are applied with modifications to ensure that appropriate action can be taken where a child who is subject to a DOL order absconds from a place or a person. In particular, these provisions ensure that the child can be returned to the relevant place or person if they abscond and that anyone who knowingly assists or induces the child to abscond; harbours or conceals them; or prevents them from returning to the relevant place or person commits an offence.

Future measures

Bringing forward Regulations at this time gives the Scottish Government an opportunity to ensure that cross-border DOL placements are better regulated, however they are an interim measure. Cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child. Moving children and young people, often to remote placements in Scotland, significantly impacts on the ability to plan for the child, or to maintain meaningful contact with family and other key people in the child's life. DOL order placements are one subset of a wider range of placements that are made across borders into care settings in Scotland and we are seeking views on future regulation of these in the consultation for the forthcoming Children's Care and Justice Bill1 which is currently open.

Ultimately, these Regulations will not – and should not – be a substitute for proper provision for the placement of vulnerable children being made available in their home nations. We are continuing to engage with counterparts elsewhere in the UK to stress the urgent need to address the current lack of provision.

Consultation

Stakeholder engagement

On 6 January 2022, the Scottish Government published a policy position paper on Cross-border placements of children and young people into residential care in Scotland.² 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. The Scottish Government

published a summary paper on 25 March, setting out the key themes from this engagement and next steps. 3

Responding to the specifics of the proposed Regulations, there were some key details that respondents agreed upon. For example, many agreed with the proposal for the non-Scottish placing authority to be the implementation authority. This would mean they would retain full responsibility for the implementation, oversight, review and financial costs of the placement.

Most respondents shared our concerns about the current situation, for example, citing an inadequacy in current legal and care structures to support children effectively. Respondents were clear that current policy and practice provisions around cross-border DOL placements should be improved. On that basis, many expressed support, in principle, for the intention to better regulate the placement process.

We have responded to the concerns of stakeholders with regard to the involvement of the Children's Hearings system in the proposal, given the lack of dispositive power available to the Hearings. As detailed above, we will put in place an offer of independent advocacy to help children who are subject to DOL orders in Scotland to understand and realise their rights. This will operate as an extension of the existing national children's hearings advocacy scheme in the relevant Scottish local authorities.

Impact Assessments

The following Impact Assessments have been completed and are attached:

- A Child Rights and Wellbeing Impact Assessment
- An Equality Impact Assessment
- A Business and Regulatory Impact Assessment
- An Islands Screening Assessment

Financial effects

A Business and Regulatory Impact Assessment (BRIA) has been completed. The impact of this policy on business is limited and no quantifiable financial effects have been identified.

Scottish Government
Children and Families
Directorate April 2022

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

² [Cross-border placements of children and young people into residential care in Scotland: policy position paper - gov.scot \(www.gov.scot\)](#)

³ [Overview - Cross-border placements of children and young people in residential care in Scotland:](#)

The logo for SPICe, featuring the text 'SPICe' in white on a purple and blue gradient background.

The Information Centre
An t-Ionad Fiosrachaidh

Education, Children and Young People Committee

18 May 2022

Deprivation of Liberty Orders

Introduction

The [Cross-border Placements \(Effect of Deprivation of Liberty Orders\) \(Scotland\) Regulations 2022](#) are being introduced as an interim measure. They will ensure that certain kinds of cross-border placements to children's residential care in Scotland from the rest of the UK have a statutory basis in Scots law and can be made without having to petition the Court of Session in each case.

The Committee will hear from the Commissioner for Children and Young People before hearing from the Minister next week [25 May].

This paper gives an overview of the regulations and the consultation on them.

No written submissions were available at the time of writing, but stakeholder consultation responses are discussed.

Deprivation of Liberty

A child or young person may be deprived of their liberty for their own best interests. This is normally done through a placement in secure care. There is a strict regulatory and inspection framework for secure care, reflecting the serious nature of such action and the need to comply with [Article 5 European Convention on Human Rights \(right to liberty and security\)](#). Where a secure placement is being considered by a Children's Hearing in Scotland the child has a [right to free legal representation](#). Settings in Scotland that provide secure care must meet certain [standards](#).

These regulations deal with placements to residential care from outwith Scotland that deprive a child of their liberty but are *not* authorised as secure care.

Why are regulations needed?

There is a shortage of secure care placements in the rest of the UK (rUK).

Local authorities in rUK have been placing children in residential care that, while it involves deprivation of liberty, is not authorised secure care. This includes making cross-border placements to some residential care services with resources in Scotland. The local authorities have been making these placements using 'Deprivation of Liberty Orders' (DOL orders) made by the High Court in England and Wales. The [Supreme Court has found that using them is not a breach of human rights](#) but has expressed grave concerns about the shortage of placements which gives rise to their use.

Where children are placed in settings in Scotland, the local authority making the placement also has to petition the Court of Session to ensure each placement is legally recognised in Scotland.¹ The Court of Session is able to do this under its equitable jurisdiction known as the "nobile officium." In simple terms this allows the Court of Session to provide a legal remedy where none exists.²

Such placements could not be made for a child under the Scottish Children's Hearings system. Under the Scottish system, where deprivation of liberty is necessary it requires a placement to be authorised and inspected as suitable for providing secure care.

As of February 2022, there are 15 DOL order placements into residential care settings in Scotland. The total number since 2019 is 35. Of these, 34 have been from England and 1 child has been placed from Wales." ([Consultation on Care and Justice Bill](#)).

Children from England and Wales are also placed in secure care in Scotland using a different statutory order. Latest statistics show that, in 2020-21, the average number of residents in secure care from outside Scotland (i.e. England and Wales) was 29. The number of residents from Scotland was 47. ([Scottish Government Looked After Children Statistics](#)).

The Scottish Government state that:

"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."

[The Promise](#) made clear that cross-border placements must be reduced to an absolute minimum.

¹ For more detail on the court processes involved see: [What English local authorities need to know when placing a child in Scotland](#). Morton Fraser lawyers, August 2021.

² For details on the "nobile officium" see the article from the Journal of the Law Society of Scotland entitled "The nobile [officium: still relevant, still useful](#)"

These regulations are proposed as an interim solution pending the development of proposals in the Care and Justice (Scotland) Bill [policy proposals](#) for which were issued for consultation in March. One of the proposals for the longer term is that: “settings hosting children and young people subject to DOL orders must obtain special approval and/or registration.”

Use of DOL orders to date

The Care Inspectorate undertook a [short thematic review](#) of 11 DOL order placements in January this year. They concluded that:

“The placement in Scotland had positive outcomes for the child in most cases”

Their findings included that:

- The children subject to DOL orders in Scotland were in houses delivered by private providers, often in rural areas, where staffing ratios were high.
- 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.
- Contact with those important to the child was in place for most children.

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.

What do the regulations do?

In summary, the regulations provide for a DOL order to be treated, *in some limited respects*, as though it were a Compulsory Supervision Order (CSO).

A CSO is an order made by a Children’s Hearing setting out where a child will live – eg in foster care or residential care. It can have certain conditions attached – eg. authorisation for secure care. It must be reviewed at least annually and there is a statutory framework including rights to appeal, right to legal representation, right to request a review etc. (For more information see; [Scottish Children’s Reporter Administration](#)). A child with a CSO is a ‘[looked after](#)’ child, which also brings in a raft of legal and administration frameworks for protecting their welfare.

The option of fully converting DOL orders to CSOs was considered but rejected. The Business and Regulatory Impact Assessment (BRIA) explains:

“Full conversion would result in the child entering SCHS (Scottish Children’s Hearings System), with concomitant issues around dual jurisdiction for the children affected and inappropriate obligations and being imposed on Scottish Local Authorities and other agencies. Further to stakeholder feedback, we did not pursue this option.”

Under these regulations, DOL orders will be treated as CSOs only for the limited purposes of authorising the deprivation of liberty, making provision for urgent transfers of placement and requiring the local authority making the placement to implement the order and any requirements in it (regulations 3 and 13).

There is a procedure for breaching these duties (regulation 13(4))

- Scottish Ministers can give the rUK local authority notice setting out which duties have been breached giving 21 days to comply.
- If the local authority fails to comply with the notice, Scottish Ministers can apply to the Sheriff Court for an order to enforce implementation.

By treating DOL orders as though they were CSOs, the placing authority in rUK will no longer need to petition the Court of Session. Neither the Scottish Courts nor the Children's Hearings System will be involved in making the placement. The DOL order will be made and reviewed by the High Court in England and Wales. The placing authority in rUK will be responsible for the placement. The point of the regulations is to ensure that DOL orders for cross border placements will have a legal basis in Scottish law. The Children's Rights and Wellbeing Impact Assessment (CRWIA) explains:

“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.”

Orders last for up to three months but can be renewed by the court that made them (regulation 5).

The regulations include certain conditions:

- Certain people in Scotland must be notified that a DOL order has been made and given certain information about it. The people to be notified are; Health board, Children's Commissioner, residential care manager, Chief Social Work Officer, director of education, Scottish Ministers, Principal Reporter and Social Care and Social Work Improvement Scotland. (regulation 8). The information to be notified is:
 - The name of the local authority in rUK making the placement.
 - Child's age and gender.
 - The name of the residential care setting.
 - The start and end dates of the DOL order.

(regulation 9)

- The placing authority in rUK is responsible for the costs of the placement (except those relating to Scottish advocacy) and for ensuring required services are provided (regulation 10).

- Advocacy services must be offered to the child/young person (regulation 11). (looked after children and young people also have a [statutory right to advocacy under English legislation](#)).

The policy note also refers to further administrative measures that will be taken:

- Memoranda of Understanding between the Scottish Government and England, Wales and Northern Ireland.
- The Scottish Government will create placement templates for placing authorities to complete.

Consultation on the regulations

In January 2022, the Scottish Government [published a policy paper](#) and sought views on draft regulations. “The engagement was focused, inviting views by email - in lieu of a formal 12-week consultation.”

An updated policy paper including an overview of consultation responses was [published in March](#). Thirty responses were received of which [nine are available in the annex to the policy paper](#).

Areas of agreement

The Scottish Government summary stated that areas of agreement included:

- cross border placements should only occur in exceptional circumstances and children’s rights should be a central consideration.
- the non-Scottish placing authority should be the implementation authority (i.e have full responsibility for the implementation, oversight, review and financial costs of the placement.)
- many stakeholders agreed with not fully converting the DOL order into a CSO for reasons including the burden it would place on Scottish local authorities.
- improving information-sharing processes through the notification requirements.

Areas of concern

The Scottish Government summary stated that key areas of concern included:

- legislating to recognise deprivation of liberty from another jurisdiction.
- regulations could lead to an increase in cross-border DOL order placements.
- the proposal seemed to focus on addressing the pressures that the current system places on the courts in Scotland rather than children’s rights.

- that Memoranda of Understanding are not legally enforceable.

In reply to these concerns, the Scottish Government argued that:

- there is nowhere else for these children to go.
- they will closely monitor the impact of the regulations.
- the regulations and administrative agreements will clarify the current arrangements, making clear that the placing authority is responsible.
- children will be offered advocacy.

Policy options not pursued – Children’s Hearing system

The consultation included a proposal to involve the Children’s Hearings system but this was dropped. The proposal was to convene a Hearing to;

“facilitate information sharing with regard to the child’s progress in placement and importantly, consider the child’s access to local rights protections.”

While most respondents agreed in principle with involving the Hearings system,

“most were concerned about the lack of power available to the CHS, meaning the proposal would not lead to parity of treatment between Scottish and non-Scottish children.”

This proposal is therefore not included in the regulations.

Individual responses: key themes

The following is a brief overview of some of the key themes from the nine published responses. Common areas of concern include: the right to legal representation, a lack of clarity about local authority responsibilities and how these placements are regulated, the lack of parity with Scottish children and the need to work urgently towards a longer-term solution.

[Children’s Hearings System](#)

- Children placed in Scotland on DLOs should have the same rights and protections as other children in the care system in Scotland.
- The local authority in Scotland is best placed to take on some responsibility for the placement.
- The proposed role for the Children’s Hearing should be clarified and strengthened.
- Concern that the settings used are not registered or inspected as secure – the Secure Care Pathway and Standards Scotland should apply to them.

- A CSO that deprives a child of their liberty provides a right to free legal representation – this doesn't appear to be the case for a DOL order.
- Resourcing of courts should be a secondary consideration to children's rights.

The Promise

- There is no detail on ending these type of placements.
- The issue is not simply about lack of provision in England and is also underpinned by funding and planning processes in Scotland.
- Providing a simpler route to placement will mean the number of placements will increase.
- It is unclear whether there are circumstances in which Scottish local authorities' duties will be engaged. (eg. if the child commits an offence).
- There needs to be "a much wider plan about how Scotland provides 'away from home' care and its interactions with placing Local Authorities outside of Scotland".

Social Work Scotland

- "the proposals to treat DOLS 'as if they were CSO's' is not a satisfactory interim solution." For example: SWS disagree with the partial involvement of the Children's Hearing (N.B. now dropped) which creates confusion about responsibility for the child
- "We do not believe that this halfway option is in keeping with our human rights approach in Scotland."

CELCIS

- "The singular focus of the policy position paper pertains to the legal matter of how DOL orders can be recognised under Scots law."
- "Legal complexities and lack of alignment between policy and practice in different jurisdictions can mean children placed across the border experience limited support to understand their rights, limited opportunities to have a say in decisions about their care, and limited access to advocacy"
- It is unclear whether the proposed new approach would serve children and young people better than the current arrangement
- Concern that children on these placements will not have the same level of protection of their rights as Scottish children.
- Lack of clarity about what 'as if it were a CSO' means for duties towards children.

- Concern that the non-statutory agreements will be insufficient to provide clarity on roles and responsibilities.

Children and Young People's Commissioner Scotland

- “These proposals are not compatible with the UNCRC and the European Convention on Human Rights (ECHR).”
- Fuller information about numbers of placements and their legal basis is needed.
- Concern that placements can ‘drift on’. Continuing deprivation of liberty must be able to be challenged.
- Children on these placements are ‘largely invisible’ to the Scottish regulatory regime. “Placements should only be made to accommodation which is authorised, regulated and approved to the highest Scots law and human rights standards.”
- There must be access to free, independent legal advice and representation
- Concern about provision of health and education – recommending that key services are notified of the placement.
- Critical of the use of the regulation making power in s.190 Children’s Hearings (Scotland) Act 2011: “make provision for a specified non-Scottish order which appears to them to correspond to a compulsory supervision order to have effect as if it were such an order.”

Faculty of Advocates

- A long-term solution is needed, focusing on the short term could make these placements more common.
- The current arrangements do not give children a practical and effective right for their voice to be heard in the Court of Session.
- “because many of these placements last no more than a few weeks or months, it would be inefficient to transfer their supervision to a Scottish local authority for a temporary period. Nevertheless, all such cases should be made known to the Scottish authority. Children may have been in care in Scotland for years, unknown to the Scottish authority.”
- In all cross-border placements, children should be brought before a Children’s Hearing. “There could be proper discussion in a way that the English High Court would struggle to do from afar.”

Law Society of Scotland

- Generally, supports the proposals and welcomes steps to better regulate this in the short term and reduce the burden on the Court of Session.

- “We have repeatedly raised the need for appropriate provision in Scotland to regulate- in an ECHR compliant way- deprivations of liberty for adults and children within Scotland, equivalent to the Deprivation of Liberty Safeguards (DOLS) regime in England.”

Article 39

- “We urge the Scottish Government to withdraw this set of policy proposals and to commission independent research into the use of cross-border placements, which includes a review of children’s views and experiences. We also ask that Sir James Munby’s 2016 suggestion for a joint investigation by the Law Commission of England and Wales and the Scottish Law Commission be given serious consideration.”

Who Cares? Scotland

- “the proposed regulations present a regressive policy decision in the Scottish Government’s commitment to shaping a positive future for how children’s care is delivered in Scotland”.
- “Access to justice, understood in its fullest sense, must include the pro-active provision of rights information, access to independent advocacy and competent, legal representation with expertise in child rights and child law, when necessary for young people affected.”
- It is unclear whether Scottish care leaver rights apply if a young person stays in Scotland once their DLO order ends.
- It is unclear whether Scottish local authorities have duties towards the children as ‘looked after children’.
- There needs to be robust monitoring, including what happens after their placement. Views of young people on such placements should be recorded.
- The best solution is to address the lack of appropriate placements in England.

Impact assessments

[Impact assessments](#) published with the regulations include a [Children’s Rights and Wellbeing Impact Assessment](#) (CRWIA) and an Equality Impact Assessment (EQIA)

These assessments are limited in scope. For example, the EQIA states:

“the decision about whether or not to grant the DOL order and where to place the child is outwith the scope of this policy. It will continue to be the responsibility of the placing authority and the High Court in another part of the UK that is granting and reviewing the DOL order to determine whether or not the placement is in the best interests of the child or young person.”

Similarly, whether the child's views are listened to when the order is granted is also considered outwith scope. The CRWIA states:

“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.”

In relation to deprivation of liberty (UNCRC article 37 and ECHR article 5), the CRWIA refers to the three-month review by the High Court stating;

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

In the consultation responses there was concern about who would be responsible for securing the child’s right to education and other services. The CRWIA states that the child’s right to education will be met through the requirement that the placing authority secure provision of services and the requirement to notify key people in Scotland about the placement.

Overall the CRWIA considers that: “the Regulations will have a positive impact on children’s rights” because:

- The cross-border placements will be lawfully recognised without recourse to the Court of Session
- The placement process is better regulated – by introducing requirement to notify and clarifying responsibility of the placing authority

It notes that providing advocacy could also have a positive impact.

Camilla Kidner, Senior Researcher (Social Security), SPICe Research

12 May 2022

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot

Annexe C

Children and Young People's Commissioner Scotland

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

Briefing for Education, Children and Young People Committee

13 May 2022

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.³ The Commissioner is fully independent of the Scottish Government.

Introduction

As they stand, we do not consider that the Cross Border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022 (the Regulations) are compatible with the UNCRC and the European Convention on Human Rights (ECHR). As such, we cannot support the passing of these Regulations in their present format.

As we highlighted in our [response](#) to the Scottish Government's policy position paper,⁴ current practice creates a "second class" of looked after children in care in Scotland, who are not subject to the full oversight, support, and human rights protections of the Scottish statutory systems. The proposed Regulations do not change this in any material way.

While the Regulations propose to treat a child subject to a High Court Deprivation of Liberty order as if they were subject to a Scottish Compulsory Supervision Order (CSO), the child will not have access to the same or analogous procedural safeguards (notably access to review and appeals through the Children's Hearing System or independent legal advice and representation) as their 'Scottish' counterparts. The Regulations create the illusion of legal protections equivalent to those that exist for children deprived of their liberty under Scots law but fall short in reality.

³ Section 4, Commissioner for Children and Young People (Scotland) Act 2003

⁴ Cross-border placements of children and young people into residential care in Scotland: policy position paper (6 January 2022). Available at: <https://www.gov.scot/publications/cross-border-placements-of-children-and-young-people-into-residential-care-in-scotland-policy-position-paper/>

We have made detailed recommendations to the Scottish Government (attached at Appendix 1) for amendments that would strengthen the Regulations and have asked that the Minister withdraw the current version. We urge the Committee to recommend to the Parliament that Regulations are not passed unless and until those amendments are made.

Key principles and analysis of the Regulations

The Commissioner's office has welcomed the commitment of the Government and the Parliament to incorporating children's human rights into Scots law to the maximum extent possible. The Scottish Government has similarly committed to implementing the findings and recommendations of 'the Promise', which explicitly highlighted the concerns for children's human rights when they are removed from their family, community and country and detained in Scotland.

"Scotland must stop selling care placements to Local Authorities outside of Scotland. Whilst this review is focused on children in Scotland there must be acknowledgement that accepting children from outside Scotland is a breach of their fundamental human rights. It denies those children access to their family support networks and services. It also skews the landscape for Scotland so that there is a lack of strategic planning for children meaning that children can be put in inappropriate settings if demand has spiked." (The Promise, p110)⁵

As the Nuffield Foundation research makes clear, the children who are affected by these proposed Regulations are amongst the most vulnerable, with complex health and wellbeing needs.⁶ They are entitled to the highest standards of care and protection from the State in all law, policy and practice to ensure all public authorities act compatibly with their human rights obligations.

Cross-border placements, even if in regulated, 'secure accommodation' must be limited to the most exceptional of circumstances, and where they are in the best interests of the individual child (Article 3 UNCRC). In order to secure their right to private and family life (Article 8 ECHR), to liberty in all but the rarest occasions, children's best interests are best served by being placed close to family, friends and cultural and community networks.

Any procedure for recognising orders made outwith Scotland must be compatible with not only existing Scots law, but also international human rights law and standards. The proposed new Regulations must contain sufficient safeguards to ensure that deprivation of liberty of any child is a last resort, that there are no delays; and those orders last no longer than absolutely necessary. The Regulations in their current form do not provide these safeguards. It is well established in international

⁵ Link to report: <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf>

⁶ Roe, A (2022) What do we know about children and young people deprived of their liberty in England and Wales? An evidence review. Nuffield Family Justice Observatory. Available at: <https://www.nuffieldfjo.org.uk/resource/children-and-young-people-deprived-of-their-liberty-england-and-wales>

law that children are entitled to higher standards of protection where deprivation of liberty is concerned, particularly in the first 24 hours of detention.⁷

In our view there are two principal issues with the provisions, as currently drafted which are similar to the concerns raised and upheld in the UK Supreme Court judgment in the Christian Institute case in 2016.⁸ The first is that there is a serious lack of clarity for those who will implement the legislation as to how they will meet their respective statutory and human rights duties, and the second is the lack of parity of safeguards for the human rights of those children and young people affected by them. As drafted, the proposed Regulations lack clarity, precision, accessibility and foreseeability as to their effects.⁹

Temporary vs Permanent Placements

Existing Regulations (“the 2013 Regulations”) made under the Children’s Hearings (Scotland) Act 2011 already allow for the placement of children and young people from England and Wales or Northern Ireland into residential units in Scotland.¹⁰ Similarly, section 10 of the Children and Social Work Act 2017 provides for cross-border placements into secure accommodation in Scotland.

It is important to emphasise that under the 2013 Regulations, High Court Deprivation of Liberty orders are treated as having the same effect as Scottish CSOs; the receiving local authority (i.e. the Scottish local authority) becomes responsible for the care of the child; and a Children’s Hearing must be arranged to consider the most appropriate arrangements for their care and protection.¹¹ These existing 2013 Regulations are intended to meet the children’s needs in more long-term or even permanent placements of children in Scotland, and we are of the view that they largely give children and young people access to the same protections as their ‘Scottish’ counterparts.

The proposed Regulations however seek to address a different problem, namely the exponential rise in demand for ‘temporary’ residential placements in Scotland. Notwithstanding this, we are concerned that in a number of cases under the current arrangements, these ‘temporary’ placements have been allowed to ‘drift on’ for a year or more, which is inconsistent with Article 5 ECHR and Article 37 UNCRC (‘shortest appropriate period of time’).

These Regulations should therefore be drafted in a way that makes clear the distinction between a temporary and more permanent placement, and which limits their use where alternative legal mechanisms are both available and more

⁷ Tobin, J. and Hobbs, H. (2019) Art.37 Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty. In: The UN Convention on the Rights of the Child: A Commentary. Editor: Tobin, J. Oxford University Press.

⁸ Christian Institute v Lord Advocate [2016] UKSC 51.

⁹ Supreme Court judgment, para 79

¹⁰ The Children’s Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013. Available here:

<https://www.legislation.gov.uk/ssi/2013/99/contents/made>

¹¹ Regulation 7, 2013 Regulations

appropriate. In particular, we recommend that the High Court should only be able to make an initial order of 22 days, to be followed by a subsequent order for up to three months at a time under these Regulations (to a maximum of six months total) before the placing local authority must consider a more permanent solution.

Placement, Notification and Legal Duties

We recommend that the Regulations ensure that no child is deprived of their liberty except in accommodation which is authorised, regulated, and approved to the highest Scots law and human rights standards. This could be achieved through duties on the unit to only accept placements if certain specified criteria are met.

Children subject to High Court Deprivation of Liberty Orders in Scottish residential care are entitled to the same oversight, support, and human rights protections (as per Scots law and policy) as their 'Scottish' counterparts. The Regulations should seek, as far as possible, to provide parity of legal protection with Scottish children deprived of their liberty (albeit no Scottish child can lawfully be deprived of their liberty in a residential unit).

The Regulations require the placing authority to serve notice on certain public authorities, including Social Care and Social Work Improvement Scotland ('the Care Inspectorate'), the Chief Social Work Officer of the receiving local authority, and the relevant Health Board. However, the notification requirements are not sufficient to ensure that some of those bodies have sufficient information to effectively discharge their statutory functions. We recommend the requirement be strengthened.

Following notification, the Regulations do not prescribe what each of the public authorities are required to do. For example, in contrast to 'Scottish' children, children subject to Deprivation of Liberty orders are usually deprived of their liberty in privately owned facilities, which are not currently authorised, inspected, or regulated to detain children. While the Regulations require the placing authority to serve a notice on the Care Inspectorate, they are not duty bound to inspect the facility, or if they do so, to consider the higher standards that apply to secure accommodation providers.

Without further detail on whether and how public authorities' existing statutory duties are triggered, we consider that notification is a tokenistic safeguard. We recommend therefore that the Regulations provide that within 24 hours of the placement, the child should be visited by a social worker and mental health worker to carry out an assessment.

The initial placement should only last for a maximum of 22 days (which would align it with a Scottish Interim Compulsory Supervision Order) (ICSO), pending a team around the child meeting involving the child, both local authorities and the health board which can provide the High Court with assurance that the placement is in the child's best interests and meeting their needs. Further orders should be made up to three months (and up to a maximum of six months).

Education and Healthcare

Children deprived of liberty retain their right to an education which develops their personality, talents and mental and physical abilities to their fullest potential, and to the highest attainable standard of health.

Many of the children involved in cross-border placements have significant and complex needs for mental health supports and additional support for learning needs or disabilities. Sufficient safeguards must be in place to ensure that the needs of disabled children and children with Additional Support Needs are met and the statutory and human rights duties of public authorities are fulfilled.

It is important that whatever Regulations are made for children in care and protection laws governing their detention and deprivation of Liberty sufficiently align with the findings of the Mental Health Law Review and the Scottish Government's commitment to "creating a modern, inclusive Scotland which protects, respects and realises internationally recognised human rights."

The review considered the use of cross border mental health and care services across the UK and the existing legal framework¹² for people being deprived of their liberty under Scots law and highlighted the need for greater rights protections for children and young people in these placements. The Regulations require that the placing authority undertakes to provide or secure all services to meet a child's needs and meet all costs. However, without further detail on roles and responsibilities, this will result in the creation of two tiers of looked after children in Scotland, and cause children to fall through the cracks in terms of education and healthcare provision. This is because English and Welsh local authorities and courts lack familiarity with Scottish legal systems and processes for care, protection, health and education, and the respective duties of public authorities.

By way of illustration, under Scots law, a child who is "looked after" by a Scottish local authority is automatically assumed to have additional support needs in terms of the Education (Additional Support for Learning) (Scotland) Act 2004. However, children placed in Scotland from England and Wales will not automatically be treated as having additional support needs. The Regulations do not appear to change this position and clarity is required on how a child will be assessed, and whether they can challenge any assessment or adequacy of provision to the Health and Education Chamber of the First-tier Tribunal for Scotland.

We recommend that undertakings by placing local authorities are made more robust, with greater detail on, for example, who will be responsible for assessing the needs of the child, under what legislation and duties, who will be responsible for coordinating and delivering services. Linking the undertaking to fulfilment of UNCRC rights would also strengthen both the requirement on the placing authority and the child's right to remedy via judicial review.

¹² Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Amendment Regulations 2017. The Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") provides for the transfer of patients

Participation and independent legal representation

To ensure their full participation in proceedings concerning them, children subject to Deprivation of Liberty Orders and placed in Scotland must have:

- Access to information on their rights and entitlements in Scotland
- A means to challenge their continued detention in Scotland through effective remedies and access to justice
- Access to independent legal advice, representation and lay advocacy.

While the Regulations make an offer of independent advocacy to children subject to a Deprivation of Liberty order, this is not a substitute for access to legal advice and representation. We have been concerned that most children subject to Deprivation of Liberty orders and petitions in the Court of Session have not participated in the decision-making processes. It is critical that children placed in Scotland can challenge the placement, their treatment in care, and every Deprivation of Liberty order and that this is via judicial rather than administrative scrutiny and oversight.

The Regulations set out a power for the Scottish Ministers to apply to the Sheriff Court for an enforcement order if a placing authority does not comply with its obligations. It is not clear how this power would work in practice and whether any order of the Sheriff Court can be competently enforced against the non-Scottish local authority. In particular, it is not clear how, in the absence of legal representation, the child would be able to alert the Scottish Ministers to any issues in the first instance.

Access to independent and expert legal advice on protections under Scots law and human rights law is an important safeguard to ensure that the State's duties to the child are met. Children should be supported and empowered to exercise their rights and access legal remedies directly rather than having to rely on an appeal to Scottish Ministers.

Unlike in 2017 when the Scottish Government and the UK Government agreed to amend the respective laws to regulate the cross-border transfer of children into secure accommodation in Scotland, we are unaware of any measures being proposed by the UK Government to amend the law to remedy the fundamental issues of a lack of necessary facilities for the care protection and treatment of children with complex needs in England.

Based on our understanding of the factors which have been driving demand for at least the last five years, none of the apparent safeguards set out in the Regulations are likely to reduce the demand for residential placements in Scotland. There is a real risk that without sufficient legal restrictions, Scotland is opening the door to significant numbers of cross-border placements, and to the possibility that this will be exploited by private, profit-making providers.

In 2021, giving judgement in *Re: T* Lady Black remarked that [the lack of provision of secure accommodation in England and Wales] "...has been drawn repeatedly to the attention of those who could be expected to take steps to ameliorate the situation,

without noticeable effect”.¹³ The Scottish Government must obtain urgent assurances from the UK Government that issues of supply are being addressed.

The Commissioner shares the concerns expressed by the UK Supreme Court that “[t]he appropriate permanent solution is the provision of appropriate accommodation” for children in their home jurisdiction near to their families and communities. Lord Stephen’s confirmed the Court’s grave concerns of many of the “judges who have called attention to this issue which is a scandal containing all the ingredients for a tragedy.”¹⁴

We look forward to the opportunity to discuss these matters further with the Committee.

¹³ [2021] UKSC 35, link to judgment: <https://www.supremecourt.uk/cases/docs/uksc-2019-0188-judgment.pdf>

¹⁴ Para 178

Appendix: Suggested Amendments to Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022

Point of Process	Relevant provision of the Regulations	Suggested amendment to ensure adequate safeguards
<p>Application to High Court by Local Authority</p>	<p>7. Notice and undertaking required for deprivation of liberty order to have effect as if compulsory supervision order</p> <p>Content of notice</p> <p>3. Deprivation of liberty order to have effect as if compulsory supervision order</p>	<p>Within 24 hours, notification of an application to the High Court should be made by the Local Authority to the receiving Scottish local authority, Health Board, the residential care home for children and young people, the child and anyone with parental rights and responsibilities for the child.</p> <p>This notification should include a copy of the application itself and the supporting social work welfare needs assessment and planning reports.</p> <p>Place additional restrictions on which care homes for children and young people are able to accept cross-border deprivation of liberty order placements.</p> <p>For example, a care home for children and young people may only accept a placement of a child subject to a Deprivation of Liberty order if:</p> <ol style="list-style-type: none"> 1. It is registered, regulated and inspected by the Care Inspectorate as a care home for children and young people and has a recent “adequate” inspection report. 2. It provides written confirmation to the placing local authority and the Care Inspectorate that it complies with the requirements of the UNCRC in upholding children’s human rights and adheres to the Secure Care Standards and Pathway, 2020, the Health and Social Care Standards; and all national guidance, policy and training requirements governing the provision of Secure Accommodation providers in Scotland (for example, National Child protection Guidance and requirements to have staff registered with the Scottish Social Services Council and other professional regulatory bodies).

		<ol style="list-style-type: none"> 3. The Head of the care home has assessed and is satisfied that staff training and experience is sufficient to deliver the child’s care plan, and to meet the individual child’s needs. 4. It provides an undertaking to support, promote and facilitate regular and meaningful contact with the child’s parents and family. A record of the assessment and undertaking must be made and provided to the placing authority for consideration by the High Court. 5. It receives written confirmation from the placing local authority that it has consulted with the receiving local authority and Health Board.
<p>Transfer of Legal Order</p>	<p>3. Deprivation of liberty order to have effect as if compulsory supervision order</p>	<p>The initial order should be limited to 22 days to reflect the emergency and temporary nature of the placement.</p> <p>Restricting the order to having the same effect as an <i>interim</i> compulsory supervision order (an ICSO) provides strict time-limited safeguards for the protection of the child’s rights and parity of treatment for non-Scottish children being deprived of their liberty under Scots law.</p>
<p>Decision of High Court and Notification</p>		<p>If the High Court grants a Deprivation of Liberty order, the placing local authority must immediately, but no later than within 24 hours:</p> <ol style="list-style-type: none"> 1. Provide basic notification of the following information: the child’s age, initials or case reference, the name of the placing local authority, the legal representative or Guardian’s name, the location of the care home and the duration of the High Court order to the Scottish Government, Children and Young People’s Commissioner Scotland, the Care Inspectorate, the Mental Welfare Commission and the Principal Reporter. 2. Provide enhanced notification (in addition to basic notification, a copy of the High Court Deprivation of Liberty Order, care and education Plans, the child’s Welfare Needs Assessment, Social work report, and the supporting application to High

		<p>Court) to the Head of the care home, the Chief Social Work Officer, Health Board and Director of Educational Services for the receiving area.</p>
Duration of placement		<p>Initial placements under these Regulations should only be made for a maximum of 22 days (as per an ICSO).</p> <p>Subsequent placement may be made for 3 months via an application for review of the placement to the High Court to determine whether the placement continues to be necessary and proportionate to meet the child's needs for care and protection, supported by a longer-term assessment and plan to be submitted to the High Court.</p> <p>No child can be lawfully deprived of their liberty in Scotland under these Regulations for a period in excess of 6 months from the first date of their placement under the High Court Order.</p> <p>There should be a duty on the placing local authority to provide a detailed assessment and plan in conjunction with the public authorities in Scotland the care home and the child and family identifying how it proposes to fulfil its human rights duties to the child.</p>
Transport	7. Notice and undertaking	<p>The placing local authority must provide an undertaking that the transportation of children to and from care placements is child-centred, trauma sensitive, and in accordance with the child's human rights.</p>
Child's rights and needs	10. Content of undertaking	<p>The placing local authority must provide an undertaking that</p> <ul style="list-style-type: none"> • it will, in the performance of its statutory functions in relation to the child, ensure that it and the care home and any 3rd party provider of services acting on its behalf, complies in full with the requirements of the UNCRC. • it will, support and pay for regular visits and contact between the child and their

		family throughout the duration of the placement.
Child's rights and needs	Receiving Local Authority and Health Board duties	<p>Within 72 hours of the child being placed in the Scottish care home, 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.</p> <p>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.</p>
Scrutiny / Inspection	11. Provision of advocacy services	<p>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.</p> <p>The child will ordinarily be receiving advocacy services as part of the statutory duties of the placing local authorities. 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.</p>
Review and challenge		We suggest that the Scottish Government consider a provision similar to that in section 7 of the UNCRC (Incorporation)(Scotland) Bill. We consider that this will ensure that children and young people have an effective remedy to challenge any rights violations.