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:

1. the DOL order ceases to have effect in the jurisdiction of the court which made it,
2. 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"),
3. 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 Bill[1] 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

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[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: regulation of Deprivation of Liberty (DOL) orders - gov.scot (www.gov.scot)

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
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