

BUSINESS AND REGULATORY IMPACT ASSESSMENT (BRIA)

TITLE OF PROPOSAL

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

PURPOSE AND INTENDED EFFECT

Policy Aim

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 ("the 2011 Act") for specified purposes and subject to certain conditions.

Background

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. 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.

There are a limited number of children involved. Since the first cross-border (deprivation of liberty) petition in 2019, there have been 36 such placements of children into residential care in Scotland, of which 35 were from England and one was from Wales. To date, there have been no placements from Health and Social Care trusts in Northern Ireland.

Scottish Ministers have committed to realising The Promise (the conclusions of the Independent Care Review), which made clear that cross-border placements must be reduced to an absolute minimum. All cross-border placements, including those involving deprivations of liberty, should only take place in exceptional circumstances where they are considered to be in the best interests of the child. The Scottish Government continues to work with the UK Government to ensure that it addresses the lack of adequate care provision, as a matter of urgency, given the increase in these cross-border DOL order placements.

The foundation of the policy is to ensure that the best interests of the children are at the centre of all decisions made about their care, their rights are protected and their needs can be met in practice.

Rationale for Government intervention

Currently, 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* jurisdiction. 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* jurisdiction 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.

The Regulations are an interim step, necessary to better regulate cross-border placements of children and young people on DOL orders into Scottish residential care. This will help us on the way to a longer-term solution as part of the Children's Care and Justice (Scotland) Bill, upon which we are now consulting.¹

The aim of the Regulations and associated administrative agreements is to ensure clarity and accountability around the placing authority's responsibilities prior to any cross-border placement, throughout its duration and at its end. Together, legal and administrative provisions will ensure that the relevant Scottish authorities are notified in writing of key information about the DOL order and will clarify roles and responsibilities, making clear that the placing authority is responsible for implementation of the DOL order and for ensuring the child's welfare. It will also provide a robust mechanism for information-sharing, which will streamline and better regulate the existing placement process.

The policy is supportive of the National Outcomes in the Scottish Government's National Performance Framework.² For example, in terms of the outcome for children and young people ('We grow up loved, safe and respected so that we realise our full potential'), the Regulations are focused on ensuring that the placement process for children subject to DOL orders is better regulated. This is to ensure that the best interests of the children are at the centre of all decisions made about their care, their rights are protected and their needs can be met in practice. This also has relevance to fulfilling the human rights outcome ('We respect, protect and fulfil human rights and live free from discrimination'). The decision regarding whether to grant, extend or end a DOL order (which is what has most impact on the child) rests with the High Court outside of Scotland; however it is within the scope of

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

² [National Performance Framework | National Performance Framework](#)

Consideration of responses

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

On 25 March 2022, we published a summary paper.⁴ In that paper, we summarised the feedback received, outlined how we were taking key feedback into account, and set out the updated proposal summary.

Key considerations have included:

- Most respondents shared our concerns about the current situation, and were clear that current policy and practice provisions around cross-border DOL placements should be improved.
- Respondents agreed that cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child.
- Many responses emphasised that children's needs and rights must be central to any work in this area.
- Respondents emphasised that it would be important to consider a wider strategic plan to address all types of cross-border placements. Some acknowledged the need for interim action, whereas others felt we should re-focus efforts on longer-term thinking instead.
- Many agreed with the proposal for the non-Scottish placing authority to be the implementation authority.
- Respondents also agreed that converting the DOL order 'as if it were a CSO' would be more appropriate than fully converting into a CSO.
- Respondents were also supportive of improving information-sharing processes.
- However, respondents also raised a number of key concerns about some aspects of the proposal, including in relation to: policy principles; children's rights and needs; Scotland's Children's Hearing System (SCHS); and operational clarity.

The three policy options considered are detailed below. In addition, we considered whether a DOL order should be fully converted into a CSO. Full conversion would result in the child entering SCHS, 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.

Option 1: Continue the current practice of the placing authority petitioning the Court of Session to authorise each placement in Scotland

⁴ [Cross-border placements of children and young people in residential care in Scotland: regulation of Deprivation of Liberty \(DOL\) orders - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/cross-border-placements-of-children-and-young-people-in-residential-care-in-scotland-regulation-of-deprivation-of-liberty-dol-orders/pages/20)

be an offer of independent advocacy made to children on cross-border DOL placements into Scotland.

This would operate under the existing national children's hearings advocacy scheme in the relevant Scottish local authorities. This offer of advocacy would be intended to support children subject to DOL orders to provide their views to the residential provider which is hosting them - as to how their in-placement experience aligns with their child's plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

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

The additional costs to the Scottish Government in respect of each existing advocacy provider grant will vary, depending on the configuration of staffing and services in the affected primary advocacy providers. Total additional provision of the order of £50k in 2022-23 has been made to support advocacy providers.

This option reflects the views of the respondents that children's rights and needs should be paramount. Regulations and associated administrative arrangements will clarify the roles and responsibilities of placing authorities and Scottish local authorities, making clear that the placing authority is responsible for implementation of the DOL order and for ensuring the child's welfare. It will also provide a robust mechanism for information-sharing, which will streamline and better regulate the process.

This option forms the basis of the proposed policy, as outlined in the Regulations laid before Parliament for approval. In summary, key features under Option 3 include:

- 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, for a limited period.
- Scots law recognition of DOL orders granted or continued by the High Court in another part of the UK, with the order having effect as if it were a CSO in certain circumstances. This recognition would be subject to conditions and for a renewable period of up to three months at a time.
- Treatment of DOL orders as if they were CSOs being for the purposes of authorising the deprivation of liberty of the child who is the subject of the order in Scotland and the application of certain provisions of the 2011 Act in relation to the order.
- A requirement for the placing authority to notify a number of key Scottish authorities in writing of key information about the DOL order as a condition of the recognition of a new or continued order.
- A requirement for the placing authority to give an undertaking as a condition of the recognition of a new or continued DOL order. The undertaking must set out that the placing authority will provide or secure the provision of all services required to support the child and bear all the costs arising from – or in

consequence of – the placement (except the costs of Scottish advocacy provision).

- Application and modification of certain provisions of the 2011 Act, in particular to designate the non-Scottish placing authority as the implementation authority and to ensure that Scottish Ministers can apply to the relevant sheriff court for an order to enforce the implementation authority's duty in relation to the child, if the authority is in breach of that duty.

SECTORS AND GROUPS AFFECTED

Scottish Courts and Tribunals Service

The intention behind making these Regulations is that going forward, placing authorities will no longer be required to petition the Court of Session in Scotland in each individual case in order to gain recognition of a DOL order in Scots law. Where, on the entry into force of the Regulations, a DOL order has already been recognised in Scots law through the current Court of Session route, the Regulations provide for the DOL order to be treated as if it were a CSO, for a limited period.

This reflects our intention 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.

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 provisions 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.

Enforcement

The Regulations provide for Scottish Ministers to apply to the relevant sheriff court for an order to enforce the implementation authority's duty in relation to the child, if

the authority is in breach of that duty. This is covered further under the Enforcement Sanctions and Monitoring heading below.

Since 2019, there have been 36 DOL order placements in Scotland and we consider that the better regulation of any future placements via the Regulations and associated agreements will ensure that the responsibilities of placing authorities are clear, well understood and adhered to. We therefore anticipate that there will only be a very small proportion of cases – if any - that will be necessary to bring before the sheriff court for enforcement action. The overall impact of these enforcement provisions on the Scottish Courts and Tribunal Service (SCTS) should therefore be minimal.

The Regulations also apply section 171 of the Children’s Hearings (Scotland) Act 2011 with modifications, with the effect of making it a criminal offence for a person to:

- knowingly assist or induce a child to abscond from a place they are authorised to be held by virtue of a Deprivation of Liberty order (which our regulations will recognise as if it were a CSO),
- knowingly harbour or conceal a child who has absconded from that place, or knowingly prevent a child from returning to the place

Few – if any – prosecutions for the section 171 offence as applied by the Regulations are expected, with a resulting minimal impact on the Crown Office and Procurator Fiscal Service and SCTS.

Scottish Local Authorities

As borne out in recent practice, Scottish Local Authorities have often not been informed of DOL order placements in their local area and this has led to considerable resourcing impacts when they have been forced to intervene in individual cases, often in crisis situations. This includes impacts on local services, including health services, police, specialist educational services and others.

The Regulations apply, with certain modifications, provisions of the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”), so that they apply in relation to DOL Orders recognised by the Regulations. The key effect of this is to ensure that the placing authority is designated as the implementation authority and therefore has full responsibility to provide or secure all services to support the child placed in Scotland under the recognised DOL order.

There will be no new statutory duties placed on Scottish local authorities as a result of these Regulations. Where a Scottish local authority is required to take action, the establishment of clear processes and agreements will ensure that information is shared effectively, the best possible support can be offered to a child and any costs incurred are identified and reimbursed by the placing authority.

As noted above, the placing authority will also be required to notify a number of key Scottish authorities in writing of key information about the DOL order as a condition of recognition of a new or continued order. In addition, the placing authority would give an undertaking as a condition of such recognition. The undertaking must set out

that the placing authority will provide or secure the provision of all services required to support the child and bear all the costs arising from – or in consequence of – the placement (except the costs of Scottish advocacy provision).

The Regulations provide for Scottish Ministers to apply to the relevant sheriff court for an order to enforce the implementation authority's duty in relation to the child, if the authority is in breach of that duty.

Children's Hearings System

The Principal Reporter of the Scottish Children's Reporter Administration (SCRA) will be notified when a placement is made. Marginal administrative costs to SCRA may be associated with recording these placements. We do not intend to make particular additional grant-in-aid provision in association with notification or recording.

Third Sector Advocacy providers

We intend to put in place an offer of advocacy to children on cross-border DOL placements into Scotland. This will operate under the existing national children's hearings advocacy scheme in the relevant Scottish local authorities. This offer of advocacy will be intended to support children on DOL orders to provide their views to the residential provider which is hosting them - as to how their in-placement experience aligns with their child's plan and how their welfare is being protected, in line with the welfare analysis submitted to the High Court when the placing authority first applied for the DOL order.

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

The cost of providing this service will be borne by the Scottish Government and therefore there will be no new costs introduced for Scottish providers of these services.

Costs for businesses

We do not anticipate any extra costs for businesses as a result of these Regulations.

Scottish Firms Impact Test

It is not considered that the Regulations will have any impact on Scottish businesses.

Competition Assessment

No competition assessment is required. The Regulation's provisions do not give rise to any immediate or direct impact on competition.

Consumer Assessment

It is not considered that the Regulations will have any impact on consumers.

Test run of business forms

There are no new business forms proposed in the Regulations.

Digital Impact Test

The Regulations do not give rise to any immediate or direct impact on technology or technological advances.

Legal Aid Impact Test

The Regulations do not give any rise to Legal Aid impact considerations.

ENFORCEMENT, SANCTIONS AND MONITORING

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 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 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.

IMPLEMENTATION AND DELIVERY PLAN

The Scottish Government will work with the UK and Welsh Governments and the Northern Ireland Executive to monitor the effectiveness of the administrative agreements that support the Regulations, including an annual review of the proposed Memorandum of Understanding which we intend to conclude between all parties.

Post-implementation review

We will work closely with stakeholders, including the Care Inspectorate and Scottish Local Authorities, to determine how well the Regulations are working in practice and what changes, if any, need to be made to the associated accompanying administrative agreements.

As set out earlier in this paper, the Regulations are an interim step, necessary to better regulate cross-border placements of children and young people on DOL orders into Scottish residential care. We are now consulting upon longer-term solutions for cross-border placements more broadly, as part of the Children's Care and Justice (Scotland) Bill.⁷

SUMMARY AND RECOMMENDATION

The Regulations and administrative agreements provide an opportunity to ensure cross-border DOL placements are better regulated. It is necessary for us to address the current gap in legislation which requires petitions to be made to the Court of Session for Scots law recognition of DOL orders, and it is appropriate for the Scottish Parliament to have the opportunity to scrutinise the Regulations.

In summary, the following is provided for in the Regulations:

- 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, for a limited period.
- Scots law recognition of DOL orders granted or continued by the High Court in another part of the UK, with the order having effect as if it were a CSO in certain circumstances. This recognition would be subject to conditions and for a renewable period of up to three months at a time.
- Treatment of DOL orders as if they were CSOs being for the purposes of authorising the deprivation of liberty of the child who is the subject of the order in Scotland and the application of certain provisions of the 2011 Act in relation to the order.
- A requirement for the placing authority to notify a number of key Scottish authorities in writing of key information about the DOL order as a condition of the recognition of a new or continued order.
- A requirement for the placing authority to give an undertaking as a condition of the recognition of a new or continued DOL order. The undertaking must set out that the placing authority will provide or secure the provision of all services required to support the child and bear all the costs arising from – or in consequence of – the placement (except the costs of Scottish advocacy provision).
- Application and modification of certain provisions of the 2011 Act, in particular to designate the placing authority as the implementation authority and to ensure that Scottish Ministers can apply to the relevant sheriff court for an order to enforce the implementation authority's duty in relation to the child, if the authority is in breach of that duty.

DECLARATION AND PUBLICATION

Sign-off for Final BRIAs:

⁷ [Children's Care and Justice Bill - consultation on policy proposals - Scottish Government - Citizen Spaces](#)

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Clare Haughey

Date: 20 April 2022

Minister's name: Clare Haughey

Minister's title: Minister for Children and Young People

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