



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.¹ 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,² 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.

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.

¹ Section 4, Commissioner for Children and Young People (Scotland) Act 2003

² 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/>



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)³

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.⁴ 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

³ Link to report: <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf>

⁴ 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.⁵

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 2016.⁶ 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.⁷

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.⁸ 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.⁹ 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’).

⁵ 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.

⁶ *Christian Institute v Lord Advocate* [2016] UKSC 51.

⁷ Supreme Court judgment, para 79

⁸ 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>

⁹ Regulation 7, 2013 Regulations

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 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 framework¹⁰ 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

¹⁰ 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



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.

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”.¹¹ 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.”¹²

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

¹¹ [2021] UKSC 35, link to judgment: <https://www.supremecourt.uk/cases/docs/uksc-2019-0188-judgment.pdf>

¹² 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

		<p>registered with the Scottish Social Services Council and other professional regulatory bodies).</p> <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.
Transfer of Legal Order	3. Deprivation of liberty order to have effect as if compulsory supervision order	<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 ICSSO) 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>
Decision of High Court and Notification		<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

		<p>Inspectorate, the Mental Welfare Commission and the Principal Reporter.</p> <p>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 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>

<p>Child's rights and needs</p>	<p>10. Content of undertaking</p>	<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.
<p>Child's rights and needs</p>	<p>Receiving Local Authority and Health Board duties</p>	<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>
<p>Scrutiny / Inspection</p>	<p>11. Provision of advocacy services</p>	<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</p>



		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.
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.