

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

Equality Impact Assessment (EQIA)

April 2022

EQUALITY IMPACT ASSESSMENT - RESULTS

Title of Policy	The Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022
Summary of aims and desired outcomes of Policy	The purpose of the 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.
Directorate: Division: team	Directorate for Children and Families Strategy, GIRFEC and the The Promise Division Improving Lives for Care Experienced People Unit

Executive summary

The Regulations provide for DOL orders made by the High Court in England and Wales or the High Court of Justice in Northern Ireland, to be recognised in Scotland as if they were CSOs. This recognition is subject to the conditions specified in the Regulations and is provided 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.

The aim 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. 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.

Background

Currently, the authorities who place children into Scottish residential care with DOL orders petition the nobile officium jurisdiction of the Court of Session for legal recognition in Scots law of the DOL orders. This is required to ensure compliance with Article 5 of the European Convention of Human Rights (ECHR).

A limited number of children are currently affected by DOL orders in Scotland, or are likely to be involved in the future. Since the first cross-border (deprivation of liberty) petition in 2019, there have been a further 35 placements of children into residential care in Scotland. Of these, 35 placements have been from England and one from Wales. To date, there have been no placements from Health and Social Care trusts in Northern Ireland.

Scottish Ministers have committed to fulfilling The Promise (the conclusions of the Independent Care Review), which made clear that cross-border placements must be reduced to an absolute minimum. The Scottish Government continues to work with the UK Government to ensure that it addresses the lack of adequate care provision, particularly in England, which has led to the increase in these cross-border DOL order placements.

Petitions to the Court of Session's nobile officium jurisdiction are not intended for routine applications, such as those to recognise DOL orders. 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 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.

That is why we have brought forward the Regulations as an interim step, necessary to better regulate cross-border placements of children on DOL orders into Scottish residential care. This will help us on the way to a longer-term solution that better serves the rights and interests of the cross-border children affected and better aligns with the Promise. We are now consulting on proposals in the Children's Care and Justice (Scotland) Bill.

The Regulations make provision so that DOL Orders have effect as if they are (Scottish) CSOs, subject to certain conditions. This does not mean that the DOL order will be fully converted into a CSO, which would result in the child entering Scotland's Children's Hearings System (SCHS) with concomitant issues around dual jurisdiction for the children affected and inappropriate obligations being imposed on Scottish local authorities and other agencies. 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. We intend to supplement the Regulations with a Memorandum of Understanding between the Scottish Government, UK Government and other devolved administrations, as well as compiling associated placement undertakings for placing authorities to complete. Our intention is to have these administrative agreements in place in time for the Regulations coming into force.

The Scope of the EQIA

The policy only relates to a very specific group of children – namely those in care in another part of the UK (outside of Scotland) for whom the High Court in that jurisdiction grants a DOL order for a cross-border placement into residential care in Scotland. Since the first of these cross-border DOL petitions in 2019, there have been a further 35 such placements.

For each protected characteristic, we considered a range of factors, such as:

- Relevant evidence and its strength/sufficiency.
- Potential impacts, whether positive or negative.

Throughout this consideration, it has been important to bear in mind that:

- The impacts of cross-border DOL placements on the protected characteristics are outwith the scope of the policy, insofar as: these placements are already happening; these placements will, at least in the short term, continue to happen; and the placing authority outside of Scotland and the High Court in the relevant part of the UK (England and Wales, or as the case may be, Northern Ireland) are responsible for determining that the placement is in the best interests of the child (and they should take protected characteristics into account in their decision-making); and
- The scope of the policy is to provide for legal recognition in Scots law of DOL orders, to ensure compliance with Article 5 of the ECHR. Furthermore, the Regulations and accompanying administrative agreements will seek to better regulate the placement process – for example, by introducing information-sharing requirements from the placing authority to relevant Scottish authorities. Overall, the policy will, therefore, have minimal impacts on each protected characteristic – though will likely have some positive impacts, in terms of ensuring that these characteristics are an important consideration in the placement process.

This EQIA, therefore, focuses specifically on the impacts, if any, of the Regulations and accompanying agreements – rather than on the impacts of the cross-border DOL placements themselves.

The wider context is that the Regulations and agreements are intended as an interim measure, ahead of the development of primary legislation which

will seek to reduce all cross-border placements to a minimum. That primary legislation (the Children's Care and Justice Bill) is now being consulted on and a separate EQIA will be developed for that work in due course.

Key Findings

Currently, all UK local authorities and organisations involved in the care of children have a duty to ensure the activities and services they are providing do not discriminate against people with protected characteristics as listed in the Equality Act 2010. This means that the child's plan and welfare report submitted to the High Court before a DOL order is granted should include full consideration of all the child's unique needs. This will continue to be the case once the Regulations are, subject to Parliamentary approval, implemented.

During the EQIA process, the potential impact of the policy on each of the protected characteristics was considered. Overall, our assessment was that any impact on each protected characteristic would be minimal. The policy should have the same direct positive impacts (in terms of better regulating these cross-border DOL placements) for all children on such placements. We did not encounter evidence that children with any of the protected characteristics would be disproportionately or adversely affected by the Regulations.

We found that the policy would have a positive impact on children with all protected characteristics. The introduction of Regulations and associated administrative arrangements will clarify the roles and responsibilities of placing and receiving 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 cross-border placement process.

It is anticipated that the introduction of an offer of advocacy to child who is placed in Scotland on a DOL order will bring further positive impact, supporting affected children to provide their views to the residential accommodation provider which is hosting them. For example, engaging with a Scottish advocate will allow the child to express 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 applies for the DOL order.

In terms of age:

- The Regulations, subject to Parliamentary approval, will apply to children – meaning a person who is under the age of 18 years.
- The Regulations will provide for DOL orders to be recognised in Scots law without the need for the placing authority to petition the Court of Session, and the Regulations and accompanying administrative agreements will provide for better regulation of the placement process. This is unlikely to have any direct impacts on age; it will not introduce anything that will alter or affect the age of children being placed.
- One condition of recognition of a new or continued DOL order which is built into the Regulations is a requirement for the placing authority to notify key stakeholders in Scotland, including Scottish Ministers, of key information in relation to each DOL placement. The age of the child will be included in that notification. Therefore, we will ensure that we continue to gather accurate data on the age of children on cross-border DOL placements, even when there is no longer a court process through the Court of Session in Scotland where this information on age is currently gathered. This notification requirement will enable us to monitor whether the policy is having an impact on the age of children to whom the policy is directly relevant.
- 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. Whether or not the placement is age-appropriate, for example, should be part of that decision-making.
- The Regulations, subject to Parliamentary approval, will have the effect that where a child becomes subject to a DOL order which has effect as if it were a CSO, Scottish Ministers must, as soon as reasonably practicable, inform that child of the availability of children's advocacy services. The Regulations also set out that the Scottish Ministers need not comply with this requirement if, taking account of the age and maturity of the child, the Scottish Ministers do not consider it would be appropriate to do so. This indicates how age and maturity would be taken into account, in order to

determine what would be in the best interests of the child who has been placed in Scotland.

In terms of disability:

- In theory, children could be moved to a residential care setting in Scotland which is not suitable for their needs. Being placed at a considerable distance from their home environment could also mean that children may not be able to access the services that they need. Furthermore, if there is a lack of planning by the placing authority before a placement, this could lead to delays or gaps in treatment. However, 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. Whether or not the placement appropriately takes account of any disability should be part of that decision-making.

- Given the scope of the policy is to provide for legal recognition of orders and better regulate the placement process, it is unlikely that the policy will negatively impact on disability. What the policy will do is ensure that the placement process for children subject to DOL orders is better regulated – so it should have a positive impact on that small group of children, regardless of whether or not any child is disabled.

- One condition built into the Regulations is a requirement for the placing authority to notify certain stakeholders in Scotland of key information on any future cross-border DOL placements. Included on this list of key stakeholders will be:

- o the Health Board which provides health services in the area in which the child has been, or is to be, placed.
- o any person acting for the time being as the director of education of the receiving local authority.

It is outwith the scope of the policy to alter a decision about whether a cross-border placement is appropriate (including consideration of whether it takes into account any disability); however, this provision in the Regulations will ensure that key Scottish stakeholders with the most direct interests in the health and learning needs of the child will be made aware that the placement is happening.

In terms of sex:

- Given the scope of the policy is to provide for legal recognition of orders and better regulate the placement process, it is unlikely that the policy will impact on male or female children differently. What the policy will do is ensure that the placement process for those children is better regulated – so it should have a positive impact on that small group of children, regardless of whether they are male or female.

In terms of pregnancy and maternity:

- There has been no evidence to date of any of the children on past or current cross-border DOL placements having been pregnant. In the unlikely scenario of this being the case for any potential future cross-border DOL placements, it would be outwith the scope of the policy to influence any potential impact; it would be for the placing authority applying for the DOL order (and the High Court granting/rejecting/reviewing the order) to take this protected characteristic into account and it is highly unlikely that a cross-border placement would be the right thing for the young person, given the distance it would place them from their home environment.

In terms of gender reassignment:

- As the policy is about providing for legal recognition of the DOL orders and better regulating the placement process, it is not anticipated that the policy would have any impact on gender reassignment.
- The policy relates to a very small subset of children. Therefore, it may be unlikely that it will affect a child who has undergone, is undergoing or is proposing to undergo gender reassignment. If this were to arise, it would be primarily the placing authority and High Court reviewing/granting a DOL order who would be responsible for considering what is in the child's best interests.

In terms of sexual orientation:

- As the policy is about providing for legal recognition of the DOL orders and better regulating the placement process, it is not anticipated that the policy would have any impact on sexual orientation.

In terms of race:

- In theory, it is possible that children could be placed in a setting in which they are more of a minority. These children could feel disorientated due to the differences from home, which could lead to feelings of isolation.
- In the possible scenario of this being the case for any potential future cross-border DOL placements, it would be outwith the scope of the policy to influence any potential impact; it would be for the placing authority applying for the DOL order (and the High Court granting/ rejecting/ reviewing the order) to take this protected characteristic into account.
- The Regulations and accompanying agreements will seek to better regulate the placement process, including to ensure that all relevant authorities in Scotland are aware of the placement. This increases the opportunity for an unlawful discrimination to be identified and addressed.
- Furthermore, Local Authorities and organisations involved in the care of children and young people have a duty to ensure activities and services they are providing do not discriminate against people with protected characteristics, as listed in the Equality Act 2010. The Regulations will help to make clear that this obligation applies to the authority which has placed the child in Scotland and to ensure that regular reviews of the placement (at least every three months) are conducted to unearth any potential issues relating to the placement.
- The Regulations also provide for an offer of advocacy to support children to provide their views as to how their in-placement experience aligns with their child's plan and how their welfare is being protected.

In terms of religion or belief:

- In theory, it is possible that children could be placed in a setting that is not appropriate to their religion or belief. Long-distance placements separating children from their families could also lead to a lack of support and guidance being available to a child in relation to their religion or belief. Children could feel disorientated due to the differences from home.
- In the possible scenario of this being the case for any potential future cross-border DOL placements, it would be outwith the scope of the policy to influence any potential impact; it would be for the placing authority applying for the DOL order (and the High Court granting/ rejecting/ reviewing the order) to take this protected characteristic into account. If a

child's religion or belief could not be appropriately accommodated in a proposed placement, the placement would not be in the best interests of the child.

- The Regulations and accompanying agreements will seek to better regulate the placement process, including to ensure that all relevant authorities in Scotland are aware of any cross-border DOL placement. This increases the opportunity for any unlawful discrimination to be identified and addressed.
- Furthermore, Local Authorities and organisations involved in the care of children and young people have a duty to ensure activities and services they are providing do not discriminate against people with protected characteristics, as listed in the Equality Act 2010. The Regulations will help to make clear that this obligation applies to the authority which has placed the child in Scotland and to ensure that regular reviews of the placement (at least every three months) are conducted to unearth any potential issues relating to the placement.
- The Regulations also provide for an offer of advocacy to support children to provide their views as to how their in-placement experience aligns with their child's plan and how their welfare is being protected.

In terms of marriage and civil partnership:

- We have not identified any potential impact of the policy on marriage/civil partnership due to the age and circumstances of the children who will be subject to DOL order placements.

We also identified that it is possible that the policy:

- Could have some slightly differing indirect impacts on groups of children already in care in Scotland. For example, it could have a positive impact on children who are being accommodated in the same residential care settings as children subject to DOL orders. For example, if a better regulated cross border DOL placement is less likely to break down, it reduces the risk of emergency staff time/resource being required (reducing the risk of negative impacts on all children in the relevant setting).
- Could also impact on the adults/authorities who are working with children subject to DOL orders, in terms of removing the need for placing authorities to petition the Court of Session for recognition of those orders,

but increasing the accountability and transparency around the placement process they should follow.

Recommendations and Conclusion

The equality screening exercise was undertaken to identify whether the provisions contained within the proposals would adversely impact any particular group of individuals and to consider how this work can better promote equality of opportunity and foster good relationships between groups.

The Equality Impact analysis has shaped the policy making process in a number of ways. It helped to inform the decisions to:

- Include a provision in the Regulations that for a DOL order to have effect as if it were a CSO, a written undertaking has to be provided by or on behalf of the placing authority to all the listed Scottish authorities, to set out that the placing authority will provide or secure the provision of all services required to support the child. This aims to ensure that any potential negative impacts on each characteristic are identified and mitigated and that provision of required services takes account of a child's specific needs, whether in relation to race, religion or other protected characteristics.
- Set out in the Regulations that Scottish Ministers may apply to the relevant sheriff for an order to enforce the implementation authority's duty in relation to the child. The sheriff may then make an order requiring the implementation authority that it is in breach of a duty to carry out that duty. Therefore, even though the decision about whether or not granting a DOL order for a cross-border placement is in the best interests of a child is outwith the policy scope, it is possible - within the Regulations - to ensure that where a placing authority is not fulfilling its duties (including failure to provide services required to support a child with a protected characteristic), it can be held to account.
- Include a provision in the Regulations that, where a child becomes subject to a DOL order which has effect as if it were a CSO, the Scottish Ministers must, as soon as reasonably practicable, inform that child of the availability of children's advocacy services. The Regulations also set out that the Scottish Ministers need not comply with this requirement if, taking account of the age and maturity of the child, the Scottish Ministers do not consider it would be appropriate to do so. Where advocacy provision is

offered and is taken up, children will have a chance to express their views through the advocate – which provides an opportunity for any issues in terms of impacts on a particular protected characteristic to be identified and communicated to the responsible authorities.

- Include a provision in the Regulations so that – in terms of applying and modifying relevant sections of the 2011 Act – offences relating to inducing a child to abscond from a placement are also applicable in relation to where a child is subject to a DOL order. Whilst it is difficult to match a potential scenario of absconding to a potential impact on a particular characteristic, it could, for example, be that a particular characteristic (such as age or disability) is exploited by an adult, who induces a child to abscond from the place where they are being accommodated. Ensuring that offences relating to absconding are applied within the Regulations helps to provide a safeguard against such scenarios.

Furthermore, whilst no issues were identified as a result of this EQIA, plans for ongoing monitoring and evaluation have been considered.

The Regulations:

- Require the placing authority to notify a number of Scottish authorities in writing with key information about a new or continued DOL order as a condition of its recognition as if it were a CSO.
- Require the placing authority to provide an undertaking as a further condition of the recognition that it 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 cost of Scottish advocacy provision).
- Set out, with modifications, the provisions of the 2011 Act which apply - including with the effect of designating the placing authority as the implementation authority.

Enforcement considerations have been included and 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.

The Scottish Government will also work with the UK and Welsh Governments and the Northern Ireland Executive to monitor the effectiveness of the administrative arrangements which will support the Regulations, including an annual review of a Memorandum of Understanding which it is intended will be concluded between all parties.

Residential Services in Scotland will continue to be regulated and inspected by the Care Inspectorate to ensure they meet the right standards of care.



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