

## **CELCIS response to the Scottish Government's policy position paper: Cross-border placements of children and young people into residential care in Scotland**

**January 2022**

CELCIS is Scotland's Centre for Excellence for Children's Care and Protection, based at the University of Strathclyde. CELCIS is a leading improvement and innovation centre. We improve children's lives by supporting people and organisations to drive long lasting change in the services they need, and the practices used by people responsible for their care.

### **Current legal situation**

We welcome the opportunity to provide feedback on the Scottish Government's policy position paper 'Cross-border placements of children and young people into residential care in Scotland', noting that it relates specifically to children and young people who are placed into Scottish residential care settings when a High Court in England or Wales has granted a Deprivation of Liberty Safeguards (DOLS) order. In England and Wales, such orders may be made with respect to children in a number of circumstances, including:

- where criteria for making a secure accommodation order are satisfied, but no places in a secure children's home are available, meaning adjustments need to be made to residential care homes which are otherwise none-secure care;
- where criteria for making a secure accommodation order are satisfied, but the local authority assesses their needs would be better met in an alternative placement; or
- where criteria for a making a secure accommodation order are not satisfied, but other measures amounting to deprivation of liberty are required to keep them safe.<sup>1</sup>

DOLS orders are made under the High Court's inherent jurisdiction, as there is no other statutory provision which authorises the deprivation of a child's liberty in residential accommodation, as opposed to secure accommodation. When the most appropriate available accommodation identified is in Scotland, this poses a challenge in that DOLS orders are not automatically recognised in Scots law. Currently where children are placed cross-border on such orders, the placing local authority in England or Wales must petition Scotland's Court of Session in each individual case for the order to be recognised, and ensure a lawful basis is established for the deprivation of a child's liberty, in line with Article 5 of the European Convention on Human Rights (ECHR).

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<sup>1</sup> UK Supreme Court (2021) [Judgement in the matter of T \(A Child\) \(Appellant\)](#), Case ID: UKSC 2019/0188

The proposals within the policy position paper aim to specifically address this matter, because of the burden the current situation is placing on petitioners and the Court of Session. The policy position paper rightly highlights the need for the individual child's best interests to be at the centre of decisions about their care. Despite the complexity of the issue, this principle must be firmly held as the basis for any policy decisions or future legislative change in this matter.

In July 2021, the UK Supreme Court ruled that the exercise of inherent jurisdiction to authorise DOLS orders is legally permissible but noted with concern that such orders are being used to "fill a gap in the childcare system caused by inadequate resources".<sup>2</sup> The policy position paper highlights that addressing this lack of resource, which could, include for example, appropriate accommodation or appropriately trained staff, is the best permanent solution. We strongly agree with this, given it would reduce, if not eradicate, the incidence of authorisation of DOLS orders being sought in Scotland.

We acknowledge and welcome the intention of the Scottish Government to implement more fundamental and sustained change to the regulation of cross-border placements in the near future. However, the singular focus of the policy position paper pertains to the legal matter of how DOLS orders can be recognised under Scots law. We have concerns that in concentrating efforts on this, the necessary efforts to address wider issues which we outline below in relation to cross-border placements may be viewed as less urgent. Furthermore, several potential implications of the proposed policy approach require further, detailed, discussion with a variety of stakeholders to ensure there are no unintended consequences of any change.

### **Wider context of cross-border placements: key considerations**

Over and above the specific legal issue the policy position paper intends to address, we share the significant concerns highlighted by a number of organisations (including the [Children and Young People's Centre for Justice](#) (CYCJ), the [Children and Young People's Commissioner for Scotland](#) (CYPCS), [The Promise Scotland](#), and the [Care Inspectorate](#)) in relation to increasing numbers of cross-border placements, where children and young people are placed at considerable geographical distance from their home, their family, their friends and their community. This will affect children who often have high levels of need, for example, special education or health needs, who have experienced multiple placement breakdowns, and who have complicated life histories often involving significant trauma.<sup>3</sup> Increasing numbers of cross-border arrangements

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<sup>2</sup> UK Supreme Court (2021) [Press Summary: In the matter of T \(A Child\) \(Appellant\) \[2021\] UKSC 35 On appeal from: \[2018\] EWCA Civ 2136](#)

<sup>3</sup> Children's Commissioner for England (2019) [Pass the parcel: Children posted around the care system](#). London: Children's Commissioner

has been noted as a particular issue for children and young people in Scotland's secure care accommodation.<sup>4</sup>

For a range of reasons, including limited local understanding of the different legal landscapes between Scotland and England and Wales, and the practicalities of being far away from important and trusted supportive relationships, children from England and Wales placed across borders may not experience the same access to their rights and protections as children already living in Scotland. The legal complexities and lack of alignment between policy and practice in different jurisdictions can mean children placed across the border experience limited support to understand their rights, limited opportunities to have a say in decisions about their care, and limited access to advocacy.<sup>5</sup>

When children and young people are placed at distance or across borders in unfamiliar communities, this can be isolating, with serious implications for their opportunities to see and spend time with family, a loss which can be traumatic, and over the longer term this presents risks to their relationships, may weaken connections between them and their family and peers, and insufficiently upholds their rights.<sup>6</sup> For example, Article 9 of the United Nations Convention on the Rights of the Child (UNCRC) requires States Parties to respect children's rights to maintain 'direct contact and personal relations' with their parents on a regular basis when they are separated from them.<sup>7</sup>

In terms of care planning, there are concerns that decisions taken to care for a child or young person under cross-border arrangements are often made based on consideration of a lack of resources closer to the child's or young person's home and family connections, rather than these decisions being based on a thorough, early, assessment of the child's needs, including their views, and subsequent planning to meet these needs, including matching with a more appropriate placement.

We are aware of concerns about limited assessment, information sharing and matching before children and young people are moved across the border. Additionally, where this does take place, multi-agency planning for such transitions is complicated by distance and different legal and policy landscapes.<sup>8</sup>

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<sup>4</sup> Gibson, R. (2021) [ACES, Distance and Sources of Resilience](#). Glasgow: CYCJ; Lightowler, C. (2020) Rights Respecting? [Scotland's approach to children in conflict with the law](#). Glasgow: CYCJ; The Promise Scotland (2021) [Change Programme ONE](#). The Promise Scotland; Gough, A. (2018) [Secure Care in Scotland: Cross border placements](#). Glasgow: CYCJ

<sup>5</sup> Children's Commissioner for England (2019) [Pass the parcel: Children posted around the care system](#). London: Children's Commissioner; The Children's Commissioner for England. (2020). [The Children that no one knows what to do with](#). London: Children's Commissioner for England

<sup>6</sup> The Independent Care Review (2020) [The Promise](#). Independent Care Review; Lightowler, C. (2020) Rights Respecting? [Scotland's approach to children in conflict with the law](#). Glasgow: CYCJ; The Children's Commissioner for England. (2020). [The Children that no one knows what to do with](#). London: Children's Commissioner for England

<sup>7</sup> UNCRC (1989) [Convention on the Rights of the Child](#), Article 9(3). London: UNICEF UK

<sup>8</sup> Lightowler, C. (2020) Rights Respecting? [Scotland's approach to children in conflict with the law](#). Glasgow: CYCJ; Children's Commissioner for England (2019) [Pass the parcel: Children posted around the care system](#). London: Children's Commissioner

The impact of cross-border care on children's lives should not be underplayed. This often comes with significant disruptions to their rights to access health services, education provision and care specific to their needs. A lack of continuity in specialist mental health care or counselling, for example, could have a profound impact on a child or young person's wellbeing, both in the immediate term, and potentially longer term if the experience of an abrupt end to a supportive relationship understandably impacts on their future inclination to invest in such relationships with professionals. Furthermore, whilst placements involving distance or across borders may be made as attempts to ensure short-term safety, evidence indicates children placed at significant distances are more likely to abscond, are at risk of exploitation, and most plan to head home.<sup>9</sup> Where cross-border placements are short term, without intensive support with the child or young person, and their family, risks to their safety (for example, exploitation) are likely to re-emerge when they return home.

The Promise makes clear and strong calls for an "end to the selling of care placements to Local Authorities outside Scotland".<sup>10</sup> In addition to the substantial impact on the rights, family support networks, and community of the children and young people concerned, The Promise highlights the impact of such practice, and of commissioning and systems-driven decisions, on strategic planning for the care needs of children already living in Scotland, the need to instead base decisions on the needs of children, and the ethical issues associated with the monetisation and marketisation of care.<sup>11</sup>

### **The proposal put forward in the policy position paper**

The policy position paper seeks views on "DOLS orders having effect in Scotland as if they were Compulsory Supervision Orders (CSOs)."

There are some potential benefits of the proposals outlined, and some areas in which further clarity or consideration would be of benefit in further developing this policy.

### **Benefits of the proposed approach**

- There would no longer be a need for local authorities in England and Wales to petition Scotland's Court of Session for a DOLS order to be recognised and ensure that there is a lawful basis established for the deprivation of a child's liberty in a residential care placement in Scotland. Article 5 of the European Convention on Human Rights (ECHR) sets out the requirements for any deprivation of liberty to be lawful, and this must continue to be upheld.
- The proposals present an opportunity to ensure more robust, multi-agency, child-centred planning is in place before a placement begins. Whilst individual

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<sup>9</sup> The Children's Commissioner for England. (2020). [The Children that no one knows what to do with](#). London: Children's Commissioner for England

<sup>10</sup> The Promise Scotland (2021) <https://thepromise.scot/planning>

<sup>11</sup> The Independent Care Review (2020) [The Promise](#). Independent Care Review

circumstances, situations and practice will currently vary, we are aware and concerned that Scottish multi-agency partners, including local authority social work departments, education authorities and health boards, are unaware that children from England and Wales with high levels of need have been placed in local residential care settings. This has clear implications for the ability of these agencies to plan for, provide the services, and support these children now living in Scotland.

- The policy position paper acknowledges that children who are subject to DOLS orders and are placed cross-border are often the children and young people with the most complex needs, living in the most vulnerable situations. If, in terms of this proposal, Scotland's Children's Hearings System has a role in the oversight of their care and future planning, that may be an additional safeguard in ensuring their rights are upheld, and to help prevent any delay to plans aimed at meeting their needs in the longer term.

### **Areas for clarity or further consideration**

- There is limited information in the policy position paper about the number and circumstances of children and young people subject to DOLS orders and placed cross-border.
  - Understanding how many children this practice applies to is important to inform the thinking about the capacity within Scotland's residential care resources to care for them, and the resource implications for Scotland's Children's Hearing system, local authorities and other services that support children and young people, including health and education. Clearer context in the policy position paper would have helped to ensure clarity about what the particular issues are and why/how they could be resolved.
  - A broad understanding of the children and young people's circumstances is important to inform views about the provision required to uphold their rights and meet their needs. At points, the policy position paper implies DOLS orders apply to children and young people in secure care (for example, paragraph 4 under 'Proposed regulations: outline'), whilst elsewhere, the paper clearly states the matter pertains to non-secure residential settings. This is confusing, and clarity is necessary to understand
    - where these children are placed;
    - what is meant by depriving a child or young person of their liberty in a non-secure residential setting (in practice and law);
    - whether specific measures pertaining to deprivation of liberty would be set out within a CSO and what these may be;
    - how the workforce will be supported with the specialist skills they may require to care for children and young people in such situations; and
    - how would this be managed within residential settings where other children and young people not subject to the same restrictions could also be living. For example, if the door of the

children's house must be locked, how will this impact upon children living there whose care and safety does not require such restrictions?

- The proposal to recognise DOLS orders as CSOs would resolve a technical, legal problem. Whilst the policy position paper states that the current arrangement “does not serve the interests of the child or young person at the heart of each application”, it is less clear whether the proposed new approach would serve children and young people better.
  - Recognising DOLS orders as CSOs would mean the children and young people from England and Wales being placed in Scotland would be brought into Scotland's Children's Hearing system, in addition to being part of existing and ongoing proceedings through the High Court in England or Wales. This will require children and young people to attend additional formal meetings, and become subject to the scrutiny of a second legal and bureaucratic system at a particularly turbulent and potentially traumatic time in their life.
  - The policy position paper suggests that by being involved in the Children's Hearing System will ensure advocacy provision has been offered to the child, and the appointment of a safeguarder could be made. Advocacy provision for children is vital, and should be in place from the earliest possible stage (i.e., before moving across the border), but this is not always the case.<sup>12</sup> The provision of advocacy services under the Children's Hearing advocacy scheme will be a welcome safeguard where existing advocacy is insufficient or not in place. However, to properly uphold the rights of children and young people placed cross-border, there is a need for concerted planning to ensure enough practitioners with the additional legal knowledge about the law in England and Wales and expertise to support children in this position are available. Further clarity is required in terms of what the role and remit of a safeguarder for children in this situation would be, given the responsibility for the implementation, oversight, and review of their care placement will remain with the local authority in England or Wales and therefore outwith the Children's Hearing System. A clear voice advocating for the child locally is extremely important, and consideration should be given to how this operates alongside other advocacy which may be provided through safeguards associated with the DOLS process in England and Wales.
  
- The policy position paper outlines proposals for DOLS orders to be recognised as if they were CSOs, however there is lack clarity and detail about any potential differences between a DOLS order recognised as a CSO, and any other CSO. We share concerns outlined by CYPCS for the rights of children and young people deprived of their liberty in care settings who do not have

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<sup>12</sup> Children's Commissioner for England (2019) [Pass the parcel: Children posted around the care system](#). London: Children's Commissioner

the protections to which children domiciled in Scotland are entitled under Scots law. There is a potentially discriminatory impact if children from England and Wales are placed in care settings in Scotland, but not fully included in the protections and accountability under legislation, such as the Children and Young People (Scotland) Act 2014 (the 2014 Act).<sup>13</sup> Further clarity is required then about what is meant by DOLS orders **having effect** as if they are CSOs.

- The policy position paper outlines an option which sees “DOLS orders being fully converted into a CSO,” specifying this means that “all the standard provisions and procedures in terms of the 2011 Act [Children’s Hearings (Scotland) Act 2011] Children’s Hearing would apply”. However, it is noted that this is *not* the proposed option to be taken forward, due to the responsibility this would place on local authorities in Scotland. While we agree the responsibility for the placement should continue to belong to the placing local authority in England or Wales, the scope, meaning, entitlements and accountability associated with an order which is, by definition, not “fully converted into a CSO” requires clarity.
- The intention for local authorities in England and Wales to retain responsibility for the implementation, overview, review, and financial cost of the placement is clear. But it is not clear whether a child or young person subject to a DOLS order recognised as a CSO would be eligible to the rights and entitlements of any other child subject to a CSO in Scotland, such as support to see and spend time with any brothers and sisters they do not live with; to access Corporate Parenting, Continuing Care, and Aftercare provisions under Parts 9, 10 and 11 respectively of the 2014 Act; or to specific financial entitlements such as the Care Experienced Student Bursary and the forthcoming Care Experienced Grant. If not, this has significant implications in terms of discrimination, and the creation of a two-tier system for children who are part of the care system in Scotland, but whose circumstances differ from other children in the same system, based solely on how they came to be cared for in the system in Scotland. If the intention is for children on DOLS orders recognised as CSOs to have the same rights and entitlements as all children subject to CSOs in Scotland this will have resource and planning implications, which need to be fully scoped and accounted for.
- The intention for a children’s hearing to be convened in the area in which a child or young person is placed (to be reviewed every 3 months), to facilitate information sharing, is noted. Aside from the ability to appoint a safeguarder, and to notify the child or young person about the availability of advocacy services, the policy position paper is unclear about the further role and remit of the Children’s Hearing System.

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<sup>13</sup> CYPCS (2021) [Submission to United Nations Committee on the Rights of the Child Children’s Rights and Alternative Care](#). Edinburgh: CYPCS

- Further clarity is required regarding what, if any, decision making powers the children's hearing will have, or whether it will be restricted to a form of advice hearing. Furthermore, will the usual procedures in relation to invitations apply? Or the consideration of Relevant Persons, and appeals, for example? How will the child's parents be included in the process, and supported to attend if appropriate? Will the child or young person's brothers and sisters have the same participation rights as they would otherwise? How will the multiagency professionals in England and Wales be supported to understand the hearing system, and fulfil any responsibilities they have in relation to the child's hearing?
  - There is a need to establish the matters that the children's hearing will discuss, what reports and paperwork are required, and who would be expected to provide these.
  - If the role of the children's hearing is to gather information about the child's progress to share with the High Court in England and Wales, and inform the reviews held at least every 3 months, it is unclear why this cannot be done by the multi-agency Team Around the Child approach used in Scotland which could directly provide information to the High Court. The child would also require access to advocacy and legal support to participate in this process, rather than through a hearing, which will be experienced by the child or young person as a second formal process.
  - Regardless of the other aspects of role/remit of the Children's Hearing System, further consideration could be given to whether establishing a blanket provision for 3 monthly reviews by a hearing is advisable, or whether a more bespoke approach in terms of hearing frequency which takes each individual child's circumstances into account is preferable.
- The policy proposal sets out an intention that local authorities in Scotland should not have any new duties imposed on them, and responsibilities in terms of implementation, overview, review, and finances will remain with the placing authority in England or Wales. Should that be the case, additional clarity would be required in relation to what is stated about the Scottish authorities' "existing statutory duties" in the case of an emergency or placement breakdown.
    - There is a need for full consultation with local authority partners and other stakeholders who may be involved in the care of children placed across the border (e.g., police, health) in Scotland to inform the policy development process at this stage. This should culminate in the development and provision of clear intentions and expectations in emergency or placement breakdown situations. For example, if a child or young person, for whatever reason, leaves the residential care they have been placed in and cannot return to that care, which local authority – the one in Scotland or the one in England or Wales - is



- responsible for their welfare and wellbeing, both immediately and in the longer term?
- We strongly agree with the requirements to hold in advance a multi-agency discussion between the Principal Reporter in the relevant local area in Scotland, the Chief Social Work Officer for the Scottish local authority in which the care is being given, and their counterparts in England or Wales to discuss the application for a DOLS order to place a child or young person into a care setting in Scotland, and to provide notification to them regarding the DOLS order's approval. This discussion should include ensuring the arrangements for the care, health and education needs of a child are in place, prior to the child moving to Scotland.
  - We are concerned about the proposal for non-statutory administrative arrangements, to sit alongside regulations, setting out the expectations about how authorities should work together and contingencies in the event of placement breakdowns. This is insufficient to achieve the necessary clarity of roles and responsibilities in cross-border arrangements. CELCIS's understanding of cross-border arrangements from current analysis within our Education Programme work has recently highlighted how complex and contested cross-border arrangements can become, even in the context of planned transitions within, for example, education services for children and young people who are not in crisis or experiencing especially high levels of need. Complications stemming from policy and legislation from different jurisdictions which do not align can at best lead to confusion, and at worst to the abdication of responsibility in meeting children's rights and entitlements. Non-statutory practice guidance would be welcome to support practitioners in Scotland, England, and Wales to understand their responsibilities, but without clear legislation too we have concerns that it will not be possible to implement such practice guidance fully. Without robust, mandatory processes and accountability arrangements, there is a risk that children and young people will be left without the services and supports they need and have the right to receive.

Whilst the urgency to introduce regulations to solve the technical legal issue at hand is recognised, the concerns and questions we raise are interlinked and have implications for one another. Cross-border placements and deprivation of liberty issues are complex, but more than this, they have profound and serious impacts on children's rights, lives, and experiences. It is critical to get this right, and as such these proposals require further detailed exploration with key stakeholders to avoid any unintended consequences.

Thank you for providing us with this opportunity to respond. We hope the feedback is helpful; we would be happy to discuss any aspect in further detail.

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