

Response to the Cross-border Placements of Children and Young people into Residential Care in Scotland Policy Paper

January 2022

This response provides comment on the proposed Scottish Government policy relating to placing children and young people into residential care based in Scotland when a High Court in England or Wales has granted a Deprivation of Liberty Safeguards Order [DOLS]. The Scottish Government are proposing to lay draft regulations in the Scottish Parliament, which would in effect convert DOLS to Compulsory Supervision Order [CSO] under the Children's Hearings (Scotland) Act 2011.

Who Cares? Scotland believe there are several issues the Scottish Government should consider if it is to maintain its commitment to keeping The Promise and to ensure these changes are not incompatible with the impending incorporation of the United Nations Convention on the Rights of the Child. All children in care deserve a lifetime of equality, respect and love, which must remain the driver for any policy change, whether short or long-term.

Context

The Promise is clear on the need prioritise the needs of children with experience of care and their families when creating changes to policy and practice, rather than the priorities of 'the care system' as it currently exists. This intent is exemplified by the commitment to end "*selling care placements to Local Authorities outside of Scotland*" which recognizes the impact such a decision has on the human rights of the children from outside Scotland, particularly in relation to their rights to family life and the maintaining of crucial professional relationships.¹

Whilst we acknowledge the need to consider the immediate safety and potential rights violations of children from outside Scotland, the proposed regulations present a regressive policy decision in the Scottish Government's commitment to shaping a positive future for how children's care is delivered in Scotland. As a result, this policy must have clear conditions to mitigate the harmful impacts and continue to address the structural failings which have led to this law change being deemed necessary. We believe the following should be urgently considered as mitigating steps:

1. Prevention of rights violations and clear methods to access justice

We are clear that rigorous methods spanning the full spectrum of access to justice must be available in practice for young people impacted by this policy, to protect against the regressive nature of this law change. Access to justice, understood in its fullest sense, must include the pro-active provision of rights information, access to independent advocacy and competent, legal representation with expertise in child rights and child law, when necessary for young people affected.

The Scottish Government must also ensure existing standards in Scotland are upheld for young people living in cross-border placements, across their care journey. In particular, the [new Secure Care Standards](#) provide a clear pathway and best practice for all young people who have their liberty restricted.

Article 12 of the UNCRC, the child's right to be heard, must be considered at every step of decision-making around such cross-border placements. This will be particularly challenging considering the different legal frameworks which govern Children's Social Care across the nations, and a clear way of sharing information, especially the views of the young person, must be possible to support decisions

¹ Independent Care Review (2020) *The Promise*, available at <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf>, p.110

being made across borders. Children under these orders must be actively informed of their rights and have the process explained to them in accessible ways throughout this journey. The most effective way of ensuring this is by the involvement of independent advocacy for every young person making the move to Scotland.

To best meet the needs of children in cross-border placements in Scotland, the Scottish Government must consult with independent advocacy providers in Scotland, England and Wales to work out a solution that is well resourced and works for the children involved in these cross-border placements. Any advocacy provision must ensure continuity of relationship throughout their journey, both during their placement in Scotland but also available if the placement breaks down or the young person moves back to their home nation for any reason. Continuity of relationship is crucial in independent advocacy to build trust and support the child to participate in complicated, adult structures such as the High Court or Children's Hearings System.

When deciding how these young people will receive independent advocacy, we ask that the Scottish Government recognise that provision within Scotland is already a scarce resource and one which does not yet receive enough investment to provide for all children currently in care in Scotland. Following the enactment of Section 122 of the Children's Hearings (Scotland) Act 2011, the development of the National Practice Model for Advocacy in Children's Hearings has been a progressive step intended on protecting the child's right to participate in decision-making about their lives. We would welcome clarification on how access to advocacy in Children's Hearings will be implemented in connection with the proposed regulations.

We also would like to echo the response from National Youth Advocacy Service response that there must be child-friendly guidance information on advocacy provided to children moving to Scotland on these orders. The offer of independent advocacy is not always well known in the English and Welsh care systems and children moving to Scotland may be unaware of what this service could offer when it is made available from a provider. The guidance should include specific information on their advocacy rights when living in their Scottish cross-border placement, when they leave their placement and should explain what advocacy is, including how it can be accessed.

2. Access to entitlements and resource in Scotland

In recent years, Scotland has taken a progressive approach to the development of entitlements and provision of support for people with experience of care as they grow up. Such developments include:

- Continuing Care - the right to remain in care until the age of 21 through Part 11 of the Children and Young People (Scotland) Act 2014.
- Aftercare – the right to access aftercare support until the age of 26 through Part 10 of the Children and Young People (Scotland) Act 2014.
- Provision of the Care Experienced Bursary for those in further or higher education.
- Council tax exemption until the age of 26 for people with experience of care.

In some cases, children who experience cross-border placements choose to stay in locality they were placed in, following the end of the relevant legal order. It is unclear from the policy proposal how the Scottish Government intends to support young people in these situations and what entitlements these children will gain access to, so they are able to thrive in life.

Given the existing implementation challenges in Scotland to ensure entitlements such as aftercare and continuing care are realised for many care experienced people, we urge Scottish Government to consider how to address this likely future need and ensure local authorities are able to identify these young people in their throughcare and aftercare services. Likewise, we would encourage the Scottish Government to consider local resource implications of the regulations, beyond residential care provision, such as how these young people will be able to access health and education services.

The current wording in the policy proposal is not clear enough on whether the receiving local authorities must provide the same level of services to children in cross-border placements as those who are looked after by Scottish local authorities, it is crucial that Scottish local authorities know exactly what their duties are for these children and plan resource accordingly:

We do not envisage the Scottish local authority to have any new duties imposed upon them as receiving local authority. However, the recognition of DOLS orders as CSOs would be without prejudice to the receiving authority's existing statutory duties. This would ensure these could be relied upon in the case of an emergency situation or in the event of a placement breakdown.

3. Robust monitoring and transparent data collection

The Scottish Government must ensure robust monitoring of this temporary change is built into any policy change, including regularly publishing accurate data on the numbers of young people living in cross-border placements. The numbers of young people moving cross-border must be available to understand the consequences of this policy change and data must also be available to understand potential impact on Scottish resources.

Included in this data collection must be information available on what happens to young people placed cross-border after their placement – including whether they stay in Scotland or move back to England. Work must also be done to understand the experiences of young people living in cross-border placements, by ensuring their views are recorded robustly and that the Scottish Government can understand how rights are effectively fulfilled in cross-border placements.

4. Clear action plan for ending the practice of cross-border placements

Our final call is that the Scottish Government must publish a plan detailing how they will transition away from this temporary policy change and regularly review the impact of cross-border placements both on the young people living in them and the consequences on local authority provision in Scotland. This plan must include clear steps which show how The Promise's intention of ending cross border placements will be realised.

Key to this is ensuring that the Scottish Government do not allow the drivers behind the unmet need for children who are being placed currently under DOLS in Scottish local authorities to continue unchallenged. The privatisation of care is currently driving the demand and supply issues for these young people with complex care needs in England, who do not have suitable placements available in their home communities. We cannot allow the continued privatisation of care across the UK to enable framing the movement of children across from England to Scotland as without serious risk of human rights violations for these children.

As recognised in the policy note, the best long-term solution is to address the lack of appropriate placements in England. We encourage the Scottish Government to continue working alongside the UK Government to resolve this issue as matter of urgency.

Should you wish to discuss the contents of this briefing, please contact:

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