

**Scottish Government Consultation  
CROSS BORDER PLACEMENTS OF CHILDREN AND YOUNG  
PEOPLE INTO RESIDENTIAL CARE IN SCOTLAND**

**SOCIAL WORK SCOTLAND RESPONSE  
28<sup>th</sup> January 2022**

**Introduction and Context:**

Social Work Scotland is the professional body for social work Leaders, working closely with our partners to shape policy and practice to shape policy and practice, and improve the quality and experience of social services. We welcome this opportunity to comment on the Scottish Government's proposals for an interim solution to cross border Deprivation of Liberty Safeguarding orders.

This policy relates to placing children and young people into Scottish residential care where a High Court in England or Wales has granted a Deprivation of Liberty Safeguards (DOLS) order. Scottish Government is seeking views about orders having effect in Scotland as if they were Compulsory Supervision Orders. The consultation is set in the context of the Promise commitment to ensuring that children are placed in or near to their own locality to allow crucial relationships and supports to be maintained, and that cross border placement should as a result, cease or only take place in very exceptional circumstances.

Social Work Scotland members have expressed concern at a perceived increase in placements from other parts of the UK over recent years. These placements take a range of forms. However, this consultation response focuses only on those where the child or young person is subject to a Deprivation of Liberty order. We note that many of the children are placed in isolated or rural locations in an effort to sever ties with relationships and behaviours that are causing them harm.

Many Social Work Scotland members have experience of children being placed in their area on a Deprivation of Liberty order by the English or Welsh High Court. There is an understanding that the law in this area is complex, and that while in Scotland we do not have 'semi-secure' facilities, a DOLS does allow a young person to be placed in a residential setting and to be deprived of their liberty. The concern expressed in the consultation paper about the rights of the child or young person, and the

inadequacy of legal and care structures to support children in this situation and their often-complex needs, is therefore acknowledged and shared. SWS is therefore supportive of the principles behind the proposed policy - to secure an interim legal solution to the current situation; to safeguard the care and rights of children placed in Scotland on DOLS; to promote improved care for children in their own home areas; and to ensure clarity of responsibility for that care and the related costs. SWS also support the efforts to find a longer-term solution in the Care and Justice Bill, and related discussions with counterparts in England and with the Care Inspectorate on means of improving the current situation.

### **SWS response in summary**

As there is no statutory provision for deprivation of liberty in residential care in the way that there is with secure authorisations, these placements are made under 'inherent jurisdiction'. We note that the UK Supreme Court ruled that the use of inherent jurisdiction to authorise deprivation of liberty in non-secure accommodation was lawful but where this is necessary due of lack of adequate provision, as appears to be the case in many situations, should only be a short-term measure.

Social Work Scotland agrees strongly with the Scottish Government that urgent reform is needed providing medium and longer-term solutions which focus on meeting the needs of children as close to their homes and families as it is possible and safe to do so.

We also agree that the current position where DOLS orders are not automatically recognised in Scotland requiring the placing authority to petition the Court of Session for recognition is time-consuming and unsatisfactory, contributing to delay in meeting a child or young person's needs. Social Work Scotland however, does not consider the proposals to treat DOLS 'as if they were CSO's' as a satisfactory interim solution.

The proposal, whilst potentially resolving issues raised the Court of Session, introduces other steps and complexities which may create new issues, risks and costs elsewhere. For example

- Introducing a new legal process, by moving these cases partially into the Children's Hearing system, with children subject to some of the process and support but not all
- An increases in work for social work service in the area where the child has been placed
- Confusion about responsibility for the child and in particular the role of the CSWO and other local services where a child requires additional support, new needs come to light or emergency action is required.
- The human rights implications of a DOLS being treated 'as if' it were a CSO. We do not believe that this half way option is in keeping with our human rights approach in Scotland.

In preparing this response SWS has sought the views of a wide range of our members, and specifically our Chief Social Work Officers, Children and Families Standing Committee and our residential sub group. We have also linked with other interested organisation including CELCIS, SOLAR and CoSLA.

### **Consultation Questions:**

***Do you Support the proposals outlines above? If yes, why. If no, what would you wish to see changed and why?***

Social Work Scotland support the intent behind the proposal, but is of the view that there are risks of greater confusion and complexities in some areas. We outline our thinking below.

Responsibility for the placement should, as laid out in the proposal, remain where it properly belongs – with the placing authorities. The experience of our members is that the children placed under the current arrangements tend to have a long and complex care and protection history and subject to Care Orders under English legislation. Their needs are unable to met in their own area due to a lack of available and suitable care services. The placing authorities therefore hold corporate parenting duties and relationships with the child's family We agree that this means that the placing local authority should have full responsibility for the implementation, oversight, review and financial costs of the placement. This is important to ensure that unnecessary additional duties and costs do not fall to Scottish local authorities. However, there are factors in the current proposal, which we consider will mitigate against this aim.

- Introducing the Children's Hearing system, where the local area is the implementation authority and therefore will hold legal responsibility for the CSO
- The resultant corporate parenting duties of the Scottish local authority and partners – health police, education, housing and others – which apply to any child who is looked after, or previously looked after. These duties bring with them costs which can be disproportionately high for smaller, more rural Scottish local authorities.

Related to this, while the proposal seeks to confirm that the placing authority will be responsible for all placement costs, given the complexity of needs of the children placed, there are likely to be additional needs which arise where the statutory duty to respond lies with the authority where the child is resident. This could be where a secure authorisation is required or related to after care or continuing care duties. Members have shared recent experiences where young people have required out of hours emergency provision, and where costs have fallen to them. Chief Social Work Officers have particularly noted the risks in this area.

Legal issues. SWS appreciate and support the intention of the proposal that new duties are not imposed on local authorities. However, central to the proposal is that DOLS are treated 'as if' they were CSO's. The desire that they are not seen as CSO's

with the resultant clear duties on Scottish local authorities and related costs is appreciated. However, concerns have been expressed about the implications of treating DOLS 'as if' they were CSOs.

- Legally, it is not clear if something can be 'as if' or if it needs to be either the equivalent of something or not. We are concerned that the 'as if' is open to challenge which then establishes that the DOLS is treated as a CSO. Our view is also that it would be hard to justify that a child on a CSO and a child on a DOLS treated 'as if' it were a CSO, should be treated in a different manner in relation to what they can expect. Consequently, the local authority where the child has been placed would be to all intents the implementing authority. Regardless of a non-binding agreement with the placing authority, this could also mean that continuing care and other duties with related finance would apply
- The introduction of the Children's Hearing in to the process is an additional complexity. As the Hearing will have no power beyond appointing a Safeguarder, will it improve the child's position? We fear that this will be confusing to the child, and that the practicalities of a hearing, even with options for remote hearings, will not be manageable e.g. involving parents, determining if siblings or those with a sibling like relationships should be involved, or accessing legal support. Clarification on the effect this step would have on the Care Order, which authority, or body, has precedence in making, and implementing decisions about a child's circumstances and the extent of this would be required.
- Rights issues. Scotland rightly does not discriminate against children in terms of their rights; if they live in Scotland, we must uphold their rights. This applies regardless of temporary or permanent residence, legal context, or their background. Being care experienced brings with it some specific rights such as the right to continuing care, after care and to additional funding eg care experienced bursary. The proposal suggests that the child on a DOLS treated as if it were a CSO would have a right to advocacy and that the Hearing could appoint a safeguarder. That child would also have a right to access to continuing care, if they meet that criteria, after care, placement near to their family, education and health provision, robust contact plans and other similar rights. This will all add to the work of the authority where the child is placed, and to other support services including advocacy services. Experience in this area suggest that Scottish authorities are already seeing costs in some of these areas. The independent and legal support available to the child to help navigate the complex arrangements and who would provide it, will also bring with it additional costs.

In considering the proposal, SWS spoke with SOLAR who hold detailed working knowledge of the Scottish legal processes and Children's Hearing system. Our discussion highlighted some of the issues noted here, and potential unintended consequences of introducing the Children's Hearing system to the equation, but with limited power. We understand that they are submitting their own response. One option suggested in our discussion was whether a streamlined court process could be

considered rather than introducing another system that has no substantive power in the situation – the Children’s Hearing system.

***Do you think the proposals omit key issues that should be addressed through the proposed regulations? If yes, what are these gaps?***

SWS understands that discussions are underway with Care Inspectorate in relation to options for additional registration requirements where a residential service wishes to take children whose liberty is to be restricted. Depriving a child of liberty in Scotland (secure care) requires stringent scrutiny and review at Chief Social Work Officer level. Current placements are not in secure units, and members describe children placed on DOLS in establishments registered as ‘Care homes for children and young people’. This brings additional concerns about the lack of oversight and scrutiny, the position of other children who may be placed in those units and the rights of the child placed. and the ongoing review of the need to continue to infringe a child’s rights via a DOLS.

***In your view, what should the scope and key features of the proposed non-statutory administrative agreements be?***

Wherever a child is to move in to a cross border placements it is critical that appropriate processes and agreement are in place before that move takes place, and that the agreement is clear and unambiguous. This should cover the following: CSWO to CSWO pre-placement discussion; consideration of contextual information which may be held by the “host authority” and may be pertinent to the suitability of that placement; agreement on current and future responsibility of the placing authority including reimbursement of costs for non-placement services, or services which result from any Scottish legal processes eg if the child commits an offence and becomes subject to a CSO; information sharing; contact arrangements with family etc.

Feedback on experiences of cross border work have varied and members have noted that in the event of placement breakdown, the wording in guidance and related documentation needs to clearly state that full responsibility is retained by the placing authority, and include matters such as the responsibility and role of the providers in relation to notice period.

It is recommended that the consultation include the views of Police Scotland, Education Authorities and local Health Boards in order to take account of their experience and additional responsibilities that may fall to them.

***In your view, is there anything additional (such as guidance on particular issues) that would further support the achievement of the policy? If so, what would they be and why/how do you think they would help?***

The use of the term ‘placing ‘ and ‘receiving’ authority has other meaning within the Hearing system, and specially in relation to transfer of responsibility. As such using receiving authority could imply that the Scottish authority is accepting responsibility.

We suggest that this terminology is not used, given the aim to ensure that all responsibility remains with the placing authority, and that the term, 'authority where the child is placed or resides' is used.

As noted guidance on registration requirements for residential establishments, seeking to take children on DOLS would assist the current dilemmas significantly. This would protect the children placed, and potentially reduce the number of placements given the likely additional costs and expectations placed on the establishments, and the implications for other children.

SWS also suggest that consultation with Health, Police and Education Services is required with related guidance to clarify duties, resources and processes for practical matters such as where the young person has mental health issues, goes missing or wishes to attend a local school. As the children placed on DOLS will be amongst the most at risk and vulnerable, and therefore most likely to require additional support and input from already stretched local services, this clarity is essential.

The requirement to review DOLS at the three-month point is positive and provides some protection for the child. Members have noted however, the additional burden which would be placed on SCRA, both in relation to the initial Hearing and review Hearing, particularly in some areas where there are a number of cross border placements. Attention to resourcing issues related to this would be required. It is also important to establish and agree how long an order may be renewed for ie is there a limitation on the time beyond the initial three-month period, given that this is considered to be a short term situation. Processes for tight monitoring and scrutiny in these situations will be required, including what role the CSWO in both the home authority and the area where the child resides might have. Details such as on which authority, or what forum, does the responsibility lie for making the decision to step back from and reduce the extent to which a child's liberty can be restricted and ensure that these steps are not taken for any longer than they need to be are critical for any such arrangement.

The context of the Promise for this work is critical, and while inherent in the proposal, we would welcome a more explicit statement about the inappropriateness of children being placed hundreds of miles from their home, families, schools and communities with a linking of this to other strands of the Promise. This would allow a clearer thread in to defining 'exceptional circumstances' where a DOLS placement is called for – which should be in only very rare situations – and as a result reduce such placements