

The Cross-Border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022 - Practice Guidance, Notice and Undertaking Template

June 2022



Scottish Government
Riaghaltas na h-Alba
gov.scot

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

Practice Guidance

Contents

1. Background	1
2. Purpose and scope.....	2
3. Wider policy context.....	2
4. Considerations before DOL is applied for	3
5. Granting of a DOL order and recognition in Scots law	4
6. The Notice and Undertaking	5
6.1 Part 1 - Written Notice (regulations 7-9)	5
6.2 Part 2 - Undertaking (regulations 7, 8 and 10)	6
6.3 Persons to receive the Notice and Undertaking – Part 1 and 2.....	6
7. Considerations for the duration of a DOL order placement.....	7
7.1 Role of the Scottish local authority	7
7.2 Role of the placing local authority	8
7.3 Advocacy arrangements.....	8
8. Review, extension and expiry of a DOL order	9
9. Enforcement in event of breach of placing authority duty	9

1. Background

The [Cross-border Placements \(Effect of Deprivation of Liberty Orders\) \(Scotland\) Regulations 2022](#) (“the Regulations”) – and this accompanying guidance – relate to the practice of local authorities elsewhere in the UK placing children into Scottish residential care under a Deprivation of Liberty (“DOL”) order. To date, the vast majority of placements have been made by English local authorities, but they may also be sought by local authorities in Wales or Health and Social Care trusts in Northern Ireland.

The Regulations will replace the current practice of placing authorities petitioning the Court of Session in Scotland for recognition of a DOL order through use of the court’s nobile officium/parens patriae jurisdiction(s). They provide for DOL orders to be treated in Scotland as if they were Compulsory Supervision Orders (CSOs) - for specified purposes and subject to certain conditions. These conditions must be fulfilled by authorities from England / Wales / Northern Ireland who wish to place a child in Scotland to ensure Scots law recognition of the order and a lawful basis for the deprivation of the child’s liberty under article 5 of the European Convention on Human Rights (ECHR).

A CSO is a Scottish order made by a Children's Hearing or sheriff including any of the measures mentioned in section 83(2) of the [Children's Hearings \(Scotland\) Act 2011](#) ("the 2011 Act") and which specifies a local authority in Scotland which is to be responsible for giving effect to the measures in the order.

The Regulations will not "convert" any DOL order into a CSO. The purposes for which a DOL order will be treated "as if" it were a CSO under the Regulations are: authorising the deprivation of liberty of the child who is subject to the order in Scotland (which is crucial for compliance with Article 5 of the ECHR); and the application of certain provisions of the [2011 Act in relation to the order](#).

Given that the Regulations do not "convert" the DOL order into a CSO, the placed child will not become subject to the Scottish children's hearings system and the placing authority will continue to be responsible for implementation of the DOL order which is legally recognised Scotland. The placing authority also has obligations under the Regulations to:

- Provide or secure the provision of all services required to support the child;
- Meet all of the costs arising from, or in consequence of, the child's placement (other than the costs of an offer of advocacy made by Scottish Ministers to the child); and
- Investigate whether, whilst the child is resident in Scotland under the DOL order, the conditions under the order are being complied with. Where an authority considers that those conditions are not being complied with, it must take such steps as it considers reasonable.

2. Purpose and scope

This practice guidance is primarily for any local authority staff in England / Wales and any Health and Social Care trust staff in Northern Ireland who are involved in the placing of children into Scottish residential care under a DOL order.¹

The guidance can also support Scottish authorities and services to understand what the placing authorities from England / Wales / Northern Ireland are required to do when placing a child with a DOL order into Scottish residential care.

The guidance is provided to support placing local authorities to understand and complete the Placement Notice and Undertaking and provide additional essential information to support the child or young person's care. In addition, the guidance sets out issues that placing authorities should consider at different stages of the placement process. The guidance explains some of the key provisions of the Regulations, for example setting out what is required for a DOL order to be recognised in Scotland, as well as the enforcement mechanisms available to the Scottish Ministers in the event of a placing authority failing to meet its obligations.

3. Wider policy context

¹ This practice guidance specifically relates to The Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022. It does not affect existing relevant legislation or guidance to be followed in a placing authority's own jurisdiction.

Following the [Independent Care Review](#) in Scotland, the [Promise report](#) was published in 2020 and Scottish Ministers are fully committed to Keeping the Promise. The Scottish Government published a [Keeping the Promise implementation plan](#) in March 2022.

The realisation of the Promise means significantly reducing the number of children and young people living away from their families and includes reducing the number of all cross-border placements, including those into Scotland and those involving DOL orders – to an absolute minimum.

Cross-border placements should therefore only occur in exceptional circumstances, where the placement is in the best interests of an individual child and appropriate safeguards are put in place to ensure that the cross-border DOL order placement works effectively and protects the rights, interests, and needs of the child.

The Regulations are an interim step, necessary to better regulate cross-border DOL placements of children and young people on DOL orders into Scottish residential care. The Scottish Government is committed to introducing broader, longer-term measures to address the wider consequences and implications of cross-border placements in Scotland through the forthcoming Children’s Care and Justice (Scotland) Bill (see Children’s Care and Justice Bill – [consultation on policy proposals](#)).

4. Considerations before DOL is applied for

Before a placing authority applies to the relevant court in their own jurisdiction to seek a DOL order to place a child into residential accommodation in Scotland, the Scottish Ministers expect that the following factors will be considered.

Placement location

Before seeking a DOL order to place a child in Scotland, it is expected that placing authorities will seek a placement, in the first instance, in their country of residence where it is in the child’s best interests to do so. However, there is recognition that the need for specialist provision of a residential children’s home placement may exceptionally require placing a child further away from home and potentially outside their country of residence. This might be because the placement is best suited to the child’s needs, because of geographical proximity, or because there is no other suitable placement available.

Children’s rights

When seeking placements in Scotland, the placing authority must fully consider and uphold the child’s rights under the ECHR and the [UNCRC](#).

The [Children’s Rights and Wellbeing Impact Assessment](#) published when the Regulations were laid before Parliament outlines the key UNCRC rights to be considered, including Articles related to:

- General Principles (Articles 3 and 12)

- Civil rights and freedoms (Articles 7, 8, 13 and 16)
- Family environment and alternative care (Articles 5, 9, 10, 18, 20 and 25)
- Basic health and welfare (Article 23, 24 and 27)
- Education, leisure and cultural activities (Article 28 and 31)
- Special protection measures (Articles 37)

Information-sharing

Cross-border placements into Scotland will require effective planning, engagement and information-sharing between the services which will be responsible for meeting the child's needs. Consultation with the relevant Scottish local authority and service providers must be undertaken in good time to enable a thorough assessment to be made with regard to how the proposed placement in Scotland best meets the child's needs.

It is critical when assessing the suitability of a cross-border placement involving deprivations of liberty into residential care in Scotland that consideration should be given to the arrangements which will need to be put in place to enable the child to access key services, such as educational provision and primary and secondary health care.

Scrutiny and registration

Children's residential services in Scotland must be registered with the Care Inspectorate and are inspected to ensure that they are providing quality care and that they meet the Health and Social Care [national standards](#).

It is expected that, in line with the requirement under the Regulations that any setting in which a child is to be placed in Scotland under a DOL order is to be managed by a Care Inspectorate registered service, placing authorities will undertake due diligence checks in relation to scrutiny and registration of a prospective residential provision in Scotland. This would entail a review of the prospective placement provider's most recent regulatory inspection information alongside its statement of functions and objectives. This information will inform pre-placement assessment to ensure that the placement is best matched to the child's individual needs and can provide a high standard of care.

Multi-agency discussion

The placing authority should initiate multi-agency discussion with the relevant Scottish stakeholders in respect of access to and recharging arrangements for services in health, education, social work, police and any other required specialist services. It must be ensured that any services to be provided to the child are appropriate and tailored to their needs, and that they are delivered in a way which respects and fulfils their rights under the ECHR and UNCRC.

5. Granting of a DOL order and recognition in Scots law

A DOL order granted by the High Court in England or Wales or the High Court of Justice in Northern Ireland in relation to a placement in Scotland will have effect as if it were a Compulsory Supervision Order, subject to the relevant conditions in the Regulations being met.

In particular, for a new or continued DOL order to be recognised as if it were a CSO, a notice and undertaking must be given in writing by the placing local authority to specified persons in Scotland (see regulations 7-10).

The Placement Notice and Undertaking² (see section 6 for further detail and Annex A for the template) provides key information to relevant Scottish authorities and agencies. The Placement Notice and Undertaking must be completed ahead of the child being moved to Scotland, in order for the DOL order to be legally recognised in Scotland. This lawful authority is an essential requirement for deprivation of liberty to be compliant with Article 5 of the European Convention on Human Rights.

Placing authorities should share any appropriate additional information about the child, ahead of the child being moved to Scotland, with the relevant Scottish local authority to ensure comprehensive care planning and support for the child or young person being placed in Scotland.

6. The Notice and Undertaking

6.1 Part 1 - Written Notice (regulations 7-9)

The Placement Notice and Undertaking Template is provided at Annex A for use by the placing authority to support the required information to be shared with the relevant parties in Scotland. Supporting information to aid completion of the template is set out below.

The notice is to be completed and signed by the authorised representative of the placing local authority (England and Wales) or Health and Social Care Trust (Northern Ireland).

The information required is set out in the template and is in accordance with regulation 9 of the Regulations. It is also listed here for reference:

- a. The name of the placing local authority
- b. The gender of the child who is subject of the deprivation of liberty order

² The only scenario in which the placing authority is not required to complete the Placement Notice and Undertaking Template before a child is placed in Scotland is if a DOL order is already recognised and enforceable in Scotland on the date the Regulations come into force (i.e. by virtue of a Court of Session interlocutor). The Regulations contain a transitional provision in regulation 4, which provides that such a DOL order will be treated as if it were a CSO until the earlier of the following occurs: the DOL order ceasing to have effect in the jurisdiction of the court which made it; the end of the period during which the DOL order is recognised and enforceable in Scotland by virtue of the Court of Session interlocutor; or regulation 5(1) applying in relation to the DOL order. Regulation 5(1) allows for the continued recognition of a DOL order previously recognised under regulation 4, as long as it is reviewed and continued in effect by the relevant court before it expires and regulation 7 (requiring the giving of a notification and undertaking) is complied with by the placing authority.

- c. The age of the child who is the subject of the deprivation of liberty order
- d. The name of the residential care setting in which the child is to be placed
- e. The time that the deprivation of liberty order –
 - comes in to effect and
 - expires (if it is not subsequently extended)

6.2 Part 2 - Undertaking (regulations 7, 8 and 10)

The placing authority is required to give in writing an undertaking which recognises its role and duties in respect of the child being placed in Scotland under a DOL order. The undertaking remains in place for the duration of the placement of the child who is subject to the DOL order.

The content of the undertaking is set out in the template and is in accordance with regulation 10 of the Regulations, setting out that the placing local authority will:

- a. provide or secure the provision of all services required to support the child, and
- b. meet all the costs arising from, or in consequence of, the child's placement, other than the costs of advocacy provided to the child in accordance with regulation 11 (i.e. costs of advocacy offered to the child by Scottish Ministers will not require to be funded by the placing authority).

6.3 Persons to receive the Notice and Undertaking – Part 1 and 2

The completed Notice and Undertaking Template must be provided to **all of the persons** set out in regulation 8 of the Regulations **in advance of the child being placed in Scotland**.³ The template provides a tick box option to identify who the copy is being sent to and to ensure that all of the relevant persons are given the required information.

The persons are listed here for reference with additional information to support the placing local authority to identify the relevant people to whom the notification must be sent. The quickest and most effective form of notification is by electronic means, however notifications may also be made by post.

- The Health Board which provides health services in the area in which the child is to be placed
Notifications should be sent to the Chief Executive of the relevant NHS board. Details of the Regional Health Boards in Scotland can be found here: [Organisations – Scotland's Health on the Web](#)
- The Commissioner for Children and Young People in Scotland
Notifications should be sent to the Children and Young People's Commissioner Scotland at: DOLnotification@cypcs.org.uk

³ The only circumstance in which the notification and undertaking can be given after the child has already arrived in Scotland is outlined in footnote 2.

Further information for the Children and Young People’s Commissioner can be found here: [Home - The Children and Young People's Commissioner Scotland \(cypcs.org.uk\)](http://Home - The Children and Young People's Commissioner Scotland (cypcs.org.uk).).

- The person in charge of the residential care setting in which the child is to be placed
The person in charge of a residential care setting in Scotland is identified as the Registered Manager of the establishment. Details of registered residential care settings are available on the Care Inspectorate website.
- The Chief Social Work Officer of the Scottish local authority in which the child is to be placed
The Chief Social Work Officer (CSWO) role fulfils a key leadership role within social work and is supported by Social Work Scotland (SWS). Every local authority in Scotland has an appointed Chief Social Work Officer. Notifications should be sent to the Chief Social Work Officer at the relevant local authority: [CSWO Contact List \(socialworkscotland.org\)](http://CSWO Contact List (socialworkscotland.org)).
- Any person acting for the time being as the director of education of the receiving local authority
In Scotland, the post holder for this role may hold an alternative job title within children’s services in a Local Authority. Notification should be addressed: for the attention of the person in the role of the director of education and sent to the Chief Social Work Officer of the Local Authority [CSWO Contact List \(socialworkscotland.org\)](http://CSWO Contact List (socialworkscotland.org))
- The Scottish Ministers
Notification for the Scottish Ministers should be sent to the Office of the Chief Social Work Adviser, marked for the attention of the Chief Social Work Adviser.
OCSWA@gov.scot
- The Principal Reporter
The Children’s Hearings System is the legal system for children and young people in Scotland who are either at risk or who have allegedly committed an offence. Notifications should be sent to: practiceteam@scra.gov.uk
Further information for SCRA can be found here: Welcome to SCRA | Scottish Children's Reporter Administration
- Social Care and Social Work Improvement Scotland (‘the Care Inspectorate’)
The Care Inspectorate is the national regulator for care services in Scotland. Notifications should be sent to: DOLnotification@careinspectorate.gov.scot
Further information for the Care Inspectorate can be found here: Care Inspectorate

7. Considerations for the duration of a DOL order placement

7.1 Role of the Scottish local authority

The Regulations make clear that the placing authority has the legal responsibility for implementing the DOL order which is recognised as if it were a CSO and for providing or securing the provision of all services required to support the placed child. The placing authority is also responsible for meeting all of the costs arising from, or in consequence of, the placement, other than the costs of Scottish advocacy provided to the child. Scottish advocacy services will be provided under the children's advocacy in children's hearings national scheme, funded by the Scottish Government.

The Regulations do not prejudice any relevant powers or duties of Scottish local authorities which could be invoked in relation to the child (for example, to safeguard a child's welfare), but the intention and expectation is that these will not need to be engaged. This is because placing authorities are required under the Regulations to implement the child's DOL order and to comply with the undertaking they have made in relation to placement costs and services.

All public authorities – including local authorities across the UK – must act in a way which is compatible with ECHR rights (under section 6 of the Human Rights Act 1998) – so both receiving and placing authorities must ensure that they do this. As above, UNCRC rights should also be fully considered where a child is placed in Scotland and it should be ensured that those are upheld.

7.2 Role of the placing local authority

The placing authority has legal responsibility in Scotland for:

- complying with any requirements imposed on it by the DOL order which is recognised under the Regulations as if it were a CSO;
- investigating whether, whilst the child is residing in the relevant residential care setting in Scotland, any conditions imposed under the DOL order are being complied with. (If it considers that they are not, the placing authority must take such steps as it considers reasonable);
- providing or securing the provision of all services required to support the placed child; and
- meeting all of the costs arising from, or in consequence of, the child's placement, other than the costs of Scottish advocacy under regulation 11.

7.3 Advocacy arrangements

Where a child becomes subject to a DOL order which has effect as if it were a CSO under the Regulations, the Scottish Ministers will inform the child or young person of the availability of children's advocacy services, unless taking into account the age and maturity of the child, they do not consider it would be appropriate to do so. The advocacy provision will operate as an extension to the existing national children's hearings advocacy scheme [Home - Hearings Advocacy \(hearings-advocacy.com\)](http://hearings-advocacy.com).

Once the placing authority has notified Scottish Ministers of the intention to place a child subject to a DOL order in a Scottish residential setting, the Children's Hearings Team, on behalf of Scottish Ministers, will contact the person in charge of the

residential care setting to offer independent advocacy for the child or young person as soon as reasonably practicable and ideally within 3 days of the child moving to the residential placement. The Scottish Government Children's Hearings Advocacy Team will notify the placing authority of the name of the advocacy organisation be the Scottish advocacy offer to the child.

If the child agrees to being supported by an advocacy worker, the advocacy worker will make arrangements to meet with the child to begin the relationship building. The child can chose to start and stop the advocacy support at any time.

The Scottish advocacy offer is not a one-time offer. Contact details will be left with the child to allow them to request advocacy support at any time during their placement. If a DOL order is extended, then the advocacy organisation will get in touch with the child or young person again via the placement manager to make an offer of support.

8. Review, extension and expiry of a DOL order

Where an extension of a DOL order is sought or a DOL order is terminated, the placing authority must inform the specified people and agencies in Scotland, as identified in Annex A - Notice and Undertaking Template.

9. Enforcement in event of breach of placing authority duty

The Regulations modify relevant enforcement provisions of the 2011 Act to provide the Scottish Ministers with the power to apply to a sheriff for an enforcement order if a placing authority does not comply with its duties under modified sections 144 and 145 of the Act (see regulation 13(4) and (5)). Those duties are for the placing authority to:

- comply with any requirements imposed on it by the DOL order which is recognised under the Regulations as if it were a CSO;
- investigate whether, whilst the child is residing in the relevant residential care setting in Scotland, any conditions imposed under the DOL order are being complied with. (If it considers that they are not, the placing authority must take such steps as it considers reasonable);
- comply with the undertaking it has given under regulation 7 of the Regulations (i.e. the undertaking to provide or secure the provision of all services required to support the placed child and to meet all of the costs arising from, or in consequence of, the child's placement, other than the costs of Scottish advocacy under regulation 11).
- Where it appears to the Scottish Ministers that the placing authority is in breach of a duty, it may give that authority notice of an intended application by them to enforce the duty. The matter could only escalate to the sheriff where the authority does not fulfil that duty within 21 days of the notice being issued.

If Scottish Ministers brought the matter to court, the sheriff could then make an enforcement order requiring that the relevant duty be carried out if it were found that the placing authority was in breach of it.

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

Placement Notice and Undertaking Template

This written notice and undertaking is to be given to the following persons to comply with the Cross Border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022⁴ (“the Regulations”):

- a. the Health Board which provides health services in the area in which the child is to be placed
- b. the Commissioner for Children and Young People in Scotland
- c. the person in charge of the residential care setting in which the child is to be placed
- d. the Chief Social Work Officer of the receiving local authority
- e. any person acting for the time being as the director of education of the receiving local authority
- f. the Scottish Ministers
- g. the Principal Reporter
- h. Social Care and Social Work Improvement Scotland (otherwise known as “the Care Inspectorate”).

This document should be completed and given in line with the guidance.

The Placing Local Authority (England and Wales) or Health and Social Care trust (Northern Ireland) giving this notice and undertaking:

Name and title of authorised representative:

Address:

Email:

Tel:

⁴ [The Cross-border Placements \(Effect of Deprivation of Liberty Orders\) \(Scotland\) Regulations 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Part 1 – Notice

This notice is given in accordance with regulations 7 - 9 of the Regulations.

The following information is provided in respect of the child being placed in Scotland:

the name of the placing local authority:

.....

the gender of the child who is the subject of the deprivation of liberty order:

.....

the age of the child who is the subject of the deprivation of liberty order:

.....

the name of the residential care setting in which the child is to be placed:

.....

the time that the deprivation of liberty order comes into effect:

.....

the time that the deprivation of liberty order expires (if it is not subsequently extended):

.....

Part 2 - Undertaking

In accordance with regulations 7, 8 and 10 of the Regulations, [name of placing local authority/ Health and Social Care trust] hereby gives the following undertaking: for the duration of the placement⁵ of the child who is the subject of the deprivation of liberty order detailed in the notice in Part 1 of this document:

[Name of placing local authority/ Health and Social Care trust] will:

provide or secure the provision of all services required to support the child, and meet all of the costs arising from, or in consequence of, the child's placement, other than the costs of advocacy provided to the child in accordance with regulation 11 of the Regulations.

⁵ "placement" is defined in regulation 2(1) of the Regulations.

[Name of placing local authority/ Health and Social Care trust] recognises that any breach of its duties under section 144 or 145 of the Children’s Hearings (Scotland) Act 2011 (“the Act”, as applied and modified by regulation 13(4) and (5) and as read with regulation 3 of the Regulations), including any breach of the foregoing undertaking, may result in enforcement action under sections 146 to 148 of the Act (as applied and modified by regulation 13(6) and as read with regulation 3 of the Regulations.)

Signed by:

on behalf of:
(Placing Local Authority/ Health and Social Care trust)

Date:



Scottish Government
Riaghaltas na h-Alba
gov.scot

© Crown copyright 2022

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80435-669-2 (web only)

Published by The Scottish Government, June 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1112322 (06/22)

W W W . g o v . s c o t