



Law Society  
of Scotland

# Consultation Response

Cross-border placements of children and young people into residential care in Scotland: policy position paper

January 2022



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability and Child and Family Law sub-committees welcome the opportunity to consider and respond to the Scottish Government consultation: *Cross-border placements of children and young people into residential care in Scotland: policy position paper*.<sup>1</sup> We have the following comments to put forward for consideration.

## General Comments

We welcome steps to better regulate cross-border placements in the short term in order to serve the interests of children and young persons, whose needs may be better accommodated in the context of a children's hearing as compared to a court setting, and to reduce the burden on the Court of Session. We welcome the recognition of the deprivation of liberty issues arising from cross-border placements, and the express reference in the policy paper to lawful authority as an essential requirement for deprivation of liberty to be compliance with Article 5 of the European Convention on Human Rights (ECHR).

We have repeatedly raised the need for appropriate provision in Scotland to regulate- in an ECHR-compliant way- deprivations of liberty for adults and children within Scotland, equivalent to the Deprivation of Liberty Safeguards (DOLS) regime in England.<sup>2</sup> We are disappointed to note that the policy paper does not include any assurance about when that will be put right.

The difficulties encountered in relation to cross-border placements for children also emphasises the need for proper intra-UK arrangements in relation to protective measures in relation to both children and adults.

To date, Hague Convention 35 of 2000 on the International Protection of Adults has been ratified by the UK in respect of Scotland only. "Adults" for the purposes of the Adults with Incapacity (Scotland) Act 2000 include young people, that is to say persons over the age of 16. It is understood that UK Government intends to ratify Hague 35 in respect of England & Wales (and possibly Northern Ireland) in 2023. If that were to occur, it would be appropriate for relevant governments and administrations to take up the option

<sup>1</sup> [Cross-border placements of children and young people into residential care in Scotland: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/consultations/policy/2021/01/cross-border-placements-of-children-and-young-people-into-residential-care-in-scotland-policy-position-paper/pages/1_to_4.aspx)

<sup>2</sup> See for example: <https://www.lawscot.org.uk/news-and-events/blogs-opinions/our-2021-priorities-incapacity-mental-health-and-adult-care-and-protection/>

provided by Article 44 of Hague 35 to apply the terms of Hague 35 in matters arising between the component jurisdictions of the United Kingdom, to the potential benefit of all adults, including 'young people'. We recommend that Scottish Government keep this possibility under review in the event of further ratification of Hague 35 by UK Government.

Further, the policy paper does not address wider legal and policy issues arising where children from Scotland may be placed in residential care in the rest of the UK.

Regulations should clearly delineate the roles and responsibilities of the Local Authorities involved. We welcome the recognition in the policy paper of both the Scottish Local Authority's statutory duties, and the non-Scottish Authority's continuing responsibility for the placement. The non-Scottish Authority should have better knowledge of the child or young person and their personal circumstances, and be better placed to make appropriate arrangements for their welfare. Similar considerations apply to ordinary residence rules for adult care placements, and lessons may be learned from the operation of those provisions. In particular, consideration should be given to including a mechanism for dispute resolution in Regulations.

We welcome the recognition in the policy paper of the role of the Scottish Local Authority in the case of an emergency situation or placement breakdown. Regulations should include provision for placement breakdown and cost recovery where a Scottish Local Authority requires to make provision under their extant and enduring statutory duties. The non-Scottish Authority should be under a responsibility to have a placement breakdown plan in place for each child or young person, and for that to be intimated to the Scottish Local Authority or shared should the need arise.

Careful consideration should be given to matters of information sharing between Local Authorities, to ensure that a child or young person's information is not shared unnecessarily and that any information sharing is compliant with data protection legislation.

## **Consultation Questions**

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### **1. Do you support the proposals outlined above? If yes, why?**

Yes, subject to sight of further detail and draft regulations in due course.

### **2. If no, what would you wish to see changed and why?**

Not applicable.



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

See our general comments, above. The proposals do not contain sufficient detail to comment further at this stage.

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

We would suggest that as much detail as possible should be placed on a statutory footing, in order to provide clarity for all involved, ensure proper resourcing, and promote consistent best practice.

### **5. 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?**

We would welcome further clarity on the proposed review requirements, and how these would operate in practice. We support the principle of regular review in all cases where a child or young person is deprived of their liberty. However, work around permanence and welfare planning in Scotland has demonstrated the unsettling impact of frequent reviews on children and young people. A balance must be struck to ensure appropriate oversight, but to avoid unnecessary duplication. Further clarity regarding who would be involved in reviews, and particularly the role of the Scottish Local Authority, would be helpful.

**For further information, please contact:**

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