

Draft Regulations laid before the Scottish Parliament under sections 190(2)(c) and 197(2) of the Children's Hearings (Scotland) Act 2011, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2022 No.

CHILDREN AND YOUNG PERSONS

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

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| <i>Made</i> | - - - - | 2022 |
| <i>Coming into force</i> | - - | 2022 |

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 190 and 195(2) of the Children's Hearings (Scotland) Act 2011⁽¹⁾ and all other powers enabling them to do so.

In accordance with section 190(2)(c) and 197(2) of that Act, a draft of these Regulations has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. These Regulations may be cited as the Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022 and come into force on the day after the date on which they are made.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Children's Hearings (Scotland) Act 2011,

“the 2010 Act” means the Public Services Reform (Scotland) Act 2010⁽²⁾,

“chief social work officer” means an officer appointed in accordance with section 3 of the Social Work (Scotland) Act 1968⁽³⁾ or a deputy designated by the receiving local authority,

“child” means a person under the age of 18 years,

“the Commissioner for Children and Young People in Scotland” means the Commissioner appointed in accordance with section 2 of the Commissioner for Children and Young People

(1) 2011 asp 1.

(2) 2010 asp 8.

(3) 1968 c. 49. Section 3 was substituted by section 46 of the Local Government etc. (Scotland) Act 1994 (c. 39).

(Scotland) Act 2003(4), or a member of staff appointed under paragraph 7(1) of schedule 1 of that Act,

“the court” means—

- (a) in relation to England and Wales, the court exercising the inherent jurisdiction of the High Court of England and Wales,
- (b) in relation to Northern Ireland, the High Court of Justice in Northern Ireland,

“deprivation of liberty order” means an order (including an interim order) made under the inherent jurisdiction of the High Court of England and Wales or, as the case may be, made by the High Court of Justice in Northern Ireland, which authorises the deprivation of liberty of a child in a residential care setting,

“Health Board” means a Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978(5),

“local authority” means—

- (a) in relation to England and Wales, a local authority within the meaning of section 105(1) of the Children Act 1989(6) as it relates to England and Wales,
- (b) in relation to Northern Ireland, a Health and Social Care trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991(7),
- (c) in relation to Scotland, a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994(8),

“placement” means the placement of a child into a residential care setting, where that child was, immediately prior to the placement, resident in England, Wales or, as the case may be, Northern Ireland, and references to a child being “placed” are to be construed accordingly,

“placing local authority” means the local authority in England, Wales or, as the case may be, Northern Ireland, which has been granted a deprivation of liberty order,

“Principal Reporter” means the Principal Reporter appointed under paragraph 8 of schedule 3 of the Act or an officer of the Scottish Children’s Reporter Administration to whom there is delegated under paragraph 10(1) of schedule 3 of that Act any function of the Principal Reporter,

“receiving local authority” means the local authority in Scotland within which the residential care setting mentioned in the deprivation of liberty order is located,

“residential care setting” means a residential institution in Scotland which provides day-to-day care for children,

“residential institution” means an establishment (whether managed by a local authority, a voluntary organisation or any other person) which—

- (a) is not secure accommodation,

(4) [2003 asp 17](#). Section 2 was amended by paragraphs 1(a) and (b) of schedule 5 of the Scottish Parliamentary Commissions and Commissioners etc. Act [2010 \(asp 11\)](#).

(5) [1978 c. 29](#). Section 2 was amended by section 14(2) and paragraph 1 of schedule 7 of the Health and Social Services and Social Security Adjudications Act [1983 \(c. 41\)](#); sections 28, 66(1) and paragraph 19(1) of schedule 9 of the National Health Service and Community Care Act [1990 \(c. 19\)](#); paragraph 1(2) of schedule 1 of the National Health Service Reform (Scotland) Act [2004 \(asp 7\)](#); and section 42(1) and paragraph 2 of schedule 2 of the Smoking, Health and Social Care (Scotland) Act [2005 \(asp 13\)](#).

(6) [1989 c. 41](#) The definition of “local authority” was amended by paragraph 13 of schedule 10 and by paragraph 1 of schedule 18 of the Local Government (Wales) Act [1994 \(c. 19\)](#). There are other amendments to section 105(1) which are not relevant to these Regulations.

(7) [S.I. 1991 No. 194 \(N.I. 1\)](#), as amended by section 1(3) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (N.I. 2009 c. 1).

(8) [1994 c. 39](#). Section 2 was amended by paragraph 232(1) of schedule 22 of the Environment Act [1995 \(c. 25\)](#).

- (b) provides residential accommodation for children in order to safeguard or promote their welfare or otherwise to protect or further their interests, and
- (c) is managed by a care service which is registered by Social Care and Social Work Improvement Scotland in accordance with Chapter 3 of the 2010 Act,
“Social Care and Social Work Improvement Scotland” means the body established by section 44 of the 2010 Act⁽⁹⁾.

(2) Unless the context otherwise requires, any expression in these Regulations which is not listed in paragraph (1) and which is defined in the Act is to be construed in accordance with the Act’s definition.

(3) Any reference in these Regulations to anything done in writing includes a reference to anything done in electronic form which is—

- (a) sent by electronic means, and
- (b) capable of being reproduced in legible form.

Deprivation of liberty order to have effect as if compulsory supervision order

3.—(1) Where paragraph (1) of regulation 4 or, as the case may be, 5 applies, a deprivation of liberty order has effect as if it were a compulsory supervision order for the purposes mentioned in paragraph (2).

(2) The purposes are—

- (a) authorising in law the deprivation of liberty of the child who is the subject of the order in Scotland, and
- (b) the application of the Act in relation to the deprivation of liberty order (in respect of which, see regulation 13).

Deprivation of liberty order recognised in Scotland on date Regulations come into force

4.—(1) This paragraph applies where, on the day on which these Regulations come into force, a deprivation of liberty order is recognised and enforceable in Scotland by virtue of an interlocutor made before that day by the Court of Session.

(2) Paragraph (1) ceases to apply on the earlier of the following occurrences—

- (a) the deprivation of liberty order ceasing to have effect in the jurisdiction of the court which made the order,
- (b) regulation 5(1) applying in relation to the deprivation of liberty order,
- (c) the end of the period during which the deprivation of liberty order is recognised and enforceable in Scotland by virtue of the Court of Session’s interlocutor.

Deprivation of liberty order made, or continued, on or after day Regulations come into force

5.—(1) This paragraph applies where a relevant circumstance as specified in paragraph (2) occurs and the circumstance specified in paragraph (3) applies.

(2) A “relevant circumstance” occurs when a deprivation of liberty order—

- (a) which was recognised and enforceable in Scotland as mentioned in paragraph (1) of regulation 4 is, before the end of the period mentioned in paragraph (2)(c) of that regulation, reviewed and continued in effect beyond the end of that period by the court which made the order, or

⁽⁹⁾ 2010 asp 8.

- (b) is made on or after the day on which these Regulations come into force.
- (3) The circumstance in this paragraph is that regulation 7 has been complied with in relation to the deprivation of liberty order.
- (4) Paragraph (1) ceases to apply—
 - (a) on the deprivation of liberty order ceasing to have effect in the jurisdiction of the court which made the order, or
 - (b) where the occurrence mentioned in paragraph (a) does not happen within a relevant period, at the end of the relevant period unless the deprivation of liberty order is, on or before the last day of the relevant period, reviewed and continued in effect beyond the end of the relevant period by the court which made the order.
- (5) The “relevant period” is—
 - (a) where the deprivation of liberty order has not previously been reviewed and continued in effect by the court which made the order, the period of three months beginning with the day on which the order was made,
 - (b) otherwise, the period of three months beginning the day on which the order was reviewed and continued in effect, or last reviewed and continued in effect, by the court which made the order.
- (6) In this regulation, references to a deprivation of liberty order being “continued in effect” include references to that order being extended.

Effect of child becoming subject to compulsory supervision order or interim compulsory supervision order

6. A deprivation of liberty order ceases to have effect as provided for in regulation 3(1) where a child who is the subject of the order becomes subject to a compulsory supervision order or interim compulsory supervision order.

Notice and undertaking required for deprivation of liberty order to have effect as if compulsory supervision order

7. This regulation is complied with if a copy of the following has been given in writing by or on behalf of the placing authority to each person mentioned in regulation 8—

- (a) a notice containing the information specified in regulation 9, and
- (b) an undertaking meeting the requirements specified in regulation 10.

Persons to be given copy of notice and undertaking

8. The persons to be given a copy of the notice and undertaking mentioned in regulation 7 are—
- (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, and

- (h) Social Care and Social Work Improvement Scotland.

Content of notice

9. The information specified for the purposes of this regulation is—
- (a) the name of the placing local authority,
 - (b) the gender of the child who is the subject of the deprivation of liberty order,
 - (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, and
 - (e) the time that the deprivation of liberty order—
 - (i) comes into effect, and
 - (ii) expires (if it is not subsequently extended).

Content of undertaking

10. The undertaking mentioned in regulation 7(b) must specify that for the duration of the placement of the child who is the subject of the deprivation of liberty order, the placing local authority will—

- (a) provide or secure the provision of all services required to support the child, and
- (b) 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.

Provision of advocacy services

11.—(1) Where a child becomes the subject of a deprivation of liberty order which has effect as if it were a compulsory supervision order as provided for in regulation 3(1), the Scottish Ministers must, as soon as reasonably practicable, inform that child of the availability of children's advocacy services.

(2) The Scottish Ministers need not comply with the requirement in paragraph (1) if, taking account of the age and maturity of the child, the Scottish Ministers consider that it would not be appropriate to do so.

(3) The Scottish Ministers may enter into arrangements (contractual or otherwise) with any person other than a local authority, CHS or SCRA for the provision of children's advocacy services.

(4) For the purposes of this regulation, "children's advocacy services" means services of support and representation provided for the purposes of assisting a child to convey their needs and views to the manager of the residential care setting in which they have been placed.

Review following transfer in cases of urgent necessity

12.—(1) This regulation applies where a child who is the subject of a deprivation of liberty order is transferred from the residential care setting where the child was residing to another place under section 143 of the Act (as modified by regulation 13).

(2) Where paragraph (1) of regulation 4 applies in relation to the order, paragraph (2) of that regulation is to be read as if, after sub-paragraph (a), there were inserted—

“(aa) the end of the period of 14 days beginning with the day on which the child who is the subject of the order was transferred to another place under section 143 of the Act,”.

(3) Where paragraph (1) of regulation 5 applies in relation to the order, paragraph (4) of that regulation is to be read as if, for that paragraph, there were substituted—

- “(4) Paragraph (1) ceases to apply on the earlier of the following occurrences—
- (a) the deprivation of liberty order ceasing to have effect in the jurisdiction of the court which made the order,
 - (b) the end of—
 - (i) a relevant period (as determined in accordance with paragraph (5)), or
 - (ii) the end of the period of 14 days beginning with the day on which the child who is the subject of the order was transferred to another place under section 143 of the Act,
 unless the deprivation of liberty order is, on or before the last day of the relevant period or, as the case may be, the period of 14 days, reviewed and continued in effect beyond the end of the relevant period or, as the case may be, the period of 14 days by the court which made the order.”.

Application and modifications of the Act

13.—(1) Despite regulation 3(1), references in the Act to a compulsory supervision order do not include reference to a deprivation of liberty order which has effect as provided for in that regulation, except in the following sections (as modified, including by way of substitution, by this regulation)—

- (a) sections 143 to 148 (implementation of orders), and
- (b) sections 168 to 171 (enforcement of orders).

(2) The following paragraphs provide for further modifications of the Act as it applies, by virtue of a deprivation of liberty order having effect as provided for in regulation 3(1), in relation to such an order.

- (3) In section 143 (transfers in cases of urgent necessity)—
 - (a) for subsection (1) substitute—

“(1) This section applies where a child is, under the authority of a compulsory supervision order, residing in a residential care setting.”,
 - (b) after subsection (2) insert—

“(3) The chief social work officer must, as soon as reasonably practicable after the child is transferred as mentioned in subsection (2), inform the implementation authority of the transfer.

(4) Subsection (5) applies where the child is in another place, having been transferred there under subsection (2).

(5) The compulsory supervision order to which the child is subject applies in relation to that other place as it applies in relation to the residential care setting in which the child was residing prior to the transfer, but only until the earlier of the following occurrences—

 - (a) the end of the period of 14 days beginning with the day on which the child was transferred to the other place under subsection (2),
 - (b) the end of the day on which the review mentioned in regulation 5(2) (as modified by regulation 12(3)) of the Children’s Hearings (Scotland) Act 2011 (Effect of Deprivation of Liberty Orders) Regulations 2022 takes place.”.
- (4) For section 144 substitute—

“Implementation of compulsory supervision order etc.: general duties of implementation authority

144. The implementation authority in relation to a compulsory supervision order must comply with—

- (a) any requirements imposed on it by the order, and
 - (b) any undertaking given by the authority in accordance with regulation 7 of the Children’s Hearings (Scotland) Act 2011 (Effect of Deprivation of Liberty Orders) Regulations 2022 in relation to the child who is the subject of the order.”
- (5) In section 145 (duty where child requires to reside in certain place)—
- (a) for subsection (1) substitute—
“(1) Subsection (2) applies where a child is, under the authority of a compulsory supervision order, residing in a residential care setting.”,
 - (b) in subsection (2), for “accommodation” substitute “setting”.
- (6) For sections 146 to 148 substitute—

“Breach of duties imposed by sections 144 and 145

146.—(1) This section applies where it appears to the Scottish Ministers that the implementation authority is in breach of a duty in relation to the child imposed on the authority under section 144 or 145.

(2) The Scottish Ministers may give the authority a notice in accordance with subsection (3) of an intended application by them to enforce the authority’s duty.

- (3) The notice must—
 - (a) set out the respects in which the authority is in breach of its duty in relation to the child, and
 - (b) state that if the authority does not perform that duty before the expiry of the period of 21 days beginning with the day on which the notice is given, the Scottish Ministers may make an application to enforce the authority’s duty.

Application for order

147.—(1) The Scottish Ministers may apply to the relevant sheriff for an order to enforce the implementation authority’s duty in relation to the child.

(2) The relevant sheriff is a sheriff of the sheriffdom in which the principal office of the receiving local authority (in relation to the child to whom the duty mentioned in subsection (1) applies) is situated.

- (3) The Scottish Ministers may not make an application under this section unless—
 - (a) the implementation authority has been given a notice under section 146(2), and
 - (b) the authority has failed to carry out the duty within the period specified in the notice.
- (4) The application is to be made by way of summary application.

Order for enforcement

148.—(1) The sheriff may, on an application by the Scottish Ministers under section 147, make an order requiring the implementation authority that is in breach of a duty imposed under section 144 or 145 to carry out the duty.

- (2) Such an order is final.”

- (7) In section 168 (enforcement of orders)—
- (a) in subsection (1), for the words from “relevant” to “place” where it first occurs substitute “compulsory supervision order which authorises the deprivation of liberty of the child who is the subject of the order in a residential care setting”,
 - (b) omit subsection (3).
- (8) In section 169 (child absconding from place)—
- (a) in subsection (1)—
 - (i) for paragraph (a) substitute—
 - “(a) a child who is the subject of a compulsory supervision order which authorises the deprivation of liberty of the child in a residential care setting resides in that setting (or another place to which the child has been transferred under section 143(2)),”
 - (ii) in paragraph (b), for “place”, in both places it appears, substitute “setting (or other place)”,
 - (b) in subsection (2), for “place” substitute “setting (or other place)”,
 - (c) omit subsections (5) and (6).
- (9) In section 170 (child absconding from person), omit subsections (5) and (6).
- (10) In section 171 (offences related to absconding)—
- (a) in subsection (1)—
 - (i) for paragraph (a) substitute—
 - “(a) a child who is the subject of a compulsory supervision order which authorises the deprivation of liberty of the child in a residential care setting resides in that setting (or another place to which the child has been transferred under section 143(2)),”
 - (ii) in paragraph (b) omit “or warrant”,
 - (b) in subsection (2), for “place” in each of paragraphs (a), (b) and (c), substitute “setting, other place”.
- (11) For section 199 (meaning of “child”) substitute—

“Meaning of “child”

199. In this Act, “child” means a person who is under the age of 18 years.”.

- (12) In section 202(1) (interpretation)—
- (a) for the definition of “implementation authority” substitute—
 - ““implementation authority” means—
 - (a) the local authority (within the meaning of section 105(1) of the Children Act 1989 as it relates to England and Wales) in England or Wales which applied for the order which has effect as if it were a compulsory supervision order by virtue of regulation 3(1) of the Children’s Hearings (Scotland) Act 2011 (Effect of Deprivation of Liberty Orders) Regulations 2022, or, as the case may be,
 - (b) the Health and Social Care trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991 which so applied,”
 - (b) for the definition of “chief social work officer” substitute—
 - ““chief social work officer” means an officer appointed in accordance with section 3 of the Social Work (Scotland) Act 1968 by the receiving local authority,”

(c) at the appropriate place in alphabetical order, insert the following definitions—

““receiving local authority” means the local authority in whose area a child is residing under the authority of a compulsory supervision order which they are subject to by virtue of regulation 3(1) of Children’s Hearings (Scotland) Act 2011 (Effect of Deprivation of Liberty Orders) Regulations 2022,”

““residential care setting” means a residential institution in Scotland which provides day-to-day care for children,”

““residential institution” means an establishment (whether managed by a local authority, a voluntary organisation or any other person) which—

- (a) is not secure accommodation (within the meaning of paragraph (a) of the definition of that term),
- (b) provides residential accommodation for children in order to safeguard or promote their welfare or otherwise to protect or further their interests, and
- (c) is managed by a care service which is registered by Social Care and Social Work Scotland in accordance with Chapter 3 of the Public Services Reform (Scotland) Act 2010.”

St Andrew’s House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision for a deprivation of liberty (“DOL”) order granted by a High Court in England, Wales or, as the case may be, Northern Ireland to have effect in Scotland as if it were a compulsory supervision order (“CSO”) in certain circumstances and for certain purposes.

Regulation 2 defines terms for the purposes of the Regulations.

Regulation 3 makes provision for when, and for what purposes, a DOL order has effect as if it were a CSO under the Regulations. A DOL order is treated in this way where paragraph (1) of regulation 4 or, as the case may be 5, applies. The purposes for which a DOL order has effect as if it were a CSO are: (a) to authorise in law the deprivation of liberty of the child who is subject to the DOL order in Scotland and (b) to enable the application of certain provisions of the Children’s Hearings (Scotland) Act 2011⁽¹⁰⁾ (“the 2011 Act”) in relation to such orders.

Regulation 4 makes transitional provision. The effect of regulation 4(1) (as read with regulation 3) is that a DOL order which is recognised and enforceable in Scots law by virtue of an interlocutor of the Court of Session prior to the entry into force of the Regulations has effect as if it were a CSO for the purposes specified in regulation 3(2). Regulation 4(2) provides that this applies until the earlier of: the deprivation of liberty order ceasing to have effect in the jurisdiction of the court which made it; the end of the period of enforceability and recognition of the order by virtue of the Court of Session’s interlocutor; or until regulation 5(1) applies in relation to the DOL order.

Regulation 5(1) (as read with regulation 3) has the effect that a DOL order is treated as if it were a CSO under the Regulations where a “relevant circumstance” as specified in paragraph (2) occurs and regulation 7 has been complied with in relation to the DOL order. There are two scenarios in which a “relevant circumstance” occurs. The first (as set out in regulation 5(2)(a)) is where a DOL order that is treated as if it were a CSO under regulation 4(1) is reviewed and continued in effect by the High Court in England, Wales or, as the case may be, Northern Ireland before the end of the period specified in regulation 4(2)(c). The second (as set out in regulation 5(2)(b)) is that a DOL order is made on or after the day on which the Regulations come into force.

Paragraphs (4) to (6) of regulation 5 make provision in relation to the “relevant period” for which a DOL order is to be treated as if it were a CSO under that regulation. The DOL order will be so treated for the duration of that period unless, within that period, the deprivation of liberty order ceases to have effect in the jurisdiction of the court which made the order (in which case, the DOL order will no longer be treated as if it were a CSO on its ceasing to have effect.) If the DOL order has not previously been reviewed and continued in effect by the court which made the order, “the relevant period” is the period of three months beginning with the day on which the order was made. Otherwise, the “relevant period” is the period of three months beginning the day on which the order was reviewed and continued in effect, or last reviewed and continued in effect, by the court which made the order. The effect of regulation 5(4)(b) is that it is possible for a DOL order to be treated as if it were a CSO on a rolling basis for several “relevant periods”, as long as the DOL order has been reviewed and continued in effect by the court which originally made it on or before the last day of the preceding “relevant period”.

Regulation 6 provides that a DOL order ceases to have effect as provided for in regulation 3(1) where the child who is the subject of that order becomes subject to a CSO or interim compulsory supervision order (“ICSO”). This is to ensure that any CSO or ICSO made in respect of the child

⁽¹⁰⁾ 2011 asp 1.

in Scotland under the 2011 Act takes precedence over a DOL order made in England, Wales or, as the case may be, Northern Ireland.

Regulation 7 sets out requirements to be met by a placing local authority (as defined in regulation 2(1)) in order that a DOL order can be recognised as if it were a CSO under regulation 5 (as read with regulation 3). The requirements are that the placing authority must give certain people (as specified in regulation 8) a copy of a notice containing the information specified in regulation 9 and an undertaking meeting the requirements specified in regulation 10.

Regulation 11(1) provides that where a child becomes subject to a DOL order which has effect as if it were a CSO under the Regulations, the Scottish Ministers must, as soon as reasonably practicable, inform the child of the availability of children's advocacy services. These are services of support and representation provided for the purposes of assisting a child to convey their needs and views to the manager of the residential care setting in which they have been placed. The requirement in regulation 11(1) can be dispensed with if, taking into account the child's age and maturity, the Scottish Ministers consider that it would not be appropriate to inform them of the availability of children's advocacy services.

Regulation 12 (as read with regulation 13) makes provision for circumstances in which it is necessary on grounds of urgency to transfer a child who is subject to a DOL order to a place other than the residential care setting which is specified in the order. In such a case, provided that it still has effect in the jurisdiction of the court which made it, a DOL order is to be treated as if it were a CSO which authorises the deprivation of the child's liberty in the place to which they have been urgently transferred for a period of up to 14 days beginning with the date of the transfer. Regulation 12 modifies the application of regulation 4(2) or, as the case may be, 5(4) in such a case, so that the DOL order can continue to be so treated beyond the 14 day period, as long as it is reviewed and continued in effect by the court which originally made the order.

Regulation 13 provides that despite regulation 3(1), references in the 2011 Act to a CSO do not include reference to a DOL order which has effect as provided for in that regulation, except in sections 143 to 148 (which relate to implementation of orders) and sections 168 to 171 (which relate to enforcement of orders). Regulation 13 sets out modifications and substitutions in these sections and in related interpretative provisions to provide for how the Act is to apply where a DOL order has effect as provided for in regulation 3(1).

Impact assessments have been prepared in relation to these Regulations and are published online at [gov.scot](https://www.gov.scot).