

## **Scottish Government policy position paper: cross-border placements of children and young people into residential care in Scotland**

### **Children's Hearings Scotland Response.**

#### **About Children's Hearings Scotland (CHS)**

A Children's Hearing is a legal tribunal made up of trained panel members who volunteer their time and skills to safeguard and protect the rights of children in Scotland.

Children's Hearings are tribunals in which children, families, professionals and Panel Members work together to identify what help children and young people need to reduce offending, protect them from harm and help them achieve their full potential. Panel Members make legally binding decision as to whether compulsory measures of supervision are needed to address risks to children and young people's welfare and ensure that their needs are properly met.

The Children's Hearings (Scotland) Act 2011 introduced the role of National Convener to oversee appointment of the Children's Panel Members who make decisions at children's hearings. CHS was established to support the National Convener to deliver their statutory functions to protect the best interest of children. These functions include the recruitment, selection, training of and support of empathetic and skilled volunteers. Maintaining the independence of CHS and the National Convener is an essential statutory requirement. CHS is governed by a Board of non-executive members accountable to Scottish Ministers and the Scottish Parliament.

CHS vision is a children's hearings system where everyone works together, making sure that all infants, children and young people are cared for and protected, and their views are heard, respected and valued. CHS responsibility is to improve outcomes for infants, children and young people in Scotland by supporting circa. 3,000 volunteers to make high quality decisions about their future and hold to account statutory bodies responsible for implementing these decisions through the Children's Hearings system.

CHS is committed to keeping The Promise to Scotland's children, by working with our partners to make the improvements identified in the Independent Care Review. At the heart of this commitment is a deep understanding of what matters to children and their families, listening to them, understanding the impact of trauma and poverty and enshrining children's rights in everything that CHS do.

## Consultation Response

1. CHS welcomed the opportunity to discuss the proposals with the Scottish Children's Reporter Administration (SCRA) and staff in the Children and Families Directorate leading this work. The proposals to introduce new regulations to the Children's Hearing (Scotland) Act 2011 on this complex issue has significant practice, operational and policy implications for CHS.
2. CHS recognises that the children and young people placed in residential care in Scotland on the basis of a Deprivation of Liberty Order Safeguards (DoLS) granted by the courts in England and Wales should have the same rights and protections as other children and young people within the care system in Scotland. These children and young people are in very vulnerable situations. CHS shares the concerns of the Scottish Government and others that the current arrangements are not in the child's best interest. Therefore we welcome any additional safeguards that meets the needs and fully protect the rights of these children and young people. The best interest of children and young people in cross-border placements must remain the primary consideration.
3. The policy position paper proposes that DoLS will be translated into a Compulsory Supervision Order (CSO) in Scotland, whereby the non-Scottish placing authority would retain responsibility for implementation, review, and cost of the placement. Although we recognise that the placing local authority should retain a level of responsibility for supporting the child it is difficult to envisage how the Scottish local authority where the child is placed would not take on an implementation role (with the exception of emergencies) in protecting the rights of the child placed under their jurisdiction. For example, if the Scottish local authority was concerned that the child needed more specialist support it would not seem adequate nor rights respecting for the Scottish local authority, or a children's hearing to merely pass these concerns onto the "implementation authority" in a different jurisdiction.
4. Intuitively in order to safeguard and fully protect the rights of child the local authority where the child resides is best placed to do this. It is also important to note that when the UNCRC Incorporation Bill is passed all children living in Scotland will benefit from additional protection of their rights. Therefore it would appear that any new regulations must give the Scottish legal system the authority to compel all implementation authorities to comply with the UNCRC Incorporation requirements.
5. Another scenario that could add further complication to the proposed partial conversion of a DoLS to a CPO would arise where a referral is made to a children's hearing for a child in a cross-border placement on offence or welfare grounds that occur whilst they are living in Scotland. We infer from the current proposal that in this scenario, there would be two parallel orders and implementation authorities for one child.
6. Children's hearings make decisions for children and young people or provide advice to Sheriffs. The paper proposed that a children's hearing will "facilitate information

sharing with regard to the child's progress in placement and importantly, consider the child's access to local rights protections". This is a significant deviation from panels current role. CHS would like to see further clarification and strengthening of the proposed role so it is closer aligned with their current powers. As discussed, we would like reassurance and further clarity for how conclusions and advice of the children's hearings will be received and acted upon by the English or Welsh courts.

7. From a practice perspective panel members involved in overseeing these cross border placements will need additional support, advice and guidance to respond effectively to cross-border placements that span two or more legal jurisdictions. CHS see this as a specialist role and will look to develop specialist panels if this new regulation is introduced.
8. A significant concern CHS shares is that children in cross-border placements under a DoLS are currently placed in residential care homes in Scotland that are not registered as secure accommodation - but to all intent and purposes it is a secure experience from the child's perspective. This legal loophole should be addressed by the Care Inspectorate, as a matter of urgency. The quality and therapeutic competency of these providers must be monitored, scrutinised and adequately assessed by the national regulator.
9. All children living in Scotland who are deprived of their liberty in residential accommodation, irrespective of the registration status of the accommodation, should expect their rights to be respected and treated with the upmost of care and respect as outlined in Article 5 of ECHR and the Secure Care Pathway and Standards Scotland. These standards must apply to all children living in Scotland before, during and after a secure placement.
10. A CSO can only authorise a deprivation of liberty under strict conditions, apart from the power to restrict movement a CSO cannot deprive a child of its liberty in accommodation that is not registered as secure. A CSO in these circumstances provides a right to free legal representation and the right of appeal and challenge to the local authorities Chief Social Worker and the head of the secure establishment. In the current proposals for DoLS there appears to be no equivalent, which is questionable from a child's rights perspective.
11. Whilst we recognise that the issue of geography is not clear-cut, we know that out of authority placements, particularly those that are a long way from the child's home, are more likely to be traumatising for the child and create additional barriers for maintaining contact with their families and friends. This is likely to erode the child's sense of a secure base which is a well-established wellbeing protective factor, and where compromised a source of acute trauma. This trauma is likely to be exasperated by cross border placement and should only occur in exceptional circumstances where a children's rights impact assessment determines that it is in the best interests of a child.

12. We must not underestimate the confusion and potential trauma which entering an entirely new legal system may create for the child and family. It is difficult to envisage any scenarios where this is in the child's best interests. Significant work will be required to ensure they understand their rights and are able to participate. If the child's legal or safeguarding representative is not familiar with both legal systems, they may be unable or unwilling to take on the support for the child or family. As discussed we would like reassurance that those providing representation will be adequately equipped with the skills and knowledge to provide expert advice and support the child and their family.
13. It is appropriate that the proposal make provision for the children's hearings to appoint a safeguarder and offer advocacy. However, this will impact on the timescales for reviewing the DoLS / CSO of children in cross-border placements every three months. Once the safeguarder has been appointed it will typically take 5-8 weeks to complete a report (potentially longer in these cases). Therefore it is likely to result in an increase in deferred hearings. We also anticipate procedural issues in the sharing of information for cross-border placements. Currently the children's hearing can compel the Scottish implementation authority to provide a report for a hearing. CHS has been working with our partners to make these reports as accessible and informative as possible. It is unclear in the current proposals how a children's hearing would be able to compel an authority in a different county to provide a report, and how the hearing could have any influence around the timescales, quality and accessibility of any reports provided.
14. The policy position paper outlines the current arrangements, and the lack of legislation at a UK level to oversee these placements. The current situation is that the High Court in England and Wales grants the DoLS and the Court of Session in Scotland is petitioned in each individual case which is a resource intensive process. However, the resourcing of the courts should be a secondary consideration and the rights of the child should be the primary consideration. The proposed new regulations may make it easier to facilitate cross-border placements which is likely to result in an increase of placements. CHS believes that these types of placements should not be encouraged and should only occur in exceptional circumstances where there is clear evidence that it is in the best interests of the child.
15. CHS recognises that the proposed change to the Children's Hearing Act to address cross-border placements is an interim measure that is intended to be addressed more comprehensively in the Children's Care and Justice Bill. However, the position paper only presents a partial case for how the proposed interim measure will more meaningfully protect and enhance the rights of children. If the interim measure is introduced we anticipate that hearings limited decision making powers to only "consider the child's access to local rights protections" is likely to be a cause of frustration to panel members who will remain committed to protecting the rights of the child but will lack the full legal authority to do this.
16. CHS acknowledges and welcomes the intention of introducing new legislation by the Scottish Government to address this complex and sensitive issue. Cross-border

placements are likely to be deeply upsetting for the children and families affected. Because the timescales for responding to this policy position paper have been tight we have not had the opportunity to engage with our volunteer community. We would also be keen to engage with children and families affected so that their experience could inform improvements. Going forward we would welcome the opportunity to work with the Scottish Government, SCRA and others to improve the policy and practice provisions within the children's hearing system for cross-border placements.

**Children's Hearings Scotland**

**28 January 2022**