# RESPONSE

**by**

**FACULTY OF ADVOCATES**

**to**

### SCOTTISH GOVERNMENT

**on**

**CROSS-BORDER PLACEMENTS OF CHILDREN AND YOUNG PEOPLE INTO RESIDENTIAL CARE IN SCOTLAND: POLICY POSITION PAPER**

This is an important issue, on which the Faculty is keen to offer comment. In the limited time available, the Faculty has only been able to approach those of our members who have been involved in litigations to date. Furthermore, our comments below come only from a particular perspective in these litigations, as other members were still actively involved to the extent that they felt unable to offer comment on the policy position paper at this stage. The comments are therefore offered particularly from the experience of members who have acted for local authorities in England and Wales, or child respondents.

1. The time-period of the consultation necessarily allows little time to develop a full response, and what is proposed is rightly said to be a short-term solution to problems requiring a long-term solution. These comments therefore have these constraints.
2. The policy paper is correct to spell out that the best interests of children should be central. It might be added, because it is not spelled out, that the voice of the child should also be central; these children are effectively being

deprived of a chance to be effectively heard on the conditions of their care and detention. At present, they are told they must instruct Scottish solicitors and counsel for the Inner House; a very few do so, but for most this is an empty right.

1. There is no doubt that a long-term solution is required, and the paper is right to recognise that the profound underlying problem is the desperate shortage of appropriate accommodation in England, which has been described by the English courts on many occasions as ‘scandalous’ or worse. That is what has led to placements in Scotland which are in effect unauthorised in law. A few of these have been appropriate, e.g. children from Cumberland placed in Dumfries. Such close proximity is rare; most are emergencies driven by the impossibility (real or perceived) of finding an appropriate placement in England & Wales. The policy paper is right to describe that background. However, it is a concern that better short-term solutions may make the problem of such placements worse, in the sense of making them more common in practice.
2. Nobody knows how common such placements are. The only measure has been ‘how many petitions are there to the *nobile* *officium’*. But this is unreliable. There is substantial reason to suspect that there are numerous cases where there are no petitions, even where there should be. A basic problem has been an apparent lack of concern as to the implications of Scotland being a distinct jurisdiction, whether from English local authorities, their lawyers, or deputy judges in the English High Court.
3. If, agreeing with the policy paper, it is made easier to place children in Scotland, more may well be placed. At present one constraint is that the legal process is rightly perceived by English authorities as difficult, uncertain, and expensive. If this changes, there will be more placements. So this will require to be kept under very close review in Scotland; the 2017 amendments led to a significant increase in the number of English children being placed in Scottish secure accommodation, which has caused extreme pressure on such places as are available for Scottish children, and we may be moving towards similar shortages in Scotland as there are in England.
4. With these warnings, the following comments are made.
5. First, it is accepted that it is inappropriate for these cases to require the *nobile* *officium*. The *nobile* *officium* does not in practice lead to proper scrutiny; the court does not have specialist expertise in child protection, and in practice simply takes local authority assurances (albeit mediated through solicitors and counsel) as to the situation. It does not test these, it rarely requires any hearing, it almost never requires any independent report (e.g. from a safeguarder), and children almost never get a proper hearing in their own right. This can thus be said to be expensive, inappropriate, and having little purpose.
6. Second, it is accepted that the statutory route of providing for recognition of some English orders under section 190 of the 2011 Act is the right one. This is probably uncontroversial. The question is, how is this to be done, as the policy paper describes.
7. Third, it is accepted that the primary supervising authority should be the English one, which is acquainted with the case. In particular, because many of these placements last no more than a few weeks or months, it would be inefficient to transfer their supervision to a Scottish local authority for a temporary period. Nevertheless, all such cases should be made known to the Scottish authority. Children may have been in care in Scotland for years, unknown to the Scottish authority. It is unclear why authorities in England & Wales would not notify their Scottish opposite numbers, but this can occur (for example, a Scottish authority may find a child who has absconded from care in Scotland and is in their area, but about whom they knew nothing). The longer the interval since transfer, the more difficult it will become for an authority based in England or Wales to provide meaningful monitoring and input, and there cannot be a vacuum in that regard.
8. For these reasons, it might be suggested that it should be a condition of all such placements – and in particular where children are being deprived of their liberty - that they should be brought before a children’s hearing in Scotland. The child would get a right of audience, and SCRA would be aware of matters. There could be proper discussion in a way that the English High Court would struggle to do from afar.
9. A good way to regularise placements might be to state that they could take effect as CSOs (with or without DOL conditions) if and only if the English order satisfied a number of conditions. At the moment, the English court (which may in practice be a deputy judge with little experience of the particular issues involved in such cases) simply makes an order and leaves its working out to the Court of Session. It could therefore be made a condition of an order to be recognised that: (a) the Scottish local authority and also SCRA were informed of it, and of its background; (b) the English authority was authorised to make any disclosure to the local authority and SCRA which the latter regarded as necessary to perform their proper functions of child protection (the confidentiality of the child’s file is important, of course, but should not act as a barrier to acting in the child’s interests); (c) the order be for a fairly short period, three months seeming appropriate as suggested; (d) to ensure proper supervision of the scale of the issues in general - and remembering that cases could increase substantially once *nobile officium* petitions are superseded - there must be intimation to CYPCS (who, it is noted, do not appear to be mentioned in the policy paper). Although a different context, the arrangements for providing local authorisation and review for those people detained for mental health treatment who are transferred across a border may offer some useful comparisons. That situation is governed by the Mental Health (Cross border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005/467.
10. It is also suggested that the new procedure under s 190 regulations should apply not only to the class of children placed in Scotland for whom *nobile officium* petitions are being (or should be) presented; that is to say, where there is a deprivation of liberty ordered by the English court, but not a placement in secure accommodation. It might also be suggested that it should apply to children in secure accommodation in Scotland authorised by section 25 of the Children Act 1989, which was the last ‘short term’ interim solution, as it would be anomalous if the fact the DOL was in secure accommodation led to less security. At present such placements do not even get the limited scrutiny of a *nobile officium* process. It might also be suggested that it should apply to all placements of children in care under either final or interim care orders; not only where there is a DOL. Although the non-DOL category are less troubling, they should also have the protections in Scotland that a similar Scottish-based child would have through the children’s hearing. This would also lead to a cleaner set of regulations, if the procedure applied to all placements taking effect in Scotland.
11. Finally, the policy paper is right to emphasise that the underlying problem is the lack of proper provision in England for these very fraught cases. As indicated, there should be consideration as to whether a flight to Scotland might put similar pressures on Scottish provision. There are policy issues here that the Faculty cannot address, but it would indeed seem critical that (as the paper states) what is to be done here as an interim solution is recognised as being no more than that. It is suggested that it would be useful for CYPCS to be involved.
12. There is, as Scottish Government recognises, real urgency here. However, Parliament will want to give this close scrutiny when draft regulations are presented. There are profound issues of principle in the proposal that one jurisdiction should recognise orders from another jurisdiction that children be detained, and Faculty may be able to comment further once draft regulations come before Parliament.

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