



# Placements: How are the courts practically dealing with unregistered and unregulated placements in light of recent legal developments?

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# Judicial deprecation 1

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“There are growing concerns around child sexual exploitation, County Lines and other forms of criminal exploitation as risks for these young people. The need for regulated placements is likely to increase. Social workers work tirelessly (and some silly hours) trying to find placements. When they turn up they are seized upon. Sometimes it has taken so long and trust has so broken down that it can be difficult to move young people on.

The problems are huge.”

HHJ Dancey, Dorset Council v A  
(Residential Placement: Lack of Resources) [2019] EWFC 62



## Supreme Court deprecation – per Lady Black JSC

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*I have punctuated this judgment with expressions of my deep anxiety that the child care system should find itself struggling to provide for the needs of children without the resources that are required. I reiterate this in concluding. It is fortunate that the inherent jurisdiction is there to fill the gaps in the present provision, but it cannot be doubted that it is only an imperfect stop gap, and not a long term solution.*



## The legal issue – Parliament required state registration

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“It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament.”

Sir Andrew Macfarlane, President of the Family Division,  
re T [2018] EWCA Civ 2136



# Some stats

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- There were 1,465 children in England securely detained in 2018, of whom 873 were in held in youth justice settings, 505 were in mental health wards and 87 were in secure children's homes for their own welfare. However, this number is likely to be an underestimate due to gaps in the data.
- There are an additional 211 children whose Deprivation of Liberty has been authorised by a court, who are locked away but whose whereabouts in the system is invisible.
- The Children's Commissioner has called for local authorities to provide data to the Children's Commissioner, Ofsted and the CQC on the number of children deprived of liberty in their area at any one time, the legal basis for that deprivation of liberty, and where those children are living.

*Who are they? Where are they? Children locked up.*

*Office of the Children's Commissioner, May 2019*



# The welfare secure accommodation estate – sufficiency ‘duty’

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S 22G “It is the general duty of a local authority to take steps that secure, so far as reasonably practicable, the outcome in subsection (2).

(2)The outcome is that the local authority are able to provide the children mentioned in subsection (3) with accommodation that—

(a)is within the authority's area; and

(b)meets the needs of those children.

(3)The children referred to in subsection (2) are those—

(a) that the local authority are looking after...

(4)In taking steps to secure the outcome in subsection (2), the local authority must have regard to the benefit of having—

(a)a number of accommodation providers in their area that is, in their opinion, sufficient to secure that outcome; and

(b)a range of accommodation in their area capable of meeting different needs that is, in their opinion, sufficient to secure that outcome.



## Section 25 Children Act 1989

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25 Use of accommodation for restricting liberty.

(1) Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England or Scotland provided for the purpose of restricting liberty (“secure accommodation”) unless it appears—

(a) that—

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm; or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.



# What is the difference between ‘unregistered’ and ‘unregulated’?

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- children’s homes must by law be registered, a placement which meets the definition of a children’s home but which is not registered in accordance with the statutory framework is an ‘unregistered placement’
- “an unregulated placement” is one which is not *required* to be registered (see for example ‘other arrangements’ as provided by s22C(6)(d))
- “Where an establishment is a children’s home, it is undoubtedly “regulated”, even if it is not registered” Per Lady Black JSC, re T para 58



## S 25 Orders for 'registered' accommodation only

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The Children (Secure Accommodation) Regulations 1991 reg 3 provides:

"3 (i) Accommodation in a children's home shall not be used as secure accommodation unless:a) In the case of accommodation in England, it has been approved by the Secretary of State for that use;b) In the case of accommodation in Scotland, it is provided by a service that has been approved by the Scottish Ministers under Paragraph 6(b) of Schedule 12 of the Public Services Reform (Scotland) Act 2010.c) Approval by the Secretary of State under Paragraph 1(i) may be given subject to any terms or conditions that the Secretary of State thinks fit."

Nb The statutory scheme for secure accommodation does not make any reference to a need to establish a lack of consent on the part of the subject of the application.



# What difference have the amendments to the Care Planning Regs made?

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Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161) in force from 9 Sep 2021 which amend the 2010 Regs:

- have the effect of prohibiting the placement of looked after children under the age of 16 in "other arrangements" settings as provided for under s.22C(6)(d) of the 1989 Act.
- The aim is to ensure that looked after children under the age of 16 are only placed in *children's homes* or foster care;
- Outlaw unregulated placements for under 16s
- Much more difficult to create bespoke placements
- See per Cobb J in *A Local Authority v M, G* [2021] EWHC 2066 (Fam)



# The National Secure Welfare Coordination Unit

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- The general ‘sufficiency duty’ is silent as to ‘secure accommodation’. A distinction is generally drawn in practice between secure accommodation seen as part of youth justice requirements, and ‘welfare secure placements’.
- Secure placements for welfare reasons are funded directly by the placing LA using their placement budget.
- Access to placements is administered under the ‘National Secure Welfare Coordination Unit’ (SWCU). This is a small unit grant funded by the Department for Education (DfE) for the purposes of administering placements and collecting data on secure welfare.
- **The unit has no role in commissioning places.**
- Local authority resourced provision in its area cannot be ‘ring-fenced’. So an authority who has made ‘sufficient provision’ for its identified needs may find it is unable to access placements in its area. Broken system? What about bespoke care planning where no ‘suitable’ registered provision?



# When can the Inherent Jurisdiction be invoked – current position?

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- Re T UKSC – lawful in principle to authorize DoL in unregistered placement where President’s guidance met
- Article 3 ‘serious harm’ threshold means the inherent jurisdiction performs an important operational protection function in compliance with ECHR
- *“How can a local authority fulfil these duties in the problematic cases with which we are concerned if they cannot obtain authorisation from the High Court to place the child in the only placement that is available, and with the ability to impose such restrictions as are required on the child’s liberty? It is such imperative considerations of necessity that have led me to conclude that the inherent jurisdiction must be available in these cases. There is presently no alternative that will safeguard the children who require its protection.” per Lady Black JSC*



# So?

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Does that mean that the courts will now be rubber-stamping unregistered placements because there is no other way to protect the child?



# Presidential guidance: Placements in unregistered children's homes

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Key features on best practice – safeguards forming part of the UKSC's rationale in ReT:

- Court to be informed of registration status of proposed placement and steps taken to confirm/check
- If a placement is unregistered – is registration required?
- If registration is required - The court will wish to assure itself the provider of the service has confirmed they can meet the needs of the child. In addition, the court will need to be informed by the local authority of the steps the local authority is taking in the meantime to assure itself that the premises, those working at the premises and the care being given are safe and suitable for the accommodated child.
- Where an application for registration has been submitted to Ofsted or CIW, the court should be made aware of the exact status of that application.

Macfarlane P, 12 November 2019



# Beware: Orders may be refused: Macdonald & in Derby v BA

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- Where the timescales for registration set out in the President's Guidance cannot be met (sabre rattling):
  - “whilst accepting that an unwillingness or inability on the part of a placement to comply with the terms of the President's Practice Guidance is a factor that informs the overall best interests evaluation on an application under the inherent jurisdiction, and that each case will turn on its own facts, I am satisfied that that the court should not ordinarily countenance the exercise the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the Practice Guidance to apply expeditiously for registration as mandated by law.” per Cobb J at para 94
- Derby City Council & others v BA & others [2021] EWHC 2931 (Fam)



# Order refused: A County Council v A mother, A father

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- 14 and a half year old vulnerable girl, s 25 criteria satisfied, no suitable regulated accommodation placement available, LA applies for DoLs order under the inherent jurisdiction
- Order refused per Holman J:
- “However, it needs clearly to be understood by this local authority, and by all local authorities, that the court itself does not have any resources at all available to it, nor a cheque book. I cannot myself find or create any solution in this case; but I am, frankly, not prepared simply to rubber stamp what the local authority and the other parties all know to be an unlawful situation at the moment in the present case.”



# Practice points:

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- bespoke placements – keep the court informed on timescales for registration, hiccups and obstacles to registration – bring it back to court promptly (see recent judgment of Recorder Dias in LB Barking & Dagenham (ZE200C00168) 1 April 2021 on failures to secure court oversight of deprivations/restrictions of liberty)
- Court will expect requirements of PD 12D to be fully adhered to in order to ensure that the court can fulfil its oversight function effectively
- Holman J judgment clear warning that the court will not be willing to provide a legal ‘figleaf’ to cover what may otherwise be unlawful conduct by local authorities in failing to make available sufficient suitable placements in accordance with the s 22 CA 1989 ‘sufficiency duty’.



# Thank you

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