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A brief history of the DOLs regime :

The apparently unnoticed practice of Judges playing the role of government

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There has been no shortage of recent High Court judgments regarding the lack of placements for children requiring either residential care or secure accommodation orders. The President of the Family Division Sir Andrew McFarlane restated the difficulties in Re X (Secure Accommodation : Lack of Provision)[1] where he noted the need to *'draw public attention to the very substantial deficit that exists nationally in the provision of facilities for the secure accommodation of children'.* He highlights the *'wholesale failure to provide adequate resources to meet the needs of these most vulnerable and needy people'* and that various decisions have been seeking to urge the government to act for over six years. He notes that whilst the inherent jurisdiction can be used to make unregistered placements lawful, *'the High Court is nevertheless having to operate outside the law as it has been made in Parliament.'*

The lack of government action in this area has been described elsewhere as *'disgraceful', 'utterly shaming', 'depressing'* and a *'significant shortfall'* without apparently any formal response to these multiple repeated warnings from the senior judiciary.

The judgment ends on a slightly more optimistic note with the President noting the submissions filed on behalf of the Secretary of State in this case appear to show an acceptance by the Secretary of State for Education that there is a problem nationally. The submissions are said to have accepted that *'this requires action by His Majesty's Government collectively to support local authorities to meet their statutory needs.'*

It remains to be seen what action is taken by the government in addressing the shortage of regulated secure accommodation placements, however it is clear that this has been an issue that has been ongoing for some time and has led to copious amounts of litigation.

Background

At the heart of the issue is a lack of secure accommodation placements for local authorities. The Children Act 1989 provides a duty on local authorities to have sufficient placements available in their area for the accommodation of looked after children.

The Secretary of State has a direct role in the approval of secure accommodation units, as to fall within the requirements of s25 CA 1989 and be an approved secure accommodation,

[1] [2023] EWHC 129 (Fam)

the Children's Home must be approved by the Secretary of state for such use.[2] Indeed for a child under the age of 13 to be placed in a secure accommodation requires direct approval from the Secretary of State.[3]

S22G CA 1989 (as inserted by the Children and Young Persons Act 2008) provides a general duty on local authorities to secure sufficient accommodation to looked after children. It could be said that this also imposes on local authorities an obligation to have sufficient secure accommodation for looked after children, however they needn't be in their own local authority area, as this would be impractical. Sir Andrew McFarlane notes in Re X that there are actually only 13 secure children's homes in England compared to some 152 separate local authorities. It appears also from Re X (paragraph 50) that the Secretary of State did appear to make the argument that the responsibility lay with the local authorities rather than the Secretary.

It is clear from the reported cases that it was now several years ago that the ability for local authorities to secure sufficient placements broke down and there was a need for an alternative mechanism to keep these highly vulnerable children safe, when there are insufficient placements available to local authorities to accommodate them in. Indeed in Re X, Sir Andrew McFarlane refers to the case of Re X [2017] EWHC 2036 (Fam) which he notes was as long ago as 2017.

Arguably there are powers available to the Secretary of State for Education to be able to address failures by local authorities to comply with their statutory duties. S84 CA 1989 provides a specific power for the Secretary of State *'if satisfied that any local authority has failed, without reasonable excuse, to comply with any of the duties imposed on them by or under this act'.* The power under the section is for the Secretary of State to declare that the authority is in default of that duty (giving reasons for that declaration) and directing that the duty be complied with in a specified period of times.

The author has been able to find no examples of where such a declaration has been made by the Secretary of State to suggest that any local authority has failed in its duty to have sufficient provision of secure accommodation. This would appear at least in part to be a tacit acceptance that the problem is at a national rather than local level.

The Department for Education did in May 2016 set up and continues to fund the 'Secure Welfare Coordination Unit'. This unit is a small unit run for the purpose of administering placements and seeking to find the most suitable placement for individual children. However as again noted by Sir Andrew McFarlane in Re X the tenor of the caselaw shows '*genuine surprise and real dismay that the issue has seemingly, not been taken up in any meaningful way in Parliament, in Government or in wider public debate.*'

[2] Regulation 3 Children (Secure Accommodation) Regulations 1991
[3] Regulation 4 Children (Secure Accomodation) Regulations 1991

What has essentially had to happen is for the court to have created an alternate system to the statutory basis for secure accommodation found within s25 CA 1989. That alternate system based on the use of the inherent jurisdiction to approve the deprivation of liberty for children has built up in various High Court decisions to such an extent that there is now a separate Court for the issuing of DoLs applications[4] based out of the RCJ. In all the cases the s25 criteria are said to be satisfied but the local authority proposes to place them other than specifically approved children's home.

The Nuffield Family Justice Observatory agreed to undertake research about the nature of the work that was issued out of this court. Their first report[5] noted that 231 applications were made in the first 2 months of the separate court sitting. Its key findings understandably note that children subject to these types of applications are highly vulnerable with multiple and complex needs. It also finds that:

- 69.2% were considered a risk to others, 59% had concerns about their mental health or emotional difficulties and 55.3% had suffered placement breakdowns;
- 70.7% were aged between 14 and 16 at the time of the application, however 7.2% were age 12 or under;
- 95% of the children had been known to the local authority for some time and 96.6% had been in care at the time of the application itself;
- 9% of children had experienced the breakdown of adoption or special guardianship arrangements as their carers were unable to meet their needs;
- In 45.6% of placements the children were going to be placed in unregistered settings, including semi-independent unregulated placements, rented flats or holiday lets staffed with agency workers.

Practice Guidance 2019

The legal basis for these types of orders has built up over the course of the caselaw. Essentially the argument being that in the absence of an alternative the High Court's inherent jurisdiction is required to approve the deprivation of liberty of a child in a children's home. Notably the approval is for the deprivation of liberty by the local authority, not an approval of the children's home in which they are placed.

Sir Andrew McFarlane issued practice guidance in November 2019 to ensure that *'where a court authorises placement in an unregistered unit, steps are immediately by those operating the unit to apply for registration so that the placement will become regulated within the statutory scheme as soon as possible.'* The guidance imposes specific obligations on the court to monitor the progress for registration and if there is not a registration to '*review its continued approval of the child's placement in an unregistered unit'.*

[4] https://www.judiciary.uk/launch-of-national-deprivation-of-liberty-dols-court-at-the-royal-courts-of-justice-4-july-2022/
[5] https://www.nuffieldfjo.org.uk/wp-content/uploads/2023/02/nfjo_report_yp_deprivation_of_liberty-1.pdf

Mr Justice MacDonald in Derby CC v CK & Ors (Compliance with DOL Practice Guidance)[6] sets out the following principles that flow from the practice guidance:

i) The applicant local authority should make the court explicitly aware of the registration status of those providing or seeking to provide the care and accommodation for the child (whilst the Practice Guidance suggests ways in which this information might be ascertained, including the option of contact with Ofsted or CIW, Lord Stephens suggests in *Re T* at [170] that contact with Ofsted or CIW is mandatory in this regard);

ii) If those providing, carrying on and managing the service are not registered, this must be made clear to the court. The Court should be made aware of the reasons why registration is not required or the reasons for the delay in seeking registration.

iii) When a child is to be provided with care and accommodation in an unregistered children's home or unregistered care home service, the court will need to ascertain (a) that steps are being taken to apply for the necessary registration; (b) that the provider of the service has confirmed that it can meet the needs of the child; and (c) from the local authority 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.

iv) 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.

v) If an order is granted and no application for registration has been made, then the court order should provide that the application for registration should be submitted to Ofsted or CIW within 7 working days from the date of the order. The provider must ensure that application to Ofsted or CIW for registration is complete (during the course of submissions each local authority before the court suggested that this timescale is untenable in most cases of an urgently secured unregistered placement).

vi) The court will need to be advised by the local authority within 10 working days of the order being made that the application for registration has been received by Ofsted or CIW, confirmed as complete, the necessary fee paid where applicable and is capable of determination by Ofsted or CIW.

vii) If the court has not received confirmation from the local authority within 10 working days of the initial order that a complete application for registration has been received by Ofsted or CIW, the court should list the matter for a further immediate hearing.

viii) Once the court is satisfied that a complete application has been received by Ofsted or CIW, the court will review the situation regarding the registration status of those carrying on and managing the children's home or care home service in a further 12 weeks. Such review (which may be on paper) will be in addition to any review the court requires to ascertain whether the deprivation of liberty should continue.

[6] [2021] EWHC 2931 (Fam) at paragraph 40

ix) If registration is refused or the applications for registration are withdrawn, the local authority should advise the court of this as a matter of urgency. The court will take this into account when deciding whether the placement of the child in the unregistered children's home or unregistered care home service continues to be in the child's best interests.

A short addendum to the practice guidance was issued in December 2020[7] that adds an *'additional required step'* which is that '*the court must include in any order approving the placement of a child in an unregistered placement, a requirement that the local authority should immediately notify OFSTED (England)- if the placement is in England- or the Care Inspectorate Wales – if the placement is in Wales- and provide them with a copy of that order and the judgement of the court.*

T (a child)

Legal challenge has been applied to this regime and the case of T (a child)[8] was determined in July 2021. The Justices identified two main issues that required the court's attention:

- Firstly whether it was a permissible exercise of the High Court's inherent jurisdiction to make an order authorising a local authority to deprive a child of his or her liberty;
- Secondly, if it was a permissible exercise, then what was the relevance of the child's consent to the proposed living arrangements.

The Supreme Court (with the leading Judgment from Lady Black) concluded that the use of the inherent jurisdiction in this way was appropriate. Notably the analysis turns on the limits of the use of the inherent jurisdiction as retained in s100 CA 1989, notably the jurisdiction being retained '*if the desired result could not be achieved through another form of order'.* In the current position there is an inability to make an application under s25 CA 1989 due to a lack of placements and *'there was no other means by which the local authority could seek the authorisation it required other than under the inherent jurisdiction.'* Notably in this case the Secretary of State was represented and specifically agreed (as a result of a question posed)[9] that if there was no approved secure accommodation available that the inherent jurisdiction could be used to authorise deprivation of liberty of a child placed in a children's home.

Lady Black went on to say the following of note:

I would accept that the inherent jurisdiction can, and will have to be, used to fill that gap, without clashing impermissibly with the statutory scheme. This is a temporary solution, developed by the courts in extremis, but attended by regular expressions of anxiety of the kind

[7] https://www.judiciary.uk/guidance-and-resources/addendum-to-practice-guidance-placements-in-unregistered-childrens-homes-in-england-or-unregistered-care-home-services-in-wales/
[8] [2021] UKSC 35 - https://www.supremecourt.uk/cases/docs/uksc-2019-0188-judgment.pdf
[9] Paragraph 140 of the judgment

articulated by the President in the present case in the Court of Appeal and by Sir James Munby in 2017 when he was President of the Family division.

It will not escape the reader's attention that this temporary solution is still the only realistic option available in a large number of cases that come before the new court.

Lady Black went on to consider whether the burgeoning practice of seeking an order under the inherent jurisdiction when the child was in an unregistered children's home was permissible. She accepted that for reasons of *'imperative considerations of necessity'* that the inherent jurisdiction must be also available in those cases, however nothing the importance of compliance with the Practice Guidance to seek to bring them within the statutory schemes as soon as is practicable.

Lady Black also addresses subsidiary challenges that were made to the regime, such as the law not being accessible (lack of applicable statute or guidance) not precise (given wide range of children and placement covered) and not foreseeable (there is no definitive criteria for its use). It is noted by Lady Black that the terms of s25 should be treated *'as applying to the same effect when a local authority is placing a child or proposing to place a child in the equivalent of secure accommodation.'* Lady Black's view was that the law on the use of the jurisdiction was sufficiently accessible and foreseeable when considering the s25 test, which is helpfully summarised in Re B at paragraph 98 of Baker LJ's judgment.[10] There is also now appropriate procedural safeguards that have been built into the application process which are on-par with any application under s25.

Lord Stephens agrees with the judgment and seeks to emphasise the point made noting the situation that has been reached is a *'scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation'.* He describes the court's exercising of discretion being as follows:

'The courts, in the exercise of the inherent jurisdiction, must only authorise such a placement where there are imperative conditions of necessity and where there has been strict compliance with the matters contained in the guidance issued by the President of the Family Division … and with the addendum'.

Conclusion

As above it remains to be seen what actual steps will be taken by the Secretary of State and the government to address this lack of provision. The judgment in Re X records that the Secretary of State's skeleton argument suggests that £259 million was set aside in the 2021 spending review to maintain capacity and expand provision in secure and open residential children's homes. This is said to be able to pay for 350 new open residential placements by the end of 2025, however the number of secure places is apparently yet to be confirmed.

[10] [2020] Fam 221

The Secretary of State also made reference to the 'Care Review'[11] published in May 2022 which proposed 20 'Regional Care Cooperatives' taking over the commissioning of all social care placements from local authorities. Notably the Secretary of State had not formed a policy position with respect of the recommendation and there is no policy position that has yet been articulated by the government.

There has still been no discussion in Parliament about this issue and no attempt to address the heart of the problem. It is a worrying indictment that the Secretary of State's position on being ordered to be represented in Re X was to ask to be excused from attendance.

There is a great irony that in the last few years of political turmoil that the government (and large parts of the media) have castigated members of the judiciary for seeking to make up rather than interpret law. This sadly is an area of law where an apparent solution to a broken system has been essentially created by caselaw, but yet continues to go unnoticed by the legislature, the media and the wider public. The inherent jurisdiction's role as the *'ultimate safety net'* has been used to solve a problem that should not exist but has only worsened over time. In reality the DOLs provisions mirror the s25 criteria, but it has been judge led rather than led by the legislature who to date, save for committing more money to the problem have only just begun to accept its existence.

Meanwhile this *'temporary solution developed by the court in extremis'* enters into its seventh year of operation.

[11] https://childrenssocialcare.independent-review.uk/final-report/