

Unregistered, unregulated or just an unresolvable problem

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It is an oft heard refrain in public law proceedings that a local authority's placement is unregulated, or is unregistered or is illegal. The use of the various terms is often used interchangeably with the same intended purpose, that is to say 'we want this placement to be changed'.

The purpose of this article is to consider the use of the terms in the context of the placement of a child in a residential home and the rules as they currently exist around the registration of the same. Similarly to consider what if any impact the implementation of the Care Planning Placement and Case Review (England) (Amendment) Regulations 2021 have made to the issue and the increasingly difficult balancing exercise that local authorities have to undertake when seeking to locate residential placements.

The problem that lies behind these terms and these rules are the diminishing number of registered children's homes that are willing to accommodate looked after children, particularly those who are perceived as difficult to care for. The problem is not as acute as seeking secure accommodation, however from conversations had is becoming more difficult for placements to be found. The argument often arises when one party doesn't support the child being placed in a particular placement and seeks to use its status as a reason to either further their own position or cast doubt upon the continued placement.

Background legal basis

Every local authority has a duty pursuant to s22C CA 1989 to accommodate looked after children. The duty requires the local authority to make arrangement for the child primarily to live with a parent, someone with PR or someone previously had a child arrangement order in the first instance. However if one of them is either not available or it '*would not be consistent with C's welfare*' then they are obliged to place a child in '*the most appropriate placement available*'.

S22C(6) then provides a further list of placements that might be available for the local authority and includes the following:

- (a) *Placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;*
- (b) *placement with a local authority foster parent who does not fall within paragraph (a);*
- (c) *placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000; or*

(d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

There is a requirement for a local authority to give preference to a placement with anyone in subsection (a) over any of the other placements¹ but otherwise has to seek to ensure the placement is close to the child's home, doesn't disrupt his schooling, enables the child to live with any sibling and if the child is disabled the accommodation meets their needs.² There is also a requirement that the placement is in the local authority's own area unless this is not reasonably practicable.³

The use of a children's home is of course one of the options available and is generally (although not exclusively) used for older children who cannot be accommodated within local authority foster placements for whatever reason. A 'Children's Home' is defined within the children act as having the same meaning as it has within the Care Standards Act 2000⁴, where it is defined in s1(2) as:

'an establishment in England is a children's home ... if it provides care and accommodation wholly or mainly for children.'

Notably the next subsections exclude the automatic definition of a foster home as a 'children's home' and also hospitals or a residential family centre being children's homes. There also is provision for a school to be regarded a children's home provided that certain conditions are met.

Importantly for the interchangeable use of terms, to be a children's home there is a requirement for registration with OFSTED. This requirement is contained within s11 Care Standards Act 2000 and says:

'Any person who carries on or manages an establishment or agency of any description without being registered under this part in respect of it shall be guilty of an offence.'

The penalties for this offence are currently a fine of up to £5,000 or imprisonment for up to six months. OFSTED have produced detailed guidance about the process of applying to be a children's home, including a lengthy list of information that must be compiled to be submitted on the application form.⁵ This includes various policies, assessments, business plans and cash-flow forecasts. There is also a registration fee that must be paid⁶ with costs of over £1,000 even if it is for a single child. OFSTED makes it clear within the guidance that

¹ S22C(7)(a) CA 1989

² S22C(8) CA 1989

³ S22C(9) CA 1989 and s22C(6)(c)

⁴ S105 CA 1989

⁵ <https://www.gov.uk/government/publications/how-to-open-a-childrens-home/introduction-to-childrens-homes#what-to-provide-when-you-apply>

⁶ <https://www.gov.uk/government/publications/become-a-childrens-social-care-provider-registration-fee/registration-fees-for-childrens-social-care-services-from-1-may-2019>

usually a decision about registration will take 47 days, albeit units should allow at least 16 weeks from the start of the application until they intend to open. The automatic consequence of refusal of registration includes the individual disqualification of partners or managers from fostering privately, being employed in a children's home, managing a children's home or having a financial interest in a children's home,⁷ without future dispensation from OFSTED. Against this backdrop it is not difficult to see why some providers are often reluctant to register or are at least slow to do so.

It is then that lack of enthusiasm to register (regardless of the criminal consequences) that leads to the relevance of the interchangeable use of unregulated and unregistered placements. They importantly have distinct meanings when it comes to the consideration of children's homes providing accommodation for looked after children. Mr Justice MacDonald in *Derby CC v CK & Ors (Compliance with DOL Practice Guidance)*⁸ described the distinction as follows:

Within this context, it is important to restate the difference between 'registered', 'unregistered' and 'unregulated' placements, as these terms continue to be used interchangeably. The three distinct situations are properly described as follows:

- i) a "registered" placement is a placement that (a) is within an establishment that is a children's home for the purposes of s.1(2) of the Care Standards Act 2000 which (b) has been registered in accordance with the requirements of the 2000 Act;*
- ii) an "unregistered" placement is a placement that (a) is within an establishment that constitutes a children's home for the purpose of s.1(2) of the Care Standards Act 2000 but which (b) has not been registered in accordance with the requirements of the 2000 Act;*
- iii) an "unregulated" placement is a placement in another establishment that (a) is not a children's home for the purposes of s.1(2) of the Care Standards Act 2000 and (b) therefore does not currently require to be registered under the terms of the 2000 Act.*

Unregulated placements are thus perfectly legitimate options for local authorities to use for the purpose of providing a placement for a looked after child. The use of the term does not mean that it is against the rules, rather it is outside of the realms of requiring to be registered.

The most common example of such an 'unregulated placement' is a placement that does not provide care and accommodation, but instead just provides accommodation. The lack of care provision means that it falls outside the definition of a 'children's home' as defined

⁷ <https://www.gov.uk/government/publications/how-to-open-a-childrens-home/introduction-to-childrens-homes#disqualified>

⁸ [2021] EWHC 2931 (Fam)

by the Care Standards Act 2000. The most oft quoted example will be supported accommodation and again OFSTED have a handy flowchart for prospective new providers to decide if they are providing supported accommodation or care.⁹

Care Planning, Placement & Case Review Regulations 2021

The government brought forward this statutory instrument in 2021 and it came into effect in September 2021. The instrument broadly just adds a new regulation 27A into the Care Planning, Placement and Case Review Regulations 2010. At the time of drafting this article the amended regulation is not present within the 2010 regulations on the Legislation.gov website.¹⁰

It initially appears that this SI generally seeks to limit down the use of the perceived exception to the rules by local authorities placing children (under the age of 16) in 'other arrangements' pursuant to s22C(6)(d) CA 1989. Regulation 27A specifically provides that any placement under this subsection can only be in very specific placements including care homes, hospitals, residential family centres or schools when the child is under the age of 16.

Anecdotally such a practice had begun to emerge prior to this with local authority's using s22C(6)(d) as a catch all provision to approve unregistered children's homes being able to care. Indeed that was the argument made by an appellant mother in the case of *A Mother v Derby CC & CK*.¹¹ It was sought to be argued (in the context of a case involving an application for a DOLs order) that an unregistered children's home prior to the 2021 regulations fell within the s22C(6)(d) exemption, as it was an unregistered placement, but now could not be, given that it was strictly prohibited under regulation 27A. Indeed it was explicitly argued '*the whole point of the new regulations is to outlaw placement of an under 16 year old in an unregistered placement*'.

Sir Andrew McFarlane giving the judgment of the court disagreed with that analysis of the purpose of the new SI. He explicitly determined that unregistered children's homes could not fall either within s22C(6) subsection (c) or subsection (d), and thus were never permitted, even before the 2021 SI. He specifically said on the matter¹²:

It is not possible, on an ordinary approach to construction, to read s 22C(6) as expressly including unregistered children's homes. They are plainly excluded from subsections (a)-(c) in that they cannot fall into the first two categories and, as they are not registered, cannot be within (c). Placements of this type have always required registration: s 22C(6)(c) makes express reference to placement in a registered children's home, making clear that such

⁹ <https://www.gov.uk/government/publications/how-to-open-a-childrens-home/introduction-to-childrens-homes#supported>).

¹⁰ https://www.legislation.gov.uk/ukxi/2021/161/pdfs/ukxi_20210161_en.pdf

¹¹ [2021] EWCA Civ 1867

¹² Ibid para 76

placements are subject to the regulatory regime specifically designed to safeguard and protect some of the most vulnerable children. I accept, as Mr Auburn submitted, that (c) is the territory within s 22C(6) which relates to children's homes and, if unregistered children's homes were to be covered in the subsection it would be in (c), and not elsewhere.

He went on to say in relation to the suggestion that the widespread view was that they were included within the exemption that:

Further, insofar as some local authorities may have been operating, as a matter of practice, on the basis that unregistered homes did, indeed, fall into s 22C(6)(d), that development created a mischief which allowed placements to be made which, if that interpretation were correct, would escape from the requirement of registration. Regulation 27A made clear that practice was to stop, but it does not alter the conclusion that unregistered children's homes do not fall within sub-section (c) as a matter of ordinary domestic statutory construction, and there is nothing to suggest that Parliament ever intended to permit local authorities to place children in unregistered children's homes.

As a result of this decision, coupled with the content of regulation 27A, local authorities can be under no illusion that unregistered placements are in some way acceptable placements that fall within the legitimate placements for looked after children. There is no grey area. This only further underlines the importance of the distinction between unregistered and unregulated placements for looked after children and it represents a reduced scope of available placements for local authorities trying to find placements for looked after children.

Upcoming legislation on 'unregulated placements'

The distinction may however be becoming a thing of the past. The 2021 regulations already prevented local authorities from placing children under 16 in unregulated semi-independent placements, meaning that such options were only available for 16 and 17 year olds. Further to that, the government has just finished a consultation as to whether unregulated providers should now also have to register with OFSTED.¹³

The consultation document outlines the following as the timeline for such changes:

These more substantive regulations to be laid in early 2023, will introduce the Quality Standards and Ofsted regime, enabling Ofsted to begin registering providers from Spring 2023, before registration becomes mandatory from October 2023. From October 2023, local authorities will not be permitted to place or arrange accommodation for looked after children and care leavers in supported accommodation that is not registered with Ofsted or has not submitted a complete application by 30 September 2023 as per the transitional arrangements.

¹³ https://consult.education.gov.uk/regulating-supported-accommodation-team/regulating-supported-accommodation-looked-after/supporting_documents/Consultation%20on%20regulating%20supported%20accommodation%202022.pdf

Providers operating without registration or without having submitted a complete application by 30 September will be committing an offence, for which Ofsted will be able to prosecute. Ofsted will begin to inspect registered providers from April 2024.

Notably these rules will apply to care leavers as well as looked after children. At the time of writing these regulations are yet to be published, but their intention would appear to be clear, to draw in all providers of both care and accommodation for children under the remit of OFSTED, rather than just the providers of both.

Arguably this step (if and when it is passed) will reduce yet further the distinction between unregistered and unregulated, as even those regarded as currently unregulated will have a need to register themselves and follow the specifics of the various regulations.

Conclusions – Impact on the ground

All the government intervention in this area has an objectively vital purpose, namely, to seek to protect very vulnerable children from receiving substandard care. The whole purpose of registration and OFSTED is to create a safe, regulated and monitored environment for children so that they can be well cared for. The absence of regulations could lead to further harm being caused to children who have almost inevitably already suffered harm. It is difficult to make an objectively coherent argument that there does not need to be regulation for all provision that provides accommodation for children.

That said these changes in regulations occur at a time when there is an ongoing and chronic lack of available placements for children. The problems in locating secure accommodation placements are well known and widely publicised in the various DOLs cases that have gone through the High Court. However the impact of the decision in *A Mother v Derby CC*, regulation 27A and the proposed new legislation regarding currently unregulated placements will limit further the available legal placements available for non-secure residential placements for local authorities. Conversely there has been no proposed changes to the fundamentals of registration, including the documents that need to be provided or the fees to be paid to encourage more placements to register or be available for looked after children, which might help increase the available supply by reducing barriers to entry. This is alongside ongoing cost pressures experienced by all local authorities due to budget cuts or limits.

Local authorities are often placed in a position where they have to place children somewhere immediately. They don't have the luxuries of waiting for a potential placement to compile all the information for registration and then wait the 47 days for it to be approved. There will therefore be an inevitable ongoing need to place children urgently in placements that remain unregistered, whether that be that they are going through the process of registration or haven't even considered yet becoming registered. Private providers in a capitalist system will not want to register until there is some financial guarantee for them of future income, particularly given the personal risks if they are not

successful with their application. These are the realities of a system that relies so heavily on private providers for such accommodation.

Within the realm of Deprivation of Liberty orders Sir Andrew McFarlane issued guidance¹⁴ spelling out what the court is required to do if the court is asked to approve a DOLs order in a placement that is unregistered. There is a specific link between this guidance and an application for DOLs under the inherent jurisdiction. The addendum to this guidance¹⁵ makes it clear that the guidance *'sets out steps that must be followed in circumstances where an application is made to the court for an order under the court's inherent jurisdiction to authorise the deprivation of the liberty of a child.'*

There appears to be no such guidance when the placement is unregistered but no DOLs orders are sought. There is thus no comparable imperative for the court to require (and then monitor) registration for unregistered placements where DOLs are not required. There can be no doubt that such unregistered placements would fall outside of the s22C(6) regime and would be a breach of the criminal law on behalf of the unregistered manager of the unit. There must remain some judicial role in seeking to encourage the local authority to abide by the provisions of s22C(5). However if issues arise it is not the court's ongoing role to police the local authority's use of any care or interim care order that it holds.

The distinct roles of the court and the local authority are widely accepted, with the court making orders and the local authority bringing those orders into effect. S31(3A) CA 1989 requires the court to consider the 'permanence provisions' of any care plan when deciding whether to make a care order. It will no doubt be decided on a case by case basis whether a placement, although unregistered (and possibly showing no signs of registration) is still the best place for that child, or indeed may be the only placement for a child. The fact that care proceedings have to conclude within a set period of time and have so many other inbuilt regulatory protections (IRO's, LAC reviews, ability to discharge, judicial review claims) may lead a court to accept that even unregistered placements are in the best interests of a child at any specified point, provided there is ongoing oversight by the local authority in that placement.

This is certainly an area where there is an ongoing clash of legal principles, of moral principles and the stark realities of a capitalist system providing the majority of options for placements for vulnerable looked after children. The removal of perceived exemptions and further impending regulation will only increase this as an issue. Local authorities and courts will more often have to choose between imperfect options for children, including bizarrely the current compliance of the very rules themselves, as there may be simply no alternatives that can meet all of the local authority's duties.

¹⁴ <https://www.judiciary.uk/wp-content/uploads/2022/07/PG-Placements-in-unregistered-childrens-homes-in-Eng-or-unregistered-care-home-services-in-Wales-NOV-2019..pdf>

¹⁵ <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/>