



# RMP & GB Specialty

## Looked After Children and Unregulated Placements

July 2024 – Version 1.2



In partnership with



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## Introduction

The purpose of this note is to clarify the extent of policy cover provided by the Public Liability policy, and the circumstances in which it should respond to a claim flowing from the placement of a looked after child (LAC) and how it operates in relation to:

- unregistered (LAC under 16) placements
- unregulated (LAC aged 16 and above) placements

## General

All LAC under the age of 16 must be accommodated with a provider who is registered with OFSTED. If not then the placement is in an *unregistered setting*, illegal under the Care Standards Act (CSA) 2000 and the Care Planning, Placement and case Review Regulations 2021. Where there is a declaration from the High Court exercising its inherent jurisdiction that the placement is nevertheless permitted or the placement provider completes a successful registration application to OFSTED, that placement is considered, for the purposes of this policy cover, to be a registered placement.

1. *Unregulated placements* are those which do not constitute a children's home for the purposes of S1(2) of the Care Standards Act 2000 and therefore do not need to be registered. They usually relate to children over the age of 16 who need support to live independently rather than needing full time care. Up until April 2023, OFSTED did not regulate this type of provision, hence the reference to 'unregulated'. However, this position changed in April 2023 when the Supported Accommodation (England) Regulations 2023 came into force. These Regulations require providers of supported accommodation for 16 and 17 year olds to submit an application to register with Ofsted. Registration with Ofsted for these providers became mandatory on 28 October 2023. Where a provider of supported accommodation has not registered with Ofsted, they will now be operating unlawfully.
2. It is arguable that placing any LAC under 16 or a LAC aged 16/17 with care needs in an unregistered setting could be viewed by OFSTED as the placing local authority aiding and abetting a provider and as such as an offence under s11 (1) CSA 2000:

## Policy Cover – Public Liability

1. A standard UK public sector insurance policy provides an indemnity to the policyholder (i.e. the Council), including its members, employees and volunteer staff. So by definition this would include the Director of Children's services, all Social Workers and Managers and associated employees.

2. The indemnity is in respect of injury (or damage to property) to third parties (i.e. not employees), as defined by the policy. The definition of injury would include a claim for Deprivation of Liberty (DOL's). We would also draw your attention to your policy schedule and the table of 'Indemnity to Other Persons'. Any indemnity provided to an additional insured is not automatically provided, but is at the request of the Local Authority.
3. If the Director of Children's Services (DCS) or any other employees are named by OFSTED in relation to any legal papers/court documents relating to a potential or actual criminal prosecution by OFSTED under the CSA 2000, the policy will not provide an indemnity in these circumstances.

The policy will only respond to civil claims in common law negligence/duty of care and/or claims brought on behalf of the LAC under the HRA 1998 where the HRA breach leads to the policy being triggered (i.e. there is injury to the LAC as defined by the policy (see point (2) above) where the LAC remains in an unregistered setting illegally.

4. To maintain the benefit of the Policy the insured (i.e. the Authority) must abide by certain terms and conditions of the policy, some of which are written into the contract of insurance whilst others are implied terms. This would include taking what insurers believe to be all reasonable steps to comply with the legislation and some of these steps are outlined below.

In the case of LAC and unregulated / unregistered placements then so long as all actions are thoroughly documented and evidenced accordingly, RMP confirm cover will operate under the Public liability Policy (subject to the usual terms and conditions) and subject to the below conditions being followed:

- a) Extensive efforts have been made to find a registered or regulated placement before any approval (from the court exercising their inherent jurisdiction) is sought to use an unregistered/unregulated one so that in the event of a claim the Authority can demonstrate they did everything possible to secure a registered/regulated placement.
- b) The authority must demonstrate that they continued to do everything possible to secure an appropriate registered/regulated placement which meets the LAC's needs (even after placement of the LAC into an unregistered/unregulated setting) and document this and the actions taken.
- c) All decisions must be thoroughly documented including the rationale and sign off process internally.
- d) Each and every potential claim would be determined on its own merits and an authority that simply *ignored* the legislation, for whatever reason, would not benefit from the policy indemnity.

- e) The Authority should notify Ofsted (as well as internal colleagues) and any other relevant persons/bodies that should be notified when the Council makes what is an unregistered/unregulated placement (this is for transparency), and the reasons why.
5. As regards to demonstrating the authority have taken all reasonable steps then this would include the local authority having to make an application to the High Court, under its inherent jurisdiction, where the local authority has placed a child in an unregistered/unregulated setting under restrictions which may even amount to a DoL.

If the local authority makes such an application and the DoL is not authorised by the court because the court is not satisfied that the placement has been made in 'imperative circumstances of necessity', but nevertheless the child remains in placement as it is the view of the local authority that there is no alternative - in this situation the Council would be acting in contravention of a High Court judgement and a HRA claim against the local authority will almost inevitably follow unless the child is moved to a registered setting.

In such circumstances and to maintain policy cover we would say the Council would need to follow the decision of the Court or demonstrate that they took all possible steps in attempting to do so. This would include demonstrating that they took all available steps to obtain a Deprivation of Liberty Safeguards Order approving the placement (whether in a regulated or unregulated setting). In this situation, the Council would need to establish that: (i) the provider of the service has confirmed that it can meet the needs of the child, (ii) that the Council have assured itself that the premises and care being given are suitable and safe for the child and (iii) that the placement is in the child's best interests.

6. The 2021 regulations concern themselves with placements of children under 16 years old in unregistered/unregulated settings. Policy cover would be subject to the points above (6) (a)-(e) above.
7. The position is the same regarding children aged 16-17 who have assessed care needs and accommodation needs but have been placed in an unregulated setting – such as supported accommodation - Policy cover would be subject to the points above (6) (a)-(e).
8. It is also worth noting that an Ofsted investigation in isolation is not enough to trigger the policy.

## Forthcoming Legislation

Legislation in this area has recently been changed to incorporate the Supported Accommodation (England) Regulations 2023 which require all providers of supported

accommodation for 16 and 17 YO's to register with Ofsted. This Regulation came into force in April 2023 and became mandatory on 29 October 2023. As such, any such provider who is not registered with Ofsted will now be committing an offence. In accordance with these new regulations, providers are required to complete a review of the support being offered to young people every six months.

There are several providers who are excluded from having to register as a supported provider including care homes, hospitals and institutions in the further education sector.

The purpose of introducing the Supported Accommodation Regulations is to ensure that young people are receiving high quality support during their transition from being in care to living independently.

In order to assess the application of policy cover we would wish to review the final legislation before confirming our position, but our initial thoughts are that cover would most likely be provided be subject to the points above (6) (a)-(e).

We fully appreciate the above matter is a complex topic to understand and appreciate and complicated even more so by the changes to the legislation and the case law. Therefore, please accept that this note and stated position is as per the date it has been created, July 2023, and maybe subject to change and alteration at any future date without a further communication being issued. For this reason, please always check with your RMP team as to the most up to date position in respect of policy cover.

You should always refer to your full policy wording and associated policy schedule and all the policy terms, conditions, exclusions and extensions contained therein.

If you have any questions which flow from this note please contact Philip Farrar or Kate Prestidge (contact details overleaf) – Philip for insurance related matters and Kate for legislation, regulation or case law matters.

## Further information

For access to further RMP Resources you may find helpful in reducing your organisation's cost of risk, please access the RMP Resources or RMP Articles pages on our website. To join the debate follow us on our LinkedIn page.

## Get in touch

For more information, please contact your usual RMP account director or Philip and Kate below:

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