**Guidance to Social Workers on the use of Section 20 of the Children Act 1989 to accommodate children.**

**Application notes**

**This guidance relates only to children under 16, as there are different considerations where young people aged 16 and 17 are accommodated under S20 (for example over 16’s can go or stay in care under S20 against their parent’s wishes and the L.A. can agree their care plan with them directly)**

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Torbay Children’s Services

1. **Introduction**

The purpose of this document is to provide guidance to social workers on the use of Section 20 (s.20) of the Children Act 1989

This guidance is required because it is clear from recent case law that there is increased judicial concern regarding the use of s.20 agreements by local authorities and there has been a host of recent cases in which local authorities have been criticised for the following:

* accommodating children under s.20 agreements for unacceptably long periods of time before issuing proceedings;
* obtaining consent to s.20 accommodation from parents who lack capacity;
* placing parents under undue pressure to consent to s.20 accommodation;
* failing to explain clearly to parents the meaning of s.20 and their rights under this provision;
* misunderstanding what s.20 requires by way of parental consent;
* exceeding and abusing the limitations of their powers under s.20

 It is important that professionals understand what the court has said is important about the use if S20 accommodation. A Local Authority that places a child in S20 accommodation without meeting the necessary legal requirements, is not only separating parents and children unlawfully and causing emotional harm to the family, but also running the risk that at a later date the court may find them to have acted unlawfully. The court could then order the Local Authority to pay compensation to their parents and/or child for breach of their Article 8 right to respect for their private and family life.

Torbay process:

In order for consideration to be given to a child becoming cared for subject to s20, a critical friend discussion must take place between two Heads of Service; this discussion, and the resulting recommendation, should be recorded on a child’s LCS file as a management oversight.

This should then be presented to the Divisional Director of Safeguarding for endorsement; the outcome of this should also be recorded on the child’s LCS file.

1. **The legislation**

 What is accommodation under s.20?

S.20 of the Children Act 1989 places a duty on the local authority to provide a child with somewhere to live because the child doesn’t have a home, or a safe home when:

* There isn’t anyone who has parental responsibility for him /her (e.g. an unaccompanied asylum seeking child);
* The child has been lost or abandoned;
* The person who has been caring for him/her has been prevented (whether or not permanently and for whatever reason) from providing him/her with suitable accommodation or care.

In these scenarios the child becomes ‘looked after’ by the local authority. However there are informal alternatives to a child becoming ‘looked after’. The most common of these is a family arrangement.

A family arrangement is a situation where the child moves into the care of a family member by agreement between the parent(s) and that person. A child in this case is not accommodated by the local authority. **However care is needed because if the role of the social worker amounts to more than simple facilitation between the parents and the person who will be caring for the child, a s.20 scenario can arise unwittingly. Examples of this would be where the authority has been instrumental in brokering the deal or has gone on to determine aspects of the care plan such as the contact that will be permitted between the child and the parents.**

If the person who will be caring for the child is not within a list of close relatives and the child will be remaining in their care for more than 28 days, a private fostering situation may arise, which is covered under other guidance.

1. **Use of s.20 of the Children Act 1989**

**(a)** The use of s.20 is very different to a child being removed from the care of their parent/s against their will by way of a legal order. The local authority does not share parental responsibility for the child because the parents have agreed to their child living elsewhere under a s.20 agreement.

This means that if the parent/s do not agree to s.20 accommodation, their child can only be removed by a court order, or by the intervention of the police using their powers of protection.

**(b)** Sometimes a parent may refuse to allow the child home, but also refuses to agree to s.20 voluntary accommodation by the local authority. s20(5) of the Children Act 1989 states that a local authority “may provide accommodation for any child within their area (even though a person who has parental responsibility is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child’s welfare.” At sub-section (7) it goes on to say that “a local authority may not provide accommodation under this section for any child if any person who:

1. Has parental responsibility for him/her and
2. **Is willing and able to –**
	1. Provide accommodation for him/her **OR**
	2. To arrange for accommodation to be provided for him/her

Objects.

Therefore, if a parent of a child refuses to have them home, but also won’t agree for them to be accommodated, the local authority can provide the child/ren with accommodation under s.20 due to the parent not being willing or able to provide accommodation or to make other arrangements, provided they are not putting any other person forward.

**(c)**Sometimes, one parent agrees to S20 accommodation and the other parent objects.

S20 (7) says that the L.A. cannot provide accommodation for a child if there is someone who has PR for the child and who objects. If a L.A. thinks that a child needs to be looked after by them and one parent objects they will usually need to apply to court to allow that (or in an emergency the police may remove the child temporarily)

If a parent cannot be found, this does not prevent S20 being used if the other parent/anyone else with PR agrees, but as a matter of good practice a L.A. should always try to get the consent of everyone who has PR.

S20 only requires the consent of anyone who holds PR. Not every father will have PR for his children, but he will if he is on the birth certificate of his child, registered after December 1st 2003, or was married to their mother when the child was born. Other people who MAY have PR for a child include their Special Guardians, people named in Child Arrangements Orders as a person that child lives with, civil partners, step parents and second same-sex parents (depending on circumstances).

What weight is given to the child’s view?

Under S20(6), the L.A. should make every effort to find out what the child thinks about S20 accommodation and give ‘due consideration’ to the wishes and feelings of the child.

Obviously for a very young child, this is not going to be possible. Older children (under 16) should be listened to but will not be able to veto a decision about S20 accommodation if their parents agree to it and the L.A. thinks that such accommodation is consistent with the child’s welfare.

**(d)** Parents can withdraw their agreement to s.20 at any time and any restriction on this is unlawful.

1. **Valid Consent to s.20 – consent and capacity**

It is the **professional duty** of the social worker at the time to be satisfied that:

* parent/s have the capacity to consent both cognitively and linguistically;
* parent/s have been fully informed and understand the nature and consequences of both consent and refusal of consent, so any consent is real;
* it is fair and proportionate in all the circumstances to seek the consent;
* parents are aware that they have the right to take legal advice and are actively encouraged to do so;
* parents are aware that they have the right to withdraw their consent and if they do, the child will be returned to their care unless she/he is made subject to police powers or an order of the court..

A table of what social workers need to consider and what conversations they should be having with a parent/s can be found at appendix 1.

Capacity to give consent

The social worker must actively consider the issue of capacity and consider the questions raised by the Mental Capacity Act 2005 at s.3and in particular the person’s capacity to use and weigh up all of the relevant information.

The Mental Capacity Act 2005 (s.3) states that a person is unable to make a decision for her/himself if she is unable to:

* understand the information relevant to the discussion.
* retain that information.
* use or weigh that information up as part of the process for making the decision or)
* communicate this decision (whether by talking, use of sign language or any other means).

If social workers have doubts that the parent in question has the capacity, they should stop trying to obtain consent, and depending on the seriousness of the situation, the options are:-

* to request that the police consider exercising police powers of protection (if urgent and immediate) or
* the social worker, following legal advice, will need to apply to the Court for an Emergency Protection Order if urgent ; or
* the social worker will need to apply to the Court for an Interim Care Order.

Obtaining legal representation for a parent does not equate to them being able to give informed consent for s.20. If a cognitive impairment means they are unable to understand what they are agreeing to (and that will be a question of fact on which their solicitors may be able to advise you and nothing more) then social workers have no option but to place the matter before the Court.

Valid Consent

If the social worker is satisfied that the parent is able to agree, the next consideration is whether the consent is *fully informed*. Does the parent:

* understand the consequences of consent or refusal;
* have the linguistic skills needed to discuss and understand the necessary issues;
* appreciate the full range of choices available;
* know about all the relevant facts;
* know that they can withdraw their consent at any time if they change their mind;

If a social worker is not satisfied that the parent is *fully informed*, no further attempts should be made to obtain consent and further advice should be sought, including legal advice if necessary.

A written record should be kept on the child’s electronic file of all discussions that have taken place with parents. Furthermore it is important that social workers complete a written agreement with parents that outline what has been agreed and ask them to sign it. This should then be added to the child’s electronic record on the date of the agreement. The agreement proforma can be found at appendix 2 and should be read by the parents without the presence of police personnel*.* (See below)

Parents should always be strongly encouraged to seek legal advice prior to signing s.20 agreements.

 Other important considerations for the Social Worker:

Once a SW is satisfied that the parents have both the capacity and the relevant information to make a decision, the case law identifies further important principles which the SW should consider:

* The current physical and psychological state of the parent, whether or not they have a lawyer, or have been encouraged to seek legal advice.
* Whether it is necessary for the child’s safety to be removed at this time or whether it would be fairer to seek a care order from the court. If the situation appears to be particularly urgent and serious, it is usually better to seek a court order.
* Removing a child to live with an unrelated foster carer under S20 must be a necessary and proportionate response to the L.A.’s concerns about a child’s welfare – if there is some other safe alternative that allows a child to remain at home or with family members, removal is unlikely to be necessary and proportionate.
* Parents must be told they have a right to take legal advice
* Parents must be told they have a right to withdraw their consent to S20 accommodation at any time – they do not have to give the L.A. advance notice/warning and they should not be asked to do this.

**5 Unplanned/immediate situations**

It is anticipated that many of these discussions with parents will arise in situations when decisions about a child’s safety have to be made more immediately. It is often at these times of high stress and anxiety that good practice can be challenging and so it is particularly important that social workers are very clear about the expectations placed upon them.

In these situations, social workers can often be accompanied by police officers and this adds a new dimension to the scenario – the issue of consent under duress. Issues have arisen when a parent has felt that they have been rushed or even bullied into making a decision to agree to let their child be accommodated under s.20.

Social workers have a duty to clearly explain to parents what actions the local authority will take if s.20 is refused. This may include police protection, application for an Emergency Protection Order (EPO) or an Interim Care Order (ICO), depending on the urgency of the situation. However the potential use of these powers must not be used as a threat if parents do not agree to s.20, because this is not lawful. If a social worker has explained this position to parents and they understand this and still do not agree to a s.20 arrangement, then legal orders should be sought, as described above.

Any police involvement must be proportionate to the assessed risk. Police colleagues should only be in attendance if necessary for the security of the children, family or workers. If it is assessed that a police presence is necessary, the role of the police should be clearly agreed beforehand including the number of potential officers being proportionate to the risks and potential task. Unless absolutely necessary for the safety of staff, police should not be present during discussions agreeing to s.20 arrangements.

Any child accommodated under s.20 consent as a result of an immediate/emergency situation should only remain accommodated for the minimum amount of time possible. Please note the pre proceedings protocol timescales of usual arrangements being limited to 10 working days.

It is also not good practice to seek agreement to accommodate from mothers in the immediate aftermath of birth, especially where there is no immediate danger to the child and where probably no order would be made**.** When a mother has just given birth to a child, her capacity to give any consent to accommodation should always be closely questioned.

If a local authority refuses to return children to the care of their parents in circumstances where police protection under s.46 of the Children Act 1989 has expired and there is no agreement under s.20 of the Children Act 1989 and no order (EPO, ICO or FCO) authorising them to ‘look after’ the children, the placement is unlawful and accordingly, an unwarranted and disproportionate interference with the parents` and children`s rights to family life.

A judge has recently looked at a situation where social workers visited parents to propose voluntary accommodation under s.20 whilst supported by uniformed police officers, and, in particular, where it was made clear that if the parents did not agree then police protection would be taken. In short this is unlawful: “Consent” must always be informed and freely given. Any suggestion of coercion or threat evidences against that.

In the case of Surrey County Council –v- MF and E [2012] the Judge stated, “To use the s.20 procedure in circumstances where there was the overt threat of a Police Protection Order if they did not agree, reinforced by the physical presence of uniformed police officers, was wholly inappropriate. By adopting this procedure, the local authority sought to circumvent the test any Court would have required them to meet if they sought to secure an Order either by way of an EPO, or Interim Care Order. If that level of intervention is necessary, then either the local authority ought to make an application for an EPO, or Police Protection should be taken. The level of urgency will determine which course of action is appropriate”.

It is important to be open and honest with parents as to what the local authority will do if consent to accommodate the child under s.20 cannot be obtained.

In the case of Williams and another v London Borough of Hackney (2015) EWHC 2629 (QB), (2015) ALL ER (D) 99 (seep) it was quoted that “the most important lesson is that local authorities must be scrupulously fair and transparent when seeking the agreement of parents under the CA 1989, s20 to accommodate children who have come to their attention in a moment of crisis for the family. They must ensure that parents are made aware of:

* The reasons why the local authority is of the view that the children should be accommodated
* The parents` right to refuse to agree to accommodation, and
* The actions which the local authority will take if parents refuse.

Courts have awarded financial damages to parents whose children have been accommodated without giving valid consent and there is also a risk that the Court may order the children to be returned

6. **Section 20 accommodation and ‘schedules of expectations’**

 Often, s20 agreements go hand in hand with other written documents, often called ‘schedules of expectations’ or a ‘written agreement’, which set out what the L.A. would like the parents to do or stop doing, while their child is in foster care. These documents are not legally binding or enforceable, but they are often relied on in evidence in later care proceedings to show that parents were given the opportunity to make changes and whether or not they have been able or willing to do so.

 Any document that sets out expectations about people’s behaviour needs to be as clear as possible, otherwise it can cause problems later if parents and professionals disagree about what the rules were and why.

 If parents are asked to sign any document by the L.A., they may have a number of questions or concerns. Asking these questions or being reluctant to sign should not in itself make professionals consider that the parent is either hostile or unreasonable.

**Social worker considerations**

|  |  |  |  |
| --- | --- | --- | --- |
| **1** | **Are you satisfied that the parent has the capacity to consent?** | **Yes/no** | **Details/evidence** |
|  |  |  |  |
| **1.1** | Is there evidence that the parents understand the information relevant to the discussion? |  |  |
| **1.2** | Is there evidence that the parents can retain the information? |  |  |
| **1.3** | Is there evidence that the parents can weigh up the information as part of the decision making process? |  |  |
| **1.4** | Is there evidence that the parents can communicate their decision to you? |  |  |
|  |  |  |  |
| **2** | **Are you satisfied that the parent has given valid consent?** |  |  |
|  |  |  |  |
| **2.1** | Have you encouraged parents to seek legal advice and/or advice from family/friends? |  |  |
| **2.2** | Have you explained your concerns to the parents? |  |  |
| **2.3** | Have you explained to the parent the consequences of consent or refusal? |  |  |
| **2.4** | Have you explained to the parent the full range of choices available? |  |  |
| **2.5** | Are parents aware that they can withdraw consent at any time? |  |  |
| **2.6** | Are you satisfied that the parents grasp of English is sufficient for them to adequately discuss issues and give consent to s.20 accommodation?  |  |  |
| **2.7** | Are you satisfied that there has been no coercion involved in parent’s coming to a decision? |  |  |
| **2.8** | Is a police presence required for security reasons? |  |  |
| **2.9** | Has the role of the police been agreed beforehand, including discussion about proportionality. |  |  |
| **2.10** | Are the police officers clear that no reference should be made to use of possible police action, unless this action is going to be taken. |  |  |
| **2.11** | Has the agreement been discussed and signed without police presence? |  |  |
|  |  |  |  |
| **3** | **Is the decision fair and proportionate?** |  |  |
|  |  |  |  |
| **3.1** | What is the physical and psychological state of the parent/s? |  |  |
| **3.2** | Is it necessary for the safety of the child for him/her to be removed at this time? |  |  |
| **3.3** | Would it be fairer for the matter to be subject of a Court Order rather than a voluntary agreement? |  |  |
| **3.4** | Have you taken legal and management advice? |  |  |
| **3.5** | Have the parents been informed about what will happen if consent is not given. |  |  |

**Agreement to s.20 Children Act 1989**

**You may seek advice from a solicitor or family or friend as to the contents of this agreement at any time.**

Agreement dated *insert date*  for the Local Authority to care for

*Insert names of children and dates of birth*

The Local Authority through ( *social worker name*) has outlined that they are concerned about:

* *List details of why the child should be accommodated by the Local Authority*
* *Should include details about significant harm*
* *Should include any details that require LA/ parents immediate action*

Together with the Local Authority, we have discussed the options available including

* *Details of accommodation considered (including family/ friends)*

I/we understand that the arrangements for contact with me are as follows insert what they are in here starting on the insert date and the contact will be supervised/unsupervised.

*I/we understand that I/we will only see my/our child at the official contact.*

*I/we agree with the local authority placing my/our child insert name.with insert name…………*

It has been agreed that this arrangement will be reviewed on *Any proposed date for issuing proceedings/ review*

I/we understand that I/we may change my/our mind as to the arrangements at any time. If I/we change our mind and withdraw consent to my/our child being accommodated, the local authority will return my/our child to my/our care and will as a matter of urgency consider whether to ask the police to exercise their powers or apply to the court for a legal order.

I/we have been encouraged to seek legal advice before signing this agreement.

I/we have read this document and the social worker has also read the contents of this to me and I/we agree to its terms

Signed

(*parents with PR)*

Signed

(*social worker obtaining consent*)