

Public law
working group



Best practice guidance:

Section 20 / section 76 accommodation

March 2021

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Glossary

ADCS	Association of Directors of Children's Services
ADSS	Association of Directors of Social Services Cymru
ASF	Adoption Support Fund
ASGLB	Adoption and Special Guardianship Leadership Board
ASP	assessment and support phase
BPG	best practice guidance
CA 1989	Children Act 1989
Cafcass	Child and Family Court Advisory and Support Service and Child and Family Court Advisory and Support Service Cymru
CG	children's guardian
CMH	case management hearing
CMO	case management order
DfE	Department for Education
DFC	designated family centre
DFJ	designated family judge
EPO	emergency protection order
FCMH	further case management hearing
FGC	family group conference
FJB	family justice board
FJYPB	Family Justice Young People's Board
FPR 2010	Family Procedure Rules 2010
FRG	Family Rights Group
HMCTS	Her Majesty's Courts and Tribunals Service
ICO	interim care order
IRH	issues resolution hearing
IRO	independent reviewing officer

ISW	independent social worker
LAA	Legal Aid Agency
LiP	litigant-in-person
LoI	letter of instruction
MoJ	Ministry of Justice
NFJO	Nuffield Family Justice Observatory
PLO	public law outline
S 20	section 20 of the Children Act 1989
S 76	section 76 of the Social Services and Well-being (Wales) Act 2014
SDO	standard directions on issue
SG	special guardian
SGO	special guardianship order
SGSP	special guardianship support plan
SSW-b(W)A 2014	Social Services and Well-being (Wales) Act 2014
SWET	social work evidence template

Introduction

1. In December 2018, the President of the Family Division asked me to chair this working group to address the operation of the child protection and family justice systems.
2. The steep rise in the issue of public law proceedings seen in 2016/17 and 2017/18 has to some degree eased more recently. But there are still a greater number of cases being issued than in earlier years. The far greater volume of cases is, as the President observed, dealt with by the same number of social workers, care professionals, CGs, lawyers and judges, if not fewer, given those who have decided to leave their chosen careers because of the incessant and overwhelming demands of the family justice system.
3. The reasons for this recent steep rise in the issue of public law proceedings are complex and multiple, as suggested by the recent work of the FRG's *Care Crisis Review: Options for Change* (June 2018)¹ and joint work done by the MoJ and DfE.
4. The various reasons for the increase in the number of public law proceedings issued are outside the remit of this working group. We are charged with considering how children and young people may:
 - i. safely be diverted from becoming the subject of public law proceedings;
 - ii. once they are subject to court proceedings, best have a fully informed decision about their future lives fairly and swiftly made.
5. The key themes of this best practice guidance are:

¹ Available online: https://www.frg.org.uk/images/Care_Crisis/CCR-FINAL.pdf

- i. when deployed appropriately, s 20 of the CA 1989 / s 76 of the SSW-b(W)A 2014 ("s 20") voluntary accommodation can be very positive and can prevent the need to start court proceedings. The importance of s 20 was re-emphasised by the UK Supreme Court in *Williams v London Borough of Hackney* [2018] UKSC 37;
- ii. working with parents and families collaboratively is an essential part of s 20 - partnership is key;
- iii. identify the context and purpose for which s 20 is being considered;
- iv. separation of a newborn or a young baby from their parents is scarcely appropriate under the provisions of s 20. The circumstances in which this is appropriate are very rare;
- v. as far as it is reasonably practicable identify, locate and consult with every person who has parental responsibility for the relevant child. The giving of consent is a positive act. Do not treat silence, lack of objection or acquiescence as valid consent;
- vi. where possible, the purpose and duration of any proposed accommodation should be agreed in advance of the child being accommodated. In case of emergencies, this should be addressed as soon as it is practicable to do so;
- vii. the purpose and duration of any accommodation should be regularly reviewed whilst the child is accommodated;
- viii. during the period of accommodation those who have parental responsibility for the accommodated child retain parental responsibility for that child. The holder of parental responsibility who consents to accommodation delegates to the local authority the exercise of their parental responsibility for the day-to-day tasks;
- ix. restrictions on a child's liberty that cross the article 5, ECHR threshold require specific court authorisation; and,

- x. at paragraph 42 of the BPG, examples of the appropriate use of s 20 are given.
6. All those involved in the child protection and family justice systems worked under considerable pressure before COVID-19. The recommendations set out in this BPG were in large part formulated in a time before the pandemic. COVID-19 has required everyone to adapt to new ways of working. It has increased the workload and pressure upon us all. It has created new uncertainties and further challenges for many children and families. It was agreed that the time was right to recommend to the President that in early March 2021 he publish this guidance. The implementation of this BPG should result in an easing of the burden and pressures on all those involved, to the inestimable advantage of all children who are involved in the child protection and family justice systems and their families.
 7. Uniquely, all stakeholders² in the child protection and family justice systems are agreed on the need for reform and on the direction of travel. All are agreed that the reforms and recommendations set out in this guidance will improve the outcomes for children and young people and their families.
 8. The President has issued this BPG to improve the ability of social workers, senior managers, children's guardians, the legal professions and the judiciary to promote the welfare and protection of children by working in partnership with families to achieve the best outcomes, in a fair and timely manner, for children and young people. The aim is to assist families to be able to make decisions that, wherever possible, enable children to be safely raised within their family network and avoid the need for more intrusive state intervention, including court proceedings. The BPG will help families to know what they should be able to expect from children's

² The 'stakeholders' are social workers and social work managers, children's guardians, family lawyers, family judges and groups supporting families and kinship carers.

services departments and the Family Court both when a child is accommodated under s 20 and if and when court proceedings are issued.

The Honourable Mr. Justice Keehan

March 2021

Appendix G: best practice guidance for s 20/ s 76 accommodation

G1. Guide to good practice: a guide for accommodation of children under s 20 / s 76

Introduction

1. The accommodation of children pursuant to s 20 of the Children Act 1989 and s 76 of the Social Service and Well-being (Wales) Act 2014 (unless otherwise stated reference to s 20 shall include reference to s 76) forms part of a social worker's essential toolkit. The use of these provisions can lead to favourable outcomes for children and their families. When deployed appropriately, s 20 can be very positive and can prevent the need to start court proceedings. The importance of s 20 was re-emphasised by the UK Supreme Court in *Williams v London Borough of Hackney* [2018] UKSC 37.
2. S 20 is extremely broad in its application, both in terms of the types of family by whom it is used and the wealth of placements to which it applies. Its range covers: orphans, abandoned or relinquished babies, unaccompanied refugee children, children with disabilities, adolescents with behavioural problems and homeless 16- and 17-year-olds. Placements under s 20 can include: short-term respite or short-break care, therapeutic placements, residential and assessment units, secure units, homes of family members, mother-and-baby foster placements, foster care and fostering-for-adoption placements.
3. A period of accommodation under s 20 has a significant impact not only on a child's immediate life, but also on her future, including the potential that it has to weigh in the court's welfare balance thus (properly) influencing the outcome of any court proceedings.

4. For some time now, the use of s 20 has been the subject of much judicial guidance and observation. The varying interpretation and application of these provisions has led to an inconsistency in approach. In some areas, s 20 is little used; in other areas, it is much more common.
5. This guidance will help families, social workers, other child protection professionals and the courts to navigate these provisions with confidence. The guide seeks to bring about a uniform and consistent approach to the use of these important statutory provisions in England and Wales.
6. The first part of this guidance summarises the law. The second part is a guide to good practice. Appended to this document are (a) a s 20 / s 76 explanatory note for older children and their families; and (b) a draft s 20 / s 76 agreement.

Legal summary

Statutory provisions: s 20, CA 1989

7. The English statutory provisions are within Part III, CA 1989 which deals with support for children and families by local authorities. S 20 provides for two classes of duty on the local authority to accommodate children: a mandatory duty and a discretionary power. The Act places:
 - i. a mandatory duty to provide accommodation for a child in circumstances where:
 - i. there are no persons with parental responsibility for the child,
 - ii. the child is lost or abandoned,
 - iii. the person caring for the child is prevented from providing suitable accommodation for the child, or
 - iv. a child in need who is within the local authority's area is at least sixteen years old and whose welfare is "*likely to be seriously prejudiced if they do not provide*" the child with accommodation;

- ii. a discretionary duty to provide accommodation for a child in circumstances where:
 - i. it is considered that it will safeguard and promote the child's welfare even where a person with parental responsibility can accommodate the child, or
 - ii. a person who is sixteen years old but under twenty-one years old may be accommodated in a community home which takes children who have reached the age of sixteen if to do so is considered to safeguard and promotes the child's welfare.
- 8. A local authority is not permitted to accommodate a child under s 20 if a person with parental responsibility who is willing and able to provide or arrange for accommodation objects. A person with parental responsibility may at any time remove the child from local authority accommodation that is provided under this section. There is no requirement to give notice. The only exceptions to that person being able to remove the child from local authority accommodation are:
 - i. when a person with a "lives with" child arrangements order, a special guardian or a person in whose care the child is put under the High Court's inherent jurisdiction agrees to that accommodation;
 - ii. when a child who is 16 or over agrees to being accommodated.
- 9. The statute does not prescribe any time limits or maximum duration for any accommodation under s 20. Any such accommodation is the subject of the local authority's duties that are set out in s 22, CA 1989, as reinforced by the Care Planning and Case Review (England) Regulations 2010, SI 2010/959.

Statutory provisions: s 76 SSW-b(W)A 2014

- 10. The Welsh statutory provisions are set out in Part 6, SSW-b(W)A 2014. The relevant provisions are summarised as follows:

- i. there is a general duty on the local authority to secure “sufficient accommodation” for a looked-after child and to meet the needs of those children within its area in so far as reasonably practicable;
- ii. the local authority has a mandatory duty to provide accommodation for a child within its area who is lost, abandoned or the person who is looking after the child is prevented from providing the said child with suitable accommodation. Additionally, this duty extends to a child who is 16 years old and whose wellbeing is likely to be seriously prejudiced if not accommodated;
- iii. “well-being” has a specific statutory definition, which includes but is not limited to “welfare” as defined in the CA 1989;
- iv. however, the local authority may not provide accommodation if any person with parental responsibility who is willing and able to provide accommodation for the child objects. Note that any person with parental responsibility may at any time remove the child from accommodation that is provided under this section. However, this does not apply where a person who (a) has a child arrangements order, (b) is a special guardian or (c) otherwise has care of the child by an order from the High Court (under its inherent jurisdiction) agrees to the child being looked after in accommodation by the local authority;
- v. the local authority also has “principal” duties to children that are looked after.

Statutory provisions: general

11. A local authority is not permitted under s 20 to prevent a person with parental responsibility from removing a child from local authority accommodation. Instead, a court order is required, either an emergency protection order or interim care order. Alternatively, the police can exercise their police protection powers.

Good practice

12. This good practice will assist in navigating through the relevant provisions of s 20 and to use it appropriately and effectively. It should be read alongside the statutory provisions set out above; it does not have the status of formal statutory guidance, but rather it promotes good practice.
13. Local authorities should promote this guide and compliance with it. Support should be given to front-line social workers to do so.
14. Within each local authority, the use of s 20 should be monitored by senior management, although this may be delegated.
15. Each case should be assessed on its own individual facts.
16. Working with parents and families collaboratively is an essential part of s 20. Partnership is key. This includes working with all relevant family members.
17. The following steps should be taken in every case where the use of s 20 accommodation is considered.

The family and s 20

18. Identify the context and purpose for which s 20 is being considered. This may be short-term accommodation during a period of assessment or respite; alternatively, it may be a longer period of accommodation, including the provision of education or medical treatment.
19. Have particular regard to the child's age. Different considerations, including the purpose and duration may be heavily influenced depending on the age group of the relevant child. Consider the groups as follows (a) newborn and very young babies, (b) toddlers up to five years of age, (c) six years' old to pre-teens, (d) teens but under sixteen years' old, and (e) sixteen years' old or older when the child can consent to accommodation. Ensure that the voice of the child is clearly recorded and stated.

20. Separation of a newborn or a young baby from their parents is scarcely appropriate under the provisions of s 20. The circumstances in which this is appropriate are very rare. The (limited) appropriate use of s 20 in this context may include circumstances where the parents need a very short period in a residential unit to prepare for the child to join them, or if a carer needs to undergo a short programme of detoxification or medical treatment.

Immigration

21. Identify and establish any immigration issues concerning the children, the family and any adults who may be caring for the children: see paras 154 – 157 of this report.

Consent and consulting with those who have parental responsibility

22. As far as it is reasonably practicable identify, locate and consult with every person who has parental responsibility for the relevant child.

23. When consulting with the person who holds parental responsibility, satisfy yourself that he has capacity to consent. Capacity can change and it should be reviewed as necessary. The issue of capacity must be decided by applying s.1-s.3 of the Mental Capacity Act (2005). If there are doubts about any relevant person's capacity, take no further steps until the question of capacity has been addressed. A person may have capacity to agree but have extra needs; consider if these needs can be met by engaging adult services, independent advocacy or an intermediary. Remember the issue of consent and capacity to consent is relevant to medical examination/treatment and obtaining a child's medical records.

24. In appropriate cases discussions about the use of s 20 can commence some time prior to birth so that those with parental responsibility have time to consider all the options and be assisted in making an informed decision. However, agreement to a child being accommodated can only be given once the child is born.

25. Special care should be taken with mothers who are close to or have recently given birth. The local authority should address the question of capacity very carefully, if appropriate, with medical advice. Put in place such support as is necessary to ensure that the mother in such circumstances can make an informed decision. This may include referral to adult or advocacy services, engaging the services of an intermediary or involving other reliable family members.
26. If the relevant person has capacity to consent, the local authority should ensure that he has all the relevant information available to him, in a form and language that can be understood. This also applies to a child who is capable of consenting to accommodation under the CA 1989 / SSW-b(W)A 2014. Consider if key documents such as the written agreement should first be translated into the appropriate first language.
27. The local authority should ensure that the relevant person who holds parental responsibility is aware of the consequences of giving consent and the full range of available options.
28. The relevant person should be informed that he can withdraw his consent at any time without notice to the local authority.
29. The local authority should ensure that consent is not given under duress or compulsion to agree (whether disguised or otherwise). Consent may not be valid if given in the face of a threat to issue court proceedings.
30. The giving of consent is a positive act. Do not treat silence, lack of objection or acquiescence as valid consent.
31. Consent to accommodation should be given prior to or at the same time as accommodation. Consent cannot be given retrospectively.
32. Where possible, the person with parental responsibility should have access to legal advice.

33. Where possible, the purpose and duration of any proposed accommodation should be agreed in advance of the child being accommodated. In case of emergencies, this should be addressed as soon as it is practicable to do so. The purpose and duration of accommodation may change and should be subject to review.
34. It is good practice to record the agreement in writing in a simple format. That document should clearly state that the persons consenting to accommodation may withdraw their consent and remove the child at any time without giving notice to the local authority. It should make the consenting persons aware that by agreeing to accommodation they are delegating the exercise of that aspect of their parental responsibility to the local authority. The document should be translated into the parents' first language if they are not fluent in English. This document should be signed on behalf of the relevant local authority and by the persons consenting to accommodation. Each local authority is encouraged to provide the parties to such agreement with a brief explanatory note or leaflet which is easily understandable and in an appropriate language.

Reviews of s 20 accommodation

35. The purpose and duration of any accommodation should be regularly reviewed whilst the child is accommodated. This may change with the changing circumstances of children. The frequency of such reviews should be agreed at the time that the agreement is signed and recorded in that document. The appropriate frequency will depend on the facts of each case. Generally longer-term provision of accommodation can be reviewed in line with looked-after child reviews; short-term provision of accommodation may require more frequent reviews. The accommodation should be reviewed as soon as it is practicable when there has been a material change in the circumstances. Make it clear that those agreeing to the accommodation may ask for a review at any time. The IRO should ensure that the accommodation

is reviewed at a frequency in line with the individual needs of the child. The review should involve all persons capable of continuing to give informed consent to accommodation. Make sure that each review has a clearly identifiable statement of the voice of the relevant child.

36. The IRO's duties and best practice are set out, in England, in primary legislation, accompanying regulations and statutory guidance, in particular: s 25B, CA 1989; regulations 36, 37, 45 and 46 of the Care Planning, Placement and Case Review Regulations 2010; and the IRO handbook. Each of those merits careful reading. In Wales, the position is again set out in primary legislation, accompanying regulations and codes, in particular: ss 99 – 102, SS(W)WA 2014; regulations 38 – 44 and 53-54 of the Care Planning, Placement and Case Review (Wales) Regulations 2015; and, the Code to Part 6 of the Social Services and Well-being (Wales) Act 2014. In addition, there is the Practice Standards and Good Practice Guide: Reviewing and Monitoring of a Child or Young Person's Part 6 Care and Support Plan. Each of those (as amended) should be read carefully and observed.
37. During the period of accommodation, the local authority should continually assess the needs of the accommodated child and provide for those identified needs. This includes educational, psychological and therapeutic needs.

Parental responsibility and s 20

38. During the period of accommodation those who have parental responsibility for the accommodated child retain parental responsibility for that child. The holder of parental responsibility who consents to accommodation delegates to the local authority the exercise of her parental responsibility for the day-to-day tasks. However, they should each be kept fully and promptly informed about the progress and any updated information concerning their child.

39. Under s 20, the local authority cannot interfere with the exercise of parental rights by those holding parental responsibility for the relevant child, even in circumstances that it deems the parental rights to be unreasonably exercised.

40. If consent is withdrawn, the local authority should immediately return the child.

S 20 accommodation that places significant restrictions on a child's liberty

41. Restrictions on a child's liberty that cross the article 5, ECHR threshold – i.e. “continuous supervision and control and lack of freedom to leave” – require specific court authorisation. The law on whether a parent can consent under s 20 continues to develop. Local authorities should consult with their legal teams if the s 20 placement is one in which a child, particularly an older child (for example, 11+) is subject to significant restrictions. That is more commonly the case in a residential placement than in foster care but can apply to both.

Examples of appropriate use of s 20

42. The following are some examples of appropriate uses of s 20 and is not an exhaustive list:

- i. respite for parents/carers where (a) the child suffers a medical condition and/or disability, (b) the child has challenging behaviour or (c) there is an unexpected, domestic or family crisis;
- ii. parents/carers require a short time to (a) undertake an assessment (e.g. during the PLO), (b) participate in extensive therapy or (c) undergo a detoxification programme;
- iii. parents/carers require a short time to improve home conditions or move to more suitable accommodation;
- iv. parents/carers or a close family member who is reliant on the parents/carer require a short period of medical intervention such as surgery including time to recover from the same;

- v. shared care arrangements between the parents/carer and the local authority where conditions of public law proceedings are not met or if met are deemed to be inappropriate. This may include placement in a residential school and provision of education;
- vi. unaccompanied minors seeking asylum where no person can exercise parental responsibility for the child or if there is such a person available, he has consented in accordance with the above guidance.

G2. Explanatory note for older children: what it means to be a looked-after child under s 20 / s 76³

What does it mean when you are “looked after” by your local authority under s 20?⁴

- parental responsibility is the ability to make big decisions about your life. The local authority does not have parental responsibility for you;
- when you turn 16, you can ask to be accommodated (i.e. given a place to live and person to live with) by your local authority. If you are not 16 yet, everyone with parental responsibility (usually your parents) must first agree;
- you are given your own social worker. The social worker will come to visit you within the first week of you being accommodated (i.e. starting to live with a family member, foster carers or a residential home). The social worker will then meet up with you every six weeks. If you want to speak to the social worker more, just ask!
- your social worker decides who you live with and where you live. Your views are very important. You can talk with your social worker about what you want. Or you can write it down;
- your social worker is in charge of your support and care plan. This plan is important. It states where you are to live, contact with your family, education and any other support that you get. Your views are very important. Your social worker will listen to what you want. The plan will include your views. If you do not feel that people are listening, you can speak to an advocate (a special person to help you communicate) or an independent reviewing officer. The

³ This has been developed by the working group and is a suggested template or point of reference that may assist older children to gain a better understanding of their circumstances and what it means to be a looked-after child.

⁴ Whenever it says s 20, that means s 20 of the Children Act 1989 (England) or s 76 of the Social Services Well-being (Wales) Act 2014 (Wales).

independent reviewing officer is independent. His job is to make sure that everything is being done properly and fairly;

- you will have looked-after child reviews. They are meetings to discuss you and your plan. You can go along to make sure that people know what you want. You can ask your advocate to come too if you want. It is all up to you. Everyone who writes the plan comes along to the meetings. The independent reviewing officer is in charge. The first meeting will take place within the first 28 days. The second meeting is three months' later. After that, you have a meeting every six months. If you want more meetings, just ask! Your social worker will talk to you about what you want and how you want to explain to the meeting what you want. You could do it in writing first or tell people at the meeting;
- when you turn 16 your social worker will help you think about the future and about living independently. The social worker's job is to help you with housing, money, further education, applying for jobs, your health and wellbeing. The social worker wants to know what your dreams and hopes are and to help that happen.⁵

⁵ Thank you to Jade (18), accommodated under section 20, CA 1989, who provided feedback on this explanatory note.

G3. Template s 20 / s 76 agreement

VOLUNTARY AGREEMENT BETWEEN [LOCAL AUTHORITY] AND
[PERSONS WITH PARENTAL RESPONSIBILITY] FOR THE
ACCOMMODATION UNDER SECTION 20 OF THE CHILDREN ACT
1989 / SECTION 76 OF THE SOCIAL SERVICES AND WELL-BEING
(WALES) ACT 2014 OF [CHILDREN]

THE RELEVANT PERSONS

The children: [names]

The persons with parental responsibility: [names]

The local authority: [name]

Date: [date]

THE AGREEMENT

Agreement

- This is an agreement between [local authority] and [persons with parental responsibility].
- The agreement is that [children] will be placed in [say, foster care] by [local authority].
- In legal terms, that placement is happening under [sub-section ... of section 20 of the 1989 Act/s 76 of the Social Service and Well-being (Wales) Act 2014].

The placement and the children's wishes

- The purpose of that placement is [purpose]. The current plan is that [current plan for children's return home] and that the [children] will remain accommodated by the local authority for a period of [X weeks / months].
- It [has / has not] been possible to find out the [children's] wishes and feelings. [The children's] wishes and feelings are [wishes and feelings].

Agreement of the persons with parental responsibility and right to remove

- [The persons with parental responsibility] do not at the moment object to [the children] being placed in [say, foster care].

- [The persons with parental responsibility] may at any time remove [the children] from the [say, foster care].
- [The persons with parental responsibility] [has / has not] had legal advice and has the right to continue to seek independent legal advice.

Reviews

- [This is / this is not] an agreement for the accommodation of a new-born baby or child under six months. / It is an agreement for the accommodation of a newborn baby or child under six months, and the exceptional circumstances requiring the use of s 20 / s 76 are [exceptional circumstances].
- [The local authority] intends to review this placement every [X weeks] and the persons with parental responsibility will, after each review, be updated by the local authority on its plan moving forward.
- Additional reviews may be requested in response to any changes.

SIGNATURES

Signature:

- Signed and dated:
 - [The persons with parental responsibility]
 - [Local authority]

Where required to be translated into a foreign language:

- This document has been written in English and translated into [foreign language]. The [persons with parental responsibility] have read it in [foreign language].
 - Signed and dated in [foreign language]: [*"I have read this document and agree to its terms"*].
 - Signed and dated by [named interpreter].

Where an advocate or intermediary has assisted

- The [person with parental responsibility] has been assisted by [name; advocate / intermediary].
- I [advocate / intermediary] confirm that I have read this document with and explained it to [person with parental responsibility] and I am satisfied that the [person with parental responsibility] understands its contents.
- [Signed and dated by advocate / intermediary].

Check list for local authorities

- ✓ Have you taken every person with parental responsibility carefully through this agreement?
- ✓ If the persons with parental responsibility are not native English speakers, has the agreement been translated into their native language?
- ✓ Are you satisfied that the persons with parental responsibility have capacity to consent?
- ✓ Are you satisfied that the persons with parental responsibility have consented?
- ✓ Have the relevant persons with parental responsibility signed a consent form for medical treatment/examination or disclosure of the child's medical records.

Public Law Working Group

Best practice guidance:

Section 20 / section 76 accommodation

March 2021

To contact us: pfd.office@judiciary.uk