Response to Proposals for the

Reform of Legal Aid in England and Wales

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Prepared by
Family Rights Group on behalf of the Kinship Care Alliance

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Introduction:

The Kinship Care Alliance is an informal network of voluntary organisations, local authorities and academics working with or having an interest in family and friends care. It campaigns for greater **recognition and respect** for family and friends ('kinship') carers. The Kinship Care Alliance has been meeting since 2006 and is serviced by the charity Family Rights Group. Between the membership organisations we advise and support thousands of family and friends cares who take on the care of children who are at risk of harm as an alternative to entering the care system each year. We draw upon this experience to inform this response.

1. Scope of public funding (questions 1-6)

We agree with the categories of cases that are being retained within scope for public funding, in particular those that are most relevant to our area of work, namely

- all public law children's cases (care proceedings, EPOs and child assessment orders) because the potential outcome of a child being removed from their parents care is such a draconian step and such a fundamental infringement of the right to respect to family life for the child and their parents that parents and others with parental responsibility must have a right to be represented at public expense; and

- Judicial review cases in order to enable litigants to call the state to account in the exercise of its public duties.

However we have considerable concerns about the proposed exclusion of **private law children's applications** (paras 4.205-4.215) as it does not appear to take account of the impact on **kinship carers who take on the care of children who are at risk of harm and often on the edge of care**.

We advise and support many relatives and friends who seek to take on the care of a child in their family network who is at risk of harm of or actually suffering significant harm as an alternative to them entering the care system. Family members often start to care for a child because there is a crisis in the parental home, for example, there may have been incidents of violence, alcohol or drug misuse, mental or physical illness, disability, separation, divorce, domestic abuse, imprisonment, or any combination of these. The children concerned are therefore likely to have experienced trauma and inappropriate parenting as a result of being exposed to any of these circumstances. Yet despite a documented lack of adequate support for such placements, there are well evidenced advantages[1] for children who cannot live with their parents to being raised by family and friends:

[1] Roskill C (2007) *Wider Family Matters* (Family Rights Group); Doolan et al (2004) *Growing up in the Care of Relatives and Friends* (Family Rights Group); Hunt J (2003) *Family and Friends Care*; Scoping Paper for Dept of Health; Broad, B (ed) (2001) *Kinship Care: the placement of choice for children and young people* (Russell House)

- Children in family and friends care tend to be in more stable placements than those placed with unrelated foster carers.
- Children feel loved and report high levels of satisfaction.
- Children placed within their family can more easily maintain a sense of family and cultural identity.
- Contact with family members is more likely to be maintained than when children are with unrelated foster carers.
- Children placed with family and friends carers appear to be as safe and their behaviour is perceived to be less of a problem when compared to children with unrelated foster carers.

It is therefore not surprising that government policy is to explore wider family placements for children on the edge of care wherever possible and safe to do so[2].

Typically, such family and friends arrangements come about as a result of

- a relative or friend being involved in child protection processes/assessments under s.47 enquiries (for example they have attended a child protection conference and/or been assessed by local authority children's services as being a suitable alternative carer for the child) and that person wishes to apply for a residence or special guardianship order to avoid the child becoming the subject of care proceedings or being taken into care, at huge savings to the legal aid fund; or

- a Family Group Conference, typically in the pre-proceedings stage, in which the whole family has agreed that such an arrangement is the best solution for the child, but an order is needed to secure it legally so as to satisfy the local authority children's services department that the child cannot be removed and return back to the parents' home where they were at risk and confer parental responsibility on the carer;

- A child is looked after in s.20 accommodation and a relative wishes to seek a residence or special guardianship order to secure the child's home with them and acquire parental responsibility, which may or may not be agreed by the local authority.

- A relative or friend being either called to give evidence in, or being joined as a party to, care proceedings, during the course of which they apply for a residence or special guardianship order to take on the care of the child as an alternative to them being in long term care.

  Case examples from FRG advice line (2011):

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[2] Department for Education, 2010, Improving Outcomes for Children Young People and Families: a National Prospectus.
http://media.education.gov.uk/assets/files/doc/n/improving%20outcomes%20for%20children%20young%20people%20and%20families%20%20%20a%20national%20prospectus.doc

A: Mrs x is maternal GM of y who is nearly 5 years old. He has been placed with a family friend for almost 10 months originally by consent of his mother under S.20 CA89 as she is in prison. The mother is in practice effectively excluded from any care planning review process and the child's care plan is not agreed by her. The mother has consistently sought placement with her mother, Mrs X. The mother formally withdrew her consent to the S.20 placement continuing, in writing, in November 2010. The local authority have continued to maintain the placement without legal authority and have not sought a legal order. The current placement has now broken down with the child due to move imminently to stranger foster care. Mrs X has not been included in any LAC planning. The local authority have finally now concluded a viability assessment and have concluded that Mrs X cannot meet the child's cultural needs. Mrs X and the child share the same ethnicity but the local authority insist that 'her African culture conflicts with Western culture'. Mrs X doesn't agree with that assessment and says no examples are cited other than her endorsement of the view that 'it takes a village to raise a child'. Mrs X is not entitled to any free legal funding and cannot afford to pay for it. She therefore proposes to apply for a residence order but has no funding to pay for it. It will be opposed by the local authority, even though they have no care order and are accommodating the child unlawfully.

B: Caller's granddaughter (aged 11) was known to children's services due to concerns re domestic violence between father and his partner, there were also concerns re alcohol use (it is not known if child protection plan in place). A serious incident occurred before Christmas where the father's partner assaulted her and was arrested. Children's services stated it was not safe for the father to care for child and she would be placed in care if no suitable family member came forward. (Mother also deemed not to be appropriate). Father contacted child's paternal grandparents (who had retired to France) and grandfather returned to Kent to take child back to France with him. This was initially meant to be a temporary measure but now parents have consented and children's services are in agreement with grandparents caring for child permanently. Grandfather wants an order to secure the placement.

A legal order is currently required to secure an arrangement for a child to live with family and friends carers. Sometimes such applications for residence or special guardianship orders will be supported by the parents but not the local authority; in other cases it will be the reverse. Thus such applications are frequently contested. If such applications are removed from the scope of public funding[3] unless there was domestic violence:

i) many potential family and friends care placement will be lost because if that person lacks the confidence and/or resources to make the necessary application to court as a litigant in person with the result that more child may end up in care, contrary to government (DfE) policy and at huge cost to the public purse; and

[3] There does not appear to be any specific mention of special guardianship orders being excluded in the consultation document but since they are private law orders we assume this is proposed.

ii) many relatives and friends who have already taken on the care of a child will be deterred from seeking such orders to secure the arrangement with the result that children will live with them with no legal security and could therefore be removed by the parents and return to a situation where they are at risk of harm again, without warning and there would be nothing the family and friends carer could do to stop them. Moreover, such carers would not even have parental responsibility for them, and therefore would be unable to make key decisions such as consent to medical treatment or school trips.

Whilst the issue of parental responsibility (PR) could be addressed by a change in the law to extend the possibility of a parental responsibility agreement (currently available to fathers without PR and step parents under s.4 & s4A CA))[4] and in the meantime the family and friends carer could apply for such an order as a litigant in person in consensual cases, the situation is more challenging for the carer where the case is contested. The acute needs of the children coming into their care and the documented lack of support for them (despite the fact that they are not financially liable for them in law under s.1 Child Support Act 1991) means that many such carers struggle to cope financially, emotionally and socially[5]. Further, many feel they have little real choice because they feel morally bound to help these children even though they haven't planned for it and frequently lack adequate means.

Given this background and the evident stresses they have to live with, it seems both unreasonable and highly unlikely to achieve the best possible presentation of their case or outcome for the child, to expect such family and friends carers to make their application as a litigant in person in a contested case, hence the child may end up in the care system after all, at enormous additional cost both to LSC and the public purse more generally. Conversely, it is clear that when such applications are made as an alternative to the child being taken into care, they generally save the Legal Services Commission the cost of care proceedings which was estimated by the Review of Child Care Proceedings to be £25,000 but is, in reality, frequently far more.

We therefore recommend that:

i) Contested private law applications for residence and special guardianship orders continue to be within the scope of public funding where the application is made by a family and friends carers, irrespective of whether domestic violence is alleged. This would include a person who falls within the definition of a relative in s.105 CA or a family and friends foster carer who has had the child living with them for one year or more, and anyone who has been granted leave to apply for such order.

ii) The LSC should liaise with officials in the DfE and the MoJ about a change in the law so as to extend the possibility of acquiring parental responsibility by agreement

[4] See recommendations below

[5] Farmer E and Moyers S (2008) *Kinship Care: Fostering Effective Family and Friends Placements* (Jessica Kingsley)

with the parents with PR (currently available to fathers without PR and step parents under s.4 & s4A CA)) to relatives as defined in s.105 CA 1989. Again, this would avert the need for care proceedings in some cases, resulting in huge savings to the legal aid fund.

2. Impact of proposed changes on litigants in person (question 6)

We have experience of advising many litigants in person (LIP) about applications for residence and special guardianship and indeed we have freely downloadable advice sheets on how to apply for such orders as a litigant in person on our website[6]. However whilst many will be able to manage to paperwork to make the application, with telephone advice as a back up resource, many lack confidence and ability to represent themselves in person where their application is opposed, particularly if it is their own son or daughter opposing them. This places huge demands on the court staff to provide them with guidance and support and in some cases leads to them simply pulling out and the child entering the care system after all. If the numbers of litigants in person increases this pressure on court resources will increase commensurately as described in para 4.266. Moreover it may also lead to:

i. ***increased conflict between the parties which may well have a negative impact on the child's relationships and contact arrangements*** with the rest of the family; and

ii. fewer parties having the benefit of pre-proceedings advice from a solicitor, with the result that they may be less likely to make use of alternative dispute resolution, such as mediation and family group conferences, to avert unnecessary proceedings, than if they did have such advice.

We note that there is a dearth of research on the outcomes of cases involving LIPs and that further research is underway to explore this issue (para 4.266). However we consider that setting out these proposals before the results of this research are available means that they will not be given much weight and the proposals will be pursued irrespective of the findings. **We therefore recommend that** implementation of any proposals which will result in an increase in litigants in person, particularly in relation to private law applications discussed above, should be deferred until the results of that research are known.

3. The Community Legal Advice Telephone Helpline (Questions 7- 11)

We have extensive collective experience of providing advice to families over the telephone primarily before or after court proceedings when dealing with the administrative decision-making of the local authority. Telephone advice has the advantage of being accessible (no travel involved) and potentially anonymous. However many callers find it hard to retain all the advice they have been given in one

[6] http://www.frg.org.uk/advice_sheets.html

conversation, therefore it is necessary to provide further advice and support to supplement the advice given. This may include:

- Advice and information sheets about particular aspect of law or procedure which are relevant but not specific to their case which can be sent out routinely following an advice call for them to peruse at their leisure. These can also be web-based, hence freely downloadable whether or not the person has called the advice service. The CLS used to produce these but has now reduced the content to 'Call to Action' leaflets. These only provide basic information and in our view are inadequate where there is a need for much more detailed information particularly for litigants in person. However other specialist advice services such as that of Family Rights Group provide such materials on their website (see http://www.frg.org.uk/advice_sheets.html)

- Individualised letters confirming advice given to them about the steps they need to take in their particular case

- Draft letters to the other party setting out their case and any proposals for them to amend and send. They can then come back for further advice if they need it once they receive a response.

However although such measures can provide a wide range of people with advice it is important to acknowledge that some people will lack the ability to access, comprehend and act upon advice given over the telephone or in writing, hence will need face to face advice. This would include those who are:

- Reticent or fearful about speaking to someone anonymous. This may be particularly acute where there has been a history of distrust and poor working relationships between external agencies, for example when a young care leaver has children who are subject to s.47 enquiries or if the family has had children removed before. It may be necessary for them to establish a relationship with their adviser through face to face meeting before they can trust them and hence heed their advice

- Do not have English as their first language or there are other communication difficulties. This might include parents with learning difficulties who need an advocate to support them to get advice because they have difficulty expressing themselves and retaining information or advice given

- Are illiterate and/or cannot follow written material

- Are or may be incapable within the meaning of the Mental Capacity Act.

- Do not have the money to pay for the call. Many of our callers no longer have landlines (relying only on pay as you go mobile phones) hence an 0800 number will not be free. This could be addressed by providing an 0808 number, which are

free to some networks, but it is still important to note that even these are not free to all mobile networks.

Moreover once court proceedings start then telephone advice is not adequate where they are contested and/or there is complex legal argument to be developed, documentation to be considered and procedures to be followed.

If there is a single point of access to publicly funded advice via the LSC telephone line, there will clearly be an administrative problem about how those who cannot access the phone line (for any of the reasons above) can access face to face advice. We suggest the only possible route would be via solicitors who could be delegated responsibility to judge whether the client who presents in their office falls into any of the specified circumstances, in which case they could self certify the authority to give initial advice in person. This could be monitored by the LSC through the auditing process.

We therefore recommend that publicly funded initial face to face advice should continue to be available from solicitors when the solicitor considers that the client is unable to benefit from calling the LSC telephone advice line because:

i. They have communication and/or learning difficulties;

ii. They are illiterate;

iii. They are or might be considered to be incapable within the meaning of the Mental Capacity Act;

iv. They are so emotionally affected by their case that they would not be able to explain their circumstances, or hear or act upon the advice given; or

v. They are involved in existing court proceedings and need to have advice about associated documentation and procedures.

In addition we recommend that there should be an 0808 number for the LSC telephone advice line.

4. Seamless provision of advice between government departments (Question 10)

It is important that the scope of any advice provided by such a CLA helpline addresses the pre-proceedings stage as well as the court process once proceedings have started. To this end it will be necessary for there to be very coherent strategy developed between relevant government departments responsible for the different areas (in particular the DfE and the MoJ) to ensure seamless provision of advice in the **full range of public and private law family cases** both between, and within, services provided by the respective departments.

At present, the DfE is responsible for ***pre-proceedings work in public law cases***. Amongst other things, it provides guidance to local authorities on working in partnership

with families prior to the issue of care proceedings, funding to a range of specialist advice services (including that of FRG) to support parents and wider family members to care for their children safely (although such funding is currently only until 31st March 2011) and it promotes (but does not fund) the wider use of family group conferences to help families find their own solutions so that unnecessary care proceedings can be avoided. It also provides relationship support to prevent relationship breakdown in private law cases. However it is the MoJ which funds mediation (but not FGC) services to avert unnecessary court proceedings as well as running the court service. It is clearly in the interests of the MoJ that this pre-proceedings work is supported as effectively as possible since it can result in fewer cases coming to court and requiring public funding.

Clearly specialist advice, whether by telephone or in person, including detailed advice for litigants in person, will be increasingly important in the future. The CLA will need to ensure that if/when the DfE funding for the specialist advice lines currently funded by the DfE ceases, there is no gap in specialist provision. Moreover the CLA should develop partnerships with key voluntary sector specialist advice services, such as Family Rights Group and The Grandparents' Association in order to utilise existing expertise rather than re-inventing the wheel. The independence of such voluntary organisations is valued by clients[7] who may have more difficulty hearing advice from a State run advice service (the CLA) when the case to remove their child is being brought by another agency of the State (i.e. the local authority).

We therefore recommend that:

a) the MoJ/community legal advice service collaborates closely with the DfE to ensure that there is seamless specialist advice provision and

b) the CLA develops partnerships with the existing independent specialist advice services currently funded by the DfE including Family Rights Group and other specialist helplines such as the Grandparents Association, in order to utilise existing expertise.

5. Financial Eligibility (Questions 12-21)

If public funding for private law applications by family and friends carers remains out of scope (unless domestic violence is present), then the question of financial eligibility is not relevant except in cases of domestic violence. However if it is retained and is means tested then these proposals will impact on family and friends carers taking on the care of a child who is on the edge of care and would otherwise be in care irrespective of violence. The most difficult of the proposed changes for family and friends carers may be the simplest: the £100 contribution out of capital savings of £1000 or more in order to get basic advice under the Legal Help Scheme, because many family and friends carer

[7] Lindley, B., Richards, M. and Freeman, P (2001) Advice and Advocacy for Parents in Child Protection Cases- What is Happening in Current Practice, *Child and Family Law Quarterly*, June: 23-51; Lindley, B and Richards, M (2002) *Protocol on Advice and Advocacy for Parents (Child Protection),* Cambridge, Centre for Family Research

are already under strain financially and they will therefore have had to draw on typically meagre savings to take on the care of the child. Further, family and friends carers are also likely to be disproportionately affected by the reduction or abolition of legal help for many other categories of law (welfare benefits, employment, housing except for homelessness, debt etc), as they tend to have lower incomes, because of giving up or reducing work commitments in order to be available for the child. This is likely to exacerbate their stress and place further strain on placements or even deter them from taking on children on the edge of care.

Our main concern about these proposals is that family and friends carers do not generally plan to take on the care of such children. As described above they frequently take on the care in an emergency to avoid the child being looked after and experience considerable emotional and financial strain because adequate support is not forthcoming. Requiring them to make a greater capital contribution than required by the current rules will not deter them from litigation as is intended and they have no real choice because they need an order to secure the child's home with them and acquire PR. Instead it is likely to place them under further financial strain and may even result in the placement breaking down. In this respect it seems unreasonable and contrary to children's welfare and DfE policy to promote wider family placements for children on the edge of care.

Thus **we recommend that** any changes to the eligibility rules which would result in them having to make increased payments out of their capital should be abandoned.

6. Impact Assessments (Questions 49-51)

We consider the impact of the proposal to exclude private law residence and special guardianship order applications (where there is no domestic violence) on children on the edge of care has been overlooked, presumably inadvertently. This needs to be redressed by public funding for family and friends carers seeking to take on, or secure, the care of a child who would otherwise enter the care system being retained, irrespective of whether or not there is violence. See recommendations under Scope above.