

Full name

Andrea Hopkins

Job title or capacity in which you are responding to this consultation exercise
(e.g. member of the public etc.)

Legal Adviser, Family Rights Group

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Company name/organisation (if applicable):

Family Rights Group

Address

The Print House
18 Ashwin Street
London

Postcode

E83DL

Transforming Legal Aid: Delivering a more credible and efficient system

Consultation response from:

Family Rights Group

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For further information contact

Cathy Ashley (cashley@frg.org.uk) or

Bridget Lindley (blindley@frg.org.uk)

Family Rights Group

The Print House

18 Ashwin Street

London E8 3DL

Tel: 0207 9232628

Advice line: 0808 801 0366

www.frg.org.uk

About Family Rights Group

Family Rights Group is the charity in England and Wales that advises families whose children are involved with or need local authority children's services because of welfare needs or concerns. We provide direct advice to over 8000 such parents and wider family members per year about their rights and the options open to them when the local authority is concerned about their children's welfare. To further our aims and objectives we:

- Publish a wide range of advice sheets on all aspects of child care law and practice which can be downloaded from our website at www.frg.org.uk/advice_sheets.html;
- Run a web-based electronic discussion board and set up support groups for family and friends carers, including grandparents who are

- raising grandchildren unable to live with their parents;
- Convene the Kinship Care Alliance and national Family Group Conference Network;
- Run training courses on a regular basis for child care professionals including Independent Reviewing Officers;
- Run action research programmes, for example on how social care services work with domestically abusive fathers and lobby for improvements in childcare law and practice.

Introduction

This response is informed by our extensive experience of working with parents, carers and wider family members who are involved with children's services about caring for their children. We wish to make it clear we do not support any of the proposals set out within this consultation document, but in this response we have focused on those proposals that affect access to legal aid in family law and related cases. We endorse all of the points of concern raised in the response to this consultation by the Association of Lawyers for Children.

In addition, we are seriously concerned about the lack of evidence base for the proposals set out in the consultation document. Specifically, the consultation document does not demonstrate

- robust impact assessments for its proposals
- any assessment or evaluation of the changes to legal aid to date, in particular the most recent ones brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2010
- reliable information regarding past spending, projected spending, and budgets.

The proposals to which we have responded below, if subsequently put into effect, will seriously undermine the ability of some families (including parents, wider family members and children) to obtain legal aid in proceedings concerning their children. In our view, this has the potential to fundamentally breach their rights under both the European Convention on Human Rights, and the UN Convention on the Rights of the Child.

Question 1 - Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?

We do not agree with this proposal.

Under this proposal, legal aid would be cut for all treatment cases. This includes the treatment of children in prison, and mother and baby issues. We do not think it is appropriate to restrict access to proper legal advice and representation to these highly vulnerable groups.

Prison law will also be affected by the proposed cuts to legal aid for judicial review. Judicial reviews have driven prison reform in relation to children (for example on the application of the Children Act 1989 to children in prison and on the issue of separating mothers and babies).

Question 4 - Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

We do not agree with this proposal.

The proposed residence test would have drastic consequences for thousands of children, young people and families and threaten their access to legal aid in those areas of law where legal aid still exists, such as community care, judicial review, special educational needs, clinical negligence, certain housing cases, certain private law family cases (domestic violence cases, child abduction) and even public law family proceedings (care cases).

In our view, the introduction of a residence test, as set out in the consultation document, will seriously undermine the rule of law. Claimants – including children, young people and families – will be disadvantaged as even though they may have a strong case against a public authorities acting unlawfully, their only choice will be to pursue them by acting as a litigant in person, in complex areas of law. Of even greater concern, there will be some parents and even children, who are respondents to a public law application by the State (in the form of local authority children's services) who will be unable to obtain legal aid to pay for proper legal representation in those proceedings.

Our main areas of concern are:

- Babies and children sometimes require their own legal representation in proceedings, but no baby who is under one year old will be able to get civil legal aid at all. CAFCASS legal cannot be expected to take on this deficit. Similarly, a British child born abroad coming to the UK would have to wait for 12 months before becoming eligible.
- The residence test is unlawful. Children facing complex administrative and legal proceedings require legal support. Articles 6 and 8 of the

European Convention on Human Rights protect the right to fair trial and to respect for family life, which carries with it the right to procedural protection. Article 12 of the UN Convention on the Rights of the Child provides that states 'shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child'. Article 3 of the Convention provides that children's best interests must be a primary consideration in all actions concerning them.

- The asylum-seeker exception does not adequately protect those seeking safety. Making recognised refugees wait for 12 months to be able to claim civil legal aid is unfair. Cutting legal aid for fresh asylum claims breaches the UK's obligations to refugees.
- The residence test is unworkable and impractical. Legal aid lawyers in the areas of law in question – such as public law childcare law, community care, special educational needs and clinical negligence – may not be able to accurately ascertain whether someone is 'lawfully resident', which is often far from straightforward.
- In the case of public law children cases, the need to establish residency before legal aid is granted will restrict early access to legal advice which could avoid the need for proceedings at all. In some cases, respondent parents to the application could be denied legal aid altogether. Further, in light of other proposals in the Children and Families Bill 2013 designed to reduce the time taken to complete public law children cases, this delay in obtaining legal representation, or the absence of any legal representation at all, will seriously undermine the court's ability to deal with the case within the prescribed time limits.
- Families or children who are refused asylum seekers, or undocumented migrants but who may be entitled to support under the Children Act 1989, will be unable to get legal representation to challenge a decision of a local authority to refuse to assess them for, or provide services under sections 17 or 20 Children Act 1989 (family support services and accommodation)
- A parent or family member who wishes to obtain a private law children order to protect a child from child abuse will not be able to do so if they do not satisfy the residency requirement.

Question 30: Do you agree with the proposal that the Public Family Law representation fee should be reduced by ten percent?

We do not agree with this proposal. We endorse the response of the Association of Lawyers for Children on this question. We are particularly worried that this will lead to further reductions in the number of firms willing or able to take on family law cases and that a further reduction in fees will drive down the quality of legal services being provided.

Conclusion

In summary, we are concerned that these reforms will have direct implications on access to justice for children and young people. We do not believe that this consultation has fully considered the consequences of the proposed changes and we would strongly urge a postponement of any further changes in respect of civil and family funding at this stage, whilst some careful thought is given and a proper analysis undertaken, and then appropriate steps considered.