



## **The Ministry of Justice's Legal Aid Means Test Review Consultation Response from Family Rights Group, June 2022**

### **1. About Family Rights Group (FRG)**

- 1.1 Family Rights Group's mission is to create a more socially just society in which the child welfare and family justice systems support children to live safely and thrive within their family, while strengthening the family and community networks of those children who cannot live at home. Established in 1974, we are the national charity that works with parents in England and Wales whose children are in need, at risk or are in the care system and with members of the wider family who are raising children unable to remain at home.
- 1.2 We campaign for families to have their voice heard, be treated fairly and get help early to prevent problems escalating. FRG introduced the family group conference model (FGC) to the UK from New Zealand. FGCs are an approach which bring together the family network to make a plan for, and with a child, where there are concerns, for example, that the child may be at risk. We now host the National FGC Network. We also developed Lifelong Links, an approach which works with children in care to build a lasting support network for them to turn to emotionally and practically in child and adulthood.
- 1.3 Our specialist legal and practice advice service advises parents, wider family and friends about their rights and options when social workers or courts make decisions about their children. In 2021/2, our advisers answered more than 7000 calls to the advice line and there were more than 550,000 visitors to our website and digital advice forums for parents and kinship carers. Evaluation of the service shows that it helps people to: better understand the child welfare system, their rights and options and professional concerns; and enables them to know how to involve/draw on their wider family and friends' network so children may be kept safely within the family. The service saves on average £15.10 for every £1 invested, in care costs and local authority costs avoided by averting the need for long-term or more intensive statutory involvement.
- 1.4 Family Rights Group (FRG) facilitated the sector-led Care Crisis Review which explored the contributory factors to the rise in applications for care orders and the number of children in care, and considered options for change. Our family panels, comprised of parents and kinship carers with experience of the child welfare and family justice systems, are integral to shaping our priorities and to all of our activities. Co-facilitated with panel members, we help local authorities to establish family engagement structures. Our trustee board comprises social care leaders, lawyers, academics and family members with experience of the system.
- 1.5 FRG is also the national policy and legal authority on kinship care. Kinship carers are family or friends who step in – often in an emergency – to raise children who cannot stay at home. They are most commonly grandparents, but many are aunts, uncles, older brothers and sisters or family friends. More than 160,000 children across England and Wales are being raised in kinship care. Many more children are raised in kinship care than are in the care system or adopted. Family Rights Group provides legal and policy support to the Kinship Care Alliance. We provided the secretariat to the Parliamentary Taskforce on Kinship Care and now provide the secretariat to its successor, the All-Party Parliamentary Group on Kinship Care.

### **2. Structure of this submission**

This submission focusses on the impact of the means test on parents and (potential) kinship carers whose children are involved in the child welfare and/or family justice system. It is organised as follows:

- **Section 3:** Family Rights Group's general observations
- **Section 4:** Family Rights Group's observations in relation to non means testing for civil cases
- **Section 5:** Evidence for the case for non-means tested legal aid for kinship carers.

### **3. Family Rights Group's general observations**

- 3.1 Access to timely, specialist, independent legal advice and representation is crucial for children and families involved with the child welfare and family justice systems. It is essential to help ensure that families are able to understand their rights and options and effectively engage and participate in decisions in relation to their child. The provision of an appropriate regime of publicly funded legal aid is a fundamental part of the checks and balances upon the state's processes and power, given decisions made by local authority children's services departments and the Family Court have potentially lifelong consequences for children and their families.
- 3.2 Currently access to legal advice in some key areas of child and family law are dependent upon the applicant passing both a merits test and also the means test. Examples include:
- Where a child is looked after in the care system under a care order and a parent requires legal advice regarding the arrangements for their child's contact with them or the potential of their child to return home to their care ('reunification')
  - Where parents have agreed for their child to become looked after by children's services under a voluntary arrangement and children's services wish for the child to be placed in a secure accommodation unit and be deprived of their liberty
  - Where a grandparent who has stepped in to take on the care of their grandchild because the child's parents are unable to, seeks to formalise the arrangement and obtain parental responsibility with a special guardianship order or child arrangements order (and has the relevant gateway evidence).
- 3.3 In such situations parents and wider families can too easily find themselves without access to the legal advice they need. Those employed with limited income, or with some capital in their home, may fall above the thresholds for the means test yet have resources that fall far short of what they would need in order to be able to privately pay for legal advice and representation. Without access to advice and representation their ability to participate from an informed position in decisions-making and effective planning about their child is jeopardised.
- 3.4 The recognition that income and capital thresholds should be increased is welcome and indeed overdue given the significant change in the cost of living since the current thresholds were set in 2009. It is essential however that revised thresholds and allowances set take into account the current cost-of-living crisis and the rise in inflation.
- 3.5 FRG also note that the proposals include various amendments to the way that a household's income is assessed. Any amendments must not unfairly or disproportionately disadvantage any groups, including (but not limited to):
- Lone parents, who face additional spending pressures in comparison to two parent households and who are likely to be particularly disadvantaged by the proposal to include housing benefit as a form of income
  - Younger parents, including those who are themselves care experienced<sup>1</sup> or are care leavers, a group that have been particularly adversely impacted by welfare reforms in recent years and who are especially vulnerable to experiencing the removal of their children to the child welfare system.<sup>2</sup>
- 3.5 Obtaining legal aid should not be so complicated for families and practitioners. The process should not deter those who desperately need legal aid from applying for it and nor should applicants have to wait a significant length of time to know if they may be able to receive legal advice and

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<sup>1</sup> The term care experienced is used here to refer to a young person who may have been in care for some period of time, including on more than one occasion, but who is not legally entitled to any ongoing support after leaving the care system

<sup>2</sup> See for example: Broadhurst, K., Mason, C., Bedston, S., Alrouh, B., Morriss, L., McQuerrie, T., Palmer, M., Shaw, M., Harwin, H. and Kershaw, S. (2017) *Vulnerable Birth Mothers in Recurrent Care Proceedings: Final Main Report*. Lancaster: University of Lancaster. Centre for Child and Family Justice Research. Available: [http://wp.lancs.ac.uk/recurrent-care/files/2017/10/mrc\\_final\\_main\\_report\\_v1.0.pdf](http://wp.lancs.ac.uk/recurrent-care/files/2017/10/mrc_final_main_report_v1.0.pdf); Roberts, L., Meakings, S., Smith, A., Forrester, D., and Shelton, K. (2017). 'Care-leavers and their children placed for adoption', *Children and Youth Services Review* 79, pp. 355-361

representation. Legal practitioners need to be able to make decisions regarding individuals' eligibility for legal aid in order to delegate (grant themselves legal aid, pending an assessment by the Legal Aid Agency) in urgent situations or in legal help cases. It is important that any reforms do not render practitioners less likely to be in a position to do this. Situations in which this will be particularly important include (but are not limited to) where:

- Urgent remedies need to be sought through the Family Court such as where victims of survivors of domestic abuse require injunctive protection.
- (Potential) kinship carers need to obtain urgent advice to participate in ongoing care proceedings which are subject of a 26-week timetable (section 32(1) of the Children Act 1989) and in which the Family Court may be considering placing a child outside of their family and friends' network. In such a situation Courts will be unable to wait for the Legal Aid Agency to make a decision on eligibility.

#### **4. Family Rights Group's observations in relation to non means testing for civil cases**

- 4.1 Family Rights Group note the proposals set out in paragraphs 313 to 342 of the means test review. Those proposals recommend that the means test be removed for under 18s (excluding legal help) and for two areas of law: i) Proceedings relating to the withdrawal or withholding of life-sustaining treatment from children which the review rightly says are so significant, in terms of the welfare of the child, and of the consequences to their parents that parents should be represented 'whatever their means', and ii) Legal help at inquests.
- 4.2 The means test review states that the removal of the means test for those under the age of 18 for civil representation '*will recognise the vulnerability of under 18s within the civil and family courts system. MoJ considers this cohort a distinct group, with needs that are different from those of other age groups, and we therefore think it is highly unlikely that a person under 18 would be able to effectively represent themselves in court.*'
- 4.3 We concur with the review but consider that non means tested legal aid should also be available for kinship carers and potential kinship carers in both public and private children law matters and for the following reasons:
- The means test is preventing many kinship carers from accessing the advice they desperately need. This is a view shared by many organisations working in children and family law. It is supported by a growing body of evidence that shows that the lack of access to legal advice for kinship carers is causing delays to court proceedings and impacting upon the number of children being placed outside their family network instead of in kinship care. This evidence is set out in detail within section 5 below.
  - Kinship carers are a distinct group, with needs that are different from others involved in the child welfare and family justice system. In many situations, they are unlikely to be able to effectively represent themselves in court. For example, in care proceedings, all other parties are very likely to have access to non means tested legal aid, placing kinship carers or prospective kinship carers at a significant disadvantage. In private children law cases, there is commonly the opposite issue, that often no one is represented and there are no other practitioners involved at court who can assist kinship carers in navigating the court system and assist them to pursue an outcome which is in the best interests of the child. In both public and private law, kinship carers are expected to go up against family members which makes representing themselves even more challenging and emotionally distressing
  - The decisions and processes that (potential) kinship carers face in the child welfare and family justice systems have far-reaching consequences for the child and their family. Matters at stake include - who looks after the child, whether they are able to remain in their own family and/or community for the rest of their minority, how stable and successful any kinship placement made is, and the long-term outcomes for the child. Part 5.4 below set out additional detail in relation to each of these matters.

## **5. Evidence for the case for non-means tested legal aid for kinship carers**

### **5.1 Legal Context**

- 5.1.1 The objectives of the Legal Aid, Sentencing and Punishment Act 2012 included targeting legal aid to those who need it most, making significant savings to the cost of the scheme and delivering better overall value for money for the taxpayer. FRG note that these objectives are set out in the means test review, along with an intention for the proposed amendments to the means test to achieve them.
- 5.1.2 Yet, the retention of the means test for kinship carers results in a failure to meet those objectives. There is evidence that a lack of access to legal advice for kinship carers results in a lack of adequate and fair exploration of kinship options for a child, and kinship placements that are insufficiently supported due to carers being uninformed when making decisions about them. This results in more children unnecessarily being placed in unrelated foster care or residential placements, being neither in the interests of the child, their family or the taxpayer. The number of children in care system is at its highest since 1985. The Independent Review on Children's Social Care estimate that the children's social care system currently costs £10 billion a year and predict that this will increase to £15 billion a year by the end of the next decade. Kinship care is a clear and obvious solution to that, but the current legal aid system too often in practice works against this.
- 5.1.3 Further, retaining the means test for kinship carers fails to target legal aid for those who need it most. As set out above, kinship carers are a unique group. They find themselves in almost impossibly complex legal situations, often less likely to pass the means test due to their stage of life, and all whilst trying to do the right thing and care for a child who might otherwise be looked after in the care system.
- 5.1.4 The means test for kinship carers, and the barrier this creates to accessing legal advice, also undermines the principles and duties which underpin the primary legislation governing children law; the Children Act 1989 and the Social Services and Well-being Act 2014. By failing to ensure that family members are properly informed and supported through access to legal advice, it undermines the principle of the state working in partnership with children and their families and of the principle of co- production.
- 5.1.5 Further, it frustrates the explicit duties on local authorities which reflect that children are best brought up within their families unless compulsory intervention is necessary. It does not sufficiently support (prospective) kinship carers' involvement or give them the ability to make informed decisions about the children they are seeking to provide a loving home for. It creates a system that does not ensure carers have access to the legal advice and representation they need to secure an appropriate legal arrangement and the support provision that would allow the child to thrive throughout their life. In some cases, the system appears to actively discourage this, making the process confusing, stressful and sometimes impossible for kinship carers.

### **5.2 Background to the evidence presented below**

- 5.2.1 The Parliamentary Taskforce on Kinship Care was set up in 2018 to bring together cross-party parliamentarians to try to develop solutions to challenges facing kinship carers. They launched an inquiry and in September 2020, they published 'First Thought Not Afterthought.' The Taskforce found that kinship carers are often an afterthought and explored at the very latest stages of the court process. Among the Taskforce's detailed findings, the lack of access to free, independent legal advice and representation was highlighted as a problem for families considering taking on the care of a child who cannot safely remain with their parents.
- 5.2.2 The Taskforce has been succeeded by the All-Party Parliamentary Group on Kinship Care ('APPG'). The APPG raises awareness of kinship care to promote policies and practice which supports more children to live safely within their family and friends' network, when they cannot live with their parents.
- 5.2.3 In 2021, FRG, the Association of Lawyers for Children, the Law Society and Resolution drafted a [briefing note](#) to the Ministry of Justice. The briefing was prepared to provide the Ministry with proposals as to how specifically, Government's proposed changes as set out in the Legal Action



Support Plan dated February 2019 should be progressed and implemented. The note highlights the need for non means legal aid for special guardians for the following reasons:

*“a. We are concerned that if legal aid is only made available to those special guardians who meet the means requirements, a great many kinship carers will continue to remain without access to legal advice.*

*b. This is because many kinship carers, particularly older carers including grandparents, have limited income, but own their home, or have a small pension. This does not mean however that they have access to the funds necessary to instruct a solicitor to advise and represent them on a private basis, particularly in contested proceedings where experts may be instructed at significant cost, but would likely leave them falling outside means-tested legal aid.”*

FRG still remain of this view. Moreover, the consultation will note the position of other responses, including the Law Society's, which calls for non means legal aid for kinship carers.

- 5.2.4 In light of the Taskforce's findings regarding kinship carers' lack of access to advice, the APPG launched an inquiry in January 2022 into legal advice and representation for kinship carers and potential kinship carers. It aimed to bring a renewed focus to the issues kinship carers face in accessing legal advice and representation when navigating the family justice system, and the wider impact this has on the child welfare and family justice system. It also sought to update the evidence base on access to legal aid from kinship carers and practitioners working in the system. The APPG heard from hundreds of kinship carers in a national survey carried out by Family Rights Group<sup>3</sup>, as well as through oral evidence sessions. It also heard from legal practitioners and organisations working in children and family law. In May 2022, the APPG published the results of its inquiry in its report [‘Lost in the Legal Labyrinth: How a lack of legal aid and advice is undermining kinship care.’](#)

### 5.3 APPG findings on kinship carer's access to legal advice

- 5.3.1 The submissions made to the APPG during the course of the inquiry highlight the difficulties kinship carers have in accessing legal advice and the effect this has on children and families and the child welfare and family justice system. Some of the most significant findings of the survey, set out in page six of the [report](#), are as follows (with emphasis added):

- 82% of kinship carers surveyed did not feel they knew enough about their legal options to make an informed decision about the best options for their kinship child
- Fewer than half of respondents (48%) were satisfied with their current legal arrangement for the child
- Nearly 4 in 10 (38%) of the kinship carers surveyed had NOT received any legal advice about their rights and options for their kinship child
- Where carers had received legal advice, a quarter (25%) had paid for some or all of the costs themselves. **Only 16% had received part or full payment through legal aid.** 56% had received part or full payment by the local authority but the scope of such provision is limited
- Where kinship carers were represented by a solicitor or barrister, almost a third (28%) of respondents paid some contribution towards the cost of legal representation, including those reliant on family and friends to help. 40% indicated their costs were covered in full by the local authority and a further 6% covered in part. **Only 19% qualified for legal aid for all of the costs and for a further 10% legal aid only covered part of the costs**
- Nearly three quarters (72%) of kinship carers said becoming a kinship carer had caused them financial hardship. 4 in 5 carers had to either give up work (52%) or reduce their hours (29%).

The data reflects that legal aid is available and accessible for only a small minority of (potential) kinship carers.

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<sup>3</sup> The survey was completed by 473 carers across England and Wales. The respondent kinship carers were raising a collective total of 742 kin children. The majority of carers were aged between 45 and 75. 55% were raising one child and 43% were raising 2 or more. 68% were grandparents and the remainder a range of other relations or friends. 84% of the children and 93% of carers were white. A quarter of carers (25%) and almost two thirds of the children (58%) had disabilities or additional needs. A large majority of carers had either a special guardianship order or child arrangements order for the children or were kinship foster carers caring for a child under either a care order or a voluntary arrangement (under section 20 of the Children Act 1989 or section 76 of the Social Services and Well-being (Wales) Act 2014).

## 5.4 APPG findings regarding the means test

- 5.4.1 The APPG's inquiry found that the legal aid means test was a barrier to many carers accessing legal aid due to the very low income and capital thresholds and that removing the means test would assist family and friends to get the legal advice and support they need to obtain the best outcome for the child.
- 5.4.2 In respect of the changes to the means test set out in this review, the APPG found that it will still result in a great many kinship carers being unable to access to legal advice. This is because many kinship carers are older carers, including grandparents, and are often on a limited income. But many will have some savings, such as a small pension, and others are likely to own a significant proportion of their property in circumstances where they have spent many years paying off the mortgage. This does not mean that they have access to the potentially significant funds necessary to instruct a solicitor to advise and represent them on a private paying basis.
- 5.4.3 Further, where kinship carers have capital in their home which is above the equity disregard permitted by the Legal Aid Agency (whether that be above the current equity disregard allowance of £100,000 or the proposed disregard of £185,000) they are unlikely to be in a position to sell that property given that they need it to raise the child(ren) who are being placed in their care. A kinship carer's accommodation forms part of the assessment undertaken by children's services when determining whether a child can be placed in their care and so they cannot simply sell it and move out to pay for legal advice. Further, as the results of the survey so starkly highlight, a large number of kinship carers face financial hardship when they become a kinship carer making it even harder to pay for legal costs.

## 5.5 Further findings

- 5.5.1 Other key findings made by APPG's [Lost in the Legal Labyrinth](#) report which are pertinent to understanding the impact of the means test on (potential) kinship carers and outcomes for children and families include:
- That kinship carers face significant challenges in accessing publicly funded legal advice and representation. Some of these challenges stem from the strict parameters of the legal aid regime including the means test.
  - The costs of securing legal advice and representation privately can also be prohibitive for many kinship carers and many are not able to seek essential legal advice or join proceedings as a result. Others are forced to represent themselves in court, often while all other parties in the proceedings have legal representation.
  - That without legal advice, many kinship carers are not in a position to make informed decisions regarding the best kinship care arrangement for them and the child they are/ will be raising. They are often unaware of the practical and financial support implications of pursuing (or agreeing to) one type of kinship care arrangement verses another. This can be detrimental to the interests of the child, particularly where they have additional needs. It can also undermine the efforts of the kinship carer to provide a safe and loving home and their ability to provide the support the child needs to thrive.
  - That it is important for (prospective) kinship carers to be clearly informed from the outset, for them to be able to understand the situation facing the family including the severity of the concerns and to be able to make a more informed decision about whether to step forward to offer to care for the child. This could also avert the need for more intrusive and costlier interventions further down the line, and smooth the progression of care proceedings where recourse to the court is necessary
  - While entitlement to support for the child and the carer is largely dependent on the type of kinship arrangement the carer has, the extent of support and access to discretionary help from the local authority is significantly influenced by the negotiations that take place. Where carers/prospective carers are not informed about their rights and options, where they do not have a full understanding of the child's needs, and where they lack the legal representation to conduct that negotiation effectively, they struggle to secure the support the child needs. This,

along with securing the appropriate kinship arrangement, both of which require kinship carers to have legal advice, can impact the long term stability of the kinship placement

- Kinship carers can struggle to gain a clear understanding of local authority assessment processes or know what is being asked of them or what they should be able to expect from children's services and the family court. A lack of information and understanding can be a reason that otherwise suitable prospective kinship carers receive a negative assessment by the local authority. Uninformed and unsupported carers can feel overwhelmed and drop out of the process altogether or emerge late in the day when the likelihood of a child being removed into the care system is greater.

## **5.6 Independent Review on Children's Social Care**

- 5.6.1 The final report of the Independent Review on Children's Social Care was published on 23 May 2022. The Review followed the Conservative party 2019 manifesto commitment to commission a review into the children's social care system. In its executive summary, the review states that a 'radical reset' of the children's social care system and states that achieving this starts with 'recognising that it is loving relationships that hold the solutions for children and families overcoming adversity.' It goes on to state that:

*'Without a dramatic whole system reset, outcomes for children and families will remain stubbornly poor and by this time next decade there will be approaching 100,000 children in care (up from 80,000 today) and a flawed system will cost over £15 billion per year (up from £10 billion now).<sup>1</sup> Together, the changes we recommend will shift these trends and would mean 30,000 more children living safely and thriving with their families by 2032 compared to the current trajectory.'*

- 5.6.2 The review highlights the difficulties caused by a lack of access to legal advice for kinship carers in Chapter Four. It states as follows:

*'Many potential kinship carers are unable to access legal advice when making a decision about whether to provide care for their family members and whether to do so under an SGO, CAO or as a foster carer. One study found that 74% of kinship carers did not have sufficient information about legal options when they became carers (Ashley & Braun, 2019). The same research reported that four out of ten families received no assistance with the legal costs associated with becoming a kinship carer. Those who had to pay their own costs in full or in part, paid an average of £5,446, with costs ranging anywhere between £100 and £50,000.'*

*The Ministry of Justice (MoJ) itself recognises that kinship carers should be given more generous access to legal aid, and made a commitment to do so in 2019 which has not yet been met (Ministry of Justice, 2019).'*

The Review goes on to make recommendations to widen the availability of legal aid for kinship carers, including making it available for family and friends who are considering entering into kinship arrangements and those going through the process of becoming a kinship carer in public or private law proceedings. It is FRG's view, formed from the evidence explored earlier in this submission, that these recommendations will only be realised if the means test is removed entirely for all kinship carers.

Family Rights Group

7<sup>th</sup> June 2022