

Civil Legal Aid Review submission

21 February 2024

1. About Family Rights Group

- 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. Our specialist advice service, advises parents, wider family and friends about their rights and options when social workers or courts make decisions about their children. In 2022/3, our advisers responded to over 7,100 enquiries. We provide a blended service, including calls to our advice line, online advice enquiries and live webchats. During the same year, nearly 700,000 people visited our website and digital advice forums for parents and kinship carers.
- 1.3. Our legal team is comprised of a barrister and two solicitors, as well as a trainee solicitor, completing her training through the Legal Education Foundation's Justice First Fellowship. Our trainee solicitor sits on the committee of the Young Legal Aid Lawyers, leading on their work in relation to family legal aid. Our legal team is able to offer a broad perspective on family legal aid. This comes from practice experience in local authority legal teams and private practice. The team have significant experience of representing parents, kinship carers and children within private and public children law, inside and outside of court proceedings. Our viewpoint of the legal aid system is

broadened further by our policy expertise, both in relation to the legal aid system and the voluntary advice sector.

2. Structure of this submission:

- 2.1. **Section 3:** The current family legal aid regime: overarching observations
- 2.2. **Section 4:** Voluntary sector, specialist advice
- 2.3. **Section 5:** Reform needed in relation to deprivation of liberty
- 2.4. **Section 6:** Reform needed in relation to kinship care

3. The current family legal aid regime: overarching observations

3.1. Early information and advice, from both legal aid providers and from the voluntary advice sector, helps prevent difficulties from escalating, and can help to avert court proceedings, including care proceedings. At a time when court backlogs continue to grow, and care proceedings are taking on average 47 weeks to conclude, proper early advice provision is essential. Family Rights Group is concerned about the difficulties that parents and kinship carers face when trying to access early advice. Both by way of:

- **Legal advice under the ‘legal help’ legal aid regime, and**
- **Advice from specialist advice organisations** such as Family Rights Group’s Advice & Advocacy service (see section 4 below).

Legal advice under the ‘legal help’ legal aid regime.

3.2. We know that families find it extremely difficult to obtain ‘legal help’ advice, to enable a solicitor to help them navigate the early stages of children’s services’ involvement, or to understand their rights and options outside of court proceedings. The government’s data detailed at [Annex C of the Review of Civil Legal Aid - Call for evidence](#), highlights the significant drop in the number of controlled work/legal help claims submitted for family legal aid over the past five years alone:

- **In relation to private family law** – the number of controlled work claims submitted in 2018/19 was 8,394 and in 2022/23 was just 6,237. When compared to the very high numbers of private law matters before the Family Court, this figure is extremely low
- **In relation to public family law** – the number of controlled work claims submitted in 2018/19 was 18,009 and in 2022/23 was just 14,401.

3.3. Our understanding is that a contributing factor for the drop in the numbers of public law legal help claims submitted over the past five years, as well as a drop in the numbers of firms offering family legal help advice, is because those cases receive such low rates of remuneration. In public law for example, legal help (level 1) covers an initial meeting with a client, follow-up advice and, where appropriate, corresponding and liaising with the local authority. The standard fee available for this work is a £132. A great proportion of firms simply cannot offer this service anymore.

3.4. Firms are similarly struggling to provide early-stage legal advice in public law even where work is remunerated at the higher level of family help (lower) (level 2) (and burdensome merits testing is not required). This is the rate that applies to advice and representation for parents with children subject to the formal pre-proceedings process. It allows a solicitor to offer advice and assistance, attend pre-proceeding meetings and negotiate with the local authority on their client's behalf. It does not cover legal representation in court proceedings. However, this type of legal aid offers still very limited payment for solicitors. The standard fee for this work is £365. Further, where pre-proceedings legal help files are opened, given the rates of pay it often falls to more junior lawyers and paralegals to advise parents, and represent them at meetings with children's services. The drop in the number of solicitors offering advice at this crucial stage of work with a family, which has a view to averting care proceedings, is a significant concern.



- 3.5. A proper review of the rate at which public law legal helps (both levels 1 and 2) are remunerated at is long overdue. We are concerned that without a fee uplift, the number of legal help files will continue to drop, and families will find it even more difficult to obtain the crucial early legal advice they need.

4. Voluntary sector specialist advice services

- 4.1. Family Rights Group's free, specialist advice service has a crucial role to play for families right along the child welfare continuum, but specifically at the early stages of state involvement children and families. Advisers and our advice materials support parents, wider family members and prospective carers to understand their rights and options and to effectively participate in decision making. In doing so, the service helps to secure the right outcome for the child and leads to savings for the taxpayer from the costlier interventions avoided. It is essential that there is adequate and long-term funding for not-for-profit independent advice, information services and advocacy services specialising in child welfare and family court law and practice. This would work alongside there being access to specialist legal advice and representation through publicly funded legal aid for those families, where necessary
- 4.2. Family Rights Group's free, independent, specialist telephony advice service is regularly evaluated, using an impact model based on our theory of change, developed with New Philanthropy Capital. The 2022 evaluation found:
- In the week after calling us 84% of respondents felt that they understood the law better
 - 4 – 6 months after calling us 45% agreed that the support they received from us made a positive difference to the local authority plan and/or services for their child/children
 - The evaluation estimates that every £1 invested in our service saves the state £15.58, including in care



4.3. Yet due to financial constraints, Family Rights Group's advice service is currently only able to answer four in ten callers. The advice service is predominantly funded by a Department for Education contract and this contract is currently due to end in March 2025. We are also very alert to how challenging the environment is to secure funding to run direct advice, advocacy, or representation services. Direct advocacy services commissioned by local authorities, including those previously run by Family Rights Group, have been forced to close due to funding cuts. The legal aid rates mean solicitors are not typically able, under legal help files, to attend child protection conferences.

5. Reform needed in relation to deprivation of liberty:

5.1. Depriving a child of their liberty, whether under a secure accommodation order or the High Court's inherent jurisdiction, is a draconian step which can:

- Have a significant impact on a child's mental and physical wellbeing
- Intervene with a child's right to liberty (European Convention of Human Rights, Article 5)
- Result in a child being isolated and subject to high levels of supervision and restraint.

5.2. Yet families of children in this situation have limited, or no, access to legal advice and information.¹ The legal aid framework is riddled with anomalies and injustice. A parent whose child is subject to care proceedings is entitled to legal aid to fund advice and representation. This is not means tested and a low merits test applies. The same is not true where the child is the subject of an application to deprive them of their liberty, either under secure accommodation order or the High Court's inherent jurisdiction.

¹ Further, data from the Nuffield Family Justice Observatory's 2023 analysis of legal outcomes of cases at the National Deprivation of Liberty Court, also provides, among other things, information about levels of legal representation for parents and carers in these cases.

Parents must pass a means test and a higher merits test; this results in many being unrepresented.

5.3. Whether, where and how a child will be deprived of their liberty are questions without straightforward answers. The relevant law is complex. It is vital that parents and children have access to legal aid to fund advice and representation to ensure:

- They understand the ways in which their child may be deprived of their liberty
- A fair process for the child and family is followed, both in and outside of court
- Families are involved and have a voice in planning for their children
- Partnership working, an underlying principle of English and Welsh legislation, is supported through children and families understanding their rights and options.

5.4. In our 2023 [briefing](#) Family Rights Group provides an overview of legal aid provision in situations where a child is, or may be, deprived of their liberty by the Family Court. The briefing includes FAQs explaining legal aid where a secure accommodation order or an order under the inherent jurisdiction is sought and provision for early-stage legal advice. At page 11 of the briefing, detailed proposals for legal aid reform are then set out. Those recommendations are reproduced at the end of this submission for ease of reference. We would urge that there be urgent reform.

6. Reform needed in relation to kinship care

6.1. Family Rights Group is 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.

- 6.2. Family Rights Group provides legal and policy support to the Kinship Care Alliance, and act as the secretariat to the All-Party Parliamentary Group on Kinship Care. In 2022, the APPG held an inquiry into access to legal aid for kinship carers and potential kinship carers. The inquiry heard from hundreds of kinship carers across England and Wales. It also took evidence from leading legal practitioners and organisations in child and family law, and from non-for-profit advice services. The APPG published its findings and recommendations in a report: 'Lost in the legal labyrinth: How a lack of legal aid and advice is undermining kinship care'. The report shines a spotlight on, and sets out proposals for addressing, the challenges carers and prospective carers face in stepping forward and navigating the family justice system, in England and Wales, to support the children they are raising to thrive.
- 6.3. The legal aid changes for prospective special guardians that were made in May 2023 implement commitments originally made by the Ministry of Justice in the 2019 Legal Action Support Plan, following a campaign led by Family Rights Group, together with other legal organisations. We wholeheartedly welcomed the changes to legal aid announced for kinship carers, as well as those which came into force for parents who oppose applications for placement orders or adoption orders for their child. But the measures for kinship carers do not go far enough, and our campaign for more extensive reforms continues. In particular:
- Legal aid in private law proceedings will be means tested, so grandparents who own their home but are financially struggling may not qualify for legal aid, and
 - Most special guardianship orders are made in public law proceedings, following the local authority bringing care proceedings. Only where the prospective carer is made a party to those proceedings or where they make a private law application for a special guardianship order may they then be entitled to legal aid for full representation (albeit means and merit tested). Many carers do not

have the early legal advice to know that becoming a party to proceedings is an option, or how to pursue it.

- 6.4. Improvements in the legal help regime, focused on the specific needs of kinship carers, are urgently needed. Prospective kinship carers and those already caring for a child in their network must be able to seek advice at an early stage, and outside of court proceedings, to properly understand their rights and options. The APPG report on legal aid found that 82% of respondents did not feel that they knew enough about their legal options to make an informed decision about the best options for their kinship child. Prospective kinship carers need to understand the range of legal orders and arrangements that may be available to them when they take on the care of a child in their family and friends' network. They need to understand what support is available to them and how they can seek this out, to meet the child's specific needs.
- 6.5. The government rightly acknowledges in its December 2023 strategy, Championing Kinship Care, that for too long, provision for kinship carers has not been adequately tailored to the needs of these carers and the children they are raising. The strategy looks to remedy this in a number of ways. But the legal aid regime still does not provide comprehensive access to advice and representation for kinship carers. Family Rights Group is clear that a bespoke form of early advice for kinship carers is now called for. This would be a specific type of legal help, which kinship carers could readily access when they are considering taking on the care of a child in their family and friends' network, or when they need advice in relation to the support that they might receive in relation to a child. Family Rights Group is in the process of developing a specific proposal of what this bespoke form of kinship legal help could look like, and we would welcome a conversation with officials about this. Set out in section 3 above we provide some more general observations about the current legal help provision, including concerns about rates of remuneration, which would apply to any consideration of a new, bespoke form of legal help for kinship carers.



This briefing has been prepared by the Legal Team at Family Rights Group

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Legal aid reform: early advice when proceedings are contemplated

Children and families who are on the edge of possible proceedings that may result in the deprivation of a child's liberty should have access to a form of legal help which is similar to that which is available to parents (and anyone with parental responsibility) during the formal pre-proceedings process (that is 'family help (lower) (level 2) - public law').⁴⁰

This proposed form of 'family help', would be:

- Non means tested
- Have the same merits test as applies to family help (lower 2) - public law. This is often referred to as the 'reasonable private paying individual test'⁴¹
- Remunerated at the same fee as family help (lower) (level 2) - public law (currently £365).

Further:

- A specific criterion could be attached to the provision for this family help (as is the case in the formal pre-proceedings process).⁴² This would be that the person seeking advice must provide confirmation in a prescribed form that children's services are contemplating (or have contemplated) applying to deprive the child of their liberty under either a secure accommodation order or an order under the inherent jurisdiction of the High Court. This could be in the form of:
 - A letter or email from a children's services department in England or Wales (or its equivalent in Scotland or Northern Ireland) confirming that children's services are contemplating (or have contemplated) applying to such an order; this must be from a children's services (or equivalent) address or email address, or
 - A copy of the child protection plan or notes from a looked after child review or other children's services decision-making meeting stating that there was such a plan in place.

This level of legal aid should be available for:

- The child who may be the subject of the application for a secure accommodation order or order to deprive them of their liberty under the inherent jurisdiction
- Their parents; and anyone else with parental responsibility for the child.

For parents, and anyone with parental responsibility, it would allow them to access free, independent advice about what could happen to, and for, their child. And what options might be available to keep their child safe. Examples of questions they may need early-stage advice about include:

- How can my child be kept safe?
- If an order is made to deprive my child of their liberty, where will my child live?
- What checks or reviews will be carried out in respect of restraints used and the impact they have on my child's wellbeing?
- If an order is made to deprive my child of their liberty, when will I be able to see them and speak with them?
- What is the difference between a secure accommodation order and an order made under the High Court's inherent jurisdiction?

Legal aid reform: where an application has been made

Changes should be made to legal aid provision in applications for secure accommodation orders and orders to deprive a child of their liberty under the High Court's inherent jurisdiction **to bring it in line with what is available in care proceedings. The specific changes needed are as follows:**

Applications for secure accommodation orders:

- Parents and anyone with parental responsibility to receive non means tested legal aid
- The merits test for parents and anyone with parental responsibility should be lowered so that it is in line with the merits test in care proceedings⁴³
- There are no changes needed to the provision of legal aid for the children subject to applications for secure accommodation orders.

Applications to deprive children of their liberty under the inherent jurisdiction:

- Parents and anyone with parental responsibility to receive non means tested legal aid
- The merits test for parents, anyone with parental responsibility and the child should be lowered so that it is in line with the merits test in care proceedings
- We support calls for children to be joined automatically as parties to proceedings where they are the subject of an application to deprive them of their liberty under the High Court's inherent jurisdiction.

⁴⁰ Pre-proceedings is the formal process where children's services consider whether they need to apply to Family Court to commence care proceedings. Once the parents or anyone with parental responsibility have received a letter confirming the process has started, they are eligible for a type of legal aid called family help (lower) (level 2). This type of legal aid offers limited payment for solicitors, who, in nearly all cases receive a fixed fee of £365 for their time

⁴¹ This test is that the potential benefit to be gained from the provision of civil legal aid justifies the likely costs, such that a reasonable private paying individual would be prepared to start or continue the proceedings having regard to the prospects of success and all the other circumstances of the case. See [regulation 7 of The Civil Legal Aid \(Merits Criteria\) Regulations 2013](#)

⁴² Applicants for family help (lower) (level 2) – public law legal aid in relation to the formal pre-proceedings process need to a) be the child's parent or other person with parental responsibility and b) need to have received a letter formally notifying them of the start of the pre proceedings process

⁴³ The merits test found in regulation 65 of the [Civil Legal Aid \(Merits Criteria\) Regulations 2013](#)