

Legal aid in deprivation of liberty cases

The current legal aid position
and proposals for reforms

**Briefing by
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Table of Contents

1. Family Rights Group	2
2. Introduction	2
Key terminology: legal aid, means test and merits test.....	2
3. Secure accommodation orders	3
Understanding secure accommodation orders	3
Legal aid provision for the child	3
Legal aid provision for parents and anyone with parental responsibility	4
4. Applications to deprive children of their liberty under the inherent jurisdiction of the High Court..	5
Understanding deprivation of liberty under the inherent jurisdiction.....	5
Legal aid provision for the child	5
Legal aid provision for parents and anyone with parental responsibility	6
5. Overview of current legal aid provision where an application for either order has been made	7
6. Early advice when court proceedings are contemplated.....	8
Types of 'legal helps'	8
Eligibility for legal help.....	8
7. Proposals for legal aid reform	9
The overarching proposal	9
Why reform is needed.....	9
8. Specific proposals for reform.....	11
Legal aid reform: early advice when proceedings are contemplated	11
Legal aid reform: where an application has been made	11
Legal aid reform: the proposed changes to section 25 of the Children Act 1989	12
9. Further information	12



1 Family Rights Group

Family Rights Group (FRG) promotes policies and practices that keep children safe within their family and strengthen the family and community networks of those children who cannot live at home. We campaign for families to have their voice heard, be treated fairly and get help early to prevent problems escalating.

Founded in 1974, the charity provides specialist legal advice to parents whose children are in need, at risk or in the care system and kinship carers. This year we will advise 7000 parents, relatives and friends about their rights and options when social workers or courts make decisions about their children's welfare.

Family Rights Group's combines commitment to human rights and social justice with expertise in child welfare law, policy and practice. The charity undertakes a range of specialist [legal and practice advice](#) and policy activities in relation to kinship care, including special guardianship.

Family Rights Group provides legal and policy support and secretariat to the [Kinship Care Alliance](#) and has done so since the Alliance's conception. From 2018, Family Rights Group supported a cross-party group of parliamentarians to establish the Parliamentary Taskforce on Kinship Care. The Taskforce existed from 2018-2021 with the aim to raise awareness about, and support for, children in kinship care and to highlight this as an option for children who cannot live with their parents. The Taskforce undertook the first ever parliamentary inquiry into kinship care, taking extensive evidence from kinship carers and children raised in kinship care. Family Rights Group provided legal and policy secretariat to the Taskforce throughout. Family Rights Group serves as the secretariat for the [All Party Parliamentary Group \(APPG\) on Kinship Care](#) which was established in March 2021 and succeeds the Parliamentary Taskforce on Kinship Care.

2 Introduction

- 2.1 This note provides an overview of legal aid provision in situations where a child is, or may be, deprived of their liberty by the Family Court. It addresses legal aid provision in respect of secure accommodation orders and orders made by the High Court to deprive a child of their liberty under the court's inherent jurisdiction.
- 2.2 The note explains key legal aid terminology and then sets out:
- A suite of FAQs addressing legal aid provision for children, parents and anyone with parental responsibility where:
 - [A secure accommodation order is sought](#)
 - [An order under the High Court's inherent jurisdiction is sought](#)
 - [Legal aid provision for early-stage legal advice – legal helps](#)
 - Family Rights Group's [proposals for legal aid reform](#).

Key terminology: legal aid, means test and merits test

Legal aid is the use of government money to pay for people to get legal advice. The Legal Aid Agency is the government body responsible for providing legal aid in England and Wales. Only some types of children law cases are 'in scope' for legal aid - this means legal aid is potentially available to those involved in cases of that type. But what exactly is available and whether an individual qualifies to receive any legal aid varies depending on the type of case and that individual's circumstances.

The **means test** involves looking at the person's financial situation as part of deciding whether legal aid will be available to them. The financial assessment has two elements: examining income and then examining capital. They both must be below a set level to qualify for legal aid. If the person has a partner, their finances must be included in the assessment. The person applying must supply specific documents to evidence their financial situation.

The **merits test** involves the Legal Aid Agency determining whether the person wanting legal aid has been able to demonstrate whether they have sufficient merits in their case to justify being legally represented. Things to consider when assessing a person's merits can differ depending on the type of legal aid.

Understanding secure accommodation orders

- 3.1 A secure accommodation order may be made in the Family Court. It permits a local authority children's services department to deprive a child of their liberty within a secure children's home. The order is made under [section 25 of the Children Act 1989](#) or [section 119 of the Social Services and Well-being \(Wales\) Act 2014](#). A children's services department can deprive a child of their liberty for up to 72 hours without a court order under these provisions. If children's services wish to deprive them of their liberty for any longer, they need a court order.¹ Initially, a secure accommodation order can only be made for a maximum of three months. An application can then be made to extend the order for a further six months.
- 3.2 For an application for a secure accommodation order to be made by a children's services department, the child must be looked after in the care system. This may be under a 'voluntary arrangement' under section 20 of the Children Act 1989 (or section 76 of the Social Services and Wellbeing (Wales) Act 2014). Or under an interim or final care order. The following regulations apply:
- In England: [The Children \(Secure Accommodation\) Regulations 1991](#) and [The Children \(Secure Accommodation\) \(No.2\) Regulations 1991](#) as amended.
 - In Wales: [The Children \(Secure Accommodation\) \(Wales\) Regulations 2015](#) as amended including by [The Children \(Secure Accommodation\) \(Wales\) \(Amendment\) Regulations 2018](#).

Legal aid provision for the child

- 3.3 **Is legal aid available for a child subject of an application to court for a secure accommodation order?**
Yes. Applications for secure accommodation orders are in scope for legal aid.²
- 3.4 **Does a child need to pass a means test before they can receive legal aid if they are the subject of a secure accommodation order application?**
No. A child who is the subject of a secure accommodation order application does not have to pass a means test to receive legal aid.³
- 3.5 **Does a child need to pass a merits test before they can receive legal aid if they are the subject of the secure accommodation order application?**
Yes, but it is a low test.⁴ It is the same low merits test that children must pass to receive legal aid for representation in care proceedings. The Legal Aid Agency need to be satisfied there is a need for the child to have representation. Whether the Legal Aid Agency consider there is a need depends on the 'circumstances of the case.' These circumstances include:
- The nature and complexity of the issues
 - Whether there are other proceedings.⁵
- Practitioners report that in practice, the Legal Aid Agency are typically satisfied that a child has merits to justify being legally represented if they are the subject of a secure accommodation order application.
- 3.6 **Where a child is the subject of an application for a secure accommodation order, will they be a party to proceedings?**
Yes, the child will automatically be a respondent to the application and as such, will be a party to the proceedings.⁶ Further, the law says a court cannot make a secure accommodation order in respect of a child who is not legally represented. There is one exception to this. This is where the child has been informed of their right to apply for legal aid, had the opportunity to apply, but refused or failed to do so.⁷

¹ See [regulation 10 of the Children \(Secure Accommodation\) Regulations 1991](#) and regulation 2 of the [Children \(Secure Accommodation\) \(Wales\) Regulations 2015](#)

² See [section 1\(a\) of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#)

³ [Regulation 5 paragraph \(1\)\(c\) of Civil Legal Aid \(Financial Resources and Payment for Services\) Regulations 2013](#) lists "Special Children Act" cases as being exempt from "the requirement to make a determination in respect of an individual's financial resources." [Regulation 5 paragraph \(2\)](#) defines special Children Act cases and includes applications made under section 25 of the Children Act 1989 "to the extent that the individual to whom civil legal services may be provided is the child who is or would be the subject of the order." See also Government guidance [Scope of Family Proceedings Under LASPO \(January 2021\)](#) available [here](#)

⁴ See [regulation 65 of the Civil Legal Aid \(Merits Criteria\) Regulations 2013](#)

⁵ See [regulation 39 of the Civil Legal Aid \(Merits Criteria\) Regulations 2013](#)

⁶ See [rule 12.3 of the Family Procedure Rules](#) ('FPR') which says that a child is a respondent in any "specified proceedings." Applications under section 25 of the Children Act 1989 are specified proceedings (FPR [rule 12.27](#), [Rule 2.3 \(1\)](#)). The court must appoint a children's guardian for the child unless it is satisfied that it is "not necessary to do so to safeguard the interests of the child" [FPR rule 16.3](#).

⁷ See [section 25\(6\) of the Children Act 1989](#)

Legal aid provision for parents and anyone with parental responsibility

3.7 **Is legal aid available for parents and anyone with parental responsibility in an application for a secure accommodation order?**

Yes. Applications for secure accommodation orders made under section 25 of the Children Act 1989, or section 119 of the Social Services and Well-being Act (Wales) Act 2014, are in scope for legal aid.⁸

3.8 **Does a parent need to pass a means or merits test before they can receive legal aid in an application for a secure accommodation order?**

Yes. A parent of a child subject to an application has to pass a means test to receive legal aid.⁹ They also have to pass a merits test. Whilst it is a low merits test, it is slightly higher than the one the child has to satisfy (see paragraph 3.5 above). Parents need to satisfy the Legal Aid Agency that there is a need for representation considering all the 'circumstances of the case.' This includes looking at whether anyone else involved in the proceedings has the same, or a similar position. Where the Legal Aid Agency considers they do, they may refuse to grant legal aid to the parent.

The Legal Aid Agency will also look at certain other factors, including:

- It is reasonable for full representation to be provided, having regard to the importance of the case to the parent or person with parental responsibility
- That it is not reasonable for the parent or person with parental responsibility to access funding for representation from other sources.¹⁰

3.9 **Does anyone with parental responsibility for the child need to pass a means test or a merits test before they can receive legal aid in an application for a secure accommodation order?**

Yes. Like parents they will need to pass a means test to receive legal aid and also pass the same merits test that parents have to.

3.10 **Is the legal aid position different if the application for the secure accommodation order is being heard alongside care proceedings?**

Yes. The solicitor representing a parent or person with parental responsibility in care proceedings can make an application to amend their legal aid certificate to cover representation in the proceedings relating to the secure accommodation application if:

- The parent or person with parental responsibility is in receipt of legal aid to fund representation in care proceedings and
- The application for the secure accommodation order is being heard together with the care proceedings.¹¹

The parent or person with parental responsibility does not have to pass a means test to receive legal aid in these situations. Clarity is sought on how the merits test operates in these situations.

⁸ See [section 1\(a\) of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#)

⁹ Civil legal services for parents in section 25 applications are not "special children act" cases ([regulation 5 paragraph \(2\)](#)). They are not exempt from the Legal Aid Agency making a determination in respect of their financial resources

¹⁰ See [regulation 66 of the Civil Legal Aid \(Merits Criteria\) Regulations 2013](#) ('the regulations') says [Regulation 39 \(a\) and \(e\)](#) applies to public law children cases as well as regulation 66 (3) and where applicable (4). Public law children cases are defined in the regulations as any matter described in either a) [paragraph 1 of schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) (care, supervision and protection of children), to the extent that the matter is not a "special Children Act 1989 case"; or (b) paragraph 9 (inherent jurisdiction of High Court in relation to children and vulnerable adults), to the extent that the matter relates to a child. [See regulation 2, Interpretation](#)

¹¹ See paragraph 10.21 of [Lord Chancellor's guidance under section 4 of The Legal Aid, Sentencing And Punishment Of Offenders Act 2012](#)

4 Applications to deprive children of their liberty under the inherent jurisdiction of the High Court

Understanding deprivation of liberty under the inherent jurisdiction

- 4.1 The inherent jurisdiction is a High Court power.¹² It can be drawn on where what needs to be done to protect or care for a child cannot be achieved under child welfare legislation, including provisions of the Children Act 1989. This means applications under the High Court's inherent jurisdiction may only be made if there are no other statutory mechanisms available to the local authority children's services department which would achieve the same outcome.¹³
- 4.2 Children's services may seek an order under the inherent jurisdiction where they have assessed a need to apply to court to deprive a child of their liberty but cannot apply for a secure accommodation order. Orders under the inherent jurisdiction can take many different forms. The orders must specifically list the deprivations that the court has made. Reasons why an application for an order under the inherent jurisdiction may be made include that:
- There are no available spaces in secure children's homes
 - The spaces that are available will not meet the child's needs
 - The child requires specific or bespoke restrictions on their liberty that may differ, or be less than, those that could be imposed in a secure children's home
 - The secure children's home is uncertain they will be unable to manage the level of risk involved in caring for the child.
- 4.3 The Supreme Court has decided the High Court can authorise the deprivation of a child's liberty under its inherent jurisdiction. This includes in a placement that is not registered with OFSTED. Lady Black described this route as an 'imperfect stop gap, and not a long-term solution' and said it was a proper use of the court's powers in 'view of the dire and urgent need for placements for such children.'¹⁴

Legal aid provision for the child

- 4.4 **Is legal aid available for the child who is subject to the application?**
Yes. Applications for orders to deprive a child of their liberty under the High Court's inherent jurisdiction are in scope for legal aid.¹⁵
- 4.5 **Does a child need to pass a means test to receive legal aid in an application to deprive them of their liberty under the High Court's inherent jurisdiction?**
No. A child who is the subject of an application for an order to deprive them of their liberty under the High Court's inherent jurisdiction does not have to pass a means test to receive legal aid.¹⁶
- 4.6 **Does a child need to pass a merits test to receive legal aid in an application to deprive them of their liberty under the High Court's inherent jurisdiction?**
Yes. Children must pass a merits test to receive legal aid in applications to deprive them of their liberty under the High Court's inherent jurisdiction. Children need to satisfy the Legal Aid Agency that there is a need for representation considering the 'circumstances of the case.'

The Legal Aid Agency will also look at certain other factors, including that it is:

- Reasonable for full representation to be provided, having regard to the importance of the case to the child
- Not reasonable for the child to access funding for representation from other sources.¹⁷

Practitioners highlight that in practice, the Legal Aid Agency are typically satisfied that a child has merits to justify being legally represented if they are the subject of an application to deprive them of their liberty.

¹² See [section 100 of the Children Act 1989](#)

¹³ See [paragraphs \(4\) and \(5\) section 100 of the Children Act 1989](#)

¹⁴ See [Re T \(A Child\) \[2021\] UKSC 35](#)

¹⁵ See [schedule 1, part 1 paragraph 9 of the Legal Aid, Sentencing and Punishment Act 2012](#)

¹⁶ See [regulation 5, paragraph \(1\) \(ba\) of the Civil Legal Aid \(Financial Resources and Payment for Services\) Regulations 2013](#). This amendment was introduced by [The Criminal and Civil Legal Aid \(Amendment\) Regulations 2023](#) which came into force in August 2023

¹⁷ See [regulation 66 of the Civil Legal Aid \(Merits Criteria\) Regulations 2013](#) ('the regulations') says [regulation 39 \(a\) and \(e\)](#) applies to public law children cases. Public law children cases are defined in the regulations as any matter described in either [paragraph 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) (care, supervision and protection of children), to the extent that the matter is not a "special Children Act 1989 case"; or (b) paragraph 9 (inherent jurisdiction of High Court in relation to children and vulnerable adults), to the extent that the matter relates to a child

4.7 Where a child is the subject of an application to deprive them of their liberty under the High Court's inherent jurisdiction, will they be a party to the proceedings?

The child will not automatically be a party to the proceedings.¹⁸ The Supreme Court has however made clear that the child subject to the application must be joined as a party.¹⁹

Legal aid provision for parents and anyone with parental responsibility

4.8 Is legal aid available for parents or anyone with parental responsibility in applications to deprive a child of their liberty under the High Court's inherent jurisdiction?

Yes. Applications for orders to deprive a child of their liberty under the inherent jurisdiction of the High Court are in scope for legal aid.²⁰ A parent and anyone with parental responsibility must be a party to the proceedings to access legal aid.

The following people are automatically a party to proceedings in these cases:

- Parents (with or without parental responsibility)
- The child's Guardian and
- Anyone who 'has an interest in or relationship to the child.'²¹

Anyone else will need to apply to be joined as a party.

4.9 Do parents or anyone with parental responsibility need to pass a means test to receive legal aid in applications to deprive a child of their liberty under the High Court's inherent jurisdiction?

Yes, they must pass a means test to receive legal aid.²² This means their financial situation will be looked at as part of deciding whether legal aid will be available to them.

4.10 Do parents or anyone with parental responsibility need to pass a merits test to receive legal aid in applications to deprive a child of their liberty under the High Court's inherent jurisdiction?

Parents and anyone with parental responsibility for the child must also pass a merits test. This is the same type of merits test children must pass to receive legal aid in applications to deprive liberty under the inherent jurisdiction. The parent (or other person with parental responsibility) needs to satisfy the Legal Aid Agency that there is a need for representation considering the 'circumstances of the case.' This includes looking at whether anyone else in the proceedings has the same or similar position. Where the Legal Aid Agency considers they do, they may refuse to grant legal aid.

The Legal Aid Agency will also look at certain other factors, including that it is:

- Reasonable for full representation to be provided, having regard to the importance of the case to the parent or person with parental responsibility
- Not reasonable for the parent or person with parental responsibility to access funding for representation from other sources.²³

4.11 Is the legal aid position different if the application for an order to deprive a child of their liberty under the inherent jurisdiction is being heard alongside care proceedings?

Yes. The solicitor representing a parent or person with parental responsibility in care proceedings can make an application to amend their legal aid certificate to cover representation in the proceedings relating to the inherent jurisdiction application if:

- The parent or person with parental responsibility receives legal aid to fund representation in care proceedings and
- The application for the order under the inherent jurisdiction is being heard together with the care proceedings.²⁴

The parent or person with parental responsibility does not have to pass a means test to receive legal aid in these situations. Clarity is sought on how the merits test operates in this situation.

¹⁸ See [rule 12.3](#) of the Family Procedure Rules which sets out who will be a respondent to different types of court applications (and as such be a party to the proceedings). Even though a child is not automatically a party to proceedings under the inherent jurisdiction, the court does have power to make the child party under [rule 16.2](#). If the child is joined as a party, then a children's guardian must be appointed for them (see [rule 16.4](#) which applies because the proceedings are not specified proceedings and are not proceedings to which Part 14 of the FPR applies). The appointment of a guardian is subject to [rule 16.6](#), which sets out when a child may conduct proceedings without a guardian or litigation friend.

¹⁹ See Lady Black's guidance in [Re T \(A Child\), Re \[2021\] UKSC 35](#), paragraph 153

²⁰ See [schedule 1, part 1 section 9 of the Legal Aid, Sentencing and Punishment Act 2012](#)

²¹ See [rule 12.3 of the Family Procedure Rules 2010](#)

²² Inherent jurisdiction applications are not listed as exempt in [regulation 5 of the Civil Legal Aid \(Financial Resources and Payment for Services\) Regulations 2013](#). See Government guidance [Scope of Family Proceedings Under LASPO \(Jan 2021\)](#) available [here](#)

²³ See footnote 10. Applications under the High Court's inherent jurisdiction are 'Public law children cases' and have a specific merits criteria – see [regulation 66 of the Civil Legal Aid \(Merits Criteria\) Regulations 2013](#)

²⁴ See paragraphs 10.20 and 10.21 of [Lord Chancellor's Guidance Under Section 4 Of The Legal Aid, Sentencing And Punishment Of Offenders Act 2012](#)

Overview of current legal aid provision where an application for either order has been made

Table 1: Court proceedings following an application for a secure accommodation order or an application under the inherent jurisdiction: Who is an automatic party and what is the legal aid provision.

	Secure accommodation order				Inherent jurisdiction deprivation of liberty			
Who?	Child	Parent with PR	Parent without PR	Anyone with PR	Child	Parent with PR	Parent without PR	Anyone with PR
Will they be automatically a party to proceedings?	Yes	Yes	No, but will be given notice of the proceedings and can apply to be joined as a party ²⁵	Yes	No	Yes	Yes	No ²⁶
In scope for legal aid to be advised/represented during proceedings?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes, if joined as a party
Must they satisfy a means test to get legal aid?	No	Yes	Yes	Yes	No	Yes	Yes	Yes
Must they satisfy a merits test to get legal aid?	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes

²⁵ There is no difference regarding the legal aid position for a parent who has parental responsibility and those that do not. However, procedurally a parent without parental responsibility will not automatically be joined as a party to secure accommodation order proceedings. So they will only be represented in the proceedings if they successfully apply to be joined as a party

²⁶ In applications under the High Court's inherent jurisdiction, only parents or guardians of the child, or any other person who 'has an interest in or relationship to the child' is joined automatically as a party to proceedings. See [FPR Rule 12.3](#)



Early advice when court proceedings are contemplated

When children's services are contemplating applying for a secure accommodation order or an order to deprive a child of their liberty under the High Court's inherent jurisdiction, children and families may be able to access a type of legal aid called legal help.

The box below explains more.

Legal helps

There are different types of 'legal helps' available for family matters, depending on what the case involves. Legal help is a form of 'controlled work'. This means that those providing the legal advice (normally solicitors' firms) must carry out any required assessment of the person's means and merits themselves and claim the appropriate fee, without the Legal Aid Agency's involvement. However, providers regularly have their controlled work audited by the Legal Aid Agency who can recoup claims they consider to be incorrect or put notices or sanctions on providers' legal aid contracts. See the Ministry of Justice Guidance on [Legal Aid Audits](#) for more information.

6.1 What happens where an application for either a secure accommodation order or an order under the High Court's inherent jurisdiction has not yet been made? Is legal help available to a parent or anyone with parental responsibility for the child?

Yes. If a parent or a person with parental responsibility is seeking advice about a child who may be deprived of their liberty, they may be eligible for a type of legal aid called legal help public law (level 1).²⁷

This usually covers an initial meeting with a solicitor, follow-up advice and, where appropriate, the solicitor corresponding and liaising with the local authority. Many solicitor firms are unable to take these cases on because the remuneration is too low.

Parents or others with parental responsibility will need to pass a means and merits test to receive this type of legal aid. The merits test is demonstrating that there is 'sufficient benefit' to the person applying having regard to all the 'circumstances of the case.'²⁸

6.2 Is legal help available to a child in respect of whom an application for a secure accommodation order or an order under the High Court's inherent jurisdiction is contemplated but has not yet been made?

A child in this situation may be able to access legal help public law (level 1). And like parents and others with parental responsibility, a means test will apply.²⁹ The merits test will be the same; that there is 'sufficient benefit' to the child having regard to all the 'circumstances of the case.' To be eligible to apply for legal help public law (level 1) however a child must satisfy the criteria in Regulation 22, paragraphs (2) and (3) of [The Civil Legal Aid \(Procedure\) Regulations 2012](#). This sets out the circumstances where a child may directly apply for legal advice through a legal help and who may apply on their behalf.

Again, children may struggle to access this type of legal aid as many solicitor firms are unable to take on legal help public law (level 1) cases because the remuneration is too low.

²⁷ Legal help public law (level 1) is available for any public law matter which is in scope. See footnote 2 and 15 confirming secure accommodation orders and applications under the inherent jurisdiction are in scope.

²⁸ See paragraphs 4.2.13 – 4.2.15 of [Lord Chancellor's guidance under section 4 of The Legal Aid, Sentencing And Punishment Of Offenders Act 2012](#)

²⁹ See section 9 of the [Lord Chancellor's guidance on determining financial eligibility for Controlled Work and Family Mediation \(September 2023\)](#) for guidance on how a child's means are aggregated and the new 'simplified approach' which was introduced in August 2023



7

Proposals for legal aid reform

- 7.1 These final sections of this briefing:
- Set out an overarching proposal for legal aid reform and the key reasons why reform is required
 - Put forward [specific proposals for reform](#) both where court applications have been made and where orders are, or have been, contemplated.

The overarching proposal

- 7.2 Legal aid provision in applications for secure accommodation orders and to deprive children of their liberty under the inherent jurisdiction should be expanded so it:
- Is in line with the level of legal aid available to parents and children in care proceedings and
 - Mirrors the [recent changes](#) made to the availability of legal aid for parents (and other persons with parental responsibility) in adoption and placement order proceedings.

Why reform is needed

- 7.3 **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 the child's quality of life and their mental and physical wellbeing
 - Intervenes with the child's right to liberty under article 5 of the European Convention of Human Rights ('ECHR')
 - May result in the child being placed in isolated positions and subject to high level supervision and restraint.
- 7.4 **Families have a key role to play in safe and appropriate plans for their children being drawn up. They need to be involved in the processes through which decisions to seek orders depriving children of their liberty are made.**
- The importance of family involvement where the state makes decisions relating to their child is reflected in the underlying principles of English and Welsh legislation: partnership working and co-production (respectively) between the state and children and families.³⁰
- 7.5 **Partnership can only be achieved where parents are informed and able to understand the options available to them and their child.**
- Whether, where and how a child will be deprived of their liberty are questions without straightforward answers and the law relating to deprivation of liberty is complex. It is vital that parents and children have access to legal aid to fund advice and representation to ensure they understand the legal routes through which their child may be deprived of their liberty and their rights and options. Such advice and representation helps to ensure process for the child and family, both in and outside of court.³¹
- 7.6 **Yet legal aid provision for families of children who are, or may be, subject to orders depriving them of their liberty is insufficient.**
- Government has recently stated that between January 2018 and September 2022, only 19% of respondents to secure accommodation orders were legally represented (this includes but is not limited to parents of the child).³² The government were unable to say what the equivalent figure was for applications made to deprive a child of their liberty under the High Court's inherent jurisdiction. The requirement to satisfy a means test before receiving legal aid will be a contributing factor to the low proportions of respondents represented in secure accommodation order proceedings. We know that the legal aid means test can be a barrier to many families accessing legal aid in family law proceedings³³ due to the Legal Aid Agency's very low income and capital thresholds. Many carers living below the Joseph Rowntree Minimum Income Standards are excluded.³⁴

³⁰ See [part 2 Code of Practice \(General Functions\) of the Social Services and Wellbeing \(Wales\) Act 2014](#); and Government statutory guidance applicable in England - [Working Together to Safeguard Children 2018](#)

³¹ A right to a fair trial being protected under Article 6 of the European Convention on Human Rights

³² Lord Bellamy's [Answer](#) to Written Parliamentary Question by Lord Ponsonby of Shulbrede on 8 March 2023

³³ See the All Party Parliamentary Group on Kinship Care's May 2022 report [Lost in the legal labyrinth: How a lack of legal aid and advice is undermining kinship care](#)

³⁴ Hirsch, D. (2018.) [Priced out of justice? Means testing legal aid and making ends meet](#). Loughborough: Centre for Research in Social Policy, Loughborough University

7.7 **Orders to deprive children of their liberty affect the nature, level and quality of family life for both the child and their family.**

In doing so, they intervene in the child and family's right to a private and family life under Article 8 of the ECHR.³⁵ Families need to be represented to ensure that any intervention for the child and the family is necessary and proportionate. Notable are the following:

- **Children are being placed long distances from their family and support networks due to lack of local provision.**
For example, some children from English local authorities, are moved to secure children's homes in Scotland due to insufficient provision. Families should be informed and properly involved in decisions which may result in their children being moved so far away. They need to be able to balance up the different risks and to assess what level of contact is possible for the child if they move a significant distance.
- **Children are also being deprived of their liberty in potentially unsuitable accommodation.**
The [Supreme Court decided](#) that as a short-term measure, and in response to the lack of provision, a court can authorise the deprivation of a child's liberty in a placement which is not OFSTED registered. Not only is this legally complicated to understand for the child subject to the application and their families, it is also likely to be deeply worrying for them. Families, and children, need access to legal aid so they can secure independent legal advice to understand the different types of accommodation their children might live in. As well as who will be caring for them and how their welfare will be reviewed and assessed.
- **Applications for secure accommodation orders or orders to deprive a child of their liberty under the inherent jurisdiction may not be made alongside care proceedings, but as freestanding applications. This has implications for access to legal advice and representation for the child's family.**
Applications for both secure accommodation orders and orders under the inherent jurisdiction of the High Court are frequently made for children who are subject to care orders.³⁶ Care proceedings may have concluded some years before, the child and their parent or person with parental responsibility may not have had any access to legal advice for some years. Applications are also frequently made in respect of children who are looked after under voluntary arrangements under section 20 of the Children Act 1989 (or section 76 of the Social Services and Wellbeing (Wales) Act 2014) or further to agreements made with a parent or other persons with parental responsibility for them. The child's family may have never had access to independent legal advice or legal representation.

Specific proposals for reform are set out in full on the next page.

³⁵ A point underscored by the [Scottish Commissioner for Children and Young People recently in his response to the Scottish Government's Policy Position Paper on Cross-border Placements of Children and Young People](#)

³⁶ Nuffield Family Justice Observatory's February 2022 report '[Children subject to secure accommodation orders: A data review](#)' and their February 2022 report '[Children deprived of their liberty: An analysis of the first two months of the applications to the national deprivation of liberty court](#)'

8.1 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 family 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').³⁷

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'³⁸
- 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).³⁹ 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?

8.2 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 proceedings⁴⁰
- There are no changes needed to the provision of legal aid for the children subject to applications for secure accommodation orders. Children receive non means tested legal aid and only a low merits test applies.

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.

³⁷ 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

³⁸ 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](#)

³⁹ 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

⁴⁰ The merits test found in regulation 65 of the [Civil Legal Aid \(Merits Criteria\) Regulations 2013](#)



8.3 Legal aid reform: the proposed changes to section 25 of the Children Act 1989

Clause 10 of the [Children's Wellbeing and Schools Bill](#) proposes changes to section 25 of the Children Act 1989. This will allow children's services departments to deprive a child of their liberty in "relevant accommodation" rather than in a secure children's home. This is described as accommodation provided for the purposes of care and treatment of children but that is also deemed capable of being used to deprive a child of their liberty. Government needs to make clear provision for legal aid for both children and families in this situation.

Legal aid provision should be available as follows:

Where an application to deprive a child of their liberty in "relevant accommodation" is contemplated:

- Children and families who are on the edge of possible proceedings that may result in an order to deprive a child of their liberty in relevant accommodation should have access to a family help 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').⁴¹ This family help would be available to parents, those with parental responsibility and the child who would be the subject of the application.
- This mirrors our proposal for legal aid where an application is for a secure accommodation order or an order to deprive a child of their liberty under the High Court's inherent jurisdiction is contemplated. The family help would be remunerated at the same rate. For more information, please see [table 8.1](#) which sets out the proposal in full.

Where an application to deprive a child of their liberty in "relevant accommodation" is made:

- Legal aid to be available to parents and those with parental responsibility in line with what is available in care proceedings:
 - i) Parents and anyone with parental responsibility to receive non means tested legal aid
 - ii) 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 proceedings.⁴²
- Legal aid to be available to children in the same as it is where a secure accommodation order application is made. That is, children should receive non means tested legal aid and only a low merits test applies. Please see [table 8.2](#) for more information about the proposals in relation to secure accommodation order applications.

9

Further information

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

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⁴¹ 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

⁴² The merits test found in regulation 65 of the [Civil Legal Aid \(Merits Criteria\) Regulations 2013](#)