Child Protection Permanency Amendments Inquiry

Submission to the Commission for Children and Young People

November 2016

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# About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority that exists to assist Victorians with their legal problems.

We provide legal information, education, advice and representation to Victorians across a wide range of legal areas, including criminal matters, family separation, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt. We have 14 offices across Victoria and, through a mix of staff and private practitioners, we assist over 80,000 clients every year.

We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

We provide:

* free legal information through our website, our Legal Help line, community legal education, publications and other resources
* legal advice through our Legal Help telephone line and free clinics on specific legal issues
* minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court
* grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer
* support to people in the mental health system through non-legal advocates in the Independent Mental Health Advocacy service
* family dispute resolution services to help families make decisions about family law disputes away from court
* funding to 40 community legal centres and support for the operation of the community legal sector
* legal advice and education in the community.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account. We take on important cases and advocate for reforms that improve the law and make it fairer for all Victorians.

## Victoria Legal Aid’s role in the child protection system

Victoria Legal Aid has a significant presence in the Family Division of the Children’s Court, providing legal advice and representation services to Victorians who are involved in matters before the court. Most families with whom the Department of Health and Human Services (DHHS) Child Protection has involvement are low income and disadvantaged. Their poverty is often intergenerational and is multidimensional, with one or more of the following factors also generally present: lack of education, inadequate housing, social isolation, mental illness, family violence, or drug and/or alcohol abuse.

Child Protection is the largest program within VLA’s Family, Youth and Children’s Law Program and the third largest within VLA. VLA staff lawyers, private practitioners and community legal centres deliver child protection legal aid services across Victoria.

VLA currently delivers or funds the delivery of the following suite of child protection legal services:

* community legal education
* legal information (including referrals to legal and non-legal services)
* legal advice, through a free telephone advice line
* minor assistance
* duty lawyer services, and
* casework under a grant of legal assistance.[[1]](#footnote-1)

In 2015/16, the Child Protection program delivered around 4,500 duty lawyer services and 7,712 grants of legal assistance. Demand for services is increasing, with the number of grants of assistance increasing by 20 per cent between 2013/14 and 2015/16. Duty lawyer services increased by 9 per cent in the last year.

VLA is currently reviewing our child protection legal aid services. Our call for submissions on a consultation and options paper is open until Wednesday 21 December 2016.[[2]](#footnote-2) The objective of the review is to identify improvements to our child protection services, with a particular focus on:

* timely and appropriate service delivery
* better supporting children, especially children at risk of long-term disadvantage
* greater consistency of service delivery across Victoria
* improving the quality of services.

The review is looking at the path a client follows in the child protection system, at how services provided at various stages can be improved, and where service gaps may need to be filled. As part of this, we are also looking at the impact of family violence on child protection, and at the effectiveness of the current service model for particularly vulnerable clients such as children, Aboriginal or Torres Strait Islander clients, and clients with a disability. It is not intended to lead to a reduction in funding for child protection legal aid services but will explore options that result in more effective use of a limited legal aid fund.

# Executive summary

VLA supports the overarching goal of the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (the amendments): timely, safe, permanent homes for children who need state intervention to ensure that they have such a home. In our child protection practice, in our criminal law practice and in our family violence practice, we see the effects of childhood abuse and neglect, and the effects of systemic delay in finding safe, stable, permanent homes for vulnerable children. We agree that prompt support for families at risk is vital.

Our experience is that the implementation of the amendments has not been supported by the resourcing required to give effect to the amendments’ goals – resourcing of Department of Health and Human Services (DHHS) workers, Aboriginal cultural support planning and reunification planning support, public housing, drug and alcohol rehabilitation services, parenting support services, family violence survivor programs, men’s behaviour change services, counselling, mental health services, disability assessment and support services, and of support for kinship carers and foster carers. Court waiting times also remain long.

VLA sees good outcomes for children and families in the matters we are involved in when there are adequate support services in place, but legislation alone cannot operate to make that support happen. To date, we have not observed that the amendments have caused earlier case-planning, more cultural support planning, earlier referrals to lawyers, or improved compliance with the Aboriginal Child Placement Principle. These issues are exacerbated in regional areas where support services are harder to access.

VLA recommends an improved focus on early access to services, including to legal services.

Aspects of the amendments are also operating as impediments to prompt outcomes in children’s best interests. Twelve and 24-month time limits on DHHS case plan objectives and on the availability of family reunification orders have had arbitrary outcomes and created artificial distinctions between siblings. While unworkable for many families given the lack of support services, the time limits are particularly inappropriate for certain groups, including: young parents, parents recovering from family violence, parents in custody, and parents with disabilities that will prevent them from ever discharging their parental responsibilities without additional support.

The amendments have also meant that lawyers must take the amendments’ limitations into account in providing advice to clients. In cases where before the amendments lawyers would have provided advice to parents about the consequences of consenting to have their children go into care, knowing the order would guarantee conditions such as that the child have regular contact with the parents, that the parents would still have input into their lives or, in some cases, that the child’s carer would be specified, advice now must explain that there will be no such protections under the new suite of orders, meaning parents must now choose between agreeing to giving up parental responsibility or litigating. A lot of the middle ground to meet on has disappeared.

VLA recommends a range of amendments to the *Children, Youth and Families Act 2005*. A full summary of our recommendations follows in the next section. Our recommendations focus on restoring court oversight and flexibility in court orders, to promote best interests outcomes for children and to cater to the wide variety of families we assist.

VLA also suggests an updating review in 24 months’ time. It has been difficult to observe trends so soon after the amendments came into force. VLA is also currently reviewing our child protection legal aid services, with recommendations of our review due to be published in July 2017.

## About case studies in this submission

Each case study in this report represents a distinct case, known to the lawyer who provided the case study. The material procedural aspects have been retained for the case study. To protect clients’ anonymity, names have been changed and other identifying details including ages and children’s genders may also have been changed.

# Summary of recommendations

**Focus on early access to services and supports:**

**1. Increase the focus on early case planning by DHHS**

This may require further obligations under the legislation such as clearer time frames, or independent monitoring and oversight of compliance with the existing new provisions requiring case planning to start at substantiation.

**2. Increase the availability and timeliness of support services to families, particularly in regional Victoria**

We recognise that this may require significant additional resources or the re-allocation of existing resources.

**3. Increase the Children’s Court’s capacity to reduce wait times, particularly in regional Victoria**

**4. Continue to increase DHHS’ capacity to prepare cultural plans for Aboriginal and Torres Strait Islander children in out-of-home care**

**5. Increase the independent oversight and monitoring of compliance with the legislative requirements regarding cultural support planning and the Aboriginal Child Placement Principle**

**Remove fetters on the ability to focus on the child’s best interests:**

**6. Amend the *Children, Youth and Families Act 2005* to remove the relevance of 12- and 24- month out-of-home care timeframes**

**7. Amend the *Children, Youth and Families Act 2005* to allow conditions on all orders that siblings (and teen parents and their children) are placed together**

**8. Amend the *Children, Youth and Families Act 2005* to allow a full range of contact conditions on all orders**

**9. Amend the *Children, Youth and Families Act 2005* to allow court orders to enable parents to share parental responsibility even when they are not sharing care**

**10. Amend the *Children, Youth and Families Act 2005* to make orders that name the placement of the child available to the court**

**11. Insert a time limit into the *Children, Youth and Families Act 2005* for DHHS to respond to requests for internal case plan reviews**

**12. Amend the *Children, Youth and Families Act 2005* to reinstate the option of interim protection orders**

**13. Retain section 276 of the *Children, Youth and Families Act 2005* and clarify its role and function in proceedings**

**14. Review the effects of the permanency amendments again in 24 months**

# Introduction

VLA supports the overarching goal of the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (the amendments): timely, safe, permanent homes for children who need state intervention to ensure that they have such a home.

However, VLA’s experience to date is that the amendments are not necessarily successful in furthering that intended outcome.

The first section of the submission looks at the importance of early case planning and strong supports for families, and highlights our experience of what has been occurring in practice since the amendments. VLA’s practice experience and data suggests that the amendments have not had the intended impact in practice.

In the second section of this submission, we describe some specific features of the legislation which we believe are undermining the amendments’ goals.

Finally, we note that the amendments have only been in place for a short period of time. We suggest that the Commission recommend a further review be undertaken once more time has elapsed in which to observe the impact of the amendments in practice.

# Lack of impact of the amendments on early planning and strong supports

The Protecting Victoria’s Vulnerable Children Inquiry recognised that targeted early support to families in need is an effective way to secure children’s safety and wellbeing.[[3]](#footnote-3) The *Children, Youth and Families Act 2005* itself provides a framework not only for protecting children but providing community services to support children and families.

VLA often sees the difference that the provision of early supports to the family can make to children’s chances of being safely reunified with family in earlier timeframes.

Given these benefits of early support to families, VLA strongly supports the amendments’ emphasis on pre-court case planning for all families. Early case planning and early support is particularly pertinent for Aboriginal families, with the additional statutory requirements to develop cultural support planning for all Aboriginal children in out-of-home care also welcome.

VLA’s experience since the amendments took effect continues to highlight the importance of early supports. VLA lawyers have had some positive experiences of how families can be supported in order to achieve prompt, safe stability for children with their parents.

However, these good outcomes seem unrelated to the amendments and are the result of good practice by DHHS workers and support services. In many other cases, early support is still not occurring.

Kaira and Jordan’s experience demonstrates the benefits of intervention where referrals to services are made effectively, with a view to supporting families to engage with, and address, protective concerns:

**Case study: Kaira and Jordan – flourishing with strong supports from their local Aboriginal co-operative**

VLA acted for Jessa, a 30-year-old Aboriginal woman, and mother of two children, Kaira (ten) and Jordan (nine). At times Kaira and Jordan lived a chaotic lifestyle exposed to Jessa’s abusive partners and her consequent drug use. The children didn’t always get the support they needed, and DHHS intervened on a number of occasions.

The children were subject to a supervision order prior to the amendments, which was breached a number of times due to Jessa’s continued drug use. Following the amendments, the supervision order transitioned to a family preservation order.

While the family preservation order was in place, Jessa engaged well with the local Aboriginal co-operative. Jessa was referred to drug and alcohol services, a mental health worker, a mothers’ group and a family violence worker. With support from a co-op worker, Jessa reconsidered a relationship with a man she had been thinking about moving in with.

When DHHS applied to the court to extend the family preservation order, Jessa’s lawyer pointed out the changes Jessa had made to address the protective concerns. DHHS recognised this, and withdrew their application.

Jessa continues to parent her children without further DHHS involvement. The supports provided to her by DHHS and the co-op at a vulnerable time were fundamental to her recovery and her ability to provide a safe environment for her children that promotes their wellbeing. Kaira and Jordan are living with their mother, going to school, and involved in cultural life at the co-op.

Lila’s case study also shows a positive outcome when a DHHS worker allowed time for relevant supports to be put in place and take their effect. Lila’s story also demonstrates the restrictiveness of the amendments in practice and is an example of adjournments being sought to avoid the arbitrariness of the amendments’ timeframes leading to an outcome not in the child’s best interests:

**Case study: Lila – adjournments and supports used to reunify Lila with her mother**

Lila is two years old. Lila’s mother, Melinda, has been struggling with drug abuse problems for Lila’s whole life.

Soon after Lila’s birth, DHHS had prepared a reunification case plan, and a family reunification order was put in place by the Children’s Court. The case plan involved Melinda going into a residential drug rehabilitation program and Lila being reunited with her mother there.

However, Melinda’s first attempt at drug rehabilitation failed, and Melinda left the program. If the court had to make a new order at that time, it would have had to make a care by Secretary order. The DHHS worker acknowledged that a care by Secretary order would be very difficult for Melinda to accept, and it might set back her recovery if pursued. DHHS chose to adjourn the matter to allow Melinda another chance to attend a rehabilitation program under the existing family reunification order.

This time the rehabilitation program has worked for Melinda, and DHHS returned Lila to Melinda in the residential rehabilitation setting. Now that Melinda and Lila are living together, a family preservation order has been made.

These case studies show how a focus on supports and appropriate interventions can provide effective and stable long term outcomes for children and their families.

## Pre-court case planning

Despite the importance of early planning and supports and the amendments’ intentions in this regard, VLA data and practice experience suggests that the amendments have not promoted an increase in pre-court case planning.

DHHS can make a protective application to the Children’s Court (an application for a protection order) by emergency care or by notice. Protective applications by emergency care follow the removal of a child from the family on an urgent basis due to safety concerns for the child. When this occurs DHHS must apply for a protection order within 24 hours. DHHS protective applications by notice, by contrast, may involve DHHS engagement with the family prior to a court application and the development of a case plan for the child.

The VLA data in [Table 1](#Table1) compares the numbers of emergency care applications against by notice applications.[[4]](#footnote-4)

Table 1: Initial approvals – protection applications by emergency care and by notice

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Initial approvals for grants of legal aid in protection application matters** | **1 Mar 2015 to  29 Feb 2016** | **% of total** | **1 Mar 2016 to  31 Oct 2016** | **% of total** |
| Protection application – by emergency care | 3005 | 68% | 2432 | 74% |
| Protection application – by notice | 1430 | 32% | 875 | 26% |
| **Total** | **4435** | **100%** | **3307** | **100%** |

The data shows that in the year before the amendments took effect, 68% of initial grant approvals in relation to applications for protection orders involved protection applications by emergency care. Since the amendments, this has grown to 74% (although we note this data only covers a short period of time to date).

While there can be more than one grant per child protection legal matter, meaning that the data does not necessarily represent the number or proportion of proceedings, the data does suggest that a shift toward pre-court case planning has not occurred with the introduction of the amendments. On the contrary, data suggests DHHS practice may have increased the use of emergency care applications since the amendments took effect. More clearly, the data shows that a smaller proportion of legally aided parties are now involved in matters being brought by notice than by emergency care than in the period before the amendments took effect.

**Recommendation 1**

**Increase the focus on early case planning by DHHS**

This may require further obligations under the legislation such as clearer time frames, or independent monitoring and oversight of compliance with the existing new provisions requiring case planning to start at substantiation.

## Unavailability and delay for families attempting to access services

Before children can be reunified with their families, a variety of assessments and support services are often required. However, provision of these assessment and support services is impeded by long wait lists. Families also experience delays when their cases are listed for conference or matters are contested.

In VLA’s experience, delays in accessing support services and delays in the court system pose a significant barrier to timely and permanent reunification within the timeframes contemplated by the amendments.

In regional areas, these issues are exacerbated. Parents experience long wait times for support services, where they exist at all, and travel long distances to make appointments, sometimes travelling into metropolitan areas to access services.

The effect of the amendments, in practice, can be to reduce a child’s chances of reunification with their family when systemic delays prevent parents from addressing protective concerns within the timeframes set by the amendments.

### Accessibility of support services

VLA is acutely aware of the practical barrier to permanency that a lack of public housing accommodation is creating throughout Victoria. Wait times for housing are upwards of six months for priority clients in Warrnambool, for example. Anecdotally, lawyers report that the lack of public housing can put parents in a catch-22 situation: their applications for housing would be prioritised were there children on the application, but DHHS will not agree to reunification until housing is in place.

We have seen a similar experience across the regions in relation to accessing support services. Men’s behaviour change programs and family violence survivor services are experiencing some of the longest delays. In Morwell, for example, the wait time for the men’s behaviour change service is currently around six months. In the Melbourne Peninsula area, the men’s behaviour change program wait list time is approximately eight months for those with mandatory conditions on a court order, and longer for voluntary referrals.

Waitlists and lack of access to services and programs are more pronounced in regional areas. Many of the necessary services are based out of Melbourne or other centres, and travelling times are difficult and expensive for some parents. For example, a child living in the Wimmera region, outside Horsham, is disadvantaged by the fact that their father is less likely to have easy access to a men’s behaviour change program, or to counselling services, except perhaps in Stawell and Ararat.

Ella’s case study describes the effect of unavailability of services in regional areas:

**Case study: Ella – lack of services in regions, siblings separated**

VLA acts for Cathy, the mother of Alice, eight, and her brother Dean, four. Alice and Dean live separately in permanent foster care. The children both have intellectual disabilities, as does Cathy. They also have a sister, Ella, who is one-year-old.

After DHHS visited Ella and spoke with Cathy briefly, DHHS removed Ella from Cathy’s care and immediately developed a non-reunification case plan with a view to placing Ella into permanent care. DHHS had not offered any parenting skills support to Cathy.

Additionally, DHHS refused to allow Cathy to have unsupervised contact with Ella at home. DHHS wants Cathy to undergo counselling first. DHHS, however, have not engaged Disability Client Services to assess how to make this workable for Cathy. While Cathy waits for DHHS support, Ella is only allowed to see Cathy in a rural community hall some distance from where she and her mother had been living together at home. There is no public transport and Cathy has no car. Cathy has trouble getting there and sometimes cannot make it on time or at all.

DHHS have advised VLA that there is no room in the local residential parenting support service where Ella could live with Cathy while Cathy learns parenting skills.

There is an interim accommodation order in place, and the DHHS case plan is to send Ella interstate to live with Alice or Dean, a long way from Cathy.

In this instance, the lack of services for Cathy minimises Ella’s opportunity for timely reunification with her mother, and at worst undermines the possibility of reunification of child with mother altogether.

In many regions, access to drug and alcohol counselling is a major barrier to children’s timely reunification with their parents. This is evidenced in Katie’s case study:

**Case study: Katie – wait time for services on family reunification order**

VLA acts for Katie, the mother of two pre-school children who were removed from her care and placed into out-of-home care on an interim accommodation order. Katie lives in a regional area where demand for support services impacts on wait lists.

Katie’s early drug screens showed positive for cannabis and methamphetamines. The DHHS sought a family reunification order, with conditions for drug and alcohol assessment and treatment for Katie. However, DHHS had not assisted Katie in referring her to an appropriate drug and alcohol service.

Katie’s lawyer provided a warm referral to a drug counselling service. Katie consented to a six-month family reunification order. At the time the family reunification order was made, however, Katie still had a wait time for drug counselling of approximately four months.

DHHS does not always have the resources to refer proactively to support services (where those services exist), and vulnerable children need their parents to be supported with referrals. In cases like Katie’s, children are at risk of missing out on reunification when timeframes expire before parents can meet the conditions of orders. Ultimately, there is a risk that outcomes may be determined by support service waitlists.

### Court wait times

In many areas, court wait times can be a barrier to timely outcomes. In regional Victoria, where longer hearings are dealt with by visiting magistrates, the delay in having a contested hearing listed can be upwards of five months. In Geelong, wait times for booking a conciliation conference are currently approximately eight weeks.

In one region, a client is currently waiting ten months for court time to contest an interim accommodation order, as described in the following case study (in which medical information, as well as other details, have been changed to protect the family’s identity):

**Case study: David – court wait time**

VLA acts for Maxine, who has two children, including a son, David, who regularly suffers convulsive seizures. After a significant seizure at home, Maxine rushed David to hospital. During scans, doctors became concerned regarding a number of small historic fractures to David’s skull. Maxine reported that in the past David has had several significant seizures in which his head slammed into furniture during the convulsions, and that she always sought medical attention for him after those episodes and has not been informed of any fractures.

The doctors deemed Maxine’s explanation inconsistent with David’s injuries and informed DHHS. A protection application was issued and an interim accommodation order was made, excluding Maxine from the hospital and from living with either of her children.

Medical records from David’s previous hospital admissions are yet to be obtained by DHHS, and there is no conclusive medical or other evidence that rules out Maxine’s explanation. VLA, acting for Maxine, sought an urgent interim accommodation order contest by evidence. A conciliation conference is unlikely to resolve the matter as the DHHS case rests on medical evidence in dispute. The court informed the parties that for the length of hearing required, the earliest available date for a contest is in 10 months. A date for a full contest could be even further off.

Maxine says her exclusion from the home has severely upset David’s sister as well, as Maxine is not allowed to live with David or spend unsupervised time with either child. Maxine told us she is distraught, ‘*I haven’t done anything wrong, but my children and I are being made to suffer without me having the opportunity to prove my innocence for so long.’* While the matter is clearly serious, and the potential risks to David do need to be properly determined, a 10 month wait for an interim contest during which time Maxine cannot live with her two children is significant.

VLA recognises that swift progress of a matter from first court date to a final order is not always appropriate – matters need to be properly considered, options need to be explored, and children need their families to be given adequate time and support to address the protective concerns. However, resolution of a matter being affected by court delays is not in the best interests of the child and undermines the intent of the permanency reforms.

### Support for families is vital, as most children go home

Earlier in this submission (see [Unavailability and delay for families attempting to access services](#_Unavailability_and_delay)) we describe the contribution that inaccessibility of services can make to the failure of reunification plans. However, it is important to remember that most children do return home after DHHS intervention, so when unavailability of services does not prevent an eventual return home it might still cause a longer period in out-of-home care, and a longer wait for permanency.

The permanency amendments can appear to focus on permanency for children who are being removed from their parents, rather than on timeliness for children who are going to remain with their parents – children who VLA data suggests are in the majority.

The data in [Chart 1](#Table2) relates to legally aided child protection grants. When a lawyer (a VLA staff lawyer or a private practitioner or community legal centre lawyer doing legally aided work) closes a grant file, we ask them what the file outcome was. In this section we show what the file outcomes have been for files closed since March 2016.[[5]](#footnote-5)

VLA data indicates that at the end of most grant files, children are at home with at least one parent, or reunification is planned.

Chart 1: File outcomes – overall concluded files

We have also analysed this data in terms of different client characteristics.

Chart 2: Aboriginal and Torres Strait Islander clients



The data suggests that removal of a child into out-of-home care is much more likely in cases where the client is Aboriginal or Torres Strait Islander. This is an even more significant factor than homelessness.

However, more than 65 per cent of Aboriginal children go home or have reunification planned in legal aid grant matters.

Chart 3: Clients who have disclosed a disability



Removal of a child into out-of-home care is slightly more likely than average in cases where the client (who may be a parent or child) has a disclosed disability.

Chart 4: Clients who are experiencing homelessness



A client’s homelessness at the time of the application is correlated with reunification as a less likely outcome for the child involved in the matter.

Chart 5: Clients in custody



The fact that the client is in custody is the factor most closely correlated to removal outcomes of all the characteristics set out in [Charts 1–5](#Table2).

These outcomes need to be kept in kept in mind when we are focussing on the importance of prompt decision-making. Timeliness and permanency applies to the support that is offered to families to keep children with their families and to support parents to parent their children well into the future.

The availability of services has not been addressed by this legislation. Ongoing efforts to improve access to services are required, and in VLA’s view it is crucial that these issues are addressed within the next 18 months before the effect of the new timeframes regarding family reunification (which we discuss in the next section) is fully realised.

**Recommendation 2**

**Increase the availability and timeliness of support services to families, particularly in regional Victoria**

We recognise that this may require significant additional resources or the re-allocation of existing resources.

**Recommendation 3**

**Increase the Children’s Court’s capacity to reduce wait times, particularly in regional Victoria**

## Aboriginal and Torres Strait Islander children

The data in [Chart 2](#Table3) is consistent with other publicly available data and evidence in indicating that Aboriginal children are more likely than others to have their case result in removal from their immediate family.

Consistent with earlier in our submission, VLA lawyers working for Aboriginal clients report that good outcomes turn not on any effect of the permanency amendments, but on the capacity of DHHS and local support services to engage the family and meet their support needs. This is illustrated in Kaira and Jordan’s case.

While anecdotal, VLA lawyers report that they have not observed cultural support planning for Aboriginal children in out-of-home care improving since the amendments. Issues remain with non-identification of children as Aboriginal, an absence of and delays in preparing cultural plans for Aboriginal children, and failures to adhere to the Aboriginal Child Placement Principle in the legislation. Unfortunately, negative outcomes and experiences are relatively common. This would magnify the risk of Aboriginal children being permanently removed from family.

A regional VLA lawyer describes the impact of this in Beth’s case:

**Case study: Beth – children not identified as Aboriginal**

VLA acts for Beth, an Aboriginal woman with several young children. The children’s father is not Aboriginal. He was violent towards Beth, and Beth ended the relationship with him years ago. Beth fled the region fearing for her safety, reluctantly leaving the children behind with the father. Beth believed she had no options to have the children returned to her care, and she remains frightened of provoking the father.

DHHS became involved with the children, due to family violence perpetrated by the father toward his new partner, who is also non-Aboriginal. The children were placed on a family preservation order with the step-mother. The father was excluded from the home initially, but later returned to the home.

For a long period of time the file was unallocated and Beth was not notified of DHHS’ involvement. When contacted some months into the life of the order, Beth informed DHHS that she was Aboriginal and as such the children were also Aboriginal. DHHS did not record the children as being Aboriginal.

The children remained in the care of the non-Aboriginal father and step-mother for the duration of the order, resulting in the children having no access to their Aboriginal family or culture.

Beth said, *‘I feel like the Department deliberately ignored the fact the kids are Aboriginal, or just didn’t think it was important’*.

**Recommendation 4**

**Continue to increase DHHS’ capacity to prepare cultural plans for Aboriginal and Torres Strait Islander children in out-of-home care**

**Recommendation 5**

**Increase the independent oversight and monitoring of compliance with the legislative requirements regarding cultural support planning and the Aboriginal Child Placement Principle**

# Impact of some aspects of the legislative amendments

While VLA’s experience and data suggests that the amendments as a whole have not, or not yet, had the intended positive impact, some features of the amendments may, conversely, be exacerbating the issues already described.

As outlined below (see [Timeframes on family reunification](#_Timeframes_on_family)), VLA is of the view that the time limits applying to family reunification set by the amendments – with regard both to the appropriate permanency objective to pursue under a case plan and to the Children’s Court’s ability to make family reunification orders – may be leading to unnecessarily adversarial approaches, and are requiring lawyers to advise clients with an increased focus on the legislation’s technicalities, rather than simply on the broader best interests of the child.

VLA’s view is that a focus on the best interests of the child requires the court to be able to:

* review DHHS action throughout the time that a child is subject to DHHS interventions, and
* address children’s best interests flexibly.

This section explains some of the specific issues with the legislation, and VLA’s recommendations to resolve those issues. Many of the case studies raise multiple issues so will be referred to in multiple sections.

## Timeframes on family reunification

The amendments introduced new significance to whether a child had been in court-ordered out-of-home care for more than 12 or 24 months. VLA experience is that these timeframes can have an arbitrary effect, and can affect lawyers’ advice, DHHS conduct and options, and court options, often in ways that operate against the child’s best interests.

VLA recommends reform of all provisions giving significance to the 12 and 24 month thresholds, and suggests that timeliness should instead be effected by prompt provision of case-planning and services.

The following case studies give examples of some of the counter-productive effects of the time-counting.

### Arbitrariness of 12/24 month thresholds

VLA lawyers report that calculations of cumulative time in out-of-home care can be complicated, contrary to the simplification aims of the amendments. Lawyers report that there have been errors in counts included in DHHS reports, or in other reports the count has been left blank. As time has passed since the amendments, VLA lawyers say that fewer reports have left the count blank.

As a 12 month or 24-month threshold approaches – particularly the 24-month threshold – the arbitrariness of the threshold becomes clear.

In Sienna’s case, she was returned to her mother’s care after more than 24 months in court-ordered out-of-home care. This was possible before the amendments, but would be much more difficult under the amendments.

**Case study: Sienna – teen parent whose child had been out-of-home more than two years**

VLA’s client, Tali, fell pregnant when she was 16, and at 17 she gave birth to her daughter Sienna. Tali and her mother Jackie had several arguments and their relationship broke down soon after Sienna’s birth. Tali effectively became transient, couch-surfing and moving from house to house with Sienna every few days, and fell in with a crowd who used drugs and alcohol daily. It was not long before the DHHS became involved, and when Sienna was just an infant Tali had no real choice but to agree to a supervised custody order to her mother Jackie, while Tali herself lived in a youth residential care unit.

Over time Tali and her mother attended counselling and were able to mend their relationship. Tali accessed counselling and treatment for her drug use. When Tali was 18 she moved back in with her mother, and was attending to all of Sienna’s daily needs for over a year: nappies, feeds, child-care, play-time, medical appointments etc.

All three generations live in Jackie’s house and Jackie wanted to return to work. Jackie had told DHHS on multiple occasions that she now wants to step back and be the grandparent, supporting an order to Tali to resume care of Sienna.

Even while they have been living together, Sienna was ‘out of home’ under section 287A for more than two years.

By February 2016, Tali had been the primary carer for Sienna for at least twelve months, she was now an adult of 20 years of age, she had been able to get the help she needed to be clean from drugs, she had been attending TAFE, and she attended a mother’s group for young mums and a psychologist for regular support.

With DHHS refusing to agree to change their disposition to a family preservation order to Tali, the court was forced to squeeze the matter into the docket in February 2016 to ensure it could hear the matter prior to the March 2016 amendments, to ensure Tali had the opportunity to run her case. Tali was ultimately successful.

Skyla and Clara’s case study also illustrates some of the effects of the focus on time spent in out-of-home care, and the unreasonableness of the timeframes given the unavailability of services:

**Case study: Skyla and Clara – short family reunification order needs services to support it**

Skyla and Clara are four and two years of age. VLA acts for their mother, Sacha. There was a family preservation order in place to Sacha.

After a significant incident of violence against Sacha by her partner, DHHS bought an application to breach the family preservation order and removed the children from Sacha’s care. Sacha acknowledged that she was still in a relationship with her partner (who has mental health and substance abuse issues) and that they were about to lose their housing as it was too expensive for them. She acknowledged that she was not in a position to have Skyla and Clara in her care, and the matter was resolved with a family reunification order.

The family reunification order is operative for only a short time, until early 2017, as there had already been a period when Skyla and Clara were out of Sacha’s care prior to the previous family preservation order.

Given the short time period available for the family reunification order, Sacha’s VLA lawyer has kept the file open to monitor the progress with the conditions that both Sacha and her partner have to abide by. Of particular concern is the condition that Sacha’s partner must undertake drug and alcohol assessment. This condition is likely to be an issue given the relatively short time frame and the difficulty accessing services.

It seems unlikely that the conditions on Skyla and Clara’s family reunification order can be complied with in the short time available, given how difficult it is to access services. However, it would be a leap to suggest that this automatically means it is in the best interests of Skyla and Clara that they be permanently removed from their mother’s care in early 2017. VLA considers that the court should be given the discretion to determine orders after giving consideration to all the facts of the case, including in this instance the delays in accessing services.

VLA experience is that since the amendments the whole system around a child (to different extents, DHHS, the court, lawyers and parents) has an undue focus on the 12 and 24 month thresholds, blinkering the system to the child’s best interests in a more holistic sense.

**Case study: Saya – undue focus on time limit**

VLA acts for the mother of Saya (aged four). Saya has been living in out-of-home care due to her father’s use of violence and drug use. Before the amendments, Saya was on a supervised custody order living with an extended family member and nearing 24 months in out-of-home care. With the introduction of the amendments, DHHS was working towards a permanent out-of-home placement for Saya.

In the meantime, Saya’s parents had another baby in another region. In that region DHHS supported the mother to attend a residential parenting skills program with the baby. DHHS has since withdrawn their involvement in relation to the new baby as there are no further protective concerns.

Saya’s mother contested the DHHS application for a permanent care order in relation to Saya, on the basis that there were no current protective concerns in relation to Saya’s sister, and sought a family preservation order.

Following VLA advocacy, the matter settled with Saya returning to her mother on a family preservation order.

The lawyer’s view in Saya’s case is that the amendments’ focus on the 24-month threshold led DHHS to not properly consider the possibility of family preservation or reunification because Saya had been in out-of-home care for a period approaching the 24-month mark.

### Inconsistency between siblings

Many VLA lawyers have experienced the complication of different options for different siblings, depending on their time in out-of-home care. This also results in different levels of court oversight.

The fact that siblings are treated so differently before and after reaching the threshold of 24 months in out-of-home care indicates to VLA that the amendments are having the effect, in practice, of blinkering the system to the child’s best interests in many cases.

[Sienna](#SiennaStory) and [Saya’s](#SayaStory) case studies provide examples of this concern. [Jadien’s experience](#JadienStory) is different but her matter is being treated differently from her siblings’ purely due to the timeframes. Jadien has been out of her parents’ care longer than her younger siblings, and consequently her case is proceeding separately.

**Case study: Jadien – timeframes cause inconsistency between siblings**

VLA acts for Tracey. Tracey has four children with her partner Adam. The children have been removed from their care over a period of years.

The two younger siblings (aged two and four) were returned to their parents under a then supervision order in late 2015. VLA began acting for Tracey at the point where DHHS brought a breach application and removed the younger children from Tracey and Adam’s care again.

Reunification is not an immediate option. Because of time the children spent in out-of-home care before the supervision order, and the length of time that it has taken to get this matter to a directions hearing, there are limited options available to the court in terms of orders for these two youngest children. A family reunification order is a possibility (though a care by Secretary order is more likely).

Jadien is six, and is Tracey and Adam’s second child. She has been in out-of-home care for more than two years. She was included in the proceedings at a later stage, when the custody to Secretary order she was under was due to lapse. The options available to the court were even more limited, and meant that Jadien’s status needed to be dealt with in isolation from the rest of the proceedings. A care by Secretary order was the only order available to the court.

At a recent directions hearing, updated clinic reports were ordered for the two younger siblings, but Jadien was not included in the assessment.

Even if Jadien is not to live with her parents again, an assessment would be useful if DHHS is to support Jadien to have any ongoing relationship with her parents and siblings.

### Not all families fit the paradigm

The 12- and 24-month thresholds envisage a family with problems that could potentially be resolved within two years, if the parents receive timely support. The legislation before the amendments catered better for a broader range of situations, including:

* parents with disabilities, who need ongoing support to parent their children (see for example Robert and Brayden’s case study)
* teen parents, who often need more than two years to become adult parents, but will be able to make that progression with the right support (see for example Sienna’s case study)
* parents who are family violence survivors, and need time to recover, and extra support to address children’s trauma-related behaviours
* parents who are incarcerated and require the opportunity of accessing housing and support services potentially beyond the legislated timeframes.

**Recommendation 6**

**Amend the *Children, Youth and Families Act 2005* to remove the relevance of 12- and 24- month out-of-home care timeframes**

**Recommendation 7**

**Amend the *Children, Youth and Families Act 2005* to allow conditions on all orders that siblings (and teen parents and their children) are placed together.**

## Reinstate or increase independent oversight options

As described in the previous section, the 12/24 month thresholds operate to limit the range of case plan objectives and orders DHHS and the court might consider.

The amendments also restricted or removed the availability of court orders that retain parental responsibility for the parents or that name the carer, and of conditions on orders. As a result, DHHS has increased discretion to place children, decide on parents’ involvement, make medical decisions, and be responsible for Aboriginal children’s contact with their culture.

VLA expressed concerns before the amendments came into force, that the pressure created by the 12 and 24 month thresholds and the removal of the availability of court oversight in a variety of ways would make proceedings more adversarial and lead to longer proceedings with unnecessary contests, because parents are less likely to consent to orders with fewer protections or conditions.

This oversight can occur by allowing parents more ability to return to court after circumstances change, and by increasing the range of orders and conditions the court can impose. The positive impact of independent oversight was evident in [Sienna](#SiennaStory) and [Saya’s](#SayaStory) case studies.

This section discusses current options for independent oversight, and recommends changes.

### Conditions on orders

Conditions on orders are a way to ensure ongoing independent oversight of out-of-home and permanent care for children.

Conditions can allow the court to have oversight of children’s placements, whether children are placed with their siblings, how often they see their parents, and who has decision-making responsibilities in children’s lives.

Conditions are important to guarantee an ongoing relationship with parents that is not dependent on the parents’ relationship with a carer or with DHHS. Contact with siblings, parents, and other family members is about the identity of the child.

As [Abed](#AbedStory) and [Robert and Brayden’s](#RobertBraydenStory) case studies show, as well as endangering a child’s right to family, the unavailability of contact conditions can increase litigiousness as parents are less likely to consent to an order with no contact conditions.

Abed is a child whose orders lost their conditions in March 2016. Later in our submission we recommend that a subsequent review of the amendments examine what has happened to ongoing contact with parents for children in Abed’s position.

**Case study: Abed – contact conditions removed in March 2016**

Abed is five years old and has complex health needs. His father is not involved in his life. His mother, Souhaila, has a mild acquired brain injury and mental health issues that prevent her from resuming primary care for Abed. Abed lives with long-term foster carers in a stable placement and has done so for the past 20 months.

Souhaila remained very involved in Abed’s life after he went into care and this has been encouraged by his carers. The conditions on his order required that she be notified and able to attend hospital appointments and stays, school events, and regular fortnightly weekend visits with Abed together with dinner after-school each Wednesday, ensuring that she remained in contact with his development and health needs and preserving his relationship with her.

Until March 2016, all of Souhaila’s contact with Abed was guaranteed by conditions on a custody to Secretary order, and by the guardianship role that she maintained even though Abed had lived apart from her for more than two years.

Following the amendments, Abed’s order transitioned into a care by Secretary order (since he had been in out-of-home care for longer than 24 months), and all conditions ceased to exist. This also means Souhaila no longer has parental responsibility for Abed.

If something were to impact her relationship with the carers, Souhaila would have no means to ask the court to provide oversight of her ongoing relationship with Abed, and Abed would be relying on Souhaila applying to VCAT to challenge any case plan decision that the DHHS makes in relation to her contact with Abed. Souhalia also has a comprehensive history of Abed’s medical condition and care, and it would not be in Abed’s best interests, particularly given his complex health needs, that she cease to be involved in his care.

Removing conditions on orders fails to cater to the wide range of family situations that exist, and promotes litigiousness when none of the available options is the most suitable:

**Case study: Robert and Brayden – no consent to permanency without conditions for contact**

Until Robert and Brayden were eight and ten (respectively), they lived with their parents. Both parents are deaf. Their mother, Jane, has an intellectual disability, and their father may too (assessment is difficult), so their grandmother lived with the family and helped to look after Robert and Brayden.

When their grandmother became elderly and moved into a rest home, Robert and Brayden’s parents struggled to parent them, with some support from another family member. Ultimately DHHS intervened and placed the boys with that family member after many attempts at parental improvement. There was never any physical abuse, but there was environmental neglect and the parents were certainly struggling to cope.

Before the amendments Brayden and Robert were placed on a guardianship order, as the parents were deemed not to have capacity to make long term decisions. Brayden and Robert continued to have contact with their parents, staying with them for three nights over every weekend by agreement with the family carer.

After the amendments, the matter came up for an extension and DHHS was asking for a permanent care order to the family member.

VLA was acting for their mother, Jane, and advised of the consequences of a permanent care order that would only guarantee four contacts between Brayden and Robert and their parents in the first year of operation.

Brayden and Robert still see their parents as their parents. The parents also consider themselves to be the boys’ parents, and are consulted about major decisions, but the orders available under the amendments do not reflect the reality of this shared care arrangement.

The boys remain under a care by Secretary order at the moment, because the arrangement the family would have agreed to is no longer an option since the amendments. Before the amendments Jane could have consented to a joint permanent care order with the current contact arrangements confirmed in the order.

Brayden and Robert’s case study illustrates the inadequacy of the amendments’ simplified orders without conditions to reflect arrangements made in the children’s best interests.

It also shows the consequent increase in adversarial advice to parents when appropriate orders are not available. Brayden and Robert’s lawyer was not the only VLA lawyer to have advised against consenting to kinship care without conditions, when with conditions the order might have represented a good arrangement for the child and the parents.

The outcome for Brayden and Robert (remaining on a care by Secretary order) does not represent permanency for them.

The range of orders available – and the lack of conditions – is similarly inappropriate in a range of cases where parents are able to parent their children well with ongoing support. This will include many parents with disabilities, as noted earlier (see [Not all families fit the paradigm](#_Not_all_families)).

**Recommendation 8**

**Amend the *Children, Youth and Families Act 2005* to allow a full range of contact conditions on all orders**

**Recommendation 9**

**Amend the *Children, Youth and Families Act 2005* to allow court orders to enable parents to share parental responsibility even when they are not sharing care**

### Naming of carers

Another important way that a Children’s Court order can provide some accountability for good outcomes for the child is to name the placement of the child in the order. This option was available to the court prior to the amendments via the availability of supervised custody orders and custody to third party orders.

VLA’s view is that the child (if old enough) should be provided the opportunity to participate in placement decisions, particularly should a placement break down. Without the placement being named on the order, children can be moved, even repeatedly, without independent oversight or the child or family’s participation in those decisions.

It is currently possible that a child could be placed in secure welfare without independent oversight. VLA is aware of section 306 of the *Children, Youth and Families Act 2005*, but does not consider this a substitute for naming the placement on the order, as it is triggered in much more limited circumstances. A child could be in and out of secure welfare over a period of months without the section being triggered.

Consent to orders may also be more likely on the part of parents if the placement of the child is named on an order, as this means the parents know where the child will be residing and they know they will be notified if that changes. Where the placement breaks down and the order is breached, the matter then returns to court for its oversight of the next placement decision, based on the best interests of the child.

These issues were canvassed by VLA in more detail when we consulted on changes to our legal aid grant eligibility guidelines for child protection from late 2015, in response to the permanency amendments. Our stakeholders noted especially the importance of placement decision in situations where Aboriginal kinship care may be an option but has not been fully pursued.

We ultimately introduced a new guideline to fund a child or parent to initiate (or respond to) an application to revoke an existing protection order, given the importance of the child in particular being able to have a say on placement decisions. However, due to the restricted availability under the amendments of alternative orders and conditions that the court could make even if it did revoke an existing order, the guideline could only usefully fund clients to initiate proceedings in very narrow circumstances.[[6]](#footnote-6)

**Recommendation 10**

**Amend the *Children, Youth and Families Act 2005* to make orders that name the placement of the child available to the court**

### Internal and external reviews of DHHS case plans

Children and families are able to seek a review of a DHHS case plan decision, which is a government or administrative decision, first internally and subsequently, if not satisfied with DHHS’ internal case plan review, they can proceed to the Victorian and Administrative Tribunal (VCAT) for an external review of the case plan.

As described above (see [Reinstate or increase independent oversight options](#_Reinstate_or_increase)), case plan decisions have taken on additional significance due to the amendments, which have resulted in increased DHHS discretion and less court oversight on key matters such as placement of children, parents’ involvement and contact with children, medical decisions and Aboriginal children’s contact with their culture.

Among the new grant guidelines that VLA introduced in response to the amendments, VLA’s new State Family Guideline 4 provides aid for parties to be legally assisted to apply to DHHS for an internal review of a case plan and to apply to VCAT in certain circumstances.

It is too soon since the amendments for VLA data to show definite trends in the operation of the current mechanisms for oversight of DHHS. Initial VLA data about internal and external reviews of DHHS case plans shows limited uptake. No internal case plan review grants were approved until June 2016, and then from June until September two or three grants were approved every month. Training in relation to this new guideline has only been completed relatively recently.

However, we note that internal review might not be a popular option because of the time it can take. VLA also has concerns about how slowly DHHS internal case plan reviews are proceeding. This may also prevent some matters progressing to external review at VCAT in a timely manner. Legal aid grants for external case plan reviews at VCAT have also been applied for only rarely to date. One VLA lawyer at a regional office noted she is still waiting for a decision on an internal DHHS review she filed just over three months ago.

**Recommendation 11**

**Insert a time limit into the *Children, Youth and Families Act 2005* for DHHS to respond to requests for internal case plan reviews.**

## Interim protection orders

VLA also recommends the reinstatement of interim protection orders as an option where reunification is proposed but final orders are premature. This would allow for adequate testing of the proposal, to warrant the making of a final order.

In cases like [Katie’s](#KatieStory) – where a short family reunification order has been made although timeframes seem unlikely to be met due to wait lists for services – an interim protection order would be more appropriate.

An interim protection order could would enable services to be set up to:

* bridge short periods of time before 12-month thresholds arise
* enable testing of access to supports to ascertain whether the next order should be a family preservation or family reunification order.

Similarly, in cases like [Lila’s](#LilaStory), where a final order was not appropriate, an interim protection order could have been used to create a period to trial Melinda’s progress in her rehabilitation program, instead of adjourning the matter.

**Recommendation 12**

**Amend the *Children, Youth and Families Act 2005* to reinstate the option of interim protection orders**

## Section 276

Section 276 ensures Children’s Court oversight of DHHS service provision when the court is making a protection order. The section requires the Children’s Court to be satisfied that DHHS has taken reasonable steps to provide services in the best interests of the child before the court can make a protection order.

VLA experience has been that section 276 has been an important safeguard for parents in instances where DHHS support has not been adequate. If the significance of the 12- and 24- month thresholds are not removed in favour of the court’s discretion to make orders in the best interests of the child, section 276’s application will need to be reconsidered for extension and clarification.

Section 276 has also been used to prevent orders when DHHS interventions have been harmful rather than merely inadequate, as the following case study shows.

**Case study: Sunny and Benny – importance of section 276**

VLA’s client, Sonya, aged 29, is a single parent to four children. This proceeding relates to the two youngest children, Sunny (six) and Benny (three). Sunny has been out of her mothers’ care for more than 24 months, cumulatively. Benny has been out of his mother’s care for six months so far.

The DHHS case plan was for family preservation and reunification. Benny was already in Sonya’s care and Sunny was on an increasing contact schedule, including weekly consecutive overnights in the family home. DHHS referred the case for in-home parenting support for the purpose of maintaining the children in Sonya’s care. Sonya needed help with parenting skills, with maintaining an adequate home environment, and with keeping up good dietary practice.

The allocated support worker went beyond her qualifications and provided Sonya with weekly sessions of complex trauma counselling to address Sonya’s own impoverished childhood. This work resulted in Sonya decompensating and losing all coping ability, which lead DHHS to remove both children and change its case plan to permanent care.

The court accepted that the support worker’s intervention caused the change of case plan to permanent out-of-home care.

VLA relied on section 276(2)(b) to submit to the court on Sonya’s behalf that the court did not have the power to make a protection order because it could not be satisfied that DHHS had taken all reasonable steps to provide the services necessary to enable Sunny and Benny to remain in Sonya’s care. The court agreed, and made an extended interim accommodation order, with conditions to promote reunification.

Without section 276, Sonya would not have been able to hold DHHS to account for the steps taken in order to maintain the children in their mother’s care. The court would have had the option to make care by Secretary orders for both children, removing all conditions for Sunny and Benny to have contact with their mother and removing all supports for Sonya.

As Magistrate Bowles has observed,[[7]](#footnote-7) ‘the legislation does not expressly provide for the situation in which the child has been in out-of-home care for a period that exceeds 24 months.’

VLA recommends that the court have returned to it the ability to make a full range of orders, with conditions, in the best interests of the child in every instance. However, the court’s powers under section 276 could also be more clearly stated, particularly if the timeframes are not ultimately removed.

**Recommendation 13**

**Retain section 276 of the *Children, Youth and Families Act 2005* and clarify its role and function in proceedings**

## Adoption

VLA has not had any recent practice experience in relation to adoption in the child protection context. The Commission has noted DHHS information stating no adoptions have occurred since the permanency amendments.[[8]](#footnote-8) VLA data shows that in at least one instance DHHS has initially sought adoption as the outcome (although that adoption did not take place).

Given the very limited role that adoption plays, VLA supports consideration of whether adoption should be removed as an option for a permanency objective under section 167, or perhaps re-positioned to last place in the s. 167 hierarchy of permanency objectives.[[9]](#footnote-9)

# 2018 review recommended

Throughout this submission we have noted the difficulty in observing trends less than a year after the amendments came into force.

We strongly suggest that another review of the legislation, whether further amended or not, will be required to have confidence that we understand the impact of the amendments. A review would be more fully informed after a cohort of children have spent 24 months under the amendments, suggesting that a review two years on, in late 2018, would be very valuable.

By 2018, trends should be more visible in:

* outcomes for children
* VLA data regarding uptake of new legal aid options since March 2016
* court data showing how long matters are taking to resolve.

VLA would also be interested to see research into the outcomes by 2018 in situations where substituted orders meant that children who had been on custody to Secretary orders with court-ordered conditions transitioned to care by Secretary orders with no conditions when the amendments came into force, such as in [Abed’s case study](#AbedStory).

There will have been many children who used to be guaranteed (for example) regular contact with their parents under conditions of orders. Where these conditions lapsed under the amendments, and contact became at the discretion of DHHS or permanent carers, some contact may have continued but VLA is aware that other contact reduced. By 2018 longer term evidence will be available about what contact has continued where it is no longer mandated by a court order.

VLA is also reviewing our child protection legal aid services. That review is due to report back in July 2017, and its outcomes could usefully feed into a 2018 review of child protection permanency legislation.

### VLA data

As previously mentioned in our submission, VLA changed its grant guidelines in response to the amendments. We have been tracking the uptake of the new guidelines since March 2016.

Data in our submission showed some uptake of the options, but more time would be needed to observe and explain a general trend. There are other areas in which this is also the case. For example, it is too early for our data to be conclusive about whether changes are occurring in the adversarial nature of proceedings, which might be seen in greater use of contests rather than consent orders over time.

The next two graphs show what VLA data can tell us about overall trends under the new grant guidelines to date.[[10]](#footnote-10)

Graph 1: Grants for interim accommodation order appeals to the Supreme Court (State Family Guideline 3)

2013/14 extension count
July: 1
August: 1
September: 2
October: 2
November: 0
December: 0

2014/15 extension count:
July: 1
September: 0
October: 1

2015/16 extension count:
May: 8
June: 3

2016/17 extension count:
July: 1
August: 1
October: 1

Soon after the amendments, a peak occurred in applications for legal aid for interim accommodation order appeals. Since then, grant numbers have remained low and steady, but again this is a very short time period over which to seek a trend.[[11]](#footnote-11)

The VLA guideline changes clarified that grants for interim accommodation order appeals are available, so may have raised awareness of the grant, but we consider it more likely that the spike is a result of the urgency to contest placements in out-of-home care in the Supreme Court.

Note that each grant might not represent an individual case, as some cases involve more than one VLA-funded lawyer, and note also that appeals may be instigated by DHHS or by another party.

We want to continue monitoring the uptake of this guideline to observe any trend.

[The next graph](#Graph2) shows grants for interim accommodation order contested hearings (State Family Guideline 2.3).

The graph shows a spike in the months immediately following the amendments, but since then grant numbers have returned to more like those in the months immediately preceding the amendments. Again, it is simply too soon to tell what the long term trend is.

Graph 2: Grants for interim accommodation order contested hearings (State Family Guidelines 2.3)

2013/14 extension count (approx)
Jul: 75
Aug: 55
Sep: 75
Oct: 85
Nov: 75
Dec: 80
Jan: 55
Feb: 90
Mar: 65
Apr: 65
May: 85
Jun: 65

2014/15 extension count:
Jul: 60
Aug: 67
Sep: 66
Oct: 65
Nov: 68
Dec: 65
Jan: 34
Feb: 45
Mar: 62
Apr: 47
May: 30
Jun: 51

2015/16 extension count
Jul: 46
Aug: 36
Sep: 54
Oct: 35
Nov: 36
Dec: 37
Jan: 39
Feb: 42
Mar: 43
Apr: 51
May: 74
Jun: 70

2016/17 extension count
Jul: 39
Aug: 44
Sep: 39
Oct: 42


This difficulty in observing any trends so soon after the amendments came into force contributes to VLA’s view that another review in 2018 is warranted.

**Recommendation 14: Review the effects of the permanency amendments again in 24 months.**

1. Details of the types of services provided in these categories are located in the VLA Annual Report <http://annualreport.vla.vic.gov.au/glossary>. [↑](#footnote-ref-1)
2. [www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/child-protection-legal-aid-services-review](http://www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/child-protection-legal-aid-services-review) [↑](#footnote-ref-2)
3. Report of the Protecting Victoria’s Vulnerable Children Inquiry (January 2012), volume 2, page 139 and page 147. [↑](#footnote-ref-3)
4. Legal aid grants include those of VLA staff lawyers, private practitioners and community legal centre lawyers. Note that the chart on the left is for a full 12 months to 29 February 2016. The chart on the right is only for the first eight months since the amendments (1 March 2016 to 31 October 2016). The charts show grants in relation to two different groups of proceedings:

   Protection order applications by emergency care (the larger, blue section on both charts)

   Protection order applications by notice (the smaller, orange section on both charts).

   There is one approval per client who receives legal aid, so when multiple clients in one proceeding are represented, that proceeding will be represented multiple times in the data. Note also that the charts exclude grants for best interests lawyers for children under 10 years of age (or otherwise unable to provide direct instructions), because our data on best interests lawyer grants do not distinguish between protection applications and other applications, nor within protection applications between applications by emergency care and applications by notice. However, best interests grants are small in number, for example 160 in total from 1 March 2015 to 28 Feb 2016. [↑](#footnote-ref-4)
5. To prepare these graphs, we grouped file outcomes where:

   * The child remained with the parent (for example, family preservation orders)
   * Reunification is planned but the child might not yet be back with the family (family reunification orders)
   * The child has been removed from the parents into out-of-home care (for example, care by Secretary orders)
   * There is a temporary (interim) arrangement and it is unclear whether the child has been removed or not (for example, interim accommodation orders)

   Some outcomes are excluded from the graphs, because they did not indicate a particular reunification or removal outcome for the child (for example, therapeutic treatment orders or family violence intervention orders).

   Note that clients will be represented in multiple charts (for example, one client might be represented as “non-Aboriginal”, “not homeless”, “no disclosed disability”, and “in custody”).

   Note also that grants may be for various family members within the same matter, for example a mother, father and the child, so a matter related to one child may be represented more than once in the same chart. Courts or the DHHS might have more complete data about outcomes per matter as opposed to per client. [↑](#footnote-ref-5)
6. See [www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/child-protection-guideline-changes/change-or-breakdown-in-childs-placement](http://www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/child-protection-guideline-changes/change-or-breakdown-in-childs-placement) for more information. [↑](#footnote-ref-6)
7. *DHHS and K* [2016] VChC2, 29 February 2016, Magistrate Bowles at paragraph 58. [↑](#footnote-ref-7)
8. Footnote 31 to the Consultation Paper. [↑](#footnote-ref-8)
9. This would also accord with *Bringing them Home* Standard 7: Adoption as a last resort: Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (April 1997). [↑](#footnote-ref-9)
10. In reading these graphs, please note:

    The financial years labelled run 1 July to 30 June each year.

    All graphs end at 31 October 2016.

    The blue bars (extension count) represent aid approved. That is, a lawyer has applied to VLA for legal aid, and VLA has approved the grant in that month. [↑](#footnote-ref-10)
11. Note that before March 2016, there was no data collection field specifically for IAO appeals, so data from before March 2016 refers to Child Protection grants for the Supreme Court, which are assumed to be IAO appeals. [↑](#footnote-ref-11)