State Family (Child Protection) Guidelines

Consultation Paper

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# About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority established to:

* provide legal aid in the most effective, economic and efficient manner
* manage our resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state
* provide improved access to justice and legal remedies
* pursue innovative means of providing legal aid to minimise the need for individual legal services in the community.

VLA assists people with legal problems involving family breakdown, child protection, family violence, criminal matters, social security, mental health, discrimination, guardianship and administration, fines, immigration, tenancy and debt.

VLA’s Family, Youth and Children’s Law Program assists people to resolve their family disputes to achieve safe, workable and child-focused parenting and care arrangements. We also assist parents to build their capacity to resolve future disputes without legal assistance.

The Program’s core function is to provide:

* duty lawyer, legal advice, representation and information services in Commonwealth family law matters and at the Family Law Courts, including in parenting disputes, family violence matters and financial and child support matters
* lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court
* independent children’s lawyers who promote the interests of children at risk and help judicial officers make good decisions
* duty lawyer, legal advice, representation and information services to children and parents in the Children's and Magistrates' Courts of Victoria, including in child protection and family violence matters
* legal advice and education in the community.

Our clients are people who are socially and economically disadvantaged, people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse (CALD) backgrounds and those who live in remote areas.

In addition to assisting people resolve their legal problems, VLA works to address the barriers that prevent people from accessing the justice system. We contribute to law reform, influence the efficient running of the justice system, and ensure the actions of government agencies are held to account. We take on important cases and campaigns that aim to improve the law and make it fairer for all Victorians.

# About this consultation

Significant amendments to Victoria’s child protection legislation – the *Children, Youth and Families Act 2005* – are due to come into effect by March 2016.[[1]](#footnote-1)

These amendments will change the way child protection matters are handled by the Department of Health and Human Services (DHHS) and the Children’s Court.

Almost every party who is legally represented in Children’s Court Family Division (child protection) proceedings in Victoria obtains that legal representation under legal aid funding. Either the VLA staff practice directly represents a party or VLA arranges funding for their legal representation by a private practitioner or community legal centre lawyer.

If VLA does not adjust our child protection funding guidelines to respond to the changing child protection landscape, the availability of legal assistance to children and families will be reduced.

VLA will commence a comprehensive review of child protection legal aid services in the first quarter of 2016 and this review will include consideration of any changes to current legal aid funding guidelines. However, given the impact of the upcoming legislative amendments, VLA considers that some guideline changes may be needed now, ahead of the review of child protection legal aid services.

We appreciate that this may result in two suites of child protection guideline changes within a short period of each other; one suite of changes coming into effect in March 2016 to respond to the new legislation, and a second suite of changes to implement recommendations arising from the review of child protection legal aid services. Not doing so, however, may result in a disconnect between our guidelines and the way child protection matters are handled by the DHHS and the Children’s Court. The effect of this would be to leave vulnerable children and parents without legal advice or representation at key points.

This Consultation Paper puts forward 6 proposals which we believe are needed to **substitute** the current child protection legal aid service to ensure clients continue to receive the same level of representation once the amendments take effect.

Your feedback is valuable to us. Your comments will provide us with an opportunity to test our assumptions and identify any issues that we may not have identified.

The feedback will assist VLA to refine the proposals and prepare guideline changes.

# How to make a submission

Members of the public and other stakeholders are invited to make written submissions in response to this consultation paper. Submissions are due by **Wednesday 16 December 2015.**

We are committed to a transparent consultation process that enables all interested people to access this consultation paper as well as the submissions we receive in response. As such, all submissions will be published on the VLA website after the close of the submission period. If you do not want your submission published, please contact us on the email address below to discuss further.

Submissions are welcome on any aspect(s) of this paper. Submissions can, but do not need to, address every proposal. Submissions **must** be in Word format.

A submission template has been provided, and is available for download on the VLA website, to assist you in preparing your feedback.

Please send submissions by email to childprotection@vla.vic.gov.au.

# Background and context

Victoria’s child protection system is governed by the *Children, Youth and Families Act 2005* (CYFA). The CYFA mandates that the State act to protect children in certain circumstances, including on the grounds of a significant risk of harm to a child. The CYFA also provides for community services to be provided to support children and families.

The State’s obligations under the CYFA are performed by the DHHS. Child Protection practitioners at DHHS are delegated to act as protective interveners to respond to notifications of suspected child abuse or neglect, carry out investigations and, if an allegation is substantiated by the investigation, to reduce the risk to the child or young person. This may include taking a matter before the Family Division of the Children’s Court to ensure children and young people are protected and safe from harm, including by placing them under DHHS formal supervision or by removing them from the family.

In recognition that the removal of a child from the family is one of the most serious actions that the State can take, the CYFA also aims to encourage the participation of children, young people and their families in the decision-making processes that affect their lives, particularly for children and young people when the State initiates legal proceedings via a protection application. Under the CYFA, a child aged 10 years or more must be legally represented in Children’s Court proceedings where a decision is sought about their removal or placement in protection (unless the Court determines that the child is not mature enough to give instructions to a legal practitioner). The Court may also adjourn proceedings to enable a child’s parents to obtain legal representation.

## Child protection legal aid services

VLA provides funding for legal advice and representation services to Victorians who are involved in matters before the Family Division of the Children’s Court. VLA staff lawyers, private practitioners and community legal centres (CLCs) provide child protection legal aid services.

VLA runs a specialist child protection legal advice telephone service. The VLA staff practice, private practitioners and CLC lawyers provide duty lawyer services at Children’s Courts across the state each day. As most matters do not resolve at first mention stage, VLA funds ongoing legal representation for children and parents under a grant of legal assistance.

In 2014-15, VLA funded 6,704 grants of legal assistance, up 8 percent on the previous year. This accords with growth in the jurisdiction more generally, including in notifications to DHHS and DHHS applications to the Children’s Court.

## Upcoming Child Protection Review by VLA

VLA’s *Strategy 2015-18* commits us to undertaking a comprehensive review of child protection legal aid services to ensure VLA is delivering high quality legal services and making the most economic use of a limited legal aid fund.

The review, scheduled to commence in the first quarter of 2016, will consider the efficiency, effectiveness and quality of the child protection legal service delivery model to ensure we are funding an appropriate service mix and that those services target the right people, at the right intensity and at the right time.

Where the review recommends changes to the service delivery model that require additional changes to legal aid funding guidelines, these will be considered at the end of the review process.

## Legislative amendments

In March 2016, legislative amendments to the CYFA passed by the Victorian parliament will come into effect. The legislative amendments will introduce significant reforms; including a new suite of Children's Court orders and a two year timeline to achieve reunification of children placed in out of home care.

Under the new provisions, once a child has been in out of home care beyond two years (cumulative), the Children’s Court will no longer have the power to make an order that aims for reunification of the child with their family, even where protective concerns have been addressed or where reunification remains a chance but more time is needed to address the issues of concern.

These changes will place additional responsibilities on the DHHS for ensuring the suitability of case plans relating to a child, conducting regular case plan reviews (for children on protection orders) and ensuring appropriate actions are being taken to secure support for the child and the family. The oversight provided by the Children’s Court will be substantially reduced.

The timing and significance of these reforms necessitates a consideration of VLA’s current guidelines in advance of the review recommendations.

## Impact of the legislative amendments on current child protection legal aid services

VLA’s child protection funding guidelines currently focus legal assistance on children, young people and parents responding to child protection applications brought by the DHHS in the Family Division of the Children’s Court.

Assistance is provided under one of two *State family guidelines:[[2]](#footnote-2)*

* *State family guideline 1* covers grants to a child
* *State family guideline 2* covers grants to parents, guardians and other interested parties to respond to DHHS proceedings (but not to initiate their own proceedings).

VLA does not apply the means test to, and does not require a financial contribution from, children and young people in Children’s Court proceedings under *State family guideline 1*.

Most grants under *State family guideline 2* are made to parents, but VLA may also provide a grant to a person who is not a parent in exceptional circumstances set out in the guideline.

In practice, almost every party who is legally represented in child protection proceedings in the Children’s Court in Victoria obtains that legal representation under legal aid funding. This is because children aged 10 or older are required to be legally represented in child protection proceedings, and most families with whom DHHS Child Protection has involvement are low income with often multidimensional disadvantage including lack of education, inadequate housing, social isolation, mental illness, family violence, or drug and/or alcohol abuse. These parents cannot afford to pay for private legal representation and they generally meet VLA’s means test for grants of legal assistance.

If the current legal aid child protection funding guidelines are not adjusted to respond to the amending legislation, child protection legal services will not be provided at the same level of assistance. As a result, children and parents in the child protection system will engage with, and be subject to DHHS decisions, unassisted by legal advice or representation at key points where currently they would have legal help and support.

# Child Protection Guidelines – proposals for change

VLA has undertaken an analysis of the legislative amendments and the likely impact on the current service delivery model. VLA has considered a suite of options informed by this analysis.

The following proposals focus primarily on the changes needed to **substitute** current services so that legal aid clients continue to receive the **same** level of legal assistance once the amendments take effect.

We are seeking feedback on these proposals and whether there are additional options within the scope of this work that VLA should be considering.

Proposals for change are listed in the sequence of key points in a child and family’s dealings with child protection services and the Children’s Court:

* Proposal 1: Case plan meetings
* Proposal 2: Appearances and adjournments at the Interim Accommodation Order stage
* Proposal 3: Interim Accommodation Order contested hearings
* Proposal 4: Appeal of an Interim Accommodation Order
* Proposal 5: Review of case planning decisions
* Proposal 6: Change or breakdown in a child’s placement

Current *State family guideline 1* details when VLA will make a grant of legal assistance to a child who is the subject of an application in the Family Division of the Children’s Court if the child is considered to be mature enough to provide instructions.

Our analysis suggests that no changes are needed to the current guideline. However, the operation of the existing guideline would be supplemented by the proposals below.

Current *State family guideline 2* details when VLA will make a grant of legal assistance to a parent, guardian or other interested parties to respond to DHHS proceedings (but not to initiate their own proceedings).

We propose to update the terminology in this guideline referring to Protection Orders in accordance with the legislative amendments. This will ensure consistency in terminology so that there is not confusion when applying guidelines under the revised CYFA.

## Proposal 1 – Case plan meetings

Currently, the first Court date is generally the point at which a lawyer meets a child or parent and begins discussions with their client.

Negotiations with the DHHS are conducted by lawyers on the basis of client instructions, to secure appropriate immediate placement of the child (generally under an interim order) and to assess and advocate for the supports required to stabilise and support a family with a view to family reunification either immediately or in time.

Under the amended legislation the DHHS will make decisions about objectives and family supports before the first Court date, at a DHHS case plan meeting.

The new legislative provisions will require case plan meetings to be convened either prior to the first Court date and/or 8 weeks following a Court final order being made (where the matter is brought by emergency application or where the Court disagrees with the DHHS’ requested disposition and the Court order made is thus inconsistent with the case plan meeting).

However, VLA does not currently provide a grant of aid to fund a child or parent to have legal advice or representation for a DHHS case plan meeting.

### Pre-court

Case plan meetings that occur before the first court date and before a Court order will become a key intervention point for a client to secure necessary non-legal supports (for example family violence services, parenting programs, alcohol or drug counselling or housing supports). This provides parents with the best chance of addressing protective concerns and de-escalating a matter prior to Court intervention.

### Post-court

If there is no case plan developed prior to the making of a Court order or a case plan is inconsistent with a final Court order, the DHHS will be required to convene a subsequent case plan meeting to ensure consistency between the case plan and Court order.

Legal representation will be important at this point to ensure compliance with the Court order. This is particularly important in light of the legislative amendments that place a two year time frame on the possibility of a Court order aiming for reunification. It is not appropriate that time in out of home care is continuing to accumulate whilst the case plan does not contemplate appropriate supports to give a vulnerable family the best chance of reunification.

This work would be a continuation of the legal representation currently provided at Court. Where currently the lawyer ensures that the Court order includes the necessary conditions to support safe reunification, under the amending legislation the identified supports would need to be advocated for by the lawyer on behalf of the child or parent in the context of a case plan meeting.

### Proposal

It is proposed to provide for **a new grant of aid for a child or parent to receive legal advice and representation for post-court DHHS case plan meetings**.

Consistent with the rationale discussed above, it is proposed to target funding to situations where:

* the child is out of the parents’ care; and
* there are reasonable prospects of the child returning to the parents’ care during the life of the order.

Where the person applying for assistance is a parent, it is proposed that this parent should have reasonable prospects of the child being placed in their care.

### An alternative proposal

An alternative proposal to the one above is to **introduce an additional fee, claimable under the existing child protection grant, to fund the lawyer to obtain the minutes of the post-court case plan meeting and provide advice to their client** where the case plan is non-compliant with the final Court order.

The availability of the additional fee would be targeted to the clients who need it most. As such, the guideline would need to confine eligibility to the post-court situation contemplated in the proposal above, namely where:

* a protection order has been made that places the child out of the parents’ care; and
* there are reasonable prospects of the child being placed in the care of a parent during the life of the protection order.

Again, where the person applying for assistance is a parent, it is proposed that this parent should have reasonable prospects of the child being placed in their care during the life of the protection order.

### Funding for legal assistance in relation to pre-court case plan meetings

The legislative amendments highlight the need to consider funding legal advice and representation for pre-court case plan meetings in addition to post-court case plan meetings. This is because under the amended legislation, time in out of home care will begin accumulating from the date at which the Court first orders a child be placed in out of home care. This can be at the first court mention, under an Interim Accommodation Order.

However, funding legal advice and representation for pre-court case plan meetings would entail a significant shift in current practice. VLA’s upcoming review of child protection legal aid services will consider this issue further. Another option that VLA may explore is the possibility of establishing a *pilot* of lawyer involvement in pre-court processes. The outcomes of such a pilot could inform the review.

## Proposal 2 – Appearances and adjournments at the interim stage

When child protection matters are first brought before the Children’s Court and it is too early for all evidence to be available for the Court to make a final or permanent order, an Interim Accommodation Order (IAO) is often made.

IAOs provide for questions of placement while the court proceedings continue – where the child will live, with whom, and whether someone should be excluded from the residence in which the child will live – as well as other conditions regarding contact with parents and siblings and other relevant matters.

Currently, VLA funds up to four appearances and four adjournments at the interim stage of child protection proceedings. In extraordinary circumstances VLA will fund additional appearances at the interim stage.[[3]](#footnote-3)

These limitations were made as part of a broad suite of changes to VLA guidelines in early 2013, to encourage practitioners to resolve IAO matters in a timely manner but to allow for unusual circumstances that justify additional adjournments and court dates.

This proposal would amend the definition of ‘extraordinary circumstances’ in the guidelines, **to add a new circumstance under which legal aid funding will be provided for additional IAO appearances**, to recognise that more intensive efforts may be required at the interim stage of proceedings to determine (and often, then obtain all parties’ consent to) appropriate arrangements.

The legislative amendments will place strict timeframes on the possibility for reunification. Time will start accumulating against the prospects of reunification immediately once a child is removed from the home under a court order, even an interim order. We expect more intensified efforts to avoid this at the interim IAO stage thus further IAO court dates may be required before the DHHS and parties are satisfied that proposed interim arrangements and orders are appropriate, including securing contact arrangements and access for parents to support services to begin addressing underlying concerns impacting on their parenting. It is hoped this may lead to a greater number of IAOs by consent and reduce the number of contested proceedings later on.

Under the proposed new circumstance, additional IAO appearances would be funded where the DHHS is proposing the child be placed in out of home care under the interim order but:

* the parent has had care of the children during the life of the current IAO proceedings;
* there is a case plan for reunification; and
* the parent has reasonable prospects of the children being placed with them.

## Proposal 3 – Interim accommodation order contested hearings

Since early 2013, legal aid funding for parents to be represented at IAO contested hearings has been limited to parents contesting a question of the child’s placement, unless the child is younger than two years of age and/or the parent is under 18 years of age.

We are considering whether to **add an additional ground for funding a parent for an IAO contested hearing**, where the parent is seeking a condition for time with the child and that parent has reasonable prospects of the child being returned to them within the term of the IAO.

As noted above, the legislative amendments will place strict timeframes on the possibility for reunification. This will mean parents do not have as much time to address underlying concerns. If greater contact between parent and child (or a schedule for a gradual increase in contact time) can be secured at the interim stage, it will assist parents to demonstrate to the DHHS their ability to parent and have successful contact with the child. This will assist in returning the child to the home within the legislated timeframe.

This approach is informed by the social science research which shows that contact and maintaining the bond between parent and child in circumstances that do not compromise a child’s safety, is essential to successful reunification.

If implemented, to appropriately target this funding we would propose that the State Reasonableness Test also apply. This test requires the proceedings to be likely to terminate in a manner favourable to the assisted person. This requires a legal and factual assessment of the case’s merits and having more than a 50% chance of success. For example, where a parent is seeking reunification with their child, consideration is given to whether this is likely to occur in the life of the proceedings, or where a parent is seeking a particular condition, consideration is given to whether the Court is likely to grant the condition.

## Proposal 4 – Appeal of an interim accommodation order

Currently an appeal against an IAO is not explicitly covered by the VLA *State family guidelines* but is able to be funded as a matter arising from and closely associated with a legally aided matter. Applications for aid for IAO appeals are submitted as a Civil Miscellaneous matter and must be fully assessed by VLA Assignments on a case-by-case basis.

This proposal would **create a specific guideline to clarify that a grant of aid is available for a child or parent to appeal or respond to an appeal against an IAO**. This would formalise and streamline the process for seeking a grant of aid for an IAO appeal.

It is anticipated that IAO contests and IAO appeals will increase under the new legislative provisions given that all time spent in out of home care will reduce a child’s chances of reunification. We consider that this change may be required to ensure clarity regarding funding for IAO appeals.

To appropriately target this funding, we would propose it apply to situations where there are reasonable prospects of the children being immediately placed in the care of a parent.

## Proposal 5 – Review of case planning decisions

At present, the twelve-month mark of a Children’s Court order triggers a court date. This is an important opportunity to review a child’s circumstances and DHHS compliance with the case plan.

Under the legislative amendments, the DHHS will be able to extend an out of home care order for a further twelve months without bringing the matter back to Court.

As such, the current avenue for review will no longer be available. Instead, an administrative review will be available via the internal DHHS Case Plan Review process. An external review of a DHHS case plan decision is then available via application to the Victorian Civil and Administrative Tribunal (VCAT).

This proposal would replace current funding available for review proceedings in court with a **new guideline providing legal aid funding for internal administrative and external VCAT review** in certain circumstances.

We note that issues may arise with compliance with a case plan prior to the 12 month mark. Under this proposal, assistance would be available throughout the life of the Children’s Court order, if the circumstances listed below are met. In practice, however, this work is also likely to be limited by a reliance on clients identifying an issue and proactively seeking legal advice, rather than automatic review at the 12 month mark.

### Internal review by the DHHS

It is proposed that this grant of assistance for an internal review of a case plan decision would target matters where:

* there is an out of home care order in place;
* DHHS is proposing a case plan decision that is inconsistent with reunification;
* there are reasonable prospects of overturning the case plan decision; and
* there are reasonable prospects of reunification.

This would focus assistance to situations where the DHHS is not complying with the Court order and this will adversely impact on the prospects of a child reunifying with their birth parents.

### External review at VCAT

External reviews of case plan decisions at VCAT are currently infrequent but are able to be funded as a matter arising from and closely associated with a legally aided matter. As with IAO appeals, however, these applications for aid are currently submitted as a Civil Miscellaneous matter and must be fully assessed by VLA Assignments on a case-by-case basis.

This option proposes a simplified grant to formalise and streamline this process.

It is also proposed that eligibility for legal assistance for a VCAT review would be subject to the outcome of the internal case plan review and a merits assessment.

## Proposal 6 – Change or breakdown in a child’s placement

Currently, once a child is in out of home care under a Children’s Court order, if the DHHS proposes to change a child’s placement or there has been a breakdown in the child’s placement, the DHHS must return the matter to Court. In such situations the current legal aid guidelines enable funding to assist the child and/or parent to respond to the DHHS application.

Under the legislative amendments, out of home care orders securing a specific placement will be replaced with orders that provide the DHHS with full discretion concerning a child’s placement under the order once it is made. This will mean that any subsequent change to a child’s placement, including moving the child to another residence or changing with whom they live, will be an administrative decision for the DHHS decision.

The only option available to a young person who wishes to participate in a decision about where they live, will be to apply to revoke or vary the current protection order.

The overall approach taken in the current VLA guidelines is to provide funding mostly to assist children and parents to *respond* to Children’s Court applications brought by the DHHS. Under the current guidelines, VLA may fund a child or parent to apply to vary or revoke a final order where there are no proceedings on foot, but only where there are ‘compelling reasons’. The number of such grants of aid are low.

This proposal would expand the existing *State family guidelines*, to **fund a child or parent to initiate or respond to an application to vary or revoke an existing protection order in certain circumstances**.

It is proposed to target this expanded funding to situations where the child is out of the parents’ care under a Family Reunification Order (that is, where the DHHS and parties are still working towards reunification of the child with their family), and there are reasonable prospects of the child being immediately placed in a parent’s care. Where it is a parent applying for legal assistance, it is proposed that there should be reasonable prospects of the children being placed in their care.

# Next steps

Submissions are due by **Wednesday 16 December 2015.**

As noted above, all submissions will be published on the VLA website after the close of the submission period unless you have advised VLA that you do not want your submission published.

VLA will consider all feedback received. This will inform the development of revised *State family guidelines* for consideration by the VLA Board.

We acknowledge that any guideline changes will need to be supported by the delivery of training to practitioners on VLA guidelines and effectively representing clients under the guidelines.

1. *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014.*  [↑](#footnote-ref-1)
2. <http://handbook.vla.vic.gov.au/handbook/6-state-family-guidelines>. [↑](#footnote-ref-2)
3. See 9.1.5 and 9.1.7 of the Simplified Grants Process – Notes on VLA Guidelines at <http://handbook.vla.vic.gov.au/sites/handbook.vla.vic.gov.au/files/vla-simplified-grants-process-notes-on-vla-guidelines-30-10-2015.doc> [↑](#footnote-ref-3)