# Changes to our Child Protection Guidelines – April 2022 update

Since November 2021, Victoria Legal Aid’s (VLA’s) Child Protection program has been consulting on possible changes to our child protection guidelines.

We have received helpful feedback from stakeholders on the proposals which we have taken into account in making decisions about our next steps. This factsheet outlines how VLA intends to proceed in relation to each proposal we have consulted on and outlines one new proposal on which we invite further feedback. After consultation on the new proposal, VLA will consult with the Legal Services Board and Commission on all proposals before making final recommendations to the VLA Board.

At this point we are not proceeding with cost saving measures, other than removing the ‘preparation upon settlement’ fee for later stage hearings (readiness hearings and directions hearings). The cost savings were originally proposed to cover the shortfall in funding for readiness hearings. However, the recent reduction in the number of protection applications as a result of the COVID-19 pandemic means that we are better able to meet the cost of readiness hearings. Further decisions about cost savings measures may be required in future pending any change in demand.

## Financially sustainable readiness hearings

### New guideline for readiness hearings and judicial resolution conferences

**Original proposal**

We proposed to introduce a single guideline for readiness hearings (RH) and judicial resolution conferences (JRC) as alternative hearing types on an extension to the broadband grant. The guideline replaces the interim readiness hearing fees set in 2020 and 2021.

Features:

* Limit of one RH or JRC per grant
* Single preparation fee (current readiness hearing preparation fee rate) to support taking instructions, negotiation with other parties and preparation of the readiness certificate. For JRCs preparation would include documenting a case strategy and other procedural requirements instead of the readiness certificate.
* Remove the ‘preparation upon settlement’ fee for readiness hearings.
* Appearance fee (current RH fee rate)

**Revised proposal**

VLA will proceedwith the above proposals with the following amendments:

* The standard preparation fee for both RH and JRC will be at a new higher rate of $340. This is to support taking instructions, negotiation with other parties and preparation of the readiness certificate (or documentation of a case strategy and other procedural requirements in the case of a JRC)
* The appearance fee for both RH and JRC will be at a higher rate of $383, in line with the current mention fee
* A post-readiness hearing mention will be funded in exceptional circumstances (at the current mention rate of $383). Exceptional circumstances will require a practitioner to certify that the matter is likely to resolve on a final basis at the post-readiness hearing mention and document on the file the reason(s) why. The post-readiness hearing mention is in addition to the four mentions on the broadband grant. Practitioners will be required to claim the specific post-readiness hearing mention fee, rather than the ordinary mention fee where a mention is held after a RH.

**Rationale**

We received feedback from a number of stakeholders that there are some circumstances in which an additional hearing after a readiness hearing has enabled parties to resolve matters on a final basis. Examples provided to VLA included situations were:

* A settlement was reached in principle at a readiness hearing, but parties needed to test the arrangements before a final order could be made
* Agreement was reached but a specific report was required before a final order could be made.

We have also taken into account that Children’s Court Practice Direction No.2 of 2022 embeds readiness hearings as the usual hearing if a matter does not resolve at conciliation conference. However, we have recognised that from time to time magistrates may direct that a judicial resolution conference is more appropriate, so flexibility to fund a readiness hearing or a judicial resolution conference is required.

The revised proposal includes removing the ‘preparation upon settlement’ fee as originally proposed, but due to the reduction in protection applications, the fee has been repurposed to fund higher preparation and appearance fees for all readiness hearings. This is based on an acknowledgement that funding should reflect the average time that is required by practitioners to undertake particular work, and that preparation for a readiness hearing is often more complex than conciliation conference preparation.

The total readiness hearing fees will increase from $614 to $723 for all matters.

### Changes to directions hearings and final contest fees

**Original proposal**

VLA proposed to:

* Move the direction hearing fee from the broadband grant to the final contest extension guideline, in recognition that directions hearings now only occur where a matter is listed for final contest
* Limit directions hearings to one per grant and only where the final contest is more than three months after the readiness hearing. Additional directions hearings will be funded in exceptional circumstances only.
* Strengthen the merits test for final contests and limit funding to only those who are seeking an order that is substantively different from the order proposed by the DFFH.
* Reduce the final contest preparation fee.
* Remove the ‘preparation upon settlement’ fee for directions hearings.

**Revised proposal**

* We will proceed with:
	+ moving the direction hearing fee from the broadband grant, but will move it to the readiness hearing extension.
	+ removing the ‘preparation upon settlement’ fee for directions hearings
	+ limiting directions hearings to one per grant and only where the application is adjourned to a final contest more than three months after the readiness hearing or judicial resolution conference. Additional directions hearings will be funded only if there is a significant change in circumstances since the last directions hearing or the final contest has been adjourned to a date more than three months from the last directions hearing.
* We will amend the final contest merit test to limit funding to only those who are seeking a substantially different outcome from what is proposed by the DFFH. This will include seeking a different order to what is proposed by DFFH or different conditions to what is proposed by DFFH, where the different conditions will result in a substantially different outcome eg. supervised vs unsupervised contact. Practitioners will be required to document on file what outcome their client is seeking.
* We will retain the overall final contest preparation fee at its current level.
* We propose to separate the preparation fee into components of general preparation ($629) and subpoena inspection ($400). ***We are seeking your feedback on this new proposal by 29 April 2022.***

**Rationale**

* Feedback from stakeholders articulated that the main circumstances when an additional directions hearing would be necessary were when there was a significant change in circumstances or there was a further long adjournment before the final contest hearing.
* The directions hearing fee will be included in the readiness hearing extension, rather than the final contest extension to give practitioners certainty of funding for the directions hearing when a matter is adjourned from readiness hearing or judicial resolution conference.
* We heard feedback that the language ‘substantially different order’ was confusing, especially where substantially different conditions were sought on the same order. To avoid this confusion, we have adopted the term ‘substantially different outcome’ which was recommended by some stakeholders.
* We received considerable feedback opposing the proposal to reduce the final contest preparation fee due to the substantial preparation work still required at this stage of a matter. In light of this, we will not proceed with the original proposal.
* The idea of designating a proportion of the final contest preparation fee for subpoena inspection was suggested by several practitioners in their feedback. This would enable practitioners to pay counsel where they are briefed to undertake subpoena inspection. The proposed general preparation fee is $629 and the subpoena inspection fee is $400 which is in line with the subpoena fee in Commonwealth family law matters.

## Changes to support high quality preparation and early resolution

### New case preparation requirements

**Original proposal**

VLA proposed to:

* Separate the preparation fee in the broadband grant into components for:
	+ Taking instructions, advice and work done between court events
	+ Preparation of a case strategy
* Separate the conciliation conference preparation fee into:
	+ General preparation (including taking recent instructions)
	+ Preparation of court documentation (in accordance with procedural directions, orders and court guidelines)
* Require practitioners to assess and certify that their client continues to meet the eligibility requirements of the grant and continues to satisfy the State Reasonableness Test prior to moving to the conciliation conference stage of proceedings.

We **will proceed with** these proposals and will make amendments to the relevant Practice Standards to align with the changes.

### Changes to conciliation conferences

**Original proposal**

We proposed the following changes for conciliation conferences:

* Removing entitlement to the conciliation conference appearance fees if preparation requirements are not met
* Replacing the ‘preparation on settlement’ fee with a single settlement bonus fee where a matter settles at conciliation. This would not change entitlement to claim the fee at conciliation conference but is intended to make the claim process simpler and reduce confusion created by the current guideline wording. The current higher preparation fee would not be available for late-stage hearings (readiness and directions hearings).
* Reducing the conciliation conference adjournment fee to align with other adjournment fees

**Revised proposal**

We will proceed with:

* Removing entitlement to the conciliation conference appearance fees if preparation requirements are not met
* Replacing the ‘preparation on settlement’ fee with a single settlement bonus fee where a matter settles at conciliation conference at the same rate

We will not proceed with:

* Reducing the conciliation conference adjournment fee to align with other adjournment fees

**Rationale**

We received feedback about the likely impact it will have on briefing counsel to appear, particularly in regional areas, if the adjournment fee was reduced.

We did receive feedback about the difficulty practitioners have in preparing for conciliation conference when DFFH has not filed an Addendum Report by the required time. We will provide information in the guideline notes for these situations to make it clear that:

* if a practitioner assesses it is appropriate for the conference to proceed regardless, preparation based on the DFFH reports provided to date is sufficient and the appearance fee will be paid;
* if a practitioner assesses they cannot adequately prepare and/or it would not be appropriate for the conference to proceed in the absence of an addendum report, they should notify the Court and parties before the day so that the matter can be adjourned. If a hearing is required for DFFH to request this adjournment, costs should be sought.

## Expanding eligibility for IAO appeals and revocation applications

### Changes to IAO appeals and revocation applications

**Original proposal**

We proposed:

* Changes to the IAO appeal guideline so that a party who has an IAO made in their favour in the Children’s Court will be funded to respond to a DFFH appeal of that decision.
* Expanding eligibility for **children** to apply to revoke long term care orders and care by secretary orders, in addition to family reunification orders.

**Revised proposal**

We will proceed with both the original proposals AND we will expand eligibility for childrento Guideline 4.1 to fund a case plan review under s305 (2)(a) to revoke a care by secretary order.

**Rationale**

We received feedback in support of the original proposals. Consultation also identified the need to make commensurate changes to Guideline 4.1 so that children are funded to seek a case plan review, as required by s305 (2)(a) prior to applying to revoke a care by secretary order.

## Clarifying eligibility for parents

### Clarifying eligibility for broadband grant of assistance

We proposed to clarify and, in some circumstances, amend the eligibility criteria for parents responding to different court applications.

The proposals were:

* For breach, variation and extension of protection applications and applications for Care By Secretary Orders (CBSO), Long Term Care Orders (LTCOs) and Permanent Care Orders (PCOs), eligibility to be limited to parties who seek an order substantively different to the order recommended by DFFH
* For breach applications, the recommendation proposed by DFFH must also be substantively different from the original order
* For extension or variation of protection order applications, the parent also has reasonable prospects of the child being placed in their care during the period of the alternative order they seek
* To improving the readability of guidelines (with no change in eligibility) for protection applications, irreconcilable differences, therapeutic treatment orders, therapeutic treatment placement orders (TTOs and TTPOs) and temporary assessment orders (TAOs)

**Revised proposals**

We will proceed with the proposals above, with the following amendments:

* For CBSO and LTCO applications, eligibility to be limited to parties who seek a substantively different outcome to the order sought by DFFH. An outcome will be substantively different if it relates to a significant impact on the child or the party’s lifestyle, contact or cultural support.
* We will proceed with the proposal to limit funding for breach of protection order applications to applications where DFFH recommend a substantively different order or conditions.

We will clarify in the guideline notes that if DFFH has not provided a report at the time the practitioner applies for aid, their certification that DFFH is recommending a substantively different order is based on the information known at the time, including orders sought by DFFH at a first hearing of the breach application and that the practitioner will re-assess their client’s eligibility upon receiving the DFFH report.

* We will fund parties opposing permanent care orders only if there are reasonable prospects of the Court making a different order or making different conditions on these orders. Documentation will be required on file to show what outcome is sought.

**Rationale**

We received feedback that the language ‘substantively different order’ could lead to uncertainty about whether different conditions on the same order type are deemed to be a substantively different order. The language ‘substantively different outcome’ makes it clearer that different conditions, even on the same order type, will be considered substantively different where they will have a significant impact on the child or the party’s lifestyle.

We received feedback that practitioners are often unable to determine what application is sought by DFFH, especially where reports are not filed and served within legislated timeframes. We will clarify in the guideline notes that if DFFH has not provided a report at the time the practitioner applies for aid, their certification that DFFH is recommending a substantively different order or conditions is based on the information known at the time, including the nature of interim orders sought by DFFH at a first hearing of the breach application. Practitioners will be required to re-assess their client’s eligibility upon receiving the DFFH report.

### New definitions for additional hearings and fee claims

**Original proposal**

We proposed changes to the definition of extraordinary circumstances and to the fees claimable for mentions and adjournments:

* A new definition of extraordinary circumstances as being ‘unusual, rare and significant’ impact on the duration of proceedings, with appropriate examples.
* Replacing the ‘substantial negotiation’ test with specific criteria for the higher fee at mention.

**Revised proposal**

We will:

* Proceed with the proposed definition of extraordinary circumstances.
* Include the following expanded criteria for the higher mention fee:
* Settlement on final order
* The matter proceeded as a submissions contest
* A new interim accommodation order was made or varied which changes the child’s placement
* An interim accommodation order contact condition is varied to change supervision requirements or to include or vary a progressive contact schedule or plan
* A costs application is made
* It is the first hearing of a new interim breach or variation application or an application for a new IAO
* Issues in dispute are narrowed or resolved and included in conditions or notations on the court file

**Rationale**

The feedback VLA received in relation to the extraordinary circumstances definition largely identified the importance of funding for additional hearings where DFFH make an interim breach or an interim variation application instead of a breach. VLA is not proposing to restrict the availability of additional hearings where there is a breach or where DFFH make an interim variation application erroneously ie. instead of a breach application. Additional hearings in those circumstances will continue to be funded in the same terms. We will review the language in the guideline notes to ensure the entitlement to funding for additional hearings upon breach or erroneous variation application is clear.

We received helpful feedback about specific circumstances where the higher fee should be paid rather than an adjournment fee. Feedback included examples of when extensive negotiation is attempted, but the DFFH does not respond or is unwilling to negotiate. The expanded criteria enables a practitioner to claim the higher fee where their client’s instructions are able to narrow issues in dispute, even if DFFH does not agree to resolve the issue at that hearing.

## Modernising language

We proposed and will proceed with changes to:

* Update references from DHHS to DFFH
* Replace references to ‘IAO appearances’ and ‘adjourned IAOs’ to ‘mention’ and ‘adjournment’ respectively to better reflect the language current used in Children’s Court hearings

## Approach to cost savings

In the context of child protection case expenditure exceeding current funding to VLA for number of years, we had proposed to fund the shortfall in funding for readiness hearings by reducing the final contest preparation fee.

The sustainability of VLA’s overall child protection expenditure is still anticipated to worsen when the impacts of the COVID-19 pandemic and public health restrictions ease, if the number of protection applications issued by DFFH each year resume growth at the expected pre-pandemic rate of 8 – 10% per year. However, the impacts of the pandemic and particularly the recent Omicron variant have seen the number of protection applications remaining lower than expected for longer. On this basis, we have decided that cost savings measures will not proceed apart from the changes the ‘preparation upon settlement’ fee for readiness and directions hearings. The volume of protection applications will be monitored and other cost savings measures may be considered in the future if necessary.

## Further consultation processes

VLA seeks feedback from practitioners, Courts, DFFH and other key stakeholders by **29 April 2022** in relation to the new proposal to separate the final contest preparation fee into general preparation and subpoena inspection components, whilst retaining the same total fee.

We will consider feedback in relation to this proposal in early May and consult with the Legal Services Board and Commission. A final decision about all proposals will be made by the VLA Board in the following months.

Feedback can be provided by emailing Elicia Savvas, Associate Director Child Protection on elicia.savvas@vla.vic.gov.au by Friday 29th April 2022.