# Submission to Victoria Legal Aid State Family (Child Protection) Guidelines – Law Institute of Victoria

## Overall comments

The Law Institute of Victoria (LIV) welcomes the opportunity to be consulted in relation to the proposed changes to Victoria Legal Aid’s (VLA) child protection guidelines. The LIV welcomes the proposed changes to the child protection guidelines in light of the 2014 legislative reforms created by the *Children Youth & Families (Permanent Care & other matters) Act 2014*, due to come into effect on 1 March 2016. The LIV commends VLA’s commitment to Victoria’s most disadvantaged children and families in seeking to change the child protection guidelines for legal representation at a time when such children and families will need, more than ever, the benefit of salient legal advice and advocacy so as to be able to ensure that, notwithstanding the 2014 legislative reforms, the intervention of the state is only to the minimum extent necessary in their lives.

The LIV makes several recommendations and comments as to Proposals 1 to 6 and also makes a further recommendation as to an additional revision of the child protection guidelines, which may also be of benefit to Victoria’s most vulnerable children and their families.

## Current State Family Guideline 1 – Child involved in a Child Protection Matter

No changes proposed.

**Response:** No comment

## Current State Family Guideline 2 – 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).

### Proposal 1 – Case Plan Meetings

* **Funding for legal advice and representation for post-court case plan meetings**

**Response:**

The LIV strongly supports the proposal overall for legal representation in case planning generally as the Children’s Court is now bound to consider the case plan of the Department of Health & Human Services (DHHS) when determining the appropriate protection order. The LIV endorses the provision of legal advice and representation to children and parents at post-court case plan meetings as set out in this Proposal.

However, the LIV considers that funding for *pre*-court advice and representation at case plan meetings is, overall, more important than representation at *post*-court case plan meetings in terms of the protection of the rights of Victoria’s children and their families.

**Alternative:**

Additional fee to obtain the minutes of the post-court case plan meeting and provide advice

**Response:**

The primary suggestion is preferred to the alternative as the LIV considers the prospects of timely intervention and effective legal representation is best provided through the presence of a lawyer at or prior to a case plan meeting. However, if VLA funds cannot extend to fund legal representation at case plan meetings, this alternative proposal is acceptable.

* **Pre-court case plan meetings**

**Response:**

The targeted focus of funds at this pre-court stage in the matter provides the greatest potential level of protection for Victoria’s most vulnerable children and their families.

There is often an asymmetry of power between DHHS and the family in circumstances where families:

* are not yet before the Court;
* may not yet have engaged with a lawyer; and
* may not have ever been the subject of statutory intervention by DHHS (for example, a family subject to a protection application by notice).

Without legal advice, many self-represented parties unwittingly enter into ‘agreements’ with DHHS which are unjust in the circumstances and/or without realising the consequences which may follow.

To remedy these matters, the LIV suggests that:

1. VLA and DHHS develop a protocol so parties (including children 10 years and over) are offered legal representation prior to a pre-court case plan meeting, through:
2. a duty lawyer service (scheduled for a limited number of hours when families can ring prior to the case plan meeting); and
3. DHHS being mandated (preferably through legislative amendment but otherwise in the protocol) to give the parties a reasonable opportunity to seek legal advice prior to convening the case plan meeting.

NB: In relation to point (i), the lawyer contacted can then make an assessment by phone as to the capacity of the child.

1. A working group be established with all relevant stakeholders (including VLA, the Children’s Court, Community Legal Centres, LIV and DHHS), in relation to how DHHS manage and advise families in the pre-court stage from 1 March 2016.

The LIV suggests that families would benefit if such a working group developed a short publication which outlined the rights of the parties (including their right to obtain legal advice and information on how to do this), as well as some basic information about court and pre-court processes once DHHS become involved. The LIV welcomes the opportunity to discuss this further with VLA.

The LIV also supports an urgent pilot of lawyers involved in all aspects of pre-court processes.

### Proposal 2 – Appearances and Adjournments at the Interim Stage

**Response:**

The LIV strongly supports increased funding for Interim Accommodation Order (IAO) appearances given the legislative reforms and, in particular, the time-frames imposed by Family Reunification Orders against families.

In terms of the proposed guideline itself, the LIV seeks amendment to the proposed guideline so that additional IAO appearances are funded where:

1. DHHS proposes that the child be placed out of a parent’s care (cf out of home care) under the interim order; and
2. there is a reasonable prospect of successful reunification of the child to the parent.

The LIV considers that the circumstances under which additional IAO appearances would be funded should not include where there is a case plan for reunification, as this requires DHHS to agree that reunification should occur and such a decision is not subject to judicial scrutiny.

Any reference in any guideline to ‘reasonable prospects’ of reunification of a child with a parent must allow the practitioner to make an assessment on the basis that services would be available without delay in Victoria.

### Proposal 3 – Interim Accommodation Order Contested Hearings

**Response:**

The LIV strongly supports this proposal 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 (subject also to the caveat expressed in relation to Proposal 2).

The LIV acknowledges, as has VLA, that the social science research shows that the frequency and quality of contact is one of the key determinants to reunification. The LIV welcomes any step by VLA which supports a child or parent/guardian’s right to seek further contact before a specialist court.

The LIV is aware there are already delays of several months in matters progressing to the next stage of litigation and ultimately receiving review by a judicial officer. The LIV is concerned that this delay, coupled with the new time-frames set out in Family Reunification Orders, may result in unjust outcomes for families.

The LIV advocates for any reduction in delays in the court process in the best interests of families and the LIV is prepared to collaborate further with VLA in relation to this issue.

### Proposal 4 – Appeal of an Interim Accommodation Order

**Response:**

The LIV supports this proposal. Our members anticipate that the amended legislation will spark a significant rise in the number of appeals. The LIV is strongly supportive of efforts by VLA to formalise and streamline the process for seeking a grant of aid for an IAO appeal which will ensure expeditious access to justice for families at a higher level. The LIV supports the proposal to 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.

The LIV also supports funding by VLA of appeals or applications on the basis of a case stated to the Supreme Court by a child or parent, given the technical deficits in the 2014 legislative reforms.[[1]](#footnote-1)

### Proposal 5 – Review of case planning decisions

**Response:**

The LIV supports this proposal. Our members anticipate that the amended legislation will spark a significant rise in the number of external reviews to VCAT and, accordingly, the LIV supports the proposal to introduce a new guideline providing legal aid funding for internal administrative, and external VCAT, review in certain circumstances.

The LIV believes that Proposal 5, if implemented, will be a significant step towards fully protecting Victoria’s most vulnerable children and their families. The LIV strongly supports funding by VLA of the internal and external review on a simplified and streamlined basis so that practitioners on behalf of children and their families can access such funding without delay. The LIV believes that the funding by VLA of administrative challenges will serve to ensure accountability of decision makers in a child protection system which is now substantially fragmented in terms of decision-making scrutiny as a result of the 2014 legislative reforms.

The LIV supports an express articulation of the types of case plan decisions which can be funded by way of review/appeal and suggests that the following categories of decisions be funded (in no particular order of priority, all being important):

* decisions as to reunification;
* decisions as to frequency of contact;
* decisions as to placement of siblings;
* decisions as to the provision of services;
* decisions as to where a child is placed and with whom (i.e. if not placed with family).

The LIV members are particularly concerned to ensure that due attention is given, particularly given the reinstatement this year of s.276, to the provision by DHHS of appropriate services.

The LIV believes that increased funding in administrative law matters must also occur simultaneously with increased education and training of practitioners. Furthermore, the LIV believes that any calculation as to funding must be based on the procedural matters to which a practitioner must also attend, i.e. applications, affidavits, general correspondence. The LIV is cognizant of VLA’s limited funds but asks that VLA consider the level of skill required of practitioners to successfully navigate and appeal administrative decision-makers.

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

**Response:**

The LIV strongly supports the proposed expansion of the current guidelines to fund a child or parent either initiating or responding to an application to vary or revoke an existing protection order in certain circumstances. The LIV believes that such funding is particularly important given the nature of Family Reunification Orders and Care by Secretary Orders, to which many thousands of Victorian children will be subject; both orders do not provide any security as to placement.

The LIV is concerned (as it notes VLA has been) in the new range of protection orders under the 2014 reforms negatively impacting upon stability. For example, the Children’s Court will no longer be able to name (e.g. with Interim Protection Orders) who cares for the child or name the person who has custody on a Supervised Custody Order. In substance, the new Family Reunification Orders and Care by Secretary Orders will replace these orders, rendering the Children’s Court unable to name or specify who will be caring for the child.

Furthermore, as the Children’s Court will not be able to make conditions for contact on Care by Secretary Orders (which automatically run for two years, rather than a period tailored by the court in the best interests of the child), there can be no testing by the court of contact and reunification.

Accordingly, the proposed expansion of this guideline is welcomed, as it will allow a child or parent to appropriately issue proceedings to revoke or vary an order where the contact or care arrangements have not been appropriate (e.g. where contact should have been increased on a Family Reunification Order by DHHS but this has not happened or when a parent is in a position to seek immediate reunification but DHHS will not reunify the child.)

The LIV seeks the following circumstances be specifically funded by way of applications to revoke or vary:

1. the removal by DHHS of a child from a family member where the child has lived with that family member for a finite period of time which could be prescribed, say at least 3 months; or
2. where a practitioner assesses that an application for immediate reunification has a reasonable prospect of success; or
3. where the parent seeks a reasonable increase in contact with a child subject to a Family Reunification Order, pending reunification.

The LIV also supports the representation, if public funds will allow, of carers if they seek to be represented, in such proceedings so that their views and concerns can be heard by the court. Such (usually) independent views and knowledge are often of fundamental importance in the court’s decision-making process.

### Additional Options for VLA to consider

* **Expansion of Regain/Retain guideline as of 1 March 2016**

In the LIV’s view, the current VLA guideline limiting assistance in protection applications to a parent who is seeking to regain or retain a child will become particularly problematic with the legislative change. As observed in the VLA discussion paper, regular contact is of great significance in maintaining an appropriate relationship. While representation in protection applications merely to ensure an appropriate contact regime for a non-custodial parent is not aided presently, such representation may be aided if a matter is returned to Court for extension or variation of a Supervised Custody Order or Custody to Secretary Order. As these orders will no longer exist under the 2014 legislative reforms, such opportunity will no longer be available. The LIV thus suggests that the guideline for parental assistance in protection applications be expanded to include ensuring an appropriate contact regime.

The LIV commends again VLA on the proposals and thanks it for the opportunity to have provided this submission.

1. The LIV notes the newly revised summation of the legislative reforms within the Research Materials of Reserve Magistrate Peter Power as of November 2015 (http://www.childrenscourt.vic.gov.au/amendments-children-youth-and-families-act-2005-november-2015-0). See for example, deficits identified by Reserve Magistrate Power in Section O – Family Reunification Orders, pp 6, 7. [↑](#footnote-ref-1)