# Submission to Victoria Legal Aid State Family (Child Protection) Guidelines – Victorian Aboriginal Legal Service Co-operative Ltd

## Overall comments

**Response:**

The Victorian Aboriginal Legal Service (VALS) has considered the Victoria Legal Aid (VLA) State Family (Child Protection) Guidelines Consultation Paper, and we appreciate the opportunity to contribute to the consultation process.

Aboriginal and Torres Strait Islander people have a diverse culture with a rich and compelling history. However, the impact of colonisation and dispossession from land and traditional culture, legislative frameworks and the effects of the stolen generation and institutionalisation have generated significant hardships for Aboriginal Australians. These problems continue today, with the impact being that our clients are largely socially and economically disadvantaged and experience poor physical and mental health, loss of culture, and destructive coping behaviours.

As a result, Aboriginal families are overrepresented in Victoria’s child protection system. Moreover, Aboriginal children are approximately 12 times more likely to be placed in out-of-home care than non-Aboriginal children, and only about 60 per cent of those children are residing in kinship care placements[[1]](#footnote-1). Many of these children are grandchildren of Aboriginal people who were removed from their own families.

We therefore welcome any adjustment to VLA’s Child Protection Guidelines in response to the amendments to Victoria’s child protection legislation and which have the objective of improving access to legal advice and representation for children, parents and other interested parties experiencing or at risk of experiencing State intervention. However, we make the following comments in relation to the consultation paper:

## Current State Family Guideline 1 – child involved in a child protection matter

No changes proposed.

**Response:**

VALS supports the current guideline remaining unchanged.

## Proposal 1 – Case Plan Meetings

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

**Response:**

VALS welcomes this proposal but encourages VLA not to limit eligibility for funding only to situations where the child is out of the parent’s care. Rather, we believe that such funding should be available in all cases where DHHS is satisfied that a child is in need of protection.

For example, where a submissions contest has successfully resulted in the child being placed in the parent’s care on an Interim Accommodation Order (IAO), legal advice and representation for post-court case plan meetings will still be crucial to advocate for and ensure that all necessary non-legal supports and services are in place and to safeguard compliance with the order so as to give the family the best possible opportunity to demonstrate to the Court that further formal DHHS supervision is either not required or can otherwise be achieved with the child remaining in the care of the parent.

We believe that such legal advice and representation would also be necessary in situations where a child has been placed in the care of a parent subject to a Family Preservation Order (FPO). Indeed, while a FPO has the objective of ensuring a child who is in the care of a parent remains in the care of a parent, such an order can still be the subject of breach proceedings should the child or their parent not comply with the conditions, which then risks the child being placed in court-ordered out-of-home care.

As VLA has already noted, compliance with Court orders will be particularly important given the legislative amendments, which will limit the Court’s power to make an order with a reunification objective where a child has been in a court-ordered out-of-home care placement for a cumulative period of two years.

VALS also believes that such legal advice and representation may reduce the need for additional funding being required by the child or their parent to seek internal administrative or external Victorian Civil and Administrative Tribunal (VCAT) review of a DHHS case planning decision with which he or she is not satisfied. This is because, in our view, important objectives and family supports are less likely to be overlooked and more likely to be successfully negotiated where a legal practitioner is present to identify relevant legal and non-legal issues and to provide realistic legal advice and/or manage client expectations.

### Alternative: additional fee to obtain the minutes of the post-court case plan meeting and provide advice

**Response:**

VALS welcomes this proposal in addition (and not as an alternative) to the previous proposal, but again encourages VLA not to limit eligibility for funding in the terms stated for the reasons already described above.

It is our very strong view that the attendance of a legal representative at post-court case plan meetings nonetheless remains highly desirable for the purposes as described above.

### Pre-court case plan meetings

**Response:**

VALS would fully support the provision of funding for legal advice and representation for pre-court case plan meetings.

However, VALS would also strongly encourage VLA to extend any such funding to include the provision of legal advice and negotiation (including, for example, an exchange of letters or emails) from the time the Department of Health and Human Services (DHHS) informs a child or parent that it has received a report that the child may be at risk of harm and that it is commencing an investigation, but has not yet formed a view that the child is in need of protection.

It is during this time that the DHHS may seek, for example, the signing of a voluntary agreement, which can include an agreement, inter alia, that one parent (or another family member) is to move out of the family home and/or that a parent is to provide drug and/or alcohol testing and/or engage with specific supports and services as identified by the DHHS. Voluntary agreements can also have a significant impact on any subsequent court proceedings.

Our experience is that earliest possible legal advice, negotiation and representation can be crucial in resolving the DHHS investigation and/or preventing the signing of unnecessarily onerous voluntary agreements and even the issuing of a Protection Application or other application with the Court.

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

**Response:**

VALS supports this proposal but encourages VLA not to limit eligibility for funding only to situations where the parent has had care of the child during the life of the current IAO proceedings. Limiting funding in such terms would mean that the parent of a child immediately placed in out-of-home care on the first Court date would not be eligible for funding for additional IAO appearances even where there is a reunification case plan, the parent is complying with the conditions of the Order and the DHHS is satisfied that he or she is addressing the underlying protective concerns, but that further time and effort is required before the parties would be satisfied that the child should be returned to the parent’s care.

Moreover, there are numerous reasons why further IAO adjournments or court dates may be required, including an unexpected breakdown in the child’s out-of-home care placement, delay in referrals being made for family support services and/or long wait lists for access to same and disputes as to the required level and quality of engagement with services, many of which are not necessarily attributable to any fault or delay on the part of the parent now seeking the additional funding, but which may mean that the parent does not meet the current standard of “extraordinary circumstances” by which VLA will fund additional IAO appearances.

We suggest that funding for additional IAO appearances should be considered by VLA on a case-by-case basis having regard to the history of previous IAO adjournments or court dates, the objective(s) of the further IAO appearance and the likelihood that the additional adjournment or court date will assist in returning the child to the care of the parent (whether immediately or during the life of the interim stage).

We also consider that extending funding in such circumstances would still satisfy the overall objectives of resolving IAO matters in a timely manner, of encouraging more IAOs to be made by consent and of reducing the number of contested proceedings.

## Proposal 3 – Interim Accommodation Order Contested Hearings

**Response:**

VALS welcomes this proposal but encourages VLA to extend such funding to situations where the parent is seeking a variation of their current contact with the child and that variation pertains either to the frequency and/or duration of contact and/or the necessity for contact to remain supervised or monitored. As VLA has already identified, meaningful contact between the child and their parent is crucial to successful reunification, and it is similarly our very strong view that securing unsupervised contact can be essential in assisting parents to demonstrate to DHHS and the Court that they have engaged in a process to address the identified protective concerns and are regaining their ability to successfully parent the child.

We also believe that funding should be extended to situations where the DHHS is seeking to impose a condition on a parent which would either be overly burdensome or which the DHHS has collected insufficient evidence of, including, for example, a requirement that the parent attend a psychiatrist and/or psychologist for an assessment and/or treatment. Given the inherited grief and trauma experienced by Aboriginal Australians and the widespread distrust of the legal system and government agencies present in Indigenous communities, engagement with counselling services, inter alia, is an extremely personal decision for Aboriginal people. Where there is a dispute about the inclusion of such a condition or other proposed condition on an IAO (or final order for that matter) which impinges on the client’s identity, culture and/or right to self-determination, it is our view that the client should be given an opportunity to have the Court carefully consider the appropriateness of imposing same by way of an evidence hearing.

VALS considers that further clarification and/or consultation is required as to how the requisite test – “reasonable prospects of the child being returned to them within the term of the IAO” – is to be applied. We question whether it is VLA’s intention that the IAO Contested Hearing must be likely to terminate in favour of the child being returned to the parent’s care during any subsequent adjournment period before the next court date, or whether VLA will provide such funding if there is a reasonable prospect that a change in the nature of contact will likely assist in the child being returned to the parent’s care during the life of the interim stage, even if additional IAO appearances are required, for example, for the DHHS to continue to assess the impact of such changes and the ongoing engagement of the parent with necessary support services? The latter is our favoured position.

## Proposal 4 – Appeal of an Interim Accommodation Order

**Response:**

VALS welcomes this proposal but encourages VLA not to limit eligibility for such funding only to situations where there are reasonable prospects of the child being immediately placed in the care of a parent. For the reasons already described above, we believe that funding should extend to cases where there are reasonable prospects of an increase in contact (or a schedule for a gradual increase in contact) being secured or of the requirement for contact to remain supervised or monitored being relaxed or removed.

## Proposal 5 – Review of case planning decisions

**Response:**

VALS supports this proposal but encourages VLA to extend such funding to situations where DHHS is proposing a case plan decision that would (1) remove the child from what has been or was intended to be a long-term kinship care placement and the child or parent seeks the return of the child to that person’s care or (2) would substantially limit the child’s contact with his or her parent, extended family and/or community, and the decision is inconsistent with the best interests of the child having regard to legislative requirements such as the best interest principles[[2]](#footnote-2), the additional decision-making principles for Aboriginal children,[[3]](#footnote-3) or the Aboriginal Child Placement Principle.[[4]](#footnote-4)

Indeed, VALS considers that limiting funding in the proposed terms will not foster accountability within the DHHS to continue to adhere to the above legislative provisions.

VALS also considers that further clarification and/or consultation is required as to how the outcome of the internal administrative review will impact eligibility for legal assistance for a VCAT review.

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

**Response:**

VALS supports this proposal but encourages VLA not to limit eligibility for such funding only to situations where there are reasonable prospects of the child being immediately placed in a parent’s care. Limiting funding in such terms would mean that a child or parent would not be eligible for a grant of legal assistance to initiate or respond to an application to vary or revoke an existing protection order in situations where the DHHS has removed the child from what has been or was intended to be a long-term kinship care placement and the child or parent seeks the return of the child to that person’s care as per application of the decision of Bell J the case of *DOHS v Sanding*.[[5]](#footnote-5) Indeed, VALS has been directly involved in and are aware of recent cases where such applications have been brought in response to decisions made by the DHHS under a current Custody to the Secretary Order.

## Additional Options that you propose VLA consider

**Response:**

VALS encourages VLA to consider relaxing the circumstances under which it may make a grant of legal assistance to a guardian or other interested person involved in a case according to Guideline 2. Given emerging evidence which suggests that the one of the strengths of Aboriginal and Torres Strait Islander cultural traditions is the emphasis on shared community responsibility in the raising of children,[[6]](#footnote-6) it is our very strong view that VLA should be encouraging and better facilitating access to legal advice and representation for people joined as a party to proceedings.

This is particularly important for VALS’ clients, who increasingly include the extended kinship network of grandparents, aunts and uncles, and who are or have been intimately involved in raising the child and who possess substantial knowledge and understanding of Aboriginal family and community life which is crucial to assisting the DHHS and the Court to promote and/or maintain the child’s sense of identity and connection to family, community and culture.

1. Report on Government Services 2015, Tables 15A.18 and 15A.19 [↑](#footnote-ref-1)
2. *Children, Youth and Families Act 2005* (Vic), s 10 [↑](#footnote-ref-2)
3. *Children, Youth and Families Act 2005* (Vic), s 12 [↑](#footnote-ref-3)
4. Children Youth and Families Act 2005 (Vic), s 13 [↑](#footnote-ref-4)
5. [2011] VSC 42 [↑](#footnote-ref-5)
6. Shaun Lohoar, Nick Butera and Edita Kennedy, “Strengths of Australian Aboriginal cultural practices in family life and child rearing”, *Child Family Community Australia*, paper no. 25 2014 [↑](#footnote-ref-6)