

MEMORANDUM OF UNDERSTANDING

Memorandum of Understanding between Victoria Legal Aid (VLA), Child Protection Program and the Department of Human Services (DHS), Child Protection and Family Services Branch.

1. INTRODUCTION

The purpose of this Memorandum of Understanding is:

- to improve the delivery of legal services to children and young people who are the subject of protective intervention pursuant to the *Children, Youth and Families Act* (2005);
- to facilitate the implementation of the *Children, Youth and Families Amendment Act* (2013), which provides that children and young people are no longer required to attend the Children's Court in Family Division proceedings, unless they express a wish to attend, the Court orders the child attend or the Principal Act otherwise requires;
- to document the statutory role and responsibilities of DHS Child Protection and VLA and how the two organisations will work together to ensure children and young people are able to meet with their legal representatives away from Court.

DHS and VLA agree that the best results for the child or young person will be achieved when all the professionals involved understand, value and appreciate the importance of their respective roles and responsibilities and learn to work together to achieve effective legal representation for children and young people.

2. BACKGROUND

The Protecting Victoria's Vulnerable Children Inquiry

On 31 January 2011 the Victorian Government announced the Protecting Victoria's Vulnerable Children Inquiry. The Inquiry was established to investigate systemic problems in Victoria's child protection and related services system, and recommend changes to improve the protection and care of Victorian children who were at risk of, or who have experienced, abuse or neglect.

The Report was delivered to the Minister for Community Services on 27 January 2012 and tabled by the Minister in Parliament on 28 February 2012.

Recommendation 53 of the Report states: 'other than in exceptional circumstances, a child is not required to attend at any stage of the Court process in protection proceedings unless the child has expressed a wish to be present in Court and has the capacity to understand the process' (page 378).

This recommendation was incorporated into the *Children, Youth and Families Amendment Act* (2013) with the insertion of section 216A, which provides that children

and young people are no longer required to attend Court in Family Division proceedings, unless they express a wish to attend, the Court orders the child attend or the Principal Act otherwise requires.

3. ROLES

3.1 Role of the Family Division of the Children's Court

The Family Division of the Children's Court is empowered to hear and determine Protection Applications and therefore to consider whether a child or young person is in need of protection. This will be the case when a child or young person has been harmed, or is at risk of significant harm and the parents have not protected or are unlikely to protect the child or young person from harm. The Court then determines the most appropriate disposition, in response to the protective needs so identified. The Court's determination on these matters may have major implications for the child or young person and their family.

The Court process must ensure the magistrate is fully informed and able to provide a careful and considered judgement. The *Children, Youth and Families Act (2005)* sets out certain matters which the Court must consider in making a determination. These include the requirement that "*the best interests of the child must always be paramount*" (section 10(1)) and that the Court in determining what decision or action is in their best interests, "*must consider the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances*" (section 10(3)(d)).

3.2 Role of DHS, Child Protection Litigation Office

Child Protection is a statutory service, which provides child centred family focussed services to protect children and young people from harm as a result of abuse or neglect within the family unit. Child Protection supports and refers children and young people to services to assist them deal with the impact of abuse and neglect on their wellbeing and development. Child Protection may also take matters before the Children's Court, to ensure children and young people are protected and safe from harm.

All applications taken before the Children's Court are conducted by the Child Protection Litigation Office (CPLO) and rural court officers. The CPLO is a legal unit within DHS Child Protection responsible for providing legal representation to the metropolitan divisions for all matters before the Family Division of the Children's Court.

3.3 Role of DHS Child Protection Practitioners

Child Protection Practitioners are delegated to act as protective interveners, i.e. to respond to notifications of suspected child abuse or neglect, carry out investigations and if the allegation is substantiated by the investigation to reduce the risk to the child or young person.

When a child or young person's health, well-being or development is threatened and the parents or care-givers cannot protect the child from significant harm, the child protection practitioner can intervene quickly to take the matter to Court.

If a child or young person is taken into emergency care, the protective intervener assumes responsibility for the safe custody of the child. The child protection practitioner must bring the child's case to Court within 24 hours to apply for an interim accommodation order. Outside Court hours, the child's case must be brought before a bail justice for an interim accommodation order of a limited duration until the next Court working day.

Prior to appearing at Court, the child protection practitioner must provide the CPLO and VLA paralegal with a completed Form B, which contains the names and birthdates of all relevant parties to the proceedings.

On the Form B, the protective intervener must indicate that there are sufficient protective concerns to arrange the making of an interim accommodation order pending the hearing of an application. The protective intervener must recommend to the Court appropriate arrangements, including accommodation, for the child pending the outcome of the case.

At the hearing where the application, be it a protection application or breach of protection order application, the DHS child protection practitioner must satisfy the Court of the justification for the application and prove the case "on the balance of probabilities". The child protection practitioner also advises the Court of the most appropriate disposition, and provides the Court with a draft dispositional case plan.

3.4 Role of VLA

VLA is a statutory body, with specific responsibility for providing legal aid in all its aspects throughout Victoria. This includes free legal information and education to all Victorians, with a focus on prevention and early resolution of legal problems, legal advice and representation, a Duty Lawyer Service and the funding of legal assistance both by VLA and private lawyers.

Children and young people are one of the groups given priority for legal assistance by VLA.

VLA has lawyers who concentrate on the representation of children and young people. Two VLA Duty Lawyers attend Melbourne Children's Court Family Division every Court day. VLA also funds and runs a private practitioner Duty Lawyer panel. The Family Division Duty Lawyer Panel ensures that all parents, children and young people deemed old enough to give instructions, have a lawyer represent them on the first day of a Court listed application.

VLA is responsible for all Duty Lawyer allocations, be they to an in-house VLA Duty Lawyer or private practitioner Duty Lawyer.

VLA is situated at 350 Queen Street, Melbourne. There are offices available to VLA and VLA funded private lawyers located on the Ground Floor to meet with child and youth clients away from Court. The Ground Floor has a reception and waiting area.

3.5 Role of Legal Representative

Legal representation for children and young people who are mature enough to provide instructions to a legal representative assists the Court in its decision making. The child or young person's representative tests and examines the facts involved in an application before the Court and the validity of the assessment made of these facts in the light of instructions given or wishes expressed by the child or young person.

The child or young person's legal representative would wish to see and interview the child or young person, to take instructions and to examine all Court reports on the child. The representative is an advocate of the child's wishes, with a responsibility to ensure that all matters and witnesses relevant to the child or young person's instructions are before the Court.

VLA lawyers receive specialised in-service training and have usually developed a special expertise in this area. They receive extensive on the job training and they appear regularly in the Children's Court. They also act for children and young person's in relation to youth crime and family violence intervention orders.

The VLA Family Division private Duty Lawyer panel currently has 19 lawyers. Selection onto the panel involves a stringent application process whereby practitioners must demonstrate expertise in the area of Children's law.

The *Children, Youth and Families Act (2005)* prescribes that the legal representative must act in accordance with any instructions given or wishes expressed by the child, so far as it is practicable to do so having regard to the maturity of the child (section 524(10)). The representative is therefore required to make an assessment of the maturity of the child to be represented.

Any child who wishes to attend Court for the first hearing and any subsequent hearings may do so. Similarly, any child who elects *not* to attend Court must be accommodated and arrangements made for legal instruction to be given away from Court.

Wherever possible, the child's representation should be arranged prior to the hearing. Arrangements can be made by telephoning VLA child protection on (03) 9269 0407. VLA can arrange representation for any child able to give instructions.

In some exceptional circumstances, the magistrate may direct that a child or young person be legally represented on a best interests basis. In this instance, the Court requests an allocation from VLA directly. Lawyers acting in accordance with what they believe to be in the best interests of the child or young person will usually meet with the child; particularly as the *Children, Youth and Families Act (2005)* requires "to the extent that it is practicable to do so" the lawyer is to "communicate to the Court the instructions given or wishes expressed by the child" (section 524 (11)(b)).

3.5.1 Phases of legal representation

- (i) Interim Accommodation Order Hearing Phase

Children and young people appearing at the Children's Court may be represented by a VLA Duty Lawyer, private Duty Lawyer or pursuant to a grant of legal aid by a VLA or private lawyer. The legal representative will present the child or young person's wishes to the Court concerning whether they should be at home. The child or young person may oppose the child protection practitioner's recommendation of immediate removal into emergency care. The child or young person may propose an alternative placement. The child or young person may agree with the child protection practitioner's recommendation.

(ii) The Court Phase – the final hearing

By this stage, the child protection practitioner will have provided a written report, which contains recommendations regarding the grounds for the protection application or for the application for a breach of protection order, or regarding the disposition. The child or young person can oppose the child protection practitioner's recommendations. Alternatively, the child or young person may support all or some of these recommendations, or the child or young person may propose an alternative course of action.

4. The Process: Making it easier for child and youth clients

The legal representative will need to interview and take instructions from the child or young person. This involves establishing the facts, understanding the child's preferences in response to the likely developments in Court and explaining the manner in which the best possible outcomes can be achieved in Court.

4.1 Emergency removal and the child or young person wishes to attend Court

Prior to appearing at Court, the child protection practitioner must provide the CPLO with a completed form B [see Annexure 1]. CPLO will provide the completed form B to the VLA paralegal.

Upon receipt of the form B, VLA will conduct necessary conflict checks to ensure appropriate legal representation for all parties. A legal representative for the child or young person will be immediately allocated, whilst any remaining parties will be allocated following their arrival at Court.

Upon arrival, the child or young person will meet with their lawyer and provide instructions. After having seen the child or young person, the legal representative will decide whether further instructions are necessary. If so, the lawyer may request that the child or young person remain at Court or provide telephone contact details.

4.2 Emergency removal and the child or young person wishes *not* to attend Court

Once an application by emergency care has been issued, it is the responsibility of the child protection practitioner to provide the CPLO with a form B [see Annexure 2 for further details]. CPLO will then provide the completed front page of the form B to the VLA paralegal.

Upon receipt of the form B, VLA will conduct necessary conflict checks to ensure appropriate legal representation for the child or young person as soon as practicable.

The allocated lawyer will liaise with the CPLO or child protection practitioner to arrange a time to meet with the child or young person at VLA Headquarters, located at 350 Queen Street, Melbourne, at Ground Floor reception.

It is noted that the VLA reception, waiting room areas and interview rooms are also used by other VLA clients with a variety of legal and social issues including crime, family law and mental health by way of example.

The lawyer will then leave Court to meet with the child or young person and take instructions. The instructions taken will be of the widest breadth appropriate to allow for developments during negotiations.

At the conclusion of the meeting, the lawyer will discuss with CPLO how they can contact the child or young person during the course of the day should the need arise.

The lawyer then returns to Court and the child or young person leaves in the care of the child protection practitioner.

5. RESPONSIBILITIES

5.1 Responsibilities of DHS

- DHS is responsible for providing VLA with the completed form B's at the earliest opportunity, via facsimile on 03 9090 5876, email on cparalegals@vla.vic.gov.au or in person at the VLA counter located at the Children's Court.
- DHS or its representative are responsible for providing information to VLA Reception about any foreseeable hazard, safety or security issue that may arise as a consequence of bringing a child or young person to meet with their legal representative *prior to arriving on VLA premises or as soon as practicable*;
- DHS or its representative are responsible for transporting child and youth clients to VLA reception area for the purposes of seeing their lawyers;
- DHS or its representative responsible for the supervision of child and youth clients in the VLA reception and waiting area;
- DHS or its representative retain the duty of care to the child and youth client whilst on VLA premises and will act reasonably to ensure their health, safety and wellbeing, including with regard to any medical or mental health issues;
- DHS is responsible for ensuring that any representative of it, including the child protection practitioner, carer, member of the CPLO or Counsel briefed on behalf of the Secretary, adhere to the following:
 - ✓ that all discussions (including telephone conversations) concerning an application occurs in the room allocated by VLA and not in the reception or waiting area;
 - ✓ that all negotiations or secondary consultations concerning an application occurs in the room allocated by VLA and not in the reception or waiting area;

- ✓ that no documents or records relating to the application are left in the room allocated by VLA, or in the reception or waiting area;
- ✓ that no DHS documents are disposed of on VLA premises;
- ✓ that no requests are made to VLA reception staff to take messages, receive, hold, fax, copy or print any document or materials;
- ✓ that they follow any instructions issued by VLA officers who are responsible for security, safety or emergency conditions.

5.2 Responsibilities of VLA

- VLA is responsible for allocating children and young people a duty lawyer;
- VLA is responsible for informing DHS of the allocation of a duty lawyer for the child or young person in accordance with procedures as set out in Annexure 2;
- VLA retains a duty of care to the child and youth client whilst on VLA premises and will act reasonably to ensure their health, safety and wellbeing including with regard to any medical or mental health issues;
- As a pre-requisite of use, VLA will provide the private lawyer and child protection practitioners with on-site induction regarding building access, security, safety and other relevant local policies and procedures.
- VLA are responsible for referring any safety issues to the appropriate VLA officer and for immediately notifying the DHS representative about any hazard, health, safety or security issue that arises while the child or young person is on VLA premises;
- VLA reception is responsible for assisting interpreters arriving for appointments;
- VLA is responsible for providing suitable interview rooms for appointments that are fitted with a duress alarm;
- VLA is responsible for ensuring that any VLA lawyer, VLA Panel lawyer, Counsel briefed on behalf of VLA or private practitioner utilising VLA offices to see a child or youth client, adhere to the following:
 - ✓ that all discussions (including telephone conversations) concerning an application occurs in the room allocated by VLA and not in the reception or waiting area;
 - ✓ that all negotiations or secondary consultations concerning an application occurs in the room allocated by VLA and not in the reception or waiting area;
 - ✓ that no documents or records relating to the application are left in the room allocated by VLA, or in the reception or waiting area;
 - ✓ that no DHS documents are disposed of on VLA premises;
 - ✓ that no requests are made to VLA reception staff to take messages, receive, hold, fax, copy or print any document or materials;
 - ✓ that any private lawyer must explain to their client that although they are using VLA offices, they are separate from VLA and as such, clients should contact them directly in relation to their case and not VLA;
 - ✓ that any private lawyer should not use VLA stationary.

6. OVERSIGHT AND REVIEW

VLA and DHS acknowledge that we are beginning a new collaboration and a new form of service delivery. DHS and VLA agree to resolve and discuss in good faith specific

issues at the earliest opportunity with the Child Protection Program Manager of Victoria Legal Aid and/or Director, Statutory and Forensic Services of DHS.

If resolution is not reached within 14 days, DHS and VLA agree to refer the issue to the Director, Family, Youth and Children's Law of Victoria Legal Aid and the Director, Statutory and Forensic Services of DHS, who will use best endeavors to resolve the issue within 14 days. During this process VLA and DHS will continue to perform their obligations under this MOU. If resolution is not reached, VLA and DHS may withdraw from the MOU on provision of 14 days' written notice to the other parties.

The agreement is for an initial pilot period of two months from the date of signing. The parties agree to reviews of the agreement at regular meetings with a view to continuing to improve access to legal assistance services for children involved in Child protection proceedings.

VLA and Youth Connect reserves the right to not provide a service where circumstances do not allow for the safe provision of the service.

7. VARIATION AND AMENDMENT

The terms of this MOU may be varied or amended by agreement of VLA and DHS in writing.

On behalf of VLA:

Name: Nicole Rich

Position: Director, Family, Youth and Children's Law

Date:

On behalf of DHS:

Name:

Position:

Date:

FORM B: INFORMATION ON SAFE CUSTODY APPLICATION

COMPLETE FOR ALL SAFE CUSTODY APPLICATIONS AND FAX TO CAU
 Information on this page is given to lawyers representing the other parties

Date and time of apprehension	
Estimated time of arrival at Children's Court:	

Names of children/young person apprehended	DOB

Name of Parents <i>(Note that step-parents and de-factos fall within definition of 'parent' under CYFA)</i>	DOB

Names of non-family members relevant to the apprehension <i>(this is relevant to determine whether VLA have previously represented such persons)</i>	

Names of Siblings (including half siblings)	DOB	Subject to Children's Court proceedings previously? Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown
		Yes / No / Unknown

Who are you expecting to attend Court?		
<input type="checkbox"/> Father	<input type="checkbox"/> Mother	<input type="checkbox"/> Aunt
<input type="checkbox"/> De Facto (F)	<input type="checkbox"/> De facto (M)	<input type="checkbox"/> Uncle
<input type="checkbox"/> Paternal GM	<input type="checkbox"/> Maternal GM	<input type="checkbox"/> Other extended family
<input type="checkbox"/> Paternal GF	<input type="checkbox"/> Maternal GF	<input type="checkbox"/> No attendances

What application are you filing today?	
<input type="checkbox"/> Protection application	<i>Which grounds:</i> a b c d e f
<input type="checkbox"/> Application for new IAO	
<input type="checkbox"/> Application to breach	<i>Specify order/condition breached?</i>
<input type="checkbox"/> Application for urgent variation	<i>What is to be varied?</i>

What Order are you seeking today?	
<input type="checkbox"/> IAO	<i>Specify who are you seeking the IAO to today? If you are unsure who you are seeking to place the child with please write 'unsure'.</i>

	Yes (Notify Registry)	No
Do you anticipate any security issues at Court?	<i>Who is the security risk?</i>	

FORM B: REQUEST FOR LEGAL REPRESENTATION

COMPLETE FOR ALL SAFE CUSTODY APPLICATIONS AND FAX TO CAU
 Information on this page is for CAU only

Name of CP worker bringing in the matter	
Contact details (mobile number)	
Region/Office	

Briefly outline why the child/young person was apprehended

What are the major issues requiring court conditions?

Have parties been personally served a copy of the application? <i>If no, explain why and any alternate attempts to inform parties of the application</i>	
Mother	Yes / No
Father	Yes / No
Young Person 12 years and over	Yes / No
Other "parent" as defined in CYFA	Yes / No

Will parties contest the IAO sought?	Yes / No
Which party will contest?	
Why?	

Do you have documents/orders pertaining to the application? <i>(e.g. PA, Affidavit/Declaration of service, IAO from Bail Justice)</i>	Yes / No
Prepared and provided copies of case notes relevant to the reasons and circumstances for the application as anticipate a contest?	Yes / No
Provided copy of a genogram clarifying family structure especially for blended families and related sibling groups?	Yes / No

SIGNED	
DATE	

Children's Attendance at Court

This protocol has been developed in consultation with the Melbourne Children's Court, Victoria Legal Aid, the Law Institute of Victoria and the Department of Human Services Child Protection Litigation Office and Child Protection.

It outlines an agreed process for children aged 10 years and over to provide legal instructions to their legal representatives whether or not they elect to attend court.

This protocol has been developed when children are placed in emergency care arrangements and the matter is to be listed at either the Melbourne or Moorabbin Children's Courts.

1. Emergency removal and child wishes to attend Court

- Child to be brought to Court by CPP.
- Prior to arriving at Court, CPP to fax the form B to CPLO indicating that the child does not wish to attend Court. In turn CPLO provides Form B to VLA.
- VLA to conduct conflict checks upon receipt of form B.

NB Allocations cannot be done without parents, step parents and siblings (and other interested parties) names and dates of births (approximate dates, ages or a home address instead may suffice)

- VLA to allocate parties as they arrive, with the exception of the child who can be allocated in advance of the arrival time.

2. Emergency removal overnight by divisional CPP and child does not wish to attend Court

- CPP to fax form B to CPLO. In turn CPLO provides Form B to VLA at the earliest opportunity. The Form B is to contain estimated time of arrival at interview location. The Form B should be comprehensive in detail, namely the names and dates of birth of all parties and information that provides for conflict checks to be undertaken (Attachment 1 – Form B).
- Application forms may need to be lodged by CPP from the same division as the allocated CPP.
- VLA to conduct conflict checks and allocate a lawyer to the child at the earliest opportunity upon the opening of the VLA duty room at 9.30am.

NB The child's lawyer should not be appearing in a directions hearing or submissions contest for other clients and must be contactable at all times by VLA.

- CPLO upon filing of the protection application with the court, may apply to the court at the earliest opportunity for a release of the case notes (served with application as per Practice Direction No 4) to provide to the child's lawyer before leaving to interview the child.
- The CPP, child and lawyer will arrive at interview location at designated time. Alternatively if the child or young person has been placed in the care of a person assessed as suitable

(family or non-family member) by CPP then this person may bring the child or young person to VLA interview location to provide instructions.

NB. CPP will ensure that the suitable person has the details of the alternative venue.

- CPLO advises the Court a matter involves a child who will not be attending Court.
- While the lawyer interviews the child, the CPP may ring CPLO to provide instructions. The CPP will require legal advice before determining what order he or she seeks. CPLO will advise the lawyer of the disposition.
- The lawyer should take instructions from the child of the widest breadth appropriate to allow for any developments during negotiations during the day.
- In the event a conflict of interest arises in the sibling group, the practitioner will advise the VLA paralegal at the earliest opportunity. The VLA paralegal will allocate additional lawyers as appropriate to the sibling group.
- The lawyer, child and CPP will discuss how the lawyer and child can communicate further during the day i.e. at school or placement, by phone or by skype.
- The lawyer returns to Court and the child leaves the interview location with the CPP or the suitable person. The CPP is then free to attend Court after taking child to placement or leaving the child in the care of another worker.

NB If there are siblings who need to be seen by different lawyers, DHS may need to consider staggered arrival times.

3. Emergency removal during the morning and child does not want to attend Court

- Largely the same process as for overnight removals, except that the form B is to be lodged with CPLO first for review and once this has been approved by CPLO then to VLA by 1pm and a lawyer allocated by 2.15 pm.

4. Emergency removal issued by AHCPEs and the child does not want to attend Court

- AHCPEs to contact CPP in the division and advise that an urgent application has occurred overnight and the child or young person has expressed a wish not to attend court. The Form B completed by AHCPEs is to contain information that the child does not want to attend Court. Form B is faxed from AHCPEs to CPLO by AHCPEs Court Officer prior to AHCPEs Court Officer attending court to lodge relevant legal documents and hand over matter to divisional CPP. In turn CPLO provides Form B to VLA.
- AHCPEs Court Officer attends court, lodges legal documents and notes at the Registry and briefs CPLO about circumstances of apprehension and that the child or young person does not wish to attend court.
- CPLO advises the Court a matter involves a child who will not be attending Court at the call over. The
- The division CPP arranges for the child to be collected from placement and transported to the VLA interview location. Alternatively if the child or young person has been placed in the

care of a person assessed as suitable (family or non-family member) by AHCPEs then this person may bring the child or young person to VLA interview location to provide instructions.

NB. AHCPEs will ensure that the suitable person has the details of the alternative venue.

- The Division is to contact VLA on a specific number 9269 0407 at the earliest opportunity to advise when the child will be presented at VLA interview location.

NB If there are siblings who need to be seen by different lawyers, DHS may need to consider staggered times.

- Divisional CPP or suitable person attends VLA interview location with child or young person. Once child has provided instructions the child departs with a divisional CPP or suitable person, who returns the child to placement or school. The lawyer should take comprehensive instructions from the child to allow for any developments during negotiations throughout the day. Lawyer, child and divisional CPP will discuss how the child and lawyer can communicate further throughout the day.
- Child's or Young person's lawyer to return to court once instructions have been received from the child.
- In the event a conflict of interest arises in the sibling group, the Divisional CPP will advise the VLA paralegal at the earliest opportunity. The VLA paralegal will allocate additional lawyers as appropriate to the sibling group.

NB The child's or young person's lawyer should not be appearing in a directions hearing or submissions contest for other clients and must be contactable at all times by VLA.

- AHCPEs is responsible for providing a redacted copy of the case notes at the time AHCPEs files the application, or as soon as practicable thereafter in accordance with Practice Direction No 4.

For urgent matters listed in the Melbourne Children's Court, children who do not wish to attend court and need to provide legal instruction should be taken to:

350 Queen Street, Melbourne

For urgent matters listed in the Moorabbin Children's Court, children who do not wish to attend court and need to provide legal instruction should be taken to:

Youth Connect, Level3, 1001 Nepean Highway, Moorabbin