SIMPLIFIED GRANTS PROCESS

NOTES ON VLA GUIDELINES

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IMPORTANT:

These notes should be read in conjunction with the online VLA Handbook and the Guidelines for Assistance contained therein. These notes serve to provide assistance in interpreting the Handbook and form a directive to practitioners participating in the SGP as to how to apply the Guidelines contained in the VLA Handbook. Practitioners must make recommendations that are consistent with these notes.

Participants in the SGP are required to apply both these notes and the Guidelines contained in the VLA Handbook.

The VLA Handbook can be obtained on-line at www.legalaid.vic.gov.au

Forms for use by SGP practitioners are also available on-line.

Any queries should be directed to the Compliance Team on phone: 9606-5355 or by email at compliance@vla.vic.gov.au

1 Introduction

Purpose

The Simplified Grants Process (SGP) simplifies the requirements of VLA in assessing applications for legal assistance without compromising VLA's statutory obligations to provide legal assistance in accordance with the Legal Aid Act, guidelines made by it and other legal aid arrangements such as the Commonwealth/VLA Agreement.

VLA's goals

It is VLA's goal to work in partnership with practitioners to achieve a process that is simpler, cheaper and will not compromise the legal aid fund.

Extent of SGP

The SGP is limited to certain areas of law. The further sections in these Notes to practitioners outline the areas which are covered.

Applications under SGP to Assessment Unit

All applications under the SGP should be directed to the Assessment Unit, and should contain only the checklist and the VLA application form. Practitioners must retain a complete copy of the signed checklist and application form on their file, along with all other documentation substantiating the matter and the applicant's means.

Where a practitioner has ticked the relevant box on the checklist making a recommendation and certifying that a matter is within the guidelines and meritorious, the grant will be processed based on that recommendation. Correspondence sent in with the checklist raising questions of guidelines / merits will not be considered. Practitioners cannot rely on that correspondence when non-compliance issues are raised. In cases requiring advice from compliance, practitioners must seek a ruling <u>before</u> making a recommendation.

VLA assessment

Where a matter is referred to a VLA officer for decision, only that part of the decision is subject to the assessment by VLA. VLA will continue to rely upon the practitioner recommendation contained in the checklist for matters such as proof of means, and guideline and merits recommendation.

If other issues arise which require consideration in relation to the guidelines, practitioners should obtain a ruling on that aspect from a compliance officer.

SGP requirements

It is VLA's view that the SGP will greatly reduce the administrative steps the practitioner ordinarily has to take in order to obtain a grant of legal assistance. A properly maintained casework file should contain all relevant documents and reflect the work done and the recommendations made eg. a file note of attendance at a contest mention or negotiations.

Practitioners should refer to the VLA Practitioner Manual for the record keeping and compliance procedure and these Notes on VLA Guidelines for guidance when completing the checklists.

Approval must be sought before commencing work on the matter

The SGP does not involve a delegation of VLA's power to approve legal assistance to practitioners. In simple terms, it is about VLA relying on the practitioner's recommendation as to merit and guidelines. VLA will assess the application for assistance based on the practitioner's recommendation and certification as to documentary proof and will usually approve assistance on such recommendations and certifications if the means test is satisfied. Practitioners should not proceed with work on the file until confirmation of the grant of legal assistance is received from VLA.

Urgent Grants

If a matter is urgent and requires an immediate appearance a completed checklist together with a VLA application form will need to be sent to VLA

a) for family law matters immediately (on the day) via facsimile
b) for Children's Court cases and Magistrates' Court criminal cases within 14 days of the appearance in accordance with the provisions of Part 15 of the Handbook. Such grants will attract the urgent grant fee.

In these circumstances it is important for practitioners to note the financial status of the client before sending in the application. Should the financial or some other circumstances of the applicant disclose that the applicant is not eligible for assistance, the grant of aid will be refused.

Applications under Special Circumstances Guideline (General provisions)

Where the application does not meet the requirements of the relevant guideline, but the practitioner is of the opinion that special circumstances (as defined in Part 14 of the VLA Handbook) may be relevant, an application and checklist should be directed to the VLA for assessment. Practitioners should tick the "special circumstances" box in Part B of the checklist and provide a memorandum / letter setting out what the special circumstances are and any additional information to support the recommendation.

A grant does not automatically follow an assessment that special circumstances exist as defined in Part 14.

Assistance can only be provided if
a) the applicant satisfies the means test; *and*
b) the application is meritorious; *and*
c) the application satisfies the cost/benefit requirements.

However, in circumstances where an applicant suffers from cognitive impairment due to mental illness or intellectual disability, assistance may be granted where the merit test is not satisfied.

Examples:

a) Summary Crime Contested Hearing
An applicant suffering from schizophrenia seeks to contest the charges against him. There is no merit to contest the charges. VLA is of the view that the applicant's cognitive functioning may be impaired and they are unable to provide reasoned instructions. As such, representation is necessary to address the issues with the court.

b) Children's Court - summary crime:
The argument that "the applicant is a child" cannot be used to overcome guideline issues such as funding on a charge of not wearing a bike helmet. The applicant being a child has already been incorporated into the guideline.

Duty to Advise VLA of any Extraordinary Events

In the event that a grant of assistance goes beyond what is reasonably expected (eg. a multi-day contested bail application, hearing or plea; repeated adjournments etc), the practitioner must advise VLA immediately of such circumstances and seek specific approval from VLA for the assistance sought.

Transfers

Where the matter for which legal assistance was approved under SGP and is transferred to another practitioner –

(a) if the new practitioner is also a participant in the SGP, they will need to complete a checklist to certify as to the documents on the file and to confirm that the matter continues to meet the merit test and the guidelines;

(b) if the new practitioner is not a participant in the SGP, the matter will be assessed for further legal assistance in the usual way by the grants team outside the SGP.

VLA will not approve a transfer of practitioner where it will result in an increase in the amount of funds expended on a case. Any transfer must be cost-neutral to VLA.

Practitioners are also referred to Part 22 of the VLA Handbook, which sets out the limitations to changing practitioner.

Where an existing grant is transferred from a non SGP firm to an SGP firm, the existing matter will then be part of the SGP and a checklist must be completed.

VLA requires that the following steps to be taken:

1. Discussion with both the client and the previous practitioner to check whether the complaint can be easily rectified/addressed by the previous practitioner.
2. Should the matter not be resolved, a signed transfer authority must be provided to the previous practitioner.

3. A signed transfer authority must be provided to VLA with a written request for transfer which includes :
    (a) advice obtained regarding the progress in the matter
    (b) whether the transfer of assistance is supported by the previous practitioner, or
    (c) whether the previous practitioner is still willing to act in the matter.

   (NB: VLA will contact the previous firm to confirm the information provided)
4. Written submission that specifically addresses the criteria as outlined in Part 22 of the VLA Handbook.
5. Completed checklist recommending assistance and certifying as to merits and proof of means.

NOTE : Where a practitioner takes over a matter after transfer both a copy of the client's application for assistance and proof of means (POM) must be retained on file.

VLA expects transfer of the file between the practitioners without delay.

Practitioners requiring further information

Practitioners should contact the Compliance Team for any queries. This includes all questions as to procedures under the simplified process, guidelines and costs. The Compliance Team can be contacted on 9606-5355 or by Fax 9269-0115.

2 Applications under Special Circumstances

(Summary Crime – SGP applications for summary crime only)

Practitioners who are on VLA's Summary Crime Panel **AND** who submit applications for assistance using ATLAS+ may recommend assistance having regard to "special circumstances".

Where an application does not meet the requirements of the relevant guideline, but the practitioner is of the opinion that special circumstances apply, assistance can still be recommended on this basis. Practitioners **must ensure** that they select "Special Circumstances" as the applicable guideline in the "guideline Statement" of the online form. Any information or corroborating documentation to support a recommendation of this nature should be retained on the practitioner's file and be clearly identifiable.

Practitioners considering matters under State and Commonwealth guidelines should refer to part 14 of the VLA Handbook if they believe special circumstances exist. Practitioners are reminded that they **cannot** recommend assistance for a State matter, citing special circumstances defined under the Commonwealth priorities.

Consideration of Special Circumstances

Although VLA may fund cases under special circumstances, this is only a discretion. The following issues must be considered:

1. Cost/benefit

   Practitioners must have regard to the nature and extent of the benefit and/or detriment to the client and give due consideration to the legal costs involved, recognising that it is public funds being spent.

2. Merit

   If a matter is not meritorious and/or does not satisfy cost/benefit criteria, a grant cannot be made based on special circumstances. (Eg summary contest where full admissions made). See Part 13 (State matters) or Part 12 (Commonwealth matters) of the VLA Handbook.

   <u>However, in circumstances where an applicant suffers from cognitive impairment due to mental illness or intellectual disability, assistance may be granted where the merit test is not satisfied</u>

3. Means test

   Special circumstances do not override the means test. Assistance cannot be granted if an applicant has access to financial resources.

Where the Children's Court guidelines is not satisfied, assistance cannot be recommended for special circumstances solely on the basis that the applicant is a child as this already factored into the actual guideline (eg fare evasion).

Language or Literacy Problem

It is insufficient to recommend assistance on the basis that English is the client's second language and/or that they have a limited understanding of court procedures. There must be real and demonstrable reasons why the client would be unable to utilise the services of a court interpreter and the required representation is outside the normal level of representation which could be provided through the duty lawyer scheme.

Clear file notes must exist detailing the grounds on which assistance is being sought on this basis.

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Intellectual or psychiatric disability

'Intellectual or psychiatric disability' means a disability which has resulted in a person either:

- being registered as an 'eligible person' under the Disability Act 2006
- receiving services from an approved mental health service under the Mental Health Act 1986.

It is insufficient to recommend assistance on the basis that the client presents as 'disturbed' or gave instructions in a manner which would suggest an intellectual or psychiatric disability. Before recommending assistance for client's with a ABI, intellectual disability or psychiatric disability, the practitioner must have on file:

- confirmation of registration under the Disability Act (there is a formal certificate produced by DHS confirming when the client became eligible for Disability Services). The practitioner will need a signed authority from the client to be able to telephone DHS to ascertain whether the client is registered under the Disability Act. A file note by the practitioner of a telephone conversation with DHS will be required ; or
- confirmation of being in receipt of services from an approved mental health service (this may include written confirmation from the service or a file note by the practitioner of a telephone conversation with the health care provider).
  A list of approved mental health services may be found on the Department of Human Services website.

3 Documentary proof of Income & Assets

Practitioners must ensure that the proof of means which they obtain correctly reflects what is contained in the VLA application form. Practitioners should check the documentation provided, and clarify any discrepancies which may be apparent either from the proof of means or the instructions provided by the applicant. If there are complex financial arrangements practitioners should contact the Compliance team for advice/guidance.

In the ordinary case, documentary proof of both **income** and **assets** for applicants and any financially associated person (FAP) must be obtained and retained on file.

Dependants with income / assets:
VLA will consider a dependant over the age 18 who has assets and / or income to be a FAP and not a dependent and will apply the normal proof of means requirements to that person.

'Income' means the gross income derived directly or indirectly from all sources whether in or out of Australia. It includes:

- receipts by way of salary, wages or allowance (including all government assistance programs)
- child support and spousal maintenance
- income from property, including royalties, rent, dividends and interest
- capital profits from the purchase and sale of property
- amounts received from life insurance, annuity or superannuation fund

Variable Income
To calculate average weekly salary, add the net weekly salary for the last 13 weeks and divide the total by 13 (or if employed for less than 13 weeks, divide the net total by the number of weeks employed).

'Assets' means any tangible or intangible property or interest that has economic value to its owner. It includes:

- real estate
- investment, shares, options or interest in trusts or companies
- trading stock
- plant and equipment
- unpreserved superannuation
- an option, a debt, any other right, goodwill and any other form of incorporeal property
- any asset over which the applicant has an equitable interest

Proof of Income

The minimum documentary requirements for applicants <u>and any disclosed financially associated persons (FAP)</u> are: -

Where the applicant and/or FAP are in employment

Latest pay slip or letter from the employer showing earnings. Proof of savings will also be required in the form of bank statements for the last three months (see below).

Where the applicant and /or FAP are Social Security recipients

Current pension or health care card.

For applicants in receipt of Centrelink benefits with FAPs also on benefits copies of <u>both</u> persons' health care cards (or other proof of benefits) must be obtained.
It is not sufficient to provide a card with either the FAP listed on the applicant's card or the applicant listed on the FAP's card.

Where the applicant and /or FAP are self-employed

Latest tax return, profit and loss statement and balance sheet.

Proof of means for a self-employed applicant / FAP must be sent to VLA for consideration.

Practitioners should ensure that the applicant's instructions accord with the financial position disclosed to VLA. If an applicant makes reference to financial support received from others, that person must be treated as a FAP. The same applies if other instructions received indicate the existence of a FAP (eg plea instructions, affidavits). If that person is not disclosed in the application form, practitioners must seek further instructions and notify VLA.

Proof of Savings and Investments

Where:

- an applicant and any financially associated person has savings and investments less than $865 AND
- their <u>only</u> income is a Centrelink social security pension or benefit, no proof of savings and investments is required

<u>All</u> other applicants must provide proof of savings and investments for both themselves and their FAPs, including statements for the last three months from

- banks
- building societies
- credit unions

Where an applicant or their FAP is on a part pension and also receive an income from any other source, then bank statements for the last three months must be obtained and retained on file, in addition to the documentary proof of that income (eg. Payslips).

Where an applicant receives child support or spousal maintenance of more than $130 per week, bank statements for the last three months must be obtained and retained on file.

The statements must be obtained for all accounts. Where transactions on bank statements provided indicate the existence of other accounts (eg regular internet or telephone transfers between accounts), practitioners must obtain further instructions and proof and advise VLA.

Additional proofs

Subject to the information given by the applicant on the application form, VLA may require practitioners to obtain further documentary proofs of assets and income. Further proofs may be required where –

- the applicant's lifestyle is inconsistent with the financial information provided
- the value of assets is disputed
- another person has contributed to the applicant's previous legal costs

In such circumstances, VLA may direct the practitioner to obtain -

- tax returns and assessment notices for the previous two years
- bank passbooks or statements showing transactions for the previous twelve months
- annual company or trust returns for the previous two years
- rate certificates for the current year
- proof of payments of rent or mortgage instalments for the previous six months
- statutory declarations about the applicant's ability to pay legal costs
- statutory declarations from persons who contribute to the applicant's financial support
- applicant's consent to other persons, such as banks, employers and accountants, providing financial information about him or her

Practitioners should contact VLA if they are in doubt as to what proofs should be obtained.

Waiver of documentary proof – Summary Crime Only

In certain circumstances a waiver of the minimum documentary proof of income and assets may be obtained from VLA. Where the applicant is seeking assistance for a summary criminal matter in the Magistrates' or Children's Courts a waiver will be approved if:

- The applicant is a child (aged 18 years or younger) and the matter is to be heard in the Children's Court
- The applicant is in custody and the matter for which legal assistance is sought will be heard and determined within 7 days of the date of the application for legal assistance
- The applicant has been remanded into custody and the matter for which legal assistance is sought relates to a bail application

- Where the applicant is in custody and has savings and investments of less than $865. Where the applicant has investments of more than $865, proof of assets only will be required (eg bank statements).

Practitioners seeking a waiver on behalf of their clients should so indicate on the checklist accompanying the application form.

The waiver provisions relate to documentary proof only. They do not relate to disclosure of means or the means test. Full disclosure of means is required in all cases.

Expiration of Waiver

If waiver of proof of income and asset was granted because the applicant was in custody and during the currency of the grant of legal assistance the applicant is released from custody, proof of income and assets will be required before any further work may be conducted under the grant of assistance. The waiver ceases to operate once the applicant is released from custody.

If waiver of proof of income and asset was granted because the matter was expected to be finalised within 7 days of the date of the application but does not finalise, the waiver is not available. Proof of income and assets must be obtained unless a different waiver applies.

Important
Practitioners should note that the policy waives documentary proof of means. It does not waive the obligation to give the information about means. Applicants must still complete the application form in full and all applicants must meet the means test. Applications with lines drawn through them are not sufficient. All questions must be completed.
Practitioners should also note that the policy applies only in respect of the person in custody. If a financially associated person is disclosed, documentary proof of means of that person's income/assets is still required.

Waiver of documentary proof – Appeals/Indictable Crime

A limited waiver of the minimum documentary proof of income and assets may be obtained from VLA where the applicant is seeking assistance for an appeal or indictable criminal matter if:

- The applicant has been remanded into custody and the matter for which legal assistance is sought relates to a bail application
- Where the applicant is in custody and has savings and investments of less than $865.

Practitioners seeking a waiver on behalf of their clients should so indicate on the checklist accompanying the application form.
Practitioners should also note that the policy applies only in respect of the person in custody. If a financially associated person is disclosed, documentary proof of means of that person's income/assets is still required.

Waiver of Means Test – Children’s Court

Where the matter is being heard in the Children’s Court and the applicant is aged between one and eighteen (1-18) years of age, the applicant is not subject to the means test and the waiver of documentary proof applies.

Currency of Documentary Proof of Means

Once documentary proof of means has been obtained at the start of a file, it remains current for 12 months. Where a file has been open for over 12 months, practitioners must ensure that they obtain new documentary proof of means for the applicant on the anniversary of that file and every 12 months thereafter. This will apply mainly to family law matters as they tend to remain active for a greater period of time. Practitioners are reminded that they must advise VLA immediately upon any change to the applicant's financial circumstances and obtain appropriate documentary proof of means on their file.

State Trustees

Where an applicant declares that their finances are managed by State Trustees and their assets would affect the applicant’s eligibility for aid, the practitioner must first ask State Trustees whether they are prepared to release funds for the purpose of funding legal costs. Applications for assistance should only be submitted where State Trustees have refused to release monies. They must be accompanied by a copy of the letter from State Trustees.

4 Summary Crime

This section provides definitions and guidance for practitioners submitting applications for assistance in both State and Commonwealth summary criminal matters. Assistance can only be sought where the applicant is ***charged*** with an offence which satisfies the summary crime guidelines.

Commonwealth charges take priority

Where an applicant is charged with a combination of State and Commonwealth matters, practitioners should first consider the merits of the application as it relates to the Commonwealth charges. If the practitioner forms the view that the application does not qualify for assistance under the guidelines on the Commonwealth charges, the application as it relates to the State charges should then be considered.

When filling out the checklist practitioners must tick the Commonwealth Summary Crime guideline box whenever the Commonwealth charges are the basis for the recommendation.

Definitions

'Reasonable prospect of acquittal' means that a prudent and experienced practitioner would consider it likely in all the circumstances of the case. The prospect of acquittal must be real and not fanciful having regard to the evidence and circumstances of the case. This requires more than an arguable case.

'Most serious charge' means the charge carrying the most serious penalty.

'Likely penalty' and 'likely to result in' means the actual penalty the applicant could expect to receive, having regard to the nature and circumstances of the charges, the applicant's prior convictions and any mitigating or aggravating circumstances.

When determining likely penalty, the practitioner must determine what the likely penalty will be irrespective of the applicant's financial position. That is, if the applicant cannot pay a fine and will seek to have a CBO or imprisonment, the assessment of likely penalty remains a fine.

'Realistic prospect of bail being granted' means that a prudent and experienced practitioner would consider it likely in all the circumstances of the case. The prospect of bail being granted must be real and not fanciful having regard to the evidence and circumstances of the case. This requires more than an arguable case.

'Opposed' means actively contested.

'Serious or complex matter' means a matter where the level of representation required is outside that which could be provided through the duty lawyer service.

‘Psychiatric or intellectual disability’ means a disability which has resulted in the applicant receiving services from an approved mental health service under the Mental Health Act or being registered as an eligible person under the Disability Act 2006.

‘Traffic prosecution’ means a prosecution involving charges under the Road Safety Act.

State Criminal Law Matters

(this section should be read in conjunction with Part 3 of the VLA Handbook)

There are 5 guidelines of relevance to state summary criminal matters. They are:

- Guideline 1.1 – not guilty pleas
- Guideline 1.2 – guilty pleas
- Guideline 1.3 – Assessment and Referral Court List
- Guideline 2 – traffic prosecutions
- Guideline 6 – bail applications
- Guideline 5.1 – Children’s Court matters

4.1.1 Not Guilty Pleas

Before recommending that assistance be granted for a not guilty plea, practitioners must form the view that:

(i) the client has a reasonable prospect of acquittal on the most serious charge AND

(ii) the likely penalty, if convicted on all or any of the charges, would be either
(a) imprisonment
(b) a suspended term of imprisonment
(c) in serious or complex matters, in which there is a likelihood the magistrate will impose a community correction order requiring more than 200 hours of unpaid community work.

(For matters assessed before 18 January 2011 the likely penalty threshold is fines in excess of 7.5 penalty units.)

Examples

The applicant is charged with theft of a small quantity of fruit and vegetables from a supermarket. Her defence is that she was waiting at the checkout when her 4 year old son ran away past the checkout and out the door. She followed him, still carrying the items, and had intended to return and pay for the items. She has no prior convictions. Whilst she may have a good defence to the charges, she is not likely to receive a penalty of a CCO requiring more than 200 hours unpaid community work, and would not qualify for assistance.

The applicant is charged with burglary of his former partner’s house. His defence is that he believed he had permission to enter the premises, he entered using a key she had given him, and that he wished to collect some items that belonged to him. He has recent prior *convictions for burglary and theft, for which he received a CCO and a suspended sentence. It is likely that, if convicted of burglary, he would receive a penalty of a CCO exceeding 200 hours. If his defence is deemed sufficient to give him a reasonable prospect of acquittal, he would be eligible for assistance.*

VLA considers that whether an applicant has a 'reasonable prospect of acquittal' may be assessed by reference to the following:

- Client's instructions,
- Strength of prosecution case in relation to direct and circumstantial evidence
- Availability and strength of evidence supporting the defence
- Admissibility of prosecution evidence, dependent upon:
    - Likelihood that evidence was obtained illegally
        - the admission was not voluntary
        - the accused was not informed of the right to silence.
        - the police engaged in illegal activity without authorisation.
    - Likelihood that propensity evidence will be unduly prejudicial to the accused

VLA considers that the likely penalty may be assessed by reference to the following:

- The primary charge or main group of charges
- The client's prior convictions
- The seriousness of the offence relative to other examples of the same offence (eg, quantum of theft, nature of injuries, amount of drugs) requiring consideration of
    - the existence of mitigating circumstances
    - the extent to which the law was breached
    - whether aggravating circumstances exist

The practitioner's file must include:

- a reference to guideline 1.1
- full details of the charges
- the basis for the defence(s)
- details of the evidence to be relied upon in support of the defence(s)
- the practitioner's assessment of the strengths and weaknesses of the defence(s)

If the practitioner forms the view that the application does not meet the prospect of acquittal requirements of guideline 1.1, assistance can only be considered for plea.

Contested Hearing

Should the matter fail to resolve, and the requirements of Guideline 1.1 continue to be met, the practitioner may take the matter to a contested hearing <u>without</u> seeking a further grant of assistance.

In the event that the contested hearing is likely to be of an extraordinary duration, VLA must be notified of the number of days the matter is listed for hearing.

4.1.2 Guilty Pleas

Before recommending that assistance be granted for a guilty plea, practitioners must form the view that conviction is likely to result in:

(a) imprisonment
(b) a suspended term of imprisonment
(c) in serious or complex matters, in which there is a likelihood the magistrate will impose a community correction order requiring more than 200 hours of unpaid community work
(d) a community correction order where the person will have difficulty communicating their rehabilitative needs because of a psychiatric or intellectual disability, lack of education or difficulties in understanding English.

The practitioner's file must include:

- a reference to guideline 1.2
- full details of the charges
- full details of prior convictions
- the practitioner's assessment of the likely penalty

VLA considers that the 'likely penalty' may be assessed by reference to the following:

- The primary charge or main group of charges
- The client's prior convictions
- The seriousness of the offence relative to other examples of the same offence (eg, quantum of theft, nature of injuries, amount of drugs) requiring consideration of:
  - the existence of mitigating circumstances
  - the extent to which the law was breached
  - whether aggravating circumstances exist

VLA anticipates that, save where the offences are extremely serious or numerous, an applicant with no prior convictions will not ordinarily qualify for assistance under this guideline.

Whilst VLA anticipates that matters involving a breach of a previous court order will often qualify for assistance under this guideline, practitioners must form the view that conviction is likely to result in at least a CCO requiring more than 200 hours of unpaid community work. This is not likely where the order involved is a lower level CCO and the breach is constituted by minor non-compliance.

Breach offences not filed with the court

Where an applicant is facing charges which are punishable by imprisonment and have technically breached a suspended sentence, the potential breach charge will be taken into account when assessing a matter under the guidelines despite not being filed yet by the informant.

Where an applicant qualifies for a grant of assistance on the new charges, the potential breach of a suspended sentence will be taken into account when assessing a matter for a consolidation grant despite not being filed yet by the informant.

Applications to Vary Court Orders – CCO's etc

Applications to vary orders (eg. CCO's) are **not** in the VLA Guidelines and accordingly are not aidable, and cannot be the subject of a recommendation for assistance.
Where the Office of Corrections seeks to vary an order, this does not form part of the SGP, and an application should be made to VLA through the traditional grants process. Such applications will be considered on a case by case basis.

4.1.3 Assessment & Referral Court (ARC) List

The *Magistrates' Court Amendment (Mental Health List) Act 2009* provides for the creation of a pilot mental health list at the Melbourne Magistrates' Court, known as the Assessment and Referral Court List (ARC) List.

Applicants will be eligible to have their matter listed in the ARC List if they:

- have a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder or a neurological impairment (e.g. dementia); **and**
- have substantially reduced capacity in at least one of the following; self-care, self management, social interaction and/or communication; **and**
- would benefit from receiving services.

The case must be listed for the ARC List eligibility assessment hearing (after the CISP assessment) before a practitioner can recommend that assistance be granted.

The practitioner's file must include:

- a reference to guideline 1.3
- full details of the charges
- full details of the applicant's prior convictions
- details of the applicant's mental health issues
- copy of report from CISP / copy of the draft individual support plan

Applicant found not suitable at ARC List eligibility assessment hearing

Where an applicant is found not suitable and the case is referred back to the standard list of cases, assistance will continue under the existing grant with fee payable per Table A.

Applicant in receipt of standard summary grant already

Where assistance has already been granted pursuant to guideline 1.2, the existing grant will not cover the case in the ARC list. An extension of assistance must be sought.

4.1.4 Traffic Prosecutions

Before recommending that assistance be granted for a traffic prosecution matter the practitioner must:

- Confirm that the applicant has a psychiatric or intellectual disability, or an acquired brain injury, **and**
- form the view that conviction is likely to result in:

(a) imprisonment; or
(b) a suspended term of imprisonment

Before recommending assistance for client's with a ABI, intellectual disability or psychiatric disability, the practitioner must have on file:

- confirmation of registration under the Disability Act (there is a formal certificate produced by DHS confirming when the client became eligible for Disability Services). The practitioner will need a signed authority from the client to be able to telephone DHS to ascertain whether the client is registered under the Disability Act. A file note by the practitioner of a telephone conversation with DHS will be required ; or
- confirmation of being in receipt of services from an approved mental health service (this may include written confirmation from the service or a file note by the practitioner of a telephone conversation with the health care provider).
  A list of approved mental health services may be found on the Department of Human Services website.

The State special circumstances guideline does not apply to traffic matters.

A practitioner must be satisfied that the matter is likely to result in imprisonment or a suspended term of imprisonment, regardless of whether the applicant is pleading not guilty or guilty. If the applicant is pleading not guilty, there must also be merit in the defence (ie. there must be a reasonable prospect of acquittal).

The above changes relate to traffic offences heard in the Magistrate's Court. This does not apply to children, where such offences would be dealt with in the Children's court.

Suspended Sentence Triggered by Traffic Offences

VLA holds that the traffic prosecution guideline will also apply in circumstances where a traffic offence will trigger a breach of suspended sentence, or breach of a CCO. It does not matter whether the suspended sentence or CCO were incurred for previous traffic offences or other offences.

Where the offending breaches a suspended sentence the primary charge is still the traffic offence. It is the finding of guilt for this offence that triggers the suspended sentence.

VLA acknowledges that although a person charged with a traffic matter in breach of a suspended sentence will face a real prospect of imprisonment, the requirement under the new guideline precludes aid being granted unless the applicant has a cognitive impairment as outlined in the guideline.

The practitioner's file must include:

- a reference to guideline 2
- Documentary proof that the applicant is receiving services from an approved mental health service or is registered under the Disability Act 2006
- full details of the charges
- full details of the applicant's prior convictions
- the practitioner's assessment of the likely penalty

and if contested:

- full details of the defence
- the practitioner's opinion as to the merits of the defence

A failure to pay traffic fines which has resulted in the applicant facing the possibility of imprisonment does <u>not</u> form part of the traffic guideline. These matters must be assessed under the Infringement Court guideline (refer below).

4.1.5 Infringement Court matters

Before recommending that assistance be granted for an infringement case the practitioner must form the view that:

(a) the client has, or was suffering at the time of the offence, from either a mental or intellectual disability, disorder or illness, or a serious addiction to drugs, alcohol or a volatile substance; or

(b) the client was at the time of the offence homeless;

<u>and</u>

(c) the client is liable to pay multiple infringements that exceed $5,000 in total; <u>and</u>

(d) there is a strong likelihood that legal assistance will result in:
- the enforcement order being revoked; and / or
- the infringement penalty being substantially discharged

Applicants who are not eligible under this guideline are <u>not</u> eligible for a grant based on special circumstances.

Part 1, Section 3 of the Infringement Act requires a causal link between the client's circumstances (disorder / disability) at the time of the infringements and the conduct. How can the condition excuse the infringements?

The practitioner's file **must** include:

- full details of the applicant's mental condition; or
- proof of the applicant's mental condition <u>at the time of the offence</u>; **and**
- full details of the infringements; **and**
- <u>the practitioner's assessment of the likely outcome</u>

Please note that infringement matters will be funded subject to fees under Table X of Fee Schedule 2 of the VLA Handbook.

4.1.6 Bail Applications

Before recommending that assistance be granted for a bail application in the Magistrates' Court the practitioner must form the view that there is a realistic prospect of bail being granted AND:

(a) bail is opposed by the prosecution; or
(b) the accused has to show cause why bail should be granted

The practitioner's file must include:

- a reference to guideline 6
- full details of the charges
- the grounds to be relied upon in support of the application
- the practitioner's assessment of the strengths and weaknesses of the application

For the purposes of the SGP practitioners should ignore the provisions relating to negotiated bail applications. It is not expected that any negotiated bail settlement would meet the requirements of the bail guideline.

Where Counsel appears and matter proceeds as a Plea

If Counsel appears and forms the view that the client's best interests would be served by proceeding to a plea rather than proceeding with the bail application, VLA will pay the appearance fee for a plea instead of the bail appearance fee. No further preparation fee is payable as preparation for the plea has not been undertaken.

Bail Revocations

Applications to defend an application to revoke bail are treated like bail applications. The assessment is made subject to the likelihood of bail being granted (more likely than not). Assistance can be recommended for Bail Revocations under the Simplified Grants Process.

Bail Variations

Applications to vary the conditions of bail are not covered by the Simplified Grants Process, and cannot be the subject of a recommendation for assistance. An application must be made through the traditional process.

4.1.7 Cancellation of Drug Treatment Order (DTO)

Applications to cancel a Drug Treatment Order (DTO) are heard in the Drug Court at Dandenong.

Applications to cancel a DTO arise in circumstances where the applicant has breached their DTO, usually through re-offending, and accordingly they are always facing an immediate term of imprisonment if the application to cancel the DTO is granted.

In most cases, in addition to the application to cancel the DTO, the applicant is also charged with further summary offences. The application to cancel the DTO and the summary hearing are usually heard together, however it is noted that in some circumstances, the application to cancel the DTO may be heard separately to the summary hearing.

Grants of assistance

Given that an application to cancel a DTO arises out of a breach of a court order ie. DTO, VLA will treat these matters as breaches of court orders pursuant to VLA's summary criminal prosecutions guideline.

If the application for assistance relates only to the cancellation of the DTO, the appropriate grant will be a summary crime grant (Table A).

Where the new summary charges and the application to cancel the DTO are heard together, if the new summary charges satisfy the summary crime guideline, the appropriate grant of assistance is the consolidation grant (Table A)

It is not appropriate to obtain two separate summary crime grants where both the application to cancel the DTO and the new summary charges are proceeding together.

Applications to cancel a DTO (either a stand alone grant or consolidated grant) can be submitted through ATLAS. The matter type to be used is "drug treatment order" which can be located in the matter group "breach offences other courts".

4.1.8 Children's Court matters

Before recommending that assistance be granted for a criminal matter in the Children's Court, practitioners should satisfy themselves that the matter is not trivial or minor (eg a public transport fare evasion matter, drunk in a public place).

The practitioner's file must include:

- a reference to guideline 5.1
- full details of the charges
- full details of the applicant's prior convictions if any
- the practitioner's assessment of the prospects of acquittal/likely penalty

Children's Court - Serious Indictable Criminal Cases

Indictable criminal cases in the Children's Court may be recommended for assistance at the Table F(i) level. This table covers all indictable criminal cases in the Children's Court where *had the charges been brought against an adult the Magistrates' Court would not have jurisdiction to hear the matter* (eg rape). Practitioners are referred to Fee Schedule 1 of the VLA Handbook.

Commonwealth Criminal Law Guidelines

The State guidelines for criminal cases apply to Commonwealth matters except for social security prosecutions where a specific guideline has been introduced (see below). Please refer to Part 3 of the VLA Handbook in conjunction with the commentary on state summary crime in these notes for all other prosecutions.

Social security prosecutions

There are 2 guidelines relevant to social security prosecutions. They are:

- Trial in Magistrates' Court – guideline 1.4 of Part 3 of the VLA Handbook
- Guilty plea – guideline 1.5 of Part 3 of the VLA Handbook

4.1.9 Social Security Prosecutions - Trial in Magistrates Court (Not Guilty)

Before recommending that assistance be granted for a not guilty plea, the practitioner must form the view that the applicant has a reasonable prospect of acquittal AND either

(a) conviction would be likely to have a significantly detrimental effect on the applicant's livelihood or employment, (current or prospective)

(b) conviction would be likely to result in one of the following penalties being imposed:

- a term of imprisonment, including a suspended term
- detention
- a community correction order requiring more than 200 hours of unpaid community work
- a community correction order where the person will have difficulty communicating their rehabilitative needs because of a psychiatric or intellectual disability, lack of education or difficulties in understanding English.

The file should contain:

- a reference to the guideline
- full details of the charges
- full details of the defence
- proof of detrimental effect or special circumstances upon which the practitioner relies, including (where relevant) documentary proof of disability
- the practitioner's opinion as to the merits of the defence

An example of a 'significant detrimental effect' is the inability to pursue the career of choice (eg dishonesty convictions for person in banking industry or law student unless the applicant already has prior convictions of the same nature)

The detrimental effect must be real and not speculative or a mere possibility.

If practitioners wish to recommend assistance for defended summary proceedings, the manner of seeking assistance, and limitations of that assistance, are identical to those set out in the provisions relating to State Summary Criminal Matters.

4.1.10 Social Security Prosecutions - Guilty pleas

A grant of legal assistance may be made for a social security prosecution for a plea of guilty if any of the following apply:

(a) a conviction will have a significant detrimental effect on the applicant's livelihood or employment (current or prospective)

(b) it is not appropriate for the matter to be dealt with by a duty lawyer due to complexity or any other aggravating circumstance

(c) the likely penalty upon conviction is:
- imprisonment
- detention
- a community correction order requiring more than 200 hours of unpaid community work
- a community correction order where the person will have difficulty communicating their rehabilitative needs because of a psychiatric or intellectual disability, lack of education or difficulties in understanding English.

Examples of aggravating circumstances are
- a disability or disadvantage of the applicant, such as a language or psychiatric disability.

The practitioner's file should contain:
- a reference to guideline
- full details of the charges
- details of the complexity/aggravating circumstances, including (where relevant) documentary proof of disability

Fees in summary criminal matters

<u>The following commentary applies to the fee schedules implemented as of 18 January 2011. For fee before this date, please see the August 2010 edition of the Notes on Guidelines.</u>

The fees for summary criminal matters are as set out in Table A of Fee Schedule 1 of the VLA Handbook. (For infringement matters, Fee Schedule 2 applies.) The following comments should be read as adjuncts to the discussion in that schedule.

4.1.11 Matters included in/flowing from the lump sum fee

Where the practitioner has recommended that assistance be granted for a summary criminal matter and VLA has granted assistance under table A, it is not necessary for practitioners to separately recommend the granting of assistance for:
- Gaol conference (where necessary)
- Second day fee (where necessary)
- Appearance for sentencing (where necessary)

- Appearance at contest mentions (where necessary)
- Group conference (where necessary)

as those matters are events that flow from the initial lump sum fee and may be claimed without specific approval.

4.1.12 Consolidations

Practitioners should only recommend assistance at the consolidated rate where:

(a) there are two or more sets of charges within the guidelines for assistance; OR

(b) a grant of aid is current pursuant to Table A (or the previous Table A1), and the applicant receives a further charge, or charges, that fall within the guidelines for assistance.

A consolidation grant is not appropriate where the applicant is charged with more than one set of charges which on their own would not satisfy the guidelines, but when taken as a whole justify a grant of assistance (for example where the applicant - in the absence of any relevant prior convictions - has been charged with 2 briefs containing a charge of drive whilst disqualified each). A standard grant of assistance applies.

A specific grant of aid is required to claim fees pursuant to the consolidation guideline prior to performing the plea. An exception is where:

- The applicant is aided pursuant to Table A (or previous Table A1) and
- The prosecution, without prior notice, and at the return date of the plea, brings further charges which meet the consolidation guideline and
- The consolidated plea is conducted on that same day

In such a case, ONLY the advocate at Court may claim the consolidated appearance component of the Table A fee.

4.1.13 Consolidations and Not Guilty Pleas

Where a client has two or more sets of charges satisfying the criteria for consolidation, the appropriate grant is a consolidation grant irrespective of the proposed plea.

The proposed plea is only relevant insofar as it may render a matter aidable (not guilty) where otherwise it would not be aidable (guilty).

A Practitioner in receipt of instructions in relation to two or more matters that would be aidable in their own right and otherwise satisfy the consolidation criteria should only apply for a consolidation grant. In the event that one or more of the matters fails to resolve at a contest mention then the unresolved matters should be separately aided as a standard grant with contest. This rule applies even if one or more matters are only aidable pursuant to the not guilty guideline.

If the matter is to be disposed of at contest mention and subsequent hearing, the following rules apply:

1. All matters resolve into plea -> the matter remains a consolidated grant;
2. (X) One or more matters resolve, and
   (Y) Another matter does not resolve

THEN

- Convert (X) and (Y) to summary grants from the beginning to allow preparation to be paid in each matter;
- Assistance for (Y) includes assistance for the contested hearing.

4.1.14 Consolidations – Pleas after contest

Where several matters are listed on the same day, one for contest and one (or more) for plea, fees will be paid as follows:

a) If the contest resolves into plea: $401 (resolved contest fee) + either $218 if the plea matter is subject to a standard grant or $249 if the plea matters are subject to a consolidated grant (equivalent of the plea at contest mention fees).
b) If the contest proceeded: $458 (standard contest fee) + either $218 or $249 as set out above.

VLA will not pay the standard plea fees in addition to the contest fee.

4.1.15 Transcription of sound-recorded records of interview

The fee allowable under this table is a fee for the clerical task of producing a hard copy of the record of interview. Such a hard copy will usually only be necessary where the record of interview is disputed or in issue. The fee does not relate to the time spent by a solicitor listening to the recording and taking notes. That work forms part of the solicitor's professional costs and is already included in the lump sum fee.

4.1.16 Contest mentions

The contest mention flows from the initial grant of assistance and you do not need to seek a further extension. However, before attending a contest mention a practitioner needs to satisfy themselves that the requirements contained in Fee Schedule 1 of the Guidelines, are met:

> *"Where an individual charge or charges to be negotiated qualify for assistance pursuant to the guidelines, VLA will pay for each necessary attendance at a contest mention in the following circumstances:*
>
> *(a) the accused had a reasonable prospect of acquittal on those charges; or*
> *(b) where the summary alleged by the prosecution does not reflect the evidence and it likely to impact on the sentence.*

Please note that a contest mention fee is not payable solely for the purposes of an informal sentence indication.

4.1.17 Special mentions – Magistrates' Court

Generally, a fee is not payable for attendance at mention. A fee can be claimed for a special mention if the appearance relates to an issue that has arisen out of the case, which must be dealt with and resolved before the substantive case can commence or continue the appearance. A fee is not payable in situations where a mention is listed to monitor progress.

Examples:
VLA will pay a special mention fee if the question of jurisdiction requires determination, and the Magistrate listed a special mention.

VLA will not pay a special mention fee if a case has been adjourned because the outcome of another case is deemed vital. Special mentions may then be listed to advise the Magistrate whether the matter has finalised. VLA considers that this information can be conveyed to the court by letter, or alternatively, the client could attend and advise the court.

No prior authority is required to incur the fee. However, reasons must be obvious from the file or well documented.

4.1.18 Adjournments

VLA does not pay for adjournments at the request of the defendant. In exceptional cases where it is reasonable having regard to all the circumstances, VLA will allow an adjournment (eg in cases where something could not have been reasonably foreseen). VLA considers such requests to be rare, and that wherever possible a matter should be administratively adjourned to another date. Adequate file notes for the request for the adjournment must be made on the solicitor's file.

4.1.19 Summary Crime Accounts

Practitioners must ensure that they fill out the dates of their appearances when completing the lump sum tax invoice. The date of the contest mention, the date of the substantive appearance claiming the lump sum fee, and any further appearances should all be noted on the tax invoice. If the tax invoices are not fully and/or correctly completed VLA will not be able to certify your account.

4.1.20 Urgent Grants

Urgent grants apply where VLA receives the request for assistance the day before a substantive hearing or on the day of the substantive hearing. VLA will pay an urgent grant preparation fee as set out in Table A in both standard summary hearings and consolidation of charges where a practitioner is in receipt of an urgent grant. The appearance fees remain the same whether the matter is standard or urgent.

Practitioners must bear in mind the 14 day time limit for submission of applications for urgent grants.

State Criminal Appeals – County Court

Before recommending that assistance be granted for an appeal to the County Court, practitioners must form the view that there are reasonable grounds for the appeal.

The guidelines provide for appeals against both sentence and conviction from decisions of the Magistrates Court to the County Court.

The grounds for the appeal should be clear from the practitioner's file.

The practitioner's file must include:

- A reference to Guideline 7.1
- Full details of the charges
- The grounds to be relied upon in support of the application
- The practitioners assessment of the strengths and weaknesses of the appeal, whether in respect of conviction and/or sentence
- In an appeal against sentence, an indication of the likely appropriate penalty that the applicant should have received and the reasons why

These provisions only apply to appeals in the <u>criminal</u> jurisdiction. Appeals against decisions in the Children's Court (Family Division) are not in the simplified process. All applications are outside VLA's guidelines and must be directed to the Legal & Policy Unit.

4.1.21 Legal Aid Act

Section 24(4) of the Act provides (inter alia) that in making a decision as to whether it is reasonable in all the circumstances to provide legal assistance, regard shall be had to:

(a) the nature and extent of any *benefit* that may accrue by a person, the public or section of the public from the provision of legal assistance (or *detriment* that may be suffered if the assistance is not provided)

(b) whether there are *reasonable grounds for the appeal*

"Reasonable grounds for the appeal" means that an experienced practitioner exercising normal and honest judgement, would consider in all the circumstances of the case that the appeal has a reasonable likelihood of success. That means more than just an arguable case. The grounds for the appeal must be reasonable, that is to say sound. They cannot be fanciful, imaginary/esoteric (vexatious) or contrived.

4.1.22 Cost/benefit

Pursuant to s.24(4) of the Legal Aid Act, practitioners must also have regard to the likely benefit of the appeal and the other demands on the legal aid fund. Consideration should be given to the penalty against which the appeal is made and the cost to be incurred in funding the appeal.

Where the appeal is in respect of a custodial sentence, the cost/benefit would be more likely to be met, than where a lower disposition was ordered. Practitioners should be mindful of this when making a recommendation.

Example 1: *The applicant is sentenced to a loss of licence for 3 years, where at appeal only a 1 year loss of licence was likely. VLA would <u>not</u> consider that there was cost/benefit in funding the appeal.*

Example 2: *An applicant pleads guilty and a fine of $1000 is imposed. A fine of $500 is considered a more likely sentence. VLA would <u>not</u> consider that there was cost/benefit in funding the appeal.*

Example 3: *Applicant pleads guilty to theft and has a fine of $800 with conviction imposed. She has part-time employment and the conviction will affect her employment. It was considered that a fine without conviction was the most likely penalty. VLA would consider that there was <u>not</u> cost/benefit in funding the appeal.*

Example 4: *The applicant is sentenced to a term of imprisonment for 3 months. A term of 1 month was considered the most likely penalty. VLA would consider that there <u>was</u> cost/benefit in funding the appeal.*

4.1.23 Relevance of Summary Crime Guidelines to Cost/Benefit

Assistance for a County Court Appeal is only available for matters which would be aided under the relevant summary crime guideline.

Appeals where the sentence/penalty does not meet the penalty/threshold test of VLA's summary crime guidelines cannot be the subject of a recommendation for assistance. eg: fines / CBO without conviction / appeal against sentence being made "with conviction" / suspension of licence – period of disqualification etc, cannot be the subject of a recommendation for assistance for a County Court Appeal.

Example 1: *Where the applicant has pleaded guilty and a penalty less than a 200hour CBO with conviction is imposed, then that decision cannot be the subject of a recommendation for assistance for an appeal, as the state guilty guideline requires a likely penalty in excess of a 200 hour CBO with conviction.*

Example 2: *In a state traffic matter, where an appeal is sought against the period of disqualification from obtaining a licence, this cannot be the subject of a recommendation for assistance for an appeal, as the state traffic guideline requires the likely penalty to be imprisonment or a suspended term of imprisonment before a matter may be aided.*

4.1.24 Previous Summary Grant of Aid

Practitioners should be wary where a recommendation was made for a matter at the Magistrates Court and subsequently seek assistance for an appeal on the basis that the sentence is excessive.

Example: *At the Magistrates Court level a practitioner recommends that the applicant meets the state guilty guideline (ie. that a 200 hour CBO or greater is possible). A sentence of a 250 hour CBO is imposed. It would be inappropriate to subsequently recommend* *assistance for an appeal on the basis that a fine or CBO less than 200 hours, should have been imposed.*

4.1.25 Counsel's Advice

Practitioners should be cognisant of the legal aid guideline when making a decision to recommend assistance. Counsel's advice indicating that an appeal should be lodged is not of itself sufficient to satisfy the legal aid guideline. This is because counsel's advice may be based on a different standard such as "arguable case". Solicitors will need to consider the appropriate weight to be given to counsel's advice in each case. Practitioners are responsible for independently forming a view about the prospects of the appeal succeeding in the terms set out in the guideline and these notes.

4.1.26 Appeal Bail

Wherever possible an application for appeal bail should be made at the conclusion of the summary hearing after sentencing. No further fee is payable for this application, as the bail material will have already been canvassed during the plea.

VLA will <u>not</u> provide assistance for an application for appeal bail where that application is made or could have been made on the same day as the summary hearing.

Where an application is made at a separate hearing date, practitioners may recommend assistance via the SGP for appeal bail from the Magistrates Court (non-complex grant). Practitioners will need to ensure that there is merit in the appeal, as well as that the other elements of the bail guidelines are met, before determining whether to recommend assistance for appeal bail.

Commonwealth Appeals – County Court

The State guidelines for criminal cases apply to Commonwealth matters. Please refer to Part 3 of the VLA Handbook in conjunction with the commentary on state summary crime in these notes.

County Court Breach Proceedings

- **Breach of Order for Suspended Sentence**
- **Breach of Order for Community Based Order**
- **Breach of Order for Probation**
- **Breach of Order for Intensive Correction Order**

(Breach of Extended Supervision Orders - part 11 of the Serious Sex Offenders (Detention and Supervision) Act 2009 are not part of the SGP. All applications must be submitted for full assessment by VLA.)

Section 24(2) of the *Legal Aid Act* provides that in indictable criminal matters, if VLA is of the opinion that it is desirable in the *interests of justice* that a person should have legal representation, regard shall be had only to the means test.

VLA presently adopts the view that matters involving a breach of a previous County Court Order listed above will ordinarily qualify for assistance.

A practitioner's file must include:

- Full details of the charges
- Full details of the applicant's prior convictions
- The practitioner's assessment of the likely penalty

5 Indictable Crime

This section provides definitions and guidance for practitioners submitting applications for assistance in both State and Commonwealth indictable crime matters. Assistance can only be sought where the applicant is charged with an offence which satisfies the appropriate parts of the State or Commonwealth criminal law guidelines relating to committals and trials.

Note: Only VLA's in-house practice and those practitioners appointed to the section 29A indictable crime panel may seek assistance for indictable matters through the SGP.

Commonwealth charges take priority.

Where an applicant is charged with a combination of State and Commonwealth matters, practitioners should first consider the merits of the application as it relates to the Commonwealth charges under the Commonwealth Guidelines. If the practitioner forms the view that the application does not qualify for assistance under the Commonwealth Guidelines, the application as it relates to the State charges should then be considered under the State guidelines. If the matter satisfies the Commonwealth guideline, the whole of the matter is aidable.

When filling out the checklist, practitioners must indicate in their guideline selection whether Commonwealth or State legislation applies. If the applicant is charged with both State and Commonwealth offences, the practitioner must select the Commonwealth guideline.

Restrained Assets

Where an applicant's assets have been restrained under the *Confiscation Act (Vic)* 1997, VLA cannot provide a grant of assistance for the applicant's substantive criminal matters until an application for a variation of the restraining order is made under section 143 of the *Confiscation Act*.

Where assets are restrained, practitioners should recommend aid for a variation of the restraining order. Practitioners must include in their recommendation advice as to which court the application will be filed in. The application must be made in the same court that imposed the restraining order.

An authenticated copy of the orders must be forwarded to VLA immediately the orders are made. Once the orders are received VLA may approve subsequent recommendations for assistance.

Practitioners must retain a copy of the affidavit material and order on their file.

Bail Applications in the County or Supreme Courts

<u>State & Commonwealth Matters</u>

Before recommending assistance for a bail application, the practitioner must form the view that there is a reasonable prospect of bail being granted.

The practitioner's file must contain:

- full details of the charges
- the grounds relied upon in support of the application; and
- the practitioner's assessment of the strengths and weaknesses of the application.

Commonwealth Matters Only

Assistance may also be recommended where aid is sought to respond to an application for revocation of bail.

State Criminal Law Matters

Guideline 4 limits the types of matters that can be aided under the State Criminal Guidelines, either in the committal stream or the County and Supreme Courts. In the absence of compelling reasons, assistance will not be provided for the hearing of charges in the County or Supreme Courts (or antecedent committal proceedings) where such charges could be and normally are heard and disposed of in the Magistrates Court.

Example: *where the applicant is charged with theft of an amount under $100,000. The charges could and usually are heard at the summary level in the Magistrate's Court, but the applicant has decided to proceed by way of a jury trial in the County Court. There are no compelling reasons to support the applicant's election. The practitioner should not recommend a grant of assistance.*

Compelling reasons is not a closed category. Examples of what have previously been accepted as compelling reasons include the:

- degree of seriousness of the offence
- complexity of the proposed defence
- unsettled/untested legal principles that need to be addressed
- potential for an order to pay civil damages following a finding of criminal liability

Where the practitioner believes there are compelling reasons for an applicant's refusal to accept the jurisdiction of the Magistrates' Court a grant of assistance cannot be the subject of a recommendation. Rather, the practitioner must provide a written statement of compelling reasons to VLA. Once this information is received VLA will assess whether, in the circumstances, a grant of assistance is available.

Appropriate grants in Indictable Matters (that cannot be dealt with summarily):

1. Where an Indictable matter is identified, a grant for general preparation at Magistrates' Court stage (Table E) should be sought at first instance (both for Supreme and County Court proceedings). This grant allows a practitioner to do all necessary work
    a) at Magistrates' Court level with the exception of a contested committal (Table E)

b) for general preparation and plea at County Court or Supreme Court level (Table F)

without seeking an extension.

Where a plea is identified and will be declared at the first opportunity, only a grant per table E is therefore required in order to finalise the case.

2. Where a matter is listed for trial or is proceeding to special hearing, a grant per table F must be sought.

5.1.1 Committal Proceedings

The State Committal guidelines deal with the following categories of offences:

- Guideline 3.1 – cases involving homicide, and cases where consent or identification is a real issue
- Guideline 3.2 – cases other than the preceding category where there is a strong likelihood that a benefit will result from representation

Both guidelines are subject to the limitations imposed in Guideline 3.3, which restricts assistance to a maximum of two days. If assistance in excess of the two-day ceiling is sought, the provisions of section 5.1.2(iii) apply.

There is a separate category involving limited committals in sexual offences. These are outlined in Clauses 5.1.2(iv) and 5.1.2(v) of these notes.

Guideline 3.1

Cases involving homicide

Assistance will be provided for matters involving homicide. For the purposes of the guidelines, "homicide" includes culpable driving and attempted murder.

Cases involving an issue of consent

These cases usually involve, but are not limited to, allegations of sexual assault. Lack of consent is an issue of fact that must be proved by the prosecution. If, on the basis of the client's instructions, there is an issue as to whether a victim consented to a sexual act, then the guidelines have been satisfied.

This guideline does not apply where the victim is a minors for offences where consent is not a relevant issue (eg sexual penetration of a child under 16).

In other cases where consent is relevant, such as a theft where the defence is on the basis that the deprived owner assented to the removal, the question as to whether the issue is "real" depends on the cogency of instructions and whether there are other facts to substantiate their defence.

Cases involving an issue of identification

In cases involving identification, the issues which require testing need to be "real". By this, it is meant that the proving, disproving, or significantly challenging the issue of identification will have significant bearing on the guilt or innocence of the accused. By recommending assistance in such cases, the practitioner must form the view that the issue of identity is sufficiently important to justify challenge and furnish adequate files notes substantiating this viewpoint.

Example 1: *An accused person is charged with assault. There are four primary witnesses who clearly identify the accused, and one secondary witness whose identification is weaker. In most cases, there would be little benefit (in the absence of significant discrepancies in witnesses' statements, or some other compelling factor) in seeking a contested committal to either (a) cross-examine the primary witnesses; and (b) cross-examine the secondary witness, as identification will likely be established by the prosecution by reliance on the four primary witnesses. The practitioner should not recommend a grant of assistance.*

Example 2: *An accused person is alleged to have assaulted a victim at night. The practitioner is instructed that the street lighting is poor, and it was raining at the time of the offence. It transpires that the assault occurred some 50 metres away from the sole witness to the assault. The evidence of the witness is crucial in proving the case against the accused. The applicant's practitioner seeks to cross-examine the witness as to the cogency of the witness's evidence of the perpetrator's identity. This would warrant a contested committal and a practitioner should recommend a grant of assistance.*

Example 3: *The accused is known to the victim (be it by name or some other knowledge) but denies committing the offence. This is not necessarily an issue regarding identity but rather an issue regarding guilt or otherwise and a practitioner should* <u>*not*</u> *recommend a grant of assistance.*

Guideline 3.2

Where there is a strong likelihood that a benefit will result from representation, assistance may be provided where:

<u>i) the charges will be dealt with summarily</u>
In matters that <u>must</u> initially be placed in the committal stream, but are capable of resolving on a summary basis (eg a plea on a lesser charge), the practitioner must form the view that summary disposition of the indictable matter(s) is a course that can, and is likely to be, adopted. Regard must be had to:

- The strength of the prosecution case
- Whether the principal charge (s) is/are capable of being heard and determined at a summary level
- Whether a lesser charge is likely to be offered by the prosecution

Example 1: *A defendant is charged with Intentionally cause serious injury. After examining all relevant matters, the practitioner may conclude:*

- *it will be very difficult for the Prosecution to prove an intent to cause serious injury*
- *that the evidence is capable of satisfying the charge of recklessly cause serious injury*

- *that on the available evidence, the court will likely decline to commit on the most serious charge, but may find there is sufficient evidence justifying a committal on that lesser charge recklessly cause injury*

As that latter charge is, in most circumstances, capable of being resolved summarily, the practitioner should recommend a grant of assistance.

Example 2: *The applicant is charged with possessing a commercial quantity of cannabis. The police evidence is strong and the police botanist has confirmed that the substance is cannabis. The practitioner should <u>not</u> recommend a grant of assistance on the basis that the committal would result in the charges being dealt with summarily.*

<u>ii) a committal hearing is likely to identify an early plea</u>
When recommending assistance under this guideline, the practitioner must form a view there is a strong likelihood that an early plea (either in the Magistrates Court or a superior court) will be identified.

Example 1: *The accused is charged with theft of goods valued at $200,000. He admits stealing them, but the defence submits the goods are over-valued by the police, and are only worth $110,000. They wish to cross-examine the prosecution's witness as to the method of valuation of the goods, as instructions indicate that the prosecution overstates the value. If successful, the applicant (who admits the theft) will plead to the reduced value in the County Court. This would justify the aiding of a contested committal on that issue and the practitioner should recommend a grant of assistance.*

<u>iii) a committal will lead to a significant reduction in the length of any subsequent trial or plea</u>
When recommending assistance under this guideline, practitioners will need to identify the basis upon which a significant reduction will be achieved. Such factors may include:

- Whether cross examination of a particular prosecution witness may provide the basis of an agreed amended summary of facts to which the accused person may later plead
- Where limited cross examination of difficult and complex prosecution evidence will lead to a clarification of the issues the defendant may ultimately face at trial
- Where cross examination may result in evidence being admitted on an agreed basis at a subsequent trial
- Where cross examination of a particular prosecution witness may lead to the discrediting of that witness, which results in the strong possibility that it will be excluded from a subsequent trial

<u>iv) the defendant will be discharged at committal</u>
In order to qualify under this guideline, the evidence (or lack thereof) must point strongly to the conclusion there is insufficient weight to support a conviction.

Where a practitioner recommends assistance under one or more of these categories, the phrase "strong likelihood" requires a practitioner to form a view that the desired result is higher than "more likely than not". The expression requires that, on the

- instructions to hand

- the strength (or otherwise) of the prosecution case
- the judgement of a prudent and experienced practitioner

the prospects of achieving the desired result are considerably higher than not achieving the desired result.

5.1.2 Available Grants:

A grant of assistance for Magistrates' Court stage can be:

(a) General preparation; and

(b) contested committal

5.1.2(i) General Preparation – Table E

General preparation per Table E is payable in all indictable matters. It includes taking instructions and advising the client, reading the material, negotiating with the prosecution, and preparing and filing the Form 32.

Where the committal guideline is satisfied, fees for committal mention (including negotiations) can be claimed.

When recommending assistance, the practitioner's file must include:

- a reference to the appropriate guideline under which assistance is sought
- details of the charges
- the basis upon which it is submitted the matter would benefit from negotiations with the prosecution
- details of the evidence to be relied upon in support of the defence(s)
- the practitioner's assessment of the strengths and weaknesses of the defence(s)
- the practitioner's assessment of the strengths and weaknesses of the prosecution's case

Example: *A defendant is charged with intentionally cause serious injury. The police case includes statements from many onlookers. However, the witnesses' statements do not clarify the issue of the defendant's involvement. A committal mention and negotiations would be justified in order to negotiate with the police to see whether they are willing to proceed on a lesser charge, based on the evidence to hand. The practitioner should recommend grant of assistance.*

5.1.2.(ii)Contested committals

A separate grant of assistance must be sought if a case proceeds to contested committal. This grant will provide fees to further prepare and attend at the contest.

Although all efforts to resolve the matter at committal mention may have been exhausted, practitioners must address the committal guidelines before recommending assistance for contested committals. The standard for satisfying the requirements of the Guidelines in contested committals is higher than for a committal mention and negotiation. Even if the guideline is met, the practitioner must show justification for the contested committal. This is because:

- (in most cases) the complete brief will have been served on the defendant;
- issues will have been negotiated with the prosecution at the mention, thus giving a more complete picture of what case the prosecution intends to prove;
- more complete instructions, and proofs of evidence, will have been obtained by the practitioner.

When recommending assistance for a contested committal, the practitioner's file must include:

- the basis upon which it is submitted the matter would benefit from a contested committal
- details of the prosecution evidence to be challenged at the committal and how this will benefit the defence case

Where evident from the outset that the committal will exceed two (2) days, practitioners must refer the matter to VLA for assessment.

5.1.2(iii) Committal hearings in excess of two days

A solicitor's recommendation is limited to a contested committal of two days. If assistance in excess of VLA's cost ceiling is sought, the application cannot be the subject of a practitioner recommendation to aid under the Simplified Grants Process. The application must be submitted to VLA for assessment. This application must be submitted as soon as it is known the committal is likely to exceed two days. When submitting such applications, practitioners must:

- provide a copy of the prosecution summary
- provide a copy of the witness list contained in the prosecution summary
- provide a copy of the Form 32
- address the contested committal guidelines
- Provide details of any circumstances affecting the length of the committal, such as the use of interpreters, use of video conferencing facilities, and the number of co-accused

5.1.2(iv) Limited Committals in Sexual Offences Cases

Some sexual offence matters may not satisfy the committal guideline. In limited cases, assistance may still be granted for preparation and **one day** to enable the applicant to be represented when the alleged victim is cross-examined. For any further extension, assistance must be sought from VLA prior to the second day's hearing. Aid beyond the first day **will only** be granted where the victim's testimony has extended beyond one day and a second is required.

Example: *A complainant alleges the accused person has committed a sexual offence against her. There is a strong prosecution case, and consent is not an issue. Under the usual committal guidelines, the matter would not be eligible for a grant of aid. However, the defendant has been given leave to cross-examine the alleged victim on certain issues. In instances such as this, limited assistance of up to one day should be recommended to* *ensure that cross-examination is conducted through counsel, rather than by the accused personally.*

5.1.2(v) Crimes (Sexual Offences) Act 2006

Where a person is charged (after 1 December 2006) with a sexual offence and the victim is either (a) a child or (b) suffers a cognitive impairment, the only examination of the victim will take place in the County Court at a Special Hearing. For the examination of the victim a practitioner will need a grant per Table F for County or Supreme Court stage. An additional preparation fee and appearance fees are available for special hearings as set in the Table.

- Aid for Committal – Child Victim
  The fact that the victim is a child is unlikely to be an issue in dispute. In recommending aid for committal solicitors should have regard to the fact that there will be no cross-examination of the victim at committal stage.

- Aid for Committal – Victim with Cognitive Impairment
  The fact that the victim suffers from a cognitive impairment may be an issue. A solicitor may recommend aid for committal to challenge the question of whether the victim is cognitively impaired. A solicitor may seek assistance for an expert report in support of the challenge. In all other respects, solicitors recommending aid for committal should have regard to the fact that there will be no cross-examination of the victim.

5.1.3 Criminal Trials and Pleas

Before making a recommendation to aid a Trial a solicitor will have in place a grant for general preparation per Table E.

5.1.3(i) Guilty Pleas

A grant for general preparation (Table E) entitles a practitioner to fees in Table F (County / Supreme Court stage) listed a "general" and "plea" fees. No extension of assistance is required to complete a matter after committal stage by way of plea. Appearance fees in Table F include all conferences.
An extension per Table F is only required if the matter is listed for special hearing or trial.

5.1.3(ii) Trials

Guideline 4 of the State Criminal Law Guidelines outlines the circumstances in which assistance may be recommended for criminal trials in the County or Supreme Court. Where assistance is granted for trial, fee per Table F apply. Appearance fees in Table F include all conferences.

Basis of a recommendation for assistance
A recommendation to aid a trial must contain a clear file note as to the following:

- The client's instructions
- The proposed plea. If the matter is proceeding to trial, the practitioner must file note the reasons that a plea of guilty is not appropriate

- A brief statement as to the evidence to be relied upon. Where a statement, or piece of evidence, is determinative of a particular issue, that piece of evidence must be easily identifiable, to enable compliance checks by VLA to be conducted in an effective manner

The file should also contain:

- A copy of the prosecution brief, with relevant parts of evidence that are relied on to found the defence clearly identified
- A copy of the proof of evidence of client, and written instructions as to plea
- Clear notes as to the dates, and nature, of Court attendances

Instructing Fees

As of 7 January 2013, practitioners may only recommend assistance for instructing fees for two half days in County and Supreme Court Trials. Instructing fees will only be paid to qualified solicitors. The two half days of fees can be used as solicitor and counsel determine, with their client, is the most effective use. This may include jury selection where appropriate – it is up to the client and their legal representatives to decide.

Additional instructing fees will only be payable in the following circumstances:

1. The client suffers from an acquired brain injury (ABI) or intellectual disability and are registered under the Disability Act 2006
2. The client suffers from a psychiatric disability and are receiving services for that disability from an approved mental health service provider under the Mental Health Act 1986
3. The client is under the age of 18
4. Where a client is facing an investigation into fitness to stand trial pursuant to Part 2 of the Crimes (Mental Impairment and Fitness to be Tried) Act 1997
5. Where a client is facing a special hearing pursuant to Part 3 of the Crimes (Mental Impairment and Fitness to be Tried) Act 1997 following a finding of unfitness under the Act

Before recommending assistance for client's with a ABI, intellectual disability or psychiatric disability, the practitioner must have on file:

- confirmation of registration under the Disability Act (there is a formal certificate produced by DHS confirming when the client became eligible for Disability Services). The practitioner will need a signed authority from the client to be able to telephone DHS to ascertain whether the client is registered under the Disability Act. A file note by the practitioner of a telephone conversation with DHS will be required ; or
- confirmation of being in receipt of services from an approved mental health service (this may include written confirmation from the service or a file note by the practitioner of a telephone conversation with the health care provider).

A list of approved mental health services may be found on the Department of Human Services website.

Overnight fees of three nights maximum and the appropriate circuit fees will apply to accommodate the two half days instructing.

Where a jury is discharged the fees under Table BBB apply, however, instructing fees remain limited to 2 half days.

Transitional Provisions

The new guidelines apply to all grants made as of the 7 January 2013. For cases already funded before this date the following transitional provisions apply:

a) existing grant for an indictable trial where client does not meet the exception criteria the practitioner will only be funded for two half days in County and Supreme Court Trials;
b) existing grant for an indictable trial where client does meet an exception criteria the practitioner will be funded for instructing for the duration of the County and Supreme Court Trials. The practitioner must have the documentary proof on file to support their recommendation.

<u>Extent of legal assistance</u>

Since the Board resolved to eliminate fee ceilings in **State criminal trials**, practitioners may now recommend assistance for most trials. Requests must be accompanied by a recommendation as to the number of days required for trial, <u>**up to a maximum of 12 weeks (60 days).**</u>

The solicitor should not make a recommendation outside the reasonably anticipated range.

In situations where the case runs longer than the original estimate the solicitor may recommend further assistance and seek a further grant. In support of this request, the practitioner must make a file note outlining the reason for the extension of assistance, and the additional time it may take to finalise the case. A completed checklist must be sent to VLA to enable the grant for the additional days to be processed before any further costs are incurred.

<u>Extension of assistance in ongoing trials</u> (where the recommendation will exceed 12 weeks)

In such cases, a further extension of assistance in on-going trials must be directed in writing to VLA prior to additional costs being incurred. The request must contain detailed particulars of the reasons why further funding is sought, including:

- The number of days required

- Additional disbursements required

<u>Legal assistance in cases which will, from outset, proceed for longer than 12 weeks (60 days).</u>

Matters where the anticipated length of a trial will exceed 12 weeks (60 days) <u>cannot</u> be the subject of a practitioner recommendation. Practitioners must submit such applications to VLA for assessment. The submission must include details of:

- Where full instructing is necessary and how the client meets the requirements for full instructing under Criminal Law Guideline 4
- Material to be perused by instructor and/or Counsel in preparation of the case
- Details of any disbursements to be incurred
- Prosecution witness list
- The number and names of co-accused
- Anticipated number of days of trial
- Whether full instructing is necessary and, if so the reasons why
- Any other factors which would affect trial duration

VLA may ask for further details and offer a fee package to the practitioner.

5.1.4 Two Counsel

Assistance to brief two counsel or Senior Counsel **cannot** be the subject of a practitioner's recommendation under the SGP and must be submitted to VLA for assessment. Only the Managing Director or Divisional Manager (Grants) can approve these requests and therefore they should be submitted in a reasonable timeframe to enable the request to be dealt with appropriately.

When making a submission, the practitioner must address all relevant matters as set out at under Fee Schedule 4 of Part 23 of the VLA Handbook ("VLA's two-counsel policy"), citing all relevant factors for each type of grant. Any submission must be in writing.

5.1.5 Additional Preparation fees for Counsel

a) Preparation fees for Counsel or solicitor advocate (in excess of the lump sum fee) **<u>up to $3,000</u>** in total are subject to a practitioner recommendation. Details are set out under Fee Schedule 4 of Part 23 of the VLA Handbook ("Principles applying to payment of preparation fees to counsel.")

   VLA will take into account non-sitting days for which counsel will be paid a fee.

   Before making a recommendation, a practitioner must be satisfied that the reading is essential and exceeds 8 hours based on a realistic estimate of the number of pages contained in the Hand Up Brief (HUB). Specifically, a practitioner must consider:

   - the different rates that apply for reading and scanning, respectively
   - discounts applicable to scanning beyond 10 hours
   - any assistance previously provided for preparation
   - whether the preparation fees will exceed the Commonwealth fee ceiling

Where full preparation fees were provided for the committal, VLA will not normally provide full preparation again for the trial. Where there is a significant passage of time between the committal and the trial (usually more than one year) VLA will provide further preparation fees for the trial.

Where a preparation fee has been allowed at the committal stage, and counsel who appeared at the committal stays briefed in the matter when it goes to the County or Supreme Courts, counsel can claim an uplift fee for the reading already done at committal when the matter reaches the plea or trial. The uplift fee is the difference between the hourly rate in the Magistrates' Court and the rate in the higher Court. (See Fee Schedule 4 of Part 23 of the VLA Handbook "Principles applying to payment of preparation fees to counsel.")

If different counsel is briefed for the committal and the trial, there must be compelling reasons why a change in counsel is necessary. Reasons must be documented on the practitioner's file. Where new counsel is necessary, VLA will provide a second grant of aid for preparation.

Where a practitioner seeks additional preparation fees for material <u>not</u> contained in the HUB, reasons why the material is relevant to the case must be documented on the file.

Expert reports will always be considered necessary and should be read at the rate of 90 pages per hour.

Where aid is sought for preparation in relation to the transcripts of interviews or similar, aid will not be provided to listen to the recordings of these transcripts as well.

Practitioners must use the worksheet provided and retain a copy on their file for compliance purposes. The completed and signed worksheet must be forwarded to VLA to obtain the appropriate extension of assistance.

The file should also contain:

- a copy of the HUB and any other documentation to be read / scanned
- clear notes as reasons for recommendation

The information provided in the checklist and its accuracy will be checked by a compliance officer as part of a compliance check.

b) Preparation fees anticipated **to exceed $3,000** in total **cannot** be the subject of a practitioner's recommendation for assistance. Any requests relating to this must be forwarded to VLA for assessment and **must** include:

- the volume of material to be read
- a breakdown of the nature of the material, and whether such material should be perused rather than scanned (and the reasons for the distinction)
- the completed preparation fee worksheet
- The prosecution summary

- The witness list
- A list of the co-accused
- The client's alleged role in the offence (if applicable)

If this information is not included, VLA cannot consider the request for additional preparation.

VLA may request additional information if not satisfied as to the necessity of the additional preparation fees. The information provided in the checklist and its accuracy will be checked by a compliance officer as part of a compliance check.

VLA will take into account non-sitting days for which counsel will be paid a fee. VLA may apply its discretion to reduce additional preparation fees in matters where the additional preparation sought is exceptionally high.

5.1.6 Additional Preparation fees for Solicitor

Assistance for additional reading fees for solicitor **cannot** be subject of a practitioner's recommendation for assistance. Practitioners must complete the worksheet and submit the request for VLA assessment. Limitations apply as set out in Fee Schedule 1, Part 23 of the VLA Handbook.

5.2 Commonwealth Matters

The State guidelines for criminal cases apply to Commonwealth matters. Please refer to Part 3 of the VLA Handbook in conjunction with the commentary on state summary crime in these notes.

5.3 Cases in the List – Not reached

VLA will pay the appropriate brief fee in circumstances where a matter is listed for trial but not reached and an appeal cost certificate has been granted.
Practitioners therefore need to ensure that appeal cost certificates are sought where applicable. Counsel briefed must be instructed on that basis.

5.4 Trial Severance

Where aid is granted for a trial involving multiple complainants or otherwise and on application the trial is severed into two or more trials no additional fees will be payable save and except:

Counsel/Solicitor Advocate
A further brief fee and subsequent day fees for each trial.

* In the event that a solicitor represents more than 3 defendants the matter should be referred for the fixing of special fees.

5.5 Nolle Prosequi

VLA will aid an application for discontinuance of proceedings (Nolle Prosequi) when counsel (usually) or the practitioner forms the view that there is a reasonable prospect that if a formal submission is made to the prosecution an election will be taken not to proceed with the charges.

The fee payable is set out in Table F.

Practitioners are not required to obtain an extension of assistance for a Nolle Prosequi if they are in receipt of either of the following grants of assistance:

Magistrates' Court stage (General preparation Table E)
County & Supreme Court stage (Table F)

5.6 Breach of Extended Supervision Order

Any application for proceedings under the Serious Sex Offenders (Detention and Supervision) Act 2009 must be submitted to VLA for full assessment through the standard Grants process and is not subject to recommendation under the SGP. This includes breach proceedings per part 11 of the Serious Sex Offenders (Detention and Supervision) Act 2009.

5.7 Section 32C applications – Confidential Communications

In criminal proceedings for a sexual offence, the defence may seek to access the complainant's medical and counselling records, such as CASA records. Section 32C of the *Evidence (Miscellaneous Provisions) Act 1958* requires a party to seek leave of the court before they can issue a subpoena to compel the production of confidential communications. These provisions apply to proceedings for a sexual offence in all courts, including committal proceedings.

VLA expects that seeking leave to issue the subpoena(s) would be incorporated in trial preparation and will usually be heard as part of another court event (such as first directions hearing etc). VLA will only consider payment for the contested hearing before the magistrate or judge to determine the issue of confidential communications. It is confirmed that, subject to a specific grant, the following fees for the hearing of these applications are as follows:

Magistrate's Court – fee equivalent to daily appearance fee
County Court – fee equivalent to subsequent plea hearing fee
Supreme Court – fee equivalent to subsequent plea hearing fee

Practitioners should note that they are required to request funding from VLA for this application.

6 Family Law

VLA only provides assistance for representation at trial (by counsel or lawyer) where the other party is represented, either privately or through pro bono assistance.

This change came into effect on 7 January 2013, and is applicable to all applications for family law trial funding, regardless of whether the lawyer is from a s.29A or s.30 panel law firm.

VLA will continue to fund stage 2 grants (including for initiating, responding, and interim hearings) and stage 3 grants for preparation for trial.

Part heard matters

Where the trial commenced prior to 7 January and recommences and proceeds within 90 days of the last hearing day, VLA will provide assistance for representation by counsel or lawyer.

Commonwealth priorities

(This section should be read in conjunction with Schedule A of the National Partnership Agreement on Legal Services, see Part 4 of the VLA Handbook under "Commonwealth family law and child support matters". Where a priority is not the subject of commentary below, it has been deemed sufficiently clear not to require such commentary. Queries may be directed to compliance or policy officers.)

VLA generally expects you to issue proceedings in the lowest Court with appropriate jurisdiction to hear the matter. If you choose to issue in a higher Court, you must keep a record on your file of the reasons you considered it appropriate to do so.

Matters Excluded from SGP

The following matters and stages do not form part of the SGP and may not be the subject of practitioner recommendations. Applications should be forwarded to VLA for assessment in the traditional manner:

- Stage 5 – appeals in Family Court
- Hague Convention matters
- Adoption
- Special medical procedures

If a matter is to proceed beyond the stages provided for in the SGP, or does not fall within the SGP, then the practitioner should promptly forward supporting documentation, proof of means and details outlining what assistance is sought, for full assessment by VLA.

Commonwealth merits test

There are 3 components to the merits tests applicable in Commonwealth matters. They are:

- The ‘reasonable prospects of success’ test
- The ‘ordinary prudent self-funding litigant’ test
- The ‘appropriateness of spending limited public funds’ test

Before recommending that assistance be granted, all 3 tests <u>must</u> be satisfied.

6.1.1 The reasonable prospects of success test

This is commonly referred to as the “merits” test. However, please note that a matter must also meet both the *prudent self-funding litigant* test and the *appropriateness of spending public funds* test to qualify for assistance.

This test involves consideration of the specific orders to be sought or opposed.

Example:
In relation to “time spent” you may need to consider the applicant’s proposals concerning:

- total number of hours of time sought per week
- whether time with the child(ren) is to be supervised (by whom & for how long should supervision continue)
- whether time with the child(ren) occurs during daytime only or includes overnight stays
- practical arrangements for travel and change over times where parties live a significant distance apart
- restrictions on contact with third parties during time spent
- conditions such as drug/alcohol screening or attendance at an anger management course

A matter meets the test if it appears that the proposed application *is more likely than not to succeed*. This requires more than *an arguable case* or *a 50/50 chance of success*. <u>The merits test must be applied stringently. “Borderline” cases do not satisfy the merits test.</u>

You must take into account all the information, evidence and material available to you. This includes information you may have about related Children’s Court (Family Division) or criminal proceedings. It also includes information you may have about the opinion of the Independent Children’s Lawyer.

Examples:

- *The father has not seen his child aged 4 for the past 18 months. The father may not have sufficient merit to seek interim orders for time with the child for 48 hours per fortnight including overnight. However, the father may have merit to seek interim* *orders limited to 2 hours per fortnight graduating to 8 hours per fortnight time during the day in 4 months.*

- *The mother has a prior history of heroin addiction. She claims to be drug free and now resides with the maternal grandmother, in Wodonga. She seeks time with the 10 year old who lives with the father in Melbourne. The father may not have sufficient merit to seek final orders that there be no time with the mother at all. However, father may have merit to seek orders that time spent be limited to one weekend per month; the maternal grandmother be substantially in attendance during that time; and that time spent be subject to mother submitting clear urine screen results for the initial 6 months.*

6.1.2 The prudent self funding litigant test

In a family law context, a litigant *without deep pockets* means a litigant who has access to funding at a similar level to legally assisted applicants. That is:

- $15,510 (including GST)
- the possibility of further funding beyond the cap in limited circumstances

As costs orders are not routinely made in the family law jurisdiction, the element of *risk* may not apply in many cases. The more relevant question may be whether a prudent litigant would *use* his or her funds for the proposed proceeding. The test requires you to prioritise the use of the limited funds available.

Example:

- *The father has interim orders for time with the child, 24 hours per fortnight. The Court counsellor recommends this be increased to 48 hours per fortnight. The final hearing is listed in 8 weeks' time. There is only $3,500 left under the ceiling. It will cost more than $3,000 to prepare and run a one day final hearing. It may not be considered prudent to issue proceedings to vary the interim orders at a cost of $1,606.*

6.1.3 The appropriateness of spending limited public legal aid funds test

This involves weighing up the cost of the legal services sought against the likely benefit to the applicant. There may be cases where it is likely that the Court would make the orders sought but the cost of making the application is not proportionate to the benefit the applicant would gain.

VLA does not generally consider there is sufficient cost benefit to bring an application seeking orders concerning limited specific issues (for example orders about schooling, religion or diet).

Examples:

- *The parent with whom the child does not live wishes to prevent the child from attending weekly comparative religion classes at her state primary school. There is insufficient cost benefit to justify funding the application.*

- *The child has been brought up as a devout Muslim. After separation the parent with whom the child does not live converts to Christianity and wishes to have the child baptised. There may be sufficient cost benefit to justify funding the parent with whom the child lives to contest the application. Such cases should be referred to Compliance for a ruling on a case by case basis.*

VLA considers that there is insufficient cost/benefit in expending public funds on matters such as:

- permission to travel interstate or overseas for holidays
- change of name.

Any application for funding solely on the basis of benefit to the community must be referred to VLA for decision.

Commonwealth Family Law Guidelines

This section should be read in conjunction with Part 4 of the VLA Handbook. The references to numbers in the headings are references to specific guidelines. Guidelines that are not the subject of specific commentary below have been deemed sufficiently clear not to need such commentary. Queries may be directed to the compliance team.

6.2.1 Applying the guidelines, means test and merit test

Any application concerning a matter for which there is no specific guideline must be referred to VLA for a decision.

6.2.2 Parenting orders – Applicant in custody

All family law matters must satisfy the Commonwealth Family Law Guidelines and merits test at the beginning of a matter and throughout the duration of a matter (see Parts 4 and 12 of the VLA Handbook).

Applicants in Custody

Before recommending assistance where the applicant is in custody, a Practitioner should take into account all relevant facts in each case including:

- details of the offences for which the applicant is in custody;
- nature of the charges (Violence offences? Sexual offences?),
- length of sentence and anticipated release date
- details of the victim/s (Age? Relationship to the applicant? Offence against the child/ren or the child/ren's mother?)
- relationship between the prisoner and the children prior to incarceration.

When assessing the merits test, the Practitioner must have regard to the nature of the relationship between the applicant in custody and child/ren prior to incarceration. The Practitioner must form the view that the applicant had a *meaningful relationship* with the child/ren prior to incarceration and that contact would assist in maintaining that *meaningful relationship*.

For example,if there has not been a meaningful relationship between the applicant and child/ren prior to incarceration, it is unlikely that the court will find that any contact including cards and telephone contact would create a meaningful relationship. Assistance should not be recommended in this instance.

Before assistance is recommended for a location order, the long term merit of the substantive application must be assessed by the Practitioner based on the issues for consideration set out above. Whilst the Court may make a location order, VLA will only provide funding if the substantive children's matter satisfies the Commonwealth merits test.

A file note addressing the issues must be kept on file.

6.2.3 Threshold considerations for RDM & Court Proceedings

<u>Primary Consideration</u>
The Commonwealth Priorities & VLA's Guidelines both require that there are real issues in dispute. Before practitioners consider their client's position in the matter, consideration must be given as to whether there is a substantive issue in dispute.

<u>Threshold for RDM</u>
Assistance for RDM must be recommended at first instance where the practitioner, having regard to the Commonwealth merits test, forms the view that the issues in dispute:

(a) regarding parenting matters are substantial (guideline 1.1); or regarding property matters fall within the criteria of guideline 1.2, and
(b) do not fall within matters that are deemed unsuitable for RDM (see guideline 2.1.2)

The practitioner need only have regard to whether the matter falls within the above criteria when recommending aid for RDM. Consequently, aid may be recommended for RDM regardless of the respective position of the parties in the dispute.

VLA does not provide grants of assistance for advice and negotiations. Where the practitioner forms the view that the issues in dispute are not significant enough to satisfy the guidelines assistance cannot be recommended.

<u>Threshold for Court Proceedings</u>
Where the practitioner forms the view that:

(a) the matters satisfies the Family Law Guidelines
(b) the applicant meets the Commonwealth merits test
(c) the issues in dispute are substantial
(d) the issues in dispute fall within those matters deemed inappropriate for RDM (guideline 2.1.2) or a section 60I certificate has been issued in accordance with guideline 2.1.1.(a)(i))

assistance may be recommended for court proceedings.

6.2.4 Guidelines 1 and 2 Substantial issue

Assistance for both early dispute resolution and litigation requires that there is a dispute about a substantial issue. The dispute must be real. Orders for peace of mind do not satisfy the guidelines.

Examples of disputes about a substantial issue:

- who the child is to live with
- whether a parent should be allowed to relocate to another state or country
- whether “time spent” should not be allowed
- whether “time spent” should be supervised
- whether “time spent” should be allowed overnight rather than just during daytime

Examples of disputes that are not considered substantial:

- who should pay for travel costs associated with “time spent”
- which school the child should attend
- “time spent” for birthdays, Christmas or other significant celebrations
- proportionately small changes to the number of hours of time spent.

6.2.5 Guideline 1 Early Intervention and Dispute Resolution

A court must not hear a new matter unless a Family Dispute Resolution certificate has been provided. Unless an application meets the criteria of guideline 2.1.2, practitioners must recommend a grant of assistance for early intervention and dispute resolution before recommending a grant of assistance for litigation.

VLA considers that the availability of an exemption from FDR does not automatically mean that a grant for RDM is inappropriate. The case must be assessed taking into account the information set out below. If a case is suitable for RDM, a grant for RDM must be recommended before issuing proceedings. The FDR exemption cannot be claimed in this instance (eg certain domestic violence cases).

A *substantial issue* is one that is likely to have a significant impact on the child’s safety or welfare or the child’s right to have contact with their parents or significant others.

6.2.6 Roundtable Dispute Management (“RDM”) Services – VLA Service Provider

VLA has an inhouse service known as ‘Roundtable Dispute Management’(‘RDM’) services. The RDM service is a registered provider of Family Dispute Resolution (“FDR”) certificates.

Features of RDM:

- RDM case managers, who are trained to identify and respond to risk issues, assess whether a matter is suitable for Family Dispute Resolution and if so, help prepare parties for an RDM conference
- Experienced chairpersons (mediators) facilitate discussions in an RDM conference to manage and resolve children’s matters and related financial disputes
- Lawyers are supported in their role as advisers in an RDM conference
- Any party eligible for a grant of legal assistance can initiate RDM, which includes an Independent Children’s Lawyer where one has been appointed. Only one party in the dispute needs to be eligible for assistance to access the service
- Clients may participate through the use of telephone conferencing facilities. This enables parties based in rural and remote locations, interstate or in prison to access

the service and it is also available to assist particularly vulnerable parties to negotiate.

- RDM services have purpose built premises at 338 Latrobe St, Melbourne, (one block from the family courts). RDM Conferences can also be arranged at various regional locations around the State.

Where a grant of assistance is made for early dispute resolution, the mediation must be provided by VLA's RDM Services.

While an FDR certificate (s60I) issued by another FDR practitioner (e.g FRC) satisfies the court's requirements to initiate proceedings, for VLA guideline purposes an assessment is required whether RDM is appropriate. In the absence of compelling reasons such as urgency (see guideline 2.1.2), the first grant of assistance should still be for RDM unless the criteria of guideline 2.1.1.(a)(i) are satisfied.

Examples:
a) Certificate issued that FDR not suitable:
Such certificate is only acceptable from the RDM service (guideline 2.1.1.(a)(i)A). What may not be suitable through another FDR practitioner, could still proceed at RDM. RDM has a far greater range of options available to facilitate mediation whilst ensuring the safety of all parties involved.

b) Genuine effort to resolve made:
Both parties must have attended mediation and engaged in negotiations (guideline 2.1.1.(a)(i)B).

c) A party did not make a genuine effort to resolve:
Assistance for litigation proceedings will not be granted to the party who refused to make the effort, as per Guideline 2.1.1(a)(i)D. VLA will only allow an RDM grant in such circumstances.

d) Certificate issued because the other party has refused to participate:
Such certificate is only acceptable from the RDM service (guideline 2.1.1.(a)(i)E). Refusal of family dispute resolution though another FDR practitioner does not necessarily lead to refusal to participate in RDM. A party's refusal to participate may have been due to issues of domestic violence or due to the other party not having a lawyer at that stage. Both issues can be addressed or may not be a concern proceeding through RDM services. Assistance for litigation proceedings will not be granted to the party who refused to participate. VLA will only allow an RDM grant in such circumstances.

e) Certificate issued after unsuccessful mediation:
VLA will accept a s60I certificate from an FDR provider other than RDM in circumstances where both parties participated in a family dispute resolution conference and had access to legal advice before or during the conference, but the parties were unable to resolve the matter

Where a practitioner is unsure whether to recommend aid for VLA's RDM services, the practitioner must contact RDM to discuss the suitability of a RDM grant. Please phone 03 9269 0500 or 1800 136 832 (toll free), or e-mail rdm@vla.vic.gov.au

6.2.7 Appropriate use of early dispute resolution

VLA no longer provides grants of assistance for pre-litigation intervention other than RDM. Whilst VLA considers that negotiation between the parties and their legal representatives is an appropriate *means of conciliation,* where FDR services other than RDM are used, this must occur without legal assistance.

6.2.8 Roundtable Dispute Management (RDM)

RDM can be utilised both pre & post litigation as outlined in Stages 1(a) and 2(i) of Fee Schedule 1M. There is no requirement to obtain the consent of the other party prior to initiating the process under stage 1(a).

Stage 1(a) Roundtable Dispute Management (Pre-Litigation)
If it has been determined that the matter is suitable for early dispute resolution, a grant for RDM must be sought at first instance. Matters deemed as not suitable include:

- a child's safety or welfare is at risk
- there are current investigations or proceedings about child abuse
- there is an immediate risk of removal or relocation of the child
- a party's safety is at risk
- a party's ability to participate in RDM, even with the active involvement of their lawyer, is effectively jeopardised by behaviour such as violence, intimidation, control or coercion, or a history of such behaviour
- a lapse of up to 6 weeks would unduly prejudice a client's legal position

Where a practitioner is unsure whether or not to recommend aid using VLA's RDM services, the practitioner must contact RDM to discuss the suitability of an RDM grant. Please phone 03 9269 0500 or 1800 136 832 (toll free), or e-mail rdm@vla.vic.gov.au

Where a second RDM conference is required and may reasonably be expected to resolve outstanding issues, the practitioner may proceed to a further conference without an extension of aid.

Stage 2(h) Roundtable Dispute Management (Litigation Intervention)
The RDM litigation intervention grant (Stage 2(h) can be considered when the practitioner forms the view that as a result of prior litigation, the issues in dispute have narrowed to such an extent that a final settlement is possible utilising a non-litigation approach. Practitioners should have regard to recommending aid for RDM where cost/benefit issues arise or where limited funds remain under the fee ceiling.

However, practitioners should be mindful that in certain circumstances, an RDM grant **may not** be appropriate. The Family Court has advised that in some instances, seeking assistance for RDM has delayed final hearings. If assistance is sought at that stage of proceedings, the practitioner should seek a ruling on the matter.

Examples:

- *The Family Report has been released recommending that time with the children be supervised, but has not recommended the timeframe for supervision, nor who is to supervise. There is now no dispute about where the children live and with time spent being initially supervised. The issues are not sufficient to warrant a two day contested hearing. The RDM Family Conference will provide a forum for the parties to arrive at a negotiated settlement regarding the appropriate supervisor and the graduation to unsupervised time with the children.*

- *The issues in dispute relate to with whom the child should live, and the matter is listed for a three day contested hearing. There are insufficient funds under the fee ceiling to fund the hearing, and no special circumstances exist which would warrant overcap funding.*

Prior to recommending aid for RDM, consent **must** be obtained from the other party so as to avoid strategic applications.

Example:
A matter is listed for final hearing, and RDM is recommended. The RDM procedure will delay the final hearing, which may be prejudicial to one of the parties.

<u>Deferral of Litigation Grant</u>
Where a litigation grant has been made and aid is subsequently recommended for RDM Stage 1(a), the litigation grant is deferred pending the outcome of the RDM process.

6.2.9 Early dispute resolution – geographical difficulties

In most cases, VLA's RDM various regional & telephone conferencing facilities can assist parties based in rural and remote locations, interstate or in prison to access early dispute resolution services that were previously considered inappropriate due to geographical difficulties.

6.2.10 Early dispute resolution – safety concerns

RDM is often suitable for matters involving substantial issues of family violence. VLA's RDM service has professional Case Managers that can conduct a comprehensive risk assessment with every party. This service also has detailed policies and procedures as to cases involving allegations of family violence and how they are to be managed. For example parties may completely avoid contact with each other through the convening of a 'Shuttle' or an 'Assisted Negotiations' conference.

Where a practitioner is unsure whether or not to recommend aid using VLA's RDM services, the practitioner must contact RDM for assessment of the suitability of RDM services. Please phone 03 9269 0500 or 1800 136 832 (toll free), or e-mail <u>rdm@vla.vic.gov.au</u>

RDM Chairperson's Report

After the RDM Conference a Chairperson's report will be made recommending whether aid for further litigation should be provided in relation to any issues that remain outstanding. The recommendation is based upon whether a party has made a genuine effort to resolve the matter and the issues remaining in dispute have sufficient merit to warrant further funding.

The Chairperson's report only forms part of the information to be considered by the practitioner in determining whether the matter meets VLA's Family Law Guidelines & Merits Test. However, it cannot be relied on for the purposes of a guideline assessment. Practitioners must assess the guidelines before recommending assistance for litigation.

Practitioners are required to retain a copy of this report on file for compliance purposes.

Any practitioner who elects to recommend further funding contrary to the Chairpersons recommendations, must have serious regard to the issues in dispute and must provide compelling reasons for doing so. These reasons must be clearly noted on the file.

6.3.1 Guideline 2 – Parenting Orders

VLA considers that it is usually most appropriate for applications for parenting orders to be made by adults. Applications by children must be referred to VLA for a decision.

6.3.2 Guideline 2.1.1 Section 60I certificates

<u>a) Certificate issued that FDR not suitable:</u>
Such certificate is only acceptable from the RDM service (guideline 2.1.1.(a)(i)A). What may not be suitable at an FRC could still proceed at RDM. RDM has a far greater range of options available to facilitate mediation whilst ensuring the safety of all parties involved.

<u>b) Genuine effort to resolve made:</u>
Both parties must have attended mediation and engaged in negotiations (guideline 2.1.1.(a)(i)B).

<u>c) A party did not make a genuine effort to resolve:</u>
Assistance for litigation proceedings will not be granted to the party who refused to make the effort, as per guideline 2.1.1(a)(i)D. VLA will only allow an RDM grant in such circumstances.

<u>d) Certificate issued because the other party has refused to participate:</u>
Such certificate is only acceptable from the RDM service (guideline 2.1.1.(a)(i)E). Refusal of family dispute resolution though an FRC does not necessarily lead to refusal to participate in RDM. A party's refusal to participate at an FRC may have been due to issues of domestic violence or due to the other party not having a lawyer at that stage. Both issues can be addressed or may not be a concern proceeding through RDM services. Assistance for litigation proceedings will not be granted to the party who refused to participate. VLA will only allow an RDM grant in such circumstances.

e) Certificate issued after unsuccessful mediation:
VLA will accept a certificate from another Family Disputes Resolution practitioner, where the parties have actually participated in a mediation conference and the matter has failed to settle.

Where a privately funded party initiates proceedings where RDM has not taken place

Respondents in matters where RDM has not taken place must still be assessed under guideline 2.1.2. A situation may arise where there is a substantial issue, it is a priority matter, but the third element of the guideline is not met i.e. the matter is not urgent or a Form 4 has not been filed or there are no reported allegations or investigations into child abuse.

In these circumstances, practitioners should not recommend a grant of legal assistance for Stage 2 litigation. Practitioners should instead recommend assistance for Stage 1 RDM (where guideline 1 is met) and one Stage 2(f) hearing. The 2(f) hearing can be used to request an adjournment to enable the parties to go to RDM.

6.3.3 Guideline 2.1.1 Substantial issues in dispute

A *substantial issue* is one that is likely to have a significant impact on the child's safety or welfare or the child's right to have contact with their parents or significant others.

Examples of disputes about a substantial issue:
- who the child is to live with
- whether a parent should be allowed to relocate to another state or country
- whether "time spent" should not be allowed
- whether "time spent" should be supervised
- whether "time spent" should be allowed overnight rather than just during daytime

Examples of disputes that are not considered substantial:
- who should pay for travel costs associated with "time spent"
- which school the child should attend
- "time spent" for birthdays, Christmas or other significant celebrations
- proportionately small changes to the number of hours of time spent.

6.3.4 Guideline 2.1.1(a)(iii) Priority matters

One of the key criteria for providing assistance for litigation proceedings is that the matter must be deemed a "priority matter". This is where a child's wellbeing or safety is at risk evidenced by one or more of the following factors:

a. The child (subject of proceedings) has been or is at risk of harm from being subjected to, or exposed to, abuse, neglect or family violence;
   - Form 4 (Family Law rules 2.04B & 2.04D) Notice of **Child Abuse** or **Family Violence** must be filed
     i. where the applicant for assistance is also the applicant in the proceedings and is making the allegations

ii. It is expected that allegations of Child Abuse or Family Violence are in accordance with Section 4 of the Family Law Act

or

b. The capacity of a party to care for a child is alleged to be affected by:

- physical health or
- mental health (including intellectual disability or an acquired brain injury) or
- substance abuse problem

or

c. The child's ability to maintain a **meaningful relationship** with one or both parents is substantially prejudiced by the proposal or conduct of a party.

- An example of conduct that would be sufficient to meet this criteria includes where the other party has denied the applicant for assistance time spent with a very young child (i.e. of less than one year old) for several weeks or more.
- An example of conduct that would not be sufficient to meet this criteria includes where the other party has denied the applicant for assistance time spent with a child of 9 years old for two weeks.

Assistance can only be recommended where the case satisfies the criteria for priority matters. Such assessment must be based on the applicant's instructions in conjunction with documentary proof if appropriate and available (eg copy of intervention order / reference to DHS involvement / Children's Court proceedings). Where the guideline assessment is made under 2.1.1.(a)(iii)A, the practitioner must file a Form 4 Notice of Child Abuse or Family Violence. A copy must be retained on file.

The orders sought must be consistent with the allegations made. For example, a claim that the other party sexually abuses the child is not consistent with order permitting unsupervised / overnight time with the child.

Substance abuse problems include both drug and alcohol abuse.

An assessment under 2.1.1.(a)(iii)C can be made in cases where the other party is seeking orders effectively preventing the applicant to spend time with the child(ren) as in the case of a "no contact" parent.

6.3.5 Ongoing Merit & Guidelines Assessment at Every Stage of proceedings

Practitioners must satisfy VLA that their client's matter continues to meet the litigation guideline during the course of proceedings and <u>at every stage of the family law proceeding</u>. This includes:

- the need for there to continue to be a substantial issue in dispute; **and**
- the matter continues to be a "priority matter"; **and**
- that there continues to be merit in the orders the client is seeking.

6.3.6 Guideline 2.1.2 Urgent applications for interim orders

<u>Examples of other *urgent* matters can be:</u>

- a party or child is seriously ill
- a party dies

VLA considers that an application for interim parenting orders is usually appropriate when proceedings are initiated. This is because of the significant time period that currently elapses between the date proceedings are initiated and the listing date for the final hearing. However, VLA considers that a second or subsequent application for interim orders is only warranted if it meets the priority for urgent matters at 2.1.2.

A recommendation under guideline 2.1.2(b)(iii) (DHS recommendation) can only be made if there is a dispute about a substantial issue.

6.3.7 "As Agreed between the Parties" Orders

VLA expects practitioners to seek orders that specifically set out who the child/ren are to live with and the regularity and number of days or hours that the other party will spend time with, including whether this is to be supervised or unsupervised. Practitioners should not seek orders "as agreed between the parties" as assistance would be refused on the basis that the parties can resolve the matter themselves and/or that there are no substantial issues in dispute. Specific orders or "as otherwise agreed between the parties" in the alternative are acceptable.

6.3.8 Guideline 6.1 Child maintenance and child support

When assessing cost benefit in relation to child support matters, you must take into account the financial position of the applicant and/or the children.

Examples:

- *An application for $10 per week child support may be significant to the children of a residence parent whose sole source of income is social security and may warrant funding.*

- *An application to increase existing child support payments by $10 per week may not be significant to a payer who earns $30,000 p.a. and may not warrant funding*

6.3.9 Guideline 6.2(c) Social Security Appeals Tribunal (SSAT) Review of child maintenance and child support decisions

Assistance under guideline 6.2(c) for appeals from a decision of the SSAT to a court on a question of law are <u>not</u> subject to practitioner recommendation. <u>Applications must be submitted through the traditional grants process.</u>

For grants under the other two criteria of guideline 6.2 practitioners **must** ensure that they clearly file note why the application satisfies the guidelines and why the proposed appeal is meritorious.

6.3.10 Guideline 6.4 Applicant children

The child may be the most appropriate person to seek an order if:

- he or she is over 18
- the parent who would otherwise make the application is genuinely unwilling or unable to do so

6.3.11 Guideline 7.1 Applications for / Responses to spousal maintenance

The applicant may be unable to *adequately defend* an application if:

- the applicant meets the guidelines set out in Part 14 of the VLA Handbook in relation to special circumstances
- the dispute involves complicated financial arrangements such as farms, family trusts, small business or corporate entities

6.3.12 Guideline 11 Recovery, Location & Information Orders

Where assistance is sought for a location order, practitioners should seek a grant of assistance for an Application for Recovery/Information Order (Stage 2(b)). Guideline 11 must be applied in conjunction with guideline 2.1.2 and/or guideline 2.1.3. If the child's safety is at risk, the matter will meet the merits test, as well as being considered both a "priority matter" and an "urgent matter" and practitioners can recommend that assistance is granted. Practitioners should not recommend that assistance be granted for both a recovery application and an application for parenting orders unless the matter is likely to continue to be a "priority matter" and an "urgent matter" once the recovery issue has been resolved. Practitioners should instead recommend assistance for Stage 1 to seek resolution at RDM. Grants of assistance for any of these are limited to $2,000 and will not be included within the fee ceiling for the substantive matter. The lump sum fee covers both the application and the return date.

<u>Recovery Orders</u>

VLA considers that an application under guideline 11 (Recovery) is only appropriate where:

a. "live with" orders are in place and funding is sought for the parent with whom the child usually lives (in accordance with the orders) to have the child returned.
b. "live with" orders are not in place but a parent has an established a clear status quo of the child living with them; and funding is sought for that parent to have the child returned. VLA expects that such case would usually be funded under cover of a substantive application for parenting orders.
c. "time with" orders are in place or a parent has established a clear status quo of spending time with the child,and funding is sought for a "contact parent" to have the child brought back into the jurisdiction (one of the parents absconded with the child).

In all other instances, an enforcement application would be the appropriate course of action. Funding for such applications will be provided as of the 1 November 2011 subject to guideline 15.

Wherever possible, VLA expects applications for recovery orders and the substantive matter (lives with / time spent) to be filed together. Only one lump sum fee would apply being the lump sum fee for the substantive application (eg stages 2(c) or 2(e)). However, should it not be possible to file together, the lump sum fee per stage 2(b) will apply in addition to the lump sum fee for the substantive matter. The practitioner's file **must** contain a file note indicating reasons and that the issue has been considered.

Where an application for recovery turns into a dispute about substantive parenting orders, an extension for a broadbanded grant must be obtained (eg stage 2(e)).

6.3.13 Guideline 12 Nullity of Marriage

Assistance will be provided subject to an assessment that the legislative requirements are met and the case satisfies the merits test.

Assistance is no longer available for divorce applications.

6.3.14 Guideline 15

VLA may grant assistance for applicants or respondents in contravention or enforcement proceedings where the matter meets the 'priority matter' guidelines in 2.1.1 and there has been a 'substantial breach' of parenting orders.

Examples of a 'substantial breach' include:

- A continued failure to provide or return the child/ren in accordance with 'time spent' orders.
- A failure to take child to medical or other appointments in accordance with court orders

Examples of circumstances which do not constitute a 'substantial breach' include:

- Being late for change over
- Failing to exercise 'time spent'

If the matter is solely concerned with contravention or enforcement, practitioners are not required to seek a grant for RDM in the first instance. If the contravention will be dealt with in conjunction with another application (i.e a variation of orders), RDM is considered appropriate.

Costs management

6.4.1 Guideline 17.1 General

VLA takes into account amounts spent on the applicant's case unless VLA determines that the application relates to a "new matter". Such applications are not subject to practitioner recommendation but must be sent to VLA for determination addressing section 17.1 of the family law guidelines.

New Matter:
A new matter is a dispute involving either

- different parties or
- the same parties about the same or substantially the same issues, where there has been a material change in circumstances or where any such change would materially affect existing orders.

A material change in circumstance for the purposes of guideline 18.1 is a change which would render the existing orders irrelevant and effectively mean that the case will need to be determined all over again. Most of the evidence obtained in proceedings so far would be irrelevant.

Factors which may be taken into account are whether a child's safety is at risk or there is a likelihood of current or future violence or physical and /or mental / emotional harm (welfare issues). Length of time since the making of the orders alone is not a determinative factor.

In making a funding decision VLA will have regard to the role the applicant for assistance has played in bringing about the material change.

Examples of what <u>may</u> constitute a new matter:

- residential parent passes away after orders made
- residential parent convicted on serious criminal charges and incarcerated long term

Examples of <u>same</u> matter:

- final orders for 2 children / after reconciliation and birth of 3rd child further proceedings initiated
- final orders for day time contact / increase to overnight contact sought
- final orders made taking into account a parent's drug abuse issues / issues arise again based on drug abuse.

Where a matter is considered the <u>same</u> matter, a request can be made for over-cap funding (see commentary to Guideline 17.3 below) .

VLA will advise you when a matter is approaching the fee ceiling. Practitioners are encouraged to telephone Assessment Officers for updated figures. All requests that a matter be treated as a new matter and all requests for funding above the fee ceiling cannot be the subject of a practitioner's recommendation. These requests must be forwarded to VLA for assessment. In such cases the practitioner should promptly forward all supporting documentation and a letter outlining what assistance is sought.

Practitioners must complete the family law overcap worksheet available on VLA's web site.

6.4.2 Guideline 17.3 Costs management – allocation to in-house practitioners

Presently VLA will allocate matters which are part of the SGP to the practitioner who applied for assistance and will not re-allocate matters from private practitioners to in-house practitioners.

Alternative means of funding

Where a matter appears likely to exceed the fee ceiling VLA expects practitioners to have regard to the appropriate use of the funds available.

Funding above the fee ceiling

All requests for funding above the fee ceiling must be referred to VLA for assessment. Practitioners must have regard to the factors set out in guideline 17.3(1) and provide sufficient information to enable VLA to determine whether over cap funding is warranted. Assistance in excess of the fee ceiling can only be provided if refusal would cause an undue hardship to the applicant. Practitioners must complete the family law overcap worksheet available on VLA's web site.

Jurisdiction

6.5.1 Proposed proceedings

In deciding whether proposed proceedings should be issued in Victoria, you must have regard to:

- the convenience of the parties and children
- limiting the expense of calling witnesses and subpoenaing documents

If on application of the guidelines a practitioner determines that the appropriate place to issue is interstate and not Victoria, then an application for assistance should be made through the Legal Aid Commission in the appropriate State. This includes applications for assistance for early dispute resolution(RDM).

Practitioners should contact the Compliance Team on 9606 5355 if there are any queries as to jurisdiction.

6.5.2 Proceedings already on foot

1. On any application for legal assistance, regardless of the state of residence of the applicant, the forum test will apply and the question of assistance is the sole responsibility of the Commission in the State in which the proceedings are listed to be heard ("the granting State").

   Forum in this context means the State in which the proceedings are listed for hearing, NOT the State of the managing registry.

   Example*: The Melbourne Registry of the Family Court manages the listing of matters for the Albury (NSW) sittings of the Family Court – the forum is NSW not Victoria as the matters will be listed for hearing in NSW.*

2. Where the forum changes to another State then the State of residence of the assisted person becomes relevant for the first time in that:

   (a) If the assisted person was and remains a resident in the granting State then the granting State Commission continues to assist the matter. The basis of that ongoing assistance is the continuing residence.

(b) If the assisted person was never a resident of, or ceases to be a resident of the granting State then assistance by the granting State will cease and application must be made to the Commission in the new forum State. The basis of this determination is that there is no longer any connection, be it forum or residence, with the granting State.

Trials / Final Hearings

6.6.1 General principles

(a) For the purposes of this section, the expression “trials” also includes *preparation* for the proposed trial.

(b) Practitioners must have regard to the merits test including cost benefit when recommending assistance for trials in family law matters (refer 6.1.1 of these notes).

(c) Assistance for family law proceedings is subject to a fee ceiling of $15,510 (GST inclusive).

(d) Prior to making a recommendation for assistance, the practitioner must ascertain from VLA that there are sufficient funds available under the Commonwealth’s fee ceiling to enable completion of the stage for which assistance is sought. A file note must be made of the advice received. If insufficient funds remain within the fee ceiling, an application for over-cap funding must be made. Such an application ***cannot*** be the subject of a practitioner’s recommendation. Assistance in excess of the fee ceiling will only be provided if refusal would cause an undue hardship to the applicant.

(e) Requests for funding of family law trials will not be considered unless the practitioner has rendered all accounts to VLA up to seeking assistance for the trial

(f) VLA only provides assistance for representation at trial (by counsel or lawyer) where the other party is represented, either privately or through pro bono assistance. This rule applies to all new and existing grants for trials listed after 7 January 2013. Where the trial commenced prior to 7 January and recommences and proceeds within 90 days of the last hearing day, VLA will provide assistance for representation by counsel or lawyer.

(g) Approval for trial funding is assessed internally by VLA’s grants officers in the Assessments and Legal & Policy Units. Trial funding will not be approved unless the application form contains the details of the other parties to the proceedings and confirmation that the other party is legally represented.

(h) Lawyers have an ongoing duty to keep VLA informed on the status of the other party’s legal representation. Should the other party appear at the first day of trial as a self-represented litigant, counsel may only appear for the first day of the hearing.

Should a practitioner become aware before the first day of trial that the other party will not be legally represented at the trial, they must notify VLA immediately, and trial funding will be terminated.

(i) Where trial preparation funding has been approved, but funding for trial costs refused, a lawyer may still apply for additional preparation funding if the trial goes for longer than anticipated and further preparation work is required to be performed by the lawyer according to the current rules.

6.6.2 Basis of a recommendation for assistance

A recommendation to aid a trial must contain a clear file note as to the following:

- the client's instructions
- a brief statement as to the evidence to be relied upon. Where a statement, or piece of evidence, is determinative of a particular issue, that piece of evidence must be readily identifiable, to enable compliance checks by VLA to be conducted in an effective manner
- a brief statement as to how, in the practitioner's opinion, the matter satisfies the Commonwealth's merits test including the cost benefit test, together with the issues that remain in dispute and any proposed offers that have been made between the parties

The file should also contain:

- a copy of the parties' pleadings/affidavits, with relevant parts of evidence that form the basis of the assisted person's case clearly identified;
- copies of all reports from third parties (including, but not limited to psychiatric/psychological assessments and Family Reports); and
- the opinion of the Independent Children's Lawyer. Practitioners should canvass the Independent Children's Lawyer's view and retain the advice (or a file note of it) on file for compliance purposes

Any practitioner who elects to recommend further funding contrary to a third-party opinion (be it an Independent Children's Lawyer or welfare report) must have serious regard to the issues in dispute and must provide compelling reasons for doing so. These reasons must be clearly documented on the file and clearly identifiable.

Examples:
The practitioner seeks legal assistance for a three-day trial over the issue with whom the child lives. All relevant court documents are on the practitioner's litigation file. The Family Report is now available and the Independent Children's Lawyer has expressed an opinion. The Independent Children's Lawyer is not entirely supportive of the client's case, and the Family Report concludes the child should live with other party. If the practitioner wishes to recommend further assistance in this matter, a detailed file note would be required, setting out the reasons why aid is being recommended in the face of adverse third-party opinion. Such matters may include (but are not limited to) the following:

The Family Report contains weaknesses in its compilation, which lessen its evidentiary strength. These weaknesses may be factual, or relate to matters of opinion, and need to be carefully detailed. There should be substantial dispute, not merely disagreement on a small point. For instance, the practitioner may have formed the view the impartiality of the report was unduly influenced by extraneous matters, or influenced by matters which (if the correct weight had been apportioned) would likely persuade a Court that a contrary view should be taken;

There is new evidence, which has arisen since compilation of the report/opinion, and this new evidence is both admissible, cogent, and of sufficient weight.

6.6.3 Extent of legal assistance

<u>Quantum in cases initially assessed as costing less than the client's available funds under the fee ceiling</u>

In cases where the trial is anticipated to be less than the remaining ceiling available to the client, a practitioner's recommendation can be made. Requests for hearing days must clearly specify the number of days sought. The practitioner must not make a recommendation outside the reasonably anticipated range.

In situations where the case runs longer than the original estimate (but less than the applicable fee ceiling), the practitioner may recommend further assistance and seek a further grant. In support of this request, the practitioner must make a file note outlining the reason for the extension of assistance, and the additional time it may take to finalise the case. A completed checklist must be received by VLA **before** any further costs are incurred.

<u>Extensions of assistance in ongoing trials.</u>

In cases where extensions of assistance in on-going trials will result in the cost ceiling being exceeded, a further extension of assistance must be directed in writing to VLA prior to additional over-ceiling costs being incurred. The request must contain detailed particulars, including:

- the amount of days required, and the reasons why the original time estimate has been exceeded
- the merits as to why over cap funding is warranted, including the final orders being sought by each party
- advice regarding the issue of hardship (guideline 18.3)
- additional disbursements required
- copies of relevant expert reports (ie family report, psychological reports)

6.6.4 Cases which will, from outset, exceed the fee ceiling

Matters where the anticipated legal costs of a trial will exceed the applicable fee ceiling ***cannot*** be the subject of a practitioner recommendation. Practitioners must submit such applications to VLA for assessment.

The submission must include:

- the urgency of the next hearing date
- the anticipated number of days of trial, including any estimation the court has itself given for the matter
- particulars of witnesses to be called by both sides, and estimated duration of their evidence
- a copy of the trial plan (if applicable)
- copies of all expert reports
- details of disbursements to be incurred
- the chronology including attempts made to settle the matter and details as to the final orders being sought by each party
- any other factors which might affect trial duration (for example, number of parties and intervenors, whether interpreters are engaged and for whom)

In exercising the discretion to extend the grant of legal assistance, VLA may also have regard to:

- whether the applicant has incurred significant additional costs due to special circumstances (referred to in Part 14 of the Handbook)
- whether it would be unreasonable to expect the applicant to adequately represent himself or herself due to special circumstances (referred to in Part 14 of the Handbook)
- whether the costs have significantly increased through no fault of the applicant's
- the multiplicity or complexity of issues in dispute
- the likelihood of risk to the child's safety or welfare

6.6.5 Magellan Matters

Cases listed in the Magellan List of the Family Court are not subject to the fee ceiling

Commentary on Fee Schedule 1M

Fee Schedule 1M effective 1 November 2011, makes provision for broadbanded family law grants.

All family law matters in the SGP are governed by fee schedule 1M of the VLA Handbook. Grants of legal assistance can only be made in accordance with this schedule.

When recommending that assistance or an extension of assistance be granted, practitioners should identify the stage in the schedule that is applicable. The work covered by the stages is largely self-explanatory but the following additional comments should be noted. In particular, with broadbanded stages, it is essential to note on the file the particular hearing dates so that practitioners can assess what parts of a broadbanded grant have been expended and VLA can discern the work done pursuant to each stage.

Broadbanding and Fee Ceiling

Regard must be had to the fee ceiling imposed on Family Law matters. Costs allocated within a broadband cannot exceed the fee ceiling. Specific authorisation must be sought to exceed the funding cap setting out the exceptional circumstances. Refer to guideline 18 of the Handbook and the commentary in these Notes.

6.7.1 RDM & Substantial Issues in Dispute

When seeking an RDM grant stage 1(a)(i)), the requirement that there are real issues in dispute must still be met. Although a matter may not be aided to issue proceedings, an RDM grant may be available. Practitioners must still satisfy themselves that the issue in dispute is substantial enough to fund a grant for RDM only, even though the issues may not be sufficient to initiate proceedings.

6.7.2 RDM – Pre-Litigation Fee Schedule 1M Stage 1(a)(i)

Where an RDM grant has been made and the matter resolves as a result of the RDM process, a fee is available to prepare consent orders.

Where a second RDM conference is required and may reasonably be expected to resolve outstanding issues, the practitioner may proceed to a further conference without an extension of aid. Only the attendance fee will be available for the second RDM.

Should practitioners recommend assistance for RDM and the other party does not attend the conference, the practitioner may claim the lump sum fees relating to taking instructions, & preparing client for RDM Conference plus 1 hour's attendance at the RDM Conference.

6.7.3 RDM - Post-Litigation

Where a litigation grant has been made and aid is subsequently recommended for RDM (Stage 2(i)) the litigation grant is deferred pending the outcome of the RDM process. If the matter is resolved by RDM, practitioners may render an itemised bill for all work done pursuant to the previous litigation grant.

It is understood that during the RDM process, necessary work that was required in the previous litigation grant may need to be undertaken. However, VLA is of the view that practitioners should only undertake those steps that are critical to court procedure. Practitioners should attempt to avoid major steps in the litigation grant previously given. For example, preparing Affidavits, briefing counsel for final hearing.

6.7.4 Consent Orders

The fee in stage 1(a)(i) for consent orders can only be claimed if orders were filed in court. Heads of Agreement and orders drafted but not filed do not attract the fee.

As the fee is payable for the work involved in getting the orders made by the court, it can only be charged by the practitioner filing the orders.

6.7.5 Subsequent Hearings – Stage 2(f)

The fees are **not** payable for administrative adjournments.

Where during the course of a proceeding a further interim application must be issued or a response is required, a grant per stage 2(f) may be recommended.

6.7.6 Interim Contested Hearings

An Interim Contested Hearing is any matter where the Court allocates a specific fixture to hear the matter on a contested basis, but which is not the final hearing. That is, any interim matter which could not be dealt with in the Registrars Duty List at a hearing, because the matter was particularly complicated or complex. Where a matter has been set aside for an interim contested hearing (no matter how described) the stage 2(g) preparation grant will usually apply. Note that once these stages apply, Counsel's fees in stage 4 are automatically available. Fees for instructing are **not** available.

6.7.7 Trial Stages – Family Court

Based on the new Trial and Case Management Pathway, Fee Schedule 1M provides

- stage 3(a) for preparation for and the appearance on the <u>first</u> day of trial and
- stage 3(c) with further preparation and fees for the Continuation and Conclusion of Trial days.

6.7.8 Stage of Matter Limits

Fee Schedule 1M contains both lump sum fees and Stage of Matter Limits (SOML) which are able to be claimed depending upon the particular grant. A SOML is the maximum amount VLA is prepared to pay for each stage of the case, and requires the practitioner to provide an itemised bill of costs for that stage. Itemised bills of costs are also required in Lump Sum grants where the stage has not been substantially completed. Bills of costs are to be in accordance with the Family Law Scale and are payable at 80% in Family Court & FMC jurisdictions.

6.7.9 Additional Work – Stage 3(e)

A grant of assistance under stage 3(e) **cannot** be the subject of a practitioner recommendation. To obtain such a grant, you must tick the appropriate box on the checklist and provide details on why the grant is required and how many hours are sought. The grant is only available in exceptional circumstances. A request for additional preparation requires a two-step assessment:

a) The work must be **<u>extraordinary</u>**. Unless the work is outside the work reasonably expected for preparation for trial, there is no room for paying additional fees. The provision for additional preparation is not designed to increase the fees because they may be considered inadequate (eg affidavit longer than usual / conference with witness longer than expected).
b) The number of hours required to complete the extraordinary work.

6.7.10 Adjourned trials:

The preparation for trial fees are fixed against the expected length of trial. In some cases trials are adjourned part heard to another date. The effect of this may be that the preparation no longer reflects the actual length of the hearing. In these cases it is more appropriate to consider an amended grant rather than a grant for additional preparation (ie uplift preparation for 1 day to preparation for more than 1 day under stage 3(d)).

6.7.11 Funding in Child Support Matters

Separate funding stages have been fixed for child support matters taking into account that these matters follow a different path through the courts.

The fees per stages 1 to 8 are attached to Fee Schedule 1M and include provisions for the initial proceedings, enforcement, appeals and stay applications.

7. Family Violence Protection Act 2008

Adult Applicant – Family Violence Intervention Order

Before recommending that assistance be granted for an applicant in a proceeding under the Family Violence Protection Act 2008 (“the Act”), the applicant must begin proceedings with the help of the police or a Magistrates’ Court registrar. VLA will only grant assistance once the case is listed for a contested hearing.
Where the application has been made by a police member with the person seeking assistance listed as an affected family member, assistance will not be granted. It is expected that the police will pursue the matter to completion.

7.1 Merit

The practitioner must have formed the view that the application is reasonable (meaning that the application is not frivolous, vexatious or in bad faith) and it is likely that the court will make the family violence intervention order as sought by the applicant.

The practitioner’s file must include:

- A reference to guideline 6.1 of Part 6 of the VLA Handbook
- A copy of the application for a family violence intervention order including the complaint

Examples:

- *The applicant has applied for a family violence intervention order and advises that she requires representation ‘just in case’ the respondent decides to contest. She is scared and intimidated by the respondent and feels that she needs the support of a solicitor in court. There have previously been instances of assault and domestic violence against the applicant. This in itself is not enough to recommend a grant of assistance. The case must be listed for contested hearing. The practitioner should not recommend a grant of aid.*
- *After an incident involving violence, a member of the police force has made an application for a family violence intervention order on behalf of the affected family member. The practitioner should not recommend a grant of aid as assistance is usually only granted to applicants, not affected family members.*

In cases where the original applicant seeks to respond to the original respondent’s application to vary or revoke a family violence intervention order, VLA will extend assistance to oppose the application only when the matter is listed for a contested hearing.

Where the original applicant seeks to respond to an appeal in the County Court by the respondent against the making of an order in the applicant’s favour, a practitioner may recommend assistance for the appeal providing that the merits of the matter remain substantially the same. In making this recommendation, the practitioner must have regard to the evidence that was adduced on oath by both parties to the Magistrate's Court proceedings.

Child Applicants / Affected Family Members

VLA will not provide assistance for children under 14 years of age (unless leave has been granted by the court pursuant to section 62 of the Act). It is expected that they are included on any application by an adult applicant. Whilst this is also true for children 14 years and older, VLA will grant assistance to them

- to seek leave from the court to apply for a family violence intervention order
- to apply for the family violence intervention order where leave has been granted; or
- where the court has decided that the child should be represented by her/his own legal practitioner.

Where leave has been granted per section 62 of the Act, proof of leave being granted must be retained on the practitioner's file.

Respondent – Family Violence Intervention Order

Before recommending that assistance be granted for a respondent to oppose the making of a family violence intervention order the practitioner must be satisfied that:

- The respondent is a child; or
- The order would deprive the respondent of an important right (for example excluding the respondent from his/her home), or
- The respondent was arrested and is still in custody (for the incident that gives rise to the application for a family violence intervention order); and
- It is likely that the Court will make a less restrictive order or no order at all.

It is not a guideline requirement that the matter be listed for contest for respondents.

If the respondent seeks to apply for a variation of an existing order, the practitioner must be satisfied that there has been a sufficient material change in circumstances to warrant the application for variation and that the proposed application is not inconsistent with any existing Family Law Orders. Assistance can only be recommended once leave has been granted by the court pursuant to section 109 of the Act.

An application by the respondent to have an order revoked or to appeal to the County Court does not form part of the VLA guidelines and cannot not be recommended for assistance. Any application outside the guidelines must be sent to the Legal & Policy Unit for assessment.

Where the respondent has breached an order, the application must meet the summary crime guidelines, not the intervention order guidelines.

Where assistance is recommended for a respondent to oppose the making of a family violence intervention order the practitioner's file must include:

- A reference to guideline 6.2 of Part 6 of the VLA Handbook
- A copy of the application for a intervention order including the complaint
- Practitioner's assessment of the strengths and weaknesses of the response

Examples:

- *The applicant is the respondent in an application for a family violence intervention order. If the order were made, he would be required to stay 200 metres from the applicant's home. The respondent resides in the same street as the applicant and the result of such an order would mean that the respondent would be unable to attend his home. Assistance should be recommended on the basis that the order would "curtail an important right of the respondent" and a "Court might be persuaded to make a less restrictive order" (different terms as to distance etc)..*

- *The applicant is the respondent named in an existing family violence intervention order. The order prevents him from attending within 200 metres of his former partner's place of residence. His employer, with no prompting on the respondent's part, has transferred him to a different factory, which is located 50 metres from the applicant's home. The respondent seeks to vary the order to allow him to attend work and was granted leave to apply. The matter is listed for contested hearing. The practitioner should recommend assistance, as an "important right of the respondent would be curtailed" were the order to remain in place without amendment.*

7.2 Family Law Matters & Family Violence Orders

Assistance can be provided to respondents where the order would curtail an "important right". Changes to the Family Law Act 1975 provide that a court must take into account the existence of an intervention order. Practically however, this only applies to intervention orders made after a contested hearing. Where an order was made by consent (eg consent without admissions) or if there is an undertaking, no finding of fact has been made.

It is VLA's view that

a) Where the children of the relationship are included in the proposed order and the order includes provision to allow contact with the children by agreement or in accordance with court orders, the order does <u>not</u> curtail an important right. Ultimately, defending the application for IO itself would not give the applicant the contact s/he desires. The issue would still need to be pursued through the family court.
b) Where the children of the relationship are included in the proposed order and it does <u>not</u> include provision to allow contact with the children by agreement or in accordance with court orders, the order would curtail an important right.

The respondent's position in defending the application must be meritorious, ie it is more likely than not that the applicant will not be able to substantiate the allegations set out in the complaint.

If a practitioner in a specific case considers that an 'important right' is curtailed, they should contact compliance for a ruling setting out:

- The basis upon which it is asserted the other side's application is unmeritorious;
- The basis on which the making of the order might impinge/restrict on any current or anticipated family law proceedings; and

- The prejudice that might be suffered generally if assistance was not granted to defend the application.

Cross-Applications

Where the person seeking legal aid is both the applicant and respondent, assistance is still subject to VLA's Guidelines. Consequently, if the person meets the Applicant Guideline, but not the Respondent Guideline, assistance will only be provided for the application for an intervention order. Alternatively, if the person meets the guideline for Respondents, but does not meet the guideline in relation to Applicants (for example, the application may be merely vexatious), then aid will only be provided to respond to the application made against him or her.

Fees

7.3.1 Urgent Grant

Where a practitioner obtains an urgent grant for a Family Violence Protection Act 2008 case, or the matter for which aid is sought is to be heard on the date the application is received or the following day, the urgent grant fee (for preparation) in Table A4 applies. At all other times the standard preparation fees in Table A4 apply.

Where the matter proceeds before a Magistrate and evidence is called, a contest appearance fee of $420 may be claimed. In the event that the contested hearing is likely to be of an extraordinary duration, VLA must be notified of the number of days the matter is listed for hearing.

7.3.2 Where the matter does not proceed to a contest

In then event that a matter is listed for a contest but on the day does not proceed to a contest, the appearance fee of $301 is claimable. There is no provision in Table A4 for a higher fee where the matter is listed for contest but does not proceed as a contest. Only if the matter proceeds and evidence is called is the fee of $420 claimable.

7.3.3 Directions Hearing

As assistance for applicants is not available until a case is actually listed for contested hearing, a directions fee is usually not payable for applicants (matter not within guidelines at that point).

7.3.4 Multiple complainants or defendants

Where a practitioner acts for multiple complainants and/or defendants or in circumstance of a cross-complaint, only one lump sum fee per Table A4 is payable.

8. Personal Safety Intervention Orders Act 2010

The commentary under chapter 7 for Family Violence Intervention Orders applies in principle to Personal Safety Intervention Orders due to the similarities in relation to the guidelines and fee tables. Where reference is made to a fee table the reference must be read in conjunction with Table A5.

9. Children's Court (Family Division)

Funding for child protection matters in the Family Division of the Children's Court will only be provided to children and people defined as 'parents' according to the definition in the *Children, Youth and Families Act 2005* ('the Act').

Extended family and other third parties will not be funded except where the matter is referred to VLA by the Children's Court, who have taken the view that the third party is critical to the Court's ability to make a decision that is in the child's best interests.

This section provides definitions and guidance for practitioners submitting applications for assistance in child protection matters and should be read in conjunction with Guidelines 1 and 2 of Chapter 6 of the VLA Handbook. Any matter that is not the subject of commentary has been deemed sufficiently clear not to need such commentary.)

A practitioner's file **must** contain:

- A reference to the appropriate guideline with the basis of the practitioner's recommendation clearly documented; and

- Copies of all relevant reports. Where a statement, or piece of evidence, is determinative of a particular issue, it must be easily identifiable, to enable compliance checks by VLA to be conducted in an effective manner.

Definitions

"Reasonable prospects of success" means that a prudent and experienced practitioner would consider the applicant's case more likely than not to succeed, in all the circumstances. The prospect of success must be real and not fanciful, having regard to the evidence and circumstances of the case. This requires more than an arguable case.

"Opposed" means actively contested.

"Third Party" means someone who the Court has joined as a third party to the proceedings and has a significant relationship with the child. This can include (but is not limited to) grandparents, aunts and uncles or adult siblings who have had a significant involvement in the child(ren)'s life.

Applications from Children

Applications received on behalf of children are subject to State family guideline 1. VLA will grant assistance to a child in the Children's Court (Family Division), provided the child is sufficiently mature to give instructions (usually ten or older).

Approval for funding for children under the age of 10 in child protection matters will now be subject to recommendation from the Children's Court. Funding for children under the age of 10 cannot be recommended by SGP firms.

Applications from Adults

Applications received on behalf of parents (as defined under the Act) in Children's Court matters are subject to State family guideline 2.

VLA will only fund parties who are not parents (as defined under the Act) where the matter is referred to VLA by the Children's Court, who have taken the view that the third party is critical to the Court's ability to make a decision that is in the child's best interests. VLA must then be satisfied that the circumstances of the case are exceptional and that the third party meets the other eligibility criteria for a grant of legal assistance as set out in State family guideline 2.

Funding for parties who are not parents (as defined under the Act) cannot be recommended by SGP firms.

9.1.1 Cost/Benefit test

The practitioner should have regard to the nature and extent of any benefit that may be gained by the applicant from providing legal assistance as measured against the likely cost of the case.

The applicant should also consider any detriment which the applicant might suffer if a grant of assistance is not provided.

> **Example:**
>
> *DHS has sought a condition that the father have supervised access twice per week for two hours at a time. The father is seeking an additional two hours on one of the days per week. VLA would not consider there was sufficient cost/benefit and would not provide a grant of aid.*

9.1.2 Compelling reasons

As stated in guideline 2, VLA does not provide funding for a client to make an application to vary or revoke an order made in the Children's Court Family Division where there are no current proceedings on foot, unless there are compelling reasons. This guideline does not refer to cross-applications made after DHS has issued proceedings, which are forensic decisions of the practitioner.

> **Examples:**
>
> *Orders have been made in the Children's Court, but the father was not a party to the proceedings when those orders were made. The father has now appeared and is seeking access to the children. VLA would not fund this application. Instead, the father should approach DHS and arrange suitable access with the children.*
>
> *DHS has sought an extension of a Custody Order and the applicant wishes to contest the extension. The solicitor seeks to revoke the Custody Order and seek a Supervision Order instead. VLA would fund this cross-application, however no additional fees (outside of the broad-banded grant of assistance) are payable.*

9.1.3 Interim and Final Contested Hearings

Where a contested hearing will exceed five days, the practitioner should seek specific approval from VLA. VLA may limit the arguments to be run (ie. allowing aid to seek additional access, rather than return of the child to the client's care) and/or number of days allowed.

When seeking assistance for a contested hearing beyond five days, the practitioner must provide:

- A completed worksheet for contests in excess of 5 days including;
- Details of the final orders being sought by each party;

- The number and nature of all witnesses to be called;
- Advice as to the merits of the case; and
- Copies of any clinic reports and/or reports prepared by DHS.

Examples:

<u>A party seeking assistance to oppose an application to vary or to extend an order</u>

The mother has been having four hours of supervised access twice per week for the last three months. However, the mother has missed the last three access visits. DHS has sought to reduce the mother's access to one visit per week. The mother has instructed that she was ill on the last three occasions and can provide a doctor's certificate. In these circumstances, the mother has reasonable prospects of success in seeking to oppose the variation of an order and aid would be granted.

<u>A party seeking assistance to oppose proving of a Breach Application</u>

DHS has brought proceedings to breach a Supervision Order, alleging that the father's violent girlfriend has moved back into the family home. The father instructs that the girlfriend has moved out, but refuses to obtain an Intervention Order. The child has disclosed that the girlfriend is living in the home. In this case, VLA would not grant aid to the father because there are insufficient prospects of success to warrant a grant of assistance.

<u>*A party seeking assistance seeking an order different to that recommended by the* Department of Human Services):</u>

DHS has become involved with a family after allegations of neglect are made. The family has no previous involvement with DHS. The Department have sought a Custody Order. The parents have agreed to accept services from DHS and will abide by conditions, but are seeking a Supervision Order. VLA would provide a grant of assistance in these circumstances.

DHS is seeking a Guardianship Order where the child has been the subject of a Custody Order for three years. The parents want the child returned to their care on a Supervision Order. Over the previous three years, the parents have not addressed the protective concerns. Specifically, they have not maintained consistent access, have not accepted services as directed, and have failed to provide the required drug screens. On this information the parents do not have merit in seeking an alternative order and VLA would not provide a grant of assistance.

<u>A party seeking assistance to oppose removal of the child:</u>

The applicant has two children in her care, currently subject to a Supervision Order on the basis of domestic violence between the applicant and her de facto. The existing order states that she is not to allow the de facto to reside with her and the children. DHS has recently sought a Custody Order and want to remove the children from her care, alleging that she has allowed the de facto to move back into the family home. She disputes this allegation and seeks to contest the making of the order. On this information, VLA would provide a grant of assistance.

A party seeking assistance to oppose a condition:

DHS is seeking an order where one of the core conditions is that the mother reside with the maternal grandmother. The mother instructs that she has her own apartment and has been living on her own for the past six months. She has been accepting help from disability support services and does not want to lose her independence. She would like an order that the child be placed in her care, in her own residence. She is happy to continue to accept services as required. In this case, VLA would approve aid.

A party seeking assistance to oppose a guardianship order or permanent care order:

DHS is seeking a Permanent Care Order, however the mother is seeking to have the children remain on a Guardianship Order. Over the three years in which the child has been in an ongoing placement, the mother has not complied with any of the conditions specified in the orders. There is no basis for the mother to oppose the orders sought. VLA would not provide aid to contest the order sought, but may provide a limited grant to negotiate appropriate access.

The child has been on a Custody Order for one year. The parents have complied with all the conditions specified in the order. DHS has sought to have the children placed on a Guardianship Order. Although the parents acknowledge that they are not yet in a position to have the children returned to their care, they want to retain some control in relation to long-term decisions about the children and are seeking to have the Custody Order extended. VLA would provide funding for this matter.

A party seeking assistance where limitations will be imposed by VLA:

The mother is 19 years old with an intellectual disability. DHS is willing to return her child to her care, but seek a condition that she be required to live with the maternal grandmother, who is willing to provide support. The mother instructs that she will not agree to this condition and wants to live with her boyfriend, who is also intellectually disabled. VLA would not fund this matter for a defended hearing as the client is unlikely to succeed and, in the circumstances, the condition is not unduly onerous or restrictive. However, VLA may under these circumstances provide limited assistance to ensure the mother was given appropriate advice and to arrange suitable consent orders.

9.1.4 Transitional Provisions

The new guidelines in relation to children under the age of 10, and parties who are not parents, apply to all grants made as of 7 January 2013. For cases already funded before this date, the following transitional provisions apply:

Children under the age of 10

Where a grant of assistance has been made to a child under the age of ten before 7 January 2013, the grant will continue to be assessed under the previous guideline. VLA will not terminate funding or refuse extension requests based on the age of the child.

Parties who are not parents

Where a grant of assistance has been made to a party who is not a parent (as defined under the Act) before 7 January 2013, the grant will continue to be assessed under the previous guideline. VLA will not terminate funding or refuse extension requests based on the fact that the party is not a parent.

Changes made on 1 September 2012 to Interim Accomodation Orders
The guideline changes in relation to IAOs apply to all grants made as of 1 September 2012. For cases funded before this date, the following transitional provision applies:

For a pictorial representation as to how the costs regime under Table A2 will operate after 1 September 2012, please see paragraph entitled “Costs Diagram” below.

Existing grant of assistance prior to 1 September 2012 Irrespective of the existing number of Interim Accommodation Order (IAO) fees already granted for the client, VLA may grant one extension of assistance for a combination of: (i) an IAO appearance fee, and (ii) an adjourned IAO fee. The practitioner’s file must justify the requirement to appear on the additional date(s), and the basis upon which the appearance was made for the IAO and the adjourned fee. To apply for these additional fees the practitioner must apply for them via an extension request.

Once the above extension of assistance has been granted, any further extensions on this file shall be subject to provision 9.1.5 below..

9.1.5 For all other grants

If any further extension is required for a fifth (or subsequent) IAO, the extension can only be recommended by the practitioner if the request relates to either:

- A breach; or
- The practitioner can demonstrate that extraordinary circumstances exist.

9.1.6 Breach

A breach is defined as occurring when DHS brings fresh proceedings for a breach of an interim order and a separate hearing date or dates is required to defend the breach.

Practitioners can recommend assistance and apply for an extension for the initial breach proceeding. A grant for breach proceedings will comprise of fees for two IAOs and two adjourned IAOs.

Any subsequent extension on the same file for a further breach grant must be VLA assessed and practitioners will be required to outline the basis and merits of the request. Practitioners must also submit whether in their view, the matter should continue to be aided if a second or subsequent breach arises.

Assistance may only be granted where the merits test is satisfied.

Where the applicant is a child the merits test will be satisfied.

9.1.7 Extraordinary circumstances

All applications for extensions under extraordinary circumstances are VLA assessed and can be lodged via the simplified grants extension template. The practitioner must complete the explanation box on the application to support their request. Practitioners if required may provide further material via the “Submit correspondence” function in ATLAS.

Fees can only be claimed if the request is granted.

What are “extraordinary circumstances?”

These are limited circumstances that are so unusual, rare and catastrophic that the usual course of litigation is unnecessarily prolonged, and there is a resulting material detrimental to the applicant's case. They include:

- The death of another party to the proceedings that materially affects the applicant's case;
- The death/serious incapacitation of the carer that is materially detrimental to the applicant's case; or
- Where a child would be unrepresented at an IAO hearing, VLA will fund the child under the 'extraordinary circumstances' provision.

Any circumstance not included in the above list must be of equivalent rarity and severity. These circumstances do not include common-place factors that delay litigation and may be detrimental to the case and cause additional appearances. Examples of circumstances that VLA does not consider extraordinary are:

- DHS is not ready to proceed, for whatever reason;
- The client has not given instructions, or has failed to attend on the day;
- A Magistrate is not available to hear the matter; or
- A children's Court Clinic Report is not ready.

Fees in the Family Division of the Children's Court

To assist solicitors and barristers in the correct application of fees (Fees in State family matters - Table A2), the chart contained at the end of this chapter (chart 1) outlines which fee is payable in which circumstance. The table includes all types of hearings in the Family Division where counsel may be briefed. In all cases the same fee is payable to a solicitor if a solicitor appears.

In a number of cases it will be necessary for solicitors to mark counsel's back sheet with two or more fees in the alternative so that counsel can mark the appropriate fee without need for further contact with the instructor or with VLA.

9.2.1 Claiming the full IAO fee, as opposed to the adjourned hearing rate

According to Table A2 in the event an IAO is continued by consent and without any *substantial negotiation* having taken place the directions hearing fee is payable.

"Substantial negotiation" – is defined by VLA as negotiations held between the applicant's practitioner and DHS in which a substantial matter, or matters, in dispute are resolved by agreement. The 'substantial matter' must directly relate to the welfare or legal position of the applicant.

Where a 'substantial matter' is resolved through a party or parties making concessions without substantial negotiations the adjourned IAO fee is payable, as no *substantial negotiation* has taken place.
Where there has been *substantial negotiation* and the IAO is adjourned the practitioner must file note what occurred to justify payment of the full IAO fee.

9.2.2 Adjournments

If DHS seeks an adjournment of an IAO, a costs order must be sought against DHS. Counsel has been instructed at the full IAO fee and therefore the practitioner is entitled to claim this fee.
If no costs order is sought only the directions hearing fee is payable.

Where a party is awarded costs for an IAO hearing, that hearing will not be included within the limits of four IAO hearings. For example where a practitioner has used three IAO hearings and on the fourth hearing applies for and is awarded costs against another party, the fourth IAO hearing will effectively be cancelled out by the costs award and the practitioner will still have one further IAO hearing.

It is important to note that the rules regarding adjournments at the request of an assisted person remain.
There must be clear file notes which demonstrate why any adjournment was necessary. VLA will not pay any fee for an adjournment which does not satisfy the adjournment criteria.

9.2.3 Interim Accommodation Order Contests

The reference in Table A2 to an 'Interim Contest' is a reference to an interim accommodation order (IAO) contest **by evidence.**

A specific extension of assistance must be obtained **before** counsel can be briefed for an IAO evidence contest. As IAO contests by evidence are booked with the court some days or weeks in advance, VLA considers that there will be ample time for practitioners to seek and obtain an extension of assistance for the contest.

The contest fee is available only for interim evidence contests. The fee may **not** be claimed in every circumstance.

<u>The Interim Contest fee is payable –</u>

- Where the contest by evidence proceeds
- Where the contest resolves and final orders on the PA are made
- Where the contest resolves and the matter is booked for the next substantive stage in the proceeding (DRC, directions or contest)

<u>The IAO Appearance Fee is payable –</u>

- Where the contest is not reached and is adjourned to a further contest date
- Where the contest is adjourned to a further contest date for any other reason

Counsel will only be entitled to the full appearance where he or she moves the case forward (either to final orders or to agreed interim orders pending the final contest). The IAO appearance fee is payable where there is a straight adjournment to a new interim contest date with **no** progress in the resolution of the matter.

Solicitors should ensure that counsel understand the basis on which they are being briefed to avoid confusion and disagreement after the event.

9.2.4 IAO contests by submissions

The interim contest fee does not apply to IAO contests **by submissions** (save in exceptional circumstances).

Unlike IAO contests by evidence, contests by submissions arise at short notice either on the first court date after a PA by apprehension or on a mention date. With some rare exceptions, they are much shorter than evidence contests and are almost invariably conducted by solicitors (or counsel) already at court with other matters. In all the circumstances VLA does not consider that submissions contests should be treated in the same way as evidence contests which are booked in advance and require counsel to book out a whole day.

VLA is aware that the usual practice is for solicitors to appear in submissions contests. The fee applicable where a solicitor appears at such contests is the IAO appearance fee.
VLA is also aware that in some cases solicitors choose to brief counsel for a submissions contest. The reasons for this may include:

- The solicitor is unable to appear in the contest because he or she has too many other matters at court that day; or

- The matter is complex or is expected to last longer than usual.

Should a solicitor brief counsel to appear in a submissions contest the brief should be marked at IAO Appearance Fee rate and the solicitor may **not** claim for an appearance on the day.

<u>Can a higher fee ever be allowed for an IAO submissions contest?</u>
VLA acknowledges that there may be some cases where it is appropriate that a higher brief fee be paid to counsel for a submissions contest. <u>VLA expects that such cases will be rare.</u>
Examples might include:

- where a submissions contest will run more than 2 hours; or

- where a submissions contest will run outside ordinary court hours.

This list is not exhaustive and it will not always be the case that a matter fitting into one of these categories will warrant the higher fee.

Solicitors must **not** brief counsel at the interim contest appearance fee for a submissions contest unless specific approval has been sought and obtained from Compliance.

9.2.5 Dispute Resolution conferences / Directions hearings

Dispute Resolution conferences (Dispute Resolution Conferences) and Directions hearings are included in the broadband grant under Table A2 and do not require an extension of assistance.

9.2.6 Final contests

The Defended Hearing daily fee is set out in Table A2.

9.2.7 Further Preparation Fees

Where a matter settles at the final Directions Hearing or final defended hearing a further preparation fee is payable.

Irrespective of whether a solicitor has a grant for a final defended hearing, the lower preparation fee is payable if the matter settles at DRC or directions hearing. No further preparation fee can be claimed.
eg. If the matter settles at the DRC, the lower fee only is payable as further preparation, regardless of whether a grant for the final defended hearing has been obtained.

Situation	Table A2 fees	Comments
First court date – mention or IAO submissions contest	Appearance fee	
Mentions/submissions contests		
Subsequent court date – IAO submissions contest	Appearance fee	Only 3 IAO appearances after first date authorised by initial grant; further extension must be submitted for the 5th IAO – VLA assessed
IAO submissions contest - case resolves, final orders made on PA	Interim Contest Day 1 fee	
Subsequent mentions – IAO continues with no substantial negotiation	Directions Hearing fee	
Subsequent mentions – substantial IAO negotiations	Appearance fee	
IAO contest by evidence		
IAO contest by evidence – case resolves, final orders made on PA	Interim Contest Day 1 fee (subsequent day Interim Contest subsequent day fee)	Specific grant required. Full fee and adjournment fee should be marked on counsel's back sheet
IAO contest by evidence - case resolves and matter booked for next substantive step in proceeding (eg directions and contest)	Interim Contest Day 1 fee	Specific grant required.
IAO contest by evidence - case not reached or otherwise adjourned (and new IAO contest date obtained)	Appearance fee	Specific grant required.
Dispute Resolution conference		
Dispute Resolution conference	DRC fee	
Dispute Resolution conference – matter resolves with final orders (Preparation)	Settles at DRC, NMC or DH fee	
Dispute Resolution conference – matter extends beyond 3 hours	Interim Contest subsequent day fee	
New Model Conference		
New Model Conference - preparation	General preparation fee	Specific grant required
Attendance at New Model Conference	Attendance at NMC	Specific grant required
Directions hearing		
Directions hearing	Directions Hearing fee	Only 3 appearances authorised by initial grant
Directions hearing – matter resolves with final orders (Preparation)	Settles at DRC, NMC or DH fee	As above
Final hearing		
Final hearing - (Preparation)	Final Defended Preparation fee	Specific grant required
Final hearing – case proceeds	Final Defended Hearing fee	Specific grant required.
Final hearing – matter resolves with final orders	Final Defended Hearing fee	Specific grant required

10. Disbursements

Professional costs in all legally aided matters are governed by lump sum fees and stage of matter limits. For this reason it is essential that a clear distinction is drawn between an item of professional costs and a disbursement.

This section should be read in conjunction with section for disbursements in Part 23 of the VLA Handbook.

Tables P and Q in Part 23 of the VLA Handbook set out some prescribed fees in Criminal and Family Law matters respectively. In the event that a fee in excess of that prescribed in the tables is sought the request for assistance must be sent to VLA for approval.

Definitions

A disbursement is a sum of money paid to a third person for a service not usually performed by a solicitor; *For example, a medical report is a disbursement*.

This is distinct from fees payable to couriers and agents to perform tasks usually performed by a solicitor such as delivering briefs to Counsel, filing documents which are not separately allowable as a disbursement.

Photocopying and facsimile charges not paid to a third person are items of professional costs and are included in the lump sum fee. They are not claimable separately as disbursements. (But see 9.4.4 below)

For VLA's purposes disbursements can be divided into the following categories:

- those that may be claimed without the need for prior notice to VLA
- those that require prior notice to VLA but regarding which practitioners may make a recommendation to grant or refuse assistance
- those that require prior notice to VLA and must be assessed by a VLA officer

Claimable without prior notice to VLA

The following disbursements may be claimed without giving VLA prior notice (though justification for them must be evident on file):

- Travel in summary criminal matters (see commentary on the following page)
- Court fees (except for those fees for which a waiver is available)
- Interpreters fees*
- Service fees
- Subpoenas
- STD Calls**
- Extraordinary postage***
- Title and other search fees****
- Title office fees (Caveats only)*****

- FOI requests from Hospitals (up to $25) and the practitioner has sought a waiver of fees based on the client being impecunious and been refused.

Practitioners are also to refer to the disbursement section of Part 23 of the VLA Handbook

**This does not include translations*
***The actual cost must be claimed, not an approximation. Local calls are not disbursements. See also Or38 rule 12 Family Law Rules*
****Ordinary postage is not a disbursement. See also OR38 Rule 12 Family Law Rules*
*****Applicable in Family Law property matters and where VLA has sought an equitable charge*
******Applicable in family Law property matters where the property is in the other party's name*

Video Conferencing
Video conferencing is a means of avoiding the cost of travel. Where VLA does not reimburse the cost of travel the cost of video conferencing may not be claimed as a disbursement. Solicitors must meet that cost out of the professional costs allowed (usually from a lump sum).

Example: *No additional fees are payable pursuant to an indictable grant in the County Court where the client is in jail. As such no disbursement claim can be made for attending the client by way of video conferencing.*

Jail Conference – Summary Crime
Subject to the practitioner otherwise complying with the provisions of Table A, VLA will pay the fee of $126 for a jail conference conducted by way of video conference.

Disbursements granted on recommendation

10.1.1 General

Before recommending that assistance be granted for a disbursement the practitioner must have formed the view that:

- The disbursement is relevant to the position the aided person wishes to put to the court and is not fishing; AND
- The disbursement is necessarily and/or reasonably required to maintain that position and cannot be achieved in some other way; AND
- The expenditure can be justified on a cost/benefit analysis.

Cost/benefit involves recognition that public funds are being spent. The cost of the disbursement must be balanced against the likely benefit that incurring the disbursement may bring to the applicant. If a prudent self-funding litigant would not spend the money, it will not be reasonable to expect VLA to pay for it.

10.1.2 Specific – Crime

Medical/Psychiatric/Psychological Reports

Before recommending that assistance be granted for such a report, the practitioner should have before them a clear indication of the client's medical or personal history, which supports the view that a report will confirm the existence of an identifiable condition. Furthermore, there must be evidence available to the practitioner to form a *reasonable expectation* of the material sought from the report (ie. not fishing). The practitioner must form the view from the applicant's medical, psychological or psychiatric state that –

- the material *cannot be presented to the court* without obtaining the report; AND
- there is a *reasonable expectation* the report will *substantiate* a defence to the charges (e.g. mental impairment) or raise an evidentiary issue (e.g. fitness to plead) OR
- the report *directly* relates to the proposed plea and there is a *reasonable expectation* that it will provide *substantial exculpatory* material leading to a **significant reduction** in the sentence that might otherwise be expected. The mere existence of a condition (eg depression) is not sufficient to support a recommendation. A practitioner must have a reasonable expectation that a link can be established between the offending and the diagnosed condition. The report must address the issue of such connection – if any.

A practitioner may have regard to the serious nature of the charge in forming the view that there is a 'reasonable expectation'.

Practitioners are required to make a file note outlining the evidence which led them to conclude that there was a reasonable expectation that the material fulfilled any of the above criteria.

Before recommending assistance for a medical/expert report, practitioners must consider which is the most appropriate report. All efforts must be made to prevent the legal aid fund incurring avoidable costs by prudently identifying issues from the outset and selecting the most appropriate reports for the case.

10.1.3 Cost-Benefit

When forming their view as to the reasonableness of obtaining such a report, practitioners should balance the anticipated probative value of the report with its cost. Indictable matters are more likely to satisfy this criteria.

Examples:

- *Where the nature and circumstances of the offence are so heinous (e.g. homicide, serious sexual offences) that it calls into question the mental state of the accused a report may be recommended.*
- *A charge of culpable driving may not of itself give rise to any question of mental impairment.*
- *The seeking of a medical report for a plea for a person charged with trafficking who has a drug addiction, would <u>not</u> of itself be aidable. But, where the person has successfully completed a drug rehabilitation program post the commission of the offence, then a medical report would be aidable.*

- *The seeking of a medical/psychological report for a plea where the applicant has a drug/drinking problem and is charged with assault would <u>not</u> of itself be aidable. But where the applicant has successfully completed treatment in the past or has post the offence successfully completed treatment then a medical/psychological report would be aidable.*
- *The seeking of a psychiatric report would be aidable where the applicant has presented with extremely unusual ideas (eg. grandiose ideations) or has a history of admission to psychiatric care would be aidable, particularly where the applicant's behaviour is directly related to the offence.*
- *The seeking of a psychological report for a plea to try to explain a drug addicted applicant's behaviour where the level of violence used is excessive is <u>not</u> of itself aidable.*

10.1.4 Fees – Hospital / Medical / Psychologist / Psychiatrist Reports

Practitioners may only recommend assistance up to the fees contained in Table S of the VLA Handbook. Fees higher than this must be specifically considered and approved by VLA.

10.1.5 Witness Expenses (Medical)

It will rarely be the case that an expert medical witness will need to be called to support a plea.

Before recommending that assistance be granted for witness expenses pursuant to Table S for a psychologist or psychiatrist, practitioners should form the view that the expense is reasonable and proportionate to the likely benefit, having regard to the factors contained in paragraphs 10.1.2 and 10.1.3 above. If assistance is sought for witness expenses for a medical practitioner, then specific approval must be sought from VLA.

10.1.6 Doli Incapax reports (Children's Court matters where applicant is under 14)

Before recommending that assistance be granted for such a report practitioners should form the view that –

a) the charges are serious
b) the report is likely to be supportive of the presumption being upheld
c) the report is necessary to rebut or explain evidence likely to be led by the police

Relevant to (b) and (c) will be such factors as:
- the instructions given by the applicant;
- any admissions made during the record of interview;
- the behaviour of the applicant at the time of the offences (eg, fleeing the scene);
- whether the applicant has any prior convictions; and
- previous psychological or medical reports indicating intellectual disability or mental impairment.

10.2.1 Specific – Family Law

Family Reports

VLA will not normally fund a private family welfare report unless assistance has been approved for preparation for trial (stage 3 under the fee schedule). VLA must be satisfied that the order for the report was made by the Court and not made by consent of the parties and that there is clear evidence that the Court's counselling section is unable to prepare the Report.
In determining whether to grant assistance for a private family welfare report at an interim stage, VLA will require detailed reasons outlining the necessity for the report at the interim stage. Such grants are <u>not</u> subject to practitioner recommendation.

Supplementary Family Reports

Any subsequent Family Report is to be treated as a supplementary report.

A practitioner should only recommend the granting of assistance for a Supplementary Family Report if

- a substantial time has elapsed since the previous report
- there are significant changes in the circumstances of the parties
- the order for the report was made by the Court and not made by consent of the parties and
- that there is clear evidence that the Court's counselling section is unable to prepare the Report.

'<u>Significant change in circumstances</u>' means a change that, if it had occurred prior to the writing of the previous report, would have resulted in a significantly different conclusion.

Practitioners are referred to Table Q in Part 23 of the VLA Handbook for applicable fees.

Contact Centre Reports

Practitioners may only recommend assistance up to a fee of $300. Fees higher than this must be specifically considered and approved by VLA.

Individual Psychological / Psychiatric Reports

Before recommending that assistance be granted for such reports practitioners must from the view that:

- there is a history of treatment or a history of behaviour giving rise to a reasonable expectation that a report would provide significant relevant evidence
- the report is reasonably required to rebut allegations made by the other side
- the exercise is not merely fishing

Proof of the above matters should be retained on file.

Disbursements requiring assessment by VLA

10.3.1 Other Experts Reports

- Fingerprinting
- Engineer
- Chemist
- Handwriting expert
- Private investigator
- Neuropsychologist
- Accident investigation expert
- Forensic pathologist
- Blood alcohol level expert
- Ballistic expert
- Botanist
- DNA expert
- Information technology expert

Such experts are very expensive and practitioners should have special regard to the cost/benefit of obtaining such reports before requesting assistance. The request for assistance should be forwarded to VLA together with details of why the matter complies with the requirements of paragraph 7.3.1 above together with advises as to the cost of the report.

10.3.2 Other experts (witness expenses)

Where the practitioner wishes to call an expert (other than a medical expert as referred to in 10.1.4 above) the request should be forwarded to VLA together with the reason why such witness needs to be called and advises as to the witness expenses.

<u>Witness expenses (out of jurisdiction)</u>

Where it is necessary to bring any witness to Victoria from out of the jurisdiction, a request for assistance should be forwarded to VLA with details as to how the witness's evidence is vital/relevant to the case, whether the evidence could be obtained in some other manner (eg by video link), and an estimate as to the cost of travel and accommodation.

10.3.3 Photocopies

It is sometimes necessary to photocopy large quantity of material and where voluminous material must be provided to an expert to qualify himself to prepare a report. In such cases, subject to prior approval, copying will be allowed at a rate (commercial) fixed by VLA and paid as a disbursement.

10.3.4 Any disbursement not otherwise proved for

Requests for assistance to obtain a disbursement not provided for in this manual must be referred to VLA for assessment. Practitioners should provide VLA with all relevant information, with particular reference to the matters contained in paragraphs 9.1.2 and 9.1.3 above.

10.3.5 Limitation on quantum

Where the cost of a disbursement that may ordinarily be the subject of a practitioner recommendation (and for which no fee has been fixed by VLA) exceeds $1,000, the request for assistance must be forwarded to VLA for specific consideration and approval. eg. Valuations