

SECTION 29A PANEL: INDEPENDENT CHILDREN'S LAWYER PRACTITIONER MANUAL

Containing:

- A: Terms and Conditions of Inclusion**
- B: Performance Standards &
Reporting and Record Requirements**
- C: Removal Procedure**

Defined Terms

In this Manual:

“Board” means the Board of Directors of Victoria Legal Aid as defined in section 11 of the Legal Aid Act

“Independent Reviewer” means that term as defined by the Legal Aid Act

“Legal Aid Act” means the *Legal Aid Act (Vic)* 1978

“Managing Director” means the Managing Director or Acting Managing Director of VLA

“Manual” means the document entitled Section 29A Panel: Independent Children's Lawyer Practitioner Manual as may be amended from time to time

“Notice to Remove” means a notice issued pursuant to clause 3.2 or 3.11 of Part C of this Manual

“Notice to Suspend” means a notice issued pursuant to clause 3.12 of Part C of this Manual

“Panel” means the Independent Children's Lawyer panel established under section 29A of the Legal Aid Act

“Practitioner” means a legal practitioner, firm or incorporated practitioner whose name has been included on the panel or who or which has applied for such inclusion

“VLA” means Victoria Legal Aid

PART A: TERMS & CONDITIONS OF INCLUSION ON INDEPENDENT CHILDREN'S LAWYER PANEL

The terms and conditions are made under section 29A(1) of the Legal Aid Act and represent the preconditions to inclusion on, and requirements for on-going membership of, the panel. A practitioner who applies for inclusion on the panel must agree to and continue to abide by these terms and conditions for the duration of panel membership.

1. The term of appointment will be three (3) years or as otherwise prescribed by the Board.
2. Practitioners seeking to continue as a member of the panel at the expiration of the term of the panel will be required to seek re-appointment. In any consideration of a practitioner's application to be re-appointed to a section 29A panel, the practitioner's conduct during the duration of panel membership will be a relevant matter taken into account by VLA.
3. Membership of a previous section 29A panel will not entitle an applicant practitioner to automatic inclusion on the new panel.
4. Appointment is to a specific panel and membership of one panel does not entitle a practitioner to automatic membership of other panels.
5. To be included on the panel each practitioner who will undertake Independent Children's Lawyer work must:
 - (a) demonstrate expertise as an Independent Children's Lawyer in cases arising under the Family Law Act;
 - (b) have practiced for at least 5 years in Family Law and have held a Practising Certificate during that period. Provision will be made for consideration for long-term illness, maternity leave and periods of long service; and
 - (c) meet the selection criteria set by VLA for inclusion.
6. To remain on a section 29A panel a practitioner must:
 - (a) continue to hold a practising certificate;
 - (b) maintain a place of business contactable by telephone during office hours;
 - (c) possess and develop such information technology capacity as is reasonably required to conform to the performance standards and reporting and record requirements detailed under Part B of this manual or notified to practitioners from time to time;
 - (d) conduct legally assisted assignments in accordance with the performance standards set out in Part B;

- (e) comply with the record keeping and reporting requirements set out in Part B of this manual;
 - (f) agree to be bound by the removal measures set out in Part C of this manual;
 - (g) if requested, make legally aided Independent Children's Lawyer files available to VLA compliance officers and/or external auditors;
 - (h) accept and complete all VLA referrals unless prevented by a conflict of interest or reasonable cause (eg illness, short staffing);
 - (i) participate in training, pilots and projects as reasonably required by VLA; and
 - (j) agree to comply with any other terms and conditions that VLA may introduce from time to time.
7. Practitioners on a section 29A panel must not:
- (a) hold themselves out to clients, court officials or police as VLA lawyers; or
 - (b) make statements to their clients, other practitioners, the Court or members of the public which denigrate VLA.

PART B: PERFORMANCE STANDARDS AND REPORTING AND RECORD REQUIREMENTS FOR THE INDEPENDENT CHILDREN'S LAWYER PANEL

The creation of section 29A practitioner panels is designed to ensure that all practitioners adhere to consistent and clear standards for the delivery of legal aid services.

1. The Independent Children's Lawyer shall at all times whilst on the panel hold a current practising certificate.
2. The Independent Children's Lawyer shall comply with all of his or her duties to the child and to the Court, including (but not limited to) any guidelines that may apply from time to time.
3. The Independent Children's Lawyer shall comply with all of his or her ethical or professional obligations under the Legal Profession Act and any rules or regulations made under that Act.
4. The Independent Children's Lawyer shall comply with all of the ethical or professional obligations imposed by his or her recognised professional association.
5. The Independent Children's Lawyer shall promote the best interests of the child and, in order to do so, shall act impartially and be independent of the parties and the Court.
6. The Independent Children's Lawyer shall use his or her best endeavours to assist VLA to achieve its statutory objective to provide effective, economic and efficient legal aid for Victorians at a reasonable cost.
7. The Independent Children's Lawyer shall familiarise himself or herself with the provisions of, and act in accordance with, the Legal Aid Handbook including, in particular, the Commonwealth's priorities and guidelines for the provision of legal assistance in matters arising under Commonwealth law.
8. It is expected that the Independent Children's Lawyer will meet with the child unless:
 - the child is under school age
 - there are exceptional circumstances (eg where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for the child)
 - there are significant practical limitations (eg geographical remoteness)

The assessment about whether, where and how to meet the child is a matter for the Independent Children's Lawyer. An assessment may be made in consultation with any Family Consultant or other expert involved in the case.

The Independent Children's Lawyer shall ensure that the child's views and wishes are made known to the Court in an admissible form (where possible).

9. The Independent Children's Lawyer shall not prepare reports, meet with the child excessively, conduct disclosure interviews, or become a witness in the case.
10. The Independent Children's Lawyer shall ensure as far as practicable that the child is not subject to systems abuse.
11. The Independent Children's Lawyer shall deal with legally assisted assignments effectively, economically and efficiently in a timely manner. This requirement means that, as a general principle, the Independent Children's Lawyer will focus on those elements of the case which are likely to promote the best interests of the child to the exclusion of peripheral or insignificant issues.
12. The Independent Children's Lawyer shall not obtain an expert's report unless it is essential. No report should be sought until an appropriate stage during the course of a matter having regard to the particular needs of the case.
13. The Independent Children's Lawyer shall respond promptly to any requests from VLA for information or advice about a matter assigned to him or her or any complaint relating to a legally assisted matter. Failure to do so may result in immediate referral to the Managing Director for proposal for removal from the panel, without further reference to the Independent Children's Lawyer.
14. The Independent Children's Lawyer shall immediately advise VLA of any information which comes to his or her attention which gives rise to a concern that the parties (or one of them) should be required to pay a contribution towards the costs of the Independent Children's Lawyer pursuant to the VLA/Commonwealth Agreement.
15. The Independent Children's Lawyer shall maintain an up-to-date knowledge of family law (and, in particular, case law concerning children and relevant social science literature in relation to children and separated families) and shall, on request, advise VLA of continuing legal education activities undertaken.
16. The Independent Children's Lawyer shall (if requested), advise VLA of his or her plan for the conduct of a legally assisted case, including details of witnesses to be called or cross examined. However, nothing in these standards and requirements shall

affect or derogate from the authority of a Independent Children's Lawyer as advocate in the conduct of a legally aided matter.

17. The Independent Children's Lawyer shall encourage and assist the parties to reach an agreed outcome which best promotes the child's welfare. In appropriate cases, VLA expects the Independent Children's Lawyer to facilitate a round table conference.
18. The Independent Children's Lawyer shall read all relevant material filed by all parties in the proceedings. VLA will allow an amount that it considers reasonable for perusals.
19. Subject to paragraph 20, the Independent Children's Lawyer must not normally delegate the preparation, supervision, conduct or representation of the case, but will deal with it personally.
20. In each case the Independent Children's Lawyer will consider whether it is in the best interest of the child to instruct another advocate in relation to the representation or preparation of the case. If it is in the best interests of the child, or necessary to instruct another advocate the Independent Children's Lawyer will either brief competent counsel to appear or, if instructing an agent, ensure such agent is a member of the VLA Independent Children's Lawyer Panel having obtained from that Panel Member their undertaking to attend and conduct the matter personally unless an unavoidable professional engagement arises.
21. The Independent Children's Lawyer shall use his or her best endeavours to co-operate in a timely manner with the parties and their lawyers before a hearing to establish the issues which are in dispute and to be determined by the Court.
22. The Independent Children's Lawyer shall use his or her best endeavours to ensure that all available evidence relevant to the welfare of the child is before the Court. In particular, the Independent Children's Lawyer shall ensure that all external agencies which have been involved in issues affecting the child's welfare are subpoenaed to produce their records to the Court (unless it is clear that those records will not be of assistance in the resolution of the dispute or the records relate to confidential communications protected by section 32 *Evidence Act 1958*).
23. The Independent Children's Lawyer shall make submissions and express views to the Court which are based on the available evidence and not on personal views or opinions

24. In appropriate cases, the Independent Children's Lawyer must seek a costs order against the parties (or one of them) and shall promptly do all things necessary to obtain payment of costs ordered by the Court.
25. The Independent Children's Lawyer shall report to VLA and render a tax invoice at the appropriate scale for legally aided services within 30 days of each Court event.
26. The Independent Children's Lawyer shall maintain such records of the conduct of legally aided cases as accord with good practice by Independent Children's Lawyer and by members of the Independent Children's Lawyer recognised professional association.
27. The Independent Children's Lawyer shall (if requested), make legally aided Independent Children's Lawyer files available to VLA compliance officers and/or external auditors in order to provide VLA with information about the quality of service provided by the Independent Children's Lawyer.
28. The Independent Children's Lawyer shall notify VLA immediately of any serious complaint made against him or her by a party to the dispute or their lawyer or by any other person involved in the matter concerning the manner in which the Independent Children's Lawyer is conducting or has conducted that legally assisted case.
29. The Independent Children's Lawyer shall notify VLA immediately of any complaint made against him or her arising out of a legally aided matter to the Legal Ombudsman or the Independent Children's Lawyer recognised professional association.
30. The Independent Children's Lawyer shall comply with any variation or addition to these performance standards and record requirements notified to him or her by VLA from time to time.
30. The Independent Children's Lawyer shall notify VLA immediately with details of any change of employment.

PART C: REMOVAL FROM THE INDEPENDENT CHILDREN'S LAWYER PANEL

A Independent Children's Lawyer may apply to have his or her name removed from the panel at any time.

1 GROUNDS FOR REMOVAL FROM PANEL

Practitioners may be removed from the panel if any of the following occurs:

- 1.1 The practitioner ceases to hold a practising certificate.
- 1.2 Information supplied by the practitioner in support of their appointment to the panel is found to be substantially and relevantly inaccurate or false.
- 1.3 The practitioner is found liable for negligence by a court or guilty of misconduct by the Legal Professional Tribunal, within the meaning of section 137 of the *Legal Practice Act*, or guilty of any offence of which an element is dishonesty.
- 1.4 The practitioner is a firm or incorporated practitioner, and there is no individual practitioner who was nominated in the application for appointment to the panel remaining with the firm or employed by the incorporated practitioner.
- 1.5 The practitioner has committed a serious breach (as defined in clause 2 below) of the terms and conditions of panel membership.
- 1.6 The practitioner has a history of breaches of panel conditions that, in the reasonable opinion of the Managing Director, have imposed an unreasonable cost burden on VLA.
- 1.7 The personal or professional circumstances of the practitioner are such that, in the opinion of the Managing Director, they pose an unacceptable risk to the Legal Aid Fund.
- 1.8 The Independent Children's Lawyer ceases to practise as a Independent Children's Lawyer.
- 1.9 The Independent Children's Lawyer refuses several grants of legal assistance from VLA without reasonable cause.
- 1.10 The practitioner has been removed from another section 29A panel or VLA has commenced removal procedures in relation to the practitioner's membership of another section 29A panel.

2 SERIOUS BREACHES

- 2.1 A breach of the terms and conditions of panel membership will be regarded as serious where, in the opinion of the Managing Director, the breach:

- (a) posed a risk of detriment to the Legal Aid Fund;
- (b) was a breach of Part B of this manual that had the potential to contravene the Independent Children's Lawyer duty to the child or to the court;
- (c) involved dishonesty or improper conduct in a professional capacity;
- (d) had the potential to adversely affect VLA's reputation; or
- (e) led to the court being deceived or, intentionally or otherwise, misled as to the true status of VLA's funding determinations.

3 REMOVAL PROCEDURE

3.1 Notice to Remove

Where VLA determines to remove a practitioner from the panel, it will serve a NR on the practitioner. The decision to serve a NR is made by the Managing Director on the recommendation of the Divisional Manager, Finance, Assignments and Business.

3.2 Contents of Notice to Remove

The NR must inform the practitioner of:

- (a) the basis on which the determination to remove the practitioner has been made,
- (b) the length of the removal;
- (c) what, if any, cases the practitioner may continue to conduct notwithstanding the removal;
- (d) the date on which the removal will take effect; and
- (e) the practitioner's right to show cause why the removal should not occur.

3.3 Effect of Notice to Remove

Unless the practitioner seeks to show cause the practitioner's name will be removed from the panel after the expiration of 14 days from the service of the NR.

3.4 Practitioner may seek to show cause

A practitioner who has been served with a NR may seek to show cause why the removal should not take place. A practitioner seeking to show cause must set out all relevant material on which he, she or it relies, including both factual matters and submissions, in writing addressed to the Divisional Manager. The material must reach the Divisional Manager within 14 days of the date of the NR.

3.6 Referral to the Chairperson of the panel of Independent Reviewers

On receipt of the request to show cause, VLA must forward the documentation to the Chairperson of the panel of Independent Reviewers, who must appoint an Independent Reviewer to determine the matter.

3.7 Material admissible on show cause hearing

The appointed Independent Reviewer will be provided with all information and documentation that was before the Managing Director at the time the NR was issued. The Independent Reviewer will also be provided with all the written material lodged by the practitioner in support of the application to show cause. Where that material raises issues that were not before the Managing Director, VLA is entitled to make a further submission on those issues. VLA will serve on the practitioner a copy of any further submission and the Independent Reviewer will provide the practitioner with a reasonable opportunity to respond.

3.8 Conduct of show cause hearing by Independent Reviewer

The Independent Reviewer determining the application to show cause hearing shall be bound by the rules of procedural fairness.

The practitioner's application to show cause will be determined on the papers and neither the practitioner nor VLA has the right to an oral hearing. Where the Independent Reviewer requires clarification of any fact or issue, he or she shall seek that clarification in writing from the party concerned. A copy of both the request and the response must be provided to the other party, who will have 14 days to make any further response.

3.9 The outcome of the application to show cause

In respect of any application to show cause, the Independent Reviewer may:

- (a) confirm VLA's decision, in which case the removal shall occur immediately;
- (b) reverse VLA's decision; or
- (c) vary VLA's decision to impose different conditions on the length and scope of the removal.

The Independent Reviewer shall provide a short written statement of reasons.

3.10 Decision of the Independent Reviewer is final and conclusive

The decision of the Independent Reviewer is final and binding on both VLA and the practitioner.

3.11 Power to remove summarily

Where VLA becomes aware that a practitioner has:

- (a) ceased to hold a practising certificate; or
- (b) been found guilty by any court or tribunal of misconduct, fraud, defalcation or any other dishonest act; or
- (c) become incapacitated or otherwise unable to carry on practise;

VLA will immediately serve a NR on the practitioner. The removal will be effective from the date of the NR.

A decision by VLA to serve a NR under this clause is amenable to review by the Independent Reviewer in the same manner as a NR served with notice under clause 3.2.

3.12 Power to suspend panel membership summarily

Where VLA becomes aware of information which reasonably suggests that the conduct or circumstances of a practitioner has caused, or will cause, detriment to:

- (a) VLA or its reputation;
- (b) the Legal Aid Fund; or
- (c) the best interests of the child

and the circumstances reasonably require that immediate action be taken prior to a full investigation, the Managing Director may, upon the written recommendation of the Divisional Manager, immediately serve a Notice to Suspend (**NS**) on the practitioner without prior notice to the practitioner for the purpose of investigating the allegations.

3.13 Contents of Notice to Suspend

The NS must provide details of the:

- (a) basis on which the determination to suspend has been made;
- (b) scope of the suspension;
- (c) practitioner's right to make submissions on the matters that have led to the NS; and
- (d) date on which the NS will take effect.

Practitioners who receive an NS have no right of reconsideration or review on the merits or the process by which it was reached.

3.14 Conduct and circumstances which may lead to suspension

Without limiting the scope of VLA's power to suspend a practitioner, VLA may issue a NS where a:

- (a) practitioner is charged with any criminal offence;
- (b) practitioner becomes bankrupt;
- (c) practitioner is found guilty by the Legal Profession Tribunal of unsatisfactory conduct (within the meaning of section 137 of the *Legal Practice Act*); or
- (d) court, tribunal or professional body has voiced what VLA reasonably regards as serious criticisms of a practitioner's conduct in a legally aided matter.

3.15 VLA must investigate the concerns

Where VLA decides to suspend a practitioner's membership of a panel, it must within 28 days commence an investigation to determine whether the conduct or circumstances giving rise to the suspension warrant the issuing of a NR or any further corrective action. That investigation must take account of any submissions or other material submitted by the practitioner.

The practitioner must set out all relevant material on which he, she or it relies, including both factual matters and submissions, in writing addressed to the Divisional Manager. The material must reach VLA within 14 days of the date of the NS.

3.16 Action at conclusion of investigation

If the investigation does not substantiate VLA's concerns and no further action is to be taken by VLA, VLA must reinstate the practitioner to the panel no later than 60 days after the date of the NS.

3.17 Effect of Notice to Suspend

A NS may prevent a practitioner from:

- (a) being allocated any new matters for child representative;
- (b) continuing to act in current child representative matters; and

3.18 Material change in circumstances

Where a practitioner has been removed from a panel, he or she may seek reinstatement if there has been a material change in the circumstances that led to the removal.

A practitioner removed because of a pending criminal investigation or after a criminal conviction is entitled to seek reinstatement after an acquittal or where the conviction is overturned on appeal. In such circumstances VLA may not refuse the reinstatement unless satisfied on reasonable grounds that the provisions of section 7 of the Legal Aid Act require that the practitioner remain excluded from the panel.

Practitioners may seek reinstatement to the panel after a period of removal. In deciding whether to re-admit the practitioner to a panel VLA may take into account any information and circumstances VLA considers relevant.

3.19 Removal from other panels

Where:

- (a) a practitioner is a member of more than one panel established pursuant to section 29A of the Legal Aid Act; and
- (b) VLA serves a NR or summarily suspends or removes the practitioner without notice in respect of one panel;

VLA may, within 7 days of that Notice, invite the practitioner to show cause to the Managing Director why a NR should not be served in respect of their membership of the Independent Children's Lawyer panel.

Where, after receiving and considering any submissions put by the practitioner, the Managing Director considers that the practitioner should also be removed from the Independent Children's Lawyer panel, a NR will be served. Clauses 3.3 to 3.10 above apply to that NR, however the Independent Reviewer has the discretion to consider all relevant removal and/or suspension proceedings at the same time.