

## Pre-LSAA Conditions on the Grant

### Overview

The Legal Services Act 2000 (the Act) changes some aspects of the former legal aid system in the way contributions and charges are imposed on the applicant. Some important aspects of the Act and its implementation by the Legal Services Agency are highlighted below.

The meaning of contribution under the Act is *the amount of money that an aided person is required to pay back to the Agency under section 15(1) as a condition of a grant.*

The Agency may seek a charge against property of the aided person as a security for the contribution. Where the Agency seeks authority to impose a charge, agreement to the charge is a condition of the grant.

The amount of money the legally aided person has to pay back to the Agency depends largely on four factors:

- the cost of the legal aid
- the applicant's income and assets
- whether there are proceeds from proceedings
- the type of proceeding

As part of its consideration of an application, the Agency establishes whether there is to be a contribution towards aid and the level of that contribution. If there are proceeds from proceedings, these are automatically owed to the Agency up to the level of the cost of the aid minus any contribution.

Court-ordered costs under sections 40 and 41 of the LSA 2000 are not conditions on a grant but may be limited by contribution levels set by the Agency.

### ***Terms used in LSA 2000***

There are a number of terms introduced under the Act. These are included in the glossary. Where these terms occur in the text below they are in italics.

### ***Summary of Key Points***

- Under the Act, contributions and charges are collectively the conditions on a legal aid grant.
- The Agency may impose a condition on a grant of criminal or civil (including family) legal aid that the aided person makes a payment or payments towards the cost of their legal aid. This does not necessarily apply in all family cases (see last 2 dot points below).
- The Agency must specify any contribution or charge it wishes to impose at the time it grants aid and/or at the time it amends a grant. An amendment to a grant includes what was formerly known as an "increase in remuneration".
- In civil (including family) cases where there are proceeds from proceedings, a repayment must be paid to the Agency. This is

- compulsory and carries an automatic charge. This is not the case for proceedings under the Waitangi Tribunal. See comments in Special Provisions
- The amount of the contribution will be determined according to the Legal Services Act Regulations 2000 (the Regulations).
- Where a contribution or a *repayment payable* (from proceeds of proceedings) is to be paid, there will usually be an agreement entered into between the Agency and the aided person.
- In civil (including) family proceedings, when the contribution is to be repaid under a repayment agreement, the Agency can also request the applicant to authorise a charge over specified property as a security for the contribution owed. The charge is the instrument to secure repayment of the contribution.
- If the Agency seeks authorisation of a charge, the grant will be conditional on this authorisation.
- The Agency may seek authorisation to impose a charge on various types of property.
- The Agency may request that the provider lodge a caveat over property where a charge has been authorised, and over proceeds of proceedings, to secure repayment.
- In civil (including family) cases, if a contribution is not paid within the specified time limit, the Agency must withdraw the grant of aid. Applicants and providers will therefore need to ensure that conditions and time limits are met if the grant of aid is to be preserved.
- The Agency can make any agreement with the legally aided person to recover a *contribution payable or proceeds from proceedings*.
- Contributions payable and the repayment payable are a debt to the Agency, which the Agency can pursue in any Court or write off, in full or in part.
- There is a limitation on contributions and charges in some proceedings under the Domestic Violence Act 1995 and before the Waitangi Tribunal.
- Conditions will only be imposed on a grant of legal aid for proceedings under the Mental Health (Compulsory Assessment and Treatment) Act 1992 in exceptional circumstances.
- The legally aided person (and any other person acting for the aided person) must notify the Agency of a change in the aided person's financial situation in the course of the case.

### **Conditions on a Grant of Legal Aid**

Section 15 of the Act allows for the imposition of charges and contributions on a grant of legal aid. These charges and contributions are called conditions. There are three types of conditions specified:

- a discretionary condition as to a financial contribution in criminal, and most civil (including family) proceedings (*s15(1) LSA 2000*);
- a compulsory condition as to repayment of aid from the *proceeds of proceedings* (*s15(2) LSA 2000*);
- a discretionary condition in civil (including family) proceedings to seek authorisation of a charge over specified property (*s15(3) LSA 2000*).

### ***Timing of Imposition of Conditions***

Conditions can only be imposed when aid is first granted and/or the grant is amended. The grant can be amended in various situations including when a decision is made to increase the level of remuneration to the provider or payment of an account.

If there are factors relevant to the imposition of conditions and the manner of payment of any contribution, such as hardship issues for the applicant, the applicant and/or provider should address these factors and provide supporting documentation at the time of the application for aid. Such factors can also be addressed at the time that an amendment to the grant is sought. See the Hardship Policy

### **Types of Conditions**

The LSA 2000 states the amount of a contribution must be determined in accordance with Regulations made from time to time (*s17 LSA 2000*). In civil (including family) cases, the LSA Regulations 2000 allow a two-part contribution, an initial \$50 contribution plus a further contribution.

The Agency will generally follow the table set out in Methods of Repayment in determining the priority method of repayment of a contribution.

### ***Initial Contributions in Civil (including Family) Cases***

In civil (including family) cases only, a \$50 initial contribution is required by the Agency. Where the \$50 contribution is not submitted with the application, the Agency will seek the contribution before processing the application and will impose a specific timeframe for payment.

The Agency may exempt the \$50 initial contribution payment for clients in the following situations:

- the application is from a person seeking a protection order under Parts II and III of the Domestic Violence Act 1995, except in exceptional circumstances.
- the applicant is in prison and is of limited means
- the application is in respect of an application under the Mental Health (Compulsory Assessment and Treatment) Act 1992
- the application is for a limited review (total time being less than 2 hours) of a plan or order made within 6-12 months of the conclusion of a grant in the same proceedings.
- the application is for Waitangi Tribunal Proceedings.

The Agency may also write-off the \$50 initial contribution debt if there is evidence that the applicant would suffer hardship if required to pay the \$50. Providers can ask the Agency to consider writing off this debt. Factors the Agency takes into account in assessing hardship are contained in the Agency's Hardship Policy

### ***Calculation of the Contribution Payable***

The Agency may establish a contribution under s15 (1) LSA 2000 with reference to the applicant's disposable income and disposable capital, calculated in accordance with the Legal Services Regulations.

In civil (including family) cases this is a further contribution because it is most likely that an initial \$50 contribution has been established. For simplicity, the further contribution in civil (including family) cases is referred to here just as the contribution.

The contribution is based on both disposable income and disposable capital, as follows:

- (a) \$1 for each complete \$2 of the first \$1,000 of the applicant's disposable income; plus
- (b) \$2 for each complete \$3 of the applicant's disposable annual income that is more than \$1,000 but less than \$2,000; plus
- (c) all of the applicant's disposable annual income that is more than \$2,000; plus
- (d) \$2 for each complete \$3 of the applicant's disposable capital that is less than \$2,000; plus
- (e) all of the applicant's disposable capital that is more than \$2,000.

A contribution:

- will be imposed only in exceptional circumstances where the grant relates to an application for an order under Parts II and III of the Domestic Violence Act 1995 (see Special Provisions)
- is unlikely to be imposed where the grant relates to an application under the Mental Health (Compulsory Assessment and Treatment) Act 1992
- is unlikely to be imposed where the grant relates to Waitangi Tribunal Proceedings

### ***Calculation of Disposable Capital***

In line with Schedule One of the Act, the contribution based on calculated disposable capital in criminal cases relates to debt free property and assets over and above the applicant's home, family vehicle, household furniture, appliances, clothing, and tools of trade. Any other debts are also deducted.

In line with Schedule One of the Act, the contribution based on calculated disposable capital in civil (including family) cases, relates to the proportion of debt free property and assets that the Agency determines should be included, minus any debts the applicant has.

Clause 3(2)(b) of Schedule 1 to the Act gives the Agency the discretion to deduct a proportion of the debt free equity the applicant has in these assets in circumstances where it would be inequitable not to do so. In calculating disposable capital, the Agency will consider any special financial or personal

circumstances whereby including the full amount of debt free equity would be unreasonable or result in severe financial hardship.

### ***Level of Contribution***

In general, the Agency will impose a contribution at the full level possible. It will reduce this if the legally aided person (or the provider on their behalf) has successfully demonstrated that they would suffer hardship if the contribution were imposed at this level. See the Agency's Hardship Policy

In civil (including family) cases, the Agency will generally impose a contribution (up to the cost of services minus \$1) calculated from the applicant's disposable income and disposable capital based on 100% of the applicant's net equity in their home and other property and assets.

There are a number of factors that the Agency may take into account in determining the actual contribution. For example:

- the applicant's assets and liabilities, disposable income, usual weekly expenditure, impending financial commitments
- the nature of the spending of disposable income, i.e. whether spending is on essential items
- the number and nature of the applicant's children and or other dependants
- whether the applicant would be able to pursue the application if the Agency imposed a contribution
- the nature of the proceedings and the applicant's interest in them
- any special needs of the applicant or the applicant's dependants.

### ***Repayment of Contributions***

The Agency may require contributions to be paid immediately.

Except for the initial \$50 contribution, where a contribution is imposed, the Agency will generally expect this to be repaid over time. In some cases, payment may be on the occurrence of a specific event, eg the sale of property. Even where the Agency seeks authorisation to impose a charge to secure the contribution, a grant will generally be conditional on the applicant signing a letter of agreement to repayment (issued by the Agency) and returning the signed letter within 10 days of the date the grant is made.

Where a contribution is required and a payment regime is set:

- repayment should be achieved in no more than 5 years, and substantially less depending on the amount to be repaid;
- the payments will be set at a level so as to not cause hardship to the applicant;
- the Agency may write-off the repayment debt of a contribution or part of a contribution if there is evidence of hardship. Factors the Agency will take into account in assessing hardship are contained in the Hardship Policy. Applicants and providers should submit evidence of hardship if they wish to apply to have a contribution (or part of a contribution) written off under the Hardship Policy;

- repayments should be at no less than \$10 per week but will often be significantly more, according to means.

Where repayment is based on a specific event, such as the sale of property, a signed letter of agreement from the applicant will usually specify:

- the event and when it is to happen; for example, the sale of land and repayment in full within 3 months; and
- an alternative if that event does not occur; for example, if the land is not sold and repayment in full made by [specified date], the aided person is to commence payments at [amount] per week, first payment starting on the [specified date], and payment of the balance, if any, being made immediately on the sale of the land.

The Agency will not usually charge interest on sums in a payment agreement, but reserves the right to do so.

The Agency can make an agreement with the aided person to come to any arrangement it considers appropriate for payment of any amount payable (s31 LSA 2000).

In civil (including family) cases if a financial contribution is more than 21 days in arrears (or some other date to which the Agency has extended the time for payment) the Agency must withdraw the aid (s26 (1)(a) LSA 2000).

The amount payable is a debt due to the Agency (s31 (1) LSA 2000). Debt officers at the Recoveries Unit will be responsible for monitoring payments and the recovery of debt. The Agency may take steps to recover the debt in any relevant court or tribunal. That can include proceedings in the District Court and the Disputes Tribunal.

The Agency may enforce a judgment or out-of-court settlement awarded to the legally aided person as a result of the proceedings (s36(2) LSA 2000). This will occur unless there are exceptional reasons not to do so. If costs are awarded, the Agency may require the applicant to complete a Deed of Assignment of Award for Costs.

### ***Increase in the Level of the Contribution***

The Agency may seek to increase the level of the contribution at the time an amendment to the grant is sought. Depending on the legally aided person's disposable income and capital, the Agency may seek to increase the contribution up to the new cost of services or to some lesser level. If so, the amended grant will be subject to the condition that the legally aided person either sign a new letter of agreement regarding repayment, and/or sign a new authorisation to impose a higher charge.

### ***Proceeds of Proceedings***

All grants of aid in civil (including family) proceedings are subject to a condition that the aided person will repay to the Agency the *repayment payable*, out of any *proceeds of proceedings* (s15 (2) LSA 2000).

*Proceeds of proceedings* may include money that is a future right or interest, or the benefit of a compromise, for example:

- an interest in a superannuation scheme
- an amount payable at a future date
- a sum payable on a contingency or after a life interest
- increased equity in an asset following reduction of a debt secured against it.

Proceeds of proceedings are automatically secured by a charge (s32 LSA 2000). This charge covers the *repayment payable* and any contribution that the Agency has established that remains unpaid. *Proceeds of proceedings* are automatically secured by a charge in favour of the Agency even where they are the result of an out of court settlement.

If the proceeds relate to an award of costs in favour of the applicant, the Agency will ask the applicant to complete a Deed of Assignment for Award of Costs where costs have not already been paid by the other party.

The Agency may ask the provider to lodge a caveat over the property that represents the proceeds of proceedings in order to protect the Agency's interest in this property.

### ***Charges in Civil (including Family) Cases***

In civil (including family) cases, the Agency may seek authorisation to impose a charge over specified property of the aided person as security for repayment towards *the cost of services*. Where the Agency wishes to impose a charge, the authorisation of the charge by the applicant is a condition of the grant.

In seeking authorisation of a charge, the Agency may take into account a number of factors. For example:

- the nature and value of the property which may be charged
- the conduct of proceedings to date and other parties to the proceeding

If the Agency wishes to impose a charge over property, or wishes to increase the level of the charge, it will seek written authorisation from the applicant to the charge over specific property. To do this, the Agency will issue a letter to be countersigned by the applicant, noting the contribution to be imposed and confirming their agreement to the specific charge as security for the contribution. Written agreement must be received within 10 days of the date of the date of the letter from the Agency.

Whenever possible, the Agency will also request repayment of the contribution by means of a lump sum and/or a repayment agreement over time.

The Agency may seek to impose a charge against any property owned by the applicant. The Agency will usually charge property in the following order of preference:

- (a) land and improvements
- (b) insurance or superannuation policies
- (c) valuable antiques and artworks
- (d) motor vehicles, boats, especially with a value over \$10,000.

### **Registration of the Charge**

The Agency will require the Provider to effect registration of the charge over property at the end of the case, as follows:

- in the case of land, against the land in question in accordance with the Statutory Land Charges Registration Act 1928;
- in the case of any other property, against that property in accordance with the Personal Property Securities Act 1999 or the Motor Vehicle Securities Act 1989.

The Agency will require a copy of the certificate of registration, to be received within 10 days of the Agency's instruction to the provider to register the charge.

### **Debt Write Off**

Under s37 LSA 2000 the Agency may write off all or part of the debt to Agency. The Agency will establish the appropriate level of contribution (if any) and seek to have this paid. If the applicant then wishes to apply to have the debt written off, the applicant or the provider must seek a write off for specified reasons.

The Agency may write off debt in the following circumstances:

- (a) if enforcement would, in the opinion of the Agency, cause hardship to the aided person (s37(1)(a) LSA 2000) (see the Agency's Hardship Policy);
- (b) if enforcement would jeopardise a reconciliation between parties to particular types of civil proceedings (s37(1)(b) LSA 2000). The relevant civil proceedings are those defined in paragraphs (a), (b), or (c) of the definition of civil proceedings in s4(1) LSA 2000, being proceedings under the:
  - Marriage Act 1955
  - Adoption Act 1955
  - Guardianship Act 1968
  - Domestic Actions Act 1975
  - Matrimonial Property Act 1976/ Property (Relationships) Act 1976
  - Family Proceedings Act 1980
  - Domestic Violence Act 1995

Also Children, Young Persons and Their Families Act 1989, other than proceedings in relation to an offence. That limitation does not, however, prevent a write off where a child is in need of care and protection on the ground specified in s14 (1)(e) of the Children, Young Persons and Their Families Act 1989;

- (c) If the cost to the Agency of enforcing the debt is likely to exceed the amount of the debt (s37 (1)(c) LSA 2000).
- (d) If the Agency considers that justice and fairness would be best served by writing off the debt. (s37(1)(d) LSA 2000). The consideration of justice and fairness involves examining the relevant issues in relation to the individual circumstances of the applicant and assessing what is fair and reasonable in their circumstances, with particular reference to the proceedings or legal matter arising from it. The following are examples of circumstances in which the Agency would consider a write off:
- Requiring payment would leave the aided person with a disproportionately small proportion of the monetary value of the property that they preserved or recovered in the proceedings. For example, where the value of a property settlement received by a parent with dependants and with little income appears unjust.
  - The conduct of the other party to the proceedings has resulted in the costs being greater than they should have been. In this circumstance, the debt might be reduced but would require strong grounds for a full write off.
  - The aided person made all reasonable attempts to minimise the costs of legal aid needed to reach a settlement. In this circumstance, the debt might be reduced but would require strong grounds for a full write off.
  - The nature of the original issues for which aid was made available and the strain of progressing these matters has resulted in a level of suffering outside the norm for a person entering into litigation that is hard to bear. In this circumstance, the debt might be reduced but would require strong grounds for a full write off. See Guidelines for consideration of hardship, which may be relevant.
  - The aided persons circumstances have changed such that a contribution would not now be imposed.
  - The proceedings in which aid was granted were in respect of unpaid wages, holiday pay or other entitlements (not including compensation) and the amount claimed was proven and was for less than \$2,000.
  - The proceedings were in respect of a successful application for paternity.

Providers will need to make a written application if they consider that a contribution or repayment payable should be written off under s37 LSA 2000.

That application should:

- (a) state under which subsection(s) it is considered that there should be a write off;
- (b) provide detailed reasons supporting the application for write off. These will need to relate to the relevant subsection of the Act;
- (c) provide appropriate documentation to support those reasons.

When the Agency writes off a debt under s37 LSA 2000 it will give notice to the debtor (the legally aided person), who from the date of notice will not longer be liable for it. Any excess moneys paid by the debtor will be repaid (ss37 (2), (3) and (4) LSA 2000).

## **Glossary**

**Cost of Services** The cost of services is the full cost of the legal aid for the legally aided person. It is defined in s18 (2) LSA 2000 and is the sum of:

- the approved fees attributable to the lead provider; plus
- the approved fees of attributable to any other listed provider who acted on the matter; plus
- the approved disbursements claimed by the lead provider and any other listed provider who acted on the matter.

**Contribution payable** This is discussed in s17 LSA 2000 and refers to the contribution set out in s15 (1) LSA 2000. It is the contribution payable towards the cost of services. This contribution is payable for criminal and civil (including family) proceedings (although there are exceptions) and is calculated by the Agency on the basis of the applicant's disposable income and assets.

**Repayment payable** The repayment payable applies to civil (including family). The repayment payable is the amount the legally aided person has to pay the Agency out of the proceeds from proceedings (if any).

It is defined in s18 (1) LSA 2000, as the cost of services less:

- any contribution paid or payable by the aided person; and
- any deductions allowed by the Agency;

- any write off allowed by the Agency.

***Proceeds of proceedings***

Under *s4 LSA 2000*, proceeds of proceedings means:

- any money or property to which the aided person is entitled under a judgment or out of court settlement relating to the proceeding;
- any money or property that was the subject of a claim and was retained as a result of the judgement or settlement;
- any costs awarded or payable to the aided person under a judgement or court of court settlement relating to the proceeding.

Proceeds of proceedings include interim and final payments of money and property.

***Amount payable***

This is set out in *ss30 and 31 LSA 2000* and is the total amount of money payable to the Agency. This will be any contribution plus the repayment payable (proceeds from proceedings minus any deductions, up to the level of the cost of services).

**Special Provisions Relating to Conditions on the Grant**

***Domestic Violence Act 1995***

Except in exceptional circumstances, there will not be conditions imposed on grants of aid to applicants in proceedings under Parts II and III of the Domestic Violence Act 1995.

*Section 16 LSA 2000* makes special provision for the imposition of conditions on grants to applicants for orders or on whose behalf an order is sought under the DVA. In relevant proceedings under Part II (which relates to Protection Orders) and Part III (which relates to Property Orders) of the Domestic Violence Act 1995, a grant of legal aid cannot be subject to a condition (neither a contribution nor a charge):

- (a) unless there are exceptional circumstances which justify the imposition of one or more conditions (*s16(3) LSA 2000*). Relevant factors may include:
- conduct in relation to previous applications made by the applicant;
  - where an amendment to a grant is sought and the proceedings appear to have been protracted unnecessarily by the applicant;
  - the means of the aided person, e.g. does the aided person have extremely substantial capital and/or income, or
- (b) except to the extent to which a grant of legal aid relates to matters

other than those types of proceedings (s16(4) LSA 2000).

It is noted that b) above may often be the case. For example, where a person has received a grant of legal aid in respect of an application for a protection order and an application for custody, a contribution or authority to charge may only be imposed in relation to the protection order application in exceptional circumstances. However, a contribution or authority to charge may be imposed in relation to the custody application (s15 LSA 2000).

A necessary consequence is that providers will need to maintain and submit to the Agency a separate time record of attendances for proceedings under Part II and Part III of the Domestic Violence Act 1995.

### **Waitangi Tribunal Proceedings**

Section 15 LSA 2000 states charges and contributions do not apply to applications under s42 LSA 2000 for aid in certain types of proceedings before the Waitangi Tribunal (ss14 (3) and 42 LSA 2000).

Separate provisions relating to charges and contributions in respect of proceedings before the Waitangi Tribunal will apply.

### **Methods of Repayment**

The following sets out the methods of repayment in the order of priority the Agency will generally seek them.

<b>Method of Repayment (in order of priority)</b>	<b>Amount of Contribution</b>	<b>Method of Payment</b>	<b>Time for Applicant to Complete</b>
1. Funds available in bank account.	100% of funds available (refer to Note 1)	Lump Sum	10 working days
2. Disposable weekly income of \$20 per week or more	100% of money above \$20 with a minimum weekly repayment arrangement of \$10 per week (refer to Note 2)	Payment by Installments	Commence within 10 working days
3. House	100% of further contribution permitted under the Act/Regulations (refer to Note 3)	Statutory land charge Authorisation of statutory land charge if total calculated contribution or cost of services	10 working days

		is over \$300 (refer to Note 4); or  If the total cost of services is expected to be over \$3,000, register a caveat immediately pending registration of the statutory land charge (refer to Note 5)	
4. Other assets (including but not limited to: <ul style="list-style-type: none"> <li>• insurance</li> <li>• superannuation</li> <li>• shares</li> <li>• investments</li> <li>• antiques</li> <li>• vehicle</li> <li>• boat</li> </ul>	100% of further contribution permitted under the Act/Regulations (refer to Note 6)	Charge	10 working days

**Notes to the Table**

1. If the total contribution exceeds the amount of funds available in bank, the Agency will consider whether the applicant has other means of paying the balance of the contribution such as a disposable weekly income, which could fund an instalment plan.

2. Practical examples

- if applicant has disposable weekly income of \$35, then the payment would be set at \$15
- if the applicant has disposable weekly income of \$28 no automatic payment would be required as the payment would be \$8 and, therefore, less than the minimum acceptable rate of \$10 per week

3. The Agency will include the registration disbursements and fees, which may be added to the repayment amount.

4. Registration of the statutory land charge is carried out when the actual cost of services is known.

5. When the contribution imposed is \$3,000 or more, the provider is required first to register a caveat, pending the registration of a statutory land charge. Once the actual and final value of the cost of services is known, the caveat is released and a statutory land charge registered for the total of the contribution.

6. A charge against these assets is usually considered if no other repayment option is available.