



Part 12 – Costs policy and procedure

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Costs policy and procedures

Introduction

These policies and procedures apply to situations in civil/family cases where:

1. There is an order of costs against a legally aided person.
2. The other party requests the Agency pay costs that the court indicated would have been ordered if the person had not been legally aided
3. Costs are awarded in favour of the legally aided person.

Which version of the Act applies?

The Legal Services Amendment Act 2006 came into force on 1 March 2007. This Act introduced a range of changes to the administration of the legal aid scheme. The changes to do with costs are subject to certain transitional arrangements.

When sections 40 and 41 as substituted apply

Costs awards from 1 March 2007 in proceedings for which legal aid has been granted *on or after* that date are covered by sections 40 and 41 of the Legal Services Act 2000 as substituted by the Legal Services Amendment Act 2006. Refer to the policies and procedures in this section of the manual below.

When sections 40 and 41 before substitution apply

Costs awards from 1 March 2007 in proceedings for which legal aid has been granted *before* that date are covered by sections 40 and 41 of the Legal Services Act 2000 as they were before their substitution by the Legal Services Amendment Act 2006. Refer to your pre 1 March 2007 provider manual.

Legislation

Section 40, as substituted by the Legal Services Amendment Act 2006:

- limits the liability of the legally aided person for costs
- establishes that there must be exceptional circumstances for costs to be ordered against a legally aided person
- sets out possible matters the court may take into account in deciding to establish costs against a legally aided person
- provides that the court must specify the amount that it would have ordered as costs but for the limitations of liability
- sets out the approach to costs where the person is mentally disordered and has a next friend or guardian ad litem

Section 41, as substituted by the Legal Services Amendment Act 2006:

- requires the Agency to consider, on request, payment of costs that would have been awarded were the person not legally aided
- sets out matters to be taken into account when considering a payment request
- provides for the Agency to recover from the legally aided person the amount it pays if an actual award of costs has been made under s 40

- allows the Agency to pay a lawyer who is not a listed provider

Definitions

Deed of Assignment	A legal document that substitutes one person for another so that the person substituted assumes the rights or penalties of the other. For legal aid purposes this means a document that transfers to the Agency a legally aided person’s right to recover costs from the other party. Deed of Subrogation is the same thing.
Deed of Subrogation	See Deed of Assignment

Policy

An award of costs against the legally aided person may specify an amount the aided person has to pay and must specify what would have been ordered if they were not aided. In making an award, the court must determine that there are exceptional circumstances and may take into account the conduct of the legally aided person.

The conduct considered by the court may include, but is not limited to that covered by s 40(3)(a-f):

- conduct that causes unnecessary cost to the other party
- failure to comply with the procedural rules and orders of the court
- misleading or deceitful conduct
- unreasonable pursuit of issues on which the aided person fails
- unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution
- any other conduct that abuses the processes of the court.

The Agency will not pay costs that would have been ordered if these are more than the costs that have actually been incurred by the party seeking a payment of costs. This is based on the general principle outlined in High Court Rule 47 made under the Judicature Act 1908.

Where one aided party is awarded costs against second aided party, the second aided party cannot apply to the Agency under section 41 for payment of some or all of the difference between amounts:

- **A** = the amount of the order of costs against the aided person that the aided person has to pay themselves, and
- **B** = the amount of order of costs that would have been made if the aided person’s liability had not been affected by being an aided person.

However, the second aided party can seek a corresponding write-off of their repayment.¹

Where the costs award establishes a specific amount to be paid (ie where it is not an award under s 40(5)) a payment of costs by the Agency does *not* automatically become a debt due to the Agency by the aided person. This is because s41(6) gives the Agency discretion about whether or not to treat a payment of costs as debt:

The Agency may recover any payment made under this section from the aided person as a debt due to the Agency, unless the payment relates to an order made under section 40(5).

Where the payment of cost is established as a debt to the Agency, this debt is over and above any interim repayment or repayment already established. In this way, the direct costs against the aided person are limited to a level they could reasonably pay now.

¹ See *LARP No 503/02 5/7/02; Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA) at [21]-[22].

Other costs are paid by the Agency, to be repaid by the aided person in the same way as an interim repayment or repayment. The Agency will consider a request to write this debt off under its write off policy, taking into account the conduct issues and other relevant findings of the court.

The Regional Manager approves or declines a payment of costs to the other party based on an assessment by the Grants Officer and the recommendation of a specialist adviser. Reconsideration and review provisions apply to all costs decisions.

Procedure for making a decision on an application for the payment of costs

Application

Step 1 The Grants Officer receives a request for the payment of costs against a legally aided person.

If...	then....
an application for the payment of costs awarded against a legally aided person is received,	<ul style="list-style-type: none"> ▪ the application must be made by the person in whose favour the order is made ▪ the application must be on the Agency's form for costs – 'Application for the payment of costs under section 40 & 41' This is available on the Internet. ▪ the Grants Officer will need to establish whether <ul style="list-style-type: none"> - the matter has been partly heard, or - an appeal is likely.
the matter has been partly heard, or an appeal is likely,	the Grants Officer will not make a decision on the application for payment of costs until the appeal or the full case has been heard. The Grants Officer will resume processing (go to step 2) when the appeal or full case has been heard.
the application has not been made by the person in whose favour the order is made,	the application will be returned to the applicant. The Grants Officer will resume processing (go to step 2) when they receive the application completed in the approved manner.
the application has not been made on the Agency's form,	
<ul style="list-style-type: none"> ▪ the application has been made by the person in whose favour the order is made ▪ the application is on the Agency's form for costs ▪ proceedings have concluded and an appeal is unlikely, 	Go to Step 2, <i>The Grants Officer considers all the factors in s41(3) the Agency must take into account.</i>

Assessment

Step 2 The Grants Officer considers all the factors in s41(3) the Agency must take into account.

Consider	Guidance
the conduct of either party to the proceedings (s 41(3)(a))	<p>The Grants Officer will use the court's findings to help determine whether the conduct of the party against whom costs are awarded has caused the litigation to be unnecessarily:</p> <ul style="list-style-type: none"> ▪ protracted and difficult, ▪ expensive, ▪ time consuming and emotionally draining for the other side. <p>The conduct issues specified in s 40(3)(a-f) will help determine whether to recommend a payment under s 41 to the other party of an amount up to what would have been ordered. Ideally the court will be quite specific in the costs order.</p>
the courts findings under s40(2), in particular, the conduct issues the court must consider specified in s 40(3)(a-f)	
the hardship that would be caused to the applicant if the costs were not paid by the Agency (s 41(3)(c))	Go to Step 3, <i>Assess hardship</i>



If the Grants Officer determines that the legally aided side caused the proceedings to be unnecessarily prolonged, Agency procedure is that this is taken up with the provider. See 'Investigating and managing provider conduct' in the Service Contracts section of this manual.

Step 3 The Grants Officer assesses hardship.

Consider	Guidance
Present and future financial commitments (including existing debt) and total disposable income	<p>The Grants Officer will:</p> <ul style="list-style-type: none"> ▪ assess all the circumstances contributing to the applicant's current situation. ▪ identify the consequences for the applicant if the costs were not paid, and ▪ be reasonably certain that the consequences would be a major setback for the applicant. This could include their inability to continue to work or maintain important aspects of their life. <p>Go to Step 4, <i>The Grants Officer decides whether to pay costs that would have been ordered if liability were not limited.</i></p>
Number and nature of applicant's children and/or other dependants and financial commitments in respect of these	
Location of the applicant and the impact of this on their particular circumstances	
Financial and other support available to the applicant	
Other issues for the applicant that impact on their particular circumstances, such as but not limited to medical condition, disability, family circumstances or custody arrangements.	
<p>The Grants Officer has the authority under s 41(4) to require any person to provide information on the financial circumstances and needs of the applicant for payment of costs.</p>	

Step 4 The Grants Officer decides whether to pay costs that would have been ordered if liability were not limited.

Consider...	Guidance
whether: <ul style="list-style-type: none"> ▪ any one factor, or if any combination of factors, will cause suffering or create a situation that is difficult for the applicant to endure, and ▪ which will be partially or fully mitigated by the payment of costs, 	The Grants Officer's decision is a matter of discretion as to whether: <ul style="list-style-type: none"> ▪ a payment should be made at all, and if so, ▪ some or all of the shortfall amount should be paid.
whether the conduct of either party to the proceedings indicates that the legally aided party has caused the litigation to be unnecessarily: <ul style="list-style-type: none"> ▪ protracted and difficult, ▪ expensive, ▪ time consuming and emotionally draining for the other side, 	In making this decision, the Grants Officer decides will keep in mind that the Courts have said that decisions under s 41 (and s 40) must have due regard to: <ul style="list-style-type: none"> ▪ securing access to justice for persons of limited means and ▪ compensating the unaided party part or all of the disadvantage caused
whether the conduct issues the court must consider specified in s 40(3)(a-f) indicate that the legally aided party has caused the litigation to be unnecessarily: <ul style="list-style-type: none"> ▪ protracted and difficult, ▪ expensive, ▪ time consuming and emotionally draining for the other side, 	Go to Step 5, <i>The Grants Officer submits their assessment to a Specialist Adviser for recommendation on paying costs and how much.</i>
all other relevant circumstances (s41(5)),	
whether any one or more of the four factors above apply,	

Decision

Step 5 The Grants Officer submits their assessment to a Specialist Adviser for recommendation on paying costs and how much.

Step	Action
The Specialist Adviser will review the case under the same criteria as outlined in Steps 2 to 4 and form a view on,	<ul style="list-style-type: none"> ▪ whether costs should be paid by the Agency and if so ▪ whether all or part or part of the costs claimed should be paid
In making a recommendation on how much will be paid the Specialist Adviser will consider,	<ul style="list-style-type: none"> ▪ the likely or usual costs of a case of that nature ▪ the actual expenditure of the case ▪ the difference between these and its relation to

Step	Action
	the cost claim by the other party.
The Grants Officer may contact the aided person and their lawyer to find out what the expected cost had been and the issues which arose as to why it was more.	Go to Step 6, <i>The Grants Officer submits their assessment...for a decision.</i>

Step 6 The Grants Officer submits their assessment and the Specialist Adviser's recommendation on the application to their regional manager for a decision.

The assessment and recommendation will cover:

- whether the Agency should pay costs or not
- how much the Agency should pay
- Go to Step 7, *Decision on application.*

Step 7 Decision on application

Decision	Action
Regional Manager approves application for costs.	The Agency will either: <ul style="list-style-type: none"> ▪ make the payment to the lawyer of the other party through the direct credit or ▪ return the cheque back to the Grants Officer to complete the process by sending it to the other party's lawyer.
Regional Manager declines application for costs.	The Grants Officer will advise the applicant for costs of the decision. End of process.