

## 10.5 Contributions under s46 of the Act

### 10.5.1 What is a s46 contribution

Legal Aid NSW may require a legally assisted person to pay a further contribution at the end of the grant of legal aid under s46 of the Legal Aid Commission Act 1979 (NSW).

Legal Aid NSW must make a determination under s46 of the Act in every matter where a grant of legal aid is made.

Legal Aid NSW must determine the amount the assisted person is to pay, if any towards Legal Aid NSW's costs in providing them with legal services (including expenses under s33 of the Act).

### 10.5.2 When are section 46 contributions to be determined?

Legal Aid NSW can make a determination under s46 of the Act:

- at, or after the conclusion of the proceedings, or
- if legal aid is terminated during the course of the matter, at or after the termination.

The amount an assisted person may be required to contribute towards the costs and expenses of the services provided by Legal Aid NSW may not be known until their matter is finalised and Legal Aid's costs are known.

Section 46 determinations should be made and entered onto the LA Office system within 30 days of the matter being finalised.

See Contribution Guideline 5 for guidance on making a determination under s46 of the Act.

### 10.5.3 Who can make a s46 determination?

Legal Aid NSW officers authorised under the Delegation Instrument can make a determination under s46 of the Act.

### 10.5.4 When should a client be advised of a s46 contribution

The legally assisted person and their legal practitioner must be advised in writing **at the time aid is granted** that a determination under s46 of the Act will be made at the end of the matter and the client may be required to make a further contribution under s46 of the Act.

### 10.5.5 How are s46 contributions calculated?

The amount of and how a contribution is calculated under s46 of the Act will depend on whether the legally assisted person recovers an interest in property or money as a result of the matter for which legal aid was granted.

Calculating a contribution when the legally assisted person recovers an interest in property or money

When calculating a contribution where the assisted person recovers an interest in property or money, the total cost and expense of providing legal services should be deducted from the money or property recovered.

If the legally assisted person has made an initial contribution that amount is deducted from the final amount calculated under s46 of the Act.

See Contribution Guideline 5 for guidance on calculating a contribution under s46 of the Act when a legally assisted person recovers an interest in property or money.

In all other cases

When calculating a contribution in all other cases, (except when legal aid has been terminated) where possible, the whole or part of the total costs and expenses of providing legal services to the legally assisted person should be recovered from them, taking into account their financial position at the conclusion of the proceedings.

#### **Calculating a s46 contribution in all cases other than when legal aid is terminated or the client recovers an interest in property or money**

The following sets out how contributions under s46 are to be calculated in all cases other than when legal aid is terminated or a client recovers an interest in property or money.

- Legal Aid NSW officer should request an updated Financial Statement.
- The amount of money to be paid should be assessed on the contribution scale used to assess contributions under s.36 (1)(a) of the Act.
- If the legally assisted person has paid a contribution calculated under 36(1)(a) of the Act this amount should be deducted from any further contribution calculated under s46 of the Act.

#### **Varying the application of the policy**

In exceptional circumstances a section 46 determination can be made other than in accordance with the policy of Legal Aid NSW. Only those persons with specific delegation can make a determination under section 46 where it is considered appropriate to vary the application of the policy.

#### **10.5.6 Section 46 determinations when the grant of aid has been terminated**

Where the grant of aid has been terminated prior to the conclusion of the proceedings, when determining the contribution Legal Aid NSW will take into account:

- whether the grant was terminated by Legal Aid NSW or the client, and
- the possibility of the legally assisted person recovering money or an interest in property at the conclusion of the proceedings.

If a contribution is determined following termination of legal aid, the amount of contribution to be paid:

- should be assessed on the scale used to assess contributions under s.36 (1)(a) of the Act using the contribution scale in the Means Test.

If the legally assisted person has made a contribution under 36(1)(a) of the Act this amount should be deducted from any further contributions calculated under s46 of the Act.

Grant of aid terminated when there are no reasonable prospects of success

If the grant was terminated because there are no reasonable prospects of success, the policy is not to seek a contribution under s46 of the Act.

#### 10.5.7 Can a s46 contribution be varied after it has been imposed?

Yes. A determination under s46 of the Act can be varied by a later determination.

However the amount of contribution determined can only be reduced where recovery of the contribution under s46 of the Act:

- would cause the assisted person special hardship, or
- is impractical in the circumstances, or
- the original amount calculated is incorrect.

A contribution under s46 of the Act which was properly imposed in the first place, but is now considered to be either partially or totally irrecoverable and has become a debt, can only be dealt with by way of write-off.

Legal Aid NSW officers authorised under the Delegation Instrument can write-off a debt.

#### 10.5.8 What supporting documentation is required to vary a section 46 contribution?

The legally assisted person must provide the following documentation before a variation of a section 46 contribution can be determined:

- a completed Updated Financial Statement with verification of the applicant's income and assets, and
- submissions on hardship and/or the applicant's financial circumstances.

A decision to vary a section 46 contribution must be documented on LA Office and the file and must include reasons and be approved by an officer authorised under the Delegation Instrument. This applies to hard copy and electronic files.

#### 10.5.9 Notifying clients of their obligations to pay contributions under s46 of the Act

See Contribution Guidelines 6 for the procedure for notifying clients of their obligations to pay contributions under s46 of the Act.

#### 10.5.10 Exceptions to section 46 contribution policy

The policy for determining contributions under s46 of the Act is applied on a uniform basis regardless of the area of law or whether it is an in-house or assigned matter.

A determination under s46 of the Act must be made for every matter except as set out below.

#### Veterans' matters

The s46 contribution policy does not apply to grants of legal aid to ex-service personnel and their dependants for matters under Part II of the *Veterans' Entitlements Act 1988* (Cth) or under the *Military Rehabilitation and Compensation Act 2004* (Cth) where the means test is not applied, unless costs are recovered by the legally assisted person.

#### Migration matters

The amount to be determined under s46 of the Act in a migration matter is to be nil, unless costs have been awarded to the legally assisted person in the Federal Court or High Court of Australia.

### 10.5.11 Expenses incurred under s33 of the Act

Under s33(2) of the Act any expenses incurred by Legal Aid NSW to assess the merits of an application, the means of the applicant or to protect the interests of the applicant prior to a grant of legal aid must be imposed no later than the time that a s46 determination is made.

The section 46 determination must include any costs incurred under s33 of the Act. Any determination to vary or waive costs under s33 of the Act should then be made as part of the overall determination of section 46 contributions and in accordance with this policy.

### 10.5.12 Costs awarded to the legally assisted person must be paid to Legal Aid NSW

If the legally assisted person is awarded costs by a court or tribunal, or if the terms of settlement include costs, payable to the legally assisted person:

- the costs of providing legal service after the grant was made must be paid to Legal Aid NSW.
- Legal Aid NSW must take into account these costs in determining the amount it will recover from the legally assisted person under s46 of the Act.

See Costs and Fees chapter for policies on costs Legal Aid NSW can direct a legally assisted person to pay to Legal Aid NSW.

### 10.5.13 How does the legally assisted person pays s46 contribution

Refer to Contribution Guidelines for guidance on how contributions are to be paid by a legally assisted person.

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