



## Part 11 – Write offs and exemptions

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## Write offs

### Introduction

All applicants, other than applicants from the exempted groups, require a decision about contributions or repayments. This becomes a debt that the legally aided person owes the Agency. A write-off is necessary to release the legally aided person from this obligation.

This section of the Manual covers write offs under the Legal Services Act 2000 as amended by the Legal Services Amendment Act 2006. For write offs prior to 1 March 2007, please refer to your pre 1 March 2007 manual.

### Policy

An aided person may apply to the Agency to seek a write off of all or part of an amount payable to the Agency. The Agency's Debt Management Group (DMG) has the responsibility for all decisions to write off debts.

A debt or a charge on proceeds of proceedings continues to exist even if aid is withdrawn or the case is finalised. It remains a debt until it is repaid or written off.

In making a decision to write off all or any debt payable, the Agency must be satisfied that one of the circumstances set out in legislation applies. When a debt has been written off:

- The Agency must give notice to the aided person of the write off
- The aided person is, from the date of write off, no longer liable to pay the debt
- The Agency must return the amount that was written off if the aided person repays some or all of a written off debt
- The write off does not affect the Agency's obligation to pay any person who provided legal services under the relevant grant of legal aid.

### Legislation

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 write offs are subject to certain transitional arrangements. This means that there are different write off criteria and policies for pre 1 March 2007 and post 1 March 2007 grants.

Section 37(1) of the Act (as substituted by s37(1) of the Legal Services Amendment Act 2006) specifies the grounds under which a write off of all or part of the debt (an interim repayment or repayment payable) may be considered:

- S37(1)(a) *Requiring payment would cause serious hardship to the legally aided person*
- S37(1)(b) *The cost to the Agency of enforcing the debt is likely to exceed the amount of the debt*
- S37(1)(c) *The Agency considers that it would be just and equitable to write-off the debt*

### Applications for write offs

Applicants and their providers are advised of the right to request a write off in the initial grant letter and final letter advising of the repayment amount.

An application for a write off must be made in writing by the aided person or their representative. It is recommended that the applicant completes the Application for Write Off / Exemption form (form 18). Agency Debt Officers can provide assistance to help the applicant complete the application form. The request must explain the reasons why the debt should be written off and include any supporting information.

The Agency may write off a debt on its own motion if staff become aware that the criteria for a write off would be satisfied. A formal application (on form 18 or by letter) from the aided person or their provider is not required in these circumstances.

Each application for write off will be considered by the Agency on its own individual merits. In making a decision, the Agency must be satisfied that one of the circumstances in the Act applies.

## Request received by Grants before the first payment date

### Policy

An aided person may seek to:

- defer the start of the interim repayment
- stop interim repayments temporarily during the course of the repayment plan
- negotiate an alternative interim payment plan
- write off or partially write off the interim repayment, the (final) repayment, or both.

All requests for write offs, including those received before the first payment date, will be referred to the Agency's Debt Management Group.

However, the Grants Officer may consider any request to:

- defer the start of the interim repayment up to a period of 6 months
- stop interim repayments temporarily up to a period of 6 months
- negotiate an alternative interim payment plan.

## Grounds for write off

### Serious hardship

#### Policy

This policy covers write offs under the provisions s37(1) of the Legal Services Act 2000 as amended in 2006.

In this policy, serious hardship refers only to significant financial difficulties. When assessing an application for a write off, the Agency will consider whether the applicant would face serious hardship if the debt was not written off.

The definition of serious hardship in s37(6) is an exhaustive one. This means that the serious hardship exists because of one or more of the following circumstances:

- (i) Inability to meet minimum living expenses according to normal community standards.
- (ii) Costs of medical treatment of injury/illness to aided person or dependant.
- (iii) Serious illness or injury by aided person or dependant.

#### Procedure

Step 1. The Debt Officer considers the serious hardship grounds for a write off.



Serious hardship is interpreted only in the sense of significant financial difficulties.

Consider	Guidance
Inability to meet minimum living expenses	▪ An examination of the aided person's minimum

Consider	Guidance
according to normal community standards.	<p>living expenses will include costs of food, accommodation, power, transport, health care, children's school expenses, clothing and other necessary expenditure associated with day-to-day living.</p> <ul style="list-style-type: none"> <li>▪ Some individuals may have expenses that relate to their specific situation and are a normal part of their day-to-day living.</li> <li>▪ For example: <ul style="list-style-type: none"> <li>- responsibility for costs associated with the care of relatives</li> <li>- in remote communities, services may cost more and transport costs for daily activities may be much higher</li> </ul> </li> <li>▪ The above consideration must be looked at according to the normal community standards. The Agency uses the Household Economic Survey (see below) to determine normal community standards.</li> <li>▪ From the information available on the file or in the application form, the Debt Officer will need to confirm that the aided person's expenses are necessary, a normal part of day-to-day living for them and that they could not do without them.</li> </ul>
Cost of medical treatment of illness or injury to the aided person or dependant.	<ul style="list-style-type: none"> <li>▪ This requires a factual inquiry into the current or ongoing costs of medical treatment for the aided person and/or their dependant(s).</li> <li>▪ Supporting documentation may be required to confirm both the existence of the medical conditions and the costs of treatment.</li> </ul>
Serious illness suffered by aided person or dependant	<ul style="list-style-type: none"> <li>▪ For the purposes of this policy, serious illness will be regarded as any physical, medical, psychological, or psychiatric condition that: <ul style="list-style-type: none"> <li>- reduces the aided person or their dependant's independent function,</li> <li>- requires daily or continuing treatment by a health care provider, and</li> <li>- is likely to continue for a substantial period of some months</li> </ul> </li> <li>▪ From the information available, the Debt Officer will need to confirm that the condition is serious. This would normally be indicated if the aided person cannot work because of the condition, or cannot undertake normal daily activities without assistance.</li> </ul>
Whether a person is the aided person's dependant.	<p>This will be determined on the particular circumstances of each case. An important consideration is whether they are dependent on the aided person for financial support and the extent of that support. This consideration should also include the payment and provision of goods and</p>

Consider	Guidance
	<p>services.</p> <p>An example may include daily transport of a disabled child/parent to day care or rehabilitation. This would be a significant petrol cost and an impact on the aided person ability to take a full-time job.</p> <p>Go to step 2, <i>Consider the 'enforcement costs likely to exceed debt' grounds for write off</i></p>



Note that serious hardship does **not** include

- the imposition of the obligation to pay the debt to the Agency
- the aided person's ability to purchase goods or services that reasonably exceed the minimum living expenses according to normal community standards
- the fact that the aided person is on a benefit
- having a statutory land charge on the aided person's property.

## Enforcement costs likely to exceed debt

Step 2. The Debt Officer considers the 'enforcement costs likely to exceed debt' grounds for write off.

Policy	Guidance
<p>The debt should be written off where the cost to the Agency of enforcing the debt is likely to exceed the amount of the debt.</p>	<p>The Debt Officer may recommend a write off under this section if it is apparent that:</p> <ul style="list-style-type: none"> <li>▪ the debt is \$50 or less, is unsecured and no payments have been received for six months</li> <li>▪ the debt is \$300 or less, is unsecured and no payments have been received for twelve months after active recovery actions have been pursued</li> <li>▪ the debt is between \$300 and \$2,000, is unsecured and no payments have been received for two years.</li> </ul> <p>Go to step 3, <i>Consider the 'just and equitable' grounds for a write off.</i></p>

## Just and equitable

### Policy

"Just" in this context refers to what is right or fair consistent with the law. "Equitable" also refers to conforming to the principles of justice and fairness. Therefore, "just and equitable" is a broad concept which means what is fair or right.

To determine whether it is just and equitable to write off some or all of a debt involves:

- examining the individual circumstances of the aided person in the light of the concept of "just and equitable"; and
- deciding what is fair or right in their situation.

## Procedure

Step 3. Consider the 'just and equitable' grounds for a write off.

Consider	Guidance
<p>Whether 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.</p>	<ul style="list-style-type: none"> <li>▪ This provision relates to:               <ul style="list-style-type: none"> <li>- the amount to be retained after a debt is paid,</li> <li>- the aided person's approach to or conduct in the proceedings (or in the course of the grant) and</li> <li>- how the outcome affects the personal situation of the aided person.</li> </ul> </li> <li>▪ The debt Officer will be guided by a reasonable expectation of what the aided person could recover and retain from the proceedings (or settlement).</li> <li>▪ From the information available, the Debt Officer needs to be satisfied that the aided person, through no fault of their own, will retain so little from proceeds that they could not afford specific appropriate expenses or activities.</li> <li>▪ For example, where the value of a property settlement received by a parent with dependants and with little income appears unjust because the aided party clearly made all reasonable effort to reach an early settlement but this was unsuccessful.</li> </ul>
<p>The conduct of the other party to the proceedings has resulted in the costs being greater than they should have been</p>	<ul style="list-style-type: none"> <li>▪ In civil and family matters, the Agency expects providers to seek costs whether or not the other party is legally aided. This will allow the Court to make a determination under Section 40 of the Legal Services Act, which will assist the Agency to decide on a write off application.</li> <li>▪ If costs are awarded, an application for a debt write off up to the value of the costs awarded may be made. A write off decision at the time the repayment payable is finalised will consider the whole situation.</li> <li>▪ Generally under this policy provision, the debt might be reduced but would require evidence of considerable merit for a full write off.</li> <li>▪ If a write off under this provision is considered appropriate, the amount payable by the aided person should be appropriate for such proceedings in normal circumstances. In other words, the costs of comparable cases could be used to assist in deciding what if any write off is agreed.</li> </ul>
<p>The aided person made all reasonable attempts to minimise the costs of legal aid needed to reach a settlement.</p>	<ul style="list-style-type: none"> <li>▪ In these circumstances, the debt might be reduced but would require evidence of considerable merit for a full write off.</li> </ul>
<p>The nature of the original issues and the</p>	

<b>Consider</b>	<b>Guidance</b>
strain of progressing these matters have resulted in a level of suffering outside the norm for a person entering into litigation that is hard to bear.	

## Household Economic Survey data

The Agency uses the Household Economic Survey to determine normal community standards. This table is based on average weekly spend by number of people in the household, from the Household Economic Survey, year ended 30 June 2004.<sup>1</sup>

	Two adults no child	Two adults, one child	Two adults, two children	Two adults, three or more children	One adult no children	One parent one child	One adult two children	One adult three or more children
Food	\$139.10	\$160.90	\$195.20	\$213.50	\$63.30	\$106.50	\$130.60	\$171.30
Housing (rent)	\$103.30	\$193.50	\$118.80	\$192.50	\$70.50	\$109.90	\$88.80	\$157.50
Housing (mortgage, rates and maintenance)	\$159.90	\$262.00	\$243.70	\$314.80	\$174.40	\$78.90	\$106.20	\$130.40
Household consumables	\$114.80	\$133.80	\$150.90	\$151.30	\$64.10	\$80.70	\$87.40	\$118.30
Clothing and Apparel	\$31.20	\$34.70	\$43.20	\$46.90	\$10.90	\$15.90	\$23.80	\$40.30
Transport (public)	\$6.60	\$7.50	\$6.70	\$8.70	\$13.60	\$5.00	\$8.60	\$11.30
Transport (private)	\$56.60	\$62.30	\$67.30	\$75.10	\$24.00	\$39.60	\$49.60	\$68.40
Leisure, recreational and personal goods	\$20.70	\$34.60	\$43.90	\$40.00	\$8.80	\$13.90	\$18.90	\$17.70
Medical goods and health services	\$35.50	\$20.10	\$29.40	\$31.50	\$17.80	\$11.50	\$16.60	\$27.90
Financial, insurance, legal services	\$32.20	\$35.50	\$35.40	\$36.10	\$17.40	\$21.50	\$27.30	\$32.20
Education and tuition services	\$4.90	\$14.60	\$29.20	\$37.60	\$3.00	\$15.30	\$18.40	\$56.80
<b>Total weekly spend (Renter)</b>	<b>\$544.90</b>	<b>\$697.50</b>	<b>\$720.00</b>	<b>\$833.20</b>	<b>\$293.40</b>	<b>\$419.80</b>	<b>\$470.00</b>	<b>\$701.70</b>
<b>Total weekly spend (Home owner)</b>	<b>\$601.50</b>	<b>\$766.00</b>	<b>\$844.90</b>	<b>\$955.50</b>	<b>\$397.30</b>	<b>\$388.80</b>	<b>\$487.40</b>	<b>\$674.60</b>

<sup>1</sup> The categories are; 1. Food. This includes fruit, vegetables, meat, poultry, fish, farm products, fats and oils, cereals and cereal products, sweet products, spreads and beverages, other foodstuffs, meals away from home and ready to eat meals. 2. Housing (rent) includes rent, property maintenance, goods and services and housing expenses. 3. Housing (mortgage, rates and maintenance) includes mortgage payments, payments to local authorities, property maintenance and services, and housing expenses. 4. Clothing and apparel includes men's, women's, children's clothing, footwear, supplies and services and clothing and footwear that is non-classifiable. 5. Transport (public) is public transport within NZ only. 6. Transport (private) includes vehicle ownership expenses and private transport costs. 7. Leisure, recreational and personal goods is a direct category from the HES. 8. Medical goods and health services is a direct category from the HES. 9. Financial, insurance and legal services is a direct category from the HES. 10. Educational and tuition services is a direct category from the HES.

## Other circumstances for a write off

### Policy

Additional circumstances in which a write off will be considered, include:

- the debtor is insolvent – here the debtor must be officially bankrupt
- the debtor is deceased and the estate was wound up before the Agency was able to notify or collect its claim
- the debtor has paid an agreed amount but this was in foreign currency and a debit balance of less than \$50 remains due to exchange rate fluctuations
- the debt has been statute barred – this would be when the debt is more than six years old and no acknowledgement of the debt or repayment towards the debt has been received in this time
- the debt cannot be recovered due to estoppels by virtue of Section 94B of the Judicature Act 1908
- the debt cannot be proven – this is when the Agency would have difficulty providing, to the satisfaction of the Court, that the debt exists
- the debt was established in error by the Agency
- the debtor cannot be proven – this is when the Agency does not have enough information about the debtor (for example, date of birth) and has not been successful in tracking the whereabouts of the debtor
- respondents in Agency appeals.

# Section 33 exemption from charge over property

## Introduction

Section 33 allows an aided person to apply to the Agency to seek an exemption from a charge over property that is part of the proceeds of proceedings.

## Policy

The Agency may exempt property that is part of the proceeds of proceedings and subject to a charge on the grounds of justice and equity.

An exemption from a charge does not write off any debt established, but as a matter of course, the Agency will make a write off decision at the same time.

The Agency may exempt property from a charge on its own motion where it is clear that the criteria for an exemption would be satisfied.

## Legislation

The key sections of the Legal Services Act 2000 are:

- s32 *Charge on proceeds of proceedings*
- s33 *Agency may exempt property from charge*
- s34 *Transfer of charge*
- s35 *Enforcement of charge*
- s37 *Agency may write off amounts payable*

## Applications for exemptions

Any application for exemption must be made within 20 working days of the date of the judgment or out-of-court settlement giving rise to the proceedings. If it is requested, an extended time to make this application may be granted where special circumstances exist. At the same time, the aided person or their representative may apply for a write off of any debt established.

The application must explain the reasons why the property should be exempt and include any supporting information.

It is recommended that the applicant completes the Application for Write Off / Exemption form (form 18). DMG can provide assistance to help the applicant complete the application form.

## Procedure

Step 1. The Debt Officer considers all the relevant circumstances of the case, including (but not limited to) the following:

Consider	Guidance
The value or nature of the property.	For example, where the value of a property settlement received by a parent with dependants and with little income appears unjust.
The outcome of the proceedings, including: <ul style="list-style-type: none"><li>▪ the amount of money and value of property recovered</li><li>▪ whether requiring payment would leave the aided person with a disproportionately small proportion of the</li></ul>	

Consider	Guidance
monetary value of the property that they preserved or recovered in the proceedings.	
<p>The conduct of the proceedings, including:</p> <ul style="list-style-type: none"> <li>▪ whether and to what extent the aided person made all reasonable attempts to reach settlement</li> <li>▪ the conduct of the other party to the proceedings has resulted in the costs being greater than they should have been.</li> </ul>	In this circumstance, the debt might be reduced but would require strong grounds for a full write off.
Personal circumstances of the aided person.	<ul style="list-style-type: none"> <li>▪ present and future financial commitments (including existing debt) and total disposable income</li> <li>▪ number and nature of aided person's children and/or other dependants and financial commitments in respect of these</li> <li>▪ location of the aided person and the impact of this on their particular circumstances</li> <li>▪ financial and other support available to the aided person</li> <li>▪ other issues for the aided person that impact on their particular circumstances, such as medical condition, disability, family circumstances or custody arrangements.</li> </ul>
Any special circumstances not covered above which may indicate that an exemption on the grounds of justice and equity should be considered.	<p>For example, victims of crime.</p> <p>Go to Step 2, <i>The Debt Officer determines whether or not to approve an exemption.</i></p>

### Step 2. The Debt Officer determines whether or not to approve an exemption.

In making a decision on the exemption, the Debt Officer must:

- decide whether to exempt the whole or any part of the property specified in the application, or any other property
- be satisfied that it would be just and equitable to do so, having regard to the value or nature of the property and all other relevant circumstances
- advise the aided person of the decision, and right to apply for a reconsideration and a review
- End of process.