

## LSANI Guidance on Applicant Fraud and Error

### Background

The Legal Services Agency (LSA) accounts for 2019-2020 were certified by the Comptroller and Auditor General (C&AG) on 12 November 2020 with a final Opinion and Report qualified in part due to fraud and error measurement in the legal aid system:

- i. *'statistics produced by the Agency estimating that £6.2 million of overpayments and £2.1 million of underpayments of legal aid costs were made during the year due to official error; and*
- ii. *limitations in the scope of my work due to insufficient evidence available to:*
  - *satisfy myself that material fraud and error by legal aid claimants and legal practitioners did not exist within eligibility assessments of legal aid applicants and in expenditure from legal aid funds.'*

### 1.0 Overview

- 1.1 The Agency currently work with the Standards Assurance Unit (SAU) of the Department for Communities (DfC) to measure and reduce Official Fraud and Error in the legal aid system. SAU act under a formal delegation from the Director of Legal Aid Casework. We are now embarking on a programme of work with SAU to measure and reduce the levels of Applicant Fraud and Error in the provision of Civil Legal Services and will shortly be beginning work to measure practitioner fraud and error.
- 1.2 It is in the collective interests to all of those in the civil legal system that fraud and error is prevented and detected to ensure the protection of the legal aid fund and to build public confidence in the system. It is therefore imperative that the Agency and the legal profession work together to ensure that

Applicants/Assisted Persons are properly informed of their responsibilities and are supported and encouraged to comply with the Agency/SAU in relation to reviews of their continuing financial eligibility. Non-compliance will mean that the entire cost of the case will be recorded as an error and on extrapolation against the total legal aid spend will result in a high percentage rate of error which for the reasons set out above is not desirable.

- 1.3 Criminal legal aid is not subject to applicant fraud and error measurement, as the Agency do not grant criminal legal aid. However, we will continue to support the Judiciary in those assessments through provision of financial information to confirm financial eligibility in granting legal aid.
- 1.4 This guidance sets out an overview of the new internal and independent processes, which will support this work.

## **2.0 Measurement Methodology**

- 2.1 A monthly sample of paid and closed eligible cases will be randomly selected for testing by NISRA statisticians using a stratified approach. The details of the Assisted Parties will be provided to SAU and they will make telephone contact with Assisted Parties to verify their financial eligibility, both from the date of their legal aid application and throughout the life of the certificate.
- 2.2 Should the Assisted Party fail to cooperate or if it is found that they failed to notify the Agency of a change in their circumstances which would have impacted on their eligibility, then the Agency can discharge or revoke their certificate. If their certificate is revoked, they will become personally liable for the full amount of their legal fees and full recovery action may be pursued.
- 2.3 It is vital therefore, that Applicants/Assisted Persons are made aware of and are regularly reminded of their duties and responsibilities to the legal aid fund by their legal representatives both on application and at all appropriate points during the course of their case. The Agency would also strongly advise practitioners to advise assisted persons at the end of their case that they

should co-operate if they are subsequently contacted by SAU on behalf of the Agency.

### **3.0 Prevention Phase (pre payment)**

#### **Pre Application**

- 3.1 When considering an application for legal aid, the client must be made aware by the solicitor of their duties and responsibilities towards the legal aid fund in terms of their initial application, throughout the life of the certificate and at any date after the ending of the case.
- 3.2 In Advice and Assistance and Representation Lower applications, the Applicant is required to make a full and candid disclosure of all of their financial means for the 7 days up to and including the date of initial advice and are required to produce documentation verifying same. This allows the solicitor to assess whether the respective income and/or capital tests are met on application (including the capital limit for Applicants for Advice and Assistance who are in receipt of passporting benefits). However, there is no duty on the Applicant to notify the Agency of any changes in their financial position after the date of their financial assessment. In an effort to prevent fraud or error entering the system, the Agency will cross check information produced against information available to us via data sharing arrangements with other Government bodies.
- 3.3 In Representation Higher cases, the legislation clearly envisages that financial eligibility will not be a fixed and immutable position established at the point of assessment. Rather, it imposes duties on Applicants to ensure that they notify the Agency of any changes in their financial circumstances (Regulation 19 of the [2015 Financial Regulations](#)) and permits the Agency to make reassessments at certain junctures (Regulations 20 and 21 of the [2015 Financial Regulations](#)). Financial Eligibility must therefore be viewed as a continuing responsibility of the Assisted Person and a primary consideration for the solicitor when seeking any steps in the proceedings under a certificate.

- 3.4 The “Notes for Applicant” which accompany the Declarations have been substantially revised to set out more clearly the duty on the Applicant/Assisted Person to notify LSANI (via their solicitor) of any change in their financial circumstances during the life of the certificate and the consequences of failing to do so. Solicitors should provide these Notes to every Applicant and ensure that they have read and understand the contents before signing the appropriate Declaration.
- 3.5 It is imperative that the solicitor is satisfied their client understands the terms and conditions before they give an assurance to the Agency on this issue by completing the Citizens Consent box on LAMS which states as follows:

### Citizen consent

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**Confirm that you have explained in detail the terms and conditions associated with the applicant declaration form and that the applicant/representative has confirmed that they have fully understood these terms and conditions.** Yes

- 3.6 Solicitors should ensure that a complete financial picture is given to LSANI with the Application. Solicitors should make themselves conversant with the [Rep Higher Guidance on completing Financial Eligibility on LAMS](#) which sets out clearly what is required. Similar guidance is being drafted for Advice and Assistance and Representation Lower and will be available in due course.
- 3.7 Prior to submitting the LAMS application, the solicitor should interrogate the financial proofs to ensure that they are satisfied, that there are no gaps and where any irregularities exist, that these are explained in the application e.g. if one-off transactions appear on the Bank Statement then these should be explained e.g. receipt of a lodgement for a birthday gift etc. – this will speed up the assessment and will avoid the Agency’s Financial Eligibility Unit (FEU) having to issue queries to seek an explanation for same.

- 3.8 Further, it is important that all financial proofs are uploaded to LAMS in the appropriate way (as set out in the [Suppliers Manual](#)) and clearly labelled and named to allow the Assessors to quickly identify the appropriate information.
- 3.9 The Agency have instituted a robust Quality Assurance process within the FEU which will mean that every means assessed case will be assessed and checked before any determination is made in relation to eligibility. This will not adversely impact on processing times.

#### **4.0 Post Application (Representation Higher):**

- 4.1 FEU will conduct the financial assessment and will cross check and data match the application against data we can access from relevant Government systems. The Agency are working to agree enhanced access to government systems which will give us greater visibility over an Applicants financial position including benefits, income, partner's information and self-assessment details.
- 4.2 If an Offer of Legal Aid is made, the "Notes for Applicant" will be resent by the Agency to the Applicant to ensure that they are fully aware of their responsibility to notify the Agency of any subsequent change to their financial position which may impact on eligibility and/or the contribution to be paid. Further, the Notes will make it clear to the Applicant that even if their case concludes or their certificate is discharged during the payment period that all contributions must be made until the total liability is discharged.
- 4.3 If a certificate is granted, a copy of the "Notes for Applicant" will be sent to the Applicant along with their Legal Aid certificate.
- 4.4 At all relevant junctures during the life of the certificate, the solicitor should check with their client whether there has been a change in their financial circumstances. The ethos being that it is better for the client to proactively notify LSA of any changes as, in a worst case scenario, they will be assessed to be outside scope and their certificate will be discharged. On discharge in this situation, the solicitor will continue to be paid to the date of discharge but the

Assisted Person will not become liable for those costs. In contrast, if an un-notified change is detected then the Agency can move to suspend and revoke the certificate which makes the Assisted Person personally liable for all legal costs incurred.

- 4.5 Examples of relevant junctures would be, before any amendment or authority request (including instructing senior counsel or seeking expert reports) is made to the Agency. These steps could increase the exposure of clients, in respect of the statutory charge (if applicable) as well as on revocation if changes in circumstances are not notified. Solicitors should confirm the position with the Assisted Person and make it clear on their request that there has been either no change in their clients financial circumstances since assessment or that there has been a change and a Change of Circumstances request uploaded with the relevant financial proofs.
- 4.6 Where an Assisted Person was assessed as being in receipt of a qualifying passporting benefit on application for Representation Higher, the Agency will conduct further checks to confirm that benefit remains in payment before considering any amendment or authority requests in a percentage of cases. The Agency is satisfied that this checking regime put in place will not delay processing times.
- 4.7 Where a properly constituted Change of Circumstances request is received, the Agency will ensure that it is given priority attention and will aim to determine the ongoing eligibility within 3 working days of the completed request.
- 4.8 The Agency will also be conducting routine checks on all certificates in respect of Representation Higher issued on the basis of the receipt of a qualifying passporting benefit and will also routinely conduct reviews on samples of means assessed cases which will involve us asking the Applicant to provide updated financial proofs in relation to their income and capital. Where non-cooperation occurs the Agency will move to revoke the certificate.
- 4.9 In any situation where information is withheld and the Agency subsequently discover same, this may result in a revocation which will mean that the Assisted Person becomes personally liable for the full extent of the legal costs.

## **5.0 Detection Phase (post payment SAU Process)**

- 5.1 Once a certificate has been paid, the case will fall into the potential pool of cases which will be sampled by the SAU.
- 5.2 The sample will be extracted by NISRA statisticians from all paid civil legal services cases with the exception of the following case types:
- Minor applicants
  - Prisoner applicants
  - Non means tested cases
  - Parole matters in Advice and Assistance and Representation Lower
  - Representation Higher certificates where the Assisted Person remained in receipt of a qualifying passporting benefit throughout the life of the certificate
  - All Representation Lower cases where on application, the Assisted Person was in receipt of a qualifying passporting benefit.
- 5.3 For Advice and Assistance matters which are sampled, SAU will contact the Applicant and seek that they verify both their income and capital for the assessment period. Those who obtained Advice and Assistance on the basis of receipt of a passporting benefit, will be required to produce verification to confirm only the capital element of the means test.
- 5.4 For Representation Lower matters, granted on the basis of a means assessment of an Assisted Person who was not in receipt of passporting benefits, SAU will require verification to confirm both the income and capital elements of the means test which was conducted on application.
- 5.5 For all Representation Higher cases which are sampled, SAU will follow their internal review processes in order to assess whether there has been any un-notified changes which would impact on financial eligibility. In summary, SAU will write to the Assisted Person and indicate that their file has been selected

for review. A date and time for a telephone interview will be set. During the telephone interview SAU will ask the Assisted Person to verify their financial position throughout the life of the certificate and will ask for certain documents to be produced to them.

5.6 SAU will return the result to LSA and confirm either:

- (a) No cooperation was achieved
- (b) Cooperation was achieved and no error was detected
- (c) Cooperation was achieved and an error was detected.

5.7 If an Assisted Person does not cooperate with SAU, the Agency will write to them and set out clearly the possible consequences of non-cooperation – in that a revocation could occur which would make them personally liable for the full extent of their legal fees – the amount paid by the Agency on foot of the certificate will be set out in the letter. If the Assisted Person then agrees to cooperate, the matter will be returned to SAU and they will complete the process and make a determination of either (b) or (c) above. If the Assisted Person fails to comply on the second occasion SAU will return the matter to LSANI with a result of (a) No cooperation was achieved – second attempt.

5.8 Depending on the result from SAU, the Agency will determine the next steps to be taken. This will be case specific and may include:

- (i) the discharge of a certificate
- (ii) the revocation of a certificate
- (iii) on revocation, LSA will seek to recover the full amount of the legal fees from the Assisted Person
- (iv) where appropriate, a referral to our Counter Fraud Unit for investigation.

5.9 If a certificate is to be discharged or revoked the Agency will comply with the requirements of regulations 22 and 26 of the [2015 General Regulations](#).



- 5.10 Practitioners should note the provisions of Regulation 29 of the General Regulations which state that once a certificate is revoked, the revocation cannot be uplifted if the bill has been paid. As all of these cases will have been paid before being sampled, where an Assisted Person seeks to co-operate post revocation e.g. after the debt is raised against them or enforcement of the debt is commenced, the Agency will be unable to uplift the revocation.
- 5.11 The discharge/revocation of a certificate may result in future applications for legal aid being impacted. The Agency has powers under [Regulations](#) 35(4), 41(4) and 49(3) to request that an applicant attend for interview in connection with an application and the use of this power will be considered in every subsequent application from an Applicant who previously had a certificate discharged or revoked due to this process.
- 5.12 While solicitors have no formal role in this process, as the case will be concluded, solicitors may be consulted by their clients in relation to the contact and request from SAU and/or the Agency. Solicitors are expected to encourage cooperation by their clients and to explain the responsibilities of the client to the legal aid fund and the consequences of non-cooperation.
- 5.13 The Agency strongly suggests that, at the conclusion of all matters funded through civil legal services, solicitors should formally notify clients that they could be contacted and that they should co-operate as failure to do so is likely to mean their certificate will be revoked and the assisted person will be liable for total costs. Same principle applies in Advice and Assistance, [Regulation](#) 31(5)-(7).
- 5.14 The Agency will be working in partnership with the Advice Sector in relation to these processes to allow them to advise any Assisted Persons who seek assistance.

## Summary:

- Applicants for legal aid are required to make full and candid disclosures of all of their income and capital to allow the means test to be applied.
- If a certificate is granted, Assisted Persons are under a statutory duty in representation higher cases to inform the Agency of any change in their financial circumstances which would impact on their eligibility.
- Legal Representatives should ensure that their clients are aware and understand their duties to the legal aid fund.
- Legal representatives should confirm whether there have been any changes to the Assisted Persons financial eligibility in representation higher cases before making any requests on a live certificate.
- If a change occurs in a representation higher case, it should be notified to the Agency via a Change of Circumstances request, which we will endeavour to have actioned within 3 working days.
- If an Assisted Person is deemed to be ineligible following a notified change then the certificate will be discharged, the legal representatives will be paid to the date of discharge and the Assisted Person will not become liable for the legal fees.
- At all levels of service, if any non-disclosure or untrue statements in relation to financial resources are discovered the Agency can revoke the certificate, the legal representatives will be paid to the date of revocation but the Agency will then pursue the Assisted Party for recoupment of the total fee.
- In Representation Higher matters, where an un-notified change of circumstances is detected by SAU or the Agency, the certificate will be revoked. In this circumstance, the legal representatives will be paid to the date of revocation but the Agency will then pursue the Assisted Party for recoupment of the total fee.
- SAU will conduct a review of a sample of paid and closed cases. The Assisted Person will be required to verify their financial eligibility from the date of application to the date of conclusion of the case.

- If an Assisted Person does not cooperate then the Agency will determine the next steps which may include revocation of the certificate and/or a referral to the Counter Fraud Unit for investigation.
- If an un-notified change is detected by SAU then the Agency will determine the next steps as set out above.
- Legal Representatives are expected to notify their clients at the end of their cases that they may be contacted by SAU and further to encourage their clients to cooperate with the SAU if the case is selected for review.

**LSANI**

**22 April 2021**