

LSANI - Guidance on Identifying, Measuring and Reducing Practitioner Error and Fraud

Introduction

1. This Guidance Note details the Legal Services Agency's (the "Agency", "LSA") approach to identifying, measuring and reducing practitioner error and fraud, as part of its' overall programme of work to address the fraud and error audit qualification on the Agency's statutory Annual Report and Accounts and ensure better accuracy and regularity in the payments we make. The Agency has had a system in place since January 2019 to identify, measure and reduce official error and fraud and introduced a system in respect of applicants' error and fraud in January 2021. The launch of the new practitioner initiative means that the Agency will have measures in place across all three sources of potential error and fraud. Since introducing official testing and measurement, the Agency has reported a £3.7m (66%) decrease in the level of error found. The applicant and practitioner workstreams will enable the Agency to quantify and report the level of error found within all areas year on year.

2. In addition, there is a working assumption that the Statutory Registration Scheme (SRS), to be introduced in the future, will build on the work of the practitioner error and fraud review work, in that, the sample of files to be reviewed as part of the SRS will seek to draw on the files reviewed as part of the Practitioner File Review. This approach is intended to reduce the overall cost of administering the SRS, avoid duplication of checks by the Agency and minimise requests to practitioners to provide files.

3. Following the approval of the SRS, and prior to the commencement of SRS compliance audits, the Agency will ensure that legal aid providers are fully informed of the audit process. This will be in the form of detailed guidance notes and other communications.

4. The approach set out in this note has been informed by the Practitioner Error and Fraud Pilot the Agency ran between 18 October 2021 and 04 February 2022. This revised guidance will be effective from 25 January 2023 onwards. The Agency has delegated the Practitioner File Review function to the Standards Assurance Unit (SAU) within the Department for Communities (DfC) who will conduct independent testing and measurement on the Agency's behalf. SAU were appointed as they are experts in this field and provide this function for a number of organisations across government as a result of experience in measuring other benefits. The Agency retains overall responsibility for the accuracy and regularity of all Legal Aid payments.

Background

5. The Agency's financial statements for 2021-22, which are the latest set of accounts certified by the Northern Ireland Audit Office (NIAO), were qualified in respect of fraud and error and provisions. In relation to fraud and error the Comptroller and Auditor General found material weaknesses in controls as stated in his certificate as follows:

- I. "Statistics produced by the Agency estimated £1.0 million of overpayments and £0.9 million of underpayments of legal aid costs were made during the year due to official error".
- II. "Further statistics produced by the Agency also estimated there to be £1.3 million of incorrect legal aid payments made due to applicant fraud and error" and "the Agency was unable to provide sufficient evidence to enable me to conclude that a material amount of legal aid expenditure had not been claimed fraudulently or in error by legal aid practitioners. There were no additional audit procedures that I could undertake to provide me with assurance as to the regularity of this expenditure. The scope of my audit was therefore limited in this respect, and I am unable to form an opinion on whether all of the remaining balance of expenditure on legal aid was in accordance with the purposes intended by the Assembly and that these financial transactions conformed to the authorities which governed them".

6. Losses resulting from practitioner error are still not quantifiable, therefore, it is imperative that practitioner file reviews are completed to ensure we can identify and address error and fraud from all potential sources.

Identifying and Reducing Error & Fraud

7. The approach to reviewing a practitioners' file (this is used as an umbrella term to include material held by solicitors and barristers outlined in paragraph 17) will be to check the information contained in a file against the relevant legislation, as listed in paragraph 12. If errors are identified SAU will notify the Agency which may give rise to queries with practitioners. The Agency will issue guidance periodically to all practitioners to help avoid future errors and this process should result in a reduction in error rates.

8. The review will consider the file to assess the consistency of the information provided on the Legal Aid Management System (LAMS) with that held on the practitioner's file, to identify omissions and determine whether the omissions or the withholding of information would have impacted upon the initial funding decision and the continual entitlement to legal aid.

9. In respect of billing, the review will assess the evidence on the file to support the claim submitted on LAMS.

Definitions of Error and Fraud

10. Following their review of the file, SAU will raise any issues of non-compliance with the Agency. It will be for the Agency to decide whether the non-compliance requires further investigation. While the Agency expects areas of non-compliance to be minor should serious concerns be raised the Agency will adopt the following definitions of error and fraud in conducting the practitioner file reviews:

Error: The practitioner has provided inaccurate or incomplete information or failed to report a change in the circumstances of the assisted person or the merits of the case immediately, which has caused a loss to the legal aid fund, however, the Agency

assesses the practitioner's intent was not fraudulent as there is no evidence that they are deliberately trying to deceive or mislead the Agency.

Fraud: The practitioner has knowingly made a false representation, failed to disclose information, and abused their position by means of a representation or conduct in order to gain or cause a loss to another. The following three circumstances may apply:

- (a) the applicant does not meet basic conditions for receipt of legal aid, or the level granted; *or*
- (b) it is reasonable to expect the practitioner to be aware of the effect on their client's entitlement of providing incomplete or wrong information; *or*
- (c) evidence the practitioner deliberately set out to falsely represent, failed to disclose information and/or abused their position to make a gain or cause a loss.

If the issues highlighted in the practitioner file review give rise to concerns about fraudulent activity, a separate review will be undertaken by the Agency's Counter Fraud Unit.

Legal Framework

11. Practitioners who engage in litigation funded by the legal aid fund are subject to the legal obligations, set out in the legal aid legislation and are required to engage with the Agency in a manner which ensures that the Agency can properly discharge its statutory functions.

12. Practitioner file reviews are subject to the following statutory powers and legal framework, which empowers the Agency to seek information and files from practitioners:

Criminal Legal Aid

- Articles 36 and 38A of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.
- Regulation 3 (2) of the Criminal Legal Aid (Disclosure of Information) Rules (Northern Ireland) 2015.

Solicitor Only

- Rule 7 of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005.
- Rule 6 (7) the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009.

Counsel Only

- Rule 10 of the Legal Aid for Crown Court Proceedings (Costs) Rule (Northern Ireland) 2005
- Rule 8 (6) the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009.

Civil Legal Aid

- Regulation 3 of the Civil Legal Services (Disclosure of Information) Regulations (Northern Ireland) 2015.
- Articles 12-14 and 34 of the Access to Justice (Northern Ireland) Order 2003.
- Regulation 12 (1) & 15 (2) of the Civil Legal Services (General) Regulations (Northern Ireland) 2015.

Sample Methodology

13. Northern Ireland Statistics and Research Agency (NISRA) statisticians within the Agency's Information and Analysis Unit (IAU) are responsible for developing and implementing statistical methodologies (sampling and extrapolation) to support the Fraud and Error Programme. Samples will be randomly selected for testing by NISRA statisticians using a stratified approach to adhere to our accepted statistical tolerances (95% confidence level and +/- 3 percentage points).

14. All categories of service – Advice and Assistance, Representation Lower and Higher Courts, Exceptionality and Criminal will be included within the pool of cases from which samples will be derived. The only matters being excluded are Criminal Court of Appeal and Criminal Supreme Court cases as there is no legislative basis that the Agency can rely on to request files in these case types.

15. Random sampling days will be selected in advance by NISRA to ensure independence in the sampling process.

16. A stratified random sampling technique will be used whereby a pre-determined number of cases will be randomly selected across each category of service, and further stratified by the claimed amount. This will ensure the overall sample is representative of the total population. At the start of each year, IAU will allocate the agreed annual sample across pre-calculated strata to ensure samples are representative of all eligible legal aid cases. This ensures that subsequent results are valid and statistically robust.

File Request

17. A file means papers, records, reports, correspondence, or other documentation, whether held in paper or electronic format, which is held by a practitioner in relation to the conduct of an individual case, for which there is a legal aid certificate. As a matter of ordinary revenue record keeping practitioners should hold financial information for seven years (current year plus six previous years), therefore, it is expected that practitioners will be able to produce sufficient records to substantiate any claim for payment.

18. When a case is selected for review, LAMS will issue an email notification to the practitioner who submitted the report on case payment request and the Account Administrator/s of the business requesting the practitioner to submit the file to the Agency within ten calendar days for review. The email notification will issue to the email address provided in the individuals LAMS account. No payment will issue until the file is received. If the file is not received within 21 calendar days of the original request the payment request will be suspended.

19. The Agency appreciates that in some cases, notably criminal cases, and in particular, those that have attracted grants of Exceptional Preparation hours, files may be voluminous due to the service of large bundles of Pages of Prosecution Evidence (PPE). We will not require these documents to be provided with the

original file if the Public Prosecution Service (PPS) has confirmed to us the page count for such PPE material in advance. It will be made clear in the message requesting the file if we have such confirmation. In relation to disclosure, which the PPS or others do not paginate and confirm the volumes, we will require the Disclosure Schedule only to be forwarded with the original file as this gives an indication of the page volumes. If the Disclosure Schedule is provided, we will not require the disclosure contents to be provided. However, we will be conducting randomised checks of such cases where the full Disclosure will be sampled. If the case is selected for such sampling, the practitioner will receive separate notification.

20. Similarly, in family cases containing voluminous medical records and third party reports we will not require sight of all records but a Disclosure Schedule to confirm the volume and type of material to substantiate payment for the amount requested.

21. The Agency further understands that practitioners often conduct business via email. Where a claim has been submitted for the payment of an email, we will expect to see evidence on the file of the existence of said email or an electronic copy. Further, we will expect any emails, which are pertinent to the initial or ongoing financial eligibility and/or merits of the case, to be on the file or included in the information that is provided to us for assessment.

22. Practitioners should send their original paper file to the Agency via post, electronically, secure courier or by hand delivery to LSA 3rd Floor, AIB Building, 92 Ann Street, Belfast BT1 3HH. Hand delivery of files must occur during office hours, currently 9am – 5pm. The Agency will not accept a photocopy of the file. If a copy file is sent to the Agency, it will be returned unprocessed. No payment will issue until the original file is received. This could result in the suspension of the payment request.

23. It should be noted that the Agency will not pay for any of the costs associated with the postage or time spent in the production of the file to us in exercising their power for the request of supporting documentation.

24. The practitioner should complete the “[File Details Form](#)” (which can be downloaded from the Agency’s website within the ‘[Legal aid supporting documents](#)’ area or by using the link in the notification message) and submit it with the file. This is a signed declaration that the full file has been submitted, save for documents not included as noted in paragraph 19 and 20 which should be set out in a schedule.

25. If your case is selected for review and you operate a digital case management system only please contact the Agency directly on CARB@lsani.gov.uk to discuss the options available to transmit the file to us. The Agency can receive information in all formats.

File Receipt

26. On receipt of the file, it will be retained until the full review has been conducted. If the file is required to be returned urgently, for example due to a pending appeal or transfer of proceedings from one court tier to another, the practitioner should contact the Agency via LAMS and set out the reasons why the file is required. If the reasons are accepted, arrangements will be made to return the file securely. All files will be held in line with the Agency’s information management policies and procedures (Paragraphs 37 and 38 refer) with only those involved in the process having access to the files.

File Review

27. Depending on the nature and matter of the case, the file will undergo a review about one or more of the following functional areas:

(1) means: Testing to assess financial eligibility is one aspect of determining if someone qualifies and continues to be eligible for legal aid– solicitor focussed.

(2) merits: Demonstration of the likelihood of success, the reasonableness of the costs and whether a reasonable person would use their own money to pay for the case.

(3) payment assessment: Check for accuracy of payment claim and evidence to support amount claimed.

28. Queries raised by the Agency should be answered within the normal 21-calendar day timeframe for query responses.

29. The review will seek to verify, based on the information contained in the file, that all relevant information was given to the Agency at the appropriate time, that there is evidence of all work claimed being done and to ensure payment accuracy.

30. If any discrepancies are detected in relation to the fees claimed, either through an under or over claim, these will be clarified with the practitioner in keeping with the Agency's business as usual practices for resolving an anomaly and reducing error.

Suspected Fraud

31. Under the Fraud Act 2006 and the Serious Crime Act 2007 the Agency, as the public body that administers publicly funds, has a legal obligation to detect and prevent fraud. Where an issue arises, which points to the possibility of fraud, the matter will be subject to the Agency's Fraud Referral Process and may be passed to the Agency's Counter Fraud Unit (CFU).

32. If a matter is referred to the CFU, they will investigate and where there is evidence of suspected fraud, will refer the matter to the Police. After engagement with the Police, the relevant Regulatory Body will be informed at the appropriate stage in line with the investigatory process. The Agency and CFU will continue to work closely with the Police and the Regulatory Body until the conclusion of the investigation.

Internal and External Audit

33. Practitioner error and fraud reviews and all associated work will be subject to review by Internal Audit on an annual basis. It will also form part of the annual NIAO Audit to inform its opinion on the Financial Statements of the Agency. Therefore,

several of the sampled files will also be reviewed by the auditors using the original files. If the audit takes place when the file is with the Agency then no further information will be sought from the practitioner, however, if the file has been returned to the practitioner, it will need to be resubmitted for the purposes of the audit.

File Return

34. When the file review, audit or any fraud investigation is completed, the original file(s) will be returned to the practitioner, and a message will issue via LAMS to confirm this. On receipt of the paper file, the practitioner should acknowledge safe receipt of same to the Agency via a case level message on LAMS using the drop down "*Practitioner File Review*".

Legal Professional Privilege Considerations

35. The Agency has the power to seek information including privileged information by virtue of the powers in the Regulations and the enabling provisions of the 1981 Order and 2003 Act as detailed in Paragraph 12 above. Practitioners should make applicants aware that their file could be selected for review as part of this process.

Data Protection and General Data Protection Regulation Considerations

36. In ensuring it complies fully with the General Data Protection Regulation (GDPR), the Agency has considered GDPR Recital 45, Article 6 GDPR and Section 8 of the Data Protection Act 2018 which cross refers with Article 6 (1) (e) of the GDPR. The Agency considers that the legal framework set out at Paragraph 12 above provides for the operation of the criminal and civil legal aid scheme. The scheme contains duties and responsibilities on the part of the Director and the Agency. Those duties arise by operation of relevant enactments in the form of the Act, Order and subsidiary regulations. The processing of personal data for a purpose which is related or ancillary to the exercise of such a function is *prima facie* lawful.

37. The Agency also applies all the Departments' and Governments' policies and procedures in relation to GDPR and Data Protection Act 2018 and has completed a

Data Protection Impact Assessment (DPIA), approved, by the Department of Justice Chief Information Officer.

Information Management and Security

38. When the Agency or SAU are in possession of the paper file it will be the Agency's responsibility to retain it securely and it will be stored in accordance with the organisation's data security procedures which align with all government information security obligations. The Agency is satisfied that the integrity of all data will be maintained throughout the review process with the use of secure couriers and information management policies and procedures.

Compliance

39. The Agency does not consider there are any legitimate reasons why a practitioner would not comply with the statutory obligations of the legal aid scheme.

40. Ongoing non-cooperation may result in the practitioner being required to submit their files on every occasion that a payment request is made until the Agency can be satisfied that full and accurate records are maintained and available to substantiate a claim to the legal aid fund.

Conclusion

41. A record of all findings will be retained centrally by the Agency's Compliance Audit and Risk Branch (CARB) who are responsible for managing the practitioner error and fraud workstream.

42. The outworking of the practitioner file reviews will be:

- identification of common errors where guidance will be provided to all practitioners to improve payment requests;
- identification of patterns of concern and potential indicators of fraud which will be reflected in guidance to Agency staff;
- enhancement of the proactive interventions to increase prevention and detection of errors and to shape the Agency's Error and Fraud Strategy; and

- estimation of losses in legal aid funding attributable to practitioners to address the account qualification so as the Comptroller and Auditor General can satisfy herself that material fraud and error by legal aid legal practitioners does not exist.

43. The content contained within this Guidance is the responsibility of the Agency. The Guidance is subject to review and the Agency will consult with the Regulatory Bodies when developing or updating such Guidance. The Agency will be responsible for applying any updates to the Guidance and communicating any changes relating to it.



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