

# **LSANI – Guidance on Identifying, Measuring and Reducing Applicant Fraud and Error using Future Overpayment Prevention Methodology**

## **1. Introduction**

- 1.1 This Guidance Note details the Legal Services Agency’s (“the Agency”, “LSA”) approach to identifying, measuring and reducing Applicant Fraud and Error using Future Overpayment Prevention (FOP) methodology, as part of its overall programme of work to address the fraud and error qualification on the Agency’s statutory Annual Report and Accounts.
- 1.2 The approach set out in this Guidance Note has been informed by the Applicant Fraud and Error Pilot the Agency ran from April 2021 until December 2021. This revised guidance will be effective from 5 April 2023 onwards and replaces all previous Applicant Fraud and Error Guidance previously published. The Agency has delegated some aspects of the FOP work to the Standards Assurance Unit (SAU) of 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. SAU are also involved in the Official Error and Practitioner Error workstreams within the Agency.

## **2. Background**

- 2.1 The Legal Services Agency (LSA) accounts for 2020-2021 were certified by the Comptroller and Auditor General (C&AG) on 6<sup>th</sup> July 2021 with a final Opinion and Report qualified in part due to error and fraud measurement in the legal aid system:

- i. *“statistics produced by the Agency estimating that £4.4 million of overpayments and £1.2 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”.*

2.2 Testing to assess the levels of Applicant Error and Fraud in the system commenced in April 2021 and a monthly sample of cases was drawn from January 2021 onwards. Within this process, SAU contacted Assisted Persons by telephone to seek to verify their financial eligibility, both from the date of their legal aid application and throughout the life of the legal aid certificate. Where an Assisted Person failed to cooperate with the process the entire value of their case was designated as an error. Given that the Applicant process looked at closed cases, there was a high level of non-cooperation from Assisted Persons which has resulted in a potentially inflated error figure.

2.3 In order to more accurately assess the true value of potential Applicant Error and Fraud the Agency have developed a Future Overpayment Prevention (FOP) process and the first sample of applications was selected in April 2022. The premise of this process is to identify and address errors and/or fraud during the life of the Certificate and before the Legal Aid Fund has incurred undue costs as a result.

2.4 It is essential to demonstrate that there are robust controls in place to prevent and detect error and fraud in respect of applications for civil legal services. 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 initial means assessment and continuing financial eligibility.

- 2.5 Criminal legal aid is not subject to applicant error and fraud measurement, as this is granted by the Court not the Agency. However, we will continue to support the Judiciary in those assessments through verification that applicants are in receipt of the benefits set out in the statement of means form.
- 2.6 This guidance sets out an overview of the new internal and independent processes, which will support this work.

### **3. FOP Measurement Methodology**

- 3.1 As Advice and Assistance and Representation Lower applications are not subject to future eligibility checking they will not form part of the FOP process. However, they will be subject to robust internal quality assurance checks at application stage. Practitioners are reminded of the importance of fully evidenced income and capital computations being uploaded within these application requests.
- 3.2 A monthly sample of 30 open Representation Higher cases with existing certificates will be selected for testing by NISRA statisticians using a stratified approach.
- 3.3 A number of case types will be excluded from the population to be sampled. These exclusions are:
- i. Cases granted on a passport benefit;
  - ii. Cases that did not require a means test;
  - iii. High Court and Immigration Bail;
  - iv. Cases where the assisted person was under 18 years of age;
  - v. Cases under one year old; and
  - vi. Cases with less than 6 months to run against the respective average lifecycle.
- 3.4 Once the sample is derived, the details of the Assisted Persons will be provided to SAU and they will write to the Assisted Person indicating they

will make telephone contact to discuss the Assisted Persons continuing entitlement to legal aid, confirm that the original financial assessment was carried out correctly and ensure that any changes of financial circumstances have been declared in accordance with the statutory duty on the Assisted Person set out in [Regulation 19 of the Civil Legal Services \(Financial\) Regulations \(Northern Ireland\) 2015](#) (“the 2015 Financial Regulations”).

- 3.5 Should the Assisted Person 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 will suspend their Certificate. Where a Certificate is suspended both the Assisted Person and Solicitor will be notified of the grounds for the suspension and it is expected that Solicitors will encourage their client to cooperate fully, even at this late stage. Should the non cooperation continue following the suspension the Agency will move to revoke the Certificate under [Regulation 26\(1\)\(d\) of the General Regulations](#). On revocation, the Assisted Person will become personally liable for the full amount of their legal fees up to the date of the revocation and full recovery action may be pursued by the Agency.
- 3.6 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 that they should co-operate if they are contacted by SAU or the Agency.

#### **4. FOP – Prevention Phase**

- 4.1 When considering making an application for legal aid, the client must be made aware by their 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.

- 4.2 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 Assisted Persons 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 fresh 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 must be a primary consideration for the solicitor when seeking funding for any steps in the proceedings under a certificate.
- 4.3 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.
- 4.4 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:
- “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.”
- 4.5 Solicitors should ensure that a complete financial picture is given to LSANI with the Application. Solicitors should make themselves conversant with the [Representation Higher](#) Guidance on completing Financial Eligibility on LAMS which sets out clearly what is required. Solicitors must NOT omit material

simply because they know the Agency is required to disregard certain income or assets.

- 4.6 Prior to submitting the LAMS application, the solicitor should interrogate the financial proofs to ensure that they are satisfied 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 avoid the Agency's Financial Eligibility Unit (FEU) having to issue queries to seek an explanation for same and speed up the assessment process.
- 4.7 Further, it is important that all financial proofs are uploaded to LAMS in the appropriate way and clearly labelled and named to allow the Assessors to quickly identify the appropriate information.
- 4.8 The Agency have also implemented a robust Quality Assurance Process within the FEU. This will not adversely impact on processing times.
- 4.9 On receipt of a Representation Higher application FEU conduct a financial assessment in accordance with the [2015 Financial Regulations](#) and will cross check and data match the application against data we can access from other Government systems.
- 4.10 If an offer of legal aid is made, the "Notes for Applicant" will be sent 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 any 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.
- 4.11 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. It is better for the client to proactively notify the Agency of

any changes as, in a worst case scenario, they will be assessed to be outside scope and their certificate will be discharged if the Assisted person has acted promptly in notifying the Agency. On discharge, in this situation, the solicitor will continue to be paid to the date of discharge and 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 to the date of revocation under [Regulation 26\(1\)\(c\) of the General Regulations](#).

- 4.12 Examples of relevant junctures where the Solicitor should check the financial eligibility 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 client's financial circumstances since assessment or that there has been a change and a Change of Circumstances request uploaded with the relevant financial proofs. If this is not clear on the request it may be queried back to confirm the position.
- 4.13 Where an Assisted Person was assessed as being in receipt of a qualifying passporting benefit on application for Representation Higher, the Agency will conduct routine checks to confirm that the benefit remains in payment before considering amendments or authority requests in a percentage of cases. The Agency is satisfied that this checking regime put in place will not delay processing times within our Key Performance Indicators.
- 4.14 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.

- 4.15 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 is seemed to have never been legally assisted and becomes personally liable for the full extent of the legal costs which will be pursued, if necessary, via the Courts.

## 5. FOP – Detection Phase

- 5.1 SAU will conduct an independent review in order to assess whether there have been any un-notified changes which would impact on the Assisted Persons' financial eligibility.
- 5.2 Initially, SAU will write to the Assisted Person and indicate that their file has been selected for review and will set a date and time for a telephone interview to take place. 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.
- 5.3 If an Assisted Person does not cooperate with SAU, the Agency will suspend the certificate under [Regulation 19\(1\)\(f\)](#) of the Civil Legal Services (General) Regulations (Northern Ireland) 2015, and write to them setting 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. If the Assisted Person fails to comply on the second occasion SAU will return the matter to the Agency for discharge/revocation action.
- 5.4 Depending on the determination by 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 and recovery of the full costs of the Certificate from the Assisted Person; and
- iii. where appropriate, a referral to our Counter Fraud Unit for investigation.

5.5 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, including any notice and appeal requirements.

5.6 The discharge/revocation of a certificate may result in future applications for legal aid by the Assisted Person 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.

5.7 While solicitors have no formal role in this process, 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.

5.8 The Agency strongly suggests that 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 or discharged and if revoked the assisted person will be liable for total costs.

## 6. Summary

6.1 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.

- 6.2 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.
- 6.3 Legal representatives should ensure that their clients are aware and understand their duties to the legal aid fund.
- 6.4 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.
- 6.5 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.
- 6.6 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.
- 6.7 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 may then pursue the Assisted Person for recoupment of the total fee.
- 6.8 SAU will conduct a review of a sample ongoing cases. The Assisted Person will be required to verify their ongoing financial eligibility to SAU.
- 6.9 If an Assisted Person does not cooperate with the SAU process 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.

- 6.10 If an un-notified change is detected by SAU then the Agency will determine the next steps as set out above.
- 6.11 Legal Representatives are expected to notify their clients 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**  
**05 April 2023**