

# Protocol for Funding of Legal Representation by the Inquiry



## 1. Introduction

1.1 This protocol relates to:

- (a) applications for an award under section 40(1)(b) of the Inquiries Act 2005 (“the Act”) in respect of expenses incurred or to be incurred in respect of legal representation ('legal expenses'); and
- (b) following a decision to make an award, the assessment of legal expenses which become payable under it.

1.2 It explains who is eligible to apply for legal expenses, the application process, how applications are decided and how the amount of legal expenses is calculated and paid.

1.3 The procedures set out in this Protocol are subject to, and should be read in accordance with:

- (a) the relevant provisions in the Act (including sections 17 and 40);
- (b) the determination issued by the Cabinet Secretary for Health and Sport under section 40(4) of the Act ('Minister's Determination'), a copy of the text of which is attached as Annex 1 to this Protocol; and
- (c) Rules 17 to 28 of the Inquiries (Scotland) Rules 2007 (SSI 2007/560) (“the Rules”).

## 2. Eligibility For An Award Of Legal Expenses

2.1 In terms of section 40 of the Act, a person is eligible to be considered for an award if they are:

- (a) a person attending the Inquiry to give evidence or to produce any document or other thing; or
- (b) a person who, in the opinion of the Chair, has such particular interest in the proceedings or outcome of the Inquiry as to justify such an award.

## 3. The Application Process

3.1 Applications for an award of legal expenses must be made in writing by completing the application form which can be found on, and downloaded from, the Inquiry’s website. (A copy of the form is attached as Annex 2 to this Protocol.)

3.2 An application must be submitted before any substantial legal work is carried out by the legal representative. As a general rule, awards will cover only legal

expenses for work carried out after the date of the award. If it is sought to include funding for expenses incurred prior to the date of the application, that must be made clear in the application and an explanation given as to why it was necessary to carry out the work ahead of the application being made. In accordance with the Minister's Determination, an award in respect of expenditure incurred prior to notification of the Chair's award can only be made in exceptional circumstances and after obtaining the agreement of the Scottish Ministers.

3.3 An application may be made in relation to all work in relation to the Inquiry to be carried out by the applicant's legal representatives, particular aspects or types of work only or for particular phases of the Inquiry only. The scope of the application should be specified in box 6 of the application form. Making an application only for particular aspects or types of work, or phases of the Inquiry, does not preclude the making of a further application in respect of other types, aspects or phases at a later date.

3.4 The form can be completed by the legal representative or the applicant.

## **4. How an Application is Decided**

4.1 For those meeting the eligibility criteria set out in section 2 above, the Chair must balance the need to act fairly with the need to avoid any unnecessary cost, and must comply with the Act, the Rules and the conditions in the Minister's Determination.

4.2 Subject to all of those, the Chair will take the following factors into account when determining whether or not to grant an application:

- (a) the financial resources of the applicant;
- (b) whether it is in the public interest to grant the application; and
- (c) whether it is necessary, fair, reasonable and proportionate to grant the application.

4.3 When considering financial resources, the Chair will take account of any alternative sources of funding that may be available, such as organisations that can assist with payment of fees. This includes, for example, trade unions, professional bodies and insurance companies.

4.4 In order to consider whether the financial resources available to the applicant are sufficient to meet their legal expenses without creating financial hardship, prior to determining any application, the Chair may require a detailed estimate from the legal representative of the likely costs that would be incurred in the provision of legal representation for the purposes of the Inquiry, either for all work to be carried out or for specific parts of it.

4.5 Having regard to the criteria set out at paragraphs 4.2(b) and (c), the Chair considers it likely that awards will only be made in cases where:

- (a) the applicant:

- i. played, or may have played a direct and significant role in relation to the matters set out in the Inquiry's terms of reference; and/or
- ii. has a significant interest in an important aspect of the matters set out in those terms of reference; and/or
- iii. may be subject to explicit or significant criticism during the Inquiry's proceedings or in the report, or in any interim report; and

- (b) it is fair and reasonable that the applicant seek legal representation, and in doing so would be prejudiced if there were to be any doubt about the availability of funds by which such representation can be funded

4.6 Given all of the above considerations, legal expenses of substantial bodies and of individuals whose expenses can be met by other bodies will not be met by the Inquiry, unless there are special circumstances which justify a call on public funds.

4.7 The Chair's decision in respect of any application is final.

## **5. The Chair's Decision**

5.1 The Solicitor to the Inquiry will notify the applicant and their legal representative in writing of the Chair's determination.

5.2 Where an award is made, the notification of the Chair's determination will specify the terms of the award which may include (but are not limited to) the following:

- (a) the nature and scope of the work that will be funded;
- (b) the size and composition of the recognised legal representative's legal team to be engaged, including the seniority and number of counsel where that is agreed by the Chair to be necessary;
- (c) the hourly rates to be paid in respect of each member of the legal team;
- (d) the maximum number of hours which will be paid for any working day or working week, even where the number of hours actually worked exceeds that maximum;
- (e) that the award is subject to the condition that payment will only be made for work that is properly evidenced and can be identified as having been done in an efficient and effective manner, avoiding unnecessary duplication and making the best use of public funds;
- (f) that disbursements in excess of £100 (net of VAT) will not be paid unless authorised in advance by the Solicitor to the Inquiry. Disbursements under £100 will only be paid where the expenditure is adjudged to have been reasonable and necessary and where they are supported by evidence of payment;
- (g) the frequency with which bills must be submitted to the Chair; and
- (h) the form in which bills must be submitted.

5.3 Examples of the type of work that the Inquiry will fund include:

- (a) considering initial instructions;

- (b) advising the applicant in relation to interviews with Inquiry staff or the making of a witness statement, and/or providing documents or other evidence to the Inquiry;
- (c) considering the material contained in Inquiry documents so far as is necessary to represent the applicant's interests properly;
- (d) advising the applicant about any Inquiry warning letter, if received;
- (e) making an opening statement at a hearing, where permitted;
- (f) representing the applicant during their oral evidence (and the evidence of others, should that be necessary);
- (g) making an application for permission to examine any witness giving oral evidence in the circumstances specified by the Chair; and
- (h) making final submissions on behalf of the applicant, where necessary.

5.4 Even in cases where an application is made in respect of legal expenses for all work carried out in relation to the Inquiry, the Chair may determine that they should only be paid in respect of certain specific categories of work, or in relation to a particular phase of the Inquiry. This will be made clear in the notification of the Chair's determination. However, if the award is restricted in this way, that does not preclude a further application being made later in respect of other categories of work or phases of the Inquiry.

5.5 The Inquiry will not fund any work which does not fall within the scope of the award. In particular, the Inquiry itself is inquisitorial and investigative in nature and legal representatives will not be paid for investigative work, or work in relation to obtaining expert reports, unless the Chair gives express permission in advance for such work to be carried out.

5.6 The Minister's Determination restricts the maximum hourly rates to be paid to solicitors and counsel (including a solicitor advocate) to the following maximums (exclusive of VAT):

- (a) Senior Counsel (i.e. a Q.C. in any jurisdiction): £200.
- (b) Junior Counsel: £100.
- (c) Solicitor with over 8 years' post qualification experience: £150.
- (d) Solicitor with over 4 years' post qualification experience: £125.
- (e) Other solicitors and fee earners of equivalent experience: £100.
- (f) Trainee solicitors, paralegals and other fee earners: £75.

5.7 The Minister's Determination restricts the maximum number of hours which will be paid to 40 hours per week in normal circumstances, and a maximum of 60 hours per week during oral hearings and in the two month period prior to such hearings where an increase in hours is justified. It also specifies that travel time will be paid at the full hourly rate when work has been carried out during this time. Otherwise travel time is restricted to 50% of the hourly rate. Regard should be had to the provisions of the Minister's Determination in regard to these points.

## **6. Changes to Legal Representation**

6.1 If there is a change of legal representation, the Solicitor to the Inquiry must be informed as soon as possible.

6.2 If there is more than one change of legal representation, the Chair may determine that it is no longer appropriate for the Inquiry to fund the legal representation.

## **7. Determining the Amounts Payable Under An Award**

7.1 Where an application is made to the Chair for payment following on an award of legal expenses, he will refer the application to the Solicitor to the Inquiry (“the Solicitor”) for an assessment of how much of the amount is to be paid. The procedure for assessing the amount to be paid is specified in detail in Rules 21 – 28 of the Rules, to which reference should be made. The following is intended only as a brief guide to the procedure.

7.2 In assessing the amount to be paid, the Solicitor will consider:

- (a) whether the work falls within the scope of the award;
- (b) whether any conditions set in the decision by the Chair have been satisfied;
- (c) whether the legal representative was approved by the Chair before the work was carried out;
- (d) whether the work done was necessary, fair, reasonable and proportionate;
- (e) whether it was done in a cost-effective and efficient way, and without duplication.

7.3 The Solicitor will write to the legal representative and to the applicant following his assessment to confirm how much will be paid.

7.4 If the Solicitor determines that the full amount should be paid, this is called a “final assessment”. The legal representative must submit an invoice for this full amount to the Inquiry which will then make payment.

7.5 If the Solicitor determines that a lesser sum should be paid, this is called an “initial assessment”.

7.6 If the applicant agrees with this initial assessment, the Solicitor must be informed in writing. The legal representative must then submit an invoice for this sum to the Inquiry which will then make payment.

7.7 If the sum in this initial assessment is not agreed by the applicant, the Solicitor must be informed of this in writing within 21 days of the date of the initial assessment.

7.8 The Solicitor will respond in writing, setting out which items he objects to and why, and proposing alternative amounts for each of those items.

7.9 A reply to this must be submitted in writing to the Solicitor within 21 days of the date of the Solicitor’s proposal to confirm whether this proposed sum is agreed or not.

7.10 If the Solicitor’s proposal is agreed, the Solicitor will make a “final assessment” for this agreed sum. The Solicitor will send the final assessment in writing to the legal

representative and to the applicant. The legal representative must then submit an invoice for this sum to the Inquiry which will then make payment.

7.11 If this proposed sum is not agreed, the Chair will decide how the matter is to be dealt with. There are two options open to the Chair, namely:

- (a) to refer the matter to the Auditor of the Court of Session who will decide what is a reasonable amount for the Inquiry to pay. He will do this holding a review hearing which the legal representative will attend with the opportunity to make oral submissions; or
- (b) for the Chair to decide what is a reasonable amount for the Inquiry to pay and require the legal representative to issue a final assessment for that amount.

7.12 The legal representative must submit an invoice for the amount of the final assessment that has been made by either the Auditor or the Chair to the Inquiry which will then make payment.

7.13 If the time limits mentioned in sub-paragraphs 7.7 and 7.9 are not met, a final assessment will be made by the Solicitor to the Inquiry which is no longer open to challenge. The legal representative must then submit an invoice for the final assessment to the Inquiry which will then make payment.

## **8. Further information**

8.1 All applications for an award, queries about any of the above, or any other matter related to the funding of legal representation should be sent to the Solicitor to the Inquiry at [legal@hospitalsinquiry.scot](mailto:legal@hospitalsinquiry.scot).

8.2 Failure to comply with the procedures set out in this protocol may result in payment being delayed or refused.

## **9. Version control**

9.1 This version of the Protocol for Legal Representation Funded by the Inquiry is dated 12 March 2021 and is issued under the authority of the Chair of the Scottish Hospitals Inquiry. It is the first version of this Protocol.

## **Annex 1**

### **DETERMINATION BY MINISTERS UNDER SECTION 40(4) OF THE INQUIRIES ACT 2005**

**Public Inquiry to consider the planning, design, construction, commissioning and, where appropriate, maintenance of both the Queen Elizabeth University Hospital Campus (QEUH), Glasgow and the Royal Hospital for Children and Young People and Department of Clinical Neurosciences (RHCYP/DCN) Edinburgh.**

### **NOTICE TO THE CHAIR OF A DETERMINATION BY THE SCOTTISH MINISTERS UNDER SECTION 40(4) OF THE INQUIRIES ACT 2005**

1. In respect of the Inquiry into the construction of the Queen Elizabeth University Hospital Campus, Glasgow and the Royal Hospital for Children and Young People and Department of Clinical Neurosciences, Edinburgh, chaired by the Right Honourable Lord Brodie QC PC in terms of the Instrument of Appointment in his favour dated 29 June 2020 (the “Inquiry”), the Scottish Ministers have determined under Section 40(4) of the Inquiries Act 2005 (“the 2005 Act”) that the power of the Chair to make awards under Section 40 of the 2005 Act to persons eligible under Section 40(3) of that Act shall be subject to the following conditions and qualifications.

2. In respect of legal representation (Section 40(2)), the conditions and qualifications are:

a) Awards in respect of legal representation may only be made in circumstances in which the Chair considers it necessary, fair, reasonable and proportionate for such an award to be made.

b) Any award must be subject to the condition that payment will only be made for work that is evidenced and can be identified as having been done in an effective and efficient manner, avoiding unnecessary duplication and making the best use of public funds.

c) Awards may only be made in respect of legal representation provided by one or more named legal representatives whose involvement has been approved in advance by the Chair. The Chair must approve the size and composition of any legal team to be engaged, including the seniority and number of any counsel where that is agreed by the Chair to be necessary. An award in respect of costs associated

with work carried out by legal representatives who are not approved in advance of the work being carried out will not be met.

d) Any award must specify the nature and scope of the work for which the award is to be made. Payment will not be made in respect of work that does not fall within the specified scope. An Inquiry under the 2005 Act is inquisitorial in nature and legal representatives will not be paid for investigative work or work in relation to obtaining expert reports unless the Chair gives express permission in advance for such work to be carried out.

e) Where the Chair has determined that an award in respect of legal representation should be made, the legal representatives will agree in advance, with the Solicitor to the Inquiry, hourly rates for counsel and solicitors, subject to the following maximum hourly rates, which are exclusive of VAT:

I. Senior Counsel (whether a member of the Faculty of Advocates or a solicitor advocate): £200.

II. Junior Counsel (whether a member of the Faculty of Advocates or a solicitor advocate): £100.

III. Solicitor with over 8 years' post qualification experience: £150.

IV. Solicitor with over 4 years' post qualification experience: £125.

V. Other solicitors and fee earners of equivalent experience: £100.

VI. Trainee solicitors, paralegals and other fee earners: £75.

f) The maximum number of hours that can be taken into account by the Chair in respect of a legal representative for the purposes of determining the level of an award shall be capped at 40 hours per week; however in exceptional circumstances the Solicitor to the Inquiry may authorise an increase in the weekly cap up to 60 hours for counsel or a solicitor during the oral hearings and for a two month period before they commence where he is satisfied that such action is justified in all the circumstances, for example, when the work involved in any week clearly needs to exceed 40 hours. Travel time may be paid subject to the limits in paragraph (e) where work is undertaken during the journey. If work cannot be undertaken during the journey then 50% of the hourly rate limits set out in paragraph (e) may be paid. If travel time is paid, it will count towards total hours chargeable for the purposes of limits on hours to be applied by virtue of this paragraph. Awards must not be made in respect of hours worked in excess of the limits set down in this paragraph.

g) In respect of paragraph (f) of this notice:

I. No unused hours in any week may be set off against any other week.

II. A week shall be taken as commencing on Sunday and ending on Saturday.



- h) Expenditure incurred before notification of the Chair’s award of funding or expenditure in excess of the terms upon which approval is granted will not be recoverable. In exceptional circumstances, and after obtaining Scottish Ministers’ agreement, the Chair may make an award in respect of expenditure incurred before notification of the Chair’s award subject to the terms of paragraph (d).
3. In respect of awards in relation to compensation for loss of time, or expenses incurred in attending, or otherwise in relation to the Inquiry, (Section 40(1)), the conditions and qualifications are:
- a) Travel and subsistence rates as they apply to Scottish Government employees apply within the United Kingdom. Rail travel would be reimbursed at standard class rate and air travel at economy class rate.
  - b) Awards in respect of compensation for loss of time may only be made:
    - I. In circumstances in which the Chair considers it necessary, fair, reasonable and proportionate for such an award to be made; and
    - II. Where the person to be compensated would otherwise face actual financial loss.
  - c) The maximum hourly rates for waiting time by legal representatives shall be half of their hourly rate agreed in advance with the Solicitor to the Inquiry per paragraph 2(e) above.
  - d) Awards for travel expenses or compensation for loss of time shall only be made for persons from outside the UK where the Chair is satisfied that their travel is essential for the fulfilment of the Inquiry’s terms of reference

## Annex 2 - Application for Legal Representation Funded by the Inquiry

<b>1. Your name:</b>
<b>2. Your status (are you applying on your own behalf, or for an organisation or body, or as a representative of a group?)</b>  <b>Please indicate whether you have been granted core participant status by the Inquiry: Yes/ No</b>
<b>3. Your contact details:</b>  <b>Address:</b>  <b>Email:</b> <b>Phone:</b> <b>Your preferred way for the Inquiry to contact you:</b>
<b>4. Contact details of your lawyer:</b> <b>Name:</b>  <b>Address:</b>  <b>Email:</b> <b>Phone:</b>
<b>5. Why do you consider that legal representation is necessary? If it is thought necessary to engage the services of counsel, please explain why.</b>
<b>6. The scope and estimated duration of the legal representation for which the award is sought</b>
<b>7. Your financial resources</b>  <b>1. Are you in receipt of any social security benefit (including tax credit) or retirement pension? (If so you need not answer questions 2 and 3)</b>  Yes/ No

**2. If you are employed or self-employed, do you have a disposable income in excess of £2,500 per month? (“Disposable income” is your after tax take home pay, less the amount you pay in council tax and rent or mortgage payments. So if you take home £3,000 per month, pay rent/ mortgage payments of £500 and average council tax of £150, your monthly disposable income is £3000-£500-£150=£2350, so your answer is “No”)**

Yes/ No

**3. Do you have savings/ investments in excess of £16,000?**

Yes/ No

**Please be aware that answering “Yes” to questions 2 or 3 does not exclude the possibility of an award of legal expenses. In determining applications for assistance with legal expenses, the Chair is required to consider the financial resources of the applicant. The questions above are designed to gather some basic information to allow the Chair to do so. If you have answered “Yes” to questions 2 or 3, we may have to ask you for more details about the financial resources available to you, but your application will not be rejected on grounds of financial resources without us so doing.**

**7. Are there other ways you could get help with funding to pay your lawyer’s fees? Examples include through a Trade Union or by an insurance company. Please provide details.**

**8. Please explain why you meet the criteria set out in paragraph 4.4 of the Protocol for Legal Representation Funded by the Inquiry or, in so far as you do not, why it is in the public interest to grant your application and why it is necessary, fair, reasonable and proportionate to do so (as specified in paragraph 4.2 of the Protocol).**

**9. Details of legal representation  
Please provide information about**

**(a) the type of work your legal team will do:**

**(b) the names of you’re the legal firm representing you and the legal team and their years of post-qualification experience:**

**(c) your lawyer’s hourly rates (see paragraph 5.6 of the Protocol):**

**(d) the estimated time to be spent monthly by your lawyer(s) on Inquiry work (may be a range):**

**(e) any other anticipated expenses relating to legal representation (for example travel expenses and photocopying):**

**10. Any other information you wish to provide in support of your application:**

**DECLARATION**

**I confirm that the information I have given in this application form (and any other documents I provide with it) is true and correct to the best of my belief and knowledge.**

**Your signature:**

**Print full name:**

**If form completed on behalf of applicant by legal representative, name of law firm and position held within the firm:**

**Date:**

Send completed forms by email to: [legal@hospitalsinquiry.scot](mailto:legal@hospitalsinquiry.scot)