

Protocol – Costs

Protocol for representation and the costs of legal representation when funded at public expense

Granting of Representation

1. The granting of representation will be dealt with separately to the question of funding and will be dealt with by the Inquiry on application. Representation will only be granted to certain witnesses, and to those parties who have a genuine interest in the business of the Inquiry and where the Chairman considers representation is necessary.
2. Where a witness or party is granted representation the legal representative's role is likely to be in relation to some or all of the following matters only: consideration of initial instructions; advising the client in relation to the making of a witness statement and/or providing evidence to the Inquiry; consideration of evidence in the Inquiry bundle (or limited bundle) so far as is necessary to represent the client's interests; representation of the client during their evidence (and the evidence of others should that be necessary), and the making of final submissions where necessary.
3. An Inquiry bundle of evidence will be prepared once the Inquiry has gathered in all documentation and witness statements and, subject to their giving a suitable confidentiality undertaking, the legal representatives of witnesses or parties will receive a copy of that bundle for use in preparation for, and during the Inquiry hearings. In some cases only a limited Inquiry bundle will be provided, for example where one witness is represented, when the bundle will be limited to the evidence related to that one client's evidence. The Inquiry bundle, together with any updates that may be necessary will be distributed in electronic format on compact disc. Hard paper copy will only be supplied in the case of late papers where electronic supply is not practicable.

Public funding for legal representation

4. From 23rd November 2005, the date on which the Inquiry was converted to an Inquiry under the Inquiries Act 2005, the Inquiry Chairman has power to make an award in respect of funding for the legal representation of any party or witness to the Inquiry.
5. Applications for funding have to be made to the Inquiry and will only be considered in accordance with paragraph 9 below. Funding will be granted to witnesses to cover the reasonable cost of legal assistance to enable them to prepare for, and deliver, their evidence. In the event of the cost of assisting a witness in delivering his/her evidence being met, the Inquiry will determine how that might best be done at reasonable cost. The Chairman will also consider awarding the cost of legal representation of a party from public funds where the normal criteria for such funding are met. These criteria evolve from a statement of the Attorney General made on 29 January 1990, in answer to a Parliamentary Question, when it was said:

“So far as the costs of legal representation of parties to any inquiry are concerned, where the Government have a discretion they always take careful account of the

recommendation on costs of the tribunal or inquiry concerned. In general, the Government accept the need to pay out of public funds the reasonable costs of any necessary party to the inquiry who would be prejudiced in seeking representation were he in any doubt about funds becoming available. The Government do not accept that the costs of substantial bodies should be met from public funds unless there are special circumstances.”

6. The question of funding of representation of parties arises only in respect those who may face potential criticism from the Inquiry and in limited other special circumstances. The Chairman will normally award funding only if such a party is not a substantial body, is at risk of criticism or is likely to be prejudiced if it were not represented and has no other means of paying for representation.

7. In making awards in respect of the cost of legal representation, the Inquiry Chairman may be subject to conditions or qualifications imposed by the Secretary of State for Northern Ireland under section 40 (4) of the Inquiries Act 2005.

8. Any costs incurred prior to 23rd November 2005 can only be considered by negotiation with the Solicitor to the Inquiry who will liaise with the Secretary of State for Northern Ireland. Prior to that date, funding was a matter solely for the Secretary of State and, ultimately, he will determine whether or not any payments should be made for costs incurred.

The basis of the payment of costs where public funding is agreed

9. In those cases where public funding of legal representation is awarded by the Chairman, certain conditions will apply. These are as follows:

a. The legal representatives of the witness or party will agree in advance, with the Solicitor to the Inquiry, the size and composition of the legal team to be engaged, including the seniority and number of counsel where that is agreed to be necessary.

b. The legal representatives of the witness or party will agree in advance, with the Solicitor to the Inquiry, hourly rates for counsel, solicitors and paralegals.

c. Capping of legal fees will be applied whereby legal teams (including counsel) will be capped as to the maximum number of hours that can be charged for any working day or working week, even though the number of hours actually worked exceeds that maximum.

d. The extent and nature of the work to be publicly funded will be agreed in advance with the Solicitor to the Inquiry. This is likely to be in relation to some or all of the following matters only: consideration of initial instructions, advising the client in relation to the making of a witness statement and/or providing evidence to the Inquiry, consideration of the evidence in the Inquiry bundle so far as is necessary to represent the client's interests, representation of the client during their evidence (and the evidence of others should that be necessary) and the making of final submissions where necessary. Normally, a witness' or a party's legal representatives will not be paid for investigative work as this is the role of the Inquiry. Similarly, payment will

not be made for the obtaining of things such as expert reports. Once again, these are matters for the Inquiry.

e. Disbursements in excess of £100 will not be paid unless authorised in advance by the Solicitor to the Inquiry. Disbursements under £100 will only be paid where the expenditure was reasonable and necessary and where they are supported by evidence of payment.

f. In some cases an overall cap on the amount of legal costs to be incurred in respect of funding for any witness or party will be agreed in advance. Where this happens the legal representatives of the witness or party receiving funding will be expected to contain all bills within that total amount, unless there are exceptional circumstances, which must be brought to the attention of the Solicitor to the Inquiry as soon as they are identified.

g. Expenditure incurred before notification of the Chairman's award of funding and agreement with these terms, or expenditure in excess of the terms upon which approval is granted will not normally be recoverable.

h. Legal representatives funded at public expense must submit to the Solicitor to the Inquiry monthly accounts together with worksheets providing sufficient detail of the hours worked and work carried out by each member of the team so that the Solicitor can properly assess the bills. Counsel's fee notes must also be submitted on a monthly basis and those fee notes must be supported by details of precisely what work was done and how much time was spent on it. A general claim for "preparation" will not be acceptable.

i. All legal representatives will be expected to work in a cost-effective and economic manner and avoid unnecessary duplication of work and all work that is not reasonably necessary for the representation of the client.

j. In some cases the Inquiry will not allow separate representation and in some cases the Inquiry may decide that the interests of certain witnesses when delivering their evidence can be adequately protected through an appointment by the Inquiry.

k. The Solicitor to the Inquiry will consider the bills and the principles set out in subparagraph (d) above will apply to that consideration. In some cases the Solicitor to the Inquiry may consult with the Treasury Solicitor's Costs Department who may also scrutinise the bills.

l. Bills will be considered in accordance with the standard basis and only those costs which are fair, reasonable and proportionate will be allowed.

m. Where agreement on any bill cannot be reached with the Solicitor to the Inquiry and/or the Treasury Solicitor's Costs Department, the Senior Costs Judge of the Supreme Court Costs Office of England and Wales will normally be asked to adjudicate and the legal representative receiving funding will be required to agree, in advance, that s/he will be bound by any such adjudication. The Solicitor to the Inquiry

will honour and approve for payment any adjudication of the Senior Costs Judge under this paragraph.

n. Failure to agree to any of the matters set out above and in this protocol may result in payment being refused.