

# **The Inquiry into Historical Institutional Abuse 1922 to 1995**

## **Costs Protocol to be followed by the Inquiry into Historical Institutional Abuse 1922 to 1995 relating to costs and expenses (including for the cost of legal representation) at public expense**

**(Applicable from 1<sup>st</sup> December, 2015)**

### **Introduction**

1. This Costs Protocol should be read with the HIA Inquiry's Procedural Protocol.
2. The powers of the HIA Inquiry are contained in the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013 ("the Act"), and in the Inquiry into Historical Institutional Abuse Rules (Northern Ireland) 2013 ("the Inquiry Rules").
3. The Act specifically requires the Chairman, in making any decision as to the procedure or conduct of the HIA Inquiry, to act with fairness and with regard to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).
4. This Costs Protocol ("the Protocol"), which is subject to, and must be read in conjunction with, sections 14, 15 and 21 of the Act, and the Inquiry Rules, is intended to provide general information and guidance as to how the Inquiry will deal with matters relating to costs and expenses. It is not intended to cover every eventuality that may arise.
5. The Protocol does not apply to that part of the HIA Inquiry described as the Acknowledgement Forum. Under the terms of reference the Acknowledgement

Forum is a separate part of the HIA Inquiry structure. For convenience, and to distinguish the investigative role of the HIA Inquiry from the Acknowledgement Forum, the investigative part of the HIA Inquiry will be referred to throughout this Protocol simply as “the Inquiry” to distinguish it from the Acknowledgement Forum.

### **The Power to Award Costs and Expenses at Public Expense**

6. Section 14 of the Act gives the Chairman power to award to a person such amounts as the Chairman thinks reasonable as compensation for loss of time, or for expenses properly incurred, in assisting the Inquiry.
7. The power to make such an award under section 14 of the Act includes power, where the Chairman considers it appropriate, to award amounts in respect of legal representation of persons assisting the Inquiry.

### **Eligibility for an Award**

8. A person is eligible for an award in respect of compensation for loss of time or expenses only if the person:
  - a. is giving evidence to the Inquiry or attending the Inquiry to produce any document or thing; or
  - b. in the opinion of the Chairman has such a particular interest in the proceedings or outcome of the Inquiry as to justify such an award.

### **Matters to be considered when deciding whether to make an award**

9. In making any decision about whether to award compensation for loss of time or expenses at public expense the Chairman will take the following into account:

- a. the financial resources of the applicant;
- b. whether making an award is in the public interest;
- c. his duty to act with fairness and with regard to the need to avoid any unnecessary cost;
- d. any conditions or qualification imposed by the sponsor department (OFMDFM) in respect of the making of awards and notified to the Chairman.

10. The factors which the Chairman may consider, when deciding whether making an award is in the public interest, include:

- a. whether the individual played, or may have played, a direct and significant role in relation to the matters set out in the Inquiry's Terms of Reference;
- b. whether the individual has a significant interest in an important aspect of the matters set out in those Terms of Reference;
- c. whether the individual may be subject to significant criticism during the Inquiry's proceedings or in any report by it;
- d. whether it is necessary that the individual should have legal representation before the Inquiry;
- e. further to d above, if the Chairman considers legal representation is necessary, whether the individual would be prejudiced in seeking representation if there were to be any doubt about funds becoming available and there are no other means by which such representation can be funded;

- f. whether it is fair, reasonable, and proportionate for the costs of the legal representation to be borne by the public purse.

11. In light of the above, the Chairman does not expect to receive applications for compensation for loss of time or expenses, including for legal representation, from Government Departments, or other public bodies, or private individuals or bodies who have access to other sources of funding, including funding from insurance companies or defence associations.

12. Further, the Chairman cannot make an award to any institution by way of compensation for loss of time. In respect of expenses, an award can only be made in the limited circumstances set out in Rule 23(5) of the Inquiry Rules.

13. In addition Rule 23(6) of the Inquiry Rules prohibits the Chairman from making an award in respect of an individual's expenses in respect of legal representation where the Chairman considers that an institution might reasonably be expected to meet those expenses.

14. If the Chairman makes an award it will be paid by OFMDFM.

### **The Funding of Legal Representation at Public Expense**

15. Awards for expenses in respect of legal representation will only be for work:

- a. that is within the Inquiry's terms of reference. Those terms are set out in Appendix A to this Protocol and include the following:

“The NI Executive's Inquiry and investigation into historical institutional abuse will examine if there were systemic failings by institutions or the state in their duties towards those children in their care between the years of 1922 - 1995.

For the purposes of this Inquiry “child” means any person under 18 years of age;

“institution” means any body, society or organisation with responsibility for the care, health or welfare of children in Northern Ireland, other than a school (but including a training school or borstal) which, during the relevant period, provided residential accommodation and took decisions about and made provision for the day to day care of children.”;

- b. which is necessary, fair, reasonable, and proportionate in all the circumstances;
- c. which is conducted in a cost effective and efficient manner, and without duplication.

### **The Scope of an Award in respect of funding for Legal Representation**

16. Where the Chairman decides to make an award, it will normally be limited to a recognised legal representative having a role in relation to some or all of the following matters:

- a. considering initial instructions;
- b. advising the client in relation to the making of a witness statement, and/or otherwise providing evidence to the Inquiry, in accordance with any request made by the Inquiry, whether under Rule 9 or Rule 10 of the Inquiry Rules or otherwise;
- c. considering any documentary material provided to the applicant by the Inquiry so far as is necessary to represent the client’s interests;
- d. advising the client in relation to any warning letter issued by the Chairman under Rule 14 of the Inquiry Rules;
- e. representing the client on those occasions:
  - i. when evidence is being given directly in respect of their client;

- ii. when their client is giving evidence; or
  - iii. when, in the opinion of the Chairman, evidence is being given by other witnesses which may have a bearing on their client;
- f. in respect of the recognised legal representative of a core participant:
- i. making an opening statement, where permitted by the Chairman;
  - ii. submitting questions to Counsel to the Inquiry to be asked of witnesses;
  - iii. providing final submissions, where permitted by the Chairman;
  - iv. making a closing statement, where permitted by the Chairman.

17. The Chairman will determine the level of representation to be met by an award for legal representation at public expense depending on the extent of the applicant's involvement before the Inquiry and the gravity of the allegations involved.

18. In order to minimise the cost to public funds and to expenses generally, applicants are encouraged to instruct recognised legal representatives who are already retained by other applicants where possible and where no conflict arises.

19. Where the Solicitor to the Inquiry has reason to believe that the interests of any applicant may conflict with the interests of any other applicant, the Solicitor to the Inquiry shall ensure that such conflict is made known to those involved and any public funding which is made available for legal representation will be awarded on the basis that separate recognised legal representatives are necessary.

### **Applications for Awards for Funding in respect of Legal Representation**

20. An applicant who wishes to apply for an award to cover amounts in respect of legal representation must apply in writing to the Solicitor to the Inquiry by submitting an ALR Form which can be downloaded from the Inquiry website at

[www.hiainquiry.org](http://www.hiainquiry.org) or obtained from the Solicitor to the Inquiry by email at [patrick.butler@hiainquiry.org](mailto:patrick.butler@hiainquiry.org).

21. The application must be made and determined before any work is done and expenses are incurred, for which funding is being sought.

22. Completed application forms should be returned electronically to the Solicitor to the Inquiry at the same address.

23. Any application of this type must state:

- a. the reason(s) why legal representation is considered necessary;
- b. the extent of the applicant's financial resources;
- c. confirmation that there are no other means by which such representation can be funded;
- d. the nature of the public interest that will be served by an award being made from public funds;
- e. the nature and function of the legal representation for which the award is sought;
- f. the identity of the applicant's proposed recognised legal representative;
- g. the size and composition of the team that the applicant's recognised legal representative proposes to engage, including the date of admission of any solicitor or solicitor advocate, and; where appropriate, the date of call of counsel or, where appropriate, the date of call to the Inner Bar of senior counsel;
- h. the proposed nature and estimated duration of the work of each member of the proposed legal team;

- i. the proposed hourly rate for each member of the proposed legal team.

24. An oral hearing may be required in respect of any application however applications for expenses may be granted without a hearing. If an application is to be refused, in whole or in part, without a hearing, the reasons for so doing will be communicated to the applicant, and the applicant will be entitled, within 7 days of being notified of the decision, to seek an oral hearing before the Chairman at which the application may be reconsidered.

**Conditions attaching to any Award for Funding in respect of Legal Representation**

25. If the Chairman decides to grant an application for amounts in respect of legal representation the award will be subject to the following conditions that will be set out in the award:

- a. the size and composition of legal representation that will be funded;
- b. the hourly rates that will be paid, subject to the maximum hourly rates as set down in Rule 24(2) of the Inquiry Rules;
- c. the nature and scope of the work that is to be funded;
- d. the limit on the number of hours for which funding will be paid;
- e. the hours allocated to each member of the legal team that has been approved;
- f. the form in which, and frequency with which, bills must be submitted to the Solicitor to the Inquiry.

26. The following further conditions apply to any award for funding in respect of legal representation:



- a. no change can be made in the composition of the legal team without the consent of the Chairman being sought in writing;
- b. no payment will be made out of public funds for any hours worked beyond the allocation of hours granted by the Chairman. If a legal representative requires additional hours in respect of any particular part of an award he should make a request in writing, setting out the reasons for the request, to the Solicitor to the Inquiry in advance of incurring the expense and the Chairman will consider the request and notify the legal representative of the decision;
- c. the maximum number of hours that can be charged by any member of an applicant's legal team in any week is 40 hours, save that, exceptionally, the Chairman may authorise an increase to a maximum of 60 hours during the week immediately preceding the commencement of the oral hearings and during the oral hearings where he is satisfied that such increase is justified in all the circumstances. For the purposes of this condition a week shall be taken to commence on a Monday and end on the following Sunday, and no unused hours below the maximum in any one week may be set-off against any other week.

**What is included in the hours allowed and the hourly rate?**

27. The number of hours allowed for legal representatives includes all the necessary time devoted to preparation, perusing papers, consulting with counsel or witnesses, as well as all ancillary expenditure (for example correspondence, telephone calls, copying).

28. Given the nature of the work involved in representing clients at the Inquiry, and that it is intended that material will be dealt with electronically, the Inquiry anticipates that many of the costs which would normally be incurred by solicitors in litigation will not be incurred by the solicitors of parties granted legal representation at public expense by the Chairman. Items such as postage, telephone calls or photocopying will not therefore be separately allowed in an

award. However, as the Inquiry recognises that there will inevitably still be some sundry expenses incurred, a fixed additional allowance of 10% of the number of hours allowed for preparation (but not for attendance at public hearings) will be added by the Inquiry to the number of hours allowed to solicitors for core participants to cover incidental expenses of whatever type (except travelling). For example, if the Chairman determines that a solicitor is entitled to 10 hours for preparation, the award will be increased to 11 hours. In exceptional circumstances this fixed additional allowance may be increased to a maximum of 20%.

### **Travel and waiting costs of legal representatives**

29. Hourly rates for legal representatives for travel to and from the public hearings will be at 50% of their agreed rate for legal work. This rate is inclusive of mileage.

### **Other Matters relating to Legal Representation**

30. Funding for other types of expenditure, such as the travel and accommodation costs of a witness, vouched in such manner as he may direct, must be the subject of agreement with the Solicitor to the Inquiry prior to the costs being incurred. Save in exceptional circumstances, such costs approved by the Inquiry will not exceed those generally permitted by the Department of Finance and Personnel in respect of public servants.

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

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

33. At any time the Chairman may approve funding for legal representation where a witness is unrepresented, and does not have access to representation from any other source, and where the interests of justice require that witness to be legally represented.

### **Billing and Assessment**

34. The Inquiry will deal with the determination and payment of bills in accordance with the provisions set down in Rules 27 to 34 of the Inquiry Rules.

35. In addition bills for legal fees to be claimed from public funds, whether by counsel or solicitor, must be sent on a monthly basis to, and received by, the Solicitor to the Inquiry no later than 4.30 pm 14 calendar days from the last working day of the month in question. In any case where bills have not been submitted to the Inquiry within 90 days of the work covered by an award being done, then, unless there are exceptional circumstances, the Chairman will revoke that costs award in respect of any part of the award that remains unclaimed. The Inquiry will notify the solicitor or counsel concerned of the revocation. Any request that a revocation should be reconsidered on the grounds of exceptional circumstances must set out in full the exceptional circumstances relied upon, and must be made in writing to the Chairman no later than 30 days from the date of the notification of the revocation.

36. Timesheets must be kept by solicitors and counsel in respect of all work for which public funding is to be claimed, and be available for inspection by the Inquiry as required.

37. A detailed bill must be provided to the Solicitor to the Inquiry which contains a description of work done, when it was undertaken, the identity and grade of fee earner, and the total of hours spent per approved period.

38. Counsel's fee notes must be supported by details of precisely what work was done and how much time was spent on it. It will not be acceptable to submit general claims along the lines of a "brief fee", "refresher" or "preparation".
39. Bills must include or be accompanied by such other information and such evidence in support of it as the Chairman may require.
40. Any matters of disagreement in a bill will be the subject of the detailed procedures set out in the Inquiry Rules.

## **Payment**

41. After the Chairman has determined any award the Solicitor to the Inquiry will refer it to OFMDFM for payment.
42. The Solicitor to the Inquiry will arrange for payment of any amount that he (or the Chairman after a review under the Inquiry Rules) has determined is to be paid by OFMDFM. All payments will be made either by Bankers Automated Clearing System (BACS) or payable order at the Inquiry's discretion. To enable payment to be made, the applicant will be required to complete the appropriate documentation supplied by the Inquiry and/or provide bank account details. When completed and signed, the documentation should be returned to the Secretary to the Inquiry to whom any queries relating to the processing of payments should also be directed.
43. The Inquiry's contact details in respects of costs are as follows:

Patrick Butler,  
Solicitor to the Inquiry  
HIA Inquiry  
PO Box 2080  
Belfast  
BT1 9QA

Email: [patrick.butler@hiainquiry.org](mailto:patrick.butler@hiainquiry.org).

### **Failure to comply with procedures**

44. It should be noted that failure to adhere to, and comply with, any of the matters or procedures set out in the Inquiry Rules or in this Protocol could result in payment being delayed or refused.

### **Discretion**

45. The Chairman and the Solicitor to the Inquiry retain the discretion to vary the application of the terms of this Protocol on a case by case basis where it is considered necessary for the proper conduct of the Inquiry.