

Inquiry Procedure Direction No 3 - Applications for legal representation at public expense

In terms of section 17(1) of the [Inquiries Act 2005 \("the Act"\)](#), which enables Lord Hardie ("the Chairman") to decide on the procedure and conduct of the Inquiry, he has directed as follows:

1. This Inquiry Procedure Direction ("this Direction") relates to:
 - (a) applications for an award of funding for legal representation under section 40 of the Act ("an Award") by:
 - (i) persons attending the Inquiry to give evidence or to produce documents, or
 - (ii) persons claiming such a particular interest in the proceedings or outcome of the Inquiry as to justify an Award; and
 - (b) the assessment of legal expenses payable under an Award.
2. This Direction is effective from the day after it is made and will remain in force until it is revoked or varied.
3. This Direction is subject to, and should be read with, the provisions of:
 - (a) [the Act](#) and, in particular, sections 17 and 40; and
 - (b) the [Inquiries \(Scotland\) Rules 2007](#) (SSI 2007/560) ("the Rules") and, in particular, Rules 2, 5 and 17 to 28.

While this Direction is intended to cover most situations it may require to be supplemented or varied by the Chairman in particular circumstances.

5. In this Direction references to persons attending the inquiry to give evidence or to produce documents include persons doing so at the investigative and later stages of the inquiry and are not confined to persons appearing at any oral hearing.

Application for an Award

6. Any person wishing to apply for an Award must complete the form of Application for Legal Representation at Public Expense ("the application form") which may be downloaded from the inquiry website at:

<http://www.edinburghtraminquiry.org/procedures>

Hard copies of the application form may also be obtained from the inquiry Secretary whose contact details are given in paragraph 26 below and to whom it should be sent.

General principles concerning Awards

7. Section 40 of [the Act](#) provides that an Award may be made where the Chairman considers it appropriate and that, to be eligible for an Award, a person must either be:
 - (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 Chairman, has such a particular interest in the proceedings or outcome of the inquiry as to justify such an Award.
8. Rule 17 of [the Rules](#) requires that an application for an Award must state:
 - (a) the nature and estimated duration of the legal representation for which the Award is sought;
 - (b) the proposed hourly rates of any legal representative providing that representation; and
 - (c) any other expenses relating to legal representation.
9. Rule 18 of [the Rules](#) requires the Chairman, in determining whether an Award should be made, to take into account:
 - (a) the financial resources of the applicant; and
 - (b) the public interest so far as relating to the making of an Award.
10. Having regard to the criteria referred to in [Section 40 of the Act](#) and [rules 17 and 18 of the Rules](#) and to his duty under [section 17\(3\) of the Act](#) to act with fairness and also with regard to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others), the Chairman:
 - (a) will only make an Award if satisfied that:
 - (i) it is fair, necessary, reasonable and proportionate to make an Award to the applicant;
 - (ii) it is appropriate for the applicant to be separately represented in relation to the inquiry;
 - (iii) the applicant would be prejudiced in seeking adequate representation in relation to the inquiry without an Award;
 - (iv) there are no other means by which such representation can reasonably be funded;

(v) the applicant is not an organisation or a person who can reasonably expect to have the cost of legal representation met by an organisation unless there are special circumstances which justify a call on public funds; and

(vi) the applicant and any legal representative have taken appropriate account of the fact that Awards are met from public funds, and of the need to make the best use of such funds, by seeking to secure the most efficient use of their legal resources, including the utilisation of paralegals in the composition of legal teams; and

(b) will not normally make an Award in relation to the provision of a witness statement or documents where the applicant's evidence primarily concerns matters of fact unless the applicant:

(i) may be subject to criticism in the inquiry; or

(ii) is likely to be prejudiced if not represented by a qualified lawyer; and

(iii) has no other means of paying for that representation.

The nature of the legal work that will be funded at public expense

11. Where the Chairman determines to make an Award it may be for a single piece of legal work, for a specific part or aspect of the inquiry's investigations or for the duration of the Inquiry and it will normally be limited to a legal representative having a role on behalf of the recipient of the Award ("the recipient") in relation to one or more specified matters which may include:

(i) taking initial instructions;

(ii) providing necessary legal advice;

(iii) advising, where necessary, in relation to the making of a witness statement, and/or other provision of evidence to the inquiry;

(iv) considering documents and other material disclosed or made available by the inquiry including any preliminary report, productions or witness statements but only so far as is necessary properly to represent the interests of the recipient;

(v) instructing counsel and named experts, subject always to the prior approval of the Chairman;

(vi) commenting on any preliminary report of the inquiry and the issues for the inquiry provisionally identified in terms of it, in so far as they relate to the interest in the inquiry of the recipient

(vii) representing, in so far as is necessary, the interests of the recipient of the Award at any preliminary hearings of the inquiry;

(viii) after a determination by the Chairman that the recipient should be a party at and represented at any oral hearings, representing, in so far as is necessary, the interests of the recipient of the Award at any oral hearings of the inquiry including:

(a) necessary preparation;

(b) representing the recipient during his or her own oral evidence (if any) and the evidence of others in so far as it relates to the recipient's interest in the inquiry;

(c) making any appropriate application to be permitted to examine any witness giving oral evidence in the circumstances specified by the Chairman and conducting any permitted examination; and

(d) making, on behalf of the recipient any opening statement or closing statement permitted under Rule 10 of [the Rules](#); or

(ix) advising in relation to any warning letter issued to the recipient by the Chairman under Rule 12 of [the Rules](#).

Applicant's Financial Resources

12. Where an applicant, otherwise eligible for an Award, has net capital assets of less than £8,000 and gross household income no greater than £30,000 per year (£2,500 per month) it will be in the public interest for the Award to be made without further reference to the financial resources of the applicant and in that case there is no need to provide financial details in the application form.
13. Applicants otherwise eligible for an award, who have net capital assets exceeding £8,000 or gross household income exceeding £30,000 per year (£2,500 per month), will be considered for an Award provided the Chairman is satisfied that, having regard to their financial circumstances and to the nature, extent and likely cost of the work to be funded, they will be likely to suffer significant financial hardship if an Award is not made.
14. In this Direction "net capital assets" is the value of the total gross capital assets owned by the applicant and his or her partner, as defined in the following paragraph, under deduction of any capital debt associated with those assets.
15. An applicant's gross household income is the total income from all sources that the applicant and his or her partner expect to receive in the 12 months following the date the application form is received by the Inquiry. A "partner" is someone with whom the applicant normally cohabits as a couple whether they are:

- married, in a civil partnership or not
 - of the same or opposite sex.
16. In calculating the amount of gross household income there shall be disregarded any payment of the following forms of benefit (which are disregarded for the assessment of disposable income for the purposes of eligibility for civil legal aid in Scotland):
- income support;
 - an income-based jobseeker's allowance;
 - a back to work bonus payable under the Jobseekers Act 1995;
 - any payment made under the Community Care (Direct Payments) Act 1996 or under section 12B of the Social Work (Scotland) Act 1968;
 - state pension credit;
 - universal credit;
 - an income-related employment and support allowance;
 - attendance allowance;
 - disability living allowance or constant attendance allowance;
 - any sums payable to a person as holder of the Victoria Cross or the George Cross; or
 - any payment made out of the social fund.
17. The provision of documents to vouch details of the financial information given will not normally be required when submitting the application form. However the Chairman reserves the right to require such documents in relation to any application and in that event an Award will not be made unless the requirement is met to his satisfaction.

Determination conditions for Awards

18. The Chairman will determine applications for Awards having regard to the provisions of [the Act](#), [the Rules](#) and the terms of this Direction, and will do so as soon as is practicable.
19. As required under Rule 20 of [the Rules](#), the Chairman will send the determination to the applicant and, where the applicant has a legal representative, to that legal representative and, where an Award is made, will specify the conditions for the Award.
20. Those conditions may include, but are not limited to:
- (a) the nature and scope of the work that is to be publicly funded which is likely to be in relation to some or all of the matters set out in paragraph 11 of this Direction;
 - (b) the size and composition of the applicant's legal team to be publicly funded, including the seniority and number of counsel or solicitor advocates

where the instruction of counsel or a solicitor advocate is considered to be necessary;

(c) the hourly rates to be paid for all counsel, solicitor advocates, solicitors and paralegals to be engaged;

(d) any upper limits on the sums or the maximum hours that will be paid for in terms of the Award;

(e) disbursements in excess of £100 (net of VAT) or such other sum as may be specified in the Award not being paid unless authorised in advance by the Solicitor to the Inquiry; disbursements of less than that amount only being paid where the expenditure is considered to have been reasonable and necessary and they are not part of a series of disbursements that cumulatively exceed £100 (net of VAT); and any disbursements only being paid where they are appropriately vouched; and

(f) the Award being 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.

21. The Chairman may, at any time after making an Award, and subject always to the provisions of [the Act](#) and [the Rules](#), vary it as appropriate, either on his own initiative or on application by the recipient or legal representative.

Billing procedures

22. The legal representative of a person in receipt of an Award should submit Accounts of Expenses at monthly intervals to the Solicitor to the Inquiry. Such Accounts should be received no later than 28 days immediately following the end of the calendar month to which they relate. Accounts of Expenses should contain the following information:

(a) a breakdown of the number of hours worked by each approved person in the legal team on each day specifying, in each case, details of the work undertaken and the time spent on it;

(b) the hourly rates charged for each person which may not exceed those specified by the Chairman in the Award;

(c) details of all disbursements which should be supported by appropriate vouchers;

(d) where work has been undertaken by counsel or a solicitor advocate, details of their fees supported by fee notes specifying the dates on which any work claimed for was carried out, the details of that work and the number of hours or part hours spent on it; and

(e) where work has been done jointly for more than one person in receipt of

an Award, an apportionment of that work as between them.

Procedure for the assessment of amounts payable under an Award

23. In relation to the assessment and payment of the amount payable in terms of an Account of Expenses submitted in accordance with the preceding paragraph the procedures set out in Rules 21 to 28 of [the Rules](#) shall apply.
24. Any work undertaken by a legal representative or member of an approved legal team which relates to matters outside the Inquiry's [terms of reference](#) and/or the issues it identifies for investigation, or which otherwise does not comply with the terms of the Award, will be disallowed.
25. All payments will be made by a Bankers' Automated Clearing System (BACS) transfer to the legal representative as per the details given in the application form.
26. It should be noted that failure to adhere to, and comply with, any of the matters or procedures set out in this Direction could result in payment being delayed or refused.
27. Unless otherwise indicated all correspondence about the matters referred to in this Direction should be sent to:

By email: evidence@edinburghtraminquiry.org

21 January 2015