

INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE, MR IAN MCGRAIL

Inquiry Protocol relating to Legal Representation at Public Expense and the Chairman’s Power to Award Amounts in Respect of Legal Representation

The Inquiries Act 2024 (“2024 Act”) came into operation on 28 March 2024.

Under section 32(1) of the 2024 Act, the Chairman has a statutory power to and may award reasonable amounts to a person:

- (a) By way of compensation for loss of time; or
- (b) In respect of expenses properly incurred, or to be incurred in attending, or otherwise in relation to, the inquiry.

Under section 32(2) the power to make an award under section 32 includes power, where the Chairman considers it appropriate, to award amounts in respect of legal representation. In this Protocol such awards are referred to as “Legal Expenses Funding awards”.

Under section 32(3) a person is eligible for an award under this section only if he is:

- (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 an award.

Under section 32(4) the power to make an award under section 32 is subject to such conditions or qualifications as may be determined by the Government and notified by it to the Chairman.

Under section 35(4) neither the repeal of the Commissions of Inquiry Act 1888 (“the 1888 Act”) nor anything contained in the 2024 Act shall affect the validity of any act or decision of the Commissioner under an existing Inquiry. Those acts and decisions remain legally valid and binding as if made under the 2024 Act and/or the 1888 Act as if that Act had not to that extent been repealed.

Prior to the operation of the 2024 Act, the Chairman (referred to under the 1888 Act as “the Commissioner”) did not have an express statutory power to make awards in respect of legal representation but made recommendations which were submitted to Government for approval in accordance with section 13 of the 1888 Act (given the entitlement to legal representation by Counsel in accordance with section 11 of the 1888 Act).

The operation of the 2024 Act has changed that position, as the Chairman now has an express power to award amounts in respect of legal representation. However, that does not affect the rulings which the Chairman (previously the Commissioner) made in respect of recommendations concerning public funding.

This Protocol outlines the circumstances in which the Chairman may award amounts in respect of legal representation and explains the process for the assessment of legal expenses awards. This Protocol is subject to the overriding discretion of the Chairman in respect of the exercise of his power under section 32 and any conditions or qualifications as may be notified to the Chairman by Government from time to time. Under section 31(2) of the 2024 Act the Government must pay any amounts awarded under section 32.

This Protocol relates to applications for Legal Expenses Funding awards; and following a decision by the Chairman that a person should receive a Legal Expenses Funding award, the assessment of the legal expenses which will be payable under the Legal Expenses Funding award.

General principles concerning applications for Legal Expenses Funding awards

1. In exercising his power to make a Legal Expenses Funding award, the Chairman will:
 - (a) act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or witnesses or others); and
 - (b) ensure that he complies with the qualifications and conditions set out in this Protocol.
2. A person is eligible to be considered for a Legal Expenses Funding award only if she/he/it is:
 - (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.
3. Paragraph 2 is subject to such conditions or qualifications as may be determined by Government and notified by it to the Chairman.
4. Subject to the qualifications and conditions in this Protocol, the Chairman will, when determining an application for a Legal Expenses Funding award and exercising his discretion under section 32, take into account: whether making a Legal Expenses Funding award is in the public interest.

5. Having regard to the criteria and considerations set out in this Protocol, the Chairman envisages that normally a Legal Expenses Funding award will be made only in cases where he decides that:
 - (a) the conduct of the applicant is the subject of inquiry; and/or the applicant is in any way implicated or concerned in the matters under inquiry; and
 - (b) significant criticism of the applicant may be inferred from the material contained in the Inquiry Bundle and/or the applicant may be subject to significant criticism in the course of the Inquiry's proceedings or in its final or any interim report; and
 - (c) the applicant would be prejudiced in seeking legal representation if there were any doubt about funding for payment of the same and there were no other means for such funding; and
 - (d) it is fair, necessary, reasonable and proportionate to make a Legal Expenses Funding award to the applicant and that such an award is an appropriate use of public funds.
6. In respect of the criterion in subparagraph 5(c), Legal Expenses Funding awards will also generally not be made in respect of the legal expenses of substantial bodies, or individuals who could reasonably expect those expenses to be met by such bodies, or where legal expenses insurance is available, unless there are special circumstances which would justify a call on public funds.

The scope of the legal representation covered by a Legal Expenses Funding award

7. In this Protocol, "recognised legal representative" means a qualified lawyer (whether a barrister or solicitor) who has been approved, admitted and enrolled as barrister or solicitor under the provisions of the Supreme Court Act 1960 (including, where appropriate, a barrister admitted for the purpose of this Inquiry under Section 28(2) of the Supreme Court Act 1960).
8. Wherever possible (and subject to any conflicts of interest), applicants are encouraged to instruct recognised legal representatives who are already retained by other applicants and/or witnesses to the Inquiry in order to minimise expense and maximise the likelihood of a Legal Expenses Funding award being made.
9. Where the Chairman considers that: (a) the interests in the Inquiry of two or more applicants are similar; (b) the facts which they are likely to rely upon in the course of the Inquiry are similar; and (c) it is fair and proper for them to be jointly represented, the Chairman may direct that they be represented by a single recognised legal

representative and, if the applicants are unable to agree on the identity of the single recognised legal representative, the Chairman may designate the same after inviting the applicants to make representations.

10. If the Chairman believes that the interests of any applicant may conflict with the interests of any other applicants, witnesses or parties to the Inquiry, he shall advise those persons and any Legal Expenses Funding awards will be made on the basis that separate recognised legal representatives are required.
11. Where the Chairman determines to make a Legal Expenses Funding award, this will normally be limited to the expenses of a recognised legal representative incurred in relation to some or all of only the following matters:
 - (a) considering initial instructions;
 - (b) considering the material contained in the documentation provided to the applicant with the request issued by the Inquiry that they make a witness statement, so far as is necessary properly to represent the client's interests;
 - (c) advising the client in relation to and for the purpose of the making of a witness statement, in accordance with a request made by the Inquiry, which request may include a description of the matters and/or issues to be covered in the witness statement;
 - (d) representing the client during their oral evidence (only Counsel to the Inquiry and the Chairman may ask questions of witnesses; the Chairman may however direct, on application, that a recognised legal representative of a witness may also ask that witness questions);
 - (e) any other matters that the Chairman may deem necessary.

Applications for awards and procedures for agreeing the level of funding

12. An applicant who wishes to apply for a Legal Expenses Funding award should submit an application under section 32 of the 2024 Act to the Solicitors to the Inquiry –

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Gibraltar
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specifying the following with as much supporting information and evidence as possible:

- (a) the reason(s) why legal representation is considered necessary;
- (b) the extent of the applicant's financial resources and confirmation that there are no other means by which such representation can be funded;
- (c) the reason that the applicant contends it would be in the public interest for an award being made from public funds;
- (d) the nature, function and extent of the legal representation for which the award is sought;
- (e) the size and composition of the legal team whom the applicant proposes to engage, including the seniority and proposed hourly charging rates for all persons to be so engaged, subject to the following maximum hourly rates –
 - i. QCs: £250
 - ii. Junior Counsel/Solicitors (10+ years call or PQE): £200
 - iii. Junior Counsel/Solicitors (5-10 years call or PQE): £150
 - iv. Junior Counsel/Solicitors (<5 years call or PQE): £100
 - v. Trainee solicitors/pupils/paralegals: £50
- (f) the estimated duration of the recognised legal representation;
- (g) the number of hours each week it is anticipated that the recognised legal representative will be engaged on Inquiry work, having regard to the interest of the applicant;
- (h) particulars of any other foreseeable expenses which the person anticipates claiming in relation to legal representation.

Determination of Applications

13. Having regard to the provisions of the 2024 Act and this Protocol, the Chairman will determine an application for a Legal Expenses Funding award within a reasonable time.
14. Notwithstanding any other paragraph in this Protocol for the avoidance of doubt it is declared that applications for payment following the grant of a Legal Expenses Funding award and assessment of those applications for payment in accordance with the provisions of paragraphs 18-25 of this Protocol will be subject to the following limits:
 - (a) in respect of the matters more particularly described at paragraphs 11(a), 11(b) and 11(c) of the Protocol the total payment under the Legal Expenses Funding

award shall not exceed £5,000. The Chairman may increase the £5,000 limit only in exceptional cases upon the application of the applicant or the applicant's legal representative, and any such increase shall be at the Chairman's sole discretion;

- (b) in respect of the matters more particularly described at paragraphs 11(d) and 11(e) the total payment under the Legal Expenses Funding award will be limited to the duration of the oral evidence given by their client to the Inquiry and/or to such other time period that the Chairman directs, on receipt of an application, by the legal representative under paragraph 12.

15. The Solicitors to the Inquiry will notify the applicant in writing of the Chairman's determination and, where a Legal Expenses Funding award is made, the terms of the award. Such terms may include (but are not limited to) the following:

- (a) the nature and scope of the legal representation that is to be funded; this is likely to be in relation to some or all of the matters set out in paragraph 11 of this Protocol; it should be noted that, having regard to the inquisitorial nature of the Inquiry –
 - normally, investigative work will not be funded, as this is the role of the Inquiry;
 - payment will not be made for obtaining items such as expert reports, unless previously authorised by the Solicitors to the Inquiry on behalf of the Chairman;
- (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 necessary;
- (c) the hourly rates for all counsel, solicitors and paralegals to be engaged;
- (d) subject to paragraph 14, the capping of the maximum number of hours work which may be charged by the recognised legal representative for any week (Monday to Sunday) with the maximum cap being 40 hours/week, even if the number of hours actually worked exceeds that cap, save that, exceptionally, the Solicitors to the Inquiry may authorise on application an increase to the cap which does not exceed the cap by more than 10% where they are satisfied that such increase is justified in all the circumstances; no unused hours in any one week below the cap may be put towards any other week;
- (e) the maximum hourly rates for travel and waiting time by a recognised legal representative shall be 25% his/her agreed hourly rate relating to legal

work; travelling and/or waiting time is to be included within the cap on the maximum weekly number of hours that can be charged by an applicant's recognised legal representative and in no case will be allowed in addition;

- (f) disbursements in excess of £100/month will not be paid unless authorised in advance by the Solicitors to the Inquiry; disbursements under £100/month will only be paid where the expenditure is adjudged to have been reasonable and necessary and where supported by evidence of payment;
- (g) a Legal Expenses Funding 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;
- (h) the form in and the frequency with which bills relating to legal expenses are to be submitted.

16. Expenditure incurred before the making of a Legal Expenses Funding award will not normally be recoverable, except where it has been expressly agreed in advance by the Solicitors to the Inquiry on behalf of the Chairman.

17. It will be open to the Chairman, either initially or at any time after making a Legal Expenses Funding award, to amend and/or impose further conditions on the award. In particular, he may determine that a lower weekly cap should be imposed.

Budgeting and billing procedures

18. Applicants in relation to whom the Chairman has decided in accordance with this Protocol that a Legal Expenses Funding award should be made or their recognised legal representatives on their behalf should submit:

- (a) budgets relating to the applicants' expected legal expenses at monthly intervals;
and
- (b) bills relating to the applicants' legal expenses at monthly intervals

to the Solicitors to the Inquiry at the address set out in paragraph 12 above. Such budgets and bills are to be received no later than 7 days immediately prior to the beginning (in the case of budgets) and following the end (in the case of bills) of the month to which they relate, with a final bill to be submitted no later than one month after final submissions to the Inquiry are made.

19. Budgets and bills should contain or be accompanied by the following information:

- (a) a copy of the relevant Legal Expenses Funding award, including the hourly rates for each recognised legal representative as determined by the Chairman;
- (b) for each recognised legal representative, (i) in the case of budgets, a breakdown/print out of the work to be undertaken/the time to be spent and cost thereby to be incurred, and (ii) in the case of bills, a breakdown/print out of the work undertaken/the time spent and cost thereby incurred. It will not be acceptable to submit general budgets or claims along the lines of a 'brief fee', 'refresher' or 'preparation'; and
- (c) a list of disbursements (details and cost) expected (in the case of budgets) or incurred (in the case of bills).

Procedure for assessments of amounts payable under a Legal Expenses Funding award

20. In assessing bills submitted subject to a Legal Expenses Funding award for eligibility for payment under the award, the Solicitors to the Inquiry will have regard to all the circumstances, including in particular the provisions of this Protocol and whether the sums billed –
- (a) relate to work falling within the relevant Legal Expenses Funding award;
 - (b) were proportionately and reasonably incurred; and
 - (c) are proportionate and reasonable in amount.
21. Any work undertaken by an applicant's recognised legal representative 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 notified to the applicant under paragraph 15 of this Protocol, will be disallowed.
22. The Solicitors to the Inquiry will use their best endeavours to provide to applicants/their recognised legal representatives their assessment of a bill submitted subject to a Legal Expenses Funding award for eligibility for payment under the award within 2 months of receipt of the bill.
23. If the Solicitors to the Inquiry have no objections to any items included within a bill, their assessment for eligibility for payment will be the final assessment.
24. If the Solicitors to the Inquiry have objections to any items included within the bill, the assessment should:
- (a) identify each item to which the Solicitors to the Inquiry object;

- (b) state the nature of the objection for each item; and
 - (c) where reductions to items are sought, propose the reduced amounts to be allowed.
25. If the applicant disagrees with such an assessment, the applicant or his/her/its recognised legal representative must provide a written response to the Solicitors to the Inquiry within 1 month of the assessment having been sent to the applicant or his/her/its recognised legal representative. If such a written response is not received by the Solicitors to the Inquiry within 1 month, the assessment as issued by the Solicitors to the Inquiry will be deemed to be accepted and be the final assessment.
26. Where there remains a disagreement in relation to an assessment, the Chairman of the Inquiry may:
- (a) engage the assistance of the Registrar of the Supreme Court by referring the assessment together with all relevant evidence and documentation to him/her; or
 - (b) determine the matter and require the Solicitors to the Inquiry to issue a final assessment of the disputed bill.

Making an award

27. When a final assessment of a bill has been issued, this will be referred by the Solicitors to the Inquiry to the Secretary to the Inquiry who will pass this on to Government for payment. The Government must then pay the amounts awarded. Any queries relating to the processing of payments should also be directed to the Secretary to the Inquiry.
28. Failure to adhere to, or comply with, any of the matters or procedures set out in this Protocol could result in payment of bills being delayed or refused.
29. The Chairman and the Solicitors 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.

Sir Peter Openshaw

11 May 2022

(Updated 22 May 2023 & further updated on 16 April 2024 following the 2024 Act)