

Cost of legal representation protocol

Purpose:

1. The purpose of this protocol is to:-
 - provide information on the scope of the legal representation covered by an award of expenses;
 - explain how to apply for an award of expenses in respect of legal representation;
 - provide information as to the criteria to be applied by the Chair in deciding applications;
 - provide information on how the assessment of the amount of the award is to be carried out.

2. The procedures set out in this protocol are subject to, and should be read in accordance with, the Notice of Determination made by the Cabinet Secretary for Justice under section 40(4) of the Inquiries Act 2005 (“Minister’s Determination”) set out in the annex to this protocol (see Annex) and rules 17 to 28 of the Inquiries (Scotland) Rules 2007 (“the Rules”).

3. In this protocol references to “Core Participant” and to “recognised legal representative” are as defined in rule 4 and 5 of the Rules. A Core Participant includes an individual, organisation or entity that has a significant interest in the Inquiry. A link to the Core Participant protocol can be found [here](#). A recognised legal representative is a qualified lawyer acting on behalf of a Core Participant or any other person required to give evidence or

documentation to the Inquiry. The Chair must regard that lawyer as the recognised legal representative in respect of the Inquiry proceedings.

Award of Legal Representation

4. Section 40 of the Inquiries Act 2005 gives the Chair exclusive responsibility for deciding whether or not an individual or group is entitled to receive payment for the expenses of their legal representation. This is known as an award and it is the Chair who determines who is eligible for a section 40 award. The Chair has the power to make an award of a reasonable amount in respect of expenses properly incurred, or to be incurred, in relation to the Inquiry.
5. To be eligible for an award under section 40, the person seeking the award must:-
 - (i) be attending the Inquiry to give evidence;
 - (ii) be attending the Inquiry to produce a document or some other thing; or
 - (iii) have, in the opinion of the Chair, such a particular interest in the proceedings of the Inquiry or in the outcome of it to justify such an award.

Scope of the legal representation covered by the award

6. Where the Chair determines to make an award in respect of legal representation, it will normally be limited to a recognised legal representative carrying out some or all of the following:-
 - (i) taking and considering initial instructions from their client;
 - (ii) considering and providing advice to their client on the documentation disclosed by the Inquiry to the Core Participants;
 - (iii) advising their 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 under Rule 8 of the Inquiries (Scotland) Rules 2007 (“the Rules”);
- (iv) advising their client in relation to any warning letters issued by the Chair under Rule 12 of the Rules;
 - (v) making opening and closing statements, where permitted, in terms of Rule 10 of the Rules;
 - (vi) examining their client during their oral evidence (and the evidence of others, should that be necessary), where permission has been given in terms of Rule 9(2) and (3) of the Rules;
 - (vii) making an application for permission to examine any witness in terms of rule 9(4) of the Rules.
7. Under Rule 6 of the Rules where there are two or more core participants, each of whom seeks to be legally represented, and the Chair considers that –
- (i) their interests in the outcome of the Inquiry are similar;
 - (ii) the facts they are likely to rely on during the course of the Inquiry are similar; and
 - (iii) it is fair and proper for them to be jointly represented,

the Chair may direct that the Core Participants be represented by a single legal representative and approve a qualified lawyer for that purpose. The approval must be agreed to by the Core Participants in question. If no agreement is reached within a reasonable period the Chair may approve a qualified lawyer who the Chair considers has sufficient knowledge and experience to act in that capacity.

8. If the Core Participants, jointly represented, consider there has been a change of circumstances and their interests require to be separately represented, they can apply to the Chair for separate representation.

How to apply for an award

9. The Minister’s Determination makes clear that, except in exceptional circumstances, expenditure incurred prior to the Chair’s award of funding will

not be recoverable. Accordingly, parties should apply for an award in advance of expenses being incurred. The application is to be sent to the Solicitor at legal@shekubayohinquiry.scot.

10. The application must provide details of the following:-

- the scope and estimated duration of the legal representation for which the award is sought;
- any other expenses relating to legal representation;
- the financial resources of the applicant and confirmation that there are no other means by which such representation can be funded;
- the public interest served in the granting of the award;
- the size and composition of the team that the applicant's recognised legal representative proposes to engage, including the seniority and proposed hourly rates of any legal representative(s) providing that representation subject to the following maximum hourly rates:

Senior Counsel (whether a member of the Faculty of Advocates or a solicitor advocate)	£200
Junior Counsel (whether a member of the Faculty of Advocates or a solicitor advocate)	£100
Solicitor with over 8 years' post qualification experience	£150
Solicitor with over 4 years' post qualification experience	£125
Other solicitors and fee earners of equivalent experience	£100
Trainee solicitors, paralegals and other fee earners	£75

11. The maximum hourly rates for travel time by the members of an applicant's legal team shall be half the agreed hourly rate relating to legal work. Any travelling time must be included within the cap on the maximum number of hours that can be charged by an applicant's recognised legal representative and in no cases will it be in addition to cap on hours.

Criteria and conditions of award

12. The Chair, in deciding whether to make an award in respect of legal representation will consider the following criteria:-

- The financial resources of the applicant; and
- Whether making the award is in the public interest.

13. Where the Chair has decided that an award should be made, in that determination the Chair must set the following conditions:-

- The nature and scope of the work to be funded. 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.
- The hourly rates to be paid up to the maximum set out in the table above;
- Any upper limit or limits on the number of hours which will be paid, which will not exceed the maximum number of hours set out in the Minister's Determination annexed to this protocol.
- The frequency with which bills must be submitted to the Chair;
- The form in which bills must be so submitted

14. 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 best use of public funds.

Assessment of the amount of the award

15. Where the Chair has determined that an award should be made and the application relates to expenses that have not yet been incurred, the Chair must send the determination to the applicant and their legal representative (if they have one).

16. If the Chair has determined an award should be made, and the amounts have already been incurred, the Chair must refer the application to the Solicitor to the Inquiry for an assessment to be made.

17. The Solicitor must make an initial assessment of the amount of the award within 21 days of the referral by the Chairman. This must be in writing and sent to the applicant and their legal representative (if they have one).

18. If the Solicitor assesses the full amount should be paid, the initial assessment becomes the final assessment. If, however, the applicant disagrees with the initial assessment the applicant must notify the Solicitor to the Inquiry of this, in writing, within 21 days of the date on which the initial assessment of the amount of the award is sent to the applicant. Where the applicant fails to respond within 21 days of the initial assessment the Solicitor to the Inquiry must issue the final assessment of the award.

19. An initial or final assessment must be in writing and sent to the applicant and, where the applicant has a legal representative, their legal representative.

Dispute procedure regarding assessments

20. Where notification has been given by the applicant to the Solicitor that they do not agree with the award, the Solicitor must send the applicant a response.

That response must be in writing and set out details of the points of dispute within 21 days of receipt of the notification. These points of dispute must:

- Identify each item to which the Solicitor to the Inquiry objects;
- State the nature of each objection; and
- Propose an amount to be allowed for each item in respect of which a reduction is sought.

21. Upon receipt of the points of dispute, the applicant must then provide a written response to the Solicitor within 21 days of the written points of dispute having been sent. The deadlines can be extended if agreed between the applicant and Solicitor.

22. Where a dispute still exists the Chair must either:-

- (i) Refer the assessment to the Auditor of the Court of Session together with all relevant evidence, including the application and any correspondence between the Solicitor to the Inquiry and the applicant; or
- (ii) Require the solicitor to the Inquiry to issue the final assessment.

23. Where there has been a reference to the Auditor of the Court of Session, the Auditor must hold a review hearing within a reasonable time. The Auditor must notify the Solicitor to the Inquiry and the applicant of the date and location of the review hearing, in writing, as soon as practicable but not later than 14 days before the date of the hearing.

24. A person other than the applicant, their legal representative or the Solicitor to the Inquiry can only be heard at a review hearing with the Auditor's permission.

25. The Auditor's assessment must be sent to the applicant and the Chair. The Auditor's assessment is the final assessment of the amount of the award.

Making an award

26. The Chair must make an award and arrange for payment of the final assessment of the amount of the award. All payments will be made by payable order at the Inquiry's discretion. To enable payment to be made a claimant will be required to complete the appropriate documentation supplied by the Inquiry and/or provide bank account details.

All applications for and correspondence about awards should be sent to the Solicitor to the Inquiry at legal@shekubayohinquiry.scot.

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

The Chair and Solicitor to the Inquiry may vary the application and terms of this protocol on a case-by-case basis where necessary to the proper conduct of the Inquiry, subject to the requirements of the Minister's Determination.

Issued under the authority of the Chair on 1 December 2020.

APPENDIX

Cabinet Secretary for Justice
Humza Yousaf MSP



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Riaghaltas na h-Alba
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PUBLIC INQUIRY INTO THE DEATH OF SHEKU BAYOH

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

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 death of Sheku Bayoh, chaired by the Right Honourable Lord Bracadale in terms of the Instrument of Appointment in his favour dated 20 November 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) Rule 18 of the Inquiries (Scotland) Rules 2007 is qualified to the extent that the general criterion in Rule 18(2)(a) (financial resources) is not to be taken into account on an application for an award in respect of legal expenses by the family of Sheku Bayoh.
 - d) Awards may only be made in respect of legal representation provided by one or more named legal representatives whose involvement has been approved

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 may be met only where this is considered by the chair to be appropriate in the particular circumstances.

- e) 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.
- f) 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**.
- g) 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/she 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 (f) 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 (f) 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.
- h) In respect of paragraph (g) 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.
- i) 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 (e).
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(f) above.
 - d) For persons from outside the UK, awards for travel expenses or compensation for loss of time shall only be where the Chair is satisfied that their travel is essential for the fulfilment of the Inquiry's terms of reference.

HUMZA YOUSAF