

**THE INDEPENDENT PUBLIC INQUIRY
INTO THE NON DOMESTIC RENEWABLE HEAT INCENTIVE (RHI) SCHEME
(known as ‘the RHI Inquiry’)**

Costs Protocol

**to be followed by the RHI Inquiry
relating to the costs and expenses (including the costs of legal representation)
at public expense**

[Applicable from 6 September 2017]

Introduction

[1] The Independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme (known as ‘the RHI Inquiry’ but referred to in this protocol simply as ‘the Inquiry’) has been set up by the Minister for the Department of Finance (‘the Minister’). The Inquiry’s Terms of Reference have been deposited in the Library of the Northern Ireland Assembly. A copy of the Terms of Reference can also be found on the Inquiry’s website.

[2] The Inquiries Act 2005 (‘the 2005 Act’) specifically requires the chairman (‘the Chair’), in making any decision as to the procedure or conduct of the Inquiry, to act with fairness and with regard to the need to avoid any unnecessary costs (whether to public funds or to witnesses or otherwise arising).

[3] This Costs Protocol (‘the Costs Protocol’) which is subject to, and must be read in conjunction with, the relevant provisions of the 2005 Act, as well as the Procedural Protocol, 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.

The power to award costs and expenses

[4] Section 40 of the 2005 Act gives the Chair power to award to a person such amounts as the Chair thinks reasonable as compensation for loss of time, or for expenses properly incurred, in attending or otherwise assisting the Inquiry. Section 40 also affords the Chair the power, in appropriate circumstances, to grant amounts in respect of legal representation for persons attending or assisting the Inquiry.

Eligibility for an award

[5] A person is eligible for an award in accordance with section 40 only if that person – (a) is a person attending the Inquiry to give evidence or to produce any document or other thing, or (b) that person is a person who, in the opinion of the Chair, has such a particular interest in the proceedings or outcome of the Inquiry as to justify such an award.

[6] The power to make an award under section 40 is subject to such conditions or qualifications as may be determined by the Minister and notified by him to the Chair.

Matters to be considered when deciding whether to make an award

[7] In making any decision about whether to award compensation at public expense for loss of time or expense, the Chair 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 costs; and
- (d) any conditions or qualifications imposed by the sponsoring Department in respect of the making of awards and notified to the Chair.

[8] The factors which the Chair may consider, when deciding whether making an award is in the public interest, include the following:

- (a) whether the individual played, or may have played, a direct and significant role in relation to the matters set out in the Inquiry 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 paragraph (d) above, if the Chair 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 in question to be borne by the public purse.

[9] In the light of the above, the Chair 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. Nor does the Chair expect to receive applications for such funding in respect of private individuals or bodies who have access to other sources of funding for this purpose, including funding from an insurance company, a defence association, their employer or other relevant organisation or body which is in a position to fund them.

[10] All applications for costs and expenses will be dealt with in accordance with the Costs and expenses section of the Procedural Protocol.

The funding of legal representation at public expense

[11] The Chair will exercise the power to hear and determine applications for legal representation in accordance with the provisions of paragraph [27] of the Inquiry's Procedural Protocol.

[12] Awards for costs and expenses in respect of legal representation will only be for work:

- (a) that is within the Inquiry's Terms of Reference;
- (b) which is necessary, fair, reasonable, and proportionate in all the circumstances; and
- (c) which is conducted in a cost effective and efficient manner without duplication.

The scope of an award in respect of funding for legal representation

[13] Where the Chair 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;

- (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 Chair in accordance with paragraphs [37] to [42] of the Inquiry's Procedural Protocol;
- (e) representing the client on those occasions:
 - (i) when evidence is being given directly in respect of the client;
 - (ii) when the client is giving evidence; or
 - (iii) when in the opinion of the Chair, evidence is being given by other witnesses which may have a bearing upon the client;
- (f) in respect of the designated legal representative of a core participant:
 - (i) making an opening statement when permitted by the Chair;
 - (ii) submitting questions to Counsel to the Inquiry to be asked of a witness;
 - (iii) providing final submissions, when such are permitted by the Chair;
 - (iv) making a closing statement, when such is permitted by the Chair.

[14] The Chair 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 any allegations involved.

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

[16] Where any applicant believes that his/her interest may conflict with the interest of another applicant with the same legal representation, the potential conflict should be brought to the attention of the Solicitor to the Inquiry, who will notify the Inquiry Chairman. If the Inquiry Chairman is satisfied that such a conflict does exist, he may, if appropriate, direct that public funding be made available for separate legal representation.

Applications for awards for funding in respect of legal representation

[17] 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. A *pro forma* application form which should be used has been provided on the Inquiry's website.

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

[19] Completed application forms should be returned electronically to the Solicitor for the Inquiry.

[20] Any such application must state:

- (a) the reason/reasons 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; and
- (i) the proposed hourly rate for each member of the proposed legal team.

[21] Applications for costs and expenses to cover legal representation may be granted without a hearing; or an oral hearing may be required in accordance with the provisions of paragraph [29] of the Inquiry's Procedural Protocol.

Conditions attaching to any award of funding in respect of legal representation

[22] If the Chair decides to grant an application for amounts in respect of legal representation the award will be subject to the following conditions which 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;
- (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 have been approved; and
- (f) the form in which, and frequency with which, bills must be submitted to the Solicitor to the Inquiry.

[23] 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 Chair being sought in writing, including giving the reasons for any such proposed change;
- (b) no payment will be made out of public funds for any hours worked beyond the allocation of hours granted by the Chair. 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 Chair 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 Chair 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 Monday and to 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 in the hourly rate?

[24] 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, etc.).

[25] Given the nature of the work involved in representing clients at the Inquiry, and that it is intended that material will be dealt with where possible 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 Chair. Items such as postage, telephone calls or photocopying will not therefore be separately allowed in an award. However, as the Inquiry recognises there will inevitably 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) may 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 Chair determines that a solicitor is entitled to 10 hours for preparation, the award may be increased to 11 hours. In exceptional circumstances this fixed additional allowance may be increased to maximum of 20%.

Travel and waiting costs of legal representatives

[26] 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

[27] 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 in respect of public servants.

[28] Expenditure incurred before notification of the Chair'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.

[29] 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.

[30] At any time the Chair 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

[31] Bills for legal fees to be claimed from public funds, whether by counsel or solicitor, must be sent on a monthly basis to, and be 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 Chair will revoke that cost 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 Chair no later than 30 days from the date of the notification of the revocation.

[32] 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.

[33] 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 hours spent per approved period.

[34] 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".

[35] Bills must include or be accompanied by such other information and such evidence in support of it as the Chair may require.

Payment

[36] After the Chair has determined any award, the Solicitor to the Inquiry will refer it to the sponsoring Department for payment.

[37] The Inquiry's contact details in respect of costs are as follows: Mr Patrick Butler, Solicitor to the RHI Inquiry, RHI Inquiry, 1st Floor, Waterfront Plaza, 8 Laganbank Road, Belfast, BT1 3LY.

Generally

[38] The Inquiry retains the right to suspend, alter or modify the procedure set out in this Protocol at any time as the circumstances may require.