

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

25 October 2022

THE SCOTTISH COVID-19 INQUIRY

**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 Scottish Covid-19 Inquiry established by the Scottish Ministers under the Inquiries Act 2005 (“the 2005 Act”), (“the Inquiry”), the Scottish Ministers have determined under section 40(4) of the 2005 Act that the power of the Chair to make awards under section 40 to persons eligible under section 40(3) shall be subject to the conditions and qualifications set out in this determination.

2. Given the unprecedented scale of those affected by Covid-19, Ministers are of the view that it is in the public interest for certain applicants to be eligible for awards for funding for legal representation without having to provide information as to their financial resources. Scottish Ministers, therefore, have determined that rule 18(2)(a) of the Inquiry (Scotland) Rules 2007 (“the 2007 Rules”) may be satisfied without enquiry as to the financial resources of an applicant, in respect of an application for an award of funding for legal representation by families of people who were infected with Covid-19 and who died (including people who, in the opinion of the Chair, do not unreasonably believe that they or their family member were so infected). It is for the Chair to interpret this condition in determining whether an award should be made.

3. The other criteria and tests set out in the 2005 Act, the 2007 Rules, in this determination and in any protocol issued by the Chair in respect of applications for awards for funding for legal representation remain applicable to all applications for legal expenses. In respect of legal representation (section 40(2) of the 2005 Act), the conditions and qualifications are as follows:

(a) Awards 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) Awards may only be made in respect of legal representation provided by one or more named legal representatives whose involvement has been approved in advance 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 will not be met. Exceptional circumstances may be considered by the Chair, subject to the terms of paragraph (h).

(d) Any award must specify the nature and scope of the work for which the award is to be made. Awards 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.

(e) Where the Chair has determined that an award 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

(f) 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 the Solicitor to the Inquiry 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 (e) 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 (e) 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.

(g) In respect of paragraph 3(f) of this determination:

- 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.

(h) 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 the 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 (d).

4. 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) of the 2005 Act), the conditions and qualifications are as follows.

(a) Travel and subsistence rates, as they apply to Scottish Government employees and as they also apply under the determination made by Scottish Ministers under section 39 (1) of the 2005 Act in respect of the Scottish Covid-19 Inquiry, apply to travel and subsistence within the United Kingdom. Rail travel, under an award, is reimbursable at standard class rates and air travel at economy class rates.

(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 in accordance with paragraph 3(e) of this determination.

(d) Awards for travel expenses or compensation for loss of time shall only be made for persons from outside the UK where the Chair is satisfied that their travel is essential to the fulfilment of the Inquiry's terms of reference.

JOHN SWINNEY