These notes refer to the Inquiries Act 2005 (c.12)
which received Royal Assent on 7 April 2005

INQUIRIES ACT 2005

EXPLANATORY NOTES

INQUIRY PROCEEDINGS

Section 17: Evidence and procedure

33. Subsection (3) requires the chairman to act fairly throughout the inquiry. This serves to underline the duty that already exists in the common law. In applying this duty the chairman may consider, for example, if certain participants require some form of legal advice or representation. Subsection (3) also ensures that the need to control cost is a valid consideration for the chairman when conducting and planning proceedings. The cost of inquiries will vary according to the complexity of the matters being investigated. The Minister is required, by section 39(3), to meet expenses incurred in holding the inquiry. Each decision to admit evidence, to hold oral hearings, or to allow legal representation adds to the cost of the inquiry. The requirement to have regard to cost will strengthen the chairman's ability to defend decisions in which the need to limit costly elements of an inquiry was a factor.

Section 18: Public access to inquiry proceedings and information

34. This section makes clear that, subject to any restrictions issued under the following section, the chairman is required to do what he considers reasonable to ensure public access to evidence in the ways set out in subsection (1)(a) and (b). The chairman is able to judge what is reasonable so, for example, if the panel has been sent documents that it considers to be irrelevant then the chairman may decide not to make those available with the rest of the evidence.

35. Broadcasting of inquiry proceedings is at the chairman's discretion. In the past, some inquiry chairmen have allowed broadcasting of particular stages, such as the opening statements. In deciding whether to allow broadcasting, the chairman will need to consider whether it would interfere with witnesses' human rights and, in particular, with the right to respect for a private and family life (Article 8 of the European Convention on Human Rights). Unlike inquiries under the Tribunals of Inquiry (Evidence) Act 1921, inquiries under the Inquiries Act will not be covered by section 9 of the Contempt of Court Act 1981, which places restrictions on sound recording.

36. Subsections (3) and (4) of this section provide that, in relation to the records of inquiries held under this Act, the general exemptions for the records of statutory inquiries in the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002 ("the FOI Acts") will not apply. During the course of an inquiry held under the Inquiries Act, that inquiry is not a public authority for the purposes of those Acts. However, once an inquiry is over, its records are generally held by a public authority, such as a Government Department or the National Archives. Section 41 enables procedure rules to be made, which could provide for the passing of documents given to or created by an inquiry to a public authority. The exemptions in section 32(2) of the FOI Act 2000 and section 37(1)(b) of the FOI Act 2002 will not apply to information contained in those documents. This section does not affect the application of the FOI Acts to inquiries held

otherwise than under this Act. Nor does it prevent any other exemption in the FOI Acts from applying to any information in inquiry records.

Sections 19 & 20: Restrictions on public access etc; Further provisions about restriction notices and orders

37. These two sections set out the extent to which inquiry proceedings can be held in private and evidence can be withheld from the public domain.

38. There may be circumstances in which part or all of an inquiry must be held in private, and over a third of the notable inquiries held in the past fifteen years have had some sort of restrictions on public access. These range from wholly private inquiries, such as the Penrose inquiry into the collapse of Equitable Life and the "Lessons Learned" (Foot and Mouth) Inquiry, to mainly public inquiries such as the Bloody Sunday inquiry and the Hutton inquiry, in which a small amount of highly sensitive material was withheld from the public domain.

39. In some past inquiries, it has been the Minister who has specified restrictions, whereas in others the chairman has set the restrictions. Section 19 allows for both. It replaces a range of statutory provisions on public access in the legislation that is repealed by Schedule 2 including, for example, section 81 of the Children Act 1989, which states:

"(2) Before an inquiry is begun, the Secretary of State may direct that it shall be held in private.

(3) *When no direction has been given, the person holding the inquiry may if he thinks fit hold it, or any part of it, in private.*

40. Public access to past inquiries has been restricted for a variety of reasons. Section 19(4) sets out a number of matters that must be taken into account when determining whether it is in the public interest to issue a restriction notice or order. Most of these factors are self-explanatory.

41. Section 19(4)(c) is intended, among other things, to cover cases in which a person has received information that he would usually be prevented by law from disclosing. For example, the Financial Services Authority receives sensitive information about firms in its role as a regulator, but is prevented from disclosing that information generally by Part 23 of the Financial Services and Markets Act 2000. Inquiries' powers of compulsion would override those restrictions, but it might be appropriate for the chairman or Minister to consider preventing the information from being disclosed more widely.

42. Section 19(4)(d) recognises that some inquiries might be conducted more efficiently or effectively with restrictions on public access. Several recent inquiries under section 84 of the NHS Act 1977 have been held partially in private, with relatives and participants admitted but not the general public.

43. Restrictions that could be imposed on attendance under subsection (1)(a) of section 19 might range from the exclusion of the press or general public (allowing those with an interest in the inquiry to attend, as was the case in the Ayling and Neale inquiries) to the exclusion of everyone except the panel, the witness and, if appropriate, their legal representatives (as happened in the Penrose inquiry into the collapse of Equitable Life). They might be imposed on all hearings, or only where a particular witness was giving evidence or where evidence was heard on a specified topic. The nature of the restriction would depend upon the reasons for it. Similarly, a range of different restrictions might be imposed on the disclosure or publication of evidence or documents.

44. Nothing in section 19 is intended to prevent a witness from passing on evidence that he himself has given to an inquiry either whilst inquiry proceedings are ongoing or after the inquiry has ended. However, there might be situations in which restrictions under section 19 could prevent a person from passing on information that he has learnt as a result of his attendance at, or involvement in, the inquiry. If the powers in this section

are exercised in any way that engages Article 10 of the European Convention on Human Rights then of course that exercise must be done in a way which complies with Article 10(2) of the Convention.

45. Section 20 allows the Minister and chairman to issue further restrictions and to vary or revoke their own restrictions at any time before the end of the inquiry. The Minister cannot vary or revoke the chairman's restrictions and vice versa. There is, however, nothing to stop the chairman from asking the Minister to consider exercising his discretion to vary a notice. The power to vary notices and orders will allow for situations in which it becomes apparent that more information can be made public than was originally envisaged, or that more people can be given access to information than allowed by the original notice, as well as any situations in which it becomes apparent that further restrictions are necessary.

46. Section 20 provides that, except in relation to inquiry records, restriction notices and orders continue indefinitely unless otherwise specified or unless they are revoked. Orders restricting attendance will only be relevant during the course of the inquiry, but some orders restricting disclosure or publication of evidence might need to continue beyond the end of the inquiry. For example, if an inquiry chairman issued an order that the identity of a particular witness was to be kept confidential, because the witness could be at risk if his identity were disclosed, that order would need to continue to protect that witness after the inquiry had ended.

47. Subsection (6) of section 20 is designed to ensure that restrictions do not create a barrier to disclosure of information from inquiry records under the FOI Acts. In addition to this, subsection (7) allows the Minister to relax or revoke restrictions after the end of an inquiry. This is to ensure that any restrictions still in place (which apply to information other than in inquiry records) can be removed if they become unnecessary.

48. Disclosure restrictions would not prevent a person not involved in the inquiry from disclosing or publishing information that had come into his possession through means unconnected with the inquiry, even if some of that information might be included in documents or hearings that were covered by a restriction order or notice.

49. For example, suppose that an inquiry were set up into the death of a hospital patient, and that a restriction notice were issued to exclude the general public from the proceedings and to prevent the publication of transcripts of evidence, because it was considered that an inquiry held partly in private would be more effective. The inquiry might consider information already in the public domain, such as papers from the inquest, or statements of hospital policy. The fact that a restriction notice was in place for the inquiry would not prevent a member of staff at the hospital from providing a patient with a copy of the hospital policy.

50. To take another example, suppose that a Government department provided information to an inquiry held in private and that, after the end of the inquiry, a request were made under the Freedom of Information Act 2000 for some of that information. The Department could not refuse to provide the information purely because it happened to have been covered by the restriction notice, because the Department would have held that information even if the inquiry had never happened. The purpose of a restriction notice is just to restrict disclosure of information in the context of the inquiry or to restrict disclosure by those who have received the information only by virtue of it being given to the inquiry.

Section 21: Powers of chairman to require production of evidence etc

51. This section provides inquiries with statutory powers to compel evidence. The powers are exercisable by the chairman, but in a multi-member inquiry he will be exercising them on behalf of the panel. It is envisaged that most requests for information from an inquiry panel will not be made under section 21. An inquiry panel will usually ask for information informally first, and experience from past inquiries has shown that the vast

majority of informal requests will be complied with. There are three main scenarios in which powers of compulsion are likely to be used:

(i) a person is unwilling to comply with an informal request for information;

(ii) a person is willing to comply with an informal request, but is worried about the possible consequences of disclosure (for example, if disclosure were to break confidentiality agreements) and therefore asks the chairman to issue a formal notice; or

(iii) a person is unable to provide the information without a formal notice because there is a statutory bar on disclosure.

52. Section 21(4) covers two reasons for which a person might refuse to comply with a notice issued under powers of compulsion. Subsection (4)(a) would cover circumstances when the person was unable to comply, for example, if he did not have the information being requested. Subsection (4)(b) is designed to cover situations in it would be unreasonable to expect a person to comply. This might be because the difficulty, time or expense involved in providing the information would be so great that a person could not reasonably be expected to do so. For example, if an inquiry chairman gave a notice requesting that an organisation produce every document it had on a particular topic within two weeks, and the organisation would have to search through thousands of files to comply, the organisation might make a claim under section 21(4)(b). The chairman would then consider, under section 21(5), whether the public interest in obtaining the information within that timeframe outweighed the cost, bearing in mind how important the information was likely to be. He might choose to vary his notice by extending the deadline, narrowing the categories of information being asked for, or by specifying that the organisation only need to search certain sites for the information. Section 21(4)(b) could also cover situations in which it would not be reasonable to expect a person to provide evidence because the evidence is unlikely to be of material assistance to an inquiry.

53. On occasion, it is possible that the evidence being requested will be an intercepted communication. To ensure that such material can be disclosed to the inquiry, there is an amendment in paragraph 21 of Schedule 2 to the Act to ensure that this is permissible under section 18 of the Regulation of Investigatory Powers Act 2000.

Section 22: Privileged information etc

54. Section 22(1) ensures that witnesses before inquiries will have the same privileges, in relation to requests for information, as witnesses in civil proceedings. In particular, this means that a witness will be able to refuse to provide evidence:

(i) because it is covered by legal professional privilege;

(ii) because it might incriminate him or his spouse or civil partner (by virtue of section 84 the Civil Partnerships Act 2004); or

(iii) because it relates to what has taken place in Parliament.

55. In some recent inquiries, the Attorney General has given undertakings along the following lines:

““To undertake in respect of any person who provides evidence to the inquiry that no evidence he or she may give before the inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence nor any document produced by that person to the inquiry will be used in evidence against him or her in any criminal proceedings, except in proceedings where he or she is charged with having given false evidence in the course of this inquiry or having conspired with or procured others to do so.”

56. If such an undertaking was given, it would be difficult for an individual to refuse to answer certain questions by claiming the privilege against self-incrimination. As for subsection (1)(b), in certain circumstances European Community law may prevent a person from disclosing information to others. An example of this is article 30 of the Directive of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, which is commonly known as the Banking Consolidation Directive.

57. Section 22(2) provides expressly that it will be possible to make in an inquiry, as it is in civil proceedings, an assertion that documents or information should be withheld from the inquiry (or from public disclosure) on the grounds that they are immune from disclosure in the public interest ("public interest immunity" or PII). Such applications have been made to inquiries in the past, including the Bloody Sunday Inquiry, for example, on the grounds that disclosure of the information would be prejudicial to national security. The Government's policy on claiming PII is that Ministers will claim PII only when it is believed that disclosure would cause real damage or harm to the public interest and that this outweighs the public interest in open justice. A claim for PII should be made by the person whose duty it is to protect the information (which need not necessarily be the Crown) supported by evidence (usually in the form of a witness statement or ministerial certificate) that disclosure would cause real damage or harm to the public interest. It is then the responsibility of the inquiry panel, having viewed the documents or information, to balance the public interest in disclosure against the public interest in maintaining confidentiality. Having carried out that "balancing exercise", the inquiry must decide whether to uphold the claim for immunity and, if so, on what terms. The inquiry panel may decide that the information may be withheld, or that it be disclosed in whole or in part (after "redaction").

58. Section 35(4) makes clear that a person who does not produce evidence to an inquiry because it is covered by section 22 is not committing any of the offences created in section 35 relating to distortion, suppression or destruction of evidence. In the case of a refusal to comply with an order of the inquiry on the ground that the evidence was covered by section 22, this could also be relied on as a "reasonable excuse" under section 35(1) for failure to comply with an order of the inquiry.

59. The House of Lords has recently made it clear in its decision in *Three Rivers v Bank of England* [2004] UKHL 48 that legal advice privilege applies in relation to advice given to witnesses in the context of an inquiry. Such privilege extends to advice given about the presentation of evidence, since it is given within a relevant legal context. There is therefore no need for an express provision relating to the application of legal professional privilege to inquiries in the legislation.

Section 23: Risk of damage to the economy

60. Although an application under section 23 can be made only by those acting on behalf of the bodies specified (the Crown, Financial Services Authority or Bank of England), it can be made in respect of information held by any person. The inquiry panel will carry out a balancing exercise between the public interest in the information being revealed to the public and to other participants and the public interest in avoiding a risk of damage to the economy. If the inquiry panel considers that the public interest in avoiding the risk of damage to the economy outweighs the public interest in disclosure, it will be able to take this material into account in its deliberations but will not be able to refer to the material (or its existence) publicly. Section 23 does not impact upon the general principles of public interest immunity, but exists in addition to them.