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

INQUIRIES ACT 2005

EXPLANATORY NOTES

SUPPLEMENTARY

Section 35: Offences

82. This section provides sanctions for non-compliance with an inquiry, or for actions that are likely to hinder the inquiry. The offences created are similar to some of those created by section 250 of the Local Government Act 1972, which have been applied to a number of different types of inquiry in the past, including some under powers being repealed by this Act.

83. The offences created in this section are summary offences and would be dealt with by magistrates (or, in Scotland, in the Sheriff or District Court). The maximum penalty given is the maximum for summary offences. Level three on the standard scale is currently £1000. The maximum term of imprisonment for summary offences is currently six months, but it will be extended to 51 weeks in England and Wales once section 281(5) of the Criminal Justice Act 2003 is commenced. Section 44(3) ensures that the maximum term will be read as six months before that section is commenced.

84. In particular section 35(1) makes it an offence to fail, without a reasonable excuse, to comply with a formal notice requiring attendance at the inquiry or the production of evidence. Subsections (2) and (3) go wider, making it an offence to deliberately distort or conceal relevant evidence. These sections are drafted in such a way that it should not be possible for a person to commit an offence unwittingly (for example, by destroying a document that he does not realise is relevant). Subsection (4) ensures that a person does not commit an offence under subsection (2) or (3) if he is withholding evidence because he is allowed to do so by section 22 or, for example, if the evidence is covered by legal professional privilege. Subsection (4) also ensures that offences of suppressing or distorting evidence do not cover actions authorised by the panel (for example conducting a forensic test on a piece of evidence). The fact that the evidence was covered by section 22 or a privilege could also be relied on as a "reasonable excuse" under subsection (1).

85. In England and Wales and Northern Ireland, only the chairman can institute a prosecution for non-compliance with a notice issued under powers of compulsion. This is because it is for the chairman to decide whether to enforce notices issued under his powers of compulsion, and how best to do this. He has two possible options: prosecution for an offence under section 35 or enforcement of the notice by the appropriate court under section 36. It is considered to be undesirable for someone else to be able to begin a prosecution under section 35 when the chairman has decided instead to certify the matter to the High Court (or equivalent) under section 36.

86. Prosecutions for offences under subsection (2) or (3) may be brought only by or with the consent of the Director of Public Prosecutions in England, Wales and Northern Ireland. This serves to ensure that it is not open to those with an interest in the outcome of the inquiry to bring private prosecutions against witnesses with whose evidence they disagree. It also ensures that prosecutions can be brought after the inquiry has ended (which would not be possible if the chairman had to bring them). Some offences of this

nature might come to light only after the end of an inquiry. In Scotland, prosecution of any offence is the responsibility of the Crown Office and Procurator Fiscal Service.

Section 36: Enforcement by High Court or Court of Session

87. This section provides for an appropriate court (the High Court or Court of Session) to enforce notices issued under powers of compulsion, restriction notices and any orders of the inquiry, including restriction orders. Where a person breaches a notice or order, or threatens to do so, the chairman of the inquiry (or the Minister, after the end of the inquiry) can certify the matter to the court, which can then take steps to enforce the order. This is similar to the mechanism that would have been used to enforce orders issued under the Tribunals of Inquiry (Evidence) Act 1921.

88. In the case of notices issued under powers of compulsion in section 21, enforcement by the appropriate court is an alternative mechanism to prosecution, and could be used in cases where a prosecution might not be the best method of obtaining the relevant evidence. However, the court could also be asked to enforce a wider range of orders, for example, to prevent someone revealing the name of a witness whose identity was covered by a restriction order. This example could occur after the end of an inquiry, when the chairman is no longer in a position to certify the matter to the court, so section 36 provides for the Minister to certify matters to the court after the end of the inquiry.

Section 37: Immunity from suit

89. This section provides immunity for the inquiry panel, the inquiry's legal advisers and assessors, and other people engaged to assist it, from any civil action for anything done or said in the course of carrying out their duty to the inquiry. Subsection (1) will change the current practice whereby sponsor Departments usually have to provide indemnities to the inquiry, which can cause delays at the beginning of an inquiry. The lack of such protection was identified as an undesirable omission in the Tribunals of Inquiry (Evidence) Act 1921 in the report of the Royal Commission on Tribunals of Inquiry in 1966 (the "Salmon Report").

90. This section also provides that witness statements and inquiry reports will be covered by the same privilege, for the purposes of defamation law, as proceedings before a court. This privilege was already afforded to witnesses under the Tribunals of Inquiry (Evidence) Act 1921 but not under some subject-specific legislation.

Section 38: Time limit for applying for judicial review

91. The aim of this section is to reduce the time limit for judicial reviews of decisions that could delay an inquiry. This is because the prospect of a challenge to a procedural decision can halt the inquiry until it has been resolved by a court. For example, a challenge regarding a decision as to whether a witness could give evidence anonymously (perhaps to ensure his right to life was protected) would mean that the inquiry could not require evidence from that individual until the court had decided the matter. This time limit does not extend to challenges about the contents of reports or interim reports.

92. Unlike that in the Civil Procedure Rules, the time limit set by this section runs from the date on which an applicant became aware of the decision, not from the date on which the decision was made. Subsection (2) ensures that this change cannot serve to increase the time limit beyond the standard time limit in the Civil Procedure Rules or the Northern Ireland equivalent.

Section 39: Payment of inquiry expenses by Minister

93. This section sets out what the establishing Minister is obliged to fund and what he has discretion to fund.

94. Under subsections (4) and (5), the Minister is not obliged to fund activities that he has certified to the panel as being outside the inquiry's terms of reference.

95. The withdrawal of funding may be temporary and the Minister will resume funding if he is satisfied the inquiry is working back within the terms of reference. It is envisaged that any withdrawal of funding would only occur in exceptional circumstances. The Minister would be expected to notify the chairman if he had any concerns that the inquiry was working outside terms of reference, giving the inquiry an opportunity to address those concerns and avoid the need to remove funding.

96. Under subsection (6), the Minister is required to publish the total amount that he has paid for the inquiry under section 38. This requirement to publish costs would not cover all those costs to which the chairman must have regard under section 17(3), such as costs borne by witnesses themselves.

Section 40: Expenses of witnesses etc

97. Legal costs of participants often constitute the most significant part of the total cost of an inquiry. The non-statutory position adopted in recent inquiries has been for the Minister to decide, in consultation with the chairman, to fund those participating in the inquiry who are considered to have such a direct interest in the inquiry that they require representation but who may be unable to pay for representation themselves. The Government would not normally meet the costs of large organisations. This section enables this practice to continue. The chairman automatically has the power to pay costs, but the Minister can place qualifications on that power. The Minister will generally set out any broad conditions under which payment may be granted, and the chairman will then take the individual decisions.

98. The legal costs of Government witnesses might be met by the sponsoring department under the mechanism set out in this section, but not necessarily. If the witnesses were from a different department, their own department might pay for their representation, putting them in the same position as any other large organisation, to whom the inquiry would not usually grant funding.