



STATEMENT OF APPROACH:

THE WARNING LETTER PROCEDURE

1. Where a witness faces criticism, the Inquiry Rules ensure that he or she is given a fair opportunity to respond to it. Rules 13-15 set out the procedures by which this is to be achieved. They involve the sending of letters. Though this has sometimes been referred to as 'Maxwellisation'¹ (as it was called in the Preliminary Hearings) or the sending of 'Salmon letters'² the Rules themselves refer to 'warning letters'. The Inquiry will therefore use that term.
2. This Statement of Approach explains how the Inquiry intends to comply with the requirements in Rules 13 – 15.
3. It is inevitable that in the course of the Inquiry's proceedings criticisms will be made of individuals or organisations, whether by witnesses in their written statements or in their oral evidence, or in documents provided to the Inquiry, or otherwise. Furthermore, the Chair may in due course have to make findings and/or reach conclusions in relation to a number of such criticisms and his proposed findings or conclusions may involve the making of explicit and/or significant criticism of individuals and organisations. The

¹ A reference to litigation in the 1970s involving the businessman Robert Maxwell.

² A reference to recommendations of the Royal Commission on Tribunals of Inquiry in 1966, which was chaired by Lord Justice Salmon.



purpose of the warning letter procedure in the Inquiry Rules is to ensure fairness to those who may be criticised³.

4. Rule 13(1) of the Inquiry Rules provides that:
 - a. The chair *may* send a warning letter to any person he considers may be, or who has been, subject to criticism in the inquiry proceedings (Rule 13(1)(a)); or about whom criticism may be inferred from evidence that has been given during the inquiry proceedings (Rule 13(1)(b)); or who may be subject to criticism in the report, or any interim report (Rule 13(1)(c)).
 - b. The chair *must not* include any explicit or significant criticism of a person in the report, or in any interim report, unless the chair has sent that person a warning letter and the person has been given a reasonable opportunity to respond to the warning letter (Rule 13(3)).
5. The effect of Rule 13 is that the chair has the power to, but does not have to, send a warning letter to a person who is or may be the subject of criticism; but that the chair cannot include any explicit or significant criticism of a person in an interim or final report unless a warning letter has been sent and the recipient has been given a reasonable opportunity to respond to the warning letter.
6. Rule 14 provides that, subject to certain exceptions, the contents of a warning letter are to be treated as subject to an obligation of

³ Section 17(3) of the Inquiries Act 2005 provides, amongst other things, that in making any decision as to the procedure or conduct of an inquiry, the chair must act with fairness.



confidence⁴ owed by the inquiry team to the recipient of the warning letter and owed by the recipient to the inquiry chair.

7. Rule 15(1) sets out what must be in a warning letter. The warning letter must: state what the criticism or proposed criticism is; contain a statement of the facts that the chair considers substantiate the criticism or proposed criticism; and refer to any evidence which supports those facts⁵.
8. Over recent years concerns have been expressed, for example in press reports and to Parliament, that some inquiries have been too slow in producing their reports and that this delay has been caused by the warning letter procedure. Concerns have also been expressed that potential criticisms have been discussed in private correspondence rather than being explored in an individual's oral evidence. The Inquiry is aware of, and understands, these concerns.
9. The Inquiry's general approach will be to ensure that significant criticisms of relevant individuals and organisations are aired, as far as practicable, in the course of the Inquiry's investigation and the Inquiry's hearings in the interests of fairness, transparency and avoiding unnecessary delay. This may be achieved in a number of different ways. Examples are:

⁴ The obligation of confidence means that the inquiry team may not disclose the contents of the warning letter to other witnesses, core participants or publicly; similarly, the recipient of the warning letter may not disclose the contents of the letter, save to the recipient's recognised legal representative.

⁵ In the case of a warning letter sent under Rule 13(1)(b) – i.e. to a person about whom criticism may be inferred from evidence that has been given during the inquiry proceedings – the warning letter must refer to the evidence from which the criticism could be inferred (Rule 15(3)).



- a. drawing criticisms to the attention of an individual or organisation and requesting (under Rule 9 of the Inquiry Rules) the provision of a written statement and/or relevant documents in response;
- b. sending warning letters under Rule 13(1) to the individual or organisation during the course of the Inquiry's investigation or prior to the conclusion of the Inquiry's hearings;
- c. ensuring that significant criticisms are explored during an individual's oral evidence;
- d. where criticisms or relevant documents come to light after a witness has given oral evidence, by recalling that witness in order that they might be asked questions about the issue.

This is not intended to be a complete list. There may be other ways during the course of the Inquiry's proceedings in which a criticised person or organisation can be given a fair opportunity to respond to that criticism.

10. Given the breadth of the Inquiry's Terms of Reference, the large number of individuals and organisations who may be subject to some form of criticism during the course of the Inquiry, and the fact that the criticisms made of different individuals or organisations are likely to vary considerably in their nature and seriousness, the Inquiry considers that there is no single, 'one size fits all' approach and that judgements will have to be made by the Inquiry on a case-by-case basis as to the best way of ensuring fairness whilst avoiding unnecessary delay.



11. Where the Chair proposes to make explicit or significant criticism of a person in his report, a warning letter under Rule 13 will be sent to the person concerned at that stage. However the Inquiry expects and intends that this should not cause significant delay, because, as set out above, most, if not all, significant criticisms should have been aired already by that stage and what is a reasonable period for response would, accordingly, be short. It is unlikely that any new or different evidence will emerge at this stage. If, however, it does but is evidence which was available previously to a person subject to criticism who now seeks to rely upon it, and it could have been relied on earlier, then it may well be rejected on the basis that for this reason it lacks credibility. If not rejected as lacking in credibility or cogency, then in the light of the Inquiry's commitment to transparency and openness consideration will be given to whether the witness should be recalled or whether core participants should be invited to make further submissions.

Issued by the Chair on 31 January 2019

Reissued with further guidance on the Inquiry's approach to Rule 13(3) overleaf



Further guidance on the Inquiry's approach to Rule 13(3)

12. As set out above, the Chair must send a warning letter to a person where he envisages including any explicit or significant criticism of that person in the report: that is the effect of Rule 13(3) of the Inquiry Rules.
13. "Person" for these purposes means legal person and thus encompasses both individuals and organisations (including Government departments). It is not limited to core participants, nor to those who have given oral or written evidence to the Inquiry.
14. Not all proposed criticisms trigger the requirement to send a warning letter under Rule 13(3): only those which are explicit or significant. Whether a criticism meets this threshold is a matter of judgement for the Chair.
15. Where a warning letter is sent under Rule 13(3), it must state what the criticism or proposed criticism is; must contain a statement of the facts that the Chair considers substantiate it; and must refer to any evidence which supports those facts: see Rule 15(1). It is often the case that the fairest and quickest way of complying with the requirements of Rule 15(1) is to provide, with the warning letter, the relevant extract from the draft report. However, it is for the Chair to determine whether to do so, or whether to detail the criticism, facts and evidence in the warning letter itself.
16. It is important to emphasise that, by virtue of Rule 14 of the Inquiry Rules, the contents of a warning letter (including any extract from the draft report) are subject to an obligation of confidence owed by each member of the inquiry team to the recipient of the letter, and



owed by the recipient and their recognised legal representative (if any) to the Chair, until such time as the inquiry report is published. This obligation is owed in addition to any other obligations owed to the Inquiry, for example by way of a confidentiality undertaking.

17. All warning letters sent under Rule 13(3) will specify a date by which a response should be received and the Inquiry expects that recipients will respond by that date. The time limit for responding may vary and may depend on the nature and extent of the proposed criticism and on the extent to which the criticism is one which has already been the subject of a warning letter under Rule 13(1) or has been explored during the course of the Inquiry's hearings. All responses should be in writing and will be provided to, and considered by, the Chair before finalising the report. The Inquiry team will not enter into correspondence concerning the terms of, or amendments to, any criticism or proposed criticism.

Issued by the Chair on 20 December 2022