



Scottish Civil Justice Council

Report on the Consultation on the draft Fatal Accident Inquiry Rules

MARCH 2017

CONTENTS	PAGE
FOREWORD	3
SECTION 1: INTRODUCTION	5
Background	
Consultation responses	
Approach to consultation exercise	
Overview of consultation responses	
SECTION 2: CHANGES TO THE RULES – KEY THEMES	7
SECTION 3: SUMMARY OF THE CONSULTATION RESPONSES AND CHANGES MADE TO THE RULES	9
SECTION 4: NEXT STEPS	23
ANNEX - LIST OF RESPONDENTS	24

FOREWORD

by Sheriff Principal Ian R. Abercrombie Q.C.

One of a sheriff's more serious responsibilities is chairing fatal accident inquiries. The purpose of an inquiry is to establish the circumstances of a person's death and to recommend steps that might prevent deaths in similar circumstances. For the sheriff to be able to fulfil that purpose, it is essential that they are supported by rules which empower them to conduct inquiries inquisitorially and which enable them to respond flexibly to issues as they arise.



I am therefore pleased to introduce the Scottish Civil Justice Council's Report on the Consultation on the draft Fatal Accident Inquiry Rules.

I had the pleasure of chairing the specialist working group, which was set up to develop the rules. Over the past year, the group has worked hard to develop a set of rules which aim to improve the way in which inquiries are prepared for and conducted.

The new rules are creative, radical and novel. The normal rules of evidence are replaced with a more flexible system for the gathering and presentation of "information". This is in-keeping with the inquisitorial nature of an inquiry.

In line with wider civil justice reform, far greater emphasis is placed on active shrieval inquiry management and sheriffs have been given a suite of broad powers to tailor the procedure at an inquiry in response to the nature and complexity of the issues raised. A statement of principles has been included in the rules to act as a guide for sheriffs and participants and to aid the exercise of judicial discretion.

The diverse membership of the Working Group has given rise to thorough debate and has generated useful ideas. This has resulted in an imaginative and robust set of rules which take into account the impact on justice organisations, practitioners, families and other participants, and of the public interest in the outcome of fatal accident inquiries.

I gratefully acknowledge the assistance which the Scottish Civil Justice Council have received from the members of the working group and to those who responded to the consultation.

The Scottish Civil Justice Council intends to review the rules in around two years' time, in light of how they are operating in practice. If there are any matters which practitioners or the public think should be looked at, they are encouraged to contact the Secretariat to the Council.

SECTION 1: INTRODUCTION

Background

1. In 2008/2009, Lord Cullen, a former Lord President of the Court of Session, undertook a review of fatal accident inquiry (“FAI”) legislation. His aim was to set out practical measures for an effective, efficient and fair system for inquiry. He made 36 recommendations for reform of the system. The Scottish Government took on board the majority of his recommendations, which were implemented by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (“the Act”).
2. One of Lord Cullen’s recommendations was that there should be a self-contained set of rules setting out the procedure to apply at an inquiry; section 36 of the Act gives the Court of Session the power to make Acts of Sederunt concerning the procedure and practice to be followed in FAI proceedings.
3. The Scottish Civil Justice Council (“the Council”) is responsible for developing the inquiry procedure rules and will hold a care and maintenance function for the rules after they are enacted.
4. The Council set up a Working Group to develop the rules. The Working Group’s remit was *“To consider the secondary legislation required to facilitate implementation of The Inquires into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 and to make proposals for draft inquiry procedure rules for consideration by the Scottish Civil Justice Council”*.
5. The Council sought nominations from the legal profession for membership of the Working Group. The members nominated were required to have a broad spectrum of experience of FAI work and to bring a high level of objectivity and impartiality to policy development.
6. Sheriff Principal Abercrombie, who is a member of the Council, was appointed to chair the Working Group. The membership of the Working Group is as follows:
 - Sheriff Principal Abercrombie (Chairman and Council member)
 - Sheriff Hughes (Council member)
 - Sheriff G Liddle
 - Elizabeth Ross (Crown Office and Procurator Fiscal Service)
 - Jillian Martin-Brown, Advocate
 - Rona Jamieson, Solicitor
 - Hamish Goodall (Scottish Government)

- Jane MacDonald (Scottish Courts and Tribunals Service)
- Marie-Louise Fox (Scottish Legal Aid Board)
- Alan McCloskey (Victim Support Scotland)
- Jackie Powell (Scottish Courts and Tribunals Service, ICMS Project Leader) was later appointed as an observer.

7. The Working Group met during the course of 2016 and developed a set of draft rules which were approved by the Council in November 2016 for the purposes of consultation.

Consultation Responses

8. The consultation ran from 30 November 2016 to 23 January 2017. The Council received 19 responses to the consultation. 18 respondents indicated that they were content for their responses to be published on the Council's website. The respondents are listed in the Annex. The responses to the consultation were published on the Council's website on 9 February 2017.

Approach to the consultation exercise

9. The focus of the consultation exercise was to obtain views on the practical aspects of the conduct of an inquiry and how those were dealt with in the rules to ensure that the procedures would work smoothly in practice.
10. The consultation questions were kept open-ended and generally took the format "*do you have any comments on....*" in order to invite broad comment. As a result the Council received helpful and detailed responses on all aspects of the draft rules.
11. A qualitative approach was taken to analysing the responses and amending the rules. If a respondent raised a good point, it was taken into account when revising the draft rules. In this way, respondent feedback has resulted in improvements to the original draft.

Overview of the consultation responses

12. The responses were generally supportive and positive across the board. Respondents indicated that they agree with the underlying aims of the rules, which are to encourage efficiency and consistency in the conduct of inquiries across Scotland and to reinforce and re-emphasise the inquisitorial nature of an inquiry.
13. Respondents were also supportive of the drafting approach to the structure and layout of the rules and generally felt they followed a clear chronological order.

SECTION 2: CHANGES TO THE RULES – KEY THEMES

14. Although the draft rules have been significantly refined, only a few major changes have been made. The changes which merit particular attention concern: -

- (i) The shift from evidence to information
- (ii) Witness statements
- (iii) Adjustment of the timeframes
- (iv) Financial sanction for non-compliance

15. These matters are discussed in detail below: -

The shift from evidence to information

16. The Legal Secretary to the Lord President offered some general observations on the laws of evidence applicable at an inquiry. He thought that the draft rules were too restrictive in confining themselves to the manner in which “evidence” is presented and suggested that what ought to be aimed for is a more fluid system whereby the sheriff can determine the form in which “information” generally, or on a particular topic, is to be presented. The Council agrees. Furthermore, the Council considers that this is both in-keeping with the inquisitorial nature of an inquiry and chimes with some of the themes in the Evidence and Procedure Review in the criminal sphere¹.

17. The Council has dealt this in two ways:-

- (i) The normal rules of evidence are now dis-applied (see rule 4.1).
- (ii) The rules provide the sheriff with “information” management powers. Rule 4.2 provides that the sheriff may make orders about the manner in which information is presented to the inquiry or about how the sheriff will “reach conclusions” (as opposed to findings-in-fact) based on that information.

18. Some of the other provisions have fallen away because of the disapplication of the normal rules of evidence or have been adapted to refer to “information” rather than evidence. See for example rules 4.10 (joint minutes of agreement, 4.11 (the duty to agree information) and 4.12 (notices to admit information)).

19. Making this change has the benefit of making the rules more inquisitorial in nature; any information in whatever form can be put before the sheriff who will draw his or her own conclusions from it.

¹ Scottish Court Service Evidence and Procedure Review Report, March 2015. The Review explores and identifies the best possible methods for ascertaining the truth in the context of the trial in the modern environment. It has generated proposals for changes to the law, procedures and practice that will contribute to the modernisation of the criminal justice system.

Witness statements

20. The majority of responses were strongly against any requirement to lodge witness statements for every witness. The Crown Office and Procurator Fiscal Service was strongly of the view that the proposal would place significant pressure on resources.
21. Accordingly, the rules now provide the sheriff with the power to order a witness statement to be lodged but that is not the default position; it is part of the “tool kit” of options and powers that sheriffs will have at their disposal.
22. The rule which provided that a witness statement stood as *evidence-in-chief* has been removed in consequence of the disapplication of the normal laws of evidence, as explained above.

Adjustment of the timeframes

23. Almost all of the consultees thought the timescales provided for in the draft were likely to prove too tight, especially in light of rule 3.7 which requires participants to lodge a note in advance of the preliminary hearing in an attempt to focus the issues. They pointed out that in some cases it would leave participants with less than a fortnight in which to prepare.
24. In response, the timeframes for setting the date of the preliminary hearing or the inquiry have been revised. The rules now provide that if a preliminary hearing is to be held this must take place within 56 days of the first order. If no preliminary hearing is to be held the inquiry must be assigned to start within 56 days. The rules previously provided for a period of 28 days in each case.
25. Notice of the inquiry must be given at least 42 days before the preliminary hearing or, if there is no preliminary hearing, the inquiry. The draft previously provided for 21 days’ notice to those who were entitled to be notified and 14 days’ public notice.

Inquiry management powers – deletion of power to impose a financial sanction

26. There was strong feeling about this provision amongst consultees. The Scottish Legal Aid Board raised a number of practical issues and others thought the effect of the rule was not distinguishable from a payment of expenses, which is prohibited by the Act. Given the strength of feeling, this provision has been omitted.

SECTION 3: SUMMARY OF THE CONSULTATION RESPONSES AND CHANGES MADE TO THE RULES

27. The main points made in the responses and key changes made to the rules are set out below.

Question 1: Do you have any comments about the approach taken to the structure and layout of the rules?

Summary of responses

28. All of the respondents who provided comments were content with the structure and layout of the rules. The general view was that the rules are set out concisely and logically. Respondents commented that the separation of the technical provision into schedules makes the rules accessible and easy to follow.

Changes made

29. No changes made.

Question 2: Do you have any comment on the content of the inquiry principles?

Summary of responses

30. The majority of respondents, who answered this question, were supportive of the inclusion of a statement of principles and the content of the principles. Respondents particularly welcomed the reference to the inquiry being inquisitorial, rather than adversarial.

31. One respondent was of the view that the role of the family should be recognised in the principles. However, provided they can demonstrate to the sheriff that they have an interest, separate to that of the procurator fiscal who acts in the public interest, the family will be entitled to participate in the inquiry; that is no different to the case at present. The principles are intended to be applicable to all of the participants equally, including the family. The principles have not been revised in response to this comment.

32. Some respondents thought that attention should be paid to reducing the length of time between the occurrence of death and the initiation of the inquiry. However, that is out with the remit of the rules project which is solely concerned with the practice and procedures which apply once an inquiry is underway.

33. The Sheriffs Principal and the Sheriffs Association expressed concerns about the principle that all participants “*are to be able to participate effectively*” in an inquiry. Their concerns were: -

(i) Third parties who claim a locus might seek to argue the principle gives them an absolute entitlement to participate.

(ii) Participants who behave in an unreasonable, disruptive or difficult manner might cite this as demonstrating their unqualified right to participate.

34. The Council considers that it is clear that the principles are not a set of absolute rights. The sheriff is to take them into account in making decisions; no more than that. The rules do not provide that the principles have any sort of overriding effect. This accords with the recommendations of the Scottish Civil Courts Review on the use of statements of principles in civil court rules.

35. It follows that this particular principle does not create an absolute right or entitlement to participate at an inquiry. Furthermore, the principle only concerns “participants” (i.e. persons who have already become participants to the inquiry, having satisfied the sheriff that they have an interest). It does not apply to third parties who claim a locus but who are not yet participants.

36. With regard to disruptive and unreasonable participants citing this as giving them an unqualified right to participate; the Council considers that the rules create no such right and further, a participant who behaved unreasonably would not be participating “effectively” in the inquiry and indeed may prevent other participants from doing so. The Council considers that when read as intended, this principle provides a helpful tool, rather than a hostage to fortune. For these reasons, the inquiry principles remain as originally drafted.

Changes made

37. The inquiry principles are unchanged.

Question 3: Do you agree that wherever possible, the same sheriff should deal with the inquiry from the point that the procurator fiscal gives notice that an inquiry is to take place, until final determination?

Do you foresee any practical difficulties with this?

Summary of responses

38. The majority of respondents were in favour of the judicial continuity provision. Some thought that this would support case management and one commented that judicial continuity works well in practice in Edinburgh and Glasgow sheriff courts where there are Practice Notes to that effect. .

39. Some respondents noted that there might be practical difficulties from time to time and two respondents were of the view that only specialist sheriffs should deal with FAIs.

40. The Council acknowledges the concerns about practical difficulties raised by some respondents and stresses that the wording in rule 2.5 (judicial continuity) is qualified so that the same sheriff should preside only “where possible”.
41. In relation to judicial specialisation, the Council highlights that section 37 of the 2016 Act makes provision for sheriffs, part-time sheriffs, summary sheriffs and part-time summary sheriffs to be designated as specialist sheriffs in FAls. Subsection (1) allows the sheriff principal to designate sheriffs and summary sheriffs within the sheriffdom, with subsection (3) allowing the Lord President of the Court of Session to designate part-time sheriffs and part-time summary sheriffs, who are not assigned to any particular sheriffdom, as specialists. Subsection (5) makes it clear that it is still competent for a sheriff, part-time sheriff, summary sheriff, or part-time summary sheriff who is not designated as a specialist in FAls to conduct an FAI. This may be inevitable owing to pressure of other business. Under subsection (7), however, the sheriff principal must have regard to the desirability of allocating an FAI to a specialist.

Changes made

42. No changes made.

Question 4: Are you content with the approach to the sheriff’s inquiry management powers? Are there specific illustrative powers which you think should be included in addition to those already listed?

Summary of responses

43. The majority of respondents were content with the sheriff’s inquiry management powers. The general view was that the powers are comprehensive, sensible and appropriate and will go a long way to assisting the sheriff in managing an inquiry.
44. Only one respondent was not content with the powers, considering them to be too wide-ranging and being too onerous on participants. The Council would stress that the powers are examples of the types of order a sheriff can impose; they cannot, of themselves, be too onerous since the duties only arise if and when the sheriff makes an order.
45. Some respondents suggested that it was not clear whether the list was illustrative only and thus might restrict the sort of orders sheriffs made. The Council considers that use of the word “including” in the opening sentence makes it clear that the list is illustrative not exhaustive. The Council notes that this is standard drafting procedure.
46. The Faculty of Advocates noted that draft rule 2.5(1)(a)(ii), which permits an order requiring participants to lead a particular witness, was unusual in the Scottish legal context and questioned whether it was required. The Council has

reflected upon this provision and has retained the power in the rules. The Council considers that this power is in-keeping with the inquisitorial nature of an FAI, which is neither criminal nor civil in nature. The sheriff has the power to control the information presented at the inquiry and will be expected to keep a tight rein over it. If the sheriff can restrict the information presented at an inquiry then the Council considers it logical that the sheriff should also be able to direct a particular witness to appear and talk about a given matter. These provisions are two sides of the same coin. In any event, it should be borne in mind that the sheriff would have this power even if this was not express because the list of powers is only illustrative and the sheriff always has the power *“to make any order necessary to further the purpose of an inquiry”*.

47. A significant number of respondents took issue with draft rule 2.5(d)(iii) which gives the sheriff the power to deal with a participant’s non-compliance with a rule or order by requiring that participant to make a payment to another participant to reflect the consequences of not complying with a rule or order.

48. In particular: -

(i) The Scottish Legal Aid Board pointed out the practical difficulties which this rule would pose if participants were in receipt of legal aid.

(ii) The Faculty of Advocates considered that it had the appearance of a payment of expenses which might be out with vires (legal power) in view of section 25 of the 2016 Act, which precludes the court awarding expenses in relation to inquiry proceedings.

(iii) The Scottish Government thought that the sheriff’s inherent powers were sufficient to deal with non-compliance and that the imposition of a financial sanction was not necessary.

49. Given the strength of opposition to draft rule 2.5(1)(d)(iii), the practical difficulties identified by the Scottish Legal Aid Board, and the concerns that the provision might not be distinguishable in nature from a form of expenses (and thus fall out with vires), this provision has been removed from the rules.

Changes made

50. Draft rule 2.5(1)(d)(ii) is omitted.

Question 5: Is there any further information which you think would be useful to include in the form of first notice?

Summary of responses

51. Respondents were broadly content with the pre-inquiry procedure but did raise a number of specific points of detail. In particular, the following suggestions were made:-

(i) Form 3.3 could be amended to highlight to potential participants that they may wish to seek legal advice and that legal assistance may be available from the Scottish Legal Aid Board and should be applied for timeously. The Council agrees and has amended the Form accordingly.

(ii) Form 3.1 could be amended to include a section reflecting rule 3.1(2)(h) which requires the notice to identify any person who the procurator fiscal considers might have an interest in the inquiry. The Council agrees and has added a section to the Form.

(iii) Form 3.1 could contain an indication from the procurator fiscal about when disclosure is likely to happen. The Council considers this is an administrative matter and does not require to be included in rules.

(iv) Form 3.1 could be amended so that the procurator fiscal must confirm that they have informed the family that an inquiry is to take place. The Council disagrees. Form 3.1 is concerned with section 15 of the 2016 Act which requires the procurator fiscal to notify the sheriff that an inquiry is to take place. The procurator fiscal is under a duty, once the sheriff has made the first order, to inform the family and there is a notice provided for this in the rules (Form 3.3). Furthermore, the Family Liaison Charter made under the 2016 Act requires to fiscal to keep the family fully apprised.

Changes made

52. Various revisions have been made to Forms 3.1 and 3.3 which reflect the helpful and practical comments received.

Question 6: Do you think that imposing a deadline of 14 days within which the sheriff must make the first order is reasonable and practical?

Summary of responses

53. Most respondents either agreed that the 14 day time limit was practical and reasonable or had no comment to offer, as they considered this to be an operational issue for the Scottish Courts and Tribunals Service.

54. One respondent thought that the sheriff should have the discretion to make the first order when ready. Another was of the view that in order to ensure that matters move forward in a timely manner, the inquiry should open, or a decision be made that an inquiry is to be held, within a fixed period from the date of death. This respondent also suggested that there should be “judicial oversight” of the investigatory process and that the sheriff’s case management powers could be used to allow the sheriff to intervene in this process to ensure the investigation proceeds expeditiously.

55. The Council considers that this cannot be done for several reasons:

(i) It is not practical to require an inquiry to start within a fixed time, given the nature and complexity of some inquiries and the need to rule out criminal prosecution before an inquiry takes place. It is for these reasons that Lord Cullen considered that a fixed deadline should not be imposed.

(ii) It is not within the remit of the Council to look at this. It is an internal matter for the Crown how it progresses investigations.

(iii) Even if it were within the Council’s remit, the Council it does not have the vires to regulate the investigatory process followed by the Crown. The 2016 Act confers power to the Council to make rules setting out the procedure and practice followed at an inquiry. This power does not extend to regulating what happens before an inquiry starts.

(iv) Giving a sheriff judicial oversight of the Crown’s investigation, even to the most limited degree of ensuring progress is being made, would cut across the constitutional position of the Lord Advocate as chief investigator of deaths in Scotland and would require a legislative basis.

Changes made

56. No changes made.

Question 7: should we provide a timeframe within which the preliminary hearing and inquiry must start after the first order? If so, what should those timescales be? Do you think that the 28 day timescales provided for in the draft are achievable?

Summary of responses

57. Although a number of the respondents thought that the 28 day period was achievable, most respondents considered that the timescales provided in the draft would prove too challenging in practice, especially in light of the duty in draft rule 3.7 (things to be done before the first preliminary hearing).

58. Some respondents pointed out that, as drafted, the Rules would give participants 14-21 days in which to prepare for a preliminary hearing (or an inquiry if no preliminary hearing was to be held).

59. A number of alternative timeframes were suggested, ranging from 35 days to 56 days.

Changes made

60. Given the concern expressed by respondents regarding the timescales being too tight, the rules have been revised.

61. The rules now provide that notice under rules 3.3 (notice of the inquiry) and 3.4 (public notice of the inquiry) is to be given at least 42 days before (a) the preliminary hearing, or (b) if the sheriff has not ordered a preliminary hearing, the date fixed for the start of the inquiry. The draft rules previously provided for 21 days' notice to those who were entitled to be notified and 14 days' public notice.

62. The timeframes for setting the date of the preliminary hearing or the inquiry have also been revised. Rule 3.2 now provides that if a preliminary hearing is to be held this must take place within 56 days of the first order. If no preliminary hearing is to be held the inquiry must be set to start within 56 days (previously 28 days). This will give people 3 weeks to prepare the note required by Rule 3.7 (before the preliminary hearing).

Question 8: do you have any comments on the duty and timeframe set out in Rule 3.7?

Summary of responses

63. Almost all respondents expressed concern that, given the other timeframes set out in the rules, rule 3.7 (before the preliminary hearing) would prove difficult to comply with in practice.

64. The point was made that if a preliminary hearing was to take place within 28 days of the first notice, participants who were only informed that an inquiry would take place when they received Form 3.3 notice, or saw the public notice, would have too little time to comply with rule 3.7 in any meaningful way.

65. The Council detected a concern from the responses that a participant will be "bound" by the terms of the rule 3.7 note and will be restricted from raising new points or may be prejudiced by raising others which they do not go on to pursue. The Council acknowledges that whilst that approach might be expected in an adversarial process, it would not be in the spirit of an inquisitorial process, which this is. The purpose of the note is to share information, insofar as the participants are able to, at an early stage in order to assist the sheriff in making the

appropriate inquiry management orders. It is intended this will assist in the front loading of the inquiry and the early identification of issues. Participants are expected to comply with the rule insofar as they are able and this has been stressed by the addition of the words “*where known*” at the end of the rule.

66. The Faculty of Advocates pointed out that there was no procedure whereby a person who was notified of the inquiry could confirm that they intended to participate. The Council agree that a procedure is required and has amended the rules accordingly.

Changes made

67. Rule 3.3 (notice of the inquiry) has been adjusted so that a person who receives notice must indicate their intention to participate by lodging a notification in Form 3.3B. Other persons (out with those categories of person who are entitled to receive notice) may apply to the sheriff to participate under Rule 3.5 (other participation).

68. A slight adjustment to rule 3.7 (before the preliminary hearing) has been made as explained above. Form 3.3 has been amended so that it now advises recipients of the duty in Rule 3.7.

Question 9: Are there any other matters you consider should be dealt with at the preliminary hearing?

Summary of responses

69. The majority of respondents who provided comments were content that the list of matters to be dealt with was comprehensive. Numerous specific points were raised, including the following.

(i) At Rule 3.8(2)(e) a further sub paragraph might direct the sheriff to the use of technology, including live link for the taking of evidence. The Council agrees and the rules have been amended.

(ii) The Crown should confirm whether anyone who has been notified has failed to respond and what steps have been taken to ensure they are aware of the inquiry. The Council agrees and the rules have been amendment to this effect.

(iii) A respondent stressed how important it was to have detailed discussions about the likely duration of the inquiry - not just the start date but realistic timescales for the completion of the entire inquiry. The Council agrees and the rules have been adjusted accordingly (see rule 3.8(d)).

(iv) The same respondent also suggested that there should be a specific opportunity for the family to be heard on what it considers should be covered

by the scope of the inquiry. The Council considers that this opportunity already exists because the family can either apply to participate, or, if they do not wish to participate in the full inquiry process, raise issues directly with the procurator fiscal during communications which will take place under the Family Liaison Charter.

(v) One respondent suggested that the list of matters to cover was far too long and it was not realistic that they could all be covered in a preliminary hearing held so soon after the first notice. The Council points out that the preliminary hearing is to be continued for as many days as are required to deal with the issues on the list. In a complex inquiry it will not be possible to deal with all of those issues in one day. The preliminary hearing will be continued to the point that all of these issues have been addressed (insofar as they need to be) and the participants are ready for the inquiry to begin.

Changes made

70. Various adjustments have been made as detailed above.

Question 10: are you content with the provisions on agreement of evidence?

Summary of responses

71. Most consultees who provided comments were supportive of these provisions, commenting that they should help focus the issues and result in court time being used more effectively. In addition, the following specific points were raised:

(i) Rule 4.10 should be amended to make it clear whether a notice of uncontroversial evidence must always be ordered or whether a participant can take the initiative to prepare one. This provision only applies where the sheriff orders it. This provision has been redrafted and renamed “notices to admit”.

(ii) COPFS suggested that rule 4.10 (notices of uncontroversial evidence) should be inverted so that other participants could be ordered to lodge a note identifying what Crown evidence they disagree with. After consideration, the Council has rejected this proposal. If the sheriff orders that rule 4.12 (notices to admit information) is to apply, the Crown could lodge a notice to admit that covers all the Crown evidence but the Council does not agree that there should be a presumption that all other participants accept the Crown evidence unless they lodge a notice of objection to it.

(iii) Another respondent was of the view that although rule 4.8 (joint minutes of agreement) is useful, rule 4.9 (duty to agree evidence) and rule 4.10 (notices of uncontroversial evidence (now rule 4.12 notices to admit) are too adversarial in nature to be appropriate in the context of an FAI. The Council

acknowledges that it may be that these provisions will be seldom used but considers that it is nonetheless useful to have them as an option.

Changes made

72. Various minor adjustments have been made including but not restricted to those narrated above.

Question 11: with regard to the lodging of witness statements, what do you think the default position should be? Should the default position be that a witnesses statement should be lodged for every witness who is to give evidence at an inquiry, or should the converse presumption apply?

Summary of responses

73. This question generated very strong opinions. Of the 18 published responses received, 11 respondents were against the use of witness statements as being the default and only 4 in favour. 3 had neutral views or no comment to offer.

74. The main body of opinion was that oral testimony should continue to be the norm because of the public nature of an FAI. The general view was that FAIs perform a valuable function whereby investigation of the death of a member of the public takes place in a public forum and oral testimony serves that function in a way that written statements do not.

75. Some respondents thought that the use of witness statements should not be discounted completely and might be useful on occasion and so should be an option open to the sheriff rather than a default position.

76. Some respondents also expressed concern that the adoption of witness statements as the default procedure would have considerable resource implications. These would fall primarily on COPFS but would also affect other participants and court operational staff (who would have to ensure that the statements were made available to the public).

77. Some respondents raised practical issues about how statements would be made available to members of the public, especially in large inquiries where there was significant public interest. Respondents thought it likely that there would be confidentiality and data protection issues requiring the redaction of certain information.

Changes made

78. The Council has considered the strength of feeling about this provision and has noted the concerns about resource implications and other practical problems which would arise if witness statements were the default. The Council has amended the rules so that a sheriff has the option of ordering a witnesses

statement to be lodged but there will be no default requirement to lodge a witness statements for each witness.

79. If a sheriff orders that a witness statement is to be lodged under rule 4.2(b) (the information management powers), then the terms of rule 4.13 (witness statements) will apply.

80. Going forward, witness statements will be part of the sheriff's "toolkit"; one of a number of powers and options open to the sheriff should the circumstances require it.

Question 12: are you content with the provisions on expert witnesses?

Summary of responses

81. The majority of respondents , who answered this question, were content with the draft provisions, though many had specific points or suggestions to make, including: -

(i) The rule on single joint expert witnesses should be amended to provide for the sharing of the cost of a single joint expert witness. The Council agrees and has amended the rule accordingly.

(ii) The rule on expert witnesses should also require the participant to specify what qualifies the expert in terms of their professional qualifications or experience to assist on the issues before the inquiry. On reflection, the Council considers this is unnecessary and, in any event, it is standard practice for expert witnesses to detail their qualifications in their reports.

(iii) A few respondents were confused about written statements by expert witnesses and were unclear whether statements were to be taken as incorporating a report by the expert. The rule has been amended so that it is clear that an expert's witness statement may consist of his or her report. Further, if the witness wishes, an additional narrative/overview supplementing or commenting on that report can be lodged in the form of a witness statement.

(iv) With regard to consultation draft rule 4.14 (expert witness instructed by the procurator fiscal), the Faculty of Advocates questioned why participants are, subject to the sheriff ordering otherwise, limited to asking the expert to clarify the contents of their report. They considered that participants should be able to lodge questions which go beyond mere clarification. The COPFS considered that the rule should be amended to provide that parties who put additional questions to the Crown expert witness should be liable in expenses for any additional expense incurred. The Council agrees that: (a) the rule should apply to expert witnesses engaged by any participant, not just the

procurator fiscal and (b) should not be limited to points of clarification. The rules have been amended accordingly and give the sheriff oversight of the process.

(v) One respondent was not keen on the requirements in the rule on expert witnesses and in particular, the requirement to give notice when considering whether to instruct an expert. They wanted the rule to provide that notification is to be sent within 7 days of the expert being instructed. The Council notes that the purpose of the rule is to allow the sheriff to make informed decisions about exercising the inquiry management powers. For example - when considering whether a joint expert witness should be instructed, the sheriff will need to know if any of the participants have already instructed an expert witness. The rule on expert witnesses has been amended so that a participant must inform the court if they have already instructed an expert witness.

(vi) Some respondents were concerned that the sheriff could compel the appointment of single joint experts. They wanted the sheriff to be allowed a greater degree of discretion as to whether such orders should be made. The rules have been amended accordingly.

Question 13: do you have any comments on how the provisions on single joint experts would work in practice?

Summary of responses

82. Respondents who answered this question, were broadly in favour of having the option to appoint a single joint expert. However, some were concerned that the sheriff could compel parties to instruct a single joint expert and thought that this would not work if there were stark differences in opinion, points of controversy, or in large FAIs with multiple participants. The Council agrees that a single joint expert would not be suitable in those circumstances. It is not anticipated however, that a sheriff would order the use of a single joint expert if there were stark differences in opinion or points of controversy and the sheriff is to be trusted to make the appropriate orders in the circumstances. The drafting of the rule has been adjusted to address this concern.

83. A respondent suggested that the rule on single joint expert witnesses should provide for the sheriff approving the terms of the joint instruction if agreement could not be reached. Their concern was that to allow participants to send separate instructions on matters that cannot be agreed could potentially result in a confused and contradictory instruction to the single expert. Having considered this point further, the Council is of the view that the sheriff should not be able to compel the terms of the instruction where the parties cannot agree. It considers this would be a step too far and may be counterproductive. However, the rule has been adjusted to provide that the sheriff must approve the terms of the separate

instructions, to ensure that participants act reasonably and to try to avoid the sort of confusion and contradiction the respondent is concerned about.

84. Another respondent suggested that an amendment be made to clarify the position regarding the sharing of the single joint expert's expenses. The rules have been amended accordingly.

Changes made

85. Amendments to the rules have been made to clarify the position regarding joint experts' expenses and to make provision that the sheriff must approve the terms of the joint instruction.

Question 14: do you have any comments on how the provisions on concurrent expert evidence would work in practice?

Summary of responses

86. Respondents who answered this question were in favour of including this as an option open to the sheriff.

Changes made

87. No changes made.

Question 15: do you agree with the approach to Part 5? If not, please provide comments.

Summary of responses

88. Most respondents were either in agreement with the approach to Part 5 or had no comment to offer. One respondent hoped that there would be a consistent approach taken across sheriffdoms.

89. FAs vary so much in their complexity and nature that to attempt to set down a one-size-fits-all procedure which could apply at the most straightforward and at the most complex and long running would not work. The Council notes that the intention is that the statement of principles will act as a guiding compass and will encourage consistency in approach. Judicial training will also have an important role to play.

Changes made

90. No changes made.

Question 16: Do you have any comments or suggestions regarding the sheriff's style determination, Form 6.1?

91. Respondents who provided comments, were either in favour of the style determination or neutral.
92. One respondent suggested imposing a time limit within which the sheriff must make the determination. The Council notes that under section 26 of the Act the sheriff must issue the determination "*as soon as possible*" after the conclusion of the inquiry.
93. Other respondents mentioned the need for flexibility. The Council notes that as with all of the forms in the Rules, the style determination is to be read with rule 1.4 (forms), which provides that a form may be varied where the circumstance require it.
94. The Sheriffs Principal and the Sheriffs Association were of the view that the determination should summarise the evidence given but there should be no requirement for the sheriff to produce findings in fact as part of the determination. They noted that an FAI is not a civil proceeding in the ordinary sense and, as such, findings-in-fact are not necessarily required. Instead, the facts upon which a sheriff basis his or her determination can be included in a broader narrative in a format which is less legalistic. The Council agrees and the form and the rules have been amended to entirely remove references to "*findings-in-fact*".

Changes made

95. Rules and forms have been amended to remove all references to "*findings-in-fact*".

Question 17: Do you have any comments on the content of the forms?

96. The respondents who answered this question were mainly content with the forms. A number of minor and typographical matters were picked up and various adjustments and corrections have been made as a result.

Changes made

97. Various minor and typographical amendments have been made to the forms as a result of helpful comments from respondents

Question 18: Do you have any comments on the technical provisions contained in schedules 1, 2, 4, 5 or 6?

98. The respondents who answered this question were generally content with the technical provision in the schedules.

99. Several respondents suggested however that it would be preferable to allow intimation of applications by email where the receiving participant is the procurator fiscal or is otherwise represented by a solicitor. The Council agrees and Schedule 2 has been amended accordingly.

100. A similar point was raised in relation to schedule 4, which is concerned with lodging rather than intimation. The Council notes that, unfortunately it is not always convenient or practical for things which require to be lodged, to be lodged electronically in every sheriff court. The Council is aware that practice and internal administrative practices and systems differ from court to court and that many sheriff courts accommodate electronic lodgement. The Council agrees that this is something which should continue to be dealt with on a court by court basis for now.

Changes made

101. Schedule 2 has been amended to allow for intimation by email. Schedule 4 is unchanged - if a particular sheriff court is content to receive productions electronically then that matter can be discussed at the preliminary hearing.

SECTION 4: NEXT STEPS

102. The Council Working Group considered the responses to the consultation and recommended a number of revisions to the draft rules prior to submitting them to the Council. The Council considered and approved the revised rules at their meeting on 20 March 2017, subject to typographical and stylistic changes. The rules will be submitted to the Court of Session for consideration to be made by Act of Sederunt and it is intended that they will come into force on 15 June 2017.

103. Both the Scottish Civil Justice Council and the Working Group are grateful to everyone who responded to the consultation. The responses have been of great assistance to the Council in developing the rules.

ANNEX

CONSULTATION ON THE DRAFT FATAL ACCIDENT INQUIRY RULES

LIST OF RESPONDENTS

- Scottish Government
- Scottish Legal Aid Board
- Faculty of Advocates
- Association of Personal Injury Lawyers
- Ray Gribben
- BLM Law Solicitors
- Glasgow Bar Association
- Brodies LLP
- Pinsent Masons LLP
- Thompsons Solicitors
- Crown Office and Procurator Fiscal Service
- Law Society of Scotland
- Medical and Dental Defence Union for Scotland
- Forum of Scottish Claims Managers
- Sheriffs Principal
- Sheriffs Association
- Anderson Strathern LLP
- Roddy Flinn, Lord President's Private Office