

ANNEX C

Consultation Questionnaire

Structure and chronology

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

We welcome the simplification of the rules into one, relatively short, document with other matters in the schedules at the end.

Part 2 – Overview

The inquiry principles

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

We agree broadly with the principles set out however, we consider that the failure to mention the central role of the family of the deceased in an FAI to be a problem.

For a family who have lost a loved one, an FAI is an opportunity for them to understand how their relative died. Perhaps more importantly, it is an opportunity to ensure that no one else's relative dies in the same way, for lessons to be learned and for things to change if necessary.

In many cases this will be the family's only opportunity to participate in proceedings and they should be able to do in a significant way.

We consider that the importance of the family and their representative at the FAI ought to be captured within the inquiry principals.

Representation and judicial continuity

Consultation 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?

We consider that it is essential that the same Sheriff deals with the matter throughout the Inquiry. However, to ensure that this is practical in reality, those scheduling the Court sittings must ensure that the Sheriff allocated to the FAI is freed up to undertake same. This means that the Sheriff cannot be allocated other work during the period where they are to be sitting during the FAI.

The inquiry management powers

Consultation 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?

Yes

Part 3 – pre-inquiry procedure

The first order and notices

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

We consider that the first notice should contain provision for the Procurator Fiscal to confirm that they have notified the family of the deceased, prior to issuing a form 3.1, that they are doing so and what the practical effect of this is. Too often families feel that they are not involved in the FAI process to the extent that they should be. Placing this requirement on the Procurator Fiscal would ensure that the family know that Notice of an FAI has been given. This requirement would not be overly burdensome on the Procurator Fiscal Service. This should be done as part of good professional practice, in any event .

Consultation 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?

Yes

Consultation 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?

If so, what should those timescales be? Do you think that the 28 day timescales provided for in the draft are achievable?

Yes.

We do consider that the 28 day timescale within the draft is achievable. However we would ask that consideration is given to the reality for the family and other individual participants to instruct a Solicitor to attend the preliminary hearing within a short period of time.

Difficulties include:

- The time it takes to find a Solicitor to conduct an FAI
- Application for Legal Aid/legal assistance through trades union/insurance company
- Other financial considerations if a legal aid application is rejected
- The time and practicalities of receiving disclosure of relevant documents from the Procurator Fiscal
- Often by the time the above is all resolved there is little time for the Solicitor to understand the case, take instructions and properly consult with their client prior to the Preliminary Hearing.

Given the above concerns we consider that while a PH ought to be listed within 28 days if one is required, if a PH is not required the FAI should start no later than 56 days from the issue date.

Preliminary hearings

Consultation question 8 – do you have any comments on the duty and timeframe set out in Rule 3.7?

We consider that Rule 3.7 is a welcome addition

Consultation question 9 – are there any other matters you consider should be dealt with at the preliminary hearing?

During the Preliminary Hearing we consider that the likely length of the Inquiry should be discussed *in detail*. Too often FAIs are listed for 1 week at a time, months a part. This is not the best way to conduct an Inquiry in any circumstances. It means that the evidence is spread out over a lengthy period of time. There is also additional cost to all parties due to the need for refreshing of the evidence between the hearing in order to adequately represent clients. On occasion we have had experience of having to have two different solicitors dealing with the same FAI as it was listed re-listed during a period of time when the solicitor conducting the first half of the FAI was on holiday. This caused great unnecessary expense to our client and also considerable and unnecessary distress and anxiety.

It is our view that realistic timescales should be discussed at the FAI and dates provided for the full FAI, not just a start date, but dates for the full FAI. This means that all parties are clear when the matter will be complete.

It is exceptionally distressing for families to require to attend an FAI for a few days over a period of months, particularly because then they first receive notification of the FAI they are advised it will last 1 week. Being told that it will last 1 week means that families think it will last 1 week, they think that this means they will no longer have to mentally deal with stress and anxiety an FAI can cause them for longer than a week. Then when they are told they have to come back for another week 2 months down the line and then another few days another 3 months down the line this places an unreasonable burden on them. Families, as do all parties to an FAI, deserve to know how long an FAI is likely to take.

This does not mean rushing the evidence, or trying to cut out witnesses, but it does mean that the Sheriff at the Preliminary Hearing and all the parties must be realistic about how long matters are going to take.

We also consider that during the Preliminary Hearing there should be a specific opportunity for the family to be heard in relation to what they wish to have included within the scope of the inquiry. Often this can lead to practical results and findings which may prevent another person dying in similar circumstances.

Part 4 – evidence

Agreeing evidence

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

Yes.

In relation to evidence we also consider that a witness timetable and running order should be agreed prior to the commencement of the FAI. This would assist the Procurator Fiscal in issuing warrants for the witnesses to attend the FAI. It would also allow parties to prepare appropriately for witnesses.

Too often in FAI's parties do not know what witnesses are being called until the day before they are being called, or at times, on the day. Another experience that is all too common is for a witness to attend for several days on citation and not be called due to the order of witnesses changing.

While we accept that this can, at times, be unavoidable, we consider that this should only happen in exceptional circumstances. Witnesses should know when they are required to attend and should attend and give evidence on that date wherever possible. If evidence runs on, which it inevitably does, the witness timetable and citations require to be amended accordingly to ensure that witnesses are aware of this.

Further, we consider that it should only be in exceptional circumstances that parties are permitted to lead witnesses which are not on their list of witnesses submitted in advance. For this to work properly all documents require to be exchanged by parties in early course. If this does not take place it inevitably leads to witnesses being required to rebut documents that no one knew about until the day of the hearing. This not only causes unacceptable delays but also disrupts all the planning which has been done through the Preliminary Hearing process. This will require to be strictly policed by the Sheriff hearing the Inquiry otherwise the work carried out in pre hearing process will become obsolete very quickly.

Consultation 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?

The default position should be that witnesses attend to give their evidence in chief. Witness statements should not be used as a default.

Expert evidence

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

Yes, subject to parties right to be heard on the matter. Joint reports and/or Joint experts are not always possible and this has to be taken into account.

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

No, subject to parties right to be heard on the matter. Joint reports and/or Joint experts are not always possible and this has to be taken into account.

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

No, subject to parties right to be heard on the matter. Joint reports and/or Joint experts are not always possible and this has to be taken into account.

Part 5 – the inquiry

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

Yes, we consider that this is the best way to ensure that each FAI is conducted in a manner which is appropriate to the issues which require to be considered. We consider that being overly prescriptive can, at times, prevent important matters being discussed or raised within the Inquiry.

Part 6 – the sheriff’s determination

Consultation question 16: do you have any comments or suggestions regarding the sheriff’s style determination, Form 6.1?

We consider that parties to whom a recommendation has been made within the FAI determination should be given a date by which they are required to explain what steps they have taken to address the recommendation. If this has not been possible, they will have to explain why. This should be shared with all parties to the FAI

Schedule 3 – forms

Consultation question 17: do you have any comments on the content of any of the forms?

No

Schedules 1, 2, 4, 5, 6

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

No