The Crown Office and Procurator Fiscal Service (COPFS) welcomes the opportunity to respond to the Scottish Civil Justice Council Consultation on the draft Fatal Accident Inquiry Rules.

COPFS strongly supports the aims of the draft rules, which are (para. 27): (i) to achieve greater efficiency; (ii) to encourage consistency; and (iii) to reinforce the inquisitorial nature of an inquiry. The consultation seeks to promote these aims by (para. 28) greater front loading of the process. It recognises (para. 32) that in consequence all of the participants will require to spend a greater amount of time on preparation.

Experience of front-loading in other contexts would suggest that, while benefits may accrue through a more efficient and effective use of court time, additional demands, including resource demands, will be imposed on the parties. In the present context, those burdens will fall, in particular, on the Crown. The Crown is considering the resource implications of the draft rules, but the point has particular relevance for Questions 11 and 12, which are addressed below.

Structure and chronology

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

Rule1.2 “Interpretation” states that *“‘participants’ includes the procurator fiscal”.* This does not accurately reflect the role of the procurator fiscal in FAI proceedings, a role which is, in turn, based upon the Lord Advocate’s responsibilities as head of the system of investigation of deaths in Scotland – responsibilities which are reflected in the Lord Advocate’s responsibilities under sections 2, 4, 6, 7, 8 and 13(2) of the 2016 Act. . The procurator fiscal is not a participant in the sense that others choose to participate or not. The procurator fiscal both initiates the inquiry, and has responsibilities in relation to the investigation of the death and the conduct of the inquiry: see, in particular, sections 1, 10, 15, 20(1)(a) of the Act. In the Act, the procurator fiscal is repeatedly described separately and in different terms from participants: e.g. ss. 11, 15(3)(b), 17, 18(1), 18(2), 20(1), 20(2), 21(3), 22(4)(b), 24(3)(b), 32(4), 32(5), 33(3), 33(4), 33(6)(a), 36(e), 36(g), 40. This distinction between the procurator fiscal and participants should, likewise, be reflected in the drafting of the Rules.

Subject to this point, COPFS does not have any comments about the approach taken to the structure and layout of the rules.

Part 2 – Overview

The inquiry principles

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

COPFS strongly supports the inquiry principles. In particular, Rule 2.2(1) highlights, at the outset, the inquisitorial nature of an FAI which emphasises that FAIs are a very different form of procedure and not an alternative to a criminal trial or civil proof.

Representation and judicial continuity

Consultation question 3: do you agree that wherever possible the same sheriff should deal with the inquiry from the point where the procurator fiscal gives notice that an inquiry is to take place, until final determination? Do you foresee any practical difficulties with this?

COPFS agrees that judicial continuity is desirable with a view to securing effective and consistent judicial case-management throughout the life of an inquiry. However, COPFS recognises that there may be situations where this may not be capable of being achieved by reason of pressure of other business or otherwise.

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?

COPFS is generally content with the approach to the inquiry management powers set out in rule 2.5. These are proportionate and appropriate allowing the sheriff the flexibility to regulate the procedure to ensure that the inquiry principles are fulfilled.

However, COPFS questions the vires for draft rule 2.5(d)(iii). Section 25 of the Act states: "The Sheriff may not make *any* award of expenses in relation to inquiry proceedings". A "payment to another participant to reflect the consequences of not complying with a rule or order" is, in effect, a payment of expenses.

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?

In response to question 7 COPFS suggests that the Rules should allow flexibility to permit the sheriff to order a preliminary hearing at a date later than 28 days after the first notice in appropriate cases. This should be underpinned by a requirement on the procurator fiscal to state in the first notice whether there are particular reasons why

the preliminary hearing should not take place within 28 days. COPFS does not consider that there is further information which should be included in the form of first notice, but offers additional comment on two features of the draft rules in this regard.

COPFS supports the flexibility inherent in Rule 3.1(d), which states the first notice must set out whether the procurator fiscal considers a preliminary hearing unnecessary and the reasons for that view. Although a preliminary hearing will be appropriate in the vast majority of cases, there will be a small number where the issues are narrowly focused and where there has been appropriate engagement between potential participants in advance. In such a case, a mandatory requirement to hold a preliminary hearing would be contrary to the inquiry principles. The decision as to whether or not to dispense with a preliminary hearing will remain one for the sheriff.

COPFS would suggest that draft Rule 3.1(e)(ii) should be revised so that it specifically requires the notice to set out which condition in section 4 of the Act is met. This would be consistent with the position taken in draft Rules 3.1(f) and 3.1(g) and better reflect the statutory framework.

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?

This is a matter for the Court. COPFS is not aware of any reason why such a timescale should not be reasonable and practical.

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

COPFS supports the aims of: (i) securing due expedition in the conduct of inquiries; and (ii) judicial case management to that end. However, a mandatory requirement to hold the preliminary hearing within 28 days of the order in all cases may be challenging in more complex inquiries and it may be appropriate to allow for flexibility by way of a qualification “unless the sheriff otherwise orders” (underpinned by a requirement for the procurator fiscal to specify in the first notice if it is considered that the preliminary hearing should be fixed at a date beyond the 28 day period).

The requirement to hold the inquiry within 28 days if there has been no preliminary hearing may not take account of pressures on court time, though COPFS recognises that this is a matter for the Court.

Preliminary hearings

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

COPFS supports the aim of Rule 3.7, but the practicalities may not be entirely straightforward. Prior to intimation of the first notice or first order on various organisations / individuals, the Crown is unaware whether particular parties will be represented at the inquiry. While, at an early stage, there is often discussion with organisations which are expected to participate in an inquiry (e.g. the Scottish Prison Service or Police Scotland in the case of a death in custody), frequently it is not known whether the individuals who are to be intimated on separately will seek representation. Equally, next of kin may only seek representation once they receive the intimation notice. Accordingly, even if some participants have received the Crown disclosure at an earlier stage, participants who have sought representation after receiving the intimation of the First Order may not be in a position to meet the requirements set out in Rule 3.7.

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

No.

Part 4 – evidence

Agreeing evidence

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

COPFS supports the provisions on agreement of evidence. However, rule 4.10 depends on parties anticipating, through a notice of uncontroversial evidence, what evidence other parties should be able to agree; and the arrangements for agreement of evidence could be strengthened in the following way. The position of the procurator fiscal and participants are not symmetrical, since the procurator fiscal has undertaken an investigation into the death, gives disclosure and leads the bulk of the evidence. It should be practicable for participants, to whom the Crown has given disclosure, to intimate to the Crown evidence which is not agreed. If such a requirement were underpinned in the rules, that could provide an effective manner of focusing and narrowing the issues on which oral evidence would be required.

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 witness statement should be lodged for every witness who is to give evidence at an inquiry or should the converse presumption apply?

COPFS acknowledges the potential benefits of requiring a witness statement to be lodged for each witness and of treating that witness statement as the evidence in chief of the witness. However, it does not consider that this would be practicable at this time. A requirement that a witness statement be lodged for each witness would have significant resource implications. This would be particularly the case if, as is proposed in the draft rules, the witness statement is the evidence in chief of the person who signs it. COPFS accordingly prefers the first alternative in rule 4.11(1), which presupposes that a witness statement will be lodged only where the sheriff orders the lodging of a statement of a particular witness.

In present practice, the police investigate suspicious deaths on the instruction of the procurator fiscal. However, police statements are generally taken with a view to potential prosecution and may not cover the issues which would require to be address in a FAI. There may be multiple statements from a single witness. Police statements are generally submitted to the Crown in a typed, unsigned form by electronic means. In some cases there is no police involvement, and the investigation is undertaken by another organisation, such as HSE.

The Crown will often have police statements only for some of the witnesses who will be led at a FAI, and the statements which the Crown does have may not cover all of the issues which required to be addressed at the inquiry, or cover them in the depth required. This is particularly the case with witnesses who speak to technical issues. In such circumstances, the Crown will precognosce the witness. Often the witnesses whose evidence is ingathered by precognition are among the most significant witnesses at the inquiry. While precognitions are taken carefully, they are not taken with a view to production as the witness' evidence in chief, or indeed, having regard to the evidential status of a precognition, to being relied upon in evidence at all.

Were there to be a requirement to lodge a witness statement for each witness, the Crown would: (a) need to require the police to produce to the Crown the signed manuscript statements from witnesses, or to secure the witnesses' signatures to typed versions of the statements; and (b) convert precognitions into usable signed witness statements. The production of good quality statements such as could be treated as the witness' evidence in chief, particularly in relation to witnesses who deal with complex technical matters and/or require to refer to multiple productions in the course of their evidence would be a time-consuming exercise.

It is difficult to quantify accurately the resource implications of this but it is liable to be substantial. COPFS estimates that in relation to between four and fifteen witnesses per inquiry there will be a precognition instead of a statement. There are around 60 FAIs per year. Therefore the number of precognitions to be converted into signed statements could be in a range of 240 (4 precognitions per FAI x 60 FAIs p.a.) to 900 (15 precognitions per FAI x 60 FAIs p.a.). The time involved in converting a precognition into a usable witness statement will vary greatly, but precognitions are

usually taken from significant witnesses – and it is not unusual for the evidence to be technically complex. The possible range is estimated at between four and sixteen hours per precognition, giving a range of 960 hours to 14,400 hours. This does not include the time and costs involved in obtaining signed statements for witnesses from whom the police have taken statements.

Participants will have had all available statements disclosed to them and are able to - and generally will - precognosce witnesses to be called at an FAI. Therefore, participants will not be disadvantaged by the adoption of the first version of the Rule.

The Crown has two additional comments on the provisions in relation to witness statements.

Rule 4.11(3) provides that the witness statement is the evidence in chief of the person who signed it. For reasons set out above, present practice does not generate statements in a form which could routinely be treated as the witness' evidence in chief.

Rule 4.11(5) requires that a witness statement must be made available for inspection by the public. This is a logical corollary of the treatment of statements as evidence in chief. However, statements may contain personal information about the witness which should not be in the public domain and provision is required to allow for redacted versions of statements to be made available for inspection by the public. This would add further to the resource implications.

Expert evidence

Consultation question 12: are you content with the provisions on expert witnesses?
Consultation question 13: do you have any comments on how the provisions on single joint experts would work in practice?
Consultation question 14: do you have any comments on how the provisions on concurrent expert evidence would work in practice?

Rule 4.12 usefully confirms that the duty of the expert is to the inquiry rather than to the party instructing them. COPFS supports the inclusion in the Rules of provisions which support the innovative arrangements envisaged in rules 4.15 and 4.16. There are, though, features of these rules which will impose additional costs and demands on the Crown. In particular, it would be desirable for the rules to provide expressly for the sharing of expert witness fees where a single joint expert is instructed under rule 4.15, and appropriately for the additional expert witness fees incurred as a result of the process envisaged in rule 4.14(3).

Rule 4.13 (witness statements by expert witnesses) will, for the reasons set out above, impose additional demands on the Crown. In many cases, the expert will have produced an expert report. However, the procurator fiscal may wish to ask additional questions arising from the report. Under the current arrangements this can be done efficiently in oral evidence. The intention of the rules as a whole would appear to be that all issues which might be addressed with the witness in chief should, as a default, be covered in writing, either in the report or in the statement. COPFS would prefer this rule to reflect the same approach suggested in relation to rule 4.11.

Rule 4.14(4) which imposes an obligation on the procurator fiscal to ask questions, on behalf of other participants, of any expert witness instructed by COPFS may require additional work by the expert. On the basis of the rule as framed, the procurator fiscal will require to instruct that work and bear any consequent fees charged by the expert. At the moment, the Crown will pay the expert for the expert's report. Other parties may precognosce that witness but will require to bear the costs thereof. They may also instruct their own experts and bear their own costs for those expert reports. The proposal will accordingly shift costs which would currently be borne by other participants to COPFS – in addition to the work required of the fiscal in undertaking the tasks envisaged in rule 4.14.

It is not straightforward to estimate the costs involved, but the following gives some indication. There are, on average, about 60 FAIs per year; two expert witnesses per FAI; and three parties to an FAI excluding the procurator fiscal. If each party wants additional questions answered, for a straightforward matter, this might, perhaps, amount to three additional hours per FAI. Experts' hourly rates vary, but a conservative estimate would put them in the region of £100 to £150 per hour. Therefore a range of additional costs in this situation may be as follows: £36,000 (3 additional hours x 2 experts x £100 per hour x 60 FAIs) to £54,000 (3 additional hours x 2 experts x £150 x 60 FAIs).

However, if the matter is more complex, costs will increase accordingly. For example, the additional work required to answer questions could, in a more complex case, easily be 10 hours. Therefore estimate costs could range from £120,000 (10 additional hours x 2 experts x £100 per hour x 60 FAIs) to £180,000 (10 additional hours x 2 experts x £150 per hour x 60 FAIs). There are many cases where the evidence is of a highly technical nature and the time taken to deal with queries from a number of parties may exceed the estimates given above. Unless provision is made for the sharing of expert costs if a single expert is ordered under rule 4.15 and for parties to bear the costs attendant on dealing with questions lodged under rule 4.14, the effective result of the rules, where a single expert is ordered, will be that all the expert witness costs will fall on the Crown.

Part 5 – the inquiry

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

COPFS has no comment on Part 5.

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?

The section "SUMMARY OF EVIDENCE" should, perhaps, specifically envisage that the sheriff will summarise the evidence of the witnesses, rather than simply set out facts which have been proved. The submissions of the parties are not evidence, and it may be that, if it is intended that the sheriff should summarise the submissions of the parties, this should be a separate section, or should be included under "DISCUSSION AND FINDINGS IN FACT".

Schedule 3 – forms

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

See answer to question 16.

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?

Schedule 5, paragraph 3(1) states:

> *"3.—(1) Where a participant seeks to obtain from the keeper of any public record production of the original of any register or deed in his custody for the purposes of a cause, that participant must apply to the sheriff."*

In respect of paragraph 3(1), incorporating the current definition of "participant" in Rule 1.2 to include procurator fiscal would therefore have the effect of restricting the way in which the procurator fiscal can obtain public records. COPFS routinely obtain public records such as medical records without requiring to specifically apply to the Sheriff for that purpose. The current terms of this Rule therefore restrict the powers of the Crown to ingather evidence in an investigation.

In respect of our answer to Question 1 above, we have challenged the definition of "participant" to include the procurator fiscal. If the definition in Rule 1.2 is amended to recognise the unique role of the procurator fiscal, then paragraph 3(1) does not

require amendment. However if Rule 1.2 is not to be changed, the wording of Schedule 5, paragraph 3(1) must be amended to ensure that the investigative powers of the Crown are not artificially restricted.