

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 structure and brevity of the rules which we consider will assist the goals of efficiency and consistency of the inquiry process

Part 2 – Overview

The inquiry principles

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

We agree that improved “efficiency” of inquiries is important, though we think that particular attention must be paid on reducing the length of time between the occurrence of the death and the initiation of inquiry proceedings.

We agree with the stated principles, but would suggest that reference to the principles of justice and fairness would also be appropriate, and indeed paramount.

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 would support the aspiration of judicial continuity, but recognise that there may be practical constraints upon this.

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?

We are broadly content with the inquiry management powers, though we think that an order restricting topics for examination in oral evidence may defeat the inquisitorial nature/purpose of the proceedings.

We are unclear of the basis upon which an order for payment could be made against a vexatious participant.

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?

It is important for the Procurator Fiscal to identify those organisations and individuals who may have an interest in the inquiry (as provided by sub-paragraph 3.1 (h)). We suggest it would be helpful if those individuals/organisations could be identified in Form 3.1, in order that the presiding sheriff can subsequently be informed that appropriate intimations of the inquiry have been made to all interested parties.

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?

We think this deadline for a first order is reasonable, and should be practical.

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?

We would suggest that the rules should not be too prescriptive on timeframe. The rule 3.3 provision that a preliminary hearing can be held within 21 days of intimation on participants seems an unreasonably short period, particularly if a written note was to be required 7 days in advance. We would have thought a minimum period of 42 days to be more appropriate.

Preliminary hearings

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

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

We view the rule 3.8 procedure as broad and comprehensive.

Part 4 – evidence

Agreeing evidence

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

We have some reservations about the provisions on agreement of evidence. We note firstly that rules 4.8 to 4.10 are inquiry-tailored adaptations to statute relating to criminal procedure, and to proceedings that are wholly adversarial in nature. In our experience, agreement has tended to be reached under existing rules in respect of uncontroversial facts and documents, as would be provided for in rule 4.8. We doubt the merit of rules 4.9 and 4.10 which adopt provisions similar to those found in adversarial proceedings, and hence detract from the intent for the proceedings to be inquisitorial in nature (and the first principle in rule 2.2 in particular). These rules would introduce a “bureaucratic” burden on inquiry participants, which we think likely to outweigh any efficiency benefits, once the inquiry gets underway.

an inquiry, or should the converse presumption apply?

We consider that it should be open to a participant to lodge a witness statement to assist them in giving evidence-in-chief. However, we strongly favour the “converse presumption” that it should not be the norm for witness statements to be required. A requirement to provide witness statements would be, in our view, an administrative burden, contrary to the purpose of a public inquiry, and adopting adversarial rather than inquisitorial principles.

Expert evidence

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

We consider that aspects of rule 4.12 are of questionable benefit. Plainly, this rule adds to the administrative burden upon participants and their representatives.

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

We hold considerable reservations about the potential imposition of a single joint expert on participants. In our experience, in the field of clinical medical practice, expert opinion may frequently vary, and there may be two or more reasonably held expert opinions which are contradictory.

We do not consider that a participant should be prevented from leading expert evidence (at their own expense), on grounds of expedition and efficiency.

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

However well-intentioned, rule 4.16 will significantly add to expense incurred by participants, and is going to be very difficult to achieve in practice.

Part 5 – the inquiry

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

We agree.

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 view as helpful the proposal of a "skeleton structure" for the Determination, recognising that the rules will allow for a variation from what is prescribed. We think that this will aid consistency, and will assist the formulation of submissions.

Schedule 3 – forms

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

No comments

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