

## 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?

The structure and layout of the rules is both logical and user friendly. Placing the technical parts of the rules within schedules is welcomed.

#### Part 2 – Overview

##### *The inquiry principles*

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

No comment, save in respect of rule 2.2(4). We are not entirely clear as to how effect is to be given to this principle. Is the court expected to take steps to enable to a participant to “participate effectively”? The ability of participants to participate in an FAI will depend on a number of factors, many of which are wholly out with the court’s control. We are concerned that the application of this particular principle (which the sheriff must take in to account) may lead to delay.

##### *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 agree that, wherever possible, the same sheriff should deal with the inquiry throughout.

We do not foresee any practical difficulties which are not capable of being overcome.

*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 content with the approach adopted.

We see no need to include further specific illustrative powers.

**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?

No.

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?

Assuming advance dialogue with COPFS and SCTS we anticipate that the timescales set down in the rules are capable of being met.

## *Preliminary hearings*

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

In the absence of prior dialogue between participants and COPFS, we anticipate that it may be difficult to lodge the required note within the envisaged timescale – the maximum notice a party will receive of a preliminary hearing being 28 days (rule 3.2(2)). We anticipate that the consequences of Rule 3.7 will be that in the majority of enquiries the first preliminary hearing will be of limited value (although we regard the holding of a preliminary hearing as worthwhile as it formally brings the case under judicial control) and that there will be more than one preliminary hearing in all but the most straightforward of enquiries.

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?

Yes

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?

We believe that the default position should be that witness statements should only be lodged for those witnesses in respect of whom an order has been made in terms of Rule 2.5(c)(ii).

## *Expert evidence*

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

Yes – although the introduction of a code of conduct and guidance on the format and information to be contained in expert reports (see *Report of the Scottish Civil Courts Review*) would be of assistance

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

No.

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

No.

We do, however, agree with the introduction of such a rule.

## **Part 5 – the inquiry**

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

Yes.

## 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?

In our view, there should not be a requirement for findings in fact to be included in the determination.

The inclusion of findings in fact should be a matter for the sheriff conducting the inquiry. In some inquiries findings in fact may be appropriate, in others they will not. We have in mind those inquiries in which evidence can be very technical and complex.

An example can be seen in the determination by Sheriff Principal Pyle in the fatal accident inquiry relative to the deaths of John Barkley and others following the 2009 Super Puma helicopter crash in the North Sea, an accident which had been the subject of a rigorous investigation by the AAIB.

The following extract from the determination is pertinent.

***“Any attempt by me to reduce (the AAIB report) to findings in fact would do a discourtesy to the careful work of the inspectors who are plainly experts in their respective fields and, more importantly, it runs the risk of a lawyer’s use of language inaccurately describing what is already correctly and comprehensively set out by skilled engineers. More prosaically, to reduce all of the evidence to findings in fact would mean that they would be in the hundreds, if not the thousands. I do not think that would assist understanding.”***

A requirement to make findings in fact in such a case may distract the sheriff from what ought to be the principal focus of his or her attention. We have in mind the observations of Lord Reed and Lord Hope of Craighead in *NJDB v JEG and another* [2012] UKSC 21 at paragraphs 30 – 32 and paragraph 40 et seq.

It seems to us that including a requirement for findings in fact in modern legislation would be a retrograde step.

If there is to be a requirement for findings in fact, to present a logical structure, it seems to us that findings in fact should be at the beginning of the determination (as they would in a civil judgment); then followed by the determination; and recommendations, with the structure of the note section being as drafted (with the exception of the findings in fact).

In relation to the required information in the Introduction, if the date the death was reported to COPFS is to be included, COPFS should be required (in their application for the FAI) to provide this information.

### **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?

In Schedule 4, paragraph 1 (Lodging), consideration could perhaps be given to permitting lodging with the sheriff clerk by e-mail, particularly where lodging by fax is permitted