

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 Association welcomes the clarity of approach and the emphasis on efficient case management.

Part 2 – Overview

The inquiry principles

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

The Association agrees with the inquiry principles but would query the drafting of the absolute formula of participants 'are to be able'. This takes no account of disruptive participants or external third party interests claiming a locus. Absolute entitlement might be amended to a statement of intent.

The Association questions whether the power in Rule 2.5(d) provides sufficient flexibility to the sheriff in the event of a participant failing to comply with orders to the extent of being disruptive of the efficient conduct of the inquiry.

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?

The Association agrees that wherever possible the same sheriff should deal with the inquiry from the point that notice is given of an inquiry to final determination. As far as the Association is aware that is the current aim in many sheriff courts.

Practical difficulties may arise in terms of limitations on court programming and adequate availability and flexibility of judicial resources.

It may be desirable to define 'lay representative' and 'lay supporter' to coincide with the definition in other sheriff court rules, to ensure that a lay representative cannot accept remuneration.

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?

The Association would suggest the following be considered. There is no express power to regulate who is to be included or excluded as a 'participant', which is not exclusive in its definition. In the event that, for example, a third-party interest claims a right to appear, it might be clarified that the sheriff has power to regulate this. 'Includes' should be clarified – is it limited to the examples given? The Association would suggest that the powers should not be so limited, and accordingly that the formula 'without limiting this generality...' or similar be used.

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?

The draft rules do not make provision for public intimation of the date of the inquiry unless no preliminary hearing has been assigned. Forms 3.3 and 3.4 allow for publication of the date of the preliminary hearing or the inquiry where there has not been a preliminary hearing.

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?

The Association considers that a timescale of 28 days between the first order and the preliminary hearing may be too short, allowing for intimation and obtaining legal aid. There may be insufficient time to carry out meaningful enquiries such that any notes lodged will be of little assistance and continued hearings will become the norm. In the event of a preliminary hearing not being fixed, the ability to assign an inquiry to take place within 28 days will be subject to court programming and adequate availability and flexibility of judicial resources. It is appreciated that any such inquiry is likely to be short in compass.

Preliminary hearings

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

The requirement to lodge a brief note in advance of the preliminary hearing is welcome and reflects an effective, informal practice currently adopted of having parties lodge a statement of issues, if appropriate. The note may be expanded upon having regard to further investigations and disclosure. There may be funding issues in terms of legal aid but those will be addressed more appropriately by other consultees.

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?

Consideration might be given to an express statement that evidence recovered for the purposes of the FAI is solely for the use of the inquiry and for no other purpose. The Association does not consider it appropriate to seek agreement as to the date and time of death as those are matters for the sheriff to determine at the inquiry.

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 Association considers that the sheriff should have a role in determining when it is appropriate for a witness statement to be lodged which would then result in application of the provisions in Rule 4.11. It would be concerned if the lodging of such statements was presumed as a standard measure. It questions whether the provision that witness statements should be available for inspection by the public during the inquiry is adequate and appropriate in an inquiry which should be conducted in public. Issues may arise as to confidentiality and data protection. It is difficult to see how this would operate satisfactorily in practice, especially if there is significant public interest. It may be more appropriate for the witness statement to be read at the inquiry, with the consequent benefit that it would be recorded. Consideration may have to be given to the implications for expert witnesses, where the statement will incorporate the expert's report.

Expert evidence

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

Yes

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

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?

The Sheriffs Principal and the Association have exchanged draft responses to the Consultation. The association adopts the response of the Sheriffs Principal in relation to the requirement for findings in fact.

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