

## 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?

No.
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#### Part 2 – Overview

##### *The inquiry principles*

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

No, but we consider that the sheriff ought to take the principles into account, together with the purpose of an inquiry, as set out in section 1(3) of the 2016 Act, when giving effect to the Rules,. This might serve to remind all participants that the inquiry's scope is limited to establishing the circumstances of the death and considering what if any steps could be taken to prevent future deaths in similar circumstances.
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##### *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?

Yes, where possible. We do not foresee any practical difficulties from the point of view of agents representing participants, and suspect this is properly a matter for consideration by the Scottish Courts and Tribunals Service.
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### *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 consider that the sheriff ought to take the inquiry principles and the purpose of an inquiry (s.1(3) 2016 Act) into account when making any order. This might ensure that the scope of an inquiry is in everyone's minds when orders are sought on, for example, the disclosure of the existence of documents or the recovery of documents, which in turn might prevent court time being wasted hearing/ considering evidence which is irrelevant to the circumstances of the death and which does not further the purpose of the Inquiry.

We are unsure why Rule 2.5(1)(d)(iii) has made it into the Rules as we are not aware of a perception that participants behave in a vexatious manner. We also consider this Rule to be somewhat inconsistent with s.25 of the 2016 Act.

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?

We consider this to be a matter for the Scottish Courts and Tribunals Service.

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 consider this to be depend on the extent to which it is expected that participants, principally the procurator fiscal, will have been communicating with each other prior to the First Notice being given. If, for example, parties have been in informal communication for a period of weeks or months in advance of that, then it might not be a problem for the first preliminary hearing to take place 28 days after the First Order. See our response to question 8.

Consideration might be given to adding a preliminary stage to the "structure of an inquiry" (Rule 2.1) which sets out an expectation that the procurator fiscal has been in informal contact with expected participants in order to obtain documentation and discuss issues in advance of the notice being lodged with the court.

## *Preliminary hearings*

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

See response to question 7. We consider it unlikely that participants will be able to confirm which witnesses they will cite, productions they will lodge, or matters they will invite the sheriff to address in the determination 7 days before the first preliminary hearing (which might be only 4/5 weeks after the First Notice) if participants haven't been in correspondence / discussions in advance of the First Notice being given. This is particularly so in complex FAIs where discussion between participants (and sight of any expert reports instructed by the Crown) will be necessary for issues to be understood, and the Crown's possible criticisms / lines of inquiry identified.

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.

However, in relation to the provision on citation of witnesses, we are not convinced that Rule 4.1(6) is necessary. We also consider that it might have the effect of discouraging unrepresented participants from citing witnesses (even if they could afford to cover costs) which would be unfortunate, particularly since unrepresented participants are most likely to be the family of the deceased.

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 do not consider there should be a "default" position but rather something which must be considered at the preliminary hearing to every FAI.

*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?

We consider these provisions may only work for matters of no particular controversy, but which still require expert evidence. For other matters, we consider separate experts will often still be required (albeit who may give evidence concurrently).

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?

No

### **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