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TO: KENNY HTET-KHIN, HEAD OF RULES RE-WRITE TEAM

FROM: RODDY FLINN

FATAL ACCIDENT INQUIRY RULES

I have discussed the FAI Rules with the Lord President and in light of that discussion I would like to offer the following observations on the draft Rules.

Information

First, given that an FAI is an inquisitorial process, the Lord President thinks that we could be more radical in relation to the collection and presentation of what could be described as "information" for the sheriff's consideration. There are references to "evidence" in the rules (e.g. 2.2.(b)). Evidence in our current system means "oral testimony". Other than where authorised by statute, this is the only method of the sheriff acquiring information; by witnesses on oath describing events or things. What we ought to be doing is introducing a much more fluid system of gathering "information", notably by permitting simple expedients such as the internet search.

It is common for the civil courts, notably those dealing with judicial review, to look at all sorts of material from all over the place in order to ascertain fact. Very often, no-one speaks to the material (because it is not practical to do so) yet it is accepted by the court. This approach is in sharp contrast to the rules of criminal procedure which restrict proof of fact to certain well-trodden methods (see generally the remarks in *Kapri v Lord Advocate* 2015 JC 30 paras [125] *et seq.*). The Lord President is of the view that the proposed rule on management powers (2.5.(1)(c)) is too restrictive in confining itself to the manner in which "evidence" is presented and commented that what we ought to be aiming for is a system whereby the sheriff can determine the form in which "information" generally, or on a particular topic, is to be presented.

Related to this, the Lord President also commented that the reference to copies being treated as originals (rule 2.5(1)(c)(vi)) does not go very far in the modern world because the reality is that very few documents are "originals" in the sense meant by the "best evidence" principle. Most "documents" will be printed copies. As such he has suggested that you include a rule which provides that a party can present information, intended as proof of fact, in such form as he or she wishes (or as the court directs) subject to any submissions about its provenance.

Witness Statements

In relation to the presentation of information, the Lord President is not in favour of the witness statement. He is of the view that, rather like affidavits, they tend to be prepared, or revised, by lawyers. The modern approach should be to move away from written material, of the type described, and from the use of "live" links, in favour of video recorded statements by witnesses, including experts. These can be lodged in the process over time and be available for inspection by the participants and, ultimately, the public. The use of this type of material ought to cut down the time needed for the inquiry itself, given that it should reduce the number of witnesses requiring to attend.

Experts

The Lord President has also indicated that he is not in favour of the court imposing duties on experts, along the lines of the English model, any more than with any other witness. The fact that they take an oath/affirmation should suffice without more.

I hope you will find these comments of assistance when considering the feedback to the consultation exercise.



Roddy Flinn
Legal Secretary to the Lord President